

# Dealing with the Past for a Better Future

## Achieving justice, peace and social cohesion in the region of the former Yugoslavia



Issue Paper



COMMISSIONER  
FOR HUMAN RIGHTS

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# Dealing with the Past for a Better Future

## Achieving **justice, peace and social cohesion** in the region of the former Yugoslavia

Issue Paper  
by the Council of Europe  
Commissioner for Human Rights

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Cover photo:  
Prijedor, 31 May 2015. Children look at a temporary installation of white roses marked with the names of the one hundred and two children killed in the town in 1992. The Commissioner has supported the longstanding call of the families of the killed children to build a permanent memorial to honour their memory. ©Edin Ramulić

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# Introduction

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The break-up of the Socialist Federal Republic of Yugoslavia was marked by devastating wars in the 1990s and early 2000s. Three major wars took place: in Croatia (1991-1995), Bosnia and Herzegovina (1992-1995) and Kosovo\* (1998-1999). There were two smaller-scale conflicts in Slovenia (June-July 1991) and North Macedonia (at the time it was “the former Yugoslav Republic of Macedonia”) (January-August 2001). The wars were marked by atrocities unseen on the European continent since the Second World War. They included genocide, torture, enforced disappearances and the systematic use of rape, leaving hundreds of thousands of victims. Several million people fled their homes and became displaced inside or outside the region.

Learning from past experiences of impunity for gross human rights violations in the region, emphasis was put on not allowing these crimes to go unaddressed. Some significant and at the time groundbreaking steps were taken to bring the perpetrators to justice. For the first time since the Nuremberg and Tokyo tribunals after the Second World War, an international tribunal for war crimes and crimes against humanity was established: the International Criminal Tribunal for the former Yugoslavia (ICTY). Domestic war crimes prosecutions were also pursued before specialised and hybrid justice mechanisms at the national level. There were also considerable efforts in terms of finding missing persons, enabling the return of displaced persons and obtaining compensation for civilian war victims.

Yet almost three decades after the wars, a lot remains to be done in order to achieve justice, reparations, and establish the truth in the region. Time is running out and victims have been waiting for a very long time. Worse still, the divisive and hateful narratives that spearheaded the wars of the 1990s are back and regaining strength. This not only threatens reconciliation but even peace. The failure to fully deal with the violent past in the region is having devastating consequences for respect for human rights and the rule of law. Against this background, the question arises as to whether

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\* All reference to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 (1999) and without prejudice to the status of Kosovo.

transitional justice efforts have been in vain in the region.

According to the United Nations, transitional justice comprises “the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past violations and abuses to ensure accountability, serve justice, and achieve reconciliation”.<sup>1</sup> The four pillars of transitional justice are commonly understood to be criminal prosecutions, truth-seeking, reparations and institutional reform. While the term ‘transitional justice’ has grown unpopular among some stakeholders in the region, this Issue Paper merely seeks to refer to the conceptual framework it encompasses, and ‘transitional justice’ is therefore used interchangeably with other expressions designating such notions such as “dealing with the past”.

The Issue Paper gives an overview of the key measures undertaken in the region to deal with its violent past and shows how instead of intensifying in order to reach completion they have either slowed or stalled in recent years. This can be attributed largely to a lack of political will. Some important transitional justice measures, such as the establishment of truth and reconciliation commissions, vetting, dealing with the root causes of the wars, and human-rights based memorialisation, have not taken place at all. The Issue Paper aims to shed light on the factors and trends that have prevented progress and stood in the way of achieving a more positive impact through transitional justice efforts. Not only have many political leaders in the region failed to demonstrate genuine commitment to dealing with past atrocities but they continue to manipulate the past for political gain. In the process they endanger one of the key objectives of transitional justice, namely to prevent atrocities from reoccurring.

Dealing with the past is far from a backward-looking exercise, rather it is central to achieving long-term peace and security in cohesive, pluralist democratic societies based on respect for human rights and the rule of law. The final chapter of the Issue Paper outlines four priority areas to re-energise and refocus efforts to deal with the past for the maximum impact on justice and reconciliation. More and better transitional justice efforts are required in the region, not less.

This Issue Paper builds on over 15 years of systematic work by the Office of the Council of Europe Commissioner for Human Rights on issues related to dealing with the past in the region, including dialogue with national authorities. The Council of Europe Commissioner for Human Rights, Dunja Mijatović, conducted broad consultations with civil society experts on transitional justice from all states of the former Yugoslavia in November and December 2021 and had exchanges on these issues with representatives of the International Residual Mechanism for Criminal Tribunals, the Kosovo



Specialist Chambers and Specialist Prosecutor's Office, the International Commission on Missing Persons in The Hague, in January 2022, as well as with the Special Adviser of the United Nations Secretary-General on the Prevention of Genocide in Srebrenica, in July 2022. The Commissioner also extends her gratitude to Thomas Unger, an expert in transitional justice and consultant, who made a major contribution to the drafting of this Issue Paper. With this Issue Paper, the Commissioner aims to draw attention to some important trends in the region related to dealing with the past, with the awareness that it is impossible to comprehensively cover all relevant issues and developments in such a format. In particular, the failure to mention exhaustively all crimes and places of suffering should be understood as resulting from the inherent limitations of such a publication and does not reflect a lack of consideration.



## Summary

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Close to three decades after the wars that tore the region of the former Yugoslavia (the region) apart in the 1990s, time is pressing to achieve effective justice, reparations, and truth for the victims. Reconciliation and social cohesion remain elusive and even peace seems threatened. There is notable backsliding of the processes to deal with the past and this coincides with a broader decline in respect for human rights and the rule of law in several countries of the region. A decade after the first Issue Paper on this topic produced by the Office of the Council of Europe Commissioner for Human Rights, this current Issue Paper analyses the achievements and shortcoming of the processes to deal with the past in the region and analyses the factors that stand in the way of a more positive impact. It argues that dealing with a past scarred by gross human rights violations is not a past-looking endeavour but rather a necessary condition for a better present and future based on respect for human rights and the rule of law.

**A considerable legacy** - Before turning to the challenges and negative trends that are slowing down progress, the Issue Paper opens, in chapter 1, by acknowledging that several pioneering approaches developed in the region have left a considerable legacy in the field of dealing with the past. Five novel practices and lessons learned are highlighted.

The atrocities committed during the wars of the 1990s, which at the time were the worst in Europe since the Second World War, were met with a resolute shift **towards no impunity**. A multi-layered combination of criminal accountability efforts has been deployed in the region, consisting of a fully international criminal tribunal, domestic war crimes trials and internationalised or hybrid accountability mechanisms. Although several high-level perpetrators have been brought to justice, accountability for wartime crimes is far from complete. These international and domestic trials have sent a strong signal that justice must be done for gross human rights violations, and they have paved the way for a better response to such crimes in other contexts.

The region is furthermore considered a **blueprint for dealing with missing persons**. It is estimated that over 70% of the estimated 40 000 persons who went missing during the wars have been found and identified. Several

factors contributed to this high rate of resolution of cases, including strong legislative and institutional frameworks at the national level supported early on by international organisations, such as the International Committee of the Red Cross (ICRC) and the International Commission on Missing Persons (ICMP), and the effective involvement of the families of the missing. The use of modern forensic technologies, such as DNA identification led by the ICMP, was key. Regional cooperation is a condition of success but it has wavered over time. Besides the humanitarian dimension, relevant evidence about missing persons has been used to hold accountable those responsible for international crimes.

The Issue Paper further pays tribute to **the central role played by civil society and human rights defenders** in helping to deal with the difficult past of gross human rights violations. Civil society has resolutely advocated for national authorities to abide by their international human rights obligations in this field, often stepping in when they failed. Civil society in the region has produced a wealth of innovative projects that can be a source of inspiration in other post-conflict situations, a few examples of which are mentioned in the Issue Paper.

Examined next are the **lessons learned for the international community**, which underscore the need for long-term consistent and well-coordinated support. Financial support, monitoring and recommendations as well as political pressure, such as the EU conditionality policy over cooperation with the International Criminal Tribunal for the former Yugoslavia, have played a critical role in securing transitional justice processes. Yet shortcomings in the engagement of the international community, including intergovernmental organisations and individual donor states, such as a certain decrease in commitment over time, the prioritisation of immediate stability over dealing with the past, inconsistent messages and a short-term project-based approaches have diminished, among others, the impact of international partners. A lesson from the region is that dealing with the past to achieve reconciliation and prevent future violence requires ongoing support that needs to extend beyond one generation.

Finally, post-war processes in the region have contributed strongly towards **breaking the silence about conflict related sexual violence and the need for gender-sensitive approaches** when dealing with the past. The courage and determination of women survivors of rape and sexual violence have been the origin of groundbreaking international developments in the fields of criminal justice, reparations, attending to the psychosocial needs of survivors and truth-seeking and memorialisation practices aimed at addressing the issue of conflict related sexual violence.

**Unfinished business** - Regardless of the advances mentioned above, chapter 2 shows that the legacy of the past continues to linger in the region with many transitional justice processes at a standstill or unresolved.

Almost three decades after the end of the wars, with victims, witnesses and suspects growing old and passing away and evidence less readily available, time is running out for the realisation of **justice through domestic prosecutions**. Thousands of suspects have yet to be prosecuted. Notwithstanding this backlog the deceleration of justice efforts continues, with national war crimes strategies remaining unimplemented. National prosecutors are not proactive and often only proceed with cases transferred from other countries, against low level perpetrators, or against perpetrators who belong to the 'other' ethnic groups. The current climate of denial of war crimes and glorification of war criminals is not conducive to effective national accountability. The protection of witnesses and amnesty laws remain ongoing challenges. One key impediment to justice is the minimal or non-existent judicial cooperation between certain countries, including their continued refusal to extradite their own nationals who continue to enjoy impunity, sometimes through holding dual nationality of countries of the region. This has resulted in an increase of trials in absentia, the impact of which is limited in terms of securing justice given that the perpetrators continue to enjoy impunity.

Furthermore, many civilian war victims in the region remain without **access to effective and adequate reparations**. None of the countries concerned have adopted comprehensive reparations programmes in line with the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation. Some compensation has been awarded through social benefit schemes; however, these are generally more favourable for veterans and through various requirements they exclude many civilian war victims. As a result, these benefits are perceived as selective and instead of recognising and honouring the suffering of all victims equally, they feed divisive discourse about 'our' versus 'other' victims. Although there has been a slow improvement in recognising the needs of survivors of sexual violence and they have been included as civilian war victims in several national laws, the fear of stigma as well as exclusionary requirements continue to make it hard for survivors of sexual violence to obtain compensation. Seeking reparation through civil and criminal court proceedings is a long and costly process that exposes victims to the risk of re-traumatisation. Overall, the national authorities have given little attention to reparations other than compensation, such as rehabilitation, satisfaction through truth-seeking, public apology and commemoration, and guarantees of non-recurrence.

The majority of the 3.7 to 4 million **persons forcibly displaced** during the wars in the 1990s have been able to return or have found reasonable

alternatives. Regional cooperation in this field has been crucially important. Yet forcibly displaced persons still face several human rights issues that require attention. Almost three decades after the end of the wars, it is imperative to find a durable and dignified solution for displaced persons who still live in collective or temporary accommodation. The process of return and integration of refugees and internally displaced persons continues to be hampered by discrimination and local hostility in areas where they belong to the minority. The Roma, Balkan Egyptian and Ashkali displaced communities remain among the most vulnerable because of poverty and long-standing prejudice. The momentum in the region towards resolving the issue of statelessness, which primarily affects these populations, should be maintained.

Attempts to establish official **truth and reconciliation commissions (TRC) or other types of official truth-seeking mechanisms** have achieved little across the region, despite civil society's laudable truth-seeking projects. A particularly disappointing development has been the failure of governments in the region to agree to the establishment of a regional truth and reconciliation commission (RECOM). The absence of national and regional official truth-seeking mechanisms not only hampers reconciliation but also leaves a gaping space for the denial of atrocities committed during the wars. A concerning development in recent years is the attempt by ethno-nationalist politicians to divert truth-seeking mechanisms with the aim of producing revisionist views and reports.

The **search for missing persons** that also contributes towards establishing the truth has declined in recent years, despite the fact that 9 876 persons are still missing. It is urgent that these pending cases be resolved in order to end the suffering of the families. The passage of time and possible misidentifications prior to the use of DNA analysis are significant practical impediments, while the unfortunate lack of political commitment to genuine regional cooperation in this field has become a major obstacle in recent years. Further efforts are required in order to better protect the human rights of the families of missing persons.

Finally, few efforts have been made in the region to address the issue of **vetting public officials either suspected or convicted of involvement in gross human rights violations** during the wars of the 1990s. As a result of the failure to implement effective vetting the perpetrators of war crimes and gross human rights violations continue to be employed in public service positions, including as elected officials. The presence of both suspected and convicted war criminals in state institutions and public offices has a serious impact on victims and survivors and on the success of rule of law reform efforts.

**Negative trends undermining efforts to deal with the past** - Not only is progress practically blocked in several areas of dealing with the past but there are relentless attempts to undermine the early achievements in this respect. Chapter 3 examines some of the key current challenges and trends that underpin this backsliding. It seeks to show the links between the increasingly negative approach to dealing with the past and the backsliding of democracy, respect for human rights and the rule of law in several countries of the region.

First, there is an alarming trend towards **ethno-nationalist discourse, denial of atrocities and glorification of war criminals** that undercuts efforts to deal with the past. It is highly disturbing that such practices are condoned and actively pursued by politicians at the highest political level and that they have become a strategy for gaining votes and remaining in power. Right wing extreme nationalist groups also contribute to such discourse. These groups are nurtured through regional and international connections and represent a serious risk factor that undermines efforts to prevent the recurrence of violence. Unfinished processes for dealing with the past have been shown to increase radicalisation and right-wing extremism. Certain politicians, religious leaders, public figures and historians also actively contribute to historical revisionism and attempts to re-legitimise and cement the positions of convicted war criminals. The dissemination of divisive ideologies and the denial of wartime atrocities is accelerated by certain traditional media and social media. This negative approach by certain media towards transitional justice is reflective of broader challenges undercutting media freedom and ethical professional journalism in the region.

Against this background, the past is deeply divisive within and between countries in the region. This produces a climate of hate and division, reflected in the well-documented increase in **hate speech, interethnic violence and intolerance**. Hate speech often includes historical references. There are recurrent violent incidents, notably against religious and cultural buildings and against returnees from minority groups. This instils fear and constitutes a major obstacle to peaceful cohabitation and trust. Prompt political responses are required in order to avoid a return to mass violence to the region. This includes zero tolerance of hate crimes and comprehensive strategies to tackle hate speech. Given the volatile context in the region and the trends highlighted above, it has proven necessary to criminalise the denial of genocide and wartime atrocities as a serious form of hate speech.

**Civil society and human rights defenders** working on dealing with the past face an increasingly difficult environment. They are affected by a more general deterioration that has an impact on the whole of civil society and NGOs. This includes restrictive government measures and hostility,

including online, by some non-state actors and members of the public. Human rights defenders working on dealing with the past also face obstacles specifically linked to the issues they cover and the fact that they challenge the dominant narrative in their community or country. They are subject to smear campaigns, judicial harassment and the failure to prevent attacks against the events they organise. Resources for work on dealing with the past have diminished and many human rights defenders face exhaustion and distress, which can lead to physical and psychological illness.

Almost three decades after the wars, the **intergenerational dimension of dealing with the past** is an area that requires urgent attention. New generations are growing up in divided societies with no meaningful opportunities to interact with members of other groups and are being educated to see the 'other' as a threat. Evidence of radicalisation of youth and several violent incidents involving young people are of great concern. The trend of separation of children according to language and/or ethnic group in education is entrenched in several countries of the region. This has a serious negative impact on social cohesion and reconciliation in multi-ethnic societies. Official remembrance policies are one-sided, focused on celebrating veterans and nationalist narratives and tend to deny the suffering of victims of other ethnic groups. Despite multiple projects seeking to improve history teaching in schools, there is still a failure to encourage critical thinking, historical empathy and multiperspectivity. Official history curricula generally avoid discussing gross human rights violations committed against different groups as well as other sensitive topics.

Another critical factor undermining processes for dealing with the past in the region is **the failure of governments over the past decades to address the root causes of the wars**. The focus on dealing with the crimes that were committed during the wars, while important, resulted in insufficient attention being paid to reforming the institutional structures and societal patterns that enabled these crimes to be committed in the first place. The consequences of this failure to conduct broader past-sensitive reforms continue to undermine democratic progress and peace in the region. Such root causes include unfair power sharing, clientelism and corruption. Ethnic discrimination has in some instances been further entrenched in the constitutions and legislation in the region. The weakness of and lack of public trust in state institutions remains a problem, including a culture of violence within institutions in the security sector. Leaving militarised and violent masculinities unaddressed has not only hampered the handling of conflict related sexual violence but also efforts to improve gender equality and the response to gender-based violence in the region today.



**Moving forward** - It is becoming increasingly difficult to reverse the negative trends that undermine efforts to deal with the past and to achieve peace and reconciliation in the region. Chapter 4 of the Issue Paper outlines four key priority areas for the way forward. It consistently reiterates that national political leaders and authorities bear the primary responsibility for ensuring respect for human rights obligations in this field and for genuinely working towards peace and social cohesion.

The first area of focus should be to ensure that **victims and survivors are at the centre of all processes of transitional justice**. Given the time that has already passed, there is an urgent need to step up the pace of domestic war crimes prosecutions. The same is the case for truth-seeking, where efforts to resolve cases of missing persons need to be renewed. States in the region should also finally deliver on their international obligations in the field of reparations. This means ensuring access for all victims to non-discriminatory and comprehensive forms of reparations, including symbolic recognition, apologies and psychosocial and other forms of transformative reparations supported by genuine political recognition. There is also a need to make visible certain types of victims who have been less present in transitional justice processes, such as minority groups, women and children. Improved consultations with victims are required. National authorities must urgently recommit and redouble their efforts in these fields.

Second, it is essential to put more emphasis on **prevention and building a future where violence is less likely to reoccur**. Besides the necessary focus on building strong and resilient rule of law institutions, attention should be paid to the intergenerational dimension of transitional justice. Nearly three decades after the end of the wars, areas such as ensuring integrated education, improving history teaching, opening and preserving archives and human rights-based memorialisation have become key areas in the region today. In these fields, the focus should be on laws and strategies that make a meaningful contribution to countering the denial of atrocities and the revisionism of the past. It is also essential to invest in the youth as agents of change by reaching out to them specifically and relying on them extensively in the formulation of policies in these fields.

Third, it is crucially important to **strengthen political and financial support for a strong civil society working on transitional justice**. The work of civil society continues to be central to transitional justice engagement in the region and for finding creative ways to generate environments for non-divisive memorialisation, reconciliation and peace. Among others, strengthening civil society requires ensuring effective consultation with and access to policymakers on relevant laws and policies. Civil society needs sufficient stable and flexible funding to continue its work on dealing with the past in the long term, institutional support from national authorities is

vital in this regard. Activities dedicated to the prevention of violence should be supported. Psychosocial assistance should be made available to activists who experience so-called vicarious trauma (signs of trauma experienced by those caring for traumatised individuals) or face harassment because of their commitment to dealing with the past. Human rights defenders are the best hope for a better future based on human rights and the rule of law.

**The backsliding on transitional justice needs to be addressed strategically, notably through regional approaches and increased investment at the local level.** The main responsibility rests with the states in the region and their representatives to provide an environment conducive to this important work, free from fear and dangerous propaganda and disinformation about the past. International partners should maintain clear messages about the importance of dealing with the past in their interactions with states in the region and follow-up on the wealth of recommendations previously formulated by international organisations and human rights bodies. Given the interdependency of both past and current challenges, the states in the region should develop transitional justice action plans to be used when evaluating progress at the regional level. Regional coordination, approaches, and strategies should be further encouraged and at the same time there should be a refocusing of action at the local level, at the grass roots and community level, where dealing with the past becomes concrete and solutions for reconciliation and peace need to be found.





Mothers of victims of the Srebrenica genocide pose with banners before the trial of former Bosnian Serb military commander Ratko Mladić in front of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the Hague, Netherlands, November 22, 2017. ©REUTERS/Michael Kooren

# Chapter 1

## A Considerable Legacy

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This Issue Paper largely focuses on the challenges that have hampered the effective confrontation of past serious human rights violations committed during the wars of the 1990s in the region of the former Yugoslavia (the region). Subsequent chapters discuss how existing, but incomplete, transitional justice processes have stalled and examine the overall factors that have worked against peace and reconciliation, cancelling out efforts that could otherwise have brought about more positive effects.

However, before going into these issues it is worth emphasising that the experience in the region provides a rich corpus of initiatives aimed at tackling past gross human rights violations. It is important to take stock of the region's legacy, which has contributed considerably to advancing the fight against impunity for atrocities and the understanding of what is required to deal with a violent past at the global level. While it is beyond the scope of this paper to comprehensively discuss all significant aspects of the post-war experiences in the region, this chapter highlights five points of particular importance: 1) measures at the international and domestic level to fight impunity for wartime crimes, 2) effective approaches for dealing with missing persons, 3) the key contribution of civil society actors, notably through innovative and regional projects; 4) the role of international partners and 5) the relentless efforts of survivors to shed light on the need to address sexual violence in conflict, bringing with it a call for gender-sensitive approaches to dealing with the past.

### **1.1 A shift toward no impunity for gross human rights violations**

The response to the atrocities in the region in the 1990s has been characterised by a novel and resolute shift towards holding the perpetrators of atrocity crimes accountable. Despite being a legal obligation under international law, accountability for grave breaches of international humanitarian law and gross human rights violations suffered from a dire lack of implementation across the world in the period after the second

World War and the Nuremberg and Tokyo trials. In contrast, the international and domestic trials for atrocities committed during the wars in the 1990s have sent the strong signal that no matter who commits them impunity for these crimes cannot be tolerated. These prosecutions have paved the way for a better response to atrocity crimes in other contexts.

### **1.1.1 The International Criminal Tribunal for the former Yugoslavia and its legacy**

Under international treaty and customary law states bear the primary obligation to investigate and prosecute gross human rights violations and grave breaches of international humanitarian law.<sup>2</sup> During and immediately after the 1990s wars in the former Yugoslavia the domestic justice systems were not in a position to fully uphold these obligations due to a combination of factors, including inadequate legislative frameworks, lack of independence and expertise of legal professionals and unstable political, security and economic circumstances. In this context, through [Resolution 827](#) the United Nations Security Council created the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993. The ICTY was the first international tribunal created by the United Nations Security Council and was conceived as an ad hoc temporary institution. The ICTY started operating in 1994, while the wars were still ongoing in the region.

The tribunal issued indictments for 161 individuals, all of whom were accounted for: 93 accused were found guilty and sentenced, while 18 were acquitted, 13 had their cases transferred to domestic justice systems and 37 had indictments withdrawn or died prior to or during trial.<sup>3</sup> The indictments addressed crimes committed between 1991 and 2001 in Bosnia and Herzegovina, Croatia, Serbia, Kosovo and "the former Yugoslav Republic of Macedonia" (now North Macedonia). The ICTY had priority jurisdiction over national courts and decided which cases it would prosecute.<sup>4</sup> It focused on the most senior leaders and left other cases to competent domestic courts.

