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## Maintaining the Process in Bosnia and Herzegovina – Coherence and Complementarity of EU Institutions and Civil Society in the Field of Transitional Justice

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Coherence and Complementarity of EU Institutions  
and Civil Society in the Field of Transitional Justice

Commissioned by



Federal Ministry  
for Economic Cooperation  
and Development

### **FriEnt**

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## 1. Introduction

Transitional justice is the process by which societies emerging from armed conflict or oppressive rule deal with the legacy of mass atrocity and past human rights abuse. The mechanisms of transitional justice are directly related to the goals of conflict transformation and democratic transition: ending the culture of illegality and rebuilding the rule of law by establishing accountability for perpetrators and justice for victims of mass atrocity; marking a clear break with past abuse and recognizing historical injustice by articulating truth-telling narratives in the transition; and deterring future conflict and promoting peace through reconciliation and restorative efforts.

The central mechanisms of post-conflict transitional justice are criminal prosecutions, truth commissions, vetting, and reparations. Criminal prosecutions can be conducted by international courts and tribunals, national courts, and mixed or hybrid tribunals that combine elements of national and international law, jurisdiction, and staffing. Truth commissions vary in their mandate and methodology from more narrow fact-finding inquiries conducting analysis of evidence and documentation, to broader truth and reconciliation initiatives that incorporate victims and perpetrators through a process of public hearings. Vetting takes an individualized approach to assessing the integrity of persons in order to determine their suitability for employment in the public and particularly the security sector, while lustration disqualifies groups of individuals from holding public office on the basis of their membership or employment in certain organizations. Finally, reparations can be provided to victims of human rights abuse either within state-sponsored reparation programs, or by courts and other judicial bodies on an individual basis. Other forms of redress and modalities of transitional justice include restitution, apology, memorialisation, and education.

This study was conducted in preparation for the international conference 'Building a Future on Peace and Justice' in Nuremberg, 25-27 June 2007. It was commissioned by FriEnt – Working Group on Development and Peace and the German Federal Ministry of Economic Cooperation and Development. The report begins with key conclusions and recommendations on coherence and complementarity of EU institutions and civil society in the field of transitional justice in Bosnia and Herzegovina (BiH). It provides an overview of transitional justice efforts in BiH and elaborates the role and activities of civil society organizations within that context. It then moves to discuss the involvement of the European Union in transitional justice in BiH, with added emphasis on issues of coherence and complementarity with civil society. Finally, the report closes with specific recommendations to address identified gaps and opportunities.

## 2. Conclusions and Recommendations

The major obstacle to the consolidation of peace in Bosnia and Herzegovina is the failure to adequately address the legacy of armed conflict and mass atrocity from 1992-1995. The Dayton Peace Agreement successfully ended the war but at the same time, established constitutional structures that further entrenched ethnic divides. Rather than seeking to confront and deal with conflict-related issues in the transition, the Dayton framework and the engagement of the international community have ignored the potential of transitional justice to contribute to peace-building and stabilisation. The limited developments in transitional justice

in BiH have come as a result of pressure exerted by the Office of the High Representative (OHR) on the political class, without broad public consultations or engagement with victims and other civil society groups.

Civil society in Bosnia is weak, divided, and largely donor-driven. It reflects the nature of the ethnic conflict, the Dayton constitutional structure, and the top-down approach of the international community in providing assistance. Civil society activism on issues of war crimes and justice rarely crosses the ethnic divide and attracts donor funding for service delivery rather than more politicized forms of advocacy and engagement.

EU policy towards Bosnia and Herzegovina reflects a two-pronged strategy: peace-building within the European Security and Defence Policy and the standard 'stick and carrot' strategy for integration into the EU. However, the relationship between the two approaches has not been conceptualized at the EU level and the incentives that come with integration have not been clearly linked to the objectives of peace-building. Apart from international war crimes trials, transitional justice has been largely ignored by Brussels since the EU takes a future-oriented approach that sees war crimes as a conflict-generating issue. However, without taking into account and addressing directly the legacy of war, the potential for instability remains, which would undermine both the achievements in peace implementation and the process of accession to the Union. Our main recommendation is to rethink the overall policy approach of the EU to Bosnia, by integrating transitional justice directly within both the peace-building and the accession effort.

The Union has overlooked the potential of transitional justice as a security strategy that can provide an institutionalized framework for processing the legacy of war crimes. The process of transitional justice opens up space for negotiating conflicting narratives of injustice. In this way, it commits people to the democratic political process and the rule of law, minimizing incentives for seeking extra-judicial and extra-political forms of redress. Moreover, it provides a rule-based methodology to sideline individuals which propel the culture of illegality, state weakness, and ethnic polarization. In this context, the challenge for the EU is not merely to enhance the coherence between the ESDP and the accession framework in their current form. Rather, the EU should deepen ESDP engagement with war crimes and justice issues and incorporate specific priorities on these issues in the accession process.

Our analysis suggests that the ESDP framework for Bosnia should take a justice-sensitive approach to security and peace-building. In order to incorporate war crimes and justice within ESDP missions, the EU will have to adjust and refocus their mandates. This would entail enhancing the European Union military force (EUFOR) to support local security agencies in apprehending war criminals, whether indicted by international or national courts. Another key recommendation is to reopen the issue of vetting in order to deal with the problem of war criminals active in the police services.

Given the regional nature of the conflict in Bosnia, another main conclusion of this report concerns the need for a regional approach of the European Union to transitional justice that focuses on the Western Balkans as a whole. In BiH and across former Yugoslavia, domestic war crimes trials are being conducted in a situation in which perpetrators, victims, witnesses, and evidence are often located across state borders. This requires regional cooperation in criminal matters, which is currently regulated by bilateral agreements but is obstructed by political, technical, and financial problems. The EU support to regional authorities

and judiciaries is necessary to operationalize existing bilateral agreements for regional cooperation in criminal matters.

Recent intensified involvement of the European Union with the third sector does not include engagement and consultation with civil society actors working on issues of transitional justice. As a consequence of this strategy of disengagement, EU assistance for civil society work on these highly politicized and sensitive problems is missing. In this sense, one cannot speak of any effort on the part of the Union to complement civil society activities on transitional justice in BiH. The lack of complementarity is not simply a result of how EU missions operate. Rather, it stems from the reluctance of Council and Commission policy to seek any engagement on these issues with the civil society actors pursuing them.

This study suggests that a meaningful engagement of the European Union with civil society groups active in transitional justice would involve not only complementing their current efforts but also helping them reclaim their voice and agency in the political process. This would require rethinking the meaning and role of civil society as seen from Brussels, to adopt a broader concept that includes more loosely organized victims groups and social movements as well as the professionalized NGO sector. Only then the EU can proceed to establish mechanisms for dialogue and appropriate schemes for assistance.

### **3. Transitional Justice in Bosnia and Herzegovina**

Bosnia and Herzegovina (BiH) presents a post-conflict case study that spans the entire range of transitional justice mechanisms, pursued with varying degrees of success at the international, state, Entity and local levels since conflict ended in 1995. It illustrates well the central dilemma of transitional justice after armed conflict and mass atrocity: high demand for justice within society coupled with little state resources and capabilities to be employed for addressing that demand. The war in BiH was marked by a high level of violence, most of which was directed against civilians and took the form of 'ethnic cleansing' through large-scale killings, torture, rape, expulsions, and extensive property destruction. While broad segments of society have experienced different forms of victimization and may now demand justice and redress, the conflict effectively destroyed state structures and twelve years later BiH remains a weak state with scarce institutional and material resources.

Ethnicity, coupled with nationalism, presents an additional challenge since it was central to the commission of crimes in the conflict and has served to politicize the calls and efforts for justice during the transition. The Dayton Peace Agreement for BiH has also contributed to the continued politicization of ethnicity that undermines the process of transitional justice, by entrenching a constitutional structure based on Bosniak, Croat and Serb 'constituent nations' and effectively mediating political power and participation through ethnic identity. In this context, most developments in transitional justice in BiH have come as a result of pressure exerted by the international community, most notably the Office of the High Representative (OHR), often by enforcing a compromise on the ethnic elites in charge in the Federation and Republika Srpska, without broad public consultations or engagement with victims and other civil society groups.

### 3.1. Criminal Prosecutions

The bulk of the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in The Hague has dealt with war crimes, crimes against humanity and genocide committed on the territory of BiH. Despite attempts to strengthen outreach and pursue ethnic balance in the trials, the ICTY remains disconnected from its local constituencies, perceptions of its work are largely modified by ethnic identity, and practices such as plea bargains are criticized by victims groups. In recent years, intensified international pressure and EU accession conditionality have helped improve the cooperation of Bosnian authorities with the Tribunal. Republika Srpska, however, has performed poorly in comparison with the Federation, and the overall record of BiH still fails to satisfy EU demands, acting as a roadblock for accession negotiations.

