

The contribution of prosecutors to the failure of damage claims of victims in war crimes trials at the Court of Bosnia and Herzegovina

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Abstract

According to definition and laws, the role of the prosecutor is to represent public goods. In the cases of war crimes, that public good is not exhausted with criminal prosecution of the perpetrators of the criminal offences, but it also covers reparation of the damage to the victims. This is not part of the judiciary praxis of Bosnia and Herzegovina. Although there is a clear obligation to collect evidence that would support damage claims of the victims as prescribed in the Criminal Procedure Code of Bosnia and Herzegovina (CPCBH), in reality prosecutors fail to fulfill this obligation. In few cases, settled before the Court of Bosnia and Herzegovina, where the court had awarded compensation to the victims of war crimes, merits for that are to be given to the victims who have, on their own initiative and with their own limited resources, hired attorneys and other experts who acted as prosecutors. To prevent this from happening in the future, having in mind hundreds of potential pending cases (with thousands of victims) waiting for trial, this practice needs to be changed. In that way, although mostly only declaratory in nature in criminal codes and during war crimes trials, more “realistic” and “humane” justice could be achieved for those directly affected by these crimes.

www.dx.doi.org/10.21113/iir.v7i2.306

ILIRIA International Review – Vol 7, No 2 (2017)

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Keywords: prosecutors; war crimes; justice; victim; damage claim; criminal trial;

1. Introduction

Since the main focus of criminal law is to alleviate perpetrators of a criminal act, to establish a basis of their criminal responsibility and their punishment and to establish their rights, victims' position in a criminal procedure had been neglected for years. That reduced position is hardly acceptable because the criminal act, that is in the focus of the entire criminal case, had been perpetrated against the victim. Yet, with new theoretical approaches to criminal law, that attitude towards victims is going through positive changes. According to Borovec and Burazer (2007), criminal law is not only interested in the alleviation of perpetrators of criminal acts but also in the protection of victims and the reduction of damage and the consequences of a criminal act.

Nevertheless, victim's legal position in the criminal system and the issue whether the victim can actively participate in the criminal procedure is still dependent on the national system. Regardless of immense changes in theoretical and legislative approach to victims, in the real implementation of these rights, victims don't enjoy full protection and cannot exercise their rights. The provisions of victims' damage reparation that would be satisfactory for them and would help them on their path to overcome consequences of a criminal act is an important part of that entire process.

There are various international documents that deal with damage reparation to victims and guarantee them their rights. The right to reparation is stipulated in Article 8 of the Universal Declaration of Human Rights (1948), as well as in Articles 2 (3) and 9 (5) of the International Covenant on Civil and Political Rights. Article XVI of the Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations recommends that the Member States "take all appropriate measures to establish accessible and effective mechanisms which ensure that victims of serious human rights violations receive prompt and adequate reparation for the harm suffered". These measures consist of measures of rehabilitation, compensation, satisfaction, restitution and guarantees that victimization will never repeat.

The EU also contributed to the damage reparation issue by adopting various documents such as the Framework Decision on the standing of

victims in the criminal proceedings (2001) and the Directive 2012/29/EU on establishing minimum standards on the rights, support and protection of victims of crime. This Directive stipulates EU Member States to ensure that in the criminal proceedings victims are entitled to obtain a decision on compensation from the offender, within a reasonable time, except where national law provides such a decision to be made in other legal proceedings.

2. The legal position of victims in Bosnia and Herzegovina and their relation to the prosecutor

The victim, as a person who suffered damage by a criminal act, has not been named as such in CPCBH, since it uses the term “the injured party”. However, the role of the injured party according to the CPCBH has been reduced to the role of a witness (Article 95 and 100) and the right to request property claim (Article 207-218) which is request can be submitted by the end of the main trial.

Despite being entitled to these rights and the fact that the victim has directly suffered damage by a criminal act, the victim is neither the subject nor the party of the criminal procedure in Bosnia and Herzegovina. On the contrary, one of the main subjects of the criminal procedure and one of its main parties is the prosecutor (along with the accused). According to the positive criminal law in Bosnia and Herzegovina, which is accusative in its nature, the role of the prosecutor is essential. That fact is proved by Article 16 of CPCBH, which establishes the principle of accusation. That principle has stipulated that criminal procedure may only be indicated and conducted upon the request of the prosecutor.

Apart from the main duties and rights of prosecutors to detain and prosecute criminal offenders (Article 35 (1)), they also have the power to collect evidence necessary to decide upon damage compensation claims (Article 35 (2) (g)). In relation with the law that allows damage claim to be submitted to the prosecutor (Article 195) and their obligation to collect all necessary evidence regarding the damage claim (Article 197), that judiciary function is clearly essential in the intention to successfully reduce negative consequences of a criminal act and reparations for the victim. That is a legal basis for the establishment of all facts and evidence necessary for a victim to “win” in the damage compensation claim.

At this point, it is highly important to remember that majority of victims before courts in Bosnia and Herzegovina are not knowledgeable in legal matters so it is of great importance to familiarize them with their rights and help them to collect all the necessary pieces of evidence. All this leads to the understanding that the success of victims' damage compensation claim is highly correlated to the success of the prosecutor to collect pieces of evidence and facts pertaining to that claim and their approach to the victims and presenting them their rights.