The ICTY started to wrap-up its work in 2010 with the implementation of a completion strategy mandated by the United Nations Security Council and closed its doors in 2017. An International Residual Mechanism for International Criminal Tribunals (IRMCT) was established in 2010 to carry out residual functions of the ICTY (and of its sister institution the International Criminal Tribunal for Rwanda (ICTR)), among which were the completion of trials and appeal proceedings, monitoring transferred cases, managing archives, detention and witness protection issues and sustaining cooperation with national judicial systems. At the time of writing, there was only one pending case related to the former Yugoslavia before the IRMCT, that of [Jović and Radeta](#). These two individuals reside in Serbia and are sought for contempt of court for intimidating witnesses in the trial of

Vojislav Šešelj. Despite three reports by the president of the IRMCT to the Security Council on it breaching its international obligations, Serbia has so far refused to execute the arrest warrants in this case.<sup>5</sup>

The legacy of the ICTY and of the IRMCT for the region of the former Yugoslavia and for international criminal justice is profound and has been commented on extensively.<sup>6</sup> It is indisputable that the ICTY has provided a measure of justice for the victims of unspeakable crimes in the region in circumstances where such accountability would otherwise have been difficult to achieve. Most notably, it is significant that the ICTY secured the arrest and, in many cases, trial and judgment of high-level commanders bearing the most responsibility for the crimes. Thorough attention was paid to protecting the right of defendants to a fair trial. While the former president of Serbia, Slobodan Milošević, died before the end of his trial it is significant that he was a sitting head of state at the time of his indictment for war crimes, crimes against humanity and genocide. This has sent the strong message that no-one is above the law when atrocity crimes are concerned.

The ICTY has also contributed to the search for the truth in the region. Through its extensive collection of evidence and judicial work the tribunal has established many historical facts about the specific incidents that were adjudicated in trials. These established facts are important for countering the denial of atrocities and revisionism. Furthermore, the ICTY produced a vast amount of caselaw on key concepts of international humanitarian law and international criminal law that continues to guide the work of other accountability mechanisms, including the International Criminal Court (ICC) that was established on the heels of the ICTY and ICTR.<sup>7</sup> The ICTY's and the IRMCT's continued focus on strengthening domestic efforts to prosecute atrocity crimes also bears mention. They shared technical and operational expertise with their counterparts at the national level. First the ICTY and later the IRMCT monitored referred cases and also jointly prepared or shared investigative dossiers on specific perpetrators still at large with domestic justice systems, based on the available evidence.

Despite these achievements the impact of the ICTY was hampered partly by institutional limitations and some flawed approaches but mainly by the politicisation of its work, especially by politicians in the region and certain media who repeatedly distorted or vilified its work. The tribunal faced criticism in the region, some justified and some possibly reflecting inflated and unrealistic expectations of what a criminal court can achieve, most notably in the field of reconciliation and needs and aspirations related to long-term justice.

### 1.1.2 Domestic prosecutions

As will be discussed in chapter 2, regrettably domestic prosecutions of war crimes, crimes against humanity and genocide in the region have slowed down in recent years and have tended overall to focus on low level perpetrators or on war crimes committed by the 'other' side. New impetus is urgently required to end impunity. Despite these challenges, it is notable that significant focus has been put on conducting domestic trials for war related atrocities in the region. In many other situations around the world only a small number if any of those who commit or bear responsibility for international crimes are ever investigated and/or prosecuted. There have been efforts in the region to reach a better result, in particular when it comes to the number of cases prosecuted. This is important in terms of ensuring further access to justice for victims, given the necessarily limited number of cases dealt with by the ICTY.

According to the OSCE Mission to Bosnia and Herzegovina, since 2004, a total of 644 war crimes proceedings involving 978 defendants were completed in that country by the end of 2021.<sup>8</sup> In Croatia the government reported that proceedings had been initiated against 3 736 alleged war criminals with 666 final convictions issued as of September 2021.<sup>9</sup> In Serbia 238 persons have been indicted since the creation of the War Crimes Prosecutor's Office in 2003, with 85% of those indicted convicted.<sup>10</sup> In Kosovo, according to civil society monitoring, 42 individuals have been convicted for wartime crimes.<sup>11</sup> In Montenegro 7 war crimes trials were conducted between 1992 and 2021 with 37 persons indicted and 11 convicted through final court decisions.<sup>12</sup>

Several meaningful and promising steps were taken in the region to facilitate domestic prosecutions. While the overall efficiency of these measures as well as their significance for trust building among the victims have been hindered by various factors, including a lack of political will at the national and regional level, they nonetheless constitute valuable practices in the field of accountability for atrocity crimes at the domestic level. Specialised war crimes investigation and prosecution units and specialised judicial chambers were established in the early 2000s in Bosnia and Herzegovina, Serbia and Croatia. The aim was to concentrate resources and expert knowledge on handling complex international crimes and thus speed up wartime cases, few of which were prosecuted in the 1990s.<sup>13</sup> Another important element is the adoption of war crimes strategies, in Bosnia and Herzegovina (2008 and 2020), Croatia (2011), Montenegro (2015), Serbia (2021) and Kosovo (2019). These strategies seek to remedy existing shortcomings by spelling out prioritisation principles and sometimes setting deadlines for implementation. Official measures



were also taken to strengthen regional judicial cooperation, most notably the adoption of several bilateral cooperation agreements between national prosecutorial authorities to address the issue of parallel investigations and the transfer of evidence. In 2015, the relevant prosecutorial offices in Bosnia and Herzegovina, Croatia and Serbia also signed [guidelines](#) for the advancement of regional cooperation on processing war crimes, the search for missing persons and the establishment of coordination mechanisms. National prosecutors' offices have participated in numerous projects involving meetings and workshops intended to enhance cooperation practices. The process of accession to the European Union (EU) has been an important driver for these processes.

### 1.1.3 Hybrid models of criminal justice

A final notable feature of accountability efforts in the region has been the use of various forms of hybrid justice mechanisms, combining elements of international and national justice. These mechanisms provide useful experience to the legal community on the use of international support to strengthen domestic prosecutions where there are concerns about capacity, independence and impartiality. In Kosovo between 2008 and 2019, international judges, investigators and prosecutors were first deployed through the United Nations peacekeeping mission UNMIK<sup>14</sup> and then through the EULEX mission; however, as previously noted by the Council of Europe Commissioner for Human Rights,<sup>15</sup> the performance of these initiatives has been reported as unsatisfactory.<sup>16</sup> In 2016, in the face of ongoing challenges with the prosecution of certain crimes and widespread intimidation of witnesses, the Kosovo parliament adopted a [law](#) establishing the Kosovo Specialist Chambers and Specialist Prosecutor's Office, with financial support from the European Union (EU). These institutions are specifically mandated to investigate and prosecute alleged war crimes, crimes against humanity and other crimes under Kosovo law that commenced or were committed in Kosovo between 1 January 1998 and 31 December 2000, as they relate to the 2011 [PACE report](#) on inhumane treatment of people and illicit trafficking in human organs in Kosovo. Although they are part of the Kosovo justice system and operate under Kosovo law, the Specialist Chambers and Specialist Prosecutor's Office are based in The Hague and staffed with international staff. The Specialist Chambers have thus far indicted eight persons, all of whom are in custody. One [case](#) relating to offences against the administration of justice is before the Supreme Court panel. Two suspects [were arrested](#) on 5 October 2023 in another case related to tampering with and seeking to intimidate witnesses. One trial for war crimes is in the appeal phase ([Salih Mustafa](#)), while two trials are ongoing, including one involving the former president of Kosovo ([Pjetër Shala and Hachim Thaçi, et al.](#)).

In Bosnia and Herzegovina the War Crimes Chamber in the state court was conceived to assist the ICTY in the implementation of its completion strategy. The War Crimes Chamber and corresponding War Crimes Prosecution Office are national institutions that were initially bolstered through the temporary presence of international staff, to be progressively phased out after five years. This was an innovative approach in the context of contemporaneous war crimes accountability mechanisms in other countries. The fact that the War Crimes Chamber was established as a hybrid mechanism but with the intention of becoming fully national served to reinforce national capacities and contributed towards creating strong national ownership.<sup>17</sup> It is notable that, according to recent reports, some members of the judiciary, experts, victims and other stakeholders speak in favour of reinstating international support for the War Crimes Chamber as a means of strengthening its effectiveness and the credibility and independence of domestic prosecutions.<sup>18</sup>

## **1.2 A blueprint for dealing with missing persons**

Almost 40 000 persons went missing during the wars of the 1990s. As will be discussed in chapter 2, efforts are still needed to resolve the remaining cases and thus respond to the continued distress experienced by the families of the missing. Notwithstanding, the search for missing persons in the region has been an unprecedented success. According to a stocktaking report by the International Commission on Missing Persons (ICMP), over 70% of the persons reported missing in the region have been accounted for. No other post-conflict situation in the world has achieved such a high rate of resolution of cases.<sup>19</sup> Missing persons continue to be found and identified each year, although progress has slowed in recent years.

One essential factor has been the commitment of national authorities in the region, who have adopted robust legal and institutional frameworks to deal with this issue. At the time of writing, all countries in the region with the exception of North Macedonia had ratified the United Nations Convention for the Protection of All Persons from Enforced Disappearance.<sup>20</sup> Most of the countries with high numbers of missing persons have adopted laws on missing persons<sup>21</sup> that, among other issues, regulate the status and rights of victims and their families. National institutions such as governmental commissions for missing person or missing persons institutes (MPIs) and/or missing persons coordinators were created in Bosnia and Herzegovina, Croatia, Montenegro, North Macedonia, Serbia and Kosovo in order to monitor cases, make recommendations and coordinate the work of national and international stakeholders, with the involvement of family associations. International organisations supported national efforts early on. In line with

its [foreseen role](#) in the [Geneva Conventions](#), the ICRC started to collect requests for tracing missing persons while the wars were ongoing.<sup>22</sup> The ICTY also played an important role in the early years through the exhumation of several mass graves in relation to its investigations into war crimes, crimes against humanity and genocide. The ICMP was created in 1996 on the heels of the Dayton Peace Agreement to assist specifically with the search for missing persons in the region. Technological developments undoubtedly had a major positive impact on the localisation and identification of mortal remains in the former Yugoslavia. This included modern forensic technologies and the use of large-scale DNA identification.<sup>23</sup>

It is notable that the families of missing persons along with their associations have been closely associated with the various processes, including the adoption of legislation and regular interaction with missing persons institutes.<sup>24</sup> Important focus was put on enhancing regional cooperation, not only at the operational but also at the government level. People reported missing in one country or area were often disappeared or killed elsewhere and thus locating missing persons depends on effective information sharing (including tracing requests and opening military archives) and cooperation between countries. Regional cooperation on the search for missing persons is, for example, one of the priorities of the [Berlin Process](#), under the auspices of which a [Joint Declaration](#) was adopted in 2018 that led to the adoption of a [Framework Plan](#) of required actions in the field of missing persons. The Missing Persons Group, which gathers senior government representatives responsible for this file, [meets regularly](#) to review implementation of the plan, although a lack of political will, project-based approaches and inter-state tensions have unfortunately hampered this work in recent years.

Another lesson learned from the experiences in the region concerns the shift away from a purely humanitarian approach to one grounded on human rights and the rule of law when dealing with missing persons. This means that relevant information related to missing persons can and has been used in court proceedings to uphold the right to justice of victims of international crimes and of their families and to hold the perpetrators accountable. DNA and mass grave evidence was used in proceedings before the ICTY and domestic criminal proceedings. National judicial authorities are closely involved in processes related to the search for missing persons.

In 2022, with support from ICMP and funding from the United Kingdom and Germany, Bosnia and Herzegovina, Croatia, Kosovo, Montenegro and Serbia launched the [regional Public Database](#) of Missing Persons Cases. The database provides an up-to-date public record of all active cases of missing persons. It also enables the anonymous submission of information about mass graves that may not yet have been discovered.

### 1.3 Civil society spearheading efforts to confront a violent past

The post-war experience in the region has amply demonstrated the key role that civil society plays in helping to deal with a difficult past of gross human rights violations.<sup>25</sup> Civil society active in these processes encompasses not only human rights defenders and non-governmental organisations (NGOs) but also victims and their associations, historians, teachers, local leaders and psychosocial workers as well as members of the media, culture and artists. The region has produced an immense wealth of civil society led projects that can be a source of inspiration for other post-conflict societies seeking to address a violent past. This section only mentions a few examples.

First, human rights defenders have relentlessly supported international and national judicial processes to secure justice for wartime crimes. NGOs in the region have documented international crimes committed during the wars and relentlessly called for the prosecution of those responsible. Decades after the crimes, victims' associations, such as the Mothers of Srebrenica, [continue to raise their voices](#) to demand that their missing loved ones be searched for, the perpetrators brought to justice and that their suffering be remembered and honoured. NGOs such as [Documenta](#) in Croatia, [Human Rights Action](#) in Montenegro and the [Humanitarian Law Centre](#) in Serbia and Kosovo have diligently monitored, commented on and offered recommendations on how to improve domestic investigations and prosecutions of war crimes. In the absence of free legal aid, NGOs have enabled the participation of victims in criminal trials and accompanied them in their civil claims for reparations.<sup>26</sup> Civil society organisations have also been attentive to the need for correct information about war crimes trials being distributed to the public so as to increase the impact of these prosecutions. So-called 'court support networks' have been created to support outreach efforts by the War Crimes Chamber in the state court in Bosnia and Herzegovina and the Kosovo Specialist Chambers, for example.<sup>27</sup>

Civil society organisations have also called for a broader approach to dealing with the past, one that would include other aspects of transitional justice such as reparations, truth-seeking, memorialisation and guarantees of non-recurrence. They have stepped in when governmental authorities have failed to tackle these other aspects, most notably by prioritising the needs of victims. In the absence of effective reparations and support programmes civil society organisations have played a key role in providing economic and psychosocial support to victims and their families. Civil society in the region has also developed profound expertise in supporting the victims of conflict related sexual violence. To contribute to truth-seeking and to honour the victims, NGOs have conducted multi-year efforts to collect the names and

stories of all victims of gross human rights violations and grave violations of humanitarian law committed during the wars of the 1990s. These efforts include, for example, the [Bosnian Book of the Dead](#), published in 2013, and the [Kosovo Memory Book 1998-2000](#), published in 2015.

Given the predominant absence of human rights based memory policies by authorities in the region, civil society has led the way in commemorating of past war crimes. Many groups insist on the importance of remembering all victims, irrespective of their ethnic affiliation.<sup>28</sup> A vibrant memory activism is developing in the region.

Civil society efforts to encourage regional approaches to processing past grievances and societal reconciliation are of particular importance. An initiative of great significance is the [RECOM Reconciliation Network](#), which is a regional network of NGOs and victims' associations established in 2008 to advocate for governments of the region to jointly establish a regional truth and reconciliation commission. The regional truth and reconciliation commission has yet to be realised, as discussed in chapter 2. The Coalition for RECOM has also initiated dialogue and projects in support of truth-seeking and reconciliation, including work on a '[Yugoslav Book of the Dead](#)' intended to collect the names of all victims from the wars. There have also been numerous valuable initiatives initiated by civil society and the cultural and artistic community. Cultural and language similarities in the region make this a natural field for communication and cooperation.

## 1.4 The centrality of long-term international support

International intergovernmental organisations, such as the United Nations (UN), the European Union (EU), the Organisation for Security and Cooperation in Europe (OSCE) and the Council of Europe, and bilateral donor states committed to human rights and the rule of law, including the United States, Switzerland, the United Kingdom, the Netherlands and Germany, have over the past three decades devoted significant attention and resources to support efforts to address past atrocities in the region. Both international diplomatic pressure and support have been instrumental in securing criminal accountability. The EU and the United States have both exercised strong and often coordinated political pressure that has at times included the withholding of aid.

One strategy of note in this regard was the EU's use of political and economic conditionality to press for full cooperation with the ICTY. In the [Conclusions](#) adopted by the EU General Affairs Council on 29 April 1997 the EU decided that progress on reaching the various steps in the Stabilisation and Association Process (SAP) towards closer ties with the EU would be conditional on meeting a list of political and economic requirements.

Among these were effective cooperation with the ICTY, respect for human rights and minority rights, the creation of real opportunities for the return of refugees and internally displaced persons and a visible commitment to regional cooperation. Over the years, as many ICTY arrest warrants remained unexecuted, the EU narrowed its interpretation of the conditionality policy in the SAP as applying essentially to full cooperation with the ICTY. EU conditionality was at times implemented firmly. For example, in March 2005, the EU decided to postpone the opening of negotiations on the Stabilisation and Association Agreement with Croatia over the failure of the authorities to take sufficient steps towards helping locate the last Croatian ICTY fugitive, namely General Ante Gotovina.<sup>29</sup> This happened despite the EU having an otherwise positive assessment of progress on other criteria in Croatia. Negotiations only resumed later that year when the ICTY reported full cooperation, the suspect was arrested shortly afterwards. Yet in other situations, leaders of EU member states at times compromised the implementation of the conditionality policy because of other political priorities in the region.<sup>30</sup> ICTY officials stressed that EU conditionality was the major factor in securing arrests and cooperation from national authorities and that without it the tribunal would have been unable to fulfil its mandate.

International organisations and bilateral partners also supported the establishment and functioning of specialised war crimes courts and prosecution offices at the domestic level. This included financial support such as funding international staff and experts in the hybrid mechanisms discussed above. UNDP and the EU implemented projects to enable cooperation between the ICTY and later the IRMCT and their domestic judicial counterparts, including meetings, exchange programmes and specialised training in, for example, the field of investigation and prosecution of international crimes and witness protection.<sup>31</sup> UNDP has also supported meetings between the prosecution offices of the various countries, which proved instrumental in facilitating regional cooperation. The OSCE started monitoring war crimes trials in Bosnia and Herzegovina in 2004. It has produced [a rich overview](#) of progress and challenges faced at the domestic level in prosecuting wartime atrocities, including crimes of sexual violence, and has formulated important recommendations to improve the process. The EU and other international stakeholders have viewed their support for war crimes trials as a cornerstone of broader efforts to reform the judiciary and strengthen the rule of law in the countries concerned, which are priorities in the process of accession to the EU.<sup>32</sup>

Civil society in the region has stated that it would be useful for the EU to apply conditionality to a broader range of issues related to dealing with the past, human rights and the rule of law. Through its [annual enlargement](#)

package, the European Commission continues to mainly monitor developments concerning domestic war crimes trials and the search for missing persons. It has albeit to a lesser extent also looked at the issue of reparations for victims. Observers, including the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, have noted that Croatia's accession to the EU in 2013 resulted in diminished attention to measures for dealing with the past in the country, given the disengagement of the EU and other international organisations and donors from this field. One direct consequence, for example, has been the loss of funding for NGOs working on these matters, who have also been cut off from regional projects gathering other countries of the region which are not EU member states.<sup>33</sup>

There has also been significant international support for the work related to the search for missing persons as well as the return of refugees and internally displaced persons. International and regional human rights bodies have monitored efforts to deal with the legacy of the wars of the 1990s and formulated recommendations to overcome challenges. They include, among others, the Council of Europe [Commissioner for Human Rights](#) and several UN bodies including the UN [Working Group on Enforced Disappearances](#) and the [United Nations Special Rapporteur](#) on the truth, justice, reparations and guarantees of non-recurrence. An important lesson to be underscored from the experience in the region is the need for international stakeholders to plan for long-term commitment in terms of their support to societies dealing with a violent past. Civil society in the region has over the years observed a certain decrease in donor support for these issues, which were viewed as intrinsically temporary and intended for the period immediately following the wars. In the early 2010s, the focus of international partners progressively shifted away from what was perceived as 'backward-looking' justice efforts to a more development oriented approach to justice reform meant to facilitate accession to the EU. This shift likely happened too early, with too much confidence placed in the national authorities' commitment to realising genuine reform.

Other shortcomings have reduced the impact of international support to the processes for dealing with the past in the region. In addition to the diminishing attention mentioned above, a lack of consistency and prioritisation of transitional justice have sent harmful messages. In general, the international community has favoured immediate stability and avoided confronting ethno-nationalist political leaders and their divisive rhetoric about the past. Furthermore, over the past decade, EU member states have not spoken with one voice on the issues of supporting measures to deal with the past and bolstering civil society in this regard. This trend may be reflective of a more general backsliding on the commitment to human

rights and rule of law values in certain EU member states. While dealing with the past seemingly remains a priority for many international partners they have put too little emphasis on advocacy. Particularly damaging is the lack of a strong response by international partners to the denial of genocide and other atrocities and the glorification of war criminals by public officials and political leaders, which are discussed further in chapter 3. Furthermore, donors have favoured a project based approach that does not necessarily seek to address the negative structural trends undermining transitional justice and does not allow for a strategic long-term approach centred on achieving real change, especially for victims and survivors, beyond the completion of project cycles.

Despite these flaws and almost three decades after the wars, international scrutiny, political pressure and financial support continue to be key factors in bringing about legislative reforms and progress in the field of transitional justice in the region, showing the need for long-term engagement.

## **1.5 Breaking the silence about war related sexual violence and the need for gender-sensitive approaches**

The courage and determination of women survivors of rape and sexual violence, most notably from Bosnia and Herzegovina and Kosovo, have been at the origin of groundbreaking international developments on addressing conflict related sexual violence. The experience from the former Yugoslavia has contributed to a global shift in breaking the silence about gender-based violence and sexualised violence in war and this has resonated across the world. It includes legal advances in fighting impunity for these crimes, experience garnered in attending to the needs of survivors and increased awareness at the international level about the urgency and imperative of tackling the problem of war related sexual violence as well as the need for gender-sensitive approaches when dealing with the past.

There are no reliable figures on the actual number of victims of sexual violence in the wars of the 1990s, mainly because of stigma and underreporting. It has been estimated that upward of 20 000 women were victims of sexual violence in the region.<sup>34</sup> The UN Commission of Inquiry that was mandated to document gross human rights violations committed between November 1992 and June 1994 in Bosnia and Herzegovina found that while acts of sexual violence were reportedly committed by members of all warring parties the vast majority were committed by members of Serb military and paramilitary forces against Bosniak women.<sup>35</sup> In Croatia sexual violence was also used systematically to intimidate communities and assert power



over women. It is estimated that between 1 500 and 2 200 women were victims of sexual violence in Croatia.<sup>36</sup> In the conflict that later broke out in Kosovo women were also subjected to rape and sexual violence, according to an NGO which interviewed 900 victims there.<sup>37</sup> Rape and other types of sexual violence were used systematically by all sides as a strategy of war. Women were raped multiple times often by multiple perpetrators and in conditions of captivity, including in locations that have been described as 'rape camps' where the perpetrators at times clearly affirmed their intention to cause forced pregnancies. Although the vast majority of victims were women, men and boys were also subjected to sexual abuse in the context of the wars.

The statute of the ICTY explicitly includes rape as a crime constitutive of crimes against humanity (Article 5) and the tribunal made it a priority to investigate and prosecute crimes of sexual violence. Relevant charges were included in close to 50% of the 161 indictments issued by the tribunal with 32 accused found guilty, and two cases were entirely focused on acts of sexual violence.<sup>38</sup> The adjudication of these crimes at the ICTY strongly anchored the understanding that crimes against women and sexual violence in conflict are not an unfortunate by-product of war but rather constitute grave breaches of the Geneva Conventions and are often used as part of policies to target civilian populations.

