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## The 2021 Memory Law in Bosnia and Herzegovina – Reconciliation or Polarization?

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### ABSTRACT

In July 2021, the outgoing international High Representative (HR) of Bosnia and Herzegovina (BiH) imposed a set of amendments to the Criminal Code of BiH, which outlawed the denial of genocide and relativization of war crimes. The decision was largely welcomed by Bosniaks but met with animosity to many in the Bosnian Serb entity and sparked one of the worst crises in post-war BiH. In this article, we demonstrate that because of the manner of the adoption and the legal stipulations, the HR's decision played straight into the raging BiH memory wars. It exacerbated tensions and distrust in state institutions, rather than contributing to reconciliation and peace as intended. We present a two-pronged argument, aligned with the scholarship that critically assesses external transitional justice. First, we argue that a punitive memory law adopted in such an opaque and elite-driven manner can hardly contribute to reconciliation in a divided post-war context as it does not contribute to an inclusive societal discussion about the past but merely silences the most outrageous dissenters. Second, even the minimal objectives of curbing hate speech and incitements of hatred – which some memory laws achieve – has delivered mixed results in the BiH case due to the poor design and implementation of the law. We showcase how the practical application has stalled, laying bare the weak capacities of state-level institutions, further reducing public trust in their functioning – the opposite of what was declaratively intended.

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### Introduction

On 22 July 2021, the outgoing High Representative of Bosnia and Herzegovina (BiH) Valentin Inzko used his extensive executive powers in an unexpected manner. After 12 years of a limited engagement in Bosnian affairs, the international administrator enacted a set of legal amendments that, among other provisions, criminalized relativizations and denial of war crimes, and banned glorification of war criminals as established by

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international and domestic courts.<sup>1</sup> Although previously criticized for his ineffectiveness and often hailed as a “lame duck,”<sup>2</sup> Inzko imposed these changes a few days prior to his departure in order to deliver on a “duty” that he declared he felt towards Bosnians and the victims of the 1995 Srebrenica genocide.<sup>3</sup> While the scope of the changes was officially all types of denial, which could “incite violence or hatred,” it was clear from the onset that the main impetus for the decision was the rampant culture of denial in Republika Srpska (RS), the smaller Bosnian Serb-dominated entity in BiH. The political leadership of RS has over nearly twenty years tried to undermine, relativize and deny the empirical evidence on the 1992–5 Bosnian war, its main atrocities, and the Srebrenica genocide.<sup>4</sup> The High Representative (HR) in his decision specified that the growing denial “represents a direct barrier to peace, reconciliation and trust-building and ultimately undermines the prospects for a secure, peaceful future.”<sup>5</sup> The US Embassy in Sarajevo joined in with their praise of the imposition as a step towards “a future based on peace and mutual trust.”<sup>6</sup> Bosniak victim associations, led by the voice of Srebrenica survivors assessed the decision as belated but a step in the right direction.<sup>7</sup> Non-Serb members of the state-level authorities called the decision an “act of civilisation” and indispensable for BiH’s future in the European family.<sup>8</sup>

Reactions from Republika Srpska, the smaller BiH subnational administrative unit (entity), were predictably negative. Bosnian Serb victim leaders hailed that the law was aimed at “satanizing Serbs.”<sup>9</sup> The leader of the opposition nationalist Serb Democratic Party (SDS) warned that the decision was “unnecessary and a step backwards on the path of BiH’s progress and exit from international tutorship.”<sup>10</sup> Statements by the de facto autocrat of RS, Serb member of the Presidency of BiH and the leader of the governing RS party, the Alliance of Independent Democrats (SNSD), Milorad Dodik could have hardly been more threatening: “Serbs must not accept this decision. This is a nail in the coffin of Bosnia and Herzegovina. After this, Bosnia and Herzegovina cannot function.”<sup>11</sup> Although everyone has become used to his threats, Dodik’s subsequent actions resulted in one of the

<sup>1</sup> See Office of the High Representative, “Decision on Enacting the Law on Amendment to the Criminal Code of Bosnia and Herzegovina,” No. 26/21, 23 July 2021, <http://www.ohr.int/hrs-decision-on-enacting-the-law-on-amendment-to-the-criminal-code-of-bosnia-and-herzegovina/> (accessed 15 September 2021).

<sup>2</sup> Adis Merdžanović, “A Few Thoughts on the Contemporary Role of the OHR in BiH,” 30 June 2019, <https://adismerdzanovic.com/2019/06/30/a-few-thoughts-on-the-contemporary-role-of-the-ohr-in-bih/> (accessed 15 August 2022).

<sup>3</sup> Una Hajdari, “Bosnia’s Peace Envoy Bans Genocide Denial,” *Politico*, 23 July 2021, <https://www.politico.eu/article/bosnia-peace-envoy-bans-genocide-denial/> (accessed 1 August 2021).

<sup>4</sup> Jessie Barton Hronešová, “Ethnopolitist Denial and Crime Relativisation in Bosnian Republika Srpska,” *East European Politics* 38, no. 1 (2021): 21–42; Jelena Subotić, “Holocaust and the Meaning of the Srebrenica Genocide: A Reflection on a Controversy,” *Journal of Genocide Research* 24, no. 1 (2021): 1–12; Hikmet Karčić, “Triumphalism: The Final Stage of the Bosnian Genocide,” in *Denial: The Final Stage of Genocide*, ed. John Cox, Amal Khoury, Sarah Minslow (London: Routledge, 2021), 99–112.

<sup>5</sup> See “Decision on Enacting the Law on Amendment.”

<sup>6</sup> US Embassy in BiH, “Statement on High Representative’s Decision on Enacting the Law on Amendment to the Criminal Code of BiH,” 23 July 2021, <https://ba.usembassy.gov/statement-on-high-representatives-decision-on-enacting-the-law-on-amendment-to-the-criminal-code-of-bih/> (accessed 1 August 2021).

<sup>7</sup> Nermina Kuloglija and Azra Husaric, “Bosnian Genocide Denial Ban Pleases Survivors, Angers Serbs,” *Balkan Insight*, 23 July 2021, <https://balkaninsight.com/2021/07/23/bosnian-genocide-denial-ban-pleases-survivors-angers-serbs/> (accessed 15 August 2022).

<sup>8</sup> Predrag Zvijerac, “Top International Official in Bosnia Criminalizes Genocide Denial,” *Radio Free Europe/Radio Liberty*, 23 July 2021, sec. Bosnia-Herzegovina. <https://www.rferl.org/a/russia-bosnia-high-representative/31373163.html> (accessed 15 August 2022).

<sup>9</sup> Senad Pećanin, *Izveštaj o Negiranju Genocida Srebrenica* (Srebrenica: Memorijalni centar Srebrenica-Potočari, 2022), [https://srebrenicamemorial.org/assets/photos/editor/\\_mcs\\_izvjestaj\\_BOS\\_2022\\_FINAL\\_ko.71.pdf](https://srebrenicamemorial.org/assets/photos/editor/_mcs_izvjestaj_BOS_2022_FINAL_ko.71.pdf) (accessed 1 October 2022).

<sup>10</sup> *Ibid.*

worst crises in Bosnian post-war history. A week after the amendments, RS officials announced a boycott of key institutions and declared a de facto secession process. By the end of the year, the entity-level Assembly of RS voted to withdraw from the state-level army, border control, judicial bodies, tax administration and set up its own health authority.<sup>12</sup> The already poorly functioning BiH governance became paralyzed. Serb representatives at last returned to state institutions in February 2022, noting that they would continue with their efforts to undermine the HR's decision.<sup>13</sup> The on-going political conflict continues to unravel the fragile institutional set-up of BiH and its security.<sup>14</sup>

It may seem puzzling that a legal change that merely requires the respect of existing judicial decisions could stir up so much trouble. However, as we argue in this article, the opaque manner of the HR's decision and its poorly thought-through legal content played straight into the raging memory wars. It exacerbated tensions and distrust in state institutions, rather than contributing to reconciliation and peace as intended. Moreover, the objective of curbing hate speech and incitement to hatred – which some memory laws achieve as we discuss below – has delivered short-lived results. While hate speech that included outright denial in the media dropped significantly after the law's adoption<sup>15</sup>, only around forty breaches of the law were actually reported to the Prosecutor's Office by October 2022.<sup>16</sup> By February 2023, not a single case had been prosecuted or even indicted although dozens of investigations were "ongoing", including one into Milorad Dodik.<sup>17</sup> Without sanctions, the long-term effects of the law on curbing hate speech as well as wider reconciliation remain dubious.

In this article, we present a two-pronged argument. First, we argue that externally imposed legal mechanisms such as punitive memory laws cannot be expected to substantially contribute to "reconciliation" in divided post-war contexts when they do not enable a wider societal discussion about the past but merely silence the most outrageous dissenters. Despite enthusiasm for the law's adoption in some circles, several European actors expressed frustration with the swift and poorly communicated execution by the HR because it was not accompanied by wider consultations.<sup>18</sup> Second, if the implied

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<sup>11</sup> Ehlimana Memišević, "Why Bosnia's Ban on Genocide Denial Was a Necessity," *Aljazeera Balkans*, 13 August 2021, <https://www.aljazeera.com/opinions/2021/8/13/why-bosnias-ban-on-genocide-denial-was-a-necessity> (accessed 15 August 2022).

