

**Enforcement of damage compensation claims
of victims of war in criminal proceedings in Bosnia and Herzegovina
Situation, challenges and perspectives**



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Enforcement of damage compensation claims of victims of war crimes in criminal proceedings in Bosnia and Herzegovina – situation, challenges and perspectives

An important right that victims of war crimes have in compliance with the Code of Criminal Procedure of Bosnia and Herzegovina is the right to assert a property claim¹ against a person suspected or accused of having committed a criminal offence that violated or prejudiced a personal right of a victim, or as a result of which the victim was harmed, as well as the right that such a claim be decided on in compliance with requirements provided for by law. However, in practice there have been no publicly known cases when a victim of war crimes truly achieved to enforce his/her right to compensation of damages in criminal proceedings. The subject matter of this analysis is the *de iure* and *de facto* situation regarding the enforcement of property claims of victims of war crimes in Bosnia and Herzegovina, with a special focus on compensation of non-pecuniary damages and specific needs and problems of the particularly vulnerable category of victims of war-related sexual violence. The text also contains a review of international standards and comparative practices in relation to this issue, as well as an analysis of advantages and disadvantages of decision-making on compensation claims in criminal proceedings. The goal of the analysis is to encourage legal experts, and primarily the judiciary, to consider the improvement of the implementation of the existing legal framework, which would result in better respect for rights and needs of victims of war crimes. The relevant analysis does not negate the still burning need for improving the legislative framework and practice related to the enforcement of victims' right to compensation through other legal remedies – in civil proceedings and through collective administrative mechanisms that should through special laws ensure an equal access to compensation throughout Bosnia and Herzegovina.

¹ Both the term victim, a substantive law term, and term used in international documents on human rights protection, and the term injured party, a procedural law term used in the legislation of Bosnia and Herzegovina, will be used for purposes of this article. In addition to this, both the term compensation and redress will be used, both of which denote pecuniary indemnification for damage caused by the commission of a criminal offence. In this respect, compensation claim and damage compensation claim are terms that will be used together with the term property claim used in procedural law.

Enforcement of compensation claims in criminal proceedings and international standards

The right to reparation is affirmed by numerous provisions of international law, such as Article 8 of the Universal Declaration of Human Rights, Articles 2(3) and 9(5) of the International Covenant on Civil and Political Rights, Articles 5(5) and 13 of the European Convention on Human Rights, Article 14 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter: Convention against Torture) and Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination.² According to international standards, victims of human rights violations must be provided with full and effective reparation measures, which imply pecuniary compensation for pecuniary and non-pecuniary damages and other measures rendering possible restitution, rehabilitation, satisfaction, restoration of dignity and reputation and guarantees of non-repetition. Even when the perpetrator is a private person, the state is obliged to ensure remedies by which perpetrators or third parties responsible for their behavior will provide fair restitution to victims and their families, including a payment for damages and losses sustained. The right to a remedy in the context of compensation implies both the right to substantive pecuniary compensation and the obligation of the state to provide in its internal law a procedural remedy through which such compensation may be effectively obtained. The existence of a remedy in theory, put at the disposal of a victim, is thus not sufficient. A victim has to be able to exercise this right in practice, and compensation claims which the victim files should be decided upon.

Numerous documents of the Council of Europe recommend to its member states that victims in criminal proceedings should have the possibility to seek compensation, through simple procedures accessible to them, including also provision of necessary information, advice and legal aid. For example, the Guidelines on Eradicating Impunity for Serious Human Rights Violations of the Committee of Ministers of the Council of Europe provide that "states should take all appropriate measures to establish accessible and effective mechanisms that ensure that victims of serious human rights violations receive prompt and adequate reparation for the harm suffered."³ The recommendation made by the Committee of Ministers to member states on assistance to crime victims provides that states should introduce procedures through which

² See also: *UN Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*, adopted based on a resolution of the General Assembly, doc. 60/147, dated December 16, 2005, principles 15-23; Article 75 of the Rome Statute 1998 (Reparation to Victims); *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Articles 31 and 34; *Commentary to the Draft Articles on State Responsibility*, comment on Articles 28 and 33.; *Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, doc. A/HRC/4/33 dated January 15, 2007, paras. 61-66. Such a right is also affirmed in practice of international mechanisms ensuring an accurate implementation of such conventions. Please see a case submitted to the Committee for Elimination of Racial Discrimination in this regard, *B.J. v. Denmark*, Views of 10 May 2000, CERD/ C/56/D/17/1999, para. 6.2.

³ Council of Europe, Committee of Ministers, *Guidelines on Eradicating Impunity for Serious Human Rights Violations*, March 30, 2011, Section XVI.

victims will file compensation claims in criminal proceedings, as well as that they should be given advice and support in making such claims.⁴ The text of the Council of Europe Recommendation on the Position of the Victim in the Framework of Criminal Law and Procedure goes also in the same direction.⁵

In compliance with Article 14 of the Convention against Torture, which guarantees the right to enforcement of fair and adequate compensation for victims of torture, the procedural aspect of the obligation of availability of an effective legal remedy implies the establishment of suitable, primarily judicial institutions, such as criminal, civil, constitutional and special human rights courts, through which victims of torture will be able to obtain compensation.⁶ In its recently issued General Comment No. 3 on the implementation of Article 14 of the Convention against Torture, the UN Committee Against Torture underlined that states must ensure both *de iure* and *de facto* access to 'timely and effective redress mechanisms, and avoid measures that impede their ability to seek and obtain redress, and address formal and informal obstacles that victims may face in that process.⁷ It is important to underline that this requires considering gender-related and specific needs of a victim, with a special focus on victims of sexual violence.⁸ In this context, it is necessary to comply with gender sensitive procedures in trials and prevent discriminating evidence material or harassment of victims and witnesses, which will ensure overall prevention of their re-victimization and stigmatization.⁹ In the context of enforcement of the right to compensation, the obligation of the state to ensure provision of adequate information to victims and their families about the right to obtain compensation, to address financial obstacles and provide assistance and support in obtaining this right, including also legal aid to victims with insufficient resources, are also emphasized.¹⁰ It is important to stress that in the context of enforcement of the rights from Article 14 of the Convention against Torture, the state is also requested to take measures for preventing interference with victims' privacy, and ensuring protection of victims, their families and witnesses from intimidation and retaliation at any moment before, during and after judicial or other proceedings related to their interests and rights because "the failure to provide stands in the way of victims filing complaints and thereby violates the right to seek and obtain redress and remedy".¹¹

4 Council of Europe, *Recommendation of the Committee of Ministers to Member States on Assistance to Crime Victims*, Rec(2006)8, June 14, 2006, para. 7.2.

5 Council of Europe, *Recommendation (1985)11 of the Committee of Ministers to Member States on the Position of the Victim in the Framework of Criminal Law and Procedure*, June 28, 1985, paras. 9 and 10.

6 *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, doc. A/HRC/4/33, January 15, 2007, para. 63.

7 *Committee against Torture (CAT), General Comment No. 3*, doc. CAT/C/GC/3, November 16, 2012, para. 39.

8 *Ibid.*, paras. 6, 33 and 39.

9 *Ibid.*, para. 33.

10 *Ibid.*, paras. 29 and 30.

11 *Ibid.*, para. 31. In this respect, please see also UN General Assembly, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, doc. A/RES/40/34, November 29, 1985, para. 6(e).

In case of Bosnia and Herzegovina, the most important convention – the European Convention on Human Rights Protection¹² provides for the relevant right of victims in its Article 5(5) in relation to unlawful detention, but also in Article 13 that guarantees the right to an effective remedy in order to realize the essence of Convention rights. According to the interpretation of the European Court for Human Rights, the effectiveness of a remedy implies the requirement that a remedy provided for by law is also effective in practice, and especially that its enforcement is not unjustifiably prevented by actions or omissions of the government of a state.¹³ In addition to this, the European Court established that when a national legal system provides for a remedy that renders possible the claiming of compensation in criminal proceedings, such a remedy constitutes a civil right as set forth in Article 6 of the European Convention, so that such a procedure has also to comply with the fair trial requirements as specified by those provisions.¹⁴ This results in, among other, the implication that a state is obliged to provide free legal aid to poor citizens, if such aid is needed for an effective access to court and fair trial, for the purpose of ensuring the right to access to court set forth in Article 6(1) of the Convention.¹⁵ If legal aid is not available, requirements set forth in Article 6(1) may be considered as met if an effective access to court has been ensured in another way, e.g. by simplifying procedures applicable to obtaining a certain right.¹⁶ In the context of the rights of victims of war rape, to which applies Article 3 of the European Convention that prohibits inhuman or degrading treatment and torture, it is also important to stress that applicants should not be subject to an excessive burden of proof in compensation procedures, but that they should rather be enabled to submit only some *prima facie* evidence on inhuman treatment, such as a detailed account of conditions of detention or witness statements.¹⁷

As regards the law of the European Union, which is relevant for the state of Bosnia and Herzegovina in the context of its integration process, it also provides very useful guidelines for the full respect victims' rights in criminal proceedings. The EU Directive Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime dated October 25, 2012 provides that EU Member States should ensure that victims have the possibility in the course of criminal proceedings to obtain a decision on compensation by the perpetrator, within a reasonable time, and that they have access to legal aid.¹⁸

It mentions an exemption in case that national legislation provides that such a decision is made in other legal proceedings, which is motivated by the wish to respect different legal cultures in the European Union,

12 According to the Constitution of Bosnia and Herzegovina, Article II (2.), this Convention is directly applicable in the national legal system and has primacy over other law.

