SECURITY IN TRANSITION:
AN INTERDISCIPLINARY
INVESTIGATION INTO THE
SECURITY GAP

EU Approaches to Justice in Conflict and Transition

Iavor Rangelov, Marika Theros and Nataša Kandić

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Iavor Rangelov is Global Security Research Fellow at the Civil Society and Human Security Research Unit, London School of Economics, and Co-Chair of the London Transitional Justice Network. He was previously a fellow of the research and training programme European Foreign & Security Policy Studies, and a visiting fellow at the European Policy Centre, Brussels; EU Institute for Security Studies, Paris; Institut Barcelona d'Estudis Internacionals, Barcelona; and T.M.C. Asser Instituut, The Hague.

Marika Theros is doctoral candidate at the Department of International Development, London School of Economics, and fellow at the Institute for State Effectiveness. She has extensive experience in research, consulting and activism on issues of human rights and justice in Afghanistan, the Middle East and the Balkans.

Nataša Kandić has been a dedicated human rights activist since her student days. Most of her projects and actions were implemented through the Humanitarian Law Center (Serbia), which she founded in 1992, and Humanitarian Law Center Kosovo, which became an independent organisation in 2010. She currently coordinates the regional fact-finding and reconciliation process known as the RECOM Initiative, dealing with human losses during the wars in the former Yugoslavia. Her work made powerful local impact and prompted wide international recognition.

Contact

Iavor Rangelov: i.p.rangelov@lse.ac.uk
Marika Theros: m.theros@lse.ac.uk
Nataša Kandić: natasakandic@recom.link

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Abstract

This paper examines EU approaches to justice for gross human rights violations in conflict-affected environments. It starts with a discussion of the significance of justice from a human security perspective and emphasises how a spectrum of abuse and criminality – human rights abuse, organised crime, corruption – is at the heart of today's conflicts. The paper then assesses EU justice policies and practices in relation to three human security principles: the primacy of human rights, a bottom-up approach and a regional approach. We argue that EU engagement in justice issues plays out differently in 'liberal peace' and 'war on terror' contexts, and draw on evidence from the Balkans and Afghanistan to illuminate some of these differences. The final section highlights the main challenges for the EU in advancing justice for atrocity crimes and economic crimes, and offers a set of recommendations for aligning EU justice policies with a human security approach. In particular, we argue for a shift in thinking about the role and potential of justice in today's conflicts and identify the key elements and resources needed for developing an alternative approach.

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Introduction

The European Union has become an important player in global efforts to promote justice for serious human rights abuses in conflict-affected environments, in particular atrocity crimes – war crimes, crimes against humanity, and genocide – and gross violations of human rights. EU policies in this area are relatively new. Over the past decade, they have been evolving in a rather reactive and incremental manner, driven by diverse foreign policy objectives (promoting human rights and democracy, strengthening international law, preventing conflict and building peace) and pursued through a range of external instruments. The EU has been most consistent in developing its policy in relation to the International Criminal Court (ICC) but over time, and to varying degrees, EU justice policies have addressed all main approaches and mechanisms associated with transitional justice: criminal prosecutions at international, domestic and hybrid courts; truth commissions; reparations; and institutional reform, including security sector reform (SSR) and disarmament, demobilisation and reintegration (DDR).

Until late 2015, the EU lacked a single policy framework that clarified the EU's concept of transitional justice, set out policy goals and priorities in this area, and indicated how they might be pursued in practice. Instead, references to various aspects of justice have been scattered across a range of EU policy frameworks, concepts and guidelines, with significant gaps and inconsistencies. The Stockholm Programme and the European Security Strategy, for example, set out the objective of strengthening international justice but provide little guidance for implementation (European Council, 2008, 2009). The EU guidelines for support to DDR include provisions for ending the culture of impunity and promoting transitional justice, whereas the EU concept for support to SSR does not make a direct reference to transitional justice (Council of the EU, 2006, 2005). The absence of a policy framework has created some confusion and incoherence in EU justice policies, but it has not precluded the EU from using the instruments at its disposal to promote justice externally.

