



Free Legal Aid for War Crimes Victims Pursuing Compensation in Criminal Proceedings

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Introduction

Bosnia and Herzegovina (BiH) must provide free legal aid to war crimes victims claiming compensation in criminal proceedings.¹ Because of the complexities of proving compensation claims in these proceedings, victims who cannot afford lawyers are unable to obtain damages for harms suffered during the Yugoslav war. As such, pending implementation of free legal aid in state and entity level criminal jurisdictions, BiH is denying victims the remedies they are due and, correspondingly, is violating its international obligations.

Numerous UN conventions ratified by BiH, for example, require that remedies be made accessible to victims, meaning that the State must provide for any necessary legal assistance. Similarly, the European Convention on Human Rights, which in BiH takes precedence over domestic laws, mandates free legal aid if such aid is critical to obtaining a remedy. Foundational documents from the Council of Europe (COE), the European Convention's parent body, likewise call upon all Council members—including BiH—to ensure that victims can effectively access compensation.

BiH's responsibility to subsidize free legal aid for victims pursuing compensation in criminal court has been further cemented by increasing recognition of victims' rights at war crimes tribunals. Over the past two decades, war crimes courts have expanded the role of victims to include the right to legal representation and reparations. The International Criminal Court (ICC), the pioneer of this movement, offers victims legal assistance throughout the reparations process. Tribunals such as the Extraordinary Chambers in the Courts of the Cambodia (ECCC) and the Special Tribunal for Lebanon (STL) have followed in the ICC's footsteps. In line with these emerging international standards, BiH should implement free legal aid in war crimes trials before state and entity jurisdictions.

¹ Though this memorandum focuses on war crimes victims, the international obligations referenced throughout the text often *also* require the provision of legal aid for victims of other types of offenses. Additionally, while war crimes victims in BiH may also choose to pursue compensation in civil proceedings, the paper is centered on criminal proceedings.



Looking forward, BiH must improve its legal aid regime so as to ensure accession to the European Union (EU). The European Commission's annual reports on BiH have repeatedly criticized gaps in the extant legal aid system. In turn, EU documents regarding Bosnian accession specifically require that BiH facilitate access to justice. Accession criteria are rooted in EU best practices—as reflected by the EU charter, EU jurisprudence, and, most recently, EU directives on victims' rights—that support the institution of free legal aid for victims. As such, in BiH, the lack of subsidized assistance for war crimes victims seeking redress will likely impede the accession process.

Even assuming that BiH does not effect free legal aid for all war crimes survivors, sexual violence victims—economically, socially, and politically marginalized in BiH—merit special protection. The UN, COE, and EU bodies referenced above require states to implement measures that attend to the needs of acutely vulnerable groups, including by providing legal support.

In sum, to honor a diversity of obligations—present and future; international, regional, and, domestic—BiH must establish free legal aid for war crimes victims pursuing compensation in criminal proceedings, and at a minimum, for sexual violence survivors. Specifically, BiH must expedite proper implementation of the new state level free legal aid law, and must ensure that victims filing claims at the entity level likewise receive adequate legal support.

Background on the Situation in BiH

Applicable Legal Framework

The Dayton Peace Accords divided BiH into two entities: the Federation of Bosnia and Herzegovina (FBiH) and Republika Srpska (RS). Under Dayton, FBiH and RS received extensive powers, including in regard to judicial matters. As a result, the processing of war crimes trials in BiH is split between entity and state level courts, which operate in parallel and are often subject to different legislation, jurisprudence, and practices.

Per Article 193 of the state-level Criminal Procedure Code (CPC), victims may file compensation claims in criminal proceedings for pecuniary and non-pecuniary damages



resulting from criminal offenses.² These requests must be filed by the end of the main trial or sentencing hearing,³ must state the claim for compensation “specifically,”⁴ and must present evidence to support the awarding of damages.⁵ Though survivors assume primary responsibility for filing compensation requests, the CPC obligates judges and prosecutors to facilitate the process. The prosecutor, for example, must “gather evidence” regarding the property claim⁶ and must ask the survivor about his or her wishes in respect to compensation during direct examination.⁷ In turn, the court is *required* to render a decision on damages when a petition has been filed.⁸ If the court finds that the evidence presented does not provide a “reliable basis” for an award or that the claim might “considerably prolong” the proceedings,⁹ it can refer the victim to civil court. Entity level provisions on compensation mirror those in the CPC.¹⁰

In pursuing compensation before the state level court, war crimes victims did not have a right to legal aid until last year. In late 2016, the BiH Parliamentary Assembly passed legislation mandating that BiH provide legal assistance in criminal proceedings to certain categories of victims, including sexual violence victims and indigent victims. At the time of writing, however, the Ministry of Justice has yet to pass the necessary bylaws and adequately implement the system of free legal aid. As a result, not a single war crimes victim has received legal support under the new legislation.

Meanwhile, entity institutions are not subject to the state law. At the entity level, the provision of legal aid is uneven at best, with legislation and practices divided between RS and FBiH and—even within FBiH—between different cantons. As such, whether claiming compensation in state or entity jurisdictions, the vast majority of war crimes victims in BiH are still unable to access legal aid.

² Article 193(1) of the CPC.

³ Article 195(2) of the CPC.

⁴ Article 195(3) of the CPC.

⁵ *Id.*

⁶ Article 197(1) of the CPC.

⁷ Article 86(10) of the CPC.

⁸ Article 198(1) of the CPC.

⁹ Articles 198(2), 193(1) of the CPC.

¹⁰ See Article 207 of the Federation of BiH CPC, Article 103 of the Republika Srpska CPC.



Obstacles to Obtaining Compensation in Criminal Proceedings

For several reasons, the absence of an effective legal aid regime prevents victims from obtaining compensation in criminal proceedings.

Firstly, the CPC's efforts to integrate judges and prosecutors into the compensation process had, until recently, floundered. Notwithstanding the requirement to "gather evidence regarding the property claim," for example, prosecutors were consistently eschewing this duty, focusing solely on proving criminal responsibility. Correspondingly, judges were automatically referring victims to civil court, either ruling—without further explanation—that the claim in question would unduly prolong proceedings, or issuing boilerplate findings that the given petition did not "provide a reliable grounds for a complete or partial resolution of the claim . . ." And while state-level judicial and prosecutorial practices have vastly improved over the past several years, they continue to lag at the entity level, heightening victims' need for legal representation.

Secondly, even assuming that courts and prosecutor's offices take all possible measures to assist victims with compensation, a significant burden remains on victims' shoulders; victims must, to a certain extent, operate autonomously in pursuing their interests.¹¹ As a result, victims without legal aid struggle to fulfill the criteria necessary to prevail on compensation.

To file a compensation claim, victims must submit a petition, a highly technical document. In the petition, victims are required to state the precise legal violations that have occurred, specific legal losses flowing from these violations, and estimated amounts of damages owed for said losses. In the *Markovic* case, for example, the victim claimed 40,000 KM for harms such as the mental anguish resulting from the reduction of her life activities and the violation of her human dignity. It is almost impossible to generate these types of calculations and characterizations absent legal support. Moreover, in addition to writing the petition, victims must put forth oral arguments, respond to defense arguments, and, in the event that compensation is awarded, launch enforcement procedures to obtain the funds in question. Consequently, without legal aid, victims' right to obtain damages is a purely theoretical matter.

