

War
Reparations
and
Litigation:
the case of
Bosnia



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War Reparations and Litigation: the case of Bosnia

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#1

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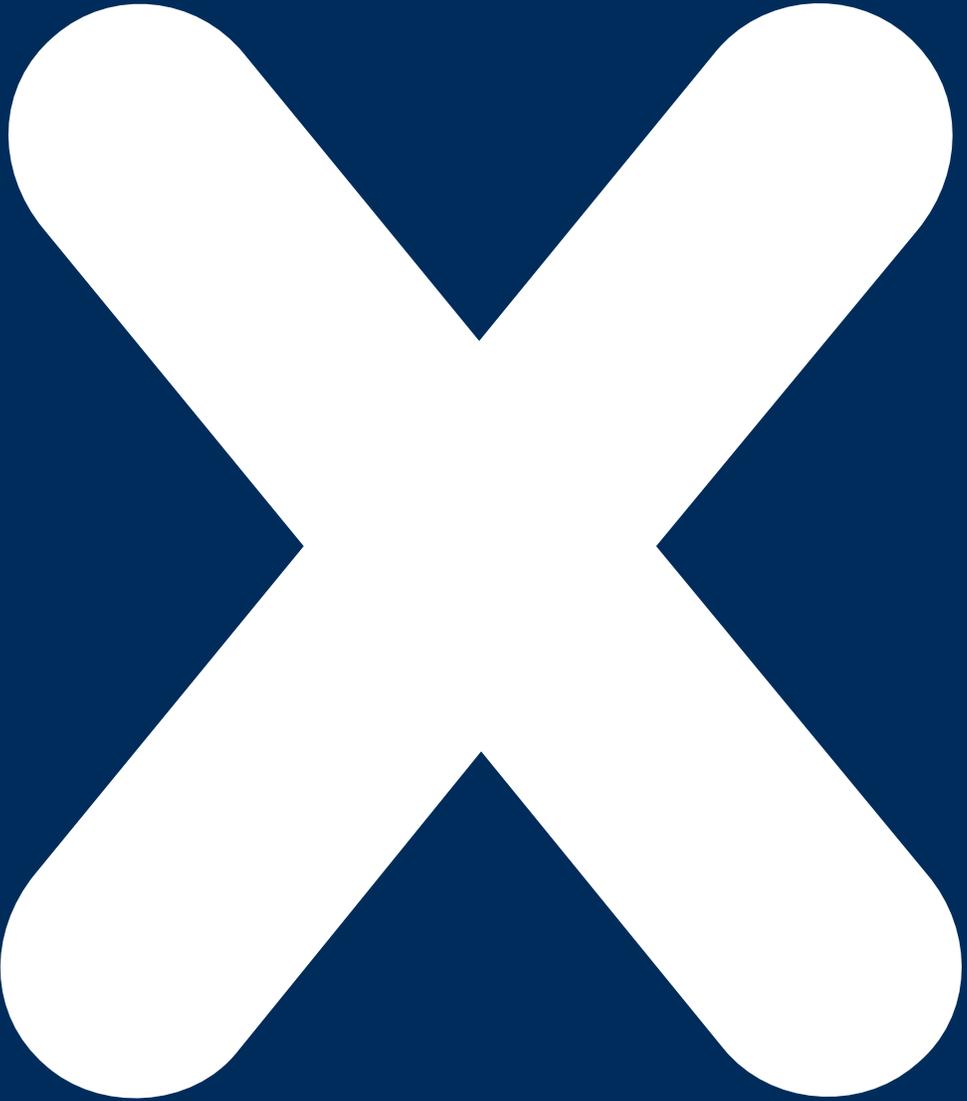
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Abbreviations

BiH	Bosnia and Herzegovina
CPC	(BiH) Criminal Procedure Code
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FBIH	Federation of Bosnia and Herzegovina
GA	(UN) General Assembly
HRC	(UN) Human Rights Committee
ICC	International Criminal Court
ICMP	International Commission on Missing Persons
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICVA	Initiative and Civil Action / Inicijativa i Civilna Akcija
IOM	International Organization for Migration
IWPR	Institute for War and Peace Reporting
LMP	(BiH) Law on Missing Persons
NATO	North Atlantic Treaty Organization
NF	Nuhanovic Foundation
OG	Official Gazette
OHR	Office of the High Representative
OSCE	Organization for Security and Co-operation in Europe
OTP	Office of The Prosecutor of the ICTY
PO	Prosecutor's Office of BiH
RS	Republika Srpska
SDWC	Special Department for War Crimes
SFRY	Socialist Federal Republic of Yugoslavia
SWD	(EU Commission) Staff Working Document
TJS	Transitional Justice Strategy
TRIAL	Track Impunity Always
UN	United Nations
UNDP	United Nations Development Programme
VRS	Army of the Republika Srpska / Vojska Republike Srpske
WCC	War Crimes Chamber
WGEID	Working Group on Enforced or Involuntary Disappearances



Foreword

Two decades after the Bosnian war of 1992-1995, many survivors continue to live in its aftermath, experiencing economic and social exclusion with inadequate access to legal or to basic health services, or none at all. Thousands of war victims have sought or are currently seeking to break through the impasse in their circumstances by means of litigation, i.e. through court proceedings. They are relying on their right to reparations for conflict-related harm as victims of war crimes, that is recognised as a right under international law¹ and in the law of Bosnia and Herzegovina.² The path to a successful claim for compensation or other forms of satisfaction in Bosnia and Herzegovina is an extremely arduous one and claimants are routinely thwarted by problems that are inherent in the post-war system of government, in the national legal system and in the climate of persistent ethnic tensions as well as simply by the high cost of litigation.

In April 2014 the Nuhanovic Foundation (NF) held a Round Table meeting at the University of Amsterdam, bringing together lawyers and activists from Bosnia and Herzegovina, Croatia and Montenegro, with prominent scholars in the area of war reparations and representatives of international human rights organisations that are active in the region. The meeting was to establish whether and how litigation can be truly effective in securing reparations for civilian victims of the Bosnian. This required a fully up to date review of the following:

- (i) the intricacies of the complex legal systems of the State of Bosnia Herzegovina (BiH) and of its internal Entities,
- (ii) the achievements in the area of reparations in BiH since the war, distinguishing between advances that have been made on paper (various strategies, programs and court decisions) and those that have actually been implemented, even if only partly,
- (iii) the activities of those currently pursuing reparatory justice by means of litigation, also considering those who may potentially do so in future,

¹ This right is most extensively defined in the UN's Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

² See chapter 3 for a discussion of Bosnia's legal provisions for civilian victims of war, in particular in the 1999 Law on Social Protection.

(iv) the particular obstacles that currently prevent civilians from obtaining reparatory measures that might or should be available to them.

The main conclusion of the Amsterdam meeting was that the outstanding problem is one of failure of implementation. Non-implementation has rendered numerous strategies, programmes, legal provisions and court decisions, that should significantly

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have advanced the cause of victims of the Bosnia war, largely or completely impotent. A second pressing problem is that there has been no systematic registration of groups of civilian victims, their whereabouts and circumstances, and the activities of those who are trying to assist them in getting reparations. Without such registration, legal and political actors and victims' organisations are handicapped when trying to represent the extent and urgency of the problems posed - for the whole society - by the failure to recognise and address the situation of civilian

war victims. Proper recognition will entail urgent structural measures to address the conditions of individuals and groups of victims of war-related harm, including them fully in the overall effort towards restoring the normal functioning and relationships that characterise the life of a citizen of a State. This is the ultimate goal of the law of reparations.

Bosnia and Herzegovina has been the focus of the most extensive international scrutiny together with rescue and restorative efforts from 1993 onwards. Relevant developments in other countries in the region of the former Yugoslavia were discussed during the Round Table and will be briefly discussed in this report.

This report is to be the first in a series of reports capturing the progressive development of reparations law and its implementation through litigation.

Introduction

The wars in the Balkans in the 1990's - like all wars - caused kinds of harm that permanently mark the lives of individuals and families, rendering them immeasurably weaker and poorer than they were before the war. A great many Bosnian victims of the war lack access to legal or medical services, are denied information about what has become of missing family members and are unable to apply for reparations from the government. The relatives of breadwinners who were killed or disappeared may lack the skills to enable a return to economic independence. The physical and mental health of people who were subjected to torture, rape, or other humiliating and degrading treatment, or who witnessed such brutalities inflicted on others, may be radically undermined such that their ability to assume or resume the normal responsibilities of family and working life is greatly diminished.

If public institutions fail to recognise the status, and to address effectively the situation of people continuing in conditions such as these, a return to normalised and honorable social and economic relationships between citizens will remain beyond reach. Relief and improvement can only be brought in a piecemeal fashion unless the responsibility for restoring the rights and honor of the victims of the war is assumed by the State, whether or not in collaboration with regional and/or international partners. It is the Nuhanovic Foundation's position that until such time as the State of Bosnia and Herzegovina is manifestly able to assume that responsibility by creating an over-arching reparations scheme, litigation will continue to be necessary to secure reparations and the proper acknowledgment that the availability of reparations implies.³

In Chapter 1 we look at the extent of current litigation activities and show how these may expand in the future. Chapter 2 presents the local and international organizations and programmes that make up the institutional framework for litigation. Chapter 3 covers the national legal context within which victims of war crimes and war-related harm in BiH are currently operating. Chapter 4 provides a survey of relevant court decisions by domestic and international courts, and considers the impact these are or should be having on the State's manner of dealing with the troubling legacy of the war for victims still without redress. Chapter 5 lists some of the administrative obstacles that stand in the way of access to effective reparations for civilian victims of the war. At the end of the report we consider the way ahead. We record the 2014 Round Table participants' visions for all citizens of Bosnia and Herzegovina in the future and the conclusions drawn about the very next steps that should be taken.

³ Illustrative is the IOM 2013 report on reparations, by P. van der Auweraert, available on the Nuhanovic Foundation's website, nuhanovicfoundation.org



1. The extent of current litigation activities in Bosnia and Herzegovina

There is no State document or legislation defining war victims for the purposes of enabling their recognition and assistance as a distinct group.⁴ There is also no central database gathering information about the numbers and whereabouts of those who have already raised or might wish to raise claims in the criminal and civil courts of BiH. Consequently, an overall impression of the number of war victim claimants and potential claimants of reparations must be pieced together from various different indicators.⁵

War-crimes cases: 1600

Among those who have sought or may be eligible to seek reparations from the State of BiH, a significant number is made up of those whose entitlement to claim compensation is based on the successful prosecution of individuals who were responsible for war crimes committed against them. In the ten years from 2004 - 2014, 256 war crimes cases have been completed within BiH.⁶ Approximately 1,200 cases remain to be processed, of which about half at State level and half at Entity level.⁷ At the ICTY a further 161 indictments for war crimes were made of which 141 cases are now completed. A total of approximately 1600 war crimes cases implies a great

⁴ A 'civil victim of war' is defined in the 1999 Law on Social Protection as: 'a person who suffered at least 60 percent of disability [...] due to injury or wound sustained in [...] abuse or deprivation of liberty through the war, [...] bombardment, street fights, ordinance explosion, a stray bullet' and similar. However, the Law only determines eligibility for social welfare benefits on the basis of injury and the condition of war victims for that purpose is contingent upon several variables that have nothing to do with the conflict-related origin of the injuries (see also Chapters 3 and 4).

⁵ To understand the size of the problem the indicators list may be compared with the following demographic statistics taken from the census compiled by the Agency for Statistics of Bosnia and Herzegovina in 2013: the population of BiH is just under 3,800,000 million people comprising around 2,400,000 in the Federation of BiH, around 1,300,000 in the Republika Srpska (RS) and around 90,000 in Brčko.

⁶ OSCE figures of February 2014 in: *Combating Impunity for conflict-related sexual violence in BiH: progress and challenges*, available on the Nuhanovic Foundation's website.

⁷ OSCE *War Crimes Map* launched in February 2014 provides the names of all defendants prosecuted so far, the court house where the trial took place, the nature of the crimes committed and the location and context of the commission. See <http://warcrimesmap.oscebih.org>

many more victims since it is the nature of the context of war that there will mostly have been multiple victims of each perpetrator.

