

Enforced Disappearances and the Right to Reparation in Western Balkans

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9.1 Western Balkans and the Issue of Missing Persons

Two decades have passed since the last armed conflicts in the ex-Yugoslav region. It is estimated that about 40,000 people went missing in the armed conflicts in the former Yugoslavia.¹ In that period, various initiatives at the national and the regional level have been made to carry out search and identification processes, mostly with the support of the International Committee of the Red Cross (ICRC) and International Commission for Missing Persons (ICMP). Even if far from perfect, these initiatives have resulted in locating, exhumation, identification, hand over and a decent burial of the body remains of a significant number of the missing persons. Unlike the search process, the reparative mechanisms available to families of persons who disappeared in armed conflicts in ex-Yugoslavia have remained underdeveloped and largely differs within the region: 35,007 cases were reported to ICRC. According to the data of this organization from September 2023, 9,772 people were still missing as a result of the conflicts in the region. Of these, 6,233 cases are related to the conflict in Bosnia and Herzegovina, 1,924 to the conflict in Croatia and 1,615 to the conflict in AP Kosovo and Metohija.² Additional complexity of the situation is associated to the fact that, in some cases, persons who disappeared in the territory of one State may have family members, who are also victims, living in the territory of another State.

Even in the absence of precise estimation, we can say that a large number of those cases fulfil the conditions to be considered as enforced

¹ M. Kolaković-Bojović and E. Tilovska-Kechegi, 'Regional cooperation in the prosecution of war crimes as an EU accession benchmark' in G. Ilic (ed.), *Towards a Better Future: Democracy, EU Integration and Criminal Justice* (Faculty of Law – Kicevo, University 'St. Kliment Ohridski' – Center for Scientific Research at the Faculty of Law – Kicevo, 2019), p. 83.

² See more at www.kznl.gov.rs/latinica/dokumenta.php.

disappearances as defined in arts. 2 and 5 of the International Convention for the Protection of all Persons from Enforced Disappearances³ (hereinafter, ICPPED). It is hard even to imagine the variety and seriousness of the consequences of the acts recognized as enforced disappearance – namely, when a person is arrested, detained, abducted or deprived of liberty by any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which placed such a person outside the protection of the law (Art. 2 of ICPPED) or as part of the widespread or systematic practice of enforced disappearance (Art. 5 of ICPPED). An extreme seriousness and gravity of enforced disappearances is not only associated with the possible consequences for the direct victim. It also strongly affects the family members of a disappeared person on multiple levels. Since they suffer a lot, victims of enforced disappearance need to be recognized, compensated, protected and supported in order to recover to the maximum possible extent. They need legal and institutional guarantees that perpetrators will be brought to justice, but also the guarantees of non-repetition. Even in cases when its duration is not so long, but especially when a fate of the disappeared person is unknown for months, or even for years, an enforced disappearance opens a dark circle of uncertainty.⁴ To achieve this, the States shall establish comprehensive reparatory mechanisms based on the international treaties and the soft law.

9.2 The Right to Reparation

9.2.1 *General Legal Framework on Reparations*

The victim's right to reparation has been well recognized and well developed within the UN Human Rights System. While there are some universal UN Human Rights treaties that include provisions that (in)

³ International Convention for the Protection of all Persons from Enforced Disappearance, adopted on 20 December 2006 during the sixty-first session of the General Assembly in resolution A/RES/61/177.

⁴ M. Kolaković-Bojović, 'Disappeared persons and the right to be considered alive – the current state of play in the Western Balkans', in Z. Pavlović and I. Stevanović (eds.), *Yearbook. No. 4, Human Rights Protection: Right to Life* (Provincial Protector of Citizens – Ombudsman and Institute of Criminological and Sociological Research, 2021), pp. 271–87.

directly concern this right,⁵ it has been addressed in detail in most of the UN instruments of the new generation (developed since 2010).

The Rome Statute of the International Criminal Court (ICC) establishes an explicit right to reparation for victims of crimes prosecuted before it, as well as measures of protection for victims and witnesses (article 68) including restitution, compensation and rehabilitation (article 75).⁶ In addition to the above-mentioned sources of international standards, an important role in recognition of the right to reparation is played by the soft law and jurisprudence of the UN treaty bodies and the special procedures, beyond those specialized in enforced disappearance.

According to the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence in 2012, the right to reparation should be perceived as ‘the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecution, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.’⁷

Finally, the number and comprehensiveness of the regional legal instruments applicable in Europe, Africa and Asia deserve a special attention.

9.2.2 *Legal Framework on Enforced Disappearances and the Right to Reparation*

The very first initiative to establish a universal legal framework on enforced disappearance was adoption of the Declaration on the Protection of all Persons from Enforced Disappearance in 1992 (hereinafter, Declaration).

⁵ This right is indirectly recognized in Art. 2(3(a)) of the International Covenant on Civil and Political Rights – ICCPR. At the same time, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) directly provides for the right to compensation for victims of torture Art. 14(1), just like the International Convention on the Elimination of All Forms of Racial Discrimination, which provides for this right in its article 6. The same applies for the Convention on the Rights of the Child (Art. 39) and the Hague Convention and Geneva Convention Protocol 1 also contain some references to reparations (Art. 91).

⁶ See M. Kolaković-Bojović, ‘Víctimas de desaparición forzada y derecho a la reparación’ in *Desaparición forzada: Colección en temas de derechos humanos, Tomo I* (Centro Internacional para la Promoción de los Derechos Humanos bajo los auspicios de UNESCO [CIPDH], 2023), pp. 196–226.

⁷ Ibid.

Article 19 of the Declaration provides for the right to reparation for the victims of acts of enforced disappearance and their families, who 'shall obtain redress and shall have the right to adequate compensation, including the means for as complete a rehabilitation as possible'. In the event of the death of the victim as a result of an act of enforced disappearance, their dependents shall also be entitled to compensation.

This article complements the rights under the Arts. 9, 10 and 13 of the Declaration, namely the right to a prompt and effective judicial remedy, the right to information and the right to investigation to be conducted and to take part in it. While the rights in these articles are designed to prevent, investigate, and terminate acts of enforced disappearance, the remedies in article 19 apply to victims of enforced disappearances and their families, after their fate and whereabouts have been established, be they alive or dead. In its General comment on article 19,⁸ WGEID interpreted that States are 'under an obligation to adopt legislative and other measures in order to enable the victims to claim compensation before the courts or special administrative bodies empowered to grant compensation. In addition to the victims who survived the disappearance, their families are also entitled to compensation for the suffering during the time of disappearance and in the event of the death of the victim; his or her dependants are entitled to compensation' (E/CN.4/1998/43, paras 68–74). In addition to the right to compensation, the right to reparation includes the right to the various means of rehabilitation. The spectre of these means is wide, including medical care; psychological support; guarantees of non-repetition; restoration of liberty, family life, citizenship, employment or property; return to one's place of residence, etc. (WGEID, GC on Art. 19, par. 75)

The biggest step forward in establishing comprehensive legal protection in terms of the right to reparation of victims of enforced disappearances was adoption of ICCPED. Since it belongs to the new generation of UN human rights instruments, it recognizes well that protecting everyone from enforced disappearance, that is, the right not to be victims of enforced disappearance is detachable from the right to truth, justice and reparation for all victims of enforced disappearances.

The concept and scope of the right to reparation are defined in Article 24 of the Convention, which provides that for the purposes of the Convention, the term 'victim' means the disappeared person and any

⁸ Working Group on Enforced and Involuntary Disappearances, General comment on Art. 19 of the Declaration on the Protection of all Persons from Enforced Disappearance, E/CN.4/1998/43.

individual who has suffered harm as the direct result of an enforced disappearance. Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. In addition, the Convention guarantees that each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation, covering material and moral damage and, if appropriate, other forms of compensation such as: (a) restitution; (b) rehabilitation; (c) satisfaction, including restoration of dignity and reputation; (d) guarantees of non-repetition.⁹ The Convention also stipulates the obligation to continue the investigation until the fate of the missing person is clarified, as well as to take adequate steps regarding the legal situation of missing persons whose fate has not been clarified and the situation of their relatives, in areas such as social welfare, financial issues, family law and property rights.¹⁰ The guarantee of establishment and free participation in organizations and associations that try to establish the circumstances of enforced disappearances and the fate of missing persons and to provide assistance to victims of enforced disappearances are also relevant in this regard, considering the important role that associations of victims play in memorialization actions.

The Convention does not provide for a comprehensive elaboration of the notion of 'reparation', since it introduces compensation as an autonomous term but not as an element of reparation. Therefore, a proper understanding of these notions is of the great importance. In that sense, so-called soft law could be a useful tool in proper understanding of the general terms.

In this sense, UN Basic Principles and guidelines of the right to a legal remedy and reparations for victims of grave violations of international human rights and serious violations of international humanitarian law (General Assembly resolution 60/147 15 December 2005) should be considered as the most useful tool to understanding the essential concept of reparation, where, according to principle of proportionality, this document provides for the State's responsibility for omissions attributable to it

⁹ M. Kolaković-Bojović and Z. Grujić, 'Crime victims and the right to human dignity' in Z. Pavlović and I. Stevanović (eds.), *Yearbook Human Rights Protection: The Right to Human Dignity* (Provincial Protector of Citizens – Ombudsman and Institute of Criminological and Sociological Research in Belgrade, 2020), p. 240.

¹⁰ M. Kolaković-Bojović, 'The synergy between criminal law and medicine under the International Convention for the Protection of All Persons from Enforced Disappearance' in I. Stevanović (ed.), *Penal Law and Medicine* (Institute of Criminological and Sociological Research, 2019), pp. 387–98.

