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Victims without Compensation: The Critique of the Constitutional Court of Bosnia and Herzegovina's Practice Regarding Compensation to Victims of the War

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Abstract

After the war in Bosnia and Herzegovina the victims of the genocide, crimes against humanity, and war crimes, demanded (and still demand), compensation for moral and material damages caused by these atrocities. When victims began to claim compensation for damages caused by these crimes, there was a question about the statute of limitations for the claim to damages caused by the crimes. According to the positive legal regulations in Bosnia and Herzegovina, for the damage made by a felony, the time limit for the claim for the damage compensation is as long as the time limit for the prosecution for the felony by which the damage was caused. In this context, the Constitutional Court of Bosnia and Herzegovina examined the constitutionality of lower courts' decisions in the Federation of Bosnia and Herzegovina and the Republika Srpska. The Constitutional Court, as this article argues, took a questionable stand regarding war compensation to war victims. In cases where the individuals were defendants in the sense of being charged for compensation for the damage (material and moral) caused by the crimes of genocide, crimes against humanity, and war crimes - the Constitutional Court took a stand that there is no statute of limitations for demanding compensation for the damage. On the other hand, when the defendants were the Federation Bosnia and Herzegovina and the Republika Srpska, as legal entities, in most cases, the Constitutional Court took a stand that demanding compensation for damage (material and moral) caused by the crimes of genocide, crimes against humanity and war crimes, the statute of limitation for the compensation is five years (general statute of limitations). In this paper, the author questions the practice of the Constitutional Court through three aspects. The first aspect is the rule of law – are entities and individuals equal before the law since one statute of limitations is valid for entities, and another is valid for individuals? The second aspect is transitional justice, where the author investigates how this practice impacted the process of compensation to the war victims. The third aspect is how this practice impacted the international obligations of Bosnia and Herzegovina regarding compensation to war victims.

Keywords: *genocide, crimes against humanity, war crimes, rule of law, transitional justice*

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1. Introduction – Factual and Legal Background

From 1992 to 1995, Bosnia and Herzegovina (B&H) was in the war. According to the International Court of Justice (ICJ), the International Criminal Tribunal for the Former Yugoslavia (ICTY), and domestic courts – genocide, crimes against humanity, and war crimes (hereinafter: mass atrocity crimes) were committed against the citizens of B&H during the mentioned period (Clark 2009). The war in B&H was a mix of an international and an internal conflict (see Oellers-Frahm 2005, 184-185). Para-legal internal actors in B&H such as the Republika Srpska (RS) and the Croatian Community Herceg-Bosna (HCHB) together with regular forces of the Republic of Bosnia and Herzegovina were involved in the conflict. Para-legal actors were supported, military and financially, by Yugoslavia (RS) and Croatia (HCHB) (Džananović, Medić and Karčić 2023; Ribičić 2001). The Dayton Peace Agreement (signed by B&H¹, Croatia, and at that time Yugoslavia) ended the war in B&H and modified the constitutional structure of B&H. The modified B&H Constitution prescribes that B&H ‘consist of the two Entities, the Federation of B&H and the RS’ (Art. I (3) of the B&H Constitution). Thus, the para-legal actor RS has been established to be part of a federal unit with B&H under the new B&H constitution. The responsibility for the crimes during the war in B&H was established, not just for perpetrators, but also for para-legal actors (the RS Army and Croatian Council of Defense) and legally recognized actors (the Army of the Republic of B&H). For example, the ICTY sentenced Radovan Karadžić, the former president of the Republika Srpska, because he was found responsible for genocide crime in Srebrenica.² On the other hand, B&H sued Serbia and Montenegro before the ICJ for violation of the Convention on the Prevention and Punishment of the Crime of Genocide. In its decision, the ICJ held accountable the Republika Srpska for genocide in Srebrenica, and Serbia only for non-prevention and non-punishment acts of genocide.³ The ICJ has decided that although Serbia was responsible for non-prevention and non-prosecution of genocide crime, it cannot be responsible for compensation of damage caused by genocide, since it was not directly involved in committing genocide at Srebrenica.⁴

¹ At that moment the Republic of Bosnia and Herzegovina.

