Amicus Curiae submission in the matter of CH/03/15129, et al. v. FBiH

HUMAN RIGHTS COMMISSION
CONSTITUTIONAL COURT OF BOSNIA AND HERZEGOVINA

In the Matter of

CH/03/15129, *et al.*

AMICUS CURIAE SUBMISSION – OHR

v.

Federation of Bosnia and Herzegovina

QUESTIONS OF THE COMMISSION IN BOLD

I. Does the issue of war damages include exclusively responsibility of the State, or the Entities and Brčko District only, or all of them jointly? As to this issue, it is necessary to take into consideration the valid constitutional provisions relating to distribution of competences between the State and its administrative units, as well as Article 21 of the Law on Determination and Manner of Settlement of the Internal Obligations of the Federation of Bosnia and Herzegovina (Official Gazette of the Federation of Bosnia and Herzegovina no. 66/04). If the responsibility of the State is foreseen, what implications it would have on the economic stability of the State of Bosnia and Herzegovina, including its administrative units as well?

a. The question whether the State, the Federation of Bosnia and Herzegovina (*hereinafter*: Federation), Republika Srpska (*hereinafter*: RS), and Brcko District of Bosnia and Herzegovina (*hereinafter*: Brcko District) are jointly or severally responsible for claims arising from so-called "War Damages"[1] appears to turn on an analysis of the legislative bases under which these claims are lodged in the respective jurisdictions. A survey of the applicable regulations in each jurisdiction reveals marked differences in the existence, substantive nature, and manner of applying laws regulating War Damages in each jurisdiction.
b. Prior to 1993, the *Law on Obligations of SFRY* (SFRY Official Gazette, no. 29/78, 39/85, 45/89 (Constitutional Court of the SFRY), 57/89 (Constitutional Court of the SFRY)), enumerated the various circumstances under which natural and legal person possess rights of compensation for material and non-material damages, *inter alia*, for the tortious destruction or deprivation of property, and for the infliction of injury or death. In 1992, the Republic of BiH took over the *Law on Obligations* (Official Gazette of the Republic of BiH (*hereinafter*: RBiH), no. 2/92) and remained applicable after the Peace Agreement pursuant to the Annex II to Annex 4 for the General Framework Agreement for Peace in Bosnia and Herzegovina, (*hereinafter*: *Peace Agreement*), which provides for the continuity of previous laws in effect within BiH until a duly enacted law supercedes such laws.
c. Neither the State nor the Brcko District currently foresees liability for War Damages. The State took over *the SFRY Law on Obligations* through the *Decree with the Legal Force on Taking Over the Law on Obligations* (RBiH Official Gazette, no. 2/92) and the District of Brcko continues to apply the SFRY law. Neither government reports claims or enforceable judgments for War Damages.

d. The Federation continued to apply the *RBiH Obligations Law* as *lex generalis* until its parliament enacted a new obligations law in 2003 (Official Gazette of the Federation of BiH (*hereinafter*: FBiH), no. 29/03) on the basis of the *SFRY Law on Obligation* However, in 1997, the Federation began introducing *lex specialis* legislation to manage government liabilities arising as a consequence of the war, culminating in 2004 in the enactment of the *Law on Manner of Specification and Payment of the Internal Liabilities of the Federation of Bosnia and Herzegovina* (FBiH Official Gazette, no. 66/04) (*hereinafter*: *FBiH Internal Debt Law*). *(See, inter alia, Law on Recording of Citizens Claims in the Process of Privatization, hereinafter "Citizens' Claims Law,"* (FBiH Official Gazette, no. 27/97, 8/99, 45/00, 54/00, 32/01, 57/03);[2] *Law on Privatization of Enterprises,* (FBiH Official Gazette, no. 27/97, 8/99, 32/00, 45/00, 54/00, 61/01, 27/02, 33/02, 28/04, 44/04);[3] *Law on Temporary Stay of Execution of Claims Created During War Time and Immediate War Hazard* (FBiH Official Gazette, no. 39/*98), Law on Temporary Suspension of Execution of Claims Arising from Enforceable Decisions Against the Budget of the Federation of Bosnia and Herzegovina,* (FBiH Official Gazette, no. 9/04, 30/04) (*hereinafter*: *FBiH Law on Temporary Suspension*)[4].

e. The effect of the earlier post-war legislation was to limit the scope and amount of War Damage claims enforceable against the Federation. In particular, Article 3 of the *Law on Specification and Enforcement of Claims Incurred During the State of War and State of Immediate War Hazard* (FBiH Official Gazette, no. 43/01) (*hereinafter*: *FBiH War Claims Law*), limits claims to those for: mobilized or ceded material-technical resources and equipment; delivery of materials, products and goods and provided services for defense needs; ceded financial means in accordance with the law or other regulations; other grounds for defense needs.[5] It further provided for the write off of interest on these claims and called for the adoption of a law on public debt. Without expressly barring claims for non-material damages, its interpretation by courts and claimants appears to have discouraged and disallowed claims for non-material damage. More generally, it limited the volume and potential government liability for War Damages.[6]

f. The *FBiH Internal Debt Law* covers all War Damage claims incurred between 18 September 1991 and 23 December 1996, provided claimants duly filed notice of their claims in accordance with the *FBiH War Claims Law,*[7] *and* provides for the settlement of War Damage liability through government issued bonds that bear no interest and mature in 50 years following a 40-year grace period.[8] Further, the law caps the total liability at KM 900 million and authorizes a proportional decrease in compensation payments for any excess liability.[9]

g. Like the Federation, the RS, continued to apply the *SFRY Law on Obligations* until 1993 when it enacted its own law.[10] Unlike the Federation, however, the RS did not enact *lex specialis* legislation regulating claims for War Damages prior to 2002 when its parliament enacted the *Law on the Postponement of the Execution of Court Decisions Against the Republika Srpska Budget for the Payment of Compensation of Material and Non-Material Damages Caused as a Consequence of the War Operations and for the Repayment of Old Foreign Currency Savings* (RS Official Gazette, no. 25/02, 51/03) *(hereinafter*: *RS Temporary Suspension Law).* The continued application of the *SFRY Obligations Law* until 2002 resulted in a multitude of claims, emanating from the war, which were filed before various judicial and administrative bodies, and a level of liability that the RS Government estimates at KM 6 Billion.[11]

h. In 2004, the RS enacted the *Law on the Establishment and Manner of Settlement of Internal Debt of the RS* (RS Official Gazette, no. 63/04,) (*hereinafter*: "*RS Internal Debt Law*"), which regulates the settlement by the RS of War Damage claims, defined as claims arising during the war from 20 May 1992 to 19 June 1996 and capping compensation payments at KM 600 million.[12] It prescribes that settlements are made through government issued bonds, which bear no interest and mature in 50 years following a 40-year grace period.[13] Pursuant to Article 19, the RS parliament adopted the *Law on Establishment of Rights and Compensation of Material and Non-Material Damage Incurred In the Period From May 20, 1992 to June 19, 1996*

