



TRIAL
International

COMPENSATING SURVIVORS IN CRIMINAL PROCEEDINGS: PERSPECTIVES FROM THE FIELD

A report by TRIAL International in Bosnia and Herzegovina

This publication is part of the "Advocating for the rights of women victims of wartime sexual violence to obtain justice and reparation" project.

"This material is completely financed by the Swedish International Development Cooperation Agency (Sida) and Kvinna till Kvinna. Sida and Kvinna till Kvinna do not necessarily agree with the opinions expressed. TRIAL International alone is responsible for the content."

COMPENSATING SURVIVORS IN CRIMINAL PROCEEDINGS: PERSPECTIVES FROM THE FIELD

A report by TRIAL International office in Bosnia and Herzegovina

TABLE OF CONTENTS

I.	FOREWORD AND INTRODUCTION	4
	A. Foreword	4
	B. Introduction	6
II.	METHODOLOGY	8
III.	BACKGROUND	9
IV.	SURVIVORS OF SEXUAL VIOLENCE	12
V.	PROGRESS AT THE COURT OF BIH	14
VI.	THE BENEFITS OF COMPENSATION IN CRIMINAL PROCEEDINGS FOR WARTIME SURVIVORS	16
	A. Transitional Justice as a Multifaceted Process	16
	B. Court Ordered Compensation as Sanction	17
	C. Acknowledgement	18
	D. Deterrence	19
	E. Empowerment through Compensation Claims and Legal Representation	20
	F. Building Trust in the Justice System	21
	G. Rehabilitation	23
	H. Economic Gains	24
	I. Enforcement Difficulties: Measuring Symbolic and Material Benefits	25
VII.	SAFEGUARDS IN CRIMINAL PROCEEDINGS	27
	A. Identity Protection	27
	B. Retraumatization: Supporting Survivors	28

VIII.	COMPENSATION IN CIVIL LITIGATION	31
	A. Symbolic Benefits and State Responsibility	31
	B. Civil Litigation as the Only Option	32
IX.	LIMITATIONS OF CIVIL PROCEEDINGS	34
	A. Legal Fees	34
	B. The Challenges of Losing Identity Protection in Civil Court	35
	C. “Multiple Retraumatization” and the Lack of Psychological Support	36
	D. Zastara (Statutes of Limitations) and Court Fees	39
X.	SOCIAL BENEFITS	41
	A. Social Benefits as a Lifeline	41
	B. Recognition of Victim Status	42
	C. Limitations to Symbolic Value	42
	D. Procedural Limitations	43
XI.	CONCLUSION	44
	ABOUT TRIAL INTERNATIONAL	46

I. FOREWORD AND INTRODUCTION

A. FOREWORD

Since the end of the war in Bosnia and Herzegovina (BiH) there have been numerous publications on wartime rape. Some of them include testimonies of survivors and some focus on the long-term effects of trauma, while others reveal the deficiencies of court procedures that do not provide adequate witness protection to survivors. Although the focus of this publication is on criminal proceedings, it also aims to illustrate advantages and mitigating factors, as well as obstacles and challenges to be overcome, when survivors/victims seek non-pecuniary damages through various mechanisms: criminal trials, referral to subsequent civil procedures, and administrative measures. The publication also discusses other aspects of survivors' lives that have been affected by trauma and can be ameliorated through compensation, such as their physical and mental health, the attitude of people in their surroundings and stigmatization, freedom of movement and safety, and economic and social security.

This publication advocates an approach to wartime rape that is not saddled by petty politics and seeks to put victims first. It is a fact that the prosecution has failed to actively insist upon ensuring non-pecuniary damages in criminal proceedings. Initiating subsequent civil procedures for non-pecuniary damages further traumatizes survivors/victims; they have to go through an identical or more elaborate trial process intended to prove facts that have already been established, upon which the perpetrator was sentenced in the previous criminal proceeding. By invoking statutes of limitations, civil courts exert further psychological and financial pressure on victims, which many cannot bear. At the same time, the state has not adopted a comprehensive strategy, law or implementable program for instituting simple administrative procedures, through which wartime rape survivors/victims can exercise their rights and receive adequate protection.

The traumatic effects of rape are lifelong; personal emotional resources, the support of society and the system of protection determine the extent to which a survivor will be able to deal with her trauma and lead a functional and satisfying life.

Prosecuting war crimes and sentencing the perpetrators can bring some sort of satisfaction to victims: it sends the message that crimes have not been forgotten and this partly restores victims' belief in the justice system. However, survivors who testify in trials often feel used, because a criminal sentence is the state's punishment of the perpetrator and their role in this process is passive and secondary.

Her body suffered terrible injuries. Against her will, **her life** took a turn for the worse. **Against her will**, she was incapacitated, deprived, shunned, stigmatized, forgotten, used... Over and over again. **Willingly**, with his body, **he** committed a crime against **her**. Consciously. Therefore, ensuring justice for **her** (the survivor) by providing compensation at **his** (the perpetrator's) expense is more than a mere symbolic admission of guilt.

Granting victims compensation for non-pecuniary damage reverses the roles. The survivor becomes an active agent, while the perpetrator's role is secondary – he is there for her sake. This brings true satisfaction. Providing compensation to survivors/victims can help them lead more satisfying lives and meet basic needs, not just by ensuring some sort of financial security and ameliorating suffering, but primarily by helping them address the severe physical and psychological consequences of rape that continue to reappear.

Team of the Centre for Legal Assistance for Women

B. INTRODUCTION

“Though he could not ever pay for what I went through, he must be held responsible for compensation.”

D, sexual violence survivor who was awarded compensation before the Court of Bosnia and Herzegovina (Court of BiH)

Over the past year, the Court of BiH has established groundbreaking precedent, awarding damages to wartime survivors in several criminal cases. Though policymakers have engaged in intensive discussion about this practice, little attention has been paid to survivors’ voices. The present report thereby highlights the perspective of wartime survivors, exploring their views on court-ordered compensation in criminal proceedings.

Based on interviews with survivors, psychologists, doctors, social workers, government officials, members of the judiciary, representatives of international institutions, attorneys, psychotherapists, academics, and NGO representatives, the report seeks to answer several key questions. How do survivors experience the process of seeking compensation in war crimes trials? What do awards for damages mean to these individuals? How does court-ordered compensation compare with other transitional justice mechanisms that have been implemented in BiH? Moving forward, should stakeholders work to standardize the awarding of damages in criminal proceedings?

Thus far, the Court of BiH has awarded compensation only in cases of sexual violence. Accordingly, the report centers on sexual violence survivors but draws insights that apply to the full range of wartime survivors. The report’s focus also derives from the vulnerable status of sexual violence survivors. Subsisting on the margins of society, many such individuals, while gravely in need of compensation, lack the support networks necessary to access justice and cope with the setbacks of legal proceedings. As such, by surveying sexual violence survivors’ experiences with court-ordered compensation, the report aims to promote policymaking that enables even the most vulnerable survivors to obtain redress.

The report ultimately concludes that compensation in criminal proceedings can be a constructive mode of reparations for war crimes survivors who have the status of injured party at trial. Damages ordered by a criminal court perform a range of functions; they impose additional punishment on the perpetrator; they recognize the harms that survivors have suffered; they express societal condemnation of wartime crimes; they help deter future such offenses; they empower

survivors; they build trust in the legal system; and they facilitate personal rehabilitation. According to interviewees, these symbolic benefits take precedence over material gain, making court-ordered damages worthwhile despite extant problems with the enforcement of verdicts.

As also described by interviewees, compensation in criminal proceedings plays a unique, indispensable role that complements other transitional justice mechanisms, such as civil trials and the social welfare system. Though civil suits are a vital option, current procedural limitations detract from their value. Civil litigation, for example, regularly results in the dismissal of claims based on statutes of limitations (zastara), forcing survivors - most of whom are already destitute - to pay high court fees; provokes additional trauma; fails to protect survivors' identities; and requires survivors to hire lawyers without exception. Meanwhile, the monthly disbursements administered by the social welfare system, a lifeline for many survivors, do not provide key symbolic benefits afforded by court-ordered compensation, such as the acknowledgement of state/perpetrator responsibility; recognition of the impact of specific harms suffered; punishment of the perpetrator/state; and deterrence of future crimes. Consequently, interviewees often perceive monthly pensions as a form of social help, not justice.

Given the above findings on the value of damages in the criminal context, the report urges policy-makers to take action. Stakeholders from the government to the judiciary to international institutions should work to standardize the practice of compensation in criminal proceedings, removing all obstacles - such as enforcement complications and the lack of free legal aid - that prevent war crimes survivors from fully accessing the redress they are due.

II. METHODOLOGY

This report is based on research conducted in BiH from May 2016 to September 2016. In order to gather the information presented in the report, the TRIAL International office in BiH team, in conjunction with its partner organization, the Centre for Legal Assistance for Women from Zenica, conducted 31 interviews with individuals either well-versed in the issue of court-ordered compensation or familiar with survivors' needs: wartime survivors, psychologists, doctors, social workers, members of the judiciary, psychotherapists, government officials, NGO representatives, lawyers, academics, and representatives of international institutions. Interviewees hail from both BiH entities - the Federation (FBiH) and Republika Srpska (RS) - as well as from countries outside Bosnia and Herzegovina. All interviewees were informed that they could choose to remain anonymous. As a result, the identifying details of certain interviewees are absent from this report.

