

# TRANSITIONAL JUSTICE AND DEMOCRATIC CHANGE: KEY CONCEPTS

Elena ANDREEVSKA\*

## Abstract

*This Article proposes a genealogy of transitional justice and focuses on transitional justice as one of the key steps in peace building that needs to be taken to secure a stable democratic future. Transitional justice is a response to systematic or widespread violations of human rights. It seeks recognition for victims and promotion of possibilities for peace, reconciliation and democracy. The paper focuses on key concepts of transitional justice before addressing its traditional components: justice, reparation, truth and institutional reform. This Article meeting point on the transitional process in a society which has experienced a violent conflict and needs adequate mechanisms to deal with the legacies of the past in order to prevent future violence and cover the way for reconciliation and democratic consolidation. It provides key stakeholders with an overview of transitional justice and its different components, while examining key challenges faced by those working in this area. The present paper concludes with some remarks that challenge the traditional concept of transitional justice and its processes in order to initiate important debate on where future work in this field is needed.*

**Keywords:** *Transitional justice, democracy, human rights, institutional reforms, democratic consolidation.*

## Introduction

The presumption in much of what has been said about transitional justice is that we can speak in general terms about these real-world practices. Some commentators have spoken explicitly of one common theory of transitional justice.<sup>1</sup> These generalizations concern the dilemmas of dealing with massive human rights abuses and ways to assess and evaluate the practices utilized when confronting such legacies of violence and injustice. Nonetheless, in a diverse world one risk of constructing a general theory is that it can lack sensitivity to different and nuanced circumstances. In particular, it is problematic to utilize a common normative framework that presupposes the liberal democratic nature of an incoming regime, or law's ability to generally further such values. While some case studies of transitional justice have argued that law can also serve to restrict democratization,<sup>2</sup> and while objectives such as reconciliation, peace, and victims' healing are now increasingly examined in the general literature<sup>3</sup>, the fact remains that the scholarship is dominated by the conception that transitional

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\* PhD, SEE-University, Tetovo, Republic of Macedonia (email: e.andreevska@seeu.edu.mk).

<sup>1</sup> See Riti G. Teitel, *Transitional Justice* (Oxford University Press, 2000): 213.

<sup>2</sup> See Brian Grodsky, "Justice without Transition: Truth Commissions in the Context of Repressive Rule", 8 *HUM. RTS. L. REV.*, (2008): 218.

<sup>3</sup> See, *Ibid.*, *Supra* 1; Carlos Nino, *Radical Evil on Trial* (Yale University Press, 1996); Neil J Krotz: *Transitional Justice: How Emerging Democracies Reckon with Former Regimes: Country Studies* (US Institute of Peace Press, 1995); and James McAdams: *Transitional Justice and the Rule of Law in New Democracies* (University of Notre Dame Press, 1997).

justice is about applying a number of legal and quasi-legal processes in democratic political transitions, and that dealing with the past will help consolidate liberal values.<sup>4</sup>

There are significant problems connected to understanding the complex and very diverse instances of transitional justice by depending on a theoretical framework that is heavily influenced by ideas about transitions from authoritarian rule to democracy that were developed in the late 1980s and early 1990s. Though the scholarship analyzes cases that are radically different from “transitions to democracy,” the conceptual underpinnings of transnational justice as an academic field continue to be heavily influenced by values and understandings of dilemmas that connect intimately to liberal transitions. In a world where systematic dealing with serious abuses can take place in democratic transitions, in non-liberal transitions, as well as in highly diverse contexts of non-transitions, there is a clear need for “updating” transitional justice theory.