(hereinafter: *RS War Damage Claims Law),**[14]*** which, *inter alia*, provides for the out-of-court settlement of pending claims and the extension of the claims filing deadline for certain claims until February 2007.

i. It is important to note that, unlike *the Federation War Claims Law*, the *RS Temporary Suspension* and *Internal Debt Laws* apply only to claims against the Entity and not to those filed against municipalities. Those jurisdictions remain subject to the *RS Law on Obligations* and other applicable legislation. This has left several municipalities vulnerable to potential insolvency as court judgments are enforced against operating budgets.[15] However, the RS recently enacted the *Law on Temporary Suspension of Claims Against Budgets of Municipalities and Cities on the Territory of the RS* (RS Official Gazette, no. 64/05), which should enter into force in mid-July. There appears to be little reason why these municipal and city claims should be settled on a different basis.

j. Due to marked differences in the legislative bases for War Damage claims between jurisdictions, including definitions, scope and settlement mechanisms, OHR is of the opinion that financial responsibility should not be affixed jointly between the State, Entities and the Brcko District. To ensure a more uniform settlement on the basis of the financial ability to settle outstanding claims within each Entity, it may be more appropriate to fix responsibility at Entity level and not subordinate levels of government.

k. Notwithstanding, OHR recognizes that the State may still bear responsibility for ensuring that settlements of War Damage claims in each Entity comport with the State's Constitutional obligation to ensure protections guaranteed by the Convention. Article 1 of the Convention requires State Parties to "secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of the Convention." Hence, throughout the State's national territory, BiH remains the guarantor of human rights protections[16] and the Entities, as sub-sovereign units of BiH remain subject to the State's general duty to secure compliance with the Convention.[17] That general duty entails and requires a national system,[18] which may require framework legislation at State-level that standardized substantive and procedural safeguards in the settlement of War Damages.

l. The *RS War Damage Claims Law* attempts to provide for some standardization of War Damage claims. [19] It proposes to establish a standardized table of all War Damage claims and their assessed value, including pecuniary and non-pecuniary claims, and all claims for material damages, goods and services. The need for this approach became evident from surveying judgments for identical claims issued by different courts where damage awards varied widely. The standardization envisioned by the RS entails voiding damage awards in excess of standardized award schedules for particular claims. Other provisions of the RS War Damage Claims law call for the offsetting of compensation received by claimants for the same injury under other laws against any final settlement under the RS Settlement Law.[20] The Human Rights Commission within the Constitutional Court of BiH (*hereinafter*: Commission) may have to consider, in the context of a subsequent case at bar, the conformity of these provisions with the Constitution.

m. Whether or not the Commission deems State-level framework legislation appropriate, a harmonized approach across the Entities, at least with respect to minimum guarantees under the Convention, may be appropriate. Such framework legislation, or harmonized Entity legislation, must address concerns voiced by the Constitutional Court of BiH in its 17 December 2004 decision in L. v. Republika Srpska (AP-288/03) (*hereinafter:* Loncar Decision) and in subsequent decisions on this issue. Once the handling of War Damage claims are harmonized with due regard to decisions of the Constitutional Court and the Commission, the authorities can in turn structure the final settlement in a manner that provides maximum value to the claimants.[21]

n. In this context, it may be appropriate for the Commission to provide guidance on the necessity for State framework legislation and any harmonization between Entity laws. In particular, the

authorities in BiH would benefit from additional guidance on issues that include:
    - The types of claims that may be recognized and compensated as “War Damage”, (i.e. whether all claims arising during the legal state of war constitute “war damage” irrespective of the nature of the underlying claim;
    - An analysis of whether the statute of limitations has run on claims appropriately categorized as War Damage;
    - An assessment as to whether, and to what extent, the State and its sub-sovereign units are jointly or severally liable for paying such claims (and thereby avoiding potential overlapping claims against, e.g. entities and municipalities);
    - The appropriateness of standardizing valuations, throughout BiH, for specific categories of War Damages (as currently envisioned in the *RS War Damage Claims Law*).

o. Regardless of whether the Commission finds that the State and Entities are jointly or separately responsible, the implications for the economic stability of country are far reaching. According to the International Monetary Fund (*hereinafter*: IMF), as already pointed out in OHR’s Amicus Brief in the case of Besarovic, et al. v. FBiH and BiH, (CH/98/375, *et al*.) (*Hereinafter*: Besarovic), countries whose public debt exceeds 50% of their gross domestic product (*hereinafter:* GDP) face a high risk of economic crisis. Recognizing such risk, by December 2003, BiH, Brcko District and the Entities each endorsed a *Strategic Plan* for settling public debts[22] designed to restructure the combined liabilities at a net present value of 10% GDP for 2003. Although only the internal debt restructuring legislation of the Federation expressly refers to this goal, the provisions in the respective debt settlement laws in the State, RS and Brcko District, were all developed on this basis. The Commission’s decision in Besarovic, which held that bonds issued in settlement of foreign frozen currency account (hereinafter: FFCA) liabilities should mature in no more than 15 years, diminishes the likelihood that domestic liabilities within BiH can be settled in a manner that avoids the risk of economic crisis, i.e. within the 10% net present value of GDP.

