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International Summer School Sarajevo is a two week summer school for graduate and postgraduate students interested in Rule of Law, Transitional Justice and Human Rights. Organizers of this International Summer School Sarajevo are the Association "Pravnik" Sarajevo together with the partner organization Konrad Adenauer Stiftung- Rule of Law Program South East Europe.

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- Networking of Alumni students and lecturers from previous generations

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Today many of them hold prominent posts and work as lawyers and political scientists in different national and international institutions like ministries of foreign affairs in their respective countries or they are delegates to the European Parliament. Several of them have dedicated their lives to upbringing new generations of students by teaching at different universities throughout the World.

INTERNATIONAL SUMMER SCHOOL SARAJEVO

**INTERNATIONAL JOURNAL OF RULE OF LAW,
TRANSITIONAL JUSTICE AND HUMAN RIGHTS**

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Volume 1

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PREFACE

The international work of the Konrad-Adenauer-Stiftung aims at, inter alia, promoting the establishment and consolidation of democratic states based on the rule of law. This holds particularly true for the foundation's work in countries which transition from authoritarian/totalitarian regimes to pluralistic democracies, and/or which are challenged with post-conflict reconstruction. The countries of South Eastern Europe (SEE), in particular the successor states of the former Yugoslavia, are among such countries in transition. For their endeavor to establish and consolidate a democratic state based on the rule of law two factors are key: Firstly, countries in transition need to face their past since there is no sustainable consolidation of democracy without a true confrontation with the past. And secondly, highly motivated and talented young people need to be supported since they are the ones who will shape their countries' future.

The International Summer School Sarajevo (ISSS) targets both. It is for this reason that the Konrad-Adenauer-Stiftung – through its regional Rule of Law Program South East Europe – supported the ISSS from its very beginning in 2006: The Summer School is not only the product of a small group of outstanding former law students from one of the most conflict-ridden countries in South Eastern Europe, i.e. Bosnia and Herzegovina; it also brings together highly qualified young scholars from the SEE region, other parts of Europe, and the US with experienced professionals to receive first hand insight into crucial aspects of human rights and transitional justice through a unique blend of theory, practice and experience. This happens with the aim to empower future decision makers to work to establish the rule of law in transitional countries, and to influence changes in transitional countries towards sustainable rule-of-law governance.

The articles published in this book reflect both the seriousness with which the students participated in the Summer School, and the high quality of their work. The authors not only analyze the difficult challenges countries in transition face when dealing with their past, but also offer solutions for transitional justice. I would like to congratulate the editors and authors of this valuable collection of essays. I wish the publication a great success: May it not only be used as a source of inspiration for students, academics, practitioners in the field of rule of law, transitional justice, and human rights alike, as well as for politicians and other opinion-makers, but also contribute to the further strengthening of peace and democratic stability in the countries of South Eastern Europe. It is my hope that the countries of the region, after a decade of post-war reconstruction and two decades of post-communist/-socialist system transformation finally come to terms with their (recent) past. The ISSS with its important publication can partly contribute to this.

Dr. Stefanie Ricarda Roos, M.A.L.D.

(Ms. Roos was the director of the Konrad-Adenauer-Stiftung's Rule of Law Program South East Europe from April 2006 - May 2010.)

PREFACE

The idea of having an international summer school in Sarajevo for social science students was born in 2006. A pilot project, which would become the International Summer School Sarajevo (ISSS), was a response to the limited freedom of movement that most countries of South East Europe region suffered from. At that time, it was very difficult to travel outside of your country even for educational purposes.

The main idea of “Pravnik” was to create an annual event that would attract students from both EU and non EU countries and offer a high quality program that would be accessible to all interested students. Five years later we are proud to say that the pilot project evolved into a highly competitive academic event which takes place every year in Sarajevo during the summer. Previous editions of the summer school brought together young people from Europe and the US and finally beating its own diversity record in 2010 with 22 countries represented by 30 students.

Such accomplishments would not have been possible without the Konrad-Adenauer-Stiftung Rule of Law Program South East Europe which has been a valuable partner and support in the creation of a very demanding and challenging academic atmosphere that allowed ISSS alumni to present their ideas and share new concepts with their fellow students and leading experts in the field of rule of law, transitional justice and human rights. Of course, the great dedication of all ISSS lecturers, who shared their valuable knowledge and expertise year after year, has played a great role in the success of the ISSS project.

As the freedom of opinion and expression have been values carefully nurtured by project’s partners, this publication represents a patchwork of different thematic discussions that have been initiated during the summer school. These young people, ISSS alumni whose works are being shared with you through the Journal, represent a new wave of thinkers set free from boundaries in their hunt for knowledge and intellectual challenges. They are current and future academics, policy makers, lawyers and teachers.

The Association “Pravnik” is honored to have the opportunity to share their work and ideas with the wider public. In the years ahead we can only hope that International Summer School Sarajevo will host additional generations of alumni with the aim to promote democratic values and human rights across South East Europe and further afield.

Lana Aćkar,
Co- President of Association “Pravnik”

A WORD FROM THE REDACTOR

By Lejla Hadžimešić

International Summer School of Sarajevo (ISSS) is a summer school established in 2006 and intended for graduate and postgraduate students interested in human rights and transitional justice. Over a period of two weeks, students have an opportunity to receive a first hand insight into the contemporary discussion on the issue of human rights and transitional justice through a unique blend of theory, practice and experience with the aim to empower future decision makers by bringing together experienced professionals and young scholars from all over the world (with a particular focus on South-East Europe) and thus contributing to the global discussion on the issue of human rights and transitional justice.

Transitional and post-conflict nature of many countries around the globe makes them new democracies, facing the transition process which always foresees big changes in a legal system that requires results in its effectiveness and efficiency in the aspect of rule of law. Transitional justice today is a diverse and vibrant field. As it has grown, it has found common ground with social justice movements, as well as the fields of conflict resolution, peace-building, and historical memory and other aspects of this multi-faceted process. The ISSS represents a perfect forum for discussions in this field.

Nevertheless, the role of the ISSS does not stop there; as part of its program, or more precisely, as its direct output, students are requested to apply the knowledge they gained through interactive discussions and lectures provided by prominent experts in the area of transitional justice into an essay where they analyze and elaborate on various segments of transitional justice, including the inter-relation between different human rights in the context of transitional justice, problems related to human rights in transitional societies and even specific transitional justice mechanisms in particular societies.

The selection of a topic is usually the first indicator of quality of the essay. Additionally, the extent to which the authors elaborate on a particular topic indicates the knowledge they gathered during the summer school, combined with their previous knowledge they had brought to the school and thus contributed to the quality of its program.

The first thing that strikes the reader of the essays is the richness of the carefully selected topics and areas covered by the authors. Its richness is reflected in a number of ways: the authors elaborate on various globally open questions that go beyond transitional justice *per se*, such as the impact of trading justice for peace on global scale, reconciling the retributive to restorative justice, contribution of transitional justice to the maintenance of international peace and security, as established in the universally accepted norms such as the United Nations Charter and many more. While doing so, the authors explore the most diverse examples of local contexts where individuals are affected by global ideas and norms or lack of their existence in their day-to-day lives.

Before a reader indulges into the rich elaborates on the development of transitional justice in various contexts, it is necessary to establish a few common ground points, which, needless to say, have been the starting point for all the authors of this publication.

Firstly, regardless of how critical one might be of a particular transitional justice process, it is necessary to step back and see the process from a different angle: when reading about criticisms of a transitional justice process in a particular country, one has to keep in mind that previous regimes or conflicts encompassed a number of gross, widely-spread human rights violations of individuals that as a result took away many lives and brought many

individuals into a situation of an almost irreparable despair. If this human side is taken into account, it is clear that transitional justice was an inevitable process. It is from this angle that the authors explore and critically review various transitional justice processes. In other words, rather than exploring whether or not the particular transitional justice process should have taken place, they explore how well the process has been done and how its quality might be or might have been improved. Silence to injustice is never the answer, since it can lead to new conflicts, as it was rightly brought up in one of the brilliant essays in this publication.

Another common ground in the essays is that fighting impunity, and leaning towards international criminal law has always been assumed, and was never meant to be put into question. One of the authors rightly reminded us that *"injustice is human, but more human is to fight injustice"*. The issue that was elaborated on throughout several essays instead was how criminal justice is necessary, how its absence can cause further violations of individuals' rights, how it can combat denial and help communities come to terms with their recent history and finally, how criminal justice could contribute to other parallel processes in a society: peace, stability and reconciliation, to name a few.

Finally, when we look carefully into the international human rights law, in fact we talk about a number of norms established over the years and commonly accepted by the states, ultimate duty-bearers of the human rights protection at the national level. At this point, it is important to stop and think of an important question in this process: are the norms created in order to be implemented in practice, or is it the practice instead that creates the norms? A number of essays in this publication prove once again that the latter is the case, and as such, this is where their outstanding contribution primarily lies. In other words, all the essays have one thing in common: their extraordinary contribution to the development of transitional justice through the application of international human rights law, rule of law principals and principals of contemporary democracy.

The principal feature of this publication is its originality and its creativeness. It is followed by the feature called the response to skeptics that the human rights protection does make a difference and finally that human rights, rule of law, democracy and eventually international law is a movement, an evolving process that reaches the individual and its basic rights provided to him or her at birth:

"Where, after all, do universal human rights begin? In small places, close to home - so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighborhood he lives in; the school or college he attends; the factory, farm, or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world."¹

And thus, as simple as that, the logical cycle of this process gets closed and wrapped up. This publication is intended primarily for those who believe and want to believe in international human rights law as an asset of making the world a better place.

¹ Eleanor Roosevelt, on the occasion of the adoption of the Universal Declaration of Human Rights

WHAT IS TRANSITIONAL JUSTICE?

By Noémie Turgis*

ABSTRACT

The idea that, to reconstruct a peaceful and stable basis for a society that went through massive violations of human rights, it is necessary to use a form of justice designed to face the past, which is now widely accepted and promoted. The debate on transitional justice has not dried up and remains more than ever a pertinent question. Nonetheless, no formal work has yet been able to precisely define the meaning of the concept. In the following pages, I argue that, keeping in mind the difficulties encountered when coining a definition, it is necessary to define and identify the objectives of such a concept. I however argue that to keep broadening the scope of transitional justice could be dangerous.

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What is Transitional Justice? Ruti Teitel, one of the most authoritative writers on the question, recently qualified transitional justice as being “globalized”². And it is indeed true that the discourse on the question of transitional justice is much more general and systematic than it has ever been in the past. The field of transitional justice has undeniably experienced an exponential growth over the last two decades. Its development has been extremely fast. The creation of the “*International Journal of Transitional Justice*”³, the existence of several institutes of research⁴, the growing interest of NGO’s⁵ and the organization of summer schools dedicated to the study⁶ of this field speak for itself. Transitional justice has become an autonomous branch of research and practice and arouses many questions studied as a coherent and systematic matter. And yet nobody precisely knows what transitional justice is.

Coining a definition for an expression such as transitional justice is not an easy challenge, as nobody fully agrees on its implications. The lack of consensus on the material content of this new field finds an echo in the fact that the expression itself is called into question. To

designate the same phenomenon, researchers use for example terms such as “post conflict justice”⁷ or “post-oppression or post-violence justice”⁸.

This difficulty put aside, one important question still needs to be answered: what is transitional justice? To what does transitional justice specifically relate? Does it represent an extraordinary form of justice? Is it the justice system itself that is in transition? Does it refer to *any* kind of ‘justice’ associated with periods of political change? There is no shared and accepted definition of what transitional justice is. There is of course a global and consensual perception that it refers to situations in which a society has to deal with a history of massive violations of human rights during a period of political transition. But is this enough? The fact that most authors and practitioners do not particularly attempt to define it anymore, and take the existence of a systematised field or concept of transitional justice for granted, is striking. It seems that it does not even raise any more doubts that transitional justice can be studied as a comprehensive domain that raises specific questions to which general answers can be given. The object here is absolutely not to contest the existence of such an autonomous field but to highlight the hypothetical consequences of its elusiveness.

In most of the literature dedicated to the study of transitional justice, authors describe the phenomenon through its mechanisms. The method commonly used consists of enumerating all the measures agreed to be constitutive of some form of transitional justice, in order to try to give a global picture of what transitional justice refers to. Scholars and even the Secretary-General of the United Nations have continuously pointed out this lack of a shared understanding. Talking about the concepts of justice, rule

² « *Transitional justice globalized* » is the name of the introductory lecture given by Ruti Teitel at the conference « *Taking Stock of Transitional Justice* » organized by the *Oxford Transitional Justice Research Group* on the 26-28 June 2009. Ruti Teitel is one of the most authoritative writers on the subject and is the author of *Transitional justice*, Oxford University Press, 2000, 292 p.

³ *International Journal of Transitional Justice*, Oxford journals, available at <http://ijtj.oxfordjournals.org/>

⁴ See, for example, the Transitional Justice Institute, University of Ulster (UK) at <http://www.transitionaljustice.ulster.ac.uk/> (12 October 2009), the Oxford Transitional Justice Research Group, University of Oxford (UK), <http://www.csls.ox.ac.uk/otjr.php> (12 October 2009)

⁵ The most relevant being the International Center for Transitional Justice, <http://www.ictj.org/en/index.html> (12 October 2009)

⁶ See the Annual summer school organized by the Transitional Justice Institute of the University of Ulster (<http://www.transitionaljustice.ulster.ac.uk/>) and the International Summer School Sarajevo (<http://www.pravnik-online.info/cms/index.php?international-summer-school-sarajevo-2009>)

⁷ Bassiouni, M. C., (ed.), *Post-conflict justice*, 2002, Ardsley, NY: Transnational, International and comparative criminal law series, 850 p.

⁸ Mihai, M., “Transitional Justice and the Quest for Democracy: A Contribution to a Political Theory of Democratic Transformations”, *Ratio Juris*, 2010, Vol. 23, n°2, p. 184.

of law and transitional justice, he noted that “there is a multiplicity of definitions and understandings of such concepts”⁹. A. Boraine made the same remark a few years later: “Despite the fact that ‘transitional justice’ has become a widely accepted term, there nevertheless remains confusion about this concept”¹⁰.

There is, broadly speaking, a common understanding of what the expression transitional justice relates to. And unquestionably, there are some definitions that are more often referred to, and that act as point of reference. Thus, the definition provided by the Secretary-General of the United Nations in its 2004 report is one of the most cited. In this report, “Transitional justice” refers to “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof”¹¹. Another quite commonly acknowledged definition is the one from R. Teitel, according to which, “[t]ransitional justice refers to the view of justice associated with periods of political change, as reflected in the phenomenology of primarily legal responses that deal with the wrongdoing of repressive predecessor regimes”¹². As a third definition, it is useful to highlight the one offered by the International Center for Transitional

Justice, one of the main NGO’s working on the subject: “Transitional justice is a response to systematic or widespread violations of human rights. It seeks recognition for victims and to promote possibilities for peace, reconciliation and democracy. Transitional justice is not a special form of justice but justice adapted to societies transforming themselves after a period of pervasive human rights abuse.”¹³. But are these definitions enough? What is the risk of allowing the still-expanding field of transitional justice without a common definition? Do we really need a definition?

It seems that, like in any field of research, it is requisite to determine what a concept designates before studying it. The following section therefore seeks to try to determine what elements distinguish transitional justice from other kinds of justice. If we try to sum up the elements generally proposed to define the scope of this young field of study, three elements stand out and appear to be its main features. Transitional justice is indeed always referred to through its context, its objectives and the type of mechanisms used. If we rely on the many processes and mechanisms called transitional justice and the definitions given by the scholars and civil society, transitional justice can be identified based on five criteria.

- Systematic and/or grave violation of human rights
- State sponsorship in the commission of those violations
- Transition, political transformation, constitutional rearrangement
- Treatment by a specific mechanism or a measure specific to the transition of those violations, by the state or with its direct support
- The direct goals are to achieve accountability, truth and reconciliation in order to

⁹ *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc S/2004/616, 24 august 2004., p. 4.

¹⁰ Boraine, A., L., “Transitional justice: a holistic interpretation”, *International affairs*, Vol.60., Issue 1, 2006, p. 17.

¹¹ *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc S/2004/616, 24 august 2004, p. 4.

¹² Teitel, R., “Transitional justice in a new era”, *Fordham international law journal*, 2003 Vol. 26, issue 4, p. 893.

¹³ International Center for Transitional Justice, « What is transitional justice? », 12 October 2009, <http://www.ictj.org/en/tj/>.

promote a transition toward the consolidation of peace, the guarantee of stability, the reinforcement of democracy and the rule of law, and reconciliation.

If an institution is set up in the context, and to achieve the objectives identified, it is a mechanism of a transitional justice process. In those five elements, two major categories of indices are noticeable: all the contextual elements which are giving birth to a situation requiring some form of transitional justice on one side and the elements which allow us to determine whether a mechanism has effectively been set up. Those elements are again part of the “common understanding” category. Nonetheless, they reflect this global perception of what transitional justice is.

Despite the fact that it is not entirely possible (yet?) to define precisely and to fix the meaning of the concept, it seems that a few more elements have to be emphasized as particular features of this domain. Above all, transitional justice is a process. It is impossible to define a mechanism withdrawn from its context as being some form of transitional justice. An instrument, usually not considered as being usually part of the transitional justice field, can be qualified as such when it is used within its specific context and serves its objectives. The purpose is to identify the exercise of transitional justice and not the quality of a mechanism as specifically being a transitional justice body.

Second of all, transitional justice is a bargain or the result of a bargain. There is no need to study for a long time the potential risks of a non-adapted application of the law and the conduct of a normal process of justice in such a period of political instability to understand the imperative necessity to put in the balance the demands of the victims and the whole society and the political and strategically constraints faced by the new government. The effective implementation of State obligations is then a subject of controversy. The application of reparation programs gives an example of these

difficulties. Victims of human rights violations are entitled to claim for reparation for the harm they suffered to their government. The existence of such a right guaranteed by international law is increasingly acknowledged¹⁴ in the international community. But those international standards are in reality, and depending on each context, extremely hard to implement. The State has just gone (or is still going through) a transition. Considering its usual lack of resources in such a period and its multiples priorities in the perspective of a long-term reconstruction, the capacity of the government to provide such reparations can be highly limited¹⁵.

The goal is to find a balance between the objectives pursued, the necessity to respect some ‘standard minimum’ in order to draw a visible line between the ancient regime and the new one and, lastly, the necessity to maintain peace and stability, which usually had been hard to obtain, in the considered region. Transitional justice is then a delicate compromise between a heavy heritage, the determination to make some norms and ideals respected and objectives sometimes incompatible. The lack of common understanding is not helping in the determination of the right balance in a particular context.

Lastly, and as a third element of distinction, transitional justice is multidisciplinary. The answers sought to strike the right balance between all the imperatives of the society or to answer the many problems of the new governments are a combination of a multidisciplinary search. Transitional justice involves law, political science, sociology, psychology, history, ethics and morals and tries to bridge the gap between all those different domains of studies to offer the most appropriate answers to the particular set of dilemmas identified as being part of the

¹⁴ See De Feyter, Parmentier, Bossuyt, Lemmens (eds), *Out of the ashes : reparation for victims of gross and systematic human rights violations*, 2005, Antwerpen [etc.] : Intersentia, 522 p.

¹⁵ The selection of the victims entitled to claim for such reparations is also a high subject of controversy, the notion of victim lacking a universal or agreed definition.

transitional justice field. The several questions examined through the lens of transitional justice are common to multiple fields of studies that propose different analysis. Transitional justice seeks to reassemble and coordinate those answers. This commitment to find the answers and overcome the surgical separation between distinct academic fields of studies constitutes one of the features of transitional justice.

Nonetheless, transitional justice has to be kept under the umbrella of international law, which sets up the appropriate standards for the protection of human rights and clarifies the priorities that the new governments have to focus on. The transition is not a circumstance that exonerates a State from its international obligations. Transitional justice is interdisciplinary and its implementation is the result of a compromise between the many imperatives of transitional societies, identified through several angles of perspective. But the transitional State is still under the obligation to respect its obligations, especially relating to human rights.

A lot of questions still need to be answered in the transitional justice debate. More than the definition of the expression itself, the elements being described as the goals of any process of transitional justice are still controversial. Nearly all the stated objectives of transitional justice have been criticised. The question of reconciliation is a good example: at the early stage of the debate, it was argued that transitional justice mechanisms and justice measures in general, were threatening the possibility of reaching a state of national reconciliation in a country. Soon, providing healing for victims and their family and promoting peaceful coexistence became the main objectives of those institutions, most of the truth commissions even being called 'truth and reconciliation commission'. Today, seeking reconciliation through those official bodies is still controversial, partly because of its religious roots, but also because it is increasingly argued that

reconciliation is above all a matter of individual will on which no institution can have a real impact. The same observation can be made on many of the declared goals of transitional justice¹⁶. Even the relationship between these objectives has raised a lot of dilemmas even though, nowadays, they are much more presented as being complementary.

At the early stage of its development, transitional justice was expressly linked to the democratization processes, even in the United Nations discourse surrounding their "peacebuilding activities". What soon became the "paradigmatic transition" of transitional justice, that is to say the journey from a non-democratic government to the establishment of a democratic one, is now contested and called into question¹⁷. First of all this label cannot encompass the variety of transitional situations this form of justice seeks to support (like the transition from conflict to peace, the most frequent contemporary form of transition). Secondly, the process of democratization itself has raised a lot of criticism, relying on the non-exportability of the western liberal model of democracy and underlying the emergence of a form of neo-colonialism or neo-imperialism through measures imposed from abroad. As a consequence, the rhetoric around the destination of the transitional journey has progressively shifted to now emphasize implementation of the rule of law principle, and of the protection of human rights, perceived as universal aims of every society, as the goals of the transition that transitional justice seeks to facilitate.

¹⁶ For example, if the search for "truth" is not really contested, the meaning and the kind of truth looked for is much more debated: can a tribunal deliver truth? Is it the role of a commission to deliver a full historical account? These are two symptomatic interrogations over this question. See Bronwyn, A. L., «The Irreconcilable Goals of Transitional Justice», *Human rights quarterly*, Vol. 30, issue 1, pp. 95-118.

¹⁷ See CAROTHERS, T., "The end of the transition paradigm", *Journal of Democracy*, Vol.13, n°1, 2002, pp. 5-21. The author argues that "The continued use of the transition paradigm constitutes a dangerous habit of trying to impose a simplistic and often incorrect conceptual order on an empirical tableau of considerable complexity." Ibid, p. 15.

The discourse is also now much more victim centred than it was at the beginning.

The issues that the domain of transitional justice continues to raise are far from being settled. This is maybe one of the first reasons why it can be dangerous to broaden the scope of the objectives of transitional justice to extremely ambitious and varied aspirations, going from peace building to economic development. It is obviously a good thing if transitional justice can facilitate and promote other ambitions of a particular society. But transitional justice should not be used and thought of as a kind of magic wand. It cannot do everything and it could even lead to nothing if its primary goals are not well established and remembered. The risk of broadening the meaning of the concept is to dilute it and turn it into something meaningless. This is why it is important to bear in mind why the discourse on transitional justice has been developed in the first place. Whether it is even possible to give a precise definition of what is meant by transitional justice is another question. Transitional justice is especially designed to help a society turn into something different from what it had known in relation to violations of human rights, through different kinds of goals. Considering this transformative purpose, transitional justice is maybe only what it takes to make sure victims of atrocious human rights violations will find a certain compensation for their suffering and, above all, that they will not be subject of such violations again. The core element of transitional justice is here: offering a “toolbox” filled with elements designed to deal with the violations of human rights from a predecessor regime to form the basis of an order able to prevent their reoccurrence. It took a long time to acknowledge that, in order to facilitate a transition and establish a good basis for peaceful development, some form of accountability is needed. It is therefore natural that defining what this justice means and what its objectives are takes a long time too.

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QUANTITATIVE IMPACT ASSESSMENT IN TRANSITIONAL JUSTICE RESEARCH: NO SINGLE TRUTH IN PLACE?

By Vera Riffler*

ABSTRACT

Transitional Justice (TJ) mechanisms have seen a rise both in number and popularity. The so called “Justice Cascade” is marked by a proliferation of TJ mechanisms worldwide. TJ as a tool to deal with a past of mass human right violations and intends via a number of mechanisms (trials, truth commissions, reparations, amnesties, vetting, etc...) to come to terms with the past, to reconcile society, to bring justice to the victims, to strengthen the rule of law and democracy and to establish accountability. The debate on the intended impacts of TJ however has been conducted largely on a theoretical basis or on the grounds of qualitative research. Only lately there have been a number of quantitative studies on large scale cross country impact assessment of TJ mechanisms. Nevertheless research results are very mixed and do not leave space for clear conclusions. This paper explores the debate on TJ impacts as well as the state-of-the-art of quantitative research and results. Further a number of shortcomings and necessary improvements are highlighted. The study provides an overview of the field of quantitative research in the realm of TJ underlines the importance of qualitative and quantitative impact assessment and provides a short outlook on needed future research.

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Introduction

The famous quote of the South African cleric Desmond Tutu “No future, without forgiveness” reflects in a simple manner the causality that researchers often ascribe to a lack of transitional justice mechanisms after transition processes. However the causality in TJ research is not as crystal clear as the quote implies. There are still a number of questions yet to answer: Does transitional justice (TJ) promote forgiveness? Is there an inherent effect of transitional justice mechanisms on peace and the spread of democracy? Will different types of mechanisms have the same positive effect on political stability and will they prevent society from taking up arms? Are TJ mechanisms beneficial for societies in transition at all? Transitional justice “is commonly understood as a framework for confronting past abuse as a component of a major political transformation. This generally involves a combination of complementary judicial and non-judicial strategies” (The Encyclopedia of Genocide and Crimes Against Humanity 2004: p. 1045) such as human right trials truth commissions, reparations or vetting.

TJ mechanisms have seen a rise, not only in number but also in popularity. The democratization processes in Latin America in the 1980’s marked the end of the politics of impunity (de Greif 2008: pp. 30) and truth commissions and other mechanisms of TJ for the clarification and prosecution of grave human right abuses and mass atrocities started to spread. Based on this development the so called “Justice Cascade”¹⁸ took off and TJ-mechanisms have been applied in almost half of all transitions (Sikkink and Walling 2006: pp. 9).

Since then there has been major debates around the questions of impacts and effectiveness of TJ mechanisms on society and politics. The advocacy of TJ

mechanisms has focused its discussion on the positive impact of different TJ mechanisms on democratization, human rights, promotion of peace and reconciliation. Within the debate there is also a discussion on the question which TJ mechanism is most adequate for dealing with the past and thereby has the most beneficial impact. Whereas TJ opponents see no or a negative causality between truth, justice and peace and some even expect that TJ undermines a peace process.

