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CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS



# CLEER

## The European Union and transitional justice

Thomas Unger

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS  
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CLEER is hosted by the T.M.C. Asser Instituut,  
Schimmelpennincklaan 20-22  
2517 JN, The Hague, The Netherlands



E-mail: [info@cleer.eu](mailto:info@cleer.eu)  
Website: <http://www.cleer.eu>

CLEER WORKING PAPERS 2010/1

CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

**THE EUROPEAN UNION AND TRANSITIONAL JUSTICE\***

**THOMAS UNGER\*\***

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- \*\* Thomas Unger is currently working within the Human Rights Department of the Austrian Foreign Ministry and previously worked as a Senior Associate at the International Center for Transitional Justice. The author wishes to thank Mark Freeman for providing a first substantive outline for this article and for his great guidance and support in the course of the drafting process. He would also like to thank Alexandra Nerisanu for her outstanding research assistance. The views expressed in the working paper are those of the author and do not represent the official position of any organisation or institution.

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The Netherlands  
[www.cleer.eu](http://www.cleer.eu)

## 1. INTRODUCTION

Over the last few years, transitional justice has emerged as a recognised field within the European Union after previously languishing in obscurity. Today, nearly everyone in the EU-related human rights and conflict resolution fields is familiar, at least to some extent, with transitional justice, and several important policies and statements have been issued at the EU level to promote transitional justice as a political as well as financial priority.

However, there remains a need to expand and deepen transitional justice as an EU priority. There is also a need to ensure that transitional justice is understood properly as an issue concerning both the Council and the European Commission, as opposed to a post-conflict issue important only to the Council, or a development-related issue important only to the Commission. The new Lisbon Treaty will assist in this endeavour, especially by creating the post of an ‘EU foreign minister’ bridging the institutional gap between the Commission and the Council especially in the areas relevant to transitional justice, such as the Common Security and Defence Policy (CSDP). The possible benefits for the EU, and for the transitional justice field, are immense. Indeed, the EU has the potential to become one of the leading transitional justice actors in the world. It is already, alongside the UN, one of the most important actors in the fields of human rights and conflict resolution. It has become the world’s largest aid donor: together with its Member States, the EU provides over half of all Official Development Assistance (ODA).<sup>1</sup> In addition, the EU has already committed itself to the same core values which guide transitional justice, and in practice, to an increased role in transitional contexts and peacebuilding.<sup>2</sup>

Against this background, this working paper will examine the opportunity for the EU to take its interest in and commitment to transitional justice to a new level by creating a framework document and a related set of operational strategies to add greater coherence and depth to its transitional justice engagements. The EU’s current policy and practice in the areas of justice and the fight against impunity are scattered. A framework document, or set of institutional guidelines, will allow for more balanced policy-making across the system and an increase in the EU’s impact on the ground.

The working paper is organised into five main sections. Section 2 will define transitional justice. The third section will explain the link between transitional justice and peacebuilding. The fourth section will examine why transitional justice is relevant to the EU, in general terms. Section 5 will describe current EU policy and practice in the area of transitional justice. Last but not least, possible future directions for EU policy and practice in the area of transitional justice will be examined in section 6.

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<sup>1</sup> See the website of the Organisation for Economic Cooperation and Development: <<http://www.oecd.org/>>.

<sup>2</sup> See European Council, *Report on the Implementation of the European Security Strategy – Providing Security in a Changing World* (December 2008), S4047/08, at 12.

## 2. DEFINING TRANSITIONAL JUSTICE

Transitional justice is a multidisciplinary and victim-centred field of theory and practice that is linked to the fight against impunity and to the broader domains of human rights and conflict resolution. Although its historical roots may be traced back to the end of the Second World War (Nuremberg) and earlier, the term ‘transitional justice’ did not enter the modern political lexicon until the early post-Cold War period.<sup>3</sup>

The emergence of the field of transitional justice reflects a sea change in the global approach to dealing with legacies of mass abuse. Whereas previously the dominant view was that societies emerging from periods of conflict or mass abuse had to choose between trials and amnesties, today there is recognition of the wide spectrum of tools and mechanisms that exist between those two extremes, as well as of their complementary nature.<sup>4</sup> Indeed, one could say that the international viewpoint today is not to ask *whether* to deal with the past, but rather to ask *how* to deal with it. Transitional justice is a field that purports to offer principled and pragmatic answers to that challenge.

Countries recovering from genocide or similar mass atrocities naturally face a myriad of moral, legal and political dilemmas. Among these dilemmas, the challenge of dealing with the past is among the most urgent. That is because, in such contexts, the demand for justice is typically at or near its apex whereas the possibility of delivering justice is typically at or near its nadir – whether due to insufficient capacity, insufficient political will, or both. In that respect, transitional justice might be described as an exercise in the ‘art of the possible’. It is premised on the idea that extraordinary times call for extraordinary measures. More specifically, it holds that in dealing with the past, courts and trials are important but insufficient to handle the multiple and complex prejudices flowing from legacies of mass abuse. Trials need to be accompanied by non-judicial measures which focus on the vindication, *inter alia*, of victims’ rights to truth, reparation, and guarantees of non-recurrence.

In this respect, transitional justice is defined by a holistic approach to dealing with the past that encompasses four main mechanisms.

- (i) *Criminal prosecutions*: Criminal prosecutions hold a privileged place in the fight against impunity, in particular because of the grave character of the crimes involved. Prosecutions are preferably carried out at the national level, where they have the greatest potential to contribute to deterrence and the

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<sup>3</sup> For a comprehensive overview and analysis of practice on transitional justice, see R. Teitel, *Transitional Justice* (Oxford, Oxford University Press 2000); N. Roht-Arriaza, *Transitional Justice in the Twenty-First Century* (Cambridge, Cambridge University Press 2006); see also the website of the International Center for Transitional Justice: <<http://www.ictj.org>>.