II. What is your estimation with regard to war damages in Bosnia and Herzegovina? Which part covers pecuniary and which one covers non-pecuniary damages?

a. The original estimates for War Damage claims of KM 900 million for the Federation and KM 6 billion for the RS were used by the Governments to structure the Settlement plan in the initial Internal Debt Settlement legislation.[23] However, it must be emphasized that these are only estimates of the maximum potential liability for various claims filed before courts and other administrative bodies.
b. In the Federation, surveys of the courts, although still incomplete, now suggest that material War Damage Claims may reach only KM 350 million while non-material damage claims may approach only KM 50 million. This suggests a potential reduction in the total liability of some KM 500 million, which provides more room to structure the bonds in a manner more valuable to the recipients. In order to determine more precisely the exact liability for enforceable judgments for material and non-material War Damages, as well as for claims that are still pending resolution, the Presidents of all Cantonal Courts have agreed to prepare analyses on the basis of information within their court.[24] Thus far, the Ministry of Justice has received information on non-material War Damage claims from eight Cantonal courts. (See *Chart 1*).

Court	Awarded (in KM)	In Progress
Mostar	80 232	1 534 520
Odzak	77 000	120 880
Tuzla	75 000	187 000
Livno	Not Mentioned	30 000
Zenica	None	35 000

Gorazde	None	None
Siroki Brijeg	None	None
Travnik	None	285 001

Chart 1.

c. In the RS the situation is even more uncertain. The initial estimate was approximately KM 6 billion in material and non-material War Damages, and the data received does not distinguish between material and non-material damages. The disproportionate number and scope of claims between Entities appears to be the direct result of different Entity regulations upon which War Damage claims are based and the KM 600 million cap on the settlement reflects a 90% write down on this estimate.
d. Data gathered concerning these claims suggested that this total will be reduced substantially for a number of reasons. First, an investigation by the RSNA[25] indicates that some War Damage claims may have been fraudulent and that amounts awarded by courts were not uniform for similar claims. The *RS War Damage Claims Law* provides for a standardized valuation for awards in War Damage claims cases. In addition, some War Damage claimants are receiving other government benefits as a result of the same damage, i.e. they have received apartments or housing as compensation for their loss. The *RS War Damage Claims Law****[26]*** disallows multiple payments as compensation for the same underlying claim, thus potentially substantially reducing the magnitude of this category of claims. The RS Treasury has recorded 6,037 court enforcements and estimates that up to 33,000 complaints remain pending at Entity level. In addition the *RS War Damage Claims Law,* as well as the *RS Internal Debt Law,* disallows interest payments on damage awards. Considering the number of claims and the necessity to settle out-of-court each pending claim, the verification process will not be completed before December 2007; therefore, no final liability for this class of claims will be available until late 2007.
e. Taken by comparison, the estimate for FFCA liabilities of KM 1.979 billion reflects all FFCA claims reported by banks involved. The actual verified liability is likely to be somewhat smaller than that due to a number of factors including deceased claimants without heirs, claims which cannot objectively be verified due to missing or destroyed documentation, and due to accounting failures related to the prior settlement of claims within the process of privatization. Some claimants may opt to forego small claims, e.g. those less than less than KM 100, particularly those claimants who permanently reside outside of BiH. In Serbia approximately 20 % of the FFCAs have reportedly not been claimed after four years of verification. Considering the comparatively short period provided under Entity regulations for the filing and verification of claims in BiH, it appears likely that more than 20% of the known accounts may also go unclaimed.[27]

III. What is the justification to write off the interest as provided for by Article 17(2) of the Law on Determination and Manner of Settlement of the Internal Obligations of the Federation of Bosnia and Herzegovina?

a. In Besarovic, the Commission considered, *inter alia*, the compatibility of interest write-offs in the settlement of FFCA liabilities under the FBiH Internal Debt Law. The Commission held "that in the mentioned sense the public interest of the State is justified" with particular reference to the write off of interest, but also the general modality foreseen for the settlement of frozen foreign currency liabilities.[28] There the Commission distinguished between writing off interest on awards and the settlement through bonds without interest. Liabilities for War Damages and the settlement for FFCA under the *FBiH Internal Debt Law* are analogous in that both categories of claims represent a "serious burden for the State and its administrative units."[29] The size of the potential liability for War Damage claims represents a similar burden on public finances and

therefore the public interest in preserving macro-economic stability by writing of interest on these claims is similarly served.[30]

b. As to interest on the bonds, depending on the terms of the bonds, some fair market interest on the bonds may be provided in accordance with relevant decisions of the Constitutional Court of BiH.[31] However, any increase in the cost of restructuring these debts, impacts upon the governments' collective ability to provide essential services.[32]
c. The Commission in Besarovic underscored that the "European Court of Human Rights [finding] that domestic authorities enjoy a 'wide margin of appreciation in [the] issuance of decisions relating to the deprivation of property rights of individuals because of direct knowledge on the society and its needs," and further went on to point out that "the decision to seize one's property often includes consideration of political, economic and social issues under which the interference within the democratic society substantially differentiate," and concluded that "the judgement of domestic authorities will be complied with except if being with no justified grounds."[33] The Commission, cited the case Lithgow et al. v. the United Kingdom[34] regarding the nationalization of property, wherein "the Court noted that:

> *"Because of their direct knowledge of their society and its needs and resources, the national authorities are in principle better placed than the international* ***judge to appreciate what measures are appropriate in this area and consequently the margin of appreciation available to them should be a wide one***." (emphasis added)

d. The Commission also relied on the fact that the European Court in Lithgow emphasized that "expropriation of property with compensation, that is not equal to its market value, in principle does not represent a proportional interference with the applicant's right to property," however "the right to possessions under Article 1 of Protocol no. 1 to the European Convention does not guarantee the right to full compensation under all circumstances, having regard to the legitimate aims of public interest serving to perform a certain economic reform or achieve wider social justice may have such an importance to justify the payment of smaller amount than the market value would demand."[35] Additionally, the Commission noted that the "European Court of Human Rights underlined that it is not prohibited when depriving the holder of the property right of his property not to reimburse the lost profit or unrealized possibility of use – *ususfructus*."[36]
e. The Commission, directly on the issue of interest write-offs, as an integral part of internal debt settlement with reference to FFCA, found the approach "sensible, objective and justified," finding that a "strong public interest exists" and that there is a "need for the State not to be overburdened in future."[37]
f. The Commission also concluded that the loss of interest (in the case of FFCA's) "is not unjustified non-reimbursement…[due to]… events that occurred in Bosnia and Herzegovina after 1992," and further that "the competence of the Commission in such cases would be to asses whether there has been any arbitrariness on the part of the State in the deprivation of this right…" [Besarovic, *et al*.]."[38] Because liabilities for War Damage, like FFCA's, involve the same aforementioned aims recognized as legitimate in Besarovic, that being to "to perform a certain economic reform,"the appropriate standard of review ought to be that of 'arbitrariness'.[39] In its assessment, OHR urges the Commission to find the interest write-off in this instance to similarly fall within the BiH authorities' 'necessarily wide margin of appreciation' enjoyed by contracting States when defining complex economic policies.[40]