13 In this respect, please see European Court of Human Rights (ECtHR), *El-Masri v. Former Yugoslav Republic of Macedonia*, December 13, 2002, para. 255.

14 ECtHR, *Tomasi v. France*, August 27, 1992, paras. 121-122.

15 ECtHR, *Airey v. Ireland*, October 9, 1979, para. 26.

16 *Ibid.*

17 ECtHR, *Ananayev and Others v. Russia*, January 10, 2012, para. 228.

18 Articles 13 and 16.

including also such Member States that do not provide for such a possibility in criminal proceedings. This is, however, not applicable to the context of Bosnia and Herzegovina given the fact that its Criminal Procedure Code primarily provides for the adoption of a decision on property claims in criminal proceedings, with the possibility to refer an injured party with such a claim to subsequent civil proceedings, under conditions defined by law. The document of the European Commission containing guidelines for the implementation of this EU Directive, adopted in December 2013, invites Member States to specify in their national legislation how and under which conditions victims may receive compensation from perpetrators and to simplify national procedures for seeking compensation.¹⁹ It is underlined that, since compensation is supposed to assist a victim in his/her recovery process, it is important to ensure its availability as soon as possible.²⁰ For this reason, as stated, legal procedures should ensure that a decision on compensation is reached within a reasonable time in criminal proceedings.²¹ In this respect, when it comes to compensation matters, the application of adhesion procedures is encouraged instead of referring the victims to instigate separate civil proceedings, in case of which victims bear the burden of proof and payment of court fees.²²

The ability of courts in criminal proceedings to order perpetrators to pay compensations to their victims and the need for informing victims about their rights, are also in the spirit of good practices recognized in several non-binding, but not less important international declarations, including UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law²³, the Updated Set of UN Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity²⁴, as well as the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power²⁵. The last mentioned declaration provides, among others, that it is necessary to establish and strengthen judicial mechanisms that will enable victims to obtain compensation through formal or informal procedures that are expeditious, fair, accessible and inexpensive, and that states should review their laws and practices in order to consider compensation as a potential sentencing option in criminal proceedings, in addition to other criminal sanctions.²⁶ As regards the enforcement of the right of victims to compensation in criminal proceedings, states are also required

¹⁹ European Commission, *DG Justice Guidance document related to the transposition and implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA*, December 19, 2013, para. 55.

²⁰ *Ibid.*, para. 56.

²¹ *Ibid.*

²² *Ibid.*

²³ UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*, doc. 60/147, December 16, 2005, Principles 12(d), 13, 15-24.

²⁴ UN Commission on Human Rights, *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*, E/CN.4/2005/102/Add.1, February 8, 2005, Principles 31-34.

²⁵ UN General Assembly, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, doc. A/RES/40/34, November 29, 1985, Annex, paras. 5, 6, 8 and 9.

²⁶ *Ibid.*, paras. 5 and 9.

to provide legal aid for them, as provided, for instance, by United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.²⁷

The right of injured parties to enforce property claims before the Court of Bosnia and Herzegovina – basic principles of the national legal framework²⁸

According to the Criminal Procedure Code of Bosnia and Herzegovina (CPC of B&H)²⁹, a property claim may be related to pecuniary or non-pecuniary damages resulting from a criminal offence. Injured parties may file a petition to pursue a property claim (hereinafter: petition) with the prosecutor or the court (Article 195 (1) of CPC of Bosnia and Herzegovina). When examined as witnesses, they have to be asked whether they wish to file a property claim (Article 86 (10) and 258(4) of CPC of B&H). This is applicable to statements made during investigations, as well as to giving testimony during trials. The primary obligation thus rests upon a prosecutor, whereas a court may meet this obligation in a subsidiary manner. An injured party may submit a petition to pursue a claim no later than the completion of the main trial, or sentencing hearing (Article 195(2) of CPC of B&H).

The Law provides that injured parties filing a petition to pursue a claim have to state their claim specifically and submit evidence (Article 195 (3) of CPC of B&H), which happens rarely given the lack of adequate information about this possibility and/or lack of legal support provided to injured parties that would help them in this respect. Since the quantification and proving of a claim may also imply, among others, an expert evaluation about physical and psychological consequences, even when victims of war crimes, who often face financial difficulties, do possess information about this possibility, obtaining findings and opinions of psychiatric expert witnesses would constitute a significant obstacle, which has a deterring impact on the exercise of this right. The legal procedural obligations put before prosecutors are therefore extremely important: to collect evidence that is relevant for the property claim of an injured party or to establish facts needed for decision making on such a claim (Article 35 (2) (g) and 197 (1) of CPC of B&H). In such a way, a prosecutor has within his/her legal powers the possibility, even during an investigation, to ensure unhindered proving of the amount of a property claim of an injured party.

If a petition is filed, the court must rule on it in its judgment. In a judgment pronouncing an accused guilty, the court may award an injured party the entire claim or part of the claim and may refer him/her to a

²⁷ UN General Assembly, *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, December 20, 2012, Guideline 7, para. 48 (c).

²⁸ These principles are also analogously applied before entity courts. Legal regulations are almost identical.

²⁹ Official Gazette of Bosnia and Herzegovina, No. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09.

civil action for the remainder (Article 198 (2) of CPC of B&H). If the data from criminal proceedings do not provide a reliable basis for either a complete or partial award, the court will instruct the injured party that he/she may take civil action to pursue his/her entire claim (Article 198 (2) of CPC of B&H). The court may also refuse to examine a claim, if this would considerably prolong criminal proceedings (Article 193 (1) of CPC of B&H). In addition to this, the court, may propose the injured party and the accused, or his/her defense, to conduct a mediation procedure through a mediator in compliance with law, if it is assessed that the property claim may be settled through mediation (Article 198 (1) of CPC of B&H).

With regards to the responsibilities of the court in the process of decision-making on a property claim filed, as being one of the secondary issues of criminal proceedings, it is important to also stress the obligation of the court, i.e. the president of the panel, to ensure that all issues are examined in a full and comprehensive manner. (Article 164 (2) of CPC of B&H).

Finally, it should be mentioned that injured parties also have to be given a possibility to present their closing arguments (Article 277(1) of CPC of B&H) during which they may, among others, pronounce themselves on the property claim, i.e. the harm they suffered, and they have the right to appeal against the judgment with respect to the decision on the property claim (Article 293(4) of CPC of B&H).

The problem of non-implementation of the existing legal framework in practice and its implications for victims of war crimes

An analysis of comparative practice points out different roles that victims of crimes have in criminal law systems, and, in relation to this, a different scope of rights they have been granted. It is thus possible to identify three basic models of their participation in criminal proceedings³⁰, which frequently also overlap: bringing the position of a victim down to the role of a witness³¹, providing a possibility for and focusing on provision of compensation by the sentenced perpetrator³², and the status of victims as holders of rights and active participants in proceedings³³.

As a result of a reform of the Criminal Procedure Code in 2003, the position of victims in criminal

30 For a detailed description of different roles that victims have in criminal proceedings throughout the European Union, please see: European Union Agency for Fundamental Rights, *Victims of Crime in the EU: the Extent and Nature of Support for Victims* (Luxembourg: Publications Office of the European Union, 2014), especially pages 28-31.

31 So for example in Ireland and the United Kingdom.

32 A typical example for this is France.

33 See for example the role of *Nebenkläger* in Germany.

proceedings has been significantly weakened in Bosnia and Herzegovina.³⁴ Although the right to the obtain compensation from the person convicted for committing a criminal offence was maintained, when it comes to non-pecuniary damages, these provisions are *de facto* extremely rarely applied, so that the position of an injured party is in practice reduced to the role of a witness.