<sup>4</sup> See *Report of the UN Secretary General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (23 August 2004), S/2004/616.

restoration of public confidence in the rule of law.<sup>5</sup> The reality, however, is that there are usually tremendous challenges facing domestic criminal justice systems in investigating and prosecuting international crimes. The main challenge is often the lack of political will, but in addition, legal barriers such as amnesties, the lack of an independent judiciary and lack of capacity in terms of technical and professional skills to investigate and prosecute serious widespread or systematic crimes, as well as security and access issues, including a volatile security environment, continued armed conflict and lack of a safe environment for legal actors or victims and witnesses, pose extra challenges at the national level in holding perpetrators to account. Many *ad hoc* international and hybrid criminal tribunals have thus emerged in recent years to deal with those bearing the greatest responsibility for atrocities that were committed in specific countries and regions such as Rwanda, the former Yugoslavia, Sierra Leone, Timor-Leste and Cambodia.<sup>6</sup> Today, there is of course also a permanent International Criminal Court (ICC) in place to try international crimes of genocide, crimes against humanity and war crimes where states are demonstrably unable or unwilling to do so themselves.<sup>7</sup> In recent years, many prosecutions have been pursued in third states too, through reliance on legal principles such as universal jurisdiction.

- (ii) *Truth commissions*: Truth commissions are *ad hoc* commissions of inquiry established in, and authorised by, states for the primary purposes of investigating and reporting on key periods of recent past abuse, and of making recommendations to remedy such abuse and prevent its recurrence.<sup>8</sup> There have been scores of truth commissions created around the world during the last few decades in places as different as Chile, Sri Lanka, Canada and Liberia. Of these, the most famous one is still the South African Truth and Reconciliation Commission, with its unique truth-for-amnesty procedure and its internationally televised public hearings. Although no prior or subsequent truth commission has possessed an equivalent power to grant amnesty, most subsequent ones have held public hearings for victims, since such hearings appear to significantly increase public awareness and open public debate about the past.

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<sup>5</sup> Rome Statute of the International Criminal Court, Preamble, paragraph 4; see also recent examples of domestic prosecutions in Argentina and Peru.

<sup>6</sup> For more information on hybrid courts and tribunals, see the website of the International Center for Transitional Justice: <<http://www.ictj.org>>.

<sup>7</sup> For a recent analysis of domestic justice systems and the impact of the ICC, see the recent discussion paper by C. Aptel, Senior Fellow, International Center for Transitional Justice, on domestic systems and the International Criminal Court, prepared for the Consultative Conference on International Criminal Justice, 9-11 September 2009, United Nations Headquarters, New York, available at: <<http://www.internationalcriminaljustice.net/prereg2009/>>.

<sup>8</sup> For a comprehensive analysis of truth commissions, see M. Freeman, *Truth Commissions and Procedural Fairness* (Cambridge, Cambridge University Press 2006); P. Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (New York, Routledge 2002).

- (iii) *Victim reparation programmes*: Victim reparation programmes are state-sponsored initiatives that aim at contributing to the reparation, on a universal scale, of the material and moral consequences of past abuse experienced by designated classes of victims.<sup>9</sup> Typically, they are established upon the recommendation of a truth commission or at a legislature's initiative, like in Germany in the years and decades after the Holocaust. Contemporary reparation programmes usually provide compensation payments to victims and their families, together with privileged or dedicated access to certain public or private services, such as health care rehabilitation services, pension benefits and educational services.<sup>10</sup> Modern reparation programmes increasingly encompass various symbolic forms of reparation too, including monuments and memorials to preserve and honour the memory of victims. Community or collective reparation measures are also beginning to be recommended and used, as, for example, in Peru and Morocco.
- (iv) *Security system reform*: Security system reform (SSR)<sup>11</sup> is a crucial means for helping to reduce the likelihood of renewed conflict or abuse.<sup>12</sup> While there is a wide range of different reform measures that may be needed or applied in any given context, in practice, the field of transitional justice places special emphasis on 'vetting programmes', in particular in the police, army and judiciary. These are integrity-focused personnel screening procedures which have as their central aim to transform specific public institutions into defenders rather than violators of the public interest.<sup>13</sup> Vetting programmes have been used in places such as El Salvador and Bosnia. They seek to ensure greater procedural fairness than the so-called 'purges' programmes used in recent years in places such as Albania and Iraq.<sup>14</sup> Another emerging tool of security sector reform, known as 'census and identification', is increasingly employed as a first step in establishing good governance.<sup>15</sup> Census and identification encompasses technical audits of dysfunctional public institutions to verify their current state of membership, and ultimately 'closure' of the institutions' formal boundaries so that subsequent reform

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<sup>9</sup> See International Center for Transitional Justice, 'Reparations in Theory and Practice', *Reparative Justice Series* (2007), available at: <<http://www.ictj.org>>.

<sup>10</sup> OHCHR, *Rule of Law Tools for Post-Conflict States, Reparations Programmes* (2008), at 22.

<sup>11</sup> On SSR more broadly, see *OECD DAC Handbook on Security System Reform: Supporting Security and Justice* (2007).

<sup>12</sup> L. Davis, 'Transitional Justice and Security System Reform' (June 2009), published in the framework of the Initiative for Peacebuilding funded by the EU. A. Mayer-Riekh and P. de Greiff, eds., *Justice As Prevention: Vetting Public Employees in Transitional Societies* (Social Science Research Council 2007).

<sup>13</sup> See *Report of the UN Secretary General on The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (23 August 2004), *supra* n. 4, at 17-18.

<sup>14</sup> Purges differ from vetting in that purges target individuals for their membership in or affiliation with a group rather than for their individual responsibility for human rights violations.

<sup>15</sup> See International Center for Transitional Justice, *Census and Identification of Security Personnel after Conflict* (2008), available at: <<http://www.ictj.org>>.

processes can be more controlled and effective. Currently a census and certification exercise is undertaken by the government of Burundi with the support of the international community.

