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A regional approach to justice? Rethinking EU justice policies in conflict and transition

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BACKGROUND

The growing involvement of the European Union in conflict-affected and transitional states has been accompanied by more sustained engagement with questions of justice. In conflict scenarios and peace processes, this often involves the need to address on-going and past human rights violations through investigation, redress for victims and accountability for perpetrators.

The EU also supports a broad range of transitional justice mechanisms, including criminal prosecutions at the International Criminal Court (ICC), *ad hoc* tribunals (Yugoslavia and Rwanda), hybrid courts like the ones in Cambodia and Sierra Leone, and national courts; truth and reconciliation commissions; reparation programmes for victims; and institutional reforms such as vetting and lustration.

The EU's most significant justice efforts have been in the Western Balkans and that region demands its attention once again as support grows for the creation of a regional truth-seeking commission (RECOM). The Coalition for RECOM, a regional bottom-up initiative which since 2008 has conducted broad consultations with civil society actors across the region, has launched a public campaign with media action and the collection of one million signatures from citizens. RECOM would be mandated to establish the facts of war crimes and human rights abuses committed during the Balkan wars in the 1990s and to address the problem of the remaining 17,000 missing persons.

The Coalition for RECOM has called upon the EU to provide its support for the initiative, which is seen as crucial for its success. These developments afford an opportunity for the Union to reassess its current justice policies in situations of conflict and transition, but also to consider the scope for a distinctive EU approach to justice for mass atrocity and human rights abuse that is *regional* in character.

An expanding justice portfolio

Justice in conflict and transition has become increasingly prominent on the foreign policy agenda of the EU over the past decade. This partly reflects the EU's pursuit of key foreign policy objectives such as the promotion of democracy and human rights, crisis management and peace mediation. But the EU has also started to set goals, develop concepts and elaborate guidelines specifically focused on justice for mass atrocity and human rights abuse.

The EU now deploys a broad range of policy instruments in advancing its justice objectives in external relations. Strengthening international justice and the ICC is defined as a core objective in the 2008 implementation report of the European Security Strategy (ESS).

Transitional justice is also one of the guiding principles of the *Concept on strengthening EU mediation and dialogue capacities* in peace processes, developed in 2009. The Commission has emphasised transitional justice in post-conflict situations, while the European Parliament has urged EU action to assist victims of serious human rights abuse, particularly women and children. The 2009 Stockholm Programme also encourages EU institutions and Member States to combat impunity for war crimes, crimes against humanity and genocide, both through internal action and international cooperation.

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Cooperation with the International Criminal Tribunal for the Former Yugoslavia (ICTY) – or 'Hague conditionality', as it is known in the region – was incorporated in the Stabilisation and Association Process (SAP) for the Western Balkans and has often dominated that process. The ICC is mainstreamed in political dialogues and legal agreements with third countries, for example the European Neighbourhood Policy and the Cotonou Agreement with African, Caribbean and Pacific countries.

Financial assistance for various justice responses to serious human rights violations is provided through the European Initiative for Democracy and Human Rights (EIDHR) and, in crisis situations, the Instrument for Stability (IfS). To allow for swift deployment of such funds, in 2008 the European Commission created a designated Transitional Justice Facility in the IfS. Finally, justice has started to appear in the mandates of Common Security and Defence Policy (CSDP) missions, such as AMM Aceh (ruling on amnesties) and EULEX Kosovo (criminal prosecutions).

STATE OF PLAY

The range of foreign policy objectives and instruments deployed in this field suggest that the EU has become a major player in global efforts to bring justice to victims of human rights abuse in conflict and transition.

This growing EU engagement, however, has often been *ad hoc* and reactive, driven by the need to respond to external events and pressures stemming from the proliferation of justice-seeking globally, for instance Security Council referrals to the ICC (Darfur, Libya) and NGO lobbying. In particular, it has involved little critical reflection on the lessons and implications of the EU's justice interventions in peace and transitional processes.

Instead of drawing on its own evolving experience in such contexts, the EU appears to have absorbed much of the conventional thinking in the justice field rather uncritically and reproduced it in its own concepts, guidelines and policies. As a result, a dominant pattern of thinking and policy-making can be detected in EU external action, which tends to frame justice policies as a dilemma between human rights and democracy, on one side, and peace and stability, on the other.