IV. What is the justification for the current legal modality for the payment of war damages (Article 20 of the Law on Determination and Manner of Settlement of the Internal Obligations of the Federation of Bosnia and Herzegovina)?

a. As specified in Article 2 of *FBiH Internal Debt Law,* developing and maintaining macroeconomic stability, and promoting the fiscal viability of the Federation, and the State, underpin the

settlement modality envisioned by the law. Bearing in mind the overall economic environment, in simple terms, the modality reflects the government's ability to pay as a transitional economy.

b. War damage claims and claims for frozen foreign currency accounts are a relatively small part of the total debt faced by BiH following the war. An estimate of the overall liabilities owed by BiH, both internal and external amounted to an estimated KM 44 Billion, or approximately four times the value of all goods and services produced in BiH in 2002.. This is a huge debt for a nation the size of BiH, which negatively impacts on the nation's ability to grow, and to provide jobs and governmental services to its citizens. Where outstanding claims against government threaten economic stability and development of the broader business environment, domestic and foreign investors are reluctant to invest in a nation that may need to raise taxes in order to pay its debts. One alternative to raising taxes, cutting government services to provide revenue to pay debt, also negatively impacts upon the business environment. Additionally, the lack of settlement mechanisms for government debt undermines the payment discipline in the nation and results in a loss of confidence by lenders when considering loans to both the government and the private sector. These risks underscore the need to restructure outstanding debts and to do so in a way that is both fair to the claimants and fiscally sustainable, specifically by paying the debt over a period of years.
c. Bosnia and Herzegovina's successful restructuring of its external debt in the late 1990's may provide useful guidance as the Commission assesses the FBiH Internal Debt Law's compliance with the Convention. BiH's debt to an array of foreign creditors, at that time exceeded KM 20 Billion. Recognizing the huge financial problems facing BiH as it emerged from 3 ½ years of war, foreign creditors agreed to write off almost 80% of the debt and reached an agreement through which BiH would pay the remaining liability of KM 4.4 billion over a period of years, some years paying only the interest on portions of this debt. Such partial write-offs of outstanding debt by creditors is common and the multi-year pay-off of the remaining domestic liabilities (i.e. through bonds) represents the only modality that allows for responsible and sustainable settlement of liabilities of such magnitude.
d. The process of paying off and restructuring domestic liabilities, including budgetary arrears and liabilities associated with public enterprises is ongoing but far from complete. Like external debt, estimates of the total domestic debt exceeded KM 22 Billion in 2002, of which War Damage and FFCA liabilities represented only a portion, and most of which of still await settlement.
e. The aforementioned Strategic Decisions by the authorities of BiH, the Entities and Brcko District to restructure approximately KM 10 billion worth of domestic liabilities[41] were the result of long deliberations that entailed balancing the interests of claimants in having their claims satisfied and the financial ability of the governments to pay. Two factors were crucial in these deliberations. First, despite sustained government efforts, the exact amount of liability for each category of debt could not be fixed prior to a formal verification process. Secondly, the financial resources available to the governments –for the foreseeable future- are limited, particularly in light of BiH's ongoing transition to a free-market economy and its development of democratic institutions following a period of armed conflict.
f. Based on these factors noted above, two conclusions seemed appropriate. First, that until the total liability could be fixed, a degree of flexibility in structuring bond terms is necessary, and secondly, in order to ensure the viability of the State and its sub-sovereign units, domestic creditors and claimants will also have to accept a partial write off of their claims. Moreover, considering the estimated size of the internal debts in relation to the annual GDP, the public interest in preserving macroeconomic sustainability warrants the settlement of wartime (and immediate post-war) liabilities on the basis of what the governments can realistically afford to pay. The settlement plan and subsequent legislation reflects the collective appreciation of the governments in BiH of the risk of insolvency against the availability of funds to fully satisfy all outstanding claims..

g. According to the IMF, only a sustainable settlement of domestic claims (FFCA, War Damage claims, government arrears, privatization vouchers, and other claims on government) will avoid excess pressure on the budget (i.e. it will avoid a permanently increasing ratio of the Net Present Value (NPV) of public debt-to-GDP).[42] Also according to IMF estimates, a primary fiscal surplus (the fiscal balance excluding interest payments) of 1 percent of GDP results in a debt-to-GDP ratio of 10 percent in NPV terms. The budget would need to be adjusted moderately to achieve that balance.
h. However, with key elements of the proposed settlement struck down by the Constitutional Court in Loncar and Besarovic, the cost (in NPV terms) of paying domestic claims has become highly uncertain, which will most likely be well in excess of 10 percent of GDP in NPV terms and therefore requires a primary surplus of well over 1 percent of GDP to achieve fiscal sustainability. While the Commission has not specified the precise terms that would be acceptable, the IMF's best estimate of the NPV of the debt-to-GDP ratio implied by the court rulings is 75 percent (representing the combination of 50 percent domestic debt and 25 percent external debt). This figure could be even higher depending on the outcome of the still uncertain treatment of restitution claims and new public debt associated with privatization.
i. Under these conditions, the government would need to run a much stronger primary surplus than anticipated under Entity internal debt settlement laws. This constrains the governments' ability to finance critical public spending, including much needed public investment and social programs, and would have a markedly negative impact on economic growth. At this level of debt, it is also unclear if the governments' will be able to obtain the affordable financing necessary to support the associated fiscal deficit. This would add to the associated risks to the economy. It is necessary to highlight that the NPV of the external debt and the recommended 10 percent ceiling on the internal debt is approximately 50% of the 20003 GDP—placing BiH in a critical fiscal position. Finally, it should also be noted that an NPV debt-to-GDP ratio of this magnitude is well in excess of the level at which emerging market economies typically face a high risk of economic crisis.[43]
j. Primary surpluses of the level that would be required are not without international precedent (Argentina 5.5 percent; Turkey 7 percent) but these have involved large cuts in government spending. At the same time, both of these economies have fiscal management systems considerably more developed than that of BiH or its Entities. This would further undermine the ability of the BiH economy to achieve the fiscal balance needed to ensure sustainability.
k. In order to maintain what the IMF has indicated is a fiscally sustainable settlement it will be necessary to pay creditors with long term bonds — the longer the maturity the lower the NPV of a given nominal value. Even if the ceiling of 10 percent of the 2003 GDP in NPV terms is breached, the use of bonds in the settlement process is a necessary. This is obvious when one compares the size of the internal debt against the 2005 budgets of the Entities and Brcko. The Federation 2005 budget stands at KM 1,011 million the RS at KM 946 million and Brcko at KM 180 million or a total of KM 2,137 million, which means that the debt for war claims and FFCAs (KM 3,279 million) is approximately one and a half times the yearly budgets of the Entities and Brcko. When one considers the necessity to maintain public services, it is clear that that only a fraction of the annual budgets ought be allocated to the payment of debt.
l. Chart 2 below illustrates the budgetary spending equivalent of various increases in the NPV of the domestic claims settlement in terms of current budgetary expenditures. Because of the large debt, an even modest increase in the NPV of the cost of the settlement significantly increases the overall burden to the various budgets. The issuance of long-term bonds is an effort to mitigate this impact. The longer the terms of the bonds, then the less the cost to the budget within any given year.