### 3. THE LINK BETWEEN TRANSITIONAL JUSTICE AND PEACEBUILDING

As noted above, transitional justice is a field that lies at the intersection of human rights and conflict resolution. While the field cannot be completely subsumed within a peacebuilding framework, given that transitional justice also encompasses legacies of abuse that have nothing to do with armed conflict (e.g., transitions from periods of dictatorship), there is a clear recognition among peacebuilders of the added value of transitional justice in restoring public security and contributing to long-term reconciliation. Transitional justice is already among the explicit priorities of the UN Peacebuilding Commission (PBC)<sup>16</sup> and is an integral component of the approved activities in its first two client member states, Sierra Leone and Burundi.

Since transitional justice strategies are often crafted in situations where peace is fragile or perpetrators retain real power, they must carefully balance the demands of justice with the realities of what can be achieved in the short term. Bearing this in mind, below is an outline of some of the main links between peacebuilding and the four chief mechanisms of transitional justice.

- (i) *Criminal prosecutions and peacebuilding*: Prosecutions may be viewed as a vital part of ending impunity, restoring the rule of law and building a culture of human rights. Especially during the last several years, there have been many important legal developments: the evolution and strengthening of international law concerning accountability for serious crimes, the creation of the ICC, and a growing global consensus that third-party exile and blanket amnesties should generally be rejected.<sup>17</sup> These developments have had a profound impact on peacemaking, mediation and peacebuilding, creating tensions but also new ideas about the proper balancing of the interests of peace and those of justice.<sup>18</sup>
- (ii) *Truth commissions and peacebuilding*: Establishing an official truth about a brutal past can help inoculate future generations against revisionism and

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<sup>16</sup> See Security Council Resolution 1645 (2005) and UN General Assembly Resolution 60/180 (2005) establishing the Peacebuilding Commission.

<sup>17</sup> For a comprehensive analysis on the question of amnesties for grave international crimes, see M. Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge, Cambridge University Press 2009).

<sup>18</sup> P. Hayner, 'Negotiating Peace in Sierra Leone: Confronting the Justice Challenge' (December 2007) and P. Hayner, 'Negotiating Peace in Liberia: Preserving the Possibility for Justice' (November 2007). These reports are part of the Humanitarian Dialogue Centre's project *Negotiating Justice: Strategies for Tackling Justice Issues in Peace Processes*.



can empower citizens to recognise and resist a return to abusive practices. In recent years, truth commissions have been established in an increasing number of countries as part of a broader peacebuilding agenda.<sup>19</sup> Under the right conditions, truth commissions in such contexts can play a number of significant roles: they can serve as repositories of data concerning victims, perpetrators, policies and key institutions that can be used for peacebuilding projects; they can provide a diagnosis of violations, as well as a roadmap for institutional and legal reforms; they can give victims a voice in public discourse, acknowledging their sufferings and hence reducing resentment and anger; and they can help identify structural inequalities that might have been at the root of past conflict.

- (iii) *Victim reparation programmes and peacebuilding*: In the context of peacebuilding processes, reparation policies must take into account the obligation to provide reparation for human rights and international humanitarian law violations attributable to the state.<sup>20</sup> Reparation programmes can make an important contribution to poverty reduction, not only because they have the potential to transfer financial resources and institutional support to their recipients, but also because they often target communities at risk for whom these resources might make the difference between continued marginalisation and the beginning of self-sufficiency. Reparation programmes must also interface with disarmament, demobilisation and reintegration (DDR) programmes.<sup>21</sup> If demobilised perpetrators receive financial assistance disproportionate to that for victims, this can create a moral asymmetry between victim and perpetrator, inflame tensions and undermine the reintegration of former combatants into society.
- (iv) *Security system reform and peacebuilding*: In responding to mass atrocity, it is not sufficient to punish perpetrators, establish the truth about violations and provide victims with reparations. It is also necessary to fundamentally change those institutions responsible for systematic human rights abuses. In some contexts it may also be important to integrate former non-state combatants into state security institutions as part of the terms of a broader peace accord, as we currently see in the DRC.<sup>22</sup> By reforming main institutions in the security sector – through a combination of legislation, census and identification, vetting, redeployment and retraining – the prospect of a return to armed conflict can be significantly diminished.

<sup>19</sup> E.g., Sierra Leone, East Timor, Kenya, Uganda and Liberia.

<sup>20</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly Resolution 60/147 of 16 December 2005

<sup>21</sup> P. de Greiff, 'DDR and Reparations: Establishing Links between Peace and Justice Instruments', in K. Ambos, J. Large and M. Wierda, eds., *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development* (Boulder, Springer 2009) 321.

<sup>22</sup> L. Davis, Small Steps, 'Large Hurdles: The EU's Role in Promoting Justice in Peacemaking in the DRC' (May 2009), published in the framework of the Initiative for Peacebuilding funded by the EU, available at: <<http://www.initiativeforpeacebuilding.eu/>>.

#### 4. THE RELEVANCE OF TRANSITIONAL JUSTICE FOR THE EU

There are various other stakeholders besides the EU which play an important role in the area of peacebuilding. At the global level, the UN plays the leading role in this respect. At the regional level in Europe, the Council of Europe and the Organisation for Security and Cooperation in Europe (OSCE) are key stakeholders. The EU has to be seen in contrast to these institutions and has to develop its own niche in cooperating closely with them in order to avoid duplications or confusions on the ground. Given the fact that the EU is represented in all these institutions, it has a huge potential to ensure greater coherence in integrating transitional justice in peacekeeping and peacebuilding agendas, and to push for consistent policies in implementation at field level. The Lisbon Treaty gives the EU as an institution even a stronger potential in this respect.

In this regard, it will be important to identify what the EU's role in the area of transitional justice should logically be in broad terms. Key questions have to be asked in this respect. They include the following: what is the opportunity for the EU in the area of transitional justice? How can it play a useful flanking role and not duplicate efforts undertaken in other multilateral institutions?

