



## AN INTRODUCTION TO THE CONCEPT OF TRANSITIONAL JUSTICE: WESTERN BALKANS AND EU CONDITIONALITY

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### **Abstract:**

This paper has a twofold purpose: First, it attempts to evaluate the different types of transitional justice (retributive-restorative-distributive) as a means of reconciliation in the context of post-conflict reconstruction. Through the assessment of each approach I argue that while trials, truth commissions and reparations provide useful tools for achieving the goal of national and individual reconciliation each mechanism has its limitations and its deficiencies. Moreover, there is no single formula which can a priori guarantee success. A multitude of intertwining variables such as the context in which the transition is attempted, cultural patterns and religious beliefs play a crucial role in determining which combination of transitional justice mechanisms should be implemented to best handle each individual case. Second, the discussion assesses the EU war crimes policy in the Western Balkans arguing that the latter, to the extent that it focused on co-operation with the ICTY has failed largely to promote the ultimate goal of any integrated transitional justice strategy that is regional reconciliation.

**Keywords:** Transitional justice; reconciliation; EU; Western Balkans.

### **Resumen:**

*Este artículo tiene un doble propósito: primero, intenta evaluar los diferentes tipos de justicia transicional (retributiva-restaurativa-distributiva) como medios de reconciliación en el contexto de la reconstrucción post-conflicto. A través de la evaluación de cada enfoque, argumento que mientras los juicios, comisiones de verificación y reparaciones proporcionan instrumentos útiles para el objetivo de la reconciliación nacional e individual, cada mecanismo tiene sus limitaciones y deficiencias. Además no hay una única fórmula que pueda garantizar a priori el éxito. Una multitud de variables interconectadas tales como el contexto en el cual la transición tiene lugar y los patrones culturales y religiosos juegan un papel crucial a la hora de determinar qué combinación de mecanismos de justicia para la transición pueden ser ejecutados de la mejor manera para cada caso particular. Segundo, nuestra discusión evalúa la política de la UE frente los crímenes de guerra en los Balcanes Occidentales sosteniendo que esta última, en la medida de que está enfocada sobre cooperación con la ICTY, ha fracasado en gran medida para promover el fin último de toda estrategia de justicia que es a fin de cuentas la reconciliación regional.*

**Palabras Clave:** Justicia Transicional; reconciliación; EU; Balcanes Occidentales.

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## Introduction

During the last decades of the twentieth century, many countries the world over have overthrown authoritarian regimes and military dictatorships to instate a new democratic order. From Latin America and Eastern Europe to South Africa and East Timor, the transition has proven to be a complex process during which the successor regime, as part of the post-conflict reconstruction agenda and in order to establish a sustainable peace, has to deal with the legacy of the past where atrocities and mass human rights violations have deeply divided the members of society.

Reconciliation is both a primary goal for every post-conflict society and a long, painful, process that cannot be externally imposed or internally legislated.<sup>2</sup> It has been described as the route that leads from a dividing past to a promising future through the restoration of shattered relations and as “creative space where mercy and truth meet justice and peace”.<sup>3</sup> However, dealing with the past can be a double edged sword for the newborn democracy. While it is a precondition for reconciliation to flourish, re-opening past wounds has also the potential to lead to a new round of violence.

In this context, justice should not be understood solely as a blind goddess seeking to implement universal norms and to hold accountable all those responsible for past crimes, but rather as a sum of complementary mechanisms and processes (judicial and non-judicial) aiming to: a) rebuild the ruined or dysfunctional judicial infrastructure through the re-establishment of the rule of law b) deal with the crimes committed by the agents of the former regime by trials or truth commissions and c) address “the structural and systemic injustices that led to conflict” through reparation and compensation.<sup>4</sup> A holistic, multidimensional approach is more suited to deal with the complex reality of post-conflict societies, promote reconciliation and ensure the successful passage to the state of positive peace.<sup>5</sup>

### 1. Retributive justice and the rule of law in the aftermath of violent conflict

In the aftermath of violent conflict, establishing minimal justice through the rule of law is one of the most important elements in building a stable peace.<sup>6</sup> This principle provides an answer to the pressing societal demand for change, as it implies that government authority may only be exercised in accordance with written laws, adopted through an established procedure and

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<sup>2</sup> Rigby, Andrew (2001): *Justice and Reconciliation After the Conflict*, Colorado, Lynne Rienner Publications, pp.139-141.

<sup>3</sup> Lederach, John P. (1999): *The path towards Reconciliation*, Scottsdale, Herald Press, p. 65.

<sup>4</sup> Mani, Rama (2002): *Beyond retribution: Seeking justice in the Shadows of War*, Cambridge, Polity Press, pp. 3-11.

<sup>5</sup> A schematic presentation of the transition from negative to positive peace through the mechanism of transitional justice is offered in Annex IV.

<sup>6</sup> Before discussing attempts to restore the Rule of Law during transitional periods it is important to define the concept and distinguish between Rule of Law and Rule by Law. According to the World Bank's “*Legal and Judicial Reform - Observations, Experiences, and Approach of the Legal Vice 2002*” the concept of the Rule of Law entails 4 basic elements: (i) the government itself should be bound by the law, (ii) every person should be treated equally under the law, (iii) the human dignity of each individual should be recognized and protected by law and (iv) justice should be accessible to all. On the other hand, Rule by Law can also describe authoritarian legal orders. For example Nazi Germany, Stalinist USSR and Apartheid South Africa ruled by Law. However all of them were regimes operating under repressive legal orders where the principle of the Rule of Law did not apply.



intends to be a safeguard against arbitrary governmental rulings often connected in the minds of people with the predecessor regime.<sup>7</sup> Achieving judicial reform during a transitional period takes time especially when the system has been in severe disrepair and requires plenty of resources that the new regime may not possess.<sup>8</sup> The role of international community is of utmost importance in the reconstruction of an independent judiciary and various international organizations like the World Bank and the United Nations contribute significantly to the process.<sup>9</sup> However, the “justice packages” that these agencies offer in order to consolidate the rule of law in the target post-conflict society are, according to Mani, subject to three fundamental flaws: a) they provide generic solutions by adopting a “one size fits all approach” which does not take into account the legal culture of the post conflict society, b) they focus on the technical aspects of the issue and tend to ignore the political realities and c) they adopt a minimalist approach of the rule of law emphasizing on rebuilding institutions and neglect the “substantiate content” of the law.<sup>10</sup>

Yet, these attempts to rebuild the institutional infrastructure and restore order in a divided society promote public confidence in the judicial system and the new government. Moreover, re-establishing the rule of law is a necessary precondition for prosecuting human rights abusers and war criminals simply because the imposed procedural standards ensure the credibility of the judicial process.<sup>11</sup> As Mobekk points out “It is futile to discuss the positive and negative effects of trials [on the process of reconciliation] if the judicial system is completely flawed.” Even if trials are not chosen as a means of addressing past crimes, the judicial system reform must be a top priority of the reconstruction agenda as the re-establishment of the rule of law serves as a crucial underpinning of security and stability.<sup>12</sup>

Prosecution has been the classic response of many successor regimes facing the dilemma of how to deal with mass human rights violations that occurred throughout the period of conflict.<sup>13</sup> The main instruments of the retributive approach are criminal courts formed on national or international level.<sup>14</sup> During the last years an international consensus has been reached on the necessity to prosecute the most severe war crimes. The development of the international humanitarian law and the rise of the human rights movement have significantly contributed towards that direction. For the proponents of retributive justice, trials play a crucial role in the pursuit of reconciliation in five distinct ways:<sup>15</sup>

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<sup>7</sup> Mani refers to a “crucial tripod” namely, judiciary-police-prison system reform as a sine qua non for the establishment of the rule of law.