² International Criminal Tribunal for the former Yugoslavia, Prosecutor v. Radovan Karadžić, Judgment, 24 March 2016, IT-95-5/18-T, para. 6071.

³ International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Merits, 26.02.2007, I.C.J. Reports 2007, p. 43 ff., para. 297.

⁴ *Ibid*, para. 469.

War victims tried to claim compensation, in this context, from individual perpetrators and entities. The Army of the Republic of B&H and the HCHB's victims claimed compensation from the Federation of B&H, and the Army of the RS's victims claimed compensation from the RS. So, in fact, there was no specific act that regulated the responsibility of jurisdiction for providing compensation to war victims. However, it is not completely clear why war victims have been claiming compensation from entities instead of central authorities for mass atrocity crimes. Strictly legally speaking, entities did not exist during the conflict, and they were certified by the DPA. From this perspective, entities could not be responsible for mass atrocities crimes. However, because of B&H's complex constitutional structure, the Parliament of B&H has never stipulated a law that would regulate the responsibility for compensation of war casualties/damages. Instead, entities according to their extended competencies in the constitutional order, have enacted several reparation acts regarding compensation to civil war victims and soldiers/defenders and their families (Popović 2009, 83). However, these reparations acts have not covered all categories of war victims in B&H, and therefore war victim addressed their compensation claims to judiciary bodies with the hope that they will find a way to be compensated for all war casualties that they outlived. The Federation of B&H was the territory controlled by the Republic of B&H and the HCHB, and the RS's territory was controlled by the RS Army. Thus, in the eyes of war victims, these entities showed up as addresses where they could seek justice compensation. Although entities *stricto sensu* were not responsible for mass atrocities crimes, judicial bodies accepted them as the right address for claiming compensation because of their broad jurisdiction in this matter that also included war reparation acts. For sure, this is a questionable practice, because B&H as a state should have been responsible for compensation of war casualties/damages as a subject of international law, but internal practice of the judiciary bodies addressed entities as responsible for compensation of war casualties/damages. But looking at this practice from another angle, entities as part of the state are still state institutions, and their responsibilities entail the state's responsibility to this matter. Therefore, B&H was found responsible before the international bodies for inconsistent practice toward war victims⁵, and that will be discussed in the section on international obligations of B&H. To sum up, judgments of international tribunals and domestic courts have been the legal basis for claiming compensation from individual perpetrators,

⁵ Committee against Torture, Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 854/2017, 11 September 2019, CAT/C/67/D/854/2017, para. 7.6.

and the internal constitutional structure that delegated war compensation jurisdiction to entities has been the legal basis for claiming compensation from entities.

Accordingly, the victims of mass atrocity crimes in B&H after the war have begun claiming compensation for war damages. According to the international law definition of war victims, they are ‘persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights’.⁶ Also, the term “victim” shall include, when appropriate, ‘the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization’.⁷ So, all persons who suffered the mentioned types of harm, have a right to demand compensation from perpetrators or a state (in the case of B&H entities). On the other hand, this definition of war victims is not legally binding for any state to respect it. However, employing this war victims’ definition does not intend to argue that states are obliged to respect it, but to describe who was entitled to demand compensation from the entities in the case of B&H.

Accordingly, war victims in B&H have two solutions in the context of demanding compensation for war damages. In the case when an individual perpetrator has been sentenced for mass atrocity crimes, then an individual can claim compensation from the perpetrator. But in the case when the crime was committed, but no individual was sentenced for the crime, then a victim has a right to claim compensation from the entities (FB&H/RS). This raised the question of the statute of limitations for claim compensation in these cases. Article 337 of the Civil Obligations Act of the FB&H and Article 377 of the Civil Obligations Act of the RS⁸ state that for damages caused by a felony, there is a limitation period that allows claims for compensation as long as prosecution for the felony that caused the damage is not precluded by time limitations. Mass atrocity crimes do not have any statute of limitations for prosecution, and therefore, given the articles mentioned, there are no statute of limitations for claiming damages compensation due to a felony. In the next section, it will be presented the practice of the Constitutional Court of

⁶ UN General Assembly (UNGA), 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, 21 March 2006, A/RES/60/147, Art. V, para. 8.

