



**TRIAL**  
International

**EFFECTIVE  
ENFORCEMENT OF  
COMPENSATION  
FOR VICTIMS OF  
WAR CRIMES  
WITHIN THE  
CRIMINAL  
PROCEDURE IN  
BOSNIA AND  
HERZEGOVINA**

**INTERNATIONAL  
LAW AND  
EUROPEAN  
UNION LAW  
REQUIREMENTS  
AND STANDARDS**



Schweizerische Eidgenossenschaft  
Confédération suisse  
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This publication has been published within the project "Access to justice for victims of war related sexual violence and other war crimes & improving access to human rights", financed by the Government of Switzerland and implemented by the TRIAL International in BiH. The contents of this publication, does not necessarily reflect the views of the Government of Switzerland.

# SUMMARY

## INTRODUCTION

The obligation to compensate for damages as a principle of international law is a long-standing concept.<sup>1</sup> Permanent Court of International Justice, the predecessor of the International Court of Justice, observed already in 1927 and 1928 in the case of Chorzow factory that “it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation (...)” and that “reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself”.<sup>2</sup> Therefore, the right to compensation has been implicitly included in all

the conventions that contain sufficiently specified obligations. However, the following analysis will deal with international and European standards that directly regulate the right to compensation of victims of war crimes.<sup>3</sup> The focus of the analysis is placed not only on the right of war crime victims to obtain a (court or administrative) decision which establishes the right to compensation but, more specifically, on the possibility of the victim to actually receive reimbursement for the damages and to effectively exercise his/her right to compensation.

The analysis takes the victim’s standpoint and it will not differentiate between sources of

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1. E. Ch. Evans, *The Right to Reparations in International Law for Victims of Armed Conflict: Convergence of Law and Practise*, London 2010, 33.

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2. *Chorzow factory*, (Germany vs. Poland), 1927, P.C. IJ, Ser A, No. 9, p. 21.

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3. Due to space constraints, a separate analysis of all relevant conventions will not be made; See Article 3 of The Hague Convention on the Laws and Customs of War on Land from 1907.

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4. Official Gazette of SFRY; International Treaties no.30/1972.

international human rights law, international criminal law or international humanitarian law. According to Article 31(3)(c) of the Vienna Convention on the Law of Treaties<sup>4</sup>, the general rule of interpretation implies that “any relevant rules of international law applicable in the relations between the parties shall be taken into account in interpreting international treaties.” For this purpose, the paper will provide a brief overview of European and international standards that should be considered together in analysing Bosnia and Herzegovina’s obligation to ensure effective right to compensation to victims of war crimes. Most international and European legal sources regulate the right of war crime victims in individual aspects only rather than comprehensively. Therefore, the analysis of norms stemming from such sources will be done from the perspective of their individual contribution to the overall regulation.

The direct motive for conducting the analysis were the first judgments passed by the Court of BiH which adopted property claims of the damaged party – war crime victims in criminal procedures against the perpetrators. The judgements will be presented briefly in the text to follow. However, after this major step was made for the victims to exercise their right to reparation, it became obvious that a very difficult challenge to bridge was to get the perpetrator to pay the compensation ordered by the judgment. Therefore, the most important segment of the analysis focuses on international and European legal sources that bind Bosnia and Herzegovina to ensure that victims do receive their compensations ordered by judgments and to provide other forms of assistance and support to victims. This analysis concludes that the most likely means of implementing the obligation is a legislative reform and does not exclude the possibility that clearly channelled interpretation of local legislation in light of international

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and European sources might also result in the attainment of this goal. The legislation of Austria, Croatia and Switzerland will be used as implementation models in this regard, with specific recommendations referring to the legislative reform in Bosnia and Herzegovina. The analysis does not address the legislation of Bosnia and Herzegovina for the fact that there is no special legislation dealing with compensations to war crime victims in BiH. Not only that there is no separate law regulating this issue but there are also no separate provisions for war crime victims i.e. victims of criminal offences in any general law. As the judgments of the Court of BiH will show, the appropriate interpretation of current laws indicates that victims of war crimes can expect a ruling which confirms the right to compensation but without any assurance that they will actually collect the damages.

