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THE EUROPEAN UNION AND TRANSITIONAL JUSTICE

Laura Davis

June 2010



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THIS INITIATIVE IS FUNDED
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ABOUT ICTJ

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THE EUROPEAN UNION AND TRANSITIONAL JUSTICE

AUTHOR PROFILE

Laura Davis

Laura Davis is a consultant and senior fellow at MediatEUR: the European Forum for Dialogue and Mediation. Previously, she was the justice expert at the Belgian Development Agency (BTC). Between 2006 and 2009, she worked for the International Center for Transitional Justice (ICTJ), latterly as senior adviser to the ICTJ's Europe and Africa programmes in Brussels. In 2007-2008, she was senior associate based in Kinshasa where she ran the ICTJ's Democratic Republic of Congo (DRC) programme.

Before joining ICTJ, she worked in the conflict prevention and peacebuilding sector. She was co-chair of the Human Rights and Democracy Network of NGOs and a member of the steering committee of the European Peacebuilding Liaison Office (EPLO). She has published on European integration, transitional justice and peacebuilding, and the DRC. She holds degrees in modern history from the University of Oxford, and is studying for a PhD at the University of Ghent.

ACKNOWLEDGMENTS

The ICTJ is grateful to the European Commission-funded Initiative for Peacebuilding, which provided financial support for this project. The author would like to thank Virginie Ladisch, Lisa Magarrell, Marieke Wierda, Catherine Woollard, and particularly Sari Kouvo for their comments on the draft.

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ACRONYMS

ACP	African, Caribbean and Pacific countries
BiH	Bosnia and Herzegovina
CFSP	Common Foreign and Security Policy
CSDP	Common Security and Defence Policy (from 1st December 2009)
CSO	Civil society organisation
DCI	Development Cooperation Instrument
DDR	Disarmament, Demobilisation and Reintegration
DRC	The Democratic Republic of Congo
EC	European Commission
EDF	European Development Fund
EIDHR	European Instrument for Human Rights
ENP	European Neighbourhood Policy
EU	European Union
ESDP	European Security and Defence Policy (CSDP since 1st December 2009)
EUSR	European Union Special Representative
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
IER	Instance Équité et Réconciliation (Fairness and Reconciliation Commission, or Equity and Reconciliation Commission, Morocco)
IFS	Instrument for Stability
IHL	International Humanitarian Law
JLS	Justice, Freedom and Security
NGO	Non-governmental organisation
SCSL	Special Court for Sierra Leone
SSR	Security system reform
TRC	Truth and Reconciliation Commission
UNSCR	United Nations Security Council Resolution

INTRODUCTION

The legacy of systematic human rights violations committed during violent conflict and repressive rule can reach well into the new order. Transitional justice can help societies address the past through prosecutions, truth-seeking, reparations for victims and institutional reform. Justice in this sense includes and goes beyond criminal justice, encompassing broader notions of accountability and redress.

Many EU Member States have experienced legacies of this kind – whether from the Second World War, the Spanish Civil War, the conflict in Northern Ireland, or the transitions from authoritarian rule in Spain, Portugal, Greece and Central and Eastern Europe. The EU itself was founded as a project to prevent the recurrence of war, and some Member States have made attempts to come to terms with past abuses through prosecutions, truth-seeking, reparations for victims, and reforming public institutions, particularly in the security sector.

Beyond its borders, the EU is a major contributor to development, crisis management, peace- and institution-building programmes – including transitional justice initiatives. It is committed to promoting peace, to the protection of the EU's rights and to the strict observance and the development of international law.¹ One of the objectives of the Union's common foreign and security policy (CFSP) is 'to consolidate and support democracy, the rule of law, human rights and the principles of international law'.² Transitional justice can help meet these objectives, but the EU lacks policies, operational guidelines and tools for implementing these commitments.

This paper argues that rather than remain simply a supporter of transitional justice endeavours undertaken by others, the EU should also draw on its experience at home and abroad, and on lessons learnt from other actors such as the UN, to develop a strategic approach to transitional justice as a way of achieving its foreign policy objectives. This could help close the credibility gap between declared commitments to peace, human rights and international law and their realisation. The institutional reforms underway at the time of this writing provide the opportunity to make this happen.

Transitional justice is a dynamic field, and closely related to areas of EU expertise, such as crisis management, peace- and institution-building and development. Some of the connections between these fields are not yet fully identified or researched, and the EU is well-placed to strengthen them. This would improve the impact of its peace- and institution-building programmes and develop the field of transitional justice more broadly.

This paper briefly reviews transitional justice and its relationship to peacebuilding and crisis management, institution-building (including security sector reform and disarmament, demobilisation and reintegration) and development, given the importance of these areas to the EU. It then offers an overview of EU policy provisions relevant to transitional justice. Finally, it draws conclusions and gives recommendations as a basis for future elaboration of an EU approach to transitional justice.

¹ Treaty on European Union Article 3 paragraphs 1, 5.

² Treaty on European Union Article 21.2 (b).