Although a lack of accountability for these crimes in the region still largely prevails, it is notable that domestic courts in Bosnia and Herzegovina have prosecuted some perpetrators over the years. According to OSCE reporting, on average about 20% of war crimes trials in Bosnia and Herzegovina have included charges of rape or sexual violence.<sup>39</sup> The journey towards obtaining justice before national courts has been gruelling for survivors who have to face challenges such as breaches of confidentiality about their identity, lack of protection and psychological support, improper questioning by judges or the qualification of rape as an ordinary crime as opposed to a war crime or crime against humanity. Reportedly, the practice and jurisprudence of national courts in Bosnia and Herzegovina has improved in recent years and become more aligned with that of the ICTY.<sup>40</sup> In 2022, a survivor of sexual violence from Bosnia was able to testify via video conference in a war crimes trial taking place in Montenegro, setting an encouraging precedent of regional cooperation aimed at achieving justice for these crimes whilst protecting survivors.<sup>41</sup> The practice of the ICTY and domestic courts have shown the need for training and specific approaches in the justice system when investigating sexual violence and in order to protect women survivors and other vulnerable victims.

The determination of women in the region to obtain recognition and support has also led to significant legislative developments in the direction

of enabling psychosocial support and compensation for victims of sexual violence. The Federation of Bosnia and Herzegovina was the first to include victims of sexual violence specifically in its law on compensations for victims of war in 2006, while Kosovo did so in 2016. Croatia adopted a law focused on victims of sexual violence in 2015, which not only covers compensation but also other forms of support. Although only a small number of victims were able to obtain recognition under these laws, their very existence clearly illustrates the need for a gender-sensitive approach towards reparations in order to ensure that all relevant victims can access reparations in a way that meets their specific needs.<sup>42</sup> Psychosocial assistance of victims of wartime sexual violence has for the most part been provided by NGOs, such as, for example, Medica from Zenica in Bosnia and Herzegovina and the Centre for Women Victims of War (Rosa) in Croatia. There is an awareness today that legal approaches alone are not enough, which is positive.

Informal processes conducted by civil society groups are also important. Research on the civil society led regional Women's Court, for example, found that it delivered justice to women by giving them the space to tell their personal stories without interruption or constraint.<sup>43</sup> The arts also provide a space for survivors to reckon with the past.<sup>44</sup> The 'Thinking of You' installation in Kosovo (with 5 000 donated skirts and dresses hung from washing lines), for instance, attempted to confront the stigma surrounding sexual violence and has contributed to a degree of recognition of wartime rape.<sup>45</sup> Putting the focus on the agency of survivors instead of seeing them as a helpless vulnerable group can also help tackle and transform traditional gender models and the perceived role of women as represented in the existing power relationships between men and women in the region.

Overall, by breaking the silence and stigma that surrounds the crimes that affected them, survivors of sexual violence and gender-based violence in the region have opened and continue to open space for sensitive discussion and legal developments that are of significance well beyond the region. Sexual violence affecting men and boys in conflict, for example, was examined for the first time before an international tribunal through cases at the ICTY. In recent years, children born of wartime rape have started to organise and to raise their voice. Their courageous engagement for visibility and recognition is leading to results. One example is the adoption in Brčko District in 2022 and in the Federation of Bosnia Herzegovina in 2023 of laws recognising children born of wartime rape as civilian victims of the war. Bosnia and Herzegovina is among just three states in the world with such laws. The association 'Forgotten Children of War' in Bosnia and Herzegovina has reported efforts to initiate a regional coalition to join forces with children in the same situation in other countries and to continue their advocacy. Important work on the need for gender-sensitive memorialisation was

initiated in Kosovo through the [Heroinat Memorial](#) that was inaugurated in 2015. The memorial, dedicated to the 'heroines of war', contains a large representation of a woman's face intended to depict the specific experience of women during the war in Kosovo, including women survivors of sexual violence and women combatants.



Relatives exhibit photos of their missing loved ones. ©Borislav Pešić Blagoja, with permission from SIVV project consortium funded by the EU.

## Chapter 2

# Unfinished Business: Stalled Processes for Dealing with the Past

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The legacy of its violent past still lingers in the region, as many transitional justice issues remain unresolved. The unfinished business related to transitional justice might at first sight appear to be the result of a lack of political interest in tackling the problems of the past, explained under the pretext of the need for societies to move on and only focus on the future; however, the failure to timely and adequately deal with the painful experience of past atrocities has had far reaching consequences in the present. This endangers the full enjoyment of human rights and prevents countries in the region from achieving inclusive democracy and the rule of law. Even almost three decades later, the transitional justice processes in the region still do not live up to internationally required standards.

Today, thousands of victims are left without access to justice as war crimes prosecutions are often obstructed because of the regional dimension of the wars of the 1990s. The lack of cooperation in the region on judicial matters prompts the use of trials conducted in absentia. Yet such trials often fail to deliver effective justice owing to the poor extradition practices between governments in the region. Each state tends to give favourable treatment to its own nationals, which undermines the principle of impartiality. This takes away from the victims the chance for just satisfaction and exacerbates ethnic based intolerance.

Moreover, there is only limited political will among state institutions to enforce victim centred approaches. Long domestic court and administrative procedures, the narrow scope of laws and ethnic bias often hamper civilian victims in their search for reparations. The war survivors, refugees and internally displaced persons (IDPs) face social stigma and a lack of psychosocial support in dealing with the harm they suffered. Victims' families continue to search for their loved ones, while finding durable solutions for children born of wartime rape is still considered taboo. Neglecting the

economic and social needs of civilian victims has real life consequences in terms of their life and emotional well-being and fosters an atmosphere of divided societies that are unable to achieve true reconciliation and build plural democratic systems.

This chapter gives an overview of the current state of transitional justice processes in the region and the obstacles undercutting them.

## **2.1 The need to accelerate and bolster domestic prosecutions of wartime crimes**

As discussed in chapter 1, there have been some efforts to fight impunity for atrocity crimes through domestic criminal proceedings in the region and the perpetrators of atrocities continue to be indicted and brought to trial. Despite the creation of specialised prosecution offices and courts and the adoption of war crimes strategies in Bosnia and Herzegovina, Montenegro, Croatia, Kosovo and Serbia, progress has been slow and fraught with hurdles. The ambitious goals articulated in these strategies have been undermined by a lack of capacity and/or the absence of strong will on the part of national stakeholders to make their implementation a matter of priority.

The spreading of ethno-nationalist discourse and the denial of atrocities and the glorification of war criminals by politicians in the region (further discussed in chapter 3) do not allow for a conducive political climate in which it would be genuinely possible to achieve accountability. Analogous trends that obstruct effective war crimes trials can be observed in all the countries dealing with such cases, as briefly illustrated below. Almost three decades after the end of the wars, time is running out for realising justice. With the passage of time witnesses and defendants are aging and dying, their memory is fading out and evidence is becoming more difficult to find. There is a serious risk that what increasingly appears as stalling tactics throughout the region will result in a betrayal of the victims and a failure to deliver on the clear commitment that there should be no impunity for war crimes, crimes against humanity and genocide. This would be a devastating message, especially at a time when nationalist divisive rhetoric and warmongering is growing again in the region.<sup>46</sup>

It has been reported that there are still more than 3 000 suspected perpetrators of war crimes, crimes against humanity and genocide committed during the wars of the 1990s to be investigated and prosecuted in Serbia, Bosnia and Herzegovina and Croatia.<sup>47</sup> There is a significant backlog of pending cases to be investigated and prosecuted in several countries of the region. At the same time, the process of deceleration of war

related justice already [reported](#) by the Council of Europe Commissioner for Human Rights in 2012 has become worse over the past decade. In Bosnia and Herzegovina the 2008 [National War Crimes Processing Strategy](#) had to be revisited after it became evident that the judicial system would not be able to meet its goals and deadlines. A [revised strategy](#) was adopted in 2020, aimed at completing all cases by 2023. However, the OSCE has expressed scepticism that the goals of the revised strategy can be achieved within this timeframe. It was estimated in 2022 that it would take at least six years to complete the 245 cases that were pending before national courts at that time.<sup>48</sup>

In Serbia, at the time of the adoption of the 2021-2026 National Strategy for the Prosecution of War Crimes, there was a case backlog of 1 731 pre-investigative cases.<sup>49</sup> Civil society has expressed concern that the strategy will not help as it lacks clear criteria for prioritising cases. Successive Council of Europe Commissioners for human rights have repeatedly criticised in country visit reports the tendency of the Serbian judiciary to focus on low level perpetrators instead of cases involving senior ranking perpetrators who remain untouched.<sup>50</sup> The prosecutors launched fourteen indictments for war crimes against sixteen persons between 2021 and 2022. Nine of the fourteen cases were fully investigated by the authorities in Bosnia and Herzegovina and transferred to Serbian jurisdiction.<sup>51</sup> Delays in proceedings continue to be reported. The beginning of the first ever trial in Serbia for war crimes in Srebrenica, for example, has been postponed over twenty times since December 2016 because the accused claimed bad health or failed to appear at proceedings without sanction.<sup>52</sup>

In Montenegro a War Crimes Prosecution Strategy 2015-2021 set three main priorities i) to identify war crimes cases in which Montenegrin nationals were involved, ii) to identify Montenegrin nationals suspected of committing war crimes and iii) to revisit old cases. The prosecution reportedly issued only two indictments between 2015 and 2023, both resulting from judicial information received from a third country rather than investigative work initiated by the Montenegrin justice system.<sup>53</sup> In 2021, in its [progress report](#), the IRMCT reported having transferred to prosecutors in Montenegro an investigative dossier concerning fifteen individuals “believed to be responsible for serious crimes, including murder, torture, sexual slavery and rape.”<sup>54</sup> The dossier is still under investigation.

Since 2019, the Kosovo judiciary has been fully responsible for the prosecution of war related crimes with the exception of those falling under the jurisdiction of the Kosovo Specialist Chambers. Previously, in 2008, EULEX had taken over responsibility for these cases from UNMIK, which had exercised executive powers in Kosovo since 1999. There were serious shortcomings in the investigation of war related crimes in the past.

According to EULEX, around 1 000 war crimes related cases were transferred to the Kosovo judiciary during 2018 and 2019.<sup>55</sup>

In Croatia it was reported that as of September 2021 proceedings had been initiated against 3 736 individuals with 666 having resulted in a final conviction.<sup>56</sup> Civil society expressed concern about significant delays in these proceedings.

Domestic justice systems either lack capacity or efficiency in dealing with these cases. There are signs of fatigue in dealing with atrocities from the past and considerable shortcomings in certain aspects of their work. The specialised offices for the trial and prosecution of war crimes are often described as understaffed and in need of strengthening in terms of their technical and human infrastructure.<sup>57</sup> In Bosnia and Herzegovina disparity in the pace and quality of proceedings has been reported depending on the jurisdiction where the proceedings are taking place.<sup>58</sup> In Montenegro several judgments acquitting suspected perpetrators were criticised for grossly misapplying international humanitarian law.<sup>59</sup> Civil society has further observed that prosecutors have failed to resort to international law criminal liability concepts such as command responsibility which would allow for the prosecution of higher level perpetrators. Bringing individuals with high social or political standing to justice comes with certain security challenges for local judicial professionals. Examples have been recorded in Kosovo and Bosnia and Herzegovina where prosecutors claim that they have been pressured and threatened over their work.<sup>60</sup>

Another issue of particular concern is the region's poor record in dealing with cases of witness intimidation, as pointed out by the Council of Europe Commissioner for Human Rights.<sup>61</sup> Recent incidents include the publication by media in Bosnia and Herzegovina of the name of a protected witness in a war crimes case reportedly implicating the Prime Minister of Republika Srpska and in Kosovo the transfer of confidential files belonging to the Kosovo Specialist Chambers to a veterans organisation in that country. Incidents have also been reported in Serbia.<sup>62</sup> National authorities have failed to take legal action to counter such practices or to demonstrate the capacity or intent to inspire trust among witnesses and to protect them from potential reprisal. In Serbia implementation of a strategy adopted in 2020 to improve the protection and rights of victims and witnesses of crimes, in line with international and European standards, is progressing slowly.<sup>63</sup> Reportedly, some important steps have been taken in Bosnia and Herzegovina such as the establishment of 22 witness support offices in courts and prosecutors' offices throughout the country, the provision of training on witness protection for judicial officials and the creation of psychosocial support programmes and improved in-court protection measures.<sup>64</sup>



Another worrying trend undermining domestic prosecutions in the region is the noticeable presence of ethnic bias in judicial proceedings, which tend to focus on the prosecution of perpetrators belonging to the 'other' ethnic groups. The Croatian NGO Documenta, for example, indicated in a recent report that in 2020 out of 44 active war trials in Croatia 40 cases or 90% were against ethnic Serbs and only 4 cases against ethnic Croats.<sup>65</sup> Furthermore, discrepancies in the sentences received by ethnic Serbs and ethnic Croats have been observed.<sup>66</sup> Reports have also documented ethnic biases by Serbian judicial authorities in relation to their higher efficiency in prosecuting Albanians and Bosnians in comparison to Serbian nationals.<sup>67</sup> In the 2022 memorandum subsequent to her mission to Kosovo, the Council of Europe Commissioner for Human Rights expressed her concern that the unwillingness to hold former KLA members accountable poses a serious challenge to the effective prosecution of war crimes and to access to justice for victims.<sup>68</sup>

Finally, despite a clear trend under international law to find amnesties for war crimes, crimes against humanity and genocide illegal as also confirmed by the European Court of Human Rights,<sup>69</sup> several countries in the region have adopted amnesty laws. In 1996, the Croatian Parliament adopted a [General Amnesty Law](#) that granted amnesty from prosecution to the perpetrators of criminal offences committed during the war that took place between 1990 and 1996. Although the Law excludes amnesty for perpetrators of war crimes, genocide and other mass violations of humanitarian law, the United Nations Committee against Torture pointed out that it may have been applied incorrectly and in violation of international law to perpetrators of torture.<sup>70</sup> North Macedonia also adopted an [Amnesty Law](#) in 2002 that excluded perpetrators of gross human rights violations committed during the conflict of 2001. However, in 2012, the parliament adopted an authentic interpretation of Article 1 of the Amnesty Law that effectively cancelled the exclusion clause and granted an amnesty to individuals suspected of or indicted for gross human rights abuses.<sup>71</sup> The authentic interpretation allowed members of the ethnic Albanian rebel fighters of the National Liberation Army (NLA), who were initially investigated by the ICTY, to be granted an amnesty after the ICTY referred the cases back to Macedonian jurisdiction. Article 118 of the [state Criminal Code](#) in Bosnia and Herzegovina continues to provide for the possibility of granting amnesty for international crimes.

Another practice allowed by Bosnian courts which negatively impacts accountability is the possibility for convicted war criminals to buy out their prison sentences by paying a fine when the sentence is less than one year in prison. This contributes to the handing down of lower sentences and sends the wrong signal about the gravity of the crimes adjudicated. This practice

should be urgently outlawed for convictions related to gross human rights violations, as it already is for other offences in the criminal code of Bosnia and Herzegovina.<sup>72</sup>

### 2.1.1 Regional cooperation

Despite some efforts to encourage cooperation among the countries of the region in the field of justice for wartime crimes, as mentioned in chapter 1, judicial and prosecutorial cooperation has faced stagnation in recent years. Recent reports have highlighted in particular Croatia's lack of willingness to engage in regional cooperation in recent years as well as tensions between Serbia and Kosovo, which hamper dialogue and limit the possibilities for mutual collaboration.<sup>73</sup>

The lack of effective judicial cooperation is one of the major factors enabling impunity for war crimes in the region. A major problem has been the refusal of governments to extradite their citizens on war crimes charges. Kosovo and EULEX issued more than 50 warrants for Serbian citizens through the United Nations mission (UNMIK) but none of them have been extradited or arrested.<sup>74</sup> In Bosnia and Herzegovina the issue of the unavailability to the courts of defendants affects approximately 38% of the 245 ongoing war crimes cases.<sup>75</sup> It has been reported that the state Court of Bosnia and Herzegovina has 135 active arrest warrants for persons suspected of or indicted for war crimes and others who have already been convicted but have yet to serve their sentence.<sup>76</sup> The possibility of obtaining multiple nationalities poses an additional problem in securing accountability in transnational cases. In some cases, this is used to obstruct justice in another state. One egregious case highlighted by the Council of Europe Commissioner for Human Rights is that of Novak Djukić, who was convicted by the state court of Bosnia and Herzegovina in 2015 for ordering the Tuzla attack and is still free in Serbia because the sentence against him has not yet been enforced.<sup>77</sup>

In addition to guaranteeing impunity for fugitives who are wanted in other countries, the lack of regional cooperation has prompted an increase in the trend of conducting trials in absentia. Croatia was the first state to make use of in absentia trials.<sup>78</sup> According to civil society [reports](#), in 2021, 41 out of 59 active cases in Croatia were trials in absentia (70%). Kosovo amended its Criminal Procedure Code in 2019 and 2021 to allow trials in absentia.<sup>79</sup> Most recently, Serbia started to use trials in absentia because of the inability to secure the presence of suspects from other countries.<sup>80</sup> While the use of this legal avenue is not problematic from a human rights point of view per se, provided that certain guarantees are respected in line with the case law of the European Court of Human Rights,<sup>81</sup> the impact they have in terms of achieving justice for the victims can be deemed insufficient. This is a

concern that civil society organisations from the region have repeatedly shared with the Council of Europe Commissioner for Human Rights. Notably, the suspects usually continue to enjoy impunity in the country where they reside. It is notable that under certain circumstances criminal codes in the region provide for exceptions to the rule of non-extradition of nationals for offences other than gross human rights violations. Such an exception should be introduced by all countries in the region in regard to the most serious crimes under international law, namely war crimes, crimes against humanity and genocide. This would send the signal that these crimes are so abhorrent that no safe haven can be provided to those who commit them. It would allow suspects to be tried close to the location of the crimes, facilitate the participation of the victims and would thus be an important step towards ensure meaningful justice.

However, considering that this has been a long-standing issue in the region and the lack of political will to address it, in order to achieve justice investigative cases should be transferred to the state where the suspect lives for prosecution there. All states in the region are obligated under several international treaties to extradite or prosecute a person found on their territory who is suspected of committing war crimes and other international crimes.<sup>82</sup> Refusal to extradite nationals without investigating and prosecuting allegations related to such crimes is in breach of these obligations. When trials take place in a country other than the one where the crimes occurred appropriate measures should be taken for the participation of victims and the protection of witnesses.

## **2.2 Ongoing challenges in the provision of adequate and effective reparation to all victims of wartime crimes**

All victims of gross violations of international human rights and humanitarian law have the right to adequate, effective and prompt reparation for the harm suffered, in line with the Council of Europe [Guidelines](#) on Eradicating impunity for serious human rights violations and the [2005 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 (hereinafter, 2005 UN Basic Principles and Guidelines). The application and implementation of these principles must without exception be without discrimination of any kind or on any grounds. The principles underline that reparations should be proportional to the gravity of the violations and harm suffered by the victims. They highlight various forms of remedies that need to be introduced to provide effective redress to the victims, including

restitution, compensation, rehabilitation, satisfaction and guarantees on non-recurrence. Almost three decades after the wars, it is deplorable that many civilian war victims in the region remain without effective adequate reparation.

The ICTY [acknowledged](#) the right of victims of the crimes it adjudicated to seek compensation and repeatedly [called](#) on the international community to establish a voluntary trust fund for victims, based on the model of that foreseen in the Rome Statute of the International Criminal Court; however, this never happened. None of the countries have adopted a comprehensive reparations programme that would effectively encompass all forms of reparation contained in the 2005 UN Basic Principles and Guidelines. The draft Transitional Justice Strategy prepared in Bosnia and Herzegovina in 2012 attempted such an approach but unfortunately it was never adopted. At the domestic level, the approach has been piecemeal throughout the region and complicated by the adoption of multiple laws that fail to provide for adequate protection of the rights of victims and survivors. Similar problematic trends are replicated throughout all the countries most concerned, for example, the tendency to favour victims from the majority ethnic group and to exclude the 'others'. There have been no regional agreements on cooperation on reparations despite the fact that the nature of the wars of the 1990s meant that the victims and perpetrators sometimes ended up living in countries others than those where the crimes were committed.

In the absence of comprehensive reparations programmes, civilian war victims have had to rely on existing social protection systems and individual court proceedings against the perpetrators and/or the state. Both represent significant shortcomings as briefly described below. Recognising the suffering of all victims of gross human rights violations and genuinely seeking to repair the harm done is a crucial component of dealing with the violent past and restoring social cohesion. Yet the current approach to reparations in the region is leading to the opposite result by fuelling inequality, frustration and resentment.

### **2.2.1 Selectivity and bias in the award of social benefits**

Instead of adopting comprehensive programmes dedicated to awarding reparations to civilian war victims, the countries of the region have used social protection laws to award monthly pensions and social benefits. If not accompanied by other measures of reparation, a social protection approach falls short of fulfilling some important symbolic aspects of the concept of reparations, including recognition of responsibility for the harm suffered. Some of the laws providing social benefits were adopted in the years after the wars and initially were focused largely on protecting army veterans. In

Croatia and Kosovo it took a very long time for civilian war victims to be included in the social protection laws, while Montenegro still does not have any legal framework providing social benefits for civilian war victims.

All of the existing laws providing social benefits to civilian war victims in the region share the common feature of being more favourable to army veterans than to civilian war victims. They also exclude many groups of civilian war victims through various qualification requirements. As illustrated below, these include the current place of residence of the victim, the time scope and the territory on which the crimes were committed, the degree of disability suffered by the victim and restrictive designations of the perpetrator as, for example, 'enemy forces', which excludes all victims of crimes committed by the armed forces of the country paying the benefit. These requirements shape the legal acknowledgment of victims through the status of 'civilian war victims' as well as the available compensation policies, which makes them inherently selective and biased. The victims and survivors who are excluded are usually the most marginalised, such as victims of war related sexual violence and Roma and those belonging to minority groups in a certain area or country. These benefits thus contribute to feeding divisive discourse about 'our' vs. 'other' victims, instead of recognising and honouring the suffering of all civilian war victims equally. Civil society organisations across the region have dedicated significant efforts over the years to advocate for these laws to be improved and made more inclusive.

The law in Serbia regulating social protection benefits for civilian war victims between 1996 and 2020 was repeatedly criticised for excluding victims whose loss of life or injuries resulted from the actions of Serbian state agencies, those who did not suffer injuries in the territory of the Republic of Serbia, those whose injuries resulted in bodily disability under a 50% threshold (thus often excluding victims of sexual violence) and camp detainees.<sup>83</sup> While the new [Law](#) on the Rights of Veterans, Disabled Veterans, Civilian Disabled Veterans and Their Family Members adopted in 2020 adds the families of missing persons as a category of civilian victims eligible for social benefits it does not address any of the previously identified shortcomings. According to the NGO Humanitarian Law Centre, 15 000 civilian war victims and their families cannot benefit from administrative reparations provided for under this Law.<sup>84</sup>

In 2021, almost thirty years after the end of the wars, Croatia adopted the Law on the Civilian Homeland War victims that regulates the rights and benefits of civilian victims who are citizens of Croatia or were residents when they were harmed. Although the Law is sought to be inclusive, human rights NGOs and some opposition members of parliament have pointed out that civilians members of the Serb minority could face difficulties proving that

they did not aid or collaborate with the 'enemy', which is a condition for exclusion.<sup>85</sup> According to the data by the Croatian Ministry of War Veterans' Affairs, around 2 500 beneficiaries are eligible; 1 775 applications were **reported** to have been filed under this Law by May 2023.

