



**Organization for Security and Co-operation in Europe  
Mission to Bosnia and Herzegovina**

**Seventh Report in the**

***Milorad Trbić Case***

**Transferred to the State Court pursuant to Rule 11*bis***

**April 2009**

## SUMMARY OF DEVELOPMENTS

### **OSCE note:**

**For the purpose of achieving greater efficiency, OSCE has decided to alternate between the local languages when translating reports. Thus, the present Report is translated into Bosnian only, while subsequent reports will be translated into Croatian, then Serbian, and so forth.**

The case of Milorad Trbić (hereinafter also Defendant) is the sixth case transferred from the ICTY to the BiH State Court pursuant to Rule 11*bis* of the ICTY Rules of Procedure and Evidence (RoPE). This constitutes the seventh report in this case that the OSCE Mission to Bosnia and Herzegovina (Mission) submits to the ICTY Prosecutor, covering the period from 10 January 2009 to 3 April 2009.

This report provides a summary of proceedings and, thereafter, makes a note on the positive development regarding the submission of injured party compensation claims in these criminal proceedings.

The proceedings of this reporting period can be summarised as follows:

- The Court held ten hearings, during which it heard six witnesses. Four of these witnesses testified without protection, while two received some protection.<sup>1</sup>
- On 12 January 2009 the first of the protected witnesses testified under a pseudonym and in closed session at times when his identity could be compromised. The second testified on 23 February 2009 also utilizing a pseudonym. In what appears to be an inconsistent decision, however, the Court allowed the public to attend this testimony, but ordered the attendees, which included a media representative, to keep both the identity of the witness and the content of his testimony secret. Clarification on this decision has been sought.
- On 4 March 2009, the Prosecution filed an amended indictment, which primarily reorganised the charges against the Defendant and revised the facts to ensure that they are consistent with those that have been presented at trial.
- The Defendant remains in custody because of the risk of flight and threat to public security pursuant to a decision of 6 March 2009.
- The next court session is scheduled for 6 April 2009.

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<sup>1</sup> Hearings were held on 12, 16, and 19 January, 2, 9 and 23 February, and 9, 16, 23 and 30 March 2009. Witnesses testified on 12 and 26 January, 23 February, and 23 March 2009.

## NOTE ON FILING COMPENSATION CLAIMS IN THESE CRIMINAL PROCEEDINGS

On 2 February 2009, the Prosecution informed the Court that it had sent out approximately 2500 notices to injured parties who it assessed may have viable compensation claims against the Defendant. Since that time, several hundred injured party compensation claims have been filed with the Court. According to the Prosecution, this is the first time that it has undertaken its duty to notify injured parties about their right to file compensation claims against a defendant to be settled through criminal proceedings.<sup>2</sup>

This is a positive development, especially since previous OSCE reports have noted that judges and prosecutors tend to neglect their duties with regard to the law's obligation for them to inform injured parties of their right to file compensation claims in criminal proceedings, to investigate these claims, and to decide upon them when possible.<sup>3</sup>

It is important to note, however, that the Prosecution's obligation with respect to compensation claims does not end with notification. According to the July 2008 amendments to the Criminal Procedure Code of BiH (CPC BiH), which included provision (2)(g) in Article 35 on *The Rights and Duties of the Prosecutor*, the Prosecution must "establish facts necessary for deciding upon compensation claims."<sup>4</sup> This provision does not change, but stresses the Prosecution's duties to gather evidence on compensation claims, as it already exists under other provisions of the law. For instance, Article 197 CPC BiH provides that "the Prosecutor has a duty to gather evidence on compensation claims related to the criminal offence." This article continues by mandating that "the Prosecutor or the Court *shall* question the suspect or the accused on the facts related to the claims by authorised persons."

Courts have additional complementary obligations. Under Article 193 CPC BiH, judges *shall* deliberate on any compensation claims arising because of the commission of a relevant criminal offence "if this would not *considerably prolong* the proceedings."<sup>5</sup> Furthermore, evidence in a criminal proceeding does not need to support the entire compensation claim of an injured party. When it does not, the Court may issue a partial award. It should, therefore, only refer the entire claim to a civil court when no part of the compensation claim is supported by evidence.<sup>6</sup>

As noted in previous reports, the settlement of compensation claims through criminal proceedings has numerous benefits. First, it greatly improves the efficiency of the judicial system as a whole. Deciding upon claims submitted in a single criminal proceeding alleviates the need for each victim to file an individual claim to be decided upon in a multitude of separate civil cases. Settling compensation claims in criminal proceedings also contributes greatly to the effectiveness of those criminal proceedings. Doing so heightens the individual recognition of each victim's injuries. Even if victims stand little chance of receiving actual money from an indigent defendant, the symbolic value

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<sup>2</sup> See the Article *Victims Miss Out on Right to Compensation*, Balkan Investigative Reporting Network, 4 March 2009, available at <http://www.bim.ba/en/156/10/17117/> (quoting the Deputy Prosecutor of the Court of BiH as stating, "This is the first time the prosecution informed the families, and so many of them, that they were entitled to file property claims").