NPV GDP (GDP is IMF estimate for 2005)	KM	Spending Equivalent Budget data is from the 2005 State and Entity budgets, as published in the Official Gazette.
1%	138 mil	2005 RS Budget for primary and secondary education
2%	276 mil	92% 0f 2005 Federation transfers for invalids
4%	552 mil	95% of the State's 2005 budget
7%	966 mil	102% of the RS 2005 budget
8%	1104 mil	109% of the Federation 2005 budget

Chart 2. NPV Budget Comparison Chart

m. While the Entities have no additional financial resources to fully satisfy all claims in cash, some escrow funds and a small budget reserves allow the government to settle part of FFCA liabilities in cash, and therefore any cash payments for War Damages would have to be drawn from current Entity revenues. Both Entity budgets already face serious potential deficits even without considering FFCA and War Damage claims. The issuance of bonds to spread the payment of these claims out over a period of years is critical to any resolution.
n. While taking note of the Constitutional Court's decision in Loncar finding that 50 year bonds with no interest does not comport with protections guaranteed by Article 6 of the Convention, the international community urges the Commission to consider extending to the BiH authorities the widest possible 'margin of appreciation' with respect to the partial write-off of War Damage liability and with respect to its flexibility in structuring bonds in settlement of the remaining liability

V. Do the legal solutions offer a guarantee that would neutralize the annual inflation rate for bonds?

a. At this time, the legislation does not offer a guarantee that would neutralize the annual inflation rate for bonds.
b. Although it may not be fiscally realistic to provide for an interest rate that neutralizes the annual inflation rate for bonds, if the overall liability is reduced following verification it may be possible to improve settlement terms through the issuance of bonds with better terms.

VI. What is justification for different treatment of internal debt based on old foreign currency savings and internal debt based on war damages?

a. Whether differences in the manner War Damage and FFCA claims are settled under the FBiH Internal Debt Law are discriminatory within the meaning of Article 14, and Article 1, Protocol 1 of the Convention depends on the Commission's assessment of whether the two categories of claims are analogous, and if so, whether their disparate settlement terms are objective and justifiable in relation to a legitimate State aim.[44]
b. To be considered analogous for the purpose of applying Article 14 discrimination tests, it must be established that "other persons in an analogous or relevantly similar situation enjoy preferential treatment." [45] The *FBiH Internal Debt Law* provides that FFCA claims will be settled through a combination of interest bearing government bonds and cash payments, and further prescribes that War Damage claims will be settled solely through long-term bonds that bear no interest.[46] OHR notes that although claimants within these two categories share some similarities, particularly with respect to the Federation's attempt to settle claims thereunder through a single law on public debt, their relative positions are distinguished by, inter alia, the nature of the underlying claim and by different legislation regulating how such claims are handled.

c. Various laws regulated the establishment of foreign currency accounts,[47] and subsequently these laws increasingly restricted access by savers to their savings.[48] Eventually, the Federation enacted the Citizens' Claims Law, aimed at settling claims for these accounts within the process of privatization,[49] which included specific rights and obligations for savers seeking compensation for their frozen accounts. Different laws underpin War Damage claims, i.e. the right to compensation for material and non-material damage,[50] and which prescribed the the types of acts that give rise to such claims, together with mechanisms and time limits within which such claims must be filed. Regulations on War Damages also culminated in the enactment of special legislation aimed at settling these claims.[51] Relevant Convention suggests that where the rights of claimants arise under different legal bases and where such legislation provided different mechanisms for realizing those underlying rights, such claimants cannot be considered to be in "relevantly similar" positions.[52]
d. In *Stubbings v. United Kingdom**[53]***, the European Court held that victims of intentional harm and negligent victims were not analogous for the purpose of determining whether differences in limitation periods for brining claims in tort were discriminatory. The European Court, inter alia, observed:

> *"[That]... victims of intentionally and negligently inflicted harm cannot be said to be in analogous situations for the purposes of Article 14 (art. 14). In any domestic judicial system there may be a number of separate categories of claimant, classified by reference to the type of harm suffered, the legal basis of the claim or other factors, who are subject to varying rules and procedures. In the instant case, different rules have evolved within the English law of limitation in respect of the victims of intentionally and negligently inflicted injury, as the House of Lords observed with reference to the report of the Tucker Committee (see paragraph 15 above). Different considerations may apply to each of these groups; for example, it may be more readily apparent to the victims of deliberate wrongdoing that they have a cause of action. It would be artificial to emphasise the similarities between these groups of claimants and to ignore the distinctions between them for the purposes of Article 14 (art. 14) (see, mutatis mutandis, the above-mentioned Van der Mussele judgment, pp. 22-23, para. 46)."* [Emphasis added.]