¹¹ Prosecutors and judges at TRIAL's 2015 roundtable on compensation claims arrived at this conclusion.



The abstract nature of this right is best reflected by the paucity of compensation awards. Before 2015, no domestic criminal court had ever granted compensation to a war crimes victim and to date, only eight victims have obtained favorable verdicts: seven at the state level and one at the entity level.¹² In each of these cases, NGOs financed the legal representation of victims or represented victims themselves, ensuring that compensation requests were correctly formulated and sufficiently substantiated. As such, while recent victories are encouraging, reflecting a shift in judicial and prosecutorial attitudes, they also underscore the need for institutionalized legal assistance.

NGOs, stretched thin, cannot provide support to all victims interested in compensation, particularly as more survivors exercise their rights based on the aforementioned success stories. The widespread violations perpetrated during the Yugoslav conflict—and corresponding damages—call for systemic solutions, not ad-hoc assistance. In any event, the international and regional obligations described in the following sections require BiH to take ownership of the compensation process and establish a comprehensive, statewide legal aid regime.

Civil Court and Vulnerable Groups

Victims who do not have the legal aid necessary to prove their claims are generally referred to civil proceedings. Though civil court has been the traditional forum for such claims, with the resolution of compensation in criminal court a relatively recent phenomenon, civil proceedings present even greater obstacles for victims; the civil system is currently mired in a backlog of cases, with the result that victims often have to wait several years for hearings on their claims; civil courts do not provide for identity protection; and civil courts have applied restrictive statutes of limitations, denying thousands of compensation claims on this basis and, in RS, imposing high court fees on victims. Consequently, to maximize victims' likelihood of obtaining compensation and render the process as painless as possible, victims must receive legal assistance at the criminal trial stage.

It is particularly important that wartime sexual violence victims participating in criminal proceedings obtain such support. Sexual violence victims face unique economic,

¹² Before the Court of BiH, compensation has been awarded in cases against Bosiljko and Ostoja Markovic, Slavko Savic, Adil Vojic and Bekir Mesic, Krsto Dostic, and Mato Baotic. At the entity level, only the district court in Doboj has awarded compensation, in the case against Nenad Vasic.



societal, and psychological challenges that obstruct their access to justice. Given the stigma and trauma engendered by sexual violence, for example, taking the first step and seeking compensation in criminal court is a formidable obstacle in itself. Subsequently, referral to civil court means that sexual violence victims will have to testify and deal with retraumatization and stigmatization for a *second* time. Moreover, the lack of identity protection measures and the prospect of another round of prohibitive legal fees may dissuade some sexual violence victims from pursuing compensation altogether. It is thus critical that BiH provide legal assistance to sexual violence victims who file compensation claims in criminal trials, averting referral to civil court.

UN Standards on the Legal Representation and Compensation of Victims

Absent effective legal aid for all war crimes survivors claiming compensation, BiH is in violation of its international obligations. The following section reviews BiH's responsibilities under UN mechanisms.

UN Conventions

As described above, the failings of free legal aid in BiH prevent war crimes victims from obtaining court-ordered compensation. BiH, however, is party to foundational UN treaties that mandate access to redress for victims of human rights violations, including through the provision of legal assistance.

Under the 1966 International Covenant on Civil and Political Rights (ICCPR), for example, States parties must “ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy . . .”¹³ The 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) likewise safeguards victims' right to a remedy. CEDAW obligates States parties to “ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination.”¹⁴ In applying the CEDAW to different country situations, the Committee on the Elimination of Discrimination against

¹³ Article 2 3(a) of the International Covenant on Civil and Political Rights. Available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

¹⁴ Article 2(c) of the Convention on the Elimination of All Forms of Discrimination against Women. Available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>



Women has urged governments to provide “easy redress” for discrimination and to facilitate access to such redress by instituting free legal aid.¹⁵

The subsequent Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter the Convention against Torture or CAT) echoes the language of its predecessors, requiring that every States party “ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.”¹⁶ Unlike the ICCPR and CEDAW, the CAT, adopted by the GA in 1984, explicitly references compensation, evidence of a growing movement to translate general principles on effective remedies into concrete practice.

In 2012, the Committee against Torture expanded upon States parties’ duty to uphold the “enforceable right to fair and adequate compensation.” As noted by the Committee in “General Comment No. 3,” the CAT obligates all signatories to eliminate obstacles to compensation; specifically, states must provide legal counsel to torture victims who lack the resources to bring claims for redress.¹⁷

The above texts apply to Bosnian war crimes survivors seeking reparations. The ICCPR includes provisions on the right to life, the right to freedom from torture, and the right to liberty and security of the person; these articles cover numerous crimes committed during the Yugoslav conflict, such as murder, arbitrary arrest and detention, enforced disappearances, torture, sexual violence, and forced labor. The CEDAW encompasses the range of wartime offenses perpetrated against women: sexual slavery, forced prostitution, internal displacement, and rape, among others. Meanwhile, the CAT bears on many of these same crimes: sexual violence, the maltreatment of detainees, torture, and so on. Consequently, pending implementation of the state-level legal aid regime and the improvement of entity level practices/legislation, BiH’s failure to ensure war crimes victims’ access to judicial remedies constitutes a violation of its obligations under all three treaties.

¹⁵ See Committee on the Elimination of Discrimination against Women, *Concluding Observations: Belarus*, (2000) at para. 360. Available at <https://www1.umn.edu/humanrts/cedaw/belarus2000.html>

¹⁶ Article 14(1) of the Convention Against Torture. Available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>

¹⁷ Committee Against Torture, *General Comment No. 3*, (2012) at para. 38. Available at http://www2.ohchr.org/english/bodies/cat/docs/GC/CAT-C-GC-3_en.pdf



UN Guidance Documents on Implementing Victims' Right to a Remedy

As evidenced by the aforementioned treaties, the past several decades have seen the UN increasingly emphasize victims' rights. Various UN guidance documents codify such advances, clarifying the responsibilities of member states—including BiH—in respect to victims' participation in criminal proceedings, entitlement to reparations, and access to legal assistance. From “Declarations” to “Guidelines and Principles,” these texts supplement obligations established by the ICCPR, CEDAW, and CAT.

The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (hereinafter the “Declaration”), adopted in 1985, was “the first international instrument to specifically focus on the rights and interests of victims in the administration of justice.”¹⁸ Aiming to curtail secondary victimization, the Declaration urges member states to behave with “compassion” and regard for victims’ “dignity.”¹⁹ Under the Declaration’s terms, states must enact accessible mechanisms of justice through which victims can secure “prompt redress.”²⁰

Adopted twenty years later, the 2005 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 (hereinafter the Principles) expand upon their 1985 forebear, identifying specific steps that member states should take to protect war crimes victims. The Principles call on states to pass domestic legislation that makes “available adequate, effective, prompt and appropriate remedies, including reparation . . .”²¹ To this end, countries must employ all “appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to a remedy for gross violations of international human rights law or serious violations of international humanitarian law.”²² The Principles thereby underscore BiH’s duty to

¹⁸ International Federation for Human Rights (FIDH), *Victims’ Rights Before the International Criminal Court*, (2007) at pg. 5. Available at https://www.fidh.org/IMG/pdf/4-CH-I_Background.pdf

¹⁹ *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, (1985) at para. 4. Available at <http://www.un.org/documents/ga/res/40/a40r034.htm>

²⁰ *Id.*

²¹ *2005 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*, (2005) at para. 2(c). Available at

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>

²² *Id.* at para. 12(d).



provide legal assistance to war crimes victims unable to “exercise their rights” without counsel.