Research has mainly focused on single case studies or qualitative comparative case studies and the examination of effects of single mechanisms. Only in the past few years has there been research on quantitative analyses and large scale cross-country statistical assessments on the impact and effectiveness of TJ mechanisms. However, also quantitative impact assessments on TJ mechanisms have failed to offer substantial answers to the discussion and to reveal a clear causality between TJ mechanisms and societal and political change. Even though quantitative analysis of TJ constitutes only one piece of the research puzzle it is nevertheless important in order to identify certain systemic effects and impacts in general and to formulate implications for policy makers in the field of TJ.

The purpose of this paper is to give an overview of the results of quantitative impact assessment of TJ mechanisms and discuss the academic void in effectiveness and impact analysis of TJ research. Chapter 2 will reflect shortly the current debate and state-of-the-art of the discussion on TJ impacts and effectiveness. Chapter 3 is dedicated to quantitative studies on TJ mechanisms and its results. Subsequent to the chapter beforehand the void in academic quantitative research is discussed. Finally in Chapter 5 a conclusion will be drawn.

The Transitional Justice Debate on Impact and Effectiveness

Transitional Justice is a multifaceted concept which not only includes a number

¹⁸ Sikkink und Walling (2006) investigate in their empirical work „Errors about Trials: The Emergence and Impact of the Justice Cascade“the development of the continuously rising number of TJ-mechanisms (Human Right Trials and Truth Commissions) after regime change. They label the phenomenon of steady growth in number as the „Justice Cascade“.

of different sometimes complementary and sometimes divergent instruments, like truth commissions, human right trials, amnesties, reparation and vetting but which is also analyzed from different multidisciplinary angles. Transitional justice can be looked from a legal, political, moral, sociological and even theological perspective and depending on the respective angle the answers that will be found and the conclusions that will be drawn will not be able to construct a complete picture. However, apart from the theoretical and normative analysis and understanding of TJ, a driving and connecting issue between different areas of study has been the question of impact and effectiveness of TJ.

The debate on the impact of TJ mechanisms has been focused largely on the distinction between retributive and restorative justice. The former refers to the conviction of perpetrators and comprehensive measures like national or international human right trials as well as lustration and vetting. The latter aims at coming to terms with the past, restoring the relationship between perpetrator and victim and reconciling the society by implementing truth commissions, reparations or compensations for the victims. The differentiation between the two ethical concepts has also largely shaped the debate on impacts of TJ. The opponents of restorative justice assume, that retaliatory measures are needed in order to bring justice to the victims and that adequate punishment will be deterring future deeds due to utility expectations of the yet-to-be perpetrator (Elliot 2001; Kritz 2001; Neier 1998; Rotberg & Thompson 2000). The lack of retributive justice is seen as destabilizing for the state and society as hate and anger of the victims will be fueled and revenge will be carried out by arbitrary law. At the same time the deficient development of the judicial system will not only allow for further atrocities in the future but will also send the wrong signals to spoilers and society. It is assumed that retributive justice strengthens on the long run the judicial system and the rule of law (Snyder

& Vinjamuri 2003). Whereas the proponents of restorative justice argue from the standpoint of the victims and at the same time they focus on the restoration of the social order and the reconciliation of formerly antagonized groups. The comprehensive discourse of the past, the official acknowledgement of massive violations and of the victims, as well as the chance for reconciliation and forgiveness will contribute to the reduction of resentments in the society and to the promotion of a peaceful interaction in their point of view. The measures of restorative justice will also enable a compromise between the antagonized groups and provides an incentive for all parties involved to allow for a peaceful transition. Furthermore it is argued that respect for human rights and the legitimacy of the state is fostered and hence, the democratization process is furthered (Hayner 1994 & 2001; Lederach 1997; Minow 1998). Reparations are also seen as beneficial for reconciliation as the victims are enabled to restore their dignity, reintegrate in society and to rebuild their trust into institutions and society (Brooks in Torpey 2003: pp. 110; de Greiff in Miller & Kumar 2007).

The more recent debate on TJ has not so much focused on the question of "truth vs. justice" or "restoration vs. retribution" anymore but rather on the increasing use and interplay of various mechanisms at a time. The main question in that debate centers on the adequate combination and sequencing of mechanisms and possible outcomes of different modes and their combination. Therewith the debate not only concentrates on the impact of TJ but also on the effectiveness of TJ due to different combinations of implementation (Barahona de Brito et al. 2001; Hafner & King 2007; Hughes et al. 2007; Mariezcurren & Roht-Arriaza 2006). Mariezcurren and Roht-Arriaza (2006: p. 8) point out that „only by interweaving, sequencing and accommodating multiple pathways to justice could some kind of larger justice in fact emerge”.

Finally a number of authors doubt or neglect the impact of TJ on concepts such

as reconciliation or retribution and they question the causality between truth, justice and peace in general (Mendeloff 2004; Baehr in Hughes et al. 2007). Whereas other critical voices see even a negative correlation between TJ and peace. They argue that “the cornerstones of justice and truth are normative – often imported – constructs, which will encounter in the respective post-conflict societies to a lesser extent a promoting then rather a conflict intensifying minefield” (translation after Buckley-Zistel 2008: p.19) .

The expectations on TJ mechanisms and their impact are mixed in the literature. Although there are different schools of thought the majority do not neglect the positive impacts of TJ mechanisms one way or the other. Nevertheless some questions remain unanswered: Is there an inherent overall positive of TJ mechanisms on society and institutions? Is there a different impact of different TJ mechanisms or are they all in a similar way beneficial? Is there a certain timing and combination which makes TJ mechanisms more effective?

The next chapter examines the quantitative research in TJ impact assessment and outlines the results and certain answers to the risen questions.

Quantitative Impact Assessment of Transitional Justice

Comparative and quantitative studies regarding TJ mechanisms have been neglected by the TJ discourse for quite some time. The majority of studies focus on single case studies or qualitative comparative studies. The reliability, validity and generalization of these findings are very limited. Conclusions drawn by these studies cannot easily be transferred to other countries and contexts? “Individual case studies help us to understand contexts and build theories, but to provide broad guidance, they must be tested on other cases to determine their scope and generalizability” (Paris et al. 2008: p. 42). The low degree to which single case study results can be

generalized underline the necessity and importance of quantitative research as a complement to qualitative research and findings.

The comprehensive comparative study of de Brito et al. (2001) marked the start of a number of studies that evaluated the impact of TJ mechanisms at large scale. De Brito et al. investigate the impact of trials, truth commissions and lustration on democratization and rule of law in a qualitative, comparative study of 19 countries in transition. The authors identify mixed results, as the mechanisms do not have a clear impact on democratization but seem to trigger reform processes in some cases and in addition they improve regime legitimacy. The first quantitative studies in the field of TJ can be found from year 2003 on.¹⁹ The impact assessment focuses largely on the institutional level. The most examined field of research is therewith the impact of TJ on democratization and human rights practice. Brahm (2006) takes a look on the influence of truth commissions on the human rights situation in 78 countries by assuming that the implementation of a truth commission will have a positive impact on the human rights situation in the following years. His hypothesis is rejected as the results do not show any statistical significance. Whereas Sikking & Walling (2006) come in there simple bivariate statistic to the conclusion that there is a positive effect of truth commissions on human right practices. Kim (2007) affirms the finding through his analysis of all transitions between 1974 and 2004, where he identifies that having a human rights trial in comparison to not having one decreases the degree of repression about the half. Also Olsen et al. (2008) find evidence for causality between trials and human rights in their multivariate analysis. They further find that trials have a positive impact not only on the human rights situation but also on democracy indicators and on the rule of law (operationalised by the Governance

¹⁹ For a summarized overview please see Table I: Quantitative studies on transitional justice mechanisms, p. 11-13

Data of the World Bank), whereas neither trials and truth commissions nor amnesties have a significant impact on violence in their analysis (measured by the homicide rate of each countries). Studies that examine the effect of TJ on democratization also have varying results. Kenney and Spears (2005) for example find in their study on the impact of truth commission on democracy values in a sample of 16 countries over a period of 20 years that there is a positive correlation between truth commission in place and democracy indicators. The study of Snyder and Vinjamuri (2003) does not find a systematic relation between democratization and TJ mechanisms in contrast to the former results.

Other studies further focus on the effectiveness of TJ on peace. Long and Brecke (2003) investigate the effect of reconciliation-events on civil wars and intra-statal conflict. The authors identify a positive relationship between reconciliation and peace after civil war, as they argue that the confrontation with the past restores the legitimacy and humanity of the antagonized groups, defines new roles of the groups and constitutes the middle course between justice and impunity (2003: pp. 148). Binningsbo et al. (2005) examine in a very comprehensive quantitative study the effect of different TJ mechanisms (trials, truth commissions, reparations, lustrations, amnesties and exile) on the duration of peace in post-conflict countries. The authors come to the conclusion that only trials have a statistically significant positive effect on the duration of peace.

All studies nevertheless somehow confront the problem of endogeneity. Endogeneity refers in this case to the question of causality. The crucial problem is whether TJ mechanisms like truth commissions and trials are established because a democratization process takes place or the improvement of the human rights situation or vice versa where the democratization and human right scores are improving because of the TJ mechanisms in place. The assumption

that lies within the endogeneity problem is that given conditions determine the types of TJ mechanisms implemented. Consequently the measurement of the impact of certain TJ mechanisms might be biased as the impact measured might not be the result of the mechanism applied but the result of the circumstances beforehand. Therewith recent quantitative research has also focused on the problem of endogeneity (Binningsbo et al. 2005, Brahm 2007, Dancy and Poe 2006, Kim 2007). Different findings come to the conclusion that there is a certain relationship between the type of transition and the TJ mechanism applied. Trials tend to be more often implemented when there was a clear victory of one side and at the same time a clear victory contributes to a prolongation of peace in statistical analysis (Binningsbo et al. 2005). Hence one can not answer easily whether trials prolong the peace period or whether the peace duration endures because there has been a clear victory. In contrary to these findings truth commissions seem to be more often applied as a result of a negotiated agreement and if the regime exhibits already to some extent democratic features (Dancy and Poe 2006). This finding implies that democratization is not necessarily an outcome of TJ but rather a perquisite. Further there are consistent results regarding the diffusion factor of TJ. The implementation of TJ thus is more likely if there has been TJ in the region already (Dancy and Poe 2006, Kim 2007). Even though results on selection effects are mixed the factor of regional diffusion, regime type after transition and type of transition seem to play a certain role whether or not TJ and what type of TJ is implemented.

The Knowledge Gap in Quantitative Transitional Justice Research

“Transitional justice moves from the exception to the norm to become a paradigm of rule of law” (Teitel 2003: p. 71). Nevertheless there is still uncertainty about impacts of TJ. Qualitative and

quantitative studies have discussed and examined possible effects of TJ on society and institutions but results have been mixed.

One major problem in TJ literature is the number of assumption on TJ impacts that are not backed up by theoretical clear causalities and hence a “black box” is created. For example the link between the implementation of a truth commission and the initiation of reconciliation process is not well-grounded on an empirical basis, as stated in the literature: “(...) it remains for the time being an open question whether finding the “truth” will always contribute to reconciliation” (Hughes et al. 2007: p. 18). What is lacking in case of the “black box” phenomenon is the identification of a clear micro-macro-relationship in congruence with the “Coleman Bathtub” (Coleman 1994), otherwise research on the impact of TJ will face the problems in operationalizing indicators into measurable variables. Furthermore one “must distinguish carefully between moral and legal rationales, which are often undeniable, and poorly tested assumptions about salutary (or harmful) effects. (...) the TJ field must move from „faith-based“ to “fact-based“ discussions of transitional justice impacts (...)” (Paris et al. 2008: p. 45).

There is a number of further problems related specifically to quantitative research besides the lack of theoretical foundation and the micro-macro-level attribution. Quantitative transitional justice research faces many technical problems, such as data issues, methodological design, operationalization, etc... It would go beyond this paper to discuss these issues more in depth. Nevertheless one has to be aware of the shortcomings of quantitative data analysis as well.²⁰ In addition to rather technical problems related to the research design, the short literature overview on quantitative research in chapter 3 demonstrated that most of the studies

focus on institutional factors such as democratization and human right scores. Most of the studies are conducted on a macro-level especially through cross-country analysis. The levels of analysis are countries and the exception is the individual - besides the very comprehensive statistical country study of Gibson (2004) in which he conducted a representative survey that was statistically evaluated in South Africa. In order to analyze more concrete how truth, justice and reconciliation are interwoven certainly a closer look on the micro level is necessary. The question on how concepts like reconciliation and forgiveness, moral and normative justice could be communicated and adapted by the society and how the adaptation of these concepts contribute to peace and stability remains unanswered. Therewith, Further quantitative in-country studies are urgently needed.

Furthermore, the majority of analysis examine the impact of single TJ mechanisms and therewith the effect that might be caused by different mechanisms taking place at the same time or with a time lag is left out. Those studies can not capture the impact that TJ mechanisms have in a certain combination or sequence. Whether or not TJ mechanisms interplay and whether they cause similar and complementing or contrary effects has been unexplored up to now. Yet another shortcoming is caused by the fact that some studies merely focus on the length of a peace period or the re-occurrence of war. A lack of reconciliation and justice, as well as weak institutional structures do not necessarily end up in another civil war, nevertheless the lack might exist as a result of an absence of TJ or despite TJ. If further research is interested in finding out more about the effectiveness of TJ, then this problem has to be addressed as well. Finally the knowledge gap of research on effectiveness of TJ has to be filled. The question of effectiveness has almost not been part of the research debate at all. This would be a further point for quantitative but also qualitative research. It is important not only to

²⁰ For father discussion on short comings of quantitative analysis in transitional justice research please see: Paris et al. 2008, pp. 42

evaluate the impact of TJ but also its effectiveness regarding the questions how effective TJ was in the scope of impact and if the TJ impact reached its targets.

Conclusions

The paper has given a short overview of the state-of-the-art of quantitative analysis on TJ research and has highlighted some of the problems and knowledge gaps in the literature.

The rising number of TJ mechanisms in place and the growing extent of debate underline the importance of research also on impacts and effectiveness of TJ. For a long time most of the research has focused on single case studies or comparative qualitative case studies. Only lately some researchers have also focused on quantitative impact assessment of TJ on society and institutions. Nevertheless quantitative research in comparison to the vast number of qualitative research on TJ is still under evaluated. Many essential questions of TJ research remain unanswered and causality is still not clearly identified. Most impacts have been evaluated on the institutional level, like the impact on democracy and human rights. The studies analyses structural changes but fail to look at the individual level. Further the results still remain very mixed and hence are difficult to interpret or to be even considered for polity implications and recommendations. The short discussion of this paper has shown that there are still many problems to be tackled in quantitative research of TJ. "Given the growing reliance on transitional justice mechanisms and the serious knowledge gaps identified (...), there is a critical need for data collection and systematic analysis of the empirical effects of different TJ mechanisms" (Paris et al. 2008: p. 46). The field of quantitative research just emerged and further research and better efforts are needed. Nevertheless robust results of quantitative data combined with well-grounded qualitative research and a sound

theoretical basis can contribute to the implementation of better TJ designs as well as to the achievement of desired results through TJ such as rule of law, democracy, peace and reconciliation and to the formulation of concrete polity recommendations. And finally to the all and overarching aim of transitional justice for society and the state:

Never again!
Nooit weer nie!
Ngeke futhi!
Ga reno tlola!-
- Desmond Tutu -

Table I: Quantitative studies on transitional justice mechanisms (in alphabetical order) ²¹

Author (Year of Publication)	Investigation Units, Time Frame	Hypotheses	Results ²²	Dependent Variable (Dataset)	Independent Variables (Dataset)	Control Variable (Dataset)
Binningsbo et al. (2005)	291 conflict- and peace-periods, 1946-2003	- Trials, truth commissions, reparations and lustration → positive impact on duration of peace - Amnesties and exile of perpetrators → negative impact on duration of peace	m.r. -	- Duration of Peace in days (data generated by the authors) - Event-Variable which indicates whether there was another conflict (data generated by the authors)	- Trial, truth commission, reparation and lustration dummy: TJ mechanism took place - Amnesties and exile - Recipient of TJ: government or opposition	- End of conflict: victory, negotiation, cease fire (data generated by the authors) - Duration of the conflict (data generated by the authors) - Regime type before the conflict (Polity IV) - Economic situation after conflict (GDP from World Bank) - Conflict type: over territory/over government (data generated by the authors) - Intensity of conflict: number of deaths (Lacina&Gladditsch data set)
Brahm, Eric (2006)	78 countries in democratic transitions, 1980 - 2003	truth commissions → positive impact on human rights	N.S	- Human rights indicator (Cingranelli and Richards Human Rights Data Set)	- Truth commissions dummy: every year after a report published	- Democracy (Polity IV) - National Wealth (World Bank Development Indicator) - Population size (World Bank) - Participation in a War (Uppsala Conflict Data)
Dancy and Poe (2006)	77 cases of state failure, 1976-2003	- The more truth commissions applied in time and/or region → the more likely further truth commissions are implemented after transition - If UN is involved in negotiation process, if transition is negotiated, if transition is ended by power-sharing agreement, the more ethical fragmented and/or the more democratic institutionalized a country, → the more likely truth commissions are implemented after transition - The more Muslims living in the country → less likely truth commission is implemented after transition	n.s. / + + + n.s. n.s. + +	- Truth commission country-year-dummies: truth commissions taking place a given year in a given country (after Priscilla Hayner)	- Diffusion count (geographical data) - UN negotiation or UN peacekeeping activity (UN data) - Transition process - Transition Agreement (Keesing's Record of World Event) - Ethical Fragmentation - Number of Muslims (Insurgency, and Civil War project data) - Presence of elections	- Economic Development - Population size
Kenney and Spears (2005)	16 post-authoritarian countries, 1978 - 2003	Truth commissions → positive impact on democracy	+	- Democracy (Polity IV, Freedomhouse Political Rights Score, UNDP Electoral Democracy Index)	- Truth commission dummies: truth commission taking place, truth commission ended, truth commission report published	- Economic Factors (UNDP Statistics on GDP per capita) - Development Factors (Human Development Indicator of UNDP)

²¹ source: authors own representation

²² n.s = no statistical significant results

m.r = mixed results

- = negative correlation of the hypothesized relation

+ = positive correlation of the hypothesized relation

Author (Year of Publication)	Investigation Units, Time Frame	Hypotheses	Results 22	Dependent Variable (Dataset)	Independent Variables (Dataset)	Control Variable (Dataset)
Kim (2007)	Democratic transitions, 1974 - 2004	- The more TJ mechanisms have been applied (in time/region/cultural similar setting) → the more likely TJ mechanisms are implemented after transition - The more democratic a country, the more international standards on human rights are signed, the more human rights NGOs in a country, the more alternative TJ mechanisms in place (reparation, lustration, etc...) → the more likely TJ mechanisms are implemented after transition - The more repressive a country and/or countries with British common law tradition → the less likely TJ mechanisms are implemented after transition - Transition type influences TJ mechanism (state failing → TJ, democratic transition → TJ, reestablishment of country → no TJ)	+ + - n.s. n.s. n.s. + + + -	- Trials and truth commission country-year-dummies: trials and truth commission taking place a given year in a given country	- % of countries implementing TJ every year - % of countries implementing TJ per region - % of countries with the same religion/culture implementing TJ - Democracy (Polity IV) - Repression (Political Terror Scale by Cingranelli and Richards) - Ratification status of human right treaties - Number of human right NGOs - Legal Tradition - Type of Transition - Alternative TJ mechanisms	- Economic development (GDP per capita and GDP growth by Worldbank)
Kim and Sikkink (2009)	Democratic transitions, transitions after civil war and transitions due to creation of new states, 1974-2004	- Trials and truth commissions → less human right violations - Trials during ongoing civil conflict → more human rights violation - Trials in the region → less human rights violations	+ - m.r.	- Human rights violation (Physical Integrity Rights Index by Cingranelli and Richards)	- Transitional human rights trials country-year-dummies: trials taking place a given year in a given country	- Human rights violation before transition (Physical Integrity Rights Index by Cingranelli and Richards) - Democracy (Polity IV) - International wars and Civil wars - Economic Situation (GDP per capita and GDP growth) - British Common Law Tradition - Population size and growth - Region
Olsen et al. (2008)	Democratic transitions, 1970 - 2004	- Implementation of TJ-mechanisms in general → positive impact on democracy, human rights and rule of law - trials, truth commissions or amnesties → positive impact on democracy, human rights and rule of law	+ + + -	- Democracy (Polity IV) - Human Rights (Physical Integrity Index by Cingranelli and Richards) - Rule of Law (Governance date World Bank and homicide rate of the UN)	- Trials, truth commissions, amnesty and de-facto amnesty dummies: trials, truth commission and amnesty took place	- Economic Performance (GDP per capita by Worldbank) - Number of neighboring countries - Time since transition - Repression prior to the Transition (Polity IV)
Sikkink and Walling (2006)	14 countries, 1979-2004	- Trials and truth commissions → less human rights abuses	+	- Human rights abuses (Political Terror Scale Dataset)	- Trial-country-years and truth commission-country-years: : trials and truth commission taking place a given year in a country	None (simple bivariate analysis)
Snyder and Vinjamuri (2003)	32 cases of civil war, 1989-2003	- Weak political institutions and strong spoilers → if trials / amnesties → negative impact on peace → if truth commissions → positive impact on peace	+ / - +	- Democracy (Polity IV and Freedomhouse)	- Trials, truth commissions, amnesty dummies: trial, truth commission took place	None (simple comparison of value changes of the dependent variable)

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SOME ASPECTS OF THE GENOCIDE CASE AND THE (NON) ACHIEVEMENT OF TRANSITIONAL JUSTICE

By Amina Alijagić*

ABSTRACT

The focuses of this analysis are the issues regarding the rules of attribution and the legal consequences, both in the light of the Genocide case. From the transitional justice point of view, the judgment was regrettable in that it left thousands of victims without judicial redress and compensation, and this is unfortunate.

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Introduction

After 14 years of arduous litigation the formal proceeding of *Bosnia and Herzegovina v. Serbia* came to a juridical close on 27 February 2007 with the release of the 171-page *Genocide* judgment by the International Court of Justice (hereinafter: ICJ, the Court). In its ruling the ICJ held that the Republic of Serbia²³ was **not** responsible for genocide, the conspiracy to commit genocide, or the incitement of genocide pursuant to the Genocide Convention of 1948.²⁴ However, the Court did find that Serbia **was** responsible for two lesser claims: failing to prevent genocide at Srebrenica in 1995 and failing to co-operate adequately with the International Criminal Tribunal for the former Yugoslavia (ICTY), i.e., apprehend and extradite the Bosnian Serb commander, General Ratko Mladić.²⁵

Since attribution rules played a significant role in this judgement, it is important to understand that their function is to attribute to the state the conduct of persons who have acted against international law. For the purpose of determining whether a breach of international law has occurred, the International Law Commission

(hereinafter: ILC) raises first, the question of attribution in order to define whether a certain act is an “(international) act of the State”, one which is of relevance under international law. Only in a second step is it asked whether this act of the state runs contrary to international law and therefore an “internationally wrongful act of a State”. This order is emphasized not only by the ILC in Article 2 of the ILC Articles on State Responsibility²⁶ but also in the ICJ’s judgment in the *Teheran Hostages* case.²⁷ That the ICJ in the *Genocide* case proceeded differently, first addressing the question of the genocide and only afterwards the attribution matter, shall not be of further concern in this paper.²⁸

There is no easy rule that defines the requirements for attribution. In order to determine the required link between the state and the acting natural person, different rules apply in different situations. The ILC has proposed altogether eight different attribution rules within Articles 4–11 of the ILC Articles. Despite their apparent concreteness, the standards stated in some rules involve important ambiguities, and their application will often require significant fact-finding and judgment.

Furthermore, short clarification is also needed regarding the factual background of the *Genocide* case. Namely, the Socialist Federal Republic of

²³ The respondent in the case went through three transformations while the case was pending: it was first called the Federal Republic of Yugoslavia (FRY), following the break-up of the Socialist Federal Republic of Yugoslavia (SFRY) in 1992; it then changed its name to Serbia and Montenegro after the overthrow of Milošević in 2000; while it is now Serbia, since Montenegro declared independence in 2006. Fourth territorial transformation of Serbia happened one year after the *Genocide* judgement, on 17 February 2008, when Kosovo declared independence. The ICJ founded that the declaration did not violate international law (*Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Jurisdiction and Admissibility, Advisory Opinion of 22 July 2010, (2010) ICJ Rep., para. 123, point 3), but Serbia did not and probably will not change its name.

²⁴ Case Concerning the *Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Jurisdiction and Admissibility, Judgment of 27 February 2007, (2007) ICJ Rep., para. 471, points 2-4, (hereinafter: the *Genocide* case)

²⁵ *Genocide* case, para. 471, points 5-7

²⁶ *Draft Articles on the Responsibility of States for Internationally Wrongful Acts - with commentaries*, Report of the ILC on the Work of its Fifty-third Session, UN Doc. A/56/10 (2001), Art. 2, p. 34 (hereinafter: *ILC Articles*)

²⁷ *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Jurisdiction and Admissibility, Judgment of 24 May 1980, (1980) ICJ Rep., para. 56

²⁸ Obviously, the Court considered it to be important to seize the moment and elaborate on the various legal requirements of the prohibited forms of genocide. Considering the outcome of the case and the negative answer given to the attribution question this would not have been the case if attribution had been addressed first. And there may also have been considerations of practicability: against the background of quite broad claims the relevant acts had to be identified before the question of attribution was addressed.

Yugoslavia (SFRY), prior to its break-up, maintained a national Yugoslav People's Army (JNA). During the break-up of the SFRY the political leadership in the Serb-controlled region of Bosnia and Herzegovina formed its own entity called the Serb Republic of Bosnia and Herzegovina (subsequently named Republika Srpska, RS).²⁹ On 12th May 1992 the Army of Republika Srpska (hereinafter: VRS) was formed. Pursuant to a UN Security Council resolution,³⁰ the FRY *formally* withdrew JNA forces from Bosnia and Herzegovina on 19 May 1992.³¹ However, FRY merely transferred the troops of Bosnian Serb origin from the JNA into the VRS and maintained control over the VRS.³² The extent of that control became a critical issue for the ICJ in *Genocide* case as it tried to determine whether the acts of the VRS and other groups of Bosnian Serbs could be attributed to the Serbian state.