(para. 15), the State's obligation to establish national reparations programs and other assistance to victims in cases where the person liable for the damage is unable to meet his/her obligation or refusal to do so (para. 16), as well as to ensure the enforcement of domestic and foreign court decisions on reparations (para. 17). In addition, this document defines that reparation includes the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition (para. 18). This provision obviously takes an approach that is different from article 24 of the Convention but is actually proper, considering the compensation as an element/modality of reparation, complementary with three other elements, all aimed at ensuring whenever possible, to return to a situation that preceded a grave violation of international human rights law or serious violations of international humanitarian law (para. 19).

It is important to underline that the Basic Principles could be considered as the most detailed, and therefore the most useful not only in terms of the 'proper reading' of the conventional law, especially of the Art. 24 of ICCPED, but also when developing domestic legislation and practices. The situation related to the exercise of the right to reparation requires States to take urgent measures, where the Basic Principles represent an extraordinary tool for developing those measures. Additionally, all relevant bodies and organizations within the United Nations have an obligation to help member countries in the implementation of their obligations (point 9), which opens up opportunities for States to ensure the necessary support.

9.2.3 *UN Committee on Enforced Disappearances Practice and the Right to Reparation*

One of the primary UN Committee on Enforced Disappearances (hereinafter, CED) mechanisms aimed at overseeing the implementation of the convention in the State Parties is review of the State Parties' reports submitted in accordance with Art. 29(1) of ICCPED. The CED has established tangible progress in terms of overseeing the implementation of the right to reparation in practice.¹¹ When it comes to the most frequently raised concerns of CED, in addition to the way the definition of a victim has been recognized in the national legislation, one of the

¹¹ See M. Kolaković-Bojović, 'Víctimas de desaparición forzada y derecho a la reparación' in *Desaparición forzada: Colección en temas de derechos humanos, Tomo I* (Centro Internacional para la Promoción de los Derechos Humanos bajo los auspicios de UNESCO [CIPDH], 2023), pp. 196–226.

most frequently repeated remarks of CED refers to the need to establish a system of reparation that is comprehensive.¹² This further means that it should include all forms of reparation in accordance with Art. 24 (5) of the Convention.¹³ In addition to the comprehensiveness/variety of reparative measures, CED underlined that they should be based on a differential approach, which is adequate and fits the real needs of victims.¹⁴

The CED has also in its practice raised an issue of reparation through the lens of the State Party denial of crime, emphasizing the importance of complementing it with the right to truth and justice.¹⁵

The CED has been focused on the right to compensation, emphasizing several important elements of this right, like the length of relevant proceedings that need to be conducted to exercise this right in practice. The compensation received in such proceedings should be prompt, fair and adequate but also granted to all persons who have suffered harm as a direct result of enforced disappearance, regardless of their nationality. A decision on compensation should not be preconditioned by the rendering of a final decision in a criminal proceeding, even more, it should be applicable even if no criminal proceedings have been initiated. The compensation claim should not be subject to any statute of limitation or precluded by finishing the investigation stage of the criminal proceeding.¹⁶

The CED has also paid attention to the accessibility of compensation for victims of enforced disappearances in relation to the application of the territorial criteria, namely, CED recommended that the State party ensure that any person who has suffered direct harm as a result of an offence of enforced disappearance has the right to obtain reparation in accordance with article 24 (4) and (5) of the Convention, including when the person was abroad at the time of the event.¹⁷

¹² See, e.g., CED/C/GAB/CO/1, 12 September 2017, paras. 19–20; CED COB on Netherlands, CED/C/NLD/CO/1, 26 March 2014, paras. 32–3; CED COB on Honduras CED/C/HND/CO/1, 31 May 2018; CED COB on Niger, CED/C/NER/CO/1, 5 May 2022.

¹³ See, e.g., CED COB on Italy, CED/C/ITA/CO/1, 17 April 2019, paras. 34–5; CED COB on Greece, CED/C/GRC/CO/1, April 12 2022, paras. 32–3; CED COB on Brazil, CED/C/BRA/CO/1, November 3 2022, paras. 28–9.

¹⁴ See, e.g., CED COB on Greece, CED/C/GRC/CO/1, April 12 2022, paras. 32–3; CED COB on Brazil, CED/C/BRA/CO/1, 3 November 2022, paras. 28–9.

¹⁵ See CED/C/JPN/CO/1, paras. 25, 26, 40.

¹⁶ See CED/C/MNG/CO/1, paras. 36–7; CED/C/SVK/CO/R.1, paras. 24–5.

¹⁷ See CED/C/CHE/CO/1, paras. 33–4.

It is important to mention that CED has also raised an issue of the accessibility of this right in practice from the perspective of the real effectiveness of the legal and institutional mechanisms.¹⁸ At the same CoBs, the CED raised a very important issue, namely, the relation with the regional mechanisms.¹⁹

This issue is of special concern when it comes to the European Union Member States whose legislation is mostly based on the EU directives. However, the CED underlines the obligation of the State parties to comply with the provisions of the Convention, including in transposition of the definition of victim in their national legislation. This is well elaborated in the COBs for Italy, where CED clearly stated that the definition of victims in domestic law – including the legislation transposing Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime and replacing Council Framework Decision 2001/220/JHA²⁰ – is not in line with the definition of victims provided under article 24 of the Convention.²¹

The above-mentioned position of CED is of great importance considering the differences between the Western Balkans States (hereinafter, WBS) on their EU path. Namely, Croatia is already an EU Member State, while Serbia started the accession negotiations in 2016. Bosnia and Herzegovina has just attained the status of candidate country in 2022 and the start of the accession negotiation for it was approved in March 2024.

9.3 The Right to Reparation and the National Legislation of the Western Balkans Countries

Considering the previously elaborated background of WB countries in terms of the history of enforced disappearances, but also the need to establish an effective mechanism to address possible future cases, several questions appear to be relevant in terms of the legal regime applicable to the right to reparation for victim of enforced disappearances:

¹⁸ See CED/C/BOL/CO/R.1, paras. 34–5.

¹⁹ See CED/C/NLD/CO/1, CED/C/PAN/CO/1, para. 13.

²⁰ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

²¹ See CED/C/ITA/CO/1, paras. 32–3.

- Does the national legislation recognize enforced disappearance as an autonomous crime?
- How does the very nature of enforced disappearances as a continuous crime affect the right to reparation in view of *ex-tempore* applicability of criminal legislation, considering the earlier mentioned fact that the armed conflicts in Ex Yugoslavia occurred three decades ago?
- Is there is a statute of limitations applicable to this category of crimes?
- Does enforced disappearance constitute a crime against humanity (*ex-tempore* and regarding territorial criteria)?

9.3.1 Bosnia and Herzegovina

According to the central register of missing persons of the Institute for Missing Persons of Bosnia and Herzegovina, of the 34,964 missing persons reported since the 1990s war in Bosnia and Herzegovina, 7,206 are still being sought. In Bosnia and Herzegovina, there is no law on torture on state level – which would define the status and rights of this category of citizens, including victims of the War, so the state lacks basic principles that should regulate this issue. The key issue for defining a right is the recognition of the holder of that right. It has resulted that Bosnia and Herzegovina has failed to establish a national legal framework and comprehensive administrative reparation programme to ensure comprehensive access to full reparation for all categories of civilian wartime victims. While several legislative attempts have been made to address this issue, they have been unsuccessful due to the lack of political agreement between authorities at different levels, who have conflicting agendas and narratives of the past. In the absence of a national reparations programme, victims rely on the existing social protection system and on individual proceedings before criminal and civil courts, both of which have shown considerable shortcomings.²² Monthly support allowances can be shamefully low, and for some this can be a source of re-victimization. The situation of the group identified as ‘women war victims of sexual violence’ illustrates how multiple vulnerabilities are not adequately dealt with and thus how the state is failing to provide adequate reparation to victims.²³ Namely, many of those victims are at the same time family members of missing persons.

²² Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, A/HRC/51/34/Add.2, para. 52.

²³ J. Džumhur, *Victimology in Theory and Practice in Post conflict Society: Perspective of Bosnia and Herzegovina* (University Press – Izdanja Magistrat, 2021).

9.3.1.1 Most Important Laws and Institutions

Bosnia and Herzegovina has ratified almost all core United Nations human rights instruments and their facultative protocols as well as the Rome Statute. In relation to the issue of missing persons, it is important to note that Bosnia and Herzegovina ratified the ICPPED²⁴ in 2012 and recognizes the competence of CED in relation to receiving addresses from signatory States and individuals pursuant to articles 31 and 32 of the Convention.

Article II (2) of the Constitution of Bosnia and Herzegovina prescribes the obligation to ‘ensure the highest level of internationally recognized human rights and fundamental freedoms’. It also stipulates that the European Convention for the Protection of Human Rights and Fundamental Freedoms together with its Protocols ‘apply directly’ and ‘have priority over all other law’.

Bosnia and Herzegovina adopted the following laws and strategies that are relevant to missing persons:

- Criminal Code of Bosnia and Herzegovina;²⁵
- Law on Missing Persons of Bosnia and Herzegovina, which came into effect in 2004 and applies to those persons who went missing between 30 April 1991 and 14 February 1996;²⁶
- Law on the Witness Protection Programme in Bosnia and Herzegovina;²⁷
- National War Crimes Strategy of Bosnia and Herzegovina, from 2008 and the Revised National War Crimes Processing Strategy from 2020
- The Criminal Code of Bosnia and Herzegovina adopted in May 2015, which introduced the offence of enforced disappearance as an autonomous crime in article 190 (a), but this new provision does not cover the responsibility of officials at the entity and district levels. The same articles in the Criminal Codes of the entity and district Brcko BiH levels contain elements related to enforced disappearance but they are not sufficient to adequately encompass all the constituent elements and

²⁴ See “Official Gazette of Bosnia and Herzegovina”, International agreements, No. 3/12 dated 15 March 2012.

²⁵ Criminal Code of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, No. 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10) 1

²⁶ Official Gazette of Bosnia and Herzegovina, No. 50/04, 17 November 2004.

²⁷ Official Gazette of Bosnia and Herzegovina, No. 36/14.

modalities of enforced disappearance, as defined in articles 2 and 6 of the Convention.