The UN Guidelines and Principles on Access to Legal Aid in Criminal Justice Systems, adopted in 2012 (hereinafter the Guidelines), pinpoint best practices states should follow in regard to said legal assistance. Per the Guidelines, it is imperative that victims’ views are considered at all stages of legal proceedings in which “their personal interests are affected or the interests of justice so require.”²³ The Guidelines correspondingly recommend that states implement measures to promote the “provision of effective legal aid for victims,”²⁴ just as they would for defendants. Suggested policy options include, among others, establishing a legal aid fund; using resources recovered from criminal activities to pay for the representation of victims; supporting the development of university law clinics; and creating incentives for domestic lawyers to offer pro bono services.²⁵ The Guidelines thus present a range of potential reforms that BiH could undertake in order to satisfy its international obligations.

Lastly, it is worth noting that the aforementioned guidance documents fall in line with the UN’s overarching objectives in the coming decades. As stated in the UN’s 2030 Agenda for Sustainable Development, adopted by the GA in 2015, realizing “equal access to justice for all” is a UN priority.²⁶

Special Protection for Sexual Violence Victims

The UN mechanisms discussed above call on states to provide vulnerable victims with heightened protection, including by instituting free legal aid. Wartime sexual violence survivors in BiH merit these special measures.

As stated in the Committee against Torture’s General Comment No. 3, for example, States parties must address “informal or formal obstacles” that impede marginalized groups’ access to redress for CAT violations.²⁷ In BiH, the “obstacles”

²³ *UN Guidelines and Principles on Access to Legal Aid in Criminal Justice Systems*, (2012) at para. 48(e). Available at https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf

²⁴ *See id.* at para. 55(a).

²⁵ *See id.* at para. 61.

²⁶ Goal 16.3 of the UN 2030 Agenda for Sustainable Development. Available at http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E

²⁷ *See General Comment No. 3, supra* note 17 at para. 39.



raised by the lack of free legal aid prevent wartime sexual violence survivors—politically, socially, and economically marginalized—from obtaining compensation, contravening the CAT requirements outlined in General Comment No. 3.

Meanwhile, the Committee on the Elimination of Discrimination against Women has issued specific recommendations regarding States parties' obligations to female victims of war. CEDAW General Recommendation No. 30, noting that conflicts often result in the perpetration of gender-based violence,²⁸ highlights the “barriers faced by women in accessing justice . . . during the post-conflict period. . . .”²⁹ The Recommendation thereby urges state signatories to implement institutional reforms—such as the establishment of free legal aid—to ensure female victims' access to “effective and timely remedies.”³⁰

The 2012 Guidelines echo General Recommendation No. 30. Asserting that “certain groups are entitled to additional protection or are more vulnerable when involved with the criminal justice system,”³¹ the Guidelines advise states to provide free legal representation to female victims of violence, so as to “ensure access to justice and avoid secondary victimization.”³² While the Guidelines apply to victims in both conflict and non-conflict settings, wartime sexual violence survivors in BiH clearly fall under their aegis.

In sum, based on the UN standards outlined above, BiH should—at the very least—institute effective legal representation for wartime sexual violence victims pursuing court-ordered compensation. Given BiH's overarching obligations concerning victims' right to a remedy, however, such assistance should cover the entire spectrum of war crimes victims.

UN Mechanisms' Recommendations to BiH

In accordance with the obligations referenced in previous sections, UN bodies have repeatedly raised concerns about access to justice in BiH, urging domestic

²⁸ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 30*, (2013) at para. 35. Available at

<http://www.ohchr.org/Documents/HRBodies/CEDAW/GComments/CEDAW.C.CG.30.pdf>

²⁹ *Id.* at para. 74.

³⁰ *Id.* at para. 81 (g)(k).

³¹ *2012 Guidelines*, *supra* note 23 at para. 12.

³² *Id.* at para. 52.



authorities to ensure that war crimes victims and—at a minimum—sexual violence victims are able to obtain the remedies they are due.

In 2005, for example, the Committee against Torture, noting the failures of domestic reparative mechanisms, called on BiH to provide torture victims with the “capacity to pursue redress and their right to fair and adequate compensation and rehabilitation in accordance with the requirements of the Convention.”³³ As detailed above, victims’ “capacity” to assert this right hinges on legal assistance.

In 2010, the Working Group on Enforced and Involuntary Disappearances (WGEID) likewise highlighted barriers to redress in BiH,³⁴ concluding that the domestic justice system had neglected victims’ needs.³⁵ To address such deficiencies, the WGEID recommended that BiH establish “an effective public system of free legal aid . . . to enable relatives of disappeared persons to receive legal support if they cannot afford it.”³⁶

Of late, the obstruction of sexual violence survivors’ right to a remedy has been a particular focus of treaty body reports on BiH. The Committee against Torture’s 2011 Conclusions and Recommendations, for example, criticized the “insufficient . . . legal protection available to victims, especially victims of war-time sexual violence,”³⁷ urging BiH to take immediate action to protect victims’ right to compensation and rehabilitation.³⁸

In 2012, the Human Rights Committee (HRC), which monitors implementation of the ICCPR, issued a report paralleling the Committee against Torture’s findings. Citing

³³ Committee against Torture Thirty Fifth Session, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention*, Doc. no. CAT/C/BIH/CO/1, (2005) at para. 10(e)(recommendations). Available at http://www.ombudsmen.gov.ba/documents/ombudsmen_doc2013031102080606eng.pdf

³⁴ Human Rights Council Sixteenth Session, *Report of the Working Group on Enforced and Involuntary Disappearances*, Document no. A/HRC/16/48/Add.1, (2010) at paras. 39-46. Available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-48-Add1.pdf>

³⁵ *Id.* at para. 64.

³⁶ *Id.*

³⁷ Committee against Torture Forty Fifth Session, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention*, (2011) at para. 18. Available at <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsjDkX3r43P00lVNIN5RRiBaoGwJqASitkTE8pnuFqIh45XNEXi8eZGoOs9swQxp%2bYrC8BEp2QF16jwLGZF%2b3wx5C4eR4O%2fPGLLnGh0wcdZZ>

³⁸ *Id.*



the “lack of support” available to sexual violence victims,³⁹ the HRC directed BiH to implement “practical measures to ensure that survivors of sexual violence and torture have access to justice and reparations.”⁴⁰ Again, an essential such “practical measure” is the provision of legal assistance.

One year later, the Committee on the Elimination of Discrimination against Women published its Concluding Observations on the combined fourth and fifth periodic reports of BiH, which also criticized “women’s inadequate and unequal access to compensation, support, and rehabilitation measures for violations suffered during the war.”⁴¹ In order to improve the situation of female wartime survivors, the Committee advised BiH to reform its legal aid regime.⁴² Most recently, in March 2017, the HRC followed up on its 2012 recommendations, calling on BiH to “make the system of free legal aid fully operational throughout its territory to all vulnerable citizens, including victims of wartime sexual violence.”⁴³

With BiH slated for consideration by the Committee against Torture and the Committee on the Elimination of Discrimination against Women in, respectively, 2017 and 2018/19, further denunciation of war crimes victims’ access to justice is imminent. So as to remedy ongoing violations of ratified UN conventions, BiH—in line with the recommendations detailed in this section—should expedite proper implementation of the

³⁹ Human Rights Committee One Hundred and Sixth Session, *Concluding observations on the second periodic report of Bosnia and Herzegovina*, Doc no. CCPR/C/BIH/CO/2, (2012) at para. 7. Available at <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsseOnooqYJD U6whjJc%2bd39Cr2QLMra%2btjix35VIXk3FCaWxmYScQsNaRcocamoKXccu49QbeFfv1jSbSZz0hcDzR WWr2Fd2tvx9AupXboZW5>

⁴⁰ *Id.* at para. 8.