As part of the Exit Strategy of the ICTY, scheduled to complete all proceedings by 2010, a special War Crimes Chamber (WCC) at the State Court of BiH was established in 2004 with international assistance, operating with national and international staff. The Chamber was created to deal with cases transferred from the Hague Tribunal pursuant to Rule 11*bis* of the ICTY Statute, as well as with the most sensitive cases initiated in Bosnia. This means that the vast majority of war crimes cases will be left to the local courts, which so far have failed to address the scale of atrocity – Republika Srpska has conducted only a handful of trials, while the Federation has performed slightly better. The local courts are currently disabled by two sets of factors when compared with the WCC. First, they are much more vulnerable to political pressure and ethnic bias in the administration of justice. Second, they lack the staff and equipment that international assistance has secured for the WCC. Local courts would not be able to handle adequately 90 per cent of the war crimes caseload, as is currently intended, without addressing both of these weaknesses.

### 3.2. Truth Telling

An official national Truth and Reconciliation Commission (TRC) in Bosnia has failed to materialize despite repeated attempts to establish one. International actors, namely the United States Institute of Peace (USIP), have taken the lead in consecutive efforts that reflected largely the international agenda rather than local ownership of truth-telling processes in Bosnia. The ICTY opposed the initial attempt to create a TRC fearing it would overlap with its mandate and interfere in the prosecution of war crimes. Subsequently, the ICTY did endorse an effort in 2001, which, however, did not attract the necessary political backing and nothing concrete emerged. The more recent USIP-led initiative in 2005 once again failed to garner local legitimacy in the planning process and suffered the same fate. Among other shortcomings, the Working Group, coordinated by USIP and tasked with writing the draft law, did not consult broad segments of civil society and one of its members was forced to resign after victims groups shed light on his wartime activities. Similarly, the government-led Sarajevo Truth Commission (2006), with a mandate confined to investigating the wartime suffering of the population in Sarajevo, has yet to begin its work after nearly one year of operation. The Srebrenica Commission in Republika Srpska (2004) remains the only successful local fact-finding body in BiH, its reports produced with High Representative Paddy Ashdown pressuring and sacking uncooperative officials. Apart from this Commission, past and current governments, to date, have failed to create an independent and official truth-telling body in the country.

Where government efforts have faltered, civil society in Bosnia has taken the lead in confronting the past and engaging the public in truth-telling. Initiatives have ranged from documentation efforts on war crimes and missing persons, to artistic, cinematic, and literary projects, to inter-communal dialogue and public forums. Civil society organizations, victims groups, academics, and media groups are seeking to foster truth-telling processes and stimulate public debate on war crimes and justice issues. Three key NGOs from BiH, Serbia, and Croatia have come together to propose the creation of a Regional Victim's Commission, which will examine the causes of a conflict that spanned borders, and are seeking broad involvement of civil society, including victims groups, in the consultation process.

### 3.3. Vetting

Comprehensive vetting efforts in BiH in the judicial and security sectors, executed as part of the institutional reform process, have produced mixed results. The Dayton Peace Agreement provides that no person indicted by the ICTY can hold public office; that civilian law enforcement agencies must operate in accordance with internationally recognized standards; and, requires the prosecution or dismissal of police officers and public servants responsible for serious violations of minority rights. In addition, the OHR is empowered by the Dayton Peace Agreement to remove civil servants from public office for reasons ranging from their wartime record to obstructing the implementation of the peace process.

While generally regarded as successful, vetting processes for the security services in BiH have lacked transparency and clear criteria. Both NATO's screening of high ranking officers in the Bosnian army (2004) and the UN review of 24,000 police officers (2002) have led to accusations of procedural shortcomings and united public opinion across the constituent communities against the decertification decisions. Vetted police officers filed complaints with the Human Rights Commission and, in February 2007, Bosnia's Human Rights Ministry established a commission to review the nearly 800 police dismissals. Although the UN refuses to disavow the vetting process, a Commission Delegation official in Sarajevo stated that EU representatives are currently involved in meetings at the UN Secretariat in New York to discuss resolution of this issue.

Apart from these procedural shortcomings, the vetting process itself was incomplete. Media reports regularly surface indicating that police officers and public officials implicated in war crimes continue to serve. The findings of the Srebrenica Report corroborate these reports. Moreover, the UN did not institutionalize formal screening procedures for police recruitment and new recruits are not subject to a review of their wartime activities.

Vetting within the judiciary in BiH has proven more successful after several bungled attempts in the early post-Dayton period. In 2001, the High Representative established an internationally-appointed Independent Judicial Commission to oversee the review and re-appointment of all judges and prosecutors undertaken by the three permanent High Judicial and Prosecutorial Councils (HJPC), created by the HR in 2002. Although the initial background checks into the applicants alleged wartime activities were limited, a process of reviewing, appointing, and disciplining judges has now been institutionalized.

### **3.4. Reparations and Restitution**

Reparations in BiH have failed to attract significant public debate or international attention and a comprehensive state-sponsored reparations program has not been considered so far. Instead, individual and collective compensation claims have been brought before the Human Rights Chamber, which in 2004 became the Human Rights Commission of the Constitutional Court. In its best-known case on Srebrenica, the Chamber ordered Republika Srpska to investigate the atrocities, make a single payment of KM 2 million (approx. EUR 1 million) and four additional payments of KM 500,000 over four years to the Foundation of Srebrenica-Potocari. While the Commission is making progress to finish all pending cases, the Court continues to receive scores of new applications, and problems persist in securing compliance with past decisions.

In 1993 Bosnia instituted proceedings against then Yugoslavia for alleged violations of the Genocide Convention before the International Court of Justice (ICJ), but in February 2007 the Court ruled that Serbia cannot be held responsible for planning and perpetrating genocide and did not award the requested billions in wartime damages. Federation authorities immediately denounced the ICJ decision with chagrin while victims organized street protests. Finally, significant restitution and rebuilding of property has been accomplished through legislation and the post-war reconstruction effort.

## **4. Civil Society and Transitional Justice in BiH**

### **4.1. The Character of Civil Society in BiH**

The literature on civil society in BiH underscores three interrelated factors that affect the nature of civil society work on the ground. These are the nature of the armed conflict in 1992-1995, the constitutional structure put in place by the Dayton Peace Agreement, and the approach adopted by the international community in assisting civil society development during the transition.

The war in Bosnia and Herzegovina has been interpreted not only as an ethnic conflict but also as a war against civil society. The violence was directed not simply against the civilian population but against civility itself: the values of tolerance, dialogue, and individual autonomy. Intellectuals and advocates of multicultural values and peace were often the first casualties of the war. Young people and the educated middle classes fled the conflict in large numbers, leaving a vacuum for developing alternatives to extremist nationalist forces that eventually prevailed. While civil society requires a framework of order, security, and law in order to operate, the war in BiH entrenched a climate of fear, disorder, and insecurity leading to the effective collapse of the state. In the early 90s, a broad anti-war movement in Bosnia challenged the nationalist rhetoric and violence, often linking up with similarly minded movements in other parts of Yugoslavia. Since ethnicity provided the basis for assaulting civilians, the space for challenging and crossing divides diminished and the majority of people sought refuge into their respective sectarian identities and communities.

The peace process in BiH has not been able to reverse the logic of conflict. The Dayton Peace Agreement rewarded the nationalist extremists by establishing a

system of power-sharing built on ethnic membership in the 'constituent nations': Bosniak, Croat, and Serb. The constitutional structure of Bosnia reflects the ethnic principle by splitting the country into two Entities, Republika Srpska and the Bosniak-Croat Federation, and the autonomous Brcko District. Political participation in post-Dayton Bosnia is mediated through ethnicity, obstructing the emergence of a shared political and civic space for debate and negotiation. Civil society has slowly returned but as a weak and fragmented force, reflecting the legacy of conflict and the design of the peace. Few civil society organizations operate on a state-wide basis. The majority of NGOs, victims associations, and veterans groups conduct their activities either at the local or Entity level. Ethno-religious divides are reflected not only in their scope and activities but also in their failure to cooperate and establish links with organizations from other communities.

The process of civil society development in BiH reflects the top-down approach of the international community and donor agendas rather than authentic bottom-up initiatives and priorities. Much of civil society assistance has been channelled to NGOs providing service delivery, effectively taking on functions of the state. Most beneficiaries of donor funding are professionalized NGOs in urban centres, some of which have even been created in response to available funding schemes. By contrast, civic associations and interest groups have been largely ignored both as interlocutors and beneficiaries of international donors. This has diminished the space for autonomous civil society actors, necessary to build an accountable and responsive state. Such organizations have been marginalized because they are seen as politicized and often have not been able to professionalize. Victims associations illustrate this point. On the one hand, they are usually perceived as too political and exclusivist. On the other hand, these are often rural associations that lack the skills to draft complicated proposals and cannot fit their demands within donor priorities.