A genealogy of transitional justice indicates that from the post-World War II tribunals at Nuremberg and Tokyo to the proliferation of tribunals and truth commissions in the present, the field of transitional justice has both expanded and normalized. The burgeoning of transitional justice is often associated with the post-Cold War political climate in which a significant number of authoritarian, oppressive and frequently violent nation-states began to transition towards peace and procedural democracy. Particularly, since the end of the Cold-War, the field of transitional justice has metamorphosed from an initially narrow focus on justice and retribution to a much more complex study of how human rights abuses, genocide and other mass atrocities are confronted by societies emerging from violent conflict or transitioning to democratic forms of governance. Transitional justice emerged as both a field of practice and field of scholarly inquiry in the 1980s and 1990s in response to dramatic political changes occurring in Latin America, Central and Eastern Europe, and South Africa. In each case, the transition to democracy included public demands to acknowledge and redress human rights abuses committed by former regimes.

This paper focuses on transitional justice as one of the peace building steps that needs to be taken to secure a stable democratic future. Since the field of transitional justice is very broad and complex, this paper focuses on its key concepts.

### 1. Defining Transitional Justice

Transitional justice can be defined as the conception of justice associated with periods of political change,<sup>5</sup> characterized by legal response to confront the wrongdoings of repressive predecessor regimes.<sup>6</sup> The origins of modern transitional justice can be traced to World War I.<sup>7</sup> However, transitional justice becomes understood as both extraordinary and international in the postwar, phase of transitional justice. The second, or post-Cold War, phase associated with the wave of democratic transitions and modernization that began in 1989. Toward the end of the twentieth century, global politics was characterized by acceleration in conflict resolution and a persistent discourse of justice throughout law and society. The third phase of transitional justice

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<sup>4</sup> Phil Clark: Establishing a Conceptual Framework: “Six Key Transitional Justice” *Themes, in AFTER GENOCIDE 191* (Phil Clark & Zachary Kaufman, 2008).

<sup>5</sup> See Gulljerme O’Donnell and Phillippe C. Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (1998), 6.

<sup>6</sup> See Neil J. Kritz, *Transnational Justice: How Emerging Democracies Reckon with Former Regimes* (1997).

<sup>7</sup> See *Ibid.*, *Supra* 1, pp. 31, 39-40; Michael Walzer, “*Regicide and Revolution: Speeches on the Trial of Louis XVI*” (1992) (providing a historical account).

is associated with contemporary conditions of persistent conflict which lay the foundation for normalized law of violence.<sup>8</sup>

The International Center for Transitional Justice (ICTJ) defines transitional justice as “a response to systematic or widespread violations of human rights. It seeks recognition for victims and to promote possibilities for peace, reconciliation and democracy.”<sup>9</sup> This approach emerged in the late 1980s and early 1990s, mainly in response to political changes in Latin America and Eastern Europe—and to demands in these regions for justice. At the time, human rights activists and others wanted to address systematic abuses by former regimes but without endangering the political transformations that were underway. Since these changes were popularly called “transitions to democracy,” people began calling this new multidisciplinary field “transitional justice.”

It is important to be emphasized that four processes are believed to constitute the core of transitional justice, even if there is disagreement about what each of them entails and the relationship that should exist between them. Usually, a transition encompasses a *justice process*, to bring perpetrators of mass atrocities to justice and to punish them for the crimes committed; a *reparation process*, to redress victims of atrocities for the harm suffered; a *truth process*, to fully investigate atrocities so that society discovers what happened during the repression/conflict, who committed the atrocities, and where the remains of the victims lie; and an *institutional reform process*, to ensure that such atrocities do not happen again (OHCHR, 2009).<sup>10</sup> In addition to these core processes, others have become part of the transitional justice agenda: primarily, *national consultations*, which have been strongly recommended by the Office of the High Commissioner for Human Rights (OHCHR) and the Peacebuilding Commission, which emphasize that “meaningful public participation” is essential for the success of any transition<sup>11</sup>. National consultations should take place in relation to different aspects of transitional justice. Finally, *Disarmament, demobilization and reintegration* (DDR), which usually take place in parallel rather than as part of the transitional justice processes, actively interact with and complement transitional justice mechanisms and policies.<sup>12</sup>