Democracy versus Stability

EU justice policies in their current form reflect two distinct logics and approaches: democratisation and stabilisation. The democratisation approach prioritises justice as part of the ethical commitments of EU foreign policy to promote democracy, human rights and the rule of law. The stabilisation approach puts a premium on ending violent conflict and maintaining public order and political stability, and assessing calls for justice against such considerations. At the EU level these two approaches are often seen as competing and conflicting, despite the fact that they tend to coexist in practice.

EU action in the Western Balkans provides ample illustration of these developments. The democratisation logic is apparent in the incorporation of ICTY conditionality in the SAP and, more recently, monitoring domestic war crimes trials in candidate countries to assess progress towards meeting the Copenhagen political criteria. A prominent example of this approach was the suspension of accession talks with Croatia in 2006 over its failure to cooperate with the ICTY in apprehending General Ante Gotovina.

In contrast, EU relations with Serbia have often prioritised stability considerations over justice goals, seeking to shape the country's political landscape and to pre-empt reactions to Kosovo's declaration of independence. For example, the EU resumed previously suspended talks with Serbia on a Stabilisation and Association Agreement (SAA) in 2007 and signed (but did not ratify) the SAA in 2008, despite Belgrade's reluctance at the time to cooperate with the ICTY in the arrest of fugitives Radovan Karadzic and Ratko Mladic.

The democratisation and stabilisation approaches can be detected also in situations where the EU acts with markedly different objectives and level of involvement than in the Balkans. In Afghanistan, for example, between 2002 and 2008 the EU Special Representative kept transitional justice on the agenda, advocated demobilisation of warlords with blood on their hands and side-lining them from positions of power, and supported efforts for documentation of atrocities.

Overall, however, the EU has followed the conventional wisdom that criminal prosecutions and thorough vetting processes are not feasible in Afghanistan. As a result, EU assistance for security sector reform (EUPOL Afghanistan) and judicial reform has not involved efforts to remove perpetrators of human rights violations from the Afghan police and judiciary.

While the EU has pursued both democratisation and stabilisation approaches to justice, often concurrently, the perceived tension between them has framed the discussion of policy options at the EU level and has sparked disagreement among Member States, for

instance over suspending accession talks with Croatia and Serbia. That tension is also codified in EU policy statements such as the *Concept on strengthening EU mediation and dialogue capacities* and the *European Union guidelines on promoting compliance with International Humanitarian Law*. Indeed, EU foreign policy in the justice arena can be understood as a series of negotiations over the tension between democracy and stability, even though these two approaches have coexisted in EU external action.

Rethinking the dilemma of the EU

The democracy versus stability dilemma of the EU mirrors a set of conventional arguments about justice, which circulate in academic and policy circles and frame the entire field as a choice between justice and security. In conflict situations, the 'justice versus peace' argument has been raised since 1993, when the ICTY was established in the midst of the war in Bosnia.

More recently, it has been revived by ICC interventions in places like Darfur and Libya, raising fears that the threat of prosecution forecloses space for negotiating peace deals with Omar al-Bashir and Muammar Gaddafi. In transitional contexts, the dilemma is expressed as a choice between principle and pragmatism, suggesting that justice policies should be assessed against the risk of radicalisation and backlash by spoilers.

This conventional framing of the debate has its origins in the 'third wave' of democratisation in Latin America, Southern and Eastern Europe and South Africa, and its relevance to contemporary conflict-affected environments should not be taken for granted.

Earlier transitions were premised on the idea that democratic change followed a linear trajectory and conflicts had conclusive endings. Such assumptions today are called into question, when most transitional states get caught in a 'grey zone' between war and peace, repressive and democratic rule. It has been estimated that the average duration of civil war has increased from two to fifteen years since 1947 and 50% of peace agreements collapse within the first five years. Situations of persistent or recurrent conflict and reversible transition have become quite frequent in recent decades, as in Afghanistan and Iraq, the DRC, and Côte d'Ivoire. It is far from clear that justice can be traded for peace or deferred until democracy is consolidated in such situations when the overall direction of peacebuilding and democratisation is itself unpredictable.