<sup>12</sup> Omer Karabeg, "Most: Da li će Dodik ovog puta ići do kraja?" *Radio Slobodna Evropa*, 31 October 2021, <https://www.slobodnaevropa.org/a/most-dodik-prijetnje/31537058.html> (accessed 15 August 2022).

<sup>13</sup> RFE Balkan Service, "Bosnian Serb Representatives Allowed to Rejoin Central Institutions," *Radio Free Europe*, 2 February 2022, <https://www.rferl.org/a/bosnia-serb-boycott-central-institutions/31682980.html> (accessed 15 August 2022).

<sup>14</sup> Majda Ruge, "The Past and the Furious: How Russia's Revisionism Threatens Bosnia – European Council on Foreign Relations," *ECFR*, 13 September 2022, <https://ecfr.eu/publication/the-past-and-the-furious-how-russias-revisionism-threatens-bosnia/> (accessed 2 October 2022).

<sup>15</sup> Senad Pećanin, "Izveštaj o Negiranju Genocida Srebrenica" (Srebrenica: ni centar Srebrenica-Potočari, 2022), [https://srebrenicamemorial.org/assets/photos/editor/\\_mcs\\_izvjestaj\\_BOS\\_2022\\_FINAL\\_ko.71.pdf](https://srebrenicamemorial.org/assets/photos/editor/_mcs_izvjestaj_BOS_2022_FINAL_ko.71.pdf).

<sup>16</sup> Milorad Milojević, "U prvoj godini zabrane 40 prijava za negiranje genocida u Srebrenici," *Radio Slobodna Evropa*, 28 June 2022, sec. Bosna i Hercegovina, <https://www.slobodnaevropa.org/a/negiranje-genocida-u-bih-tuzbe-bez-kazni/31919561.html> (accessed 16 December 2022).

<sup>17</sup> Official data obtained from the Prosecutor's Office upon our request. See also Klix.ba, "Tužilaštvo BiH o Dodikovom negiranju genocida: Potrebno je angažirati međunarodne eksperte," 23 February, <https://www.klix.ba/vijesti/bih/tuzilastvo-bih-o-dodikovom-negiranju-genocida-potrebno-je-angazirati-medjunarodne-eksperte/230223091> (accessed 27 February 2023). And Radio Free Europe, "Prosecutor Files Case Against Bosnian Serb Leader Dodik For Genocide Denial," 6 March 2023, <https://www.rferl.org/a/bosnia-dodik-genocide-denial/32305177.html> (accessed 2 April 2023).

<sup>18</sup> For example, the French ambassador previously expressed reservations to a similar law: <http://tortura.ba/ambasada-francuske-clanice-pic-a-ne-mogu-prihvati-prijedlog-zakona-o-zabrani-negiranja-genocida-2/>.

objective of the law was to weed out public lies about the past, then the law's design and implementation needed to take seriously the existing institutional obstacles, legal limitations of the BiH constitutional system, and human capacities. Instead, the law's poor design has prevented its practical application, laying bare the weak capacities of state-level institutions, further eroding public trust in their functioning – the opposite of what was ostensibly intended.

We critically analyse the 2021 decision to amend the BiH Criminal Code, which we conceptualize as a “memory law” (a legal measure which either prescribes or bans certain interpretations of the past) that in this case bans the denial of war crimes and genocide.<sup>19</sup> We focus on memories in BiH's “fractured” memory field – to use a classification by Bernhard and Kubik for societies with conflicting views about their past.<sup>20</sup> While driven to analyse why the decision proved so contentious, we ultimately ask: How can we understand the 2021 decision by the HR and why did it prove so problematic? In our analysis, we first rely on the scholarship on memory laws and their conceptualization. We then provide background to the case and outline the ongoing disputes in the post-war Bosnian memory landscape, which have so far been addressed, with limited success, by legal efforts such as war crimes prosecutions. We then examine the process of adopting the memory law and show the limits of its effects. Finally, we focus on the societal and political consequences of the law's adoption, demonstrating that it has further polarized the debates without having the needed teeth to enforce it.

Our analysis relies on an examination of the decision and four semi-structured interviews with Bosnian legal scholars and practitioners, including one prosecutor.<sup>21</sup> These legal scholars were selected based on their experience, knowledge of the rather complex Bosnian constitutional system and expertise in hate speech prosecution. Under the 2000 BiH state-level law on Free Access to Information, we also requested access to official records of the Prosecutor's Office and High Judicial Council of BiH on the number of cases under their purview in relation to the new memory law. We consulted publicly available media and civil sector reports about the impact on hate speech, including the Srebrenica Memorial Center's annual denial report, MediaCentar and the Regulatory Agency for Communication, which monitor and receive reports from citizens about instances of hate speech and war-crimes denial. One of the authors, during his advisory role at the Ministry of Foreign Affairs of BiH from January 2020 to November 2021, was also in closed discussions with war victim associations and the Office of the High Representative on potential changes to the BiH criminal law to prohibit genocide denial. He was thus privy to discussions about how to curb war-crimes denial. While these discussions are not included in this article, we draw on this experience when discussing some of the legal obstacles of the decision.

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<sup>19</sup> Kuposov Nikolay, “Populism and Memory: Legislation of the Past in Poland, Ukraine, and Russia,” *East European Politics and Societies: And Cultures* 36, no. 1 (2022): 272–97.

<sup>20</sup> Michael Bernhard and Jan Kubik, “Introduction,” in *Twenty Years after Communism: The Politics of Memory and Commemoration*, ed. Michael H. Bernhard and Jan Kubik (Oxford/New York: Oxford University Press, 2014), 1–6.

<sup>21</sup> Due to the sensitivity of the issue, we agreed that their names will not be mentioned in this article.

## Memory Laws: Protection of Minorities or Nationalist Interpretations of the Past?

Unlike declarative memory-related legislation that does not specify sanctions, banning genocide denial and war-crime relativization through criminal legislation belongs among “punitive” memory laws.<sup>22</sup> Such laws generally either prescribe a certain vision of the past, “ban factual (or, more exactly, counter-factual) statements about history rather than assessments of the past”<sup>23</sup>, or do both. They aim to limit “the scope of interpretation of underlying events by imposing criminal sanctions on some of these interpretations.”<sup>24</sup> Memory laws are a recent phenomenon, originating in western Europe, aiming to anchor the existence of the Holocaust beyond any debate and sanction the denial of this historical fact. As the rich memory scholarship documents, the Holocaust has in the past three decades become the foundational *lieu de memoire* of European memoryscape with a fairly strong consensus across western European democracies for the need to protect it from falsification.<sup>25</sup> Unlike other atrocity denials that have never been outlawed (especially those of colonialism), there is a strong agreement that denying the Holocaust cannot be tolerated, exemplified in genocide denial bans in most European countries.<sup>26</sup>

Indeed, the origins of memory laws as we know them today can be traced to countries such as France, Austria, and Germany in the 1980s and 1990s when a cross-societal consensus was reached that Holocaust denial and conspiracy theories could not be tolerated, making memory laws a path towards victims’ redress and societal tolerance of minorities. Their adoption was the result of societal pressures and wider debates. As Bachmann with colleagues argued, “in liberal democracies, punitive memory laws enter into force as a result of bottom–up dynamics that are often triggered by the courts’ failure to solve civil lawsuits in a way that would satisfy the wider public and the political establishment of the respective country.”<sup>27</sup> In their initial adoptions, memory laws were thus historical products “inspired by the desire to offer historical clarification and even justice to victims,”<sup>28</sup> but also a protection of minorities whose experiences became part of the historically verified narrative. Their adoption was generally a rather drawn-out process and rarely came in the form of swift executive decisions.

In other parts of the world, memory laws emerged to “repress demands for redress and whitewash mass atrocities” as part of nationalist policies that did not originate in societal

<sup>22</sup> Nikolay Koposov, *Memory Laws, Memory Wars: The Politics of the Past in Europe and Russia* (Cambridge: Cambridge University Press, 2017).

<sup>23</sup> *Ibid.*, 7.

<sup>24</sup> Klaus Bachmann, Christian Garuka, Grażyna Baranowska, and Vjeran Pavlaković, “The Puzzle of Punitive Memory Laws: New Insights into the Origins and Scope of Punitive Memory Laws,” *East European Politics and Societies: And Cultures* (2020): 996–1012.