For a detailed description see: Mani, *op. cit.*, p. 55-68.

<sup>8</sup> Kritz, Neil J. (2001): “The Rule of Law in the Postconflict Phase” in Crocker, C.A. Hampson, F.O. and Aall, P. (eds): *Turbulent Peace: The Challenges of managing International Conflict*, Washington, United States Institute for Peace Press (USIP), p. 804-805.

<sup>9</sup> Ibid.

<sup>10</sup> Mani, Rama: “The Rule of Law or the Rule of Might?: Restoring Legal Justice in the Aftermath of Conflict” in Pugh, Michael (2000) (ed): *Regeneration of War-Torn Societies*, Basingstoke, Macmillan Press, p. 90-111.

<sup>11</sup> Kritz, *op. cit.* p. 813-814.

<sup>12</sup> Mobekk, Eirin: “Transitional Justice in Post- Conflict Societies-Approaches to Reconciliation”, pp. 274 available at [www.bmlv.g.at/wissen-forschung/publikationen/publikation.php?id=239](http://www.bmlv.g.at/wissen-forschung/publikationen/publikation.php?id=239).

<sup>13</sup> The cases of Argentina and Greece are striking examples of handling with the past by conducting trials. For similarities and differences of these two study cases check.

<sup>14</sup> A distinction should be made between ad hoc international tribunals like the ICTY and the ICTR and the ICC which is the first permanent international tribunal created to put to trial those responsible for the worst international crimes (genocide, crimes against humanity and war crimes are included in its jurisdiction).

<sup>15</sup> The list of pros and cons of the retributive approach that follows was extracted from the IDEA Handbook (2003): “*Reconciliation after Violent Conflict: Policy Summary*”, IDEA Publications, pp. 13-14 available at: [www.idea.int/publications/reconciliation/index/cfm](http://www.idea.int/publications/reconciliation/index/cfm)



First, by prosecuting the perpetrators in trials under the rule of law, retributive justice serves as a *deterrent against acts of private revenge*. Summary justice or vigilantism might be the response on the part of the victims and their families if the demand that “justice be done” is not met by the government.

Second, prosecution serves to *break the circle of impunity and discourages future violations* making clear that no individual is above the law. Moreover, as Rigby has pointed out “trials show that there are other ways of dealing with disputes than resorting to violence”.<sup>16</sup>

Third, *trials fulfil a moral obligation to the victims*. Many scholars argue that society cannot forget what it cannot punish and for the majority of the victims that is true.<sup>17</sup> Consequently, penal justice by holding accountable those who had committed punishable acts, by acknowledging the suffering of the survivors and by establishing a record of the past misdeeds can be seen as the first step in the process of healing the societal and the individual trauma.

Fourth, the restoration of functioning relations between the former adversaries requires the dissolution of dichotomist perceptions and nihilistic stereotypes which stigmatize entire communities and might lead to a new round of violence. Criminal justice by *individualizing guilt* contributes significantly towards this direction.<sup>18</sup>

Fifth, retributive justice provides a *guarantee that those who had committed war crimes will not retain positions with power* in the new democracy.

Despite the robust arguments in favour of criminal prosecution, in complex post conflict settings, trials may not always be a viable solution especially when reconciliation is hoped for. Critics of retributive justice argue that trials: a) focus on punishing the perpetrators and *cannot heal the trauma of the victims*, b) they are “*combative encounters*” that fail to promote the revelation of truth,<sup>19</sup> which is an essential element of reconciliation, c) they do not recognize the general patterns of abuse and thus their deterrent value against future conflicts is trivial, d) they fail to recognise that many perpetrators were at the same time “victims” of a repressive structure<sup>20</sup> and e) they can *destabilize a fragile peace agreement as the defeated side might consider them as “victor’s justice.”*<sup>21</sup>

Moreover, in contemporary intra-state conflicts the number of those involved in atrocities is vast<sup>22</sup> and the practise so far, has shown that both national courts and international tribunals cannot deal with every individual case and do not contribute significantly to long-term

<sup>16</sup> Rigby, *op. cit.*, p. 4.

<sup>17</sup> Landsman, Stephen, “Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions”, *Law and Contemporary Problems*, vol. 59, n° 4 (1997), pp. 83-85.

<sup>18</sup> *Ibid.*

<sup>19</sup> To this point Barahona De Brito comments: “Trial “truths” can be partial and can get lost in the morass of juridical and evidentiary detail” Moreover, truth is a highly contested concept especially in the aftermath of conflict as most of the times adversaries have fought for their own version of truth”

Barahona de Brito, Alexandra; Fernandez-Dominguez, Carmen; Aguilar, Paloma (2001) (ed): *The politics of memory: Transitional Justice in Democratizing Societies*, Oxford: Oxford University Press, p.28.

<sup>20</sup> Low-level officials of the communist regimes of Eastern Europe when acting as enforcers of the law at the same time were victims of structural violence having no freedom to choose an alternative path without risking severe punishment. For a plethora of examples read: Rigby, *op. cit.*, pp 5-6.

<sup>21</sup> IDEA Handbook, *op. cit.*, pp. 14. For a vindication of retributive justice against criticism see Mobekk, *op. cit.*, pp. 277-280.

