

Justice in Peacebuilding: Towards a policy framework for the European Union

Discussion Paper

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The European Union has an extensive commitment to peacebuilding. This includes the whole range of relevant EU activities, from facilitating peace agreements and crisis management under the Common Foreign and Security Policy (CFSP), to short-, medium- and long-term peacebuilding programmes with international bodies, third country governments, local authorities and civil society organisations supported by the European Commission.

As part of the *Initiative for Peacebuilding* programme, the ICTJ has examined how transitional justice approaches do or could strengthen peacebuilding in range of specific cases: security system reform (in Burundi and the DRC), and mediation (in the DRC, Nepal and Indonesia). The Center has also studied the role of women in the implementation of international peace and security instruments through a case study of transitional justice mechanisms in Liberia. In each case, the ICTJ has generated a series of recommendations for how the EU, Member States and other actors could strengthen their contribution to peacebuilding in these specific examples by incorporating transitional justice approaches. These reports are available at www.initiativeforpeacebuilding.eu

The case studies suggest that while there is a principled commitment to justice, human rights and the rule of law, the EU lacks a policy framework for the whole range of “justice tools” it may have at its disposal to strengthen its peacebuilding activities. The purpose of the roundtable *Justice in Peacebuilding: Towards a policy framework for the European Union* on 5 March 2009 is to complement these country- and policy-specific case studies by initiating a process to move towards a common understanding of *justice in peacebuilding* as a basis for future EU policy.

What is justice?

“The International Criminal Court should grow further in effectiveness, alongside broader EU efforts to strengthen international justice and human rights.”¹

There is international recognition that some crimes – war crimes, crimes against humanity, and genocide – are so heinous that they are an affront to humanity itself, and are known as “international crimes.” The International Criminal Court (ICC) was set up to investigate and prosecute cases of these crimes if states are unwilling or unable to do so themselves. It is, in many ways, the epitome of justice for past serious

¹ *Report on the Implementation of the European Security Strategy – Providing Security in a Changing World*
European Council (December 2008) S407/08 p.12

human rights abuses. The European Union is a staunch supporter of the Court and is committed to supporting its effective functioning and advancing universal support for it.

The creation of the International Criminal Court has raised high expectations, especially among victims, that justice will be done for serious human rights abuse and that there will be an end to impunity. But the ICC alone cannot fulfil these expectations by investigating and trying all serious international crimes. The ICC as a global justice institution, with obvious limitations, can only investigate and prosecute a handful of cases focusing mainly on those who bear the greatest responsibility. The bulk of cases are, therefore, left to be dealt with at the domestic level.

A significant aspect of the ICC to consider in this respect is the principle of complementarity. This means that the ICC can only act where a state is unwilling or genuinely unable to investigate and prosecute crimes under its jurisdiction. National jurisdictions must act where possible, and the ICC, as a court of last resort, should complement national efforts, not replace them. But post-conflict societies are marked by vast numbers of victims of serious crimes, and a large number of perpetrators. At a time when the need for justice is high, the judicial system is usually extremely weak and compromised, and least capable of delivering justice.

This gives rise to one of the main challenges for justice in post-conflict societies: bridging the “impunity gap” between the vast numbers of victims and perpetrators and the small number of cases which can reasonably be tried by the courts, whether domestic or international.

Civil society has a key role in lobbying governments to address impunity. But even if there is a will to prosecute, there is usually also an urgent need to improve national accountability mechanisms so that the state can investigate and prosecute cases of mass crimes domestically. This capacity building is beyond the mandate of the ICC, so support from the international community and particularly the EU is crucially important for fighting impunity through the Court and the broader system established by the Rome Statute.

Beyond criminal justice: positive complementarity and transitional justice

Positive complementarity is a concept which suggests that to overcome the impunity gap, trials should be accompanied by a range of other judicial and non-judicial measures to address lower-level perpetrators and the needs of victims. As the Prosecutor of the International Criminal Court Luis Moreno Ocampo states, these may include transitional justice measures:

*“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.**”²*

Transitional justice is not in itself a special form of justice, but constitutes a set of approaches that seeks to bring about justice in extraordinary conditions. It places the victim at the centre, ensuring that the victims of conflict or oppression are recognized as such, and are empowered as dignified, fully rights-bearing citizens.

² Policy Paper on the Interests of Justice, ICC-OTP-2007, September 2007, pp.7-8 emphasis added

Transitional justice approaches include:

- bringing those responsible for past abuses to account through criminal prosecutions and non-judicial forms of inquiry (such as truth-seeking mechanisms);
- providing reparations to victims and going some way to satisfying their needs;
- transforming security systems, making them accountable for past violations, and potentially removing human rights abusers from public institutions; and
- reforming public institutions to prevent the repetition of past violations.