FFCAs and War Damage claimants, by analogy, similarly seek compensation for different types of interferences with protected property rights where the underlying legislation for each category of clam is based upon different legislation, each with its own body of rules and procedures. As such, OHR is of the opinion that these claimants are not relevantly similar for the purposes of Article 14.

e. Further, should the Commission hold FFCA and War Damage claimants to be analogous with respect to their treatment under the FBiH Internal Debt Law, the different legislative bases, considered in the context of the wide margin of appreciation afforded to contracting States when reforming the economy, support a finding that such differential treatment is not beyond the boundaries of the Convention. The European Court has held that it is "for the national authorities to make the initial assessment as to the existence of a problem of public concern warranting measures of deprivation of property," and accordingly, the authorities "enjoy a certain margin of appreciation," which is necessarily a wide one.[54] Moreover, contracting States enjoy that "margin of appreciation [when] assessing whether and to what extent differences between otherwise similar situations justify a difference in treatment."[55]
f. By providing more favorable terms for savers, specifically through cash payments against FFCA claims within a 4-year period, the Federation implicitly prioritized savings accounts over those claims for material and non-material damages. In doing so, the government assigned greater importance in extending to savers short-term cash payments as partial 'in-kind' restitution for claimed accounts that have been largely inaccessible for over 12 years. For War Damage claims, which range in nature from claims for property ceded for defense purposes to claims for consequential damage resulting from the war-time injury or loss of a loved one, the government deemed cash compensation payments to be of a lower priority. Such distinctions appear objective and justifiable in light of differences between these types of claims. Considering the

Commission's prior recognition of public debt restructuring as a legitimate aim,[56] OHR is of the opinion that differential treatment between these categories of claims falls squarely within the discretion of BiH as Contracting State.

VII. What guarantees do the State and the Entities offer for the payment of bonds?

a. Currently, the State guarantee only applies if the War Damage compensation bonds are issued by the State itself and are paid out of its own budget resources. However, the State guarantee does not extend to bonds issued on behalf of the Entities. These bonds are secured only by the credit and ability of the Entity to pay, and the ability of the government to pay rests, in part, on its ability to restructure outstanding liabilities.
b. However, to this end, he Parliamentary Assembly of BiH recently adopted *Law on Debt and Guarantees of BiH*, which prescribes mechanisms and procedures related to the issuance of debt, guarantees and securities by BIH.[57] It was drafted with assistance of the US Treasury Department and includes input from all relevant stakeholders.
c. This Lawalso specifically provides that the Entities and Brcko may choose to access the State government market by requesting that the State issue bonds on their behalf.

VIII. Has the Government of the Federation of Bosnia and Herzegovina complied with legal obligations relating to enactment of by-laws; for example, according to Articles 18(1) and 21(3) of the Law on Determination and Manner of Settlement of the Internal Obligations of the Federation of Bosnia and Herzegovina?

a. Following the enactment of the *FBiH Internal Debt Law*, the government undertook significant measures to enact by-laws envisioned by the law. Thus far, the Federation adopted and published the *Book of Rules on the Procedure of Verifying the Frozen Foreign Currency Savings Claims in the Territory of the Federation of Bosnia and Herzegovina****[58]*** (*hereinafter*: *FBIH FFCA Rulebook*) and *the Decision on Recording Priorities in Settling the Liabilities for Unpaid Net Salaries and Allowances and Unpaid Liabilities to Suppliers of Goods, Materials and Services in 2005****[59]****.*
b. Unfortunately, several known issues are unresolved in relation to the *FBiH FFCA Rulebook.* Among these issues are the short deadline within with savers must file claims and the deadline within which the government must verify these claims. Article 12 of *FBIH Internal Debt Law* provides that the "verification process of all claims for Frozen Foreign Currency Savings shall be completed within nine months from entry into force of this Law." The *FBIH Internal Debt Law* entered into force on 28 November 2004, which means that the deadline for the verification of all FFCA claims is 28 August 2005. However, the public announcement, aimed at informing the public that the verification process is to begin on 11 August 2005 in both Entities and Brcko District, was published only on 12 July 2005. This effectively provides a mere 17-day verification period for a debt that remains outstanding after over 12 years. However, OHR notes that the government representatives have already initiated procedures to amend both the law and the *FBIH FFCA Rulebook* to address these issues.
c. Further, Article 12 of the *FBIH Internal Debt Law* calls for the adoption of verification procedures, which, inter alia, should provide a mechanism for savers whose passbooks are unavailable to have their claims verified and for appealing decisions on verification. On these matters, Federation representatives indicate that they are considering appropriate mechanisms for incorporation into the *FBIH FFCA Rulebook.*
d. It should be noted that the RS Government adopted the *Decree on Conditions and Procedures to Verify Old Foreign Currency Savings* at its 19th regular session on 7 July 2005. Also, public notification, as provided for by the rulebooks, announcing the official start of the verification process was published in several daily newspapers on July 11-12, 2005.[60]
e. While there have been no formal decisions adopted regarding the obligations set forth in Articles 18(1) and 21(3), both of those issues are currently in process. Regarding Art. 18(1), the

Ministry of Justice has contacted all Cantonal Courts regarding the amount of non-material damage claims and began collecting the data submitted by Cantonal Courts.[61] Also, while the Federation has not formally adopted decisions or regulations pursuant to Art. 21(3) regulating bond conditions, the entry into force of the *Debt and Guarantees Law of BiH* was considered as a necessary precondition.

IX. Does the suspension of the payments based on war damages, as determined by the Law on Determination and Manner of Settlement of the Internal Obligations of the Federation of Bosnia and Herzegovina, and in the manner established by the final and binding judgments by the courts, represent justified interference with the right to access to the court within the meaning of Article 6 of the European Convention for Protection of Human Rights and Fundamental Freedoms?

