



Humanitarian Law Center



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Policy Paper:

**Awarding restitution claims for
victims of sexual violence
in war crimes proceedings
before Serbian courts**



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ABSTRACT

An associated action for restitution constitutes a claim for the compensation of damages, recovery of property or the annulment of a legal transaction arising from the commission of a criminal offence.

In criminal proceedings, the injured party may file an associated action for damages starting from the investigation stage until the end of the main hearing and the claim shall be decided by the court unless it would delay the proceedings.

Although awarding this claim has been laid down as a rule in the Criminal Code of the Republic of Serbia, the courts in the Republic of Serbia have been interpreting this legal provision as an exception. Namely, ever since 2003, from which time specialized court divisions handling solely war crime trials have been in existence, not a single war crime victim has been awarded damages in associated action during the criminal proceedings, but they have been referred to exercise their right to compensation in civil action.

Apart from it being a legal possibility, by awarding claims for damages to victims of war crimes, in particular victims of sexual violence, the court would avoid the re-victimisation of victims who would otherwise have to appear and participate in proceedings before courts yet again, this time as plaintiffs in civil action for the compensation of damage.

The need for such claims to be addressed immediately in the course of criminal proceedings was also recognized by the Supreme Court of Cassation, which in 2019 adopted the "Guidelines for the Improvement of Jurisprudence in Proceedings for the Compensation of Damage to Victims of Serious Criminal Offences in Criminal Proceedings" (SCC Guidelines).

This practical policy proposal constitutes a guide for legal professionals (prosecutors, judges and lawyers) as to how war crimes trial can be rendered more efficient, but also how they can contribute to preventing victims of war crimes, victims of sexual violence in particular, from being subjected to re-victimisation by participating in another protracted and costly judicial proceeding.

The practical policy proposal offers an analysis of the legal provisions pertaining to the awarding of damages in associated action, as well as recommendations for their application. As well, the practical policy proposal also presents positive practices in this area in evidence in Bosnia and Herzegovina (B-H) which the Serbian judiciary should also follow.

As well, awarding damages to the victims of all crimes and not only of war crimes, during the very course of the criminal proceedings would render the judicial system of Serbia more efficient and more just for the victims. More efficient – because the judicial system would be disencumbered of an increasing number of civil action cases, and more just because the victims would be enabled to obtain criminal justice, but also be compensated for damages in single proceedings.

The Humanitarian Law Center (HLC), as the only non-governmental organisation in Serbia which has continuously been monitoring all war crimes trials conducted before the domestic courts, maintains that it is the obligation of the judiciary in Serbia to recognise the need to enable the victims of serious crimes, among whom certainly victims of war crimes, to efficiently exercise their rights without any additional delays, re-traumatisation or additional costs.

INTRODUCTION

The systematic and mass raping of Bosniak women in Foča during 1993 was among the principal triggers behind the establishment of the International Tribunal for the former Yugoslavia (ICTY). In addition to foreign media outlets and international human rights organisations, the Humanitarian Law Center (HLC) was the only non-governmental organisations from Serbia which documented the sexual violence perpetrated against Bosniak women in Foča. HLC investigators interviewed the raped women in several camps in the territory of Serbia, Macedonia and Turkey, where the victims were accommodated.

Even over 25 years after the end of the conflict on the territory of the former Yugoslavia, precise numbers of raped and sexually abused women still do not exist. A UNHCR report states that between 12,000 and 70,000 women were raped in B-H in 1993 alone. Among the reasons for the non-existence of precise records and documented cases of rape is the fact that rape is still a taboo topic in the Balkans, and that even after three decades since the events in question, the victims are still being stigmatized both by their own families and by their immediate communities.

Since its establishment in 2003, the Office of the War Crimes Prosecutor (OWCP) has filed a total of 11 indictments which also encompass war-related rape and sexual abuse, and which cover a total of 14 victims.¹ Three indictments were filed for rape only (the indictments do not include murders). By the mid- 2021, a total of nine convictions for rape in war were rendered by a final ruling before Serbian courts.

Widespread rape and sexual violence perpetrated during the conflicts in the territory of the former Yugoslavia, on the one hand, and the number of the accused and convicted before the courts in Serbia, on the other hand, attest to the fact that these crimes are still not being adequately investigated and prosecuted.

1 Čuška, Skočić, Brčko, Bijeljina, Bijeljina II, Bratunac, Anton Lekaj, Gnjilanska grupa, Kalinovik, Brčko II, Bratunac II.

Apart from the small number of handled cases, other problems observed in this field include the absence of systematic support to the victims of sexual violence. Namely, victims of this crime are not extended comprehensive psycho-social support which they need in order to pick up their lives and overcome the traumas resulting as a consequence of rape, because the state has failed to develop an adequate system to support them. The victims of these crimes are faced with lifelong traumas and insecurity, are economically and socially impoverished and must cope with a multitude of problems in seeking justice and the effective legal redress that they are entitled to.