### **4.2. Civil Society, War Crimes and Justice**

Civil society in Bosnia remains weak, divided, and largely donor-driven. Civil society work on issues of war crimes and justice exhibits these characteristics as well. Transitional justice activities discussed in this section include documentation, support for criminal prosecutions, truth-seeking initiatives, reparations and advocacy of victims groups, peace-building and reconciliation, memorials, public education, and debate.

Documentation of war crimes and missing persons has been an ongoing activity in BiH since the very beginning of the war. The Research and Documentation Centre (RDC) in Sarajevo has developed, over the year, a comprehensive database on victims and atrocities within the project 'Population Losses 1992-1995.' Within the project, the organization is publishing a report on population losses in BiH expected in May 2007. The RDC has also taken the lead on monitoring war crimes trials in BiH as part of a regional initiative with partner organizations from Serbia and Croatia. Documentation has also been done at the local level. For example, the Mostar-based Center for Peace and Interethnic Relationships has created an archive on the Mostar region.

Civil society has been both active and largely ignored in the process of establishing a truth and reconciliation commission (TRC) for BiH. The Citizens Association for Truth and Reconciliation was established by Jakob Finci in order to lobby for the creation of a TRC. It successfully liaised with the ICTY and secured their support for a truth-telling body. But the draft law that resulted from this

effort failed to attract political backing. The second TRC initiative involved the United States Institute of Peace (USIP) taking the lead in partnership with the local NGO Dayton Project, created to facilitate the process. This initiative coordinated a working group composed of the eight leading political parties to draft legislation. It provoked an outcry among civil society and the public since both were excluded from the process of consultation and negotiation.

While this process has been frozen, the RDC has initiated a regional consultation exercise on a TRC with the Humanitarian Law Center (HLC) in Belgrade and Dokumenta Zagreb. This network is organizing public debates in Sarajevo, Zagreb, and Belgrade with broad civil society participation, discussing the various aspects of a possible regional victims commission for the former Yugoslavia. The Srebrenica Commission and the Sarajevo Truth Commission have not provided for any participation of civil society either through consultations or public hearings.

With respect to reparations, civil society groups have been making use of the available legal mechanisms for redress. Avenues they have explored include the Human Rights Chamber (now the Human Rights Commission at the BiH Constitutional Court) as well as civil suits for compensation in foreign courts. Examples include the 49 cases of victims from Srebrenica submitted to the Human Rights Chamber by the Association "Women of Srebrenica", seeking information on their missing relatives as well as compensation. Women victims of sexual violence have brought reparation cases in American courts under the Alien Tort Claims Act and the Torture Victim Prevention Act. Relatives of the Srebrenica victims filed a lawsuit for compensation in the Netherlands against the Dutch government and the UN for failure to prevent the Srebrenica massacre.

Associations of the families of missing persons started organizing in 1996-7 and expanded across Bosnia in 1998. They mobilized in response to the indifference of the political class to their problems and concerns. These groups are primarily based in rural areas, most harshly hit during the war. In the beginning, they used controversial methods to protest and focus public attention on their demands, such as blocking roads and public building entrances, and were widely seen as radical and highly politicized. With the support of the International Commission for Missing Persons, the various missing persons victims associations connected to engage in joint actions. In RS, they initially worked within an umbrella organization that included war veterans, civilian victims, the war disabled, and other groups. In order to better represent their demands related to missing persons, they have become more autonomous over time.

On the Federation side, most Bosniak and Croat associations have engaged in cooperation, except for the area of Central Bosnia where the nature of the conflict makes such cooperation more difficult. The Srebrenica victims have remained largely outside of this network and operate independently. The collaboration of the associations coming from the different sides succeeded in pushing through the Law on the Missing, which was adopted in 2004 with substantial input from these groups. The envisioned Trust Fund for compensating the family members of the missing remains inoperative due to lack of funds – there were expectations that any war damages awarded to BiH by the ICJ might be channelled into the Fund, and the recent decision unsurprisingly sparked protests across the Federation.

The relative success of mobilizing associations of families of missing persons has become an example for other victims associations to follow. Former prisoners of war (POWs) have more recently come together at the Entity level and cooperation between Croat and Bosniak former POWs has developed over time.

They have established some contacts with similar associations in Republika Srpska, but so far have kept these conversations private, away from the public. A common priority for this emerging network is to secure compensation for ex-POWs.

War veterans associations have also become more active locally and at the Entity level. For example, the War Veterans Associations 90-95 in Tuzla have created a "Self-Help" project to respond to marginalization and high rates of suicide in their ranks. The training and education combined with individual and group therapy is in high demand and now the Tuzla Associations want to replicate and share their experience with other war veterans groups. It remains difficult for war veterans who fought on different sides to establish links among themselves. Other victims groups worth mentioning for their recent activities are women victims of sexual violence during the war. These associations of the sexually harassed emerged within the space created by the widely publicized Foca case at the ICTY and the release of films like "Grbavica" ("Esra's Secret").

Civil society has been a key agent of public debate around issues of war crimes and justice in BiH with individual intellectuals, journalists, and civil society activists often taking the lead on these sensitive subjects. Documentaries, films, and art projects have provided alternative avenues for stimulating public debate on dealing with the past. For example, XY Films was established specifically to produce documentaries and television programs on the crimes committed during the war. The demand for producing narratives of the war has become another way of facing mass atrocity such as Emir Suljagic's internationally acclaimed 'Postcards from the Grave.'

Organizations such as the Association of the Alumni of the Center for Interdisciplinary and Post-graduate Studies for Sarajevo have contributed to academic research and debate. At the grassroots level, the Nansen Dialogue Network organizes public debates within the framework of the Dialogue for Democracy Project. In addition to publishing books and producing films on dealing with past, the Center for Nonviolent Action has organized public forums with war veterans in towns throughout BiH. Finally, NGOs such as the Helsinki Committee for Human Rights in RS and the RDC in Sarajevo have strong media presence and actively participate in public debate on a range of transitional justice issues.

Civil society in Bosnia has also mobilized around honouring the victims of the war and erecting memorials to capture the suffering of the different communities during the conflict. Each year, thousands gather in Srebrenica-Potocari to commemorate the victims of the massacre at a memorial established after the Human Rights Chamber's ruling in the Srebrenica case. Other memorials have also been erected to commemorate victims on each side of the conflict. However, this process has been ethnically focused and divisive, causing resentment and competition between communities. For instance, a monument was quickly set up in Kravica for Bosnian Serb victims of 1992-1993 in response to the Potocari memorial. A similar pattern occurred in Prijedor. In spite of the large number of Bosniaks killed there, only memorials for Serb civilians and soldiers existed until Bosniak victims mobilized to build one at Omarska camp. Years after the end of the war, inclusive commemorations of the victims in Bosnia are yet to emerge.

Much civil society effort has focused on peace-building and reconciliation. Activities for rebuilding interethnic trust and tolerance represent the core work of the International Multi-religious and Intercultural Center, while the Youth Initiative for Human Rights works specifically to build trust between young people

through seminars and exchanges. TERCA (Training, Education, Research, Consulting, Action) defines its projects as peace-building through dealing with the past. The Center for Building Peace – Sanski Most runs peace camps, conducts workshops for ‘former enemies’, and implements conflict transformation programs for young people. While education, particularly on recent history, has been recognized as necessary in the peace-building and reconciliation effort, civil society has not been able to overcome the ethno-religious divides entrenched in the school system. The Nansen Dialogue Network is currently working with high schools to address the problem of ‘Two Schools under One Roof’, whereby the student body is ethnically segregated within the same school buildings.

International assistance to civil society has been much more forthcoming in areas such as legal aid and the socio-economic aspects of refugee return and reintegration, i.e. activities related to service delivery. Donors have mostly avoided supporting civil society work on sensitive and politicized issues of transitional justice. Furthermore, it is in the nature of transitional justice to focus on advocacy and the broader political process rather than the measurable outcomes and deliverables preferred by the donor community. Where civil society projects on transitional justice have received funding, the beneficiaries have usually been professionalized human rights NGOs, perceived to be neutral and objective and able to draft complicated proposals and reports. The dense network of victims associations representing the interests of missing persons, former prisoners of war, and women, as well as war veterans groups, have been excluded from both the political dialogue facilitated by the international community in BiH and the assistance priorities of donors.

## **5. EU Involvement in Transitional Justice in BiH**

### **5.1. Policy Framework**

EU policy with respect to BiH reflects a two-pronged strategy combining active engagement on the ground and monitoring of the country’s performance against benchmarks and conditions. The first approach stems from the armed conflict that took place on the territory of BiH in 1992-1995 and the goals of post-conflict stabilisation and the consolidation of peace. The European Security Strategy adopted in 2004 stipulates that the long term objective of the EU is a stable, viable, peaceful and multiethnic BiH. The Council of the EU has deployed significant resources in the country to address a situation which may deteriorate and harm the Union’s objectives in the context of the Common Foreign and Security Policy (CFSP) and the European Security and Defence Policy (ESDP). The European Union Special Representative (EUSR) in BiH is also the High Representative in BiH, tasked to coordinate the implementation of the Dayton Peace Agreement and subsequent Peace Implementation Council (PIC) conclusions and declarations. In the framework of CFSP/ESDP, the Union maintains a peace-keeping force and a police mission in BiH. The EUFOR/Althea operation, with some 6,000 troops, and the European Union Police Mission (EUPM) both operate in line with the general objectives of the Dayton Agreement.