In Kosovo, the 2012 Law on the Status and Rights of the Martyrs, Invalids, Veterans, Members of the Kosovo Liberation Army, Sexual Violence Victims of the War, Civilian Victims and their Families entitles these categories of persons to family or disability pension, medical and physical rehabilitation, paid healthcare, professional rehabilitation and priority in employment. Yet the Law only recognises victims of crimes committed by 'enemy forces' or those who suffered injuries between February 1998 and June 1999 and is therefore focused only on Kosovo Albanian victims and excludes other victims, particularly Serb and Roma.<sup>86</sup>

Because of political disagreements and conflicting ethnic based narratives about the war, Bosnia and Herzegovina has failed to adopt a unified legal framework at the state level for the compensation and legal recognition of wartime civilian victims. The consequence of this is a fragmentation of the reparation regimes which goes against an important function of reparation, namely the integration of all victims. Under entity and cantonal social protection and disability schemes civilian war victims receive monthly allowances similar to those provided to persons who are unemployed or with disabilities.<sup>87</sup> Because they often do not meet the restrictive conditions set in the Law, namely the need to have submitted the request by December 2007 and to be resident in Republika Srpska, only a few Bosnian Croats and Bosniaks have obtained the status of civilian war victim in Respublika Srpska.<sup>88</sup> In a positive move, in 2023, the Federation of Bosnia and Herzegovina **revised** its Law on the Protection of Civilian Victims of War and removed, among others, a ban on exercising such rights if a victim had left the Federation for more than three months.

### **2.2.2 Reparation for victims of war related sexual violence**

As noted in chapter 1, there has been a slow improvement in terms of the recognition of the needs of survivors of sexual violence in the region in recent years. They are recognised as a specific category of civilian war victims in social protection laws in the Federation of Bosnia and Herzegovina (2006) and Kosovo (2014), while Croatia passed a specific law on victims and survivors of sexual violence in 2015. As mentioned above, the Law in Serbia does not have specific provisions on survivors of sexual violence and tends to exclude them because of disability requirements.

Unfortunately, the discriminatory requirements discussed above also exclude groups of survivors of sexual violence. In Kosovo, for example,

only those who endured sexual violence before June 1999 can apply. The Commission to Recognise and Verify Survivors of Sexual Violence During the Kosovo War, which was established to process claims, had as of December 2022 recognised 1 406 individuals and its work remains ongoing.<sup>89</sup> Civil society organisations have alerted that this number does not reflect the real extent of the number of persons affected. There is a need to address the still prevailing stigma associated with these crimes as it means that survivors are afraid that their identity may be revealed in the process. It is also essential that the authorities depart from a medical approach, because survivors may not possess the required medical documentation of the harm they suffered.<sup>90</sup>

In Croatia civil society organisations report that certain survivors of sexual violence are unjustly excluded from receiving compensation under the 2015 Law. This includes survivors of crimes perpetrated by members of the Croatian Army or police forces as well as cases in which the judicial authorities find that the crime was an individual act and therefore not related to the war.<sup>91</sup> The Law was further criticised for not including all forms of sexual violence as foreseen under the ICC statute.<sup>92</sup> Untreated trauma and the fear of stigmatisation continue to hamper the process. [According to](#) civil society organisations, as of July 2023, only 298 persons had applied for the status of civilian victim of wartime sexual violence and therefore well below the estimated number of victims.

In Bosnia and Herzegovina many survivors of sexual violence are excluded from compensation because of the complex legal framework, statutes of limitations and unsuccessful court proceedings. Despite momentous efforts by civil society organisations up to 2022 only around 1 000 survivors had or were in the process of obtaining some form of reparation.<sup>93</sup>

### **2.2.3 Difficult path through criminal and civil court proceedings**

Given the inadequacy and selectiveness of the existing social protection systems, victims have also sought to obtain reparations through criminal court proceedings against the perpetrator or civil proceedings against the perpetrator or the state. Seeking recognition through court proceedings can be an exhausting experience for the victims, both mentally and financially.

Civil court procedures against the state last longer than administrative claims and are costly. The burden of proof is on the claimants who need to prove that they suffered harm from the state or state agencies. Civil complaints can place a substantial financial burden on those claimants who lose their cases. In some cases, the court fees have reached amounts equivalent to 10 000 euros in Croatia<sup>94</sup> and up to 5 000 euros in Bosnia and

Herzegovina.<sup>95</sup> In some instances in Bosnia and Herzegovina victims have been expelled from their property for being unable to pay these fees, which is contrary to international human rights principles.<sup>96</sup> Another serious impediment to obtaining reparation through civil proceedings are statutes of limitations. In 2013, the Constitutional Court of Bosnia and Herzegovina ruled in favour of statutes of limitations for pecuniary damages claims for war crimes if they were directed against the state or the entities, thus effectively blocking victims' access to compensation countrywide. This is contrary to international standards, according to which war crimes, crimes against humanity and genocide are not subject to statutes of limitations.<sup>97</sup>

Victims and survivors also face serious challenges when seeking to obtain reparations in criminal proceedings against the perpetrator, in addition to potential re-traumatisation resulting from the court proceedings. Across the region victims and survivors rarely have access to free legal aid and they are usually assisted by NGOs. Judges often omit to award compensation to civilian victims in a criminal case and instead instruct them to go through civil proceedings, which creates further delays and re-traumatisation of the victim. In some cases, the awarded reparations are never paid because the perpetrator allegedly lacks resources. In 2019, in a case involving a Bosnian victim of sexual violence who could not obtain reparation because the perpetrator could not pay and the applicable statutes of limitation, the United Nations Committee against Torture found Bosnia and Herzegovina in violation of its human rights obligations and ordered several measures to remedy the situation. These included the provision of fair compensation, free health and psychological care and an official public apology.<sup>98</sup> There is no indication that the authorities of Bosnia and Herzegovina have implemented these recommendations.

Overall, there has been a lack of attention and focus by national authorities on forms of reparation other than compensation. As discussed below, there is a dire need to provide rehabilitation to victims and survivors as well as proper recognition through memorialisation and official state apologies. Guarantees of non-recurrence are also essential for victims and survivors but require effective state action to address the root causes of the violence, protect survivors from rising intolerance and hate speech, and effective measures to combat stigma and marginalisation, most notably for the survivors of sexual violence. Victims have varying needs and visions<sup>99</sup> when it comes to reparations and it is crucial that their views be heard.



## 2.3 Forcibly displaced persons: remaining human rights challenges

The wars that took place in the 1990s caused the forced displacement of between 3.7 and 4 million persons within and outside the region. The majority of those originally uprooted have been able to return or have found reasonable alternatives. As explained below, there has been some progress over the last decade in solving the issue of protracted displacement in the region; however, serious obstacles to sustainable return remain. According to information reported by states of the region to UNHCR, as of November 2018 there were still approximately 28 000 refugees and 310 000 internally displaced persons (IDPs), including 4 500 persons at risk of statelessness, in the region as a result of the wars of the 1990s. Political will, funding and regional cooperation continue to be necessary in order to uphold the human rights of forcibly displaced persons.

Most countries of the region have adopted laws and policies to facilitate return and ensure adequate housing and the restitution of the rights of returnees, but these frameworks are not always well implemented in practice. In 2013, the authorities in Croatia adopted a Decision on Housing Care for Returnees – former occupancy/tenancy rights holders (OTR) outside the Areas of Special Concern – and created the State Office for Reconstruction and Housing Care, which deals with requests from OTRs who, among other things, exercise their right to return. However, serious delays in reconstructing homes destroyed during the wars have been documented. In 2022, the UN Special Rapporteur on the truth, justice, reparations and guarantees of non-recurrence reported a lack of investment in the reconstruction of housing units leaving cities completely uninhabited. In other areas, particularly Slavonia, returnees live without access to vital public facilities, such as water, electricity, gas, health, education and transport infrastructures, which contributes to their social exclusion.<sup>100</sup>

In 2010, Bosnia and Herzegovina adopted a revised strategy for the Implementation of Annex VII of the Dayton Peace Agreement. The Peace Agreement explicitly recognises the right of all refugees and displaced persons to return to their homes and to receive compensation for property that cannot be restored to them. Progress has been made in the restitution of property and access to employment, water and electricity. In 2019, the government reported that around 50% of the total number of 2.2 million refugees and IDPs had returned. It is estimated that two-thirds of the damaged and destroyed housing stock has been reconstructed. Further attention is however required in the area of compensation for property that cannot be returned. Restitution of property has not necessarily resulted in

returns to communities of origins, as many displaced persons have chosen to sell their properties instead of living in areas where other ethnic groups are in the majority. The country's multi-ethnic nature remains deeply changed with more mono-ethnic areas than before the wars.

Serbia has provided support for the voluntary return of refugees from other countries of the region. Those who chose the option of integration in Serbia have access to a simplified naturalisation process and the same rights as citizens, such as access to healthcare and education, as well as the right to vote once naturalisation is complete. Of the close to 200 000 people who fled Kosovo to Serbia between 1999 and 2004 it is estimated that around 68 000 still have displacement related needs.<sup>101</sup>

A total of 28 000 voluntary returns to and within Kosovo was registered between 2000 and 2019, but there were still around 15 000 IDPs as of April 2022.<sup>102</sup> Kosovo provides for special rights for displaced persons through, for example, the 2017 Strategy on Property Rights, the 2018 Law on Immovable Property Tax that exempts displaced persons from payment of the accumulated property tax, and the 2018 Law on Treatment of Constructions without Permit.<sup>103</sup> The Commissioner has however noted reports that the enjoyment of these special rights is hindered by a lack of effective response to illegal occupation, including non-enforcement of decisions upholding displaced persons' property rights, a slow justice system, the non-payment of compensation for destroyed property and a lack of sustainable solutions for returnees who did not own land or property.<sup>104</sup>

Montenegro adopted the [Strategy on Migration and Reintegration of Returnees in Montenegro](#) (2021-2025) with the aim of providing a permanent solution to the issue of displaced and internally displaced persons through local integration and voluntary sustainable return to their country of origin. In 2018, with the help of internationally financed housing programmes, the country closed the Konik refugee camp, which was inhabited for more than two decades by Roma and Balkan Egyptians who fled the violence in Kosovo in 1999.<sup>105</sup> However, the new apartment blocks were built at the same location as the camp and therefore away from the city centre of the capital city Podgorica and close to the country's largest landfill.<sup>106</sup>

In 2010, Slovenia adopted the [Act on Amendments and Supplements to the Act Regulating the Status of Citizens of Other Successor Countries of the Former Socialist Federal Republic of Yugoslavia in the Republic of Slovenia](#). In 2014, the [Act on compensation for damages to persons who were deleted from the permanent population register](#) (better known as 'the erased') entered into force following the 2003 [ruling](#) by the Slovenian Constitutional Court and the 2012 [judgment](#) of the European Court of Human Rights that foresaw restitution of the residence rights and compensation for the

'erased' citizens. Notwithstanding these laws, many 'erased' were never able to recover their residence rights or receive compensation either because of restrictive conditions or because they missed the deadline for applying. A few 'erased' persons still live in Slovenia without any legal status.<sup>107</sup>

Regional cooperation has been crucially important for solving the issue of protracted displacement. An important initiative in this regard was the creation of the Regional Housing Programme (RHP) in 2010. This was a [joint initiative](#) by Bosnia and Herzegovina, Croatia, Montenegro and Serbia with international support from the EU, the United States, the Council of Europe Development Bank and the OSCE. The RHP [aims](#) to provide a durable housing solution for more than 34 000 of the most vulnerable persons in the four countries by the end of 2023. Another important regional project is the 'Inter-Institutional Initiative on Displaced persons from Kosovo', otherwise known as the [Skopje Process](#), which was initiated in North Macedonia in 2014. The Skopje Process foresaw the establishment of a regional technical working group and a high-level forum to politically support proposals put forward for institutional cooperation between Kosovo, Serbia, Montenegro and North Macedonia on the issue of integration and repatriation of refugees from Kosovo.

Almost three decades after the end of the wars, it is a humanitarian imperative to find a durable and dignified solution for displaced persons who continue to live in collective centres. Despite steady progress over the past few years towards closing the collective centres, it is estimated that thousands of persons continue to live in poor conditions in such accommodation in Bosnia and Herzegovina, Serbia and Kosovo. Precise figures about the number of people displaced by the wars who still live in temporary accommodation are not available and should be published by the states concerned.

In addition to obstacles regarding housing and compensation rights, the process of return and integration of refugees and IDPs continues to be hampered by discrimination and local hostility when they return to areas where they constitute the minority. The steady rise in intolerance and hate based incidents against returnees in countries of the region are of the highest concern. These incidents include threats and intimidation, hateful graffiti, damage to property and attacks against religious objects. This is discussed further in chapter 3. Marginalisation, discrimination and safety concerns for returnees are exacerbated by the media and divisive narratives by nationalist political parties. In Kosovo, for example, there have been reports of Serb returnees being collectively stigmatised as "war criminals". This encourages intolerance among local communities.

The Roma, Balkan Egyptian and Ashkali communities remain among the

most vulnerable among displaced communities, because of existing poverty and long-standing prejudice and antigypsyism. One issue of concern that has specifically affected these communities is statelessness, partly as a result of the wars of the 1990s. As of 2022, UNHCR [estimated](#) that around 4 200 people were stateless or at risk of statelessness in the region. It is notable that the countries of the region have made significant progress in this area in the past decade, making commitments as part of the [UNHCR 10-year campaign](#) to end statelessness that was launched in 2014. Bosnia and Herzegovina, North Macedonia and Montenegro could be in a position to eradicate statelessness in the coming years.

## **2.4 Failed attempts to establish truth and reconciliation commissions**

International law recognises the “inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetuation of those crimes”.<sup>108</sup>

According to Principle 1 of the UN Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, it is the state’s obligation to ensure the right to truth about violations. The right to the truth can involve various mechanisms, including judicial accountability and searching for missing persons. The practice of truth-seeking, including through the establishment of formal Truth and Reconciliation Commissions (TRCs), is another crucial component of this right and of dealing with the past. It can create a platform for the recognition of victims and survivors and for the establishment of commonly agreed facts about what happened and this can form the basis for a common future.

While civil society has conducted laudable truth-seeking projects, as discussed in chapter 1, attempts to establish official TRCs or other types of official truth-seeking mechanisms have achieved little across the region. Even worse is that nowadays there is the risk that these processes be diverted by ethno-nationalist politicians with a revisionist and divisive agenda. The absence of national and regional official truth-seeking mechanisms in relation to the wars in the 1990s in the region not only hampers reconciliation but also leaves a gaping space for revisionism and the denial of atrocities committed during those wars.

In 2001, the then President of the Federal Republic of Yugoslavia, Vojislav Koštunica, established a TRC by decree. However, after three prominent members resigned because of concerns regarding the functioning of the Commission it was dissolved in 2003 without having achieved any

outcomes.<sup>109</sup> In Bosnia and Herzegovina, despite several attempts, it was never possible to establish a nationwide TRC. This was reportedly because of political resistance, a lack of local ownership and fear that it could compete with the ICTY.<sup>110</sup> Two local investigative commissions were established however: the Commission for the Investigation of the Events in and around Srebrenica between 10 and 19 July 1995 and the Commission for the Investigation of the Siege of Sarajevo, established in 2006. Only the Commission on Srebrenica produced a report, which was published in 2004. It included information on 32 mass graves and a list of 17 342 suspected soldiers involved in the siege of Srebrenica and the atrocities that followed. The Commission's report led to a public apology in 2004 by officials of Republika Srpska who recognised that mass atrocities were committed in Srebrenica, although they refused to use the word 'genocide'.<sup>111</sup> However, later in 2018, the authorities of Republika Srpska questioned the impartiality of the Commission and rejected the report. Neither of these two local commissions allowed for the public hearing of victims.

In Kosovo in 2017, the then President Hashim Thaçi initiated steps to establish a TRC but it never materialised.<sup>112</sup> In October 2022, the Kosovo Assembly adopted a law that established a War Crime Institute within the Office of the Prime Minister. The Institute is tasked with collecting and documenting information about "the crimes committed during the war in Kosovo" and about "actions that led to the war". Following criticism from NGOs and international organisations about the previous temporal scope (20 June 1999) that practically excluded Serb, Roma and other victims from non-majority communities<sup>113</sup> the authorities broadened the temporal scope of this Law by providing that the Institute 'can document' crimes that occurred up until 31 December 2000.

A particularly disappointing development has been the failure of governments in the region to agree to the establishment of a regional truth commission (RECOM) to proactively investigate all alleged war crimes and human rights abuses committed during the wars of the 1990s. The idea was launched in 2006 by civil society representatives from Serbia, Bosnia and Herzegovina and Croatia who created a large coalition of non-governmental organisations, associations and individuals from all countries of the region with the aim to press for a regional approach to truth-seeking through a jointly established truth commission.

In 2018, the Coalition had obtained commitments by the presidents of Serbia, North Macedonia, Montenegro and Kosovo as well as the Bosniak member of the Presidency of Bosnia and Herzegovina to sign a declaration on the establishment of RECOM at the London summit of the of the [Berlin process](#) in July 2018. However, the topic of RECOM was taken off the agenda of the meeting at the last minute.<sup>114</sup> Following the summit, the

political will to establish RECOM declined. In December 2019, the coalition abandoned the advocacy for an official regional TRC and restructured itself into the 'RECOM Reconciliation Network'. The RECOM Network took on the responsibility of curating a list of all the victims of the wars of the 1990s and continues to collect information and publish reports.<sup>115</sup>

A concerning development has taken place in Republika Srpska where the National Assembly established and funded two commissions to investigate the war crimes against "all people" in Srebrenica and in Sarajevo. The commissions completed their work in 2021 and produced reports that were widely denounced as an attempt at revisionist history, denial of war crimes and minimisation of the crimes against Bosniaks.<sup>116</sup>

## 2.5 Delivering on commitments regarding missing persons

The search for those who are still missing as a result of the wars of the 1990s remains an ongoing imperative. According to the ICRC, as of July 2022, a total of 9 876 persons were still missing in the region: 6 302 in Bosnia and Herzegovina, 1 953 in Croatia and 1 621 persons as a result of the war in Kosovo. A total of 51 cases of missing persons are registered in Montenegro and 13 in North Macedonia. There is an urgent need to resolve these pending cases through effective investigations in order to end the anxiety and suffering of the families. However, there has been a significant decline in the search for missing persons in the region in recent years, due to a combination of practical factors and the politicisation of the process.

One source of serious difficulty is the potential misidentification of remains that were found before the use of DNA analysis became available in 2002-2003.<sup>117</sup> Traditional methods previously used included dental and fingerprint analysis and identification of private belongings. Estimates suggest that around 8 100 persons were identified using traditional methods in Bosnia and Herzegovina and about 2 700 in Croatia.<sup>118</sup> As such, the extent of possible misidentification could be significant in these countries. Human remains that have been exhumed but not identified may be profoundly degraded making analysis difficult or blood samples from relatives may be missing. Other practical problems hampering the search for the missing include insufficient budget and a lack of forensic experts, notably in Bosnia and Herzegovina, as well as delays in criminal investigations.<sup>119</sup> The passage of time further complicates the task. Potential witnesses who could possibly provide information about as yet unidentified mass graves are dying or are reluctant to testify. In this regard in 2021 members of the Bosnian Missing Persons Institute (MPI) [voiced](#) concerns in the media about the shortage of reliable information on mass grave sites and diminishing

witness testimony. Landscapes are changing and this makes the discovery of mass graves even more difficult.

Another major impediment to resolving cases of missing persons has been the lack of political commitment to genuine regional cooperation in this field in recent years. Several cooperation agreements have been signed over the past decade, including, for example, the [Declaration](#) on the Role of the State in Addressing the Issue of Persons Missing as a Result of Armed Conflict and Human Rights Abuses, which was signed in August 2014 by Bosnia and Herzegovina, Croatia, Montenegro and Serbia and was followed by bilateral protocols on cooperation. Such regional agreements have led to the joint monitoring of excavations and exhumations, the transfer of human remains and the exchange of information and material.

Yet this cooperation has slowed down in recent years and there have been reports about a pattern according to which each country is constantly measuring the others' efforts.<sup>120</sup> There has been a noticeable politicisation of the issue within the context of political tension between Serbia and Kosovo and between Serbia and Croatia leading to a profound disregard for and hinderance of the humanitarian aspect of the search for missing persons.<sup>121</sup> One persistent obstacle is Serbia's refusal to open the military archives of the People's Army of former Yugoslav that could contain important information about missing persons across several countries of the region, most notably with regard to unregistered or secondary mass graves.<sup>122</sup> It is crucially important to open all police and military archives in order to facilitate the search for missing persons. The Council of Europe Commissioner for Human Rights has repeatedly called for the opening of archives as a way to help resolve cases of missing persons.<sup>123</sup>

Finally, increased attention is needed to ensure the protection of the [rights of the families](#) of missing persons. It is positive that Croatia adopted the Law on the Missing Persons in the Homeland War in 2019 that regulates the non-material rights of families of missing persons. Another law that improves the protection of civilian victims of war was adopted in 2021 and provides for financial benefits for families of disappeared persons, including those who have not yet been declared dead and those belonging to national minorities. Similarly, it is positive that the 2020 Law on the rights of veterans, disabled veterans, civilian disabled war victims and their family members in Serbia does not condition benefits for families of missing persons to them being officially declared dead, in accordance with international human rights standards. In Bosnia and Herzegovina the national authorities have still not established the Fund for the Support of Families of Missing Persons, which is provided for in the 2004 Law on Missing Persons, due to a lack of agreement between the Federation of Bosnia and Herzegovina and Republika Srpska about the financing and location of the

Fund. As a result, no reparations have been paid to the families of missing individuals. Instead the relatives are entitled to only certain benefits, such as reimbursement of the cost of burials, health insurance and social benefits in the field of employment and education for the children of disappeared persons.<sup>124</sup> In Serbia a draft law on missing persons is currently being prepared by the Ministry of labour, Employment, Veteran and Social Affairs, which will reportedly improve the protection of victims.<sup>125</sup> The Parliament of Montenegro adopted a law on veterans and disability protection in May 2023, but it was not promulgated by the President. While the Law regulates compensation for families of civilian victims, including those who disappeared during the wars, civil society organisations rightly pointed out that it discriminates against certain victims.<sup>126</sup>

## 2.6 Inadequate vetting of public officials involved in wartime crimes

According to the United Nations, vetting in a post-conflict setting “usually entails a formal process of identification and removal of individuals responsible for abuses, especially from the police, prison services, the army and the judiciary.”<sup>127</sup> Vetting is an important part of efforts to deal with the past and of reforming state institutions that were involved in human rights abuses. Yet few efforts have been made in the region to address the issue of vetting public officials involved in gross human rights violations during the wars of the 1990s. While all states of the region have taken important steps to reform their law enforcement and judicial systems these reforms were approached from the perspective of strengthening good governance and democratisation after communist rule rather than as a tool for vetting potential perpetrators of atrocity crimes and preventing them from entering or removing them from public service. Several influential political, military and police officials involved in human rights abuses were effectively removed from office because they were prosecuted by the ICTY or domestic courts.

Serbia is the only country in the region to have adopted a law on the vetting of public officials that included the period of the wars in the 1990s. The [Accountability for Human Rights Violations Act](#), also known as the ‘Lustration Law’, was adopted in 2003 and provided for the establishment of a commission to conduct checks of public officials for possible involvement in human rights violations committed since 1976 (the date of the coming into effect of the International Covenant on Civil and Political Rights). Yet the Law was never implemented and it expired in 2013. Attempts to adopt a new law on vetting have failed.<sup>128</sup>



More meaningful attempts to enforce vetting of public officials were implemented by the United Nations in Bosnia and Herzegovina as part of implementing the [Dayton Peace Agreement](#). The UN Security Council established the UN International Police Task Force (IPTF) within the (former) UN Mission in Bosnia and Herzegovina, which was tasked with conducting background checks on law enforcement officials.<sup>129</sup> IPTF vetted approximately 24 000 police officers between 1999 and 2002, paying special attention to involvement in the 1990s wars. Of this number 689 (3.9%) police officers were decertified.<sup>130</sup> Yet the process was marked by certain shortcomings, most notably concerning possible human rights violations of the persons barred from service because of a lack of transparency and legal safeguards of the procedure.<sup>131</sup> The Office of the High Representative also implemented a process of screening and reappointment of judges and prosecutors, which included them disclosing their wartime activities. This process was also considered by observers to have little impact, mainly because of the limited nature of investigations conducted into the applicants' declarations on their wartime activities.<sup>132</sup> No vetting for possible involvement in gross human rights violations during the wars was conducted in Croatia, North Macedonia, Kosovo or Montenegro.