<sup>22</sup> Rwanda, Sierra Leone and Liberia are striking examples.



reconciliation. The scarcity of resources and the dysfunctional infrastructure pose dire practical limits to the effectiveness of the former while the latter try only the most prominent agents of the old regime and do not entail the element of local ownership in the process.<sup>23</sup> Can justice be done or at least seem to be done if the majority of the perpetrators escape conviction? On the other hand, how feasible is it to hope for reconciliation if justice means that thousands must be purged? Are trials a continuation of war by legal means as many critics of retributive justice argue? Do they imply new division rather than a new start for the war-torn society? The dilemmas are grave and no easy answer can be given. Furthermore, it is precisely in those societies in which the call for robust and comprehensive punishment is strongest that the difficulty in achieving it is greatest. The clash between the normative and the practical dimension of prosecuting war criminals (between retribution and reconciliation one might say) in the post-conflict context is immense.<sup>24</sup>

When there is no clear winner and peace is achieved through compromise or negotiations, “collective amnesia” and granting amnesty to perpetrators of human rights abuses might be alternatives to retribution.<sup>25</sup> The “forgive and forget” approach has often been justified on the grounds of promoting societal reconciliation or as the only viable solution where former human rights abusers preserve significant power in relation to the new regime.<sup>26</sup> To this point Tina Rosenberg comments: “The kind of reconciliation that lets bygones be bygones is not true reconciliation.”<sup>27</sup> Amnesties have been severely criticized, particularly because: a) their

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<sup>23</sup> The tendency of forming tribunals combining both international and national mechanisms like the Special Panels with Exclusive Jurisdiction over Serious Crimes in East Timor and the SCSL in Sierra Leone is a recent solution aiming to combine the benefits of both mechanisms and provide a more flexible response, adapted to the needs of each post-conflict society. Moreover, another pattern that should be mentioned here is trials taking place in third countries under the principle of universal jurisdiction. “The principle allows courts to trial cases of genocide, war crimes and crimes against humanity even if they didn’t take place in their territory.” For a short yet concise introduction to the topic read Kritiz, Neil J.: “Where are we and how we got here: An Overview of Developments in the search for Justice and Reconciliation”, in Henkin, Alice H. (2002) (ed): *The Legacy of Abuse: Confronting the Past Facing the Future*, Washington, Aspen Institute, pp. 41-54. For the principle of universal jurisdiction see J. Zalaquet “*The Pinochet case: International and Domestic Repercussions*” in Henkin, *op. cit.*, pp. 47-71. Also see IDEA Handbook, *op. cit.*, p. 15. For an account of ICTR role in promoting reconciliation in post-genocide Rwanda, the challenges that had to be addressed and the problems that were faced during the process and how these have affected its contribution to the reconciliation process see Olonisakin, Funmi, “*Peace and Justice in Africa: Post Cold War Issues*”, *International Relations*, Vol. XV, n° 1 (April 2000), pp. 45-49 and Alana Erin Tiemessen, “*After Arusha: Gacaca Justice in post-genocide Rwanda*” *African Studies Quarterly*, vol. 8 n° 1, (Fall 2004), pp. 61-64.

<sup>24</sup> Here lies a fundamental tension between those who aspire to the discipline of conflict resolution and those who emphasize on the concept of democratic governance, between conflict managers and “democratizers”. The former consider reconciliation as the ultimate goal of post-conflict reconstruction. They adopt a pragmatic approach. Negotiation is a necessary part of a process that seeks to compromise antithetic interests. On the other hand, “democratizers” consider justice to be the primary objective of peace. Universal principles that cannot be negotiated form the core of this approach. However, controversy arises because most transitional policies adopt a “middle way” combining elements from both schools of thought. Please see Annex I for a comparative analysis of the two approaches. For a detailed analysis of this major debate in contemporary conflict resolution see O. Baker, “*Conflict Resolution and Democratic Governance: Divergent Paths to Peace*” in Crocker *et al.*, pp. 753-764 (Special attention should be given on the diagram of p. 759).

<sup>25</sup> Spain and Cambodia are cases where past abuses were not prosecuted and the path of collective amnesia was chosen instead of prosecution as a consensus between the elites has been reached. Brazil in the seventies followed the path of amnesty as a consequence of the negotiated type of transition to democracy. For these two important case studies see Rigby, *op. cit.*, pp.39-40 and pp. 64-65.

<sup>26</sup> D. Pankhurst: “Issues of justice and reconciliation in complex political emergencies: conceptualising reconciliation, justice and peace”, *Third World Quarterly*, vol. 20, n° 1, (1999), p. 248.

<sup>27</sup> Cited in Boraine, Alex (1997): *Dealing with the Past: Truth and Reconciliation in South Africa*, Cape Town: IDASA Publications, p.66.



logic is contradictory to the standards of international law, b) they can foster a sense of impunity and c) may further encourage the continuation of human rights violations.<sup>28</sup>

To summarize, retributive justice has both the potential to be an effective way for the new regime to address the demons of the past and foster reconciliation but in certain post-conflict contexts, purges might re-inflate violence. A compromise, between the ethical imperatives and the international legal norms that urge for retribution on the one hand and the complex political reality on the other, must be reached in order to ensure that justice is pursued in tandem with the overarching purpose of national reconciliation.<sup>29</sup> However cynical this approach may be for the families of the victims and the survivors of war crimes who demand that justice be done, maintaining the delicate balance between justice and reconciliation is the only viable option for a fragile democracy emerging out of violent conflict. Yet, justice may come in various forms and retribution is just one of them.

## **2. Restorative justice.**

Restorative justice seeks to address the issue of human rights violations committed during periods of conflict based on a different logic.<sup>30</sup> Reconciliation and forgiveness, through a mending process that requires the active participation of the community (even though the focus is on the victims, the involvement of both victims and offenders is equally important) and is based on flexible rules of evidence rather than an established procedure, lie at the core of the concept.<sup>31</sup>

The truth commission, (TC) which has been described as a “third way” between trials and “national amnesia”, is the most prominent mechanism of restorative justice. TCs are temporary, non-judicial bodies created most of the times by national governments with the contribution of the international community to establish a historical record of the committed human rights violations, promote truth telling and provide a place for the victims to publicly express their suffering.<sup>32</sup> While trials focus on punishing the offender, at the epicenter of restorative justice stands the victim.

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<sup>28</sup> Teitel, Ruti G. (2000): *Transitional Justice*, Oxford: Oxford University Press, p.54-59.

<sup>29</sup> Kritz, Neil J.: “Where are we and how we got here: An Overview of Developments in the search for Justice and Reconciliation”, in Alice H. Henkin (ed) *op. cit.*, pp. 41.

<sup>30</sup> The different logic through which restorative and retributive justice seek to tackle with the past is clearly depicted in Annexes II and III.

<sup>31</sup> Brahm, Eric (2005) “Getting to the Bottom of Truth: Evaluating the role of truth commissions to post conflict societies”, available at [www.beyondintractability.org](http://www.beyondintractability.org)

<sup>32</sup> Since 1980 TCs were created in Argentina, Bolivia, Chad, Chile, East Timor, Ecuador, El Salvador, Ethiopia, Federal Republic of Yugoslavia, Ghana, Guatemala, Haiti, Honduras, Nepal, Nigeria, Panama, Peru, Philippines, Sierra Leone, South Africa, Sri Lanka, Uganda, Uruguay, Zambia and Zimbabwe. Moreover, other traditional justice mechanisms such as the Gacaca courts in Rwanda and the Ajaweed experts in Sudan are also facets of restorative justice. However, many objections have been raised on the suitability of the latter to deal with systematic abuses of human rights. The flexibility of due process, the implementation of different standards from case to case and the humiliation often suffered by the defendants during the process are weaknesses that cannot be easily overlooked. The bibliography on TCs is extensive. For a variety of key articles on the function of truth commissions access the website [www.ictg.org](http://www.ictg.org). For case studies read Rigby *op. cit.* pp. 63-94 and Hugo Van der Merde, “National and Community Reconciliation Competing agendas in the South African Truth and Reconciliation Commission” in Bigar, Nigel (ed) (2003): *Burying the Past: Making Peace and Doing Justice After Civil Conflict*, Washington, Georgetown University Press, pp. 101-125. For a critical review of the Gacaca courts please see Tiemessen, *op. cit.*, pp 64-68 and Alexander, Jane, (2003): “A scoping study on transitional justice and poverty reduction”, *Final Report of the Department of International Development*.