One of the problems the HLC has noticed while monitoring all war crimes trials being conducted before Serbian courts is the failure to award damages to war crimes victims, including victims of sexual violence, in associated actions for damages during criminal proceedings. The reason for such a practice is the inertness of the Office of the War Crimes Prosecutor, as well as the mechanical conduct of the courts with the argument being advanced that such claims are not to be decided in criminal proceedings as that would procrastinate them, but exclusively in civil action for damages. This problem compounds the closed circle of impunity and that of the social non-acceptance of such victims. Awarding damage claims leads to the establishment of restorative justice and has the potential to break that circle and help victims overcome the injustice and the discrimination structures which sustain it. In this way the consequences of sexual and gender-based violence faced by the victims could be redressed, their sense of integrity and of taking control of their own lives could be restored, as well as the feeling that justice has been served.

When the term "victim" is used in this text, it is understood to have the meaning given in the definition contained in EU Directive 2012/29/, namely that a victim is a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence; in criminal proceedings the term victims is understood to also mean family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death.² In the procedural sense, the term victim is equivalent

2 Directive 2012/29/EU of the European Parliament and Council establishing minimum standards on the rights, support and protection of victims of crime, Article 2.

to the term injured party as defined in the Criminal Procedure Code of Serbia. Although these two terms are not synonymous, and it is necessary to amend the legal framework in Serbia so that it recognize the term "victim" in the way specified in Directive 2012/29/EU, in this text both terms will be equally used for easier reference and understanding.

I. INTERNATIONAL LEGAL FRAMEWORK

Numerous international treaties specify the right of victims to damages as a fundamental right. Among such documents are the International Covenant on Civil and Political Rights, the United Nations Convention on the Elimination of All Forms of Racial Discrimination, the UN Convention on the Elimination of All Forms of Discrimination against Women, the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the UN Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power, the European Convention on Human Rights, EU Directive 2012/29 establishing minimum standards on the rights, support and protection of victims of crime , etc.

The European Convention on the Compensation of Victims of Violent Crimes, which Serbia has signed but not yet ratified, guarantees the right to compensation of damage to victims and their dependants in the event of the victims' death and obligates the state to provide compensation when it is not available from the offender.³ This Convention is very important as it makes it possible for damages to be obtained from the responsible state also by victims who are unable to exercise that right either because of the absence of a nexus between the perpetrator of crime and the state authorities, or because the offenders lack sufficient resources to compensate the damage. Likewise, EU Directive EU 2012/29 sets forth that "in the course of criminal proceedings, victims are entitled to obtain a decision on compensation by the offender, within a reasonable time, except where national law provides for such a decision to be made in other legal proceedings"⁴, whereby the need is accentuated for the victim to obtain compensation immediately in criminal proceedings, and only exceptionally in other proceedings.

3 European Convention on the Compensation of Victims of Violent Crimes, Article 2. The Convention came into force on 1 February 1988. Serbia signed this Convention in 2010, but has not yet ratified it.

4 Directive 2012/29/EU of the European Parliament and Council establishing minimum standards on the rights, support and protection of victims of crime, Article 16.

On the other hand, on the subject of compensating victims of sexual violence in war, several resolutions of the United Nations Security Council on Women, Peace and Security stress the need to protect all who live in conflict-ridden areas from sexual violence, and to provide support and reparations (compensation of damage) to the victims.⁵ Thus in the first Security Council Resolution, number 1820, sexual violence against women in armed conflict is recognised as a weapon and tactic of warfare subject to prosecution as a war crime, a crime against humanity and genocide,⁶ while the need to award restitution, i.e. reparations to this category of victims is first referred to in Security Council Resolution number 1888 from 2009.⁷

Calls for action through the mentioned Security Council resolutions were formalized in 2014 through the Secretary-general's Guidelines on reparations for survivors of conflict-related sexual violence (Guidelines)⁸, which contain clear recommendations for further steps in providing reparations for victims. The Guidelines list eight specific recommendations, all of which are equally important and necessary in order to adequately and in a proper manner compensate such victims. However, in the context of this document, the first two guidelines are the most important. Thus, the first guideline states that "Adequate reparation for victims of conflict-related sexual violence entails a combination of different forms of reparations."⁹ The reason for stressing this need lies in the fact that the harm done to victims of sexual violence in war is so grave as to require a combination and the interlinking of different forms of reparations. Conflict-related sexual violence is a complex phenomenon which entails both physical and mental trauma, with the consequences varying from person to person and also depending on

5 United Nations Security Council Resolutions 1820 (2008.), 1888 (2009.), 1960 (2010.), i 2106 (2013.) exclusively deal with sexual violence perpetrated in armed conflicts.