## RECOMMENDATIONS REFERRING TO COMPENSATIONS TO WAR CRIME VICTIMS IN BOSNIA AND HERZEGOVINA

Bosnia and Herzegovina does not have separate legislation dealing with the rights of victims of criminal offences. Not only that there is no special law regulating this issue but the legislators have not included special rules referring to war crime victims or victims of violent crime into general legislation such as the criminal procedure code or the enforcement procedure law in order to ensure that in practice the victims of criminal offences actually receive compensation.

A whole range of international and European legal sources oblige Bosnia and Herzegovina

to ensure effective legal remedy within its legislation for compensation of victims of war crimes. Certain sources provide broader means for implementing the obligations. The obligation may be implemented individually for certain groups of war crime victims as was the case with the announced law on the rights of victims of torture in BiH. Certainly, the scope of implementation in such a case would greatly depend on the definition of torture but, nevertheless, a large number of victims would potentially be excluded. That does not mean that the law on the rights of victims of torture should not be adopted but

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that it should cover other groups of war crime victims as well. That can be done through a general law on the rights of war crime victims or even broader through a general law on victims of violent crimes.

The primary international source stipulating the adoption of such a regulation is the European Convention on the Compensation of Victims of Violent Crimes which directly and explicitly stipulates in Article 2, paragraph 1 that when compensation is not fully available from other sources, the State shall contribute to compensate the victims. Thus, the 1983 European Convention should be used as the starting point in view of the victims of war crimes that have been awarded compensation of damages in criminal procedures. According to Article 2, paragraph 1 of the 1983 European Convention, when compensation is not fully available from other sources, the State shall contribute to compensate those who have sustained serious bodily injury or impairment of

health directly attributable to an intentional crime of violence as well as the dependants of persons who have died as a result of such crime. It is evident that the 1983 European Convention does not refer only to victims of war crimes but encompasses a large number of victims of intentional violent crimes. Thus, pursuant to the obligations arising from the 1983 European Convention, Bosnia and Herzegovina is obliged to compensate damages to all victims of violent crimes committed intentionally especially when such compensation cannot be obtained from the perpetrator or from other sources.

This obligation can also be found in the official interpretation of Article 14 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the UN Committee against Torture. Article 14 of the Convention against Torture stipulates that each State Party shall ensure in its legal system that the victim of an act

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5. *Ibid.*, item 39

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6. *Ibid.*, item 38

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7. UN Committee against Torture, General Comments no.3 - implementation of Article 14 of the Convention by the signatory states, November 19, 2012, item 29

of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. More specifically, the states have to ensure the victims not only *de jure* but also *de facto* access to timely and efficient mechanisms to exercise the right to compensation and remedy of violation and to eliminate all forms of formal and informal barriers that could be faced by the victims in the process.<sup>5</sup> The failure of any member state to implement the ruling that ordered reparations to victims of torture represents a significant limitation and an obstacle to the victims' right to compensation.<sup>6</sup> If the civil procedure fails to provide adequate compensation, the UN Committee against Torture recommends signatories to establish effective mechanisms, notably a state fund, which would be used to directly compensate the victims of torture or other inhuman treatment.<sup>7</sup> It should be reiterated that this is a Convention taken on by Bosnia and Herzegovina in

1992 through succession, but the aforementioned state fund is still non-existent.