⁷ *Ibid.*

⁸ Art. 337 of the Civil Obligations Act of the FB&H and Art. 377 of the Civil Obligations Act of the RS.

B&H regarding the statute of limitations for claiming compensation in the cases of mass atrocity crimes.

2. Constitutional Court of B&H's Practice Regarding the Victims of the War

Victims of the war in B&H demanded (and still demand) compensation before domestic courts (on economic problems of the war victims in B&H see Muftić 2022). Some were successful in their demands, and some were rejected because courts decided that demands for compensation were time-barred. Victims who were rejected before ordinary courts filed appeals to the Constitutional Court of B&H. Thus, the Constitutional Court of B&H established the practice regarding war compensation claims. In fact, the Constitutional Court of B&H established the distinction between war casualties/damages committed by perpetrators for that they were sentenced before international or domestic courts, and war casualties/damages for no one perpetrator was not sentenced, and accordingly, entities take subsidiary responsibility for mass atrocity crimes. So, the Constitutional Court of B&H in the case of AP-4288/11 stated (or repeated) the stance that Article 337 of the Civil Obligation Act of the FB&H (Article 377 of the RS) cannot be enforced in the case when there is no verdict against a perpetrator for mass atrocity crimes, and when the state (in this case entities) subsidiary ought to be accountable for compensation war casualties caused by mass atrocity crimes.⁹

In fact, the Constitutional Court of B&H stated that if a perpetrator was sentenced for any mass atrocity crimes, then there is no statute of limitations for claiming compensation from that perpetrator. But, in the case when there is no verdict against a perpetrator for any mass atrocity crimes, and when entities take responsibility for damages caused by the mentioned crimes, then the statute of limitations is 5 years (general statute of limitations). Thus, all victims of the war in B&H, who have claimed compensation for

⁹ See Constitutional Court of Bosnia and Herzegovina, Edina Ratkušića v. Bosnia and Herzegovina, Decision, 9 December 2014, AP-4288/11, para. 29. See also Constitutional Court of Bosnia and Herzegovina, Haša Omerović v. Bosnia and Herzegovina, Decision, 16 December 2021, AP-1165/20, para. 26; Constitutional Court of Bosnia and Herzegovina, Tarik Manov v. Bosnia and Herzegovina, Decision, 10 September 2019, AP 1660/18, para. 31; Constitutional Court of Bosnia and Herzegovina, Božo Stojanović v. Bosnia and Herzegovina, Decision, 17 December 2019, AP 3565/18, para. 33; Constitutional Court of Bosnia and Herzegovina, Nevresa Jašarević and Esmā Jašarević v. Bosnia and Herzegovina, Decision, 4 June 2020, AP 7513/18, para. 31; Constitutional Court of Bosnia and Herzegovina, Rasema Milić i Berina Milić v. Bosnia and Herzegovina, Decision, 17 December 2019, AP 7596/18, para. 30.

war damages from entities, had only 5 years from the war's end to demand compensation from entities for damages they suffered. The next sections of this paper will challenge this practice of the Constitutional Court of B&H from three different angles. The first angle is on the question of equality before the law, between entities and individuals. The second angle concerns the transitional justice process and war victims' reparation. The third angle concerns the international obligations of B&H.

3. Constitutional Court of B&H's Practice and Equality Before the Law

The fundamental element of the rule of law is equality before the law. In the broader sense, also respecting international obligations and standards is part of the rule of law, but this aspect of the rule of law (international obligations and compensation of war victims) will be tackled in the section on international obligations and the Constitutional Court of B&H's practice. According to the former Secretary-General of the UN, the rule of law is

a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards (see Farrall 2009, 147).