Although non-legal punishment may also be seen as part of restorative justice, forgiveness from the part of the victims, reintegration of the offenders into the social web and restoration of the co-operative spirit of the community are the ultimate goals.<sup>33</sup> The latter is of utmost importance in post-conflict settings where the absence or the proximity of territorial borders between the former adversaries means that the victims have to learn to live side by side with the perpetrators in the aftermath of a negotiated peace settlement.<sup>34</sup> In the context of post-Apartheid South Africa and in order to counter the argument of those who claimed that the TRC process failed to satisfy the victims' demand for justice while it has deteriorated the relations between the different racial groups, Desmond Tutu commented: "while the Allies could pack and go home after Nuremburg, we in South Africa have to live with one another."<sup>35</sup>

Proponents of restorative justice argue that truths commissions can play a more constructive role in promoting reconciliation than trials which might instead deepen the division between former antagonistic ethnic/racial/cultural groups. Through the revelation of truth,<sup>36</sup> TCs foster the healing of the traumas without forgetting the past and help to restore relationships at individual and community level.<sup>37</sup> "I m ready to forgive but I have to know whom to forgive and for what" cry some of the victims and restorative justice mechanisms seem more capable to respond to this demand.

However, the issue becomes more complex where in order to reach truth, amnesties are granted to former human rights abusers. Truth-seeking might be an important first step towards reconciliation however the moral credibility of the trade-off, amnesty in exchange of truth, is disputable. To this point, Rigby comments: "...to put it at its crudest, the criminals provide a version of the truth in return for amnesty and victims are left to do the reconciling...[however he adds]... but maybe this is the price that has to be paid for democracy and the restoration of human rights."<sup>38</sup> Moreover, even if the truth (despite of the elusive nature of the concept) is revealed can everything be forgiven?<sup>39</sup>

In addition to the aforementioned moral dilemma there is also a practical aspect of TCs that has to be critically examined in order to reach an overall assessment of restorative justice mechanisms. It has been argued that process of truth telling can also lead the survivors to relive the trauma.<sup>40</sup> Although the risk of re-victimization applies also to the case of trials, in the context of restorative justice it acquires special importance as the therapeutic quality of the latter is considered to be its main strength.<sup>41</sup>

Moreover, TCs have received severe criticism because they do not possess the authority to allocate legal punishment or reparations. Their role is restricted to suggestions which can be ignored by the political leadership whether because the new regime lacks the resources to

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<sup>32</sup> IDEA Handbook, *op. cit.*, pp 16-17.

<sup>33</sup> Alexander, *op. cit.*, pp 18-20.

<sup>34</sup> BiH is a prominent example of the case.

<sup>35</sup> Tutu, Desmond (1999): *No Future without Forgiveness*, London, Rider, p.25.

<sup>36</sup> Zalaquet, José and Méndez, Juan in Boraïne *et al.*, *op. cit.* pp. 33-57.

<sup>37</sup> Brahm, *op. cit.* pp. 4-6.

<sup>38</sup> Rigby, *op. cit.* p. 9.

<sup>39</sup> On the topic please see the excellent critique of J. Derrida, "On Cosmopolitanism and Forgiveness", (London/New York: Routledge, 2001) pp. 25-59.

<sup>40</sup> Mobek, *op. cit.* pp 271-273.

<sup>41</sup> *Ibid.*



implement them or because other priorities come first in the reconstruction agenda. Such an outcome is likely to foster disillusionment and frustration to the victims rather than contribute to societal reconciliation.<sup>42</sup>

A key question is whether restorative justice mechanisms should be understood as alternative or as complementary to retribution. On the one hand, those who consider restorative justice an alternative to tribunals emphasize the fact that the former entails the element of punishment.<sup>43</sup> During the process the perpetrators have to confess their crimes, reveal the truth and consequently sustain the social outcry for their misdeeds. In that way the compromise which takes place is not one sided as non-criminal sanctions are part of it.<sup>44</sup> On the other, those who claim that restorative mechanisms are a useful complement to trials argue that although healing and truth telling are important elements in the process of reconciliation it is important to be supplemented by guarantees that the past will not be repeated. At this point the deterrent value of a non-judiciary mechanism such as the truth commission is highly debatable.<sup>45</sup>

During the last two decades, restorative justice mechanisms have become an integral part of most transitional justice strategies. Either as an alternative or as a supplement to trials and despite various criticisms, their contribution in dealing with the past and reconciling divided societies had been significant.

### 3. Distributive justice

While retributive and restorative dimensions of transitional justice focus on the consequences of conflict, distributive justice seeks to “tackle the roots of the unrest” by addressing the structural factors that led to the escalation of conflict to violence.<sup>46</sup> Not all conflicts are consequences of political, economical, social and cultural injustices however, dealing with them during the reconstruction phase, is really important in order to ensure peace, establish a more just order and promote national reconciliation.

The obligation of successor regimes to compensate the victims of war crimes and human rights violations even if these acts were committed by its predecessor is enshrined in various international law documents.<sup>47</sup> Yet, the focus is on property restitution. The latter is a burning issue in many post-conflict settings where returning refugees find their land and their houses taken by new occupants.<sup>48</sup> If the new government fails to compensate the returnees, this may destabilize the peace process and obscure reconciliation.

Reparations are the key element of distributive justice. The term entails a wide range of measures aiming to: a) rectify past wrongs, b) restore property or rights and c) provide

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<sup>42</sup> In El Salvador for example none of the recommendations of the TC has ever been implemented.

<sup>43</sup> Stovel, Laura (2003): “When the enemy comes home: Restoring justice after mass atrocity”, pp. 3-14. available at <http://www.sfu.ca/cfrj/fulltext/stovel.pdf>

<sup>44</sup> Ibid. pp. 36-38.

<sup>45</sup> Ramsbotham, Oliver, Woodhouse, Tom; Miall, Hugh (ed) (2005): “*Conflict Resolution in Contemporary Conflict*”, Cambridge, Polity Press, pp.232-233.

<sup>46</sup> Mani, *op. cit.*, pp. 7-11.

<sup>47</sup> Teitel *op. cit.*, pp. 119-147.