Rather than absorbing and reproducing the received wisdom of third-wave thinking about justice, the EU should consider the lessons from its own experience in peace and transitional processes. The ICTY indictments of Karadzic and Milosevic in the run-up to the peace talks for Bosnia and Kosovo, respectively, did not prevent the emergence of peace; indeed, the opposite might have been the case. The failure to remove war criminals from the Bosnian police force turned into a major obstacle for police reform and the country's progress towards EU membership. In Afghanistan, the prevailing culture of impunity since 2001 and the entrenchment of commanders, who are implicated in atrocities, in positions of power, become key drivers of the current escalation of the conflict.

The EU should reassess its justice policies in the light of such lessons from places where it has been directly involved in conflicts and transitions, rather than appropriating any conventional arguments and assumptions that might circulate in the field.

PROSPECTS

Recent developments suggest that the democracy versus stability dilemma might be asking the wrong question; instead, the challenge today is to rethink justice as a security strategy. This is the trend even at the UN Security Council, which increasingly draws on the ICC to supervise violent conflict, most recently in the case of Libya.

Beyond the need to reassess this dilemma, can the EU make any distinctive contribution to the justice field?

The EU could add value to global efforts for justice seeking by helping to address the neglected regional dimension of justice in conflict and transition.

Among the host of international actors currently involved in this field, the EU is best positioned to pioneer a regional justice approach and to mobilise the resources needed for its implementation.

Why a regional approach?

There is currently a mismatch between the character of violent conflicts, which are often regional and transnational in character, and the scope of justice responses to serious human rights violations, which tend to be statist and nationally framed.

In conflicts in the Balkans, the Great Lakes, the Middle East, Afghanistan/Pakistan or Darfur/Chad,

the relevant unit of analysis has often been the region rather than the state. In such regional conflict situations, neighbouring states often provide funding, bases, or fighters, and conflict tends to spill across borders through refugee flows, illicit economic activities, and transnational crime.

Regional conflict, however, has not been accompanied by a regional justice response. Transitional justice mechanisms tend to be nationally bounded or premised on the statist model of international law, which makes them incomplete and inadequate in addressing the transborder aspect of conflict and crime.

This contradiction has become apparent in the Western Balkans, where justice processes have been held back by the fact that survivors and affected communities, perpetrators, witnesses, and evidence, are usually located on different sides of today's borders.

Why the EU?

The ESS recognises the challenge of regional conflict and the EU has pursued regional peacebuilding initiatives in situations where justice concerns loom large, for example in Darfur (with the African Union) and Colombia (Andean Community). The EU's experience with the SAP and ICTY conditionality in the Balkans stands out in this respect. Indeed, in the context of the SAP, the ICTY has come close to serving as a *de facto* regional justice mechanism.

With the changes of the Lisbon Treaty, the EU is joining the Member States and candidate countries as a party to the European Convention on Human Rights – the most successful regional human rights system in the world. The recent rulings of the European Court of Human Rights in *Jularic v. Croatia* and *Skendzic and Krznaric v. Croatia*, suggest the emergence of a new transitional justice jurisprudence at the European level that will expand in the future.

Moreover, EU policies to promote regional cooperation beyond its borders, more than any other aspect of its foreign policy, express the EU's internal identity and raise its distinctive profile on the world stage.

Because of its unique experiences in regional processes and its unrivalled legitimacy in promoting regional cooperation, the EU is best equipped among international actors to pioneer a regional approach to justice in conflict and transition.

The promise of regional justice

The EU's experience in the Western Balkans demonstrates the need for a regional justice approach but also highlights its promise. The regional civil society initiative for RECOM has involved more than one hundred consultations at local, national and regional levels with thousands of participants, including many survivors of the violence in the 1990s. Its members include over one thousand organisations and individuals across the region: victims associations, war veterans, NGOs, women's and youth groups, media, and public intellectuals.

The coalition for RECOM has been more successful in crossing ethnic and national divides than any other initiative in the countries of the former Yugoslavia and has built the basis for an unprecedented regional process of dealing with the past from the ground up.

Most justice mechanisms are top-down and criticised for failing to afford meaningful participation to affected communities and societies. It is indicative that the most participatory justice process to date has coalesced around a regional framework and movement for justice. In recent months, this initiative has been endorsed by the presidents of Croatia and Serbia and the Council of Europe, and has reached out to the EU for support. The EU should seize the opportunity to ensure the success of RECOM and draw on this experiment to develop its own regional approach to justice in conflict and transition.

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These issues are analysed in the EPC's Europe in the World programme and the European Politics and Institutions programme.

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