As the field has expanded and diversified, it has gained an important foundation in international law. Part of the legal basis for transitional justice is the 1988 decision of the Inter-American Court of Human Rights in the case of Velázquez Rodríguez v. Honduras,<sup>13</sup> in which the court found that all states have four fundamental obligations in the area of human rights. These are:

- To take reasonable steps to prevent human rights violations;
- To conduct a serious investigation of violations when they occur;
- To impose suitable sanctions on those responsible for the violations; and

<sup>8</sup> See Ruti G. Teitel, *Transitional Justice Genealogy*, *Harvard Human Rights Journal*, 1 Vol. 16 (2003): 69-70. Also, there is a rich scholarship on transitional justice. Early analyses reflected mostly Latin American and Southern European experiences of democratic transition. But current thinking about transitional justice is informed by a much broader range of experiences, including post-socialist transitions in Eastern Europe and various post-conflict settings, many in sub-Saharan Africa and Asia.

<sup>9</sup> ICTJ website, <http://www.ictj.org/en/tj/>. Accessed January 4, 2009.

<sup>10</sup> Office of the High Commissioner of Human Rights (2009), *Analytical Study on Human Rights and Transitional Justice*, A/HRC/12/18, Geneva: United Nations.

<sup>11</sup> (A/HRC/12/18, 2009, and A/63/881-S/2009/304, 2009).

<sup>12</sup> Clara S. Villalba, “Transitional Justice: Key Concepts, Processes and Challenges”, *I.DCR, Knowledge for governing the world* BP 07/11 (2011): 3-4.

<sup>13</sup> The Velasquez Rodriguez case, INTER-AM. CT.H.R., June 26, 1987 (preliminary objections), July 29, 1988(merits); see Facts on File, Aug. 5, 1988, § A3, at 577; N.Y. Times, July 30, 1988, at I, col. 2.

- To ensure reparation for the victims of the violations.

Those principles have been affirmed explicitly in later decisions by the court and endorsed in decisions by the European Court of Human Rights and UN treaty bodies such as the Human Rights Committee. The 1998 creation of the International Criminal Court was also significant, as the court's statute enshrines state obligations of vital importance to the fight against impunity and respect for victims' rights.

In spite of this impressive evolution, there are still many questions in need of answers. One such question revolves around the role of international organizations, especially United Nations and European Union, in promoting transitional justice.

## 2. United Nations Approach to Transitional Justice

Over the years, the United Nations has acquired significant experience in developing the rule of law and pursuing transitional justice in States emerging from conflict or repressive rule. Experience has demonstrated that promoting reconciliation and consolidating peace in the long-term necessitates the establishment or reestablishment of an effective governing administrative and justice system founded on respect for the rule of law and the protection of human rights.

For the United Nations system, transitional justice is the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.<sup>14</sup> Transitional justice processes and mechanisms are a critical component of the United Nations framework for strengthening the rule of law.

Transitional justice consists of both judicial and non-judicial processes and mechanisms, including prosecution initiatives, truth-seeking, reparations programmes, institutional reform or an appropriate combination thereof. Whatever combination is chosen must be in conformity with international legal standards and obligations. Transitional justice should further seek to take account of the root causes of conflicts and the related violations of all rights, including civil, political, economic, social and cultural rights. By striving to address the spectrum of violations in integrated and interdependent manner, transitional justice can contribute to achieving the broader objectives of prevention of further conflict, peacebuilding and reconciliation.<sup>15</sup>

The normative foundation for the work of the UN in advancing transitional justice is the Charter of the United Nations, along with four of the pillars of the modern international legal system: international human rights law, international humanitarian law, international criminal law, and international refugee law. Specifically, various UN instruments enshrine rights and duties relative to the right to justice,<sup>16</sup> the right to truth,<sup>17</sup> the right to reparations,<sup>18</sup> and the

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<sup>14</sup> See S/2004/616.