A result of this failure to implement effective vetting is that perpetrators of war crimes and gross human rights violations who escaped justice continued to be employed in public service positions, including as elected officials. A recent report found that 800 individuals who were identified as having participated in the Srebrenica genocide are still active duty police officers in Bosnia and Herzegovina today.<sup>133</sup> In Serbia civil society has called for police officers and members of the army indicted for war crimes to be suspended, but this has not been implemented systematically.<sup>134</sup>

With the passage of time the problem is now compounded by the fact that war criminals found guilty by the ICTY or before domestic courts are being released after serving their sentences. There are numerous examples across the region of convicted war criminals running for and holding public office after having served their sentences. Bosnian Serb politician Blagoje Simić, for example, was found guilty by the ICTY of aiding and abetting in the persecution of non-Serb civilians and yet he returned to the city of Bosanski Šamac, where he committed the crimes, and was appointed director of the local health centre in 2017. Another example related to Fikret Abdić who was re-elected mayor of the Municipality of Velika Kladuša in Bosnia and Herzegovina after being convicted in Croatia for war crimes against Bosniaks and spending 10 years in prison.<sup>135</sup> In Serbia the politician Vojislav Šešelj, who spent 11 years in detention during his trial at the ICTY and was found guilty of crimes against humanity in 2018, served again as a member of the National Assembly between 2016 and 2020. Worryingly, ahead of the

parliamentary and local elections scheduled for 17 December 2023 Šešelj [announced](#) that his political party (the Serbian Radical Party) will form a coalition with the ruling Serbian Progressive Party which will participate in the local elections.

The countries of the region do not have specific legislative provisions that regulate the question of whether persons convicted of the most serious crimes under international law, such as war crimes, crimes against humanity and genocide, can hold public office after having served their sentences or under which conditions. Other provisions of domestic criminal codes regarding the consequences of having a criminal record are not always applicable to ICTY sentences<sup>136</sup> or are simply not implemented. A recent attempt to amend the election Law in Bosnia and Herzegovina in order to prohibit a person convicted of war crimes from being eligible failed.<sup>137</sup> This is an issue that deserves urgent attention, especially at a moment when convicted war criminals do not admit to the crimes for which they were convicted, do not express remorse and continue to promote the same ideologies that led to the crimes in the first place. The presence of both suspected and convicted war criminals in state institutions and public offices has a serious impact on victims and survivors and on the success of rule of law reform efforts. Survivors are reluctant to return to areas where perpetrators are still in position of influence, while the perpetrators are more likely to resist reform of state institutions in order to maintain their networks of influence and thus to jeopardise efforts to rebuild confidence in the state.<sup>138</sup>





A mural in Belgrade glorifying convicted war criminal Ratko Mladić is covered with lime following protests in November 2021. Such murals, which are tolerated by the authorities in several countries of the region, contribute to the denial of past atrocities and undercut efforts to deal with the past and foster reconciliation. © Milos Miskov / ANADOLU AGENCY / Anadolu Agency via AFP

## Chapter 3

# Negative Trends Undermining Efforts to Deal with the Past

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As shown in the two previous chapters, after some strides there has been serious backsliding in efforts to deal with the past over recent years across the region. Not only is progress practically blocked as regards concrete measures in the field of accountability, reparations, truth-seeking and missing persons but there are relentless attempts to undermine the early achievements in dealing with the past.

This chapter examines some of the current key challenges and trends that underpin this backsliding. Denial of genocide and other atrocities, glorification of war criminals and attempts to restore the credibility of persons convicted of war crimes in the 1990s are of serious concern and are proliferating in the region, including at the highest political levels. Other negative trends include an increase in hate speech and interethnic violence, harmful policies that have a negative influence on younger generations, including the teaching of polarised narratives about the past and segregation in schools, and a long-lasting failure to truly address the root causes of the wars of the 1990s. In this climate, human rights defenders who work on transitional justice issues face increasing obstacles.

The outlook in several countries of the region is not only negative in terms of transitional justice but also from the perspective of respect for human rights and the rule of law in general. Most worrying are trends that show a shrinking level of acceptance of the importance of the rule of law and a decline in support for democracy among citizens.<sup>139</sup> The level of trust among populations in the state and its institutions is low and there is continued mistrust between certain communities, while international actors not committed to promoting human rights and the rule of law are becoming more influential in the region.

This chapter seeks to demonstrate the links between the increasingly negative approach to dealing with the past and the backsliding of democracy, respect for human rights and the rule of law. It also demonstrates how a

sharp rise in dangerous ethno-nationalism negatively impacts transitional justice processes and at the same time amplifies polarisation in society, as well as interethnic tensions and thus increases the risk of conflict.

The current context clearly highlights the fact that measures dedicated to dealing with the past do not operate in isolation. Their effectiveness and the potential positive impact they could have on society depend greatly on having genuine commitment among the national authorities in terms of respect for human rights and the rule of law, the promotion of inclusive and cohesive societies and the preservation of a vibrant and diverse civic space. Leaving the trends discussed below unaddressed would be a betrayal of the victims of some of the worst crimes committed on European soil since the Second World War. These trends should also raise alarm bells about the serious risk of a recurrence of violence in the region.

### **3.1 Ethno-nationalist discourse, denial of genocide and war crimes and the glorification of war criminals**

The political space to engage in addressing the legacy of the past has shrunk dramatically in the last few years. While there are some important differences between countries, public discourse on the legacy of the past is dominated by ethno-nationalist narratives across the region.<sup>140</sup> With this comes the alarming glorification of convicted war criminals, denial of atrocities, even where these have been established by judicial institutions, the spreading of fear of the 'other' ethnic groups, manipulation and polarisation of narratives about the past and the suppression of opposition and views that diverge from nationalist rhetoric.

The Council of Europe Commissioner for Human Rights has warned that denial and relativisation of past atrocities normalise hatred and weaken a society's ability to detect the re-emergence of discourse and acts that preceded the crimes in the first place. Denial is also an affront to the victims and the survivors. It heightens their suffering and rips from them the recognition and justice they may have obtained in courts. It can ultimately hinder any possibility of reconciliation.<sup>141</sup> It is alarming that revisionist rhetoric in the region has spread beyond fringe circles and is once again infiltrating mainstream discourse. As examined below, multiple stakeholders are engaging in the denial of war crimes and distorting the past.

It is particularly disturbing that the denial and relativisation of atrocities and historical revisionism continue to be condoned and actively pursued by nationalist politicians at the highest political level. This is particularly

strong in Serbia, Croatia and Bosnia Herzegovina, but also in Kosovo where the authorities have so far led a one-sided approach to dealing with the past. This trend has also been noticed in Montenegro in recent years. Some alleged war criminals have escaped accountability to this day and maintain political influence in society. Veteran groups still wield high influence in political decision-making around the past, while political leaders have welcomed back ICTY convicted war criminals as heroes.<sup>142</sup>

In Serbia the nationalist narrative is accompanied by open support provided by ruling political parties to convicted war criminals who have finished serving their sentences.<sup>143</sup> The Council of Europe Commissioner for Human Rights has [expressed concern](#) about open support by Serbian government officials to events and publications attempting to deny or relativise past atrocities. Across the region war criminals have used public platforms to deny the very crimes for which they were convicted or even worse to brag about them. A particularly egregious example of this is the ICTY convicted war criminal Dario Kordić who publicly stated that his prison sentence “was worth the crimes” and that “he would do it all over again”.<sup>144</sup> Croatian politicians have openly supported and attempted to publicly re-legitimise Kordić. The Catholic Church in Croatia has also sought to restore his reputation by inviting him to speak at their churches.<sup>145</sup> In the same vein, the Serbian Church also handed an award to war criminal Vojislav Šešelj.<sup>146</sup> In this context it is to be welcomed that, in 2020, the IRMCT revised its [Practice Direction](#) for the determination of applications for pardon, commutation of sentence and early release of ICTY (and ICTR/IRMCT) convicted war criminals which now foresees that early release can be subject to conditions, including the prohibition to speak about one’s case in the media, to deny the war crimes over which the ICTY had jurisdiction and to glorify other convicted war criminals.<sup>147</sup>

The [2022 Srebrenica Genocide Denial Report](#) suggests that “denial of the Srebrenica genocide and glorification of war crimes and criminals remains ubiquitous in both Bosnia and Herzegovina and the region, and that the prevalence of these practices has in fact increased in comparison to the 2020-2021 reporting period.”<sup>148</sup> The report also finds that public figures and public officials are most active in denying genocide, ahead of media outlets and private individuals.<sup>149</sup> In April 2019, Milorad Dodik, the Serb member of the Bosnian Presidency, [stated](#) that the Srebrenica genocide was a “a fabricated myth”.

It has been noted that the manipulation of wartime events is intended to revive ethnic tensions and resentment and has become a strategy for nationalist politicians to gain votes and keep their positions of power.<sup>150</sup> It is notable that such rhetoric is particularly present around election campaigns or anniversaries of certain battles and national days.<sup>151</sup> In these

circumstances there is no room at the political level for an appeased and objective public debate about responsibilities surrounding the wars of the 1990s. Denial of atrocities and divisive rhetoric by politicians also have a strong regional dimension, because either they unleash 'counter denial' in other states or embolden members of the same ethnic group in other countries to escalate their own negationist and hateful rhetoric. Denial of atrocities and the glorification of war criminals by public officials is particularly nefarious because it sets the tone for what is acceptable in a society and has profound ripple effects in the way others in society allow themselves to speak about past atrocities, as further discussed below.

Right wing extreme nationalist groups are also key drivers of the culture of denial and glorification as well as of violence.<sup>152</sup> They represent a serious risk factor in the region and undermine efforts to prevent a recurrence of conflict. Examples of right wing extremism can be found across the region.<sup>153</sup> These groups openly call for hatred against other ethnic and religious groups as well as against minorities, including Lesbian Gay Bisexual Transgender and Intersex (LGBTI) people. The denial of mass atrocities, such as the genocide in Srebrenica, and the glorification of convicted war criminals is commonplace among these groups. Murals that glorify war criminals can be found across the region and they are often maintained and protected by these groups, sometimes through the use of violence. Graffiti, monuments and parades displaying symbols of ethno-nationalism remain a concern in Bosnia and Herzegovina, Montenegro, Serbia and Croatia. They contribute to a normalisation of right wing extremist ideologies in the public space.

Reports show that the activities of right wing groups are often connected to public events, such as concerts and sports, with, for example, recurrent displays of violence and hate speech by hooligans during football games.<sup>154</sup> Slogans and symbols used at these events often allude to past violence and glorify war crimes and nationalist ideologies and movements. In May 2023, for example, Montenegrin prosecutors [opened an investigation](#) after football supporters sang a nationalist chant referring to a nationalist slogan celebrating the Srebrenica genocide. In 2021, Croatian football fans from Dinamo Zagreb [chanted](#) the nationalist slogan "Oh mother Croatia – we will slaughter the Serbs!" during a game against another club where many players are Serb. One of the main reasons for the lack of effective measures to counter such extremism amongst hooligans is the fact that prominent politicians control or enjoy close relationships with football clubs. Right wing extremist groups are generally tolerated and/or enabled by nationalist political leaders. Radicalisation is fed through everyday divisive political discourse that creates an atmosphere of suspicion of the 'other' groups, a sense of threat and the fear of losing out. Despite this trend,



following a recent [visit to Bosnia and Herzegovina](#), the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism stressed that the official understanding of and ensuing measures to tackle violent extremism in the country were limited to “thoughts and ideas mostly of a religious nature, with limited application to extreme right wing ideologies”. The Rapporteur was of the opinion that these were instead met with indifference.

There are strong regional as well as international connections that nurture these movements, both ideologically and financially. Croat right wing extremism spills over from neighbouring Croatia to ethnic Croats in Bosnia and Herzegovina. It is ripe with glorification of war crimes and promotes historical revisionism about the Second World War<sup>155</sup> and the wars of the 1990s. Russian support for Serb right wing activists and organisations is multifaceted and spans from support for online activities to military training.<sup>156</sup> Right wing radicalisation feeds itself on similar radicalisation in other countries or among other ethnic groups, with reciprocal actions that increase the spiral of violence and exclusion. Almost all Serbian right wing extremist organisations are regionally connected.

A recent report commissioned by the European Commission highlights numerous risk factors that can be related to right wing extremism, such as “unresolved identity related issues, conflicting historical and governance issues, in some cases difficult transition to a fully accomplished democracy, frozen conflict and administrative dysfunctionality.”<sup>157</sup> Unfinished processes of dealing with the past have been equally mentioned as one of the reasons for the increase of right wing extremism.<sup>158</sup> This shows that the past is connected to the present day violence and extremism. An unaddressed past constitutes a major risk factor for the future.

In addition to undermining efforts to deal with the past by denying atrocities and the glorification of war criminals, right wing extreme nationalist groups in the region undermine respect for human rights more generally by promoting an exclusionary and discriminatory environment of toxic masculinity, LGBTI-phobia and racism through a discourse that aims to dehumanise the ‘other’. Some of these groups also show a profound rejection of feminism, gender equality and the right to abortion, partly because of their links to religion and religious institutions. The latter applies in particular in Serbia and Croatia.<sup>159</sup> Right wing extreme nationalist groups maintain close ties with religious institutions, particularly in Serbia, and invoke religion and religious symbols in their activities.<sup>160</sup> The fact that religious institutions do not unambiguously reject such extremist ideologies and their promoters contributes to their gaining legitimacy in the broader population.

Local academics and historians also contribute to keeping divisive and nationalist ideologies alive and engage actively in historical revisionism, particularly around the Second World War but also the relativisation of the atrocities committed in this region in the 1990s. They are platformed in universities, peer-to-peer discussions and the media as well as various TV talk shows. These interventions aim to legitimise narratives of ethnic centred victimhood and the 'us vs. them' polarisation, through a facade of pseudo-scientific and historical knowledge. The Bosnian Serb Centre for War Research, War Crimes and the Search for Missing Civilians has, for example, published reports and books claiming that (well investigated and judicially established) massacres of Bosniak civilians at the Markale market, in Kapija and in Tuzla were Islamist terrorist attacks or "inside jobs".<sup>161</sup>

It is important to note that academics and historians in several countries of the region had already played a critical role in crafting and spreading nationalist ideologies at the end of the 1980s and during the wars of the 1990s. Some of the ethno-centric identity messages and twisted historical narratives they helped create are still reflected today, albeit to a lesser extent, in some textbooks and history teaching in the region.<sup>162</sup> Artists, filmmakers and writers have also engaged in spreading harmful denial in the mainstream public conscience. Similarly, some western intellectuals have also contributed to this trend. In 2019, for example, victims' associations, including the Mothers of Srebrenica, [expressed outrage](#) at the decision to grant the Literature Nobel Prize to Austrian novelist Peter Handke, who is known for denying that a genocide was committed in Srebrenica and for supporting former Serbian President Milošević<sup>163</sup>. It is highly disturbing that some ICTY convicted war criminals are allowed to present themselves as authoritative voices about what happened during the wars. Often granted state honours and functions, they are producing memoirs that seek to revise and reinterpret the history and memory of the wars for the public in Bosnia and Herzegovina, Croatia and Kosovo.<sup>164</sup>

Furthermore, the media in the region contributes to the dissemination of divisive ideologies, denial of past atrocities and the glorification of war crimes both through traditional forms of media (TV, radio, print) and through new communication outlets such as digital media and social media. While there are some positive examples of quality and creative reporting on issues related to dealing with the past, such as the [Balkan Transitional Justice](#) project of the Balkan Investigative Reporting Network (BIRN), they have limited readership. Overall coverage of transitional justice topics is poor and when it does happen it is often politicised, sensationalised and biased. Throughout the region the media tends to portray issues related to dealing with the violent past through ethno-nationalist lenses, with an absence of stories about victims and interethnic reconciliation. In North Macedonia

negative stereotyping in the media against both of the main ethnic groups – Macedonians and Albanians – contributes towards frequent and violent incidents based on ethnic hatred occurring primarily between members of these two groups, often between youngsters.<sup>165</sup> The Council of Europe Commissioner for Human Rights also documented a polarisation of public debate in Slovenia, with references to unaddressed societal opinions and tensions dating from the Second World War and the former Yugoslavia.<sup>166</sup>

According to the [2022 Srebrenica Genocide Denial Report](#), the media constituted the second sector, after politics, in which the highest number of incidents of denial of genocide occurred. Among the top 20 media outlets conveying most Srebrenica genocide denial content in the region in 2021 14 were in Serbia, 5 in Republika Srpska in Bosnia and Herzegovina and 1 in Montenegro. Media outlets also influence the way war crimes prosecutions are perceived in society. Research into mainstream news reporting of the ICTY trials in Serbia found that, for example, all three of the TV stations analysed (PINK, RTS and B92) reproduced the view of collective Serbian victimhood and sought to ‘normalise’ Serb defendants through symbolic images of the state.<sup>167</sup> Local media coverage in Kosovo of the trials of the KLA leaders at the Kosovo Specialist Chambers [has emphasised](#) an expression of empathy towards the defendants, without addressing the suffering of the victims. Domestic war crimes trials suffer from the same problematic media coverage.

Digital communication technology is amplifying the reach of traditional media, with an increasing number of articles denying or relativising war crimes and genocide to be found on online portals in the region.<sup>168</sup> Despite [public commitments](#) made by social network platforms such as Twitter, Google and YouTube to remove content that denies the Srebrenica genocide, social media continue to be a major multiplier of content denying atrocities and insulting the victims.

The low level of trust in the media and of media literacy and the limited presence of critical and independent journalism make the region particularly vulnerable to disinformation, including about the past and measures to face the past.<sup>169</sup> As underscored by the European Commission in its [Communication on EU Enlargement Policy 2022](#), such disinformation aims to undermine public trust in democratic institutions, deepen polarisation and ethnic divides and challenge the credibility and values of the EU. While a lot of disinformation is produced locally, disinformation about the past is also part of interference by networks that go beyond the region. Several Russian state sponsored outlets that are [included](#) on the EU sanctions list, for example, have been reported for conveying divisive disinformation, including genocide denial. They include ‘Sputnik Srbija’ and ‘Russia Today’, which opened an office in Belgrade in the summer of 2022.

These negative trends pertaining to the role of the media and its influence on transitional justice coincide with and reflect the broader challenge of the weakening of media freedom and ethical professional journalism in the region.<sup>170</sup> The privatisation of the media has led to ‘tabloidization’ and lowered the quality and standards of journalism, which undermines fact oriented reporting in general as well the media contribution to dealing with the past. Reports also show that media outlets often lack independence and are used by politicians as tools to influence the public. The European Commission against Racism and Intolerance (ECRI) found, for example, that hate speech in the media, including in social media and televised debates, increased significantly during election campaigns in several countries of the region, for example, in [Bosnia and Herzegovina](#) and in [North Macedonia](#).

### **3.2 Hate speech, inter-ethnic violence and intolerance**

In an environment dominated by the negative discourse highlighted in the section above, the past is deeply divisive within and between countries of the region. This produces a climate of hate and division and has a direct and visible impact, most notably through a strong increase in hate speech and violence, both offline and online, on the grounds of ethnicity, sex and religion. This trend has been well documented by international organisations<sup>171</sup> as well as media and civil society.<sup>172</sup>

Hate speech often includes historical references, such as, for example, designating members of a group by using negatively connotated references instead of naming them, namely ‘chetniks’ for Serbs or ‘ustaša’ for Croats (in reference to the respective paramilitary forces during the Second World War). Old nationalist slogans or references to acts of genocide and other crimes committed during the wars of the 1990s are used to intimidate. The widespread use of terms such as ‘foreign mercenaries’, ‘traitors’, ‘foreign agents’ and ‘spies’ which are used to designate members of other ethnic groups and more broadly those who disagree with the ethno-nationalist narratives, including human rights defenders,<sup>173</sup> is reminiscent of the kind of hate speech used prior to the wars of the 1990s in the region. Violent incidents include attacks against persons, cultural places and places of worship as well as memorials and property.

In its [2021 Opinion](#) on Croatia the Advisory Committee on the Framework Convention on National Minorities expressed concern about the stark increase in hate crimes and hate speech in the media and in political discourse. It noted that a surge of radical nationalism and historical revisionism is affecting Serb, Roma and Jewish minorities in particular. The Serb National Council in Croatia reported 400 incidents of hate speech,

historical revisionism and hate crimes against Serbs having taken place in 2019, a considerably higher number than in previous years.<sup>174</sup> In Kosovo, in just one month in 2021, Kosovo police [reported](#) six incidents of societal violence or discrimination targeting ethnic minorities, including the placement of wartime photographs at the apartment building of a Serb returnee in Gjakove/Djakovica and vandalism of an Orthodox Church in Pristina.

In Montenegro the Advisory Committee on the Framework Convention on National Minorities reported in its [2022 Opinion](#) growing divisions along ethnic and religious lines, finding that “emphasis may be placed upon differences between religious and minority groups, often reflecting the broader geographical and historical circumstances, rather than finding common ground”. There have been several violent incidents, including vandalism against religious buildings, such as the St Nicholas Church in Kotor and the Cetinje Monastery in 2021. That same year in Montenegro, the Hadzi-Ismael Mosque in Niksic was defaced with graffiti saying “Srebrenica,” “Turks” and “Niksic will be Srebrenica.” The government, NGOs and other religious groups condemned the graffiti.<sup>175</sup>

In Bosnia and Herzegovina discriminatory language and hate speech is prevalent and has a dire impact on interethnic relations.<sup>176</sup> As reported by ECRl in its [third report](#) on Bosnia and Herzegovina, interethnic tensions are “the main cause of racist violence in the country, in particular against returnee communities”. The Council of Europe Commissioner for Human Rights has for example [condemned](#) provocations by hatemongers in Srebrenica, Višegrad and Bratunac in 2020, regretting the lack of reaction by local authorities. A particularly concerning series of incidents occurred in January 2022 around the marking of the day of Republika Srpska, which keeps being celebrated despite a ban by the Bosnian Constitutional Court. The incidents occurred in several cities, including some where atrocities were committed during the war in the 1990s, such as Prijedor and Foča, with individuals parading in the streets with torchlights and singing nationalist songs calling for the takeover of some locations and in one case shooting gunshots outside of a mosque.<sup>177</sup> The OSCE mission in Bosnia and Herzegovina, in its [hate monitor](#) of March 2022, reported a sharp increase in the number of hate crimes on ethnic and religious grounds, having recorded 60 between January and March 2022 alone. These incidents instil fear, anxiety and insecurity among the targeted communities and are a major obstacle to peaceful cohabitation and trust.