The EU uses legal, political, economic and security instruments in the justice arena. It is yet to deploy the full range of instruments in one specific issue area or country/region, although the ICC and the Western Balkans come closest in that respect. EU instruments may advance country- and region-specific objectives or cross-cutting priorities, such as support for the ICC. The main thematic instruments are the European Instrument for Democracy and Human Rights (EIDHR), which can support the whole range of justice processes, and the Instrument for Stability (IfS), which focuses on emerging and ongoing crises. Geographic instruments have also been important, especially for supporting the ICC. An 'ICC clause' is often included in agreements with third countries and regional policy frameworks, for example in the Cotonou Agreement with African, Caribbean and Pacific Countries, the EU-Africa Strategic Partnership, and the European Neighbourhood Policy. In addition, the EU encourages ratification of the Rome Statute of the ICC with regular demarches and political dialogues with third countries (European Communities, 2008).

The EU has started to address justice concerns in the operations of Common Security and Defence Policy (CSDP) missions and EU Special Representatives (EUSR). The mandates of some EUSRs for countries where the ICC is active include provisions for supporting the work of the court (Sudan and Sahel/Mali), but others do not (Great Lakes/DRC and Southern Mediterranean/Libya) (Davis 2014: 107). So far, justice-related provisions have been included only in the mandates of AMM Aceh (disputed amnesties) and EULEX Kosovo (prosecution of war crimes and ethnically motivated crimes). The mandates, of course, should not be conflated with the actual practices of CSDP missions and EUSRs, some of which may and do engage with justice issues in the absence of specific provisions. Nevertheless, such discrepancies are indicative of an inconsistent, if not selective, EU approach. Analysis of EU justice policies before the Lisbon Treaty changed the three-pillar architecture suggests that the problem has not been so much "a lack of coherence between the pillars, but rather a lack of coherence, confusion even, *within* the pillar structure about transitional justice and transitional justice mechanisms" (Davis 2014: 177-178).

To address such concerns, the EU Action Plan on Human Rights and Democracy 2015-2019 included a commitment to develop and implement an EU policy on transitional justice. In November 2015, the Foreign Affairs Council adopted the Council Conclusions on the EU's support to transitional justice along with the EU's Policy Framework on Support to Transitional Justice (hereinafter, EU Policy Framework). The Framework adopts the widely accepted UN definition of transitional justice and promotes a holistic approach: it incorporates the four main elements of transitional justice – criminal justice, truth, reparations, and guarantees of non-recurrence/institutional reform – and sets out the key objectives of EU justice policy: a) ending impunity; b) providing recognition and redress to victims; c) fostering trust; d) strengthening the rule of law; and d) contributing to reconciliation.

This paper examines EU approaches to justice for gross human rights violations in conflict-affected environments. It starts with a discussion of the significance of justice from a human security perspective and emphasises how a spectrum of abuse and criminality – human rights abuse, organised crime, corruption – is at the heart of today's conflicts. The paper then assesses EU justice policies and practices in relation to three human security principles: the primacy of human rights, a bottom-up approach and a regional approach. We argue that EU engagement in justice issues plays out differently in 'liberal peace' and 'war on terror' contexts and draw on evidence from the Balkans and Afghanistan to illuminate some of these differences. The final section highlights the main challenges for the EU in advancing justice for atrocity crimes and economic crimes, and offers a set of recommendations for aligning EU justice policies with a human security approach. In particular, we argue for a shift in thinking about the role and potential of justice in today's conflicts and identify the key elements and resources needed for developing an alternative approach.

The Importance of Justice

The pursuit of justice for human rights abuses offers a set of approaches for tackling key characteristics and drivers of contemporary conflicts, in particular the criminalised nature of both the violence and the war economy in conflict zones. The analytical value of the distinction between 'political violence' and 'criminal violence' is diminishing as prevalent forms of conflict and violence do not fit easily with either category, and tend to occur in repeated cycles, thus also blurring the distinction between 'war' and 'peace' (World Bank 2011). From a human security perspective, these distinctions are losing their significance as far as the safety of human beings is concerned. Whether criminal or political or both, violence in contemporary conflicts is associated with widespread and systematic violations of international humanitarian law and human rights, and even when hostilities are suspended, such violations tend to persist.

In fact, many individuals and communities experience violent conflict as a series of abuses and injustices of different form and gravity. The prevalence of abuse reflects the goals and methods of contemporary wars. Ethnic cleansing, for example, takes the form of crimes against humanity and can be seen as both a goal and a method of war: mass atrocity and displacement are used to mobilise exclusivist identity and to establish political control over territory (Kaldor 2013). Preventing human rights violations should be the main objective but where serious violations have occurred, it is critical to address them with an appropriate mix of justice instruments, and to do so as early and robustly as possible. Accountability for atrocity crimes is important for shaping the calculations of existing and potential perpetrators, and for preventing the entrenchment of a culture of impunity that encourages further abuse. Equally important, however, is to enable recognition and redress for victims – as a way of vindicating their rights and limiting the potential to exploit conflict-generated grievances for purposes of political mobilisation or legitimation of violence.