<sup>15</sup> United Nations rule of law and transitional justice activities include developing standards and best practices, assisting in the design and implementation of transitional justice mechanisms, providing technical, material and financial support, and promoting the inclusion of human rights and transitional justice considerations in peace agreements.

<sup>16</sup> See International Covenant on Civil and Political Rights, article 2, Convention against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment, articles 4, 5, 7 and 12, International Convention for the Protection of All Persons from Enforced Disappearance, articles 3, 6, 7 and 11. See also E/CN.4/2005/102/Add.1, Principle 19.

<sup>17</sup> See International Covenant on Civil and Political Rights, article 2, International Convention for the Protection of All Persons from Enforced Disappearance, article 24. See also E/CN.4/2005/102/Add.1, Principles 2-5.

<sup>18</sup> See Universal Declaration of Human Rights, article 8, International Covenant on Civil and Political Rights, article 2, International Convention on the Elimination of All Forms of Racial Discrimination, article 6, Convention against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment, article 6,

guarantees of non-recurrence of violations (duty of prevention).<sup>19</sup> In addition, treaty bodies and court jurisprudence, as well as a number of declarations, principles, and guidelines<sup>20</sup> have been instrumental in ensuring the implementation of treaty obligations.

To comply with these international legal obligations, transitional justice processes should seek to ensure that States undertake investigations and prosecutions of gross violations of human rights and serious violations of international humanitarian law, including sexual violence. Moreover, they should ensure the right of victims to reparations, the right of victims and societies to know the truth about violations, and guarantees of non-recurrence of violations, in accordance with international law.<sup>21</sup> Without doubt, transitional justice processes and mechanisms do not operate in a political vacuum, but are often designed and implemented in fragile post-conflict and transitional environments. The UN must be fully aware of the political context and the potential implications of transitional justice mechanisms. The question for the UN is never whether to pursue accountability and justice, but rather when and how.<sup>22</sup>

Finally, transitional justice programmes include the following elements:

- Prosecution initiatives;<sup>23</sup>
- Facilitating initiatives in respect of the right to truth,<sup>24</sup>
- Delivering reparations;<sup>25</sup>
- Institutional reform;<sup>26</sup> and
- National consultations.<sup>27</sup>

International Convention for the Protection of All Persons from Enforced Disappearance, article 24, the Convention on the Rights of the Child, article 39. See also A/RES/60/147.

<sup>19</sup> See International Covenant on Civil and Political Rights, article 2, Convention against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment, article 2, International Convention for the Protection of All Persons from Enforced Disappearance, article 23. See also LaGrand Case (Germany v. United States), Judgment of 27 June 2001, I.C.J. Reports 2001. See E/CN.4/2005/102/Add.1, Principle 35.

<sup>20</sup> *Inter alia*, founded on the 1948 Universal Declaration of Human Rights.

<sup>21</sup> These international standards further set the normative boundaries of UN engagement, for example: the UN will neither establish nor provide assistance to any tribunal that allows for capital punishment, nor endorse provisions in peace agreements (See Guidelines for UN Representatives on Certain Aspects of Negotiations for Conflict Resolution, 1 Dec. 2006) that include amnesties for genocide, war crimes, crimes against humanity, and gross violations of human rights (gross violations of human rights include torture and similar cruel, inhuman or degrading treatment; extra-judicial, summary or arbitrary executions; slavery; enforced disappearances; and rape and other forms of sexual violence of comparable gravity).

<sup>22</sup> The UN cannot endorse provisions in peace agreements that preclude accountability for genocide, war crimes, crimes against humanity, and gross violations of human rights, and should seek to promote peace agreements that safeguard room for accountability and transitional justice measures in the postconflict and transitional periods.