Thus, equality before the law does not mean just equality among individuals. Also, this fundamental principle requires the equality of a state and an individual before the law (Bingham 2011, 55-60). Although a state stipulates laws, it is not above them, and a state also ought to obey its laws.¹⁰ In this sense, a state should be treated equally as individuals before the law, even though the law is enacted by a state.

The B&H Constitution prescribes that B&H is a rule-of-law state (Art. I (2) of the B&H Constitution). Therefore, the Constitutional Court of B&H in its decisions should respect equality before the law. But, how does the mentioned Constitutional Court of B&H's practice affect the rule of law in

¹⁰ In addition, 'equality before the law meant that individuals and the State must be equal before the law. This remains an important principle, but modern concepts have expanded it to encompass the general equality of everyone concerned with the law. What is important for the rule of law is that everyone should be equal before the law, regardless of power, wealth, individual or corporate status or other characteristics not directly relevant to the issues at hand. In individual-State matters, the State and its officials should be bound by their own laws, subject to the same scrutiny and sanctions for non-compliance, and stand on an equal footing with individuals in legal disputes between the two' (Fitschen 2008, 369-370).

this context? The distinction between entities and individuals regarding the accountability for damages committed by mass atrocity crimes made by the Constitutional Court of B&H is controversial in terms of equality before the law. Because, there is no statute of limitations for individuals who committed mass atrocity crimes, for their possible accountability on compensation to the victims of these crimes. But, when the state is accountable for mass atrocity crimes, the status of limitations to demanding compensation from the state (entities) is five years. In fact, the Constitutional Court of B&H privileged the state contrary to individuals. The question is why the status of limitations is not the same as for individuals. The Constitutional Court of B&H explains that Article 337 of the Civil Obligation Act of the FB&H (377 in the RS) cannot be enforced in the case when the state is accountable for damage caused by mass atrocity crimes. The reason why it cannot be enforced, as the Constitutional Court of B&H observed, is that the state cannot be criminally liable, but only individuals.¹¹ Thus, the Constitutional Court of B&H's standpoint is that because the state (entities) is not guilty of the mass atrocity crimes, and it (they) cannot be because they are not criminally liable, the status of limitations for compensation caused by mass atrocity crimes in the case of states' accountability can be only five years (general status of limitations).

Although the Constitutional Court of B&H tried to justify privileges given to entities over individuals regarding the statute of limitations, the mentioned explanation did not convincingly answer the question of why the statute of limitations is not equal for entities and individuals regarding the obligation of compensation for damages caused by mass atrocity crimes. If a state is not criminally liable, why a state should be accountable at all for damages caused by mass atrocity crimes? But this question shows us how the state found a way to circumvent the obligation to compensate damages caused by mass atrocity crimes because this question leads to a false discussion on this topic (Sajó 2021, 302-304). In the context of the Constitutional Court of B&H's practice, the enforcement of Article 337 of the Civil Obligation Act of the FB&H (377 in the RS) is not about whether a subject of criminal activity is criminally liable for that crime. The decisive question in this context is whether a victim suffered damage caused by the felony (mass atrocity crimes). Because, the role of this Article of the Civil Obligation Act, is not to find who is guilty of a crime, but to create circumstances where victims will have an opportunity to claim compensation for damages that they suffered. Therefore, there should not be a distinction between individuals

¹¹ Constitutional Court of Bosnia and Herzegovina, Edina Ratkušića v. Bosnia and Herzegovina, Decision, 9 December 2014, AP-4288/11, para. 29.