The experience of Bosnia and Herzegovina has particularly shown the importance of ensuring full support and cooperation of family members of missing persons in this process. This resulted in the adoption of the Law on Missing Persons in Bosnia and Herzegovina (hereinafter, LMP BiH), which is a single law to regulate the issue of missing persons. The Institute for Missing Persons was established in 2008 as the single national mechanism for the search, and other measures to improve process of searching missing persons have been taken.

Law on Missing Persons Bosnia and Herzegovina was among the first countries to regulate the issue of missing persons through a separate law. The content and arrangements of the LMP are certainly unique in every respect and completely new compared with the previous practice of searching for missing persons. This Law represents a combination of the standards set within humanitarian law and the standards for basic human rights and freedoms. Apart from guaranteeing and ensuring the right to know, the LMP also regulates the right to social protection and other rights of the members of the families of missing persons (Art. 11).²⁸ The LMP promotes a non-discriminatory and principled approach to all victims of the war – missing persons, defining a missing person in such a way that it includes not only civilians but also combatants and does not differentiate between these two categories. This is also important in terms of establishing the rights prescribed by the LMP, including the right to minimum financial support.²⁹ When it comes to the exercise of this right, it is proven that this right is defined too restrictively.³⁰ The WGEID

²⁸ Art. 11. 'In accordance with this Law, the family members of missing persons, as defined in Article 2, paragraph 2 of this Law, who were supported by the missing person and who are in need of support, shall be entitled to monthly financial support.'

²⁹ More precisely, this Law gives a general simplified definition of a 'missing person' whose disappearance relates to the period of their disappearance as set forth in the Dayton Agreement, which defines the period of the war and immediate war danger in Bosnia and Herzegovina as being from 30 April 1991 to 14 February 1996. When implemented, it has to be associated with the standards from the above-mentioned international sources.

³⁰ Art. 2.9 of the Law: 'The need for financial support is found to exist where a missing person's family member is not benefiting from any rights based on which s/he is supporting him/herself, such as: the rights of social protection, pension and disability insurance, veteran disability protection, work-related income, self-employed economic or other independent activity and other income that is considered as support under the applicable legislation.'

noted that there were some compensation programmes in Bosnia and Herzegovina for persons affected by the conflict but that these programmes relate mostly to individual monthly allowances for families of killed or missing persons and that it is necessary to introduce a comprehensive and detailed reparations programme. A particularly worrisome element is the fact that victims are not informed about these programmes and neither are the civil servants who are expected to implement the programmes. There is a need to change this particular provision in such a way that the family members who enjoy the right to pension under the pension and disability insurance provisions are not excluded from the right to financial support, particularly if the amount they receive is minimal, as it is an additional right given to members of the families of missing persons. This is also important, having in mind that a small number of citizens are familiar with the LMP, and the rights of their families are guaranteed by this Law. In the group of family members of missing persons that was part of this study, 61.3% were not even aware that the Fund for Support for Families of the Missing exists. The family members stressed the need to increase efforts to disseminate information on the Fund, since that will initiate lobbying for the creation of the Fund.³¹

Institute for Missing Persons The Institute for Missing Persons (hereinafter, IMP) was created for the purpose of locating missing persons and ensuring the rights of the victims of enforced disappearance in accordance with Article 8 of the Law on Missing Persons of Bosnia and Herzegovina. The co-founders of the IMP are the Council of Ministers of Bosnia and Herzegovina (hereinafter, CoM) and the ICMP. The IMP began its work on 1 January 2008, which was certainly too late in view of the basic intention and relevant provisions of the LMP.

Fund for Support of Families of Missing Persons in Bosnia and Herzegovina For the purpose of securing funds and realizing the rights of family members of missing persons, the Fund for Support of Families of Missing Persons in Bosnia and Herzegovina (hereinafter, Fund) is established as an independent administrative organization that has the status of a legal entity with its own seal and stamp (Art. 15 para. 1 of the LMP). The Fund was established by the Decision of the Council of

³¹ International Commission on Missing Persons, *Persons Who Disappeared Due to Armed Conflicts during the 1990s: An Overview* (ICMP, 2014), pp. 120–1.

Ministers of Bosnia and Herzegovina,³² with the basic purpose of ensuring and realizing the rights of family members of missing persons, which include the right to financial support, health care, assistance to associations of families of missing persons, marking of places of burial and exhumation of missing persons and other rights in accordance with the Law.

Paragraph 3 of Article 15, as well as Paragraph 2 of Article 1 of the Decision stipulate that the headquarters, method of financing, management and issues related to the work of the Fund shall be regulated by the Agreement that should be signed by the CoM, the Government of the Federation of BiH, Bosnia and Herzegovina, the Government of Republika Srpska and the Government of the Brčko District of BiH within thirty days from the date of entry into force of the Decision. As it was pointed out, the Decision entered into force on 12 December 2006, but unfortunately, the Agreement between the aforementioned entities has not yet been signed, and thus neither the Fund's headquarters nor its financing and asset management have not been determined. This has the consequence that the families of missing persons cannot exercise the rights established by the Law. The establishment of the Fund is particularly important due to the fact that most associations of families of missing persons depend in their work on the goodwill of entity governments and foreign donors, so the implementation of their programs is very difficult.

By establishing the Fund's financing system, that is, by enabling the basic needs of the families of missing persons to be financed from the Fund, primarily with monetary compensation and then other rights, it would enable the families themselves to directly influence the implementation of the LMP and the satisfaction of their basic needs. The Law also enables the Fund, in addition to the primary sources of financing from the budget, to be financed from secondary, additional sources (donations), which creates assumptions that certain goals from the law, especially the marking of places of burial and exhumation of the remains of missing persons and other social programs, which require larger financial resources, are solved in a faster and more efficient way.

Associations of families of missing persons throughout the country have voiced their deep concern over the situation and their loss of trust in

³² Decision on the Establishment of the Fund for Support of Families of Missing Persons of Bosnia and Herzegovina, adopted by the CoM ('Official Gazette of Bosnia and Herzegovina'), No. 96/06, 4 December 2006.

domestic institutions. Many of their members die without being able to exercise any of their rights and without any support from the proposed Fund. Lastly, it is clear that the failure to establish the Fund also constitutes a failure to execute a significant number of rulings of the Constitutional Court of Bosnia and Herzegovina in relation to missing persons. In this context, the lack of payment of compensation to these families recognized as victims of serious human rights violations relates directly to the failure to establish the Fund, the establishment of which was ordered explicitly by the Constitutional Court of Bosnia and Herzegovina.³³

There are two reasons for the delay in establishing the Fund. The first is the failure to agree on the location of the Fund and the second relates to the amount of money that each entity should pay to the Fund; the entities have differing opinions on this topic.

The WGEID and CED expressed their concern over the failure to establish the Fund and the fact that no state level law on access to social benefits has been adopted. Furthermore, there were also concerns regarding the lack of a centralized system and over the terms 'reparation' and 'social benefits for the families of missing persons' because these terms are deemed to be unnecessarily confusing. The lack of a centralized system continues to generate numerous cases of discrimination in the entities.³⁴ It recommended that the authorities in Bosnia and Herzegovina take steps to finally establish the proposed Fund for the Support of the Families of Missing Persons.³⁵

Also, the Council of Europe Commissioner for Human Rights expressed grave concern over the failure of the government to meet the remaining obligations related to the LMP, such as establishing the Fund for the Support of the Families of the Missing, increasing the pace of the search for the missing and the provision of funds to support the operations of the associations of the families of missing persons.³⁶

³³ Follow-up Report to the Recommendations made by the Working Group on Enforced or Involuntary Disappearances on its Mission to Bosnia and Herzegovina in February 2014, Submitted by TRIAL (Track Impunity Always), p. 7, available at <https://trial.ba/wp-content/uploads/2016/02/Follow-upreportBiHFeb2014.pdf>.

³⁴ Follow-up Report to the Recommendations made by the Working Group on Enforced or Involuntary Disappearances on its Mission to Bosnia and Herzegovina. A/HRC/27/49/Add.2, 8 September 2014, items 30 and 31 and Concluding Observations of the Committee on Enforced Disappearances, Item 37.b.

³⁵ Concluding Observations of the Committee on Enforced Disappearances, Item 38.b.

³⁶ For more information, see the report by Nils Muižnieks, the Council of Europe Commissioner for Human Rights, on his visit to Bosnia and Herzegovina on 12–16 June 2017, Item 41.

The LMP also constitutes the basis for the work of the associations of the families of missing persons. Through the establishment of the Fund, all associations of missing persons would be able to request assistance from the Fund in compliance with criteria defined in the internal documents of the Fund (Art. 19 LMP). Delay in establishing of the Fund has serious impact on their functioning.

Related to implementation of international obligations, the WGEID recognized the substantial progress that Bosnia and Herzegovina has achieved in searching for and identifying missing persons, making reparation to victims and in the criminal prosecution of those responsible for such heinous crimes.³⁷ Also, CED in its Concluding Observations fully reflect the recommendations adopted by the WGEID.³⁸ At the same time, much remains to be done in order to realize the rights to truth, justice and reparation for the missing and their families, including establishment of the Fund for the Support of the Families of the Missing, as provided for under the Law on Missing Persons of Bosnia and Herzegovina.

The European Union constantly indicates that Bosnia and Herzegovina will have to thoroughly improve its legislative and institutional framework, in order to ensure the fulfilment of several priorities listed in the Opinion on BiH's request for membership in the European Union (hereinafter, Opinion on progress),³⁹ of which a significant number aimed at improving the overall state of the rule of law in the country. There are still unsolved cases of war crimes, and it is necessary to adopt a revised state strategy for working on war crime cases. Bosnia and Herzegovina needs to significantly improve the system of protection of civilian victims of war.⁴⁰ In this context, it was pointed out that Bosnia and Herzegovina lacks a nationwide strategy for transitional justice in order to ensure a political framework for dealing with the legacy of the past. It is necessary to significantly improve the compensation system for civilian victims of war, including the abolition of the statute of limitations

³⁷ See A/HRC/16/48/Add.1 and A/HRC/27/49/Add.2, Item 32.