<sup>23</sup> See The Rule of Law Tools for Post-Conflict States, <http://www.ohchr.org/EN/PublicationsResources/Pages/SpecialIssues.aspx>

<sup>24</sup> See E/CN.4/2005/102/Add.1, Principles 6-13 and E/CN.4/2004/88 and E/CN.4/2006/91.

<sup>25</sup> The General Assembly has reaffirmed the right of victims to reparations in the 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. See A/RES/60/147.

<sup>26</sup> Public institutions that helped perpetuate conflict or repressive rule must be transformed into institutions that sustain peace, protect human rights, and foster a culture of respect for the rule of law. Also See E/CN.4/2005/102/Add.1, Principle 36.

<sup>27</sup> National consultations are a critical element of the human rights-based approach to transitional justice, founded on the principle that successful transitional justice programmes necessitate meaningful public participation, including the different voices of men and women. Effective outreach must address both

Taking into account the emerging developments in international law, the principles and needs of UN, including its field presences, the following approaches should be incorporated into transitional justice activities of the UN:

- Adopt an approach to transitional justice that strives to take account of the root causes of conflict or repressive rule, and address the related violations of all rights, including economic, social, and cultural rights in a comprehensive and integrated manner;
- Take human rights and transitional justice considerations into account during peace processes;<sup>28</sup> and
- Coordinate disarmament, demobilization, and reintegration (DDR) initiatives with transitional justice processes and mechanisms, where appropriate, in a positively reinforcing manner.<sup>29</sup>

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### **3. The EU and Transitional Justice: A comprehensive approach to justice and peace building**

The UN has led the field in developing norms and standards regarding human rights and peacemaking, and in practice, EU mediators are already actively engaged in these issues. Yet despite this emerging normative framework, the extent to which peace and justice issues are brought to the fore depends very much on the conflict and on the personality and personal experience of the mediator, regardless of his/her institutional affiliation.<sup>30</sup>

Transitional justice is a relatively new area of concern for the European Union (EU). Indeed, until recently it was largely absent from EU policies promoting democracy, the rule of law and human rights. But that does not mean that it was ignored.<sup>31</sup> Moreover, there is no specific reference to transitional justice in the corpus of treaties establishing the European Union. Also, the EU does not have a common definition of “transitional justice” despite its support for and engagement in transitional justice processes in Europe and beyond.<sup>32</sup> On the other hand, transitional justice can contribute to the rule of law by strengthening the legitimacy of public institutions and the processes by which laws are made, including through promoting public participation. Transitional justice can also contribute to changing social norms which in turn strengthen legitimate rule of law and democracy. Transitional justice contributes to public recognition that the abuse suffered by victims was and remains wrong; this recognition can help

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specific groups affected by the particular mechanisms involved as well as the broader community. It requires careful planning during the design phase and adequate resources.

<sup>28</sup> See the study on human rights and transitional justice activities undertaken by the human rights components of the United Nations system (E/CN.4/2006/93) and the progress report on human rights and transitional justice (A/HRC/4/87); and the Human Rights Council Resolution, Human Rights and Transitional Justice, No. 9/10.

<sup>29</sup> Guidance Note of the Secretary-General (2010). ‘United Nations Approach to Transitional Justice’, p.p. 1-10.

<sup>30</sup> Laura Davis, “The EU and advancing justice issues in mediation” Brussels: Initiative for Peacebuilding, (2010), [www.initiativeforpeacebuilding.eu](http://www.initiativeforpeacebuilding.eu)

<sup>31</sup> Avelle, M. (2008) *European efforts in Transitional Justice*. Working Paper 58, Madrid:FRIDE, Fundación para las Relaciones Internacionales y el Diálogo Exterior, 9.