a. Relevant jurisprudence of the European Court defines Article 6 § 1 of the Convention as the "effective access to a court,"[62] which includes an obligation on Contracting States to ensure that court decisions are respected.[63] However, some limitations may be compatible with the Convention if they pursue a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[64]
b. Hence, the right of access to the courts is not absolute and may be subject to limitations, which therefore calls for regulation by the State to ensure any such limitations comport with its obligations under the Convention. In this respect, the Contracting States enjoy a certain margin of appreciation, the appropriateness of any such limitations are determined by the European Court, after considering all relevant circumstances.[65]
c. In Besarovic, the Commission previously recognized the preservation of economic stability in the context of heavy debts as a legitimate State aim when it considered the settlement mechanisms for FFCA holders under the *FBiH Internal Debt Law*. The principle of preserving macroeconomic stability similarly underpins the settlement of War Damage claims under *FBiH Internal Debt Law* and therefore also should be recognized as legitimate. To the extent the Commission does find the aim to be legitimate in the context of War Damage, the Commission must consider whether the means employed under the *FBiH Internal Debt Law* bear a proportional relationship.
d. The European Court's jurisprudence in analogous cases suggests that an unjustified interference occurs only when there are no time limits or subsequent regulating legislation.[66] The European Court, in Multiplex v. Croatia, noted "that a situation where a significant number of legal suits claiming large sums of money are lodged against a State may call for some further regulation by the State and that in respect of that matter the States enjoy a certain margin of appreciation."[67] OHR is of the opinion that some length of suspension in the payment of judgments for war damages is justifiable within the meaning of Article 6 insofar as it is time limited, and provided the mechanism for such suspension ensures that such suspension is not permanent.
e. However, OHR duly notes that in Loncar, the Constitutional Court of BiH held that the settlement terms for War Damages did not bear the necessary relationship of proportionality and that settlement through 50-year bonds, which bear no interest following a 40-year grace period places "an excessive burden on individuals."[68] The economic analysis detailed in this brief, with the cooperation of our international and domestic partners, outlines the economic impact of changes to bond structure under the settlement as mandated by the Constitutional Court. These analyses suggest that little or no flexibility exists to reduce bond terms, or to execute these judgments in the short-term through cash payouts without risking government insolvency. Lengthier delays in the enforcement of judgments or an alternative settlement mechanism appear both necessary and appropriate. While the authorities and their international partner agencies have yet to identify feasible alternatives, one option the authorities may wish to consider is a much larger partial write-off of liabilities from all categories of debt under the respective internal debt settlement laws in favor of either short-

terms bonds for all claimants, or in favor of nominal short-term cash payments. However, OHR takes no position on either the appropriateness of these alternatives within the context of the Convention, or their economic feasibility.

f. Finally, while mindful of the Constitutional Court's expressed concerns regarding length of time a judgment creditor would have wait before realizing any return on their claim, OHR urges the Commission to consider all economic circumstances related to the cumulative debts of the State, Federation and other administrative units within BiH. In this context, the Commission may wish to consider providing the authorities with additional guidance on approaches through which amended legislation might responsibly conform to Convention requirements.

Notes:

[1] No uniform definition, either in the Federation or other jurisdictions in BIH, defining the concept of 'War Damage'. Therefore, for the purposes of this brief, references to War Damage refers generally to any claim or enforceable judgment based on material and non-material damage claims arising during period of the state of war in BiH or arising as an immediate consequence thereof.

[2] Article 2 provides for the settlement of claims based on FFCA, unpaid salaries of soldiers and general citizens' claims determined by the *Law on Privatization of Enterprises*.

[3] See Articles 20-25, which defines compensation mechanisms for certain claims, *inter alia*, confiscated property, and FFCA.

[4] This law covered the Federation, cantonal and municipal budgets and explicitly covers decisions against war damages.

[5] The Law did not expressly bar claims for non-material damages pursuant to the *Law on Obligations*; see *FBiH War Claims* Law at Article 7.

[6] *See* also Question II Section d.

[7] *Id.*, Article 3(5).

[8] *See* Article 16, *FBiH Internal Debt Law*.

[9] *Id.* Further, as show in Question II, section b., the Federation government estimates the total liability to be far below the 900 KM million limit.

[10] *See Law on Obligation Relations* (RS Official Gazette, no. 17/93, 3/96, 39/03, 74/04).

[11] Ministry of Finance estimates.

[12] *See* Article 18, RS *Internal Debt Law*.

[13] *Id.*, Article 21.

[14] At the time of writing this law had not been published in the Official Gazette.

[15] In accordance with Entity Laws on enforcement procedures, the governments report that operating budgets of several municipalities have been temporarily frozen for the benefit of judgment creditors, including the most notable example of Trebinje in January 2005.

[16] See, Assanidze v. Georgia, European Court of Human Rights, (*hereinafter*: European Court), judgment of 8 April, 2004, at p. 27, para. 146).

[17] The European Convention does not contain a federal clause (Assanidze v. Georgia, judgment of 8 April, 2004,

p. 26, para. 1410).

[18] *Ibid.,* p. 27, para. 147.

[19] The law was adopted by the RSNA at the 28th regular session on June 30, 2005.

[20] See, *RS War Damage Claims Law*.

[21] The economic reality in the two Entities is different. More claims are upheld in the RS than in the FBiH due to differences in legislation. Provided that the underlying value of the claims is treated equally there are no obstacles to structuring bonds differently in the two Entities in order to take account of the different realities across the Entities.

[22] The State, Entities and Brcko District each adopted 'Strategic Debt Settlement Decisions, two of which were published in the respective Official Gazette. See, FBiH Official Gazette, no. 63/03; RS Official Gazette, no. 108/03.

[23] The State, Entities and the Brcko District each adopted *Strategic Decision on the Specification and Settlement of Internal Debt*, two of which were published in the Official Gazette, (FBiH Official Gazette, no. 63/03; RS Official Gazette, no. 108/03).

[24] On 06 June 2005, the FBiH Minister of Justice forwarded a request to all Cantonal Courts requesting relevant information.

[25] Investigative Committee for Establishment of the Factual State Regarding Legal and Natural Persons That Have So Far Collected Material and Non-Material Damages Occurred Due to War, Republika Srpska, Report no. 02-1183/04 dated June 24, 2004.

[26] *See* Article 14*, RS War Damage Claims Law*.

[27] Although the issue of FFCAs is not the issue under Commission consideration in this application, OHR is of the opinion that considering the experience in Serbia, it may be necessary to harmonize the time allotted by applicable entity regulations for filing and verifying claims.

[28] Besarovic at 1233.

[29] *Id.*

[30] Should the Commission deem the State responsible for settling War Damage, a combined estimated liability for the RS and Federation of KM 6.3 billion would far exceed the combined estimate for FFCA liability of ~KM 2 billion; section II, supra. Therefore, the public interest in restructuring war damage liability should be clear.

[31] See, Loncar, supra.

[32] See section IV, infra.