⁴¹ Committee on Discrimination against Women Fifty Fifth Session, *Concluding observations on the combined fourth and fifth periodic reports of Bosnia and Herzegovina*, Document no. CEDAW/C/SR.1146 and 1147, (2013) at para. 9(f). Available at <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsPYo5NfAs NvhO7uZb6iXOThwzQJX3DQeQDIgZHYTTs8AV4vrrszWT4WC8nZMWCqbSxajeQwEFTpiQWo6w3%2Fn FFX5ncneSL%2Bh%2FBRNbpuUjFJIASrg27yuBcCh%2FdP7OTkLQ%3D%3D>

⁴² *Id.* at 16(c).

⁴³ Human Rights Committee One Hundred and Nineteenth Session, *Concluding observations on the third periodic report of Bosnia and Herzegovina*, Doc no. CCPR/C/BIH/CO/3, (2017) at para. 14. Available at <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsseOnooqYJD U6whjJc%2bd39Cr2QLMra%2btjix35VIXk3FCaWxmYScQsNaRcocamoKXccu49QbeFfv1jSbSZz0hcDzR WWr2Fd2tvx9AupXboZW5>



state level law on legal aid and address gaps in legislation/implementation at the entity level.

BiH's Obligations as a Member of the Council of Europe

In addition to the aforementioned UN treaties, guidance documents, and recommendations, the European Convention on Human Rights (ECHR) governs BiH's treatment of war crimes victims. Under the Constitution of BiH, the ECHR is privileged over all domestic laws.⁴⁴ BiH's present legal aid regime, however, does not comply with its ECHR obligations regarding access to justice and victims' right to a remedy: namely, Article 6 and Article 13.

Article 6(1) of the Convention states, in part, "in the determination of his civil rights and obligations or of any criminal charge against him, *everyone is entitled to a fair and public hearing* within a reasonable time by an independent and impartial tribunal established by law . . . (emphasis added)" Article 13 of the Convention correspondingly states, "everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." As discussed below, European Court of Human Rights (ECtHR) case-law makes it clear that BiH is falling short of these standards.

ECtHR Jurisprudence

The European Court is charged with ensuring implementation of the ECHR in Council of Europe member states, including BiH. Similar to the approach taken by UN bodies, the ECtHR has interpreted both Article 6(1) and 13 to mean that domestic courts and remedies must be practically— not just theoretically—accessible. If legal aid is necessary to achieve this end, states must provide victims with the requisite support.

In *Airey v. Ireland*, for example, the ECtHR considered the case of an Irish woman seeking separation from her husband. Mrs. Airey claimed that because she could not afford a lawyer, she had been unable to obtain a judicial separation order and, per Article

⁴⁴ Article II(2), Constitution of Bosnia and Herzegovina. Available at http://www.ccbh.ba/public/down/USTAV_BOSNE_I_HERCEGOVINE_engl.pdf



6(1), had been denied the “effective right of access to the courts for the determination” of her “civil rights and obligations.”⁴⁵ In assessing the scope of Article 6(1) rights, the Court concluded that legal counsel, though not always essential, was compulsory when “such assistance prove[d] indispensable for an effective access to court . . . by reason of the complexity of the procedure or of the case.”⁴⁶ Applying these standards to Mrs. Airey’s situation, the Court found an Article 6(1) violation; due to the intricacies of Irish law and the emotional dimension of the case, which made it difficult for Mrs. Airey to navigate the judicial separation process on her own, she was owed legal aid under Article 6(1).⁴⁷ In the ECtHR’s words, the Convention “is designed to safeguard the individual in a real and practical way . . .”⁴⁸

Bringing the *Airey* principle back to the Bosnian context, it is clear that Article 6(1) requires BiH to establish an operational legal aid system for all indigent war crimes victims seeking compensation.⁴⁹ In BiH, the compensation claim procedure is highly complex. As a result, Bosnian war crimes victims—like Ms. Airey in respect to judicial separation—need legal counsel in order to obtain court-ordered awards. The rarity of successful compensation claims is evidence of this truth. Consequently, until BiH properly implements the state level legal aid law and addresses gaps in legislation/implementation at the entity level, Article 6(1)’s guarantee of effective access will go unfulfilled.

Article 13 cases before the ECtHR have followed *Airey*’s emphasis on the “real and practical” exercise of Convention rights, finding that States cannot meet their Convention obligations with remedies that are—in effect—unfeasible.⁵⁰ In the recent *O’*

⁴⁵ *Airey v. Ireland*, Application no. 6289/73, Grand Chamber of the European Court of Human Rights, (9 October 1979) at paras. 13, 26. Available at <http://ww3.lawschool.cornell.edu/AvonResources/Airey.PDF>

⁴⁶ *Id.* at para. 26.

⁴⁷ *See id.* at para. 24.

⁴⁸ *See id.* at para. 26.

⁴⁹ *Tomasi v. France*, a 1992 ECtHR case, established that when a national legal system allows for a remedy, “such a remedy constitutes a civil right as set forth in Article 6 of the European Convention.” As such, the right to compensation delineated in the BiH CPC is a civil right under Article 6.

⁵⁰ *See 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) at para. 255. Available at https://www.opensocietyfoundations.org/sites/default/files/CASE_OF_EL-MASRI_v_THE_FORMER_YUGOSLAV_REPUBLIC_OF_MACEDONIA_0.pdf; *Al Skeini and others v. United Kingdom*, Application no. 55721/07, Grand Chamber of the European Court of Human Rights, (7 July 2011) at paras. 162-164. Available at <https://www.icrc.org/casebook/doc/case-study/echr-al-skeini-et-al-v-uk.htm>; *Cobzaru v. Romania*, Application no. 48254/99, Third Section of the European Court of



Keeffe v. Ireland case, for example, the ECtHR held that remedies must be “accessible,” must be “capable of providing redress,” and must offer “reasonable prospects of success.”⁵¹

The system in BiH does not pass the *O’ Keeffe* test. Absent the institution of an operational legal aid regime, compensation procedures before criminal courts are not “accessible,” are not “capable of providing redress,” and do not offer “reasonable prospects of success.” Again, given that the ECHR binds BiH, superseding all domestic laws, BiH must act swiftly to address these failings, putting the new state level law into practice and undertaking corresponding measures at the entity level.

Council of Europe Standards

In addition to the European Convention, best practices established by the Committee of Ministers (CM), the Council of Europe’s (COE) statutory decision-making body, lay out BiH’s obligations to war crimes victims. CM standards parallel the “real and practical” doctrine developed in the aforementioned ECtHR cases, further affirming BiH’s responsibility to establish an effective system of free legal aid.