<sup>3</sup> See OSCE *Fourth Report in the Case against Mejakić et al.*, June 2007 & OSCE *Fourth Report in the Case against Mitar Rašević and Savo Todović*, October 2007.

<sup>4</sup> Official Gazette of BiH, number 58/08

<sup>5</sup> Article 193(1) CPC BiH states, "A claim under property law that has arisen because of the commission of a criminal offense shall be deliberated on the motion of authorized persons in criminal proceedings if this would not considerably prolong such proceedings." Moreover, Article 198(1) CPC BiH states that the Court shall decide upon compensation claims.

<sup>6</sup> Article 198(2) CPC BiH states, "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." Under the July 2008 amendments, Article 198(1) CPC BiH also allows the Court to "propose that the injured parties and defendant carry out mediation if it assesses that such mediation can meet the requirements of the compensation claims." Official Gazette of BiH, number 58/08.

of awarding compensation should not be underestimated. Certain injured parties in this case appear to have filed claims exactly because of their symbolism.<sup>7</sup>

As noted above, Article 35(2)(g) CPC BiH establishes explicitly among the Prosecutor's duties the need to establish facts necessary for deciding upon compensation claims. The fact that this provision was introduced in recent amendments to the CPC BiH underscores the BiH legislature's continuing belief that courts should decide on compensation claims in connection with the criminal proceedings and that doing so is desirable.

As mentioned in an earlier OSCE Report,<sup>8</sup> guiding standards for the adjudication of compensation have been established to assist courts, at least with respect to non-pecuniary damages in civil cases. For example, the Supreme Court of the Federation of BiH has disseminated "Orientational Criteria" for determining just compensation for non-pecuniary damages.<sup>9</sup> Although no such criteria exist in the Republika Srpska, the RS Supreme Court has similarly articulated standards through its jurisprudence. The Constitutional Court of BiH and the Human Rights Chamber have also addressed the issue of compensation for violations of Article 3 and Article 5 of the European Convention of Human Rights, although they have done so with regard to matters against the State, and not individual citizens. What is noteworthy with regard to these judicial bodies is that they also have established easily applied compensation standards for particular injuries, such as a set amount for each day a person is illegally deprived of liberty.<sup>10</sup>

This is all to say that the determination of compensation amounts to award victims for particular injuries may not be exceedingly complex or beyond the grasp of the criminal judge. In light of the many benefits of addressing compensation claims through criminal proceedings and the BiH legislature's clear intent to insist upon the matter, it is praiseworthy that the Prosecution in this case has taken the first step.

In this regard, the Mission encourages judges and prosecutors to meet their legal obligations, which include investigating these claims and deciding upon such claims when possible. Chief Prosecutors and Court Presidents are also urged to ensure that those under their administration are aware of their obligations toward the adjudication of compensation claims in criminal proceedings. Providing further information and support, also through education programmes, to justice officials on how to investigate and settle compensation claims can also facilitate their work in this regard.

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<sup>7</sup> According to Ms. Munira Subašić, head of the Association of Mothers of the Srebrenica and Žepa Enclaves, members filed claims because "Trbić was commander of all shooting squads and, as such, he had the greatest responsibility for what happened [in Srebrenica]. These claims will influence the verdict against him, in the sense that it will eventually state how many victims have requested compensation." See BIRN Article, *supra*, footnote 2.

OSCE *Fourth Report in the Case against Mitar Rašević and Savo Todović*, October 2007.

<sup>9</sup> Under these guidelines, the court correlates articulated criteria with monetary amounts of compensation. The criteria are: physical pain; fear; psychological/emotional suffering resulting from impairment; psychological/emotional suffering from visibility of disfigurement; psychological/emotional suffering caused by the death of a close family member; and psychological/emotional suffering resulting from the particularly difficult impairment of a close family member. "Orjentacioni kriteriji I iznosi za utvrđivanje visine pravicne novcane naknade nematerijalne stete," discussed and adopted at the session of the Civil Law Department of the Supreme Court of the Federation BiH on 20 February 2006.

<sup>10</sup> The Constitutional Court and Human Rights Chamber have also addressed the issue of compensation for violations of ECHR Article 3 and Article 5 by state actors. See for example, *Mr. Bogdan Subotic*, Constitutional Court of BiH, No. AP-696/04, adopted at the session on 23 September 2005, sitting in Grand Chamber; *Zuhdija Rizvic et al. v. The Federation BiH*, Human Rights Chamber of BiH, No. CH/98/1335, CH/98/1370, CH/99/1505, CH/99/2805, CH/00/4371, Partial Decision on Admissibility and Decision on the Merits, delivered on 8 March 2002; *R.G. & Predrag Matkovic v. The Federation BiH*, Human Rights Chamber for BiH, No. CH/98/1027 & CH/99/1842, Decision on Admissibility and Merits, delivered on 9 June 2000; and *H.R. and Mohamed Momani v. The Federation BiH*, Human Rights Chamber for BiH, No. 98/946, Decision on Admissibility and Merits, delivered on 5 November 1999.