The report draws upon qualitative, not quantitative analysis, aiming to provide readers with a window into survivors' experiences. As mentioned above, the views of survivors - particularly sexual violence survivors - are too often silenced or disregarded. As such, the report creates space for these voices, focusing on personal stories instead of statistics and percentages. Unless referring to an official law or quote, the report refers to individuals subjected to grave violations of international law as "survivors."

III. BACKGROUND

Bosnia and Herzegovina has yet to establish a statewide reparations scheme for survivors of the war. As the result of political battles over wartime wrongs, efforts to set up such a mechanism have failed time and again. Instead, survivors have been funneled into litigation and the social welfare system.

Under Article 193 of Bosnia and Herzegovina’s Criminal Procedure Code (CPC), injured parties may file compensation claims in criminal proceedings for pecuniary and non-pecuniary damages stemming from criminal offenses. These requests must be filed by the end of the main trial or sentencing hearing;¹ must state the claim for compensation “specifically”;² and must provide evidence to support the awarding of damages.³

While survivors assume primary responsibility for compensation requests, the CPC obligates judges and prosecutors to facilitate the process; the prosecutor must “gather evidence regarding the property claim,”⁴ the prosecutor must ask the survivor about his or her wishes in respect to compensation during direct examination,⁵ and the Court must notify the survivor about the possibility of a claim if he or she has not filed a request by the time the indictment is confirmed.⁶

Though the CPC aims to protect survivors’ right to compensation, in practice, the lack of free legal aid thwarts redress. Only persons accused of having perpetrated crimes, not survivors, are eligible for state subsidized counsel. Accordingly, most survivors - unable to afford lawyers - navigate the criminal justice process alone. Without counsel, even survivors who are better informed struggle to satisfy technical compensation criteria, including the CPC requirement that the claim be stated “specifically.”

Meanwhile, prosecutors have consistently eschewed their duties under the CPC. Because of a confluence of factors - the outdated conviction that compensation claims should be tried in civil court, concerns that claims will stretch already overburdened offices too thin, and inexperience with claims - prosecutors have

1 Article 195(2) of the CPC.

2 Article 195(3) of the CPC.

3 *Id.*

4 Article 197(1) of the CPC.

5 Article 86(10) of the CPC.

6 Article 195(4) of the CPC.

often refrained from “gathering” the requisite evidence, leaving the issue of damages for civil courts.

Correspondingly, judges have historically referred survivors to civil litigation. Instead of evaluating whether claims can reasonably be decided in criminal court, judges have tended to issue almost automatic referrals, citing boilerplate rationales such as insufficient evidence - generally the result of the prosecutor’s lack of initiative/the survivor’s lack of counsel; failure to state the claim specifically - again the result of survivors’ inability to afford counsel; and the risk that claims will unduly prolong proceedings - a permissible grounds for referral under the CPC, but a rationale regularly deployed without justification.⁷

As such, war crimes survivors’ compensation requests in criminal litigation are rarely successful. Before 2015, the Court of BiH had never awarded damages to a survivor and - to date - there have been only four such verdicts, with the bulk of cases passed on to civil court.⁸ Civil suits, however, place survivors at a significant disadvantage; unlike in criminal proceedings, survivors are not entitled to identity protection; survivors undergo additional retraumatization, without the assistance of a department of witness support; survivors are forced to pay for counsel; Republika Srpska - under an unforgiving statute of limitations - currently rejects all claims filed after 1999, imposing prohibitive court fees on survivors who lose cases on this basis; and FBiH courts, drawing upon recent Constitutional Court decisions,⁹ have also begun adopting a restrictive approach to the application of statutes of limitations.

The social welfare system offers an alternative to the travails of the courtroom. Under entity payment schemes, survivors receive monthly pensions - much like individuals who are disabled or unemployed. Benefits, however, exclude a large swathe of survivors.

RS, for example, bars all applications filed after 2007, notwithstanding the fact that societal upheaval, stigma, physical dislocation, the psychological barrier of telling one’s story, lack of knowledge about the possibility of benefits, and security fears prevented many survivors from applying for welfare

7 For more on the challenges to the awarding of compensation in criminal proceedings, see TRIAL International office in BiH, *Enforcement of Damage Compensation Claims of Victims of War in Criminal Proceedings in Bosnia and Herzegovina: Situation, Challenges, and Perspectives*, (2015). Available at http://trial.ba/wp-content/uploads/2015/10/ENG_Ostvarivanje-zahitjeva-za-naknadu-%C5%A1tete-%C5%Bertava-ratnih-zlo%C4%8Dina-u-okviru-krivi%C4%8Dnih-postupaka-u-Bosni-i-Hercegovini-%E2%80%93-stanje-problemi-i-perspektive-.pdf

8 After criminal courts refer victims to civil litigation, only a small number of victims actually initiate civil proceedings, largely because of the practical obstacles detailed in the following pages.

9 See Constitutional Court of Bosnia and Herzegovina, *Desanka Stanisic i Srecko Stanisic*, AP-4264/11, (17 September 2014). Available at <http://www.ustavisud.ba/dokumenti/AP-4264-11-689674.pdf>; Constitutional Court of Bosnia and Herzegovina, *Republika Srpska*, AP-3979/11, (17 September 2014). Available at http://www.ustavisud.ba/dokumenti/_bs/AP-3979-11-689637.pdf

until recently. Even those able to meet the 2007 deadline face additional hurdles. Legislation in RS hinges on material injuries, awarding “civilian victim of war” status only to individuals with “60 percent damage of the organism.” It is unclear whether survivors who bear psychological, not physical, scars - such as the majority of individuals subjected to sexual violence - qualify for welfare.

The Federation - like RS - requires proof of 60 percent damage to the organism, but has carved out an explicit exception for survivors of sexual violence and does not impose RS’ temporal limitations. Federation benefits, however, are restricted to residents of FBiH; survivors living in RS or outside of Bosnia and Herzegovina are ineligible for monthly payments. Furthermore, the Federation’s decentralized canton system means that welfare packages are distributed unevenly at best, and sometimes not at all.

IV. SURVIVORS OF SEXUAL VIOLENCE

“We as a society have shown that we are not ready to give a hand to survivors and accept them as they are - those ladies and their families suffer the most because we are not ready to support them.”

Murat Tahirovic, President of the Association of Victims and Witnesses of Genocide

As discussed in the previous section, transitional justice mechanisms in Bosnia and Herzegovina are flawed, hindering many war crimes survivors from realizing their right to redress. These failings particularly affect survivors of sexual violence. Stigmatized by their communities and facing lasting psychological, physical, economic, and social harms, sexual violence survivors are severely in need of reparations.

Wartime sexual violence engenders trauma that is difficult to overcome. As detailed by psychologists and psychotherapists who work with survivors, sexual violence is “combined torture”: because of its intimate nature, the crime is not only physical, but also psychological.¹⁰ Perpetrators in the Bosnian war aimed to dehumanize, striking at the essence of a person’s dignity and character.¹¹

The vast majority of sexual violence survivors suffer from Post Traumatic Stress Disorder (PTSD), with associated depression, sleeping problems, mood swings, difficulties concentrating, paranoia, and aggression. According to interviewees, however, PTSD is “the lightest version of trauma they would have.”¹² Symptoms of the disorder tend to deepen over the years, in some instances leading to a “permanent change of personality.”¹³ Psychological trauma can also give rise to chronic physical pains.¹⁴

Troublingly, the issues described above often go untreated. As noted by court expert and neuropsychiatrist Alma Bravo Mehmedbasic, “the percent of those who had support and rehabilitation is much lower than that of those who did not.” Particularly in rural areas, medical services are few and far between. Traveling to an urban center for treatment requires funds that most survivors do not have.

¹⁰ Interview with Alma Bravo Mehmedbasic, neuropsychiatrist and court expert.

¹¹ *Id.*

¹² See interview with Alma Taso Deljkovic and Tanja Tankosic of the Witness Support Section of the Court of BiH.

¹³ *Id.*

¹⁴ See interview with Alma Bravo Mehmedbasic; interview with Sabiha Husic, Director of Medica Zenica; interview with Marijana Senjak, psychotherapist.

Moreover, even survivors who obtain assistance may find that doctors and other caregivers are not trained to deal with sexual violence offenses, and, correspondingly, are unable to facilitate the recovery process.

The stigma surrounding sexual violence likewise impedes rehabilitation. The intimacy of the crime means that many survivors experience shame, perceiving the assault to have been their fault. In her work with survivors of sexual violence, psychotherapist Besima Catic tries “to explain to them that what happened was involuntary, they didn’t want that. It happened without their permission so they shouldn’t feel guilty.”