The second approach of the EU with respect to BiH resembles the standard ‘stick and carrot’ strategy employed for all countries aspiring to join the Union, spearheaded by the Commission and its DG Enlargement. In this context, the progress of candidate countries is continuously monitored against sets of criteria

and conditions, and supported with EU assistance to match accession priorities. The Thessaloniki European Council in 2003 introduced the European Partnerships as a means to integrate the Western Balkans into the Union, within the framework of the Stabilization and Association Process (SAP) which will govern relations with these countries until accession. While the first European Partnership with BiH dates back to June 2004, the country is yet to meet the conditions necessary to secure a Stabilization and Association Agreement (SAA).

EU accession conditionality for the countries of the Western Balkans comprises two sets of criteria. First, the Copenhagen European Council of 1993 defined political, economic and institutional criteria for all candidate countries, elaborating the political criteria to include stability of institutions guaranteeing democracy, the rule of law, human rights and the protection of minorities. Second, there are conditions set specifically for the SAP for South East Europe, which include, *inter alia*, full cooperation with the ICTY, respect for human and minority rights, the creation of real opportunities for refugees and internally displaced persons to return, and a visible commitment to regional cooperation. Each European Partnership incorporates the core SAP conditions and elaborates further priorities specific to the respective applicant country. Community assistance under the SAP to the Western Balkan countries is conditioned on further progress in satisfying the Copenhagen criteria as well as progress in meeting the specific priorities of the European Partnership. The Commission makes assessment of progress and reports regularly to the Council of the EU and the European Parliament through annual country progress reports.

EU conditionality in the SAP for Bosnia has been dominated by one aspect of transitional justice – the criminal prosecutions taking place at the ICTY, while at the same time it has ignored domestic transitional justice mechanisms. Cooperation with the ICTY has been consistently emphasized as a central priority of the European Partnership, and together with police reform and public broadcasting, it remains the central obstacle to concluding an SAA with the Union. In January 2006 the Council reiterated as a key priority of the European Partnership that BiH must fully cooperate with the Tribunal in apprehending all ICTY indictees at large.

The BiH 2006 Progress Report of the Commission concludes that while the Federation's cooperation with the ICTY has been satisfactory, the RS efforts remain insufficient. Recently the RS authorities have handed over to The Hague parts of its wartime archives and have made efforts to undermine the support networks of indictees, but so far they have failed to conduct further arrests and transfers of suspects. It remains to be seen whether the RS will improve its record of cooperation and, in case it does not, whether BiH will be given a Stabilisation and Association Agreement regardless of the failure or negotiations will be postponed, as is currently the case with Serbia. Despite its firm commitment to international justice, however, the EU has shown little interest in domestic mechanisms for dealing with the legacy of war crimes. Apart from identifying the need to staff and finance the State Court of BiH, which includes Section I for War Crimes, transitional justice issues are not mentioned among the European Partnership priorities and are largely excluded from Commission assessments of the Copenhagen criteria and Community assistance schemes.

### 5.2. Instruments

#### The European Union Special Representative in BiH

The European Union Special Representative in BiH, appointed by the Council, is responsible for the overall political coordination of all EU actors on the ground. He acts also as High Representative of the international community, mandated to promote continued progress in the implementation of the Dayton Peace Agreement, in accordance with the OHR's Mission Implementation Plan, and to support the policy objectives of the EU within the framework of the Stabilization and Association Process. The EUSR directs the European Union Police Mission (EUPM), provides guidance to the EUFOR Commander, and offers EU advice and facilitation in the political process. As High Representative, he can exercise the so-called Bonn Powers to intervene in all aspects of Bosnian political life and can remove officials from office, quash judicial decisions, and enact legislation necessary to advance the peace process.

Since the Dayton Peace Agreement did not set out a comprehensive vision for justice, transitional justice efforts undertaken by the OHR have been ad hoc and incomplete, primarily focused on prosecutions and vetting. The OHR created the War Crimes Chamber and a corresponding special department for war crimes within the Prosecutor's Office. He has supported the ICTY by freezing bank accounts and assets of indicted war criminals. In addition, consecutive High Representatives, using the Bonn Powers, have dismissed a total of 185 public officials, barring them from holding public office until further notice, and have established a process to review the appointment of judges and prosecutors.

The most recent EUSR/HR, Dr. Christian Schwarz-Shilling, took office in early 2006 and has pursued a different strategy. He declared that he would refrain from using the Bonn Powers, unless a serious threat to peace and stability emerged, so that BiH authorities could assume ownership of and full responsibility for the reform process. He envisioned 2007 as the year of change in BiH, with a transition from an OHR-led reform process to an EU presence that emphasizes reform without international community imposition. In 2006, the HR did not impose any major reforms required for European integration and enacted far fewer executive decisions than his predecessor.

Until Schwarz-Shilling, each previous HR augmented the use of the Bonn Powers, achieving significant breakthroughs, especially in weakening the support networks for war crimes suspects. Despite his reluctance to interfere, Schwarz-Shilling has made use of his Bonn Powers to overturn previous OHR vetting decisions removing and barring individuals from public life. Schwarz-Shilling rehabilitated 18 officials and put forth two decisions in 2006, effectively allowing any formerly barred officials to assume positions in public institutions and to serve in political parties, regardless of the reason for dismissal.

The decision to shut down the OHR by June 2007 was revised at the Peace Implementation Council meeting held at the end of February 2007. The PIC prolonged the OHR mandate, with its Bonn Powers, for another year until June 2008. The EU stated that it will strengthen its engagement with BiH in line with the expected OHR closure through a revised and reinforced EUSR mandate. But it remains to be seen how the future role of the EUSR will evolve.

### European Union Police Mission

In January 2003, the EU deployed its first ESDP mission, the European Union Police Mission (EUPM) in BiH, which replaced the UN-led International Police Task Force (IPTF). Under the direction of the EUSR, the EUPM's aim is to establish a sustainable, professional, and multiethnic police service, operating in accordance with the best European and international standards. Its mandate is to strengthen Bosnia's police forces through "monitoring, mentoring, and inspecting," emphasizing local ownership of the reform process and local police capacity for fighting organized crime. It concentrates on providing technical assistance in order to improve the police services' organizational capacity and to facilitate policing on complex forms of crimes, such as organized crime, trafficking, and money laundering.

The mandate of the EUPM was extended in December 2005 with two years and strengthened to focus on the fight against organised crime and police restructuring. The EUPM works with the State Investigation and Protection Agency (SIPA) to build its operational effectiveness in fighting organized crime, including the dismantling of support networks for war criminals, and assists in the development of the State Border Service and the Ministry of Security. In addition, it monitors the police force throughout the entire investigation process to ensure it meets appropriate standards.

By concentrating primarily on technical issues and working with a weak mandate, which lacks executive powers, the EUPM has encountered significant difficulties in establishing a professional and independent police force. The lack of effective investigation of war crimes has been a principal obstacle to rebuilding the rule of law in BiH. Police, especially in the RS, still serve the narrow interests of nationalist politicians and arrests of lower-ranked indictees have been empty gestures of cooperation, arising mostly out of political pressure. Despite the declared success of the IPTF vetting process, police officials with questionable wartime backgrounds remain a problem, confirmed by the RS Government Srebrenica Report, which lists hundreds of individuals taking part in the massacre as active duty officers. Unlike the IPTF, the EUPM has not been mandated to decertify obstructionist police officers or those implicated in war crimes and it has abstained from making such requests to the EUSR/HR.

### European Union Force/Althea

In December 2004 the EU launched its military operation in BiH, EUFOR/Althea, in order to strengthen the EU presence and replace the NATO-led SFOR. Operating under an UN Chapter VII mandate, EUFOR's mission is to maintain a stable and safe environment for the implementation of the military and civilian aspects of Dayton through deterrence and reassurance. NATO retains a small headquarters presence in Sarajevo to provide advice on defense reforms and to support EUFOR efforts to apprehend indicted war crimes suspects, under the so-called 'Berlin Plus' arrangements.

EUFOR's primary task is to support the ICTY and relevant authorities, including the detention of persons indicted for war crimes, and to combat organized crime through the Integrated Police Unit, its military police force. The IPU enables it to conduct anti-organized crime operations without informing local police. To date, EUFOR has conducted several operations aimed at collecting illegal weapons, disrupting organized criminal activity, pursuing war crimes fugitives and attacking their support networks. EUFOR has worked closely with Bosnian law enforcement agencies on combating organized crime, including conducting joint anti-crime

operations and arrests. It cooperates with NATO and SIPA in hunting down and arresting war criminals.