Although the Criminal Procedure Code of Bosnia and Herzegovina provides for a detailed legal framework for the exercising of rights of victims, including victims of war crimes, to compensation for the harm they suffered, in practice there have been no known cases of decision making on property claims filed by such persons, which is subject to constant criticism by representatives of victims and organizations engaging in their protection.³⁵ Also, when it comes to the wider group of victims of criminal offences, there is only a small number of judgments that include decision making on a submitted property claim that relates to non-pecuniary damages³⁶, as well as examples of property claim agreements as part of guilty plea agreements.³⁷

Courts generally only shortly instruct an injured party to file a property claim in civil proceedings, explaining that the reason for this is the fact that that decision-making on the claim would prolong proceedings³⁸, that a claim is lacking specificity in terms of grounds and extent of damage³⁹ or that it is not substantiated, or that data of criminal proceedings do not constitute a reliable basis for full or partial award⁴⁰. As regards the last conclusion, sometimes it is also explained that a person failed to submit evidence along with the

34 For a detailed analysis of the position of an injured party in the Criminal Procedure Code of Bosnia and Herzegovina, please see: Ljiljana Filipović, *Položaj oštećenog u krivičnom postupku (Position of an Injured Party in Criminal Proceedings)*, in: *Pravo i pravda*, year 8, issue 1., Sarajevo, 2009, pages 295-329.

35 In this context, see please, among other, the General Allegation "*Situation of Women Victims of Rape or Other Forms of Sexual Violence*", which was submitted by TRIAL in coalition with other NGOs and associations of victims to the Special Rapporteur on Violence against Women, its Causes and Consequences in May 2011, paras. 66-72. Available at: http://www.trial-ch.org/fileadmin/user_upload/documents/CAJ/BH/GeneralAllegationSRViolenceAgainstWomen_-_May_2011.pdf

36 So, for example, in the judgment of the Cantonal Court in Zenica, No. 04 0 K 001647 10 K dated October 8, 2010, it is stated that the injured party filed a property claim amounting to 2,000.00 KM, that the accused "did not particularly contest the amount of the property claim filed", due to which the court awarded the full claim for the pain and fear sustained. The evidence presented during the evidence hearing includes, among other, testimony of the injured party as a witness and medical documentation on injuries of the injured party. However, this judgment was subsequently reversed in the part related to the property claim so that the injured party was after all referred to civil proceedings (Judgment of the Supreme Court of the Federation of Bosnia and Herzegovina, No. 04 0 K 001647 10 Kž dated April 20, 2011). In the reasoning of the judgment, it was determined that the Cantonal Court stated that the accused did not contest the amount of the property claim filed, but that the claim was not specific and that no evidence was presented in relation to this claim, due to which, in the opinion of the Supreme Court, the criteria set forth in Article 212, Paragraph 3 of CPC of FB&H had not been met.

37 See the judgment of the Cantonal Court in Tuzla, No. 03 0 K 004755 10 K dated November 30, 2010

38 For example, in the trial against Trbić Milorad before the Court of Bosnia and Herzegovina. For detailed information please see: Nuhanović Foundation – Center for War Reparations, *War Reparations and Litigation: the Case of Bosnia*, (Amsterdam: Nuhanović Foundation, 2014), pages 12-13, available at: <http://www.nuhanovicfoundation.org/user/file/bosnia-report-digi.pdf>.

39 Judgment of the Supreme Court of Republika Srpska, No. 118-0-Kžk-09-000 002, dated March 18, 2009

40 Judgment of the Supreme Court of Republika Srpska, No. 118-0-Kžž-07-000 004, dated June 8, 2010; Judgment of the Court of Bosnia and Herzegovina, No. S1 1 K 004648 11 KRI (X-KR-05/111) dated November 9, 2011

claim in order to render possible decision-making on the property claim.⁴¹

Such a situation was qualified as problematic by international mechanisms for human rights protection. The UN Special Rapporteur on Violence against Women, its Causes and Consequences, Rashida Manjoo, pointed out, in her report on her mission to Bosnia and Herzegovina from June 2013, amongst others, to the problem of inability of victims of war rape to enforce their right to financial compensation in criminal proceedings.⁴² She explained that victims are referred to initiate separate civil proceedings, which is too expensive for them due to a difficult economic situation they face as a result of the fact that judges and prosecutors claim that this would delay criminal proceedings.⁴³ The Special Rapporteur thus recommended that "courts should ensure rights of women to make any financial compensation claims during criminal proceedings".⁴⁴

This problem was also recognized as such in national expert writings⁴⁵, and also by international organizations⁴⁶, including also those monitoring trials in the field⁴⁷. This is also regularly discussed during public events attended by persons representing the interests and acting on behalf of victims⁴⁸, and sometimes also in the media⁴⁹. However, in spite of this, it has not been discussed in more depth in the judiciary itself. This issue is given rather marginal importance.⁵⁰

What is mentioned as the cause of this problem is primarily the judiciary practice, i.e. failure of prosecutor's offices and courts to meet their obligations prescribed by law.⁵¹ In this respect, particular focus is placed

41 Judgment of the Supreme Court of Republika Srpska, No. 118-0-Kžk-09-000 009, dated February 18, 2010

42 Human Rights Council, *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences*, doc. A/HRC/23/49/Add.3, June 4, 2013, para. 94.

43 Ibid.

44 *Ibid.*, para. 105.(i).

45 Filipović, *Položaj oštećenog u krivičnom postupku (Position of an Injured Party in Criminal Proceedings)*, op.cit., pages 322-327; Amra Mehmedić and Midhat Izmirlija, *Pravo na kompenzaciju žrtvama krivičnih djela sa elementima nasilja (Right to Compensation for Victims of Criminal Offences with Elements of Crime)*, in: *Ljudska prava i pravosuđe u Bosni i Hercegovini (Human Rights and Judiciary in Bosnia and Herzegovina)*, (Sarajevo: Association for Democratic Initiatives/Human Rights Center in Sarajevo, on behalf of Mreža pravde in Bosnia and Herzegovina, 2013), available at http://mrezapravde.ba/mpbh/mpbh_files/file/mp-publikacije/7%20-%20Human%20Rights%20and%20Judiciary%202012-2013.pdf (website visited on February 4, 2015), pages 75-85.

46 Nuhanović Foundation, *War Reparations and Litigation: the Case of Bosnia*, op.cit., pages 12-13.

47 OSCE B&H, *Reasoning in War Crimes Judgments in Bosnia and Herzegovina: Challenges and Good Practices*, 2009, Sarajevo, pages 24-25, available at http://www.oscebih.org/documents/osce_bih_doc_2010122314244699ser.pdf (website visited on January 15, 2015).

48 A special round table discussion entitled "*Enforcement of Property Claims of Victims of War-Related Crimes – Problems and Perspectives*" was organized by TRIAL in Sarajevo on September 22, 2014.

49 Please see, for example, *Oslobođenje*, August 2, 2013, "*Svjedoci suđenja za ratne zločine: žrtve bez naknade*" (Witnesses in War Crimes Trials: Victims without Compensation)

50 As regards, for example, official training programs for judges and prosecutors, there are no known cases of special sessions being organized specifically on this issue.

51 Filipović, *Položaj oštećenog u krivičnom postupku (Position of an Injured Party in Criminal Proceedings)*, op.cit., pages 325-327;

on the fact that instead of formally informing injured parties about their right to file a property claim, it is rather necessary to "truly inform them by giving them instructions and explaining the content of such right in a manner that would be understood by the respective injured party"⁵², i.e. provision of a comprehensive instruction based on the general legal provision on instruction of rights⁵³. Although, the fact that "chief prosecutors issued orders to prosecutors to distribute property claim forms made by the Mission (OSCE Mission to B&H) and discuss filing of such claims with every potential claimant"⁵⁴, was recognized as positive progress, experiences of victims over the past years show that this is not being implemented in practice⁵⁵.

What is furthermore criticized is the fact that prosecutors neglect the obligation to gather evidence needed for decision-making on a petition⁵⁶, but also that courts and prosecutors⁵⁷ automatically instruct injured parties to initiate separate civil proceedings for claiming compensation. During a round table discussion about the enforcement of property claims by victims of crimes perpetrated during the war, which was organized in September 2014 by TRIAL, a judge of the Court of Bosnia and Herzegovina pointed out that during the main trial they are only informed about evidence presented by parties in the proceedings, but that they have never received a property claim during proceedings in any of more than

Mehmedić and Izmirlija, *Pravo na kompenzaciju žrtvama krivičnih djela sa elementima nasilja (Right to Compensation for Victims of Criminal Offences with Elements of Crime)*, op.cit., pages 79-80.; OSCE B&H, *Reasoning in War Crimes Judgments*, op.cit., page 24.: The problem of lack of clarity and incompleteness of provisions of the Criminal Procedure Code regulating this matter are also underlined. In this context, please see A.Dautbegović, N.Pivić, *Položaj oštećenog u krivičnom postupku BiH (Position of an Injured Party in Criminal Proceedings in Bosnia and Herzegovina)*, page 15, in: *The Annals of the Faculty of Law of the University of Zenica*, available at: <http://www.prf.unze.ba/docs/anali/01%20Dautbegovic%20Pivic.pdf> (website visited on January 8, 2015).