Victims/witnesses bringing claims for compensation within criminal proceedings as permitted under Bosnian law

Transcripts of war crimes trials at the domestic courts of the entities are not available in English but a few statistics are available thanks to the work of victims associations. By contrast, the State Court of BiH has an impressive English language site where all completed cases are listed by name and by number. On closer inspection however transcripts are in fact not yet available for a very significant number of cases while

for others the English translation is not yet available. Consequently, it is very difficult to get a clear picture of the numbers of victims that are bringing claims within the War Crimes trials before this Court.

A sample of the cases reveals that judges routinely decline to exercise their power to rule on compensation claims presented within criminal trials. One case stands out in this context. In

Not a single applicant has obtained any form of compensation through criminal proceedings.

the 2009 case against Milorad Trbić more than 800 applicants, representing more than 2.000 aggrieved persons, brought compensation claims for the death of their family members who were captured, detained, summarily executed and buried in mass graves following the evacuation of the Srebrenica enclave in 1995.⁸ The Court referred the applicants to civil courts, declining to rule on the value of their claims despite being legally empowered to do so.⁹ The judges argued that pursuing the property claims would prolong the criminal proceedings.¹⁰ The applicants' appeal before the Appellate division of the War Crimes Chamber failed, the judges confirming the lower court's rationale for referral.¹¹ This reasoning might have been more convincing had it not been applied in every single case to date, including those where there was only one applicant seeking compensation: Bosnian lawyers participating in the Round table confirmed that to date not a single applicant has obtained any form of compen-

⁸ Prosecutor's Office of Bosnia and Herzegovina v Milorad Trbić Case No.: X-KR-07/386 First Instance Court of BiH, 16 October 2009 at Section XII: 295, available on the Nuhanovic Foundation's website.

⁹ See 2003 Criminal Procedure Code of BiH Arts 195, 197 and esp 198 (2), available on the Nuhanovic Foundation's website.

¹⁰ Fn. 8 at para 873.

¹¹ Prosecutor's Office vs Milorad Trbić, Case X-KRŽ-07/386, Appellate Verdict, 21 Oct 2010, para. 327-333, available on the Nuhanovic Foundation's website. See also Ch. 4

sation through criminal proceedings. In all cases applicants have been referred on to civil courts. However, most applicants lack the necessary means and legal assistance to pursue their claims.

Registered missing persons: 22.438

Figures of the number of missing persons in BiH following the war have varied according to the institutions documenting them and their various methodologies. By July 2013 the ICRC reported having received tracing requests regarding 22.438 persons since the end of the war in BiH. 14.552 families had received information on their relatives by mid-2013 while 7.886 families have received no information.¹² In its 2013 report on BiH's progress towards EU membership, the EU Commission noted with concern that the work on tracing missing persons has met with considerable resistance from political quarters.¹³ In September 2014 the UN Working Group on Enforced or Involuntary Disappearances (WGEID) issued a Follow-up report on the implementation of its recommendations for the resolution of thousands of missing persons cases. The report confirms that many important steps urged by the WGEID have not been taken.¹⁴ The organization TRIAL has assisted in the submission of 15 applications before the European Court of Human Rights (ECtHR) and 14 before the UN Human Rights Committee (HRC) each representing the relatives of multiple missing persons. They requested the State, among others, to provide them with integral reparation including restoration of dignity and reputation and prompt, fair and adequate compensation for the harm suffered.¹⁵ The International Commission on Missing Persons, relying on a very extensive collection of sources, provide the most recent and probably the most accurate account in their October 2014 'stocktaking' report.¹⁶ The ICMP estimates the number of missing persons as 31,500. Of these, more than 25,000 have been located in 'illicit mass graves and other clandestine locations.'

¹² International Red Cross report - 'BiH: Families of missing persons pursue their quest' 28 Aug 2013. <https://www.icrc.org/eng/resources/documents/feature/2013/09-28-bosnia-herzegovina-disappeared-missing.htm>

¹³ EU Commission Staff Working Document - Bosnia and Herzegovina: 2013 Progress Report (Accompanying the Communication from the Commission to the European Parliament and the Council on 'Enlargement Strategy and Main Challenges 2013-2014', COM(2013)700 final, p.21.

¹⁴ Report of the Working Group on Enforced or Involuntary Disappearances: Follow-up to the recommendations made by the Working Group to Bosnia and Herzegovina from 14 to 21 June 2010, A/HRC/27/49/Add.2, 8 Sept 2014, p. 34-35.

¹⁵ See TRIAL's website at <http://www.trial-ch.org/en/home.html>

¹⁶ ICMP; Bosnia i Herzegovina: Missing persons from the armed conflicts of the 1990's: A Stock-taking

Victims of crimes of sexual violence including rape: 20.000

Based on the local outreach and monitoring activities of its BiH mission, the OSCE estimates the number of female victims in this category at approximately 20.000. Statistics on male victims are unknown as yet.¹⁷ Local advocates representing victims of sexual violence, Amnesty International, and numerous other prominent NGOs have indicated that access to justice for victims of sexual violence is a matter of urgency.

Claims brought by victims associations: 6.900+

Some victims have tried to obtain compensation through the vehicle of a mass claim submitted by a victims organization. The Institute for War and Peace Reporting (IWPR) reported in January 2011 that 'RS authorities said that they received some 1.400 compensation requests from The Union of Civil Victims of War from the Sarajevo canton - amounting to around 470 million euro - for the suffering endured by residents of the capital during the 1992-95 siege. The legal basis for the reparation claims stems from the Hague tribunal's judgment in the case against the former commander of the Sarajevo-Romanija Corps of the RS Army, VRS, General Stanislav Galić'.¹⁸

In June 2012 Balkan Insight reported that the Regional Former Detainee Association of Banja Luka had 3.500 pending claims for compensation from Republika Srpska in the District court in Banja Luka, and 2.000 claims from the Federation of Bosnia and Herzegovina before a Sarajevo court.¹⁹ Both associations affirm that they ultimately want to see the State devise a comprehensive system of reparations that will be applied with more consistency and transparency than can be achieved by piecemeal court decisions using divergent standards and too frequently ending in non-implementation.

Cases against BiH pending before the ECtHR (as of July 2013): 1.662

In July 2013 the EU Commission's report on BiH, drafted in the context of the State's application to join the European Union, noted that there were 1.662 cases against BiH pending before the ECtHR. The cases concern the non-implementation of de-

¹⁷ OSCE Report *Combating Impunity for Conflict-Related Sexual Violence in BiH: Progress and Challenges*, February 2014: 5, available on the Nuhanovic Foundation's website.

¹⁸ IWPR Tribunal Update 10 January 2011, <https://iwpr.net/global-voices/bosnia-war-compensation-dispute>. Prosecutor v Stanislav Galić, ICTY Case No. IT-98-29-A 30 Nov 2006.

¹⁹ Balkan Insight 13.06.2012 <http://www.balkaninsight.com/en/article/bosnian-ex-camp-detainees-coming-together>.

cisions by the Constitutional Court of BiH. 'These cases relate inter alia to non-payment for war damage and to the non- possibility to withdraw foreign-currency savings deposited before the dissolution of former Yugoslavia.'²⁰ TRIAL is currently assisting victims in 40 claims pending before the ECtHR or the HRC (see below). TRIAL has expressed concern that the critical mass of claims against BiH before these international fora has not yet been reached. Only when it has, will sufficient pressure come to bear on the State.

Acknowledging that there will be considerable overlap of claimants in the categories listed above, we may safely conclude that the number of victims who seek reparations of various forms through litigation, is certainly in the tens of thousands. It was reported during the 2014 Amsterdam Round table that a great many others have not come forward with claims to public fora fearing stigmatization and further discrimination. They are unlikely to do so unless proper legal aid and assistance in court, as well as appropriate protection are provided to them. This was a key concern raised during the meeting.

²⁰ EU Commission *Bosnia and Herzegovina Progress Report 2013*, SWD, 415 final, 16 October 2013: 15, para. 2.2, available on the Nuhanovic Foundations website.



2. The institutional framework for litigation in post-war BiH

This section provides an overview of local and international organizations that have worked towards stabilizing and strengthening the rule of law in BiH. While the sense of frustration and injustice aroused by the failure to achieve a satisfactory scheme for recognizing and rehabilitating the victims of the war is undeniable, it is no less obvious that tremendous efforts have been made to develop an infrastructure for the prosecution of war crimes and for civil litigation aimed at obtaining compensation. BiH has continuously developed the capacities of its own judicial institutions and personnel and it has devised certain strategies and legal instruments intended to facilitate the rehabilitation of war victims. External monitors and advisors in all sorts of capacities are on hand, funding for transitional justice initiatives from various sources has been forthcoming. It is important to have an overview of these structures in order to understand the successes, but also the persistent failures that make litigation on behalf of war victims an ongoing necessity.

The International Organization for Migration (IOM) 1992 - present

The IOM has been in BiH since 1992 when it began with a program for the evacuation of war-wounded. Its role has greatly expanded to providing advice, assistance and co-ordination in all types of situations involving regular and irregular migration, refugee return, human trafficking, peaceful reintegration and employment of discharged military personal, public health challenges and generally monitoring and reporting on various developments. For the purposes of this report the IOM's study *On Reparations for Wartime Victims in the Former Yugoslavia: In Search of the Way Forward* of 2013, is invaluable reading.²¹

International Criminal Tribunal for the Former Yugoslavia (ICTY) 1993-present

The ICTY was established by the UN in 1993 to try the most senior civil and military leaders who were suspected of (co-) perpetration of war crimes in the Yugoslavian wars. From 1996-2000 the ICTY's Office of The Prosecutor (OTP) assumed the additional task of reviewing all domestic arrests and indictments for war crimes. This measure, known as the *Rules of the Road Procedure* was intended as a safeguard against arbitrary arrests in the context of deep ethnic divisions. The OTP reviewed 1.419 files involving 4.985 suspects, and advised local prosecutors whether or not

²¹ You can read the report on the Nuhanovic Foundation's website.

they had enough evidence to proceed. Approval was granted for the prosecution of 848 persons, around 20%. (This review function would later be taken over by the Special Department for War Crimes, see below).

From 2005 on, in order to facilitate timely completion of all its high-level cases, the ICTY began transferring a certain number of cases to the domestic courts. These cases involved intermediate and lower-ranking accused and incomplete case files (cases investigated at the ICTY but not leading to an indictment). National judiciaries were to conclude the investigations based on the evidence already gathered and proceed (or not) to an indictment. A small number of cases (8) for which an indictment had been issued were transferred, mostly to BiH, under the so-called 11 bis rule to be tried in accordance with national laws.²² All cases transferred down from the ICTY, most of which concerned mid-level perpetrators at Srebrenica, Foča and Prijedor, were concluded by end 2010.

Regrettably, the ICTY statute does not include a provision on reparations for the victims of crimes committed during the war. This was explicitly regretted by Judge Patrick Robinson, the then president of the ICTY, in a letter to the Security Council in 2011:

Victims of the conflict in the former Yugoslavia have a right to compensation under international law for the crimes committed against them. In previous reports, I have called upon the Security Council to establish a trust fund for victims of crimes falling within the Tribunal's jurisdiction, considering the legal bases for such compensation, including the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (GA resolution 40/34 of 29 November 1985). The Tribunal has received a wellspring of positive responses to this initiative from the victims of the atrocities that were committed during the destructive dissolution of the former Yugoslavia during the 1990s. However, the Security Council has not responded to my call.²³

Judge Robinson emphasized that:

[t]he Tribunal cannot, through the rendering of its judgments alone, bring peace and

²² See ICTY *Rules of Procedure and Evidence*, at <http://www.icty.org/sections/LegalLibrary/RulesofProcedureandEvidence>

²³ Letter dated 12 May 2011 from the President of the ICTY, addressed to the President of the Security Council, S/2011/316, 18 May 2011 at par 89-90, available on the Nuhanovic Foundation's website.

reconciliation to the region: other remedies should complement the criminal trials if lasting peace is to be achieved, and one such remedy should be adequate reparations to the victims for their suffering. (idem)

The Dayton Peace Accords 1995

These accords comprised agreements between the warring parties on many different aspects of the return to peaceful relations in 1995. Most relevant for our purposes was the establishment of Offices and Commissions set up to promote and implement International Human Rights Standards. See below: the Commission for Displaced Persons and Refugees, the Office of the Ombudsman and the (Bosnian) Human Rights Committee which later became the Human Rights Commission.