Another critical issue concerns the linkages between atrocity crimes and economic crimes in conflict-affected environments. The networks of state and non-state actors responsible for serious human rights abuses are also the ones that tend to benefit most from the predatory war economy, which feeds off and sustains insecurity. Moreover, these networks often drive processes of state capture and criminalisation, and become adept at subverting international peacebuilding and statebuilding efforts. Justice instruments may contribute to the disruption and marginalisation of such networks in several ways. Criminal prosecution of those most responsible for atrocity crimes is particularly important, but it is not sufficient. Unlocking the full potential of criminal justice requires a broader approach that acknowledges the linkages between human rights abuse, organised crime, and corruption, and exploits openings for prosecution and punishment across that spectrum. Human rights screening and vetting can provide another instrument for diminishing the power and influence of illicit networks in state structures, especially in the security sector where they tend to be deeply embedded. Again, harnessing the potential of justice-sensitive institutional reform, such as SSR and

DDR, requires taking into account and addressing the whole spectrum of abuse and criminality.

Of course, justice instruments alone cannot resolve the problem of gross human rights violations in contemporary conflicts, or disrupt the powerful networks that drive abuse and predation. They need to be complemented and reinforced by other instruments for preventing and suppressing human rights violations and for protecting civilians, and by sustained efforts to create legitimate political authority and legitimate economic opportunities and livelihoods. Traditional conflict-resolution approaches, however, may have the opposite effect. In the 'liberal peace' model, for example, peace agreements and power sharing often end up entrenching perpetrators in power structures and undermining the prospects for justice and accountability either for atrocity crimes or for economic crimes (Rangelov 2016). In an environment where abuse of power is endemic and unchallenged, statebuilding may contribute to the problem by strengthening the illicit networks and stimulating more abuse and predation. These challenges are exacerbated in conflict zones affected by the 'war on terror', where repressive regimes and warlords implicated in past and ongoing abuses are also key allies in the fight against terrorism (Rangelov and Theros 2012)..

This suggests that effective justice responses may have to start at home: they need to take into account the challenges of EU aid subversion, for example, and the ways in which counterterrorism partnerships or the agenda for Countering Violent Extremism (CVE) serve to entrench the conflict networks and shrink the space for justice and accountability. Moreover, the spectrum of abuse and criminality that prevails in today's conflict zones is embedded in economic and social relations that are transnational in character. The conflict networks involved in atrocity crimes and economic crimes are tied into criminal enterprises with a global reach and invest the proceeds of abuse and predation transnationally, including in the real estate market and financial sector of European cities. In fact, violent conflict could be seen as a mechanism for a predatory form of global redistribution that drives inequality both in conflict zones and in Europe. An effective justice response depends upon recognising these linkages, taking them seriously and aligning the EU's internal and external policies accordingly.

Primacy of Human Rights

The primacy of human rights is the backbone of the human security doctrine – it is "what distinguishes the human security approach from traditional state-based approaches" (Barcelona Report 2004: 14). The Treaty of the EU includes human rights protection and strict observance of international law, as well as peace and security, among the core objectives of EU foreign policy (European Union, 2008, Art. 3.5). Human rights principles are also reflected in the EU's comprehensive approach to conflict prevention, crisis management, and peacebuilding. This suggests that the EU considers peace, security,

and human rights to be mutually reinforcing, which provides a solid foundation for pursuing EU justice policies that are aligned with the human security approach.

In policy documents that deal specifically with justice, however, the framing is much more ambiguous. It suggests that in the justice arena, there are tensions and trade-offs between the EU's normative commitments to human rights and strategic considerations such as peace and stability. The EU guidelines for compliance with international humanitarian law, for example, state that it may be "difficult to balance the overall aim for establishing peace and the need to combat impunity" (Council of the EU, 2009a: 16(g)). The EU concept for mediation refers to "potential tensions between the EU's normative commitments in the area of human rights and international law and short-term conflict management objectives" (Council of the EU, 2009b: 4(c)). Country-specific policies reflect a similar framing. In Colombia, for example, the EU supports both peacebuilding and justice for human rights abuses but expects that a 'difficult balance' has to be struck between peace and justice.