Feelings of humiliation and degradation are rooted in Bosnia and Herzegovina’s patriarchal culture. As Aleksandra Petric of United Women Banja Luka observes, “in Bosnia, even if rape happened in peacetime, victims are judged for provoking that kind of crime.” Societal stigma makes it difficult for survivors to speak about the offenses perpetrated against them; some survivors keep their suffering a secret, hiding it from family members, doctors, and therapists. This “frozen trauma,” suppressed deep within, is damaging, as “wounds cannot be healed by themselves.”¹⁵

Because of stigma and the paucity of institutional services, mental health problems amongst sexual violence survivors have persisted unabated in the twenty years since the war. Untreated trauma prevents survivors from securing employment and achieving economic independence, with many relying on their families and/or monthly benefits to survive. In the experience of Seida Karabasic, coordinator at IZVOR Prijedor, “what little money victims do have they must often spend on pills for their health issues,” with nothing left over for housing, psychological counseling, or vocational training. Sexual violence perpetrated during the war thus provokes a cycle of trauma and deprivation, which frequently extends to the next generation. Termination of this cycle will require redress.

The vulnerable position of sexual violence survivors, however, obstructs their access to reparative mechanisms. Taking the first step and deciding to seek compensation, for example, is a formidable psychological obstacle in itself. In any subsequent compensation claim procedure, socio-economic infirmity means that many sexual violence survivors cannot afford a lawyer, greatly reducing their chances of success; untreated psychological conditions mean that survivors are prone to retraumatization; societal stigma means that the possibility of losing identity protection in civil litigation is harrowing; and the combination of social, economic, and psychological problems means that the dismissal of claims on the basis of statutes of limitations - and the subsequent imposition of court fees - strike sexual violence survivors particularly hard. As such, although survivors of sexual violence would greatly benefit from court ordered compensation, they struggle to obtain redress, remaining trapped in the aforementioned cycle.

15 Interview with Alma Bravo Mehmedbasic.

V. PROGRESS AT THE COURT OF BIH

Recent judgments issued by the Court of BiH reflect significant progress in regard to compensation, specifically for survivors of sexual violence. In June 2015, WCC (War Crimes Chamber) panels awarded compensation to sexual violence survivors in cases against Slavko Savic, and Bosiljko and Ostoja Markovic.¹⁶

In February of this year, an appellate panel at the Court upheld the *Savic* decision. In March, the Court again awarded damages to a sexual violence survivor in the case of Adil Vojic and Bekir Mesic, and in October in the case of Krsto Dostic. While these seminal verdicts indicate a shift in judicial and prosecutorial attitudes, it is worth noting that in each case, TRIAL International office in BiH - in conjunction with a domestic attorney - provided legal aid to survivors. Accordingly, such assistance continues to be vital to the realization of survivors' right to a remedy.

Troublingly, even if compensation is granted, it is likely that many perpetrators will be unable to pay the awards. Savic's lawyer, for example, has already stated that his client does not have the requisite funds. It is thus unclear how or when compensation will be enforced. Though survivors can initiate civil litigation against FBiH/RS based on successful criminal claims, entity level courts have - as discussed above - repeatedly employed statutes of limitations ("zastara") to deny civil damages.¹⁷

The position of a survivor who has already received a criminal verdict awarding compensation, however, differs from that of a survivor filing civil suit without such a decision; in the former situation, international human rights standards require enforcement of the reparative judgment and prohibit the application of statutes of limitations.¹⁸ Nonetheless, it remains to be seen whether

¹⁶ In these cases, the Court of BiH also sentenced the aforementioned perpetrators to various jail terms.

¹⁷ It is worth noting that even if survivors are able to obtain civil judgments against FBiH/RS based on successful criminal claims, enforcement may still be difficult. In RS, for example, numerous civil verdicts that were issued against the entity prior to the expiration of the statute of limitations have yet to be enforced, despite ECtHR decisions – such as *Duric and Others v. Bosnia and Herzegovina* - finding a violation of the European Convention and calling on RS to pay out awards. Because of the many obstacles to enforcement, TRIAL International office in BiH strongly supports not only compensation awarded through court proceedings, but also - before anything else - compensation through an administrative, reparative mechanism created by statewide legislation.

¹⁸ See *United Nations 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*, adopted based on a resolution of the General Assembly, doc. 60/147, (16 December 2005), principles 6, 16-17. Available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>; Committee against Torture (CAT), *General Comment No. 3*, doc. CAT/C/GC/3, (16 November 2012), paras. 38-40. Available at http://www2.ohchr.org/english/bodies/cat/docs/GC/CAT-C-GC-3_en.pdf; *El-Masri v. the Former Yugoslav Republic of Macedonia*, Application no. 39630/09, Grand Chamber of the European Court of Human Rights, (13 December 2012), para. 255; *Judicial*

entity courts will recognize this distinction. As such, with the issue of enforcement unresolved, it is all the more important to examine survivors' views on the relative material and symbolic benefits of compensation.

VI. THE BENEFITS OF COMPENSATION IN CRIMINAL PROCEEDINGS FOR WARTIME SURVIVORS

A. TRANSITIONAL JUSTICE AS A MULTIFACETED PROCESS

“Compensation and the conviction of perpetrators are two sides of the same coin.”

Marijana Senjak, psychotherapist/psychologist.

Transitional justice in Bosnia and Herzegovina encompasses an array of measures: war crimes trials, prosecutions, memorial-building, social welfare, and institutional reforms, among others. In interviewees’ eyes, these forms of redress are complementary, addressing the manifold harms caused by the conflict.¹⁹ Correspondingly, in the context of court proceedings, interviewees emphasized that both convictions *and* compensation are necessary for justice to be done.

As K, a survivor of sexual violence whose criminal case is still in the investigative phase, notes, “I think perpetrators should be sentenced but that they also should pay compensation. Maybe if the perpetrators are not in a position to pay they will ask the court to substitute years of imprisonment for money, and I don’t think that is right.” In K’s view, a conviction cannot replace compensation, and vice versa.

B, who was detained in a concentration camp during the war, filed a civil compensation claim against RS in coordination with the BiH Union of Former Camp Detainees. B then separately participated in entity level criminal proceedings against a soldier who raped her at the camp. While the RS civil court rejected the mass claims of B and other detainees on the basis of statutes of limitations, the District Court of Dobož sentenced B’s perpetrator to 3 years for rape. The Dobož court, however, disregarded B’s compensation claim; despite the fact that TRIAL International office in BiH worked on the request, ensuring that it fulfilled all technical criteria and was supported by the requisite evidence, the Dobož criminal verdict simply referred B to civil proceedings. B, satisfied with the conviction, came away “very disappointed by the compensation issue.” In B’s words, her “feelings are mixed.”

¹⁹ See interview with Mervan Mirascija, Open Society Fund Law Program Coordinator, “transitional justice is composed of many things- war crimes trials, memorialization, reparations- all of these segments are the way to full truth and justice.”

As evidenced by the above perspectives, interviewees understand court-ordered damages to be a crucial, unique component of the broader transitional justice agenda. The following section will describe the range of benefits that survivors derive from compensation.

B. COURT ORDERED COMPENSATION AS SANCTION

“It is vital for victims that perpetrators are materially punished.”

Teufika Ibrahimefendic, psychologist/psychotherapist

“Perpetrators are sentenced by the state but compensation is the punishment that victims get.”

M, sexual violence survivor

Interviewees consistently highlighted compensation’s value in sanctioning perpetrators, deeming the sense of justice created through accountability key to survivors’ psychological recovery. In her work on war crimes issues, for example, BiH Ombudsman for Human Rights Jasminka Dzumhur has found that “there is no rehabilitation of survivors without punishment.” Psychotherapist Besima Catic has likewise witnessed the ways in which accountability mechanisms can facilitate the process of healing. In Catic’s experience, while survivors have “lost a huge part of their personalities after the crime,” sanctions make them feel like the moral order has been restored and, correspondingly, help them move on.

Though traditional conceptions of punishment focus on sentencing and imprisonment, interviewees also view material responsibility as a meaningful form of reckoning. As K comments, “compensation will be an additional mark on the perpetrator and I would like to know that he always thinks about the crimes that he committed in the past when he needs to pay money to me.” Sexual violence survivor G, whose criminal case is in the investigative stage, similarly states that she would want court ordered damages, not solely a conviction, so as to sanction the perpetrator additionally.

In line with K’s remarks, survivors may regard compensation as a particularly personal form of accountability; the perpetrator must pay funds directly to the survivor for specific harms suffered, as opposed to serving time in jail at the behest of the state.²⁰ In this way, punishment via compensation

²⁰ Redzo Delic, deputy chief prosecutor for war crimes at the Prosecutor’s Office of the Zenica-Doboj Canton, makes the point that some

can be more victim-centered. As psychotherapist Besima Catic notes, there is a singular value for survivors in “receiving money from those who committed the crimes against them.”

C. ACKNOWLEDGEMENT

“The majority of victims just want people to know the truth about events that happened to them and accept that truth, this is a way that they can continue their lives.”

Aleksandra Petric, United Women Banja Luka

In addition to punishment, interviewees pinpointed acknowledgement as vital for survivors: in some cases, their central objective. With political forces in Bosnia and Herzegovina continuing to clash over responsibility for wartime crimes, history has become a site of political exploitation and obfuscation, silencing the stories of entire communities.