The Commission for Displaced Persons and Refugees 1995 ²⁴

This Commission was established to receive and decide on claims from people wishing to return to their pre-war properties so long as these had not been voluntarily sold or transferred. It also provided compensation in lieu of return. Despite many problems and weaknesses this was in itself an impressive and effective form of reparations scheme, namely a type of restitution.

The Office of the Ombudsman 1995 - present

The office was established to work together with the Human Rights Chamber as an integral part of the Human Rights Commission (see below). Unlike the Human Rights Chamber it still exists today, receiving complaints related to poor functioning of, or to human rights violations committed by any organ of Bosnia and Herzegovina. Where the Ombudsman finds malfunctioning of a public organ or that there has been a violation of human rights, it issues a recommendation to the competent bodies to undertake measures to remedy the violation or rectify malfunctioning. The office also assists citizens in pursuing the legal remedies available to them.

Human Rights Chamber/Commission 1995 - 2003/2004 – present

The Human Rights Chamber was established to receive, investigate and decide upon claims of human rights abuses (not war crimes abuses), especially evidence of systemic discrimination, in the period after the war. Its work was intended to prevent a descent into discriminatory practices and other human rights abuses by State organs. The Chamber had the power to order the offending Party to take steps to

²⁴ Dayton Agreement, Chapter VII.

remedy its breach, including orders to cease and desist, to provide monetary relief (including pecuniary and non-pecuniary damages), and to take provisional measures. Hearings of the Chamber were public and, where a friendly settlement was reached before a complaint came before the Chamber, the Chamber published a report on the agreement and forwarded it to the High Representative, the OSCE and the Secretary General of the Council of Europe. The HR Chamber was succeeded by the Human Rights Commission within the Constitutional Court of BiH in 2004.

Office of the High Representative (OHR) 1995 – present

The Dayton Accords provided for the appointment of a High Representative to monitor the implementation of the Peace Agreement, help in resolving difficulties that arose, and to coordinate efforts of various parties and donors. The OHR reports to the UN and the EU. It was instrumental in bringing the OSCE into Bosnia. In 1997, in the face of obstructionism from nationalist parties, the OHR was endowed with special powers, known as the 'Bonn powers', to dismiss local officials and impose laws if necessary. These powers were used extensively between 1997 and 2009.²⁵

OSCE 1995 - present

During the Dayton negotiations it was recognized that the OSCE had the capacity to take on certain crucial roles especially in three areas: elections, regional stabilization measures and human rights. It was involved in the appointment of the Human Rights Ombudsman, and continues to monitor developments related to human rights, the Rule of Law, governance and security concerns. It has closely observed and reports regularly on all aspects of the judicial processing of war crimes in BiH.²⁶

State Court of BiH 2002- present

This court was established in 2002 by the High Representative to BiH (by the 2000 Law on the Court of Bosnia and Herzegovina, adopted by the Parliament of BiH in 2002). It has criminal, administrative and appellate jurisdictions. Most relevant for our purposes is its criminal jurisdiction to try in the first instance criminal offenses as defined in the Criminal Code of BiH which have a national dimension, namely war crimes, organized crime, economic crime and corruption cases. Its administrative jurisdiction covers cases involving violations of human rights and complaints against decisions issued by BiH institutions. As well as appellate jurisdiction in relation to

²⁵ European Institute for Security Studies; *The EU in Bosnia and Herzegovina: Powers, Decisions and Legitimacy*: 29-36.

²⁶ The OSCE's war crimes mapping project at <http://warcrimesmap.oscebih.org>

decisions from its own criminal division, the Court of BiH can issue practice directions on the application of the substantive criminal law on genocide, crimes against humanity, war crimes and violations of the laws and practices of warfare, and on individual criminal responsibility in relation to those crimes. It does this *ex officio* or at the request of any court of the Entities or of the Brose crimes.

Prosecutor's Office of BiH (PO) (2002) and its Special Department for War Crimes (SDWC) (2004) - present

The PO was created with a special jurisdiction for proceedings before the State Court. It deals with requests for international legal assistance, the implementation of international conventions and requests for extradition. The SDWC was established in December 2004 to take over the review role of the ICTY's Rules of the Road Unit (see above). It had the task of designating cases as either 'sensitive' or 'highly sensitive' for the purpose of choosing the level of court before which each case should be tried. This depended mainly on the type and seriousness of the alleged crime, and the rank or political prominence of the defendant. Other relevant factors included whether the case involves 'insider' or 'suspect' witnesses, whether there was a prospect of witness intimidation, and whether political conditions locally were such that a fair trial may be impossible. It would then pass each case accordingly either to the War Crimes Chamber or to Entity level courts.

War Crimes Chamber (WCC) - Chamber 1 of the State Court of BiH (2005) - present

The Special Chamber was established in the context of the ICTY's completion Strategy by agreement between ICTY and OHR in January 2003. It was created as a hybrid court with national and international judges but intended to become entirely national by the end of 2009 but the period of international involvement was later extended by order of the OHR. By 2012 most internationals had left and there are presently only national judges on the court. The WCC was initially envisaged as having exclusive jurisdiction for War Crimes in BiH. It would take on cases passed down by the ICTY involving mid-level perpetrators, all domestic cases involving crimes against humanity (new legislation in 2003 having made this possible in BiH),²⁷ cases initiated by its own prosecution and war crimes cases sent up on appeal from Entity courts. In order to manage its caseload the WCC would in turn pass down less serious cases to Entity courts.

In practice, however things did not work out as neatly as envisaged. The WCC never

²⁷ See Criminal Code of BiH of 2003, available on the Nuhanic Foundation's website and discussed in chapter 2.

did acquire exclusive jurisdiction over war crimes as entity courts had been engaged for ten years in trying war crimes cases by the time the WCC was created and their jurisdiction was not extinguished by its creation. This was to cause several problems that effected both legal certainty and the satisfaction of victims and of the broader public. Firstly, Entity courts generally applied the criminal code that existed in BiH at the time the crimes were committed (1976 Criminal Code of Yugoslavia) while the WCC applied the new 2003 Criminal Code of BiH with its extended provisions on war crimes, genocide and crimes against humanity. The application of different laws resulted in divergent standards of sentencing. Moreover, some decisions were subsequently challenged (as we shall see in Chapter 4) for infringing the prohibition against retrospective application of laws. In numerous cases, harsher sentences were then replaced by lesser ones, creating an impression of injustice having been done and adding to legal uncertainty for perpetrators, while at the same time adding to the injury for victims of those perpetrators. Secondly, most Entity courts are unable to provide adequate protection for witnesses such that they might be willing to provide evidence in court. The 2008 War Crimes Strategy (see below) affirms that BiH cantonal and district courts lack the funding, staffing and facilities to provide adequate protection as required by BiH's 2004 Law on Witness Protection Program. The Law was in fact still awaiting adoption in 2008. Thus, the parallel operation of different levels of courts means that the decision about which cases will be tried before which courts has an impact on the safety of victims and consequently on their willingness to come forward.

Finally, the State Court does not hold a higher position in this non-hierarchical court system for the purpose of establishing precedent or even as a model of best practice. Consequently, its decisions are not always reflected in decisions by Entity courts. The practice of the WCC was thus not capable of having a streamlining effect on domestic judicial practice. Needless to say, arbitrary differences in sentencing and some recent high-level retrials have not generated the confidence of the population in the war crimes process.

Additional problems stem from the fact that while the caseload of the WCC quickly became overwhelming, a well-defined strategic approach for the transfer of cases between courts was lacking. This was acknowledged and partially addressed in the 2008 War Crimes Strategy (see chapter 2). Surprisingly, access to ICTY materials was not automatic which thwarted quicker progress on the cases handed down to the State Court. The WCC's system of prioritizing its own cases was inadequate, hindering efficient downward transfer. The WCC's competence to 'remove' proceedings (i.e. the more serious cases) from the Entity courts was not matched by any obligation on the part of the Entity courts to disclose their dossiers to the WCC. The relevant provision in the Law of the Court of Bosnia and Herzegovina (Art 43(2)) was

in effect toothless. The much-needed centralized database that could have brought together all the data on case progress and transfer, does not exist.

Finally, as we have seen in section 1, judges at the WCC have entirely side-stepped the mechanism by which they could have addressed compensation claims submitted within the criminal trials, by referring claimants to civil procedure, as their colleagues at the Entity level generally do. This pattern remains unchanged at the time of the writing of this report.

Judges at the WCC have entirely side-stepped the mechanism by which they could have addressed compensation claims.

TRIAL 2008-present

The organization TRIAL has been in BiH since 2008 and is working at the forefront of the struggle to gain proper recognition and reparations for victims. TRIAL's strategy includes three different avenues of approach. The major focus is case preparation and presentation of applications before the State and Constitutional Courts of BiH, the ECtHR and the HRC. Secondly, in order to push towards implementation, TRIAL contacts the institutions who should implement court decisions or legislation or who can exert influence on ministries, prosecutors, cantonal offices, the Missing Persons Institute, the Ombudsman and others. It asks for an account of the measures they plan to take, with a timeline, and presses for translation and publication of these intentions so that they will have some public traction. In addition, TRIAL reports on implementation problems to the relevant UN bodies. Finally, relying particularly on the HRC's views, TRIAL mounted a media conference in 2013 highlighting the historical importance of the HRC's recent Views on the State's failure to fulfil its responsibility to account for the whereabouts or fate of thousands of missing persons, disappeared during the war.²⁸ These Views constitute the first international recognition of the State's responsibility for disappearances.

On the periphery: the EU

The EU Delegation to BiH is engaged in steering the Bosnian state towards meeting the various targets required for accession to the EU. Among many other things, reforms that will increase the professionalism and efficiency of an accountable and independent judicial system in Bosnia and Herzegovina are a prerequisite for

²⁸ The HRC issues 'Views' rather than 'decisions'. These are not legally binding but are intended to apply pressure for reform on States violating Human Rights norms.

future integration into the European Union. In Oct 2013 the delegation announced the suspension of pre-accession assistance to BiH because of the State's failure to implement the ECtHR's Sejdić-Finci ruling.²⁹ The ruling required review of electoral legislation such that all citizens (including Roma and Jewish citizens) will be eligible to be elected for the House of Peoples, the Parliamentary Assembly and the Presidency.

A European Commission memo of 3 December 2013 expressed satisfaction that some progress had been made in that 'leaders were able to tentatively agree on the composition and method of the selection of Delegates for the House of Peoples' and that 'important progress on the main principles for the election of the members of the Presidency' had been made.³⁰ However, participants at the Nuhanovic Foundation's Round Table in April 2014 expressed disappointment that the EU had in the meantime effectively pulled back from applying financial pressure and that its funding and other assistance to BiH appears to be continuing without noticeable change. It is regrettable indeed that this potentially powerful tool was not better used to insist more firmly on the implementation of the European Court's ruling in a context where non-enforcement of rulings has been a serious and persistent problem.

Conclusion

Overall, a strong and relatively stable development of local and international institutions can be observed, as well as high levels of commitment to improve the processing of war crimes cases. In practice however, it is obvious that certain systems have failed. Implementation lags behind judicial rulings in various areas. Ongoing human rights violations are not adequately addressed. Finally, participants at the April 2014 Round Table observed a severe lack of political and administrative will concerning compensation for victims of war crimes or war related harm.

**Implementation lags
behind judicial rulings
in various areas.**

²⁹ Sejdić and Finci vs BiH Applications nos. 27996/06 and 34836/06, 22 December 2009, available on the Nuhanovic Foundation's website.

³⁰ EU Commission Memo *EU-BiH: Sedjić Finci positive progress*, Prague, 3 December 2013.



3. The national legal framework for reparations

In this chapter we present the domestic laws that contain provisions relevant to reparations. There is no single law in Bosnia and Herzegovina dedicated to the regulation of war reparations. Instead several Laws include provisions addressing different categories of war victims, but as we shall see, entitlements for victims appear to be equated with other types of social benefits and thus contingent on factors such as the recipient's income, employment and marital status.

1999 Law on Principles of Social Protection, Protection of Civil Victims of War, and Protection of Families with Children³¹

Strictly speaking this Law has nothing to do with reparations in the comprehensive sense of measures that grant recognition, ensure access to justice, promote truth-telling or restoration of the victim's former condition and honour. Yet it is an important piece of legislation for many victims as it regulates certain social benefits for which they, as victims of the war, may be eligible.