<sup>32</sup> This is discussed in detail in Matthew L. Davis (2010). *The European Union and transitional justice*. Brussels: Initiative for Peace-building.

strengthen inclusive citizenship, enabling the excluded and marginalised more generally to become fully rights-bearing citizens who participate in a common political project.<sup>33</sup>

According to the treaty on European Union, 'The Union's aim is to promote peace, its values and the wellbeing of its peoples'.<sup>34</sup> 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'.<sup>35</sup> Moreover, 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 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,<sup>36</sup> and the Special Tribunal for Lebanon.<sup>37</sup>

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

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<sup>33</sup> Pablo De Grieff, "Justice and Social Integration" in P. de Grieff and R. Duthie (Eds.), *Transitional justice and development: Making connections* (New York: Social Science Research Council (2009): 56-62.

<sup>34</sup> Article 3.1., of the Treaty of European Union, Official Journal of the European Union, EN C 321 E/1 (2006).

<sup>35</sup> Council of the European Union, The Stockholm Programme – An open and secure Europe serving and protecting the citizens, December 2009 Doc. 17024/09, p.12. 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'. Also See *Report on the implementation of the European Security Strategy – Providing security in a changing world* (December 2008). European Council, S407/08<sup>35</sup> Laura Davis, "The EU and advancing justice issues in mediation" *Brussels: Initiative for Peacebuilding*, (2010), www.initiativeforpeacebuilding.eu

<sup>35</sup> *Ibid.*, Supra 31.

<sup>35</sup> *Ibid.*

<sup>35</sup> *Ibid.*, Supra 33.

<sup>35</sup> *Ibid.*, Supra 34, Article 3.1.

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<sup>36</sup> European Communities (2008). *EU Report on Human Rights 2008*, p.74.

<sup>37</sup> 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.

democracy, the rule of law, human rights and respect for and the protection of minorities'<sup>38</sup> 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'.

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'.<sup>39</sup>

Missing a consistent overarching framework, legal or otherwise,<sup>40</sup> the EU approaches transitional justice from primarily two perspectives. First, transitional justice mechanisms are nested in various policies that promote human rights, development, democracy, and enlargement under what is known as the Community Pillar (First Pillar) of the EU.<sup>41</sup>

Additionally to the Community Pillar, the EU promotes transitional justice as part of its Common Foreign and Security Policy (Second Pillar), filtered through the prism of the European Security and Defense Strategy (ESDP). From this vantage point transitional justice mechanisms are embedded with other peace-building and security-oriented tasks, such as crisis-management, security sector reform (SSR), and disarmament, demobilization and reintegration (DDR).

The EU is committed to promoting peace, to the protection of human rights and to the strict observance and the development of international law.<sup>42</sup> 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'.<sup>43</sup>

The Concept on Strengthening EU Mediation and Dialogue Capacities states that:

'Issues such as holding human rights violators accountable in justice for their actions, reparations to victims, reintegration of ex-child soldiers, restitution of property and land ... have to be tackled during the peace negotiations and the drafting of peace agreements. Although it is widely acknowledged that it is only through justice to victims that enduring peace can be achieved, there are often tensions between these two objectives, and the EU should consider on a case by case basis how best to support transitional justice mechanisms, including addressing impunity. EU mediation efforts must be fully in line with and supportive of the principles of international human rights and humanitarian law, and must contribute to fighting impunity for human rights violations'.<sup>44</sup>

<sup>38</sup> European Council in Copenhagen 21-22 June 1993 Presidency Conclusions SN 180/1/93, p.13.

<sup>39</sup> General Affairs & External Relations Council (GAERC). Extracts from successive General Affairs & External Relations Councils 16 June 2003.

<sup>40</sup> See Heiner Hänggi and Fred Tanner, "Promoting Security Sector Governance in the EU's Neighbourhood", Challiot Paper no. 80, (July 2005).

<sup>41</sup> In these instances, decisions are made using the so-called "Community method": the Commission holds a monopoly on the right of initiative; the Council employs the qualified majority voting rule; and the European Parliament takes a more reactive role in co-legislating with the Council.