6 United Nations Security Council Resolution number 1820 of 19 June 2008.

7 United Nations Security Council Resolution number 1888 of 30 September 2009.

8 United Nations (2014). Guidelines of the Secretary-General: Reparations for Victims of Conflict-related Sexual Violence, accessed on 20 May 2021. <http://www.ohchr.org/Documents/Press/GuidanceNoteReparationsJune-2014.pdf>

9 Guidelines of the Secretary-General: Reparations for Victims of Conflict-related Sexual Violence, accessed on 20 May 2021. <https://www.ohchr.org/Documents/Press/GuidanceNoteReparationsJune-2014.pdf>

the context in which the sexual violence was committed (whether it was perpetrated in a group, before family members, whether it resulted in pregnancy, etc). For that reason the restitution should consist of a comprehensive package of support and services adapted to the local context and specific needs. That implies appreciating all the needs of the victims (and of their family members), and not merely addressing the immediate consequences of crime. For that reason, as a form of reparation for such victims it is of inestimable importance for restitution to be provided, i.e. damages awarded them immediately in associated action as part of the criminal proceedings.

The second guideline specifies that “Judicial and/or administrative reparations should be available to victims of conflict-related sexual violence as part of their right to obtain prompt, adequate and effective remedies.”¹⁰ In this connection, in the case of conflict-related sexual violence, administrative reparation programmes are potentially more inclusive and accessible than courts, being better adapted to the needs of the victims, involving more flexible procedures and having considerably lower evidentiary standards and costs. This kind of reparations is based on the recognition of the harm suffered and does not require judicially establishing the responsibility of the perpetrator. However, even though it may seem that obtaining administrative reparation is simpler for the victims, in Serbia this category of victims are unable to obtain such reparations. Namely, in Serbia, victims of sexual violence should have the status of civilian invalids of war to be able to exercise their right to reparations on that basis. However, under the Law on the Rights of Veterans, Disabled Veterans, Civilian Invalids of War and their Family Members, which was adopted in 2020, this category of victims cannot acquire that status as the Law itself contains discriminatory provisions, namely – with, among other things, the required bodily damage of the victim being 50%. Account being taken of the fact that the majority of sexual abuse victims do not have bodily injuries, but that their injuries are exclusively of an emotional nature associated with their traumatic experience, it is clear that these victims are unable to obtain reparations in administrative procedure.¹¹

¹⁰ *Ibid.*

¹¹ Law on the Rights of Veterans, Disabled Veterans, Civilian Invalids of War and their Family Members (Official Gazette of the Republic of Serbia, no. 18/2020), Article 22.

II. NATIONAL LEGAL FRAMEWORK

Under Serbia's legislation, victims of crime can obtain restitution in criminal or civil proceedings. The relevant procedural provisions are contained in procedural laws – the Criminal Procedure Code and the Law on Civil Procedure, while the provisions of substantive law pertaining to different types of damage are to be found in the Law on Contracts and Torts. In the text below we shall analyse the rights of victims/injured parties, the conditions for exercising their right to associated action for damages, the forms of damage that exist in the national legislation, the problems that arise in deciding such claims and the recommendations for overcoming these problems. An overview is given of the rights of victims /injured parties in all criminal proceedings and they also apply to victims of war-related sexual violence.

i. Rights of victims/injured parties

The Criminal Procedure Code of Serbia defines an injured party as a person whose personal or property right has been violated or jeopardised by a criminal offence;¹² Thus, in the case of war crimes proceedings prosecuting rape cases – the injured party is the victim of rape and/or sexual violence.¹³

During criminal proceedings the injured party is entitled to:

- 1) submit a motion and evidence for realising a restitution claim and a motion for interim measures for securing it;
- 2) present facts and propose evidence of importance for proving the claim;
- 3) retain a proxy from amongst attorneys;

¹² Criminal Procedure Code (Official Gazette of the Republic of Serbia, nos. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 i 55/2014), Article 2, item 11.

¹³ Sexual violence against men has also been tried before the Serbian courts, namely in the *Zvornik III and IV* cases.

- 4) examine the files and exhibits serving as evidence;
- 5) be notified about the dismissal of a criminal complaint or abandonment of criminal prosecution by the public prosecutor;
- 6) submit objections to the public prosecutor's decision not to conduct criminal prosecution or to abandon criminal prosecution;
- 7) be advised about the possibility of assuming criminal prosecution and representing the prosecution;
- 8) attend the preparatory hearing;
- 9) attend the trial and participate in examining evidence;
- 10) file an appeal against the decision on the costs of the criminal proceedings and the adjudicated restitution claim;
- 11) be notified about the outcome of the proceedings and be served the final judgment;
- 12) undertake other actions where provided for by this Code.¹⁴