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. In addition, the ICC, the national judicial systems and other transitional justice mechanisms should be mutually reinforcing if they are to address the impunity gap successfully. But to date, international justice has rarely complemented domestic transitional justice practices and has usually operated quite independently from them. Similarly, non-judicial accountability mechanisms are often designed and implemented without sufficient consideration of their potential to contribute to international justice and to narrowing the impunity gap. Thus, the lack of interaction and understanding between judicial and non-judicial systems can inhibit positive complementarity in practice.

Finally, while effective investigations and fair, efficient trials are the core business of the Court, the ICC will only be successful if it is meaningful to the populations for whom justice is being done. This also applies to non-judicial accountability mechanisms. The needs of local stakeholders must inform strategies for positive complementarity and for developing justice initiatives which are responsive to victims' needs. Civil society will play an important role in this process.

Justice and peacebuilding

“Addressing the question of human rights abuse in transitional and post-conflict situation is instrumental in order to foster reconciliation and sustainable peace and stability.” Benita Ferrero-Waldner, European Commissioner for External Relations and European Neighbourhood Policy³

Justice, therefore, goes beyond a narrow definition of criminal justice - punishing the perpetrators of crime. Justice also seeks to acknowledge the harms inflicted on the victims, and, crucially, to recognise that this was and is wrong. It aims to restore the victims' dignity and to (re)establish their position in society as fully rights-bearing citizens.

This more inclusive understanding of justice is particularly important to building sustainable peace. As criminal prosecutions will only ever treat a limited number of discrete cases, other truth seeking measures can help establish the truth of what happened in the wider society. In turn, this can form the basis of a common historical narrative, and contribute to reconciliation.⁴ These processes will help build ties between population groups; as trust between groups grows (particularly between those which previously have had antagonistic relationships), the more conflict-resilient a society becomes.

³ *European Commission supports additional assistance for reconciliation of societies affected by human rights abuses* IP/08/1057 Brussels, 1 July 2008.

⁴ “Reconciliation” is understood here as a multi-faceted and long-term process of building civic trust between citizens and the state, and among citizens themselves after a conflict. Reconciliation in this sense does not include forgiveness or forgetting. Nor does it include agreements made between belligerent groups, in their own interests, to leave the past untouched.

Addressing the past will help build a more just society in the future. For example: justice-sensitive institutional reform is not only intended to reform an abusive institution, making it a defender of the citizens' rights and responsive to the citizens' needs, but also to empower victims to become citizens and hold public institutions to account. The institution is not reformed in a vacuum: its relationship with the population and its place in society are also transformed as victims become citizens. Transforming abusive public institutions in this way is vital for building democracy, promoting good governance and the rule of law. Acknowledging that the victims are citizens whose rights have been abused and whose rights are now restored to them is an important part of building a just society in which access to resources, services and rights is based on equity, not membership of one powerful group, and a society in which all people are equal before the law, and equally protected and served by the state.

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In 2004, the Secretary General of the United Nations issued a Report on *The rule of law and transitional justice in conflict and post-conflict societies*.⁵ Since then, the United Nations has continued to develop policy guidelines and toolkits addressing different transitional justice approaches and justice-related issues. The EU has made some progress: the *Draft document on "Transitional Justice and ESDP"* (2006),⁶ and the *Presidency Report on ESDP* (2006)⁷ acknowledge the need to develop transitional justice strategies for ESDP missions. In 2008, the European Commission launched a transitional justice facility as part of the Instrument for Stability. Despite these positive developments, the EU still lags behind the UN in this policy area.

The purpose of this discussion is to move towards a common understanding of *justice in peacebuilding*, as the starting point of a process to identify what policy frameworks and tools are needed (perhaps guidelines for ESDP missions and a Commission Communication) and to begin a process to meet these needs.

Reference documents:

EU documents:

- [Transitional Justice and ESDP, Council of the European Union, Brussels, 19 June 2006](#)
- [Presidency Report on ESDP, Council of the European Union, Brussels, 12 June 2006](#)
- [8th EU NGO Forum on Human Rights: Mainstreaming Human Rights and Democracy in European Union Policy, Helsinki, 7-8 December 2006](#)
- [EU Presidency Statement – UN Security Council: Open Debate on Women, Peace and Security, 23 October 2007](#)
- [EU Presidency Statement – The rule of law and transitional justice in conflict and post-conflict societies, 6 October 2004](#)

UN documents:

- [Report of the UN Secretary-General, "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies", UN Doc. S/2004/616 \(2004\)](#)
- [D. Orentlicher, UN Special Rapporteur, "Promotion and Protection of Human Rights: Impunity", UN Doc. E/CN.4/2004/88 \(2004\)](#)

⁵ United Nations Security Council S/2004/616 23 August 2004

⁶ *in view of the PSC meeting on 20 June 2006* (Doc 10674/06)

⁷ Council of the European Union 10418/06 12 June 2006 para.63