The responses of the authorities to hate speech and hate crimes are often cosmetic since division and hatred serve the political establishment in power. Reports of training for the police and the adoption of legislation and action plans to better regulate hate speech as well as good legislative frameworks

to combat discrimination and protect racial and ethnic minorities are to be welcomed.<sup>178</sup> However, as yet, they have not translated into concrete results on the ground. Effective implementation of the legislative and policy frameworks remains a fundamental problem throughout the region, including in the field of countering discrimination, hate crime and hate speech. Data collection on hate crimes remains insufficient. Very often, only misdemeanour charges or no charges at all are brought against the perpetrators. There are no or very few investigations instigated by the police, as seen in Bosnia and Herzegovina and Montenegro.<sup>179</sup> The Protector of Human Rights and Freedoms (ombudsman institution) in Montenegro has repeatedly stressed that it is regrettable that cases of hate speech are mostly prosecuted under the Law on Public Order and Peace instead of the Law on the Prohibition of Discrimination. He has stressed that it is important to shed light on the fact that the issue is not about disturbing public order but about discriminating against the “other”.<sup>180</sup> The lack of adequate and sustained public responses sends a signal of impunity.

Those who spread hatred and division often claim that their actions are an integral part of freedom of expression. While properly balancing freedom of expression and the prohibition of incitement to hatred is not a simple task, it is worth recalling that the question of distinguishing those forms of expression that should be defined as incitement to hatred and thus prohibited is contextual and that the individual circumstances of each case, such as local conditions, history, cultural and political tensions, must be taken into account.<sup>181</sup> The context in many cases in the region is highly divisive and volatile and this increases the risk that instances of intolerant speech will lead to real life violence.

Clear responses are needed to avoid a return to violence on a larger scale. This includes prompt political responses to the incitement of hatred. Comprehensive strategies are required to tackle hate speech, including effective monitoring mechanisms, counter speech and condemnations by political leaders, anti-hate speech public campaigns, self-regulatory bodies within the media, codes of conduct for politicians, and human rights and anti-discrimination education in schools.<sup>182</sup> As prescribed under international law as well as in various criminal codes in the region, there is also the obligation to investigate and prosecute acts that constitute incitement to hatred and violence. An independent judiciary is a vital component of the process of effectively adjudicating cases related to incitement to hatred.

### 3.2.1 Criminalisation of the denial of genocide and wartime atrocities as a particularly serious form of hate speech

The climate of tolerance surrounding the denial of wartime atrocities and the glorification of convicted war criminals contributes to a steady increase in the phenomenon, which is now both widespread and mainstream, particularly in Croatia, Bosnia and Herzegovina and Serbia, as discussed above.

Given the generalised absence of counter speech and other non-judicial approaches to ending denial in the countries most concerned, the need for criminalisation has become topical. Civil society in the region has made a strong argument about the need to outlaw the denial of genocide as a means to deter its recurrence.<sup>183</sup> In Bosnia and Herzegovina several attempts to prohibit genocide denial have faced opposition from Serb members of the state parliament over the past decade. Eventually, in July 2021, the outgoing High Representative introduced amendments to the state criminal code using his powers under the Dayton Agreement.<sup>184</sup> The amendments foresee prison penalties for the incitement of violence and hatred and for:

“publicly condon[ing], den[ying], grossly trivialis[ing] or try[ing] to justify a crime of genocide, crimes against humanity or a war crime established by a final adjudication pursuant to the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945 or by the International Criminal Tribunal for the former Yugoslavia or the International Criminal Court or a court in Bosnia and Herzegovina [...] when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group”.

The law was met with strong resistance by the Presidency of Republika Srpska.<sup>185</sup> No one has yet been prosecuted under the new law, despite numerous instances of denial since its adoption.<sup>186</sup> While it is still early to evaluate the impact of the ban early reports suggest that it may have helped diminish instances of denial of the Srebrenica genocide, most notably in the media and on social media.<sup>187</sup>

While Serbia [has a law](#) prohibiting denial of certain acts committed during the Second World War or adjudicated by the International Criminal Court, it does not cover crimes committed in the 1990's, thus offering no effective judicial response to the current practices discussed above. Those who publicly deny past atrocities are furthermore protected in their communities.

The legal ban on genocide denial in Bosnia and Herzegovina revived the debate about whether criminalising the denial of genocide and other atrocities is effective and whether it violates freedom of expression. This

debate is not unique to the region and has been led elsewhere with different outcomes, such as in Germany and the United States in regard to the Holocaust. At the time of writing, 17 states in Europe had laws that prohibit denial specifically related to the Holocaust or more generally in relation to genocide and international crimes or, under certain circumstances both, in part because of an EU Directive on the matter. This includes Croatia and Slovenia.<sup>188</sup> The European Court of Human Rights has repeatedly ruled that there are limitations to the right of freedom of expression, as protected under Article 10 of the European Convention on Human Rights, and that it may indeed be necessary in a democratic society to sanction forms of expression that spread, incite or promote hatred based on intolerance when certain factors are present. In several cases related to negation or revisionism of the Holocaust, for example, the Court found that when denying a historical fact such as the Holocaust applicants could not invoke the protection of Article 10 because their actions “were manifestly incompatible with the values which the Convention sought to promote”.<sup>189</sup> The denial of the genocide in Srebrenica, a legally established fact through judgments of international courts, should be assessed in the same manner.

Where deniers are made to bear consequences for their actions, denial seems to be more under control. This is the case, for example, in Montenegro where such behaviour appears to still be frowned upon. In 2021, for example, Vladimir Leposavić the then minister of Justice was removed from office after openly denying judicially established facts about the Srebrenica genocide and questioning the work of the ICTY and the International Court of Justice in the National Assembly. That same year, the Montenegrin National Assembly [adopted a resolution](#) recognising the Srebrenica genocide, condemning denial and calling on the government to create a Remembrance Day on 11 July. Article 370 of the [Montenegrin Criminal Code](#) prohibits the denial of international crimes if these have been determined by final judgment of an international or national court.

Given the specifically tense context in the region, the deleterious impact of denial on the victims and survivors and on peaceful cohabitation as well as the ongoing failure of the national authorities to implement other non-coercive measures to combat the active denial of wartime atrocities, criminalisation may well be the only way to send the signal that such denial cannot be tolerated in a democratic society founded on human rights values. Combating genocide denial, including through the effective implementation of such laws, will remain difficult as long as national authorities do not take a clear stance against it.



### 3.3 Challenges faced by human rights defenders engaged in dealing with the past

The role of civil society in fostering effective transitional justice processes is becoming all the more important given the growing challenges discussed above. Yet the space to work on transitional justice is shrinking. Human rights defenders in several countries of the region are affected by a more general deterioration of the environment for civil society, which includes restrictive measures taken by governments as well as hostility by some non-state actors and members of the public as well as online. The Balkan Civil Society Development Network (BCSDN), which monitors the state of fundamental freedoms through its annual [Monitoring Matrix](#) exercise, [Civicus Monitor](#) updates for Balkan countries, [Civil Rights Defenders](#) and local human rights organisations<sup>190</sup> have all recorded numerous cases of state interference, government intimidation and the use of strong measures against civil society organisations, the media and activists, which curtails their effective operations. Human rights defenders in North Macedonia, Montenegro and Serbia have reported an increase in intimidation and attacks online.<sup>191</sup>

The European Commission Reports of 2022 also highlight the challenges faced by civil society, most notably in [Bosnia and Herzegovina](#) and [Serbia](#). In Bosnia and Herzegovina, for example, the European Commission has noted pressure against civil society, stating that “activists dealing with issues perceived as sensitive (anticorruption, women’s rights, rights of LGBTIQ persons, migrants, the environment) continued to be subject to threats, abuse and physical attacks”. The reports also mention some concerns regarding freedom of assembly, especially when demonstrations touch on sensitive topics such as corruption, the human rights of LGBTI people or dealing with the past.

There are worrying trends involving the use of legislation on defamation to undermine the work of civil society actors, including journalists, in the form of the threat of criminalisation.<sup>192</sup> In Republika Srpska amendments to the Criminal Code to reintroduce defamation as a criminal offence along with disproportionate sanctions were adopted by the National Assembly in June 2023. Defamation was decriminalised in Bosnia and Herzegovina 20 years ago. In order to prevent abuse aimed at muzzling legitimate criticism it is important that defamation laws only provide for proportionate civil sanctions and respect the right to freedom of expression. In addition, there have been reports of cases of intimidation of civil society through strategic lawsuits against public participation (SLAPP). In Serbia, for example, an organisation was sued after publishing information about apparent links between a public official and war crimes and calling for accountability.<sup>193</sup> Civil society organisations neither have the funding nor the resources to

respond to such lawsuits led by wealthy individuals or organisations and instead often have to depend solely on pro-bono legal support.

There have been reported attempts to create unnecessary hurdles in the registration and functioning of civil society organisations, which can result in stigmatisation and can undermine the work of critical civil society organisations. This is often done by the authorities under the pretext of promoting the rule of law and fighting corruption or extremism. In this respect, human rights defenders in Serbia, Montenegro and North Macedonia have reported sudden unexpected financial audits that impede on their operations.<sup>194</sup> The Government of Republika Srpska has submitted to parliament a draft law on the creation of a Special Register and Transparency of the Work of Non-Profit Organisations. The proposed law aims to create “a register of non-profit organisations financed or in other ways supported by foreign actors, as agents of foreign influence” as well as a separate legal regime for such organisations. This would subject them to reporting requirements and inspections that do not apply to other non-profit organisations. The draft law raises several concerns in the light of Council of Europe standards as stressed by the Council of Europe Commissioner for Human Rights, including that the legitimate aim of increasing transparency of the work of non-profit organisations should not be sought through excessive and discriminatory means to the detriment of the effective enjoyment of human rights and freedoms.<sup>195</sup> Civil society organisations working on transitional justice issues in Bosnia and Herzegovina rely primarily on funding from international partners. This is because of a lack of institutional support by the national authorities (like other human rights defenders working on issues that may be unpopular or politically sensitive at the national level) and thus they would be particularly affected by such a law.

In addition to encountering the same challenges that affect civil society in general in the region, human rights defenders working on dealing with the past often face obstacles caused specifically by the issues they cover and the fact that they challenge the dominant national narrative in their communities or country.<sup>196</sup> Today civil society working on dealing with the past in the region is confronted with a hostile environment marked with ethno-nationalist discourse, denial of the suffering of victims and the glorification of war criminals. Human rights defenders who stress the importance of remembering all victims and who work on reconciliation are often presented as enemies, called ‘traitors’ or accused of working as foreign agents to undermine their country, including by people in positions of influence and political leaders.<sup>197</sup>

There have been several recent incidents where state institutions have undermined the work of civil society on dealing with the past, most notably

by failing to protect their activities from interference by non-state actors and through judicial harassment. On 18 September 2022, for example, activists of the association Youth Student Action and members of the opposition political party Zajedno (Together) from Novi Sad in Serbia were detained and questioned by local police after they protested against the erection of a Monument to innocent victims of 1944-1945. According to the activists, the monument contains the names of persons responsible for atrocities committed against the civilian population in that period in the Bačka Region and in Novi Sad. The protesters were charged with destruction of public property for writing messages on the walkway and they have been summoned more than once by the authorities. Another striking example relates to civil society mobilisation against murals to Ratko Mladić in Serbia. In November 2021, the police banned a rally against these murals organised by the Youth Initiative for Human Rights, citing the possibility of confrontation with counterdemonstrators. After this, human rights activist Aida Ćorović threw eggs at a mural in Belgrade. She and another activist, Jelena Jaćimović, were detained on the spot by police in civilian clothes. Aida Ćorović was later prosecuted for the misdemeanour of disturbing public order and breaching the peace and sentenced to pay a fine.<sup>198</sup> Another example of judicial harassment of human rights defenders for their work on transitional justice is that of the late women's rights activist Sevdije Ahmeti who whilst working with survivors of sexual violence in Kosovo was charged with embezzlement. Reportedly, this was in retaliation for her work.<sup>199</sup>

Human rights defenders working on dealing with the past are also confronted with violence and hostility from non-state actors, including extremist groups and members of the public, both online and offline. In Republika Srpska in Bosnia and Herzegovina, for example, Srđan Šušnica, a local political analyst, was forced to flee the country after receiving death threats because of his writing about war crimes committed by the Bosnian Serb military forces.<sup>200</sup> More recently, in July 2023, staff of the Srebrenica Memorial Centre and Edin Ikanović, a co-author of the report documenting instances of the denial of the Srebrenica genocide, and his family members received serious threats after the release of their latest report. In Croatia, in August 2022, several civil society organisations held a half-hour anti-war protest in Ban Jelačić Square in downtown Zagreb to commemorate the people killed and expelled during and in the aftermath of 'Operation Storm' that took place in 1995. Some passers-by staged a counter protest and swore at the activists, calling them a "Chetnik gang". In Serbia the NGO Women in Black (Žene u Crnom), which advocates for justice in regard to the atrocities in the 1990s and holds a yearly commemoration of the Srebrenica genocide in Belgrade, has documented in [a book](#) the administrative repression,

physical attacks by non-state actors, smear campaigns by tabloids and the misogyny and stigmatisation that they face because of their work.<sup>201</sup> In 2019, the festival 'Miredita, dobar dan!', which is organised annually by civil society organisations from Serbia and Kosovo in order to build bridges between communities, was attacked by right wing extremists.<sup>202</sup> Human rights defenders from the region report that the threats and attacks they face are met with systematic impunity.

Resources and support available to civil society organisations working on transitional justice issues are insufficient throughout the region. These organisations lack institutional support from national authorities. The situation is especially dire in Croatia as a result of the departure of many donors from the country since its accession to the European Union, even though transitional justice initiatives are still acutely needed in the country in order to redress the legacy of war.

Civil society that works with minority communities, such as those working with Roma, have specific needs. The lack of support for civilian war victims belonging to the Roma ethnic minority and the scarcity (or weakness) of civil society organisations representing them is deeply worrying throughout the region. The lack of trust within these communities runs deep and is one of the reasons why victims and survivors remain silent about the past. This is in addition to the intersectional issues of poverty, lack of access to education, bureaucratic hurdles and discrimination rooted in antigypsyism that they face. Meaningful participation of minority groups in transitional justice work is a challenge across the region.

Finally, the long-term engagement that characterises activists mobilised to demand justice and deal with the past comes with negative consequences derived from their frustration over the limited success in this area. Many activists are exhausted and face high levels of stress that can and in many cases has led to health and psychological problems. Nevertheless, it is encouraging to see the many expressions of solidarity among members of civil society that cross the ethnic, age and religious divides.

### **3.4 Intergenerational dimension of dealing with the past**

With almost three decades having passed since the wars in the 1990s, the intergenerational dimension of dealing with the past is an area that requires urgent attention. There are worrying trends of new generations growing up in divided societies with no meaningful opportunities to interact with members of other groups who they are being 'educated' to see as 'other' and as a threat.

Yet some of the youth in the region are taking steps to overcome the divisions. There are several initiatives and projects that offer hope, both at the local and regional level. At the same time, evidence of radicalisation of youth and several violent incidents involving young people are of great concern. Research in Croatia, for example, suggests that hate speech and nostalgia for the Ustaša regime, which are being used as a breeding ground for nationalism and populism, are particularly popular among young people.<sup>203</sup> A study commissioned by UNDP on youth radicalisation in Serbia showed that societal fragmentation along ethnic lines remains a key driver of radicalisation and that the youngest respondents (aged 15-19) seemed most ready to engage in violence.<sup>204</sup> Although of low intensity, there have been a number of violent incidents involving children and youngsters in Montenegro and North Macedonia. In 2023, a regional junior futsal tournament in Sarajevo was marred by interethnic incidents.<sup>205</sup> These trends show the urgent need to halt the transmission of past tensions and ethnic resentments into future generations.

### **3.4.1 Segregated education: growing up apart**

Education has a direct influence over the ability of future generations to live in a multi-ethnic diverse society. Yet while the importance of integrated education for reconciliation and social cohesion cannot be overstated, the trend of separation is becoming entrenched in several countries of the region. First, the displacement of populations that occurred in the region during the wars of the 1990s has not been fully reversed. This has led to a de facto increase in the geographical separation of ethnic communities and reduced contact, including between children. Moreover, the trend of segregated schooling along ethnic and linguistic lines continues in several of the countries. Generally, despite recommendations by international organisations and civil society to bolster integrated education, there are no systemic policies to encourage multilingualism and joint curricular topics. The topics of language and education remain highly politicised in the region and there is no political will to reform education in a manner that would allow for more interaction.

In North Macedonia schools are organised according to the language of instruction. Because language coincides closely with the belonging to an ethnic community and because most children study in their mother tongue if they can this results in divisions along ethnic lines. In schools where several languages of instruction are taught, known as 'mixed schools', children are often separated physically according to the language of instruction (they can be in separate buildings, separate floors or study in morning and afternoon shifts).<sup>206</sup> In its [2022 Opinion](#) the Advisory Committee on the Framework Convention on National Minorities documented and welcomed

the fact that a few schools had reorganised the practice of shifts so that children could at least meet during the breaks and/or had introduced joint sports, arts and English classes. Yet such efforts remain the exception to the rule.

In Kosovo there has been no progress in addressing divisions along ethnic lines in public education.

Despite a recommendation of the Independent Commission for the Review of Serbian Language Teaching Materials from 2010 on the importance of a single education system for all communities in Kosovo, two parallel education systems persist. One follows the curriculum developed by the Ministry of Education, Science, Technology and Innovation of Kosovo whereas the other follows the Serbian curriculum. There is almost no contact between the two parallel systems, except in a few schools where pupils attend school in separate buildings or shifts.<sup>207</sup>

The 'two schools under one roof' system in the Federation of Bosnia and Herzegovina continues to stand out as a sad symbol of the lack of political will to address the issue of the separation of children in school, despite repeated calls on the authorities, including by successive Council of Europe Commissioners for human rights, to put an end to this practice.<sup>208</sup> This system, whereby children of different ethnic backgrounds visit the same schools but in separate buildings or shifts, was introduced as a temporary measure to enable the return of displaced children to school in the tense climate in the years that followed the wars. Yet it persists despite a [2014 judgement](#) of the Supreme Court in Bosnia and Herzegovina that found that the system is discriminatory and ordered the authorities to take all necessary measures to establish integrated multicultural schools whilst respecting the pupils' right to education in their own language. Not only does the judgment remain unimplemented but there have been attempts to establish more of the 'two schools under one roof' against the wishes of the pupils. Additional mono-ethnic schools have also been established in mixed areas and some children are being transported to schools in areas where they constitute the ethnic majority.<sup>209</sup>

A lack of intercultural contact is likely to result in less tolerance of diversity, lack of respect for religious and cultural differences and could exacerbate attitudes of racism, discrimination and exclusion among the youth.<sup>210</sup> Exclusion and divisions within education along ethnic and linguistic lines have a seriously negative impact on social cohesion and reconciliation in multi-ethnic societies struggling to come to terms with a violent past.<sup>211</sup>

### 3.4.2 One-sided memory policies

The remembrance culture is biased throughout the region. This one-sided approach to memorialisation is sometimes enshrined in the legislation. In Serbia the Law on Monuments was adopted in 2018 to regulate the memorialisation of Serbia's war history covering the period from 1912 to 1999. It only foresees the erection of memorials that are important "for cherishing the tradition of Serbia's wars of Liberation" and gives the authorities broad discretion when deciding on what is allowed to be a memorial.<sup>212</sup> In Bosnia and Herzegovina there is no state level legislation; however, in 2012, Republika Srpska adopted the Law on Monuments and Memorials of the Liberation Wars. The Law prescribes the protection, maintenance and construction of monuments and memorials to pay tribute to "fallen members of the Serbian and Montenegrin armies in the liberation wars until 1918 and participants in the anti-fascist struggle in World War II as well as combatants in the Defence and Patriotic War of the Republika Srpska".<sup>213</sup> In Kosovo a law established the Agency for the Management of Memorial Complexes of Kosovo, which only looks at memorials from the Kosovo Albanian perspective. It is noteworthy that the transitional justice strategy currently under preparation in Kosovo envisages a change in temporal jurisdiction for the agency in order to include events after June 1999.

Memorialisation measures reflect this mindset, with an unprecedented number of new monuments having been built all over the region.<sup>214</sup> The majority of these monuments commemorate war incidents, fallen fighters and war veterans, historical heroes or foreign allies and victims of the majority ethnic group in a location. Official memorialisation efforts are generally blatantly biased, mentioning only 'one's own' victims. The individuals commemorated are in some cases considered war criminals in other jurisdictions. Streets and places are named after convicted war criminals and the socio-political context in which these monuments are erected enhances the potential for them to become a focus of division and conflict.<sup>215</sup>

In Serbia, for example, there are around 300 memorials dedicated to the events from the 1990s in the country. More than 72% of memorials commemorate fallen combatants, 15% both combatants and civilians but only 11% commemorate civilians who lost their lives, with the vast majority of these dedicated to Serbian victims. As underscored by the United Nations Special Rapporteur on truth, justice, reparation and guarantees of non-recurrence in his 2022 [end of mission statement](#), it is important that memorials have been erected to commemorate the suffering of Serbian victims, such as children killed during NATO bombings, but it is unfortunate that this is not the case for victims of other ethnic groups. Initiatives by

civil society to commemorate victims of other ethnic groups are often obstructed by the authorities or restrictive regulations. One example is the attempt to memorialise a mass grave containing the remains of 744 Kosovo Albanians on a police training ground in [Batajnica](#). In Croatia, official memorialisation processes, including ceremonies, memorials and plaques, have mainly focused on commemorating the victory and the conduct of the war and honouring Croatian veterans and victims.<sup>216</sup> In Bosnia and Herzegovina, the Council of Europe Commissioner for Human Rights for example [expressed concerns](#) about the fact that a memorial at the Kazani Pit near Sarajevo did not mention war crimes committed there and was conceived without consultations with the survivors and relatives of victims. In Kosovo too, there is no proper commemoration of civilian war victims, a lack of ethnic inclusivity and memorials and commemoration ceremonies contribute to building a collective memory of hatred.<sup>217</sup>

Throughout the region, it is a constant struggle for ethnic minorities and returnees to gain recognition through official memorialisation. This is shown by a recent case in Mitrovica in Kosovo where Roma victims were excluded from a memorial that remembered the Green Market Massacre.<sup>218</sup> The link between displacement and the need for memorialisation is also not present. For instance, some of the abandoned places where Roma, Ashkali and ethnic Egyptians used to live are a reminder of a culture that has disappeared but they are not marked. In Bosnia and Herzegovina civil society efforts to memorialise victims belonging to national or ethnic minorities at the entity level, particularly in Republika Srpska, have been hampered by local authorities. The Council of Europe Commissioner for Human Rights has for example called on the local authorities in Prijedor to heed the request by the families of the 102 children killed there to have a memorial build. Their long-standing request is being ignored.<sup>219</sup>

The currently one-sided policies and practices described in this section risk keeping grievances and divisions alive and transmitting them to subsequent generations, thus directly contributing to the risk of a recurrence of violence.

### **3.4.3 History teaching**

The one-sided narrative of the past is also expressed in history teaching in schools. While the overt nationalist propaganda of the 1990s has been mostly removed from school textbooks across the region, thanks to the important advocacy work conducted by civil society with the support of international partners, textbooks are still wrought with messages specifying who belongs to 'us' and who is the 'other'. They heavily employ victimisation discourse and interpret events exclusively through the prism of each nation's preferred narrative.<sup>220</sup>



Despite various formal and informal projects, also with the support of international partners, to create guidelines and standards for history teaching in curricula and textbooks that include critical thinking, historical empathy, multiperspectivity and the ability to analyse sources and evidence, the education authorities in many areas continue to push their own ideologies and advance wider political objectives through the teaching of history. History books prepared by civil society that go beyond the one-sided narratives have been shared with the respective ministries of education but this has yet to yield results in terms of changes to the official curricula or the attitudes of teachers.<sup>221</sup> A recent [OSCE report](#) analysing history teaching materials on 1992-1995 in Bosnia and Herzegovina shows the consequences of failed education reforms on dealing with the violent past. It stresses that “there is a need for fundamental change in the approach to teaching the subject of history in Bosnia and Herzegovina, especially in relation to the period 1993-1995.”