TRANSITIONAL JUSTICE

Although “transitional justice”, “international justice”, “peace and justice”, and “accountability” are inter-related notions, they are not synonymous. This paper focuses on transitional justice, which the UN Secretary-General has defined 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...’

‘Transitional justice consists of both judicial and non-judicial mechanisms, including prosecution initiatives, facilitating initiatives in respect of the right to truth, delivering reparations, institutional reform and national consultations. Whatever combination is chosen must be in conformity with international legal standards and obligations’.³

Transitional justice is not in itself a special form of justice, but a set of approaches that seeks to bring about justice in extraordinary conditions, often in the aftermath of violent conflict or repressive rule. These efforts to promote accountability for past crimes may take place in the immediate aftermath of a crisis, or much later. Transitional justice mechanisms have been applied not only post-conflict and after the overthrow of authoritarian regimes, but also by established democracies wishing to address systematic abuse in their past. There is no exclusive list of approaches, and indeed new techniques are developed all the time. This paper will address the following four main thematic approaches:

- Criminal prosecution of at least those bearing the greatest responsibility for international crimes such as war crimes, crimes against humanity and genocide (through domestic, hybrid or international courts or tribunals);
- Truth-seeking, often through truth commissions which investigate and report on key periods of past abuse and may make recommendations to remedy the abuse and prevent recurrence;
- Reparations programmes for victims which help repair the material and moral damages of past abuse, typically through a mix of material and symbolic benefits; and
- Reform of public institutions, including of the security sector (particularly the army, police and judiciary), from instruments of repression and corruption into instruments of public service and integrity.

Transitional justice approaches typically pursue interconnected objectives: to hold those responsible for past abuse to account; to provide reparation for victims; to prevent repetition by reforming public institutions; and to increase civic trust in public institutions and in the rule of law. Meeting these objectives requires using the different mechanisms described above in a holistic manner. These approaches should not be seen in isolation from or in competition with each other; they are mutually reinforcing and much more effective together than apart.

For example, the International Criminal Court is in many ways the epitome of international justice. It was set up to investigate and prosecute cases of the worst crimes – war crimes, crimes against humanity, and genocide – if states are unwilling or genuinely unable to do so themselves. As a matter of policy, it will only investigate and prosecute a handful of cases, and national jurisdictions must act where possible. But in transitional societies, there are often vast numbers of victims of serious crimes, and a large number of perpetrators. The need for

3 Guidance Note of the Secretary-General ‘United Nations Approach to Transitional Justice’ (2010), p.2.

justice is high, but the judicial system is usually extremely weak and compromised, and least capable of delivering justice. The court recognises that judicial and non-judicial measures, including transitional justice approaches, can play an important complementary role to international trials in overcoming this impunity gap.⁴

A gender-sensitive approach to justice is particularly important to understand women's and men's different experience of abuse, and to avoid reinforcing discrimination through poorly-designed projects. Some truth commissions have had a particularly important role in bringing to light women's experience, the limits of official histories, the hierarchies within the human rights field, and the complexities of "victim" identity. They have also identified continuities and discontinuities between ordinary and extraordinary violence that emphasise the long struggle for gender justice.⁵ Women and men may prioritise political and socio-economic rights differently, and this should be taken into account. Impunity for sexual- and gender-based violence must be addressed as a key component to each transitional justice approach and gender-sensitive approaches can also empower women as agents of positive change in transitional justice mechanisms.

LINKS WITH OTHER KEY POLICY AREAS

Transitional justice approaches tend to be used in extraordinary circumstances, in the aftermath of violent conflict or repressive rule, where the EU may be supporting a range of interventions. The relationships therefore between transitional justice and the overlapping areas of peacebuilding and crisis management, institution-building, security sector reform (SSR) and disarmament, demobilisation and reintegration (DDR), and development should be examined. In general, these relationships remain understudied, and the EU could make a major contribution to the field by contributing to a deeper understanding of these relationships. Although each context will require a specific response, the following examples suggest that there are connections and tensions at conceptual and policy levels to be explored.

Transitions create opportunities for political change and for renegotiating the founding principles of the state, society, and the relationships between them. Where the post-conflict settlement becomes a power-sharing arrangement between former belligerent factions, each seeking to maximise their gains and power rather than found a new state, impunity for human rights violations, corruption and other criminal activity may become institutionalised. Attempts to promote accountability may be stymied, and future reforms rendered even more difficult.⁶ Addressing questions of accountability in peace talks and ensuring there are justice provisions in peace agreements may have an important effect in creating space for transitional justice in the post-conflict phase.⁷

Reforming abusive institutions (especially the army, police and judiciary) is important in itself. It may also be a necessary pre-condition for other transitional justice and democracy-building approaches to succeed. And in post-conflict environments, integrating a justice-sensitive SSR approach to DDR early on in the process may prevent a culture of impunity for human rights violations becoming entrenched in new security institutions.⁸ Likewise, it is important to recognise the need for investment in DDR processes to be balanced with attention to victims in a post-conflict setting.⁹

The contribution that transitional justice approaches could make to institution-building beyond the security sector is understudied. A justice-sensitive approach to SSR adds value to broader SSR programmes, as it aims to prevent recurrence and repetition of violations by transforming abusive institutions and instilling accountability for past abuses. It emphasises increasing the integrity, accountability and legitimacy of institutions

4 'The pursuit of criminal justice provides one part of the necessary response to serious crimes of international concern which by itself, may prove to be insufficient as the Office [of the Prosecutor] is conducting focused investigations and prosecutions. As such, it fully endorses the complementary role that can be played by domestic prosecutions, truth seeking, reparations programs, institutional reform and traditional justice mechanisms in the pursuit of a broader justice'. Policy Paper on the Interests of Justice, ICC-OTP-2007, pp.7-8.