52 Mehmedić and Izmirlija, *Pravo na kompenzaciju žrtvama krivičnih djela sa elementima nasilja (Right to Compensation for Victims of Criminal Offences with Elements of Crime)*, op.cit., page 80. In the OSCE report it is stated that observers monitoring court proceedings have noticed that injured parties frequently did not understand the question of the panel of the Court of Bosnia and Herzegovina on whether they wish to file a property claim, without additional efforts to explain this issue to them. OSCE B&H, *Reasoning in War Crimes Judgments*, op.cit., page 21.

53 Filipović, *Položaj oštećenog u krivičnom postupku (Position of an Injured Party in Criminal Proceedings)*, op.cit., pages 324-325. In the context of CPC of B&H, that is Article 12.

54 OSCE B&H, *The Processing of ICTY Rule 11bis Cases in Bosnia and Herzegovina: Reflections on Findings from Five Years of OSCE Monitoring*, Sarajevo, 2010, pages 22-23, available at http://www.oscebih.org/documents/osce_bih_doc_2010122314321282ser.pdf (website visited on January 25, 2015)

55 In this context, Bakira Hasečić, the President of the Association "Žena žrtva rata", while speaking during a round table discussion organized in September 2014 by TRIAL in relation to this issue, said that nobody at prosecutor's offices and courts gave victims as injured parties the brochure on the rights of victims and witnesses and the property claim form, and that victims were even told not to fill it out. On this occasion, Vania Lorenzo, an independent researcher, also confirmed that the brochure was not reaching the target group.

56 OSCE B&H, *Reasoning in War Crimes Judgments*, op.cit., pages 21-22; Filipović, *Položaj oštećenog u krivičnom postupku (Position of an Injured Party in Criminal Proceedings)*, op.cit., pages 325-326.

57 As part of its work related to fighting against impunity in cases of war-related sexual violence crimes, TRIAL had, for example, an opportunity to accompany a victim to her first meeting with the prosecutor acting in her case, who, after being asked a self-initiated question by the victim on whether she was entitled to obtain damage compensation, answered that this was part of different proceedings that follow after criminal proceedings.

300 cases processed so far.⁵⁸ There may be a number of reasons for this, such as lack of awareness of this issue, lack of time and of specified internal organizational priorities for the resolution of this issue, and lack of knowledge of some prosecutors⁵⁹. It is of particular importance to raise awareness of this aspect of the problem, given that the enforcement of the right of an injured party to be granted compensation in criminal proceedings largely depends on the efforts of a prosecutor to meet his/her legal obligations⁶⁰.

As regards the role of court itself, it is important to keep in mind the legal obligation of courts to ensure comprehensive and full examination of the subject matter of criminal proceedings, including also property claims. When it comes to criminal proceedings, not just in relation to war crimes, it is being stressed how practice has shown that the enforcement of the right of an injured party to compensation considerably depends on "(...) the willingness of the court to make additional efforts in order to award a property claim to an injured party, in full or in part, as part of the judgment by which the accused is proclaimed guilty. Unfortunately, it frequently occurs that the court does not award a property claim to an injured party even in cases when it does not require any additional efforts."⁶¹As stated, this occurs even in cases when the "damage suffered by an injured party as a result of a criminal offence is an element of the criminal offence and as such established in the judgment or although the injured party submitted evidence on other forms of damage he/she suffered as a result of the criminal offence in criminal proceedings that was not contested by anyone"⁶². In addition to this, as regards practices of courts, particular criticism is related to the use of a standard explanation in judgments that deciding on such a claim would prolong criminal proceedings. Attention is drawn to the fact that according to legal provisions, only an expected considerable prolongation, and not any prolongation of proceedings constitutes a valid reason for the court not to examine a property claim in criminal proceedings.⁶³ This is also criticized in the context of processing of war crimes. In a report by OSCE to B&H it is stressed that such reasoning is insufficient, which is "especially true in more straightforward war crimes cases, or when the injured parties have endeavored to make their claims more concrete and substantiated"⁶⁴. As specified further, "... when one considers the length of time that criminal proceedings take for the presentation of evidence regarding the

58 Judge, Court of Bosnia and Herzegovina, Minka Kreho, Round table "Enforcement of Property Claims of Victims of War-Related Crimes – Problems and Perspectives", TRIAL, Sarajevo, September 22, 2014. The judge probably had in mind a claim substantiated by evidence that would be presented by the prosecutor himself/herself, since injured parties themselves have filed petitions to pursue property claims in the past.

59 In its work with victims giving testimony before the Court of Bosnia and Herzegovina, TRIAL staff has noticed a certain lack of knowledge of some prosecutors regarding the manner in which they should act in case when a property claim is filed. So for example, in a meeting related to a case, which was attended by one of TRIAL's legal advisers, in response to an injured party's expressed wish to have a property claim filed, the prosecutor admitted that he did not know how that could be done and that he had to ask someone.

60 In this context, please see Filipović, *Položaj oštećenog u krivičnom postupku (Position of an Injured Party in Criminal Proceedings)*, op.cit., page 326.

61 *Ibid.*

62 *Ibid.*

63 *Ibid.*

64 OSCE B&H, *Reasoning in War Crimes Judgments*, op.cit., page 25.

charges, it can be estimated that deciding on compensation would only take a fraction of that time."⁶⁵ In the period following the publication of this report by OSCE, there has been a change regarding the use of court reasoning related to the grounds for referring a party to civil proceedings from the previously used argument of prolongation of criminal proceedings to the argument of unspecific and unsubstantiated claims that are presented.⁶⁶

A particularly alarming problem is the practice of some court panels regarding the exercise of rights of injured parties under the Criminal Procedure Code, including an instance of connecting the truthfulness of a testimony of a female witness-victim of war-related rape with the fact that she failed to file a property claim.⁶⁷ By doing so, they imply that, in a contrary situation, claiming compensation in criminal proceedings might be understood as a factor that reduces the credibility of a witness due to the personal interpretation of judges that something like that points to the existence of other motives, stronger than those to give testimony and establish the criminal responsibility of the accused. In doing so, they fully neglect the fact that the right to compensation, in addition to being a legally recognized right of injured parties, is also one of fundamental and legitimate, internationally recognized human rights important for the rehabilitation of most victims, although it is also clear that a pecuniary compensation for damage suffered is a symbolic minimum that will never have the potential of full redress for the tragedy of women who were victims of rapes committed during the war. Such an attitude reflects insufficient awareness and knowledge of fundamental rights and needs of victims, and maybe partly even a general stigmatization of victims, which is unfortunately still present in the society of Bosnia and Herzegovina. If the law provided for a possibility to submit a property claim in criminal proceedings as a right of an injured party, than the use of such a possibility should not be understood as a factor that might adversely affect the evaluation of credibility of a witness testimony, especially when it comes to victims of war-related rapes.

Such a prevailing practice of government authorities of Bosnia and Herzegovina results in a prolonged victimization and re-traumatization of victims and it strips them of their right to enforce their right to compensation through expeditious, fair, simple, accessible and inexpensive procedures. It is true that the state provided victims with a remedy through which a perpetrator may compensate a victim for the

65 *Ibid.*

66 Mehmedić and Izmirlija, *Pravo na kompenzaciju žrtvama krivičnih djela sa elementima nasilja (Right to Compensation for Victims of Criminal Offences with Elements of Crime)*, op. cit., page 80.

67 As stated in the judgment: "The truthfulness of her statement and the intention to testify is sufficiently supported by the fact that during proceedings she did not file a property claim or requested any material compensation for the tragedy she suffered, which only proves the honesty of the witness." *Judgment of the Court of Bosnia and Herzegovina, No. S1 1 K 004648 11 KRI (X-KR-05/111) dated November 9, 2011, para. 230, quoted in Mehmedić and Izmirlija, Pravo na kompenzaciju žrtvama krivičnih djela sa elementima nasilja (Right to Compensation for Victims of Criminal Offences with Elements of Crime)*, op.cit., page 81. In this judgment, Saša Barićanin was sentenced to 18 years of prison for committing crimes against humanity – killing, enslavement and rape.

damage it suffered. However, this remedy, although it exists in theory, has not been applied in practice so far, which makes it ineffective and somewhat illusory at this moment for an average victim of war crimes, who does not have any expert knowledge and financial means. In this regard, its enforcement is unjustifiably made impossible as a result of omissions of government authorities, because they still have not ensured a consistent implementation of the relevant legal provisions in relation to this issue and they failed to remove the obstacles faced by victims in this process, which is particularly applicable when it comes to victims of war-related sexual violence. This calls in question the implementation of obligations assumed by the state of Bosnia and Herzegovina in relation to compliance with international standards of human rights protection elaborated on in the first part of the analysis.