<sup>25</sup> Daniel Levy and Natan Sznaider, “Memory Unbound: The Holocaust and the Formation of Cosmopolitan Memory,” *European Journal of Social Theory* 5, no. 1 (2002): 87–106; Lim Jie-Hyun, “Triple Victimhood: On the Mnemonic Confluence of the Holocaust, Stalinist Crime, and Colonial Genocide,” *Journal of Genocide Research* 23, no. 1 (2021): 105–26; Jeffrey K. Olick and Daniel Levy, “Collective Memory and Cultural Constraint: Holocaust Myth and Rationality in German Politics,” *American Sociological Review* 62, no. 6 (1997): 921–36.

<sup>26</sup> Although the European Parliament in 2005 pondered whether banning Nazi symbols and Holocaust denial should be legislated at EU-wide, it ultimately settled on a Holocaust Memorial Day rather than a pan-European ban due to the opposing views of some newer EU members.

<sup>27</sup> Bachmann et al., “The Puzzle of Punitive Memory Laws,” 12.

<sup>28</sup> Elzar Barkan and Ariella Lang, “Mapping Memory Laws,” in *Memory Laws and Historical Justice: The Politics of Criminalizing the Past*, ed. Barkan Elzar and Ariella Lang (Cham, Switzerland: Palgrave Macmillan, 2022).

debates.<sup>29</sup> In Turkey, Russia and some eastern European countries, there has recently been a proliferation of top-down legislation that established uniform and nationalist accounts of the past. These aimed to reinforce national identity by obfuscating some deeply troubling national complicity in the Holocaust and other crimes.<sup>30</sup> Yet even across eastern Europe, motivations differed, and cannot be easily described as resulting from nationalism. Initially, the “eastern” approach to memory laws was driven by anti-communism and then as an emulation of the western “standard” described above. This is exemplified in the European Council’s 2008 “Framework Decision on Racism and Xenophobia” that included requirements to introduce bans on genocide denial to protect minorities.<sup>31</sup> For example, in Latvia and Lithuania, memory laws resulted from multiple political phenomena. They were perceived to deliver on the EU obligations of anti-racism and the western commemoration of the Holocaust. They were also a direct route to criminalize both Soviet and Nazi crimes on equal footing, and deflect local responsibility. Specifically, they answered the local need to condemn communist crimes and helped to generate international recognition of Stalinist deportations and crimes as genocide.<sup>32</sup> But they were also a foreign policy response to Vladimir Putin’s politics of rehabilitating Stalinism and nationalism. Although each east European country differed in its motivations for passing memory laws, mandating memories via legal stipulation became a common avenue for asserting political and hegemonic interpretations of the past, where protecting minorities or curbing hate-speech was a secondary objective.

Instructively for the Bosnian case, it is not surprising that memory laws – particularly in transitional or illiberal political contexts – can exacerbate societal conflict.<sup>33</sup> Looking at the case of Poland and the Baltics, Maria Mälksoo argued that “the securitization of historical memory by means of law tended to reproduce a sense of insecurity among the contesters of the ‘memory’ in question.”<sup>34</sup> This dynamic can be particularly important in divided societies and societies still processing major traumas where there is no consensus over what happened. Mandating memory through criminal sanctions can escalate tensions over issues of historical interpretation as those who disagree with such laws tend to feel targeted and threatened. In Poland, memory laws have come as top-down measures to protect public consensus over the past and silence counter-narratives, making memory laws into a nationalist political tool against dissenters.<sup>35</sup> Barkan and Lang thus conclude that “while memory laws may have begun as an effort to frame pluralistic identity, to accept responsibility for historical crimes, to promote an ethics of responsibility and to embrace the wider social and political discourse of human rights, the expansion of memory laws to majoritarian states is inspired by a very different [nationalist] objective.”<sup>36</sup>

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<sup>29</sup> Barkan and Lang, “Mapping Memory Laws,” 1.

<sup>30</sup> Bachmann et al, “The Puzzle of Punitive Memory Laws.”

<sup>31</sup> Grażyna Baranowska and León Castellanos-Jankiewicz, “Historical Memory in Post-Communist Europe and the Rule of Law: An Introduction,” *European Papers* 5, no. 1 (2020): 95–106.

<sup>32</sup> Eva-Clarita Pettai, “Protecting Memory or Criminalizing Dissent: Memory Laws in Lithuania and Latvia,” in *Memory Laws and Historical Justice*, ed. Elzar Barkan and Ariella Lang (2022):167–93.

<sup>33</sup> See Emanuela Fronza, *Memory and Punishment: Historical Denialism, Free Speech and the Limits of Criminal Law* (New York: Springer Berlin Heidelberg, 2018).

<sup>34</sup> Maria Mälksoo, “Memory Must Be Defended: Beyond the Politics of Mnemotional Security,” *Security Dialogue* 46, no. 3 (2015): 221–37.

<sup>35</sup> Bachmann et al., “The Puzzle of Punitive Memory Laws.”

<sup>36</sup> Barkan and Lang, “Mapping Memory Laws,” 11.

Given the mixed record of memory laws, the application of such laws continues to have its opponents and defenders. In the United Kingdom, fears of denialism have never trumped the reticence to curtail free speech, with frequent arguments against the adoption of memory laws. Indeed, while some see memory laws as a fundamental infringement on a pluralist discourse that forecloses fruitful societal engagement with the past, others see them as a critical bulwark against falsifications of history and atrocity denial.<sup>37</sup> In many liberal regimes, memory laws remain a useful means to protect the truth and deradicalize society by outlawing Holocaust denial, and act as an expression of a shared moral ethics.<sup>38</sup> In such cases, as Pettai argued, memory laws can also act as anti-hate speech measures.<sup>39</sup> Denialism is often accompanied by extremist discourse that can constitute hate speech if directed against a specific group. Memory laws that focus on the protection of minorities and their experience can limit such discourse. Indeed, in their original design and context, there was a sound consensus that they can be effective against propagators of hate-speech and denialism.<sup>40</sup>

This joint evidence suggests that political context and the manner of adoption is important. Only political regimes with strong institutions, legal frameworks and pluralist societal discourse can handle a fruitful discussion about the past that may result in memory laws. And memory laws that are initiated top-down, by elites or by powerful interest groups may politicize the past, criminalize opposition and/or increase societal polarization rather than lead to societal reconciliation. In such situations, mandating punitive memory laws may not actually change the substance of the discussion and narratives, as it does not represent an expression of societal maturing towards shared moral values.<sup>41</sup> Lea David powerfully argued that a “duty to remember” in the name of human rights, as a symbolic act rather than a bottom-up process, rarely leads to peace and tolerance as it often lacks legitimacy in parts of society as it has to be enforced or is expected.<sup>42</sup> Indeed, a growing number of transitional justice scholars argue that external efforts to “come to terms with the past” may in fact weaken opportunities for genuine domestic debates about the past.<sup>43</sup> Instead, they place emphasis on education, media literacy, popular cultures and other societal interventions.<sup>44</sup> As they – and we in this article – argue,

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<sup>37</sup> See Belavusau Uladzislau and Aleksandra Gliszczyńska-Grabias, eds. *Law and Memory: Towards Legal Governance of History* (Cambridge: University Press, 2017); Berber Bevernage and Nico Wouters, eds. *The Palgrave Handbook of State-Sponsored History after 1945* (Basingstoke, Hampshire: Palgrave Macmillan, 2017).

<sup>38</sup> Gliszczyńska-Grabias Aleksandra, “Penalizing Holocaust Denial: A View from Europe,” in *Global Antisemitism: A Crisis of Modernity*, ed. Charles Asher Small (Nijhoff: Brill, 2013), 237–56.

<sup>39</sup> Pettai, “Protecting Memory or Criminalizing Dissent,” 171.

<sup>40</sup> Grażyna Baranowska and León Castellanos-Jankiewicz, “Historical Memory in Post-Communist Europe and the Rule of Law: An Introduction,” *European Papers* 5, no. 1 (2020): 95–106.

<sup>41</sup> Timothy Garton Ash, “The Freedom of Historical Debate Is under Attack by the Memory Police,” *The Guardian*, 16 October 2008; Jan Grabowski, “The Holocaust and Poland’s ‘History Policy,’” *Israel Journal of Foreign Affairs* 10, no. 3 (2016): 481–86.

<sup>42</sup> Lea David, *The Past Can’t Heal Us: The Dangers of Mandating Memory in the Name of Human Rights* (Cambridge: Cambridge University Press, 2020).

<sup>43</sup> Jelena Subotić, *Hijacked Justice: Dealing with the Past in the Balkans* (Ithaca: Cornell University Press, 2009); Jelena Obradović, *Ethnic Conflict and War Crimes in the Balkans: The Narratives of Denial in Post-Conflict Serbia* (Bloomsbury Publishing, 2013).