As such, many survivors have spent the years since the war fighting for recognition of the crimes perpetrated against them and the harms suffered. In the experience of Aleksandra Petric of United Women Banja Luka, “the majority of victims just want people to know the truth about events that happened to them and accept that truth, this is a way that they can continue their lives.” Acknowledgment of the “truth” is particularly important to sexual violence survivors, who - as discussed above - grapple with both societal stigma and personal feelings of shame. As noted by Tanja Tankosic of the Witness Support Section of the Court of BiH, survivors of sexual violence are deeply moved when judges rule in their favor. For survivors, a verdict confirming their testimony, convicting the perpetrator, and granting damages is affirmation that the “crime happened in the same way that they survived and experienced it”: that the offense was not the result of provocation and that it was not the survivor’s duty to mount a defense.

According to J, who was awarded damages by the Court of BiH, the recognition obtained through compensation makes it possible for her to share her story moving forward. In J’s words, “it means a lot. It means that I can explain to my kid in the future about everything that happened, that the perpetrator was convicted and ordered to pay, because my kid doesn’t know what happened, the

survivors do not even want prosecutions. At times, his office has proceeded anyways. With compensation, the decision to bring a claim is up to the survivor alone.

child is small, but this means that a court knows it is true.”

Moreover, unlike a conviction, compensation encompasses the entirety of a survivor’s story: not just the existence of the offense, but the specific harms that survivors have undergone because of the crime. In this way, compensation can paint a fuller picture than that of a sole conviction.

D. DETERRENCE

“Compensation is important in the economic sense, but also it is just as important for future generations in order that these types of crimes do not happen again.”

K, survivor of sexual violence

Interviewees emphasized the fact that compensation, through sanction and acknowledgement, can facilitate deterrence, preventing future generations in BiH from perpetrating the types of crimes committed during the 1990s war. From this perspective, judicial condemnation of wartime offenses, whether in the form of convictions or court-ordered damages, is particularly important in BiH: a country where ethnic tensions are very much alive and both the memory and possibility of violence are far from remote. As Jasminka Dzumhur, BiH Ombudsman for Human Rights, notes, “we need to let citizens know, do not do these things again because you will face justice.”

In particular, survivors view deterrence - and, correspondingly, compensation - as a significant component of transitional justice. Sexual violence survivor G, for example, who is still awaiting a trial in her own case, values convictions and compensation because they help guarantee that sexual violence crimes “would never happen again in other wars to other women.” J likewise appreciates the preventative role of compensation, especially in regard to younger generations. For J, the compensation awarded by the Court of BiH means being able to say to her own child, “everyone who does something bad will be punished, they will have to pay so that it doesn’t happen again.” As reflected by the remarks of G and J, court-ordered damages can provide a sense of security moving forward; as psychotherapist Besima Catic puts it, the awards let survivors know that “society will not accept these crimes anymore.”

E. EMPOWERMENT THROUGH COMPENSATION CLAIMS AND LEGAL REPRESENTATION

The possibility of compensation gives “victims more confidence to go forward and to fight for justice to the end.”

K, sexual violence survivor

“With a property claim the victim gets an opportunity to actively participate in the proceedings and present her requests, creating the sense that she is not only a procedural instrument and that the perpetrator is in court because of her, not that the victim is there because of him.”

Lawyer Nedzla Sehic, who represented sexual violence survivors in the seminal *Savic*, *Markovic*, and *Vojic and Mesic* cases

The process of obtaining compensation can empower survivors, who often feel passive and impotent in the face of war crimes investigations/prosecutions. In the Bosnian justice system, survivors participating in criminal proceedings have the same role as any other witness; they provide evidence relevant to establishing the fact of the commission of the crime. L, a sexual violence survivor, comments, “besides testifying, I didn’t do anything at all.”

As the result of functioning as “evidence tools,”²¹ some survivors find legal proceedings more demoralizing than liberating. As IZVOR Prijedor coordinator Seida Karabasic observes, “victims feel so used at court, they just give testimony and feel squeezed-like all the energy has been taken from them.” Particularly in respect to sexual violence survivors, who are already economically, socially, and psychologically vulnerable, participation in an investigation and subsequent trial can engender a sense of powerlessness.

Becoming a plaintiff for compensation, however, changes survivors’ standing in court. They are permitted to assume a more active role: presenting evidence, calling witnesses, and giving opening and closing arguments. As Director of Medica Zenica Sabiha Husic notes, “it’s a sign for them that they can go forward and they are no longer in the position of a survivor who just waits.”

²¹ Interview with Besima Catic, psychotherapist.

D, for example, who obtained damages before the Court of BiH, was “really involved in the proceedings.” In D’s words, with a lawyer representing her and explaining the legal terminology, “I felt like I was part of everything.” Similarly, J, who was also awarded compensation by the Court of BiH, was “very satisfied with the relationship with the Prosecutor’s Office and the Court.” Through legal support provided by TRIAL International office in BiH and counsel, J felt engaged in the compensation claim process; she “received answers to questions” she sent to the Prosecutor’s Office and was regularly updated on the case’s progression.

As illustrated by the experiences of D and J, adequate legal support is vital to the empowerment of survivors. With little to no legal education, survivors need counsel in order to fully participate in the pursuit of compensation. L, for example, remarks of her own struggle to file a criminal compensation claim without a lawyer, “I was lost, all the legal terms were unfamiliar to me and I didn’t even know who to contact about everything”: this description stands in stark contrast to the more active involvement of D and J. As stated by Tanja Tankosic of the Witness Support Section of the Court of BiH, it is important for survivors that lawyers “are there to give them that voice.”

F. BUILDING TRUST IN THE JUSTICE SYSTEM

“I now have a positive view of war crimes trials. It is obvious that the crimes have not been forgotten . . .”

J, sexual violence survivor who was awarded damages by the Court of BiH

Compensation awards can build survivors’ trust in the rule of law and, correspondingly, help them feel more included in the social fabric.

As the result of delays in war crimes proceedings and continued impunity for perpetrators, the Bosnian public has little faith in the justice system.²² Amongst survivors who have experienced the legal process firsthand, frustration is rampant. K, for example, “is totally unsatisfied with the work of

²² See *Delivering Justice in Bosnia and Herzegovina: An Overview of War Crimes Processing from 2005-2010*, The Organization for Security and Cooperation in Europe (OSCE), (May 2011) at pg. 90. Available at <http://www.osce.org/bih/108103?download=true>; *Retribution and Restoration: Bosnia on Trial*, University of Cambridge, (13 February 2013). Available at <http://www.cam.ac.uk/research/news/retribution-and-restoration-bosnia-on-trial>; *Bosnia and Herzegovina: Nations in Transit 2015*, Freedom House. Available at <https://freedomhouse.org/report/nations-transit/2015/bosnia-and-herzegovina>

the courts and prosecutor's office." With her case still in the investigative stage and the years piling up, K is "wondering why it is taking so long and beginning to lose hope"; judicial inaction is all the more disheartening because K is able to identify several of the men who raped her. G, also awaiting the trial of the perpetrator in her case, comments, "there is no justice in BiH." In G's view, "it's constant disappointment and there is not any kind of improvement."

Many of the survivors counseled by psychotherapist Besima Catic have run into their perpetrators, "who are still free and live in their areas." From Catic's perspective, "victims want to believe but they are so let down that more than 20 years have passed since the war and these people have not been prosecuted. This is a catastrophe for their psychological state." For survivors such as G and K, the "catastrophe" sends the message that society does not care about their wellbeing and will not protect them.

These sentiments can be somewhat mitigated, however, by constructive interactions with the justice system, such as the granting of compensation that survivors are owed. J, who was awarded damages by the Court of BiH, has developed "some level" of trust in the legal system. Prior to the verdict in her case, J "did not believe in justice or that the perpetrators would be prosecuted." Now, J is more positive about the rule of law in BiH. In J's words, "it is obvious that the crimes have not been forgotten no matter who did something and to whom something was done. I am very satisfied with the relationship with the Prosecutor's Office and the Court."

D, who likewise obtained compensation from the Court of BiH, found that the judges and prosecutors at her trial treated her "with respect." In light of these exchanges, the conviction of her perpetrator, and the awarding of damages, D believes that there is at least "partial justice" in BiH; while D thinks the law was upheld in her own trial, she recognizes that many other survivors have not seen justice in their cases.

As evidenced by J and D's comments, establishing a constructive relationship with the judiciary - being shown respect by judges and prosecutors, developing rapport with and trust in court staff, and seeing judges and prosecutors work to facilitate survivor claims - can be valuable in itself. If more survivors have experiences akin to those of J and D, engaging a justice system that treats survivors with dignity and awards compensation where due, it is possible that survivors' disillusionment with legal proceedings - and society more generally - will gradually evolve into the tentative faith exhibited by J and D.

Additionally, cases such as *Savic*, *Markovic*, *Vojic* and *Mesic*, and *Dostic* can have a ripple effect, with word spreading to other war crimes survivors. K, for example, observes that stories about sexual violence survivors receiving compensation make "us all" more persistent and confident. Psychologist/psychotherapist Teufika Ibrahimfendic correspondingly notes, "positive examples will bring hope

to victims and we do not have many positive examples.” It is therefore crucial that the few “positive examples” of recent years transform into standard practice.

G. REHABILITATION

“The judgment gave me a lot of positive things, I closed that part of my life.”

D, sexual violence survivor who was awarded compensation by the Court of BiH

While this text has intermittently referenced the rehabilitative effects of compensation, the following section consolidates the most valuable of such upshots.