A particularly worrisome, separate problem that occurred in practice as a consequence of the impossibility to enforce the right to damage compensation in criminal proceedings is the inability of victims that testified under protection to enforce their right to compensation without putting their personal safety or the safety of their family at risk. The Law on Protection of Witnesses under Threat and Vulnerable Witnesses of Bosnia and Herzegovina⁶⁸ provides for measures ensuring protection of witnesses under threat, vulnerable witnesses and the special category of protected witnesses in criminal proceedings before the Court of Bosnia and Herzegovina. This law provides that even after the completion of proceedings personal data of a witness are kept secret as long as this is considered necessary, the maximum period being 30 years after entry into force of such a decision.⁶⁹ Disclosure of data on the identity of protected witnesses in this period constitutes a criminal offence.⁷⁰ However, problems occur in practice when a protected witness is instructed to initiate civil proceedings in order to enforce his/her property claim and obtain compensation, and is thus forced to disclose his/her identity in such subsequently initiated proceedings. Neither civil procedural law nor the applicable legislation related to witness protection in criminal proceedings provide clear guarantees for protection of identity of this category of victims, which prevents them from effectively enforcing their claims for damage compensations in practice.

The organization TRIAL BiH was, for example, reported a case of a woman who was raped in war and was given the status of a protected witness in criminal proceedings before the Court of B&H at the end of which the accused was found guilty of the crime perpetrated against her, and who subsequently brought action before the Municipal Court in Sarajevo for obtaining damage compensation. In the action itself, the plaintiff was addressed by using a pseudonym that she was granted based on a decision of the Court of B&H. The attorney-lawyer of the plaintiff that established her identity contacted the Court of B&H by phone in 2014 in order to obtain that decision. On that occasion he was informed that such data would be provided only at the request of the judge leading the proceedings for damage compensation. As a result,

68 Official Gazette of Bosnia and Herzegovina, No. 3/03, 21/03, 61/04, 55/05.

69 Article 13, Paragraph 1 of the Law.

70 Article 24 of the *Law on Witness Protection and Article 240 of the Criminal Code of Bosnia and Herzegovina*.

in the action itself it was proposed that the acting judge of the Municipal Court should request the Court of B&H to submit the needed data – the decision on granting the status of a protected witness – as part of the preparation of the hearing, and to invite the plaintiff before scheduling a preparatory hearing through the attorney for the purpose of verification of these data. However, the Municipal Court in Sarajevo has not accepted this solution, and it returned the action to be corrected and completed.⁷¹ Since the Court has not recognized the category of protected witness as a party to civil proceedings, based on the belief that she does not meet the requirements provided for by the Law on Civil Proceedings of the Federation of Bosnia and Herzegovina, and as the attorney was not authorized to disclose the name and last name of the plaintiff at his own initiative, the plaintiff was forced to find another solution with her attorney. A solution they found was that the plaintiff made a statement before a notary public, declaring that she renounces the status of a protected witness, and by doing so, she put her personal safety and the safety of her family at risk.

Following a request for an official statement from the Court of Bosnia and Herzegovina in relation to this issue by the Association "Women – War Victims" in May 2014, in a letter by the Court of B&H it was explained that the problem might be overcome in such a manner that a "witness would submit a request for a change of previously ordered protection measures, so that for the purposes of proceedings conducted in relation to a property claim, the previously ordered measures would be changed."⁷² The letter furthermore states that the protection measures would remain in force, but the participants in civil proceedings would become aware of the identity of the protected witness, and they might be subject to criminal sanctions if they disclosed his/her identity to a third party. Although a certain solution for resolving this situation was provided in such a manner, the letter does not refer to a specific legal provision as the legal basis for such action. In any case, the above example points to the danger that such a legal gap constitutes, with insufficient awareness and knowledge of the most adequate manner to act in such situations, both from the side of injured parties that give testimony as protected witnesses as well as various courts throughout Bosnia and Herzegovina. In this context, during the round table discussion on the enforcement of property claims in criminal proceedings organized by TRIAL in September 2014, some participants, representatives of the judiciary, outlined that there was also another specific problem regarding the content of the decision that is adopted and the manner in which such a judgment would be reasoned. Such an unresolved situation deprives of their essence the existing legal provisions on witness protection, and

71 In its reasoning in relation to the case, the court pointed out the following: "During preliminary examination of action in compliance with provisions of Article 66 of the Civil Procedure Code, this court established that it was incomplete, since the plaintiff is not specified in compliance with provisions of Article 334, Paragraph 2 of the Civil Procedure Code, which provide that petitions to the court have to be understandable and have to contain everything that is needed so that actions can be taken in relation to them. They particularly have to contain the name of the court, name and last name of the person or name of legal person, place of residence or stay, or seat of parties, their legal representatives and attorneys, if applicable, subject matter of the dispute, content of the statement and signature of the person submitting it. The Court is also of the opinion that the appointed attorney of the plaintiff in this legal matter failed to submit an orderly power of attorney for representation of the client".

72 Court of Bosnia and Herzegovina, letter No. Su-10-117/14, dated May 8, 2014

it eventually results in legal uncertainty and serious violation of the right of a victim to access an effective remedy for the suffered violations and compensation, to his/her re-victimization and re-traumatization. The existing legal gap is, i.a., problematic also in terms of implementation of the obligation of the state to prevent violations of privacy and protection of victims, witnesses and their families after completion of criminal proceedings, in compliance with Article 14 of the Convention against, since victims are as a result prevented from filing reports and claims.⁷³

If we analyze the overall situation related to the inability of victims of war crimes to enforce property claims in criminal proceedings, it is certainly necessary to bear in mind that part of the problem also lies in the fact that victims frequently failed to file substantiated claims for damage compensation in such proceedings, including a specified amount and grounds for compensation. However, there is an explanation to this. They, on the one hand, are frequently not informed at all or are insufficiently informed by competent authorities about their rights and the manner in which they may obtain it, and/or they do not have sufficient financial means to pay for a professional who would represent their interests in relation to the property claim, while, at the same time, the state failed to provide them with free legal aid. If we compare such a situation to the fact that persons charged with committing the most horrendous crimes are entitled to legal aid, i.e. ex officio defense lawyers, victims are additionally frustrated in their efforts to enforce their fundamental rights.⁷⁴ Ultimately, not even the lack of legal aid does necessarily have to be an obstacle for enforcing a property claim. However, this is conditioned by the fact that at the same time, sufficient commitment of the prosecutor to this issue is ensured, as well as an active role of the prosecutor in implementing his/her legal obligation to gather evidence and establish facts relevant for property claims of injured parties. Insufficient information provided to victims, lack of legal aid, with a simultaneous lack of simplification of procedures for effective enforcement of compensation claims, and a passive role of the prosecutor in implementing his/her obligations, however, jointly point to the conclusion that the state, by failing to act, made ineffective the remedy which it put at the disposal of victims in theory, and it thus endangered their fundamental rights.

In addition to the aspect of violation of human rights of victims to which the current situation in Bosnia and Herzegovina in relation to this issue is leading, it may also be seen as problematic in terms of lack of legal certainty, as one of the key elements of the rule of law in a certain state, and an important pre-requisite for the trust of citizens in the judicial system.⁷⁵ Legal certainty requires, i.a. that judicial authorities comply

⁷³ CAT, General Comment No. 3, doc. CAT/C/GC/3, November 16, 2012, para. 31. In this sense, please see also UN General Assembly, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, op.cit., para. 6(d), and Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, op.cit., Principle 12(b).

⁷⁴ In this sense, please see the statement of Hasečić Bakira, President of the Association "Žena žrtva rata" published in: Oslobođenje, August 2, 2013, „Svjedoci suđenja za ratne zločine: žrtve bez naknade“ (Witnesses in War Crimes Trials: Victims without Compensation).

⁷⁵ ECtHR, *Zasurtsev v. Russia*, April 27, 2006, para. 48.

with this principle when applying the legislation in force to specific cases and when interpreting legal provisions.⁷⁶ In this context, it is particularly required that once adopted laws are applied in a consistent manner and that their effects are predictable for citizens that they relate to.⁷⁷ This practice is problematic also in terms of complying with the related principle of legality that provides that the legislation in force should be enforced to the extent possible.⁷⁸ Both legal certainty and the principle of legality provide that laws are implemented and are implementable in practice. It is thus very important to conduct an evaluation both before and after the adoption of a certain law on whether it is effectively applicable in practice⁷⁹ in order to ensure the respect for the rule of law and to assess measures that need to be taken to address problems occurring in relation to this.