and entities in the context of compensation for mass atrocity crimes, because both of them are civically liable for compensation, and they should be equal before the law, including the statute of limitations (see Frulli 2011, 1140-1141). However, the Constitutional Court of B&H with this distinction tried to get rid of entities from paying compensation for war causalities/damages. For that purpose, the Constitutional Court of B&H also referred to the European Court of Human Rights (ECtHR) judgment in the case of *Baničević v. Croatia*.¹² Although this case was used by the Constitutional Court of B&H to justify the mentioned practice, as Begić points out, this case proves that the practice of the Constitutional Court of B&H regarding this question does not follow the practice of the ECtHR. Namely, in the *Baničević v. Croatia* case, as Begić states, the ECtHR held that the statute of limitations for demanding compensation in cases when damage caused by a felony follows the statutes of limitations for prosecuting that crime (Begić 2021, 203). So, the ECtHR judgment in this case does not give the argument to the Constitutional Court of B&H for its practice regarding compensation for victims of mass atrocity crimes. However, the rule of law was undermined by the Constitutional Court of B&H's practice of compensating the victims of the war, because of unduly established privileges to entities over individuals in the context of compensation to the war victims. But this did not affect only the rule of law in the part of equality before the law, as will be shown in the next paper's section, this distinction undermined the transitional justice in B&H.

4. Constitutional Court of B&H's Practice and Transitional Justice

Justice for war victims is crucial for finding a solution to any conflict. As Val-Garijo points out, the resolution of conflicts that have been disrupting communities for years or even generations requires victims to be materially and morally repaired, which is the only way communities can achieve lasting peace, justice, and reconciliation (Vel-Garijo 2010, 39-40). In the process of transitional justice, it is important to ensure that victims will not only view the "enemy" army as the harbinger of pain and suffering but as a force that fairly and justly compensates those they harm (Tracy 2007, 19). Protecting human rights in the process of transitional justice is essential for a successful transition from war to peace, and therefore a state must enable all war victims' access to compensation (reparation) (Moffett 2017, 399). War victims should be entitled to compensation.

¹² Constitutional Court of Bosnia and Herzegovina, *Edina Ratkušića v. Bosnia and Herzegovina*, Decision, 9 December 2014, AP-4288/11, para. 26.

In the context of war victims in B&H, the Dayton Peace Agreement did not establish the obligation of state parties to provide compensation to the war victims. B&H at the state level, nor their entities, have not enacted a compensation law that would clarify responsibility for mass atrocities crimes of each army involved in the conflict. Thus, legislators in B&H have failed to provide a clear path for war victims regarding their compensation claims. On the other hand, the judiciary in B&H also has failed to provide tangible possibilities to war victims to obtain compensation.¹³ In a formal sense, war victims in B&H had and still have the right to demand compensation from the state (entities). Despite this, many war victims B&H did not obtain compensation. The reason why they did not obtain compensation is the distinction between entities and individuals, that was made by the Constitutional Court of B&H. More precisely, many war victims after the war did not know which perpetrator committed mass atrocity crimes against them or which perpetrator was responsible for war casualties, and therefore many of them could not demand compensation from perpetrators. Also, many perpetrators were not prosecuted for mass atrocity crimes, so many war victims were not able to demand compensation from them, in the case that they would know who was responsible for damage caused against them. On the other hand, the Constitutional Court of B&H established the practice that war victims had only five years after the war to demand compensation from entities. Practically, many war victims could not demand compensation from individuals for factual reasons, and they could not demand compensation from entities for legal reasons. From this perspective, it seems like a trap for war victims in which they are stuck. Albeit, the Constitutional Court of B&H stated that war victims had enough time to demand compensation from entities, it is clear that five years cannot be considered a reasonable time for demanding compensation after the war.¹⁴

Of course, this impacts the process of *transitional justice* in B&H. Firstly, in the context of justice for the war victims that requires, *inter alia*, providing war compensation to the war victims, this requirement was not satisfied since many war victims did not obtain reparation for damages caused by war felonies. This produced another problem. It is important for transitional justice that war victims receive reparation because war victims in the process

¹³ Since formally victims could claim for compensation in five years after the end of the war. However, in fact, non of victims could claim for compensation with this time limit.