Based on a positive evaluation of the security situation in BiH, the EU decided to implement a transition of EUFOR/Althea in late February 2007. The EU will reduce the size of EUFOR 2,500 troops at the end of June 2007. However, it will maintain a reserve force for rapid deployment in case the security situation deteriorates. The reduced force retains the same robust peace-enforcement mandate under Chapter VII and will continue to provide support to the ICTY while noting that responsibility for cooperation rests with BiH authorities.

### The Reform Process Monitoring

The main operational instrument for political and technical dialogue between the EU and BiH is the Reform Process Monitoring (RPM), which is the successor to the Consultative Task Force. It is the primary mechanism established for the European Partnership in the Stabilisation and Association Process. Each year, approximately two to three plenary RPM meetings are held, bringing together representatives from the BiH government and the EC, to assess the progress made in implementing reforms. A total of seven plenary meetings have been held so far. In addition, sectoral RPM meetings are organized every few months to discuss technical aspects of reform implementation. Officials in Brussels have stated that the impact of this dialogue has been limited. While the RPM meetings have focused on full cooperation with the ICTY, they have *de facto* ignored domestic transitional justice mechanisms, both as priorities of the European Partnership and as a subject of monitoring by the Commission.

### 5.3. Assistance

EU financial assistance to Bosnia has been declining since 2001 with only €332 million being earmarked for the 2007-2010 period. The EU has distributed aid through the Community Assistance for Reconstruction, Development and Stabilization (CARDS) program in 2000-2006 and continues to fund civil society through the European Instrument for Democracy and Human Rights (EIDHR). On 1 January 2007, the EU introduced the Instrument for Pre-Accession to replace CARDS as the financial instrument of the SAP. The IPA will distribute a total of €62 million in 2007 and funding will increase annually to reach €110 million by 2010.

The CARDS funding has been allocated to match primarily the institution-building and economic development priorities of the European Partnership. CARDS assistance for 'Democratic Stabilization' has focused on return and reintegration of refugees and internally displaced persons, media reform, and civil society but has ignored the right to justice and reparation for past human rights abuse, and missing persons. Under 'Good Governance and Institution Building', support was given for general public administration reform and capacity building (customs and taxation; public finance; health sector; local government) and justice and home affairs (combating corruption, financial and organized crime; border management and police; technical assistance to national judiciaries; restructuring ministries of justice). While CARDS co-funded the establishment of the War Crimes Chamber of the State Court of BiH, support was not provided for training war crimes police investigators, prosecutors or judges, establishing witness protection and relocation programs, or funding fact-finding bodies across the region. Similarly missing was assistance in relevant police reform to deal with war crimes and ethnically-motivated crimes.

The IPA will primarily focus on transition assistance, institution building, and regional and cross-border cooperation. The main areas of intervention in support of the Copenhagen political criteria include public administration reform; constitutional reform; assistance to minorities and returnees; and support to civil society and the media. The IPA will continue to fund the War Crimes Chamber and will support cooperation between police, prosecution, courts, and the penitentiary system. Assistance will be provided to strengthen regional cooperation in criminal matters between the countries of the former Yugoslavia but only at the State Court of BiH. Support to local courts will not include specific assistance for the prosecution of war crimes at the local level. Assistance for a witness protection and relocation program remains missing.

The second priority for IPA assistance is the development of the NGO sector in Bosnia. For 2007, the IPA will allocate €1.5 million to strengthen cooperation across civil society and to further its involvement in the reform processes. An emphasis is placed on building civil society capacity to act as a watchdog and partner of the government. To that end, the IPA designates funding in support for a State-level Economic and Social Council as a framework of civil society dialogue with the government. While assistance is earmarked for work with vulnerable groups (children, the elderly, the disabled, and minorities), no provision is made for support of the associations of war crimes victims.

The EIDHR funds civil society organizations, through macro- and micro-projects that promote the rule of law, respect for human rights, protection of minorities, and political pluralism. Past and ongoing assistance includes civil society initiatives for fighting torture and impunity with a special emphasis on international criminal courts; the promotion of children's and women's rights; education reform; strengthening democratisation and good governance; and combating discrimination against minorities. It should be stated that the failure to spell out the general programmatic areas to include explicitly transitional justice, has effectively banned access of NGO war crimes work in Bosnia to EIDHR funding. Moreover, war crimes and justice are not currently envisioned as possible priorities for future funding.

## **6. EU Coherence and Complementarity with Civil Society**

### **6.1. Policy Coherence**

Bosnia and Herzegovina presents a challenge for the European Union because the legacy of conflict remains an obstacle to the consolidation of peace. At the same time, the country aspires to join the European Union and has entered into a standard process of negotiations involving EU conditionality and monitoring. The ambiguity of Bosnia's status as a post-conflict zone and a 'normal' country on track to accession is reflected in the two approaches that the Union has developed to tackle the challenge: peace-building within the ESDP and EU integration. The Council of the EU has deployed significant resources to prevent the situation on the ground from deteriorating and presenting regional threats to peace and security, including the EUSR, EUFOR, and EUPM. Alongside the peace-building effort, the European Commission has incorporated Bosnia in the Stabilisation and Association process through European Partnerships, elaborating key priorities and reforms as preconditions for the eventual accession of the country to the EU. Interviews at the Commission confirm that the relationship

between the two approaches has not been conceptualized at the EU level and the incentives that come with integration have not been clearly linked to the objectives of peace-building.

Currently, these two approaches are integrated in an EU policy framework that establishes the role of ESDP missions in support of the overall objective of BiH's integration through the SAP. As peace implementation by the international community phases out and less resources and powers are used to that objective, the accession framework is intended to absorb the residual conflict-related issues on the ground. This vision is reflected in the expected closure of the Office of the High Representative and his Bonn Powers in 2008 and the concurrent reinforcement of EU engagement in BiH. But the standard 'stick and carrot' approach used for integrating other Eastern European countries might prove inadequate to achieve both consolidation of peace and transition towards EU accession on its own. Without taking into account and addressing directly the legacy of war, the potential for instability remains, which would undermine both the achievements in peace implementation and the process of accession to the Union.

Conflict transformation in BiH has not been completed to the point where it is irreversible. The recent speculations of RS Prime Minister Dodik suggesting the possibility to hold a referendum for the Entity's secession have reignited divisive rhetoric in public debate on the very viability and integrity of the state. The stalemate in the current debate on constitutional reform demonstrates the reluctance of the ethnically-divided political class to achieve compromise on their own and to prioritize state-building over narrow political interests. The impotence of the OHR to facilitate compromise, without using the Bonn Powers, has also been revealed in this context. War crimes issues that have been largely ignored by the international community continue to undermine the political process and to reinforce existing grievances at the level of communities and individuals in society. For example, the RS representatives at the State Parliament effectively blocked its operation for a month in 2006 over delays in setting up the Sarajevo Truth Commission. The shortcomings of vetting of the police services remain a persistent source of popular resentment in BiH, since the process is seen as both incomplete and unfair. Most recently, the ICJ judgment exculpating Serbia for genocide reinforced divides as Serbs in the RS celebrated while Bosniaks in the Federation protested and mourned.

These conflict-related issues cannot be easily ignored by the EU if it takes its peace and integration objectives in BiH seriously. Instead of sidelining them in the political dialogue with Bosnian authorities and the assistance framework, a better approach might involve rethinking how such issues should be integrated coherently in its overall strategy. In order for the SAP to effectively facilitate the resolution of the remaining problems stemming from war and mass atrocity, while it prepares BiH for accession, the SAP must be adapted to take into account these potential sources of conflict and instability. As it currently stands, the SAP does not articulate a coherent strategy for the consolidation of peace and integration in EU structures. The problem in this context is not merely about enhancing the coherence between the ESDP and the SAP frameworks in their current form. In other words, it is not a matter of better coordination between the Council and the Commission. Rather, a coherent strategy would involve first, deepening the ESDP engagement with conflict-related issues and second, incorporating specific priorities that will address such issues as part of European Partnerships and the SAP.

War crimes remain one of the outstanding conflict-related issues with high potential to galvanize tensions between communities, to obstruct the political

process, and to undermine the legitimacy and stability of transition. Transitional justice offers a security strategy and an institutionalized framework for processing the legacy of war crimes. On the one hand, it opens up space for negotiating conflicting and often competing narratives of injustice across communities and at the individual level. The opportunity for articulating grievances and claims for justice in a public policy debate commits people to the democratic political process and the rule of law, minimizing incentives for seeking extra-judicial and extra-political forms of redress. On the other hand, transitional justice can provide a rule-based methodology for disabling those elements within society that might have a stake in the culture of illegality and state weakness linked to the conflict.