For the purposes of this law a civil victim was defined by Art. 54 as follows:

(...) a person who suffered at least 60 percent of disability (hereinafter: disabled person), due to injury or wound sustained in:

- 1. abuse or deprivation of liberty through the war situation or immediate war danger*
- 2. in war events (bombardment, street fights, ordnance explosion, a stray bullet)*
- 3. from the explosion of ordnance after the war ended*
- 4. diversionist terrorist actions that endanger the security and order in the Federation of BH.*

A disabled person is also a person with at least 60 percent of physical disability due to illness sustained in circumstances described in the paragraph 1 of this Article.

A civilian war victim is also regarded a person who dies, was killed or disappeared in circumstances described in the paragraph 1 of this Article.

Under Article 5, family members of a civil victim of war who are entitled to family disability allowance, comprise the spouse and children, as well as the (step)father, (step)mother or adopted parent.

Read in isolation, these provisions appear to provide reasonable clarity as to the identity of civil victims of war and those who, by relationship, may be entitled to fi-

³¹ Unauthorized translation from the Official Gazette of the Federation of Bosnia and Herzegovina no. 36/99 available on the Nuhanovic Foundation's website (<http://www.nuhanovicfoundation.org/en/legal-instruments-2/>).

nancial assistance in connection with harm done to a family member during the war. Read in the context of the entire Law on Social Protections however, the distinct status of war victims quickly becomes blurred: the category of war victims overlaps with other categories of potential recipients of social benefits with the effect that entitlements to victims can be considerably reduced or simply cancelled out by other provisions. Far from being a mechanism for providing reparations to war victims, this is an overarching law regulating social welfare benefits.³² Article 11 states that:

Social protection, in the sense of this Law, is the organized activity in the territory of the Federation, aimed at providing social security for all its citizens and their families in the state of social need.

Thus other recipients include the elderly, the unemployed and those unable to work, orphans, developmentally handicapped children etc. Several provisions exclude the possibility of receiving multiple types of benefits in parallel. And, as shown below, a network of other provisions restricts the applicability of the right to allowances for victims and their families. Article 56 provides that:

[t]o exercise the rights determined for civil victims of war of this law, disabled people are classified into six groups according to the percentage of physical disability afflicting them.

The degree of disability must range from 60-100%. Relevant types of disability for civilian war victims have been extended by subsequent amendments to include those who have suffered through wounding or some other form of war torture, damage to the body, including mental damage or significant deterioration of health, disappearance or death of such a person.³³ In addition, following the 2006 amendments and supplements, Article 54 (3) provides that:

persons who were victims of sexual assault and rape' constitute a special group of

³² The problem of the merging of war reparations with the social welfare scheme was the subject of a very thorough analysis in an independent research publication by: L. Popić and B. Panjeta; 'Compensation, Transitional Justice and conditional credit in Bosnia and Herzegovina: Attempts to reform government payments to victims and veterans of the 1992-1995 war', available on the Nuhanovic Foundation's website.

³³ Amendments to the Law on Social Protection were made in 2004 and 2006. The 2013 Transitional Justice Strategy provides that: *Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'* p.135. But this strategy document has not been formally adopted at the time of writing this report.

civil victims and are entitled to a monthly personal cash benefit amounting to 70 per cent of the base that is applied to disabled war veterans' entitlements.

The degree of physical disability is to be determined in compliance with cantonal legislation originally pertaining to disabled war veterans (Art 80). Medical reports 'made immediately after the injury was incurred' and a record of proof, by a competent body, of the circumstances in which the injury occurred, must be submitted. This poses an obstacle to many who fled who for other reasons could not obtain or hold on to medical reports on their injuries at the time. Article 58 provides that civil victims of war, according to the law, are entitled to the following rights:

- 1. personal disability payment*
- 2. allowance for the care and assistance by another person*
- 3. orthopaedic allowance*
- 4. family disability payment [for the family members of the direct victims]*
- 5. child allowance*
- 6. financial support to cover the costs of treatment and procurement of orthopaedic aids*
- 7. vocational training (professional recovery, pre-qualification and additional qualifications)*
- 8. preferential treatment concerning employment.*

In addition, following the amendments just mentioned, civilian victims of the war have a right to psychological assistance and to legal aid.³⁴ Regrettably, at the time of writing this report no national legal aid system is yet in place. However – and here we see the blurring of the victim's distinctive status - spouses of persons rendered disabled during the war lose their entitlement upon remarriage (Art 76). Family members caring for the disabled victim lose their allowance whenever the injured person is temporarily placed in institutional care (Art 74). Children of victims are entitled only for so long as they are engaged in formal education (Art 63(2)). A widow or widower will only receive the benefit until s/he reaches pensionable age (Art 63(1)).

³⁴ The Transitional Justice Strategy was conceived as a sub-strategy of the Strategy for Judicial Reform in BiH (see p.113). The latter strategy foresees the establishment of a 'streamlined system of legal aid based on clear standards for receiving free legal aid and similar standards for those providing free legal aid in the entire BiH'. See also the BiH Justice Sector Reform Strategy p.33, available on the Nuhanovic Foundation's website.

In short, these provisions, which no doubt have brought relief to many victims, should not be mistaken for reparations as such. They attach to disability or other negative health impacts and can be cancelled out by changes in the economic position of beneficiaries. They do not imply any recognition of wrong done to the victim,

These provisions, which no doubt have brought relief to many victims, should not be mistaken for reparations as such.

and are independent of any effort to establish the truth behind the reasons for victims' injuries.

A 2010 analysis of the Law on the Principles of Social Protection points out that the State of BiH has no responsibility or legal framework to guarantee the same levels of protection for the same needs Statewide.³⁵ The authors state that the system in BiH is 'particularly complicated and dysfunctional [...] with a lot of overlaps and frequent evasion of responsibilities

between the 10 cantons and FBiH' and add that 'the social protection rights are regularly violated by non-adoption or non-implementation of laws at cantonal level, preventing implementation of the Federation laws in practice.' Indeed each canton has its own Law on Social Protection while there is no obligation on the State to ensure that these are harmonized with the State's provisions. The authors emphasize that the system lends itself readily to discriminatory implementation and this was confirmed by participants at the Round table in Amsterdam.

2003 Criminal Procedure Code of BiH ³⁶

Article 86(10) of this Code provides that:

[t]he injured party being examined as the witness shall be asked about his desires with respect to satisfaction of a property claim in the criminal proceedings.

The wording reflects the original location of this provision in the Property Law section of the SFRY Code. However elsewhere in the CPC an Injured Party is defined as 'a person whose *personal or property rights* have been threatened or violated by a criminal offense (Art.20(h)) [emphases added].

In Art.198 (2) we can see the basis for the State Court's practice of consistently referring injured parties to civil procedure to pursue their claims for compensation.

³⁵ Report by Initiative and Civil Action (ICVA) in collaboration with Prava za sve BiH *Why we are not equal in rights to social protection? Analysis and recommendations*, 2010.

³⁶ Available on the Nuhanovic Foundation's website.

In a verdict pronouncing the accused guilty, the Court may award the injured party the entire claim under property law or may award him part of the claim under property law and refer him to a civil action for the remainder. If the data of criminal proceedings do not provide a reliable basis for either a complete or partial award, the Court shall instruct the injured party that he may take civil action to pursue his entire claim under property law [emphasis added]. Art 258(4): If the injured party is present, but still has not filed the claim under property law, the judge or the presiding judge shall inform the person in question that such a claim may be filed by the closing of the main trial.³⁷

The judges appear to have a discretionary power only, rather than an obligation to award the injured parties their claim within the trial. On the other hand, it appears that it is only when 'the data of criminal proceedings do not provide a reliable basis for either a complete or partial award' that the judges should resort to instructing the parties to pursue their claims through civil action. In any case, it is unlikely that this provision was ever intended to serve the purposes of multiple claimants of gross human rights violations. Equally clear from the case law so far, is that victims generally do not have the legal advice needed to formulate a claim that would 'provide a reliable basis for either a complete or partial award'

These slender provisions, which seem to be only just barely applicable to victims of war crimes, appear in remarkable contrast to the extensive and detailed provisions on the compensation of persons who have been unjustly convicted by the State, detained without trial or unjustly imprisoned under normal circumstances. These persons, or their spouses, extra-marital partners or heirs, are entitled to file claims directly with the competent ministry or court. In this situation the connection between the institutions of the State and the injury done is direct and obvious. By contrast, in the case of war crimes, the question of exactly who should provide compensation is rarely clear. And even by 2003 when this law was passed, no broad solution for dealing with legitimate claims from the victims of war crimes had been conceived. TRIAL reported in February 2014 that 'to the

The judges appear to have a discretionary power only, rather than an obligation to award the injured parties their claim within the trial.

³⁷ Articles 195 and 197 provide further procedural details.

knowledge of the organizations the present general allegation, there has not been a single case where compensation has been awarded [within criminal trials], and this proves true not only before the State Court of BiH, but also before tribunals at the Entity-level.³⁸

The following Laws and Programmes are instruments designed for the post-war situation and relevant to war reparations. In practice though, these instruments have had little positive effect whether because of delays and postponements at the drafting and/or approval stages, unjust practices associated with the implementation, or simply because of non-implementation.

2004 Law on Missing Persons (LMP)

Chapter IV of the 2004 Law on Missing Persons is entitled *Rights of Family members of Missing Persons*. Articles 11-14 of this law provide for a limited right to monthly financial support for the families of missing persons. Article 15 establishes a dedicated *Fund for Support to the Families of Missing Persons*. Eligibility for financial support is heavily circumscribed, as it cannot be received concurrently with other forms of support. For example, support for a minor would be lost upon completion of his/her education or upon marriage, and a spouse loses his/her support upon remarriage or upon finding employment.

Advocates and victims have rightly argued that such provisions cannot be equated with reparations payments for war victims, since those should be payable regardless of the circumstances of the beneficiary. This point was made by the applicants of the family Prutina in their communication to the HRC.³⁹ It is certainly doubtful whether this kind of hybrid provision, blurring the boundary between compensation for the harm done to the families of Missing Persons and ordinary social welfare provisions for persons in financial need, meets the standards of the UN's 1992 Declaration on the Protection of All Persons from Enforced Disappearance which the 2004 Law on Missing Persons explicitly recognizes in its Article 1. Article 19 of that Declaration provides that:

[t]he victims of acts of enforced disappearance and their family shall obtain redress

³⁸ *General Allegation on the Situation in Bosnia and Herzegovina to the Special Rapporteur on Truth, Justice, Reparations and Guarantees of Non-recurrence*, submitted by TRIAL in February 2014, available on the Nuhanovic Foundation's website.

³⁹ Prutina et al; Communications Nos. 1917/2009, 1918/2009, 1925/2009 and 1953/2010 to the HRC – View adopted 11-28 March 2013, at para 5.3. Details of the case can be read on TRIAL's website.

and shall have the right to adequate compensation, including the means for as complete a rehabilitation as possible. In the event of the death of the victim as a result of an act of enforced disappearance, their dependents shall also be entitled to compensation.

In its 2013 report, the HRC's Working Group on Enforced or Involuntary Disappearances (WGEID) stressed that

[m]easures that provide for social assistance do not ...prejudice the obligation of the State to provide reparation to victims as a consequence of the violation of their rights.⁴⁰

The report also emphasized that

the obligation to provide redress to victims of enforced disappearances is not limited to the right to monetary compensation, but includes, inter alia, medical and psychological care and rehabilitation for any form of physical or mental damage as well as legal and social rehabilitation, guarantees of non-repetition, restoration of personal liberty and similar forms of restitution, satisfaction and reparation that may remove the consequences of the enforced disappearance.⁴¹

The principle of war reparations acknowledges that the recipient has been harmed by the war or by conflict-related criminal acts against him or her. Reparatory measures towards the victim are thus not to be negated by circumstances such as remarriage or an income from employment. In respect of the 2004 Law on Missing Persons however, this is regrettably a moot point, since the law has not been implemented at the time of writing this report.

The 2010 Transitional Justice Strategy recommended amendments to the LMP, in particular addressing the non-implementation of the MP Fund and proposing that plea bargaining should be made conditional upon disclosing information about missing persons. It proposed also an amendment to the 2003 Criminal Code making enforced disappearance an independent criminal act.