<sup>48</sup> South Osetia, Burundi and Bosnia are striking examples.



compensation, rehabilitation and satisfaction to the victims.<sup>49</sup> They may come as the outcome of a judicial process or as the implementation of the recommendations made by a truth commission and may be allocated individually or collectively.<sup>50</sup> Reparations can be either material, in the form of provision of goods, services and monetary compensation or “moral”<sup>51</sup> in the form of apologies, acknowledgement of truth and commemoration of victims.

Moreover, reparations provide: a) a mechanism to deal with the practical/financial aspects of social injustice, b) a means for the new government to officially acknowledge crimes committed under the former regime and c) (as they bear significant economic costs) a deterrent to future state misconduct.<sup>52</sup> Hence, their contribution to the process of societal reconciliation is not to be underestimated.

Yet, redistribution of assets should be closely interrelated with retributive and restorative justice. Holding trials and establishing truth commissions without any compensation for the victims delegitimizes these processes, and confines their contribution to reconciliation. On the other hand, providing reparations without prior resolution of a tribunal or a TC, can be perceived as way to “buy” victims’ silence.<sup>53</sup> Moreover, how feasible is it to fully compensate mass numbers of victims of a repressive socio-political structure especially when the resources available are scarce?

Reparations whether material or symbolic, cannot totally compensate the victims for the loss and the trauma that was inflicted upon them.<sup>54</sup> In addition, many scholars argue that reparations focus exclusively on the past while reconciliation is forward looking. However, temporal continuity binds the past with the present and the future. Therefore, addressing the structural factors that led to the escalation of conflict to violence is crucial in order to transform social relations.<sup>55</sup>

Lederach defines reconciliation as a “creative space where mercy and truth meet justice and peace”. The process works on different levels (individual-community-national) takes time and requires painful compromises between the afore-mentioned constitutive elements.<sup>56</sup> To this point Rigby notes: “Just as it takes time for wounds to heal and for people to work through anger and bitterness so that they are in a position to offer the gift of forgiveness, so it takes time to achieve truth, peace and justice. These struggles do not end with the conviction of a war criminal, the publication of a truth commission report or the attempt of successor regimes to sweep the past under the carpet.”<sup>57</sup> The variety of transitional justice mechanisms provide useful tools to deal with the complex post-conflict reality, but none of them should be considered a panacea in every attempt to bridge the gap between a violent past and a promising future. Between South Africa and Germany; between East Timor and Rwanda the distance is not merely spatial. Different historical backgrounds, religious beliefs, cultural

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<sup>49</sup> Gunnar, Thiessen, “*Supporting Justice, Co-existence and Reconciliation after Armed Conflict: Strategies for dealing with the past*” pp. 8-9 and Rigby, *op. cit.*, pp. 10-12.

<sup>50</sup> IDEA Handbook *op. cit.*, pp. 23-29.

<sup>51</sup> “Chile’s TRC introduced the term “moral” reparations to publicly of those who perished from the stigma of having been falsely accused as enemies of the state” see R. Teitel, *op. cit.* 126.

<sup>52</sup> Kritz, Neil J. (1995), *Transitional Justice: How emerging Democracies reckon with former regimes, Vol.3*, Washington, USIP Publications, p. xxix.

<sup>53</sup> Rigby, *op. cit.*, pp. 10-11.

<sup>54</sup> Alexander, *op. cit.*, pp. 40-43.

<sup>55</sup> For the various linkages between past-present-future in relation with the process of reconciliation see Lederach, John P. (1999): *The path towards Reconciliation*, Scottsdale, Herald Press, pp. 65-77.

<sup>56</sup> *Ibid.*, p. 65.

<sup>57</sup> Rigby, *op. cit.* p.13.



patterns are also important parameters of the equation that should not be neglected. The re-establishment of the rule of law, the implementation of a combination of retributive and restorative measures along with reparations for the victims and their families form the general cadre of any integrated policy addressing issues of transitional justice and reconciliation in post conflict societies. However, there is no single formula, nor a single best way to deal with the atrocities of the past. In every post-conflict society a plethora of interlocking variables (i.e. the context in which the transition is to be attempted, the intensity of the past conflict, the depth of the individual and the societal trauma) determine the path that should be followed in order for reconciliation both as a goal and as a process to fructify. A holistic transitional justice strategy is a vital element for the successful passage from the state of negative peace (absence of direct violence) to that of positive peace (absence of direct, structural and cultural violence).<sup>58</sup> In this context, International Humanitarian Law seems too important to be ignored however and because transitional justice is a delicate context dependent compromise western legal standards and norms cannot provide viable solutions in every post-conflict setting.<sup>59</sup>

In what follows, through the examination of EU's war crimes policy in the Western Balkans it will be established that the formulation of a transitional justice strategy should incorporate all or at least several of the afore-mentioned elements. Unfortunately EU's strategy with respect to the legacy of mass atrocities that took place during the last decade of the 20<sup>th</sup> century in the region seems almost entirely focused on retribution handed down by an ad hoc international tribunal (i.e. ICTY). As such it does not incorporate the vital element of local ownership in the process and systematically neglects to include restorative and the distributive transitional justice mechanisms in its conditionality agenda. This monolithic approach bears major deficits that do not only delegitimize the role of ICTY but most importantly narrow the scope of the process of transitional justice thus failing to make a significant contribution to the over-arching purpose of regional reconciliation.

#### **4. EU conditionality in the Western Balkans: political criteria co-operation with icty and the progress so far**

Shortly after the collapse of the Communist regimes of Eastern Europe and as a consequence of the resurgence of ethnic tensions in the Balkans, EU faced the threat of an instability spill-over spreading from the periphery to the core of the continent. Since the early nineties the Union, influenced by B. Russett's democratic peace theory<sup>60</sup> systematically tried to forge closer relations with the former socialist republics and become an agent of democratic reform and stability for the region through the implementation of an integrated 'carrot' and 'stick' policy.<sup>61</sup> The latter has been based to a large extent on the principle of conditionality which linked the association and accession process of all candidate and potential candidate countries

<sup>58</sup> Galtung, Johan: "Cultural Violence", *Journal of Peace Research*, vol. 27 n° 3 (1990) pp. 291-305.

<sup>59</sup> "Restoring democratic institutions is also important. However, "even the most effective democratic institutions cannot ensure the passage from negative peace to positive peace when society remains divided" IDEA Handbook *op. cit.*, pp 16-17.