<sup>42</sup> *Ibid.*, Supra 34, Article 3 paragraphs 1, 5.

<sup>43</sup> *Ibid.*, Article 21.2 (b).

<sup>44</sup> Doc. 15779/09 II. 4 (d), p.8; Council Common Position 2003/444/CFSP; European Communities (June 2009). *The European Union and Central Asia: The new partnership in action*, pp.16-17; Agreement between the International Criminal Court and the European Union on cooperation and assistance, ICC-PRES/01-01-06; and The Rome Statute of the International Criminal Court (July 2002), Preamble.



Peace-building and human rights agendas are pushed by activist Member States (usually Sweden, Denmark, Finland, the Netherlands, Belgium and sometimes the United Kingdom, plus others depending on the issue) and by activist officials in the national capitals and in Brussels. The extent to which these issues are prioritised in dealing with third countries depends on Member States' other interests there, or indeed the interests of third countries. In the Western Balkans, by

contrast, human rights and justice are seen as integral to the EU's interests in the region and cooperation with the ICTY is a condition of furthering relations with the EU. Yet even there, Member States set the bar at different heights.

Moreover, civilian crisis management is a central focus of the European Security and Defense Policy (ESDP) and is now considered the "core" of a human security based approach (Dwan 2006: 265). Increasingly, the most overt expression of the EU's support for transitional justice occurs in the context of EDSP, but without additional support provided by communitarized programs "winning the peace" would be that much more difficult. In examining how the EU's ESDP capabilities and missions have evolved, as well its first pillar instruments dedicated to the promotion of democracy, development and human rights, we observe an expanding EU international role that explicitly integrates the importance of ethical and normative concerns in formulating foreign policy, particularly in the areas of human rights and the security of individuals. Such concerns animate, indeed permeate, the EU's newly launched efforts in the area of transitional justice. The ethical power Europe model emphasizes what the EU does, and what the EU does in promoting transitional justice is to help establish the conditions for legitimate political authority, legitimate institutions, and the rule of law, all of which are preconditions for ensuring human security.

Lastly, transitional justice is recognised as an important policy area in the Mediation Support Concept, and indeed, the transitional justice element of the concept was the subject of most substantive debate during the drafting process. The concept also states that 'the EU should consider on a case by case basis how best to support transitional justice mechanisms, including addressing impunity'.<sup>45</sup>

### Conclusion

Justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives. Advancing all three in fragile post-conflict settings requires strategic planning, careful integration and sensible sequencing of activities. Approaches focusing only on one or another institution, or ignoring civil society or victims, will not be effective. The approach to the justice sector must be comprehensive in its attention to all of its interdependent institutions, sensitive to the needs of key groups and mindful of the need for complementarity between transitional justice mechanisms.<sup>46</sup>

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<sup>45</sup> Doc. 15779/09 II. 4 (d), p. 8.

<sup>46</sup> For example, the UN main role is not to build international substitutes for national structures, but to help build domestic justice capacities. See UN Doc S/2004/616.

<sup>47</sup> Ibid.

Furthermore, despite the fast development of transitional justice as a field and of the processes described, such mechanisms are not always based on consistent normative foundations, simply because in periods of radical change different political forces and goals can be incompatible.<sup>48</sup> Also, the goals of each individual process (truth, justice, reparations and institutional reform) are not always achievable in parallel.

New practical challenges have forced the field to innovate, as settings have shifted from Argentina and Chile, where authoritarianism ended, to societies such as Bosnia and Herzegovina, Liberia and the Democratic Republic of Congo, where the key issue is shoring up peace. Ethnic cleansing and displacement, the reintegration of ex-combatants, reconciliation among communities and the role of justice in peace-building have become important new issues.

Ultimately, there is no single formula for dealing with a past marked by large-scale human rights abuse. All transitional justice approaches are based on a fundamental belief in universal human rights. But in the end, each society should—and indeed must—choose its own path.

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