3. The state in practice

When it comes to the war crimes that have been on trial before the Court of Bosnia and Herzegovina at the War Crimes Department from its establishment in 2005 until 2016, there have been 182 first-degree verdicts and 162 final verdicts. Out of those cases, 185 persons were sentenced to 2449 years in prison in total (Statistics of Court of Bosnia and Herzegovina, 2017) and 6 persons were acquitted. Regarding damage claims of victims, out of 162 final verdicts, this decision was made in 5 cases and out of 182 first degree verdicts that have not yet been finalized, it this decision was made in 2 cases.

Considering only final cases, in most of these cases perpetrators have been found guilty and were sentenced to 8-10 years in prison for crimes against humanity (1 case) and war crimes against civilians (4 cases). Considering victims' profile, all victims that submitted their claims were women, 4 of which are protected witnesses who use a pseudonym. In all of these cases the perpetrators committed rape as an act of crime. Most of these victims were represented before court by their attorneys. The content of their damage claims was similar. It was based on non-pecuniary damage compensation which was related to the reduction of life activities and the emotional pain as the result of the violation of freedom or personal rights.

In all other cases before the War Crimes Department of the Court of Bosnia and Herzegovina victims claims had been forwarded with their request to civil courts.

According to the information presented in the verdicts, in 2 out of these 5 cases, the victims used evidence that had been delivered to them by the prosecutor. That evidence mostly consists of reports based on the findings of an expert psychiatrist.

In line with the above mentioned facts, it is necessary to point out the following problematic situations:

- The number of decisions on damage claims in criminal procedure is very low. This is caused by two factors. Firstly, the victims are not familiar with their rights as they don't have a legal educational background. It is important to note that even when victims file their damage claims, they don't request interest and procedural costs compensation (Savić and Marković cases). This is where the role of the prosecutor becomes very important. They should collect evidence for them but also let them know about their property rights. Having that in mind, OSCE in Bosnia and Herzegovina created flyers that prosecutors should distribute to the victims. Those flyers consist of all information related to victims, their rights and deadlines of filing their claims. According to Hanušić (2015), the president of one NGO in Bosnia and Herzegovina working with victims of war claimed that prosecutors don't distribute those flyers, and even when victims want to file the request, they advise them not to do that. On the other hand, the small number of those decisions in criminal trials is caused by the fact that judges by default decide that decision on damage claim should be given in civil procedure, in order not to postpone criminal procedure due lack of evidence necessary to pass decisions in a criminal procedure.
- Even though that kind of decision would require more time and resources for the victim to file their case before a civil court, in normal circumstances that would not be an issue. But that kind of decision becomes very problematic and sensitive for the protected victims in the future, where they formally have the possibility to exercise their rights, but the actual implementation and realization of damage request is difficult to accomplish. Victims (witnesses) protected in a criminal procedure by pseudonyms can't act as claimants in the civil procedure with that pseudonym. According to the civil procedure rules in Bosnia and Herzegovina, a claimant should be indicated with all relevant information about their identity. So, in that situation, the victim who is a pseudonym-protected witness, who got protection due to a high risk of secondary or repeated victimization, should consider of giving up on these protective measures in order to achieve damage claim in a civil procedure. That is an intolerable risk that no one should be exposed to and indeed, most of the victims don't.

- In both criminal and civil procedure victims can have an attorney to defend their rights who are not provided to them by the state free of charge (as in the case of the accused). This leads to financial costs, but not every victim can afford to have an attorney. Based on Article 35.2 of CPCBH, *argumentum a minori ad maius*, if the prosecutor is the one who is entitled to find evidence related to damage claim, then that person can defend rights of the one who files that damage claim. In fact, who is more qualified to represent and defend the rights of a victim than the person who collected evidence? In that way, procedural costs of victims would be eliminated and justice would be more accessible. Furthermore, it is hard to understand why CPCBH provides legal help to accused persons, while victims (injured persons) are denied of that help and, if they wish to have that kind of help (which is obviously necessary) they need to provide it using their own resources. Having this in mind, the role of the prosecutor in representing the rights of victims is even more important and significant.
- It is necessary to emphasize the fact that in very small number of cases prosecutors submitted this evidence. Out of all final decisions on damage claims, prosecutors delivered files only in two cases. But even these two cases suggest that prosecutors (or at least some of them) understand that it is their legal obligation to represent damage claims in war crimes trials. Why others don't, remains question for further research.

4. Conclusion

Even this short paper is sufficient to prove the premise that prosecutors have an important role in preventing the realization of the damage claims of victims in Bosnia and Herzegovina. *De lege ferenda*, their role in collecting evidence and their obligations to victims needs to be prescribed in more detail, as well as their responsibility for the failure to do so. Apart from collecting evidence, they should pay attention to its quality, so that judges can decide upon claim without any doubt, and to prevent the claims from being forwarded to civil courts. Finally, even though there are offices of experts from diverse fields in the judicial system that deal with victims, as the first ones who get in touch with victims, the prosecutors should additionally educate themselves in how to interact with victims. Together

with their existing knowledge and experience it would improve the quality of their relationship with the victim and help them understand their position and needs. Additional education would also strengthen the understanding of the prosecutors that when it comes victims (and achieving "justice" for them), their role is far more important than in the first ten years of prosecuting war crimes before the Court of Bosnia and Herzegovina. Finally, the proclamation from the Criminal Code of Bosnia and Herzegovina that one of the purposes of criminal sanctions is also to provide protection and redress to victims of criminal offence (Article 6), would have more sense being, instead of just legal form, "way of life" of the society.

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