<sup>44</sup> Dubravka Stojanović, “Memory Laws: The Continuation of Yugoslav Wars by Other Means,” in *Memory Laws and Historical Justice: The Politics of Criminalizing the Past*, ed. Elzar Barkan and Ariella Lang (Cham, Switzerland: Palgrave Macmillan, 2022), 225–50.



memory laws are incapable of resolving “deep political issues with simple acts of recognition.”<sup>45</sup>

## The Toxic Memory Landscape of Bosnia and Herzegovina

Bosnia and Herzegovina represents a “fractured” memory regime where at least three versions of the past coexist and clash on daily basis, defining the political discourse. Criminal prosecution efforts have so far failed to substantially change the existing narratives of the main parties of the Bosnian war (Bosnian Serbs, Bosnian Croats and Bosniaks, also referred to by some as Bosnian Muslims)<sup>46</sup> who remain stuck in a mnemonic conflict. Such disputes are generally waged over: whether the 1992–5 war was a civil or an international conflict; who is to be blamed for its start and conduct; numbers and identities of victims; whether genocide was committed by Bosnian Serbs and Serbia (and where); and consequently, how the post-war constitutional order of BiH should be reformed, if at all. There is an impressive compendium of research on these issues, including international war-crimes prosecutions at the International Criminal Tribunal for the former Yugoslavia (ICTY), and other courts that established the basis of these crimes whose main victims were Bosniaks.<sup>47</sup> Despite all the research, mnemonic dissonance over the war has proliferated in BiH since 1995, in parallel with the domestic (mainly RS-elite driven) contestation of the HR’s international governance (that was tasked to enforce the peace negotiated at Dayton in 1995).<sup>48</sup> From conspiracy theories to exclusive self-victimization narratives that often side-line victims, nationalist BiH politicians have gradually escalated memory wars into a discourse about the threat of another physical war. Bosnian memory landscape has become an amalgam of dissonance.<sup>49</sup> The historical evidence on the war clearly shows the intensity and nature of the crimes, as well as the identity of the victims and the perpetrators. Yet the main focus of the debate remains the categorization of Srebrenica as genocide. There has been an intensive relativization of the crime and a proliferation of the application of the term genocide to other atrocities committed during the war (and before).

Bosnian Serb authorities – increasingly aided by their Bosnian Croat counterparts – deny the classification of genocide, noting that Bosnia is being “srebrenized” as all debates result in disputes over Srebrenica. These political debates impact public

<sup>45</sup> Cited in Raffi Wartanian, “Memory Laws in France and Their Implications: Institutionalizing Social Harmony,” *Humanity in Action Blog*, November 2009, [https://www.humanityinaction.org/knowledge\\_detail/memory-laws-in-france-and-their-implications-institutionalizing-social-harmony/](https://www.humanityinaction.org/knowledge_detail/memory-laws-in-france-and-their-implications-institutionalizing-social-harmony/) (accessed 9 October 2022).

<sup>46</sup> While Bosnian Croat leaders have increasingly weighed in in the debate on the side of Bosnian Serbs, due to the scope of this article, we leave their positions aside.

<sup>47</sup> Klejda Mulaj, “Constructions of Genocide Denial and Remembrance: Fractured National Identity in Postgenocide Bosnia,” in *Postgenocide: Interdisciplinary Reflections on the Effects of Genocide*, ed. Klejda Mulaj (Oxford: Oxford University Press, 2021).

<sup>48</sup> Clark, Janine Natalya, “Judging the ICTY: Has It Achieved Its Objectives?” *Southeast European and Black Sea Studies* 9, no. 1–2 (2009): 123–42.

<sup>49</sup> Jovana Mihajlovic-Trbovc, *Public Narratives of the Past in the Framework of Transitional Justice Processes: The Case of Bosnia and Herzegovina* (Ljubljana, University of Ljubljana, 2014); Open Society Fund BiH and ProMente, *Obrazovanje u BiH: Čemu (Ne) Učimo Djecu? Analiza Sadržaja Udžbenika Nacionalne Grupe Predmeta u Osnovnim Školama* (Sarajevo: Mas Media Sarajevo, 2017); Mladen Lakić, Anja Vladislavljević, and Filip Rudić, “State of Denial: The Books Rewriting the Bosnian War,” *Balkan Insight*, 19 October 2018, <https://balkaninsight.com/2018/10/19/state-of-denial-the-books-rewriting-the-bosnian-war-10-18-2018/> (accessed 9 October 2022); Filip Rudić, “Bosnian Serb War Commissions ‘Seeking to Revise Truth’: Academics,” *Balkan Insight*, 21 February 2019, <https://balkaninsight.com/2019/02/21/bosnian-serb-war-commissions-seeking-to-revise-truth-academics/> (accessed 9 October 2022).

opinion. According to a 2018 poll, 76.1% and 73.6% of Bosnian Serbs in RS respectively saw the two orchestrators of the Srebrenica genocide, Ratko Mladić and Radovan Karadžić, as war heroes despite both being found guilty of genocide by the ICTY.<sup>50</sup> Conversely, 82.7% of young Bosniaks and 52.7% of young Croats saw Mladić as a war criminal in 2021.<sup>51</sup> While the vast majority of Bosniaks consider Srebrenica a genocide, the poll found that only 20.1% of Serbs in RS did so. This glaring dissonance in narratives is the result of nearly a quarter of a century of divisive politics and nationalist policies, fuelled by denialism and a lack of responsibility in neighbouring countries, most notably Serbia (and to a lesser degree Croatia). It is also the product of a lack of trust in BiH's international governance and the ICTY, most notably among Bosnian Serbs who see the ICTY as a biased "anti-Serb" institution that disproportionately prosecuted Serbs.<sup>52</sup>

Bosnian Serb mnemonic defence has been allegedly waged in the name of the protection of their territorial unit (RS), separate identities and their status in the moral order of BiH (notions that Bosnian Serbs were also victims not only perpetrators, which is certainly the case and is not denied). In these efforts, Republika Srpska has become a champion of denying historical facts and celebrating war-crime perpetrators as national heroes, which some have termed "triumphalism."<sup>53</sup> The two dominant parties, the governing SNSD under Milorad Dodik and the main opposition party SDS, have both supported a range of policies to rewrite history and celebrate war criminals. Since the 2008 infamous "Srebrenica Project," led by a dubious "scholar" and funded by the SNSD government with the aim of denying Srebrenica,<sup>54</sup> RS government has created new war-crimes "research" institutions, problematic "truth" commissions, and rewritten school curricula. By 2018, RS revoked its previous 2004 statement accepting guilt and published reports with farcical research findings that dispute the numbers of victims and present a false version of history.<sup>55</sup> In parallel, RS funds research that portrays Srebrenica as a fabrication, to evade the collective portrayal of Bosnian Serbs as genocidal.<sup>56</sup> Serbs stress that they were victims of a genocide during World War II (indeed in Jasenovac) and refute the "genocidaire" label with the logic that a victim cannot also be a perpetrator.<sup>57</sup> The "culture of denial" and accompanying "culture of silence", as Dimitrijević put it, has been characterized by the refusal of the "majority population [in the region] in confronting the elementary facts of the crimes."<sup>58</sup> Similar denialism is not only common in neighbouring Serbia but also in Croatia.

Targeted by Bosnian Serb denial and fabrications, the Bosnian Muslim (Bosniak) community has been threatened by such a nationalist discourse. Yet in Bosniak nationalist

<sup>50</sup> Valicom data provided to us directly. See also "Istraživanje: Kako građani RS-a gledaju na genocid u Srebrenici," Aljezera, July 2018. <https://balkans.aljazeera.net/videos/2018/7/11/istrazivanje-kako-gradani-rs-gledaju-na-genocid-u-srebrenici> (accessed 11 October 2022).

<sup>51</sup> Srdjan Puhalo and Marijana Toma, *Kako Mladi u Bosni i Hercegovini Opazaju Protekli Rat?* (Banja Luka: Art print, 2022).

<sup>52</sup> Cf. Clark, "Judging the ICTY."

<sup>53</sup> Hariz Halilovich, "25 Years after Srebrenica: 'Local Genocide'," in *Bosnian Genocide Denial and Triumphalism: Origins, Impact and Prevention*, ed. Hikmet Karčić and Sead Turčalo (Sarajevo: Faculty of political science, 2021), 115–25.

<sup>54</sup> Eric Gordy, *Guilt, Responsibility, and Denial: The Past at Stake in Post-Milošević Serbia*, (Philadelphia: University of Pennsylvania Press, 2013).

<sup>55</sup> Monica Hanson Green, *Srebrenica Genocide Denial Report* (Srebrenica-Potočari Memorial, 2020).

<sup>56</sup> Such as in the 2019 publication Milovan Milutinović, ed., "Srebrenica: Reality and Manipulation" Proceedings of the International Scientific Conference.

<sup>57</sup> Stojanović, "Mapping Memory Laws."