Specifically in regard to sexual violence survivors, judicial recognition of the offense and harms perpetrated can greatly advance the healing process. As psychotherapist Besima Catic notes, “during the trial, they prove for themselves that they were innocent, that they were victims, that they weren’t guilty of anything.” This revelation helps survivors shed the shame and guilt that have haunted them for so long.

As mentioned above, punishment - by ostensibly restoring the moral order - can likewise be crucial to rehabilitation. In the experience of psychologist/psychotherapist Teufika Ibrahimfendic, seeing perpetrators brought to justice through both imprisonment and compensation is a “form of recovery in itself.” Besima Catic deems this yearning for justice intrinsic to the psychological makeup of most individuals: as she observes, “when someone hurts us, it is normal that you want this person to be punished. It is necessary satisfaction for victims.”

Meanwhile, as also referenced above, compensation awards communicate that survivors are empowered rights holders, part of the social fabric and protected by the legal system: in creating this inclusive environment, court-ordered damages show survivors that they can proceed onward as citizens of BiH, further facilitating their recovery from the crimes committed against them during the war.

For D, who was awarded damages by the Court of BiH, the range of benefits beget by her verdict has made the difference in her rehabilitation. In D’s words, “it helped me a lot to move forward. I know I must live and go on through my life and that was much easier after the judgment.”

H. ECONOMIC GAINS

“Compensation allows survivors to normalize their situation, integrate, and improve their status in society because they really need financial help.”

Sabiha Husic, Director of Medica Zenica

In addition to the symbolic benefits of compensation, the money itself can be a lifeline for survivors facing severe economic challenges as the result of wartime violations. G, for example, notes that awards are important “because many survivors are very sick, they do not have subsidized apartments, they do not have any kind of assistance, they are raising their kids with social benefits.” As discussed above, wartime trauma frequently prevents survivors from securing employment and, correspondingly, economic stability. Compensation can thus help survivors tend to basic needs, such as child-care, medical services, and housing.

T, a sexual violence survivor, was referred to civil litigation for compensation after a cantonal court convicted her perpetrator. T lives off monthly pensions and struggles to cover the cost of pills for her trauma. Every summer, the children of T’s late husband return home to BiH from abroad, and proceed to throw T out of her apartment. T must then scramble to find housing, relying on the kindness of family and friends. For T, court-ordered damages would “at least help resolve the issue of the apartment,” which she does not have the financial means to handle herself.

The economic benefits of compensation can also facilitate survivors’ rehabilitation. Subsisting on the margins of society, such individuals are often unable to focus on anything but survival. Once they achieve economic security, however, they can begin paying heed to long-neglected concerns, including education, employment, and health. As Duska Andric Ruzicic of the Centre for Legal Assistance for Women from Zenica remarks, “when someone doesn’t have material issues anymore, he or she can concentrate on physical and psychological problems and get support.”

I. ENFORCEMENT DIFFICULTIES: MEASURING SYMBOLIC AND MATERIAL BENEFITS

“I often hear from victims that they just want the court to say he is guilty, that at least for one day everyone knows what that person did and for that they would give back all their pensions and money.”

Duska Andric Ruzicic, human rights activist at the Centre for Legal Assistance for Women from Zenica

The economic gains described in the previous section depend on the efficacy of enforcement procedures. Accordingly, in light of current difficulties with enforcement, it is necessary to weigh the symbolic and material benefits of court-ordered damages. Is compensation still worthwhile if awards are not paid out? Interviewees answered this question with a cautious yes, consistently deeming punishment, recognition, deterrence, empowerment, and rehabilitation more valuable than monetary reimbursement.

J, for example, says that she “would not be disappointed” if she was unable to obtain the damages granted by the Court of BiH. From J’s perspective, “the most important thing is that the perpetrator is punished, that he is identified, and that everyone knows he is a war criminal.” Likewise, though D does not expect to receive her court-ordered award, she has already derived “a lot of positive things” from the judgment, including the ability to move forward with her life. Survivors such as K and G echoed these sentiments.

As Murat Tahirovic, President of the Association of Victims and Witnesses of Genocide, observes, “the material part of compensation is not in first place for the majority of victims, it’s more in third or fourth place. First they want society to recognize and accept them.” Correspondingly, IZVOR Prijedor coordinator Seida Karabasic notes that even if the perpetrator does not pay what he owes or - alternatively - the state later compensates the survivor instead, “what is important for the victim is that *in the judgment* it is stated that he must pay” (italics added).

Interviewees raised concerns, however, that a lack of enforcement might eventually detract from symbolic benefits such as societal inclusion, punishment, recognition, and empowerment. Psychotherapist/psychologist Teufika Ibrahimovic, for example, believes in the healing power of damages. Ibrahimovic nonetheless worries that the withholding of payments could provoke mistrust, disappointment, and alienation, neutralizing an award’s rehabilitative effects. In the view of

sexual violence survivor M, whose compensation claim was rejected by a civil court on appeal, words like justice and acknowledgement might wind up meaning “nothing if compensation is in the end never realized.”

The “in the end” phrasing used by M reflects the fact that timing is key. Survivors, cognizant of the economic challenges faced by both perpetrators and the state, are realistic about the unlikelihood of immediate payment. Murat Tahirovic, for example, has found that survivors “understand that the state does not have enough money to pay those claims in a short time period.” As such, Tahirovic considers it “important that there is justice now even though it is stated only on paper.” In contrast, failed enforcement over a *lengthy* time period could chip away at “justice now” and the real progress achieved by the awarding of court-ordered damages.

VII. SAFEGUARDS IN CRIMINAL PROCEEDINGS

Moving away from the substantive advantages and disadvantages of court-ordered damages in criminal proceedings, this section will focus on the procedural facets of the compensation claim experience. As described below, survivors who file compensation claims in criminal court receive procedural protections that are currently unavailable to those seeking redress in civil litigation.

A. IDENTITY PROTECTION

“Survivors need these measures to protect their dignity, private lives, and mental states.”

Alma Taso Deljkovic, Witness Support Section of the Court of BiH

Survivors pursuing compensation in criminal proceedings are entitled to identity protection. For many such individuals, this precaution is essential. D, for example, felt “much safer with the protection measures.” As D was already unsettled by the prospect of meeting her perpetrator face to face in court, the guarantee that her identity would not be further disclosed “was important” to her.

As noted by interviewee legal experts, psychologists, psychotherapists, and social workers, sexual violence survivors place particular value on identity protection because of the stigma surrounding crimes of sexual assault. Survivors often fear the reactions of their communities and loved ones. As mentioned above, some have never told their families what happened to them during the war. While others have shared their experiences with family members, they may not want their neighborhoods/villages/towns to find out about the crimes.

Still other survivors worry that perpetrators and/or their compatriots will retaliate in the event of identity disclosure. As Director of Medica Zenica Sabiha Husic remarks, “they often don’t feel safe, sometimes they worry what will happen after trial and sometimes they have threats before trials, especially when perpetrators are free.” Survivors ask, “how can I be safe when I go to visit my family and I am passing by the cafe where he sits? He is sitting there and smiling.”²³

23 Interview with Sabiha Husic, Director of Medica Zenica.

In certain trials, it is difficult to provide effective identity protection; communities that are small may take note of a survivor's departure to give testimony, or, alternatively, the factual circumstances of a crime may make it easy to identify the survivor. Even in these cases, however, identity protection can offer survivors psychological comfort. As Redzo Delic, deputy chief prosecutor for war crimes at the Prosecutor's Office of the Zenica-Doboj Canton, observes, "at least at the end, the victim still thinks he or she is under protection, which gives psychological relief, regardless of whether no real protection can be had."

Accordingly, the availability of identity protection measures in criminal proceedings may make war crimes trials a more appealing reparative vehicle than civil lawsuits, which do not offer these safeguards.

B. RETRAUMATIZATION: SUPPORTING SURVIVORS

"For victims, their foremost thought is just to finish everything. They want it to be over because it is too hard for them. That's where the influence of retraumatization is obvious."

Redzo Delic, deputy chief prosecutor for war crimes at the Prosecutor's Office of the Zenica-Doboj Canton

Pursuing compensation for wartime harms exposes survivors to retraumatization. The presence of targeted support units, however, can mitigate the negative psychological effects of participating in legal proceedings.

In the experience of OSCE war crimes trial monitor Dusanka Sekulic, "no victim has testified without going through the retraumatization process." While retraumatization impacts all categories of survivors, survivors of sexual violence face heightened risks because of both the intimacy of the crime and the untreated psychological issues discussed above. The statements of interviewees reflect this truth. As noted by L, for example, taking part in the criminal prosecution of her perpetrator was "extremely stressful." For L, "each testimony was additional retraumatization," with - in her words - "everything I survived coming back to me." D likewise remarks, "I felt terrible during the trial, I felt that I went back to the same period when that happened to me in the war. I didn't see anyone in the courtroom, I only saw the perpetrator." Neuropsychiatrist/court expert Alma Bravo Mehmedbasic recalls one sexual violence survivor who grew so distressed during her testimony that she began to talk about herself in the third person, then had "complete amnesia, like a kid."