Issue of Unredacted Documents

The Court stated at the outset of its analysis that Bosnia and Herzegovina has the burden of proof in establishing its case and proving the facts it asserts.³³ Bosnia and Herzegovina accepted this as a general proposition, but put forth the argument that the burden should be reversed on the specific question of whether acts of genocide could be attributed to Serbia. Its rationale for this request was that Serbia had refused to provide full transcripts of several meetings of the FRY's Supreme Defence Council (hereinafter: FRY Council), which had already been disclosed by Serbia to the ICTY in the *Milošević* case.

The FRY Council consisted of the highest-ranking political and military officers of the FRY and was the constitutionally highest authority over the military during the events in question.³⁴ During oral arguments, counsel for Bosnia and Herzegovina argued that the unredacted versions of the minutes of the FRY Council meetings could be expected to show orders given by the FRY to armed forces in Bosnia and Herzegovina and payment by the FRY to officers in the VRS³⁵ – both of which would have been central to proving that the FRY exercised “effective control” over the actions of the VRS at Srebrenica. Regrettably, Bosnian team did not: (i) insist vigorously enough that these documents be produced; (ii) make it sufficiently clear to the Court that the documents were central to its case; (iii) make its request early enough.³⁶

For its part, Serbia (i) refused to provide these documents, stating that they contained sensitive national security information and that the request itself had not been made in a timely manner; (ii) argued that the ICTY Trial Chamber had ordered the documents to be held secret, and that by providing these documents it would violate the binding confidentiality order of the ICTY.³⁷ It is, of course, rather cynical of Serbia to argue that the disclosure of the documents would violate an ICTY order when it was precisely Serbia who had asked for this confidentiality order to be made, and when it is precisely Serbia in whose favour the privilege exists and Serbia who can waive it.

²⁹ “*The Republika Srpska never attained international recognition as a sovereign state, but it had de facto control of substantial territory, and the loyalty of large number of Bosnian Serbs.*” (*Genocide* case, para. 235)

³⁰ UN Doc. S/RES/752 (1992), para. 4

³¹ *Genocide* case, para. 238

³² *Prosecutor v. Tadic (Tadic Trial Chamber case)*, Opinion and Judgement, Case No. IT-94-1-T, Trial Chamber II, 7 May 1997, paras.113–118

³³ *Genocide* case, para. 204

³⁴ Marko Milanović, ‘State Responsibility for Genocide: A Follow-Up’, *European Journal of International Law (EJIL)* Vol. 18 No. 4 (2007), 677, note 34

³⁵ *Genocide* case, Oral arguments, Merits, CR 2006/30, 18 April 2006 (Softić and van den Biesen), para. 19

³⁶ Bosnian team asked for the documents only two months prior to the oral hearings, although the existence of these transcripts was known well beforehand, at least in 2003.

³⁷ *Genocide* case, Oral arguments, Merits, CR 2006/43, 4 May 2006 (Fauveau-Ivanović), para. 57-59

The basic problem here is not so much Serbia's conduct, but rather the ICJ's long-entrenched general passivity in fact-finding. We do realize that it is not the usual practice in ICJ litigation to summon witnesses or engage in other direct forms of fact-finding, but that is exactly the point – the *Genocide* case was not an ordinary case.³⁸ In what has since become one of the most controversial parts of the Court's judgment,³⁹ the Court not only (i) refused to request unredacted versions of the documents from Serbia, because then Serbia would have no objective reason for making them available to the ICTY and not to the ICJ;⁴⁰ it also (ii) refused to draw any inferences on account of Serbia's failure to provide unredacted versions of those documents.⁴¹ If Serbia had failed to abide by the Court's order, the Court would have been able to have much greater recourse to inferences in order to establish Serbia's knowledge of the genocide.

In attempting to justify its decision, the Court noted that Bosnia and Herzegovina had “*extensive documentation and other evidence available to it, especially from the readily accessible ICTY records*”.⁴² This is hardly persuasive, given that Bosnia and Herzegovina's reason for requesting unredacted versions of these documents was that it believed these documents would provide evidence on the issue of attribution that was not clear from the documentation it already

had available to it.⁴³ The *unredacted* documents were not available to Bosnia and Herzegovina from the ICTY because of a confidentiality order imposed by the Tribunal at Serbia's request.⁴⁴

Conclusion Regarding the Issue of Unredacted Documents

Given that the Court found insufficient evidence to attribute the genocide at Srebrenica to Serbia, the Court's failure to request unredacted versions of documents that may have been probative on the issue is likely to damage the legitimacy of the Court's judgment in the eyes of many. Of course, only Serbia, the judges of the ICTY trial chamber, and some members of the ICTY Office of the Prosecutor know how probative the unredacted versions of the FRY Council documents actually are. However, it is not an unreasonable

⁴³ Richard J. Goldstone, Rebecca J. Hamilton, 'Bosnia v. Serbia: Lessons from the Encounter with the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia', *Leiden Journal of International Law* Volume 21 (2008), 108

⁴⁴ It is interesting to mention on this place that the former counsel for the prosecution in the *Milošević* case, Geoffrey Nice, publicly accused the ICTY Chief Prosecutor Carla Del Ponte of making a deal with the Serbian Government to keep the FRY Council minutes confidential, even though *he* initiated subpoena proceedings against Serbia before the *Milošević* Trial Chamber in order to produce these documents in open court. (This allegation was first made in a letter from Mr. Nice to a Croatian newspaper: O. Obad, 'Carla Del Ponte nagodila se s Beogradom', *Jutarnji List*, 14 April 2007). According to Nice, this deal allowed Serbia to hide its involvement in Srebrenica from the ICJ. Ms Del Ponte, however, vigorously denied that any such deal was made, stating that protective measures on confidentiality could have been made and were made solely by the Trial Chamber, at Serbia's request. (ICTY Press Release, Statement of the Office of the Prosecutor, 16 April 2007.) It is impossible to establish the truth of any of these claims without being privy to confidential ICTY documents. It is certain, though, that a confidentiality order was indeed made by the Trial Chamber in the *Milošević* case, though the decision itself is also confidential. The Trial Chamber made at least 13 decisions pursuant to Rule 54bis. Two of these, although not available at the ICTY's website, are referred to by the *Second Decision on Admissibility of Supreme Defence Council Materials*, 23 September 2004, which is publicly available.

³⁸ Ruth Teitelbaum, 'Recent Fact-Finding Developments at the International Court of Justice', *Law and Practice of International Courts and Tribunals* Vol. 6 No. 1 (2007), 119

³⁹ See, e.g., R. Wedgwood, 'Slobodan Milosevic's Last Waltz', *International Herald Tribune*, 12 March 2007; M. Simons, 'Genocide Court Ruled for Serbia Without Seeing Full War Archive', *New York Times*, 9 April 2007

⁴⁰ The Court acknowledged that it has the authority to do so through its *proprio motu* powers under Article 49 of the Statute of the ICJ and Article 62 of the Rules of the Court. (*Genocide* case, para. 44, 205 and 206)

⁴¹ *Genocide* case, para. 206

⁴² *Ibid.*, para. 206

assumption that Serbia's argument that it cannot provide unredacted versions on the grounds of its national security interests, almost 15 years after the period in question, is simply a veil to keep hidden evidence of a more explicit link between the FRY and the acts taken by the VRS at Srebrenica. The unredacted documents may have also provided evidence of the specific-intent element that the ICJ failed to find regarding the commission of genocide in other areas of Bosnia and Herzegovina.⁴⁵

Even if, in actuality, the unredacted versions of the documents would not have provided an explicit link between the FRY and genocide at Srebrenica, the perception of unfairness generated by the Court's refusal even to ask for the documents is a sad legacy. At best, an international judicial process has the potential to lay contested issues to rest, thereby allowing those affected to move into a phase of healing and a more stable form of coexistence, if not complete reconciliation. By refusing, without any plausible justification, to request unredacted versions of the documents, the Court undermined its potential to play this much needed role in the region.

The ICJ's Concept of Attribution in the Genocide Case

Having refused Bosnia and Herzegovina's request to demand unredacted versions of the FRY Council documents from Serbia, the Court assessed the question of attribution on the basis of the redacted versions of the FRY Council documents and other

evidence presented by the parties.⁴⁶ Since Serbia had not admitted responsibility for genocide at Srebrenica, the ICJ could have found Serbia responsible only if it concluded that the acts of those who committed the massacres were attributable to Serbia. The procedure to be followed in this respect, set out by the ICJ, reads as follows:

*„First, it should be ascertained whether the acts committed at Srebrenica were perpetrated by **organs** of the Respondent, i.e., by persons or entities whose conduct is necessarily attributable to it, because they are in fact the instruments of its action. Next, if the preceding question is answered in the negative, it should be ascertained whether the acts in question were committed by persons who, while **not organs** of the Respondent, did nevertheless act on the instructions of, or under the direction or control of, the Respondent.“⁴⁷*

The ICJ followed this outline strictly and addressed first, with reference to Article 4 of the ILC Articles, the attribution rule concerning **de jure** organs.⁴⁸ As none of the persons or groups involved in the massacres at Srebrenica (official army of the FRY,

⁴⁶ We do not have enough place to show how the ICJ drew inferences not only from the findings of guilt made by the ICTY, but also – problematically – from the absence of certain ICTY convictions, and even charges, in order to find that genocide had **not** occurred in Bosnia in any region **other than** in Srebrenica. For instance, the Court implied that “had Milošević survived trial and been convicted of the crimes for which he was indicted, or had Karadžić and Mladić been arrested and brought to trial, then **the Court might have reached a different outcome...**” (Goldstone, Hamilton, ‘Bosnia v. Serbia’, 105-106)

⁴⁷ *Genocide case*, para. 384

⁴⁸ *Ibid.*, paras. 385–389; Article 4 of the ILC Articles, entitled ‘Conduct of organs of a State’, reads as follows:

“1. *The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.* 2. *An organ includes any person or entity which has that status in accordance with the internal law of the State.*”

⁴⁵ In the course of the Milošević trial, the Trial Chamber of the ICTY concluded that “**there is sufficient evidence that genocide was committed in Brcko, Prijedor, Sanski Most, Srebrenica, Bijeljina, Ključ and Bosanski Novi**” (*Prosecutor v. Slobodan Milošević*, Decision on Motion for Judgement of Acquittal, Case No. IT-02-54-T, Trial Chamber III, 16 June 2004, para. 289). This statement of course does not carry the evidentiary weight of a final judgment.

political leaders of the FRY, RS, VRS, General Mladić, the “Scorpions”) were found to have held the status of officially entitled organs under the internal law of what was at that time the FRY, the Court denied attribution for actions of *de jure* organs.⁴⁹

Still under the heading of Article 4 of the ILC Articles, the Court proceeded, however, by raising the question of whether the acts (of RS, VRS, as well as the paramilitary militias known as “Scorpions”, “Red Berets”, “Tigers”, and “White Eagles”) could be attributed to Serbia as acts committed by *de facto* organs.⁵⁰ In this respect the Court, with reference to the *Nicaragua* case,⁵¹ applied a test of “complete dependence”.⁵² According to the ICJ this test required proof that ‘*the persons, groups or entities act in “complete dependence” on the State, of which they are ultimately merely the instrument*’.⁵³ In applying this test the Court concluded that no such relationship existed between the FRY and the various examined groups of Bosnian Serbs.⁵⁴ Furthermore, it stated that “*differences over strategic options between Yugoslav authorities and Bosnian Serb leaders*” were evidence of “*some qualified, but real, margin of independence*” (sic!).⁵⁵

The Court then turned to the subsidiary question which arose, namely whether the Srebrenica genocide could be attributed to Serbia on the basis of direction or control.⁵⁶ While the Court understood the notion “control” within Article 8 of the ILC Articles⁵⁷ to signify

“effective control”, as provided for in the *Nicaragua* decision,⁵⁸ it discussed whether the standard of “overall control” applied by the ICTY in the *Tadić Appeals Chamber* case⁵⁹ was preferable. This idea of operating with the less restrictive standard of “overall control” was dismissed on two grounds: first, the test had been suggested by the ICTY with respect to the question of determining whether an armed conflict was international and not with regard to the different issue of state responsibility;⁶⁰ secondly, in any case the test would have overly broadened the scope of state responsibility.⁶¹ Some authors agree with this Court’s reasoning,⁶² while others consider it doubtful.⁶³

In its application of Article 8 of the ILC Articles and in particular the effective control test, the Court denied that Serbia had “effective control” over the actors at Srebrenica because of the absence of evidence of instructions from the FRY to commit the massacre.⁶⁴ However, it is exactly such instructions that Bosnia and Herzegovina claimed were likely to be found in the *unredacted* versions of the FRY Council documents.

(Non) Responsibility for the “Scorpions”

The evidence of the involvement of the “Scorpions”, a paramilitary group from Serbia, in the Srebrenica massacre, is considered almost *en passant* in the

⁴⁹ *Genocide* case, paras. 386–389

⁵⁰ *Ibid.*, paras. 390–395

⁵¹ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Jurisdiction and Admissibility, Judgment of 27 June 1986, (1986) ICJ Rep., para. 109, (hereinafter *Nicaragua* case)

⁵² *Genocide* case, para. 391

⁵³ *Ibid.*, para. 392

⁵⁴ *Ibid.*, paras. 394–395

⁵⁵ *Ibid.*, para. 394

⁵⁶ *Ibid.*, para. 396–397

⁵⁷ *Ibid.*, para. 398; Article 8 of the ILC Articles, entitled ‘Conduct directed or controlled by a State’, reads as follows: “*The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is*

in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”

⁵⁸ *Nicaragua* case, para. 115

⁵⁹ *The Prosecutor v. Tadić (Tadić Appeals Chamber case)*, Judgement, Case No. IT-94-1-A, Appeals Chamber, 15 July 1999, para. 137

⁶⁰ *Genocide* case, para. 405

⁶¹ *Ibid.*, para. 406

⁶² Jörn Griebel, Milan Plücker, ‘New Developments Regarding the Rules of Attribution? The International Court of Justice’s Decision in *Bosnia v. Serbia*’, *Leiden Journal of International Law* Volume 21 (2008), 618

⁶³ Antonio Cassese, ‘The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgement on Genocide in Bosnia’, *EJIL* Vol. 18 (2007), 655

⁶⁴ *Genocide* case, para. 413

Court's "neat" analysis. This group is known to have committed serious crimes in the Trnovo area, located close to Srebrenica, where members of this group are shown on film (which they made themselves) executing several teenage boys from Srebrenica.⁶⁵ This deeply disturbing video was procured by an NGO, the Humanitarian Law Centre in Belgrade, led by Ms. Nataša Kandić, from a member of the "Scorpions". It was shown at the Milošević trial before the ICTY, as well as on Serbian TV, producing an intense reaction among the Serbian public.⁶⁶ The film was also shown to the judges of the ICJ during the oral arguments in the *Genocide* case, while members of the "Scorpions" themselves were arrested by Serbian authorities and have been convicted in 2007 for war crimes before the District Court of Belgrade.⁶⁷

What was not conclusively established before any court, however, was the exact position of the "Scorpions" in relation to Serbia. While most of the members of the Scorpions are known to have resided in Serbia and worked for the Serbian police *after* the war, their exact relationship with Serbian authorities

during the war remains unclear. They were claimed by the Belgrade prosecutors not to have been a unit of the Serbian army or (secret) police,⁶⁸ even though some members of this unit did join the Serbian police forces in 1996 and 1999. This qualification has now been accepted by the war crimes chamber of the Belgrade District Court.⁶⁹

The Humanitarian Law Centre in Belgrade criticized the Belgrade District Court's judgment in this regard, claiming that the lack of motivation on the part of the Belgrade prosecutors and the judiciary to explore the relationship between the "Scorpions" and Serbia was directly related to the proceedings before the ICJ.⁷⁰

Non-attribution as de jure organs

For its part, Bosnia and Herzegovina produced several documents before the ICJ, namely military dispatches from the RS Ministry of Interior (MUP) headquarters to the police commander in the Trnovo area, and vice versa. Though these documents certainly implicate Serbia in the Srebrenica genocide, the ICJ did not view them as being fully conclusive: "In two of the intercepted documents presented by the Applicant (*the authenticity of which was queried* – see paragraph 289 above), there is reference to the 'Scorpions' as 'MUP of Serbia' and 'a unit of Ministry of Interiors of Serbia' (...)".⁷¹ It is interesting to compare this with the testimony of Mr. Tomislav Kovač before the Belgrade

⁶⁵ The video as presented at the Milošević trial is available at: <http://jurist.law.pitt.edu/monitor/2005/06/srebrenica-killings-video-icty.php>.

⁶⁶ The official declaration made by the Serbian Council of Ministers on 15th June 2005, as a reaction to the video, was dismissed by the ICJ as a political statement (*Genocide* case, para. 376), although legal weight is attached to such statements in previous Court jurisprudence (*Nuclear Tests Judgment (New Zealand v. France)*, Jurisdiction and Admissibility, Judgment of 20 December 1974, (1974) ICJ Rep., para. 51). Of equal note is the Court's failure to address its decisions in *Nicaragua (Nicaragua case, para. 64 and para. 71)* and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Jurisdiction and Admissibility, Judgment of 19 December 2005, (2005) ICJ Rep., para. 61) — both of which were invoked in the Applicant's pleadings on this subject (Oral arguments, Merits, CR 2006/11, 7 March 2006 (Condorelli, Pellet and Franck), para. 1-16). Concise explanation of the neglected case-law can be found in: *Genocide case, Dissenting opinion of Vice-President Al-Khasawneh*, paras. 56-61

⁶⁷ 'Jail for Serb Video Death Squad', *BBC News*, 10 April 2007

⁶⁸ They were alleged, for example, to have been formed as the security forces of an oil company in the Republika Srpska Krajina (the Croatian Serb separatist republic), and then incorporated into Croatian Serb armed forces which were put at the disposal of the Bosnian Serbs in 1995 after the fall of Krajina to the Croatian army.

⁶⁹ The judgment itself is not available online, but has been extensively reported in the Serbian press. See, e.g., T. Tagirov, 'Presuda Škorpionima: Istina, ali samo Pravosudna', *Vreme* No. 849, 12 April 2007

⁷⁰ 'HLC: Scorpions Verdict Politically Motivated', *B92*, 12 April 2007

⁷¹ *Genocide* case, para. 389 (emphasis added)

District Court in 2006,⁷² who was the Deputy Minister of the Interior of the RS in 1995 and to whom and from whom these dispatches were sent. Although his testimony contains a lot of contradictions,⁷³ *he at no point challenged the authenticity of the documents.*

ICJ concluded that: “neither of these communications was addressed to Belgrade. Judging on the basis of these materials, the Court is unable to find that the ‘Scorpions’ were, in mid-1995, *de jure* organs of the Respondent. Furthermore, the Court notes that in any event the act of an organ placed by a State at the disposal of another **public authority** shall not be considered an act of that State if the organ was acting on behalf of the **public authority** at whose disposal it had been placed.”⁷⁴ It is one thing to say that there is insufficient evidence to find Serbia directly involved in Srebrenica only on the basis of two inconclusive documents, though there was absolutely nothing preventing the Court from asking for further evidence on the matter *proprio motu*, for instance by ordering Serbia to produce the persons named in these documents, including Tomislav Kovač, as witnesses. It is something else, however, when in the following sentence the Court says that even if the documents could conclusively establish that the Scorpions were *de jure* organs of Serbia, their acts

would still be unattributable to Serbia. Indeed, the documents themselves show that the Scorpions were put at the disposal of the Republika Srpska and were acting on its behalf, but it is questionable whether the legal rule that the Court announced was the appropriate one.

The Court simply took Article 6 of the ILC Articles,⁷⁵ which deals with the situation of an organ of one state being put at the disposal of another state, and changed the references from this second state to some other “**public authority**”. It is doubtful that the rule in Article 6 can truly be expanded to cover non-state actors in such an off-hand way as the Court did. There is certainly very little state practice to rely on, and the Court provides no justification or reasoning for using such an analogy.⁷⁶ Some authors have rightly criticized the ILC for using such analogies with rules applicable solely to states in respect of *international organizations*, as not all international organizations are the same.⁷⁷ This criticism rings even more loudly when it comes to *non-state actors*, as *international organizations* are at least generally considered to possess some legal personality under international law.

Indeed, the Bosnian agent before the Court has publicly stated several times that Bosnia and Herzegovina might ask for revision of the judgment if new evidence would come to light until 2017.⁷⁸ It should be noted, though, that any request for revision would not only

⁷² Milanović, ‘State Responsibility’, 675. Milanović quoted the verbatim transcript of hearings held on 3 July 2006, from the page: www.hlc-rdc.org/storage/docs/14bbddabba275714fe99c682be5853d9.pdf, but this link is no longer active.

⁷³ He testified that the documents deliberately falsely referred to the Scorpions as a unit of the Serbian MUP, with the purpose of raising the battle morale of the troops in the field, since this ruse would lead them to believe that Serbia was supporting them, when Serbia was at the time actually blockading the Republika Srpska and denying it assistance (Milanović, ‘State Responsibility’, 675, note 25, i. e., Transcripts at 32– 33, 38). This is, of course, a rather ridiculous explanation – as if soldiers in the field were privy to confidential dispatches between their own commanders and the highest Bosnian Serb police officials, and as if a couple of references in these documents to the Serbian MUP could somehow magically improve the soldiers’ morale.

⁷⁴ *Genocide* case, para. 389 (emphasis added)

⁷⁵ Article 6 of the ILC Articles, entitled ‘Conduct of organs placed at the disposal of a State by another State’, reads as follows: “*The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.*”

⁷⁶ The ILC does not mention any such cases even hypothetically – see *ILC Articles*, pgs. 43-45

⁷⁷ José Alvarez, “International Organizations: Accountability or Responsibility?”, address to the Canadian Council on International Law, 27 Oct. 2006.

⁷⁸ A. Alijagić, ‘Otvorena Pitanja’, *Preporodov Journal* Vol. 88, February 2007, 31

(probably) be obstructed by the Bosnian Serb member of the Presidency of Bosnia and Herzegovina,⁷⁹ but the new evidence would have to be exceptionally strong. Because the Court chose to apply the rule in Article 6 of the ILC Articles by analogy to the relationship between Serbia and the Republika Srpska, it would not suffice for Bosnia and Herzegovina to prove that the Scorpions were a *de jure* or *de facto* organ of Serbia. Bosnia and Herzegovina would actually have to prove that (i) the “Scorpions” were *not* put at the disposal of the Republika Srpska, but were still acting on behalf of Serbia itself; or that (ii) Serbia knew that the “Scorpions” would be used for genocide when it put them at the disposal of the RS. Needless to say, it is unlikely that this kind of evidence will ever come to light, but we should be aware that a request for revision is possible, in no small part due to the internal politics in Bosnia and Herzegovina.⁸⁰

Non-attribution as *de facto* organs

The Court then turned to the question whether the “Scorpions” were acting as *de facto* organs of Serbia. The standard of requirements for holding a state directly responsible for acts of *de facto* organs is extremely high, or, to put it in the words of the ICJ, ‘to equate persons or entities with State organs when they do not have that status under internal law must be exceptional’.⁸¹ Accordingly, the ICJ denied that the requirements for the application of Article 8 of the ILC Articles had been met. However, what if the Court had found Article 8 of the ILC Articles to be applicable according to its conception? Is it generally of any relevance if responsibility is based on instructions or exercised control and not on an attributable act?

The answer to this is in the affirmative; it does matter if one can hold a state *directly* responsible based on attribution or, as the ICJ states, only *indirectly*, by basing responsibility on acts like instructions or control. Had the requirements for Article 8 been fulfilled in this case one would, following the ILC, have regarded Serbia as the “author” of the massacres of Srebrenica, while the ICJ would have concluded that Serbia gave instructions or exercised control regarding a genocide committed by somebody else.⁸² There is a difference as to whether one can regard a state as a mass murderer or merely as an accessory to somebody else’s mass murder.

Furthermore, the differentiation affects the “instrumental consequences” (e.g. countermeasures)⁸³ and the “substantial” ones (e.g. forms of reparation: restitution, compensation, satisfaction).⁸⁴ If an act is seen as attributable, the state is responsible for all the damage based on this act. Where the state is merely responsible for instructions or control exercised over somebody else’s acts, not all the consequences of the ultimate act necessarily fall within the state’s responsibility. This shows that there can be differences following the two conceptions, which in certain cases may have an enormous relevance. The legal consequences ascribed to Article 8 of the ILC Articles are therefore not a marginal question.

The evidence before the Court, and particularly the evidence coming from the ICTY, was not sufficient to prove Serbia’s *direct* involvement in the Srebrenica genocide. This is so not only because (i) the Milošević trial was not completed, but also because (ii) the proceedings against Jovica Stanišić and Franko Simatović, the chief and deputy-chief of the Serbian secret police, and Momčilo Perišić, the

⁷⁹ A. Alic, ‘Bosnia vs. Serbia: The Evidence Scandal’, *ISN Security Watch*, 24 April 2007

⁸⁰ A. Aljagić, ‘Još Više Otvorenih Pitanja’, *Preporodov Journal* Vol. 90, April 2007, 14-15

⁸¹ *Genocide case*, para. 393

⁸² Griebel, Plücken, ‘New Developments’, 610

⁸³ See *ILC Articles*, Art. 49

⁸⁴ See *ILC Articles*, Art. 31 and 34-9

FRY army chief of staff, are still at trial.⁸⁵ Thus the question lingers as to whether a more expeditious trial in these ICTY cases could have provided evidence for ICJ that the “Scorpions” were “completely dependant” on the FRY, thereby generating a potentially different outcome in the *Genocide* case. The ICJ seems to have been aware of this possibility, and it does say that it is basing its decision only on the evidence currently before it.⁸⁶ This almost explicitly leaves open to Bosnia and Herzegovina the possibility to ask for a revision of the *Genocide* judgment if new evidence of “complete dependence” between the “Scorpions” and the FRY is made public in the *Stanišić and Simatović* or in the *Perišić* case.

Conclusion from Transitional Justice Point of View

Using a fairly misleading formulation, the Court pointed out that Bosnia and Herzegovina “*itself suggested*” that a declaration finding that Serbia had “*failed to comply with the obligation imposed by the Convention to prevent the crime of genocide*” was the most appropriate form of satisfaction.⁸⁷ ICJ wanted to create the impression that no one else other than Bosnia and Herzegovina confined itself to requesting such a declaration and that its wishes did not go any further. Even a superficial reading of the submissions of Bosnia and Herzegovina, however, shows that Bosnia and Herzegovina sought to obtain full reparation for any kind of the damage which had been inflicted upon it. In its application, Bosnia and Herzegovina had already requested “*reparation for damages to persons and property as well as to the*

Bosnian economy and environment ... in a sum to be determined by the Court.”⁸⁸

This request was concretized and amplified in the reply, where Bosnia and Herzegovina made it clear that the FRY is required to pay and Bosnia and Herzegovina is entitled to receive “*full compensation for the damages and losses caused, in the amount to determined by the Court.*”⁸⁹ It would be hard to contend that the scope *ratione materiae* of these formulations is so narrow as not to include monetary compensation under the head of satisfaction. It is true that Bosnia and Herzegovina did not explicitly mention that concept. But the moral injury suffered by Bosnia and Herzegovina is clearly encompassed by the phrase “*damages and losses*”.