<sup>58</sup> Nenad Dimitrijević, *Duty to Respond: Mass Crime, Denial, and Collective Responsibility* (Budapest: Central European University Press, 2011).

circles the mnemonic defence has been based on the “ultimate” victimhood identity.<sup>59</sup> Victimhood has been transformed into a political tool as a defence of victim identities in the name of survival.<sup>60</sup> Any attempt to divert from this ideology is vociferously criticized. For example, when Sulejman Tihić (the late leader of the main Bosniak party SDA) criticized the Bosniak “philosophy of the victim” in 2008, he was met with hostility from many corners of Bosniak society.<sup>61</sup> Similarly, Edin Ramulić, a respected human-rights defender who represents families of (primarily Bosniak) missing people in Prijedor, is repeatedly under attack for arguing that Bosniak nationalist authorities also operate with inflated victim numbers.<sup>62</sup> Bosniak nationalist politicians apply the term “genocidal creation” to RS in their misguided belief that this would delegitimize and weaken it.<sup>63</sup> Instead, such positions fuel the debate over if, when and by whom genocide was committed, rather than placing historical facts about the past at the centre. As a result, externally led interventions to change these irreconcilable narratives fail to achieve more than shallow, short-lived gestures used solely to placate international publics.<sup>64</sup> The substance of discussion remains unaltered due to the lack of leadership and discourse to confront the past. Instead, the domestic political infighting uses disputes over the past for political campaigns – with Bosnian Croat leadership increasingly siding with Bosnian Serbs to achieve their political aims. As a result, engaged and genuine debates about the past happen only within the increasingly weak and marginalized civil society.<sup>65</sup>

## The 2021 Memory Law in BiH: Normative Aims and Misguided Expectations

In such a polarized context, any external intervention is met with furious criticism from one side or another. In the case of the memory law, it was initiated by one section of society (Bosniak MPs and victim associations) – arguably the section of society that is most victimized by the denial – but externally imposed after repeated failures to reach a political consensus. While its normative aims were inspired by the original west European memory laws – to ban denial of historical facts, which have a sound empirical base – the context and manner of its adoption was more reminiscent of the east European experience where memory laws become elite projects and exacerbate political infighting. As we trace below, we see two fundamental problems with the 2021 Bosnian memory law. First, the combination of the tense political context and imposition of the law by a foreign actor through an opaque adoption process resulted in limited legitimacy and

<sup>59</sup> Elissa Helms, *Innocence and Victimhood: Gender, Nation, and Women's Activism in Postwar Bosnia-Herzegovina* (Madison: University of Wisconsin Press, 2013); Christian Axboe Nielsen, “Surmounting the Myopic Focus on Genocide: The Case of the War in Bosnia and Herzegovina,” *Journal of Genocide Research* 15, no. 1 (1 March 2013): 21–39.

<sup>60</sup> Hasić, “Deviating Party Leadership Strategies in Bosnia and Herzegovina: A Comparison of Milorad Dodik and Dragan Čović,” in *Party Leaders in Eastern Europe*, ed. Sergiu Gherghina (Cham: Springer International Publishing, 2020), 17–41; Barton Hronešová, “Ethnopolitist Denial and Crime Relativisation in Bosnian Republika Srpska.”

<sup>61</sup> R. Čengić, “Tihić laže i vrijeđa Bošnjake,” *Nezavisne novine*, 27 December 2008, <https://www.nezavisne.com/novosti/bih/Haris-Silajdzic-Tihic-laze-i-vrijedja-Bošnjake/34783> (accessed 3 May 2022).

<sup>62</sup> Marko Tomaš, “Pismena zadaća: Edin Ramulić, velikosrpski redar i instant izdajnik,” *Žurnal*, 2 June 2022, <https://zurnal.info/clanak/edin-ramulic-velikosrpski-redar-i-instant-izdajnik/25040> (accessed 3 June 2022).

<sup>63</sup> Nielsen, “Surmounting the Myopic Focus on Genocide,” 30.

<sup>64</sup> Jasna Dragović-Soso, “Apologising for Srebrenica: The Declaration of the Serbian Parliament, the European Union and the Politics of Compromise,” *East European Politics* 28, no. 2 (2012): 163–79.

<sup>65</sup> Zala Volčič and Olivera Simić, “Localizing Transitional Justice: Civil Society Practices and Initiatives in the Balkans,” in *Transitional Justice and Civil Society in the Balkans* (New York: Springer, 2013), 1–14.

effectiveness of the law. We argue that the law sought to engender a consensus judicially, institutionalizing historical memory through external legal transitional justice. Second, even if conceptualized as an anti-hate speech measure and a normative legal tool to weed out extreme deniers, the law's flawed design ignored the complexity of BiH's governance and human resources, preventing its effective implementation. These contextual and procedural limitations did not result in any meaningful progress towards reconciliation.

Undeniably, curbing hate speech and the rampant rewriting of the past was one of the main motivators for the proposals by Bosniak victims and their advocates for criminalizing genocide denial in BiH.<sup>66</sup> This justification was not to dictate a uniform understanding of the past but to closely connect BiH's recent history with existing international and domestic war-crimes prosecutions, as well as the wider European standards of banning genocide denial.<sup>67</sup> The logic of this measure was understandable given the "underground false historic currents" of RS policies, as some outspoken critics put it, and widespread relativizations of past atrocities.<sup>68</sup> Importantly, the 2019 European Commission's Analytical Report on BiH, which outlined 14 key priorities for BiH to become an EU candidate, explicitly stated that BiH must take concrete steps to promote an environment conducive to reconciliation in order to overcome the legacies of war as a *sine qua non* for EU membership, noting that "revisionism and denial contradict the most fundamental European values."<sup>69</sup> Indeed, the European Commission repeatedly referred to "European values" in their appeals to Bosnian authorities to curb the denial and hate speech, exerting external pressure on domestic authorities.

These pressures led to several attempts to legally ban denial at various levels of Bosnian governance. Constitutionally (Annex 4 of the Dayton Peace Agreement), BiH is a multi-ethnic federation with two key territorial units – the centralized Republika Srpska (RS) and the decentralized Croat–Bosniak Federation of BiH (FBiH) where power is divided between Bosniak and Bosnian Croat representatives in so-called cantons.<sup>70</sup> (A self-governed multi-ethnic District of Brčko was created later as the third territorial unit.) Legislation is thus created at several levels of governance: state, subnational entities (and cantons in FBiH), and the District. Criminal legislation in BiH comprises the criminal justice provisions contained in the Criminal Code of BiH and in other laws of BiH, including subnational criminal codes of the two BiH entities. Banning genocide at the state level necessitates an agreement of both entities, which also means all three so-called

<sup>66</sup> Velma Saric and Srdjan Puhalo, "Zakon o Negiranju Genocida," *Kontrasti*, Sarajevo, 2019, [https://www.youtube.com/watch?v=Pt8l\\_qolKQ8](https://www.youtube.com/watch?v=Pt8l_qolKQ8) (accessed 3 October 2022); Genevieve Parent, "Genocide Denial: Perpetuating Victimization and the Cycle of Violence in Bosnia and Herzegovina (BiH)," *Genocide Studies and Prevention* 10, no. 2 (October 2016): 38–58.

<sup>67</sup> Ehlimana Memišević, "Battling the Eighth Stage: Incrimination of Genocide Denial in Bosnia and Herzegovina," *Journal of Muslim Minority Affairs* 35, no. 3 (2015): 380–400.

<sup>68</sup> Karčić, "How Denial of Bosnian War Crimes Entered the Mainstream"; Sead Turčalo and Hikmet Karčić, "The Far-Right in Bosnia and Herzegovina: Historical Revisionism and Genocide Denial," *Balkan Insight*, August 2021, [https://balkaninsight.com/wp-content/uploads/2021/08/The-Far-Right-in-Bosnia-and-Herzegovina\\_preview\\_without-IRI-logo.pdf](https://balkaninsight.com/wp-content/uploads/2021/08/The-Far-Right-in-Bosnia-and-Herzegovina_preview_without-IRI-logo.pdf) (accessed 3 October 2022).

<sup>69</sup> European Commission, "Analytical Report Accompanying the Document Communication from the Commission to the European Parliament and the Council Commission Opinion on Bosnia and Herzegovina's Application for Membership of the European Union," The European Union, 29 May 2019, <https://neighbourhood-enlargement.ec.europa.eu/system/files/2019-05/20190529-bosnia-and-herzegovina-analytical-report.pdf> (accessed 3 October 2022)..

<sup>70</sup> The General Framework Agreement for Peace in Bosnia and Herzegovina, "The General Framework Agreement for Peace in Bosnia and Herzegovina Initialled in Dayton on 21 November 1995 and Signed in Paris on 14 December 1995," 21 November 1995, <https://www.osce.org/bih/126173?download=true>.

“constituent peoples” (Bosnian Serbs, Croats and Bosniaks). Such consensus is, of course, not needed at the subnational level (where only Bosniaks and Bosnian Croats need to agree). Indeed, *the entity* (subnational) Assembly of FBiH adopted amendments to its Criminal Code in 2014 with provisions on the prohibition of justifying or denying any type of genocide established in the final decisions of the International Court of Justice (ICJ), the ICTY and/or domestic courts in BiH.<sup>71</sup> In contrast, to reform how denial is processed *at the state level*, the 2003 Criminal Code needs to be amended or a new state law adopted. This proves insurmountably difficult due to the intense political disputes between Bosnian Serbs and Bosniaks about the 1992–5 war.