Official history curricula generally avoid discussing gross human rights violations committed against other groups and other sensitive topics. In Serbia the events of the past are taught superficially and with a selective choice of information, which often results in the Serbian nation being portrayed as the main victim of the wars of the 1990s. Emphasis is put on the crimes committed against ethnic Serbs, while the crimes committed against other ethnic groups are often ignored.<sup>222</sup> In Bosnia and Herzegovina the president of the IRMCT [expressed concern](#) that the authorities of Republika Srpska were “indoctrinating children with denials of the 1995 genocide in Srebrenica [...] and wrecking attempts at reconciliation.”

In this regard, there are crucially important initiatives to better integrate the work of the ICTY into education. These are led by the IRMCT together with EuroClio (European Association of History Educators), which have developed training for history educators.<sup>223</sup> A series of workshops have been developed for history teachers and educators in order to train them in, for example, the use of the archives of the ICTY. During 2020-2023, more than 300 lecture plans and corresponding teaching materials were prepared based on the ICTY archives to deal with the topics of the 1990s wars. Unfortunately, it is not clear whether this material as well as others developed by civil society are truly being used in practice.

### **3.5 Failure to address the root causes of the violence of the 1990s**

Efforts to deal with the past in the region have, as previously shown, focused primarily on seeking to address the direct violence of the conflict of the 1990s through the prosecution of the countless war crimes and serious human

rights violations, especially in the early years. This focus was important for ensuring justice and was demanded by the victims. Yet at the same time, it has taken attention away from reforming the institutional structures and societal patterns that had enabled these crimes to be committed in the first place. In order for true change to occur the broader legacies of the past and their impact on society and not just the crimes need to be confronted. Such fundamental reforms are essential for preventing a recurrence of violence and ensuring real and sustainable change for the victims and survivors.

Early discussions on transitional justice did not seek to examine the root causes of the conflict or to understand the pathways to violence. These root causes are complex and multiple. They include competition between groups based on the economic interests of their leaders, intergenerationally produced hatred and fear of the 'other', lack of trust among citizens in the state and its institutions as well as between citizens, high levels of inequality, militarisation, patriarchal structures and religious extremism and ethno-nationalism. Where the root causes were brought up for discussion, such as during the comprehensive consultations leading to the draft transitional justice policy in Bosnia and Herzegovina, initiatives to take forward a more comprehensive transitional justice policy were discontinued because of a lack of political will at the state level. Similarly, even though it could have helped uncover patterns of violence as well as the systemic root causes of it official truth-seeking has yet to become a reality in any of the countries of the region.

As a result, the legacy of the root causes that led to the wars of the 1990s were never properly addressed in the post-conflict period.<sup>224</sup> The consequences of this failure to conduct broader past-sensitive reforms continue to undermine democratic progress and peace in the region. Over the past three decades ethno-nationalist politicians have been a central part of the political reconstruction of the region, even though they pursue political agendas that foster division instead of reconciliation. In the post-conflict period, they maintained and even increased their political, social and economic influence in several of the countries. They also controlled the narrative surrounding security in the region. Peace, in the limited sense of immediate stability and the absence of war, may have been secured but this minimalist approach has come at a cost. The logic of power sharing between nationalists along ethnic lines has resulted in a reinforcement of clientelism and corresponding high levels of corruption in the region, which are some of the highest globally.<sup>225</sup> Economic development and the incentive of EU integration were entrusted to automatically solve these problems and yet the fundamental question of unchanged power relationships was not properly addressed. Corruption and loss of trust in fair opportunities are among the key reasons why over 60% of youth does not see a future for

themselves in the region.<sup>226</sup>

Moreover, ethnic divisions and discrimination in the region have sometimes been entrenched in constitutions and legislation. A case in point continues to be the Constitution of Bosnia and Herzegovina stemming from the Dayton Peace Agreement and the electoral legislation that institutionalise discrimination against citizens of the country who are not members of the three constituent peoples, namely Bosniaks, Croats or Serbs. This approach, by conceiving the interests of individuals as being based mainly on ethnicity, “impedes the development of a wider sense of nationhood”.<sup>227</sup> Despite recurring judgments by the European Court of Human Rights and recommendations by human rights bodies to initiate constitutional reforms that would “change the emphasis from the equality of three constituent peoples to a state based on the equality of citizens”,<sup>228</sup> the provisions are still in place.<sup>229</sup> In North Macedonia the Ohrid Framework Agreement that was signed to end the conflict in 2001 includes a number of rules to improve equitable representation of ethnic communities in public service and about the use of languages. It has been pointed out that these rules contribute to entrenching the separation between communities in the countries rather than reinforcing social cohesion.<sup>230</sup>

Despite years of reforms, institutions continue to be weak. Independence of the judiciary remains one of the main rule of law challenges in the region.<sup>231</sup> The trust of citizens in judicial institutions is low. This is a long-standing trend, which reflects negatively on transitional justice since it needs institutions that are trusted and can bring forward the change.<sup>232</sup> Unaddressed past violent practices by certain state institutions continue to feed a culture of violence that undermines respect for human rights. Security sector structures in the region, for example, often include in their ranks individuals and officers who glorify war crimes and operate with excessive violence in the context of ordinary law enforcement. There have been reports of disproportionate use of force by Serbian police forces in response to peaceful assemblies.<sup>233</sup> In Montenegro there have been numerous cases of torture by police officers.<sup>234</sup> The extreme violence used by Croatian law enforcement officers in the context of pushbacks of migrants and asylum seekers has also raised concerns.<sup>235</sup> The notion of post-conflict security in the region has been interpreted mainly as military security. This has contributed to preserving structures of militarisation that are prone to violence. While some paramilitaries were disarmed at the end of the wars of the 1990s there has been a considerable increase in the import and production of weapons in the region in recent years.<sup>236</sup> The recent mass shootings in Serbia<sup>237</sup> demonstrated the militarisation of the society as well as the intergenerational nature of solving disputes through violence and the use of weapons.

Leaving militarised and violent masculinities unaddressed feeds other trends that undermine efforts to combat post-conflict impunity for gender-based and other forms of violence. Efforts to restore the credibility of war criminals as heroic martyrs trivialise international crimes such as genocide and systematic sexual violence, as discussed above. The prioritisation of reparation to veterans over conflict victims also rewards militarised and violent masculinities. The fact that male ex-combatants have become community leaders and politicians contributes to upholding violence as a way of solving conflicts and to the side-lining of women from such roles. A more constructive interpretation of security would include good education, employment opportunities and ease of access to healthcare. In this regard, it is notable that better inclusion of women in post-conflict reconstruction could have widened perspectives on peacebuilding, development and security.<sup>238</sup>

The lack of reliable institutions because of rampant corruption as well as state capture has led to the continuation of old gendered roles or practices. In situations where there is high unemployment and ineffective health and education systems the responsibility of caring for the family often falls back to women. In Kosovo, for example, only 14.4% of women are employed.<sup>239</sup> The imbalance of power between men and women and situations of economic dependence are a breeding ground for gender-based and domestic violence, which are increasing in the region.<sup>240</sup> The responses are ineffective and impunity for such violence is widespread. Perpetrators of domestic and sexual violence often receive lenient sentences, while the burden of proof falls mainly on the victim. The stigma and taboo surrounding gender based and sexual violence continues to be high throughout the region.<sup>241</sup> This striking phenomenon highlights the effect of rampant impunity for sexual violence committed during the wars of the 1990s as a component of the current violence. Domestic and gender-based violence against women in the countries of the region should be part of a transitional justice agenda that links the past with the present and the future.<sup>242</sup>

In a context where root causes remain unaddressed and where the status quo of power relationships does not change it is easier to use divisive power politics to stay in power and to maintain negative trends in society. This illustrates the need to go beyond looking at the past narrowly in terms of accountability for wartime crimes and to see it as a societal process that requires various interventions.<sup>243</sup>





Young people from Bosnia and Herzegovina and Serbia jointly participate in an action in honour of victims of war crimes organised by the Youth Initiative for Human Rights in Tuzla, Bosnia and Herzegovina on May 25 2019. The sign reads "Too young to remember, Determined never to forget". ©Youth Initiative for Human Rights

## Chapter 4

# The Way Forward

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The worrying trends documented in the previous chapters have a strong impact on processes to deal with the past and on the societies in the region. It is harder to reverse these trends today than it was 10 years ago. Owning the past has become a way to stay in power. The power that is promoted through denial of atrocities and the glorification of war criminals is one that promotes violence and impunity. In this context it is urgent to take steps to counter these trends and live up to the commitment of never again by making sure that comprehensive transitional justice processes are implemented effectively. Four areas should be prioritised for the way forward.

The first area of focus should be to ensure that victims and survivors are at the centre of all processes of transitional justice, including through the urgent realisation of their rights to justice, truth and reparations.

Second, it is essential to put emphasis on building a future where violence is less likely to reoccur. Besides the necessary focus on building strong and resilient rule of law institutions, attention should be paid to the intergenerational dimension of transitional justice. In this field it is essential to implement effective laws and strategies that will make a meaningful contribution towards countering the denial of atrocities and revisionism of the past.

Third, it is crucially important to strengthen political and financial support for a strong civil society working on transitional justice. Dealing with the past is a topic that generates activism both in younger and older generations and these intergenerational alliances need to be built upon. Human rights defenders are the best hope for working towards a better future based on human rights and the rule of law in the region.

Finally, the backsliding on transitional justice needs to be addressed strategically. The main responsibility firmly rests with the states and their representatives in the region, who should show leadership and genuine commitment to international human rights obligations. It is also necessary for international partners to redouble efforts to integrate dealing with

the past into their political dialogue and interaction with governments in the region. Furthermore, strategic engagement on dealing with the past should emphasise the importance of thinking and working regionally, while at the same time refocusing action at the local level, where challenges are concrete and solutions for reconciliation and peace need to be found. These four areas are discussed in more detail below.

## **4.1 Putting victims and survivors at the centre of transitional justice efforts**

The inclusion and participation of victims and survivors in processes to deal with the past is essential. There are no hierarchies of victims, each grave violation of human rights counts the same. States have a legal obligation under international law to redress past violence and a moral and political responsibility to recognise those who have suffered harm and to rehabilitate them as equal members of the society. With the current backsliding of transitional justice victims and survivors of war crimes and other gross human rights violations suffer the most. They again face the silencing and marginalisation that keeps grievances alive and makes it impossible to move on. The participation of and consultation with victims and survivors need to be prioritised to ensure that their role and interests are upheld in the processes of transitional justice in the region.

### **4.1.1 Redoubling efforts on war crimes prosecutions**

Victims and civil society organisations in the countries of the region continue to demand effective war crimes prosecutions. The promise of justice is time sensitive. Many victims are old or have died already. Yet there is still a last chance to live up to the vision that guided the immediate aftermath of the wars of the 1990s, namely that there should be no impunity for crimes that shocked the conscience of humanity and to ensure that such atrocities are not repeated. The steps required for this to happen have been identified in numerous reports and recommendations articulated by international organisations and human rights bodies, as demonstrated in this document. They include urgently accelerating the processing of pending complex cases.

This requires increasing the resources and maintaining training and expertise of investigative and prosecution offices. Moving forward, the implementation of existing war crimes strategies should identify and focus on the actual needs expressed by all victims irrespective of their identity or origin. National justice systems must be allowed to work independently and prioritise cases involving high-level perpetrators and those bearing responsibility for the most serious crimes. Judicial regional cooperation



must be strengthened, particularly when it comes to assisting in the prosecution of former high-ranking officials indicted for or convicted of war crimes but who currently enjoy impunity. Effective and well-resourced protection mechanisms are required to enable the safe participation of victims and witnesses. The participation of victims and survivors in war crimes trials, when they wish to do so, should be facilitated and supported. This includes access to free legal aid, coverage of travel costs if required, psychosocial services to help them deal with the trauma induced by the proceedings and provision of alternative means for participating, including through video conferencing, as appropriate.

Prosecutions for past atrocities can, if done effectively, have a deterrent effect. This is of increased importance today in the region from the perspective of protecting victims' rights, not only to justice for past violations but also to safety and the assurance of non-recurrence. There is an interplay between resolute action to fight impunity for past atrocities and the need to reduce the political space to stock-up ethnic hatred and discrimination and the glorification of violence. The decrease in war crimes prosecutions in recent years has coincided with an increase in revisionism and the glorification of war crimes, exacerbated by the return of convicted war criminals to their communities and their glorification. Support for war crimes prosecutions is not only a technical matter, to be addressed through funding and capacity building, but requires political advocacy, which is crucial in this field, including within the EU accession process, because it helps send the right political signal that there can be no tolerance of atrocity crimes in the past, present or future.

It is vital that strategic communication and outreach campaigns be implemented to explain to the public the reasons why justice for past crimes and combatting the denial of atrocities are pillars of building societies respectful of the rule of law and human rights. Recognising the difficult political context, domestic courts and prosecution offices should increase their efforts to share accurate and objective facts about ongoing prosecution efforts, trials and judgments. This should be done in full respect of judicial rules in order to counter disinformation and political manipulation of war crimes prosecutions.

Beyond war crimes prosecutions, effective ways to deter incitement to violence and the denial of atrocities should be explored, including criminalisation and prosecution in the most serious cases, in accordance with well-established human rights standards and practice. Taking into consideration the impact of denial and revisionism, which includes revived suffering inflicted on victims and divisions in society, politicians must in order to draw a clear line with the violent past immediately refrain from denying or downplaying genocide and war crimes and inciting hatred.

## 4.1.2 Ensuring meaningful and transformative reparations for victims and survivors

From the perspective of victims and survivors, reparations are essential for recognising the harm they suffered. States in the region should finally deliver on their international obligations and adopt comprehensive non-discriminatory reparation programmes that would enable the rapid provision of effective reparations to all victims. This should take into consideration all possible forms of reparations, in line with the [UN Basic Principles and Guidelines](#). Victims and survivors do not all have the same needs and while financial compensation is an important component so are other forms of reparation. Because reparations can change the life of individual victims in concrete ways they can be transformative. Harnessing the transformative potential of reparations should be a key priority for states in the region in the next years. To that effect, reparations should be understood and implemented in a more comprehensive and creative manner than has been the case so far.<sup>244</sup> Governments in the region should make commitments in upcoming high-level discussions on the United Nations Sustainable Development Goals process to invest more in reparations for victims and survivors, including in the form of rehabilitation through psychosocial support.

Symbolic recognition through, for example, memorials or official apologies can help combat the stigma that many victims experience. State apologies are key to acknowledging the gravity of what happened and in influencing a society's perception of the victims. This is particularly important to heed in the region as those in power fail to work for more social cohesion. In order to count as recognition, an official apology needs to be a legally, socially and culturally recognisable expression of authority.<sup>245</sup> There have been a few statements by politicians and institutions in the region acknowledging responsibility for past human rights violations. The Council of Europe Commissioner for Human Rights welcomed for example the [official apology](#) extended in 2022 by the Slovenian President Borut Pahor on behalf of the state and himself to the 'erased' 30 years after their removal from the official residence registry. Other one-off examples of positive statements over the years, most notably in Croatia and Serbia, have unfortunately not been followed by an official culture of inclusive memorialisation honouring all victims, which has cancelled out their value and impact. One of the most famous examples of a political apology for past atrocities in another post-conflict context, namely Chancellor Willy Brandt's kneeling at the Warsaw Memorial in 1970, marked a profound shift in West Germany's understanding of the nation's past.<sup>246</sup> Such a 'Willy Brandt-Moment' is still to happen in the region.

Another important focus to make reparations truly transformative for victims is to address the marginalisation of survivors. Human rights violations often exacerbate already existing marginalisation. Impunity for these crimes further heightens the vulnerability and exposure of victims to other stress factors, such as poverty, conflict over resources and migration. Reparations are called transformative when they provide an opportunity to respond to this situation by diminishing the adverse effects of marginalisation, reversing the root causes of exclusion and integrating victims as members of society with equal rights and opportunities.<sup>247</sup> In order for this to happen meaningful reparations must make a difference in the lives of survivors and address their different needs. To identify which reparations would be meaningful, the participation of survivors in the design, implementation and evaluation of reparation processes is essential. There have been efforts in the past to compare knowledge and trends on reparations at the regional level, especially around reparations for survivors of conflict related sexual violence.<sup>248</sup> These efforts should be revived. There are also important initiatives by civil society such as, for example, the [Western Balkan coalition for genocide and mass atrocity crimes prevention](#), which put a more regional focus on reparation and reparative strategies.

Rehabilitation in the form of psychosocial support for victims and survivors also needs to be increased. The needs in the region are massive. Traumatic experiences and the resulting mental health problems can be an obstacle to people finding the energy to rebuild their lives and to becoming active citizens who demand their rights and mobilise for change. The need for rehabilitation as an important form of reparation is recognised globally, including in the 2005 UN Basic Principles and Guidelines. Unaddressed traumas can in some cases also fuel future cycles of violence, particularly when individual experiences become collective narratives via the intergenerational transmission of trauma. This is why mental health and psychosocial support has been acknowledged as an essential component of supporting efforts to combat impunity and in making such efforts more victim centred by putting the victims' well-being at the forefront.<sup>249</sup>

Psychosocial approaches explicitly recognise that conflict and violence do not only affect the individual but also social relations among families and communities as well as within the broader society. This is crucial in contexts of mass violence targeting large numbers of individuals and creating collective trauma that often becomes intrinsic to group identity. Mental health and psychosocial support should therefore also be available in the form of collective approaches, through group or community based psychosocial strategies that address this interaction between the psychological and the social and aim to help build agency and resilience to overcome the legacy of violence. There is an urgent need to increase

capacities and resources on the issue of psychosocial support, not only among civil society but also in public service in the region. The recent work with survivors of conflict related sexual violence, as discussed in chapter 1, is a positive example of how a psychosocial lens can be integrated into transitional justice processes, especially around reparations. This should be mainstreamed in action plans prepared by governments of the region on the topic of women, peace and security.

#### **4.1.3 Increasing truth-seeking efforts for forgotten victims**

The needs of many victims of the wars of the 1990s have not been addressed and these victims are at risk being forgotten. Victims of conflict related sexual violence only recently became more visible in the region. There is a lack of official strategies to consider the specific suffering, needs and concerns of marginalised communities and how to preserve this information in existing archives and records. Post-conflict documentation efforts in the region often adopted a perspective that focused mainly on victims belonging to the ethnic communities that were the main parties to the conflict. Because they have historically been victims of exclusion and discrimination, fear and mistrust within marginalised communities can negatively impact their willingness to participate in documentation and transitional justice efforts. This, for example, has been evidenced by the lack of community specific information on violence against Roma.

Mainstream documentation and transitional justice efforts focus on gross human rights violations and on establishing individual criminal responsibility, which can leave aside information about structural violence (of a socio-economic nature for example) faced by marginalised communities. Civil society is trying to fill the gaps, most notably through the highly successful documentation of victims killed during the wars examples cited above. Yet responsibility for ensuring comprehensive documentation of all violations without discrimination rests with the states. As a consequence of this documentation gap, many victims from marginalised groups do not receive reparations – neither individually nor collectively – or justice through the courts and their needs remain invisible. This leaves trauma and discrimination unaddressed and undermines redress and prevention. Additional efforts are required in the next years to consolidate knowledge about victimisation among those groups and to find innovative ways to ensure that victims and survivors can participate in inclusive transitional justice initiatives. Besides Roma, there are many other victims and survivors who are at risk of being forgotten, including children born out of rape, the families of disappeared persons who have not been found or identified, the ‘erased’ who were never able to regularise their situations and forcibly displaced persons who continue to live in limbo, among others.

#### **4.1.4 Effective consultation with and participation of victims and survivors**

Victim centred approaches to dealing with the past are not implemented consistently throughout the region. Grass roots voices are not systematically integrated and consultations are often perfunctory. Context specific methodologies and knowledge on how to interact with victims from minority communities, such as the Roma community, are missing. In an overall climate of disinformation and divisive narratives the nuanced voices of victims on their experiences and needs often go unheard.

Victim participation has been recognised as an essential component of any transitional justice process.<sup>250</sup> While victims and survivors in the region have pushed for efforts to deal with the past their role in the relevant processes has often been limited to giving evidence in trials or providing information in documentation and truth-seeking efforts. Effective participation and consultation strategies should be developed from the perspective of creating agency and enabling victims to influence the design of transitional justice processes. This would have an impact on the efficiency of the processes and on the lives of victims and survivors. Women are leading voices on the need to create such transformative models of justice.<sup>251</sup>

There have been some important experiences of such consultations with victims in the region from which lessons can be learned, including in the context of the preparation of a comprehensive transitional justice strategy in Bosnia and Herzegovina in 2010. The latter included extensive consultation with a broad selection of stakeholders. The resulting draft transitional justice strategy (2013) and a detailed action plan for its implementation included crucial suggestions around education, history teaching, gender-sensitive approaches and memorialisation. Unfortunately, because of a lack of political will, the strategy was never adopted and this caused frustration and disengagement of victims from policy discussions on dealing with the past. These lessons should be heeded in current discussions in Kosovo around developing a transitional justice strategy. The Government of Kosovo is currently the only one in the region that still pursues the idea of developing a context specific comprehensive strategy for dealing with the past based on the United Nations definition of transitional justice. This is to be welcomed. This process should establish a central place for all victims without discrimination and build on lessons from previous failed attempts to prepare such a strategy.<sup>252</sup>

## **4.2 Contributing towards ensuring non-recurrence**

In the face of worrying signs that the factors that led to violence in the 1990s are currently repeating, the goals of implementing transitional justice

processes need to be firmly anchored to the imperative of preventing recurrence. Beyond ensuring accountability for past atrocities, the promise of 'never again' is a widely recognised objective of efforts to deal with the atrocities of the past.<sup>253</sup>

As such, transitional justice is very much a future oriented field. Since looking back to move forward is important, the issues of education, archives and memory become important topics for transitional justice. The next generation should be spared from mass violence and should be allowed to move forward with some sense of justice and empathy towards other groups if they are to build a better and peaceful future. The added value of a holistic approach to transitional justice that can help address structural root causes and prevent the recurrence of violence needs to be better understood, articulated and pursued consistently, including at the highest political level and in official policies. Improving integrated education, strengthening history teaching, enhancing the preservation of and access to archives about past atrocities as well as supporting memorialisation that counters revisionism and one-sided viewpoints should be key priorities in this regard. It is essential to invest in the youth as agents of change by reaching out to them specifically and relying on them extensively in the formulation of policies in these fields, while recognising that dealing with the past for a better future is a responsibility that rests on all members of society.

#### **4.2.1 Ending segregated education**

The authorities in the region should urgently reform their education systems in order to end the practice of separation of children from different ethnic communities, either within schools or through mono-ethnic schools, while at the same time ensuring access to learning in their mother tongue and about their culture for minority children. This can be achieved by mixing children in certain common classes and introducing a core curriculum. Such integrated education would help children to come into contact with each other and develop acceptance of cultural, social, religious and other differences. It would facilitate the emergence of shared values within diverse societies and a sense of common belonging.