<sup>60</sup> For an introduction in the Democratic Peace Theory see: Russett, Bruce (1993): *Grasping the Democratic Peace*, Princeton, Princeton University Press, and Russett, Bruce; Oneal, John, "Triangulating Peace: Democracy, Interdependence and International Organisation" (New York: Norton Pubs. 2001)

<sup>61</sup> For a short yet concise overview of the development of EU's relations with the post-communist Balkans read: Papadimitriou, Dimitris "The EU's Strategy in the Post-communist Balkans", *Southeast European and Black Sea Studies*, vol. 1, no. 3, (September 2001), pp. 69-94.



to the fulfillment of a set of political and economic standards, widely known today as the Copenhagen Criteria.<sup>62</sup> While in the economic field establishing a functioning market economy able to withstand the competition pressures of the free market became a *sine qua non*, the political pillar of the Copenhagen Criteria prioritized the establishment of democratic institutions, the rule of law, human rights and protection of minorities. In its perpetually evolving process the Union incorporated the afore-mentioned criteria (with the exception of the area of minorities' protection which was excluded for political reasons) in the Treaty of Amsterdam as preconditions that any future candidate country should fulfill before accession.<sup>63</sup>

Parallel to the adoption of the Copenhagen Criteria and in order to supplement the Dayton Agreement, the General Affairs Council of 26-27 February 1996 launched the Regional Approach for the Balkans. Focused on the Balkan Peninsula and structured around three major pillars namely, stability, economic recovery and good neighborliness the afore-mentioned strategy sought to provide a framework that would promote socio-economic reforms and enhance the transition of the post-war Balkans to a stable order.<sup>64</sup> However, the breakdown of the Rambouillet talks on Kosovo and the subsequent NATO bombing of FRY in March 1999 highlighted the limited contribution of EU's 'civilian' approach in stabilizing the region and urged for the adoption of more integrated regional strategy.<sup>65</sup> In June 1999, EU in co-operation with various international actors responded to the challenge by launching the Stability Pact.<sup>66</sup> Consolidating a lasting peace, establishing functioning market-democracies and promoting regional reconciliation were declared as the ultimate goals of the initiative.

Within the broader framework of the Stability Pact and through the initiation the Stabilization and Association Process (SAP), a new type of relationship with the countries of the Western Balkans emerged. The SAP offered not only autonomous trade measures and substantial financial assistance but also enabled Albania, FYROM, Bosnia Herzegovina, Croatia and FRY to forge closer bonds with the Union by signing, on a bilateral basis, Stabilization and Association Agreements (SAAs).<sup>67</sup> However, the signing of the latter was once again conditioned on compliance to a second set of standards closely resembling to but distinct from the Copenhagen criteria. The SAP put special emphasis on democratization, institution building and regional cooperation as well as in the areas of human and minority rights.<sup>68</sup> Moreover in the context of the SAP the Union recognized that dealing with the crimes of the recent past is an essential element for the consolidation of a lasting peace as well as a precondition for regional reconciliation.<sup>69</sup> Therefore, full-cooperation with the International Criminal Tribunal for the Former Yugoslavia (ICTY) was included in the EU's

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<sup>62</sup> Established in 1993 in the conclusions of the Copenhagen European Council, the Copenhagen Criteria are considered the cornerstone of EU conditionality. See *Bull. EU* 6-1993, Pt. I. 13.

<sup>63</sup> See Articles 6 and 49 of the Treaty of the European Union (TEU).

<sup>64</sup> Papadimitriou, *op. cit.*, p. 74-75.

<sup>65</sup> *Ibid.*

<sup>66</sup> The Stability Pact was officially launched by the Cologne Special International Summit on 10 June 1999. The participants of the summit were the foreign ministers of the EU, Albania, Bosnia, Bulgaria, Canada, Croatia, Hungary, Japan, Romania, Russia, Slovenia, FYROM, Turkey and US; representatives from the OSCE, the UN, CoE NATO OECD IMF, WB, EBRD, and other regional organisations. More information on the Stability Pact is available at <http://ec.europa.eu/enlargement>

<sup>67</sup> The SAAs are second generation agreements that move beyond the narrow confines of trade and cooperation agreements (first generation agreements) and are often described as slightly differentiated equivalents of the Europe Agreements that were signed between the EU and CEEs in the first half of the nineties as a preparatory stage for accession.

<sup>68</sup> See COM (99) 235 of 26 May 1999.

<sup>69</sup> Papadimitriou, *op. cit.*, p. 77.



conditionality agenda for those countries that participated in the Bosnian war.<sup>70</sup> Ever since, co-operation with the ICTY has become the thorniest issue in the relations of EU with Serbia, Croatia and BiH. To this respect, while the European Council of Thessaloniki (19-20 June 2003) dangled the carrot of membership to all three countries by nominating them potential candidates<sup>71</sup> at the same time both the Commission in its Annual Report on SAP and the Council made clear that the road to Europe passes through courtrooms of Hague.<sup>72</sup>

The strong commitment of the Union on full co-operation with the ICTY as well as the effectiveness of the EU's conditionality strategy was clearly demonstrated in the case of Croatia. After the 2000 elections the newly-elected Mesic government managed in short time to make significant progress in reforming the state bureaucracy and the security sector.<sup>73</sup> By 2002 the country was also regarded a functioning market economy with stable democratic institutions while it enjoyed solid political backing from Austria.<sup>74</sup> As a result, five months after the issue of a positive avis from the Commission (in May 2000) an SAA was signed to regulate the relations between the two parties until Croatia reached the status of membership.<sup>75</sup> Despite the county's rapid progress and the emerging consensus over Croatia's European future the initiation of the accession negotiations came to a temporary stalemate in 2004 as a result of Croatian authorities' failure to deliver General Ante Govotina to ICTY.<sup>76</sup> Based on the report of the Chief Prosecutor Carla Del Ponte which highlighted the reluctance of the Croatian government to provide information that would lead to the arrest of Croatia's remaining ICTY indictee, the Council on 16 March 2005 decided to postpone the whole process until the outstanding condition was met. It was not until the publication of a new report by Del Ponte on the 3<sup>rd</sup> of October of the same year and the positive assessment that co-operation was now full that the Council decided to open accession negotiations with the country.<sup>77</sup>

Shortly after the suspension of Croatia's negotiations the other two countries of the Western Balkans increased their efforts to comply with ICTY conditionality. Neither Serbia nor BiH have managed to fully meet the afore-mentioned requirement. Consequently contractual relations between the Union and have not yet been established.<sup>78</sup> As important indictees are still on the run enjoying shelter in the territory of Serbia the Commission on the

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<sup>70</sup> *Ibid.*

<sup>71</sup> Institute of European Affairs, Balkans Update no. 5 July 2003 available at [http://www.iiea.com/newsxtest.php?news\\_id=33](http://www.iiea.com/newsxtest.php?news_id=33)

<sup>72</sup> To this point the Thesalloniki Agenda for the Western Balkans reads in part: "*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, 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*", see [http://ec.europa.eu/enlargement/enlargement\\_process/accession\\_process/how\\_does\\_a\\_country\\_join\\_the\\_eu/sap/t\\_hessaloniki\\_agenda\\_en.htm](http://ec.europa.eu/enlargement/enlargement_process/accession_process/how_does_a_country_join_the_eu/sap/t_hessaloniki_agenda_en.htm). Also see COM(2003)139, COM(2004)202