The EU often negotiates such perceived tensions and trade-offs on a case-by-case basis, which is one factor that might explain discrepancies in EU practice. An underlying rationale, however, can still be detected in EU approaches to justice and that rationale accounts for much of the uneven implementation of justice policies and objectives. When justice and peace or stability are seen to clash, EU actors tend to adopt a sequencing approach that effectively prioritises peace and stability objectives and defers the pursuit of justice to a later stage (Rangelov 2014). This is consistent with the EU's overall approach to conflict resolution and peacebuilding, where sequencing means that elite-mediated peace deals and stabilisation are the first priority, whereas governance issues are addressed over the longer term (Faria and Youngs 2010: 6).

The sequencing logic is evident in the Balkans, a region that has served as a laboratory for EU approaches to peace and justice. The main peacebuilding instrument of the EU in the region is the Stabilisation and Association Process for South East Europe (SAP). The SAP set out 'full cooperation' with the International Criminal Tribunal for the Former Yugoslavia (ICTY) as a condition for progress towards EU membership. Negotiations with Croatia were suspended in 2006 over a high-ranking suspect, General Gotovina, and resumed only after the ICTY had been satisfied that Croatia was cooperating on his arrests and transfer to the Hague. In the case of Serbia, however, the EU's war crimes conditionality was repeatedly compromised and its implementation deferred over concerns for stability, and was effectively used as a tool to shape election outcomes and reactions to Kosovo's declaration of independence (Rangelov 2016).

In 'liberal peace' interventions, such as the Balkans, the primacy of human rights appears to be compromised by the EU's emphasis on strategic objectives like peace and stability, and by prevailing perceptions at the EU that justice and accountability may clash with and complicate the pursuit of such objectives. A key factor that shapes the EU approach might be the experience of the member states in dealing with their own past. The EU's

consistent support for the ICC, for example, could be explained by the lasting legacy of the Nuremberg Trials. More generally, however, with the partial exception of the Holocaust, European states have done little reckoning with legacies of past abuse and injustice.

The third-wave transitions from dictatorship to democracy in southern and eastern Europe were mostly negotiated, and involved either a very limited justice response or no justice at all, as in Spain's 'pact of silence'. In large parts of eastern Europe, the absence of transitional justice enabled former elites to convert their political power into economic power, and paved the way for the plunder and criminalisation of the region after the revolutions of 1989. Another example is the unaddressed legacy of colonialism (see, e.g., Shepard 2006). Since the financial crisis, in many member states of the European Union this combination of amnesty and amnesia for past abuse and injustice is revealing its dark underside; in fact, these unaddressed legacies are paving the way for historical revisionism and the rise of fascist, racist, xenophobic, and other extremist identities and movements across Europe. It could be argued that the EU's external policies on justice reflect the internal experience of the member states – and at the current juncture – the dangerous consequences of compromising justice are becoming increasingly evident both internally and externally.

Another factor concerns a structural problem at the heart of the 'liberal peace': political elites and their networks in conflict-affected states tend to be heavily implicated in human rights abuses, organised crime and corruption, but they are also the ones enlisted by the EU to serve as partners in peacebuilding and statebuilding. The problem is compounded in 'war on terror' contexts, where the strategic objective of defeating an enemy creates even more space for abuse and criminality that undermine the security of the population. Particularly significant in that respect is the reliance on repressive regimes and local strongmen implicated in human rights abuses as allies and proxies in prosecuting the war, which tends to result in further entrenchment of perpetrators in power structures and rampant impunity. Whereas in 'liberal peace' interventions the justice deficit typically reflects problems with the framing and implementation of justice policies and processes put in place, in conflict zones affected by the 'war on terror' the outcome is usually an absence of such policies and processes.

The case of Afghanistan, the first front in the 'war on terror', offers important insight into these challenges. It suggests how in conflict-affected environments where fighting terrorism is a major concern, EU policies aimed at peacebuilding and statebuilding may be subverted and even co-opted for furthering the objectives of the 'war on terror'. The EU has emphasised a civilian approach to addressing security challenges in Afghanistan, focusing its efforts on rebuilding state institutions and striving to strengthen human rights, democracy and the rule of law. However, in a context where many state institutions are captured by networks implicated in past and ongoing abuses of various kinds, and impunity is unchallenged, EU policies that seek to strengthen the state and its security structures may exacerbate insecurity. The average Afghan citizen interacts

with the police and the judiciary, for example, mainly through a series of shakedowns and corruption payments to access basic services or simply to avoid further abuse (Rangelov and Theros 2012). Strengthening these structures can reinforce their abusive and exploitative character.