To see what a missed opportunity this decision on the remedies represented, one need not look very far as another court, besides the ICJ and the ICTY, dealt with the consequences of the Srebrenica genocide: the Human Rights Chamber of Bosnia and Herzegovina. It ruled, in a number of applications submitted by the family members of those slaughtered at Srebrenica, that the RS was indeed responsible, and ordered it to pay approximately two million Euros for the construction of the genocide memorial in Potočari, near Srebrenica, as well as to conduct an effective investigation into the massacre.⁹⁰

This order of the Chamber, coupled with intense international pressure, caused the Government of the RS to form a special commission of inquiry on Srebrenica, and to acknowledge, for the first time, its responsibility for the massacre, even though it was not labelled as genocide.⁹¹

⁸⁵ *Prosecutor v. Stanišić and Simatović*, (Trial) Decision on Prosecution Motion for Admission of Redacted Copies of Confidential Exhibits as Public Exhibits, Case No. IT-03-69, Trial Chamber I, 23 August 2010; *Prosecutor v. Perišić*, (Trial) Decision on Request to Make Certain Documents Public, Case No. IT-04-81, Trial Chamber I, 26 July 2010

⁸⁶ *Genocide* case, para. 395

⁸⁷ *Ibid.*, para. 463

⁸⁸ *Ibid.*, para. 64 (r)

⁸⁹ *Ibid.*, para. 65 (7) (emphasis added)

⁹⁰ *Ferida Selimović et al. v. the Republika Srpska (The “Srebrenica Cases”)*, Decision on Admissibility and Merits, CH/01/8365 *et al.*, 7 March 2003, para 220, points 8, 10, 11

⁹¹ The RS Government Commission’s Report on Srebrenica, as well as the apology of the RS Government issued on 10 November 2004, was soon

The single time the word “genocide” is used is when quoting from the *Krstić* judgment to the effect that the accused was convicted of “aiding and abetting genocide”.⁹² The Commission does not, however, take a position in the matter and expressly notes that it is not a judicial body and lacks a mandate to deal with legal issues.⁹³

We believe that something similar would have been the most appropriate form of reparation for Serbia’s breach of one of its most fundamental obligations. Such a remedy would have captured the essence of Serbia’s wrong, i.e., its failure to prevent, and its “collective” dimension. One could have also thought of the financing of some programmes for the benefit of the survivors and the relatives of the victims of Srebrenica, such as measures of rehabilitation and psychotherapeutical treatment.⁹⁴

In conclusion, even if the Court’s decision not to grant financial compensation might have been motivated by the intent of sending a message to the parties to look to the future and attempt to reconcile,⁹⁵ on the whole the Court’s decision to dispose of the matter of

largely forgotten and it became *practically unavailable in electronic or printed form*. We have managed to find the Report on only one web-page: http://www.srebrenica-project.com/DOWNLOAD/Izvestaj_komisije_o_Srebr_enici_oktobar_2004.pdf. Izvestaj komisije o Srebrenici, October 2004.

⁹² *Prosecutor v. Krstić*, Trial Judgment, Case No. IT-98-33, 2004, Trial Chamber I, 2 August 2001; *Prosecutor v. Krstić*, Appeals Chamber Judgment, Case No. IT-98-33, 2004, Appeals Chamber, 19 April 2004

⁹³ ‘Izvestaj’, p. 5

⁹⁴ The examples are taken from: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. GA/RES/60/147 (2005), para. 22

⁹⁵ “*Under the circumstances, it was – on balance – probably the wisest thing to put the case to rest after fourteen years of litigation and trust to future developments to provide any additional form of admission of responsibility and possible compensation as part of the process of reconciliation.*” (Terry D. Gill, ‘The “Genocide” Case: Reflections on the ICJ’s Decision in *Bosnia-Herzegovina v. Serbia*’, *Hague Justice Journal* Vol. 2 (2007), 47)

reparation by means of a simple declaration in the judgment as a form of satisfaction seems to have been quite rushed, and unfortunately gives the whole judgment a flavour of half-heartedness. Not only that such decision does not help the transitional justice process, but in times they stand on its way obstructing them.⁹⁶

⁹⁶ On March 31, 2010, the Serbian parliament adopted a declaration “condemning in strongest terms the crime committed in July 1995 against Bosniac population of Srebrenica” and apologizing to the families of the victims. The inflammatory atmosphere during the 13-hour debate that preceded parliamentary approval - and the continued denial of Srebrenica and other atrocities during the war - raises questions about whether the resolution actually offered a genuine acknowledgement and apology to victims. Many members of parliament failed to attend the vote - and some voted against the resolution - so it passed by a small majority. Much of civil society considers the apology insufficient, as it does not explicitly recognize the massacre as an act of genocide (Serbian Declaration on Srebrenica Massacre an Imperfect but Important Step, *ICTJ*, 9 April 2010). Dusan Bogdanovic, an analyst with the Lawyers’ Committee for Human Rights in Belgrade, said: “The lack of the word genocide could be viewed as a diplomatic technicality in a normal political climate, where it is sufficient to mention **the ruling of the ICJ** and everyone ... can know what it means. But, here it **is used purposely to mitigate the responsibility of Serbia.**” Bogdan Ivanisevic, a consultant for the ICTJ, said that “many in Serbia are still not able to cope with the weight that this word carries.” He said that the text also left out other important details, such as the number of people killed and forcibly displaced - figures that were included in the ICJ decision and the Srebrenica declaration passed by the European parliament in 2009 (‘Some Still in Denial over Massacre in Srebrenica’, *ICTJ*, April 26 2010). Sinan Alic, acting president of the Helsinki Committee for Human Rights in Bosnia, thinks that “the political establishment of Republika Srpska sees the resolution as endangering the existence of the entity”. Sulejman Tihic, the leader of Bosnia’s Party of Democratic Action, SDA, noted that “awareness and acknowledgement of Srebrenica had been considerably higher during the *previous* RS administration, which actually completed a report in 2004 on the massacre and issued an apology to victims. Now, however, tensions are such that it seems to observers *as if those steps had never been taken.*” (‘Bosnian Serbs Block Srebrenica Massacre Resolution’, *IWPR*, April 11 2010)

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IS PLEA BARGAINING IN INTERNATIONAL WAR CRIMES TRIBUNALS AN EFFECTIVE TOOL IN THE PROCESS OF RECONCILIATION?

*“Mercy and truth are met together; righteousness and peace have kissed each other”
Psalm 85:10*

By Miloš Bogičević*

ABSTRACT

This essay explores the role that international war crime tribunals have in the process of reconciliation and restoration of peace. In this paper, particular focus shall be placed on the role of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in achieving these goals and the appropriateness of the current Rules of Procedure for reaching the goal of reconciliation. It explores the meaning of reconciliation and shows that truth about past events is a prerequisite for it. It shows that plea bargaining distorts the truth and therefore may impede with the process of reconciliation.

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What is the role of International War Crimes Tribunals?

It should be mentioned at the very beginning that there is a clear distinction between the purpose of a criminal court and that of other institutions that may deal with post conflict environments, such as truth and reconciliation commissions. One could argue that the process of reconciliation, although important, should be left to other institutions and that criminal procedure does not provide the appropriate framework for such an endeavor. The thesis presented here is, however, that international war crime tribunals can have a significant role in the process of reconciliation and that the way in which their procedures are set up is the crucial factor in succeeding in that role.

Why is it important to have war crime tribunals? What roles do these tribunals have in dealing with the challenges of post-conflict justice? If we look at the stated goals of the tribunals we can conclude that their main purpose, their *raison d'être*, is to prosecute those responsible for the crimes committed. Even though establishing individual criminal responsibility is their primary goal, it is often declared that international tribunals can contribute to the process of reconciliation⁹⁷. War crimes tribunals are (or should be if they are not envisaged as such) only a part of a larger effort for reconciliation in post-conflict societies. In exploring the meaning of reconciliation, John Paul Lederach says:

[...] reconciliation promotes an encounter between the open expression of the painful past, on the one hand, and the search for the articulation of a long-term, interdependent future, on the other hand. Second, reconciliation provides a place for truth and

mercy to meet, where concerns for exposing what has happened *and* for letting go in favor of renewed relationship are validated and embraced. Third, reconciliation recognizes the need to give time and place to both justice and peace, where redressing the wrong is held together with the envisioning of a common, connected future.⁹⁸

Consequently, reconciliation is seen as a **place where truth, justice, mercy and peace meet**.

Looking at war crime tribunals from the perspective of reconciliation we must ask ourselves this fundamental question: What elements of reconciliation can we hope to find in the work of these tribunals? In order to answer that question, the role of the International Criminal Tribunal for the Former Yugoslavia will first be presented in brief.

After receiving continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia, the International Criminal Tribunal for the Former Yugoslavia (ICTY) was established by the United Nations' Security Council to "put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them"⁹⁹ so that it may contribute to restoring and maintaining the peace.

[...] Stated otherwise, its mission is to promote reconciliation through the prosecution, trial and punishment of those who perpetrated war crimes, crimes against humanity and genocide. By ensuring that people are held individually responsible for the crimes they committed, the International Tribunal must prevent entire groups – be they national, ethnic or religious – from being

⁹⁷ Reconciliation as a goal is specifically mentioned in Security Council resolutions 1329 (2000), para 3, 1534 (2004) para 5, with regards to ICTY and International Criminal Tribunal for Rwanda (ICTR)

⁹⁸ Building Peace: sustainable reconciliation in divided societies / John Paul Lederach, United States Institute for Peace Press, 1997., page 31.

⁹⁹ United Nations Security Council Resolution 808 (1993), p 1, 2.

*stigmatized and must ensure that others do not resort to acts of revenge in their search for justice. It must neutralize the major war criminals and preclude them from sustaining a climate of hatred and virulent nationalism which will inevitably lead to future wars. By hearing the voices of the victims in a solemn but public forum, it must assuage their suffering and help them to reintegrate into a society which has been reconciled. Finally, by **establishing the legal truth**¹⁰⁰ on whose basis society can take shape, the International Tribunal must prevent all historical revisionism.”¹⁰¹*

Looking at these two statements, we can draw the conclusion that from the time the Tribunal was founded its main goals were not only to prosecute individuals but also to “hear the voices of the victims in a public forum” and to “establish legal truth” in order to “prevent historical revisionism”. By proclaiming these goals, the Tribunal moved beyond the scope of a traditional criminal court which has the classical goals of *special deterrence*, punishing war criminals, and *general deterrence*, preventing the crimes from recurring. By aiming to establish “legal truth”, to “hear the voices of victims”, and to “prevent revisionism” the Tribunal stepped into the arena of restorative justice¹⁰² similar to the role of truth and reconciliation commissions.

¹⁰⁰ Emphasis added

¹⁰¹ “The ICTY and the Truth and Reconciliation Commission in Bosnia and Herzegovina” ICTY President Claude Jorda’s speech made on 12 May 2001 in Sarajevo; ICTY Press Release The Hague, 17 May 2001 JL/P.I.S./591-e

¹⁰² Restorative justice can be defined as “a broad term which encompasses a growing social movement to institutionalize peaceful approaches to harm, problem-solving and violations of legal and human rights. These range from international peacemaking tribunals such as the South Africa Truth and Reconciliation Commission to innovations within the criminal and juvenile justice systems, schools, social services and communities. Rather than privileging the law, professionals and the state, restorative resolutions engage those who are harmed, wrongdoers and their affected communities in

The ICTY defines its role as follows:

[...] The Tribunal has laid the foundations for what is now the accepted norm for conflict resolution and post-conflict development across the globe, specifically which leaders suspected of mass crimes will face justice. The Tribunal has proved that efficient and transparent international justice is possible. The Tribunal has contributed to an indisputable historical record; combating denial and helping communities come to terms with their recent history. Crimes across the region can no longer be denied. For example, it has been proven beyond reasonable doubt that the mass murder at Srebrenica was genocide¹⁰³.”

While the traditional approach of war crime tribunals is to focus on the need to punish offenders, the role of restorative justice is to give both victims and offenders the opportunity to tell their stories of how the crime affected their lives, to find out the truth, and to resolve any questions they feel need to be answered. It is evident that when explaining the role of the Court the emphasis is put equally on the individual responsibility of the perpetrators (leaders will face justice) and establishing the truth about what has happened (crimes across the region can no longer be denied). Even from this brief analysis of the Tribunal’s mandate, we can conclude that all elements of reconciliation can be found in its proceedings. Two of the four elements of reconciliation – **truth** and

search of solutions that promote repair, reconciliation and the rebuilding of relationships. Restorative justice seeks to build partnerships to reestablish mutual responsibility for constructive responses to wrongdoing within our communities. Restorative approaches seek a balanced approach to the needs of the victim, wrongdoer and community through processes that preserve the safety and dignity of all” Suffolk University, College of Arts & Sciences, Center for Restorative Justice, What is Restorative Justice?

¹⁰³ <http://www.icty.org/sections/AbouttheICTY>

justice – are the prerequisite and the result of the Tribunal's work.

To better understand the distinction between international criminal tribunals and truth and reconciliation commissions a short overview of the work of the Truth and Reconciliation Commission of South Africa (TRC) will be presented. Over the past three decades, truth and reconciliation commissions have been set up in countries as diverse as Uganda, South Africa, Guatemala, Argentina and Sierra Leone. However, the work of the TRC is probably most well known and it served as a role model for many similar institutions that were subsequently established. In the words of Richard Wilson:

[...] Truth commissions have fascinated international audiences and led to a voluminous literature acclaiming their promises of truth and restoration, mostly from law, political science and moral philosophy. The South African truth commission, as the largest and most ambitious in scope, is perhaps the zenith of this trajectory, and has attracted the most attention and discussion so far. The literature evaluating the achievements of truth commissions has mostly been positive and laudatory, claiming these commissions heal the nation by providing therapy for a traumatized national psyche. They break a regime of official denial of atrocities by ending the public silence on violence and violations. They expose the excesses of the previous political order and so discredit it, aiding in democratic consolidation¹⁰⁴.

The TRC was established under the *Promotion of National Unity and Reconciliation Act, No. 34 of 1995*, and was based in Cape Town. The objectives of the Commission were to promote national unity and reconciliation by:

[...] (a) establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed during the period from 1 March 1960 to the cut-off date, including the antecedents, circumstances, factors and context of such violations, as well as the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations, by conducting investigations and holding hearings; (b) facilitating the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective and comply with the requirements of this Act; (c) establishing and making known the fate or whereabouts of victims and by restoring the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims, and by recommending reparation measures in respect of them (d) compiling a report providing as comprehensive an account as possible of the activities and findings of the Commission contemplated in paragraphs (a), (b) and (c), and which contains recommendations of measures to prevent the future violations of human rights¹⁰⁵.

In short, the focus and the main purpose of the TRC were to establish the truth as an authoritative record of the past and to promote reconciliation across social, political, and ethnic divisions. Granting amnesty (mercy) or prosecuting those responsible for crimes was a goal that was only secondary to establishing the truth. By granting amnesty to those who told the truth about their involvement in the crimes, some justice, or rather *retributive justice* was sacrificed in order for the truth to be found. In fact,

¹⁰⁴ Wilson, Richard A., (1964) *The politics of truth and reconciliation in South Africa: legitimizing the post-apartheid state*, Cambridge University Press, p 18-19.

¹⁰⁵ *Promotion of National Unity and Reconciliation Act, No. 34 of 1995, Article 3*

TRC had no mandate to impose sentences on those who were not granted amnesty, those cases being left to the courts. It should be noted that out of 7112 petitioners for amnesty, only 849 were granted and 5392 refused amnesty, and that amnesty was never guaranteed to those who apply for it, even if they would tell the whole truth.

According to the TRC report:

[...] the various participants experienced the Amnesty Committee process differently. Victims who attended hearings had to contend, generally speaking, with the reopening of old wounds. Their responses varied from strongly opposing to supporting applications for amnesty; from opposing the principles underlying the amnesty process to embracing them; from frustration with perceived non-disclosure by perpetrators to satisfaction at having learnt the facts; from animosity towards applicants to embracing them in forgiveness and reconciliation. Often they merely stated that they had learnt the truth and now at least they understood how and why particular incidents had happened¹⁰⁶.

Courts and truth and reconciliation commissions serve different, but compatible roles in ensuring accountability and bringing about reconciliation. While regular criminal courts do not always place the ultimate priority on finding the whole truth, the imperative of finding the whole truth in war crime cases does seem to be a necessity. This conclusion can especially be drawn in the light of the work of the abovementioned TRC in reaching the goal of reconciliation.

Plea bargaining in war crime cases

How much emphasis is placed on finding the truth in criminal procedure depends on several elements. The most

important one is whether the adversarial (common law) or inquisitorial (civil law) system is employed. This is closely linked with the practice of *plea bargaining* – a negotiation in which the defendant agrees to enter a plea of guilty to a lesser charge and the prosecutor agrees to drop a more serious charge. Plea bargaining is frequently used in common law countries and to a lesser extent in civil law countries. It comes about in two forms: *sentence bargaining* – where a lenient sentence is recommended by the prosecutor in exchange for a guilty plea and sometimes cooperation provided by the defendant (e.g. promise to testify in other cases etc.); and *charge bargaining* – dropping the charges in return for a guilty plea.

The most significant benefit of plea bargaining for the accused is to take away the uncertainty of a criminal trial and to avoid the maximum sentence. The benefits from plea bargaining for the prosecution and the court are that agreements lessen time and costs necessary to reach a judgment and victims and witnesses are relieved from giving evidence in court and potentially re-living their trauma. On the other hand, with the use of plea bargaining the victims lose the opportunity to have their voices heard, many facts of the case are not determined, and the complete picture of the crime is not given. By failing to establish the *forensic truth* in cases which end in a plea bargain, the court fails to establish the judicial historical record – the legal truth, proclaimed to be one of the functions of ICTY¹⁰⁷. In addition, charge bargaining distorts the truth even further as those who are initially charged with many serious crimes end up being sentenced for only one or a few of them, but not the gravest ones.

Is plea bargaining compatible with the unique functions of international

¹⁰⁶ Truth and Reconciliation Commission of South Africa Report, Section 1, Chapter 5, para 35

¹⁰⁷ It should be noted that finding the truth about a certain historical event through criminal proceedings is additionally hampered by the fact that the scope of such proceedings is limited to the actions of a particular perpetrator(s).

criminal courts? Does plea bargaining contribute to the process of reconciliation or does it make it even more difficult? From the time the ICTY was first established, its judges were aware of this quandary. First president of the ICTY, Judge Antonio Cassese, argued against the use of plea bargaining:

[...] The question of the grant of immunity from prosecution to a potential witness has also generated considerable debate. Those in favor contend that it will be difficult enough for us to obtain evidence against a suspect and so we should do everything possible to encourage direct testimony. They argue that this is especially true if the testimony serves to establish criminal responsibility of those higher up in the chain of command. Consequently, arrangements such as plea-bargaining could also be considered in an attempt to secure other convictions. However, we always have to keep in mind that this Tribunal is not a municipal criminal court but one that is charged with the task of trying person accused of the gravest possible of all crimes. The persons appearing before us will be charged with genocide, torture, murder, sexual assault, wanton destruction, persecution and other inhumane acts. After due reflection we have decided that no one should be immune from prosecution for crimes such as these, no matter how useful their testimony may otherwise be.¹⁰⁸

Although judges initially rejected plea bargaining as incompatible with the goals of the Tribunal, a guilty plea resulting from the plea bargaining process came about in 2001 in *Simić et al.*¹⁰⁹. By

¹⁰⁸ Statement made by the President Made at a Briefing to Members of Diplomatic Missions, IT/29, 11 February 1994, reprinted in V. Morris and M.P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, Vol. 2 (Irvington-on-Hudson, New York: Transnational Publishers, Inc., 1995), at 649,652.

¹⁰⁹ Prosecutor v. Stevan Todorović Case No. IT-95-9/1-S, Sentencing Judgement, 31 July 2001.

the end of 2001, six accused had pled guilty before the Tribunal. This led to a change in Rules of Procedure and Evidence where Rule 62ter was added¹¹⁰:

[...] The Prosecutor and the defense may agree that, upon the accused entering a plea of guilty to the indictment or to one or more counts of the indictment, the Prosecutor shall do one or more of the following before the Trial Chamber: (i) apply to amend the indictment accordingly; (ii) submit that a specific sentence or sentencing range is appropriate; (iii) not oppose a request by the accused for a particular sentence or sentencing range. (B) The Trial Chamber shall not be bound by any agreement specified in paragraph (A). (C) If a plea agreement has been reached by the parties, the Trial Chamber shall require the disclosure of the agreement in open session or, on a showing of good cause, in closed session, at the time the accused pleads guilty in accordance with Rule 62 (vi), or requests to change his or her plea to guilty.

Has plea bargaining been a successful strategy in the work of the ICTY? Has it advanced, or offended the objective of reconciliation? There is no prevailing opinion so far. Alain Tieger and Milbert Shin argue that:

[...] Even if the documentation accompanying plea agreements lacks the details of a full trial record, the efficiency of the plea agreement process results in a greater number of completed cases and, therefore, more additions to the historical record. Plea agreements can therefore make up in breadth what they may lack in depth¹¹¹.

Michael P. Scharf is of the opposite opinion:

[...] In light of the unique objectives of international justice in cases of charge bargaining, the Tribunal

¹¹⁰ Rules of Procedure and Evidence, IT/32/Rev. 44, 10 December 2009., Article 62ter.

¹¹¹ Alan Tieger and Milbert Shin, *Plea Agreements in the ICTY, Purpose Effects and Propriety*, Journal of International Criminal Justice 3 (2005) ,666-679

should require that the defendant append a signed document detailing the facts underlying the original charges (not just the reduced charges as in the Plavšić case). Similar to the full admissions that were required as a condition for receiving immunity from prosecution by the South Africa Truth and Reconciliation Commission¹¹².

Concluding remarks

Establishing a historical record or a judicial truth of the crimes that took place during a war is an important function of any international criminal tribunal. Establishing the truth is a prerequisite for any hope of reconciliation and prevention of historical revisionism which can lead to new conflicts. Even though plea agreements are a useful tool in dealing with domestic crimes, their employment in international war crime tribunals may lead to a distortion of truth, particularly in the case of charge bargaining. By sacrificing or trading truth for efficiency, international criminal tribunals may fail in reaching the goal of reconciliation and thus fail to fulfill their mandate of “restoration and maintenance of peace¹¹³”.

¹¹² Michael P. Scharf, *Trading Justice for Efficiency: Plea Bargaining and International Tribunals*, *Journal of International Criminal Justice* 2 (2004), 1070-1081.

¹¹³ United Nations Security Council Resolution 827, 25 May 1993., para 6.

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CRIMINAL PROSECUTION AND TRANSITIONAL JUSTICE DOES PLEA BARGAINING HELP IN FOSTERING RECONCILIATION? PLEA AGREEMENTS BEFORE THE BOSNIA AND HERZEGOVINA WAR CRIMES CHAMBER

By Elena Atzeni*

ABSTRACT

This essay expounds on the advantages and disadvantages of plea bargaining in war crimes trials, notably in the context of BiH War Crimes Chamber. The ruling about Dušan Fuštar will be taken as a case in point for essentially two merits: first, it illustrates the difference existing between “charges” bargaining and “sentence” bargaining. In so doing, I will illustrate why an agreement on the scope of the sentence should be preferred to one involving dropping charges. Secondly, I will assess the rationale behind the court’s mitigating of the sentence and thereby will draw some final remarks as to the most apt way to deal with plea agreements in the context relevant to this study.

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The War Crimes Chamber was established within the Court of Bosnia and Herzegovina¹¹⁴ (BiH) and officially began its operations on 9th March 2005. It was set up pursuant to a series of reforms involving the Bosnian legal system, albeit a significant role in its creation was played by the ICTY completion strategy drafted in 2002. The latter provided for partnership and cooperation with local jurisdictions in -pursuing the tribunal's objectives, while rethinking the relationship between primacy and complementarity among ICTY and national jurisdictions.¹¹⁵ The 2003 BiH Criminal Code and Criminal Procedure Code gave the State Court of BiH, and in certain instances cantonal and district courts, jurisdiction over war crimes and selected international crimes.

From September 2005 to June 2008 the War Crimes Chamber tried 84 accused and rendered 32 trial judgments.¹¹⁶

The purpose of this essay is to examine how plea agreements between defendants and the prosecution may impact the reconciliation process in BiH, which is one of the most relevant objectives pursued by internationalized and international tribunals in trying war crimes and crimes against humanity. No plea agreements had been made in the

context of trials before the War Crimes Chamber before February 2008, despite the fact that this possibility was provided for in the Criminal Procedure Code.¹¹⁷ Between February 2008 and May 2008 plea agreements were agreed to with four defendants, as a likely result of a change of strategy within the prosecution.

The examination of the plea agreement's sentence against Dušan Fuštar is instrumental in gauging whether any disadvantages of plea bargaining in war crimes trials within the State Court of BiH may exist, while keeping in line with the practice of the ICTY on this matter. Dušan Fuštar was held accountable for persecution as a crime against humanity for the events which took place at the Keraterm concentration camp, in the Prijedor municipality between June and August 1992. He was sentenced to nine years of imprisonment on 21st April 2008.¹¹⁸

Two aspects of the ruling are of interest: the first issue relates to the charges of active participation in the killings or maltreatment of inmates, which was dropped by the Prosecution as a consequence of the Plea Agreement. This brings us to analyze the practice of "charges" rather than "sentence" bargaining between the Prosecutor and the defendants in war crimes trials. The second facet under scrutiny involves the mitigating circumstances to which the Chamber attached a considerable weight in evaluating what sentence would have been appropriate *vis-à-vis* the charged crimes.