<sup>73</sup> Democracy challenged

<sup>74</sup> See the 2002 Annual Commission Report on SAA COM(2002)163

<sup>75</sup> A more detailed overview of the evolution of EU-Croatia relations is available at [http://ec.europa.eu/enlargement/croatia/index\\_en.htm](http://ec.europa.eu/enlargement/croatia/index_en.htm)

<sup>76</sup> Rangelov, Iavor, "EU Association Conditionality and Transitional Justice in Former Yugoslavia", *European Policy Conference 2006*, London School of Economics (LSE) and King's College London, p. 2, available at <http://www.lse.ac.uk/Depts/intrel/EFPC/Papers/RANGELOV.pdf>

<sup>77</sup> The reports of the High Prosecutor Carla Del Ponte on Croatia's cooperation with the ICTY are available at [www.un.org/icty](http://www.un.org/icty)

<sup>78</sup> Zupan, Natasha, "Facing the Past and Transitional Justice in the countries of Former Yugoslavia", *Project "Bosnia-Ten Years after Dayton"*, Berghof Forschungszentrum für Konstruktive Konfliktbearbeitung, pp. 328-329, available at [http://www.berghof-center.org/uploads/download/dayton\\_zupan\\_rec.pdf](http://www.berghof-center.org/uploads/download/dayton_zupan_rec.pdf)



3<sup>rd</sup> of May 2006 froze the negotiations for the signing of an SAA with the country urging the Serbian authorities to overcome the obstacles and cooperate with the Tribunal in order for the SAA to be concluded.<sup>79</sup> However, it is important to notice that although not up to a satisfactory degree, progress towards meeting the criterion of co-operation with ICTY has been made.<sup>80</sup> To this point and despite the initial insistence of the Serbian government to pursue the path of national trials, by June 2005 Generals Lukic and Pavlovic were among a large number of indictees who were finally transferred to Hague in order to answer for the crimes they have committed during the war period.<sup>81</sup>

## **5. Assessing the impact of eu conditionality on the process of transitional justice in the countries of former Yugoslavia**

Combined with the substantial financial assistance provided by the Union to the countries of the Western Balkans through the Community Assistance for Reconstruction Development and Stabilization programme (CARDS) as well as through the European Initiative for Democracy and Human Rights (EIDHR) conditionality forms the core of EU's 'civilian' approach in the region and is often described as one of its most effective tools in promoting democratic reforms. However, the image turns bleak when the contribution of the current conditionality criteria in dealing with the legacy of the past and in promoting the over-arching purpose of regional reconciliation is put on the table.

Rangelov notes that "with EU conditionality focusing exclusively on co-operation with the ICTY the wider process of transitional justice in the societies of Former Yugoslavia has been largely ignored."<sup>82</sup> From the broad range of transitional justice mechanisms the Union has chosen to prioritize retributive justice by prosecuting the perpetrators of war crimes and human rights violations in an international Tribunal. At the same time though, the Union's conditionality agenda for the region showed profound disregard for other equally important facets of transitional justice while the vital element of local ownership in the process has not been included in the Union's approach.

## **6. Reparations**

Up to date there has been no official government-sponsored programmes for the victims of war and the survivors of human rights violations have been established in the respective countries. As a result several lawsuits have been filled. The first country to submit an application in the ICJ<sup>83</sup> demanding reparations for alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 from the Former Yugoslavia was BiH in March 1993.<sup>84</sup> Six years later Croatia followed the example of the latter pursuing the same route to hold Yugoslavia accountable for ethnic cleansing and extensive property

<sup>79</sup> On the current status of EU-Serbia relations, see [http://ec.europa.eu/enlargement/serbia/eu\\_serbia\\_relations\\_en.htm](http://ec.europa.eu/enlargement/serbia/eu_serbia_relations_en.htm)

<sup>80</sup> Zupan, *op. cit.*

<sup>81</sup> Rangelov, *op. cit.*, p. 2-3.

<sup>82</sup> *Ibid.*

<sup>83</sup> Bosnia Serbia and Croatia have all signed and ratified the Statute of ICJ.

<sup>84</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (BiH vs. Yugoslavia) Application, 20 March 1993 available at [www.icj-cij.org](http://www.icj-cij.org)



destruction.<sup>85</sup> The final judgment on both applications is still pending however the way that the demand for reparations has been articulated sets further impediments to the process of regional reconciliation by accentuating antagonistic truths.<sup>86</sup> This is not to say that reparations should be excluded from the transitional justice agenda but rather to imply that in the context of the Western Balkans the latter should come as the eventual outcome of dialogue and genuine reckoning with the past. Only in such a way compensation for the victims material or symbolic can make a positive contribution to inter-ethnic and cross-border reconciliation.

## 7. Truth telling

As has been noted earlier, in the aftermath of violent conflict the importance of establishing a widely accepted truth about what happened in the past, however a difficult and elusive task it might be, is of utmost significance especially when reconciliation is hoped for. However, in the countries of Western Balkans the restorative transitional justice mechanisms remain largely excluded from the process of transitional justice. While in Croatia there has been no attempt to establish a truth and reconciliation commission the short-lived 2001 Serbian TRC paradigm is often quoted as an example of what one should avoid in order to create a successful TRC.<sup>87</sup> Established by a presidential decree with the mandate to investigate the causes and the course of events of all the conflicts that took place in the territories of Former Yugoslavia the latter, was largely perceived by the public opinion as an orchestrated attempt of the international community to promote its interpretation of truth and project the Serbs as those responsible for the atrocities committed during the Bosnian War.<sup>88</sup> Consequently it was largely delegitimized from the very beginning. Scarce recourses, resignations of key members and lack of minorities representation further discredited the truth telling process and led to the final disband of the TRC in 2003 before the issue of a report.<sup>89</sup> Its Bosnian counterpart widely known as the “Srebrenitsa Commission” is the only worth mentioning initiative of truth telling in the region. Established by the National Assembly of the Republica Srpska under the pressure of OHR comprised of seven chambers (five of them appointed by RS authorities and two of them by OHR) it began its work in early 2004 and despite the initial delays by the end of the year it issued its final report.<sup>90</sup> In its conclusion it is recognised that on July 10–19, 1995, 7000 thousand Muslim Bosnians were “liquidated” and the perpetrators and others “undertook measures to cover up the crime” by moving bodies away from the killing site. Moreover, the Commission declared the discovery of 32 unknown locations of mass graves, four of which were “primary sites.”<sup>91</sup> The above can be seen as an important first step from the part of the Bosnian Serb community to reckon with the past however, I. Rangelov, notes

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<sup>85</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia vs. Yugoslavia) Application, 2 July 1999 available at [www.icj-cij.org](http://www.icj-cij.org)

<sup>86</sup> Zupan, *op. cit.*, pp. 331-332.

<sup>87</sup> IDEA handbook *op. cit.*, p. 27.