Enduring activism among some of the youth in this regard is both noteworthy and encouraging. In Bosnia and Herzegovina, for example, Bosniak and Bosnian Croat secondary pupils from Jajce have been calling for the abolition of the system of 'two schools under one roof'. In 2017, as a result of the Jajce pupils activism, supported by international partners, the cantonal authorities revoked their decision to establish a segregated secondary there.<sup>254</sup> There are also some encouraging projects in some schools in Montenegro and North Macedonia that enable children to mix

through joint extra-curricular activities (see, for example, projects by the [Nansen dialogue network](#)). While this gives important positive signals, authorities across the region bear the responsibility to develop more systemic and long-term policies to avoid separation between children from different ethnic communities in the education system.

#### 4.2.2 Memorialisation

Without a memory of the past there can be no right to truth, justice, reparation or guarantees of non-recurrence. Remembering the wrongs of the past, unequivocally condemning them and telling the truth about history are essential elements in the promotion of and commitment to a democratic society and human rights. Memorialisation helps foster respect for the human rights of other groups and promotes peace, justice and reconciliation.<sup>255</sup> Memorialisation includes methods such as building memorials, commemoration ceremonies, museums and history teaching. It is a long-term process and can only be effective if it pursues the political goal of establishing a culture of peace and democracy. Memorialisation policies must be developed in compliance with human rights, namely they must ensure the participation of victims, avoid hate speech and discriminatory messages and leave no place for the denial of serious human rights violations. State officials in the region have the responsibility to change the one-sided and divisive way in which memory policies are currently implemented, as discussed in chapter 3.

The private sector and businesses must also be part of the discussion. The site of the notorious Omarska detention camp in Bosnia and Herzegovina, for example, where, according to the ICTY, crimes against humanity were committed continues to be used as a mining production site. Likewise, former hotel complexes that were used as rape camps during the conflict in Bosnia and Herzegovina are functioning as lucrative spa sites. The responsibility of the private sector, which often works closely with political elites, needs to be further addressed in the area of remembrance and memorialisation. The authorities should secure ‘business or commerce free areas’ on sites where mass crimes took place, as has been [recommended](#) by the Council of Europe Commissioner for Human Rights in other contexts.

Opportunities and innovative approaches exist in the region in the area of commemoration and memorialisation, carried out mainly by civil society, but they need support. It is encouraging that initiatives on joint commemorations at the community level in Bosnia and Herzegovina have been supported by the newly established international quartet in the country, namely the United Nations, European Union, the Council of Europe and the OSCE. The process of the [renaming of streets](#) in Mostar that were formerly named after Ustaša commanders is a positive development. A similar [initiative](#) by local

authorities in Zagreb is to be equally welcomed. It is particularly impactful when state officials participate in joint commemorations. In October 2021, for example, the ministers of foreign affairs of Montenegro and Croatia for the first time jointly [attended](#) the 30th commemoration of the opening of camp Morinj in Montenegro, where hundreds of Croatian prisoners of war were detained and tortured. Both ministers acknowledged the suffering of the victims and called for reconciliation.

Civil society has initiated memorialisation efforts that include different sides and viewpoints as a way to counterbalance the one-sided and divisive official commemoration culture. Research around the impact of these inclusive memorialisation initiatives is encouraging.<sup>256</sup> The Sarajevo under Siege exhibition, for example, does not adopt an ethnic framework but focuses on the commonality of experiences among residents and non-residents, and on resilience.<sup>257</sup> Research into the effective strategies employed at the War Childhood Museum in Bosnia and Herzegovina found that the focus on personal stories enables visitors to experience war from the child's perspective and to honour victims in an apolitical manner.<sup>258</sup> Particularly remarkable are activities that are inward looking and deal with violations of the inner-group as opposed to showing the responsibility of the outer-groups. One example is the play [The Lullaby for Mladenka](#), whose author Sead Đulić is a former officer of the Army of the Republic of Bosnia and Herzegovina. The play is performed by the Mostar Youth Theatre and tells the story of 33 Croat Bosnian civilians killed by the Army of Bosnia and Herzegovina in the village of Grabovica in September 1993, the oldest of whom was 87 years old and the youngest just 4 years of age. In Kosovo too, there have been notable efforts by civil society to promote inclusive memorialisation practices. One example is the '[Virtual Museum of Refugees](#)' which compiles personal narratives of individuals from various ethnic groups who share their experiences as they were displaced as a consequence of the war in Kosovo.

Ultimately, in addition to adopting official policies of memorialisation in compliance with international standards, national authorities in the region have a responsibility to provide adequate support and resources for these initiatives to flourish.

#### **4.2.3 Investing in history teaching as a bridge between the past and a better future**

History education is an important factor of change and a widely recognised tool for transitional justice today. The Council of Europe has articulated relevant standards and principles in the field of history teaching in general<sup>259</sup> as well as regarding teaching history in post-conflict situations, including the Parliamentary Assembly of the Council of Europe 2009



[Recommendation 1880](#) on History teaching in conflict and post-conflict areas and the Committee of Ministers' [Recommendation CM/Rec\(2011\)6](#) on intercultural dialogue and the image of the 'other' in history teaching. These should guide the way forward. The obstacles surrounding history teaching in the region have been identified (see chapter 3) and the authorities should take steps to reform current practices and implement international standards in this field.

The recent [OSCE study](#) mentioned above on history teaching materials regarding the period 1992-1995 in Bosnia and Herzegovina articulates how the Council of Europe standards on history teaching should be implemented when teaching about the violent past. According to the study, this includes moving away from the current dominant narrative of 'monumental' history, which presents some historic events or figures in an unquestioned manner, to that of the narrative of 'critical' history, which presents multiple perspectives of the wars and develops the pupils' critical thinking and willingness to question the actions and narratives of members of one's own people. It is also important to develop flexible curricula throughout the region that equip young people with a foundation of knowledge and skills as well as the disposition necessary to engage in democratic discourse beyond the confines of the history classroom and school.

An important area of work is to strengthen the competency of teachers. History teachers should be trained specifically to teach the history of the 1990s, as it is one of the most controversial and sensitive periods in the region today. The training should focus on cognitive and emotional aspects of both teaching and learning sensitive history. A collaborative effort of education authorities and historians in the different countries is vital for discussing the role and purpose of the history subject in schools as well as for engaging the legacies of the past in a sensitive and nuanced manner. The goal is not to have one narrative and one joint textbook. Rather, the aim is for the education authorities to adopt approaches whereby critical thinking is encouraged and multiple perspectives are introduced. It is also essential to increase learning and discussions in schools about judicially established facts, including about the work and judgments of the ICTY.<sup>260</sup> Such an approach can foster mutual understanding and respect and help nurture democratic culture and participation. This approach could have a profound impact on youth and ultimately have a much needed positive impact on society as a whole.

Beyond the teaching on the wars of the 1990s, which continues to be highly sensitive, governments in the region should proactively look for entry points that present similarities but are less emotionally difficult in order to start developing the culture described above regarding history teaching. While still sensitive, one possible area is teaching about the Holocaust

and other atrocities committed during the Second World War. History teaching on these topics should elucidate the build-up to the atrocities and demonstrate the tragic consequences of structured and widespread violence. Recent public debates in Croatia on the Ustaša regime that looked at the nature of a system that was built on valuing violence against other groups in order to get promoted constitute important reflections that can spark critical thinking within one's own group. This should be replicated elsewhere in the region.

Given the difficulties associated with changing official curricula and education systems, many analysts have pointed out the importance of also investing in informal spaces where some history education can take place (student exchange programmes, youth and community groups, sports associations and others). There are multiple worthwhile non-state projects in the region, some of which are mentioned in chapter 1. Some initiatives focus on regional cooperation among youth, which is particularly valuable. The Regional Youth Cooperation Office (RYCO) or the Youth Initiative for Human Rights, which was founded in 2003 and has offices throughout the region, have the initiative, capacity and enthusiasm to take on work that requires multiple perspectives and shared narratives that the official education system currently fails to convey.

Exchanges among students and academics in the region should be further facilitated. The Centre for Democracy and Reconciliation in Southeast Europe (CDRSEE) has gathered historians and experts from the region to develop innovative history schoolbooks that include multiple perspectives as part of the effort to encourage better history teaching in the region.<sup>261</sup> Many civil society organisations in the region are engaging in storytelling aimed at countering the one-sided and exclusive narratives about what happened in the past. Narratives represent a key strategic peacebuilding tool that warrants further attention when narrative complexity is understood as a fundamental condition of post-conflict resilience and rehabilitation.<sup>262</sup> A good example of a creative storytelling strategy is the initiative '[Ordinary Heroes](#)', a documentary series of the Post Conflict Research Centre in Bosnia and Herzegovina. It depicts real life stories of people who rescued other people during the war, often putting themselves in danger. It has proven successful especially in attracting younger generations and persons from divided communities.<sup>263</sup> The use of arts and culture in this field is also particularly useful. This important work requires political support from the authorities in order to lead to tangible change in the societies of the region.

Cooperation between the education authorities from the member states of the Council of Europe [Observatory on History teaching in Europe](#) (OHTE) is also a significant development when it comes to history teaching. The Observatory plays a pivotal role in this context by bringing disparate

historical perspectives to the fore. The primary objective is to foster dialogue, facilitate mutual agreements, and contribute to peaceful relations among member states. Membership of the countries in the region not yet part of the Observatory should be further considered.<sup>264</sup>

#### **4.2.4 Preserving archives and making them accessible to processes of dealing with the past**

In the years to come, more attention should be devoted to promoting the preservation and accessibility of existing archives that are relevant to transitional justice processes, including state and military archives, judicial archives, the archives of international institutions and of civil society. Specific focus should be given to improving access to these archives for journalists, human rights defenders and the general public. National authorities should develop good archival policies in line with international standards, such as those reflected in the Council of Europe 2000 [Recommendation CM2000\(13\)](#) of the Committee of Ministers on a European Policy on Access to Archives, the OHCHR [Rule of law tool on archives](#), the [Tshwane Principles](#) on national security and the right to information and the [2015 Set of general recommendations](#) for truth commissions and archives developed by the UN Special Rapporteur on truth, justice, reparations and guarantees of non-recurrence.

In this regard, it is important to stress that when it comes to archives relevant to gross human rights violations, the information “may not be denied to the public on grounds of national security unless the restriction is in full compliance with international human rights law”,<sup>265</sup> As mentioned above, archives can be particularly relevant in the search for missing persons and should urgently be made accessible to that effect. Freedom of information acts should be complied in relation to requests and inquires dealing with a serious human rights violations of the past. In Serbia the Humanitarian Law Centre has thoroughly documented the resistance of the national authorities to opening archives and to replying to freedom of information requests related to dealing with the past. A request for information on, for example, how many persons indicted for war crimes are still serving in the police or in the army was denied and subsequently ignored, despite the Serbian Commissioner for Information of Public Importance and Personal Data Protection having overturned the authorities’ decision.<sup>266</sup> Regional journalist networks also complain about the prevalent ‘silence of the administrations’ in response to their freedom of information requests.<sup>267</sup>

There are some positive examples of cooperation around access to archives, such as between the Srebrenica Memorial Centre and the Bosnian State Court. Initiatives pertaining to archives by civil society should be funded and actively supported. Efforts to, for example, digitalise available information

and records should be promoted.<sup>268</sup> The issue not only covers access to information but also how to manage the stark increase in information and data online. Developing standards on digital archiving is important, especially concerning the protection of the dignity of victims and survivors and personal data rights in relation to the documentation, preservation and use of data. The issue of moving digital, both in terms of preserving and making accessible existing records and information in archives, and utilising the digital space for civil activism linked to dealing with the past will remain a key area of work within transitional justice in the years to come.<sup>269</sup> This digital work is part of the civic space and the respective governments are required to provide conducive environments so that this important work can continue, including by suppressing disinformation.

Preserving the archives of the ICTY and IRMCT is key for future generations. The archives are a common heritage preserving the history of the region and are vital not only for historical research and solving remaining cases of missing persons but also for combatting the denial of atrocities.<sup>270</sup> They include an extensive video archive of court proceedings, including testimonies of survivors. They also include information about political, military and civilian structures that show “how the violence was planned, instigated and implemented” which is of value to historians.<sup>271</sup> An initiative of note is the agreement concluded between the IRMCT and the ICRC that allows the ICRC to go through the ICTY and IRMCT archives for the purpose of identifying information that may be of use in the search for further mass graves and missing persons.<sup>272</sup> At the time of writing, the work based on this agreement had led to 300 missing persons being located and identified. The archives are currently managed by the IRMCT in The Hague. Public judicial records and archives are available online, while access to public records with no digital equivalent can be requested. Judicial records containing confidential information and the archives of the Office of the Prosecutor are not available to the public.<sup>273</sup> Given the importance of the information in their possession for local memory and other processes, it is essential that international and hybridised criminal courts periodically review the classification of information, including the archives of their prosecution offices, with the goal of releasing as much information as possible without, of course, jeopardising the safety of victims and witnesses.

Finally, it is important to initiate discussions about archives and epistemic injustice. In the coming years, this should entail an examination of how archives, including databases that have been built over the years, can avoid discriminatory outcomes and the perpetuation of bias concerning marginalised and ‘forgotten’ victims. Wider narratives about life before, during and after the wars of the 1990s directed at more structural issues that have led to violence and impunity are also under-represented in

existing archival work. This may require specific efforts to collect additional information and complement existing archives, which is why efforts to collect oral histories, like those of the [Memorial Centre in Srebrenica](#), are an important way forward.

### 4.3 Creating an environment conducive to human rights defenders

The critical role of human rights defenders and victims' groups in dealing with the past has been highlighted throughout this Issue Paper. In the way forward, it will continue to be of utmost importance to bolster these courageous and persistent voices that have stood by a principled vision of dealing with the past based on human rights and the rule of law. The region can be proud of still having an active and sophisticated civil society that works on dealing with the past almost three decades after the wars. There are strong youth networks as well as new forms of activism that use modern technology to promote non-divisive memorialisation. Activists also creatively link dealing with the past with art and culture. It is important to capitalise on these opportunities, while addressing the increasingly hostile environment discussed in chapter 3.

National authorities in the region should commit unequivocally to fostering diverse and vibrant civic participation in public affairs, to creating an environment that is conducive to the functioning of civil society organisations and to upholding the human rights of activists. In this regard, it is critical that political decision makers and authorities effectively tackle judicial harassment, condemn stigmatising comments made by politicians and others and refrain from adopting legislation that is harmful to the independent work of NGOs. As discussed below, other areas related to strengthening civil society in the region deserve attention.

**Genuine consultation with and access to policymakers:** National authorities in the region should ensure that civil society working on dealing with the past is consulted and has access to policy decision-making fora, including in the areas of prevention and security, drawing on the Council of Europe Guidelines for civil participation in political decision-making. In particular they should facilitate regular exchanges of views with civil society networks, such as RECOM and the civil society Coalition on Atrocity Prevention, to discuss progress on topical issues in the field of transitional justice. These networks are important because they bring in comparative experience and constitute platforms for coordination and mutual support among organisations, thus helping to prevent the fragmentation of civil society. Actively supporting structured processes for working with civil society would not only assist in consolidating and strengthening the voice of

civil society but would also enhance the efficiency and legitimacy of the rule of law institutions engaged in such processes. Civil society organisations in Bosnia and Herzegovina, such as TRIAL International, for example, provide ongoing training and conduct advisory work with prosecutors' offices to ensure the application of victim-sensitive approaches.

**Enhancing sustainable resources:** Civil society in the region relies to a great extent on support from external donors. The long-term vision for the region should be that adequate support will stem from the respective states, but this is not happening. Moreover, the organisation of project funding by donors, characterised by short cycles and highly cumbersome application and reporting requirements, has failed to strengthen civil society and has failed to more consistently reach the grass roots level. The aim should be to support a strong and vibrant civil society sector in continuing to address the issue of dealing with the past, namely empowered to formulate their priorities without needing to respond to agendas that are imposed because of funding or political pressure.

**Supporting the work on prevention:** It is clear that the governments of the region bear the primary responsibility for preventing violence and human rights violations and should act on this responsibility. Yet the lack of state action in this area has pushed many civil society organisations to expand beyond their more traditional work on transitional justice and to fulfil important functions in implementing strategies related to guarantees of non-recurrence. As mentioned previously, this work includes facilitating psychosocial support, supporting reconciliation and trust building efforts, including in areas such as memorialisation and interreligious dialogue, and informal history teaching efforts. Civil society organisations have gained the trust of many sections of society in the region and this work is worthy of support aimed at making it sustainable. However, this should not impede important functions of civil society in relation to transitional justice processes, namely advocacy towards national authorities and acting as watchdogs and monitors.

**Making psychosocial assistance available:** Civil society activists and NGO staff working with victims and survivors of gross human rights violations often experience so-called vicarious trauma. Documentation efforts related to past atrocities involve visioning and listening to harrowing accounts and images of human suffering. Other human rights defenders working on transitional justice suffer mental health problems as a result of their human rights activism and the associated harassment, both offline and online, smear campaigns and hate speech. To enable them to continue their crucial work on dealing with the past and combating impunity, it is essential to take measures to make the harassment stop, while at the same time ensuring that human rights defenders benefit from mental health and psychosocial

support. Besides the offer of therapy, this should include strategies to sensitise society at large through the media and public education about the important work conducted by civil society.

## **4.4 The need for regional strategies and for local action**

Dealing with the past is a regional issue in the former Yugoslavia not only because of its history and the fact that serious crimes were committed and orchestrated across borders but because regional cooperation is still essential today if justice responses are to be effective, whether in the area of the prosecution of war crimes, the search for the missing persons or in respect to reparations. Yet while there have been good experiences of regional cooperation the willingness among the governments currently in place to work regionally on transitional justice processes has diminished.

Additional challenges with a regional dimension have emerged and are impacting the success of efforts to deal with the past. These include radicalisation, the denial and the glorification of war crimes, militarisation and disinformation about the past. Given that the backlash against transitional justice is a regional phenomenon, there is a correlative need for a regional response. At the same time, there is now a better understanding that effective change must happen locally. Focusing on the grass roots level is a good way to find lasting solutions and to identify the needs and aspirations of people, especially of victims and survivors. While working bottom-up by connecting the local and the region level it is important to keep the bigger picture in mind, namely the broader vision of democracy and rule of law to which dealing with the past can contribute.

### **4.4.1 Follow-up on recommendations by multilateral bodies**

International organisations and human rights monitoring bodies have built a repository of recommendations to improve the processes of dealing with the past in the region, looking both at country specific needs and at the actions required at the regional level. There is a dire need to systematically follow-up on these recommendations through existing political and diplomatic forums, such as in the context of EU accession summits, meetings of the Berlin Process, Permanent Council meetings of the OSCE, the Universal Periodic Review process, Security Council meetings, visits of high-level United Nations officials and special rapporteurs, the Agenda 2030/Sustainable Development Goals process and within the Council of Europe framework.

It is essential that international partners maintain clear messages about the importance of dealing with the past in their interactions with states

in the region and follow-up on previously formulated recommendations. States in the region should develop action plans on transitional justice, similar to those that exist in other areas, that identify entry points and opportunities for advancing initiatives to deal with the past, based on previous recommendations and by monitoring relevant actors. These transitional justice action plans should include pressing topics such as victim participation and reparations, strengthening of civil society, education, access to archives, memorialisation policies, tackling hate speech and radicalisation and improving monitoring mechanisms on transitional justice processes. Such action plans would help better evaluate progress throughout the region and identify transitional justice related benchmarks and baselines as part of the EU accession process. They should be grounded on Council of Europe standards and principles in the areas of education, history teaching, justice reform and combatting hate speech and intolerance. These are crucially important for a future oriented approach towards dealing with the past and should be aimed at contributing towards prevention.

#### **4.4.2 Strengthen regional coordination and increase local action**

Regional approaches to dealing with the past are necessary in the region because the countries concerned share a common history and because actions and narratives in one country can have significant impact in the others. The countries of the region must urgently prioritise coordination on war crimes prosecutions and the search for missing persons and on regional truth-seeking efforts that are victim centred. Other regional coordination activities in the field of transitional justice by civil society, historians and archivists should be promoted and adequately supported and resourced. Participation in such regional coordination activities should take place and be encouraged on the basis of the relevance of the issues considered and not be impeded by the fact that certain countries of the region are now members of the EU. As mentioned above, for example, it is unfortunate, given the relevance of developments in Croatia, that participation by Croatian NGOs in regional activities related to dealing with the past has become problematic because EU funding rules are different for projects involving non-EU member states.

Work on history research and teaching would, for example, also benefit from the involvement of all countries that were previously part of the Socialist Federal Republic of Yugoslavia. Research has found that regional debates among civil society organisations are more restorative than those led at the national level.<sup>274</sup> The potential of harnessing the National Human Rights Institutions' contribution to transitional justice processes through



increased regional cooperation should also be explored. National Human Rights Institutions could exchange on their respective experiences of monitoring processes of dealing with the past, making recommendations to national authorities and cooperating with civil society, most notably in relation to fields that are relevant to prevention.

There is growing consensus among scholars and practitioners that in order to foster meaningful change transitional justice must extend beyond trials (the dominant mechanism in the region) and be more firmly anchored in affected communities through alternative sites, safe spaces and modes of engagement.<sup>275</sup> As the recently revised [UN Secretary General Guidance Note on Transitional Justice](#) highlights, change has to respect the need for transitional justice to be victim centred (in a way that brings real and tangible change to them) and to foster broad community ownership. In addition to bringing people into transitional justice processes, with a focus on those traditionally excluded and marginalised, governments in the region should place the issue of inclusivity on the public agenda and build more inclusive institutions for the future. Today, this requires a transgenerational lens that harnesses the potential of children and youth and takes into account the challenges encountered by minority groups and communities.

Reconciliation initiatives in the region at the grass roots level lack robust evaluation, while the evidence base is fragmented and suffers from a shortage of studies in specific areas (e.g., arts, heritage and alternative forms of truth-telling).<sup>276</sup> More work on research and evaluation is encouraged along with the development of methodologies on how to better integrate grass roots voices into policy and decision-making. In Bosnia and Herzegovina there have been some small but important initiatives at the community level on joint commemorations and such efforts should be established officially and amplified. Some families of victims have, for example, for years participated in efforts to jointly commemorate victims, regardless of ethnicity, including on the International Day of the Victims of Enforced Disappearances.<sup>277</sup> In the current context of war criminals returning to the region after they have served their sentences there is a need to work at the grass roots and community level to support victims and witnesses that have testified at the ICTY, taking into account their protection needs.

As highlighted in this Issue Paper, there are huge psychosocial needs among victims and survivors in different communities throughout the region and this is an area where states in the region need to invest more resources. In Kosovo UNMIK recently launched an important pilot project linking grass roots knowledge/expertise with official health providers through training by signing a memorandum of understanding with the Kosovo Ministry of Health.

The role of civil society in supporting transitional justice at the local level is essential in this regard. Grass roots activism can play an important role in counterbalancing existing structural challenges at the institutional and societal level that undermine progress in dealing with the past, such as growing revisionism, through joint activism that crosses ethnic lines. The regional work of the Youth Initiative for Human Rights that connects youth activists working on dealing with the past from various countries is to be commended as it links the issue of transitional justice directly to the local level. At the same time, support in terms of funding and capacity building of civil society at the grass roots level is very irregular and represents a major challenge. Yet it is encouraging that the EU and other donors have recently started to support work on transitional justice at the grass roots level. This involves, for example, work in the area of documenting victimisation in the past and capacity building of youth at the grass roots level. Monitoring of progress in the field of transitional justice should seek to include the perspectives of grass roots organisations.

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- thematic studies and advice on systematic human rights work, and
- awareness-raising activities.

The current Commissioner, Dunja Mijatović, took up her functions in April 2018. She succeeded Nils Muižnieks (2012-2018), Thomas Hammarberg (2006-2012) and Álvaro Gil-Robles (1999-2006).



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