Broadly speaking, the EU has a chance to play a leading role in transitional justice standard- setting. First, the EU comprises exclusively democratic states committed to an international rule of law. Second, as already mentioned, it is one of the biggest funders of transitional justice initiatives, given its lead in global Official Development Assistance (ODA). Finally, the EU is increasingly moving into situations of high relevance from a transitional justice perspective through the missions established in the framework of the Common Security and Defence Policy (CSDP, previously ESDP) (e.g., DRC and Kosovo).

However, transitional justice is not only relevant to EU foreign policy, but also to its internal policies. This is especially true given the number of countries within the EU where legacies of abuse and reconciliation processes remain on domestic political agendas.<sup>23</sup> In this context, transitional justice should not be conceived by the EU as only a matter of foreign policy. Doing so would risk that the EU would be perceived as leading a policy of double standards and not one of promoting the universality of human rights. This might be especially true in the context of the EU's enlargement policy, since transitional justice was not an explicit or implied conditionality for past EU candidates. In this context, it will be important for the EU to promote the idea of transitional justice in Community policy and to also recall the several 'positive examples' and best practices of transitional justice in

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<sup>23</sup> For example: UK/Northern Ireland, Cyprus (internal armed conflicts), Spain (Franco era but also Basque conflict), Baltic and Central/Eastern European Member States (communist past and Soviet occupation legacies), Germany (Holocaust) and Belgium (colonial past). There are many other Member States where legacies *should* be on the domestic agenda but are not, or only partially, such as: Austria and Baltic/Central/Eastern European Member States (Holocaust), Portugal/France/Netherlands/UK/Italy (colonial past) and Romania (communist past).

Europe that have already occurred.<sup>24</sup> Finally, it has to be acknowledged that the term ‘transitional justice’ is a major challenge in the European context. Few, if any, EU Member States see themselves as still being in ‘transition’, which makes it hard to put transitional justice on the political agenda without re-labelling it as something else (e.g., ‘dealing with the past’).

## 5. CURRENT EU POLICY AND PRACTICE ON TRANSITIONAL JUSTICE

Given the overall relevance of transitional justice for the EU, in particular in the area of peacebuilding, it is worth focusing on the role played therein by the different institutions of the EU. This should help in identifying and closing potential policy and operational gaps in order for the EU to further develop and strengthen its role in the area of transitional justice.

### 5.1. General overview

Transitional justice (TJ) as a concept only recently entered the political discourse in Brussels. Up until the end of 2004, there was only a single reference to transitional justice in EU documents: an affirmative statement by the EU Presidency regarding the UN Secretary-General’s 2004 Report on transitional justice and the rule of law.<sup>25</sup> ‘Transitional justice’ has tended to be associated by the EU mainly with the idea of ‘reconciliation’; ‘justice’ (or the ‘fight against impunity’) with the functioning of the International Criminal Court (ICC); and the ‘rule of law’ with security system reform. Transitional justice should, however, be understood as a holistic and comprehensive concept encompassing justice, reconciliation and the rule of law.<sup>26</sup> Hence, it will be important to change the EU’s perception in order for the ICC and SSR to be seen as *part of* a transitional justice framework, as opposed to *external* elements or approaches.

Also, EU institutions have different approaches to the concept of transitional justice. The Council has considered transitional justice as a short-term post-conflict issue. The Commission, on the other hand, has tended to understand TJ as a long-term reconciliation issue. In light of this apparent contradiction, it will be important to get the Council and Commission to understand that they are both

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<sup>24</sup> For example: Germany (reparations for holocaust victims, public education), Greece (torture trials after military dictatorship in the 70s) and Northern Ireland (national dialogue on transitional justice after internal conflict).

<sup>25</sup> EU Presidency Statement – The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, 6 October 2004, available at: <[http://www.europa-eu-un.org/articles/en/article\\_3872\\_en.htm](http://www.europa-eu-un.org/articles/en/article_3872_en.htm)>.

<sup>26</sup> *Report of the UN Secretary General on The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, 23 August 2004, *supra* n. 4.

right and that transitional justice is an important issue of relevance to both of them, conceptually and operationally.

## 5.2. The Council (the ‘voice of Member States’)

Transitional justice is already of great relevance to the work of the Council and is explicitly or implicitly mentioned in various documents and policies established by it. The following examples should illustrate the various areas where transitional justice is at the centre of the Council’s work and discussions.

- *EU Guidelines and mandates of the EU Special Representatives (EUSRs)*: The EU Guidelines on Children and Armed Conflict refer explicitly to transitional justice as a priority in order to address children’s special short and long-term post-conflict needs.<sup>27</sup> There are several EUSR mandates which encompass SSR actions, for example, those pertaining to Bosnia-Herzegovina, Afghanistan and the Great Lakes Region (DRC).<sup>28</sup> The EUSR mandate for Sudan refers explicitly to the fight against impunity.<sup>29</sup> In addition, every existing EUSR mandate involves a country or sub-region where transitional justice issues are extremely relevant.
- *Council Conclusions*: In some country contexts the Council mentioned specific transitional justice mechanisms. In the recent Council Conclusions on the Great Lakes Region the Council referred to the importance of vetting and stated that ‘[t]he Council calls on the Government of the DRC to ensure without exception that those responsible for violations of international law, including hu-

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<sup>27</sup> EU Guidelines on Children and Armed Conflict (5 June 2008), 10019/08, at 1: the EU recognises the particular vulnerability of children in situations of conflict and their particular needs in post-conflict situations, including ‘for tracing of family members, redress and social reintegration, psycho-social rehabilitation programmes, participation in disarmament, demobilisation and reintegration programmes as well as within *transitional justice frameworks*.’ [emphasis added]. See also European Union Guidelines on Promoting Compliance with International Humanitarian Law (IHL) (2005/C 327/04): ‘Individuals bear personal responsibility for war crimes. States must, in accordance with their national law, ensure that alleged perpetrators are brought before their own domestic courts or handed over for trial by the courts of another State or by an international criminal tribunal, such as the International Criminal Court’, para. 14.