However, for the victims/injured parties to exercise these rights, they must first and foremost be informed of them, namely at the first encounter with the responsible state authority they should be promptly advised of their rights, which should also include information on the possibility of a damage claim award. As a rule, the public prosecutor is the victim's first point of contact and his role is therefore the most important. In the context of war crimes trials, it is the Office of the War Crimes Prosecutor that is primarily responsible for imparting information to victims, or more

¹⁴ Criminal Procedure Code (Official Gazette of the Republic of Serbia, nos.. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 i 55/2014), Article 50.

specifically its Service for Assistance and Support to Victims and Witnesses which was set up in 2017 and employs 2 OWCP staff and a coordinator.¹⁵

Information provided to victims should be understandable and imparted in plain language avoiding the excessive use of legal terminology, preferably via a booklet listing all the rights that they are entitled to in criminal proceedings. As well, such a brochure should contain information on their right to legal aid, including the right to legal representation by counsel and the possibility of being granted the status of a particularly sensitive witness.

In respect of the victim's right to an award of damages in associated action in criminal proceedings, the booklet should explain the advantage of that right being exercised during the criminal proceedings.

It is of the essence that the brochure be provided to the victim along with the summons for the hearing and that it explain:

- That the victim can claim damages to be awarded in associated action;
- That if filed, the damage claim must be quantified and supported by evidence;
- That in restitution claims the kind of damage must be specified (material or non-material damage), the forms of damage (types of non-material damage are: diminished life activity, suffered physical pain, fear, disfiguration, defamation of character, honour, violation of personal freedoms and rights, death or grave disability of a close person; types of material damage: simple damage, lost profit and lost livelihood), as well as the relevant amount;
- Which persons are authorized to file damage claims;

¹⁵ Semi-Annual Report of the Negotiating Group on Chapter 23 for the Third and Fourth Quarter of 2018, Activity No. 1.4.4.3., p. 230-232. The report is available at: <https://www.mpravde.gov.rs/tekst/22364/polugodisnji-izvestaj-pregovarackegrupu-za-poglavlje-23-za-treci-i-cetvrti-kvartal-2018-godine.php>, accessed: 02/04/2019.

- To whom a claim may be submitted, specifying the deadline; that the claim can be withdrawn by the end of the main hearing but may not be filed again afterwards;
- The victim should be advised of his right to attend the preliminary hearing at which he may file a claim, and in particular that the main hearing may also be conducted at that time and that in case the proceedings end at that point, filing the claim will no longer be an option;
- The victim should be informed of the possibility of evidence being secured in accordance with the provisions of the Law on Civil Procedure, as this right is exercised only at the request of a party in non-litigious proceedings. This is especially important because in the majority of cases medical expert evaluations undertaken in criminal proceedings are incomplete and may not be used in civil proceedings even if the parties so agree and additional expert analysis will be required. Procrastination additionally traumatises the victims. Therefore it should be explained to the victim, already in the preliminary investigation stage that he/she may demand the securing of evidence, especially of expert evaluation, immediately following the sustained injury. This possibility is particularly important for rape victims where some types of expert evaluation are impossible to undertake after a certain period of time has elapsed. In securing evidence, a number of concrete witnesses may also be heard who for a variety of reasons (illness, staying abroad, etc.) will not be available for hearing at a later date.¹⁶

¹⁶ Guidelines for the Improvement of Jurisprudence in Proceedings for the Compensation of Damage to Victims of Serious Criminal Offences in Criminal Proceedings, Supreme Court of Cassation, p. 17.

ii. Restitution claims – requirements for awarding

A restitution claim arising from perpetration of a criminal offence or illegal act defined by law as a criminal offence may refer to compensation of damage, recovery of assets or annulment of a certain legal transaction.¹⁷

If the requirements are met, the court is obliged to hear the restitution claim in criminal proceedings. The option of not hearing the claim in criminal procedure is to be interpreted as an exception from the rule, in order to avoid unnecessary delays in exercising the victims' rights.

Thus, in order to hear a restitution claim in criminal proceedings, several requirements should be met: the first one is that the restitution claim arose as a direct consequence of commission of a criminal offence and the consequence is most often reflected as a form of damage (more on types of damage, its determination and proof will follow below).¹⁸

The second requirement refers to a group of persons authorised to submit a restitution claim. Those are primarily the injured parties, but also persons entitled to litigation claim for compensation of damage as spouse, children and parents of injured parties, and, in some cases, brothers and sisters as well as civil partners.¹⁹

The third requirement to be met in order to have a restitution claim decided upon within criminal proceedings is for the decision not to significantly procrastinate the proceedings. This requirement is at the same time the most disputable one and the one mostly left to the courts' own assessment. Namely, the threshold of "significant procrastination of the proceeding" is decided upon by the court in each individual case. However, although awarding restitution claims in criminal proceedings is set as a rule, the courts in Serbia construe that provision as an exception. In other words, by

17 Criminal Procedure Code (The Official Gazette of the Republic of Serbia no. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014), Article 252.