Regarding the ban on genocide denial, there were five key failed domestic initiatives at the state level, primarily led by Bosniak MPs in consultation with victims’ associations. The initial attempt of Ekrem Ajanović from the Party for BiH (SBiH) – a party that has often called RS “genocidal” – for a special law failed in 2007 in the BiH Parliament. This led to the option of amendments to the Criminal Code, which he submitted with Remzija Kadrić and Ekrem Ajanović in 2009, and again failed to gain support from RS representatives.<sup>72</sup> Two years later, Azra Hadžiahmetović and Beriz Belkić, again from SBiH, proposed a new draft law on the prohibition of denial, minimization, justification of the Holocaust, the crime of genocide and crimes against humanity, which were supported by only a third of deputies from RS (when it requires a majority) and thus failed. Several RS representatives explained that they rejected the law because it would “satanize one nation,” and voiced their opposition to the party that proposed the law – SBiH.<sup>73</sup>

Thereafter, there was another attempt to reform the Criminal Code of BiH, by adding a sub-clause to the section regulating crimes against humanity and values protected by international law, but with no success due to repeated blockages from RS. In 2016, Denis Bećirović (Social Democratic Party, SDS) proposed a law on the prohibition of public denial, minimalization, justification or approval of the Holocaust, the crime of genocide and crimes against humanity.<sup>74</sup> The draft law proposed up to three years of imprisonment and a series of fines. It yet again failed to secure RS support. In 2017, he futilely advocated for amendments to the Criminal Code of BiH one more time, followed by a rejected proposal by Zlatko Miletić from the (again mainly Bosniak) Democratic Front in 2019.<sup>75</sup> All these initiatives ostensibly followed the west European model (also symbolically including Holocaust denial as part of the amendments when it was clear that the memory of World War II had little bearing in this context) and were initiated by Bosniak or Bosniak-dominated political parties, garnering little support from Bosnian Serb parties.

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<sup>71</sup> Criminal Code of FBiH, Official Gazette of FBiH, no. 36/03, 37/03, 21/04, 69/04, 18/05, 42/10, 42/11 and 59/14, see <https://fbihvlada.gov.ba/bosanski/zakoni/2014/zakoni/35.htm> (accessed 16 August 2022).

<sup>72</sup> Ehlimana Memišević, “Battling the Eighth Stage: Incrimination of Genocide Denial in Bosnia and Herzegovina,” *Journal of Muslim Minority Affairs* 35, no. 3 (2015): 380–400.

<sup>73</sup> Cited in Memišević, “Battling the Eighth Stage,” 14.

<sup>74</sup> Lejla Gačanica and Caroline Finkeldey, “Nazivanje ratnih zločina pravim imenom,” (Sarajevo: ZFD and TRIAL, 2019), 8. See also: Prijedlog Zakona o zabrani javnog poricanja, minimiziranja, opravdavanja ili odobravanja holokausta, zločina genocida i zločina protiv čovječnosti BiH (Proposed Law Banning Public Denial, Trivialisation, Justification or Condonation of the Holocaust, Genocide Crimes and Crimes against Humanity of BiH), 27 April 2016, <https://www.javnaraspava.ba/bih/Zakon/1305> (accessed 16 December 2022).

<sup>75</sup> Nejra Džaferagić, “Analiza: Poslije decenije odbijanja, treba li nametnuti zakon o negiranjju genocida?” 16 April 2021, see <https://ba.voanews.com/a/bih-genocid-negiranje-zakon-zabrana/5855498.html> (accessed 16 December 2022).

The decision of the HR Inzko to use his so-called Bonn powers in 2021 to change domestic state legislation thus came in response to these previous initiatives. The OHR is the only institution in the country with powers to overrule any legislation (it even has the power to sack elected officials).<sup>76</sup> Indeed, the 2021 changes imposed by the HR reflected some of the previous attempts to elaborate on the existing legal definitions contained in Article 145 of the Criminal Code of BiH that relate to the “practices of inciting hatred or violence.” The OHR decision incorporated not only what the law needed to yield as a result (stopping genocide denial), but it also implied a protection of the existing legal order, which the OHR co-created. It amended the Criminal Code, a piece of legislation that was imposed by the OHR in 2003 and was thus seen as building upon this precedent.<sup>77</sup> The new memory law (in the form of amendments) outlined a more precise set of complementary legal grounds for preventing incitement of hatred and violence against individuals or groups.<sup>78</sup> It stipulated imprisonments ranging from six months to five years.

According to his statements, the HR wanted to not only ban denial but also leave a legacy to incentivize prosecutorial and judicial action to safeguard BiH legal order, weakened by political infighting. From this perspective, the 2021 memory law symbolized an attempt to restore the basis for judicial activism and for prosecutors to take ownership over hate speech in court proceedings. Additionally, at a normative level, such a symbolic measure was publicly seen as setting out moral redlines.<sup>79</sup> Yet contrary to the divided political map of BiH, the OHR’s decision was designed to work in line with universal and non-ethnic standards of judicial activism that may well work in other contexts in Europe, but which failed to address the governing and ethnic complexity of BiH. Despite previous domestic debates, which generally emulated the western examples that were extensively referred to by Denis Bećirović and other Bosniak representatives arguing for their adoption<sup>80</sup>, the HR’s solution was not sensitized to the BiH legal context.

First, there already was poor legal practice in regulating hate speech and denialism at the FBiH level since 2014, producing no successful cases of prosecution relating to the hate-speech provisions of the 2014 amendments.<sup>81</sup> Building strong(er) case-law in FBiH to prosecute the denial of genocide and war crimes proved challenging because prosecutors (by their own account) were unable to navigate the legal complexities of FBiH in proving the intent of a person to publicly provoke or incite ethnic, racial or religious hatred, discord or intolerance by denying or condoning genocide, and thus causing distress among citizens.<sup>82</sup> The other obstacle was the interpretation of freedom of expression in such cases. The prosecutors repeatedly struggled to prove that offensive narratives could incite actions and that it was outside of an individual’s rights to freely

<sup>76</sup> See, for example, Harun Išerić, Nasir Muftić, and Tahir Herenda, “Inkriminacija negiranja genocida u BiH: Između bh. politike i slobode izražavanja” (Sarajevo: YIHR, 2022).

<sup>77</sup> *Odluka kojom se proglašava Krivični zakon Bosne i Hercegovine*, 24.01.2003, see <http://www.ohr.int/odluka-kojom-se-proglasava-krivichni-zakon-bosne-i-hercegovine/> (accessed 16 August 2022).

<sup>78</sup> See “Decision on Enacting the Law on Amendment.”

<sup>79</sup> Bećirović: Negiranje genocida vodi njegovom ponavljanju,” *AlJazeera Balkans*, 16 June 2017, <https://balkans.aljazeera.net/news/balkan/2017/6/16/becirovic-negiranje-genocida-vodi-njegovom-ponavljanju> (accessed 16 December 2022).

<sup>80</sup> Dragana Erjavec, “Teško do zabrane negiranja genocida,” *Radio Slobodna Evropa*, 16 July 2020, sec. Bosna i Hercegovina, <https://www.slobodnaevropa.org/a/srebrenica-genocid-negiranje-zabrana/30730544.html> (accessed 16 December 2022).

<sup>81</sup> Official Response of the High Judicial and Prosecutorial Council of BiH to the Request for free access to information submitted by the authors (no. 01-07-10-178-103/2022), received on 16 August 2022.

<sup>82</sup> Discussions with FBiH legal experts, Sarajevo, August 2022.

express themselves. Without taking much notice of these difficulties, the HR's amendments essentially mirrored the definition of the criminal act from the entity level but with the application to the entire BiH territory. As some of our interlocutors noted, similar to the entity level, the state-level Prosecutor's Office has not been granted sufficient human resources and training to take on this task.

It is highly unrealistic to expect state prosecutors to succeed where entity prosecutors have failed. After much criticism of the lack of state level indictments, prosecutors explained that they had to dismiss reports of denial because they deemed it impossible to: prove the substance of the submitted claims were in breach of the law, identify the alleged perpetrator (especially for social media posts under pseudonyms) and/or prove incitement to hatred that would be acted upon.<sup>83</sup> As charges have failed to be successfully brought against the highest ranking political leaders who repeatedly deny genocide in Srebrenica, the law has failed to change the atmosphere of impunity for denial. Confident of impunity, Milorad Dodik in February 2023 declared that "genocide didn't happen there [Srebrenica], we all know that, but they keep trying to insist on it in a violent way".<sup>84</sup>

Second, the institutional and legal scope of the 2021 amendments' practical application across BiH was dubious. It was clear from the onset that RS would reject the changes and hinder its implementation with all its powers. Such powers primarily stem from the separation of "exclusive" and "shared jurisdiction" principles of the BiH constitutional system.<sup>85</sup> According to the Constitution, which the HR is obliged to defend, the state only assumes responsibility over criminal acts at the entity level if they "threaten the sovereignty, territorial integrity, political independence, national security and international subjectivity" of BiH or if such acts "have serious repercussions or harmful consequences on the economy of Bosnia and Herzegovina, or may cause other harmful consequences for Bosnia and Herzegovina, or may cause serious economic damage or other harmful consequences outside the territory of the given entity or the Brčko District."<sup>86</sup> This constitutional right was exercised to protect and enforce BiH's basic principle of the state's right to preserve itself and were used in the establishment of the state-level Court of BiH in 2004 as well as the adoption of the Criminal Code of BiH. It remains questionable whether the 2021 amendments would address such threats. Importantly, for them to function, the Criminal Code of RS would need to be aligned with the state-level one, which the HR refused to consider, allegedly as it would reveal the limits of HR's powers across BiH territory.<sup>87</sup> It was thus highly unlikely that RS courts and prosecutors would implement the amendments to the Criminal Code of BiH, if the RS Criminal Code remained unaltered given the subnational powers RS holds.