<sup>28</sup> Council Joint Action 2008/130/CFSP of 18 February 2008 extending the mandate of the EUSR in BiH: the mandate contains provisions related to rule of law, support for police restructuring and cooperation of BiH authorities with the ICTY; Council Joint Action 2008/133/CFSP of 18 February 2008 amending and extending the mandate of the EUSR for the Middle East peace process: the mandate contains a provision on engaging in wider collaboration on SSR; Council Joint Action 2008/612/CFSP of 24 July 2008 concerning the appointment of the EUSR for Afghanistan: mandate to advise on the progress achieved in meeting the objectives of the Afghanistan Compact, in particular in the areas of rule of law and SSR. Council Joint Action 2008/108/CFSP of 12 February 2008 amending and extending the mandate of the EUSR for the African Great Lakes Region: mandate to provide advice and assistance for SSR in the DRC.

<sup>29</sup> Council Joint Action 2008/110/CFSP of 12 February 2008 amending and extending the mandate of the EUSR for Sudan: mandate to maintain regular contacts with the OTP of the ICC with regard to human rights and the fight against impunity.

man rights and international humanitarian law, are held accountable. Timely vetting of FARDC commanders and soldiers is of crucial importance in this respect.<sup>30</sup> Also in recent Council Conclusions on promoting compliance with international humanitarian law the council emphasised ‘the importance of dealing effectively with the legacy of serious violations of international humanitarian and human rights law by supporting appropriate accountability mechanisms.’<sup>31</sup>

- *CSDP Missions*: There are currently several CSDP missions with transitional justice elements, such as Georgia (EUJUST THEMIS) encompassing judicial reform,<sup>32</sup> Aceh (AMM)<sup>33</sup> covering amnesty proceedings, and Kosovo (EULEX KOSOVO) and Iraq<sup>34</sup> (EUJUST-LEX) involving judicial and police reform. Kosovo is generally designed as a rule of law mission.<sup>35</sup> According to the mandate, the EULEX judges and prosecutors in Kosovo shall assist the judicial authorities in their progress towards sustainability and accountability and in further developing and strengthening an independent multi-ethnic justice system, ensuring that these institutions are free from political interference and adhering to internationally recognised standards. In following a similar model as the previous UN Mission in Kosovo (UNMIK), EULEX judges and prosecutors retain certain executive responsibilities by working together with their local Kosovo counterparts in mixed panels or mixed teams, ensuring that cases of war crimes, terrorism, organised crime, corruption, inter-ethnic crimes, financial/economic crimes and other serious crimes are properly investigated and prosecuted.<sup>36</sup> The mission has so far not made extensive progress in further investigating war crimes allegedly committed by the Kosovo Albanian side during the conflict at the end of the 90s. How the mission deals with the legacy of past abuses especially by the ruling Kosovo Albanian majority will be an important factor in evaluating its success, but also beyond reflect on the EU’s credibility in implementing its clear policies towards fighting impunity for serious human rights violations of the past.

<sup>30</sup> Council Conclusions on the Great Lakes Region, 2971st External Relations Council Meeting, Luxembourg, 27 October 2009, para. 3.

<sup>31</sup> Council Conclusions on promoting compliance with international humanitarian law, 2985th Foreign Affairs Council Meeting, Brussels, 8 December 2009, para. 2.

<sup>32</sup> Council Joint Action 2004/523/CFSP of 28 June 2004. This was the first rule of law mission launched by the EU in the context of the European Security and Defence Policy (ESDP).

<sup>33</sup> Council Joint Action 2005/643/CFSP of 9 September 2005 on the EU Monitoring Mission in Aceh (Indonesia) (Aceh Monitoring Mission – AMM); Memorandum of Understanding between the Government of the Republic of Indonesia and the Free Aceh Movement, Helsinki 2005.

<sup>34</sup> Council Joint Action 2005/190/CFSP of 7 March 2005 on the EU Integrated Rule of Law Mission for Iraq (EUJUST LEX).

<sup>35</sup> Council Joint Action 2008/124/CFSP of 4 February 2008 on the EU Rule of Law Mission in Kosovo (EULEX Kosovo).

<sup>36</sup> Ibid., Law No. 03/L-053 ‘On the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo’; Law No. 03/L-052 ‘On the Special Prosecution Office of the Republic of Kosovo’.

- *Enlargement*: Full cooperation with the ICTY was always a condition of accession for the states comprising the former Yugoslavia. This is perhaps the most ‘high profile’, but also controversial, example of the EU’s transitional justice practice to date. The approach so far is, however, to think of this as an example of ‘international’ justice and not ‘transitional’ justice. Transitional justice features as a condition, at least indirectly, of future accession for other official candidate countries.<sup>37</sup>
- *The Political and Security Committee (PSC) and the Committee for Civilian Aspects of Crisis Management (CIVCOM)*: At the Political and Security Committee level, a transitional justice seminar was held in March 2006 under the auspices of the Austrian Presidency. The key document resulting from the seminar was the June 2006 report *Transitional Justice and ESDP*,<sup>38</sup> which mentioned, *inter alia*: the need for planning to include an analysis of the transition process in the host country, the need for transitional justice expertise within EU Member States, the need to include transitional justice in existing and future training for EU crisis management operations, and the need for guidelines on transitional justice that would be inspired by, and be consistent with, UN standards. Apart from various transitional justice briefings in CIVCOM, no real follow-up has been given to this public PSC document. The Council Working Group on Human Rights (COHOM) has so far not addressed the issue. At the Secretariat level, Solana’s first Personal Representative on Human Rights (Michael Matthiessen) played a key role in 2006 in putting TJ on the Secretariat’s agenda. Since then, however, the debate has not gone further at the level of the Secretariat.
- *Mediation*: The EU, as a global actor committed to the promotion of peace, democracy, human rights and sustainable development, is generally seen as a credible and ethical actor in situations of instability and conflict and is thus well placed to mediate, facilitate or support mediation and dialogue processes. The EU is currently seeking to conduct a more coordinated and focused approach in the area of conflict mediation. The Council adopted a Concept on strengthening EU mediation and dialogue capacities.<sup>39</sup> The joint Council and Commission Concept should provide a policy basis for EU engagement in the area of mediation and dialogue, with concrete proposals on how to strengthen the Union’s capacity and support to EU and EU-backed mediators. Based on the tasking by the Political and Security Committee of 31 July 2009, the Concept is part of the follow-up and implementation of the European Security Strategy (ESS) of 2003<sup>40</sup> and the SG/HR’s 2008 Report on the Implementation of