Facilitating Access to a Remedy

The Recommendation on the Position of the Victim in the Framework of Criminal Law and Procedure, issued by the CM in 1985, aims to render remedies for victims realistically accessible. In line with the ECtHR precedent, the Recommendation sets forth a clear prescription for member states with respect to compensation, noting that “existing

Human Rights, (26 July 2007) at paras. 83-84. Available at [http://hudoc.echr.coe.int/eng#f{fulltext}:\[\"cobzaru\"\],\"itemid\":\[\"001-81904\"\]}](http://hudoc.echr.coe.int/eng#f{fulltext}:[\). It is important to note that the Court has previously characterized Article 6(1)’s role in relation to Article 13 as that of *lex specialis*, with Article 13 subsumed by the more stringent criteria of Article 6(1). Recent cases, however, have seen the Court consider Article 13 violations separately.

⁵¹ *O’Keeffe v. Ireland*, Application no. 35810/09, Grand Chamber of the European Court of Human Rights, (28 January 2014) at para. 177. Available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805a32bb>



limitations, restrictions, or technical impediments which prevent such a possibility from being generally realised should be abolished.”⁵²

Jumping ahead two decades, the CM’s 2004 Recommendation on the Improvement of Domestic Remedies likewise highlights the distinction between redress “in law” and redress “in practice,”⁵³ calling on member states to ensure the effectiveness of extant remedies.⁵⁴ Meanwhile, 2006’s CM Recommendation on Assistance to Crime Victims goes one step further, elaborating upon its 2004 forebear and explicitly linking said effectiveness with state subsidized legal aid. Specifically, the Committee urges the provision of legal support “in appropriate cases” to victims filing compensation claims in criminal and civil proceedings.⁵⁵ Given the 2006 Recommendation’s focus on accessibility as well as the CM’s overarching alignment with ECtHR jurisprudence, “appropriate cases” are likely those in which victims cannot obtain awards without legal assistance: the situation in BiH.

As a member of the Council of Europe, BiH should align its legal system with CM standards. Per the foundational 1985 Recommendation, however, BiH has yet to remove the “limitations, restrictions, or technical impediments” that impede the realization of compensation for war crimes victims: namely, the lack of a functioning legal aid regime. As such, to comply with the principle of effectiveness endorsed by both the COE and ECtHR, BiH should make the necessary changes at the state and entity level.

Offering Special Protection to Sexual Violence Victims

Various Council of Europe texts, in line with the UN conventions and guidance documents discussed in previous sections, afford special protection to vulnerable groups: most importantly for the purposes of this paper, to sexual violence victims. The

⁵² Committee of Ministers, *Recommendation of the Committee of Ministers on the Position of the Victim in the Framework of Criminal Law and Procedure*, (1985) at para. 10. Available at http://ec.europa.eu/civiljustice/comp_crime_victim/docs/council_eur_rec_85_11_en.pdf

⁵³ Committee of Ministers, *Recommendation of the Committee of Ministers to Member States on the Improvement of Domestic Remedies*, (2004) at Preamble. Available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805dd18e

⁵⁴ *Id.* at articles I, II.

⁵⁵ Committee of Ministers, *Recommendation of the Committee of Ministers to Member States on Assistance to Crime Victims*, (2006) at article 7(1)(2). Available at http://www.coe.int/t/dghl/standardsetting/victims/Rec_2006_8.pdf



2002 CM Recommendation on the Protection of Women Against Violence, for example, notes that women are “often subjected” to abuse on the basis of their gender.⁵⁶ The Recommendation thereby calls on member states to provide such victims with “immediate and comprehensive assistance,” including legal support.⁵⁷ In specific regard to war crimes victims, the Committee recommends that member states “ensure social and legal assistance to all persons called to testify” before war crimes courts.⁵⁸ At present, given delayed implementation of the state level law and corresponding gaps at the entity level, sexual violence victims who pursue compensation struggle to access both the legal support referenced more generally by the Recommendation, and the targeted assistance relating to testimony at trial.

The 2011 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (hereinafter the Istanbul Convention) parallels its 2002 predecessor, recognizing the disproportionate violence wrought on women, including during armed conflict.⁵⁹ The Istanbul Convention requires states to “take the necessary legislative or other measures to ensure that victims have the right to claim compensation from perpetrators . . .”⁶⁰ In particular, the Convention urges states to “provide for the right to legal assistance and to free legal aid for victims under the conditions provided by their internal law.”⁶¹

As noted by the Explanatory Report accompanying the Istanbul Convention, the complexity of judicial and administrative procedures, high legal fees, and the economic disadvantages faced by victims of gender based violence made the drafters deem it “essential to place an obligation on Parties” regarding free legal aid.⁶² These considerations are all too resonant in BiH. To meet Istanbul standards, BiH must

⁵⁶ Committee of Ministers, *Recommendation on the Protection of Women Against Violence*, (2002) at preamble. Available at <http://www.legislationline.org/documents/action/popup/id/7972>

⁵⁷ *Id.* at para. 23.

⁵⁸ *Id.* at 71.

⁵⁹ Council of Europe, *Convention on Preventing and Combating Violence Against Women and Domestic Violence*, (2011) at preamble. Available at <http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008482e>. BiH signed and ratified the Convention in 2013.

⁶⁰ *Id.* at article 30(1).

⁶¹ *Id.* at article 57.

⁶² *Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence*, (2011) at para. 294. Available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d383a>



expedite the establishment of an effective state and entity legal aid system, providing wartime sexual violence victims with the support they need to navigate complex criminal compensation procedures and avoid referral to civil court.

Legal Representation and Compensation for Victims at War Crimes Courts

In line with trends at the UN, ECtHR, and COE, war crimes courts have transitioned toward a victim-oriented approach. The Rome Statute of the International Criminal Court (ICC), a standard-bearer in international criminal law, codifies this expansion of victims' rights, providing for both legal representation and compensation. The Statute's advances have been reproduced by subsequent war crimes tribunals, such as the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Tribunal for Lebanon (STL). Correspondingly, BiH—which has signed on to the Rome Statute—should align its legal aid regime with these emerging standards, ensuring that all war crimes victims seeking compensation receive the support of counsel.

From the ICTY to the Rome Statute

In the 1990s, the ICTY (International Criminal Tribunal for the former Yugoslavia) and the ICTR (International Criminal Tribunal for Rwanda) took great strides toward ending impunity for war crimes. These seminal mechanisms focused on restoring “international peace and security by punishing those responsible for heinous crimes during wartime,”⁶³ sometimes to the detriment of other interests. Victims' primary function was that of witness, putting forth evidence to help establish criminal responsibility.⁶⁴ As such, neither the ICTY nor ICTR provided for reparations or the participation of victims.⁶⁵ Since the 1990s, however, perceptions regarding victims' rights have undergone a

⁶³ Dinah L. Shelton and Thordis Ingadottir, *The International Criminal Court Reparations to Victims of Crimes (Article 75 of the Rome Statute) and the Trust Fund (Article 79)*, NYU Center on International Cooperation, (1999) at Prologue. Available at http://www.pict-pcti.org/publications/PICT_articles/REPARATIONS.PDF

⁶⁴ *Id.*

⁶⁵ Luke Moffett, *Realising Justice For Victims Before the International Criminal Court*, International Crimes Database, (2014) at pg. 1. Available at <http://www.internationalcrimesdatabase.org/upload/documents/20140916T170017-ICD%20Brief%20-%20Moffett.pdf>



“significant evolution.”⁶⁶ This “evolution” is reflected in the ICC’s Rome Statute, and related practices.