³⁸ The Committee on Enforced Disappearances considered the report of Bosnia and Herzegovina submitted pursuant to Art. 29, para. 1 of the Convention (CED/C/BIH/1) during its 180th and 181st sessions (CED/C/SR.180 and 181), held on 4–5 October 2016. In its 191st session, held on 12 October 2016, the Committee adopted its Concluding Observations.

³⁹ European Commission, Opinion on BiH's request for membership in the European Union, COM(2019) 261, 29 May 2019.

⁴⁰ Opinion on progress, p. 9.

for claims for compensation in civil proceedings, the introduction of a mechanism for financing compensation from the budget where convicted perpetrators are insolvent and better protection of the identity of victims and witnesses in civil proceedings.

9.3.1.2. Cross Cutting Issues Relevant for Missing Persons

Compensation Bosnia and Herzegovina has not adopted legislation to regulate right to compensation. The lack of implementation of the Law on Missing Persons prevents victims of disappearances to enjoy rights prescribed by this law. Some compensation programmes, mostly related to individual monthly allowances for families of killed or missing persons in Bosnia and Herzegovina have been established but not as a part of the comprehensive and detailed reparations programme. Any solution outside international standards creates opportunities for human rights violations. They can apply for rights defined by legislation on civilian war victims and can receive benefits in the form of monthly allowances pursuant to the existing entity-level or district-level social protection and disability schemes. However, the recognition of victim status – and therefore the requirements for accessing rights and the benefits guaranteed and the implementation of those rights – is regulated differently in each entity or district, pursuant to the legislation in force. These allowances are not intended as reparation for the damage suffered but rather as social protection measures without any link to the liability of the entity paying the benefit, or to the beneficiary's rights as wartime victim. In addition, access to this benefit is mainly linked to the place of residence.⁴¹ Also, additional requirements prescribed by entity laws, such as a high threshold of disability,⁴² documentation and short deadlines for submission,⁴³ have serious influence on realization of rights. Disability benefits received by civilian wartime victims remain significantly lower than those received by war veterans.

The cause of this problem is related to defining the concept of victim in BiH legislation. The CED considers that the term 'injured' does not cover every individual who has suffered harm as a direct result of an enforced disappearance. The CED is of the opinion that domestic laws do

⁴¹ See A/HRC/51/34/Add.2, para. 53.

⁴² Law on the Basics of Social Protection, Protection of Civilian Victims of War and Protection Families with Children, 'Official Gazette of the Federation of Bosnia and Herzegovina', No. 36/99.

⁴³ Law on the Protection of Victims of War Torture of Republika Srpska, 'Official Gazette of Republika Srpska', No 90/2018.

not include a definition of victim that is in accordance with the ICPPED, which is why it called on the state to make the necessary amendments to the law in order to ensure the harmonization of the term 'victim' with the term prescribed in the Convention.⁴⁴ Different laws adopted on entity's level have different definitions. This has significant impact on enjoyment of the right to reparation.⁴⁵ It is clear that not much has been done to avoid multiplication of concepts and approaches in solving this issue. Two of the causes are the absence of state-level legislation regulating the rights of victims and the lack of harmonization of those relevant laws that do exist.⁴⁶ This is exactly what creates space for further misuse of victims' sufferings and puts them in the position to be a tool for political campaigns, hate speech, etc. Furthermore, in recent years, the exacerbation of nationalistic discourses, marked by a rise in hate speech, the glorification of war criminals, rhetoric of national/ethnic division and the denial of the crime of genocide, crimes against humanity and war crimes – including calls for separation by some officials – have led to worrying levels of polarization and a virtual standstill in governance.⁴⁷ The status of mission persons and their family relatives has been partially solved by adoption of the Law on Missing Persons.

The victims are still habitually neglected, both nationally and globally. The lack of empathy for victims manifested also in the absence of adequate measures to ensure their protection and support remains very pronounced. In the context of BiH, this has been particularly evident in court proceedings in which victims' claims for compensation were rejected, invoking the statute of limitations, in circumstances where the damage was caused by war crimes that are not statute-barred. The obligation of the victims to pay the costs of the procedure of the defendant (entities) in the cases for compensation of damages is especially problematic, in the amount of the lawyer's costs, even though the defendant was represented by the attorney's office financed from the budget. Unfortunately, even when the Constitutional Court of Bosnia and Herzegovina and international mechanisms find violations of

⁴⁴ CED/C/BIH/CO/1, 2016, points 35 and 36.

⁴⁵ See: J. Džumhur, *Victimology in Theory and Practice in Post conflict Society: Perspective of Bosnia and Herzegovina* (University Press – Izdanja Magistrat, 2021).

⁴⁶ L. Pilegaar and J. Džumhur, 'Human rights shortcomings of the Dayton Peace Agreement', *Forced Migration Review*, 2015, www.fmreview.org/.

⁴⁷ Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Preliminary Observations from the Official Visit to Bosnia and Herzegovina, 2–10 December 2021.

victims' rights in their decisions, their enforcement is often ineffective. In 2018, the State Court ruled that this practice constituted an excessive burden and a violation of the victim's right to property and access to remedy, prompting many payment exemptions before regular courts. Nevertheless, in a significant number of cases in the Republika Srpska, property seizures already underway have continued.⁴⁸

The rejection of claims against the State and the entities in civil proceedings put victims in the position to ask for compensation in criminal proceedings against the perpetrators in which judges referred them to civil proceedings. This changed with a court judgment in 2015, after which sixteen judgments obliged the perpetrators to pay compensation, although payment was rarely enforced due to the perpetrators' reported lack of assets.⁴⁹

The two Universal Periodic Review cycles,⁵⁰ in relation to missing persons and the prosecution of war crimes, recommended that Bosnia and Herzegovina, among others, continue its effort on fighting impunity for serious human rights violations committed during the armed conflict, adopt the Law on Reparation and Compensation to Victims of Torture during the War and amend the criminal legislation in order to harmonize it with obligations under international criminal law and obligations relating to criminal proceedings against the perpetrators of international crimes and war crimes in particular.⁵¹

Memorialization There is no comprehensive legal or policy framework regulating memorialization processes at the State level. Therefore, this matter is handled unevenly at local levels. A law on memorials adopted in the Republika Srpska in 2011 has been criticized for fostering discrimination.⁵²

Article 20 of the LMP provides for the obligation to ensure that sites of suffering of missing persons in Bosnia and Herzegovina are marked,

⁴⁸ Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, A/HRC/51/34/Add.2, para. 56.

⁴⁹ TRIAL International, Bosnia and Herzegovina Study on Opportunities for Reparations for Survivors of Conflict-related Sexual Assault Violence, p. 63, available at https://trialinternational.org/wp-content/uploads/2022/03/GSFReportBiH_ENG_Web.pdf.

⁵⁰ The second UPR cycle on Bosnia and Herzegovina took place on 5 November 2014 and received a total of 167 recommendations.

⁵¹ See more at www.ohchr.org/EN/HRBodies/UPR/Pages/BAIndex.aspx.

⁵² Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, A/HRC/51/34/Add.2, para. 65.

which represents an important contribution to the process of facing the past. The legal provision regulating this issue is defined in very broad terms and the application of the prescribed right requires that the applicant meets the minimum requirements in order to be able to enjoy this specified right.

The families of missing persons or their associations may request that burial and excavation sites (individual or joint sites) be marked, regardless of the number of victims or missing persons.

In accordance with the Law, the appearance of markers or memorial plaques, financing and other issues are regulated by the Rulebook on Marking Places of Burial and Exhumation of Missing Persons (hereinafter, Rulebook), adopted by the CoM,⁵³ based on the proposal of the Ministry of Human Rights and Refugees of Bosnia and Herzegovina, in consultation with the competent ministries of the Federation of BiH, Republika Srpska, Brčko District of BiH and representatives of the association of families of missing persons.

The procedure for exercising the right to mark the place of burial and exhumation begins with the submission of a request to the IMP, as the competent authority for searching for missing persons, to issue a certificate that a body was exhumed at the specific location. This certificate, together with the request for marking the place of burial and exhumation, is submitted to the Fund, which, in cooperation with the competent state authorities, will obtain all the necessary documentation regarding the marking of the place (Art. 6 para. 1 of the Rulebook).

Article 20 para. 3 of the LMP and Article 6 para. 3 of the Rulebook prescribe that the competent authority of the municipality is the Department for Urban Planning and Spatial Planning and, in accordance with the laws in the field of urban and spatial plans, is obliged to issue appropriate permit for placing a memorial plaque or other appropriate sign.

The Law does not prohibit the marking of other places (e.g., the place where a missing person died, the place of a primary mass grave, etc.) with other means, provided that a permit has been obtained from the competent office for urban spatial planning.

Namely, the appearance of the marker/memorial plaque is regulated in a unified manner by Article 2 of the Rulebook, which establishes a unique text in the individual case and prescribes the method of marking the

⁵³ Rulebook on Marking Places of Burial and Exhumation of Missing Persons, 'Official Gazette of Bosnia and Herzegovina', No. 83/06.

excavation site of multiple bodies. The Rulebook also defines the procedure for marking a site of joint or individual exhumation and the burial of unknown persons. The MPI is competent for submitting a request for marking a site of joint or individual exhumation or the burial of unknown persons (article 4 and 6 of LMP).

Great powers by the Rulebook are given to the Commission for the Selection of the Conceptual Design of the Memorial Plaque and Signs. The rights regulated by the Rulebook are financed by the resources of the Fund in accordance with the plan and priorities established by the Committee. The maintenance of the memorial is also financed from the resources of the Fund (Article 7 of the Rulebook). The failure to establish the Fund prevents creation of the Committee and implementation of the Rulebook. As a result, the families of missing persons do not enjoy the right to memorialization prescribed by the Law on missing Persons of BiH.