5 V. Nesiiah (2006). *Truth commissions and gender: Principles, policies and procedures*. New York: International Center for Transitional Justice, p.42.

6 S. Kouvo and L. Davis (forthcoming 2010). 'Lessons from Afghanistan and the Democratic Republic of Congo', in European Commission *Making the Difference? What works in response to crises and security threats – The debate continues*, p.465.

7 L. Davis (forthcoming 2010). *The EU, transitional justice and peace mediation*. Brussels: Initiative for Peacebuilding.

8 S. Kouvo and L. Davis (forthcoming 2010). 'Lessons from Afghanistan and the Democratic Republic of Congo', in *Making the difference? What works in response to crises and security threats – The debate continues*. European Commission.

9 Guidance Note of the Secretary General (2010). 'United Nations approach to Transitional Justice', p.11.

through reform, and on transforming the institution's role in society and its relationship with the population. This may include vetting processes to remove human rights violators from the security system, and installing effective disciplinary and oversight mechanisms. Empowering citizens is crucial and aims to build civic trust in the institutions, transform victims into citizens whose rights are known, protected and enforced, and who hold public institutions to account.¹⁰ These techniques developed for the security sector could be adapted with some success to other reform programmes. In doing so, the EU could strengthen the impact of its work by adopting a justice-sensitive approach to reforming public institutions beyond the security sector, to increase accountability, transparency, and the rule of law.

Transitional justice can make important contributions to peacebuilding. Popular notions of "justice" during and after war or repressive rule may include aspects of injustice and inequality, which manifest themselves as discrimination against particular population groups. This may include discrimination that preceded the conflict and may have been exacerbated by it (e.g. gender inequality), as well as discrimination and abuse directly related to the conflict. Transitional justice places the victim at the centre, ensuring that the victims of conflict or oppression are recognised as such, and are empowered as dignified, fully rights-bearing citizens. In this way, transitional justice can contribute to peacebuilding by helping change social norms to become more inclusive and more just.

There are also complex linkages between development and transitional justice: Some transitional justice measures may address issues such as social and economic rights, which are directly related to both past abuse and to future development. But even when the connection is less direct, transitional justice endeavours may contribute to key conditions for sustainable development such as stability, safety, security and access to justice. Development may also contribute to transitional justice through direct funding and technical assistance, and through supporting institutional capacity-building, particularly in the justice and security sector. Conversely, transitional justice may also compete with other development initiatives for scarce resources.¹¹

Insecurity or the threat of increased violence complicates peacebuilding and development programmes, and may pose a particular problem to those pursuing a justice agenda. Short-term interventions to increase security may undermine longer-term peace and justice programmes, whilst efforts to achieve justice may risk increasing stability. Timing is an important aspect to both successful transitional justice endeavours and crisis management, and the ways in which transitional justice and crisis management may in the short term reinforce each other is under-examined. Given the temporary nature of transitional justice interventions, they could even form part of an exit strategy for a crisis management mission, if well coordinated with longer-term peace- and institution-building programmes.

10 L. Davis (2009). *Transitional Justice and Security System Reform*. Brussels: Initiative for Peacebuilding, p.7. For a full discussion of justice-sensitive SSR, see A. Mayer-Rieckh and P. de Greiff (Eds.) (2007). *Justice as Prevention*. Social Science Research Council.

11 R. Duthie (2009). 'Introduction' in P. de Greiff and R. Duthie (Eds.). *Transitional Justice and development: Making connections*. Social Science Research Council, pp.19-21.

THE EUROPEAN UNION AND TRANSITIONAL JUSTICE

According to the treaty on European Union, 'The Union's aim is to promote peace, its values and the well-being of its peoples'.¹² In Stockholm in December 2009, the Council of the EU declared: 'The Union is an area of shared values, values which are incompatible with crimes against humanity, genocide and war crimes'.¹³ The EU has no policy or agreed approach to transitional justice, so this section reviews EU policy to consider whether an EU approach to promoting peace and combating impunity for the gravest crimes can be pieced together from different policies. The focus is on the external policies of the EU, as this is the area in which the EU institutions have most competence; the pursuit of transitional justice within the EU will for the most part remain the domain of the Member States.