2005 War Damages Act of Republika Srpska

In response to the thousands of cases brought under ordinary Tort law in the Republika Srpska, the RS government enacted the War Damages Act 2005 creating a general compensation scheme for war victims. Ironically, the government then

⁴⁰ WGEID report 2014, A/HRC/22/45 28 Jan 2013, p.10 para 53.

⁴¹ Idem p.9 para 50.

proceeded to extinguish pending civil claims for war compensation in anticipation of the actual establishment of the Compensation Scheme. Suspended also was the enforcement of around 9.000 successful claims, in respect of which the Court of Banja Luka had ordered the RS to pay a total of 140,000,000 BAM. It was argued by the government that it would be unfair for those who had won compensation through court cases to fare better than those who would be awarded compensation under the intended general scheme. In the case of Čolić vs BiH a group of claimants took their case to the ECtHR (see Chapter 4).

Law on the Rights of Victims of Torture

BiH has been publicly affirming its intention to adopt a Law on the Rights of Victims of Torture since 2006. No progress having been made by 2011, the BiH Ministry of Human Rights and Refugees re-launched the initiative, circulating a draft law in February 2012. In March 2013 Ministry officials reported a lack of readiness on the part of both the Federation of BiH and the Republika Srpska to adopt the law. By late December 2013 the Constitutional-Legal Commissions of the House of Representatives of the Parliamentary Assembly of BiH and the House of Peoples had accepted a new draft. However, it was subsequently given a negative assessment by the Joint Commission for Human Rights in January 2014. At the date of writing this report the law has still not been approved, nor was there approval at the February 2014 meeting of the House of Representatives for a proposal from a member of Parliament to assign to the BiH Council of Ministers the task of preparing a new version of the law to be sent for parliamentary procedure within 90 days. The delays have caused bitter frustration particularly among prison camp detainees.⁴² Victims' groups were actively involved in the drafting process and were seeking full recognition and reparations. In particular they wanted 'the term and status of camp detainee to be defined, [as well as] welfare, healthcare for victims, free legal aid, the right to rehabilitation, disability status, and very importantly, memorialization at the places of detention to be allowed'.⁴³

⁴² Victims' groups have been vocal in the press and have demonstrated inside the Bosnian Parliament as documented here by the online journal Balkan Insight. See their posts of 14 Feb 2013

<http://www.balkaninsight.com/en/article/bosnian-victims-want-law-on-torture>
and 24 April 2013

<http://www.balkaninsight.com/en/article/bosnian-torture-victims-stage-parliament-protest>

⁴³ Association of Prison Camp Detainees' representative Jasmin Mešković, cited in Balkan Insight 14 Feb 2013.

The Program for Improvement of the Status of Survivors of Conflict related Sexual Violence

In its *General Allegation on the situation in BiH* TRIAL reports that the process of drafting and adoption of the Program for Improvement of the Status of Survivors of Conflict-related Sexual Violence, coordinated by the United Nations Population Fund and the BiH Ministry of Human Rights and Refugees, was launched at the end of 2010.⁴⁴ Finalization of this program, initially expected by the end of 2011, has been repeatedly postponed and in November 2014 the draft has not yet been submitted to the Council of Ministers of BiH for approval, but remains at the Entities level awaiting feedback. No opinion from the government of Republika Srpska has been forthcoming. Consequently the whole process is currently stalled. TRIAL points out that this raises serious doubts as to the level of priority attributed by BiH authorities to this legislative initiative, and considers BiH's latest plan for 'modular implementation' of the Program – which would largely depend on the financial support of external donors – to be unconvincing: without the formal approval of one of the Entity governments, no comprehensive and State-wide implementation of such a program can realistically be achieved.

Transitional Justice Strategy

The drafting and adoption process for an over-arching Transitional Justice Strategy (TJS) supported by the UNDP began in 2010, and was expected to result in the presentation of a draft document to the Parliamentary Assembly during the summer of 2012. A 'working document' emerged in early 2013.⁴⁵ In November 2013 TRIAL reported that 'the Ministry of Justice of BiH is coordinating new efforts into organizing further consultations at the local and other levels with a variety of actors to gather their comments to the draft document, enter amendments and advocate for its adoption'.⁴⁶ However, as of November 2014, to our knowledge, there has been no presentation of the document to Parliament.

Despite the stagnation, we have chosen to include just two paragraphs from the TJS 'working document' here that clearly show recognition that the current legislative

⁴⁴ Available on the Nuhanovic Foundation website.

⁴⁵ BiH Ministry for Human Rights and Refugees and Ministry of Justice; Transitional Justice Strategy for BiH 2012-2016 – Working Document, Sarajevo March 2013. The document is available in English on the Nuhanovic Foundation's website.

⁴⁶ TRIAL Follow-up Report on the Implementation of the Recommendations issued by the Human Rights Committee (CCPR/C/BIH/2), Nov 2013, at para 41, available on the Nuhanovic Foundation's website.

arrangements are inadequate as instruments for reparations. The Strategy provides this definition of reparations:

*material and non-material methods which have individual and collective effects. They contribute both directly and indirectly to restoring dignity of victims; acknowledging and accepting the harm suffered; overcoming the effects of human rights violations; achieving devictimisation; and improving the socio-economic status of victims, all with a view to achieving their social reintegration.*⁴⁷

Secondly the TJS would adopt the definition of victim:

*Victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.*⁴⁸

Draft Law on Free Legal Aid

A draft law on free legal aid was submitted to the BiH Council of Ministers in April 2012. TRIAL reports that the draft law was adopted by the Council as a proposal and introduced into the BiH Parliamentary Assembly on 23 July 2012, but was eventually not approved. The deadline for the drafting of a new law was December 2013 but as of November 2014 no new draft has been presented. TRIAL points out in its General Allegation that the great majority of victims of gross human rights violations during the war are in dire financial conditions and cannot pay for legal assistance and representation. Hence, the failure to advance the drafting of this law has very serious and far-reaching consequences for a large group within the population of BiH. Participants at the Amsterdam 2014 Round Table stressed the fact that the absence of legal aid posed an insurmountable obstacle for thousands of potential applicants for reparations.

⁴⁷ See fn. 42, p.16.

⁴⁸ See fn. 42 p.134. The provision relies on the definition of victims in The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law at para 8. See <http://www.nuhanovicfoundation.org/en/general/>

Laws on internal debt: the conversion of private bank accounts and compensation awards into public debt.

Many claims for compensation have arisen in relation to foreign currency bank accounts held by BiH citizens, that were frozen during the war and have apparently remained so. A series of 'Laws on Internal Debt' was devised with the aim of addressing this problem but in effect the laws justified a policy of (partially) withholding the contents of the accounts, absorbing them into the 'internal debts' of the two Entities.

The Law on Establishment and Mode of Settlement of the Internal Obligations of the Federation of Bosnia and Herzegovina of 2004 enabled calculation of the foreign currency accounts of private citizens as part of the 'internal debts of the separate Entities.'⁴⁹ This law was successfully challenged by Nikola Špirić before the Constitutional Court. The Court found that the accounts were the property of the citizens, not of the Entities, and that the State of BiH had to assume responsibility for the disposal of these accounts in a Statewide solution, instead of allowing Entities to devise their own solutions.⁵⁰ The more recent Law on Settlement of Liabilities for Frozen Foreign Currency Accounts (OG 28/06) deals with the interest levels that should be paid to the account holders, allowing these to be compromised in the interest of the national debt. This was found to be constitutional.⁵¹ However the case of Ališić (see Ch.3 below) was only one of several by claimants still unable in 2012 to dispose of the money in those accounts, suggesting that the problem, at that time at least, was not yet resolved.

A series of laws on internal debt from the Republika Srpska provides that court-awarded rights of non-pecuniary damages for arbitrary deprivation of liberty during the war should be considered as part of the public debt of the RS and be paid out in bonds within a period of 13 years.⁵² While the awarding of any reparations is welcomed, in 13 years from 2014, victims will be 32-35 years older than they were at the time of the crimes committed against them. Many will no longer be living. This policy is likely to discourage potential litigants while at the same time there appear to be no other options open to them.

Conclusion

In their 2010 Commentary on the Constitution of Bosnia and Herzegovina, Steiner et al. observed that 'a great obstacle for stabilization of the country is the lack of

⁴⁹ Official Gazette 66/04.

⁵⁰ Request by Nikola Špirić to the Constitutional Court in Case U-14/05, 2 December 2005.

⁵¹ Constitutional Court decision U 3/08.

⁵² This was reported by Bosnian lawyers at the Round table.

preparedness for consensus. Groups not favoring a joint state, through constant delays and inhibition of the decision-making process, are trying to prove that such a state is dysfunctional. [...] Bosnia and Herzegovina's warring sides went together aboard the same "ship", the sinking of which would be acceptable for at least two out of the three of them.'⁵³

This captures well the background against which all efforts towards any kind of restorative justice in BiH are being made. We have reviewed a number of legal and quasi-legal instruments that have had the potential to work against the impunity of those involved in committing war crimes, and to advance the rehabilitation of victims. The chief problem afflicting these instruments has been the failure to see them through to full enactment or to full implementation. Notwithstanding important advances made especially in the area of war crimes processing, the legislative system has, generally speaking, not been able to provide victims with effective remedies. In this context, the question debated during the Nuhanovic Foundation's April 2014 Round Table is a very legitimate one: can litigation achieve what is needed for a significant number of victims?

The conclusion reached (see further chapter 5) was that in the absence of an adequate administrative reparations scheme, litigation is a tool with the potential to achieve a three-fold aim. Firstly, active exercise of the right of access to the court system is perhaps the strongest evidence of the persistence of the Rule of Law in the post-conflict setting. Second, each court case in which victims are recognized as such or reparations are awarded, provides a precedent that underlines the right

of civilians to reparations for harm suffered during conflict. Third, persistence in litigating is a means of continuing to exert pressure on the State to create an adequate administrative reparations scheme.

Participants at the Amsterdam Round Table concluded that the compilation of data on the names, locations, current situation and specific needs of victims is a matter of pressing urgency in order to make concrete representations to the government of BiH about what such a scheme must be able to provide.

Persistence in litigating is a means of continuing to exert pressure on the State to create an adequate administrative reparations scheme.

⁵³ Constitution of Bosnia and Herzegovina – Commentary, Steiner, Christian et al; Konrad Adenauer Stiftung: Rule of Law Program South East Europe, Sarajevo 2010: 23.



4. National and regional jurisprudence

In this chapter we present a sample of significant cases concerning either perpetrators or victims of the Bosnia war, before national and international fora. Each of the cases exemplifies some problematic aspect of the functioning of the judicial system in BiH.

Čolić and Others vs BiH - European Court on Human Rights (ECtHR) 2009 ⁵⁴

Procedural trajectory District Court of Banja Luka 2001 - Human Rights Chamber and Constitutional Court of BiH 2005 - ECtHR 2009

Complaint Payment of court-awarded compensation barred in anticipation of Public Claims Scheme

The applicants in this case complained variously to the Human Rights Chamber of BiH, or the Constitutional Court of BiH that the compensation payments awarded to them by the Banja Luka Court of First Instance in 2001 had never been paid, and therefore that the judgment in their favour had not been implemented. In 2005 the beneficiaries of the judgments - along with those of 9,000 other judgments made in 2005 - learned that enforcement of their judgments had been suspended by the RS government. The government claimed that honoring these court-awarded payments would cost more in terms of public debt, than the new reparations scheme to be created under the 2005 War Damages Act (see chapter 2). In addition, the government argued that in the light of the immanent creation of that scheme it would be unjust if some victims were to be awarded (higher) compensation on the basis of the court decisions while others in similar situations would receive compensation only under the new scheme.

The European Court found that no judgments finalized before the creation of the scheme could be set aside in this way. It held that there had been a violation of fair-trial rights and of the right of enjoyment of possessions and ordered all payments to be paid as ruled, plus 1.500 Euro per claimant for non-pecuniary damages. At the time of writing this report we have not been able to ascertain whether these payments have been made. Participants at the NF's Round table confirmed that in any case the intended reparations scheme envisaged in the 2005 War Damages Act has never been established. The case illustrates that legislative provisions on

⁵⁴ Čolić et al vs Bosnia and Herzegovina, ECtHR Application nrs 1218/07, 10 November 2010, available on the Nunahovic Foundation's website.

paper can have a potency that is deceptive. Here we see the very government that has made the legislation, use it to deflect claims that have been approved by court rulings. As we see in the Mujkanović case (below), reliance on written laws as guarantee of future action can veil inactivity or lack of implementation over very long periods of time.