Also, there is concern that civil society efforts to memorialize victims belonging to national or ethnic minorities at the entity level, particularly in the Republika Srpska, have been hampered by local authorities (often belonging to the majority ethnic group) or by administrative requirements that delay or block the process for years. As a result, families of victims and survivors do not have the possibility to remember the harm suffered and to honour the victims.⁵⁴

9.3.1.3 Remaining Challenges

Therefore, in Bosnia and Herzegovina, there is not a state level reparations programme that includes compensation, allowances, restitution, rehabilitation, memorialization and the guarantee of non-repetition. Lack of implementation of the provisions of LMP that define establishment of the Fund prevents victims from accessing social benefits for the families of missing persons. Regulation of social benefits on the entity level for civilian war victims results in the overlapping of the terms 'reparation' and 'social benefits for war victims'. It also raises the issue concerning differences in access to and level of social benefits and other social protection measures resulting from the place of residence. Bosnia and Herzegovina should take measures with the aim to implement recommendations of WGEID, CED and other international bodies that victims

⁵⁴ Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, A/HRC/51/34/Add.2, para. 70.

of disappearances have access to the right to reparation in accordance to international standards.

9.3.2 Serbia

Making the search processes efficient and providing for reparation to the family members of the disappeared persons are highly dependent not only on national policies but also on regional cooperation, having in mind that most of the searched persons have gone missing in the territories of other States created by the disintegration of the former Yugoslavia and Kosovo.⁵⁵ In the territory of Serbia, a total of 1,402 remains were exhumed, of which 457 were exhumed in city cemeteries and 31 were exhumed in individual grave sites in connection with armed conflicts in the territory of the former Yugoslavia and 4 graves in connection with the conflict in Kosovo,⁵⁶ where 914 persons were exhumed and where the percentage of identification of the remains is greater than 97%. The Commission for Missing Persons of the Republic of Serbia (CMP) no longer has any information that would indicate the existence of a grave where the remains of the victims are buried in the territory of the Republic of Serbia.⁵⁷

9.3.2.1 The Most Important Laws and Institutions

Serbian legislation does not recognize the term 'reparation' itself, due to legal tradition, whereas the right to reparation is mostly seen in the context of compensation. However, specific elements of the right to reparation (restitution, rehabilitation and satisfaction, including restoration of dignity and reputation and guarantees of non-repetition) are guaranteed to victims through the set of rights provided to victims by Constitution,⁵⁸ ratified international agreements that consist of an integral part of the domestic legal order and by domestic legislation.

In accordance with Art. 194. of the Constitution, the Serbian legal and institutional system is governed by the Constitution, ratified

⁵⁵ This designation is without prejudice to positions on status and is in line with UN Security Council resolution 1244 and the International Court of Justice Opinion on the Kosovo declaration of independence.

⁵⁶ This designation is without prejudice to positions on status and is in line with UN Security Council resolution 1244 and the International Court of Justice Opinion on the Kosovo declaration of independence.

⁵⁷ See more at www.kzn.gov.rs/latinica/dokumenta.php.

⁵⁸ Constitution of the Republic of Serbia 'Official Gazette RS', No. 98/2006 and 115/2021.

international treaties and generally accepted principles of international law and Serbian laws. Generally accepted rules of international law and ratified international treaties shall be an integral part of the legal system in the Republic of Serbia, and they are directly applicable (Art. 16). Since Art. 167 provides that the Constitutional Court shall decide on the compliance of laws and other general acts with the Constitution, generally accepted rules of the international law and ratified international treaties, it's clear that national legislation is subordinated to the ratified international treaties and generally accepted principles of international law that are, as the integral part of the domestic legal order, directly applicable by Serbian authorities, together with the provisions of the domestic legislation.

Therefore, the obligation of Serbia to ensure an effective remedy to compensate damages to victims of enforced disappearances stems from the Constitution itself, from the generally accepted rules of the international law, directly applicable international treaties integrated in the domestic legal order by the ratification and the domestic legislation.

The Constitution of the Republic of Serbia guarantees that everyone 'shall have the right to compensation of material or non-material damage inflicted on them by the unlawful or irregular activity of a state body, entities exercising public powers, bodies of an autonomous province or local self-government' (Art. 35(2)), as well as the rights to receive assistance from the state in cases of 'social and existential difficulties' (Art. 69(1)).

Serbia ratified the ICPPED and other relevant international instruments (universal and regional) whose provisions supplements the ICPPED in terms of the right to reparation in 2011.⁵⁹ In addition to this, Serbia has ratified relevant regional legal instruments such as the European Convention for the Protection of Human Rights and Fundamental Freedoms⁶⁰ and the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes.⁶¹ Therefore, the Serbian authorities are also guided by the European Court of Human Rights (ECtHR) jurisprudence.

⁵⁹ Convention for Protection of all Persons from Enforced Disappearances 'Official Gazette RS- International Treaties', No. 1/11.

⁶⁰ Arts. 13 and 41 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 'Official Gazette of the SaM - International Treaties', No. 9/03.

⁶¹ European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes Strasbourg, 25 January 1974.

It is also governed by the following legislation: the Criminal Code of (S)FRY,⁶² the Criminal Code (CC)⁶³ and the Criminal Procedural Code (CPC)⁶⁴; the Law on Civil Procedure⁶⁵ (LCP); the Law on Contracts and Torts⁶⁶ (LCT) and the Law on Non-contentious proceedings,⁶⁷ with interpretation supported by the Guidelines for improving the case law with regard to procedures for compensation of damage to victims of serious crimes in criminal proceedings.⁶⁸

In this regard, the issue of major concern is the legal status of enforced disappearances in Criminal Legislation, in accordance with Arts. 2 and 5 of ICPPED. Namely, Art. 371 of CC recognizes, as an autonomous crime, only enforced disappearances committed under the Art. 5 of the ICPPED, while those committed under the Art. 2 of the Convention are not recognized as autonomous crimes, but partially, under the other crimes such as abduction, illegal detention, abuse of power, etc. Therefore, the legal regime applicable to the right to reparation in criminal proceedings for enforced disappearances is one applicable to crimes against humanity.

In terms of the *ex-tempore* applicability of the penal legislation, it is important to reiterate that a crime of enforced disappearance is considered to be finished when the fate and whereabouts of the disappeared persons are known. Therefore, the provisions of the two criminal codes are relevant for cases of enforced disappearances: CC, SFRY and CC. The

⁶² Criminal Code of SFRY 'Official Gazette SFRY', Nos. 44/76-1329, 36/77-1478, 34/84-895, 37/84-933, 74/87-1743, 57/89-1441, 3/90-63, 38/90-1217, 45/90-1340, 54/90-1773 and 'Official Gazette FRY', Nos. 35/92-651, 37/93-816, 24/94-273, 61/01 of 9 November). In 1992, the name of the law was changed from the Criminal Code of SFRY to the Criminal Code of FRY.

⁶³ Criminal Code, 'Official Gazette RS', Nos. 5/2005, 88/2005 – ispr., 107/2005 – ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019 and 27/2021 – CC decision i 62/2021 – CC decision.

⁶⁴ Criminal Procedure Code, 'Official Gazette RS', Nos. 72/11 of 28 September 2011; 101/11 of 30 December 2011; 121/12 of 24 December 2012; 32/13 of 8 April 2013; 45/13 of 22 May 2013; 55/14 of 23 May 2014; and 35/19 of 21 May 2019.

⁶⁵ Civil Procedure Law, 'Official Gazette RS', Nos. 72/11, 49/13, 74/13, 55/14 and 87/2018.

⁶⁶ Law on Contracts and Torts, 'Official Gazette SFRY' Nos. 29/78, 39/85, 45/89, 57/89, 'Official Gazette SRY', No. 31/93, 'Official Gazette SM', No. 1/2003.

⁶⁷ Law on Non-contentious proceedings, 'Official Gazette of the SRS', No. 25/82 and 48/88 and 'Official Gazette of the RS', No. 46/95 – other law, 18/05 – other law, 85/12, 45/13 – other law, 55/14, 6/15 and 106/15 – other law, 14/22.

⁶⁸ Guidelines for improving the case law with regard to procedure for compensation of damage to victims of serious crimes in criminal proceedings, available at www.podrskazrtvama.rs/en//posts/presentation-of-guidelines-for-damage-compensation-87.php.

first one was in force when the armed conflicts in the former Yugoslavia occurred and has not recognized enforced disappearances. The present one establishes the responsibility for enforced disappearances committed under Art. 5. of the Convention, but it could be applied only on enforced disappearances committed or still ongoing after entering the 2005 CC into the force.

9.3.2.1 The Mechanisms to Get Compensation

The Access to Compensation in Criminal Proceedings In criminal proceedings, Serbia does not apply statutory limitations for war crimes and crimes against humanity. Article 2 (11) of the Serbian Criminal Procedure Code (CPC) defines a victim (injured party) ‘as a natural or legal person who’s personal or property right has been violated or jeopardized by a criminal offence’. This definition seems to be narrower than the definition provided in article 24 of the Convention, which provides that for the purposes of the Convention, the term ‘victim’ means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance.

The rights of a victim (injured party) in criminal proceedings are listed in article 50 of the CPC. However, the CPC exclusively recognizes the notion of *injured person* whereas the Criminal Code refers to both concepts of *injured party* and *victim* without clear criteria for distinction, which creates some confusion.

Article 50 of the CPC includes a wide scope of the rights in line the EU *acquis* among which are the right to submit a motion and evidence for realizing a restitution claim and a motion for interim measures for securing it (Article 50 (1)). This mechanism allows a victim to claim compensation from an offender for material or non-pecuniary damage suffered, since a claim for restitution may relate to the compensation of damage, return of objects or annulment of a certain legal transaction (Art. 252 of CPC). In cases where the court assessed that rendering a decision on a compensation claim could result in the significant delay of the procedure, it can refer a victim to a civil proceeding (Art. 256 of CPC).