The Stockholm Programme, which is concerned with justice and home affairs, is the exception. It outlines how the EU has a three-fold role in combating impunity for the gravest crimes. It does this firstly, by promoting cooperation with the International Criminal Court and other international tribunals and secondly, through exchanging judicial information and best practices in relation to the prosecution of perpetrators of genocide, crimes against humanity and war crimes through the European Network of Contact Points. And thirdly, by acting as a facilitator for Member States' approaches to dealing with crimes committed in their own past, including by totalitarian regimes, for 'in the interests of reconciliation, the memory of those crimes must be a collective memory, shared and promoted, where possible, by us all'.¹⁴

The Stockholm Programme is largely concerned with matters within the EU, but the link between the internal (within the EU) and external (outside the EU) dimensions is important. Firstly, we can expect the external dimension of internal justice, freedom and security (JLS) policies to strengthen in the future, particularly in relation to the role of EU delegations abroad and Common Security and Defence Policy (CSDP) missions. Secondly, it emphasises that transitional justice is not only a foreign policy matter, but an objective to be pursued as much at home as abroad.

Turning to external policy, the 2008 European Security Strategy report declares:

'The International Criminal Court should grow further in effectiveness, alongside broader EU efforts to strengthen international justice and human rights'.¹⁵

The report highlights the central role of the ICC in the EU's strategy, alongside "broader EU efforts" that presumably include transitional justice. In 2008, the European Commission established a Transitional Justice facility to enable speedy and flexible funding to transitional justice measures, noting:

'Transitional justice and ad hoc tribunals have emerged as a critical issue for peace building and post-conflict resolution and have been integrated into broader EU crisis management approaches, reflecting

¹² TEU Article 3.1.

¹³ Council of the European Union, *The Stockholm Programme – An open and secure Europe serving and protecting the citizens*, 2nd December 2009 Doc. 17024/09, p.12.

¹⁴ *Ibid.*

¹⁵ *Report on the implementation of the European Security Strategy – Providing security in a changing world* (December 2008). European Council, S407/08, p.12.

the importance of addressing the question of past human rights abuse in transitional and post-conflict situation[s] for sustainable peace and stability'.¹⁶

These extracts raise a series of questions. 'Transitional justice *and* ad hoc tribunals' suggests that prosecutions are not necessarily integral components of transitional justice, contrary to the definition used by the UN Secretary-General. Is this how the EU understands transitional justice? Secondly, has transitional justice 'been integrated into broader EU crisis management approaches', and if so, on what policy basis, and does EU engagement extend beyond financing?

This section will address these questions by examining EU policy provisions for the different transitional justice components – prosecutions, truth-seeking, reparations and institutional reform. Given the central role accorded to international justice, it is to this policy area we now turn.

INTERNATIONAL CRIMINAL JUSTICE

THE INTERNATIONAL CRIMINAL COURT

The EU and its Member States are the main contributors of financial and technical assistance of the ICC. And, as the European Security Strategy report makes clear, the EU is also a robust political supporter of the court. It is also committed to advancing universal support for the Rome Statute.¹⁷

At Lisbon in 2007, African and European leaders declared that:

Africa and the EU will work together to protect and promote the human rights of all people in Africa and Europe ... Both sides commit themselves to fighting impunity in all its forms. The most serious crimes of concern to the international community as a whole, especially crimes against humanity, war crimes and genocide, should not go unpunished and their prosecution should be ensured by measures at both domestic and international level. In this context, the partners agree that the establishment and the effective functioning of the International Criminal Court constitute an important development for peace and international justice.¹⁸

This reflects a previous, legally binding commitment made in 2005 in the revised Cotonou Agreement between the EU and 79 African, Caribbean and Pacific (ACP) countries to ratify and implement the Rome Statute, and 'fight against international crime in accordance with international law, giving due regard to the Rome Statute'.¹⁹ The implications of this recently came to the fore: because of this article and the outstanding ICC warrant against President al-Bashir,²⁰ the government of Sudan chose not to ratify the revised Cotonou Agreement with the result that it cannot access aid worth around €300 million from the European Development Fund (EDF).²¹

Cooperation with the ICC, as well as abidance by international law and efforts at conflict resolution are also identified as priorities of the European Neighbourhood Policy (ENP),²² and the ENP Action Plans for Armenia, Azerbaijan, Egypt, Georgia, Jordan, Lebanon, Moldova and Ukraine include ICC clauses. Although the Development Cooperation Instrument (DCI) does not reference the ICC, nonetheless ICC clauses are negotiated with trade and partnership agreements falling under the DCI's geographical reach.²³

THE AD HOC TRIBUNALS: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

The EU has provided extensive political and financial support to the ad hoc tribunals, including the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the former Yugoslavia (ICTY), the

16 Commission Staff Working Document SEC(2009) 932: Accompanying document to the Annual report from the European Commission on the Instrument for Stability in 2008 COM(2009) 341, p.57.

17 Council Common Position 2003/444/CFSP.

18 European Communities (2008). *The Africa-European Union strategic partnership Lisbon Declaration 8-9 December 2007*, p.24.

19 OJ L 209/37 11.8.2005.

20 The court issued a warrant for President Al Bashir's arrest on charges of war crimes and crimes against humanity in March 2009.