18 Criminal Procedure Code (The Official Gazette of the Republic of Serbia no. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014), Article 252, paragraph 2.

19 The Law on Contracts and Torts, Article 201.

default and automatically, without ascertaining whether deliberations on a restitution claim would lead to significant delay in the proceedings, courts refuse to decide on it and refer the injured parties to litigation proceedings for exercising their rights. Namely, so far the courts in Serbia have not awarded any single restitution claim to a victim of war crimes (including the victims of sexual violence)²⁰, precisely with a rationale that deciding on the claim would significantly procrastinate the criminal proceedings. Upon completion of the proceedings, the victims would be referred by courts to exercise their right to compensation of damage through civil proceedings. By doing so, instead of applying it as an exception, the courts in Serbia have made a rule in court practice that restitution claims are not to be decided on within criminal proceedings, but solely through civil (litigation) proceedings, which is not in keeping with the principle of efficient conducting of proceedings.²¹

The negative practice built in Serbia regarding the failure to award restitution claims in criminal proceedings was flagged by the Serbian Supreme Court of Cassation too, publishing the "Guidelines on Improving Court Practice in Proceedings for Compensation of Damage to the Victims of Criminal Offences in Criminal Proceedings", in 2019. The intention was to primarily provide public prosecutors with guidance on how to collect evidence for the claims and then to provide judges with guidelines acting in criminal proceedings on how to decide on the claims with all the necessary evidence collected.

Although these Guidelines were launched in public as early as in 2019, so far not a single victim of war crimes, including victims of sexual violence, has received any compensation of damage during criminal proceedings. Namely, in the proceedings against Dalibor Maksimović (the "*Bratunac*" case), the court refused to award the restitution claim to a woman who even testified under an identity protection

20 See: *Victim of rape referred to litigation on order to receive damages*, communication, 25 September 2019, HLC, available at: <http://www.hlc-rdc.org/?p=36916>, accessed on: 1 December 2019.

21 Guidelines for the Improvement of Jurisprudence in Proceedings for the Compensation of Damage to Victims of Serious Criminal Offences in Criminal Proceedings, Supreme Court of Cassation, p. 8.

measure (under pseudonym).²² The case was a result of regional cooperation and was transferred from the B-H judiciary. The B-H prosecutorial office had not collected evidence valid for the court to decide upon the claim, and since the case was transferred, not even the OWCP was able to initiate the collection of evidence. For that reason, the representative of the injured parties requested the forensics of the victim on order to decide on the restitution claim. In the expert's findings and opinion, the intensity of mental anguish and fear was determined, as well as reduction of general life activity, for the court to use as grounds for awarding the restitution claim to the victim. However, the court did not decide on the claim, but referred the victim to litigation in order to exercise her rights. Thus, the court unnecessarily placed the victim in the position to participate in another lengthy, expensive and uncertain procedure.

iii. Prerequisites for awarding restitution claims

However, in order for the court to effectively decide on the claim, it is necessary to efficiently and timely collect the evidence that the decision on the claim depends upon. The greatest responsibility for collecting evidence on the claim is with the public prosecutors, or, in case of war crimes – War Crimes Prosecutor's Office. Collecting the evidence may be done in parallel with proving criminal liability by way of expanding the forensics order.

Pursuant to the Law on Criminal Proceedings, the OWCP is encumbered with this obligation even before the victim files the claim.²³

For this reason, it is important for the War Crime Prosecutor's Office to: hear the victim about the circumstances of the restitution claim and invite her to submit evidence or propose collection of certain evidence; issue an order to perform psychiatric examination of the victim in order to establish her mental condition and, subsequently,

²² See: *Victim of rape referred to litigation on order to receive damages*, communication, 25 September 2019, HLC, available at: <http://www.hlc-rdc.org/?p=36916>, accessed on: 1 December 2019.

²³ *Ibid*, Article 256, paragraph 1.

to establish the grounds for awarding the damage compensation; hear the defendant on the circumstances of the claim; take the defendant's claim on property; examine the witnesses; request court medical and psychiatric expertise on the circumstances of the mechanism of occurrence, type and gravity of corporal injuries, reduction of life activity due to injuries, i.e. psycho-social alterations of personality of the victim, intensity of the suffered physical and mental pain and fear, as well as reduction of life activity; request economic forensics of the circumstances of the suffered material damage occurring directly or indirectly as a consequence of commissioned criminal offence; conduct financial investigation in case of grounds of suspicion that the owner possesses significant assets derived from criminal activities, in order to seize them as the damages suffered by the victim can be compensated from them.²⁴