Advantages and disadvantages of ruling on compensation claims in criminal proceedings

The idea that victims have the possibility to obtain compensation for damage resulting from criminal offences within a single, combined procedure is nothing new. Numerous countries of Roman legal tradition allow victims and other interested parties to file compensation claims in criminal proceedings, whether in the form of private or additional prosecution, i.e. prosecution in parallel with the prosecutor (Belgium, France, Hungary, Poland, the Czech Republic and Sweden), or subsidiary prosecution, i.e. prosecution instead of the prosecutor (Poland).⁸⁰ In France, there is the concept of the so-called *partie civile*, or "plaintiff" through which victims may file a claim for the award of compensation in criminal proceedings, represent their interests and in this regard they are also provided with legal aid.⁸¹

Decision-making on a compensation request in criminal proceedings has several important advantages for victims themselves. They are thus able to enforce their right to compensation in a simpler and more cost-effective manner, which is of particular importance given the wide spread problem of their lack of expert knowledge and financial resources; also, they are not exposed to any complications and additional costs related to instigating separate civil proceedings, such as court fees, costs of expert evaluations, etc.; they may potentially obtain a compensation for damages sustained even without the need to hire a

⁷⁶ European Commission for Democracy through Law (Venice Commission), *Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina*, CDL-AD(2012)014, para. 25.

⁷⁷ European Commission for Democracy through Law (Venice Commission), *Report on the Rule of Law*, CDL-AD(2011)003rev, March 25-26, 2011, para. 44.

⁷⁸ *Ibid.*, para. 42.

⁷⁹ *Ibid.*, para. 51.

⁸⁰ European Union Agency for Fundamental Rights, *Victims of Crime in the EU: the extent and nature of support for victims* (Luxembourg: Publications Office of the European Union, 2014), str. 29, available at http://fra.europa.eu/sites/default/files/fra-2015-victims-crime-eu-support_en_0.pdf (website visited on January 23, 2015). In common law countries, a compensation claim is usually subject to separate civil proceedings.

⁸¹ *Ibid.*, page 29.

lawyer⁸²; they save considerable amounts of time that would be needed for instigation and completion of separate proceedings⁸³; and they are not exposed to re-traumatization that would result from a repeated instigation of proceedings and giving testimony that is required in such proceedings.⁸⁴ The possibility to enforce damage compensation claims in criminal proceedings is particularly important when it comes to injured parties who have the status of protected witnesses, and who, as a result, in accordance to the applicable legislation and court practice, in civil proceedings do not have such clear protection guarantees as those they are given in criminal proceedings.

If a claim was filed in compliance with Article 198(2) of CPC of B&H, i.e. on the condition that a victim filed a specific and substantiated property claim, which means that the criminal proceedings data provide a reliable basis for an award of compensation, as a result of a proactive role of the prosecutor⁸⁵, the court, in general, should not refuse to examine a filed claim because of the alleged risk of a considerable prolongation of proceedings. It should be kept in mind that the enforcement of the right to compensation in criminal proceedings also enables victims to gather evidence in a simpler manner, since it is possible to use the advantage of existing evidence or evidence that is being gathered by the prosecutor in order to substantiate the allegations from the compensation claim. This is especially true having in mind that the facts and evidence pointing to the existence and scope of damage or level of violation that an injured person suffered, are being presented and used for the purpose of establishing the guilt of the accused and/or sentencing⁸⁶ and that they partly overlap with those needed for decision making on the property claim. So, for example in the case of war-related sexual violence, this includes different medical and psychiatric findings of the victim that he/she gathered so far, as well as expert evaluation by a psychiatrist, which is possibly ordered by the prosecutor in criminal proceedings. This, however, implies the existence of relevant knowledge and timely gathering of necessary evidence by the prosecutor, but also that the court examines those facts that are frequently legally relevant both for the main subject and property claim⁸⁷. In a scenario in which prosecutors would devote active attention to the implementation of their

82 Although an effective exercise of this right in criminal proceedings still requires a lawyer, at least until prosecutors take over a more active role, his/her engagement in such proceedings would imply less procedural actions, and thus also lower costs. Besides that, the provision of legal aid, like under the concept applied for example in France, might ensure full protection of the right of victims.

83 In compliance with the practice of the European Court for Human Rights, victims have to have the possibility to seek and obtain compensation for damages within a reasonable time. Please see ECtHR, *Gäfgen v. Germany [GC]*, June 1, 2010, para. 127.

84 For an analysis of advantages of this type of decision making, please see also: European Union Agency for Fundamental Rights, *Victims of Crime in the EU*, op.cit., page 29

85 This implies that evidence and facts needed for decision-making on this claim have already been gathered and established.

86 For more detailed elaboration on the correlation between the presentation and evaluation of certain evidence for the purpose of sentencing and the examination of the property claim, please see Filipović, *Položaj oštećenog u krivičnom postupku (Position of an Injured Party in Criminal Proceedings)*, op.cit., page 327.

87 As regards the role of the court in this context, and the argument that its consistent meeting of obligations would not considerably prolong criminal proceedings, please see Filipović, *Položaj oštećenog u krivičnom postupku (Position of an Injured Party in Criminal Proceedings)*, op.cit., pages 326-327.

legal obligation to timely establish facts and gather evidence needed for ruling on a property claim, and the court would examine these issues in a comprehensive and complete manner, the support to victims of war crimes would be fully completed without considerable prolongation of criminal proceedings.

In this context, the advantage in ruling on damage compensation in criminal proceedings lies also in the fact that the court deciding on a compensation claim has already been well informed about the facts of the case during the process of presentation of evidence that relates to establishing criminal responsibility of the accused. In one of very rare judgments in which the Court of Bosnia and Herzegovina, in addition to convicting a person of the criminal offence of human trafficking, also awarded damage compensation to the injured party (a lump-sum amount of 5,000.00 KM for non-pecuniary damage suffered). The basis for this was the testimony of the injured party based on which a conclusion was made in relation to indubitable, numerous adverse consequences of the commission of this criminal offence on her.⁸⁸ After calling such a compensation "deeply equitable and justified" in an impressive, very sensitized manner, the acting panel of the Court of B&H concluded the following: "The Court finds a basis for the court to award partial compensation without presentation of evidence about the amount also in the civil law system. Namely, in the Civil Procedure Code of Bosnia and Herzegovina, the legislator authorized judges to decide at their own discretion about the amount of damage, if such an amount cannot be established or it could be established only with disproportionate difficulties (Article 94). Such power is based on the principle of justice."⁸⁹

Having in mind all of the above, the argument that in every war crime trial a simultaneous decision making on a property claim would lead to a considerable prolongation of criminal proceedings is hard to sustain. Finally, in addition to a positive impact on victims, and improvement of their position as injured parties in criminal proceedings⁹⁰, it is important to have in mind that decision making on property claims in criminal proceedings is also recognized as a manner of achieving the principle of cost-effectiveness and suitability and disburdening of civil courts⁹¹, or contribution to the overall effectiveness of the judiciary in Bosnia and Herzegovina⁹².

In addition to advantages, a basic disadvantage of such decision making lies in the fact that, by their very nature, such proceedings may be focused only on the suspect/accused, and not another legal person that might be held accountable for its acts in compliance with the principle of objective liability, as well as the

88 Judgment of the Court of Bosnia and Herzegovina, No. K-76/08, dated September 11, 2009

89 Ibid.

90 Mehmedić and Izmirlija, *Pravo na kompenzaciju žrtvama krivičnih djela sa elementima nasilja (Right to Compensation for Victims of Criminal Offences with Elements of Crime)*, op. cit., pages 78.-79..

91 Ibid.

92 OSCE B&H, *The Processing of ICTY Rule 11bis Cases in Bosnia and Herzegovina*, op.cit., page 21.

fact that some suspects/accused will not possess sufficient funds that might potentially be used to pay for the awarded amount, or that they might conceal them.

Some Member States of the European Union have found a solution for this situation, in such a manner that victims are paid the awarded amount directly by the state, and the state then uses its enforcement mechanisms to obtain, if available, a reimbursement of the funds from the convicted person.⁹³ In this way, a victim receives the compensation immediately upon issuing of a court ruling, and avoids the tedious situation of repeated claiming of the right to compensation from the perpetrator as part of an enforcement procedure.⁹⁴ In this respect, the European Commission Guidance document related to the transposition and implementation of Directive Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, invites Member States of the European Union to consider this good comparative practice^{95,96}

It is also important to have in mind that, even when it is not possible to get the awarded compensation paid by war criminals, a victim still has the possibility to initiate separate civil proceedings against the competent entity or state, who would be subsidiarily liable for the damage. The position of victims in those civil proceedings would, however, be considerably facilitated by the opportunity to use the evidence gathered and presented by the prosecutor during the criminal proceedings and the use of judicially established facts which formed part of the decision adopted on the property claim.