Interviewees from psychotherapist Besima Catic to IZVOR Prijedor coordinator Seida Karabasic to psychologist/psychotherapist Teufika Ibrahimfendic have found that common triggers for sexual violence survivors include meeting their perpetrators face to face; cross-examination about whether they somehow provoked the crimes under consideration and/or didn't sufficiently resist; and questioning about the details of the sexual act. As Catic observes, "in those situations, the woman becomes the victim again."

Legal proceedings can also result in the traumatization of survivors' loved ones. As referenced in previous sections, trans-generational trauma is widespread amongst the families of sexual violence survivors, especially when the survivor in question has not undergone counseling. Alma Taso Deljkovic of the Witness Support Section at the Court of BiH, for example, has worked with sexual violence survivors whose children have "major psychological issues" because of their parents' ongoing suffering.

Correspondingly, survivors' participation in legal proceedings can "provoke a reaction in the whole family."²⁴ This "reaction" may be particularly severe if a survivor has not previously shared his/her story with his/her family. In such cases, a family spends the entire trial emotionally processing what has happened to their loved one. Even families aware of the sexual assault prior to trial may be affected by combative cross-examination and/or detailed recounting of the crime. Redzo Delic, deputy chief prosecutor for war crimes at the Prosecutor's Office of the Zenica-Doboj Canton, tried one sexual violence case that caused anguish to the point that the survivor and her husband divorced shortly thereafter. In Delic's words, the process was "very very painful" for all involved.

Departments for witness support - present at the Court of BiH and several entity-level criminal courts, such as Travnik, East Sarajevo, Banka Luka, and Zenica - can alleviate the trauma borne by survivors and their families. Enes Malicbegovic, a judge at the Cantonal Court in Zenica, recalls that prior to the introduction of these units, survivors would often lose consciousness or become otherwise incapacitated by the experience of giving testimony. Malicbegovic observes that the provision of witness support has minimized the frequency of such occurrences, making survivors feel "more safe and comfortable."

Alma Taso Deljkovic and Tanja Tankosic approach every witness as an individual, devoting intensive attention to his or her particular condition and circumstances with the goal of "decreasing the possibility of retraumatization."²⁵ The Witness Support Section of the Court of BiH has "constant

24 Interview with Aleksandra Petric of United Women Banja Luka.

25 Interview with Alma Taso Deljkovic.

communication” with the survivor before, during, and after the trial: preparing the survivor for the courtroom, assisting him/her throughout the proceedings, and helping the survivor work through any psychological distress that arises subsequent to the giving of testimony.

Though - as mentioned above - interviewees agree that retraumatization can only be mitigated, not avoided altogether, thrusting a survivor into court without psychological reinforcement can be deeply harmful, producing “lasting effects.”²⁶ Departments of witness support enable survivors to participate in trials in the most positive and empowering manner possible. As civil courts do not currently offer this type of assistance, criminal prosecutions are an important option for survivors pursuing compensation.



Inside the Office of a Psychotherapist/Psychologist

Psychotherapist/psychologist Teufika Ibrahimefendic, who regularly counsels survivors, including those seeking redress, emphasizes the importance of reviewing testimony with survivors before they enter the courtroom. From Ibrahimefendic’s perspective, it is especially vital for sexual violence survivors that they “first say in a secure and protected environment what happened to them, before they must speak about these kinds of details in front of unknown persons.” Ibrahimefendic has found that survivors who are not psychologically prepared freeze in court, “blocked” and unable to summon the words to describe the intimate crimes perpetrated against them. She thereby works with survivors to “come up with the appropriate language,” such as “someone ordered me to take off my clothes and pointed a gun at me.” Ibrahimefendic finds that this process of review “helps ladies feel more relaxed and not ashamed, not guilty or shy, so that they can more easily talk about the things that happened to them.”



²⁶ Interview with Duska Andric Ruzicic.

VIII. COMPENSATION IN CIVIL LITIGATION

“My advice to all victims would be to try and exercise all rights and pursue all options, in both civil and criminal proceedings.”

L, sexual violence survivor

As discussed throughout this report, survivors can presently claim reparations in a variety of procedures: filing compensation claim requests in war crimes trials, initiating civil litigation, and/or applying for monthly pensions as part of the social welfare system. In examining the merits of court-ordered damages in the civil context, this section will draw upon the experiences of both survivors who were referred to civil court from criminal proceedings and survivors who exclusively pursued civil claims.

A. SYMBOLIC BENEFITS AND STATE RESPONSIBILITY

“Both should pay the money, the entity and the perpetrators, because both are responsible, the state which did not prevent crimes, and the perpetrators who committed the crimes.”

J, sexual violence survivor awarded damages by the Court of BiH

Survivors who obtain damages in civil court can - in addition to the material rewards themselves - derive many of the symbolic benefits referenced in previous sections: punishment, acknowledgment, empowerment, inclusion in the social fabric, rehabilitation, etc. Sexual violence survivor M, for example, sued the Federation in civil proceedings. Though M was granted compensation by a first instance court, a second instance court overturned the judgment on appeal. M's primary goal in bringing her claim was to “get recognition from the state for all the things the state did not prevent or helped happen.” In M's eyes, the awarding of damages in civil proceedings would have been “a form of justice.”

As illustrated by M's perspective, some survivors greatly value compensation from the entity/state. In her work with survivors, BiH Ombudsman for Human Rights Jasminka Dzumhur has found

that “it is important to them that the government or institutions that committed the crimes be held responsible, because victims recognize that individuals were merely committing crimes in the name of these institutions.” Murat Tahirovic, President of the Association of Victims and Witnesses of Genocide and a war crimes survivor himself, correspondingly favors compensation from the entity/state so that “institutions don’t escape responsibility for all the things that were done during the war under their orders.” Tahirovic also worries that ordering perpetrators to pay damages will create financial problems for their families, meaning that the next generation will carry on the legacy of bitterness.

As such, because of the possibility of entity/state accountability, certain survivors prefer civil litigation over criminal proceedings. Others - given that both institutions and individuals were responsible for wartime crimes - are ambivalent about whether compensation is obtained from the coffers of the perpetrator or those of the entity/state. G, for example, notes, “if the perpetrator is not able to pay, then the state should because the state failed us too.”

B. CIVIL LITIGATION AS THE ONLY OPTION

“Civil claims are usually dictated by strategic circumstance,” subject to the options available in the situation at hand.

Alfredo Strippoli, legal adviser on War Crimes and the Rule of Law with the OSCE Mission to BiH

Civil litigation is the sole means by which some survivors can obtain court-ordered damages. As such, civil suits play an indispensable role within Bosnia and Herzegovina’s transitional justice framework.²⁷

Sexual violence survivors, for example, are often unable to identify their perpetrators; they know only that a perpetrator belonged to a particular detachment and/or was acting on behalf of a particular government. In many cases in which lawyer Nedzla Sehic has represented survivors of sexual violence, “victims are not aware of who the perpetrator was because they were in concentration camps, where the army and paramilitary forces were changing units and regularly entering and

²⁷ Civil suits are all the more important because of the lack of legislative response to demands for reparations.

leaving.” In these circumstances, when criminal proceedings may not be possible, lawyer Sehic deems it vital for victims that “someone is identified as responsible for the crime, for example, the army, and pays compensation.”

The challenges faced by sexual violence survivor V encapsulate the situation described by lawyer Sehic. V, who was raped by men in masks, cannot identify her perpetrators. It is unclear whether they will ever be found and, correspondingly, whether criminal convictions will ever be secured. Consequently, V had no choice but to seek compensation in civil proceedings.

Even if a perpetrator is identified, a multiplicity of forces can stall the criminal investigation/prosecution, precluding the filing of a criminal compensation claim: political influences, plea agreements, evidentiary difficulties, case backlogs, situations in which the perpetrator has died or left the country, etc. The perpetrator in G’s case, for example, fled to another state, beyond the jurisdiction of the Bosnian system. As a result, it is unlikely that a criminal trial will ever take place; civil litigation appears to be G’s only opportunity for court-ordered damages.

Additionally, as discussed above, criminal courts often refer survivors to civil litigation, notwithstanding the fact that the resolution of damages in criminal proceedings is routinely warranted; in such instances, survivors have already testified and filed a compensation claim in criminal court, but are involuntarily funneled into the civil system. Lastly - as also referenced above - assuming the aforementioned hurdles are overcome and a criminal court awards compensation, civil litigation against the responsible entity/state may be an appropriate stand-in when the perpetrator does not have sufficient funds.

IX. LIMITATIONS OF CIVIL PROCEEDINGS

Civil court is a valuable option - and often the only option - for survivors seeking redress. Survivors who have the *opportunity* to obtain compensation in criminal litigation, however, may favor such proceedings because of the procedural limitations currently hindering access to justice in the civil system. The setbacks posed by civil suits particularly affect vulnerable groups, including sexual violence survivors.

A. LEGAL FEES

“When survivors are referred to civil proceedings, they cannot write the claim themselves. They have no choice but to get a lawyer.”