In order to advance its goals in BiH, the ESDP framework should take a justice-sensitive approach to security and peace-building. Council officials confirm that war crimes issues are discussed at the Ministerial level only with respect to the ICTY. So far, the ESDP missions on the ground have not been mandated to reflect the role of justice mechanisms in enhancing security and peace-building on the ground. The key supporting tasks of the EU-led force are to provide support to the ICTY and relevant authorities, including the detention of persons indicted for war crimes, and to provide the security environment in which the police can act against the organised criminal network. However, the overall security environment is compromised by the significant number of war criminals at large, not only the remaining few ICTY indictees. Similarly, EUFOR efforts to facilitate local authorities in combating organized crime cannot be effective without explicitly focusing on the links, if not continuity, between wartime networks and organized crime.

The mandate of the EUPM to build a professional police service, through mentoring, monitoring, and inspecting, effectively ignored the key contentious issue of vetting. The vetting implemented by IPTF was incomplete in purging war criminals from the structures; unfair in conducting recertification; and failed to institutionalize a review process for recruitment. It is difficult to see how the EUPM can achieve its goals given the persistent obstacles inherited from the flawed process of vetting. A coherent ESDP approach would entail facilitating the EUPM in completing its mandate by reopening the issue of vetting in the Dayton framework. Given that the EUSR is tasked with the overall coordination of the peace implementation process and the OHR is due to close within a year, the responsibility for implementing a coherent justice-sensitive approach across ESDP missions should be centralized under his authority, within a framework adopted by the Council.

Since the SAP provides the overall framework of EU policy and engagement in BiH, deepening the ESDP component must take place within a broader adaptation of that framework to address outstanding conflict-related issues in the country. The European Partnerships and the Reform Process Monitoring are useful instruments for absorbing the potentially disruptive war crimes and justice issues within the political process and the rule-of-law structures. This potential has not been explored so far. The Council puts a premium on cooperation with the ICTY as a key priority for the European Partnership with BiH, while neglecting domestic transitional justice mechanisms. The Commission interpretation of the Copenhagen political criteria places full cooperation with The Hague and domestic war crimes trials in the section assessing progress on regional issues and international obligations, rather than in its judicial system reporting. The Commission assessment of administrative reform ignores the problems related to vetting in evaluating police reform. Apart from the Human Rights Commission, mechanisms for dealing with war crimes and justice for mass atrocity are not part

of the assessment of national institutions guaranteeing democracy, rule of law, and human rights.

By leaving aside these highly politicized and sensitive demands of transition, the EU has failed to engage Bosnian authorities and the broader public in a political dialogue that could help find policy solutions to address the legacy of conflict. Furthermore, since domestic transitional justice does not feature in the SAP and Copenhagen conditionality, it has also been largely excluded from EU assistance that matches reform priorities. The EU has missed valuable opportunities to trigger political dialogue, public debate, and the emergence of institutional capacity for dealing with the divisive aspects of the past. Brussels officials have openly stated that the EU takes a future-oriented approach to BiH and an overemphasis on war crimes is a stumbling block for rebuilding the country. However, this analysis ignores both the potential of past injustice to jeopardize the entire project of state-building, and the forward-looking contribution of transitional justice to the consolidation of peace and EU integration of BiH. To operationalize a coherent framework that addresses war crimes and justice in Bosnia, these issues must be incorporated at the level of the SAP and Copenhagen conditionality, the European Partnership priorities, and by providing matching assistance through the Instrument for Pre-Accession and the European Instrument for Democracy and Human Rights.

### **6.2. Operational Aspects of Coherence and Coordination**

Given the complexity of EU engagement in BiH, alongside multiple international actors, coordination to ensure coherence has been a continuous challenge. Arrangements are in place for external coherence between Brussels and Sarajevo and for internal coherence between the different EU missions within BiH. Decision-making authority on CFSP/ESDP is concentrated at the level of the Council, the Political and Security Committee (PSC), and the Council Working Groups, while the Commission and Parliament oversee relevant financial arrangements. The Council, through its Secretary General, must ensure coherence between the various ESDP instruments while the Commission is responsible for developing its assistance programs along the lines of Council priorities. While coherence at this level remains a challenge, the Secretary General is tasked to guaranteeing that funding matches policy. The PSC coordinates and provides strategic direction to ESDP missions. The Commission provides regular progress reports to the Council and Parliament, incorporating contributions from its Delegation, the government of BiH, the Member States, European Parliament reports, and information from various international and non-governmental organizations.

Internal coherence and overall political coordination in Bosnia is the responsibility of the EUSR. In this role, the EUSR convenes weekly meetings with EU Heads of Mission, monthly EC assistance coordination meetings, and chairs monthly operational meetings with EUFOR, EUPM, Commission Delegation, EUMM, and the EU Presidency. The EUSR directs the EUPM while providing only political guidance to the EUFOR Commander. In the case of disagreement between EUFOR and the EUSR, both report to their separate chains of command to seek clarification. In the fight against organized crime, tensions existed between the EUPM, instructed to delegate to local police authorities, and EUFOR, which was instructed to bypass them. Coordination improved after EUPM's mandate was strengthened and revised to allow it to take the lead in coordinating operations to counter organized crime.

Since the EUSR is the High Representative, he also must coordinate with other international actors operating in BiH. The permanent members of the Steering Board of the PIC (Canada, France, Germany, Italy, Japan, Russian, UK, US, the Presidency of the EU, the Commission, and the Organization of the Islamic Conference, represented by Turkey) meet once a week in Sarajevo to provide the OHR with political guidance and coordination. A Board of Principles was established as the main coordinating body in 2002, meeting once per week to ensure coherence and prevent overlap in activities. The Board of Principles brings together the OHR, EUFOR, NATO, OSCE, UNHCR, EUPM, the European Commission, IMF, and the World Bank. Another level of coordination involves formal and informal donor meetings, specifically to support the State Court of BiH, which have been managed by the International Registry quite successfully.

International organizations active in the field of transitional justice issues include the OSCE, the International Commission for Missing Persons (ICMP), the ICRC, USIP, UNDP, and other development agencies. Within its Dayton mandate to monitor the human rights situation in BiH, the OSCE currently monitors domestic war crimes trials, including those transferred from the ICTY pursuant to Rule 11*bis*, and provides technical assistance in the process of trying war crimes cases. It also coordinates the effort for education reform. The ICMP and the ICRC have overall responsibility for the remaining missing persons, exhumations of mass graves, and support civil society efforts for dealing with the past. USIP has facilitated the initiatives for establishing an official truth-telling mechanism. The UNDP has conducted a survey of transitional justice in BiH in an attempt to develop a comprehensive approach to the process. Currently, it provides support to the War Crimes Chamber of the State Court, some assistance to local courts, and is planning to broaden their work in this field. Individual Member States have also committed resources to the War Crimes Chamber and to NGOs working in the field.

While there are multiple international actors involved in different aspects of transitional justice work in Bosnia, there is lack of coordination among them, limiting the impact of their work. Our interviews suggest that no international agency is prepared to take the lead on the highly sensitive and politicized problems of war crimes and justice. Furthermore, the EU is perceived within this group as largely disengaged and reluctant to take the issues on board. Given that all international actors are committed to working within the framework established by the EU in the SAP, the European Union is best positioned to coordinate these efforts. The logical steps to ensure coherence among international organizations in the field of transitional justice include commissioning an assessment or mapping study to clarify the activities of all relevant actors and proposing a coordination structure. Within his mandate to coordinate all ESDP and Community activities in BiH, the EUSR is the most relevant body to implement these tasks.

One policy area with clear lack of coherence and coordination between international actors is the domestic prosecution of war crimes in BiH. The EU and Member States have largely focused their efforts on establishing and making operational the War Crimes Chamber of the State Court of BiH. Yet this War Crimes Chamber will be able to prosecute no more than ten percent of the war crimes case load likely to come before Bosnian courts in the next period. The vast number of criminal prosecutions will have to take place at the poorly equipped, understaffed, and under-funded 16 local courts that have already begun to hear cases. Without a coordination effort between the EU and the other agencies committed to supporting local war crimes trials, the discrepancy between a well-established and well-funded War Crimes Chamber and weak local

courts with limited capacity, is likely to persist. It should be noted that the EU's overall goal of seeing war crimes processed through domestic courts, as the ICTY is phasing out its operations, would be better served if it engages more closely with other actors that can channel their resources towards the 16 local courts that the EU currently does not support. For example, recent UNDP assessments identify their commitment to take the lead in that respect. Rather than calling for an across-the-board increase in EU funding and engagement with specific transitional justice mechanisms, this case suggests that the more pressing need is for the EU to map and pool existing international resources in a coherent framework.

It should be noted that improving the operational coordination of European missions, on its own, will have a limited impact on transitional justice processes in BiH. As already noted, the EU lacks a coherent policy framework matched with adequate assistance for addressing transitional justice as part of the conflict-related obstacles to peace-building and EU integration of Bosnia. Without deepening and fine-tuning EU engagement in war crimes and justice, the multiple EU agents on the ground can achieve little, regardless of efforts to improve coordination. However, given that the Union intends to strengthen its engagement over the next period, if it adopts a justice-sensitive approach within its policy and instruments, this would have to be matched with structural adjustments on the ground. Currently, transitional justice efforts involve the infrastructure for security and rule of law provided by the EU and the relevant local stakeholders. In this sense, transitional justice emerges at the intersection of security structures, rule of law activities, conditionality and dialogue, as well as the provision of technical and financial assistance, all of which depend on the interaction between the EU and BiH.