However, the implementation of the legal framework remains inconsistent. In order to harmonize the practice for deciding on compensation claims in criminal proceedings, the Supreme Court of Cassation (SCC) adopted Guidelines for improving the case law with regard to procedures for compensation of damage to victims of serious crimes in criminal proceedings in late 2019. Aside from this role of the courts, for the

purpose of this analysis, it is important to mention an issue pertaining to the role of public prosecutors in obtaining compensation in criminal proceedings. Since the CPC from 2011 came into the force, public prosecutors have become those who lead the investigation. Considering this, the obligation of collecting evidence also lies with the public prosecutor at the investigation stage. Despite the great capacity of collecting evidence during the pretrial stage, whereby a court would have the capacity to decide not to prolong the procedure for collecting evidence during the main trial, it seems that prosecutors are either not aware of their role in this regard or they don't have sufficient administrative capacities and/knowledge to do so.

Therefore, despite these clear and adequate provisions of CPC, courts almost never use this mechanism of deciding on compensation claims in criminal proceedings. Instead, victims are regularly referred to submit a compensation claim in a separate civil proceeding. This is partially caused by the prosecutorial inactivity in terms of their role in collecting evidence relevant for a court to render decision not only on criminal conviction but also on the compensation claim.

As final outcome victims are pushed to initiate a new procedure before civil court, and

- engage additional costs in legal fees and in legal representation,
- face undue length of procedure for several years,
- potentially have to repeat their testimonies before the two different courts, hence causing re-traumatization and are
- not be able to benefit from any victim assistance, support or protective measures (including protection of the identity) when they are before civil courts as in civil proceedings, victims are a party equal to the offender from whom they are claiming a damage.

The Mechanisms to Claim Compensation in Civil Proceedings The LCT (Art.376) prescribes that the general limitation period to submit the lawsuit is three years from the moment that the victim has learned about non-material damage they have suffered as a consequence of a violent act, and/or the period of five years from the date on which the damage occurred.⁶⁹ When 'the claim for compensation against the person liable shall expire upon the expiration of the limitation period set forth in the statute of limitations of the criminal prosecution' (Art. 377 of the LCT).

⁶⁹ Judgment of the First Basic Court in Belgrade, 32 P br.70585/10, 15 June 2012.

The Supreme Court interpreted that the privileged statute of limitation is applicable on compensation claims based on the convictions in criminal proceedings – its length is connected with the statute of limitation applicable to the criminal proceeding for a certain crime. Therefore, since there is no statute of limitations applicable to international crimes, the same applies on compensation claims. In 2011, the Constitutional Court ruled an expansion of the application of the privileged statute of limitation (in cases of crimes against humanity, that means its non-applicability), not only to civil claims against the perpetrator but also against the State. In case a civil lawsuit is submitted prior to the criminal conviction, a general three years⁷⁰ statute of limitation from the LCT is applicable. This solution is adequate from the legislative standpoint but could raise concerns when criminal proceedings are prolonged, preventing access to compensation in civil proceedings against the State, in absence of a criminal conviction against a perpetrator.

Therefore, in terms of the applicability, but also the length of the statute of limitation, the qualification of the crimes committed as international or ordinary crimes is paramount, which is directly dependent on the time and territorial borders of the armed conflict in which an enforced disappearance occurred.

The same issue relevant for the criteria that Serbian authorities take into account when deciding on reparation have been addressed in the ECtHR jurisprudence, mostly in *Fejzić and others* against Serbia⁷¹ and *Kamenica and others* against Serbia.⁷² Most importantly, the ECtHR addressed the issue of territorial criteria, more precisely, confirming that Serbian authorities consider crimes that occurred in the Serbian territory, during the conflict in Bosnia and Herzegovina, as an ordinary, not international crime.

In terms of the practical possibilities to enforce a decision on compensation from the perpetrator, it is important to mention that Serbia has established an efficient mechanism of enforcement through the bailiffs, but

⁷⁰ *Refik Hasani et al*, Judgment of the First Basic Court in Belgrade 84.P.46946/10, 6 June 2011, and Judgment of the Court of Appeal in Belgrade, Gž. 1771/12, 24 August 2012.

⁷¹ *Fejzić and others v. Serbia*, Application No. 4078/15, 26 September 2017, inadmissibility of compensation cases for acts committed on the territory of Serbia out of 'state of war' – application of the statute of limitation.

⁷² *Kamenica and others v. Serbia*, Application No. 4159/15, 4 October 2016, inadmissibility of compensation cases for acts committed out of 'state of war' on the territory of Serbia – application of the statute of limitation.

this cannot address the situations where, by referring the victim to civil proceedings, the court allows the offender enough time to sell all their property and therefore prevents the victim from getting compensation or where the offender is simply very poor. In that case, there are no alternative sources (e.g., State funds) from where compensation can be sought.

9.3.2.3 Reparative Measures in Administrative Proceedings

By the adoption of the Law on the rights of veterans, military invalids, civilian invalids of war and members of their families (hereinafter, The Law on War Veterans, LoWV) in early 2020, a new legislative framework for acquiring the status of civilian victim of war for the family members of a missing person has been introduced to replace the procedure earlier ruled by the Law on the Rights of Civilian Invalids of War of 1996.⁷³ The law brings a wide scope of social benefits grounded in the fact that a person has suffered damage in the context of an armed conflict but without establishing the direct causal link between a crime against humanity committed and a damage suffered. The LoWV also recognized the rights of the family members of a missing person, providing them a status as family members of civilian victims or civilian invalids of war. Namely, according to Art. 27 of the same Law, a family member of a civilian war victim or invalid is considered a member of the family of a deceased civilian war invalid if they lived together in a joint household for at least one year before death and, therefore, this does not match the notion of victim as provided in Art. 24 of ICPPED.

Upon acquiring the status, victims become entitled to monthly cash benefits, subsidized public transport passes, health care, costs for care assistance and funeral costs (Art. 32 of the LoWV). The extent of the right and the amount of the monthly cash benefit for the family members of a victim are determined by the damage a victim suffered but also by various social characteristics of the family members associated with the status of vulnerability.

The competent authority for rendering a decision on the status of civilian victims of war is the local municipality/self-governments (the first instance) and the Ministry of Labour, Employment, Veterans, Social Affairs (hereinafter, the Ministry) as a second instance.

While listing the documents that need to be submitted by applicant a (family member of a missing person), LoWV requires, among others, to

⁷³ Law on the Rights of Civilian Invalids of War, 'Official Gazette of the RS', No. 52/96.

submit a declaration of death. This declaration/certificate could be issued to the family members as a result of a procedure for the declaration of missing person as dead or proof of death, according to the Law on Non-contentious proceedings. This law (Art. 57, par. 1(d)) provides that, among others, persons who disappeared during the war in connection with the events of the war, and about whose life there was no news for a year from the day of the cessation of hostilities, may be declared deceased. A proposal for declaring a missing person dead can be submitted by any person who has a direct legal interest in it, as well as by the public prosecutor (Art. 58).

Basically, this means that the family members of missing people are not considered as civilian victims of war until a declaration of death is issued (Art. 177), which is not in line with Art. 24(6) of the UN CPPED and prevents numerous potential family members of the victims of enforced disappearances to access the social protection measures. They are supposed to choose between upholding a presumption that their family member is alive and the right to access some social benefits.

9.3.2.4 Rehabilitation and Symbolic Reparations

Rehabilitation plays an important role in reparation to victims, and it is preconditioned by establishing and operation of victim support services, specialized programs and adequate training of practitioners in contact with victims. The current legislative framework insufficiently deals with the rehabilitation of victims through victim support. According to the Law on the organization of courts⁷⁴, the Higher Court in Belgrade 'provides and provides assistance and support to witnesses and victims' (Art. 25(4)), while the Art. 52 of the same law provides that: 'In the judicial administration of higher courts, as well as other courts determined by the High Judicial Council [hereinafter, HJC], a service may be organized to provide support and assistance to witnesses and victims.' Organization and the operation of the victim support services are governed by the Court Rulebook (Arts. 38a–b)⁷⁵ and internal guidelines issued by the HJC⁷⁶ and Republic Public Prosecutor.⁷⁷

⁷⁴ Law on the organization of courts, Official Gazette, No. 10/2023.

⁷⁵ Court Rulebook, Official Gazette, Nos. 110/2009-87, 70/2011-31, 19/2012-28, 89/2013-7, 96/2015-130, 104/2015-50, 113/2015-61 (corr.), 39/2016-44, 56/2016-56, 77/2016-57, 16/2018-34, 78/2018-161, 43/2019-16, 93/2019-275.

⁷⁶ www.podrskazrtvama.rs/lat/media/domaci/Uputstvo-o-nacinu-pristupa,sistemu-rada-i-nacinu-postupanja-sluzbe-za-pomoc-i-podrsku-svedocima-i-ostecenima-07.04.2015..pdf.

⁷⁷ www.podrskazrtvama.rs/lat/media/domaci/Opste-obavezujuce-uputstvo%20_Tuzilastvo.pdf.

There are also services at certain civil society organizations, legal clinics and social work centres, which offer support services to victims. There is a lack of exact data on the number and structure of service providers and programmes they offer, although it is known that their geographical coverage and the range of services they offer are highly inconsistent. What is also lacking are clearly defined criteria for professional qualifications of providers and the quality of services they provide. Needs assessment procedures, referral procedures along with procedural rules for provision of support have not yet been standardized. There are no formal mechanisms in place for maintaining liaison and cooperation between support providers nor has a system for coordination and funding of providers been established. This applies as well to a system for oversight of providers' activities. Training programmes in victims' rights have not been either standardized or established as part of initial and ongoing training for judicial office holders. Information regarding available types of support has not been systematized or made accessible via a single database.