Regrettably, the failure to implement laws and policies has become a pattern in BiH. Together with unimplemented court rulings, this pattern diminishes public confidence in the authorities and the transitional justice process. Notwithstanding the non-implementation of some court rulings, it is the NF's position that a court ruling granting reparations in favor of victims carries its own persuasive weight: it demonstrates that the institutions of justice have not ceased functioning and it provides evidentiary material for claimants who are driven to expose the workings of the State to international observers.

Prosecutor vs Milorad Trbić – Court of BiH⁵⁵

Procedural trajectory ICTY - WCC 2009 - Court of BiH Appellate division 2010
Judicial referral of compensation claimants to civil procedure

The case against Trbić, transferred from the ICTY to the court of BiH in 2007, resulted in a conviction for genocide and led to a thirty-year sentence for the perpetrator.⁵⁶ It was one of the first cases in which a large number of victims - more than 800 - presented compensation claims during proceedings before the Court of BiH. The Court declined to process the claims, and referred the claimants to a civil procedure.

*Pursuant to Article 198(2) of the Criminal Procedure Code of BiH, the Court refers the victims to pursue their property law claims by taking civil action, considering that the process of establishing the facts in terms of the amounts of the claim would require a longer time.*⁵⁷

⁵⁵ Prosecutor's Office vs Milorad Trbić, Case no. X-KR-07/386, 16 October 2009, available on the Nuhanovic Foundation's website:

<http://www.nuhanovicfoundation.org/en/reparations-cases-2/>

⁵⁶ In November 2014 the Trbić verdict was quashed by the Constitutional Court of BiH and a retrial ordered. This was the most recent in a series of rulings overturning cases that had been decided under the 2003 Criminal Code of BiH instead of the 1976 Criminal Code which was in force at the time. The rulings follow upon the ECtHR's decision in the case of Maktouf, holding that there had been a violation of the applicant's rights under Art 7 ECHR (No punishment without law).

⁵⁷ See fn.2 at para 378.

In 2010 the applicants appealed, asking the Appellate Court to reverse the part of the decision referring them to a civil court to pursue their compensation. However the Appeals Court upheld the original decision: The State Court added:

Under the circumstances of this case, considering the length of the proceedings, the difficult legal issues presented, and the fact that the Accused was in custody throughout, determination of property claims by the Court would have been impractical (see Article 198(2) of the CPC).⁵⁸

The Court relies here on the non-prescriptive language of Article 198, discussed above. During the Round Table it was reported that the claimants had not succeeded in pursuing their claims before civil courts. The referral to civil procedure continues to thwart the vast majority of claimants from obtaining compensation.

Abduladhim Maktouf vs BiH, European Court on Human Rights 2013⁵⁹

Procedural trajectory WCC 2005 – Court of BiH Appellate Division 2006 – Constitutional Court of BiH 2007 - European Court on Human Rights 2013 – Court of BiH (retrial) 2014

Retro-active application of the New Criminal Code to war-time crimes

This case did not involve any reparations claims. We include it here because the case has had a significant impact on subsequent rulings of the Constitutional Court of BiH. Seventeen verdicts have been quashed and retrials ordered in the wake of Maktouf. Legal certainty in BiH has been compromised and victims have had to see convicted persons freed and then retried, always receiving lower sentences. In 2005 Maktouf was sentenced by the War Crimes Chamber to ten years imprisonment for his involvement as a driver and assistant in the unlawful arrest and detention of two civilians in 1993. This was the minimum sentence applicable under the 2003 Criminal Code of BiH for the crime of hostage taking during armed conflict. Maktouf's sentence was reduced to five years because of mitigating circumstances. However, under the 1976 SFRY Criminal Code, in force at the time the crime was committed, the minimum sentence would have been five years, reducible to one year in the event of mitigating circumstances.

⁵⁸ Prosecutor's Office vs Milorad Trbić, Case X-KRŽ-07/386, Appellate Verdict, 21 Oct 2010.at para 330.

⁵⁹ Maktouf and Damjanović vs BiH, Applications nos. 2312/08 and 34179/08, 18 July 2013, available on the Nuhanovic Foundation's website: <http://www.nuhanovicfoundation.org/en/reparations-cases-2/>

The War Crimes Chamber argued that the 2004 amendment to the Criminal Code of BiH (art 4(a)) provided for 'exceptional departure' from the principals of non-retro-activity and mandatory application of the most lenient sentence when the crimes in question were committed within the context of war.⁶⁰ The article reflected the provisions of Article 7(2) of the ECHR:

1. No one shall be held guilty of any criminal offence ...which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according the general principles of law recognized by civilized nations.

On Appeal to the Appellate Division of the Court of BiH in 2006, the WCC's ruling on the applicability of the 2003 Code was upheld. It was upheld again by the Constitutional Court of BiH in 2007. However in 2013 Maktouf brought his case before the ECtHR. The European Court was

*unable to agree that if an act was criminal under "the general principles of law recognised by civilised nations" within the meaning of Article 7(2) of the Convention at the time when it was committed, then the rule of non retroactivity of crimes and punishments did not apply.*⁶¹

It argued that

the drafters of the Convention did not intend to allow for any general exception to the rule of non-retroactivity. Indeed, the Court has held in a number of cases that the two paragraphs of Article 7 are interlinked and are to be interpreted in a concordant manner...

The court added that

*[a]rticle 7(2) is only a contextual clarification of the liability limb of that rule, included so as to ensure that there was no doubt about the validity of prosecutions after the Second World War in respect of the crimes committed during that war...*⁶²

⁶⁰ 'Article 4(a) Articles 3 and 4 of this Code shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of international law.'

⁶¹ Case of Maktouf and Damjanović v Bosnia and Herzegovina (Application nrs 2312/08 and 34179/08), 18 July 2013 at para 72.

⁶² Idem.

Moreover, the Court held that unlike crimes against humanity for which there is no provision in the earlier Code, the very same definition of 'war crimes' is given in both the 1976 and 2003 Codes, removing any necessity to apply the later code on that ground.⁶³

The Court's conclusion was that there had been a violation of Article 7 of the Convention in the particular circumstances of Maktouf's case, adding that this conclusion should not be taken to indicate that lower sentences ought to have been imposed, but simply that the sentencing provisions of the 1976 Code should have been applied. Maktouf was awarded costs but no damages. The case was returned to the Court of BiH for retrial. In its decision of 7 July 2014 the Court of BiH 'handed down a [new] first instance verdict sentencing the accused Abduladhim Maktouf for the criminal offence of War Crimes against Civilians to five years in prison.' This decision may yet be appealed.

In October 2013 the Constitutional Court was reported to have overturned ten cases that had been decided under the 2003 code, following the European Court's ruling. This meant that retrials became necessary and that in the interim the defendants were free from custody. Participants at the Round table expressed serious concern that this posed a potential serious threat to victims/witnesses who had been involved in the original prosecutions. In November 2014 the State Court of BiH quashed the verdict against Milorad Trbić (see above) on the same grounds. Human rights experts expressed alarm over his potential release and the possibility that he may flee to another jurisdiction as has already happened in at least one other similar case.⁶⁴

These cases illustrate how legal certainty has suffered in the post-war context in which two different Criminal Codes have been applied to sometimes similar or even identical crimes. This is not really surprising: Bosnia is truly a test case in that the crimes committed during the war, albeit already recognizable as war crimes, predated - because they triggered it - the first of the statutes that have given firm shape to international criminal law, namely, those of the ICTY, ICTR and ICC. Nevertheless, the State's willingness to respond rather vigorously to the ruling of the European Court on this particular occasion contrasts disconcertingly with its resistance to the implementation of so many other court rulings in favour of victims.

⁶³ Articles 142 and 173 respectively.

⁶⁴ Press release from the UN News Centre, 19 Nov. 2014 available at http://www.un.org/apps/news/story.asp?NewsID=49380#VIDUzEscG_c

The State's willingness to respond rather vigorously to the ruling of the European Court on this particular occasion contrasts disconcertingly with its resistance to the implementation of so many other court rulings in favour of victims.

Prutina et al., Application before the Human Rights Committee 2013 ⁶⁵

Procedural trajectory Sarajevo Cantonal prosecutor - Constitutional Court – UN Human Rights Committee

Complaint (Inadequate information, investigation and compensation for families of missing persons)

On 9 September 2005, the applicants in this case filed a criminal complaint with the Sarajevo Cantonal Prosecutor against unidentified members of the VRS in relation to the abduction, torture and disappearance of their relatives. They received no response from the Prosecutor until September 2011, when a statement was taken from one of

the authors. In the same month (September 2005) they submitted an application to the Human Rights Commission of the Constitutional Court of BiH, claiming violations of Art.3 and 8 of the European Convention on Human Rights and articles II.3(b) and (f) of the Constitution of Bosnia and Herzegovina on the basis that neither the federal nor the Entity governments had given them any information about the whereabouts of their missing relatives.

On 23 February 2006, the Constitutional Court confirmed violations of articles 3 and 8 of the ECHR and the corresponding constitutional provisions. The Court ordered the Council of Ministers of BiH and the Governments of all three entities to release all information in their possession pertaining to the fate or whereabouts of the authors' missing relatives and to ensure that the State agencies envisaged by the Law on Missing Persons 2004, namely the Missing Persons Institute, the Central Records and the Fund for Support to the Families of Missing Persons, become operational. No compensation was awarded, explicitly because the Court foresaw this aspect being resolved through the Fund.

On 18 November 2006, the Constitutional Court held that its decision of 23 February 2006 had not been fully enforced. RS had released all relevant information in

⁶⁵ Communications Nos. 1917/2009, 1918/2009, 1925/2009 and 1953/2010 - Views adopted by the Human Rights Committee 28 March 2013, available on the Nuhanovic Foundation's website: <http://www.nuhanovicfoundation.org/en/reparations-cases-2/>.

its possession, but the other institutions had not done so. Furthermore, the Missing Persons Institute, the Central Records and the Fund for Support to the Families of Missing Persons had not yet become operational. This decision was submitted to the State Prosecutor, as non-enforcement of decisions of the Constitutional Court constitutes a criminal offence in BiH.

On 28 March 2013 the UN Human Rights Committee adopted its Views on the case, affirming that the State of BiH was in violation of Articles 2 and 3 in conjunction with Arts 6,7 and 9 of the International Covenant on Civil and Political Rights.⁶⁶ The Committee found that the non-resolution of some cases of missing persons, in a context of manifest efforts to resolve as many cases as possible, did not in itself amount to a violation: the obligation was one of means, not of result.⁶⁷ However it considered that three particular aspects of the State's handling of these cases fell short of the standards required of States parties to this covenant, in respect of the treatment of victim of enforced disappearance. Firstly, some additional information as to the fate of the missing relatives came to light only during the course of these proceedings before the HRC. This indicated that the State had been less than fully forthcoming with the applicants, whereas all relevant information should have been forwarded to family members. This was a violation of Art. 2(3) requiring 'effective' remedy. Social allowances for the families of missing relatives should not be made conditional upon procurement of a pronouncement that the missing person was presumed dead. A remedy was due simply because obligations had been breached. Finally, two of the applicants were minors at the time of the disappearances. The State's failure to provide them with special protection as required by Article 24 was a violation of that Article.

In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including (a) continuing its efforts to establish the fate or whereabouts of their relatives as required by the Law on Missing Persons 2004; (b) continuing its efforts to bring to justice those

⁶⁶ Ibid at para 10-12. Decisions of the HRC are called 'Views' and are not legally binding in the same sense as court decisions. Views are rather to be considered as a weighty, public evaluation by an expert committee with the highest credentials, that may involve approval or condemnation, and that is disseminated in the international domain. Its aim is to exert pressure on States parties to comply with their obligations under the Covenant.

⁶⁷ It is worth noting that one member of the HRC gave a partially dissenting view, stating that the obligation to provide an effective remedy for the families of missing persons *should* be understood as an obligation of effect, since it was only full knowledge of the fate and whereabouts of the loved one, that could ever be an 'effective' remedy: nothing less could end the State of torment in which they lived until that moment. Ibid – Appendix para 2-3.

responsible for their disappearance and to do so by the end of 2015 as required by the National War Crimes Strategy; (c) abolishing the obligation for family members to declare their missing relatives dead in order to benefit from social allowances or any other forms of compensation; (d) ensuring adequate compensation.⁶⁸ (These views may be contrasted with the *Mujkanovic* decision in which the judges of both the Constitutional Court of BiH and the ECtHR accepted a lower standard of remedial measures for the applicants under provisions of the ECHR.)