Alma Taso Deljkovic, Witness Support Section of the Court of BiH

As mentioned above, the process of filing a compensation claim is highly technical, requiring extensive legal knowledge. Although the prosecutor in criminal trials is - under the CPC - obligated to assist survivors by gathering evidence for compensation, civil litigation does not provide for any comparable source of support. In civil proceedings, the survivor in effect *must* hire a lawyer to be successful.²⁸

The majority of survivors, however, cannot afford legal counsel. In pursuing compensation in civil court, for example, sexual violence survivor L was assisted by TRIAL International office in BiH, which covered the costs of an expert witness. In L’s words, “it was otherwise too much money for me to pay, I wouldn’t have been able to do it. But because I had a lawyer, I had someone who was educated and had the expertise to protect my interests.” As such, unless survivors are wealthy or are offered legal services pro bono, civil litigation is not a viable option. Legal fees are especially prohibitive for economically vulnerable groups, such as sexual violence survivors.

²⁸ In reality, given current investigative/prosecutorial/judicial dynamics and the complexities of the compensation claim procedure, victims in criminal proceedings - as in civil litigation - almost always need counsel to win their claims.

B. THE CHALLENGES OF LOSING IDENTITY PROTECTION IN CIVIL COURT

“Revealing their identities is a huge additional stress for survivors. Because of this some of them do not want to go through civil proceedings.”

Sabiha Husic, Director of Medica Zenica

As referenced above, survivors filing civil claims are not entitled to identity protection; civil law does not provide for protection measures and, while some courts have devised informal solutions to this problem, there is no guarantee against disclosure. Loss of privacy can discourage survivors of sexual violence from pursuing civil litigation; as discussed in previous sections, identity protection is often essential to sexual violence survivors because of security fears, societal stigma surrounding the crime of sexual violence and, correspondingly, the fact that many such individuals have yet to inform their loved ones about their wartime suffering.

The process of exposure can thus be traumatic. Sexual violence survivor L was referred to civil court from criminal litigation, in which her perpetrator was convicted. Though L’s identity was protected during the criminal trial, she was forced to reveal her identity in civil court, which she describes as “very very tough, one of the hardest parts.” L struggled to understand why she was afforded protection in one proceeding, but not the other; to L, this disparity seemed unfair.

Until civil legislation is amended to include identity protection measures, the resolution of compensation in criminal proceedings is an important option for both survivors like L, who undergo great stress because of identity disclosure, and the myriad others who forgo redress altogether in order to keep their wartime experiences private.

C. “MULTIPLE RETRAUMATIZATION” AND THE LACK OF PSYCHOLOGICAL SUPPORT

“Participating in proceedings evokes memories from that period—each testimony or questioning is an attack on your emotional life.”

Murat Tahirovic, President of the Association of Victims and Witnesses of Genocide

Civil proceedings can lead to traumatization, a likely eventuality given that many survivors will be testifying for a second or third time, and civil courts do not provide witness support.

In the experience of human rights activist Duska Andric Ruzicic, repeated participation in legal proceedings means “multiple retraumatization,” which can produce its own brand of psychological damage and attendant physical manifestations. Alma Taso Deljkovic of the Witness Support Section at the Court of BiH has encountered this phenomenon firsthand. In one case, for example, a man who had already testified at the trial phase was asked to give a statement for the appeal. According to Deljkovic, when this man entered the courtroom, “he said that he could not stand it this time, that he could not breathe.” From Deljkovic’s perspective, “every time survivors talk about the events that they survived, it is another layer of retraumatization.” As such, referral to civil litigation from criminal court poses clear psychological hazards.

This reality is reflected in the accounts of survivor interviewees. As discussed above, sexual violence survivors are at a heightened risk for retraumatization because of the intimate nature of the crime and untreated psychological issues; multiple rounds of testimony can thereby be overwhelming. L, who was referred to civil court following a criminal verdict, found that the civil suit made everything “come back.” After her second cycle of legal proceedings, L says that she would “never do it again,” even if “compensation was endangered by not testifying.” For L, the prolonged undertaking was simply too stressful. In this vein, D, who was awarded damages by the Court of BiH, is grateful that she was able to resolve her compensation claim in criminal court. In D’s words, “it provokes much less stress and is easier for victims. Each proceeding brings up bad memories.”

Even when survivors initiate civil claims without first participating in criminal litigation, the absence of witness support units in civil court renders survivors vulnerable to retraumatization. As mentioned in previous sections, such units provide survivors with the psychological tools necessary to manage the stress of the courtroom. For sexual violence survivor M, for example, who filed a civil claim against the Federation, the “whole proceeding was so difficult,” taking her “back to wartime.” M

needed “7 days after every hearing to recover and continue with everyday life.” In proceedings before the Court of BiH, the Witness Support Section would have been in communication with M throughout those 7 days, working with her to tackle any psychological troubles that surfaced. In civil court, M was on her own.



The Importance of Psychological and Legal Support

The importance of psychological and legal support is illustrated by the experience of V, a sexual violence survivor who filed a civil claim in coordination with the Tuzla Association of Camp Detainees. As V needed legal assistance in civil proceedings and could not afford individual counsel, she agreed to representation administered by the Association. The lawyer did not explain the compensation claim process to V, failed to regularly update her on the progress of the case, and never informed V about the risk of court fees.

As the civil court - per usual - did not have a Witness Support Section and V lacked the funds for external psychological assistance, she navigated the civil suit on her own, finding it “extremely traumatic.” One day, V’s lawyer told her that she and several other survivors had to attend a hearing in Banja Luka the very next morning. The lawyer did not provide sufficient details as to the purpose of the proceeding and was not sensitive to V’s concerns. Feeling unprepared and shaken, with no witness support unit to turn to, V told her lawyer she was sick and could not participate in the hearing.

Due to subsequent events involving V's confusion over the compensation claim process, increasing anxiousness, and, ultimately, revocation of her power of attorney, the lawyer did not appear at key proceedings, meaning that the court - in line with civil procedural law - concluded that V had dropped the claim. As noted above, the party that loses the case must cover the costs of the suit. Unaware of these consequences, V was shocked to receive a document from the Banja Luka court, ordering her to pay court fees and threatening that failure to pay would result in her property being seized.

The total charges amounted to 5,000 KM, which V could not afford. Bewildered, scared, and distraught, V "was thinking about suicide." The only thing that prevented V from killing herself was speaking to another sexual violence survivor about the court fee problem. This friend referred V to TRIAL International office in BiH for help. Since then, TRIAL has succeeded in reducing V's individual costs from 5,000 KM to 300 KM. V, however, has lost faith in the justice system and rule of law. In her words, "I don't trust anything."

V's account encompasses some of the drawbacks to civil court; namely, the absence of psychological support for survivors who require counseling in order to seek redress. Additionally, V's story encapsulates the necessity of effective legal aid - in both civil and criminal litigation. As the result of a lack of information, and, correspondingly, a lack of understanding of the compensation claim procedure, V's mental health deteriorated, she was unable to participate in the proceedings, and she lost the case. The suit was disempowering, leaving V in a worse state than she had been prior to her efforts to secure justice.



D. ZASTARA (STATUTES OF LIMITATIONS) AND COURT FEES

“The practice of zastara and court fees is the torture of victims in another form.”

Jasminka Dzhumhur, BiH Ombudsman for Human Rights

“I don’t believe in justice because of this. It’s a really big disappointment for me, it is all a political issue. The state saw that they will be bankrupt if they pay compensation for war crimes so they made a political agreement not to provide compensation and stop helping victims.”

M, sexual violence survivor

Another hazard of civil proceedings is the unlawful imposition of statutes of limitations, otherwise known as “zastara.” Courts in RS employ zastara to reject all claims filed against the entity after 1999. Of late, FBiH courts - following Constitutional Court jurisprudence - ²⁹ have likewise exploited statutes of limitations to deny survivors access to remedies against the Federation.³⁰

The degradation of survivors does not end with the dismissal of claims. RS judges, relying on the principle that the party that loses must shoulder the costs of the trial, are forcing survivors to pay high court fees. Many survivors - due to the financial difficulties detailed throughout this report - cannot afford the charges. In certain cases, authorities have seized survivors’ assets.

As noted by interviewees, the zastara/court fee crisis has devastated and disillusioned survivors, worsening the already poor economic, psychological, and physical conditions of vulnerable groups, such as individuals subjected to sexual violence. B, for example, who filed a claim against RS, saw her claim rejected on zastara grounds. B was unable to pay the subsequent court fees, causing “big stress”: in B’s words, “yet another traumatic experience to be survived.”³¹

29 See *Desanka Stanisic i Srecko Stanisic* at note 9.

30 Zastara does not apply to civil suits filed against individual perpetrators.

31 Almost at the same time that the Municipal Court of Banja Luka rejected the compensation claim submitted by B, the District Court of Doboj convicted her perpetrator. TRIAL International office in BiH is thus working to secure compensation on the basis of the Doboj verdict and annul B’s court costs.

The disappointment of not only justice denied but also *punishment* through material sanctions has deepened survivors' alienation from the legal system - and Bosnian state more generally. G describes the near disbelief of women who, after decades of waiting for justice, were forced to take out bank loans to pay the costs of their lost cases. As G remarks, "the ladies are so disappointed because of this, they don't even want to share what happened to them with others. They don't believe anyone anymore." Lawyer Nedzla Sehic correspondingly observes that victims "feel that they are punished a second time. The first time they were punished was during the war. And now, they understand that the state doesn't recognize their suffering and that they are punished again even though they are victims."