One avenue for facilitating the necessary interaction between different stakeholders involved in the process is provided by the emerging methodology of interface units. This methodology is particularly relevant for a context that involves multiple actors and multilateral coordination needs. This study proposes the creation of a War Crimes Interface Unit within the office of the EUSR. The Unit should provide permanent infrastructure and staff for coordination of justice-related activities of the EU missions (EUSR, EUFOR, EUPM, the Commission Delegation) and key local agencies and ministries dealing with justice, security and policing. Directed by the EUSR, the Interface Unit should perform coordination functions with view to ensure the necessary support and interaction between all active members. Specific functions can include, *inter alia*,

- Coordinating the effort for cooperation with the ICTY within the SAP
- Coordinating support for the War Crimes Chamber
- Coordinating support for the 16 local courts working on war crimes
- Coordinating issues of regional cooperation in criminal matters

The Interface Unit additionally would provide a forum where local stakeholders and EU representative can bring up problems and identify pragmatic solutions to day-to-day challenges, within a framework of dialogue. The sensitive issues of transitional justice have so far been dealt with by the international community, either through direct action, sidelining local counterparts, or by using the instruments of political pressure. The Unit would provide an opportunity to engage in a technical discussion that can operationalize policy and help generate ideas and strategies that can be taken up to relevant decision-makers on both sides.

### 6.3. A Regional Approach to Transitional Justice in the Western Balkans

The war in Bosnia was not a traditional civil war and was *de facto* a regional conflict. The cross-border and inter-ethnic nature of the war requires a regional approach to dealing with the legacy of mass atrocity. In BiH and across former Yugoslavia, domestic war crimes trials are being conducted in a situation in which perpetrators, victims, witnesses, and evidence are often located across state borders. This requires regional cooperation in criminal matters, which is currently regulated by bilateral agreements but is obstructed by political, technical, and financial problems. Cooperation at the investigation and prosecution stages must be enabled through training and resource allocation to fit current agreements. Furthermore, without regional witness relocation and exchange programs, the witness protection legislation that Bosnia and the other ex-Yugoslav countries have adopted, remains inoperative. Both the War Crimes Chamber in Sarajevo and local courts depend on witnesses and evidence that can be obtained only in a regional framework.

Since the SAP was established for all Western Balkan countries, a coherent approach to transitional justice in BiH can emerge only within this regional framework. Adopting a justice-sensitive approach to the SAP in Bosnia must be replicated across the border with Serbia and Croatia, which would provide both incentives for the governments in the region and would prevent the politicization of the issue in each context. If transitional justice is a priority in BiH, it must be a priority in the other countries implicated in the conflict as well, in order for the Union to be seen as fair-handed. A regional approach is necessary to ensure the effectiveness and coherence of overall EU policy, as well as the strengthening of regional cooperation in criminal matters. Our interviews at the EC Delegation in Sarajevo demonstrate that local staff are aware of this need. The Delegation has been coordinating a project that brought the regional war crimes prosecutors together to discuss the matter. The project has exposed the need for more support and pressure at the political level. Moreover, it has clarified the current lack of coherence – cases on Srebrenica, for example, have been opened in different countries without coordination at any level.

### 6.4. Complementarity with Civil Society

The European Union has engaged in a political dialogue in Bosnia that has sidelined civil society as an interlocutor and partner in the transition. The SAP framework and the Reform Process Monitoring does not provide for mechanisms to engage non-state actors. Furthermore, the European Partnership priorities do not even mention civil society, which means that effectively the third sector is excluded from the agenda of EU negotiations with BiH authorities. The literature on post-conflict reconstruction has long emphasized that civil society is a key factor for the political and economic development of weak states. Given that Bosnia remains a weak state, the Union has ignored the potential role of civil society in state-building to the detriment of its own policy goals and efforts. The potential of civil society for development is significant, both with respect to building responsive and transparent state structures and as a partner in the reconstruction effort.

Recently, EU policy for engaging with and supporting civil society organizations in BiH has been reconsidered and is moving in a positive direction. The background for policy change was provided in the Thessaloniki Agenda for the Western Balkans, stipulating that consolidation of peace, stability, and democratic

development cannot be achieved without thorough involvement of local stakeholders. Thessaloniki further established that strengthening the capacity of civil society in partner countries should be given a priority and the financial means should be made available for non-state actors when drawing up programmes of financial support.

As a result, civil society was consulted for the first time in the planning for the current IPA assistance programming for 2007-2009. In 2005, the Commission carried out a Mapping Exercise for civil society, shared the results with BiH authorities, and used it as the basis for the development of its 2007 project "Capacity-Building of Civil Society to take part in Policy Dialogue." The purpose of the project is to strengthen civil society both as partner and as a watchdog of the government in the reform process. The project also aims to develop better communication and cooperation among non-state actors, as well as between Entities and the constituent peoples, in this way facilitating greater understanding between citizens of BiH. As already mentioned, the EU has committed resources for the development of a State-level Economic and Social Committee. Once established, the Council will initiate an institutionalized policy dialogue between civil society and the government.

This intensified involvement of the European Union with the third sector does not include engagement and consultation with civil society actors working on issues of transitional justice. Indeed, our extensive interviews with key NGOs and victims groups suggest that the European institutions in Bosnia have pursued a deliberate strategy of avoiding engagement with transitional justice issues and actors. For example, Mirsad Tokaca, head of one of the strongest and most vocal outfits, the Research and Documentation Centre in Sarajevo, stated that the EU ignores those groups in civil society that work on war crimes. Key organizations for dealing with the past such as Helsinki Committee for Human Rights in Republika Srpska, Center for Nonviolent Action, Youth Initiative for Human Rights, and the Association of the Families and Missing Persons in Zvornik, among others, have never been contacted by EU representatives for consultations or discussion of war crimes and justice issues. Where links exist, they are often based on personal contacts rather than coherent policy.

Not surprisingly, EU assistance for civil society work on war crimes issues also reflects this general strategy for disengagement. The distribution of funds from the EIDHR incorporates only civil society projects providing services to war victims, for example, support for therapy and rehabilitation of torture victims, carried out by the NGO Citizen Association "Vive Zene" in Tuzla. Activities such as monitoring war crimes trials, truth-telling, or advocacy on behalf of war victims are not supported. In this sense, one cannot speak of any effort on the part of the Union to complement civil society activities on transitional justice in BiH. The lack of complementarity is not simply a result of how EU missions operate. Rather, it stems from the reluctance of Council and Commission policy to seek any engagement on these issues with the civil society actors pursuing them.

EU officials in Brussels and Sarajevo explain that war crimes and justice are not covered by EIDHR and the IPA because there is no consensus on this subject in BiH itself. Furthermore, as the situation on the ground has deteriorated in the last year, they don't foresee future assistance anytime soon. They state that the only opportunity to pay more attention to mass atrocity would come if Bosnian authorities agree amongst themselves to prioritize the problems in this field. However, this approach contradicts the notion that civil society is an autonomous sphere, separate from the state and reflecting interests and priorities that are often ignored by state institutions. When civil society is expected to perform

watchdog functions, again the assumption is that the officials should not be the only ones to determine what is best for the citizens and should be responsive to demands coming from the bottom-up.

By disengaging the broad segments of Bosnian society that have a stake in transitional justice, the European Union has failed to identify an alternative source of legitimacy in the political process. Groups of victims of torture and sexual violence, prisoners of war, associations of the families of the missing, and war veterans comprise the part of civil society with the highest demand for justice and the one that can provide legitimacy to efforts to address mass atrocity. These groups can be a powerful partner of the international community in the peace-building effort especially since they often feel neglected and betrayed by the ethnic elites and political classes. Rather than abstaining from war crimes and justice for fear of destabilization, the EU would be better served if it recognized the potential of bringing in and empowering civil society that is currently marginalized on all sides of the ethnic divides. Indeed, it is precisely the most victimized groups in Bosnian society that have been seeking inter-ethnic cooperation as a result of their common experiences during the war and their shared struggle for justice and redress during the transition. Together with NGOs that already work across communities, these victims groups constitute a powerful resource that can generate the legitimacy necessary to transcend ethnic divides in the state-building project.

This study suggests that a meaningful engagement of the European Union with civil society groups active in transitional justice would involve not only complementing their current efforts but also helping them reclaim their voice and agency in the political process. This would require rethinking the meaning and role of civil society as seen from Brussels, to adopt a broader concept that includes more loosely organized victims groups and social movements as well as the professionalized NGO sector.