It should be stressed that the experiences of victims of torture so far have shown that the alternative to decision making on compensation claims in criminal proceedings – civil proceedings initiated against entities/the state, and sometimes also against perpetrators of crimes, is not the best solution. Namely, until now, there has been no harmonized case-law between the Republika Srpska and the Federation

93 Victim Support Europe, *Handbook for Implementation of Legislation and Best Practice for Victims of Crime in Europe* (Brussels: Victim Support Europe, 2013), page 46, available at: http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/51.1.1374573250handbookforimplementationandbestpracticeforvictimsofcrimeineurope_23713_en.pdf (website visited on February 20, 2015)

94 *Ibid.*, page 46.

95 *European Commission, DG Justice Guidance document related to the transposition and implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA*, op.cit., para. 57.

96 It is interesting that in France (in addition to the concept *partie civile*) there is an independent system of provision of compensations to victims based on national solidarity, through which victims of the most serious crimes, including death and sexual violence, are provided compensations that they may claim before a special Commission on Compensation for Victims of Crime established at first-instance courts with territorial jurisdiction, whereas the funds themselves are paid from a separate fund for victims of terrorism and other crimes. Such a commission was established in order to prevent situations in which victims have to wait for the outcome of criminal proceedings, while it is possible to award compensations also in criminal proceedings, in case of already awarded amounts against perpetrators. See *Compensation to Crime Victims – France* at: http://ec.europa.eu/civiljustice/comp_crime_victim/comp_crime_victim_fra_en.htm#2 (website visited on February 10, 2015)

of Bosnia and Herzegovina, and no harmonized case-law of the Constitutional Court of Bosnia and Herzegovina in this respect, and different standards have been applied to interpretation of the same provisions of the Law on Contractual Relations and to decision-making on award of compensations. In Republika Srpska, for example, such action claims are mostly rejected by applying the statute of limitations. In addition to this, the Public Attorney Office of RS charges fees for representing that entity, so that victims are eventually required to pay excessive court fees, which they have to bear as parties that initiated and lost the dispute. All of this together is certainly no reason for renouncing this legal battle. Many victims and representatives of their interests and rights have the intention to subject this negative practice to examination by international mechanisms for human rights protection, primarily the European Court in Strasbourg. At the same time, many victims have also already lost the chance that their claims be decided on in criminal proceedings, since these ended with their referral to civil proceedings, and some of them will never have this opportunity due to the fact that the crime will never be prosecuted or that it will take a long time until its prosecution. For those victims, the only remaining manner to claim compensation is by initiating civil proceedings. However, the fact that such an alternative exists as such should not be an excuse for automatic referral to its use by all other victims that still have the opportunity to enforce at least part of their rights simultaneously with the prosecution of persons charged with having committed war crimes against them.

We also have to be aware of the special importance for many survivors when it comes to the symbolic satisfaction as such of an additional condemnation of a perpetrator of crime also in this manner.⁹⁷ Particularly relevant is also the psychological factor related to the fact that in such a manner, such a person, in addition to a criminal conviction by the court, is also directly obliged to provide compensation to the victim for damage caused, which constitutes a formal recognition of victim's suffering and validation of the account of the victim as truthful.⁹⁸ This results in a considerable contribution to the rehabilitation of a survivor, a shift in her perception of her position in criminal proceedings as being merely an evidence tool – a witness used for establishing criminal responsibility of the accused, which is connected to the feeling of being used and re-victimization, in practice particularly present in case of war-related victims of sexual violence after a trial, towards seeing herself as an active party that is thus enabled to enforce at least in part her fundamental human rights to compensation and satisfaction.

In case of victims, compensation after a crime has been committed frequently has a deeper meaning than mere receipt of a certain amount of money, which certainly in itself can never compensate for

97 In this sense, please see *UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*, op.cit., Principle 22(f).

98 With regards to the role of compensation as a symbolic form of social reaction, please see: M A Young, *The Role of Victim Compensation in Rebuilding Victims' Lives*, International Organization for Victim Assistance, available at: <http://www.iovahelp.org/About/MarleneAYoung/RoleOfVictComp.pdf> (website visited on February 16, 2015),

the immeasurable damage he/she suffered. In this respect, the Court of B&H, in the above mentioned judgment⁹⁹ in which it awarded a lump-sum damage compensation, identified this as a form of partial and symbolic satisfaction, "which will help her stop feeling as a victim and mitigate the consequences she suffers as a victim of criminal offence", and "... see her justice being done". As concluded by the Court: "... In criminal procedural law, this right has an even deeper meaning, since by providing compensation to a victim of a criminal offence, the principle of social justice is being established. From a sociological point of view, the principle of victim compensation should be given the same importance as the principle of punishment as a form of social reaction to criminal activities. The purpose of a trial may namely not be just repression of the perpetrator of a crime, but has to aim at full redress of the situation that occurred as a result of a criminal offence."¹⁰⁰

Due to all of the above, the award of damage compensation in criminal proceedings is important for an empowerment of victims, their integration in criminal proceedings and identification with the proceedings. Such a trial does possess transformative potential, which is currently not the case, since the primary goal of proceedings is to punish the perpetrator. This would also strengthen the trust in the judiciary and in the concept of restorative justice, which would have a long term positive impact on the process of reconciliation.

Concluding remarks

Bosnia and Herzegovina should, in compliance with international standards of human rights protection and requirements set by the principle of rule of law, re-examine its laws and practices related to the exercise of property claims, and enable victims to enforce this existing right in criminal proceedings. As observed in the OSCE B&H report, the 2008 amendments to the Criminal Procedure Code of Bosnia and Herzegovina underline the obligation of prosecutors to establish facts needed for decision making on property claims, which emphasizes the intent of the "legislator to force courts to decide on property claims in criminal proceedings, whenever possible".¹⁰¹ This also expresses the view of the legislator that "such a manner of work is adequate, important and desirable".¹⁰² Seven years after this, it would be useful to evaluate the application of these provisions among expert, especially judicial community, but also among other authorities responsible for the work of the judiciary and protection of human rights. Building on such an evaluation, it is necessary to examine modalities that would ensure the implementation of the obligation

99 Judgment of the Court of Bosnia and Herzegovina, No. K-76/08 dated September 11, 2009

100 *Ibid.*

101 OSCE B&H, *The Processing of ICTY Rule 11bis Cases in Bosnia and Herzegovina*, op.cit., page 21.

102 *Ibid.*, page 21.

of Bosnia and Herzegovina to provide all victims of war crimes with access to an effective remedy through which they may enforce the right to compensation, taking care that the adopted legal provisions are applicable and applied in practice.¹⁰³

In case of judiciary personnel it is necessary to raise their awareness of the needs of victims of war crimes and encourage them to recognize the responsibility they have towards them, i.a. in terms of enforcement of property claims in order to ensure an effective access of victims to this legal remedy.

This may be achieved in such a manner that chief prosecutors and presidents of courts disseminate among prosecutors and judges relevant general guidelines defining their roles set by law in relation to property claims,¹⁰⁴ as well as through adequate training of prosecutors and judges about obligations they have in relation to the submission of property claims by victims, and specific modalities in which they can meet them, primarily through specialist training of judges and prosecutors before the competent institutions.¹⁰⁵

It is crucial to ensure that representatives of judicial authorities meet their already existing obligations resulting both from the Criminal Procedure Code of Bosnia and Herzegovina and international standards¹⁰⁶. In case of prosecutors, this would mean that they would timely integrate rights and interests of injured parties related to enforcement of compensations in their prosecution strategies for individual cases, which implies an active implementation of the obligation to establish facts and gather evidence relevant for decision making on property claims, and timely provision of detailed information and support to victims in the exercise of their rights related to such claims.¹⁰⁷ In order to minimize opportunities for a prolongation of criminal proceedings, the prosecutor should already during the investigation procedure examine the intention of the injured party to file a claim, if necessary hire a psychiatric expert witness, enclose gathered findings with the indictment, and use them later on along with all other evidence from the indictment.¹⁰⁸ Courts, on the other hand, should stop with the practice of automatic referral of injured parties to enforce their property claim in civil proceedings, and should examine such a claim in a comprehensive and complete manner and make a decision along with the main subject matter, in criminal proceedings, whenever this

103 One of the proposals presented during the round table discussion organized by TRIAL is also the adoption of a special law that would regulate the legal position and legal interests of injured parties, i.e. victims of war crimes in criminal and civil proceedings". Milena Savić, Director of the Information and Legal Aid Center Zvornik, Sarajevo, September 22, 2014

104 In France, for example, the rights of victims provided under laws in force are additionally specified and supported through the dissemination of certain guidelines encouraging judicial bodies to follow specific practices in treating vulnerable categories of victims. For example, there are guidelines on court proceedings related to the processing of sexual violence crimes, issued by the Ministry of Justice in 2005. European Union Agency for Fundamental Rights, *Victims of Crime in the EU*, op.cit., page 41.