Immediate reparation by the state is stipulated under item 16 of the United Nations General Assembly Resolution 60/147 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. Namely, under item 16 of the UN General Assembly Resolution on Basic Principles, the states should endeavour to establish national programmes for compensation and other types of assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations. Furthermore, item 17 of the UN's Basic Principles stipulates that the states shall enforce domestic judgements for reparation against individuals or entities liable for the harm suffered and provide effective mechanisms for the enforcement



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of compensation judgements. Considering the fact that the UN principles and guidelines represent a codification that sums up current obligations stemming under international human rights law and international humanitarian law, it is clear that items 16 and 17 of the UN's principles and guidelines stipulate the means in which Bosnia and Herzegovina should ensure that victims of war crimes actually receive the compensation ordered by court.

Furthermore, item XVI on Reparation of the Guidelines of the CoE Committee of Ministers on eradicating impunity for serious human rights violations stipulates that the states should take all appropriate measures to establish accessible and effective mechanisms which ensure that victims of serious human rights violations receive prompt and adequate compensation for the harm suffered. Regarding the compensation of damages, the Council of Europe Guidelines repeatedly draw attention to the

requirement of implementing the UN principles and guidelines as the current international standard into the local legislation.<sup>8</sup> According to item II 2 of the CoE Guidelines, these guidelines are primarily addressed to the states and cover the acts or omissions of states while at the same time they cover the states' obligations to take positive action in protecting human rights in respect of non-state actors. They also imply a positive action of the state to ensure prompt and adequate compensation in case the violation was conducted by a natural person. Moreover, item 8.9 of the Appendix to the Recommendation of the Committee of Ministers to member states on assistance to crime victims reads that State compensation should be awarded to the extent that the damage is not covered by other sources such as the perpetrator, insurance or state funded health and social provisions. Therefore, the Recommendation directly suggests that the state should compensate damages to victims

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if they cannot be received from the perpetrator as is the case with judgments passed by the Court of BiH. In addition, item 120 of the introductory explanation of the CoE recommendation states that, according to research, the most effective means of compensating the victims is when the states ensure enforcement of the compensation-related criminal court judgment.

Finally, the establishment of a payment mechanism by the state is required under Article 2 of the Council Directive 2004/80/EC relating to compensation to crime victims while a similar recommendation is also included in the explanatory guidelines for the implementation of Directive 2012/29/EU on establishing minimum standards on the rights, support and protection of victims of crime. The guidelines include a recommendation that the states should compensate damages in order to speed up the process and to establish mechanisms to encourage perpetrators to

pay compensations. One of the mechanisms would be for the states to pay the compensation to the victims in advance as ordered by the court within the criminal procedure and then to seek repayment from the perpetrator or, alternatively, to pay a certain amount to a joint victims' fund which would be used to settle compensations to victims of crimes. According to the harmonization clause of Article 70 of the SAA, Bosnia and Herzegovina is obliged to harmonize its current and future legislation with the *acquis communautaire* of the European Union and to ensure adequate implementation and application of the current and future legislation. Direct compensation of damages to victims of war crimes should also be viewed in the context of Article 47 of the EU Charter of Fundamental Rights which stipulates the right to an effective remedy to be used directly for interpreting the national legislation that implements the directives. This also applies to

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the obligation to ensure effective remedies stemming under Article 13 of the European Convention for the Protection of Human Rights which is directly applicable in Bosnia and Herzegovina as an integral part of its constitutional law. The obligation of Bosnia and Herzegovina to ensure an effective remedy to compensate damages to victims of war crimes in accordance with Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedom (ECPHRFF) must be interpreted in a manner that takes into consideration the fact that the damage was incurred as a result of actions of the Army of the Republic of Bosnia and Herzegovina or the Army of Republika Srpska and that these actions can be attributed to BiH entities. The obligation of BiH to ensure effective remedies pursuant to Article 13 of ECPHRFF also exists in case of claims of victims of war crimes against persons whose actions cannot be attributed to state capacity, but in this case, there is the additional

stress placed on the fact that their claims are directed against members of the Army of RBiH or the Army of Republika Srpska.