In total, at the time of writing, the Views issued by the HRC on BiH cases since *Prutina* are the following:

- *Rizvanović v. BiH* (21 March 2014)
- *Selimović and others v. BiH* (17 July 2014)
- *Đurić and others v. BiH*, 16 July 2014
- *Hero v. BiH*, 28 October 2014
- *Kozljak v. BiH*, 28 October 2014.⁶⁹

In all cases BiH has been found responsible for the violation of several provisions of the International Covenant on Civil and Political Rights vis-à-vis missing persons and their relatives and similar measures of reparation have been recommended. Unfortunately, at the time of writing, the level of implementation is almost zero in all cases.

Mujkanović et al. v BiH European Court on Human Rights (ECtHR) 2014⁷⁰

Procedural trajectory Constitutional Court of BiH 2007 and 2009 – European Court on Human Rights

Complaint Inadequate response of the BiH authorities to the disappearances of their relatives.

The applicants in this case, all family members of persons who had gone missing in connection with a mass killing at Korićanske Stijene in August 1992, lodged a complaint with the Constitutional Court of BiH in 2006. They alleged an inadequate response of the BiH authorities to the disappearances of their relatives. In July 2007 the Constitutional Court ruled that BiH had breached Arts 3 and 8 of the ECHR: the relevant State agencies (Central Records and Fund) had not been set up. The Constitutional Court ordered the release of all information relevant to the disappearances, to the applicants.

⁶⁸ *Ibid* para 11.

⁶⁹ For a summary of each of these and access to the relevant texts, see <http://www.trial-ch.org/en/activities/litigation/the-advocacy-center-trial-act/acts-cases/bosnia-herzegovina.html>

⁷⁰ *Munira Mujkanović et al. vs Bosnia and Herzegovina*, Application no. 47063/08, 3 June 2014, available on the Nuhanovic Foundation's website.

On 27 March 2009, by which time little had changed, the Constitutional Court considered the alleged non-enforcement of its July 2007 ruling. However it concluded: that that decision was to be considered enforced notwithstanding the fact that some of the State agencies envisaged by the Law on Missing Persons 2004 (precisely, the Central Records and the Missing Persons Fund) had not yet become operational. It held that no further action was required from the Constitutional Court as the failure to enforce a similar decision had already been reported to the State Prosecutor (non-enforcement of a final and enforceable decision of the Constitutional Court being a criminal offence in BiH).

An application was then lodged with the ECtHR. The European Court considered the various legislative advancements made since 2005 and also the convictions of 11 perpetrators in relation to these deaths, and concluded that, notwithstanding the failure to actually implement some essential provisions of the BiH Law on Missing Persons, the State had not been inactive and had taken important steps within its powers under the circumstances. Therefore there had been no violation of Articles 2,3,5,8 or 13 of the European Convention of Human Rights.

The Court found that:

(i) investigations into the circumstances and cause of death and whereabouts of the bodies had been at least partially, if not fully, effective, as some parts of the remains of the missing persons in question had been discovered and 'the procedural obligation under Article 2 is not an obligation of result, but of means'.

(ii) criminal investigations had led to the conviction of over ten perpetrators of the crimes;

(iii) access to information relating to investigations had been adequate: '[T]he procedural obligation does not require applicants to have access to police files, or copies of all documents during an ongoing inquiry, or for them to be consulted or informed about every step, families need not be provided with the names of the potential suspects against whom insufficient evidence has been gathered for prosecution';

(iv) applicants requests for information have been answered (albeit not by individual notifications but) by press releases or group meetings with victims and/or their associations. The Court found this procedure reasonable given the large number of war crimes cases pending before domestic courts and the tens of thousands of victims;

(v) it was only from 2005 that cases pending before domestic court capable of dealing with disappearance cases and from that time on there had been no period of inactivity in the criminal investigations. Thus the investigations were sufficiently expeditious under the circumstances. In particular the Court set considerable store by the provisions of the Missing Persons Act of 2004. It noted that the Missing Persons Institute mandated by the Act had been set up in 2005 and become operation-

al in 2008.⁷¹ It considered that the Fund - though not yet established in 2014 and thus not having made any payments 'so far' - would provide family members with monthly financial support;

(vi) the Central Records mandated by the Act were founded in Feb 2011 (albeit, at the date of this decision 'it would appear that the verification process is still ongoing').⁷²

It is regrettable that the Court managed to side-step the very serious complaint about the non-establishment of the Fund for families of Missing Persons, by relying on a technicality:

*[W]hile it is true that the payment of financial support to relatives of missing persons has not begun because the Missing Persons Fund has not been set up, the applicants have not demonstrated that they would be eligible for such support.*⁷³

This is a strange assertion given that the Constitutional Court of Bosnia and Herzegovina had already explicitly referred the claimants to the Fund, implying their entitlement. An element of pragmatism seems to mark this decision. It is not difficult to understand the Court's motivation in crediting the State with having taken as many steps as possible in the very difficult circumstances of post-war BiH, where the State faces potentially thousands of victim applicants/claimants. However, the measures taken by the State continue – ten years after the enactment of the Law on Missing Persons – to fall far short of the standard of conduct that this very Court has upheld in earlier decisions on enforced disappearances. An excellent summary of the ECtHR's interpretation of what is required to be done for the family members of Missing Persons can be found in the *Amicus Brief* submitted by the NGOs Redress and the World Organization against Torture, addressed to the ECtHR in 2013.⁷⁴ By implicitly approving of the Law on Missing Persons provisions for family support while ignoring the non-establishment of the Fund, the Court missed an opportunity to support the very urgent cause of implementation of legislation and court rulings in BiH, the lack of which is at the very heart of the problems facing victims in BiH today.

⁷¹ <http://www.ic-mp.org/icmp-worldwide/southeast-europe/bosnia-and-herzegovina/>

⁷² Fn.70 at para 30.

⁷³ Fn.70 para 49.

⁷⁴ Intervention by Redress and the World Organization against Torture, in relation to the case of Mujkanović et al v BiH, Application nr: 47063/08, 3 June 2014, available on the Nuhanovic Foundation's website.

Sejdić-Finci v Bosnia and Herzegovina - ECtHR 2009 ⁷⁵

Procedural trajectory Constitutional Ct. of BiH 2006 - ECtHR 2009

Discriminatory barring of political participation for minorities

This case provides an example of the broader impact that failures to implement court rulings can have. It also serves as a reminder that as well as constituting in itself a form of reparation, namely 'just satisfaction', litigation attracts the focus of international observers and can be a means of exerting pressure on the State to bring about necessary reforms.

The applicants are two prominent public figures in the political life of BiH. Their complaint was that they are precluded, by provisions of the Constitution of BiH, from running for election to the Presidency or the House of Peoples because they are of Roma and Jewish origin respectively and cannot therefore identify as members of one of the three 'constituent peoples' of BiH, namely Bosniak, Croat and Serb.⁷⁶ Mr Sejdić is the Roma monitor for the OSCE in BiH and was formerly a member of the Roma Council of BiH. Mr Finci is prevented is BiH's ambassador to Switzerland and was formerly Head of the State Civil Service Agency.

Their claim was brought under Article 14 of the European Convention on Human Rights and Art.1 of its Protocol 12, both of which prohibit discrimination generally and in particular by public authorities. In addition, they relied upon Art.3 of Protocol 1 providing for a right to free and fair elections.

The Court found that given the applicants' 'active roles in public life' it would be entirely coherent that they would in fact consider running for the House of Peoples or the Presidency.⁷⁷ If the State was not solely responsible for the provisions of the Constitution (partly a creature of the Dayton Agreements) it was certainly responsible for maintaining them. The Court found that the applicants' rights under the convention had indeed been violated. The ruling itself was found to constitute 'just satisfaction' by way of a remedy the applicants' costs were largely covered. The true impact of the decision was of course the pressure it brought to bear on the State of BiH, a signatory of the Convention.

However, between December 2009 and February 2014 the ruling had no visible impact on the legislature in BiH. On 18 February 2014, the EU's Commissioner for

⁷⁵ Sejdić and Finci vs BiH Applications nos. 27996/06 and 34836/06), 22 Dec 2009, available on the Nuhanovic Foundation's website.

⁷⁶ Article IV of the Constitution of BiH, available on the Nuhanovic Foundations website.

⁷⁷ Fn 75 para 79.

Enlargement expressed 'deep disappointment' about the non-implementation of the ECtHR's ruling:

[I]mplementation of this judgment is not a remote issue or virtual issue. It is an international obligation of Bosnia and Herzegovina that, following the will of the Member States, is now a key to progress on the EU path. It has real consequences. It means the full entry into force of your Stabilisation and Association Agreement. It means the possibility for Bosnia and Herzegovina to submit a credible application for EU membership.⁷⁸

The Commissioner reminded the BiH authorities that since 2010 there had been three formal initiatives to implement the ruling, all of which had failed. He emphasized that:

Bosnia and Herzegovina will remain, at least for the time being, in breach of its international commitments. It is a shame for the politicians, through inaction, to fail because the rest of the region is moving forward towards the European Union, and because citizens are calling politicians to be accountable.

Participants at the Round table expressed dismay that the EU delegation and Commission have failed to exert the pressure it would take to move the BiH government towards the necessary legislative change.

A panel of European ministers, academics and policy makers, hosted by The Hague Institute of Global Justice in July 2014 confirmed an apparent lack of a coherent strategy on the part of the EU or the US in their efforts to influence the progress of BiH.⁷⁹ It was remarked that

Bosnia is stuck because its constitution ensconced ethnically nationalist political parties in positions of power from which only more nationalist parties are able to remove them. Dayton ended the war but failed to provide the country with a central governing structure capable of negotiating and implementing the requirements of NATO or European Union membership.⁸⁰

⁷⁸ European Commission Memorandum, 18 February 2014, EU: *Deep disappointment on Sedjić Finčić implementation*, available on the Nuhanovic Foundation's website.

⁷⁹ HIGJ Newsletter, *Finishing the Job in the Balkans*, 18 July 2014, available on the Nuhanovic Foundation's website: <http://www.nuhanovicfoundation.org/en/reparations-cases-2/>

⁸⁰ Daniel Serwer, Senior Fellow, Centre for Transatlantic Relations, John Hopkins University, US.

It was also observed that a failure to achieve 'mutual acknowledgement of the harm done' was undermining and would continue to undermine the reconciliation that was crucial to break the current stagnation.

It is our view that the Sejdić Finci ruling and the response to it demonstrate that litigation, even confronted with non-implementation, can heighten international scrutiny and, albeit slowly, increase pressure on the State to make essential reforms based on human rights principles.

Conclusion

The cases we have reviewed in this chapter illustrate a number of persistent problems in the legislative and judicial system in post-war BiH. It is dismaying that not one of these claimants/applicants has to date received any form of reparations. We have noted that stagnation on the ground can hide quite successfully behind legislative improvements that - being published - are visible and convincing to national and international observers. And we have seen that in the long drawn-out aftermath of the Bosnian war, the ECtHR, acknowledging hard work and good intentions in very difficult circumstances, may have allowed certain standards to be quietly lowered. Above all, non-implementation either of a piece of legislation and/or of a court ruling was a feature of every one of these cases.

Nevertheless it is a remarkable feature of litigation, in so far as it has the potential to reach a broad domestic and international public, that it serves as a very accurate mirror of certain malfunctions in post-war domestic systems that might otherwise remain utterly obscure to observers. Litigation has a currency of its own: even a partially or fully unimplemented ruling carries a certain weight. Litigation illuminates the existence of an operative legal system, but reveals at the same time its weaknesses. Without it, in the absence of strong and pro-active public authorities, or highly organised and vocal civil society groups, victims stand no chance at all of drawing attention to the failure of regard for their human and civil rights that has weakened their hold on full participation in the post-war society.

Litigation illuminates the existence of an operative legal system, but reveals at the same time its weaknesses.