So, when collecting the evidence a pro-active role of OWCP and additional endeavours are requested in order to not only collect the evidence leading to issuance of indictment and establishment of accountability, but to also collect the evidence relative to restitution claims. Since it is only necessary to expand the forensic order when making it, in order to establish the intensity and length of pain and fear and, accordingly, the percentage of general life activity of the victim, LHC deems that the efforts requested of OWCP are not strenuous, and can greatly assist the court when deciding on the claim and spare the victims from initiating new court proceedings.

iv. Imposing temporary measure to secure restitution claim

While collecting evidence on restitution claim, OWCP may face a range of obstacles together with victims. One of the obstacles is certainly that the defendant may give away his property during the proceedings and thus prevent the victim's restitution claim from awarding. In order to avoid such a situation, the Criminal Procedure Code envisages the option of imposing a temporary measure, i.e. ban on defendant's property to be given away until the criminal proceedings are closed. That means in practice that the defendant could be prohibited from selling a house he owns because

²⁴ The Law on Seizure of Assets from the Proceeds of Crime (The Official Gazette of the Republic of Serbia no. 32/13, 94/16), Articles 2, 19.

by selling it and remaining without any assets, he would prevent the victims from compensation of damage.

So, the injured party/victim may request during criminal proceedings to impose temporary measures of securing restitution claim and this procedure shall be conducted under the rules of the Law on Enforcement and Security.²⁵ In this case, the victim becomes enforcement creditor, while the perpetrator of the criminal act is the debtor.

This request shall be decided upon by the judge from previous proceedings, and after issuing indictment it shall be the court chamber.²⁶

In order to impose the temporary measure, several requirements need to be met on aggregate. The first requirement is for the victim to make her restitution claim probable – i.e. to provide evidence that certain damage is likely to have been inflicted when perpetrating criminal offence. The second requirement is that without imposition of the temporary measure the perpetrator of criminal offence would preclude or significantly aggravate the collection of damages from the restitution claim. That is a situation when, as described above, the perpetrator of criminal offence sells the house he owns and thus remains without any assets wherefrom the victim could be indemnified. In the proposal of temporary measure imposition, the type of temporary measure must be stated, as well as its duration, means and object of enforcement.

The types of temporary measures for imposition are: prohibition of disposing of or encumbering both movable and immovable assets; order to a compulsory collection organisation to impose on the banks keeping the accounts of criminal offence perpetrators the obligation to transfer the funds tantamount to the secured liabilities to a public enforcement officer's deposit; order to seize cash and securities.²⁷

25 Criminal Procedure Code (The Official Gazette of the Republic of Serbia no. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 i 55/2014), Article 253.

26 *Ibid*, Article 257.

27 The Law on Enforcement and Security, Articles 459, 460.

By the same token, instead of temporary measure there can be a guarantee, if the victims states that the purpose can be achieved also by having the perpetrator of criminal offence depose surety into the court deposit, of the amount exacted by the court.²⁸

v. Types of damage arising from commission of criminal offences

By commission of criminal offences, victims can suffer both tangible and intangible damage. Intangible damage is infliction of physical or mental pain or fear. Tangible damage is reduction of one's assets and it is plain damage, but so is the prevention of its amassing, which constitutes prevention of benefit.²⁹ Most victims of war crimes, in particular the victims of sexual violence, have suffered intangible damage, so we shall analyse that type of damage hereinafter, as well as the manners of its determination, when it is possible to award without forensics, etc.

Monetary compensation of intangible damage constitutes a certain satisfaction of the victims enabling her to obtain certain value conducive for restoring the frustrated balance after damage inflicted. The obligation of damage compensation is not a sanction in criminal proceedings, but a civil legal obligation of the party that inflicted the damage.

The Law on Contracts and Torts envisages the following forms of intangible damage: physical pain, fear, mental anguish (disfiguring, reduction of life activity, defamation, derogation of freedom, infringement of personal rights, death of a close person, particularly serious disability of a close person) and mental anguish caused by perpetration of a criminal offence against gender identity, dignity of person or morality.³⁰

„When taking a decision on compensation for intangible damage, courts shall evaluate the qualification of injury, length and intensity of physical pain, length and

28 The Law on Enforcement and Security, Article 451.

29 The Law on Contracts and Torts, Article 155.

30 The Law on Contracts and Torts, Articles 200-202.

intensity of fear, degree of disfiguration and percentage of life activity reduction, as well as specific consequences on the victims' life activity, i.e. whether the victim is able to perform all life activities or can perform some only with enhanced efforts, on the grounds of findings and opinion of court medical experts – physicians of specific specialisation according to the type of injury (e.g. gynaecologist, psychiatric specialisation, orthopaedic surgeon-traumatologist, etc.).³¹

Depending on the phase of criminal proceedings – public prosecutor or court order forensics when they need expertise for establishment or assessment of a fact. In keeping with the obligation to collect evidence for decision on restitution claim, it is necessary for public prosecutor, in the order of forensics, to expand the task of medical court expert by adding an order for the expert when giving findings and opinion to declare the intensity and duration of fear (psychiatrist), pain (surgeon, traumatologist) or psychiatrist in case of far-reaching consequences of fear in form of disease, etc.