Rome Statute Provisions on Reparations and Victim Participation

Unlike the ICTY and ICTR, the ICC allows for reparations, positioning victims at the center of the process. Article 75(1) of the Rome Statute lays out the ICC’s base rules on reparations, stating, “the Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.”⁶⁷ Under Article 75(3), the Court must “take account of representations from . . . victims” when making its decision.⁶⁸ In offering said representations, victims can—*inter alia*—present oral and written arguments; request the appointment of experts; question experts, witnesses, and the accused; and submit observations on expert reports.⁶⁹

Given the complexity of these legal procedures, the Court provides victims with legal counsel when so required. Per Rule 90(5) of the ICC’s Rules of Procedure and Evidence, victims who cannot afford a lawyer “may receive assistance,” including financial aid. While the extent of said assistance is not specified, left for determination by “the Registrar in consultation with the Chamber,”⁷⁰ the ICC regularly finances the common legal representation of victims with shared interests.⁷¹

The *Lubanga* and *Katanga* cases illustrate ways in which lawyers can give victims a voice. In *Lubanga*, the participating victims—primarily former child soldiers— were

⁶⁶ VICS, *Improving Protection of Victims’ Rights: Access to Legal Aid*, (2013) at pg. 113. Available at <http://victimrights.eu/wp-content/uploads/2013/06/Report.pdf>

⁶⁷ Article 75(1) of the Rome Statute.

⁶⁸ Article 75(3) of the Rome Statute.

⁶⁹ *International Criminal Court Rules of Procedure and Evidence*, (2000) at rules 91, 97(2). Available at <https://www1.umn.edu/humanrts/instree/iccrulesofprocedure.html>

⁷⁰ *International Criminal Court Regulations*, (2004) at regulation 83(2). Available at https://www.icc-cpi.int/NR/rdonlyres/B920AD62-DF49-4010-8907-E0D8CC61EBA4/277527/Regulations_of_the_Court_170604EN.pdf

⁷¹ International Criminal Court, *Lubanga Case Information Sheet*, (2016) at pg. 3. Available at <https://www.icc-cpi.int/drc/lubanga/Documents/LubangaEng.pdf>. In the *Lubanga* case, for example, the Registry appointed two teams of legal representatives for the 129 victims.



divided into two groups for the purposes of legal representation. Representatives of both groups argued that the Trial Chamber should award individual reparations, not collective reparations; per the lawyers' submissions, their clients had suffered personal, specific harms that did not lend themselves to group reparations.⁷² The representative of one group presented additional arguments against the awarding of collective reparations, noting that the victims were often in conflict with their communities, which in some cases had approved the recruitment of children, and that collective reparations were thereby inappropriate.⁷³ Though the Chamber ultimately ruled that collective reparations would be "more beneficial and have greater utility than individual awards,"⁷⁴ the proceedings in *Lubanga* exemplify the role of lawyers in articulating and defending victims' interests, particularly in the realm of reparations.

Most recently, in the *Katanga* case, the ICC Trial Chamber granted individual and collective reparations to victims of an attack perpetrated by DRC commander Germain Katanga.⁷⁵ Based on victims' expressed preferences as well as the evidence presented, the Trial Chamber awarded financial compensation to 297 out of the 341 applicants and also ordered the institution of long-term community projects.⁷⁶ While the reparations decision has yet to be published, the Chamber noted that it had taken the arguments of victims' legal counsel into account.⁷⁷ As the first ICC case in which financial compensation has been granted, *Katanga* constitutes a real victory for victims and a potent demonstration of the impact of legal representation.

⁷² *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo*, Case no. ICC-01/04-01/06, Decision establishing the principles and procedures to be applied to reparations, (7 August 2012) at paras. 29, 43. Available at https://www.icc-cpi.int/CourtRecords/CR2012_07872.PDF

⁷³ *Id.* at para. 51.

⁷⁴ *Id.* at para. 274. This part of the decision was affirmed by the ICC Appeals Chamber.

⁷⁵ International Criminal Court, *Katanga case: ICC Trial Chamber II awards victims individual and collective reparations*, (24 March 2017). Available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1288>

⁷⁶ *Id.*

⁷⁷ *Id.*



Special Tribunal for Lebanon and the Extraordinary Chambers in the Courts of Cambodia: Following in the ICC's Footsteps

The ICC serves as a model for progressive legal practices in regard to victims' rights. Following the ICC's lead, several international tribunals have implemented like-minded regulations. For example, at the Extraordinary Chambers in the Courts of Cambodia, a hybrid court that opened in 2006, victims can apply to become civil parties; if approved, victims may participate in proceedings for the purposes of both securing "collective and moral reparations" and establishing criminal responsibility.⁷⁸ In order to ensure that victims are able to fully exercise their rights as civil parties, the ECCC funds two Lead Co-Lawyers who represent all victims in a given case and who also collaborate with victims' individual lawyers.⁷⁹ The Lead Co-Lawyers are integrated into the ECCC's infrastructure, with their own dedicated office and team of support staff.⁸⁰

Meanwhile, at the Special Tribunal for Lebanon, established in 2009, victims may present their "views and concerns" at stages of the proceedings where their personal interests are affected, as determined to be appropriate by the Pre-Trial Judge or Chamber.⁸¹ The STL provides victims with free legal aid so that they can effectively participate in the case at hand.⁸² Victims—usually through their legal representatives—can make oral and written submissions, call witnesses, tender other evidence, and examine and cross-examine witnesses.⁸³ Although victims at the STL cannot claim compensation,⁸⁴ they are afforded some rights that exceed those established by the ICC. The STL, for example, prescribes a detailed procedure through which victims who object

⁷⁸ *Internal Rules of the ECCC*, (rev. 2015) at rules 23, 23 *quinquis*. Available at http://www.eccc.gov.kh/sites/default/files/legal-documents/Internal_Rules_Rev_9_Eng.pdf

⁷⁹ See *id.* at rules 12, 12 *ter*.

⁸⁰ REDRESS and the Institute for Security Studies, *Expert Conference on Participation of Victims of International Crimes in National Criminal Justice Systems*, (2015) at pg. 10. Available at <http://www.redress.org/downloads/conference-report17-nov-2015.pdf>

⁸¹ *Statute for the Special Tribunal for Lebanon*, (2007) at article 17. Available at <https://www.stl-tsl.org/en/documents/statute-of-the-tribunal/223-statute-of-the-special-tribunal-for-lebanon>

⁸² *Victims' Participation at the STL*. Available at <https://www.stl-tsl.org/en/the-cases/other-matters/in-the-matter-of-el-sayed/appeal/filings/pre-trial-and-trial-briefs/victims-participation/victim-participation-1>

⁸³ See *id.*

⁸⁴ Victims can use STL judgments to seek compensation as civil parties before national bodies in Lebanon.



to the Registrar's choice of common legal representative can seek review of the decision by a Pre-Trial judge.⁸⁵

In embracing the ICC's victim-oriented approach, tribunals—as evidenced by the examples surveyed above—have adopted a diverse array of methods. The ECCC and STL operate very differently than the ICC, with distinct statutes, procedures, and evidentiary rules. What the three tribunals share, however, is a dedication to facilitating victims' access to justice; the ICC serves as a blueprint on victims' rights that States can adjust to their own needs and legal systems.