As for the first aspect, it is worthwhile to point out the difference between charges

114 The Court of BiH was established in 2002, through a law imposed by the High Representative, subsequently approved by the BiH Parliamentary Assembly. See *Law on the Court of Bosnia and Herzegovina*, "Official Gazette" of Bosnia and Herzegovina, 29/00, 16/02, 24/02, 3/03, 37/03, 42/03, 4/04, 9/04, 35/04, 61/04, 32/07

115 Pursuant to Rule 11bis of ICTY Rules of Procedure and Evidence (RPE), a case can be referred by the Tribunal to the authorities of a State, having considered also the gravity of the crimes charged and the level of responsibility of the accused. See Rule 11bis, ICTY Rules of Procedure and Evidence, available at http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_Rev42_en.pdf. See also United Nations, Security Council, *International Tribunal for the former Yugoslavia and International Tribunal for Rwanda*, UN Doc. S/RES/1503 (2003).

116 See Ivanišević, Bogdan. *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court*, International Centre for Transitional Justice, 2008, p. 10.

117 Article 231, *Criminal Procedure Code of Bosnia and Herzegovina*, "Official Gazette" of Bosnia and Herzegovina 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09.

118 Court of Bosnia and Herzegovina, Section I for War Crimes of the Criminal Division of the Court, *Prosecutor v. Dušan Fuštar*, Sentencing Judgment, 21 April 2008.

and sentence bargaining. While both these practices fall within what is commonly defined “plea bargaining”, in the context of BiH the application of bargained justice in the form of sentence bargaining would seem more appropriate. This conclusion stems, first of all, from the provision of Article 231 of the BiH Criminal Procedure Code itself.¹¹⁹ The

wording of this article, notably paragraphs (1) and (2),¹²⁰ suggests a preference for an agreement which involves the scope of the sentence to be imposed, rather than the number and type of charges. Furthermore, other arguments support this conclusion: those who endorse bargained justice often underline the advantages of the defendant’s cooperation, a scenario that may help establishing historical truth as well as the gathering of evidence otherwise hard to obtain. However, for the sake of a balance between advantages and disadvantages, one must keep in mind that the objective of historical truth can’t be overestimated: the truth pursued through a judicial process is likely to be incomplete, even more so if certain charges are being dropped. Thus the consequences of dropping charges are easy to comprehend when one considers that the purpose of a trial is to ascertain facts that might be key to determine if the accused committed or not the crimes for which he is being tried. Likewise, it needs to be considered that dropping of specific charges, for instance genocide, might also lead to further denial by alleged perpetrators.

To ensure that plea bargaining elicits positive effects (i.e. contributing to reconciliation through acknowledgment of guilt by perpetrators, contributing to establish the truth, etc.) and that its shortcomings are curbed, a number of criteria must be met. Firstly, no agreement should be made between the Prosecution and the Defense prior to confirmation of the indictment.¹²¹

119 (1) The suspect or the accused and the defense attorney, may negotiate with the Prosecutor on the

*conditions of admitting guilt for the criminal offense with which **the accused is charged.***

(2) In plea bargaining with the suspect or the accused and his defense attorney on the admission of guilt pursuant to Paragraph 1 of this Article, the Prosecutor may propose *an agreed sentence* of less than the minimum prescribed by the Law for the criminal offense(s) or a *lesser penalty* against the suspect or the accused.

(3) An agreement on the admission of guilt shall be made in writing. The preliminary hearing judge, judge or the Panel may sustain or reject the agreement in question.

(4) In the course of deliberation of the agreement on the admission of guilt, the Court must ensure the following:

(a) that the agreement of guilt was entered voluntarily, consciously and with understanding, and that the accused is informed of the possible consequences, including the satisfaction of the claims under property law and reimbursement of the expenses of the criminal proceedings;

(b) that there is enough evidence proving the guilt of the suspect or the accused;

(c) that the suspect or the accused understands that by agreement on the admission of guilt he waives his right to trial and that he may not file an appeal against the pronounced criminal sanction.

(5) If the Court accepts the agreement on the admission of guilt, the statement of the accused shall be entered in the record. In that case, the Court shall set the date for pronouncement of the sentence envisaged in the agreement referred to in Paragraph 3 of this Article within three (3) days at the latest.

(6) If the Court rejects the agreement on the admission of guilt, the Court shall inform the parties to the

proceeding and the defense attorney about the rejection and say so in the record. Admission of guilt

given before the preliminary proceeding judge, preliminary hearing judge, the judge or the Panel is inadmissible as evidence in the criminal proceeding.

(7) The Court shall inform the injured party about the results of the negotiation on guilt.

120 Ibid.

121 For the agreement to be entered voluntarily, consciously and with understanding, the

Secondly, in a view of fostering reconciliation, in-court confessions should be preferred to agreements reached before the trial in private and then presented to the judges for approval.¹²² Lastly, judicial review of the agreement plays a crucial role in the system. It is critical that the fair and transparent achieving of justice is perceived as such by the population, and that evidence supporting the plea agreement is thoroughly reviewed by the judicial bench.

Furthermore, it is necessary that the procedure involving plea bargaining is carried out in compliance with the guarantees set out in various human rights treaties, especially those provided for by Article 6 of the European Convention on Human Rights.¹²³ The

defendant must have a complete knowledge of the charges against him and the fact supporting these charges.

122 Agreements are not binding on the judges in reaching their final decision about the sentence to be served.

123 Article 6 – **Right to a fair trial**

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - b. to have adequate time and facilities for the preparation of his defence;

most sensitive issue relates to the right to be presumed innocent. This presumption, in fact, can only be overridden by establishing proof of guilt beyond reasonable doubt; this means that the confession of an accused cannot be the sole basis for a conviction. Therefore where the prosecution has presented its case and the accused, assisted by a counsel and duly informed about the scope of its declaration, decides to plead guilty, it doesn't seem incompatible with his rights recognized under the European Convention on Human Rights.

The second point that this paper takes up are the mitigating circumstances to which the Judges attached considerable value in determining the appropriate sentencing. In assessing the gravity of the crimes committed, judges typically weigh the abstract gravity, the concrete gravity of the facts, the level of intent and level of participation of the accused. To establish the reduction that they may warrant in case a plea agreement is presented, the judicial bench needs to strike a balance between the gravity of crimes perpetrated and the number of mitigating circumstances.

In the case of Dušan Fuštar the Chamber mainly took into consideration four elements. First of all, the same fact of pleading guilty which, also pursuant to

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- c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

the ICTY case law on this merit,¹²⁴ constitutes an important contribution to the process of societal reconciliation since it represents an acceptance of responsibility for the crimes committed; at the same time it increases the efficiency of proceedings and reduces the costs. The second element is the public expression of remorse at the main trial: the real challenge in this case is to be able to distinguish between real expressions of remorse and those that are forged to manipulate the judges into imposing a lesser sentence. Third element is the readiness of the accused to cooperate with the prosecution, which is deemed valuable in terms of efficiency and contribution to the work of the court in prosecuting certain crimes. Lastly, the Chamber considered the fact that Dušan Fuštar was a family man and had no prior convictions: concerning this issue, judges should be careful in estimating the value of these circumstances, especially in contexts where a large part of the civilian population had been involved in committing crimes.

To draw some conclusions, first of all it must be said that efficiency appears the strongest element in support of plea bargaining. Despite this fact, guilty pleas may well have the potential to contribute to societal reconciliation and to the maintenance of peace. To this end a number of criteria must be met in the process of plea bargaining, so as to avoid perception among victims that the accused is eluding punishment and to confer legitimacy to the final judgment; the latter objective can be met by reaching the judgment in respect of procedural fairness. Since trials are still considered the most legitimate and credible way to deal with war criminals and past mass atrocities,¹²⁵ it is crucial that aspects of

the judicial process are understood by victims and that truths are accepted. This purpose can be achieved through an effective outreach program, which in the case of BiH War Crimes Chamber can benefit from the proximity of the population. Also, trials remain one of the few effective tools existing to deter mass crimes at international level; it follows that judges should be wary of delivering excessively low sentences: a clear message needs to be sent.

124 See *Sentencing Judgment, Erdemović* (IT-96-22), Trial Chamber, 29 November 1996 and also (*Sentencing Judgment, Plavšić* (IT-00-39&40/1-S), Trial Chamber, 27 February 2003.

125 “The people of BiH overwhelmingly identify criminal justice as the most legitimate response, if not the only response, to crime. People at all

levels of society and from every part of the country see putting war crimes suspects on trial as a necessity with no serious alternative. The overwhelming opinion is that those who committed war crimes must be brought to justice, and that trials are the most legitimate and credible way to do so”. See United Nations Development Programme (UNDP), *Transitional Justice in Bosnia and Hercegovina: Situation Analysis and Strategic Options ^ Mission Report for UNDP*, August 2005 (Sarajevo: UNDP, 2005) 1⁴³, at 14.

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- *Criminal Procedure Code of Bosnia and Herzegovina*, “Official Gazette” of Bosnia and Herzegovina 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09.

REPORTS ON THE TRANSITIONAL JUSTICE EXPERIENCE IN BOSNIA AND HERZEGOVINA

By Azra Somun*

ABSTRACT

15 years have passed since the signing of the 1995 Dayton Peace Agreement which ended the war in the former Yugoslavia. However, the Agreement was not only signed to stop the hostilities, but also to lay down the requirements for a durable peace through, among other things, the process of reconciliation. In order to achieve that goal, different transitional justice mechanisms have been set up. This paper is a short review of the main transitional justice mechanisms put in place in Bosnia, a review that will show the political tensions that are in the background of the process of reconciliation. Thus, the trials, national and international will be analyzed; followed by a description of different truth seeking mechanisms; and finally a quick examination of the vetting process of public officials will be given.

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Introduction

Transitional justice is a way to address widespread violations of human rights. It seeks to promote possibilities for peace, reconciliation and democracy.¹²⁶ Transitional justice mostly refers to four specific areas: truth-seeking, criminal prosecutions, reparations to victims and institutional reform.¹²⁷ It is impossible to achieve the goal of transitional justice unless all of these pillars are inter-linked and fulfilled.

This paper covers only parts of criminal justice, truth-telling and vetting. Reparations to victims are a very complex field that requires its own research. Though much has been done in Bosnia and Herzegovina (BiH) regarding reparations, this issue will not be treated in this paper.

15 years have passed since the signing of the 1995 Dayton Peace Agreement which ended the war in the former Yugoslavia. The war devastated the whole region, but especially BiH, where the death toll, although hard to estimate is more than 100.000¹²⁸. Moreover, there were approximately 2 million displaced persons according to the UN Refugee Agency¹²⁹. It is important to mention that there are no official figures on death tolls in BiH, thus figures are often used by BiH politicians for manipulation purposes. The number of deaths that occurred during the war should be identified as these figures are needed for transitional justice purposes.

The Dayton Agreement established a complex political structure to accommodate Bosnian Muslims (Bosniaks), Bosnian Serbs and Bosnian Croats. BiH is thus composed of two

entities: the Federation of BiH (the Federation) and the Republika Srpska (RS) and of a region called Brčko District. The Constitution of the country, which happens to be the Annex 4 of the Dayton Agreement, established a central government with a bicameral legislature, a three-member presidency (consisting of a Bosniak, a Bosnian Croat and a Bosnian Serb), a council of ministers, a constitutional court, and a central bank.

However, the Dayton Agreement was not only signed to stop the hostilities, but also to lay down the requirements for a durable peace through the process of reconciliation and different transitional justice mechanisms have been set up as a result. It is hard, and maybe useless to try to paint a clear and coherent picture of the different transitional justice initiatives in BiH. Indeed, there is no global strategic vision that leads to the introduction of a new politic of reconciliation; we thus have to look closer at what is really going on inside the country, on the ground. This paper is a short review of the main transitional justice mechanisms put in place in BiH, a review that will show the political tensions that are in the background of the process of reconciliation.

As has already been said, in order to insure a lasting peace and reconciliation, different transitional justice mechanisms were introduced. It seems that a great focus was put on trials (I), especially with the International criminal Tribunal for the Former Yugoslavia (ICTY), though not forgetting prosecutions in local courts and in the specialized War crimes Chamber in the Court of BiH. The Human Rights Chamber, created by the Dayton Agreement, led to important judgments that paved the way for the creation of truth seeking commissions (II), as the so called Srebrenica. Later on, the Sarajevo commission was established according to a Council of Ministers' decision¹³⁰. At the

¹²⁶ "What is transitional justice?". International Center for transitional justice. Updated December 2008. <<http://www.ictj.org/en/tj/>>. 19.11.2010.

¹²⁷ "What is transitional justice?". Office of the High Commissioner for Human Rights. 12.04.2007. <http://nepal.ohchr.org/en/resources/publications/TJ%20brochure_E.pdf>. 19.11.2010.

¹²⁸ "The former Yugoslavia Conflicts". ICTY – TPIJ. <<http://www.icty.org/sid/322>>. 19.11.2010.

¹²⁹ "Briefing Note on UNHCR and Annex 7 in BiH". UNHCR Representation in BiH. October 2007. <<http://www.unhcr.ba/protection/DPsbackgroundnote.pdf>>. 19.11.2010.

¹³⁰ Vijeće Ministara BiH. <<http://www.vijeceministara.gov.ba/akti/odluke/?id=84>>. 19.11.2010.

same time, a process of vetting public officers took place in order to ensure the independence of the police and judiciary (III).

Thus, we will try to analyze one by one the different strategies put in place, starting of course with the main one, being the trials.

I. Trials

It seems that a great focus was put on the trials, especially with the ICTY (A). However, prosecutions also took place locally, in BiH Courts (B).

A. The International criminal Tribunal for the Former Yugoslavia (ICTY)

The ICTY is a United Nations Court of law established in 1993 to deal with war crimes that took place during the conflicts of the 1990's in the Balkans. The Tribunal has contributed to the fight against the culture of impunity, to combat denial and help communities come to terms with their recent history.¹³¹ The ICTY's impact in BiH was profound, but was and still is perceived differently in the Federation and in the RS. Indeed, it appears that in the Federation, the Tribunal has achieved a certain level of trust, even though the condemnations are seen as being too soft. However, this same Tribunal is perceived in the RS as a biased, anti-Serb body. This is probably the case because the most significant number of cases heard by the Tribunal dealt with alleged crimes committed by Serbs and Bosnian Serbs.¹³²

The ICTY has nonetheless dealt with the high-ranking politicians and military men showing that an individual's high position cannot protect him from prosecution. We have to keep in mind that it took twelve

¹³¹ "About the ICTY". ICTY - TPIY. <<http://www.icty.org/sections/AbouttheICTY>>. 19.11.2010.

¹³² Ibid. See also the key figures : "Key figures". ICTY-TPIY. <<http://www.icty.org/sections/TheCases/KeyFigure>>. 19.11.2010.

years to catch one of the most notorious Serb politicians Radovan Karadžić, and that Ratko Mladić is still a fugitive.

Thus, even though the ICTY has done a lot of work in trials, it is not enough to ensure reconciliation. Indeed, the Tribunal is not a proper place for the victims to voice their stories, and as has been said, the Tribunal is perceived differently within the country. Its mandate will most likely end in 2014¹³³; that is why the ICTY is transferring more and more cases to the War Crimes Chamber of the Court of BiH.

B. Local trials

Local trials, meaning trials within BiH, have taken place since the beginning of the war, by the ordinary jurisdiction of the country. But in 2002, the Court of BiH was created, and one of its Chambers is dedicated to War Crimes (1). There was another transitional justice organ in BiH that does not exist anymore but has helped the reconciliation process, namely the Human Rights Chamber (2).

1. The War Crimes Chamber in the Court of BiH

"The state of BiH presents the classic dilemma in the area of transitional justice: it is a context marked by an unusually high demand for justice and an unusually low capacity or willingness to deliver it."¹³⁴ However, criminal justice efforts, especially at the domestic level, are an essential component of any comprehensive transitional justice strategy.¹³⁵

¹³³ "Brammertz: Tribunal will work until 2014". B92. 19.05.2010. <http://www.b92.net//eng/news/politics-article.php?yyyy=2010&mm=05&dd=19&nav_id=67234>. 19.11.2010.

¹³⁴ "BiH: Selected developments in transitional justice." International Center for Transitional Justice. October 2004. <<http://www.ictj.org/images/content/1/1/113.pdf>>. 19.11.2010.

¹³⁵ Ibid.

Because of the attention being focused on the ICTY for so long, BiH's justice system has suffered from neglect, and there is a fear that the judiciary is still under the influence of executive, nationalist elements, and political parties.¹³⁶ However, as will be analyzed later on, steps have been taken to reform the judiciary (see III).

That is mainly why the Court of BiH was created. The Law concerning this Court was adopted in July 2002 by the Parliament of BiH and promulgated in November 2002 by the High Representative in BiH.¹³⁷ The ICTY is now transferring cases involving intermediate and lower-rank accused to this court. The cases transferred fall into two categories of the so-called Rule 11bis cases, where the indictment has already been issued and confirmed, and cases still under investigation in which no indictment has been issued, where the local prosecutor will finish the investigations and if appropriate, issue the indictments.¹³⁸

The Court of BiH which has jurisdiction over both entities and the special War Crimes Chamber are composed of both international and national judges and prosecutors.

In 2009, both Houses of the BiH Parliament rejected the amendments to the Law on the Court of BiH and the Law on the Prosecutor's Office of BiH which

¹³⁶ "BiH's 2010 Progress Report". European Commission. 09.11.2010.

<http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/ba_rapport_2010_en.pdf>. 19.11.2010.

¹³⁷ Court of BiH. <<http://www.sudbih.gov.ba/?opcija=sadrzaj&kat=7&id=15&jezik=e>>. 19.11.2010.

¹³⁸ "BiH: Selected developments in transitional justice." International Center for Transitional Justice. October 2004. <<http://www.ictj.org/images/content/1/1/113.pdf>>. 19.11.2010.

would have provided for the extension of the mandate of international judges and prosecutors.¹³⁹ However, by an imposed Decision of the High Representative in BiH, the mandate of international judges and prosecutors was extended.¹⁴⁰

Unfortunately, however needed and wanted is the justice at the national level, it is said that even if all the Courts in BiH would only deal with war crimes cases, it would take up to 50 years to wrap up all the trials. Even though, the War Crimes Strategy was adopted in December 2008, and provides for the "prosecution of the most complex and top priority war crimes cases within 7 years and other war crimes cases within 15 years from the time of adoption of the Strategy"¹⁴¹; it seems that these goals are unachievable. Indeed, the Strategy foresees the transfer of less complicated cases to local courts; but the slow pace of referring war crimes cases to lower courts is totally jeopardizing the possibility of meeting the 15 years goal set down by the Strategy.¹⁴²

There is however a relatively positive story in the area of justice in BiH, that of the Human Rights Chamber which has wielded some positive results.

2. Human Rights Chamber

¹³⁹ "Court and Prosecutor's Office of BiH on the decision of the BiH Parliament". Court of BiH. 02.10.2009.

<<http://www.sudbih.gov.ba/index.php?id=1387&jezik=e>>. 19.11.2010.

¹⁴⁰ "Support for the Decision of the High Representative in BiH on the extension of mandates of international judges at the Court of BiH". Court of BiH. 15.12.2009.

<<http://www.sudbih.gov.ba/index.php?id=1461&jezik=e>>. 19.11.2010.

¹⁴¹ "National war crimes strategy". Geneva Academy of International humanitarian law and human rights. December 2008. <http://www.adh-geneva.ch/RULAC/pdf_state/War-Crimes-Strategy-f-18-12-08.pdf>. 19.11.2010.

¹⁴² Dzidic, Denis. "Slow Transfer of Cases Undermines War Crimes Strategy". Balkan Investigative Report Network. 05.01.2010. <<http://www.bim.ba/en/200/10/24791>>. 19.11.2010.

The Chamber was set up as part of the Human Rights Commission under the Dayton Agreement and was composed of international and national jurists. Its jurisdiction covered cases involving violations of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and other human rights treaties. Its decisions were final and binding upon all three levels of BiH government.¹⁴³

Many of the cases involved wartime violations of human rights that local courts were unable or unwilling to resolve. Indeed, the constant rise in applications during the Chamber's years of operation suggests that, for many in BiH, the Chamber represented the best or last recourse for obtaining some form of justice.¹⁴⁴ As it was provided for in the Dayton Peace Agreement, the Chamber was disbanded and the backlog of cases was transferred to, the largely unprepared BiH Constitutional Court.

Among other decisions, the Chamber issued important decisions in cases of unresolved disappearances, in which the families had no information about their loved ones. These decisions led to the creation of the Srebrenica Commission.

II. Truth seeking mechanisms

In 1997, a proposal was developed by the US Institute of Peace to discuss the establishment a Truth and Reconciliation Commission (TRC), which, could help establish the facts about the nature and scale of past violations and serve as a safeguard against nationalist or revisionist accounts.¹⁴⁵ A second initiative

to establish a TRC led by the US Institute of Peace and NGO Dayton Project failed at the end of 2005.¹⁴⁶

For better or worse, there is still no TRC in BiH. The obstacles to its creation surely lie at the national level.¹⁴⁷ However, it is possible to notice that so far there is no space in BiH for a TRC. Indeed, a TRC may not be the most suitable model of truth telling in BiH. Anyhow, transitional justice standards do not require the existence of a truth commission per se, there might be other suitable truth telling mechanisms.

A few commissions were created, but the success of their work is doubtful. Thus, the Srebrenica (A), Sarajevo (B) and Bijeljina (C) commissions will shortly be mentioned. After that, the new coalition for RECOM (D) will be pointed out.

A. The commission for investigation of the events in and around Srebrenica between 10 and the 19 July 1995

The Chamber of Human Rights was confronted with cases being brought by the family of the victims of Srebrenica. It ordered in March 2003 to the government of RS to launch an investigation into the events that happened in Srebrenica in July 1995, and to share all the information that it had in its possession. The commission for investigation of the events in and around Srebrenica between 10 and the 19 July 1995 was established by RS in December 2003, in accordance with an Office of the High Representative mandate "aiming to establish lasting

¹⁴³ Human Rights Chamber for BiH. <<http://www.hrc.ba/ENGLISH/DEFAULT.HTM>>. 19.11.2010.

¹⁴⁴ "BiH: Selected developments in transitional justice." International Center for Transitional Justice. October 2004. <<http://www.ictj.org/images/content/1/1/113.pdf>>. 19.11.2010.

¹⁴⁵ "Vodič kroz tranzicijsku pravdu u BiH". Ministarstvo Pravde BiH.

<<http://www.mpr.gov.ba/userfiles/file/Publikacije/Vodic%20kroz%20tranzicijsku%20pravdu%20u%20BiH.pdf>>. 19.11.2010.

¹⁴⁶ Ibid.

¹⁴⁷ "BiH: Selected developments in transitional justice." International Center for Transitional Justice. October 2004. <<http://www.ictj.org/images/content/1/1/113.pdf>>. 19.11.2010.

peace and build confidence in BiH¹⁴⁸. This included investigating the crimes, discovering who committed and ordered them, and locating the mass graves. The commission received approximately 1,800 applications and 32 mass graves were discovered. In June 2004 it published its final report and an addendum was added in October 2004.¹⁴⁹ The conclusion states in unambiguous terms that on July 10–19, 1995, several thousand Bosniaks were “liquidated” and the perpetrators and others “undertook measures to cover up the crime” by moving bodies away from the killing site.¹⁵⁰

The government of RS took into account the report of the Srebrenica Commission, and without delay, Serbian political figures and family of victims started a campaign for the creation of a Commission for Sarajevo that would investigate crimes against Serbs committed during the war.

B. Commission for investigating of Sufferings of Serbs, Croats, Bosniaks, Jews and Others in Sarajevo in between 1992-1995

The birth of the Sarajevo commission is indivisible from the existence of the Srebrenica commission. The Sarajevo Commission was created in June 2006 by a decision of the Council of Ministers, after long lasting political delays but is called the Commission for investigating of *Sufferings of Serbs, Croats, Bosniaks, Jews and Others in Sarajevo* in period 1992- 1995.

¹⁴⁸ “Commission for Investigation of the Events in and around Srebrenica between 10 and 19 July 1995”. Justice in Perspective. <http://www.justiceinperspective.org.za/index.php?option=com_content&task=view&id=54&Itemid=100>. 19.11.2010.

¹⁴⁹ Ibid.

¹⁵⁰ “BiH: Selected developments in transitional justice.” International Center for Transitional Justice. October 2004. <<http://www.ictj.org/images/content/1/1/113.pdf>>. 19.11.2010.

This commission’s mandate is to pursue the truth concerning the killings, incarcerations, rapes, expulsions, missing and other violations of the Geneva Convention during the siege of Sarajevo. But since its creation, the commission is not progressing in its work and its members no longer meet. The commission is heavily criticized by civil society, the media, political parties as well as international actors.¹⁵¹

It seems that the idea behind the commission has been over-politicized. Thus, no results can be achieved. Despite these problems, a third commission was nevertheless created a few years ago.

C. The Bijeljina Commission

The Bijeljina Commission is unfortunately a failed truth commission, which was set up in 2007 by a decision of the municipality of the town of Bijeljina. It was meant to have a four-year mandate. The commission started its work and two public hearings were held in 2008. Nevertheless, in March 2009, without being formally disbanded, the commission ceased to work. A lot of factors lead to this situation: a lack of funding, disagreements among the members of the commission, and the presence in the commission of the commander of the notorious Batković detention camp.¹⁵²

D. The Initiative for Establishing a Regional Commission for Truth-seeking and Truth-telling About War Crimes (RECOM)

¹⁵¹ Buljugic, Mirna. “No progress for Sarajevo Truth Commission.” Balkan Investigative Reporting Network. 20.02.2007. <<http://www.bim.ba/en/51/10/2327/>>. 19.11.2010.

¹⁵² “BiH - Submission to the Universal Periodic Review of the UN Human Rights Council”. International Center for Transitional Justice. 8 September 2009. <http://www.ictj.org/static/Publications/UPR_BiH_Sep2009.pdf>. 19.11.2010.

The Coalition for RECOM is a network of nongovernmental organizations (NGOs) and associations, who represent the initiative for establishing a regional, independent, impartial, and official commission with a mandate to investigate, establish, and publicly disclose the facts about serious human rights violations, including war crimes, committed in the past on the territory of the former Yugoslavia.

The founding of the Coalition occurred after a two-year long process of consultations with civil society about mechanisms for addressing the legacy of the armed conflicts in the 1990's.¹⁵³ This commission is to be established on the basis of the common will of the governments of BiH, Croatia, Kosovo, Macedonia, Montenegro, Serbia, Slovenia, and with the support of the United Nations and the European Union.¹⁵⁴

Although the idea of such a commission is welcome, it appears that the probability that it will start working is slim. Indeed, it is difficult to bring all the governments to such an agreement and the practicalities of its structure and members are certainly hard to determine in order to please everyone.