5. Further obstacles to the procurement of reparations in BiH

From the previous chapters we have seen that the outstanding problem facing civilian war victims who have not received the necessary recognition or support is the problem of non-implementation: numerous highly relevant Government strategies, pieces of legislation or draft legislation and even binding court decisions of national and international courts have failed to have effect because they have not been implemented. Indeed, participants at the Amsterdam Round Table observed the dismaying contrast between the advancements that have been achieved on paper, in and for BiH, and what has actually changed for war victims on the ground.

In Chapter 4 we saw that criminal court judges consistently decline to resolve the compensation claims brought by victim/witnesses who have participated in trials, despite having the power to do so. We noted that compensation (as one important form of reparation) has only a very marginal place in the domestic criminal law provisions of BiH and that the existing provisions cannot effectively be harnessed by those seeking redress for war crimes. Bosnia's Law on Obligations (1978) offers a limited framework for applying for compensation for damage and some advocates reported having obtained modest successes using this law as the legal basis for civil claims.⁸¹ Several crucial post-war legislative instruments have failed to provide reparations as envisaged, due to interminable delays at the drafting, presentation or approval stages, while others were only partially or never implemented. Chapter 4 showed how the impact of court rulings awarding reparations has been greatly limited by the failure to implement many of them, even after confirmation by the European Court of Human Rights that such failure itself constitutes a violation of the European Convention. Several Views of the Human Rights Committee, repeatedly drawing the State's attention to the non-implementation of court rulings, have likewise failed to have any direct impact. Legal practitioners from BiH at the Round table confirmed that unenforced rulings contribute to a general sense of discouragement and demoralization: victims are daunted by the arduous process leading so often to no real recognition or change while a widespread lack of interest amongst authorities in matters related to victims was also reported.

A second over-arching problem hampering all efforts to reach and obtain adequate reparations for victims is the absence of a central registration mechanism compiling data on the effected population in BiH and mapping the activities of those who are currently working to assist them.

⁸¹ 1978 Law of Obligations, articles 200-205.

In this chapter we look at a number of additional factors that continue to thwart efforts to obtain reparations. These can broadly be classified under four categories: (i) administrative obstacles of various kinds, (ii) the lack of adequate provisions for legal aid and victim support, (iii) the lack of legal certainty and the non-harmonization of practices and (iv) the lack of centralized data on the numbers, condition and whereabouts of victims of war-related harm.

Time limits and obstacles related to residency or returnees status.

An obstacle has been posed to many victims by the unjust or discriminatory application of time limits for applying for certain entitlements. It was reported at the Amsterdam Round Table that, for example, many who wished to return to the Republika Srpska after 2003 found that they now fell outside of the Entity's provisions for returnees and that in particular, Bosniak and Croatian former residents of the RS have faced such obstructions. In March 2014 the internet journal Balkan Insight reported that the RS, ostensibly frustrated by the stalled process to legislate for residency at the State level, has now passed its own residency law, adding that Bosniak returnee organizations and Bosniak lawmakers at State level say they fear the law will allow the RS police to discriminate against returnees and other individuals at the local level.⁸²

Further restrictions have been imposed by attaching eligibility for social assistance to the applicant's current place of residence, to the unjust exclusion of victims who now live outside BiH. In particular, disability pensions including those for war victims have merged with the social welfare system: people outside of BiH cannot access it.

Families face a tormenting dilemma in accepting a declaration of death, knowing that it means giving up on the struggle to have the fate of their loved one properly investigated and explained.

The requirement of acceptance of declaration of death in order to obtain social welfare benefits

Families wishing to obtain social welfare to mitigate the impact of the loss of a 'disappeared' relative must first obtain a declaration that the missing person is dead. Families face a tormenting dilemma in accepting a declaration of death, knowing that it means giving up on the struggle to have the fate of their loved one properly investigated and

⁸² Report available at <http://www.balkaninsight.com/en/article/republika-srpska-adopts-disputable-residence-law>

explained. They are frequently issued with declarations on which the date of death has been randomly chosen, in some instances fixed even before the person was last seen alive, and in others, a year after hostilities had ceased with the consequence that the person in question could not qualify as a victim of war. The HRC has specifically condemned the requirement of death declarations as a prerequisite to obtaining social benefits as a victim and requested BiH to amend its legislation.

Difficulties related to litigation, lack of legal-aid and inadequate support structures for victims as witnesses

Participants at the Amsterdam Round Table reported low levels of awareness among the civilian population of their right to bring claims. The court process and the rationale for suing the State of Bosnia and Herzegovina are puzzling to many victims: some feel uncomfortable suing the State since they do not consider the State of BiH to have been at fault for the harms done to them. TRIAL representatives in BiH reported that considerable and repeated effort was required to explain the principles of responsibility that underpin the pursuit of redress through a court. Restrictive time limits have also reduced the number of those with a realistic chance of litigating for damages. Examples included the unjust requirement that medical documents should have been obtained not later than one year after the damage had been done. Participants of the Round table who are working for victims in Bosnia confirmed an overall picture of evidentiary requirements lacking sufficient flexibility, such that many genuine victims' claims could not be accommodated. Bosnian lawyers at the Amsterdam Round Table reported that legal-aid facilities are vastly inadequate and this effectively excludes a great many victims from contemplating legal action. They described the plight of people who have been ostracized by their families and communities, notably victims of sexual violence, and especially when the men of the family are no longer there to protect them. This situation leads to persistent, inescapable poverty and also to stigmatization and discrimination affecting not only the victims but also their children. In particular victims of sexual violence face the greatest difficulties accessing assistance and obtaining redress. No proper legal assistance is available to victims who participate in criminal trials and are entitled to raise claims for damages if the perpetrator is convicted. It is reported that advocates may be present but generally assume only a passive role rather than acting on behalf of the claimant. Witnesses are frequently not informed of their right to make testimony and judges do not invite them to do so. Courts assign no personnel to assist victims. Some witnesses come alone, as no fund exists to finance their legal support, while the accused routinely have lawyers who are paid with state money. The result is a drastic inequality of arms between the victim-witness and the defendant.

Lawyers and representatives of NGOs depicted a scenario in which victims have no autonomy vis a vis the legal process: all tools are in the possession of the prosecutors and judges. In the event that the prosecutor decides to refrain from prosecution, victims are legally completely disempowered. Meanwhile, judges in the State Court are not trained or given clear guidelines on how to handle the compensation claims that often follow upon a conviction.

Lack of legal certainty and harmonization of practice

A lack of agreement as to accepted bases for jurisdiction means that cases are frequently dismissed by courts asserting they do not have jurisdiction. At the same time there is confusion as to which Entity's government would bear responsibility for making reparations, the one in which the criminal act was committed or the one in which the defendant or the victim now lives? Or is it a question of attributing objective responsibility? Practices and standards for awarding reparations are not established. Lawyers rely on 'orientation criteria' for granting compensation under the Law of Obligations that were last reviewed in 1986. These are the same criteria used to award compensation for car accidents and other kinds of damage and are not responsive to different types of crime.

Lack of statistical data regarding number of war victims

A recurring theme of the Nuhanovic Foundation's Round table meeting was that the efforts of those who are working for the proper rehabilitation of victims are greatly hampered by the lack of a centralized database which should identify victims of the war, their current location and family situation, their living conditions and their economic, health and educational needs. Without such data it will be impossible to define the precise nature and the (economic) size of the task that the government of Bosnia and Herzegovina must undertake in order to establish a comprehensive reparations scheme along the lines indicated by the IOM in 2013.⁸³ The author of the report outlined a scheme that 'would include the provision of recognition to victims as citizens and right-holders, the re-establishment of trust between victims and the State and the promotion of political participation of marginalized victims.'⁸⁴

⁸³ Peter van der Auweraert and Igor Cvetkovski, *Reparations for Wartime Victims in the Former Yugoslavia: In Search of the Way Forward*, published by the International Organization for Migration, 2013, available on the Nuhanovic Foundation's website.

⁸⁴ *Ibid* at p.43.

Conclusion

TRIAL representatives working in BiH expressed great frustration about the inertia surrounding the implementation of court rulings by the Constitutional Court of BiH and the ECtHR and of the Views issued by the HRC, and also about the non-establishment of the Fund for missing persons as required by the 2004 Law on Missing Persons (see chapters 3 and 4). Dozens of reports to different UN bodies have not been able to bring about significant change in this regard, nor has an extensive media campaign, involving the State Prosecutor's Office, the Missing Persons Institute, the Ombudsman, and the Ministry of Human Rights and Refugees. Nevertheless they expressed satisfaction that the HRC's views marked the first international recognition of the responsibility of the State of BiH to pay compensation for its failure to implement court rulings. This has historical significance.

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Conclusion

In its 2013 report the IOM expressed the conviction that notwithstanding the inertia surrounding the implementation of reparations, 'victims' associations and civil society actors are unlikely to abandon their political fight for reparations any time soon'.⁸⁵

The question whether litigation can help the victims of the war in Bosnia and Herzegovina in their fight for reparations came up repeatedly during the Amsterdam Round Table. The consensus was that litigation is a long and arduous road and that results to date have been meager but that Bosnia and Herzegovina must be seen as a test case, and that litigation is a tool that does have the potential to advocate for change in the society. Its full potential will be achieved once a critical mass of cases have been tried and claims brought. Litigation has an important role to play, alongside other 'multiple and ongoing initiatives to address the reparations gap, which hold significant promise and could be built upon in the context of a comprehensive reparations program.'⁸⁶

Alongside litigation activities, the active involvement of the media and lobbying of politicians has been and will continue to be indispensable in cultivating a climate of political and public acceptance of the necessity or reparatory mechanisms. The Nuhanovic Foundation commends its partner TRIAL for striving, while fighting legal battles at the highest level, to involve Bosnian media and politicians in its endeavors to the greatest extent possible.

The Bosnian State and Constitutional Courts have provided an invaluable resource by publishing English translations of many of their decisions. As we have mentioned above, Bosnia is a test case in many respects: these decisions provide insight into the workings of a functioning judicial system in an immensely complex post war setting. The legal context featured interlocking international and domestic legal systems whereby the domestic court system is itself multi-layered, and applies different statutes in some cases than the higher national courts. Publication of the decisions of lower domestic courts would allow for even fuller understanding by the outside world of how the State tackled the immense task of processing war crimes and civil cases related to war-time damage, over two decades, and still ongoing. In this

Litigation is a tool that does have the potential to advocate for change in the society.

⁸⁵ Van der Auweraert & Cvetkovski, 2013: 21.

⁸⁶ Van der Auweraert & Cvetkovski, 2013: 6.

connection the OSCE's interactive, online war crimes map has made a wonderful contribution, showing in which domestic courts cases were tried, and the geographical spread of the relevant crimes.

There has been no comprehensive attempt to register all the affected civilians, their losses and injuries, in the short and long term, and the extent to which they have been (un)able to return to economic independence and access adequate health and other basic provisions. As we have seen, systematic registration of civilian injuries, casualties and their surviving relatives - still a novelty in the aftermath of war⁸⁷ - would greatly have facilitated the work of those working for reparations. One of the

Systematic registration of civilian injuries, casualties and their surviving relatives would greatly have facilitated the work of those working for reparations.

conclusions of the round table was that such registration should be moved much higher up the agenda in post-conflict settings than it currently is. The Nuhanovic Foundation commends the work of several of its partners in registering the details of civilian victims to the extent possible for them.

The Nuhanovic Foundation shares the conviction of its Bosnian and international partners that litigation for reparations must continue until such time as a convincing statewide reparations scheme can be put in place. It is a cumbersome instrument, and not

always effective. However litigation represents a lifeline connecting civilians to the institutions of justice while they wait for the full recognition and reparatory assistance that is their right under international law. Criminal prosecutions (being one of the elements of full reparations) have advanced consistently in BiH, signaling that impunity would not be the rule. The State's criminal courts have confirmed that victims have legitimate claims to reparatory assistance. That mechanisms for enabling those claims to be addressed have remained weak, is not an argument for abandoning the path of litigation, but for pursuing it and documenting it, while advocating vigorously for the establishment of an effective legal aid mechanism that would bring the realization of the right to reparations through civil litigation within reach. The Nuhanovic Foundation looks forward to continuing its cooperation with its Bosnian colleagues and friends in the years ahead.

⁸⁷ L. Zegveld, 'Bodycounts en de afscherming van oorlogsgeweld', public lecture for Felix Meritis - Vredeslezingen, 19 Sept 2013. Zegveld reported that a few States undertake limited registration of civilian injuries and casualties but generally keep the information classified.

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