21 Answer given by Commissioner De Gucht on behalf of the European Commission to a written question, 4th February 2010, available at <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2009-6327&language=EN> accessed 23rd March 2010.

22 European Commission (2004). *European Neighbourhood Policy Strategy Paper*, COM(2004) 373 final p.13.

23 European Communities (2007). *The European Union and the International Criminal Court*, p.14.

Extraordinary Chambers of the Courts of Cambodia, and the Special Court for Sierra Leone. It also supports the trial of the former Chadian president Hissène Habré in Senegal,²⁴ and the Special Tribunal for Lebanon.²⁵

Some of the strongest commitments to international criminal justice are found in the EU's Enlargement policy. The European Council meeting in Copenhagen in 1993 laid down conditions for EU membership, which included 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and the protection of minorities'²⁶ and provided financial assistance for countries in the region to strengthen democratic institutions and the rule of law as a way to 'advance regional cooperation as well as reconciliation'.²⁷ Cooperation with the ICTY became a condition for membership candidacy, as spelled out in the Thessaloniki Agenda for the Western Balkans:

'The EU urges all concerned countries and parties to co-operate fully with the International Criminal Tribunal for the former Yugoslavia. Recalling that respect for international law is an essential element of the SAP [Stabilisation and Association Process], the EU reiterates that full co-operation with ICTY, in particular with regard to the transfer to The Hague of all indictees and full access to documents and witnesses, is vital for further movement towards the EU'.²⁸

The EU Special Representative (EUSR) in Bosnia and Herzegovina (BiH) is mandated to 'engage with relevant BiH authorities on their full cooperation with the International Criminal Tribunal for the Former Yugoslavia (ICTY)'.²⁹ This conditionality remains an important – and at times, difficult – aspect of the EU's relations with the countries in the region, particularly Serbia and BiH.

The pursuit of justice through international or hybrid courts is not, however, the preferred approach. States should rather prosecute domestically; the international and hybrid options are last resorts and exceptional. This is set out in the EU guidelines on promoting compliance with international humanitarian law (IHL):

'To have a deterrent effect during an armed conflict the prosecution of war crimes must be visible, and should, if possible, take place in the State where the violations have occurred. The EU should therefore encourage third States to enact penal legislation to punish violations of IHL. The EU's support of the ICC and measures to prosecute war criminals should also be seen in this context'.³⁰

THE CONTRIBUTION OF EU MISSIONS TO CRIMINAL JUSTICE

The EU also has an extensive agreement on cooperation and assistance with the ICC.³¹ This agreement sets out the ways in which, in accordance with the EU Treaty, the EU institutions³² would share information (including EU classified information) with the court, cooperate with the prosecutor, waive privileges and immunities, and support training for court personnel. The EU, upon request of the court, shall also provide facilities and services, including 'support at field level'.³³

The EU guidelines on promoting compliance with international humanitarian law (IHL) state:

'The importance of preventing and suppressing violations of IHL by third parties should be considered, where appropriate, in the drafting of mandates of EU crisis-management operations. In appropriate cases this may include collecting information which may be of use for the ICC or in other investigations of war crimes'.³⁴

24 European Communities (2008). *EU Report on Human Rights 2008*, p.74.

25 European Commission (2009). *Commission Staff Working Document Accompanying the Communication from the Commission to the European Parliament and the Council Implementation of the European Neighbourhood Policy in 2008: Progress Report Lebanon COM(2009) 188*, p.6.

26 European Council in Copenhagen 21-22 June 1993 Presidency Conclusions SN 180/1/93, p.13.

27 Council Regulation (EC) No 1085/2006 of 17 July 2006 establishing an Instrument for Pre-Accession Assistance (IPA).

28 General Affairs & External Relations Council (GAERC). Extracts from successive General Affairs & External Relations Councils 16 June 2003.

29 Council Decision 2010/111/CFSP 22 February 2010 Article 3.p.

30 Doc. 16841/09 III, operational guideline B16 (g).

31 Agreement between the International Criminal Court and the European Union on cooperation and assistance, ICC-PRES/01-01-06.

32 The council of the EU, the secretary general/high representative, the general secretariat of the council, and the European Commission, and specifically not the Member States. *Agreement between the International Criminal Court and the European Union on cooperation and assistance*. ICC-PRES/01-01-06, Article 2.1.

33 Agreement between the International Criminal Court and the European Union on cooperation and assistance, ICC-PRES/01-01-06. Article 14.