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<sup>37</sup> For example: Croatia (ICTY, domestic prosecutions), FYROM (ICTY) and Turkey (SSR, compensation of Kurdish civilian victims, acknowledgment of Armenian events). Potential candidate countries: Albania, BiH (ICTY, domestic prosecutions and police reform), Serbia (ICTY, domestic prosecutions and SSR) and Montenegro (ICTY).

<sup>38</sup> *Transitional Justice and ESDP* (19 June 2006), 10674/06.

<sup>39</sup> The Concept Paper is on file with the author.

<sup>40</sup> *A Secure Europe in a Better World, European Security Strategy* (2003).

the ESS,<sup>41</sup> both of which refer to EU engagement in the area of mediation and dialogue. The Concept also prominently mentions transitional justice by acknowledging that in many cases mediation efforts take place in highly complex contexts, where one or several parties to the conflict have committed serious violations of international human rights and humanitarian law. Issues such as holding human rights violators accountable before court for their actions, reparations to victims, reintegration of ex-child soldiers, restitution of property and land as well as the return of internally displaced persons (IDPs) and refugees have to be tackled during the peace negotiations and the drafting of peace agreements. The Concept paper also seeks to address the difficult question of ‘justice versus peace’. In order to effectively deal with its mediation tasks, the EU will have to take into consideration the international experience and expertise available through the UN, EU Member States and other countries active in mediation, NGOs and research bodies, especially in the area of transitional justice. There is also a need to provide efficient guidance and support to EU-appointed and EU-supported mediators on these issues, including through expert advice.

### 5.3. Commission (the ‘driving force of the EU’)

At the Commission level, there is a growing awareness that the rule of law and the civic dialogue and reconciliation processes, all ingredients and components of a transitional justice strategy, create a foundation for sustainable development.<sup>42</sup> In the 2007 Communication from the Commission on the EU response to situations of fragility, the fundamental role of nationally owned transitional justice and rule of law systems in post-conflict settings was recognised, as was the importance of parallel advancement of justice and reconciliation initiatives in stabilising divided societies after conflict.<sup>43</sup>

The importance of transitional justice is also reflected in the various policies of the European Commission as well as in its financial instruments. Transitional justice and mechanisms are explicitly mentioned in several places in the European Instrument for Democracy and Human Rights (EIDHR) as well as in the Instrument for Stability (IfS).<sup>44</sup> TJ also implicitly figures in other instruments, such as in

<sup>41</sup> European Council, *Report on the Implementation of the European Security Strategy – Providing Security in a Changing World* (December 2008), *supra* n. 2.

<sup>42</sup> *The European Consensus on Development* (2006/C 46/01) (the general framework for action on EU development cooperation): one of the common principles of EU development policy is ‘addressing state fragility’, whereby the EU commits to preventing state fragility through governance reforms, rule of law, anti-corruption measures and the building of viable institutions: ‘in a post-crisis situation development will be guided by integrated transition strategies, aiming at rebuilding institutional capacities (...)’ (paras. 20-21).

<sup>43</sup> Commission Communication, ‘Towards an EU Response to Situations of Fragility’ (Brussels, 25 October 2007), COM (2007) 643, at 9.

<sup>44</sup> Article 3 IfS, OJ 2006 L 327/1. Also note that a specialised ‘TJ Facility’ has been established allocating 12 million euros for 2008; Regulation (EC) No 1889/2006 of the EP and the Council

the Citizenship Programme 2007-2011, which supports a wide range of activities and organisations promoting ‘active European citizenship’, especially the involvement of citizens and civil society organisations in the process of European integration. Action 4 (Active European Remembrance) provides support to projects aimed at preserving the sites and archives associated with deportations as well as the commemoration of victims of Nazism and Stalinism.<sup>45</sup>

The EC is also directly funding transitional justice initiatives. For example, the EU is providing 80% of the total cost of the Community reparation scheme recommended by the Moroccan Truth Commission. In Colombia, the EC is financially supporting the Peace and Justice Law, including civil society work on reparation and domestic prosecution efforts. In the area of institutional reform, the EC has a ‘Community Concept’ on SSR, which is, however, currently not understood as being part of transitional justice.<sup>46</sup>

From a transitional justice perspective, the Directorate-General for External relations (DG RELEX) is the key DG, especially the Human Rights and Democracy Unit and the Conflict Prevention Unit. Their key funding instruments are the European Initiative for Democracy and Human Rights (EIDHR), which provides funding to NGOs, multilateral organisations and international tribunals without the requirement of host government consent, and the European Neighbourhood and Partnership Instrument (ENPI), which covers MEDA countries, Southern Caucasus countries and Eastern European countries. DG RELEX is also responsible for the Instrument for Stability, including the new TJ Facility as well as the Peacebuilding Partnership Facility.<sup>47</sup>

Also crucial is the Directorate-General for Enlargement (DG ELARG), in particular in relation to EU candidate and potential candidate countries. The relevant

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of 20 December 2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide (EIDHR Regulation), *OJ* 2006 L 386/1, provides for Community assistance in promoting and strengthening the ICC, *ad hoc* international criminal tribunals and the process of transitional justice and truth and reconciliation mechanisms (Art. 2(1)(a)(iii)); Compendium of projects financed by the EC under the EIDHR, 2000-2006, at 154-164 – projects in the areas of international justice (including funding to the ICC, ICTY and ICTR), truth and reconciliation mechanisms and peaceful conciliation; Document de travail des services de la Commission, *Mise en œuvre de la Politique européenne de voisinage en 2007. Rapport de Suivi Maroc* (Bruxelles, 3 avril 2008), SEC(2008)398: ‘En revanche, des recommandations importantes de l’Instance Équité et Réconciliation (l’IER) ne sont pas encore mises en œuvre, notamment en matière de réforme de la Justice, de révision constitutionnelle, d’adoption des conventions internationales et de leurs protocoles, malgré la mise en place de commissions spécialisées’, at 5.