¹⁴ See Constitutional Court of Bosnia and Herzegovina, Edina Ratkušića v. Bosnia and Herzegovina, Decision, 9 December 2014, AP-4288/11, para. 34 and compare with the Committee against Torture, Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 854/2017, 11 September 2019, CAT/C/67/D/854/2017, para. 7.6.

of establishing sustainable peace should see an “enemy army” not just like the army that committed mass atrocity crimes against them, moreover like an army that fairly compensates all damages that they caused. Unfortunately, the war victims in B&H were not able to demand compensation from entities as representors of armies that took part in the war from 1992 to 1995 because of the restrictive statute of limitations. That contributed to war victims’ distrust of entities and central states’ authorities regarding reconciliation and building sustainable peace (see Amnesty International 2017). For victims of the war, is not the same if they are compensated by a perpetrator and a state, because in this context the political role of compensation to the war victims should not be neglected. For example, victims who are compensated by a state will have a feeling of financial and political satisfaction. If they are, however, compensated by a perpetrator they will have a feeling of financial satisfaction without political satisfaction.

Another problem with the Constitutional Court of B&H’s practice regarding transitional justice is the financial aspect of compensation. There is an answer to why the Constitutional Court of B&H established the distinction between individuals and entities regarding the statute of limitations. Compensation for damages caused by mass atrocity crimes requires a large sum of finances that perpetrators usually cannot pay. On the other hand, entities have budgets from where they can find funds to compensate the war victims. With this legal reasoning, the Constitutional Court of B&H has been protecting entities’ budgets from compensation claims of war victims. Therefore, many victims in B&H did not receive compensation because of the following aspects:

- Many victims did not know which perpetrator committed damage against them.
- Victims who knew, could not obtain compensation from individuals because many of them did not have enough financial means to pay compensation to them (Hanušić 2015, 26-27).
- Victims who did not know which perpetrator was responsible for damage against them, had only five years after the war to demand compensation from entities.

However, the problem with favoring the political and financial stability of entities was not justified under the transitional justice mechanism. In other words, war victims have not obtained any other satisfaction from the state in return for disabling them from obtaining war reparations. In this sense, the war victims in B&H have been stuck in the trap of the Constitutional Court of B&H’s practice and the post-war social and economic facts. B&H

thus failed in the process of transitional justice because it did not enable compensation to war victims.

5. Constitutional Court of B&H's Practice Regarding the International Obligations of B&H

Compensation for war victims is part of human rights, and it is recognized by international law (Evans 2012, 42-43). From the very beginning of the evolution of international humanitarian law, war compensation to victims has been part of it. Article 3 of the Hague Convention on Land Warfare 1907 stipulates those states

which violates the provisions [of the Regulations on Land Warfare annexed to the Convention] shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.¹⁵

In addition, Article 91 of Protocol Additional to the Geneva Conventions stipulates those states (parties) in conflict 'which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces'.¹⁶ Moreover, the United Nations (UN) set basic principles of reparation for war victims by the resolution adopted by the General Assembly. The full name of the resolution is "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" (hereinafter: UN Resolution). By this UN Resolution, the UN set standards regarding the responsibility for compensation to war victims. Thus, the UN Resolution stipulates that

a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.¹⁷

¹⁵ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907, Art. 3. Also see (Kalshoven 1991).

¹⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, Art. 91.

¹⁷ UN General Assembly (UNGA), Basic Principles and Guidelines on the Right to a Remedy

Also, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter: Convention against Torture) prescribes the right to compensation for war victims. Article 14 of the Convention against Torture thus states:

Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.¹⁸

The Dayton Peace Agreement did not establish any obligations of state parties to provide compensation to the war victims, nor establish a special body that would regulate this aspect of peace reconciliation. The judgments of the ICTY and domestic courts have been just legal basis for demanding compensation from individual perpetrators. On the other hand, because in the case of B&H's war, there was no obligation of other states to provide compensation to war victims, B&H (their entities) is the only international law subject responsible under mentioned conventions for providing compensation to war victims. B&H ratified the Convention against Torture in 1993. Also, Protocol Additional to the Geneva Conventions and the Convention against Torture are part of the B&H Constitution which in Annex I prescribes that these conventions will be applied in B&H legal order.¹⁹