Moreover, since its creation, the coalition for REKOM lost the support of some key NGOs and victim's group. Amongst them is the Research and Documentation center which was one of the founders of the coalition.¹⁵⁵ Besides, there has still been no support of any governments towards this initiative.

To conclude on truth seeking mechanisms, a quote often attributed to Winston Churchill seems relevant here: "If you have a problem that you do not want

to solve, create a commission".¹⁵⁶ Indeed, it appears that the commissions which were created are the fruits of political decisions taken in accordance with political circumstances. Thus, a commission created by men in power will not establish the truth simply because there is no political will for that. So, sometimes there is no will to create a commission and the commission is created due to political reasons and the results are often disappointing.

Finally, last but not least, the vetting of public officials was conducted in BiH.

III. Vetting of public officials

In the past few years, police officers, judges and prosecutors in BiH had to undergo a vetting process. Indeed, firstly police officers were reviewed and around 24.000 of them were vetted between 1999 and 2002.¹⁵⁷ Secondly, between 2002 and 2004 all judges and prosecutors had to reapply for their positions and thus went through a vetting process. In fact, three High Judicial and Prosecutorial Councils screened the appointments of approximately 1.000 judges and prosecutors during the period and rejected about 200 of them.¹⁵⁸

Conclusion

The main transitional justice mechanisms put in place in BiH were analyzed in this paper. Indeed, apart from the reparations to victims which were set aside, the national and international trials, the

¹⁵³ Ibid.

¹⁵⁴ Koalicija za REKOM. <<http://www.korekom.org/webpage/1>>. 19.11.2010.

¹⁵⁵For further details: "Odgovor REKOM-a organizacijama koje su istupile iz Koalicije". Peščanik. 01.06.2010. <<http://www.pescanik.net/content/view/5102/61/>>. 19.11.2010.

¹⁵⁶ Jonhanneau, Cécile. "« Si vous avez un problème que vous ne voulez pas régler, créez une Commission ». Les commissions d'enquêtes locales dans la Bosnie-Herzégovine d'après-guerre." *Mouvement des idées et des luttes* March – May 2008: 166-174.

¹⁵⁷ "BiH: Selected developments in transitional justice." International Center for Transitional Justice. October 2004. <<http://www.ictj.org/images/content/1/1/113.pdf>>. 19.11.2010.

¹⁵⁸ "The Former Yugoslavia". International Center for Transitional Justice. <<http://www.ictj.org/en/where/region4/510.html>>. 19.11.2010.

different truth seeking mechanisms and the vetting process of public officials were examined. It seems that the trials that took place at international and national level were not enough to ensure reconciliation and that a TRC could not be established until now. Indeed, it appears that there is no place for such a Commission in BiH. As for the other commissions that we created, only the Srebrenica commission gave some results. Concerning the institutional reforms, some vetting of public officials took place in the past few years.

Nonetheless, in January 2010, the BiH Council of Ministers adopted a decision on the establishment of a Working Group tasked with drafting a National strategy on transitional justice. According to the results of consultations that took place in the country, the future strategy will be divided in 3 pillars: 1. Determining the facts, 2. Reparations and memorials, 3. Institutional reform.¹⁵⁹

Once drafted, this strategy will be sent to the BiH Council of Ministers, the Federation, the RS and Brčko District for adoption. Hopefully, this strategy will enable BiH to finish its transitional justice process.

¹⁵⁹ "Informacija o procesu izrade strategije tranzicijske pravde u BiH". Ministarstvo Pravde BiH. <http://www.mpr.gov.ba/userfiles/file/Projekti/20_10_10%20HJ%20Informacija%20o%20STP%20u%20BiH.pdf>. 19.11.2010.

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CITIZENS' PARTICIPATION WITHIN THE LEGISLATIVE PROCEDURE OF THE OFFICE OF THE HIGH REPRESENTATIVE OF BOSNIA AND HERZEGOVINA IN LIGHT OF ARTICLE 3 PROTOCOL 1 TO THE ECHR

By Marjolein Schaap*

ABSTRACT

The concept of an international administration has led to a significantly constrained state sovereignty and affects the lives of millions of people directly. The authority exercised by international administrators as in Bosnia and Herzegovina is extensive, including the power to legislate. It is vital for an international administration's domestic legitimacy that its authority is justified through participation of citizens within a polity. The right to political participation is recognized as a fundamental right in article 3 Prot. 1 to the ECHR. Therefore, the author examines if article 3 Prot. 1 to the ECHR is applicable to the legislation adopted by the international administrator and thereby if citizens of Bosnia and Herzegovina enjoy the right to participate in the legislative procedure of the High Representative. This will be analyzed at the national level in light of the theory of functional duality as developed by the Constitutional Court of Bosnia and Herzegovina. Lastly, the paper examines if citizens can enforce their right to participation which will be examined by analyzing if the Constitutional Court has the competence to review the legislation of the High Representative on compatibility with article 3 Prot. 1 to the ECHR.

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Introduction

The concept of an international administration¹⁶⁰ has led to a significantly constrained state sovereignty and affects the lives of millions of people directly. The authority exercised by international administrators as in Bosnia and Herzegovina (hereafter BiH) is extensive, including the power to legislate. It is vital for the domestic legitimacy of an international administration that its authority is justified through participation of citizens within a polity.¹⁶¹

The international administrator in BiH, the Office of the High Representative (hereafter OHR), is responsible for the civilian implementation of the Dayton General Framework Agreement for Peace in Bosnia and Herzegovina (hereafter DPA).¹⁶² The domestic authorities retained full sovereignty in BiH; the OHR has the power to intervene in the domestic legal order when it is deemed necessary. For some time it was unclear how legislation adopted by the OHR should be qualified and thereby reviewed. The Constitutional Court of BiH (hereafter 'Constitutional Court') developed the theory of functional duality in order to review legislation adopted by the OHR on compatibility with the Constitution of BiH. With the development of this theory as a means to hold an international administrator accountable domestically when adopting domestic legislative acts, new discussions

arose on the applicable standards to these legislative acts.

One possible standard is article 3 Prot. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter 'ECHR'), which ensures a democratic society through protecting political participation in the decision-making process of governmental authorities, thereby ensuring free election of the legislative body and the functioning thereof.

Therefore, this paper examines whether or not the citizens of BiH have a right to political participation within the legislative procedure of the OHR, more specifically whether article 3 Prot. 1 to the ECHR is applicable to the legislative activities of the OHR, and if so, whether citizens can enforce this right within BiH's domestic courts.

In order to answer these questions, firstly the importance of participation will be addressed in light of the functioning and mandate of the OHR. Thereafter, the applicability of the provision to the legislative activities will be assessed in light of the theory of functional duality as developed by the Constitutional Court, subsequently it will be examined if the Constitutional Court has the competence to review the compatibility of legislative activities of the OHR with article 3 Prot. 1 to the ECHR. The article will conclude with placing this topic in its legal and political context in BiH.

The role of participation in an international administration and more specifically in BiH

The importance of participation within international administrations was already acknowledged in 1968 by the United Nations.¹⁶³ The degree of participation is

¹⁶⁰ Stahn defined an international administration as 'the exercise of administering territory by an international entity for the benefit of a territory that is temporarily placed under international supervision or assistance for a communitarian purpose'. C. Stahn, *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond*, Cambridge: Cambridge University Press, 2008, pp. 2-3.

¹⁶¹ Bodansky defined legitimacy as relating to 'the justification and acceptance of political authority' D. Bodansky, 'The Concept of Legitimacy in International Law', (2007) *University of Georgia School of Law Research Paper No. 07-013*, at 1.

¹⁶² The Dayton General Framework Agreement for Peace in Bosnia and Herzegovina 10 December 1995, available at <http://www.ohr.int/>.

¹⁶³ The General Assembly of the United Nations addressed the importance of participation in light of the administering Namibia; See Stahn, *Law and*

decisive for the legitimacy of an international administration. The legitimacy will be based on to what extent the international administrator is able to incorporate the will of the people into the decision-making process.¹⁶⁴ In order to do so, some form of involvement of the local actors and citizens is necessary within the decision-making process. Participation in the context of international administrations implies often power-sharing arrangements between local actors and the international administration,¹⁶⁵ but it also implies involvement of local actors representing citizens or direct involvement of citizens within the decision-making process of the international administration. Involvement within the legislative activities of the OHR could be realized through various forms and degrees of participation. This article will focus on two phases which can be identified in the process of participation; the actual participation within the decision-making process and the possibility to enforce the right to participation in case citizens feel that their right has been limited or interfered by the authority, i.e. access to justice.¹⁶⁶

Participation is in BiH even more pertinent in comparison to other administrations considering the fact that, firstly, the governmental role of the OHR

Practice, p. 718; Also see UN GA Res. 2248 (1968), para. 1(a).

¹⁶⁴ B. Knoll, *The Legal status of territories subject to administration by international organizations*, Cambridge: Cambridge University Press, 2008, p. 297.

¹⁶⁵ C. Stahn, 'Governance Beyond the State', 2 *International Organizations Law Review* 9 (2005), 46; The importance thereof was reflected in the power-sharing arrangements in the mandates of international administrations in Kosovo and East-Timor. For Kosovo see SC Res. 1244 (1999), para. 10-11. For East Timor see SC Res. 1272 (1999), para. 8; In both cases the international administration had full authority as of the beginning of the administration and gradually conferred powers upon the local authorities based on the arrangements as stipulated in the mandates.

¹⁶⁶ J. Ebbesson, 'Public Participation' in D. Bodansky, J. Brunneé and E. Hey (eds.) *The Oxford Handbook of International environmental law*, Oxford: Oxford University Press 2007, p. 681.

was not anticipated,¹⁶⁷ and secondly, that the OHR does not have the exclusive authority to govern.¹⁶⁸ Originally, the OHR's mandate was to solely facilitate and coordinate the implementation of the DPA, whereas as of 1997, the OHR had the power to adopt binding decisions, which subsequently became known as the 'Bonn powers'. The OHR exercises authority through intervention into the domestic legal order when it is deemed necessary for the implementation of the DPA.

The legislative activities of the OHR and the theory of functional duality

In order to decide on the applicability of Article 3 Prot. 1 to the ECHR to the legislative activities of the OHR it is necessary to have a good understanding of the scope of the powers of the OHR. Furthermore, it is important to understand the notion of functional duality which the Constitutional Court developed in order to create competence to review legislative activities of the OHR on compatibility with the Constitution of BiH.

The mandate of the OHR and its power to legislate

The UN Security Council endorsed the establishment of the OHR through resolution 1031 adopted under Chapter VII of the UN Charter.¹⁶⁹ As of 1997, the OHR has the power to adopt binding decisions,¹⁷⁰ which means that the OHR

¹⁶⁷ It seems that this explains why no official power sharing arrangement or other forms of participation have been arranged structurally and institutionally from the beginning.

¹⁶⁸ Nevertheless, the international administrations as in Kosovo and East-Timor are comparable in most elements with regard to the need for participation and the standards applicable to it.

¹⁶⁹ See Paragraph 2 of Annex 10 to the DPA; UNSC Res 1031 No. 26, 27.

¹⁷⁰ The re-interpretation of the powers of the High Representative took place at the meeting of its supervising body, the Peace Implementation Council. *PIC Bonn Conclusions* (8/12/1997), para. XI, available at <http://www.ohr.int/>. The Security Council endorsed the reinterpretation in UN SC Res. 1144 (1997).

has the power to dismiss or remove persons from holding public office when they work against the spirit of the DPA,¹⁷¹ and the power to legislate when the Parliamentary Assembly of BiH is not able or not willing to adopt legislation deemed necessary for effective implementation of the DPA.¹⁷² The difficulties encountered by the Parliamentary Assembly in adopting necessary legislation or amendments can be explained through the designed decision-making mechanism in the Constitution with equal ethnic representation within state institutions and a veto power for the three ethnic groups.¹⁷³ The (new) Constitution of BiH¹⁷⁴ was agreed on within the drafting process of the DPA and entered into force as an annex to the DPA.¹⁷⁵

The authority to legislate and the exercise thereof by the OHR have been criticised severely.¹⁷⁶ E.g. there are no procedural

rules for the legislative acts adopted by the High Representative even though there are strict rules for the Parliamentary Assembly to adopt legislation.¹⁷⁷ Furthermore, the legislation adopted by the OHR contains a paragraph which instructed the Parliamentary Assembly to adopt the law in due form without any amendments or conditions attached.¹⁷⁸

The OHR exercised the power to legislate and to amend laws extensively: between 1998 and 2010, 339 laws and/or amendments were imposed in this manner.¹⁷⁹ There are several examples which illustrate the exercise of legislative authority by the OHR; e.g. on November 12, 2000, one day after the Parliamentary Assembly elections, the OHR adopted eight laws and three amendments concerning various subjects from establishing institutions to laws deciding on weights and measures.¹⁸⁰ Moreover, in some cases the OHR also initiated laws by giving orders to the Parliament to adopt laws on a certain area within a set timeframe and a given context.¹⁸¹ In other instances, the OHR drafts the legislation instead of the Parliamentary Assembly with participation of parties' representatives and adopts the legislation.¹⁸² Even though most laws

¹⁷¹ This paper will not address the authority of the OHR to remove persons from holding public office.

¹⁷² See PIC Bonn Conclusions. See for further explanation M. Schaap, *Regulating the powers of the High Representative*, Erasmus University Rotterdam, Master's thesis, 2009, p. 49; See for comments R. Wilde, 'The complex role of the legal adviser when international organizations administer territory', *ASIL Proceedings* 251 (2001), p. 253.

¹⁷³ The three constituent people are Bosniaks, Serbs and Croats. For a critical review of this Constitutional provision see European Commission for Democracy through Law of the Council of Europe (Venice Commission), *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative* (Venice, 11 March 2005), CDL-AD (2005)004, para. 87; European Court of Human Rights, *Sejdic and Finci v. Bosnia and Herzegovina* (application nos. 27996/06 and 34836/06) 2009.

¹⁷⁴ The Constitution of BiH is unique to the extent that it was not adopted by the domestic legislator but annexed to an international treaty. Furthermore, till this day the official version of the Constitution not available in one of the official languages of BiH (only in English). See for more information on the Constitution and its provisions Steiner and Ademović (Eds.), *Constitution of Bosnia and Herzegovina*.

¹⁷⁵ Annexes 4 and 10 to the DPA are the most relevant Annexes with regard to this paper, where Annex 4 comprises the Constitution of BiH and Annex 10 deals with the civilian implementation of the DPA.

¹⁷⁶ This paper will not look into the authority to legislate by an international administrator. See for criticism e.g. G. Knaus and F. Martin, 'Lessons from

Bosnia and Herzegovina- Travails from the European Raj', *Journal of Democracy* 14 (2003), p. 60; Schaap, *Regulating the powers of the High Representative*.

¹⁷⁷ However, all legislative acts adopted by the OHR are published in the Official Gazette of Bosnia and Herzegovina as are the legislative acts adopted by the Parliamentary Assembly.

¹⁷⁸ See e.g. High Representative, *Decision Enacting the Law on Changes and Amendments to the Law on the Council of Ministers in Bosnia and Herzegovina* (October 19, 2007) available at <http://www.ohr.int/>.

¹⁷⁹ See <http://www.ohr.int/>.

¹⁸⁰ It is quite questionable if the new Parliamentary Assembly was unable or unwilling to adopt these 8 laws and three amendments. For decisions of the OHR see <http://www.ohr.int/>.

¹⁸¹ See e.g. the legislative program of the OHR as addressed to the Parliamentary assembly in which 10 pledges and 69 pledges were stipulated 'Justice and Jobs', available at <http://www.ohr.int/>. Also see Knaus and Martin, 'Lessons from Bosnia and Herzegovina', 60.

¹⁸² See e.g. the law on the Council of Ministers of Bosnia and Herzegovina and the OHR decision enacting the law on the Council of Ministers of

adopted by the OHR were vital for BiH to move forward because of the impasse within the Parliamentary Assembly, the intrusion into the domestic order is nevertheless extensive.¹⁸³ Furthermore, for a long time it was considered that legislative activities of the OHR were not subject to review,¹⁸⁴ until the Constitutional Court delivered their judgment in case *U 9/00*.

The Constitutional Court and the theory of functional duality

The OHR has a dual role; as international actor, responsible to the international community and as national actor, responsible to the people of BiH.¹⁸⁵ The OHR enjoys immunity. Article III (4) of Annex X to the Dayton Peace Agreement accorded the same immunities to the OHR as to a diplomatic mission and the diplomatic agent; consequently the OHR enjoys immunity *rationae materiae* and immunity *rationae personae*. This implies that the BiH courts do not seem to have jurisdiction to review decisions taken by the OHR. The Constitutional Court developed a theory of functional duality in order to review legislative activities of the OHR to solve (partly) the accountability problem. The Constitutional Court reviewed for the first time legislation adopted by the OHR in case *U 9/00*. The decision in question concerned the validity of a law creating a border service for BiH, adopted by the OHR after failure

of the Parliamentary Assembly to do so.¹⁸⁶ Various members of the BiH House of Representatives challenged this law, because the procedure set forth in the Constitution was not followed, i.e. the OHR did not have the power to enact a law in the absence of a vote by the Parliamentary Assembly, and additionally, because the law was unconstitutional on other grounds.¹⁸⁷ The Constitutional Court argued that they were not competent to deal with a question of authority of the OHR due to the immunity of the OHR. However, the Constitutional Court argued that they were competent to review the legislation because the OHR:

... intervened in the legal order of Bosnia and Herzegovina by substituting himself for the national authorities. (...) he therefore acted as an authority of Bosnia and Herzegovina and the law which he enacted is in the nature of a national law and must be regarded as a law of Bosnia and Herzegovina.¹⁸⁸

According to the Court, '*such situation amounts to a sort of functional duality: an authority of one legal system intervenes in another legal system, thus making its functions dual.*'¹⁸⁹ The acts of the OHR are 'acts of two distinct legal persons simultaneously', the international actor and the national actor.¹⁹⁰ The

Bosnia and Herzegovina, all available at <http://www.ohr.int/>.

¹⁸³ Venice Commission, 'Opinion on the Constitutional Situation'; European Stability Initiative, *Reshaping international priorities in Bosnia and Herzegovina – Part II International Power in Bosnia* (Berlin: European Stability Initiative 2000) available at <www.esiweb.org>

¹⁸⁴ See for the criticism of the unchecked role of the HR especially Knaus and Martin, 'Lessons from Bosnia and Herzegovina', who compared the OHR with the 'European Raj'.

¹⁸⁵ C. Stahn, 'Accountability and Legitimacy in Practise: Lawmaking by transitional administration', 11 *International Peacekeeping: the Yearbook of Peace Operations* 81 (2006), 102. This concept has been applied to various international administrations, such as East Timor and Kosovo.

¹⁸⁶ OHR, 'Decision imposing the Law on State Border Service of Bosnia and Herzegovina' (13/1/2000), available at <http://www.ohr.int/>; Constitutional Court of Bosnia and Herzegovina, *U 9/00* (3 November 2000), para. 5, available at <www.ccbh.ba> (accessed July 10, 2009).

¹⁸⁷ The applicants claimed that article III.5 (a) of the Constitution was not followed by the Presidency of the BiH, i.e. asking for prior consent to the entities before drafting this law. The Court concluded that there was no violation of the Constitution. Constitutional Court of Bosnia and Herzegovina, *U 9/00*, para. 10 *et seq.*

¹⁸⁸ Constitutional Court of Bosnia and Herzegovina, *U 9/00*, para 5.

¹⁸⁹ *Ibid.* (emphasis added by author).

¹⁹⁰ R. Wilde, 'The accountability of international organizations and the concept of function duality', in W.P. Heere (Ed.), *From Government to Governance*,

Constitutional Court has the competence to review legislation of the Entities and other domestic legislation if referred to the Constitutional Court for review by any of the other courts in BiH.¹⁹¹ Additionally, the Constitutional Court has appellate jurisdiction 'over issues under this Constitution arising out of a judgment of any other court in BiH'.¹⁹² Confronted with a question of review of legislation, the Court will examine the legislation on compatibility with the Constitution and with the ECHR and its Protocols.¹⁹³ As mentioned the legislation imposed by the OHR has the same constitutional status as ordinary legislation and is therefore subject to review by the Court on compatibility with the Constitution and with the ECHR and its Protocols.¹⁹⁴ The interpretation of the Court on its competence to review legislative acts adopted by the OHR has also been referred to as the 'Bosnian version of ... *Marbury v. Madison*'.¹⁹⁵ In most cases the Court concluded that laws and legislative amendments adopted by the OHR were compatible with the Constitution.¹⁹⁶

Proceedings of the Sixth Hague Joint Conference, The Hague: T.M.C. Asser, 2004, pp. 164-167.

¹⁹¹ Constitution of BiH, annex 4 to the Dayton Peace Agreement, article VI (III) (1) (b) and (3).

¹⁹² *Ibid.*, Article VI (III) (2).

¹⁹³ *Ibid.*

¹⁹⁴ B. Knoll, 'Beyond the *Mission Civilisatrice*: the properties of a normative order within an internationalized territory', *LJIL* 19 (2006), 296; D.S. Smyrek, *Internationally administered territories – International protectorates?*, Berlin: Duncker and Humblot, 2006, p. 152.

¹⁹⁵ *Ibid.*; Supreme Court of the United States of America, *Marbury v. Madison* (1803), in which the Supreme Court of the United States of America defined their competence to exercise of judicial review under Article III of the Constitution.

¹⁹⁶ Constitutional Court of Bosnia and Herzegovina, *U 26/01* (September 28, 2001); Constitutional Court of Bosnia and Herzegovina, *U 16/00* (February 2, 2001); Constitutional Court of Bosnia and Herzegovina, *U 25/00* (March 23, 2001), all available at <http://www.ccbh.ba/> (accessed July 10, 2009); the Human Rights Chamber produced similar case law: R. Everly, 'Assessing the Accountability of the High Representative', in D.F. Haynes (ed.), *Deconstructing the Reconstruction*, Burlington/Aldershot: Ashgate, 2008, p. 104. Also see Human Rights Chamber of Bosnia and Herzegovina, *Case No. CH/02/12470*, Decision on

However, in 2006, the Constitutional Court had proven that its competence to review legislative activities of the OHR was not merely based on 'tacit consensus between the Court and the OHR' as argued in 2004 by a former judge of the Constitutional Court.¹⁹⁷ In *case U 6/06* the Court concluded that for the first time that legislation adopted by the OHR was incompatible with the Constitution.

Assessing the applicability and enforceability of article 3 Prot. 1 ECHR to the legislative activities of the OHR

The right to political participation is a vital right in a democratic society. It requires state authorities to have some form of democratic legitimation.¹⁹⁸ Individuals have the right to participate in processes constituting the conduct of public affairs.¹⁹⁹ Within the ECHR participation is protected by Article 3 Prot. 1 to the ECHR.²⁰⁰ The provision 'presupposes the existence of a representative legislature, elected at reasonable intervals, as the basis of a democratic society'.²⁰¹ The essence is that the political power to legislate should be subject to a freely elected legislature, as in the case of BiH the Parliamentary Assembly.²⁰² Article 3 Prot. 1 to the ECHR has been developed into a classical

the Admissibility and Merits (October 10, 2003) and *Case No. CH/02/9130*, Decision on the Admissibility and Merits (January 6, 2003).

¹⁹⁷ J. Marko, 'Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina: A First Balance', *European Diversity and Autonomy Papers* 16 (2004), 18.

¹⁹⁸ C. Tomuschat, *International Covenant on Civil and Political Rights*, available at http://untreaty.un.org/cod/avl/pdf/ha/iccpr/iccpr_e.pdf.

¹⁹⁹ *General Comment 25*, HRC, Article 25 (1996), UN Doc. CCPR/C21/Rev.1/Add.7.

²⁰⁰ Steiner and Ademović (Eds.), *Constitution of Bosnia and Herzegovina – Commentary*, Berlin: Konrad Adenauer Stiftung, 2010, p. 437.

²⁰¹ Report of the Commission, 'The Greek case', 5 November 1969 (1969), *Yearbook* 12, p. 179.

²⁰² F.G. Jacobs, R.C.A. White and C. Ovey, *The European Convention on Human Rights*, 3rd edition, Oxford: Clarendon Press, 2002, p. 331.

human right;²⁰³ it comprises two subjective political human rights, ‘the right to vote’ and ‘the right to stand for election to the legislature’, which together embraces the right to participate in political life.²⁰⁴ As said by the Constitutional Court Article 3 Prot. 1 implies that states may not limit the freedom of participation to the extent that it will impair its very essence and deprive it of its effectiveness.²⁰⁵ In order to examine if citizens have a right to participation within the OHR legislative procedure and if they can enforce their right in the domestic courts it is important to look at the applicability and enforceability of article 3 Prot. 1 to the ECHR at the national level.²⁰⁶

Applicability of article 3 Prot. 1 to the ECHR

The ECHR has a special status within BiH, which provides for far-reaching human rights protection.²⁰⁷ The ECHR is directly applicable within BiH and the ECHR supersedes conflicting national law. When the OHR intervenes and adopts legislation instead of the Parliamentary Assembly the question arises whether article 3 Prot. 1 to the ECHR is applicable to this legislation. The right to participation for citizens in BiH means that they have the right to participate in political life; actively through the right to vote and, passively through the right to stand for elections to the legislature, i.e. the Parliamentary Assembly in BiH.²⁰⁸

²⁰³ Steiner and Ademović (Eds.), *Constitution of Bosnia and Herzegovina - Commentary*, p. 437.

²⁰⁴ AP 952/05 in conjunction with EComHR, X. V. *Belgium*, Application No. 1028/61 (1961).

²⁰⁵ Constitutional Court, *Case AP-35/03* (2005), para. 42.

²⁰⁶ This paper will not address the possible evaluation of the issue at hand at the regional level by the ECtHR. See for more discussion on this and thereby the discussion on extra-territorial application of human rights to international administrations Knoll, *The Legal status of territories subject to administration by international organizations* at 360.

²⁰⁷ Article II (I) of the Constitution.

²⁰⁸ AP 952/05 in conjunction with EComHR, X. V. *Belgium*, Application No. 1028/61 (1961); Steiner

The legislation adopted by the OHR is regarded as national legislation on the basis of the theory of functional duality, to which the same legal framework is applicable as to legislation adopted by the Parliamentary Assembly. This implies that the OHR in its decision-making process of legislation has to comply with the Constitution and the ECHR and its Protocols. Concluding, article 3 Prot. 1 to the ECHR is applicable to the legislation adopted by the OHR.

Now it has to be examined if citizens can enforce their right to participation at the domestic level when they believe their right to participation has been violated or unjustifiably limited due to the legislative procedure of the OHR. Therefore, the next paragraph will examine if the BiH courts have the competence to review legislation of the OHR on compatibility with article 3 Prot. 1 to the ECHR.