<sup>45</sup> See: <[http://eacea.ec.europa.eu/citizenship/programme/action4\\_en.php](http://eacea.ec.europa.eu/citizenship/programme/action4_en.php)>.

<sup>46</sup> ‘A Concept for European Community Support for Security Sector Reform’, COM(2006) 253: sets out principles and norms for the European Community’s engagement in SSR.

<sup>47</sup> Under the crisis preparedness component of the Instrument for Stability (Art 4.3), the European Commission has established the Peacebuilding Partnership (PbP) to develop the capacity of its potential partners to respond to crisis situations worldwide. The Peacebuilding Partnership envisages building the capacities of relevant organisations in pre-crisis situations, for instance, to develop early-warning systems, to provide mediation and reconciliation services and to address inter-community tensions. It also involves measures to improve post-conflict and post-disaster recovery.



funding instrument is the Instrument for Pre-Accession (IPA), which covers human rights generally, albeit without specifically referring to transitional justice.

The Directorate-General for Development (DG DEV) is also of relevance, especially in terms of the mainstreaming of human rights – and thus indirectly of transitional justice – into development policy. It relies above all on the Development Cooperation Instrument, which deals with African, Caribbean and Pacific (ACP) countries and is based on the Cotonou Agreement.<sup>48</sup> The Directorate-General for Justice, Freedom and Security (DG JLS) is also relevant in terms of transitional justice in the external dimension of its policies, but thus far there are no relevant documents on transitional justice. DG JLS is also the main Directorate-General dealing with the question of universal jurisdiction. Whether universal jurisdiction for serious human rights violations is exercised is however within the competence of every single Member State of the EU. Yet, at the level of the EU, efforts are underway to enhance cooperation between the Member States in the prosecution of serious crimes, such as those against humanity and war crimes. The need for more cooperation on this matter was recognised by the EU in the Framework Decision setting up a network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes.<sup>49</sup> The Framework Decision is aimed at facilitating contacts between professionals specialised in the investigation and prosecution of international crimes and at increasing the cooperation and exchange of information between them.

#### 5.4. The Parliament (the ‘democratic voice of the people’)

So far, the European Parliament (EP) has held various hearings on the issue of transitional justice. Relevant examples to consider here are the public hearing on transitional justice which opened the fall session of the Sub-Committee on Human Rights (August 2006).<sup>50</sup> In similar vein, other EP committees and sub-committees occasionally explore transitional justice issues. At present, however, this is only done in an *ad hoc* fashion. Transitional justice is also mentioned in the Annual Report on Human Rights in the World 2006, where the EP ‘calls on the Council and the Commission to encourage third countries to promote transitional justice mechanisms on their territory as a step towards securing justice for victims of grave violations of human rights.’<sup>51</sup>

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<sup>48</sup> Article 9(4) of the Cotonou Agreement: ‘The Partnership shall actively support the promotion of human rights, processes of democratisation, consolidation of the rule of law, and good governance.’ Article 11: ‘The Parties shall pursue an active, comprehensive and integrated policy of peacebuilding and conflict prevention and resolution within the framework of the Partnership.’

<sup>49</sup> Council Decision 2002/494/JHA of 13 June 2002, available at: <<http://eurocrim.jura.unituebingen.de/cms/en/doc/265.pdf>>.

<sup>50</sup> Other transitional justice hearings at DROI: Morocco (February 2007) and general (March 2006).

<sup>51</sup> *Report of the EP on the Annual Report on HR in the World 2006 and EU’s policy on the matter* (10 April 2007), A6-0128/2007.

The EP has, however, made it clear that the fight against impunity is a key priority for the Union. On 16 March 2006, the European Parliament passed a resolution on impunity in Africa and in particular the case of Hissène Habré, reiterating that the fight against impunity is one of the cornerstones of the Union's human rights policy and calling 'on the Commission, the Council and the Member States of the African Union to continue to pay attention to this issue.' Furthermore, the resolution called on Member States 'to do whatever they can to ensure that (...) victims of such crimes [committed in Africa or developing countries] receive compensation.'<sup>52</sup> In its resolution on the proceedings against Rios Montt, on 26 October 2006, the European Parliament 'welcomes the progress made in the application of the principle of universal jurisdiction in respect of crimes against humanity, genocide and torture (...) the same procedure should be followed under similar circumstances in taking action against dictators and persons responsible for mass human rights violations.'<sup>53</sup> It is hoped that the EP will also in the future be the engine calling for concrete actions in the area of fighting impunity, including transitional justice.

## 6. POSSIBLE FUTURE DIRECTIONS FOR THE EU ON TRANSITIONAL JUSTICE

There is a clear, albeit indirect, EU practice on transitional justice. It appears to be scattered and undertaken in an *ad hoc* fashion. Below are some recommendations for possible future directions the EU could take as regards transitional justice to remedy current shortcomings. The recommendations seek to provide concrete operational solutions both for the EU as a whole, and individually for different institutions.