Third, the HR was aware that any direct impositions of legal changes within RS would be overridden by the RS entity-level Assembly, rendering them ineffective. Only the Constitutional Court of BiH has powers over RS legislation that cannot be overridden. The HR

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<sup>83</sup> Lamija Grebo, "Bosnia's Genocide Denial Law: Why Prosecutors Haven't Charged Anyone," *Balkan Insight*, 28 February 2023, <https://balkaninsight.com/2023/02/28/bosnias-genocide-denial-law-why-prosecutors-havent-charged-anyone/> (accessed 28 February 2023).

<sup>84</sup> Klix.ba, "Tužilaštvo BiH o Dodikovom negiranju genocida".

<sup>85</sup> Milos Babic, "Actual Questions on the Validity and the Application of Criminal Legislation in Bosnia and Herzegovina," *Journal of Criminology & Criminal Law* 48 (2010): 3.

<sup>86</sup> Nedim Ademović, Joseph Marko and Goran Marković, *Ustavno Pravo Bosne i Hercegovine* (Sarajevo: Fondacija Konrad Adenauer e. V., Predstavništvo u Bosni i Hercegovini, 2012), 117.

<sup>87</sup> Interview with a legal expert, Sarajevo, July 2021.

decided to use a state-wide legislation rather than meddle into RS laws. After the Memory Law was enacted, RS President Željka Cvijanović (SNSD) issued a decree on the annulment of the amendments in an emergency procedure, which was then adopted by the RS National Assembly, thus making their legal powers over RS territory void.<sup>88</sup> It also directly prohibited relevant RS authorities from cooperating with BiH state authorities regarding the implementation of the decision of the HR. The RS entity-level Assembly then amended its Criminal Code in the opposite direction: Article 280a of the RS Criminal Code now stipulates prison sentences for all those “damaging the reputation of Republika of Srpska and its peoples,” and for publicly scorning or grossly belittling its flag, coat of arms, emblem or anthem, as well as referring or labelling RS or its people a “genocidal creation” or aggressors.<sup>89</sup> This effectively represents a counter-memory law, and a dangerous legal tool to wield against the opposition. Soon thereafter, the RS Constitutional Court weighed in by declaring all these countermeasures legal. For its part, on 15 July 2022 the state-level Constitutional Court (which still has three international judges and has the highest judicial powers in the country) annulled the RS Law and legally allowed for the application of the HR’s decision in RS.<sup>90</sup> The court outlined that the HR effectively substituted domestic institutions, and that the 2021 amendments, in addition to being considered the law of BiH, also represent a decision of BiH institutions. Such legal disputes became a rather common practice whereby the HR imposes decisions that are later challenged by political actors and then legitimized by the Constitutional Court.<sup>91</sup> However, as decisions of the Constitutional Court of BiH are frequently ignored, the practical situation on the ground remained unaltered.

Fourth, the 2021 Memory Law offered some hope that outright denial would diminish.<sup>92</sup> Here we see some positives. Indeed, the 2022 Srebrenica Genocide Report that monitors annual changes in denial in the media and public speeches recorded a whopping 80% drop in genocide denial in BiH from May 2021 to April 2022 when compared to the previous 12 months. Unfortunately, this encouraging number was eclipsed by an overall uptake in genocide denial in the post-Yugoslav region, especially in Serbia, suggesting trans-border travel.<sup>93</sup> Moreover, 18 months after the decision, there are worrying signs that denialism has in fact intensified in the wider political arena and the region.<sup>94</sup> Alarmingly, in the first year after the changes the state-level Prosecutor’s Office has not issued a single indictment due to the burden of proving actions<sup>95</sup> despite over forty reports from the civil sector of breaches in the first year<sup>96</sup> and 27

<sup>88</sup> Official Gazette of Republika Srpska, no 89/2021, 7 October 2021, [https://tuzilastvobih.gov.ba/files/docs/KZ\\_RS\\_dopuna\\_89\\_21\\_bos.pdf](https://tuzilastvobih.gov.ba/files/docs/KZ_RS_dopuna_89_21_bos.pdf) (accessed 1 October 2022).

<sup>89</sup> Ibid.

<sup>90</sup> Constitutional Court of BiH, 128th plenary session, 15 July 2022, <https://www.ustavisud.ba/bs/128-plenarna-sjednica> (accessed 1 October 2022).

<sup>91</sup> Nedim Kulenovic, “Court as a Policy-Maker?: The Role and Effects of the Constitutional Court of Bosnia and Herzegovina in Democratic Transition and Consolidation” (Sarajevo: Analitika, 2016).

<sup>92</sup> Kuloglija Nermina and Irvin Pekmez, “Smanjeno negiranje genocida u medijima i na Twitteru nakon Inzkove odluke,” *Detektor*, 3 August 2021, <https://detektor.ba/2021/08/03/smanjeno-negiranje-genocida-u-medijima-i-na-twitteru-nakon-inzkove-odluke/> (accessed 10 August 2022); Pistan, Čarna, “Call it by its right name,” *Verfassungsblog*, 23 August 2021, <https://verfassungsblog.de/call-it-by-its-right-name/> (accessed 10 August 2022).

<sup>93</sup> Pečanin, “Izveštaj o Negiranju Genocida Srebrenica”.

<sup>94</sup> faktor.ba, “Šta radi Tužilaštvo BiH: Dodik nastavlja negirati ratne zločine, koristi govor mržnje, za Turković kaže “svaka joj za šamara,” 13 January 2023, <https://www.faktor.ba/vijest/sta-radi-tuzilastvo-bih-dodik-nastavlja-negirati-ratne-zlocine-koristi-govor-mrznje-za-turkovic-kaze-svaka-joj-za-samara/186795> (accessed 20 January 2023).

<sup>95</sup> Information obtained from the High Judicial and Prosecutorial Council upon our free information access request on 16 August 2022. See also Klix.ba, “Tužilaštvo BiH o Dodikovom negiranju genocida”.



investigations launched by December 2022.<sup>97</sup> The 2022 Srebrenica-Potočari Memorial Centre outlined that even after the law's adoption, key political and victim representatives in RS and Serbia continued to publicly reject that Srebrenica qualified as genocide.<sup>98</sup> While it may be too soon to judge the self-regulating effect on hate speech, the existing data are not too encouraging.<sup>99</sup> As already noted, Milorad Dodik continues with his denial of Srebrenica while also questioning the veracity of a multitude of wartime events beyond Srebrenica. He recently also proposed the resuscitation of the very force that effected the genocide, the Army of Republika Srpska, leading to intensified security concerns.<sup>100</sup> The National Day of RS on 9 January 2023, a holiday that was deemed unconstitutional by the Constitutional Court of BiH, featured a convicted war criminal – in addition to awarding Vladimir Putin the highest RS award.<sup>101</sup>

Finally, the timing of the adoption puts the Memory Law's "peace and reconciliation" aims into question too. Bosnian political situation and denialist culture has been deteriorating for well over a decade, during which Valentin Inzko was in power.<sup>102</sup> He was appointed as BiH's High Representative in 2009. Despite BiH's political unravelling over this time, he used his powers sparingly and refused to wield them in moments of crises where they could have remedied some of the current political paralyses.<sup>103</sup> The rather rushed adoption of the measures raised questions about the true motivation of the decision, with some speculations about whether Inzko sought an easy legacy measure or whether back-room deals were concluded with some political actors in BiH. Several analysts speculated that the memory law was a concession to the Bosniak side in exchange for later changes to the Electoral Law (in October 2022) that benefitted the Bosnian Croats, allegations which we could not unequivocally verify.<sup>104</sup> The memory law came at a time when BiH's three main groups were engulfed in political infighting over electoral rules and constitutional changes. Indeed, the application of HR's vast powers just a few days before his departure shocked many, including some of his European counterparts, later leading to calls for its retraction.<sup>105</sup> It also seems that the BiH public was well aware of the political explosiveness of the decision. According to a 2021 poll, 59% of BiH citizens (65% of RS citizens) saw the amendments as creating more problems than they solved.<sup>106</sup> This suggests that even the public considered the adoptions as practically and politically unworkable, questioning the legitimacy of the adoption.