34 Doc. 16841/09 III, operational guideline B16 f.

To date, this potential remains largely unrealised. In the Western Balkans, the CSDP mission EUFOR Althea contributed to identifying, disrupting and closing down networks supporting persons indicted for war crimes, which in turn contributed to the arrests of Stojan Zupljanin and Radovan Karadzic in 2008.³⁵ But other missions, such as EUPOL Proxima in Macedonia (FYROM) could have contributed more to the ICTY.³⁶

EU Special Representatives could contribute significantly to promoting transitional justice in relevant contexts, including during peace mediation.³⁷ But of the EUSRs, only two are mandated to cooperate with international courts: the EUSR for BiH mentioned above, and the EUSR for Sudan, who is mandated:

'... with regard to human rights, including the rights of children and women, and the fight against impunity in Sudan, [to] follow the situation and maintain regular contacts with the Sudanese authorities, the AU and the UN, in particular with the Office of the High Commissioner for Human Rights, the human rights observers active in the region and the Office of the Prosecutor of the International Criminal Court'.³⁸

By contrast, in the Democratic Republic of Congo (DRC), where the court is also active, none of the mandates of the four different ESDP missions to date or of the EUSRs have included cooperation with the ICC, despite the outstanding ICC warrant against Bosco Ntaganda for war crimes.³⁹

COMPLEMENTING CRIMINAL JUSTICE: TRUTH COMMISSIONS, REPARATIONS AND INSTITUTIONAL REFORM

As with criminal prosecutions discussed above, the EU provides extensive financial support to other transitional justice mechanisms, through the geographic funding instruments, the Instrument for Stability (IfS) and the European Instrument for Human Rights (EIDHR).

Within the IfS, a transitional justice facility of €12 million was established in 2008. In addition to support for tribunals, such as the Habré trial in Senegal and the Special Court for Sierra Leone, the facility supports a range of non-judicial transitional justice measures. In Colombia, it contributed €5 million to a programme to assist the victims of the armed conflict, their families and civil society organisations in their search for truth, justice and reparation. In the Solomon Islands, the facility contributes around €300,000 to a technical assistance programme to establish a credible truth and reconciliation commission (TRC) process as a way towards justice for past human rights violations and contributing to national unity and sustainable peace in the country. The facility also supported activities in Zimbabwe from the end of 2008 which are expected to lay the groundwork for future transitional justice activities in that country.⁴⁰

The EIDHR provides longer-term assistance which, unlike the other instruments, does not require host-government consent. It supports mainly international organisations and NGOs 'promoting and strengthening the International Criminal Court, ad hoc international criminal tribunals and the processes of transitional justice and truth and reconciliation mechanisms; and supporting reforms to achieve effective and transparent democratic accountability and oversight, including that of the security and justice sectors'.⁴¹

Between 2007 and April 2009, the EIDHR funded transitional justice programmes including promoting criminal prosecutions, gender justice and security sector reform in Eastern Africa (€1.1 million), in Peru (€250,000), and in Haiti (€75,000). In Croatia, a project to monitor war crimes trials in the process of dealing with the past received

35 European Communities (2009). *2008 Annual Report of the Council to the European Parliament on the main aspects and basic choices of the CFSP*, p.23.

36 I. Ioannides (2009). 'EUPOL Proxima/EUPAT (FYROM)' in *European Defence and Security Policy the first ten years (1999-2009)*. European Institute for Security Studies, p.197.

37 This is discussed in more detail in L. Davis (2009). *Small steps, large hurdles: The EU's contribution to peacemaking in the DRC*. Brussels: Initiative for Peacebuilding; and L. Davis (forthcoming 2010). *The EU, transitional justice and peace mediation*. Brussels: Initiative for Peacebuilding.

38 Council Decision 2010/110/CFSP 22 February 2010 3.f.

39 The ICC issued a sealed warrant for the arrest of Bosco Ntaganda on charges of war crimes in 2006. The warrant was unsealed in 2008. He remains at large.

40 Commission Staff Working Document SEC(2009) 932: *Accompanying document to the Annual report from the European Commission on the Instrument for Stability in 2008* COM(2009) 341.

41 Regulation (EC) No. 1889/2006 20 December 2006 Article 1.2.iii), iv).

€600,000 in funding; in Guatemala a project to help trace the disappeared was supported with €100,000. A project in Peru to assist communities in accessing reparations received €250,000.⁴² Other projects, particularly those connected with UNSCRs 1325 and 1820, may also contribute directly to transitional justice efforts.

The EU's financial support to non-judicial transitional justice mechanisms is therefore significant. It also has policy commitments in this field, scattered amongst different policy areas. Within the European Neighbourhood Policy, the EU gives financial support to Morocco's Fairness and Reconciliation Commission (IER).⁴³ The EU/Morocco Action plan includes implementation of the IER's recommendations, including regarding reparations for victims, which is then monitored through the EU/Morocco progress report.⁴⁴

Beyond the geographic policies, the human rights guidelines also offer some piecemeal guidance, although none cover transitional justice holistically. Despite the absence of any policy towards truth-seeking, the checklist on children affected by armed conflict includes provisions for engaging children in accountability and truth-seeking mechanisms and for protecting child participants.⁴⁵ There is a draft document on transitional justice and ESDP but it is rather general, remains a draft and, in any event, would only cover CSDP.⁴⁶

The relationship between transitional justice and SSR and DDR is described in more detail in EU policy documents. The EU Concept for ESDP support to Security Sector Reform (SSR) states that:

'EU support to SSR will be based, inter alia, on [...] democratic norms and internationally accepted human rights principles and the rule of law, and where applicable international humanitarian law'.