Another challenge for the EU is to carve out space for human rights in a highly unfavourable policy environment dominated by counterterrorism objectives. It is not uncommon for different EU actors and member states to work at cross-purposes on the ground in a particular area. When this has been the case in Afghanistan, it has constrained significantly the ability of the EU to promote a justice and accountability agenda, and to gain leverage with the United States on these issues. Some member states consistently support justice efforts while others have been reluctant to challenge US policies that undermine such efforts (personal communication, EU official, 2011). Divisions have been particularly pronounced between Europeans who work in NATO and those who work on behalf of the EU.

At the political level, the EUSR for Afghanistan in 2002-2008, Francesc Vendrell, played a critical role in keeping questions of justice and accountability on the agenda, whereas subsequent EUSRs have generally neglected these issues. In a place like Afghanistan, the importance of personalities cannot be overstated. Vendrell came into office with more than a decade of experience in the region and prioritised transitional justice from the start. He advocated policies to disarm militias and stressed the need for vetting mechanisms in elections and appointments processes. His team provided crucial support for the establishment of the Afghanistan Independent Human Rights Commission (AIHRC), pressed the government to adopt a transitional justice roadmap (2005), and lobbied against the adoption of the controversial amnesty law (2007).

In 2007 the EU deployed a police mission, EUPOL Afghanistan, which was intended to Europeanise the German police support project in the country. The EUSR opposed the idea of putting a European face on police reform in Afghanistan. His concern was that the whole effort might be overtaken by the vastly resourced US paramilitary approach to policing. Indeed the US managed to re-task police forces to conduct counter-insurgency operations, effectively robbing ordinary Afghans of police protection and exacerbating the problem of abuse by the police (Theros 2010). The case of Chief of Police Abdul Razziq in Kandahar is just one example: a trusted ally and model police chief for the US, he has achieved notoriety for his brutality. Forces under his command have been accused of torture, enforced disappearances, and extra-judicial executions (Human Rights Watch 2015). The failure of the EU to establish a civilian law enforcement model reflects in part the reluctance of large member states to support the EU approach and to merge, or at least coordinate, their bilateral police missions with EUPOL. Without support from member states, EUPOL officials have struggled to make themselves heard (Burke 2014: 16). But even within EUPOL itself, a sustained effort was never made to pursue a justice-sensitive approach to police reform and to implement human rights screening and vetting.

At a time when violence and insecurity in Afghanistan are growing, the EU's commitment to justice and accountability objectives appears to be withering away. The new country strategy stresses the importance of ending the culture of impunity but does not provide funding for activities that might advance that objective, and allocates less than one per cent of the overall budget for commitments in the area of human rights (Council of the EU 2015). And the new annual Human Rights Dialogue with the Afghan government, while a welcome development, does not include any transitional justice processes and mechanisms among the agreed deliverables (European Delegation Afghanistan 2015).

Bottom-up and Regional Approaches

The bottom-up principle recognises that external actors can only play an 'enabling' role in delivering human security and supporting the (re)construction of legitimate authority. It is premised on the idea that continuous engagement with affected individuals and communities is crucial to gain understanding of critical issues and to empower citizens in the process. A bottom-up approach may respond to the legitimacy deficit of narrowly negotiated peace agreements, while providing a guide for external actors "on what strategies are most likely to be effective as well as feedback and evaluation for ongoing missions" (Barcelona Report 2004).

A combination of top-down and bottom-up approaches is seen as critical for transitional justice, although there are questions about the relationship between these levels. In 'liberal peace' contexts where elite-mediated peace deals and power sharing are prevalent, such as Bosnia, a key concern for the EU is to maintain its influence and leverage over political elites and state actors. Transitional justice is often disruptive for the power and interests of such actors, but instead of harnessing and amplifying civil society demands for justice precisely for that reason, the EU tends to view such demands as conflict-generating and destabilising (Rangelov and Theros 2009). A top-down focus of EU support for transitional justice is also reflected in the emphasis on civil society engagement with formal justice mechanisms. Once such mechanisms are put in place, the EU provides significant support for civil society activities such as monitoring, outreach, awareness campaigns, and engagement with victims (Davis 2014).