On 22 August 2019, the Committee against Torture which supervises the implementation of the Convention, adopted the decision against B&H, because as stated in the decision, B&H failed to ensure compensation to the war victims. More precisely, the Committee stated that

[A]lthough the complainant was granted compensation, there is no possibility to receive it in practice since the perpetrator has no property or financial means to compensate the complainant for the violations committed. The Committee notes that the domestic legislation regulating civil claims for non-pecuniary damage provides for a statute of limitations for such cases and that the Constitutional Court jurisprudence on the matter, interpreting article 377 of the Law on Civil Obligations, fails to acknowledge the principle of subsidiary liability. The Committee is therefore of the view that the State party has failed to fulfill its obligations under article 14 of the Convention

and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 21 March 2006, A/RES/60/147, Art. IX, para. 15.

¹⁸ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 26 June 1987, 1465 UNTS 85, Art. 14.

¹⁹ Annex I of the B&H Constitution.

by failing to provide the complainant with redress, including fair and adequate compensation.²⁰

Hence, the Constitutional Court of B&H's practice regarding compensation to victims of the war failed to fulfill the international obligations of B&H. However, the abovementioned decision does not only affect that B&H failed to implement assumed international obligations. Moreover, the Convention against Torture and Protocol Additional to the Geneva Conventions are also an integral part of the B&H Constitution and should be applied directly, regardless of whether B&H ratifies or not them. The Constitutional Court of B&H neglected international law obligations in its decisions, and formal reasons put over the international obligations of the state to provide compensation to the war victims. As Gaeta points out, statutes of limitations cannot be invoked to deny the victims' right to be compensated for war casualties that they survived (Gaeta 2011, 327).

6. Conclusion

The practice of the Constitutional Court of B&H disabled the war victims to obtain compensation for damages that they suffered during the war. The Constitutional Court of B&H found a way to liberate entities from paying compensation to the war victims. Legally, entities were not liberated from paying compensation to the war victims, but the Constitutional Court of B&H stated that the statute of limitations for demanding compensation from entities was five years. Factually, that was too restrictive the limit for demanding compensation from entities after the war, therefore, entities because of establishing this practice of the Constitutional Court of B&H were liberated from paying compensation to the war victims. On the other hand, perpetrators who were responsible for the mass atrocity crimes in most of the cases were not solvent to pay high amounts of compensation for war casualties/damages. So, the Constitutional Court of B&H found a legalistic way to avoid providing compensation possible for the war victims in B&H by establishing the practice where the Constitutional Court of B&H was aware that only entities are solvent to compensate war victims and that perpetrators of mass atrocity crimes are not. Because of that, the Constitutional Court of B&H intentionally made the distinction between entities and perpetrators, claiming that there is no statute of limitations for demanding compensation from perpetrators and that the statute of limitations

²⁰ Committee against Torture, Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 854/2017, 11 September 2019, CAT/C/67/D/854/2017, para. 7.6.

for demanding compensation from entities is five years. The consequences of this practice were circumventing the rule of law, undermining transitional justice, and non-implementation of international obligations of B&H. The rule of law was circumvented by establishing different statutes of limitations for entities and individuals (perpetrators) based on the same law, with no clear explanation as to why the provision on statutes of limitations is valid for individuals and not for entities. This practice thus undermined the process of transitional justice because B&H failed to fulfill the key element of transitional justice – to compensate the war victims. B&H because of the mentioned jurisprudence of the Constitutional Court of B&H failed to implement international obligations (and also constitutional obligations). This was recognized by the Committee against Torture which adopted the decision against B&H. Therefore, the Constitutional Court of B&H's practice regarding compensation to the war victims failed to satisfy the core elements of constitutional and democratic principles, because it neglected international obligations and circumvented the rule of law – the fundamental principle of the B&H Constitution.

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