Some preparatory steps have been made in order to amend relevant penal and judicial legislation in order to address requirements of the National Strategy for Enforcement of the Rights of the Crime Victims in Serbia (2020–5) in order to establish the nationwide network of support services, but legislation necessary to do that is to be amended yet.

Some activities of the Commission for Missing Persons, like an adoption and the implementation of the Framework Plan for Resolving the Issue of Missing Persons from the Conflict in the Former Yugoslavia (Framework Plan to Address the Issue of Persons Missing from Conflicts on the Territory of the Former Yugoslavia, 2018), also contribute to memorialization. All of these symbolic reparative measures have had a significant influence on the change of the general climate in terms of the public recognition of victims and the reconciliation. However, sporadically, there are still some public statements made by officials that jeopardize the principle of non-selective public recognition of victims, non-discrimination of victims and the spirit of non-repetition.

9.3.2.5 2021 Developments

In early 2021, the Serbian government established the working group to develop a draft Law on Missing Persons. A few months later, an initial draft was published, addressing the comprehensive scope of the rights of

the persons missing in, or in relation to the conflict in the former Yugoslavia.⁷⁸

As a basis for the draft, the working group used the CED's 2019 Guiding Principles for the search for disappeared persons⁷⁹ and reflected them, in detail, in the chapter of the law dedicated to the main principles and in the section that regulates the rights of the missing persons and the members of their families. In addition to the right to be searched, the Law provides for the wide spectrum of the rights of the family members, starting from the right to be informed about the progress and the results of a search, through monthly cash benefits and other social protective, assistance and support measures.

Assumption about the life of a missing person is ruled by the separate article (Article 3), which stipulates that a missing person shall be considered alive, until:

- he/she is found alive
- the remains are identified
- or until the missing person is declared dead in accordance with the regulation governing the declaration of a missing person as dead and proving death.

In order not to leave this presumption without legal effects, Art. 3, para. 2 provides that the rights of family members of a missing person or a person whose burial place is unknown shall not cease, in accordance with this Law, with the identification or declaration of the missing person as dead. Therefore, the draft law has introduced a kind of correctional mechanism in relation to the earlier mentioned requirements of the LoWV and the Law on Non-contentious proceedings, having in mind that it not only upholds the presumption that a missing person is alive but also upholds exercising the rights of the family members even if a missing person has been declared dead.⁸⁰

⁷⁸ 'In terms of this law: 1) Missing person is a person about whom the family has no news, and whose disappearance occurred during or in connection with the armed conflicts in the territory of the former Socialist Federal Republic of Yugoslavia (hereinafter: SFRY) in the period from 1 January 1991 to 31 December 1995 and in the territory of the Autonomous Province of Kosovo and Metohija (hereinafter: AP KiM) in the period from January 1, 1998 to December 31, 2000 (hereinafter: armed conflicts) and which was reported on the basis of reliable disappearance data' (Art. 2).

⁷⁹ Committee on Enforced Disappearances, Guiding principles for the search for disappeared persons, CED/C/7, 8 May 2019.

⁸⁰ Kolaković-Bojović, 'Disappeared persons and the right to be considered alive', pp. 271–87.

Some efforts to rule activities in the field of memorialization have been made through the draft Law on Missing Persons (Arts. 60–5), which provides for the mechanisms of cooperation between the Commission and other relevant national, regional and international interlocutors to coordinate activities in connection with commemorating the International Day of the Disappeared and allocating funds to finance programs of associations of families of missing persons but also to promote the rights of missing persons. However, since the Draft was finalized in December 2021, no progress has been made in order to send it to the legislature, which strongly affects the family members who are patiently waiting to exercise their right to reparation in practice.

9.3.3 *Croatia*

In the territory of the Republic of Croatia, disappearances especially happened at the beginning and end of the conflict. Most Croatian victims disappeared in 1991, while most Serbian victims disappeared in 1995 during the operations ‘Bljesak’ and ‘Oluja’. According to data provided by the Ministry of Veterans’ Affairs of Croatia, 18,000 persons disappeared in 1991 and a further 1,226 persons disappeared in 1995.⁸¹ The fate of more than 82% of registered cases of missing persons have been discovered. According to information submitted to the WGEID in 2018, the Republic of Croatia is searching for 1,945 missing persons, nationals of the Republic of Croatia or the mortal remains of persons killed from the beginning of the War.⁸² They can be divided into two basic groups, based on the period of their disappearance: missing or killed persons from the period 1991–2 or 1,130 persons (95% of them are of Croatian ethnicity) and missing or killed persons from the period 1995 and later or 815 persons (98% of them are of Serbian ethnicity).

9.3.3.1 The Most Important Laws and Institutions

The Republic of Croatia is a signatory to numerous agreements in the field of international humanitarian law and human rights. In 2022, the Republic of Croatia ratified the ICPPED.

⁸¹ See A/HRC/30/38/Add.3 paras. 24 and 25.

⁸² On 6 February and 14 August 2018, the government of the Republic of Croatia provided the Working Group on Enforced or Involuntary Disappearances with the information it requested concerning the implementation of the recommendations of the Working Group that were made following its visit to the Republic of Croatia. For more information, see Item 73 on p. 6 of the corresponding report.

The Constitution of the Republic of Croatia guarantees the highest level of international standards. The Law on Persons Missing in the Homeland War⁸³ (hereinafter, LPM) was adopted in 2019. The Homeland War Croatia is narrative in use based on a pervasive conception of self-defence against a larger Serbian aggressor. This opens a question of its relationship with the narrative of transitional justice that is focused on truth, justice and reparation. Especially, it opens questions of the position and treatment of civilian war victims. This Law constitutes the legal framework for defining a missing person, whereas respective rights are regulated under the Law on Civilian Victims from the Homeland War (hereinafter, LCVHW).⁸⁴ Article 8 of LCVHW, the Law on Civilian Victims from the Homeland War, defines civilian victims as civilian invalids and civilians killed, died or missing, that is, members of the immediate and extended family of a civilian killed, died or missing in the Homeland War. Also, Croatia has adopted the Act on the Rights of Croatian Homeland War Veterans and their Family Members and the Act on the Protection of Military and Civilian War-Disabled Persons. The acts establish a monthly stipend to the victims and families, although differences have been noted regarding the benefits received by families of veterans as opposed to families of civilians. A system of psychosocial assistance to families of missing persons has been set up.⁸⁵

In accordance with Article 2, citizens of the Republic of Croatia are entitled to the rights prescribed by the Law. Exceptionally, foreign citizens may exercise rights under the Law, if they or the person on whose behalf they are submitting an application for exercising rights at the time of the injury had permanent or temporary residence in the territory of the Republic of Croatia; they do not obtain rights from the state of which they are citizens or from the state in whose territory they reside at the time of submitting a request for the exercise of rights under the Law. The citizens of the Republic of Croatia who also have foreign citizenship can apply for rights prescribed in the Law if they do not obtain them from another state of which they are citizens. Article 5 of the Law defines those who cannot enjoy the status and rights established by the Law. An element of the law that has raised concern is that it prevents the granting of benefits, including to 'members, helpers or associates of

⁸³ The Law on Persons Missing in the Homeland War, 'The Official Gazette', No. 70/19.

⁸⁴ 'The Official Gazette', No. 84/2021 (1555), 23 July 2021.

⁸⁵ The Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, A/HRC/51/34/Add.1.

enemy military and paramilitary units who took part in the armed aggression against Croatia, as well as members of their families'. Several interlocutors expressed concern that this broad notion could lead to inconsistent interpretations and unfair applications of the law.⁸⁶

The LCVHW prescribed a set of rights for the following depending on victims' categories: (a) rights of the disabled based on body damage; (b) rights based on the loss or disappearance of a family member and c) other rights.

The rights based on loss or disappearance of a family member are family disability allowance, increased family disability allowance, enlarged family disability allowance, family disability allowance after the death of a disabled civilian from the Homeland War I to IV groups and monetary compensation in the amount of family disability allowance and increased and enlarged family disability allowance. For victims of disappearances other rights prescribed by the Law are relevant. Those rights include monetary compensation for civilian victims from the Homeland War, the right to one-time financial assistance, allowance for household appliances, the right to free textbooks, the right to a scholarship, preference for accommodation in student dormitories, the right to priority in hiring and filling a position, preference for placement in social welfare institutions, the right to use the services of veteran centres, the right to psychosocial assistance, the right to legal aid, special internships, exemption from payment of compensation for conversion of agricultural land, exemption from payment of court, administrative and notary fees and the right to the costs of transportation and burial of the remains of exhumed and identified civilians missing in the Homeland War on the territory of the Republic of Croatia.

9.3.3.2 Compensation

In regard to the issue of damage compensation, the Republic of Croatia has adopted the Law on Liability of the Republic of Croatia for the Damage Caused by Members of the Croatian Army and Police Acting in their Official Capacity during the Homeland War (hereinafter, Liability Act).⁸⁷ This Law regulates the liability of Croatia in terms of

⁸⁶ Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, A/HRC/51/34/Add.1.