Potential activities for ESDP missions to play in strengthening justice and the rule-of-law elements in SSR include 'the development of emergency rule of law mechanisms and transitional justice institutions such as special tribunals and truth/reconciliation commissions' and the related issues of 'promoting the right of victims throughout the criminal justice process and improving witness protection from any intimidation and harassment'.⁴⁷ The SSR Concept does not, however, explicitly envisage ESDP missions playing a role in supporting vetting processes of the armed forces or police to remove human rights abusers, although this function is foreseen in reference to the reforming the judiciary.

The EU Concept for support to disarmament, demobilisation and reintegration (DDR) includes as one of the principles for EU support to DDR:

'The EU should ensure respect for Human Rights and carry out DDR support in relation to efforts in the area of reconciliation and transitional justice'.

'[...]Human rights of all, both victims and offenders, should be ensured at all stages of the process and at all times. This requires ending the culture of impunity, such as granting a role to war criminals in a national army or political bodies. All war crimes, crimes against humanity and other offences must be duly and timely investigated and the perpetrators brought into a fair trial. Sufficient support should be given to the International Criminal Court (ICC), International Criminal Tribunal for Rwanda (ICTR), International Criminal Tribunal for Yugoslavia (ICTY), Special Court for Sierra Leone (SCSL) and other similar structures'.⁴⁸

42 The European Instrument for Democracy and Human Rights (EIDHR) Compendium January 2007 – April 2009 available at http://ec.europa.eu/europeaid/what/human-rights/documents/eidhr_compendium_en.pdf

43 The author uses the translation which appears in Commission documents. Called the *Instance Équité et Réconciliation (IER)* in French, the IER is also known as the Equity and Reconciliation Commission in English.

44 SEC(2009)520/2 p.4.

45 European Communities (2008). *Checklist on children affected by armed conflict*, Doc. 9822/08.

46 'Draft document on "Transitional Justice and ESDP" in view of the PSC meeting on 20 June 2006'. Doc 10674/06.

47 Council of the European Union, *EU Concept for ESDP Support to Security Sector Reform (SSR)*, December 2006 Doc 12566/4/05 October 2005 paragraph 39.

48 Council of the European Union, *EU Concept for Support to Disarmament, Demobilisation and Reintegration (DDR)*, December 2006 Doc 16387/06 paragraph 46.

While the EU's own policies do not reflect a consistent or holistic approach to transitional justice, its commitment to the UN's "Women, Peace and Security" resolutions may be pertinent.⁴⁹ These UNSCRs focus on the role women play in peacebuilding and post-conflict reconstruction, and on the conflict-related crimes committed against them, particularly sexual violence. They reiterate states' obligations to prosecute perpetrators of sexual violence, prohibit amnesty for these crimes and call for vetting of armed forces to remove and prosecute perpetrators. A holistic approach to transitional justice measures is seen as an important way of addressing the problem, as laid out in UNSCR 1888:

'Reaffirming that ending impunity is essential if a society in conflict or recovering from conflict is to come to terms with past abuses committed against civilians affected by armed conflict and to prevent future such abuses, *drawing attention* to the full range of justice and reconciliation mechanisms to be considered, including national, international and "mixed" criminal courts and tribunals and truth and reconciliation commissions, and *noting* that such mechanisms can promote not only individual responsibility for serious crimes, but also peace, truth, reconciliation and the rights of the victims'.

As the EU has an extensive commitment to implementing these resolutions, this may have important consequences for the EU's approach to transitional justice, particularly for supporting holistic transitional justice approaches; vetting of perpetrators within the armed forces; ensuring that crimes committed against women do not go unpunished; and engaging women, women's groups, and women's interests in transitional justice mechanisms.

49 The group of UN Security Council Resolutions (UNSCRs) including UNSCR 1325 (2000), UNSCR 1820 (2008), UNSCR 1888 (2009) and 1889 (2009).

TOWARDS AN EU APPROACH TO TRANSITIONAL JUSTICE

CONCLUSIONS

The EU has extensive commitments to peace and international justice. These commitments could become a source of strength for the EU as it develops as a foreign policy actor. However, the credibility gap between declaratory commitments and realisation is currently a source of weakness. By placing its treaty commitments to peace, justice, and human rights at the heart of its foreign policy, the EU could become stronger and more effective. Adopting transitional justice as an approach could help it achieve these commitments.

Transitional justice is not a new policy area for the EU. Some of its Member States have direct experience of transitional justice, and more may gain this in the future. The EU is a major funder of international criminal justice, through the International Criminal Court and the ad hoc tribunals, and it pursues international justice as a policy objective. In some instances, such as in the Western Balkans and the Sudan, its relationships are conditioned on cooperation with justice through the ICTY and ICC, respectively. But in others – such as the DRC – they are not.

When it comes to the complementary measures – truth-seeking, reparations and institutional reform – the EU's primary engagement is as a donor, supporting the initiatives of others. Its political support to Morocco's Fairness and Reconciliation Commission is an exception, and perhaps an interesting precedent for greater political support to other non-prosecutorial transitional justice endeavours around the world.