European Convention on the Compensation of Victims of Violent Crimes, Article 14 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, items 16 and 17 of the United Nations General Assembly Resolution 60/147 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, Article 2 of the Council Directive 2004/80/EC relating to compensation to crime victims require that Bosnia and Herzegovina establishes national mechanisms to assist victims in case the perpetrators are unable or unwilling to fulfil their obligations. This would resolve the fundamental issue of paying compensation to victims of war crimes who have been

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awarded compensations in criminal procedures in Bosnia and Herzegovina but were unable to collect them.

Alongside this important conclusion, we also need to address other issues that are regulated by these sources in order to comprehensively implement the obligation. This notably relates to the covering of medical and rehabilitation expenses, and costs of initiating civil or other procedures with the aim of exercising victims' rights as stipulated under Article 14 of the UN Convention against Torture, for instance. Furthermore, EU Directives stipulate that victims should receive all information on any form of assistance and filing of claims for compensation in one place. The right to access relevant information on violation of rights and mechanisms for compensation of damages is regulated under item 15 of the United Nations General Assembly Resolution 60/147 Basic Principles and Guidelines on the Right to a Remedy and

Reparation for Victims. Moreover, European and international standards have given the state a possibility and not an obligation to regulate certain issues such as the minimum and maximum amounts of compensation, etc. In view of the above, there is a need to address the justification behind regulating the issues relating to the establishment of the state fund from which the damages of war crime victims would be collected: the right of indirect victims to file claims, the deadlines for submission of claims, the right of the state to collect funds from the perpetrator, the means of financing compensation funds and the competencies of the relevant ministry, limitation of compensations to certain acts of crime or resulting consequences of the criminal offence, the right of the victim to an advance payment in case of financial urgency, the maximum amount of compensation, the composition of the body that will pass decisions on the victims' requests and the deadline for the decision-making,

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the relation of such a procedure to a possible criminal procedure relating to the absence of the obligation to initiate a criminal procedure beforehand, means of implementing property claims adopted in criminal procedure, the other rights of victims such as the right to rehabilitation, psychological and physical assistance, etc. Austrian and Swiss legislations may be used as models whereby the latter has a more moderate approach. We should be more cautious in using Croatian legislation as a model for the reforms in Bosnia and Herzegovina for the fact that the Republic of Croatia has failed to implement its obligations towards victims of war crimes stemming under international legal sources or to draw up a general law dedicated to victims of criminal offences. The only model provisions that can be used from Croatian legislation are that the laws can widely be applied to a large number of criminal offences and the right to claim compensation from the state regardless of whether the

perpetrator is known or not. The above model provisions from the Law on Victims of Criminal offences were transferred into the Croatian Law on the Rights of Victims of Sexual Violence During the Armed Aggression against the Republic of Croatia passed in 2015. This law directly relates to victims of war crimes but to a single group only. Croatian legislation can thus only be used partially and with relevant caution as a model for BiH.

The presented European and international mechanisms and the comparative law lead towards the final recommendation of introducing possibilities for war crime victims to directly receive compensations from the state. This possibility should also be made available in cases when the perpetrator is unknown whereby the state that has compensated the damages attains all the rights the victim had towards the perpetrator.

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In any case, direct compensation of damages from the state should be made possible when there is a court judgment in the criminal procedure in favour of the victim. The victim should not be burdened again with the enforcement nor should he/she have to wait to exercise the claim towards a state in case of inability to receive compensation from the perpetrator. The deadlines for the submission of claims towards a state should begin from the finality of the ruling in the criminal procedure. Finally, the victims who have failed to file a property claim in an already concluded criminal procedure should be given the opportunity to exercise their right in a special administrative procedure within a certain period of time from the adoption of the law.

## 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.

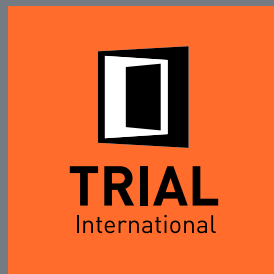
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Sarajevo, 2017