On the other hand, there are certain forms of intangible damage for which courts, as a rule, do not take evidence by examination of court expert of psychiatry background, but takes decisions solely on the basis of the direct hearing of victims about the circumstances of suffered damage. Such forms of intangible damage are damage inflicted due to defamation, derogation of freedom and rights of a person and death of a close person. With this regard, according to the position of the Supreme Court of Cassation, courts can award restitution claim to many victims on the grounds of their hearing only, without experts' findings and opinion. Such group of victims are, among others, victims of war crimes and other assets protected by international law.³² Given that the Supreme Court of Cassation recognised the victims of war crimes – members of victims' families, as a category of victims to be who should be tried for a restitution claim only on the basis of a hearing, it is clear that courts in Serbia must abandon their ingrained view that this claim can be to be discussed exclusively in civil proceedings.

31 Guidelines for the Improvement of Jurisprudence in Proceedings for the Compensation of Damage to Victims of Serious Criminal Offences in Criminal Proceedings, Supreme Court of Cassation, p. 34.

32 *Ibid*, p. 34.

vi. Exacting the monetary compensation of intangible damage

Regarding the compensation of intangible damage, the first and foremost criterion is that it should be fair and awarded in proportion to each individual case, because compensation of damage should always be tailored to each individual, i.e. be customised and not awarded only in accordance with objective indicators.

So, if it is physical pain or fear suffered by the victims, the intensity of fear and the length of its duration must be taken into account by the expert. Also, fear may lead to permanent alteration of personality and disease, i.e. post-traumatic stress disorder permanently reducing victims' life activity. Then the victims are entitled to both compensation for the suffered fear and the compensation of damage for mental anguish due to the reduced life activity. Also, the circumstances influencing the amount of damages are age, gender, family status, inconvenience due to consequences of injury, etc.

According to the data of the Supreme Court of Cassation, the highest amount of fair monetary compensation for intangible damage due to complete reduction of life activity awarded in proceedings for compensation of damage before courts in Serbia is between 2,500,000.00 and 3,000,000.00 dinars.³³

vii. Special procedures

Plea agreement

One of the ways to end criminal proceedings is plea agreement concluded between public prosecutor and defendant, and – if formal requirements are met – confirmed by the court. One of the requirements to be met in order for the court to confirm the agreement is that a special clause determines the type, amount, deadline and manner of execution of the restitution claim. Thus, it is the obligation of public prosecutor even before opening negotiations with the defendant to get the victim acquainted

³³ *Ibid*, 37.

with the right to file a restitution claim and obtain the data on the defendant's assets.³⁴ This obligation belongs also to WCPO.

One of the Supreme Court of Cassation's recommendations to judges deciding on pleas agreement is to check whether there is evidence in the case writs on the victim being informed of the right to compensation of damage during the prosecutor's negotiations with the defendant. If such evidence is lacked, the court shall obliged public prosecutors to submit such evidence within a certain time frame, i.e. to amend the agreement.³⁵

³⁴ Criminal Procedure Code (The Official Gazette of the Republic of Serbia no. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014), Article 314, paragraph 1, point 4.

³⁵ *Ibid.*, Article 229, paragraph 3.

III. PROBLEMS FACING THE VICTIMS OF SEXUAL VIOLENCE IN WAR CRIME PROCEEDINGS

It has been emphasised several times throughout this document that so far no victim of war crimes has been awarded restitution claim during criminal proceedings. The consequence of such an attitude is that victims, after lengthy and, for them very emotionally exhausting criminal proceedings, are additionally victimised as they are forced to exercise their right to compensation of damage through another very lengthy and costly procedure. Lack of knowledge and enough information about the rights, as well as the lack of legal aid, also result in the victims rarely deciding to exercise their rights through civil proceedings, which practically means renunciation of the right to damages.³⁶

In the cases of sexual violence victims there is yet another problem. Namely, if the victim of sexual violence had the status of protected witness during the criminal proceedings and has not been awarded the restitution claim therein, the victim will have to – if she wants to initiate civil proceedings – be deprived of protection measures, since the Law on Civil Proceedings does not allow the plaintiff to appear under a pseudonym, but solely under name and surname. So, by not awarding them the restitution claim during the criminal proceedings, victims of sexual violence need to choose whether to keep protection measures and lose the right to compensation of damage, or renounce the protective measures and appear as plaintiff in civil proceedings in order to exercise the right to damages. The witness, victim of rape in case against Dalibor Maksimović, ended up in such a situation (the “*Bratunac*” case) whom the court did not award the compensation of damage despite the protection measures and medical report and expert opinion regularly submitted, with precisely determined restitution claim, but referred

³⁶ Guidelines for the Improvement of Jurisprudence in Proceedings for the Compensation of Damage to Victims of Serious Criminal Offences in Criminal Proceedings, Supreme Court of Cassation, p. 8.

her to civil proceedings instead.³⁷ It is important at this point to highlight the fact that when awarding the claim, the court should take into account all the circumstances of the case – and here the circumstances are that the victim is citizen of another country (B-H), living in a small community where she is still exposed to discrimination as a victim of rape and of humble financial status, now obliged by the Serbian court to come to Serbia again, give statements and incur significant court expenses.