Enforceability of article 3 Prot. 1 to the ECHR at the domestic level

As argued, on the basis of the theory of functional duality the Constitutional Court has the competence to review legislative activities of the OHR on compatibility with the Constitution of BiH and with the ECHR. So far the Constitutional Court has only reviewed the legislation adopted by the OHR on compatibility with the Constitution.²⁰⁹ However, the Constitutional Court has the competence to review it on compatibility with the ECHR if presented with a question thereupon. For instance, in the *Kalinic case* the Constitutional Court concluded that there was no effective legal remedy available against decisions of the OHR removing a person from holding public office, thereby violating article 6 of

and Ademović (Eds.), *Constitution of Bosnia and Herzegovina - Commentary*, p. 437.

²⁰⁹ Article II (1) (2) of the Constitution.

the ECHR.²¹⁰ Thus, theoretically speaking, the Constitutional Court has the competence to review legislative activities of the OHR on compatibility with article 3 Prot. 1 to the ECHR, the question arises whether the immunity of the OHR will result into a bar to review by the Constitutional Court.²¹¹

The OHR's Immunity – a bar to review?

As discussed previously, the legislative activities of the OHR constitute simultaneously an act of an international as well as a national actor. The OHR enjoys immunity for those decisions taken in the capacity as international actor. According to the Constitutional Court this implies that the OHR's authority to legislate is not subject to review, whereas the product of the authority, the legislation, is subject to the review as any other national legislative act. As mentioned, in case *U 9/00* the Constitutional Court argued that it will not review the procedure of the OHR to adopt a law without a vote on it from the Parliamentary Assembly, because it was barred to do so due to the immunity of the OHR. Consequently, the Court did not assess if it was justified for the OHR to act instead of the democratically elected Parliamentary Assembly.²¹²

However, article 3 Prot. 1 to the ECHR is a classical right applicable to the legislation and to the legislator. This article sets the standards for participation into the legislative activities and is thereby meant to serve as democratic legitimation of the decision-making process. As mentioned earlier, participation can take various forms and

degrees. As said by the Venice Commission, the right will be deprived of its content if a parliamentary assembly elected by the people will not be the legislative body adopting the legislation.²¹³ It is obvious that we cannot expect the OHR to have a democratically elected legislature because it would be contradictory to the reason d'être of the OHR.²¹⁴ Nevertheless, article 3 Prot. to the ECHR should be interpreted in such a manner that it is applicable to the legislative activities of the OHR and that it set democratic standards for the legislative activities in regards to involvement of citizens.

Therefore, it can be argued that the Court has the competence to review the legislation of the OHR on compatibility with article 3 Prot. 1 to the ECHR; it should not be barred by the immunity of the OHR. In principle the right to participation is enforceable, citizens could go the domestic courts to enforce their right, and however time will tell how the Constitutional Court will deal with this question if confronted with it.

Conclusion

As often mentioned, the situation in BiH is complex; there is an OHR with legislative power intervening into the domestic legal order of BiH who enjoys immunity from court proceedings when it concerns his conduct as international actor. At the other end, there is a Constitutional Court which sets up a system of review of the conduct of the OHR when he acts as national actor. As argued, citizens in BiH have a right to participate in the legislative procedures of the OHR, as citizens have within a purely national legislative procedure. Citizens can enforce their right at the domestic

²¹⁰ Constitutional Court of Bosnia and Herzegovina, *AP-954/05, Milorad Bilbija i Dragan Kalinić* (8/7/2006), available at <http://www.ccbh.ba/>.

²¹¹ This article does not address the possible outcome of a case on participation before the Constitutional Court, therefore the possible justifications and the margin of appreciations of states will not be addressed within this article.

²¹² Venice Commission, 'Opinion on the Constitutional Situation', para. 89.

²¹³ Venice Commission, 'Opinion on the Constitutional Situation', para. 87.

²¹⁴ This is a question of justification and margin of appreciation of states, which requires more research in order to have a proper conclusion and solution to this problem.

courts in BiH. However it would be unrealistic to expect from the OHR to create a form of participation similar to the domestic level, due to the major discrepancy between the legal situation and its demands on the one hand and the political reality and its consequences on the other hand.²¹⁵

Nevertheless, it is essential for a country that acceded to the Council of Europe in 2004 to look ahead. The OHR needs to take human rights provisions into account in his decision-making process, especially when he adopts decisions directly affecting individuals in BiH. As international administrator, it is essential that he exercises his functions in accordance with the principles of good governance and thereby in accordance with the right to participate. On the basis of article 3 Prot. 1 to the ECHR, the OHR has an obligation to let citizens participate in the decision-making process in order to create some form of democratic legitimation. Even though, due to the situation it is sometimes necessary for the OHR to adopt legislation, democratic rights should always be taken into account within the legislative procedure including some form of participation.

Therefore, in order for citizens to enforce their right to participation, the Constitutional Court should take a broader approach to the legislative activities of the OHR and apply the provisions of the ECHR to his legislative activities. BiH as a member of the Council of Europe is responsible for commitments in respect to the [Council of Europe] and this responsibility has to be fulfilled by the country and not by the [OHR].²¹⁶ Consequently, the domestic courts need to provide for a remedy against a violation of article 3 Prot. 1 ECHR²¹⁷ by the OHR

considering that they have the competence to do so on the basis of the concept of functional duality.

²¹⁵ Even though this is a highly interesting question, it falls outside the scope of this article.

²¹⁶ Venice Commission, 'Opinion on the Constitutional Situation', para 88.

²¹⁷ This line of argumentation leaves aside the actual review by the domestic courts and the fact if the

courts will or will not conclude that the OHR has unjustifiably breached Article 3 Prot. 1 to the ECHR.

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“TOMORROW PEOPLE, WHERE IS YOUR PAST?”²¹⁸

Transitional Justice Mechanism and Dealing with Past in Serbia and Croatia

By Ana Ljubojević*

ABSTRACT

Conflicts in Bosnia and Croatia from 1991 to 1995 have left a huge impact on the political and economical systems of successor countries of the former Yugoslavia. At present, almost 15 years after the end of war, society is still intensively trying to deal with the past.

Societies in transition from war a ravaged reality to democracy are using various mechanisms of transitional justice, such as war crimes trial, truth commissions, lustration and reparation. In 1993, a UNSC Resolution established the International Criminal Tribunal for the former Yugoslavia. The Dayton peace agreement obliged all post-Yugoslav states to collaborate and extradite alleged war criminals. The transfer of cases to domestic Special Courts for war crimes started with back referral and completion strategy. Regional cooperation on some cases highly influenced success of the later ones. The problem of reconciliation as one of the most pressing in post-conflict societies, is made possible only by systematic, persistent, long-lasting confrontation with past in order to create a democratic environment.

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²¹⁸ Ziggy Marley

A combination of economic decay starting in the 1980s, political illegitimacy of the communist system and a failure to create a common historical narrative led to the outbreak of wars in Croatia and Bosnia. Almost a decade of war and violence devastated the economic and political systems of the former Yugoslav republics and had a huge impact on the social fabric.

Mutually excluding “truths” about these wars and the atrocities committed quickly developed, and were used in the creation of new national identities, reinforcing at the same time the fragmentation of post-war societies.

The clash between “us” and “them” was strongly underlined, and each group had a tendency to see their own country or nation or group as the victim of a conspiracy organized by other nation or group. Gellner argued that the national sentiment that relies on the relation and the comparison with the others would be politically more effective if nationalists had as fine a sensibility to the wrongs committed by their nation as they have to those committed against it²¹⁹.

One of the most difficult questions to be answered by a country in transition from past conflicts to a democracy based on the rule of the law is how the society shall deal with the atrocities and injustices of the past. Both legal and political developments of measures concerning human rights gave as result notion of transitional justice.

In the UN report “The rule of law in conflict and post-conflict societies” transitional justice is described as “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation”²²⁰.

Transitional justice may include either judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions. Its mechanisms consist of criminal justice oriented policies such as trials for war crimes or lack of trials. In addition transitional justice mechanisms are addressed to institutional reform (vetting and lustration), reparations and truth telling (truth commissions).

A milestone document that defines state obligations in case of great breaches of human rights is the judgment in the *Velásquez Rodríguez vs Honduras* case brought before the Inter-American Court of Human Rights. It clearly defines the objectives of transition justice asserting that “the State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation”.

In case of the successor states of the former Yugoslavia traumatic legacies of the past have to be dealt with in order to build a stable future; that special attention should go to the needs and rights of people including in victims in particular; and that only a comprehensive approach will rebuild trust among citizens and between citizens and the state.

So far, apart from seldom attempts of truth commissions and lustration, the focus has been on prosecution of war crimes. Transition towards stable democracy and strengthening of the rule of law in all post-Yugoslav states was not possible without justice and accountability for the committed crimes.

The International Criminal Tribunal for the former Yugoslavia (ICTY) was established by United Nations Security Council resolution 827²²¹. This

²¹⁹ Ernest Gellner, *Nations and Nationalism*, Cornell University Press, 1983

²²⁰ Report of the Secretary General Kofi Annan, *The rule of law in conflict and post-conflict societies*, United Nations Security Council, 2004

²²¹ Full text of UNSC Resolution 827: <http://daccessdds.un.org/doc/UNDOC/GEN/N93/306/28/IMG/N9330628.pdf?OpenElement>

resolution was passed on 25 May 1993 in the face of the serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, and as a response to the threat to international peace and security posed by those serious violations.

Among the aims of the ICTY, as reported in its Statute, appear statements such as:

- Bringing a sense of justice to war-torn places;
- Re-establishing the rule of law;
- Providing a sound foundation for lasting peace;
- Bringing response to victims and providing an outlet to end cycles of violence and revenge;
- Demonstration that culpability is individual and not the responsibility of entire groups; and
- In a didactic mode, explanations about what caused the violations, and illustrate particular patterns of violation²²².

The task of the ICTY is to understand the development of international criminal justice within a political context and not to detach justice from politics. The fact is that there can never be a complete separation between law and policy. No matter what theory of law or political philosophy is professed, the inextricable bounds linking law and politics must be recognised. Transitional justice, although situated at the niche of human rights, represents its political development in many of its manifestations.

In the case of ICTY, the link between the law and the politics is unusually close and transparent. It was only in 1995 that the states created after the dissolution of Yugoslavia had an obligation to accept cooperation with the ICTY. Article IX of the “General framework agreement” (also known as Dayton agreement) requires full cooperation with all organizations involved in

implementation of the peace settlement, including the ICTY²²³.

Consequently, the EU made this an important condition of its accession policy vis-à-vis the Western Balkan countries concerned, making the start of negotiations contingent on full cooperation with the ICTY.

For the ICTY to fulfil its broader mandate of contributing to peace and reconciliation it had to ensure that its “investigative and judicial work ... [is] known and understood by the people in the region.”²²⁴ Unfortunately, during the first six years of the ICTY’s work, the lack of resonance within the affected communities due to the lack of any kind of community outreach programs, resulted in broad misconceptions and understanding of the Tribunal’s work. The legal professionals either took public relations for granted or as not being their concern; they were also mainly interested in the development of International Humanitarian Law; that is in “the rules of the game” instead of “the actual content of the game”. Even ten years after creation of ICTY over 60% of the population in former Yugoslav Republics did not know what laws govern war crimes and 66% had not received any information about the kind of crimes for which one can be indicted²²⁵.

One of the main tasks of the media is to attempt to paint comprehensive narratives about the past atrocities, to tell stories that include everybody, regardless of his or her ethnicity or current residency. It is obvious that print media, radio and television may either aid the process of truth seeking and

²²³ Full text of Dayton Peace Agreement: <http://daccessdds.un.org/doc/UNDOC/GEN/N93/306/28/IMG/N9330628.pdf?OpenElement>

²²⁴ Judge McDonald, *Outreach Symposium Marks the First Successful Step in Campaign for Better Understanding of the ICTY in the Former Yugoslavia*, 20 October 1998

²²⁵ Cibelli, Kristen and Guberek, *Justice Unknown, Justice Unsatisfied? Bosnian NGOs Speak about the International Criminal Tribunal of the Former Yugoslavia*, 2000

²²² Statute of the ICTY: <http://www.un.org/icty/legal/doc-e/index-t.htm>

reconciliation, or be a major obstacle on that path.

In the Balkan's region there are multiple versions of the truth that build new national narrative traditions. The detainees' "shows and performances" in courtrooms are creating postmodern myths in ex-Yugoslav society. Those myths have been created together with the myths of rebirth of nationalism and their impact is huge although their appearance on the political scene is quite recent²²⁶.

It may seem to be a paradox, although one that can easily be explained, that in the times of Milosevic and Tudjman, the Tribunal had more support in Serbia and Croatia than it has now²²⁷. This had nothing to do with the opposition parties accepting the necessity of facing the bloody past and assigning personal responsibility in order to avoid being saddled with collective guilt, but because the Tribunal was seen exclusively as an instrument of political pressure which could be wielded to overthrow the regime.

Nevertheless, criminal justice intervention had, as former ICTY Chief Prosecutor Louise Arbour stated, "a weapon in the arsenal of peace"²²⁸. They realized it only after they had exhausted all other weapons in the traditional peace building armoury: diplomacy, conflict management, bilateral and multilateral negotiations and pressure, political and economical sanctions and more or less credible threats.

Social reactions to past war crimes and human rights abuses are today becoming more oriented towards establishing truth and punishing perpetrators. At present, almost 15 years after the end of the war there is very little consensus among the former republics on official narratives about what actually

happened. In the successor states of Yugoslavia national identities came to be defined dialectically, in relation to one another. In terms of responsibility of war crimes, issue raised was the existence of double standards for "ours" and "theirs". Accused compatriots though still enjoy the status of public heroes. It is necessary to outline that failing to raise a voice about the committed crime is as if the crime never happened. Therefore, the work of Tribunal is to be legal, political and moral catalyst.

One of the frequently stated goals of prosecuting individuals for violations of international humanitarian law through the ICTY is to lift the burden of collective guilt from the nations in whose names violations were carried out, by tying the violations to specific individuals who bear criminal responsibility. Still, clear distinction between collective responsibility and collective guilt should be made. Every nation in conflict is bearing collective responsibility for the acts its individuals committed in helping or not preventing them of doing it, while no nation can be named criminal nation²²⁹. All the criminals are individuals or are taking part of the criminal group or organization.

This raises two important political questions. Firstly, do legal institutions in general offer an appropriate arena for the resolution of issues relating to national identity and guilt? Secondly, is the way in which the ICTY functions effectively decoupling national identities from the notion of collective responsibility?

²²⁹ "Zločinačkih naroda i nikada, baš nikada, ne može cijeli jedan narod biti odgovoran i kriv za ono što su počinili pojedini njegovi pripadnici, ili organizirane skupine – ma kako velike i brojne bile. Postoje individualni zločinci, postoje i zločinačke skupine i organizacije, ali – kažem još jednom – zločinačkih naroda nema". ("There are no criminal nations and never, absolutely never, an entire nation can be responsible for acts of some of its nationals or organized groups – no matter how large they were. There are individual criminals, there are criminal groups and organizations, but – I' will repeat- there are no criminal nations") Croatian President Mesić's speech on 8th February 2007

²²⁶ Sabrina P. Ramet, *The Dissolution of Yugoslavia: Competing Narratives of Resentment and Blame*, 2007

²²⁷ Report by SENSE News Agency, 21 April 2002

²²⁸ Mirko Klarin, *Tribunal Update*, No. 141, September 1999

The reply to this question may be searched by looking towards another International Tribunal. At the International Court of Justice (ICJ), a permanent court of United Nations, only states are eligible to appear before the latter in contentious cases. The issues of sentences between ex-Yugoslav republics, seems though not to contribute to the sense of collective responsibility. The case of *Bosnia and Herzegovina against Federal Republic of Yugoslavia* represented for the first time that a court had adjudicated whether a sovereign state could be held responsible for genocide in almost sixty years since the convention on the prevention and punishment of the crime of genocide was unanimously approved by the General Assembly of the UN. The widely commented sentence that basically acquitted Serbia of genocide turned the attention back to a group of individuals, mostly members of paramilitary units.

Apart from preventing war-time leaders from continuing their political careers, the ICTY trials play a crucial role in establishing truth. They are essential for initiating the process of truth-telling and acknowledgment by rendering denial impossible. In that sense, the ICTY does represent an important source for writing history and for collective memory. The truth established by the ICTY in its verdicts against indicted individuals is a court-established truth, which is not questionable by some other court, or challengeable by historical, political or moral tests.

In addition to the ICTY trials, domestic trials are a very important step towards the rehabilitation of renegade states, which can thus prove their willingness to establish the rule of law. In this context all states on the territory of former Yugoslavia have demonstrated a willingness to try war crimes. So called "completion strategy" or the transfer of intermediate or lower rank indicted persons from the ICTY to competent national jurisdictions, is where the international community expects the

former warring parties to demonstrate their membership of the group of democratic countries and their "capability" of acceding to the EU²³⁰. In order for the ICTY to refer proceedings it must be sufficiently assured of the domestic judiciary's capability of conducting the proceedings fairly and adhere to internationally accepted standards.

In general, national courts have a greater impact on the society and its values and benefits than international tribunals. Through national proceedings, societies more directly face their own problems and mistakes and learn from them. It has been argued that for example, national proceedings had a much stronger psychological and moral impact on population and contributed more to the denazification of Germany than Nuremberg and other international trials²³¹.

At present, the ICTY is applying the back referral which is aimed at enhancing "the essential involvement of national governments in bringing reconciliation, justice and the rule of law in the region"²³². Domestic institutions are carrying out the restoration of the rule of law in the region, since UN Security Council resolutions 1503 and 1534 project the end of Tribunal's investigations in 2004, the closing-down of trials in 2008/2009, and the completion of the appeal processes by 2010.

According to Rule 11bis of the ICTY *Rules of Procedure and Evidence*²³³, so far 8 cases have been transferred to

²³⁰ Louis Aucoin and Eileen Babbitt, *Transitional justice: Assessment Survey of conditions in the former Yugoslavia*, June 2006

²³¹ Ivan Simonović, *Dealing with the Legacy of Past War Crimes and Human Rights Abuses*, 2004

²³² *Assessment and Report of Judge Theodor Meron, President of the International Criminal Tribunal for the Former Yugoslavia, Provided to the Security Council Pursuant to Paragraph 6 of Security Council Resolution 1534 (2004)*, UN Doc. S/2005/343, 25 May 2005, para. 12.

²³³

http://test1.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_Rev43_en.pdf

domestic courts, for a total of 13 accused. *Ovčara* trial was the first case that ICTY referred to Serbian justice system.

War Crime Council of the Special Department of the District Court in Belgrade was created on 1st October 2003. It has jurisdiction over crimes against humanity and international law established in Criminal code of Republic of Serbia, as well as for grave breaches of international humanitarian law, committed on the territory of the former Yugoslavia from 1991. If ICTY refers the case to Serbian Special Court for War Crimes, the prosecutor applies domestic law during the criminal proceeding.

As opposed to the Office of the War Crimes Prosecutor which acts as a governmental institution, and not as a part of the judicial system, the War Crimes Trial Chamber of the Belgrade District Court performs its judicial duty in war crimes trials professionally and impartially. However, as provided by the law, judges are unable to amend and correct the indictments, which constitute a serious danger that some of the court's rulings, as may happen in the *Scorpions* case, will be contradictory to the already-established truth in the cases tried before the ICTY.

In Croatia, no special chamber has been established and war crimes trials are mainly held before district courts. Four investigative units are formed within district courts of Zagreb, Rijeka, Osijek and Split that are specialized for prosecution of alleged war criminals. During the last few years, legislation related to war crimes trials as well as procedures and trial proceedings has improved, mainly due to the EU accession process. Still, ethnically biased prosecutions and convictions *in absentia* are prevalent. Those proceedings involved approximately 75 percent Serbs, many of them returnees, and 17 percent Croats²³⁴. The trial of General Mirko Norac before the Regional Court in Rijeka for war crimes against Serbian civilians in Gospić

and the renewed trial of officers of the military police for the war crime against prisoners of war at the military prison *Lora* indicate a break with the practice prevailing in Croatia to exclusively indict and try Serbs. In the course of the trial, Serbian victims testified for the first time. This has contributed to recognition of this trial by the victims. This participation by Serbian victims resulted from cooperation of the Public Prosecutor's Offices from Croatia and Serbia.

One of the main obstacles for the beginning of trials is certainly the prohibition in the Serbian and Croatian Constitutions to extradite their citizens. This limitation was not relevant for transfer of the accused to the ICTY in The Hague, but creates problems if the trials are held in the country where the crime had been committed. In general, trials held in the country of the accused are rarely successful, as the witnesses are often unwilling to travel to the country of the former enemy. One of the most radical propositions was to abolish right of dual citizenship.

Regional cooperation between Serbia and Croatia started officially on 13th October 2006 by Agreement for prosecution war crimes, crimes against humanity and genocide, signed by Office of the War Crimes Prosecutor from Serbia and State Bar Association of Croatia. This agreement allows transfer of the war crimes trials in the country of the accused, which is not necessarily the country where the crime has been committed.

We already said that war crimes trials offer proper human rights response, but there is no broader strategy in implementing other transitional justice mechanisms such as truth-seeking, reparations and institutional reform. The main problem Yugoslav successor states are facing is the decisive switch from retributive to restorative justice. Restorative justice, as the final stage of transition, should involve all layers and structures in society.

²³⁴ OSCE Mission to Croatia 2005. *Background Report: Domestic War Crime Trials* 2004

Public opinion in Croatia is still divided, even almost 15 years after the end of the war. Political discussion about past two wars (World War II and 1991-1995 war in Croatia and Bosnia) is manipulated and polarized about questions of domestic criminals and war heroes. The process of dealing with the past means changing a narrow and myopic historical narrative which refuses to criticize fellow citizens.

The situation in Serbia is not much different. Diffused public opinion about the past war is that Serbia was not responsible for the break-up of Yugoslavia and that only paramilitary units were involved in fights. On one side some claim that it is a myth that the war in Yugoslavia was a civil war; others that it is a myth that it was a war of aggression. Indeed, dealing with the past means facing the role of proper nation in war dynamics.

Throughout the region no public debate about the past has been undertaken. This fact has a great impact on everyday life and provokes constant "delay of grieving" and discrimination of the victims. In the successor states of the former Yugoslavia, there is still not a single official body that would systematically try to establish the fact about war crimes and other gross human rights violations.

National legal instruments are not enough in order to achieve truth telling and truth seeking. There is an obvious need for a regional level public agreement about the mechanisms for establishing and telling the facts about the past.

The regional dimension of the wars on the territories of former Yugoslavia and the subsequently established borders add a specific challenge to dealing with the past processes: on the one hand, certain very concrete and pressing issues, such as identifying missing persons, war crimes prosecution and witness protection, can only be addressed by taking a regional approach.

Since the end of 2005, representatives of the civil society for ex

Yugoslav region, guided by Humanitarian Law Centre from Belgrade, Documenta from Zagreb and Research and Documentation Centre from Sarajevo, are working on a regional approach for establishing the truth. Regional approach and cooperation (RECOM) should give more chance to deal with the past than the national level perspective. RECOM certainly will not be able to operate without full support from the states, which are still not ready to give secret documents about the past.

The author of this text is strongly convinced that only by explaining the past from all the possible points of view; we can hope to mark the decisive step towards the reconciliation. In our search for the role in future reconciliation and integration processes, we must consider numerous international cases in the past (Nuremberg, Tokyo, Rwanda, Sierra Leone etc.). To this horizontal timeline has to be joint also vertical one which investigates cited impact and mirco-marco linkages between individual identities, group behaviour and institutional structures.

The problem of reconciliation is one of the most important in post-conflict societies, and is made possible only by systematic, persistent, long-lasting confrontation with past in order to create a democratic environment. If we don't face the past, if the perpetrators of war crimes are not brought to justice, there's a great probability that the past will repeat itself.

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15 YEARS OF WALKING BUT HOW MANY STEPS? TRANSITIONAL JUSTICE AND THE ROLE OF THE PRINT MEDIA IN BOSNIA AND HERZEGOVINA

By Stela Nenova*

ABSTRACT

Despite 15 years of major domestic and international peacekeeping and stabilization efforts, there are still major obstacles to state building in BiH. One of the clear signs of the internal divisions and tensions has been the recent alarming trend of efforts to curtail the development of free and independent media in the country to support the process of reconciliation with the past and the growth of a strong civil society. What has been the role of the media in BiH in the process of transitional justice? Have the print media encouraged a constructive social dialogue about the past or they have contributed to further divisions among BiH citizens? This paper looks at the role of print media in the process of transitional justice in BiH. The study investigates the role of the media as a unifying or dividing factor in the process of transition in Bosnia and Herzegovina. The paper then looks more in depth into the case of BiH and the print media's role for transitional justice's successes and failures so far. It argues that the print media have had a more negative impact on the processes of transitional justice in BiH because of the persistent nationalistic rhetoric creating a divided image of Bosnian society.

*

Introduction

The High Representative and EU Special Representative Valentin Inzko said about media freedom in BiH at a meeting in Sarajevo on April 2, 2010²³⁵: “In recent weeks, there have been attempts to curtail the ability of media to report freely, accurately, and fairly from all parts of the country. Particularly alarming are efforts led by elected officials to deny certain media access to information or to influence their editorial policies.” This dark assessment of the OHR on the media environment in BiH brings up a number of questions about the road of democratic development in the country. Fifteen years after the bloody conflict in Bosnia and Herzegovina, the country continues to be deeply divided over differing conceptions of its past and the war in the 1990s.

Various mechanisms of transitional justice have been implemented to varying degrees of success as a means to reconcile the people with the past and to keep moving forward together. The role of the media is essential in the process of transition and democratization. The way the media chooses to portray transitional justice mechanisms (truth commissions, trials etc) is essential in building certain perceptions among society members in a post-conflict situation and in shaping the public opinion. “Failure to take into account the importance of public opinion during transitional justice processes carries the risk of societal divisions being reinforced.”²³⁶ Thus it is important to take appropriate steps to ensure that adequate media reforms and development would lead to a positive and constructive social dialogue that possibly enhances a common collective memory among other things. The media is a powerful

instrument in the hands of politicians that may both encourage or impede reconciliation and constructive dialogue in a post-conflict society, either promoting peace or bringing more tension between different ethnic groups.