The EU's reluctance to engage with civil society on politically charged issues of justice and accountability is even more pronounced in 'war on terror' contexts, where EU actors generally prefer to support NGO efforts in development, reconstruction, and service provision. Nevertheless, when the EU has provided support to civil society on politically sensitive issues in Afghanistan, for example, it has been successful in strengthening the ability of local advocates of justice to respond to public demands for accountability, and even to push through concrete initiatives (AIHRC 2005).

Structurally, EU assistance programmes tend to favour support to professionalised, urban-based NGOs. The space for civil society is shrinking in many parts of the world, however, and in the justice arena civil society activity increasingly takes place outside formal justice processes and involves more informal, grassroots initiatives (Security in Transition 2014). This is in effect 'bottom-up transitional justice' and its strength is that it may reflect locally embedded understanding of justice and may address needs and issues that are neglected in formal processes. But these are precisely the sort of civil society actors and initiatives that are least likely to be able to access EU funding, especially in places where concerns for terrorist financing loom large.

A regional approach responds to the ways in which conflict spreads "through refugees and displaced persons, through minorities who live in different places, through criminal and extremist networks. Indeed most situations of severe insecurity are located in regional clusters" (Barcelona Report 20014: 18). It is difficult to pursue meaningful justice for atrocity crimes without taking into account the regional and transnational character of most contemporary conflicts and legacies of abuse. In Africa, for example, the mismatch between regional conflicts and crimes with statist criminal justice responses is seen as creating 'zones of impunity' (Sriram and Ross 2007). In fact, most types of justice instruments and processes in today's conflict zones are facing the challenge that perpetrators, victims, witnesses, and evidence are often scattered across state borders.

Civil society actors in east Africa and the Balkans have drawn attention to the regional challenges for transitional justice and have emphasised the need for regionally focused solutions (Security in Transition 2014: 7-8). In Latin America, the Inter-American Court of Human Rights has highlighted patterns of persecution and repressive policies that were regional in character, reflecting the aims of 'Operation Condor', for example, to counter an ostensible regional threat of terrorism (*Goibarú v. Paraguay*). Abuses committed in the context of the 'war on terror' are currently posing even greater challenges and may require a combination of national, regional and extraterritorial approaches.

And yet, neither the EU nor other international actors have sought to develop a regional justice approach. The EU tends to rely on the UN for leadership in the field of transitional justice. In this case, however, the EU should lead. The EU has unrivalled legitimacy, resources, and experience in promoting regionalism on the world stage, as well as a wealth of experience internally in dealing with issues like regional cooperation in criminal matters. And it has been involved for quite some time in an ongoing experiment with regional justice in the Balkans: RECOM, a civil society initiative that advocates the creation of a regional commission to establish the facts of war crimes and other serious violations of human rights committed on the territory of the former Yugoslavia between 1991 and 2001.

The RECOM initiative is an innovative example of the ways in which bottom-up and regional approaches to justice can be productively combined and mutually reinforcing in practice. It is also an example of the sort of 'justice networks' that the EU should be supporting because they offer a real alternative to the conflict networks and provide a viable constituency for EU reform policies in conflict-affected states. The idea for the RECOM initiative emerged from extensive regional debates in civil society in 2006-7, led by several civil society organisations from Serbia, Croatia and Bosnia and Herzegovina. These discussions brought together diverse sections of civil society, including many victims and families of victims from different ethnic communities. They highlighted a shared understanding that, firstly, dealing with the past in the region would require collective efforts of civil society across all post-Yugoslav countries; and, secondly, a regional approach could help address the limitations of domestic war crimes trials and could create space for confronting the experience of the 'other', missing at the local level.

Once a regional approach to dealing with the past had crystallised in the discussions, the consultations focused on the question of what instruments could be effective in creating a complete, more credible record of past human rights abuses and opening up space for the voices of victims. At a meeting with associations of victims and veterans in May 2008, it was decided to build a regional civil society coalition to advocate the creation of a regional commission for establishing the facts of war crimes committed from 1991 to 2001. When the Coalition for RECOM was established in October 2008, more than one hundred civil society organisations joined in the first few days. The Coalition's first decision was to organise an extensive process of consultations on the mandate and activities of a future regional commission.