<sup>96</sup> Milorad Milojević, "U prvoj godini zabrane 40 prijava za negiranje genocida u Srebrenici," *Radio Slobodna Evropa*, 28 June 2022, sec. Bosna i Hercegovina, <https://www.slobodnaevropa.org/a/negiranje-genocida-u-bih-tuzbe-bez-kazni/31919561.html> (accessed 16 December 2022).

<sup>97</sup> Grebo, "Bosnia's Genocide Denial Law".

<sup>98</sup> Pećanin, "Izveštaj o negiranju genocida Srebrenica," 28.

<sup>99</sup> There is a clear gap in a transparent and systematic monitoring of genocide and war-crimes denial in BiH and the wider region, with various NGOs (e.g. BIRN, MediaCentar) filling the gaps but providing only partial information.

<sup>100</sup> Berina Bahtanović, "Milorad Dodik Nazvao Armiju RBiH 'Zločinačkom Organizacijom'," *N1*, 9 May 2022.

<sup>101</sup> "Brojne kritike i osude defilea pripadnika MUP RS u Banjaluci – Region – Dnevni list Danas," *Danas.rs*, 10 January 2023, sec. Region, <https://www.danas.rs/svet/region/brojne-kritike-i-osude-defilea-pripadnika-mup-rs-u-banjaluci/>.

<sup>102</sup> Karčić, "How Denial of Bosnian War Crimes Entered the Mainstream."

<sup>103</sup> See also Adis Merdžanović, *Democracy by Decree: Prospects and Limits of Imposed Consociational Democracy in Bosnia and Herzegovina* (Stuttgart: ibid, 2015), 436.

<sup>104</sup> For more, see Išerić, Muftić, and Herenda, "Inkriminacija Negiranja Genocida u BiH: Između Bh. Politike i Slobode Izražavanja".

<sup>105</sup> Julian Borger and Daniel Boffey, "EU Working to Amend Genocide Denial Law That Is Blamed for Bosnia Crisis," *The Guardian*, 22 December 2021, sec. World news, <https://www.theguardian.com/world/2021/dec/22/eu-working-to-amend-law-on-srebrenica-genocide-denial-to-blame-for-bosnia-crisis>.

<sup>106</sup> "Bosnia and Herzegovina Poll," National Democratic Institute, IPSOS, December 2021, <https://www.ndi.org/publications/bosnia-and-herzegovina-poll> (accessed 3 October 2022).

## Conclusion

Hailed as a symbolic act in the right direction, the 2021 decision to ban the denial of war crimes and genocide in Bosnia and Herzegovina was ostensibly adopted in the spirit of peace and reconciliation. Its objective was to introduce a moral framework that would clearly distinguish between “justice” and “injustice.”<sup>107</sup> In its content and objectives, the decision was justified by the standardized European rejection of Holocaust denial and European values. However, in western Europe such memory laws were adopted after much delay through a drawn-out bottom-up process to protect minority and victim memories rather than as part of a hasty externally managed transitional-justice interventions. In eastern Europe, similar laws have been generally adopted in an attempt to decide on one version of history in an authoritative fashion, close off painful and complex parts of national history, and in some cases symbolically prove their belonging to existing European remembrance frameworks. The Bosnian case does not comply with these approaches easily – while its aims are not to prescribe a strictly nationalist vision of the past (even if that is the interpretation in RS), it is equally not a result of societal reckoning across the country but a demand of the most numerous victims of the 1992–5 war – Bosniaks – for redress and truth. The 2021 changes constitute neither a revision of history by law as many east European governments have done nor allow for a societal (or individual) journey to come to terms with the past. While the symbolic power of the memory law is undeniable, the already apparent non-implementation casts a shadow over its positive lasting effects. Rather than moderating the political discourse, the law has inadvertently exacerbated an already fractured memory regime.

As we argued in this article, the 2021 stipulations provide another instance of the limits of externally mandated justice and memory. Critical scholarship on transitional justice has repeatedly noted that the globally espoused models of how to deal with the past score poorly when they do not allow for nuanced and localized applications.<sup>108</sup> In her criticism of the three pillars of transitional justice through a human-rights perspective – “facing the past”, “duty to remember” and “justice for victims” – Lea David noted that “moral remembrance captures the best and the worst of the humanity. It contours the dreams and aspirations of human morality, justice and equality, but ends up strengthening narrow nationalist sentiments, producing inequalities and perpetuating the animosities that it meant to extinguish in the first place”.<sup>109</sup> A similar assessment could be made of the 2021 memory law, which aspired to once and for all eradicate manipulations of the past but instead intensified such debates – not only in BiH but in the wider post-Yugoslav space. Indeed, the decision came at a time when neighbouring Montenegro was embroiled in a scandal about Srebrenica denial that threatened to topple the government.<sup>110</sup> Its adoption also resulted in an intensification of glorification of war criminals and denial of war crimes in Serbia.<sup>111</sup> More alarmingly, despite an initial reduction of

<sup>107</sup> Chandran Kukathas, “Responsibility for Past Injustice: How to Shift the Burden,” *Politics, Philosophy & Economics* 2, no. 2 (2003): 165–90.

<sup>108</sup> See, for example, Rosalind Shaw, Lars Waldorf, and Pierre Hazan, *Localizing Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford: Stanford University Press, 2010).

<sup>109</sup> David, *The Past Can't Heal Us*, 213.

<sup>110</sup> Samir Kajosevic, “Montenegro Minister Sacked for Querying Srebrenica Genocide Rulings,” *Balkan Insight*, 17 June 2021, <https://balkaninsight.com/2021/06/17/montenegro-minister-sacked-for-querying-srebrenica-genocide-rulings/> (accessed 3 October 2022).

<sup>111</sup> Pećanin, “Izveštaj o Negiranju Genocida Srebrenica”.

hate speech linked to war crimes by political leaders, when Milorad Dodik again publicly denied Srebrenica as genocide in February 2023, the State Prosecutor explained that not even such statements can be effectively prosecuted using the changes to the Criminal Code as the “consequences” of such statements are unclear.<sup>112</sup>

Given these multi-levelled problems, rather than focusing on legal measures to secure the history of the war, an option may be found in societal approaches that require complex groundwork. As Dubravka Stojanović noted in her analysis of denialism in Serbia and Croatia, it is in schools, media, and cultural institutions where narratives and views about the past change.<sup>113</sup> Similarly, Jasna Dragović-Soso in her work on denying Srebrenica in Serbia noted that in addition to an array of political and socio-economic conditions, “a broad societal reckoning with the past” can be expected once it “represents a response to a public demand for knowledge and understanding.”<sup>114</sup> In BiH, a 2018 poll showed that more educated respondents in RS were more likely to call Srebrenica genocide, suggesting some relationship between levels of education and acceptance of internationally validated war-crimes investigations.<sup>115</sup> Although education is not a magic bullet for denialism, a wealth of research shows that countering disinformation with facts and forensic truth fails as cognitive biases prevent us from accepting facts that do not fit with our beliefs.<sup>116</sup> Instead, understanding the sources of these beliefs and dismantling them through multi-level societal engagements in schools, media, arts and culture – but also families – produce better results.<sup>117</sup> Encouraging societal trust and reducing fear plays an important role. It is important to call liars by their name and to put an end to the creation of alternative truths such as the Sarajevo and Srebrenica commissions launched in Republika Srpska. However, the public would benefit from funding for and encouragements of activities and policies that encourage cross-community communication, media literacy, support for civil society and culture rather than imposed legal initiatives that cannot replace these long-term domestic processes.

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<sup>112</sup> Klix.ba, “Tužilaštvo BiH o Dodikovom negiranju genocida”.

<sup>113</sup> Stojanović, “Mapping Memory Laws,” 250.

<sup>114</sup> Jasna Dragović-Soso, “Apologising for Srebrenica: The Declaration of the Serbian Parliament, the European Union and the Politics of Compromise,” *East European Politics* 28, no. 2 (2012): 163–79.

<sup>115</sup> Valicom data provided to us directly. See also “Istraživanje: Kako građani RS-a gledaju na genocid u Srebrenici,” Aljazeera, July 2018. <https://balkans.aljazeera.net/videos/2018/7/11/istrazivanje-kako-gradani-rs-gledaju-na-genocid-u-srebrenici> (accessed 11 October 2022).

<sup>116</sup> Miloš Gregor and Petra Mlejnková, eds., *Challenging Online Propaganda and Disinformation in the 21st Century. Political Campaigning and Communication* (Cham, Switzerland: Palgrave Macmillan, 2021).

<sup>117</sup> Katherine V. Aumer, ed., *The Psychology of Extremism* (Cham: Springer, 2020); Lid Stian and Stig Jarle Hansen, eds., *Routledge Handbook of Deradicalisation and Disengagement* (Abingdon, New York: Routledge, 2020).

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