⁸⁷ Law on Liability of the Republic of Croatia for the Damage Caused by Members of the Croatian Army and Police Acting in their Official Capacity during the Homeland War, 'Official Gazette', No. 117/2003, 23 July 2003.

the damage caused over the period 17 August 1990 to 30 June 1996. It constitutes the legal basis for damage compensation for any damage caused to any person as the result of an act by a government official. However, the Law does not provide for the prior establishment of individual liability for the damage. The WGEID recognized that there were problems with the implementation of the Law. These problems have led to a situation where most compensation claims are rejected, except in the case of court disputes where criminal liability has already been established. The main reasons for the rejection of such claims are the Republic of Croatia's refusal to accept liability for damages caused during the war in the territory that was not under its control and its failure to prosecute the perpetrators. At the same time, there is an established practice, especially in cases of enforced disappearances, which shifts the burden of proof mostly to the plaintiff.⁸⁸ The WGEID recommended that a detailed analysis of the obstacles to the implementation of the Liability Act be conducted for the purpose of ensuring the effective application of this Law.⁸⁹ Despite this legislative framework, difficulties were still faced by victims trying to obtain compensation from the State. Moreover, attempts by many families of victims to receive compensation through lawsuits against the state have failed, and plaintiffs have been reportedly forced to pay substantial court fees, forcing some of them to sell their homes. This situation has reportedly disproportionately affected ethnic Serbs. Other measures to provide full reparation owed to victims beyond compensation, such as restitution, rehabilitation, satisfaction and guarantees of non-recurrence are not regulated under this legal framework.⁹⁰

9.3.3.3 Memorialization

According to observations of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, memorialization processes in Croatia have been mainly focused on the commemoration of the victory and the conduct of the war and in honouring Croatian veterans and victims. These efforts are welcomed; however, they show a prevalent focus on memorializing the victory in the conflict and Croatian victims, albeit the latter to a lesser extent. Memorialization efforts aimed at commemorating all victims, and in particular victims

⁸⁸ Report of the Working Group on Enforced or Involuntary Disappearances on its visit to Croatia on 15–18 June 2014, A/HRC/30/38/Add.3., 17 August 2015, para. 63.

⁸⁹ See A/HRC/30/38/Add.3. para. 96.

⁹⁰ See A/HRC/51/34/Add.1. paras. 46 and 47.

of Serb ethnic origin or other minorities, seem restricted to civil society efforts, with the notable exception of the commemoration of Day of Remembrance of Missing Persons in the Homeland War. The Special Rapporteur recognized the recent efforts from some high-ranking officials to commemorate all victims of the conflict and to recall violations suffered on all sides.⁹¹

9.3.3.4 Remaining Challenges

The government of Croatia adopted certain measures in the areas of accountability, missing persons, reparations, and legal and institutional reform to address the legacy of the conflict. After the conflict, and particularly during Croatia's accession process to the European Union, some of these areas saw discernible progress, such as the prosecution of war criminals, the search for missing persons and the pace and quality of legislative and institutional reforms aimed at ensuring the rule of law, democracy and the promotion and protection of human rights. However, progress appears to have stalled in the last seven years since the accession to the EU and concerns have risen regarding the prospects of effective social reconciliation, particularly as a result of growing instances of hate speech, the glorification of war crimes and the relativization of the decisions of the ICTY and national tribunals.⁹²

The WGEID, after visits to Croatia, recommended to authorities to continue its efforts in the search for missing persons and the identification of mortal remains in order to ensure the efficient prosecution of war crimes in compliance with international standards, adopt all necessary measures to fight impunity and establish a comprehensive programme of reparation.⁹³

9.4 EU Integrations and the Issue of Disappeared People in the Western Balkans

Victims as witnesses should be provided with support in accordance with Resolution GS UN 60/147(2005) and the Directive 2012/29/EU. However, it is of the utmost importance to use EU integrations of the

⁹¹ See: A/HRC/51/34/Add.1, paras. 56–61.

⁹² See: A/HRC/51/34/Add.1.

⁹³ The Follow-up Report to the recommendations made by the Working Group on Enforced or Involuntary Disappearances on its missions to Croatia, Montenegro, Serbia and Kosovo. A/HRC/39/46/Add.2., 10 September 2018, p. 2.

WB countries as an effective mechanism not only to achieve the standards in terms of the protection of the victims' right to reparation but also to preserve the achieved level of the rights, once a state become the EU Member State, where the proactive role of the European Commission (hereinafter, EC) is crucial.

In that regard, the role of the EU accession processes in the Western Balkans should not be disregarded as a mechanism that can significantly contribute to the developments at the national level as through the regional cooperation. Namely, the mechanisms established by EC to measure the progress made by candidate countries based on the fulfilment of the interim and closing benchmarks in Cluster I (Fundamentals), more precisely, in negotiation of Chapter 23 (Judiciary and Fundamental Rights)⁹⁴ ensures that the progress towards the better protection of the rights of missing persons and their families influences the EC assessment of the Rule of Law state of play and therefore ensures fostering additional reforms.

In addition to the domestic reforms, progress and achievements in this field are also assessed by EC through the lens of regional cooperation under the ICMP and EU-WB mechanisms.

Namely, the regional dimension of searching for missing persons requires a regional approach.⁹⁵ In this context, the signatory member States should continue to fulfil their obligations assumed by signing the Declaration on the Role of the State in Addressing the Issue of Persons Missing as a Consequence of Armed Conflict and Human Rights Abuses in 2014, supported by ICMP (Mostar Declaration).⁹⁶ It is also necessary to ensure implementation of obligations from the final declarations of the EU-WB summits held in 2018 and 2019 in Sofia, London in 2018 and

⁹⁴ For more info on the new accession methodology, see M. Kolaković-Bojović and I. Simonovski, 'The accession negotiations of North Macedonia to the EU: Between new methodology and old challenges' in *International Scientific Conference 'Law between the Ideal and the Reality'* (Faculty of Law and Institute for Comparative Law, 2023), pp. 103–15.

⁹⁵ See more in M. Kolaković-Bojović and Elena Tilovska Kechegi, 'Regional cooperation in the prosecution of war crimes as an EU accession benchmark' in *International Scientific Conference 'Towards a Better Future: Democracy, EU Integration and Criminal Justice': Conference Proceedings* (Faculty of Law, Bitola: 2019), pp. 83–99; Kolaković-Bojović, 'Disappeared persons and the right to be considered alive, pp. 271–87.

⁹⁶ ICMP (2014). Declaration on the Mostar Declaration (Declaration on the Role of the State in Addressing the Issue of Persons Missing as a Consequence of Armed Conflict and Human Rights Abuses).

Poznan,⁹⁷ which address in detail the need for an individual commitment to improve the legislative and institutional framework and practice in accordance with relevant international standards but also their mutual cooperation in the field of war crimes prosecution, victims' rights and the search for missing persons and good neighbourly relations.

The above-described mechanisms have significantly contributed to raising the awareness of the general public on the issue of missing persons but also fosters the processes of the adoption of the national legislation dedicated to this issue. In this process, the WBs face various challenges, starting from a need to achieve a large number of international standards but also to avoid further regional conflicts through ensuring equal rights to all persons missing under the same circumstances associated to the armed conflicts. Finally, one of those challenges appears to be addressing the right to be considered alive until the fate of a missing person has been ascertained.

9.5 Conclusions

The issue of missing persons is regulated differently across the WBs, which also includes the legal regime of the crime of enforced disappearances and the different legal status of the victim. This has a huge impact, especially in the terms of whether the victim was a member of a military structure or a civilian. Regulation in this area is complicated further by the fact that persons who disappeared in the territory of one state may have family members, who are also victims, living in the territory of another state. This raises the question of who should ensure the rights of victims. The understanding of the concept of reparation is highly developed in the region, with the focus on compensation as an element of reparation. At the same time, the victims mostly seek recognition, namely, to be acknowledged under the law. The fact that in most of countries the relevant laws have still not been adopted points to an unwillingness to define the matter in accordance with international standards. In terms of compensation, this mostly relates to specific minimum social benefits, which complies with the prevailing challenges in the World in this regard.⁹⁸ There is a lack of memorialization, and it

⁹⁷ Sofia Declaration, 2018, retrieved April 15, 2020, available at www.consilium.europa.eu/media/34809/sofia-declaration_sr.pdf.

⁹⁸ G. Baranowska, 'The rights of the families of missing persons: Going beyond international humanitarian law' (2022) 55,1 *Israel Law Review* 25–49.

remains mostly unregulated, just as is the case of support to the associations of the families of missing persons. In addition to this, participation of victims in the various judicial and non-judicial processes, in parallel before the national, regional and international mechanisms, water down the concept of the efficiency of justice, keeping them trapped in the limbo of various standards and procedures.

The regulation of the right to reparation should be a part of a comprehensive, integrated process that includes the right to truth and justice. This process, from the perspective of disappearance, does not have solely a humanitarian purpose, but it is also a legal requirement and a factor that can improve inter-state relations and strengthen social cohesion in the societies in the region. The conclusion of the WGEID following its visits to the countries of the region was that despite the impressive results of the past, the level of progress in the search for missing persons has slowed down significantly in recent years. A common gap at the regional level within the existing legal systems is the absence of the crime of enforced disappearance and the absence of an encompassing framework for compensation and reparation for the victims and their relatives.⁹⁹ It is important to adopt a national reparation policy aimed at implementing the existing legal framework in order to provide effective and timely reparations to all categories of victims, including compensation, rehabilitation, satisfaction, restitution and guarantees of non-recurrence. The reparations programme should be adopted in full consultation with victims and according to international standards and include a gender and disabilities perspective.

Also, it is necessary to ensure that national legal frameworks define a missing person and his or her rights in accordance with Article 24 of the ICPPED. The equitable distribution of existing resources for civilian war victims should be ensured in order to eradicate, among others, discrimination between civilian and military war victims. In terms of the specific challenges at the national level, in the context of Bosnia and Herzegovina, it is important to adopt comprehensive legislation on torture victims, including legislation on reparation. Government authorities should take action without delay to establish the Fund for the Support of the Families of Missing Persons. This requires a prior assessment of the potential number of beneficiaries, considering the limitations as set out in Article 2.9. of the LMP.

⁹⁹ See A/HRC/30/38/Add.1. and A/HRC/30/38/Add.3. paras. 8 and 13.

The analysis also revealed several shortcomings peculiar to each of the countries. For example, in Croatia it is crucial to eliminate the discriminatory policies in terms of the access to reparation in practice in order to comply with relevant international standards. In Serbia, the adoption of the Law on Missing Persons based on the 2021 Draft Law is the main prerequisite to comply with relevant standards and ensure that victims can access comprehensive reparative measures.