As discussed throughout this paper, BiH has yet to pay sufficient heed to the interests of war crimes victims. While BiH need not, and cannot, mimic the ICC model, it must—in line with the STL and ECCC—make a serious commitment to victims' rights. The dysfunction of free legal aid at the state level and corresponding gaps at the entity level have precluded war crimes victims from realizing the right to compensation set forth in the BiH Criminal Code. As such, a serious commitment in the BiH context, within the existing domestic framework, means providing free legal aid. As noted by the 2012 UN Principles, establishing a legal aid fund, incentivizing pro bono work, amending legislation, covering victims' expenses with seized assets, and supporting university law clinics are all potential options; the means is within BiH's discretion, but the end—protecting the rights afforded victims by Bosnian law—is a necessity.

BiH's Obligations in Joining the EU

While the previous sections address obligations that BiH has already assumed, ranging from membership in the Council of Europe to ratification of the Convention Against Torture to the signing of the Rome Statute, this section will deal with obligations that BiH aspires to take on: namely, accession to the European Union (EU). BiH officially submitted its application for EU membership in early 2016 and will need to fulfill certain criteria in order for its bid to be successful. As stated in a 2011 report issued by the Organization for Security and Cooperation in Europe (OSCE), “although BiH is not formally obliged to comply with the relevant EU law at this stage of the accession

⁸⁵ *Directive on Victims' Legal Representation*, (2012) at article 22. Available at http://www.stl-tsl.org/images/k2/attachments/20120621_STL-BD-2012-04-Corr1_Directive_on_victims_legal_representation_EN.pdf



process, it is expected that it will establish a corresponding institutional and legislative framework on its path to EU integration.”⁸⁶

One step along this “path” will be facilitating victims’ access to justice. Fundamental EU principles prioritize the protection of victims’ rights. In turn, the EU has indicated that BiH should establish a functional legal aid regime as part of its accession bid, including by providing legal counsel to war crimes victims pursuing compensation. Key EU documents, jurisprudence, and practices are detailed below.

Foundational EU Documents

Foundational EU texts contain provisions obligating member states to secure their citizenry’s access to the courts. Article 47 of the Charter of Fundamental Rights of the European Union, for example, states that “everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article . . . Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”⁸⁷ EU countries must comply with the Charter when implementing EU law or EU directives. In line with Article 47, Article 67 of the Treaty on the Functioning of the European Union (TFEU) proclaims that the Union “shall facilitate access to justice . . .”⁸⁸

Judgments issued by the European Court of Justice (ECJ), the body tasked with interpreting EU law, have clarified member state responsibilities in respect to “access to justice” and, correspondingly, legal aid. In *DEB Deutsche Energiehandels-und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland* (hereinafter “the DEB case”), the ECJ considered the case of a German company that could not afford the advance

⁸⁶ OSCE (Organization for Security and Cooperation in Europe), *Trafficking in Human Beings for the Purposes of Labour Exploitation*, (2011) at pg. 16. Available at <http://www.osce.org/bih/106977?download=true>

⁸⁷ *EU Charter of Fundamental Rights*, (2012) at article 47. Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>

⁸⁸ *Treaty on the Functioning of the European Union*, (2012) at article 67. Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>



administrative fee necessary to initiate civil litigation, and, as a result, was unable to pursue a civil suit.⁸⁹

Turning to Article 47 of the Charter, the Court adopted an approach similar to that of the ECtHR, focusing on whether relevant procedural rules made it “in practice impossible or excessively difficult to exercise rights conferred by EU law.”⁹⁰ So as to provide guidance to domestic jurisdictions, the Court articulated a range of factors relevant to the assessment of alleged Article 47 violations: “the subject matter of litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the applicable law and procedure; [...] the applicant’s capacity to represent himself effectively;” and whether or not the given legal costs “might represent an insurmountable obstacle to access to the courts.”⁹¹ The ECJ subsequently referred the case back to the German courts for performance of the above analysis.

Applying the DEB calculus to the Bosnian context, Article 47 would require BiH to provide legal aid to war crimes victims pursuing compensation before criminal courts. Going through the enumerated factors, such victims *do* have a reasonable prospect of success; the stakes for applicants—who face acute social, psychological, and economic challenges due to the crimes in question—are high; the procedures and laws surrounding compensation claims are complex; and prohibitive legal fees constitute “an insurmountable obstacle to access to the courts.”

The Accession Process in BiH

In line with principles set forth in the EU charter and articulated in the DEB case, member states protect victims’ rights through a diverse range of procedures, dependent on the nature of their respective legal systems and the challenges at hand.⁹² As Article

⁸⁹ *DEB Deutsche Energiehandels-und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, Case no. C-279/09, Reference for a Preliminary Ruling from the Kammergericht, (22 December 2010). Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62009CJ0279>

⁹⁰ *Id.* at para. 28.

⁹¹ *Id.* at para. 61.

⁹² While the EU standards set forth in the Charter and TFEU obligate states to ensure effective access to the courts, EU member states have different approaches to victims’ participation in the justice system and, correspondingly, different legislation on legal aid. These practices can be divided into three strands. Firstly, in civil party or subsidiary prosecutor systems—such as those in France and Germany—victims have the



47 of the EU charter applies only when countries are enforcing EU law, member states have some autonomy in passing and implementing domestic legislation.⁹³ The Stabilization and Accession Agreement (SAA) and the Indicative Strategy Paper for 2014-2017 (ISP), however, make it clear that the EU has assessed the particular issues facing victims in BiH and has deemed it imperative that BiH fix its inoperative legal aid system before joining the Union. Both texts highlight the importance of citizenry's access to the courts.

The SAA, essentially a contract between BiH and the EU that aims to bring BiH in line with EU standards, identifies strengthening "the rule of law" as a principal objective

most rights. Victims are recognized as official parties, meaning that they can call witnesses and experts, question the defendant, and give opening and closing arguments. In regard to compensation, victims file their own applications for damages, presenting evidence in support of an award. Because of victims' expanded role in these systems, they are generally eligible to receive legal aid if they cannot afford a lawyer. In the second type of legal scheme, victims are treated as parties specifically in respect to compensation. Victims can submit evidence, call witnesses and experts, and make oral and written submissions *only* for the purposes of compensation, *not also* for the purposes of establishing criminal responsibility. This setup, used in Belgium, Hungary, Poland and Sweden, resembles that in BiH. Provisions on legal aid vary by country. In the third type of legal arrangement, such as that in Ireland/the UK, victims are not recognized as parties at all. Prosecutors and/or the judiciary stringently enforce victims' rights, filing compensation claims and undertaking other actions on victims' behalf.

⁹³ In light of the diversity of legal schemes in the EU, recent Union directives have tried to set common minimum standards in respect to victims' rights, pushing member states to implement harmonizing reforms, including the provision of legal aid in certain circumstances. The 2012 EU Victims' Directive, for example, mandates that victims receive "sufficient access to justice." As such, Article 13 of the Directive, paying heed to the different legal traditions throughout the Union, calls on member states to establish free legal aid schemes "where they have the status of parties to criminal proceedings." The article further states that the "conditions or procedural rules under which victims have access to legal aid shall be determined by national law."