The RECOM consultation process, which lasted three and half years, was incredibly important. It involved more than 7,000 people coming from human rights organisations, associations of the families of the missing, associations of former camp detainees, religious communities, artists, journalists, lawyers, researchers and academics, youth activists, and citizens concerned with the process of dealing with the past. The Coalition organised 110 consultations and debates to discuss the mandate and activities of RECOM, as well as eight transitional justice forums with participants from the entire region and ten discussions dedicated to the voices of the victims. A number of recurrent views and positions were articulated in these debates, some of which include:

- The regional level helps to hear the voices of victims from other communities and encourages empathy with the 'other'
- 'In the consultations, I learned how to listen to others'
- 'I've recognised that others suffer like I do'
- All victims are equal in death

The consultations also called into question certain prejudices about the 'other':

- ‘I have now become convinced that not all Serbs committed crimes’
- ‘I have come to realise that not all Albanians are terrorists’

The members of the Coalition share the conviction that only a *regional* body for establishing the facts of war crimes has the potential to create favourable conditions for much-needed public recognition and to promote respect of all victims. In particular, identifying all civilians and combatants who have lost their lives in the wars in the former Yugoslavia is seen as a critical precondition for the emergence of a culture of remembrance of all victims, regardless of their ethnic and national belonging.

The civil society coalition for RECOM has demonstrated that it has the capacity to initiate and carry out a process that offers an answer to the continuing conflict over the past in the region. The most significant aspect of this process was the drafting of a Statute of RECOM. With respect to the activities of a future commission, participants in the consultative process prioritised identifying the names of victims and establishing the facts of their death or disappearance, which they saw as directly contributing to one of the main objectives of RECOM: to create the conditions for official public recognition of all victims. Over time, this objective started to be discussed as a key precondition for initiating reconciliation, where ‘reconciliation’ was understood as a long-term process. Many participants also identified holding public hearings with victims as a critical aspect of the work of the commission, highlighting their potential to encourage solidarity with victims from the ‘other’ community.

In November 2014, the Coalition adopted amendments to the Statute of RECOM that had been agreed by the personal representatives of the presidents of post-Yugoslav states. Since then, however, the political environment in the region has changed significantly. For example, the Coalition has not been able to ensure continuity in support for RECOM among some of the newly elected presidents and governments in the region. There is a trend, especially in Croatia and Serbia, towards growing strength and momentum of right-wing parties and groups.

EU conditionality for the post-conflict states in the region has emphasised the arrest and transfer of suspects indicted by the ICTY. These policies were effective in pressing Croatia to arrest General Gotovina in exchange for progress towards EU membership. Over time, Serbia’s record of cooperation with the Tribunal also improved. However, once the arrest of the remaining suspects sought by the ICTY was completed, the EU appears to have lost interest in transitional justice processes in the region. As a result, transitional justice is left in the hands of national governments. The governments are promoting their own interpretations of reconciliation, tied to their own narrow political interests and purposes, and successfully converting their rhetoric of reconciliation into tangible support from the EU.

At this juncture, the EU can play a decisive role in ensuring that the RECOM process transitions successfully from civil society to public institutions and becomes an intergovernmental project, with strong support from EU institutions. The European Commission is providing financial support for the RECOM initiative but so far, its political support has been limited to mentioning the RECOM process in its reports on Serbia. The EU's decisive political support is seen as critical for taking the process to the next level and catalysing the necessary inter-governmental negotiations. At the same time, RECOM could be equally important for the EU. It gives EU actors a chance to assess the potential of regional and bottom-up approaches to justice and to experiment with them in practice. Moreover, it provides an opportunity for the EU to calibrate its policies for strengthening the justice networks, and marginalising the conflict networks that so often subvert and hijack EU policies.

Conclusions and Recommendations

The EU Policy Framework on transitional justice was adopted only in November 2015, and its impact on EU justice policies is yet to be seen. From a human security perspective, a welcome development is that the EU states its commitment to a holistic approach that incorporates a gender dimension and includes the whole spectrum of judicial and non-judicial, retributive and restorative mechanisms. It is useful that the Framework clarifies the EU's position on amnesties: the EU opposes amnesties for war crimes, crimes against humanity, genocide, and gross violations of human rights, including in the context of peace negotiations. This development does not address the challenge of *de facto* amnesties in peace and transitional processes, but at least it precludes EU support for legally sanctioned impunity for international crimes.