<sup>88</sup> Freedman, Mark, “Serbia and Montenegro: Selected Developments in Transitional Justice”, *Case Study Series*, International Center for Transitional Justice, (October 2004), available at [http://ictj.org/downloads/ICTJ\\_Serbia.pdf](http://ictj.org/downloads/ICTJ_Serbia.pdf)

<sup>89</sup> Zupan, *op. cit.*, pp. 333-334.

<sup>90</sup> Freedman, Mark, “Bosnia Herzegovina: Selected Developments in Transitional Justice”, *Case Study Series*, International Center for Transitional Justice (October 2004), available at [http://ictj.org/downloads/ICTJ\\_Bosnia.pdf](http://ictj.org/downloads/ICTJ_Bosnia.pdf)

<sup>91</sup> The original text from which the above was extracted is available at [www.ohr.int](http://www.ohr.int)



that: “many in the Bosnian-Croat camp have dismissed the Commission’s report as produced under international pressure, without genuine remorse...”<sup>92</sup>

## **8. Local trials**

Incorporating the element of local ownership by holding trials on local or national courts has also proven problematic. Scarce funding and other various practical impediments (such as the inability to reach evidence) form only the top of the iceberg. Beyond that lays a widespread denial of guilt along with the persistence of strong nationalist sentiments in the public opinion of the countries of Western Balkans which combined explain the reluctance of the political elites to try persons which are considered national heroes from a significant part of the electorate and thus to bear the political cost of such a decision.<sup>93</sup> In Croatia holding trials of Serbs in absentia has become the norm while Serbia and BiH have only conducted a very limited number of trials. As a result, national judiciaries have failed so far to prosecute the majority of the perpetrators and provide justice and compensation to the victims.<sup>94</sup> Moreover, the recent establishment of War Crimes Chambers both in Belgrade and Sarajevo to deal with war crimes at a national level should be understood more as the outcome of external pressures rather than a conscious choice made by the societies of the region.<sup>95</sup>

## **Conclusion**

Established in May 1993, by the UN Resolution no. 827, ICTY started its work in August 1994. According to its Statute the first ad hoc international Tribunal after Nuremberg and Tokyo had broad aims, ranging from “[bringing] to justice persons allegedly responsible for serious violations of international humanitarian law committed in the territory of former Yugoslavia since 1 January 1991” and “[rendering] justice to the victims”, to “[detering] further crimes” and “[contributing] to the restoration of peace by promoting reconciliation in the former Yugoslavia”<sup>96</sup> Yet, more than a decade since its establishment and despite the emphasis of EU conditionality on full cooperation with the Tribunal, inter-ethnic and cross-border relations in the area of the Western Balkans remain problematic. The main reason is the persistence of ethno-nationalistic sentiments; sentiments rooted in mutual grievances, competing interpretations of truth and on a protracted common feeling of injustice.

While international judges continue to try those accused for war crimes and human rights violations in the courtrooms of Hague the populations of the region those who have primarily suffered from the war remain in “safe distance” from the process of transitional justice. The end result of is alienation; alienation which is clearly illustrated in the profound inability of the political elites and the public opinion to recognize their responsibilities and show genuine commitment to the cause regional reconciliation.<sup>97</sup>

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<sup>92</sup> Rangelov, *op. cit.*, p. 4.

<sup>93</sup> HLC Newsletter no.20, “*Transitional Justice: EU War Crimes Policy in the Western Balkans*” available at [www.hlc.org](http://www.hlc.org)

<sup>94</sup> Rangelov, *op. cit.*, p. 5.

<sup>95</sup> HLC Newsletter No.20, “*Transitional Justice: EU War Crimes Policy in the Western Balkans*” available at [www.hlc.org](http://www.hlc.org)

<sup>96</sup> [www.un.org/icty](http://www.un.org/icty)

<sup>97</sup> Rangelov, *op. cit.*, p. 8.



Furthermore, ICTY seems to have failed so far to promote the ultimate goal of regional reconciliation for another reason. By prosecuting sole individuals as perpetrators of war crimes it fails to map and consequently to tackle with the roots causes that led to the escalation of ethnic conflict to mass violence. However useful it might be to individualize guilt in order to avoid the emergence dichotomist stereotypes of the type *we* against *them*, it is also important to take into account the wider image, the structural causes that led to the Balkan Wars of the nineties. Retributive justice mechanisms such as the ICTY are primarily concerned with facts and evidence therefore they are not suited by their very nature to contextualize criminal acts and provide a wider account.<sup>98</sup>

ICTY has set an important international paradigm by holding accountable former state-leaders for their deeds and misdeeds thus declaring the intension of the international community to abide to principles of International Humanitarian Law. However, the EU by narrowing its war crimes conditionality policy to the confines of ICTY has failed to recognize that every transitional justice mechanism has its limitations and its deficiencies and consequently undermined its own declared goals. What needs to be done is a fundamental readjustment of the Union's conditionality agenda for the countries of the Western Balkans in order for the latter to incorporate previously marginalized aspects of transitional justice (such as truth telling mechanisms and compensations for the victims) and formulate a truly integrated war crimes policy for the region.

## Annexes

### Annex I

The crucial debate: the conflict managers against the "democratizers"	
Conflict Managers	Democratizers
Inclusive Approach	Exclusive Approach
The goal is reconciliation	The ultimate goal is justice
Pragmatic focus (cultural and normative diversity should be taken into consideration)	Normative focus (priority of universal norms and western legal principles)
Negotiation is acceptable and necessary	Justice cannot be negotiable
Focus on the process	Focus on the outcome
Local ownership of the process is prioritized	International actors should have a decisive role

<sup>98</sup> HLC Newsletter, no. 20, *op. cit.*

**Annex II**

<b>RETRIBUTIVE AND RESTORATIVE JUSTICE POINTS OF DIFFERENCE</b>	
<b>RETRIBUTIVE JUSTICE</b>	<b>RESTORATIVE JUSTICE</b>
Victims are of peripheral importance in the process	Victims are at the epicenter of the process
Focus on punishing the perpetrators	Focus on restoring shattered relations
The state represents the community	The community participates actively
The process is characterized by an adversarial relation between the two parties	Emphasis put on negotiation and dialogue in order to reach a compromise

**Annex III**

<b>Highlighting the different underlying logic between restorative and retributive transitional justice mechanisms the case study of Rwanda</b>		
	<b>The Gacaca Courts</b>	<b>ICTR</b>
<b>GOAL</b>	Justice as part of reconciliation	Justice to end impunity
<b>SETTING</b>	Inside Local Communities	Outside the country
<b>JUDGES</b>	Elected members of the community	Appointed by the international community
<b>DUE PROCESS</b>	Prioritizing truth-telling	Primacy of rules and procedures
<b>ESTABLISHING GUILT</b>	Confession; Community consensus	Based on evidence



Annex IV

## From negative to positive peace through justice

Negative Peace	Transitional Justice	Positive Peace
Absence of direct violence	Restoration of the Rule of Law Trials Truth Commissions Reparations	Long-term Reconciliation