In order to operationalize such a concept, the Commission can conduct a mapping study in Bosnia that incorporates this broader set of actors and civil society forces. The EU should then establish a mechanism for dialogue on transitional justice between civil society and EU representatives. This presents an opportunity for the EU to justify a future engagement in war crimes issues since civil society can lend legitimacy to bringing demands for justice into the political process. The dialogue can also generate policy solutions through a participatory process, emphasizing local ownership on this most sensitive subject. Such a process of engagement has the potential to provide the EU and civil society with counterarguments to the divisive ethnic rhetoric of the political elites, stressing shared demands and problems of victims across communities. As a last step, based on its mapping exercise and the dialogue with civil society, the EU will be prepared to devise an adequate strategy for financial assistance to support civil society action in transitional justice.

## 7. Recommendations to the European Union

### CFSP/ESDP and Enlargement

1. To rethink the current approach to BiH by integrating coherently the peace-building imperative within the EU integration strategy and the Stabilisation and Association process for the country.
2. To develop a targeted policy on transitional justice in BiH by first, deepening the ESDP engagement with conflict-related justice issues and second, incorporating specific priorities that will address these issues as part of the European Partnerships and the assistance framework of the SAP.
3. To elaborate, within the CFSP/ESDP framework, a justice-sensitive approach to security and peace-building in BiH. This would entail incorporating war crimes and justice within existing mechanisms, by refocusing the mandates and adjusting the operational structures of ESDP missions.
4. To enhance EUFOR/Althea support for the State Investigation and Protection Agency and the local police structures in the overall effort to arrest and detain war crimes suspects, whether indicted by the ICTY or domestic courts.
5. To support the demands of BiH authorities for reopening the issue of police (de)certification within the Dayton Peace Implementation framework.
6. To enable the EUSR/OHR and the EUPM to provide technical assistance and facilitate the establishment of a comprehensive framework for vetting and recertification, including provisions that institutionalize a review process for ongoing recruitment in the BiH police services. This would involve broadening the mandate of the EUPM to include war crimes in addition to organized crime.
7. To task the EUSR to ensure coherence in the implementation of this integrated strategy on transitional justice across Commission and ESDP missions in Bosnia.
8. To adopt a regional approach to transitional justice in the countries of the former Yugoslavia, and to ensure coherence of BiH policies within that framework.

### Coherence and Coordination in BiH and the Region

9. To commission a mapping exercise, coordinated by the EUSR in BiH, in order to establish the involvement and activities of all relevant international actors supporting various transitional justice mechanisms
10. To propose a coordination structure that will facilitate the coherence and complementarity of actions in support of transitional justice across all relevant donors and international agencies. The precise format and membership of this structure should build on the findings of the mapping

exercise, while responsibility for its coordination should be delegated to the EUSR

11. To establish a War Crimes Interface Unit within the office of the EUSR, in order to coordinate the overall transitional justice effort of EU missions and key local agencies working on justice, security, and policing.
12. To support regional authorities and judiciaries with technical expertise and assistance in designing mechanisms that will operationalize existing bilateral agreements for regional cooperation in criminal matters.

### **Complementarity with Civil Society**

13. To adopt a broader concept of civil society to include the networks of loosely organized victims groups and social movements as well as the professionalized NGO sector in Bosnia.
14. To conduct a mapping exercise that reflects this broader understanding of civil society, in order to identify all relevant non-state actors with stake in war crimes and justice issues in BiH.
15. To establish a mechanism for dialogue between civil society and EU representatives on transitional justice policy and mechanisms in BiH. This dialogue can generate practical policy solutions and serve as an alternative source of legitimacy for EU engagement with war crimes and justice.

## Appendix

### 1. Abbreviations

BiH	Bosnia and Herzegovina
CARDS	Community Assistance for Reconstruction, Development and Stabilization
CFSP	Common Foreign and Security Policy
EC	European Commission
EU	European Union
EIDHR	European Instrument for Democracy and Human Rights
ESDP	European Security and Defence Policy
EUFOR	European Union Force
EUMM	European Union Monitoring Mission
EUPM	European Union Police Mission
EUSR	European Union Special Representative
HJPC	High Judicial and Prosecutorial Councils
HLC	Humanitarian Law Center in Serbia
ICJ	International Court of Justice
ICMP	International Commission for Missing Persons
ICRC	International Committee for the Red Cross
IPA	Instrument for Pre-Accession
IPTF	International Police Task Force
NATO	North Atlantic Treaty Organization
NGO	Non-governmental Organization
OHR	Office of the High Representative
OSCE	Organization for Security and Cooperation in Europe
POWs	Prisoners of War
RDC	Research and Documentation Center in Sarajevo
RPM	Reform Process Monitoring
RS	Republika Srpska
SAA	Stabilization and Association Agreement
SAP	Stabilization and Association Process
TRC	Truth and Reconciliation Commission
USIP	United States Institute of Peace
WCC	War Crimes Chamber (Section 1) of the State Court of BiH

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#### 4. Interviews

Institution/Department	Person/Position	Date	Method
International Center for Transitional Justice, Belgrade	Bogdan Ivanisevic	26 March 2007	Phone Interview
European Commission, DG Enlargement, Brussels	Stefan Simosas	28 March 2007	Interview in Brussels
European Commission, DG Enlargement, Brussels	Jose Sanchez-Alegre, Political Desk Officer, BiH	28 March 2007	Interview in Brussels
Charles Stewart Mott Foundation, London	Walter Viers, Program Officer	30 March 2007	Interview in London
EC Delegation, Sarajevo	Isabel Royo Pla, Task Manager for Judiciary and Justice Issues	3 April 2007	Phone Interview
European Commission, DG External Relations, Brussels	Inger Buxton, Advisor for Conflict Prevention Issues (SSR, Crisis Management, CFSP/ESDP)	4 April 2007	Phone Interview
Research and Documentation Centre	Mirsad Tokaca, Executive Director	10 April 2007	Phone Interview
Council of the EU, Brussels	Rasa Ostrauskaite, BiH Desk Officer	11 April 2007	Phone Interview
UNDP Sarajevo, Rule of Law	Alma Dedic, Program Officer, Transitional Justice	12 April 2007	Phone Interview
EC Delegation Sarajevo, Rule of Law Section	Anonymous	19 April 2007	Phone Interview
Royal Danish Embassy Sarajevo (formerly at International Commission for Missing Persons)	Alma Masic, Regional Coordinator for SEE Programs	23 April 2007	Phone Interview
EC Delegation, Sarajevo	Michael Docherty, Head of Democratic Stabilisation and Social Development Section	27 April 2007	Phone and Email

**5. Civil Society Organizations Survey (Questionnaires)**

<b>Name of Organization/Person</b>	<b>Date</b>	<b>Method</b>
Nansen Dialogue Center, Sarajevo, Ljulijeta Goranci Brkic	3 April 2007	Email
Human Rights Center, University of Sarajevo, Sasha Madacki	3 April 2007	Email
Association of the Alumni of the Centre for Interdisciplinary Post Graduate Studies (ACIPS), Ivan Barbalic	3 April 2007	Email
Nansen Dialogue Center, Mostar, Elvir Djuliman	3 April 2007	Email
TERCA (Training, Education, Research, Consulting, Action), Sarajevo, Goran Bubalo	4 April 2007	Email
Bureau for Human Rights, Tuzla	10 April 2007	Telephone
Helsinki Committee for Human Rights in BiH, Sarajevo, Zivica Abadzic	10 April 2007	Telephone
Youth Organization ODISEJ, Bratunac, Cedomir Glavas	11 April 2007	Telephone
Helsinki Committee for Human Rights in RS, Bijeljina, Aleksandra Letic	12 April 2007	Telephone
Nansen Dialogue Centre, Banja Luka	13 April 2007	Email
IMIC: International Multi-religious and Intercultural Centre, Sarajevo	16 April 2007	Email
Center for Nonviolent Action, Sarajevo	17 April 2007	Telephone
Center for Building Peace – Sanski Most, Vahidin Omanovic	17 April 2007	Telephone
Citizen's Association "Viva Zene", Mima Dahic	17 April 2007	Email
Citizen Association "Truth and Reconciliation", Jakob Finci	17 April 2007	Email
Research and Documentation Centre, Sarajevo	17 April 2007	Email
Youth Initiative for Human Rights, Sarajevo, Dejana Grbic	18 April 2007	Email
Association of the Families of Prisoners and Missing Persons in the Zvornik Municipality, Tuzla	20 April 2007	Telephone
Association of War Veterans 1992-1995, Tuzla, Alija Mouratovic	20 April 2007	Telephone

Association of Camp Prisoner "Omer Filipovic", Kljuc, Mehmet Begic	25 April 2007	Telephone
Youth Cultural Centre "Abrasevic", Mostar, Hussein Orucevic	26 April 2007	Telephone
Youth Centre Gornji Vakuf-Uskoplje, Gornji Vakuf- Uskoplje,	27 April 2007	Email