[33] Besarovic Decision citing the Human Rights Chamber's (*hereinafter:* the Chamber) Decision on Admissibility and Merits in cases nos. CH/98/1311 and CH/01/8542*,* Kurtišaj and M.K. v. the Federation of Bosnia and Herzegovina, of 2 September 2002, para. 87; judgement of the ECHR, James et al., of 21 February 1986, Series A, no. 98, para. 46.

[34] Lithgow et al. v. the United Kingdom*,* judgment of 8 July 1986, Series A, no. 102, para. 122.

[35] Besarovic at 1235.

[36] *Id.* citing the European Commission of Human Rights Decision, X. v. Austria, of 13 December 1979, application no. 7978/7, Decisions and Reports (DR), no. 18, para. 3, p. 47.

[37] Besarovic at 1243.

[38] *Id*. comparing the European Court of Human Rights judgement, James et al. v. the United Kingdom, of 21 February 1986, Series A, no. 98, p. 46. and 54.

[39] Besarovic at 1235.

[40] *See* Jahn v. Germany, *nos. 46720/99, 72203/01 and 72552/01*, paragraph 80.

[41] These included general government arrears, FFCA's and War Damage claims. In the RS, the war damage claims were estimated at KM 6 billion, while the *RS Internal Debt Law* provides for the settlement of war damage claims in the amount of KM 600 million, representing a 90 percent write-off. See, section I (o), supra.

[42] NPV is the value of the stream of future payments (both principal and interest) brought forward to the present and discounted to reflect the opportunity cost of the delayed payments.

[43] Public Debt in Emerging Markets: Is it Too High?, Chapter 111 in the IMF's World Economic Outlook of September 2003: "Countries whose public debts exceed 50 percent of their GDP face high risk of economic crisis."

[44] See explanation of this rule in *Lithgow v. United Kingdom*, European Court Judgment of 8 July 1986, Series A no. 102 at paragraph 177.

[45] *See* National Provincial Society, et al, at paragraph 88; see also Human Rights Chamber Cases no. CH/98/706 et al Secerbegovic and Other v. BiH, FBiH, Decision on Admissibility and Merits, 7 April 2000 at paragraph 99.

[46] See, *FBiH Internal Debt Law,* Articles 9-15, and Articles 16-20, which respectively specify settlement terms for FCCAs and War Damage claims.

[47] Foreign currency accounts were regulated by, for example the *Law on Foreign Exchange Transactions* (SFRY Official Gazette, no. 66/85, 96/91, 1992 *Decree with Force of Law on Foreign Exchange Transactions* (RBiH Official Gazette, no. 2/92), 1994 *Decree with Force of Law on Foreign Exchange Transactions* (RBiH Official Gazette, no. 10/94, 13/94).), and The *Law on Banks and Other Financial Institutions* (SFRY Official Gazette, no. 10/89, FBiH Official Gazette no. 2/95, 39/98.

[48] See, *Decree with Force of Law on Foreign Exchange Transactions* (Official Gazette RBiH no. 2/92, 10/94; enacted later as Official Gazette RBiH no.10/94 and 13/94). See also, *Decision on Aims and Objectives of the Monetary Credit Policy* 1995 (Official Gazette RBiH no. 11/95).

[49] See, *FBIH War Claims law* at Articles 3,7, 11, and 18.

[50] See, *Law on Obligations of SFRY* (SFRY Official Gazette, no. 29/78, 39/85, 45/89 (Constitutional Court of the SFRY), 57/89 (Constitutional Court of the SFRY)), *Decree with the Legal Force on Taking Over the Law on Obligations* (Official Gazette RBiH no. 2/92), and *Law on Obligations* Official Gazette FBiH no. 29/03), *Law on Defense*, (Official Gazette RBiH no. 4/92, 9/92, 19/92, 11/93, 17/93, 4/94, 13/94, 4/95 and 20/95), *Decree on Criteria and Standards of Deployment of Citizens and Material into Armed Forces and for Other Defense Purposes,* (Official Gazette RBiH no. 19/92) and the *Decree for Deployments of Citizens and Material Means for HVO Purposes and Other Defense Purposes* (Official Gazette HR HB no. 19/92).

[51] See, FBiH War Claims Law, supra.

[52] See, Van der Mussele v. Belgium, European Court Judgment of 23 November 1983, Series A no. 70 at paragraphs 45 and 46.

[53] See, Stubbing, et al. v. United Kingdom, European Court Judgment of 22 October 1996, R.J.D. 1996-IV at paragraph 73.

[54] See, *James and Others v. the United Kingdom,* judgment of 21 February 1986, Series A no. 98, pp. 32, § 46.

[55] See Jahn, et al. v. Germany, judgment of 30 June 2005 at para. 122.

[56] See, Besarovic at para. 1217-1221.

[57] The House of Representatives of the Parliamentary Assembly of BiH and the House of Peoples of the Parliamentary Assembly of BiH adopted the law, respectively, on May 17, 2005 and on June 29, 2005. However, the law has yet to be published in the Official Gazette of BiH and thereby has not entered into force.

[58] FBiH Official Gazette, no. 33/05.

[59] FBiH Official Gazette, no. 13/05.

[60] Oslobodjenje and Glas Srpske.

[61] See question II above for further detail on results.

[62] *See* Golder v. United Kingdom, European Court judgment of 21 February 1975, Series A no. 18 at paragraph 36.

[63] Human Rights Chamber case no. CH/99/1859, *Jelicic v. Republika Srpska at paragraphs 22-27.*

[64] *Id*.; see also (see National & Provincial Building Society, *et al.* v. the United Kingdom, No. 117/1996/736/933-935, at paragraph 105.

[65] *See* Waite and Kennedy, cited above, § 59; T.P. and K.M. v. the United Kingdom [GC], no. 28945/95, § 98, ECHR 2001-V; and Z and Others v. the United Kingdom [GC], no. 29392/95, § 93, ECHR 2001-V).

[66] *See* Multiplex v. Croatia, 58112/00 of 10 July 2000, holding that "In the present case the proceedings have so far been stayed for over three years and seven months and no new legislation has been passed in the meantime that would enable the applicant company to have its civil claim determined." Multiplex at paragraph 52.

[67] *Id.*

[68] *See* Loncar, *Ibid.* at paragraph 34.