The considerable extent of funding for these measures and some limited policy support suggest that the EU does recognise the important role that these measures can play in complementing prosecutions to promote justice. However, the lack of policy addressing transitional justice means that the EU effectively out-sources its understanding of justice, and particularly the pursuit of justice in crises. It should rather draw on its own experience and international best practice to develop an EU approach to transitional justice. This approach should consider the different elements of transitional justice – prosecutions, truth-seeking, reparations and institutional reform – holistically, and provide the framework for a coherent policy approach.

Where there are policy provisions for implementing certain aspects of transitional justice, they are not uniformly applied. Common security and defence policy missions, and EU Special Representatives could play an important role in promoting justice in peace mediation and in short-term crisis management, including SSR/DDR and other institution-building projects, but this potential has not been realised. The guidelines on compliance with IHL explicitly include the possibility for CSDP missions to prevent or suppress violations of IHL or assist war crimes investigations. Currently, more emphasis is placed on the military aspects of CSDP than the civilian, but CSDP missions could bring added value to operations around the world by specialising in civilian and military interventions which put human rights and justice at the heart of crisis management. By realising this potential, CSDP missions could play a unique global role. Justice-relevant benchmarks could provide a useful exit strategy for CSDP missions, and also improve coordination with longer-term peacebuilding projects.

Transitional justice is a dynamic field, and new approaches are developing all the time. The EU has considerable experience in crisis management, peace- and institution-building, and development. Each of these policy areas are interconnected with transitional justice, and promoting justice within each may improve their impact. There are certain areas such as mediation, crisis management and institution-building (beyond SSR), where the connections and tensions with transitional justice are less well understood, and where EU experience from home and abroad could strengthen the field of transitional justice more broadly.

RECOMMENDATIONS

The EU needs to close the credibility gap between its commitments to peace, justice and human rights, and the realisation of these values in its foreign policy.

This credibility gap is a source of weakness for the EU as a global actor. As reform of the EU's foreign policy architecture is underway, this would be an excellent opportunity to strengthen the EU's global role by adopting a foreign policy firmly grounded in the EU's values. Transitional justice should form part of this, and its integration into policy would help the EU meet its objectives for peace and human rights.

A value-based approach would help the EU be more consistent in its engagements worldwide. It would also provide a transparent framework within which the EU and its partners could develop relevant benchmarks as an integral part of their relationship. It would make some relationships more difficult, but it would be a sign of new strength of the EU as a global actor, and a reflection of the EU's unique role.

The EU should develop its own approach to transitional justice.

The EU has extensive – and laudable – commitments to international criminal justice. But it needs to develop its own understanding of and strategic approach to transitional justice, drawing on its own values and commitments, its experience at home and abroad, and informed by other actors, notably the UN.

This approach should be holistic, recognising that criminal prosecutions, truth-seeking mechanisms, reparations for victims and the reform of abusive public institutions are more effective together in pursuing justice for human rights abuse than separately.

The EU should maximise its expertise.

The EU is a major donor to transitional justice processes, and this should continue. However, it should also develop its own expertise as an actor. The competence of EU institutions in transitional justice initiatives within the EU may be limited, but the institutions should be creative in finding ways to facilitate the exchange of information and experience, easing cross-border processes, and helping develop a collective memory – to be shared by all Europeans – of the abuses committed in the past. Transitional justice processes in established democracies such as the Member States may benefit from the experiences of others and may add rich new experience to the development of the field of transitional justice.

The EU has considerable experience in peace- and institution-building, crisis management and development, all areas which may interconnect with transitional justice. By focusing on how these interventions could reinforce each other, the EU could become a leading transitional justice actor.

The EU should implement transitional justice effectively.

The institutional reforms underway provide the opportunity to implement a strategic transitional justice approach and potentially overcome the problems of coherence between the pillars which have undermined effective implementation in the past.

- The European Parliament should play an important role in developing the strategic approach, and monitoring its implementation;
- The EAS should include transitional justice expertise to provide leadership and support from Brussels;
- The EU delegations should be equipped to monitor and support transitional justice processes and relevant political developments in the field;
- EU diplomats – including heads of delegations and EUSRs (if the function continues) – should promote justice for human rights violations (including in peace mediation) as part of their mandate; and
- CSDP missions should develop into a unique tool for effective crisis management by grounding civilian and military interventions in the principles of human rights and justice.

The EU should promote excellence.

The EU should promote women's engagement with and participation in transitional justice processes at all levels. Transitional justice mechanisms should be gender-sensitive, addressing violations suffered by women as well as the enabling environment.

Following international good practice, the EU should support the best transitional justice processes possible by supporting reliable international and national civil society organisations and representatives, the media and other actors in promoting public consultation and engaging with transitional justice mechanisms.

INITIATIVE FOR PEACEBUILDING

c/o International Alert
205 Rue Belliard, B-1040 Brussels
heckert@international-alert.org www.initiativeforpeacebuilding.eu



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