The legal context for the Directive indicates that Article 13 should be interpreted expansively, so as to encompass both the first and second type of legal schemes in which victims have the "status of parties." As mentioned above, the EU charter—and the attendant calculus articulated in the DEB case—applies when states are implementing EU law, such as the Victims' Directive. Moreover, the Guidance Document for the Victims' Directive, issued in 2013, uses stronger language than that of the Directive, inviting member states to consider "specifying in national criminal law under what conditions and circumstances victims are able to access legal aid, *bearing in mind the need to ensure equal access to justice and victims' right to a fair remedy* (emphasis added)."



of the accession process.⁹⁴ In this regard, the Agreement, citing aforesaid documents such as the ECHR,⁹⁵ proclaims that “access to justice” is an area in which reforms will be necessary.⁹⁶

The ISP delves into greater detail regarding Bosnian accession criteria. Placing the “rule of law at the centre of the enlargement strategy,”⁹⁷ the ISP lays out expected results of the accession process, such as “every citizen [having] access to justice,” and, “in particular for the vulnerable,” that such “access will be free.”⁹⁸ In supporting BiH’s progress towards these goals, the ISP states that the Instrument for Pre-Accession Assistance—the mechanism through which the EU finances reforms in candidate countries—will devote funds to the “improvement of legal aid.”⁹⁹

The two documents thus peg reform of BiH’s legal aid regime as an accession priority; BiH must provide free legal assistance to “the vulnerable,” including war crimes victims at an economic, social, and psychological disadvantage because of harms suffered during the war. At a bare minimum, BiH must ensure such support for victims of wartime sexual violence, an acutely marginalized group that faces heightened challenges in accessing the justice system.

EU Commission and Parliament Recommendations

Per the EU Charter, the TFEU, the SAA, and the ISP, the EU Commission (EC)—the executive body of the EU—has repeatedly raised the issue of legal aid in its annual reports on BiH. In 2014, for example, the Commission noted that the lack of statewide free legal aid had created a “fragmented and non-harmonised system,” posing a serious

⁹⁴ *Stabilization and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part*, (6 June 2008) at article 1(2)a. Available at http://europa.ba/wp-content/uploads/2015/05/delegacijaEU_2011121405063686eng.pdf

⁹⁵ *Id.* at article 2.

⁹⁶ *Id.* at article 78.

⁹⁷ Indicative Strategy Paper 2014-2017, (December 2014) at pg. 10. Available at http://ec.europa.eu/enlargement/pdf/news/annexe_acte_autonome_nlw_part1v1.pdf

⁹⁸ *Id.* at pg. 17.

⁹⁹ *See id.*



risk of discrimination against victims.¹⁰⁰ In the Commission's words, "equality in relation to rights, criteria, and procedures" was not "uniformly guaranteed."¹⁰¹

In 2015, the Commission concluded that little progress had been made on this front, with "the legal and institutional framework for free legal aid" continuing to operate in an "incomplete, un-harmonised and discriminatory" manner.¹⁰² The Commission thereby called upon BiH to incorporate "minimum common standards for free legal aid" into its legal regime.¹⁰³ Correspondingly, the Commission stressed that realization of war crimes victims' right to compensation remained "uneven."¹⁰⁴ 2016 brought more of the same, with the Commission criticizing delays in the adoption of legal aid legislation¹⁰⁵ and declaring that in 2017, BiH should "in particular . . . introduce a harmonised, consistent, effective and free legal aid system across the country and ensure non-discriminatory access to justice,"¹⁰⁶

Most recently, in response to the 2016 EC report, the European Parliament (EP) issued a resolution specifically urging BiH to "enhance further access to justice for victims of conflict-related sexual violence, including by making available free legal aid . . . as well as better compensation and follow-up."¹⁰⁷ The resolution thereby calls upon competent authorities to ensure that victims' right to reparation is "recognized in a consistent manner."¹⁰⁸

The aforementioned EC and EP recommendations parallel the accession criteria detailed in the ISP and SAA. In order to attain a future as part of the Union, BiH must

¹⁰⁰ European Commission, *2014 Bosnia Progress Report*, (October 2014) at pg. 14. Available at http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-bosnia-and-herzegovina-progress-report_en.pdf

¹⁰¹ *Id.*

¹⁰² European Commission, *2015 Bosnia Progress Report*, (November 2015) at pg. 25. Available at http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_bosnia_and_herzegovina.pdf

¹⁰³ *Id.*

¹⁰⁴ *Id.* at pg. 26.

¹⁰⁵ European Commission, *2016 Bosnia Progress Report*, (November 2016) at pg. 26. Available at https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_bosnia_and_herzegovina.pdf

¹⁰⁶ *Id.* at pg. 21.

¹⁰⁷ *Motion for a European Parliament Resolution on the 2016 Commission Report on Bosnia and Herzegovina*, (February 2017) at para. 20. Available at

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0037+0+DOC+XML+V0//EN>

¹⁰⁸ *Id.*



make access to justice for victims a priority going forward and, specifically, must provide legal counsel to war crimes victims seeking compensation before both state and entity level criminal courts. At the very least, BiH, as articulated in the EP resolution, must ensure that victims of wartime sexual violence receive the support they need to obtain compensation.

Conclusion

In recent years, BiH has made significant progress in regard to war crimes victims' participation in criminal proceedings. The state level law on free legal aid, passed in November 2016, codifies the right to legal assistance for war crimes victims pursuing compensation before criminal courts. At the entity level, RS and several cantons in FBiH have adopted legislation foreseeing free legal aid for indigent victims and, in certain cases, sexual violence victims. Proper implementation of these laws, however, has still not occurred, with the result that war crimes victims have yet to receive support under the state or entity regimes. Meanwhile, a number of cantonal jurisdictions have no free legal aid provisions in place, leaving victims without redress.

The dysfunction of extant legal aid systems violates BiH's international and regional obligations. BiH is party, for example, to foundational treaties such as European Convention on Human Rights, the UN Convention on Torture, the UN Convention on the Elimination of Discrimination Against Women, and the International Covenant on Civil and Political Rights, all of which require BiH to ensure that war crimes victims are able to access relevant remedies. As discussed throughout this paper, the complexity of legal procedures in BiH means that victims' right to compensation is illusory without legal assistance, thereby necessitating the establishment of institutionalized legal support.

In line with UN and ECHR standards, the most recent war crimes courts, deviating from the tradition of the ICTY and ICTR, have adopted victim-centric approaches. The International Criminal Court, for example, provides for the legal representation of victims, recognizing the necessity of such support in victims' pursuit of reparations. Tribunals such as the Extraordinary Chambers in the Courts of Cambodia and the Special Tribunal for Lebanon have likewise taken steps to strengthen victims' position in the proceedings. To honor these emerging norms, BiH should provide war crimes victims with the legal aid necessary to realize their reparative rights before criminal courts.



Looking forward, entry into the EU will, as articulated in the SAA and ISP, require competent authorities to improve victims' access to justice, including by instituting effective free legal aid. In turn, the European Commission's annual reports have repeatedly raised concerns about the shortcomings of BiH's legal aid system, further affirming that legal aid reform will be important for the accession process.

At a bare minimum, BiH must ensure that victims of wartime sexual violence receive free legal support. Given the unique economic, social, and psychological challenges faced by such victims, the international and regional mechanisms discussed above afford them heightened protection. Consequently, while all war crimes victims pursuing compensation are due free legal assistance, BiH must take special measures to facilitate sexual violence victims' access to reparations.

In sum, though developments at both the entity and state level are promising, there is much work to be done. 2017 is the year for BiH to fulfill its international and regional commitments and implement statewide free legal aid, enabling war crimes victims to obtain remedies that are long overdue.