As far as the human security principles are concerned, a major gap is the absence of any reference to a regional approach, even though the Framework acknowledges that local conflicts may have 'international dimensions'. A bottom-up approach is implicit in multiple references to civil society dialogue and consultation throughout the Framework. The framing, however, is problematic as it assumes a symbiotic relationship between civil society and the state. Civil society is seen as a partner and supporter of state actors and formal justice institutions, rather than an alternative source of support and legitimacy for justice and accountability processes in the face of prevailing resistance and backlash from state-based actors. With respect to the primacy of human rights, the Framework suggests continuity with the EU's current approach: human rights principles are integrated in the EU's comprehensive approach to conflict as normative commitments. The *primacy* of human rights is not addressed in the document as it avoids going into questions of prioritising particular principles and objectives, and does not address the 'peace versus justice' issue. Overall, the Framework does not suggest that the EU is rethinking its overall approach to justice and its relationship to conflict and peace.

Our analysis of EU justice policy and practice in conflict-affected environments suggests that from a human security perspective, the main challenges are cognitive – they reflect the ways in which EU actors think about justice, its significance, and its relationship to conflict and peace. For the EU, justice tends to be a question of principle, whereas for human security, it is about the coming together of principle and pragmatism. The primacy of human rights has a solid foundation in EU foreign policy but the EU treats justice and accountability mainly as normative commitments, and when such commitments are seen to clash with strategic considerations for peace and stability, as in the 'liberal peace' model, the primacy of human rights is often compromised. These challenges are exacerbated in areas of insecurity affected by the 'war on terror', where impunity is usually the norm and perpetrators of atrocity crimes and economic crimes are deeply embedded in state structures. In such environments, the EU faces a real risk that its peacebuilding and statebuilding policies are either subverted or co-opted for war-fighting.

Although the EU has been largely able to pursue peace and human rights internally without pursuing justice for past abuse and repression, this is currently called into question by the rise of extremist movements and ideologies that reveal the dangerous consequences of these unaddressed legacies across Europe. Foregoing justice is even more problematic in today's conflict zones, where pervasive abuse and criminality – human rights violations, organised crime, corruption – is a structural condition of persistent conflict and a key factor in the failure of peacebuilding and statebuilding interventions to accomplish their objectives. Justice is critical for addressing the spectrum of criminality and abuse in contemporary conflicts, but unlocking its potential contribution does require a cognitive shift. It effectively means rethinking justice as a strategy for sustainable peace and stability, rather than seeing it only as a normative commitment or aspiration of EU foreign policy.

There are five main recommendations to the EU that emerge from our analysis:

- EU justice policies need to take into account and address the entire spectrum of abuse and criminality in contemporary conflicts. The nexus between human rights abuses, organised crime and corruption is at the heart of the predatory social condition that so often ends up subverting EU policies to conflict. The specific justice responses most likely to be effective in disrupting the conflict networks will vary from one context to another. They will depend on the ability of the EU to seize 'windows of opportunity' and to exploit openings for pursuing justice for atrocity crimes, economic crimes, or both, wherever these openings may occur.
- A bottom-up approach can help reframe and reinforce EU justice policies in conflict-affected environments by tapping into an alternative set of actors, ideas, and sources of legitimacy and support for political reform and societal transformation. This, however, would require the EU to reach out to less

established, less formal structures, where the meanings of justice may differ from Western notions, and to take seriously civil society proposals even when they appear disruptive.

- A regional approach to justice is urgently needed to match the regional character of today's conflicts and their criminal legacies. So far, EU actors have overlooked this issue but given its distinctive identity and strengths, the EU's most significant contribution in the justice arena may well be in addressing the currently neglected regional and transnational dimensions of justice.
- EU justice policies must involve sustained internal and external action to be effective. The dangerous implications of Europe's own unaddressed legacies of past abuse and injustice need to be confronted head-on. In fragile and conflict-affected areas, the conflict networks benefit from transnational linkages and opportunities that can only be disrupted by tackling the problem from both ends. And the justice networks that exist in conflict areas also depend on transnational linkages and opportunities for their survival and ability to offer a viable alternative.
- Adopting a human security approach to justice for atrocity crimes and economic crimes depends on the ability of the EU to provide financial and other assistance to a range of internal and external actors, who often work in particularly challenging environments. A designated Instrument for Justice, complementing the existing Instrument for Stability, is necessary both to prioritise justice, and to find ways to support justice networks and initiatives in today's conflict zones.

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