For that reason, HLC considers OWCP obliged to do all in its powers to collect evidence for awarding this claim in a valid manner and give an expanded order to an expert of certain specialisation to examine the victim immediately, during the investigation. By the same token, the courts should by no means decide to refer the victims to litigation by default, but consider all the circumstances contributing to the decision, in particular – whether expert examination has taken place, the citizenship of the victim, the financial status, whether she suffers from certain diseases as consequences of experienced trauma, etc. All the above taken into consideration, there are rare occasions when the court cannot decide on such claims during the criminal proceedings.

³⁷ See: A victim of rape was referred to litigation on order to exercise the right to reparation, communication of 25 September 2019, HLC, Available at: <http://www.hlc-rdc.org/?p=36916>, accessed on: 1 December 2019.

IV. GOOD PRACTICE EXAMPLES – BOSNIA AND HERZEGOVINA

Court practice developed in this area is one of the positive examples that is possible to award restitution claims to victims of sexual violence in criminal proceedings. Namely, in 2015, the Court of Bosnia and Herzegovina made the first judgment awarding a restitution claim to a victim of war rape, in the amount of 30,000 KM (cca 15,000 EUR) during the criminal proceedings. This was followed by a few other judgments with the criminal court adjudicating the same.³⁸ However, the victims of sexual violence have encounter additional problems after being awarded the restitution claim in criminal proceedings, as they were unable to collect the monetary assets from the convicts as they do not possess the property to be charged and there is no special fund at the national level for victims to collect their claims.³⁹ For that reason, TRIAL International submitted an application to the UN Committee against Torture in 2017, with the Committee deciding in August 2019 that B-H is obliged to establish an efficient mechanism of paying the compensation of damage to the victims of war crimes, including the victims of rape during the war, but also to ensure adequate and free medical and psychological assistance.⁴⁰

³⁸ The Court of Bosnia and Herzegovina issued its first judgment in June 2015, for the case against Slavko Savić, TRIAL International, B-H Office, *Reparation for the survivors within criminal proceedings: perspectives from the ground*, p. 10, available at: https://trialinternational.org/wp-content/uploads/2016/11/TRIAL-International_compensation-publication_BO_web.pdf, accessed on 11 December 2019.

³⁹ *Ibid.*, str. 44.

⁴⁰ Aljazeera Balkans, *Judgment against B-H in favour of a victim of rape during the war*, available at <http://balkans.aljazeera.net/vijesti/presuda-protiv-bih-u-korist-zrtve-silovanja-tokom-rata>, accessed on 11 December 2019.

RECOMMENDATIONS

1. It is an obligation of all national authorities responsible for war crimes prosecution, especially OWCP, to invest additional efforts to change the court practice in Serbia and enable the victims of criminal offences, in particular victims of rape and sexual violence during the war to receive compensation of damage during criminal proceedings;
2. It is an obligation of OWCP to immediately inform the victim at the very first encounter other right to being awarded restitution claim and the primacy of her awarding during the criminal proceedings;
3. OWCP must play a more pro-active role and, at the very beginning of the criminal proceedings, before the victim herself files a claim, embark on collecting evidence for its awarding;
4. In its order of forensics, OWCP must specify the order to the expert to determine the intensity and length of pain and fear in the findings and opinion, and the rate at which the victims' life activity has been reduced;
5. OWCP shall encourage the victims in each individual case to request temporary security measures;
6. In case resulting from long-standing cooperation with the B-H's judiciary, it is the obligation of OWCP to propose forensics of the victim at the preparatory hearing;
7. For each specific case of deciding on restitution claim, the court shall take into account all the circumstances of the specific case and, whenever possible, award the claim during criminal proceedings. A particular circumstance for the court to take into consideration is whether the victim of sexual violence testified under protection measures during the criminal proceedings;
8. In case the claim is genuinely impossible to decide upon in criminal proceedings, and the victim testified under protection measures, HLC recommends the amendments to the Law on Civil Procedure by enabling the victims who were under protection measures during criminal proceedings to keep them during the civil proceedings too. Also, Serbia is obliged to establish an adequate mechanism for the victims who have been awarded the restitution claim to indeed be paid the amount exacted.

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