105 In this context please see OSCE B&H, *The Processing of ICTY Rule 11bis Cases in Bosnia and Herzegovina*, op.cit., page 22.

106 A detailed account of these obligations, with reference to the specific legal basis, was given in previous parts of the text.

107 In this sense please see also *Ibid.*, page 22.

108 Minka Kreho, judge of the Court of Bosnia and Herzegovina, believes that the presentation of such evidence along with an indictment would be a much more efficient manner of acting. Round table "Enforcement of Property Claims of Victims of War-Related Crimes – Problems and Perspectives", TRIAL, Sarajevo, September 22, 2014.

is possible.¹⁰⁹ The OSCE Mission to Bosnia and Herzegovina also particularly stresses the need to ensure that well-reasoned court judgments on property claims are reached.¹¹⁰

In order for injured parties to file a substantiated and precise property claim, along with strengthening of the role of prosecutors in the preparation of elements important for decision making on claims, and providing timely and full information to victims, they should be provided free legal aid to represent their interests in criminal proceedings in compliance with international standards of human rights protection.¹¹¹ That would be possible by establishing a legal team that would be paid from public funds that victims would have at their disposal in case of initiation of criminal proceedings in which they have the status of injured parties. In an ideal scenario, such a legal team would, when needed, be at the disposal of victims, even in cases of referral to initiate separate civil proceedings under circumstances in which complete decision-making on a claim would truly not be possible in criminal proceedings.

However, it would ultimately be useful to define and delimit the role, powers and responsibility of injured parties, i.e. their possible attorneys as well as that of prosecutors and courts, in enforcing property claims¹¹², and clarify which requirements must be met by a property claim in order to be considered sufficiently specific and substantiated for decision making on it in criminal proceedings. This is possible through more precise legal provisions¹¹³ and/or through the mentioned evaluation and consultations within the judiciary in Bosnia and Herzegovina that would result in an official interpretation of existing legal provisions and a harmonized opinion on this issue. An excellent forum for such a discussion would be the recently established Panel for Establishing Dialog among the Highest Court Instances, i.e. Panel for Harmonization of Criminal Case Law, which might result in a conclusion in the form of a unanimous view on this legal issue and/or in the form of an initiative to competent authorities to adopt or amend laws and other regulations.¹¹⁴

109 In this sense please see OSCE B&H, *The Processing of ICTY Rule 11bis Cases in Bosnia and Herzegovina*, op.cit., page 22.

110 It is thus stated that decisions should examine the submissions, arguments and evidence, and in case of non-deliberation on a property claim, the court "should explain the basis for that decision clearly and provide well-grounded reasoning". OSCE B&H, *The Processing of ICTY Rule 11bis Cases in Bosnia and Herzegovina: Reflections on Findings from Five Years of OSCE Monitoring*, Sarajevo, 2010, page 22.

111 In this context, please see also Dautbegović and Pivić, *Položaj oštećenog u krivičnom postupku BiH (Position of an Injured Party in Criminal Proceedings in Bosnia and Herzegovina)*, op.cit., page 31.

112 As regards the general need for more specific regulations of powers of attorneys of injured parties in criminal proceedings, please see Filipović, *Položaj oštećenog u krivičnom postupku (Position of an Injured Party in Criminal Proceedings)*, op.cit., pages 319-322.

113 The only possibility is, as suggested by a judge of the Supreme Court of the Federation of Bosnia and Herzegovina, Ljiljana Filipović, in the above quoted article, *Položaj oštećenog u krivičnom postupku (Position of an Injured Party in Criminal Proceedings)*, op.cit., page 326, to put a general obligation on prosecutors and authorized officials to gather evidence and data during investigations in relation to damage or violations suffered by victims.

114 In compliance with *Rules of the Panel for Harmonization of Case Law*, dated April 10, 2014, Article 15, available at: http://pravosudje.ba/vstv/faces/pdfservlet?p_id_doc=28469.

In addition to this, for the purpose of facilitating the adoption of decisions on the award of property claims, it would be desirable to develop certain principles or guidelines in compliance with which the amount of compensation for non-pecuniary, war-related damage would be determined, analogously to existing orientation criteria of the Supreme Court of the Federation of Bosnia and Herzegovina¹¹⁵ in relation to compensation of damage occurred in times of peace.¹¹⁶ Such guidelines would have to be fully adapted to the specific type of war crimes and the situation of long lasting suffering that victims live with, so that for example, victims of war-related sexual violence would be exempted from the general damage compensation regime applicable to someone who suffered some type of violation of right of personality in times of peace¹¹⁷. This would ensure a certain level of legal certainty and consistency of case law among different panels, and for this reason they have certainly been needed for quite a long time also in the context of civil proceedings initiated for the purpose of enforcing war-related damage compensations. Injured parties and their legal representatives would thus also have at their disposal guidelines they might use to file an adequate property claim. This would, first of all, render possible a realistic assessment of the amount of damage compensation that is requested, and they would also be informed about the criteria based on which a decision on their claims is made, so that they can have realistic expectations regarding the outcome of proceedings.

Particular attention should be devoted to ensuring the enforcement of property claims of protected witnesses in criminal proceedings. Under the current legislation and practice it is not certain that they will have effective access to damage compensation in subsequent civil proceedings, with guarantees for the protection of their identity they were granted in criminal proceedings. However, since the problem is thus again resolved only in part, having in mind that such persons would be able to obtain damage compensation from the perpetrator, but not also from the entity or state responsible (in case that the perpetrator of a war crime is found to be insolvent), it is also necessary to initiate amendments to the Civil Procedure Codes, which would ensure full protection of witnesses that were granted procedural measures of identity protection. At the same time, it is necessary to ensure that all courts in Bosnia and Herzegovina, as well as persons that gave testimony under protection, are informed about the official viewpoint of the Court of B&H in case of initiation of civil proceedings for the purpose of realizing compensation after completion

115 For access to the Orientation criteria and amounts for determining the amount of fair pecuniary compensations for nonpecuniary damage (*Orijentacioni kriteriji i iznosi za utvrđivanje visine pravične novčane naknade nematerijalne štete*), February 20, 2006, please see: https://advokat-prnjavorac.com/zakoni/ORJENTACIONI_KRITERIJI_naknada_nematerijalne_stete.pdf (website visited on February 20, 2015)

116 In relation to this, Zikreta Ibrahimović, Deputy Representative of the Council of Ministers of Bosnia and Herzegovina before the European Court for Human Rights, outlined during the round table discussion on compensation claims of victims held on September 22, 2014 in Sarajevo, that a new remedy might be created "as separate proceedings or as part of existing proceedings, e.g. by introducing provisions in CPC and secondary legislation the basis and scope of compensation amounts that a criminal court can then award without an unnecessary prolongation, and which can if needed, be paid from the public budget."

117 This was also supported by participants in a round table discussion organized by TRIAL in September 2014, Fadila Musić, Assistant Director of the Free Legal Aid Institute of Sarajevo Canton, Nedžla Šehić, a lawyer, and Nermin Hanjalić, a lawyer of the Association "Vaša prava BiH".

of criminal proceedings. Taking all these measures is extremely important, taking into account the needs of these persons, but also the importance of witness testimony for successful processing of war crime cases.

Finally, for the purpose of ensuring the protection of rights of victims in cases when it is impossible to access effective financial compensation from the assets of the perpetrator of a war crime, it is necessary to ensure damage compensation from special government funds.¹¹⁸

Only a combined set of measures implemented by different actors from the judiciary, but also other bodies responsible for the proper functioning of the judiciary and protection of human rights of citizens of Bosnia and Herzegovina, has the potential to provide victims of war crimes with access to court and an effective remedy for the enforcement of the right to compensation in criminal proceedings. This requires harmonization of views, harmonization of practices and conducting legislative amendments and, above all, a proactive, complete and timely action of previously trained prosecutors and courts, as well as the establishment of systematic pre-requisites for injured parties themselves to take the relevant steps. In addition to compliance with international obligations and standards of human rights protection, this would eventually contribute to building and respecting the rule of law through full implementation of adopted procedural legislative solutions.



TRIAL (Track Impunity Always) is a nongovernmental organization which fights against the impunity of perpetrators and instigators of the most serious crimes under international law (genocide, crimes against humanity, war crimes, enforced disappearances, sexual violence in conflict and torture). TRIAL is 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. TRIAL also raises awareness among the authorities and the general public regarding the necessity of an efficient national and international justice system for the prosecution of crimes under international law.

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¹¹⁸ As regards arguments in favor of introduction of a special law that would, among other, provide for such a possibility for victims of premeditated criminal offences of violence, please see also Filipović, *Položaj oštećenog u krivičnom postupku (Position of an Injured Party in Criminal Proceedings)*, op.cit., page 326.

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