X. SOCIAL BENEFITS

To access reparations outside of the courtroom, survivors can apply for civilian victim of war status within the social welfare system. Welfare payments - while an important form of redress - serve a different purpose than court-ordered compensation, lacking key symbolic benefits.

A. SOCIAL BENEFITS AS A LIFELINE

“If I do not receive money, I don’t know how I would buy the medicine and everything else for my life, because I wouldn’t have money for it.”

V, sexual violence survivor

Social welfare is a lifeline for numerous survivors. As referenced above, untreated mental health conditions prevent survivors from securing work, part of a cycle of deprivation and trauma. Amidst attendant economic insecurity, pensions are imperative. As sexual violence survivor D notes, “monthly benefits mean a lot, I wouldn’t be able to live without them.” Sexual violence survivor T likewise considers her monthly pension essential; she has “no additional sources of income” and cannot otherwise afford the medical bills for her health problems.

As illustrated by T’s account, survivors - often barely eking out an existence - struggle to obtain medicine for their physical and psychological conditions. With no statewide reparative mechanism, they rely on pensions to manage the health issues caused by wartime crimes. Many of the women with whom IZVOR Prijedor coordinator Seida Karabasic works, for example, “are very sick, need continuous medical help, and need to use their benefits to buy pills for themselves.” These constant - and necessary - expenditures on expensive medicine exacerbate survivors’ destitution and, correspondingly, dependence on welfare.

B. RECOGNITION OF VICTIM STATUS

“The monthly benefits that victims receive are really important because it is some kind of acknowledgement - even if some of them do not need the money it is important for them.”

Teufika Ibrahimfendic, psychologist/psychotherapist

Pensions provide certain symbolic benefits, such as recognition that crimes were perpetrated against the individuals in question. Many survivors have spent numerous years fighting for acknowledgement of what happened to them. In particular, sexual violence survivors - as discussed throughout this report - confront antiquated notions that that they somehow provoked the offense and/or did not sufficiently resist. As such, the social welfare system's affirmation of their status as victims can be meaningful.

C. LIMITATIONS TO SYMBOLIC VALUE

“Social welfare cannot be compared with court-ordered compensation for non-material damages. Benefits do not represent any kind of responsibility and they are a completely separate thing.”

Lawyer Nedzla Sehic

There are limitations to the symbolic value of monthly pensions. The punishment and responsibility component of court-ordered damages, for example, is non-existent in the social welfare context; the system is geared toward supporting vulnerable groups, not remedying human rights violations.

As mentioned above, benefit schemes are organized by entity; FBiH distributes benefits to residents of the Federation and RS distributes benefits to residents of Republika Srpska. Because of demographic shifts since the war, most survivors in the welfare system do not receive pensions from the entity responsible for the crimes perpetrated against them; the source of the funds tends to be detached from the source of the wrongs and, correspondingly, the distribution of welfare does not represent the entity's acceptance of responsibility for wartime offenses. As psychotherapist Besima Catic notes, “for it to be compensation it must be paid by those who committed the crimes.”

Additionally, the acknowledgement function of compensation is diminished in the social welfare system. Applying for civilian victim of war status is a perfunctory, administrative process; a survivor

files an application with medical documents and other relevant materials, including certification from the given victims' association or NGO Medica Zenica, and the application is evaluated/approved by a commission. There is no detailed, individualized fact-finding; allocation of responsibility; or record akin to that of a legal proceeding.

In light of the stunted punishment, responsibility, and acknowledgement capacities of social welfare, other benefits such as empowerment, deterrence and societal condemnation are likewise lost. Interviewees thus generally conceive of benefits as charity instead of justice. G, for example, considers pensions akin to "sadaka": a term used to describe the giving of money to poor or old people in the hope that god will compensate good deeds. K similarly remarks, "I see pensions as social help, not justice, more dependent on the situation in Bosnia's budget." As such, the welfare system is an inadequate substitute for court-ordered compensation and, more generally, does not relieve the state of its obligation to redress wartime harms.

D. PROCEDURAL LIMITATIONS

"Victims have unequal statuses in the Federation and Republika Srpska. This issue of pensions yet to be resolved by the state or entities. Victims are very tired."

Aleksandra Petric, United Women Banja Luka

Lastly, it is worth noting that entity benefit schemes exclude numerous survivors. As mentioned above, RS rejects all applications filed after 2007. It is unclear whether even survivors who meet the 2007 deadline must additionally prove some form of physical damage.

IZVOR Prijedor coordinator Seida Karabasic has witnessed the challenges of obtaining RS benefits firsthand. Several sexual violence survivors involved with IZVOR - internal refugees who returned to Prijedor after the war - subsequently moved back to the Federation because of their inability to secure pensions in RS. Gordana Vidovic, the head of civil society organization Buducnost Modrica, has likewise encountered the barriers posed by RS' welfare system. The sexual violence survivors with whom Vidovic works are "very disappointed, because they have heard that victims in FBiH can exercise their rights, but they cannot."³² Such restrictions make the existence of other reparative options, including litigation, all the more important.

32 As noted above, even in FBiH, the distribution of monthly pensions is uneven and far from certain.

XI. CONCLUSION

“It’s already been 23 years since the end of the war and they are very slow, but I still believe that one day perpetrators of war crimes will be arrested and punished.”

K, sexual violence survivor

“Obstacles are transitory, as long as they can be removed, compensation can be achieved and enforced.”

Alfredo Strippoli, OSCE legal adviser

The social welfare system, civil litigation, and criminal proceedings all serve as meaningful reparative mechanisms for survivors. As noted above, transitional justice measures are - necessarily - complementary, satisfying different needs and accommodating different circumstances. While entity benefit schemes, for example, offer certain survivors a reliable - and crucial - source of funding, welfare payments cannot replace the symbolic value of court-ordered damages.³³

Compensation in both civil and criminal proceedings can provide a range of intangible benefits; punishment of the perpetrator/ state, acknowledgement, deterrence, empowerment, burgeoning trust in the legal system, societal inclusion, and so on. The many layers of meaning contained within a court-ordered award can facilitate survivors’ psychological recovery, enabling them to move on from the crimes perpetrated against them.

As discussed in previous sections, civil suits are a vital option for many survivors: particularly individuals unable to pursue compensation in criminal proceedings. Because civil litigation is currently beset by procedural challenges, however, war crimes trials that combine prosecutions with compensation are - at present- a uniquely effective form of redress; criminal litigation affords survivors identity protection and psychological support while bypassing problems such as multiple retraumatization, zastara, and court fees, which hinder access to justice in the civil context.

Given the merits of compensation in criminal proceedings, the state, the entities, NGOs, the judiciary, and international institutions should work to remove extant obstacles to the awarding of

³³ As mentioned above, while compensation ordained by law has thus far taken the form of court-ordered damages in civil or criminal proceedings, it could potentially also be issued through state legislation. Efforts to set up such statewide reparative mechanisms have - thus far - failed.

such damages: primarily, lingering judicial and prosecutorial intransigence; the lack of free legal aid for survivors; and difficulties with enforcement. Prosecutors and judges have historically been reluctant to facilitate compensation in criminal trials. As evidenced by the string of recent successes at the Court of BiH, however, attitudes are changing. To ensure that survivors can obtain redress in criminal proceedings going forward, judges and prosecutors at all levels must continue fulfilling their obligations in respect to compensation.

Correspondingly, the state/entities must address the lack of free legal aid. Due to the complexity of compensation claim procedures in both criminal and civil litigation, survivors who cannot afford counsel are effectively denied access to a remedy. In light of the symbolic and material benefits afforded by court-ordered damages, BiH authorities should take steps to provide survivors with the assistance they need to obtain the redress they are owed.

Lastly, difficulties with enforcement could reverse the progress achieved by the granting of compensation. Survivors' sense that justice - in the form of punishment, acknowledgement, empowerment, deterrence, societal inclusion, etc. - has been done will begin to wane if awards are not enforced in the long-term. Options such as a state fund, the freezing of perpetrators' assets, the use of seized criminal goods, and the solicitation of international loans can prevent the loss of real gains that have been and *can be* attained through compensation in criminal court. As OSCE trial monitor Dusanka Sekulic declares, "let's fight for it. Let's not lose the momentum from the granting of damages in criminal proceedings and let's step by step make sure enforcement happens." Survivors like V, G, K, B, M, T, D, J and L deserve as much - and so much more.

ABOUT TRIAL INTERNATIONAL

TRIAL International is a non-governmental organization fighting impunity for international crimes and supporting victims in their quest for justice. The organization provides legal assistance, litigates cases, develops local capacity and pushes the human rights agenda forward.

TRIAL International has been present in BiH since 2008 and provides support to war time victims of serious human rights violations and their families in the quest for justice, truth and reparations.

HEADQUARTERS

TRIAL International, P.O Box 5116
1211 Geneva 11, Switzerland
+ 41 22 321 61 10
www.trialinternational.org
info@trialinternational.org

BOSNIAN OFFICE

TRIAL International - office in BiH, Cobanija 19
71 000 Sarajevo, Bosnia and Herzegovina
+387 33 219 873
www.trial.ba



TRIAL

International