### (i) *Recommendations for the EU as a whole*

- The EU could consider creating a framework to inform and guide the EU's transitional justice policies in order to avoid that actions are taken in an *ad hoc* fashion. A transitional justice framework will give the EU the ability to evaluate the quality of transitional justice interventions at national level and to propose evidence-based and viable transitional justice policy choices at international and national levels. A framework will also ensure coherence and consistency in the EU's transitional justice engagements.
- In parallel, it is recommended to establish a working group on transitional justice composed of staff members of the Council and the Commission, to ensure institutional follow-up to an established transitional justice framework. The working group could draw from existing rule of law staff in the different institutions or establish specialised transitional justice focal points in the Commission and Council.

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<sup>52</sup> Impunity in Africa and in particular the case of Hissène Habré, P6\_TA(2006)0101.

<sup>53</sup> Case against Rios Montt, P6\_TA(2006)0466.

(ii) *Recommendations to the Council*

- *Transitional justice checklist and handbook*: A transitional justice checklist for CSDP missions could be developed with a requirement to be consulted in the course of designing and carrying out any CSDP mission. In addition to the checklist, a transitional justice field handbook for CSDP missions (as well as for the EU's in-country delegations) should be developed in order to put theory into concrete terms of operation and to ensure effective implementation on the ground.
- *Transitional justice training*: The Council should further implement regular pre-deployment training on transitional justice, in coordination with EU Member States, and offer in-mission transitional justice training modules and courses.
- *Transitional justice experts*: The Council could establish a roster of available EU and non-governmental experts in the transitional justice field. This could be a sub-category of any existing EU 'rule of law' experts roster. At the mission level, the creation of a transitional justice focal point for relevant CSDP missions could be considered. There are already some proposals that this should be done in the context of the EU mission in Kosovo. In the context of Kosovo, transitional justice is listed as a formal element of the Ahtisaari plan.
- *Enlargement*: The Council should consider, after the closure of the ICTY,<sup>54</sup> replacing the ICTY conditionality for accession countries of the Balkans with an incentive-based scheme that builds support for the next crucial phase of dealing with the legacy of abuse in the region: regional truth recovery and reconciliation through a regional truth commission (RECOM) as well as domestic prosecutions in the different countries of the former Yugoslavia.
- *Transitional justice as an agenda item in EU human rights dialogues with third states*: The EU undertakes over thirty human rights dialogues with third states, among which countries or regions where transitional justice is relevant (e.g., Colombia, AU). A discussion and exchange of good practices on transitional justice could contribute to building confidence and ensuring that the EU is seen as a partner in finding sustainable solutions for complex issues. Linked to this is a coherent approach within the different EU Member States to address transitional justice questions.

(iii) *Recommendations to the Commission*

- *Expert paper on the link between transitional justice and development*: Development policies are often seen to stand in contradiction to efforts to address the legacy of the past. New studies show, however, that development and transitional justice complement each other.<sup>55</sup> In order to

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<sup>54</sup> It is expected that the ICTY will complete its work by 2013.

<sup>55</sup> P. de Greiff and R. Duthie, eds., *Transitional Justice and Development: Making Connections* (The Social Science Research Council 2009).

undertake transitional justice-friendly development policies, the Commission could work on a possible expert paper regarding the link between TJ and development.

- *Survey of lessons learned in the area of transitional justice:* The Commission could undertake a possible survey of TJ ‘lessons learned’ and ‘best practices’ through consultations with EU Delegations in countries where TJ processes are underway. These surveys could also be made available in dialogues which the EU is leading with third states.
  - *Mainstreaming of transitional justice at DG AIDCO:* The Europe Aid Coordination Office (AIDCO) is responsible for implementing the external aid instruments of the EU.<sup>56</sup> Transitional justice should be better mainstreamed into the work of AIDCO.
- (iv) *Recommendation to the Parliament*
- TJ should be formally ‘situated’ as a responsibility within a relevant sub-committee of the Committee on Foreign Affairs (AFET).

## 7. CONCLUSIONS

For now, the priority remains to continue to raise the level of awareness and understanding of what transitional justice is and why it is relevant to the EU, especially in the area of peacebuilding. As has been shown, there are several entry points for transitional justice to be taken up in the work of the EU, at the policy as well as the operational level. An EU policy framework on transitional justice together with measures to strengthen EU institutions with transitional justice expertise should enhance the future work of the EU on this important matter. The following benchmarks could be considered in order to evaluate the success of an EU transitional justice policy in the future:

- *Council:* More transitional justice-sensitive mandates for CSDP missions and EUSRs. Transitional justice should be a key priority for the new President of the EU and within the Council Secretariat as well as for the High Representative of the Union who, after the entry into force of the Lisbon Treaty, has a stronger role especially in the area of CSDP (right to set initiatives, coordination role, special hierarchical status in certain situations vis-à-vis the PSC).
- *Commission:* Quality transitional justice policies are developed, and significant expenditures on quality transitional justice actors and processes are made.
- *Parliament:* Significant political support for quality transitional justice actors and processes is expressed on a regular basis.

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<sup>56</sup> The main instruments are the European Instrument for Democracy and Human Rights (EIDHR), the Instrument for Stability (IfS), the European Neighbourhood and Partnership Instrument (ENPI), the Instrument for Pre-Accession Assistance (IPA) and the Development Cooperation Instrument (DCI).

Overall, there is a need to make sure that TJ is not conceived as merely a foreign policy priority. Just as Europe needs to ensure that its foreign policies on HR are matched by effective domestic human rights policies, so it has to guarantee that its foreign policies on transitional justice are matched by effective domestic policies. There is still some ‘unfinished business’ in the area of transitional justice in Europe which needs to be addressed. To take a pro-active stance on these issues will also potentially help in countering attacks against EU efforts to promote the International Criminal Court and rebut the claim of double standards.

Whatever TJ policies and practices are ultimately adopted, it would be beneficial for the EU to have a strong relationship with local and international civil society (TJ expert) institutions in order to guarantee that its actions reflect best practices and local knowledge and ownership.