What has been the role of the media in BiH in the process of transitional justice? Have the print media encouraged a constructive social dialogue about the past or they have contributed to further divisions among BiH citizens? This paper looks at the role of print media in the process of transitional justice in BiH. It argues that the print media have had a more negative impact on the processes of transitional justice in BiH because of the persistent nationalistic rhetoric creating a divided image of Bosnian society.

The first part of the paper makes an overview of the concept of transitional justice in post-conflict societies such as the BiH case and of the role of the media as a unifying or dividing factor in the process of transition. The paper then looks more in depth into the BiH case and the print media’s role in transitional justice’s successes and failures so far.

The Concept of Transitional Justice and the Role of the Media

The concept of transitional justice has gained particular importance and relevance in the post Cold war period in issues related to state building, dealing with the past and with victims of conflicts. Usual mechanisms of addressing crimes of the past and the demand for justice have been truth commissions, seeking to build a consensus on the past among divided societies, criminal trials exposing the truth about wrong deeds of the past, reparations and institutional reforms with the aim to promote reconciliation among divided societies, state building, the rule of law and democratization, as well as peaceful reconstruction.²³⁷ Reconciliation

²³⁵ “Inzko and Kelly deplore pressures on media freedom.” OSCE Press Release. April 2, 2010. http://www.oscebih.org/public/print_news.asp?id=2419

²³⁶ Lisa J. Laplante and Kelly Phenicie. “Media, Trials and Truth Commissions: ‘Mediating’ Reconciliation in Peru’s Transitional Justice Process.” *International Journal of Transitional Justice* 2010 4(2):207-229.

²³⁷ Laplante, L. and Kelly Phenicie. 2009. “Mediating Post-Conflict Dialogue: the Media’s Role in

refers generally to the process of development of mutual conciliatory agreement between opposing persons or groups. Further it is viewed as a social contract to address marginalized and suffering groups as a result of armed conflicts through the incorporation of these groups or persons into society's democratic transformation processes through mechanisms to preserve peace.

As Eytan Gilboa points out:

*The distinction between resolution and reconciliation is based on the assumption that even if parties to a conflict reach a peace agreement, it is only an agreement between leaders, not between peoples, and that to be effective it must be fully implemented and respected over time. Successful conflict resolution ends with a formal peace agreement (negative peace), while successful reconciliation ends with a positive or stable peace.*²³⁸

The role of media in post-conflict societies has not been explored deeply especially in connection with transitional justice processes. Media can influence reconciliation processes in post-conflict societies but it might also impede them and promote further conflicts. As the Organization for Security and Co-operation in Europe (OSCE) underlined, "building a free and independent media is integral to creating an open and civil society as well as fostering peace and reconciliation."²³⁹ Thus an independent media is vital to promoting active social dialogue on issues of justice and human rights and ensuring a more engaging process of reconciliation in divided societies.

As the media provides a platform for social debate on conflicting issues in divided societies, it has significant influence over the mediation of difficult conflicts. Because of their major role in shaping the public opinion in society, the media and journalists have the responsibility not only to report information truthfully, but also to analyze it and frame it in a way which will influence the audience in a specific manner. The way mass media depicts given issues is vital in shaping the public opinion and the development of societies in transition, thus affecting largely the processes of transitional justice and reconciliation with the past. The media can serve various purposes in society and it can both mediate and dilute conflicts or provoke extremist positions within divided societies without a commonly agreed perception on their past of conflicts. As such, the media also directly influences the public perception of transitional justice mechanisms such as truth commissions, trials, and reforms.

*[T]he choices journalists make about how to cover a story from the words, phrases, and images they convey to the broader — angle they take on a controversy — can result in substantially different portrayals of the very same event and the broader controversy it represents. These alternative portrayals, or frames, can exert appreciable influence on citizens' perceptions of the issue and, ultimately, the opinions they express.*²⁴⁰

Through the representation of events and stories, the media can create a bridge between divided societies or it can increase the abyss between different perceptions of the past and the current identity of different groups within a post-

Transitional Justice Processes." *Media in Transitional Justice Journal*. 255.

²³⁸ Gilboa, E. 2007. Media and International Conflict: A Multidisciplinary Approach. *Journal of Dispute Resolution*. Vol. 2007, No.1, 229:232.

²³⁹ Price, Monroe. 2000. "The Experience of Intergovernmental and Non-Governmental Organizations." A Background Paper for the UNESCO World Press Day Conference in Geneva, May 2000. <http://archiv.medienhilfe.ch/Reports/cojcr-kos.htm>

²⁴⁰Laplante, L. and Kelly Phenicie. 2009. "Mediating Post-Conflict Dialogue: the Media's Role in Transitional Justice Processes." *Media in Transitional Justice Journal*. 274.

conflict society, thus impeding the healing process.

The Case of Bosnia and Herzegovina's print media

3.1. Print Media Overview

Media played an important role in inciting the conflict in the Balkans in the 1990s with media outlets focusing exclusively on propaganda activities and news becoming a "patriotic duty."²⁴¹ As the director of SENSE agency Mirko Klarin said, "Media in former Yugoslavia were like nuclear reactors manufacturing hate, prejudice, and especially fear."²⁴² During the conflict, investigating reporting emerged. The magazines *Dani* and *Slobodna Bosna*, and the daily newspaper *Oslobodjenje* started criticizing the atrocities committed by the BiH army during the war in public discussions, such as the attack on the Croatian Grabovica and exposing the truth about war criminals. Currently, the audience continues to be highly divided along ethnic group lines, and there are no strong initiatives to appeal to an audience from other ethnic groups since many newspapers owners are also very close to political elites.

Some independent journalists however suffered from voicing their opinions on the war: after the editor-in-chief of Republica Srpska's independent magazine *Nezavisne Novine*, Željko Kopanja, wrote about the executions of Bosniak population in Prijedor in 1999, he lost his legs in an attack against his life.²⁴³

The Balkan Investigative Reporting Network (BIRN) has been a wide regional

effort of media cooperation with the goal to raise awareness about the past. The network publishes a weekly journal, the "Justice Report" which focuses on the work of the Bosnian War Crimes chamber.²⁴⁴

With one of the major objectives of media being to create comprehensive narratives about the past without excluding anybody based on ethnicity or residency, it is important to look at the present structure of the media market in order to judge whether there is enough potential and appropriate conditions to ensure that media are independent and could serve this function in society without fostering further divisions.

The Bosnian print media market offers more than 600 public print media products, but the number of readers has been declining recently due to economic restraints and lower quality of the media.²⁴⁵ Print media continues to be largely divided along ethnic lines and this has prevented it from reaching higher popularity in the state by only targeting specific ethnic groups, which has arguably had a negative effect on the efforts of unification and finding common ground among ethnic groups.

Six major daily newspapers are published in the country. Four of them are in the Federation of Bosnia-Herzegovina: *Dnevni Avaz*, *Oslobodjenje* and *San* in Sarajevo, and *Dnevni List* in Mostar. *Nezavisne Novine* and *Glas Srpske* are published in Banja Luka in the Republic of Srpska.

Dnevni Avaz daily, published by the NIK Avaz publishing company, has the highest circulation numbers in BiH. The newspaper is very influential on the country's political life. It started to play a major role after the War in 1995 in close proximity to the then ruling Party of Democratic Action. The owner of the

²⁴¹ Šajkaš, Marija. 2007. Transitional Justice and the Role of the Media in the Balkans. ICTJ. <http://www.ictj.org/images/content/8/3/833.pdf>

²⁴² Šajkaš, Marija. 2007. Transitional Justice and the Role of the Media in the Balkans. ICTJ. <http://www.ictj.org/images/content/8/3/833.pdf>

²⁴³ Šajkaš, Marija. 2007. Transitional Justice and the Role of the Media in the Balkans. ICTJ. <http://www.ictj.org/images/content/8/3/833.pdf>

²⁴⁴ Šajkaš, Marija. 2007. Transitional Justice and the Role of the Media in the Balkans. ICTJ. <http://www.ictj.org/images/content/8/3/833.pdf>

²⁴⁵ Jusić, Tarik. *Media landscape: Bosnia and Herzegovina*. <http://www.ejc.net/media-landscape/article/bosnia-herzegovina/>

newspaper has become over time a successful entrepreneur founding his own political party in 2009. The newspaper targets a primarily Bosniak audience, and has a more tabloid character with short texts and numerous photographs, with contributions often left anonymous and criticizing violations of the journalist codes, but it remains one of the most highly rated newspapers by readers (35%) according to research estimates.²⁴⁶

Oslobodjenje, which was at one time a very popular newspaper, has nowadays lost most of its audience's and has not been a serious competitor to *Dnevni Avaz* after the War. The bigger part of the newspaper is owned by the Sarajevo business group MIMS, whose owners have had a negative reputation following privatization processes after the War in Bosnia. The newspaper has retained its multiethnic character but without too much success among other groups except the Bosniak audience and remains seen as mostly a Bosniak newspaper even though it does not identify itself as such.

San is a private daily from Sarajevo owned as well by the Sarajevo business group MIMS. The paper is not particularly influential.

Dnevni list is a private newspaper in Mostar. It was created after the war with the aim to address a primarily Croatian audience in BiH and deals mostly with Croatian political issues. Although it targets a specific national group, the newspaper remains distant from the nationalistic rhetoric of some other dailies.

Glas Srpske newspaper was founded during the World War II by national liberation parties. Originally named *Glas*, the newspaper was based in Banja Luka and during the Yugoslav era it had a regional character until it became a Serbian paper in its content and target audience and shortly before the War and was renamed *Glas Srpski* and eventually

Glas Srpske to signify its affiliation with the Republic of Srpska. The newspaper was privatized in 2008 and sold to *Nezavisne novine* from Banja Luka and it is known as a daily with strongly nationalist rhetoric. During the war, it was portrayed negatively Bosniaks and Croats. After the war, *Glas Srpske* has continued to be strongly nationalist and targeting an exclusively Serbian audience in Republica Srpska despite the fact that it was bought by the owner of the more liberal and professional *Nezavisne novine*.

Nezavisne novine was established with the help of the international community to counteract the nationalist rhetoric of the Republica Srpska's *Glas Srpske*. *Nezavisne novine* has been targeting the entire BiH population with offices in Sarajevo and Mostar as well. It was the first media outlet in Republica Srpska to touch upon the question of crimes against Bosniaks and Croats thus supporting to a certain extent the transitional justice mechanisms in BiH.²⁴⁷ However, the newspaper continues to be read mostly by Bosnian Serbs. With the change of government of Republica Srpska in 2006, the newspaper leaned towards a more nationalist rhetoric in support of political parties that came to power and in support of Milorad Dodik.

A recent GfK research on the print media in Bosnia and Herzegovina shows that the print media are still strongly divided along ethnic lines, especially the daily newspapers. According to the study, more than 70% of *Dnevni Avaz* readers are from regions where the majority group is Bosniacs. *Glas Srpske*, *Večernje novosti*, *Nezavisne novine* and *Blic* are mostly popular in predominantly Serb areas. *Večernji list* and *Jutarnji list* target mostly the Croatian population and are very popular in areas mostly populated by Croats.²⁴⁸

²⁴⁶ "Dailies in B&H." Press Release, GfK BH. 23.02.2006.

http://www.gfk.ba/imperia/md/content/gfkbh/pr_eng/gfk_pr_02-2006_-_daily_newspaper.pdf

²⁴⁷ "Nezavisne novine." 2007. <http://www.ex-yupress.com/neznov/neznovindex.html>

²⁴⁸ "Dailies in B&H." Press Release, GfK BH. 23.02.2006.

http://www.gfk.ba/imperia/md/content/gfkbh/pr_eng/gfk_pr_02-2006_-_daily_newspaper.pdf

The general conditions of underdevelopment and low popularity of the print media has been seen as a consequence of Bosnia's poor economic performance and the limited revenues from advertisements with only 6% of advertising investments going to print media annually which is not enough to foster a competitive print media market.²⁴⁹ The majority of print media is still highly dependent on donations for survival and the lack of foreign direct investments has limited the ability of the print media market to develop further.²⁵⁰

The Federation of Bosnia-Herzegovina News Agency (FENA) existing since October 2001 after the merger of the BHPRESS and HABENA news agencies from the early 1990s by the Bosniak and the Croat parties, is one of major news agencies in the country.²⁵¹ The Serb News Agency (SRNA) was established by the Republica Srpska Government in 1992. ONASA, the most influential private news agency and the SENSE News Agency, registered in Sarajevo and covering the entire South Eastern European region with a special focus on following and reporting from the Hague tribunal, are also very important media outlets.²⁵²

3.2. Mechanisms for Supporting Independent Democratic Media and Transitional Justice

The reconstruction and the independent and free development of media has been a major part of the post-

conflict state-building process in Bosnia. In the 1990s after the war, major steps were taken to change the ownership of media and remove state-owned media enterprises from the power of nationalist parties in order to develop more independent, objective and self-sufficient media. The international community (OSCE, OHR) and other organizations (OSI, USAID) supported strongly the creation of adequate legislative and regulatory framework to ensure the development of media.

The Communications Regulatory Act (CRA) was created to monitor and enforce the regulatory framework for broadcast media.²⁵³ The Law on Free Access to Information and the Law on Libel and Defamation from 2001, as well as the Law on the Basis of the Public Broadcasting System and on the Public Broadcasting Service of Bosnia and Herzegovina from 2002 were important achievements to stabilize and enhance media development and to attract more foreign investments to strengthen the media sector.²⁵⁴

An official Press Code has been developed in 1999 for journalists to enhance their performance and ensure highest ethical standards, as well as citizens' rights to impart information freely. The Press Code underscores the importance of journalists and media to respect the truth, the rules of factual and fair reporting, the right to privacy and children protection, and to avoid intolerance, hate speech and discriminatory practices. In 2000, the Press Council was created as an institution to defend the interests of both the media and the audience by reviewing complaints against the press, resolving disputes etc.

Common challenges that journalists face are the fast "tabloidization" of print

²⁴⁹ Jusić, Tarik. *Media landscape: Bosnia and Herzegovina*.

http://www.ejc.net/media_landscape/article/bosnia_herzegovina/

²⁵⁰ Jusić, Tarik. *Media landscape: Bosnia and Herzegovina*.

http://www.ejc.net/media_landscape/article/bosnia_herzegovina/

²⁵¹ Jusić, Tarik. *Media landscape: Bosnia and Herzegovina*.

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²⁵² Jusić, Tarik. *Media landscape: Bosnia and Herzegovina*.

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²⁵³ Jusić, Tarik. *Media landscape: Bosnia and Herzegovina*.

http://www.ejc.net/media_landscape/article/bosnia_herzegovina/

²⁵⁴ Jusić, Tarik. *Media landscape: Bosnia and Herzegovina*.

http://www.ejc.net/media_landscape/article/bosnia_herzegovina/

media, obstacles to real editorial and financial independence, and an audience which is not so interested in issues of war crimes and prosecution topics which do not ensure enough revenue for magazines and newspapers to survive.²⁵⁵ This leaves out of the public sphere to a great extent the investigative reporting practices.²⁵⁶

The question of freedom and independence of the media is also very important when determining whether a story will be published in a newspaper. With some Bosnian print media still being largely financially dependent on political interests, advertising, donors, it is even more challenging to promote transitional justice practices through truthful and objective storytelling about the past and the current investigations. While during the war the main focus was on showing the stories of victims and survivors, nowadays the media need to investigate and present stories within a broader and more complex context.²⁵⁷ For the editor of BIRN's Justice Report, Nidžara Ahmetašević, it is important for journalists to know about and keep in mind the influence media can have on the public opinion and on victims of the conflict because journalists "can make an impact on our surroundings and even bring some changes into society."²⁵⁸ Contemporary press and journalists needs to also have knowledge and understanding of international law and tribunals in order to be able to successfully convey the real meaning of war crime trials and prosecutions.²⁵⁹

Conclusions

The timing of transitional justice actions and reflections within the media matters. If there are people connected to the conflict who are still in power and influence the media and decision-making processes, public opinion and perceptions on transitional justice, shaped by the media, will continue to be contradictory and counterproductive to social dialogue and reconciliation.

The print media continues to be a divisive factor rather than a unifying one in Bosnia and Herzegovina and this has a negative impact on the process of transitional justice and reconciliation with the past in the country. As long as nationalistic rhetoric continues to prevail in the mass media, this can aggravate divisions within society instead of using the power of the media to unite people along a common purpose of stabilization and reconstruction.

²⁵⁵ Šajkaš, Marija. 2007. Transitional Justice and the Role of the Media in the Balkans. ICTJ. <http://www.ictj.org/images/content/8/3/833.pdf>

²⁵⁶ Šajkaš, Marija. 2007. Transitional Justice and the Role of the Media in the Balkans. ICTJ. <http://www.ictj.org/images/content/8/3/833.pdf>

²⁵⁷ Šajkaš, Marija. 2007. Transitional Justice and the Role of the Media in the Balkans. ICTJ. <http://www.ictj.org/images/content/8/3/833.pdf>

²⁵⁸ Šajkaš, Marija. 2007. Transitional Justice and the Role of the Media in the Balkans. ICTJ. <http://www.ictj.org/images/content/8/3/833.pdf>

²⁵⁹ Šajkaš, Marija. 2007. Transitional Justice and the Role of the Media in the Balkans. ICTJ. <http://www.ictj.org/images/content/8/3/833.pdf>

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THE RIGHT TO REPARATION FOR WAR-AFFECTED CHILDREN SPECIAL FOCUS ON BIH

By Francesca Capone*

ABSTRACT

As it has been pointed out M.Cherif Bassiouni from the mid 20th century to the present, wars, insurgencies, ethnic unrest and the repressive actions of authoritarian regimes have produced enormous human suffering and the deaths of tens of millions, the majority of whom have been civilians.²⁶⁰ A consistent part of those civilians, killed or injured, are children. What happen to the children in the aftermath of these heinous crimes? International law provides a range of remedies for victims of gross human rights violations and serious violations of international humanitarian law. According to article 39 of the Convention on the Rights of the Child, child-victims should also benefit from those remedies, in particular from reparations programs and efforts set up by the State. The aim of the present contribution is twofold: it is meant to provide first the readers with a general overview of the right to reparation for child-victims and then it will focus on the implementation of the right to education in the Bosnian context as a form of rehabilitation for the children directly or indirectly involved in the war which occurred in BiH.

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²⁶⁰ M.Cherif Bassiouni, *Facing atrocity: the importance of guiding principles on post-conflict justice*, introduction to the Chicago Principles on post-conflict justice, International Human Rights Institute, Chicago, 2007.

Introduction

According to many authoritative scholars and to the new victim-oriented trend adopted by both international tribunals and regional human rights bodies²⁶¹, reparations have primarily strive to give victims a sense of recognition in order to help them to face their trauma and overcome it. The children affected by human rights violations also have to be recognized as individuals who are entitled to demand and obtain specific reparations, but they are often included in a broader group of vulnerable people and they don't gain a relevant and uniform identity; the need for a uniform identity become even more essential when we talk about post-conflict states tear to pieces by ethnical divisions, like BiH. While the main goal of this article is to provide an overview of the most salient issues to be considered with respect to the right to reparation in general and how it applies to child-victims, it doesn't claim to provide a comprehensive evaluation of either the legal or the social actions undertaken or neglected with regard to this specific group of victims. In the Bosnian context the role played by public institutions in granting any kind of reparation to victims has so far been irrelevant. In none of the judicial mechanisms triggered both at the international and at the local level is it possible to detect redress mechanisms and the State itself never launched a victim-friendly reparation program. When it comes to child-victims in BiH the lack of reparations and remedies becomes even

more obvious: many monuments have been unveiled after the conflict, most of them dedicated to the youngest victims, but whilst the symbolic forms of reparation have been granted all the other remedies identified by the international law have been ignored: the range of those remedies includes access to justice, reparation *stricto sensu* and access to relevant information concerning violations and reparation mechanisms. According to the Secretary-General *where transitional justice is required strategies must be holistic*: reparation programs are part of a transitional justice process and therefore they need to be implemented taking into account other contingent circumstances and factors. Bearing in mind the entirety of the process, is it undeniable that the potential impact of a reparation program in a post-conflict society can affect efficaciously the whole population and, particularly, the victims; especially when many of them are calling for reparations and it's impossible to redress their claims only through individual cases brought before international or local courts.

When we talk about child-victims we must consider that they are vulnerable above all in regard to their age and immaturity, moreover their mental attitude is influenced by their inability to speak for themselves and act independently from adults. Therefore the best way to ensure their rehabilitation²⁶² and reintegration into the society should be the implementation of the education system and all the other activities related to their physical and psychological care. The present work will start introducing

²⁶¹ *Decisions of regional human rights bodies play an important role in setting expectations. In Latin America, for example, decisions of the Inter-American Court of Human Rights have been crucial not only for providing redress to individual victims, but also for motivating States parties to establish reparations programmes for other victims. The incentive effect of these decisions is, however, a result of the level of compensation that they provide. This level is seldom met by broader programmes, but this decisions do raise expectations among the victims. See Rule of Law Tools for Post-Conflict States: Reparations Programmes, Office of the United Nations High Commissioner for Human Rights, New York 2008.*

²⁶² Please see Redress Report on "Rehabilitation as a form of reparation under international law", December 2009, available at <http://www.redress.org/smartweb/reports/reports>: *There is a lot of discussion about rehabilitation as a form or reparation but so far, no one has been able to define it properly. This lack of agreement about its meaning could be partly explained by the fact that in its nature, rehabilitation requires multidisciplinary and interdisciplinary work to secure a holistic treatment of victims. Doctors, social workers, educators, psychologists, lawyers, the survivors themselves and other stakeholders are all vital to such a dialogue.*

the normative framework of the right to reparation, both its developments and shortcomings, consequently, it will define who are the child-victims. As it has been pointed out by the work of several TRCs, especially the one set up in Sierra Leone until 2004, the reparation programs²⁶³ promoted so far to help and support the reintegration of the child-victims have been mainly focused on their right to education, assuming that this fundamental right, when fully satisfied, enables the child-victims to become active members of the societies they live in. In BiH no reparation program has been designed so far and no actions have been taken to promote and spread a child-sensitive approach: on the contrary the education reforms implemented in the past years have been upgrading fragmentation and internal divisions. The last part of this contribution will be dedicated to a brief analysis of the current education system in BiH, followed up by some conclusive remarks.

The right to a remedy and reparation and its normative framework

Traditionally in international law the States are identified as the main subjects. As the Permanent Court of International Justice pointed out in the Chorzow Factory case: *It is a principle of international law that the breach of an engagement involves an obligation to make a reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.*²⁶⁴ This oft-quoted passage of the sentence clarified, once for all, that every violation of an international obligation creates a duty to make reparation and that an international tribunal with jurisdiction over a dispute, once it has been proven

that a breach of international law has occurred, has jurisdiction to award reparations. Only in the aftermath of the second world war, with the adoption of the Universal Declaration of Human Rights and the International Covenants on Human Rights, the international community recognized that the wrongs committed by a State against its nationals were more than just a matter of domestic law and, hence, that the violations committed by a State against the nationals of another State could give rise to claims not only by the State, but by individuals and groups themselves. The legal basis of the right to reparation are, thus, rooted in the customary international law and in the jurisprudence of the ICJ, moreover, as Pablo de Greiff has recently underlined, the right to reparation has a dual dimension under the international law: *a substantive dimension to be translated into the duty to provide redress for harm suffered in the form of restitution, compensation, rehabilitation, satisfaction and, in case it may be, guarantees of non-repetition; and a procedural dimension as instrumental to securing this substantive redress.*²⁶⁵ Its procedural dimension in particular shows that the right to reparation is playing a crucial role in the transition out of conflicts or toward democracies, because, while criminal justice *per se* is a struggle against perpetrators, reparation is an effort on behalf of the victims and represents a tangible and concrete manifestation of the liability of the offenders, states or individuals, to repair the harms caused. The best example of how the implementation of the right to reparation can have a strong impact on transitional justice process can be found in the jurisprudence of the Inter-American Court of Human Rights. The Court's decision in

²⁶³ Ibidem, p.3: *Reparations programmes are designed from the outset as a systematically interlinked set of reparations measures.*

²⁶⁴ *Factory at Chorz'ow*, Merits, Permanent Court of International Justice, Ser. A, No. 17 (1928).

²⁶⁵ On this point see *Rule of Law Tools for Post-Conflict States, Reparation Programmes*. Office of the United Nations High Commissioner for Human Rights, author: Pablo de Greiff, New York, 2008.

*Velázquez-Rodríguez*²⁶⁶ marked a sea change in human rights jurisprudence. The innovative reparation framework crafted by the Court over the last two decades can be traced to that decision²⁶⁷; the Court imposed to the State of Honduras the adoption of measures which express its emphatic condemnation of the facts that gave rise to the Court's judgment: in particular, it should be established that the Government has an obligation to carry out an exhaustive investigation of the circumstances of the disappearance of Manfredo Velásquez and bring charges against anyone responsible for the disappearance". The Court went even further granting to the victim's wife and children of other financial benefits, such as pension and scholarship, and the payment to Velasquez 's family of a cash amount corresponding to the resultant damages, loss of earnings, and emotional harm suffered. Today the Court, through its mandate to grant reparations contained in article 63²⁶⁸ of the American Convention, has creatively developed the law of reparations within the Americas and its work reflects the undeniable need to improve worldwide a solid victim-oriented approach.

Recent developments

On the purpose to provide the international and the local actors with an

²⁶⁶ Velásquez Rodríguez Case, Judgment of July 21, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 7 (1989).

²⁶⁷ C. Grossman, Reparations in the Inter-American System: A Comparative Approach, 56:6 AM. U. L. REV. 1375, 1376 (2007).

²⁶⁸ "If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party. 2. In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission."

exhaustive tool entirely focused on the right to reparation, the UN General Assembly in December 2005²⁶⁹ adopted and proclaimed the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; notwithstanding their *soft law status*, the Basic Principles represent a huge step forward in the struggle for the implementation of the human rights worldwide: they highlight which are the victims' needs and in the same time they strengthen the rule of law and deter the culture of impunity. The access to justice for those who suffered abuses through acts or omissions that constitute violations of international human rights law is strictly related to their identification as victims; according to the Rome Statute and its RPE once an applicant has been recognized as a victim, in the sense that all the criteria indicated in Rule 85²⁷⁰ are met, the participation in the proceedings is still uncertain because it has been left to the discretion of the judges. Although the ICC, compared to the ICTY and the ICTR, has concretely promoted the participation of victims in the trials, so far only 89 people have been granted with the status of victim and only one has claimed for reparations. Furthermore, according to Article 79(1) of the Rome Statute, on 9 September 2002 a Trust Fund for Victims has been established under a Resolution of the Assembly of States Parties. The goal of the TFV is: *to support programs which addresses the harm resulting from the crimes under the jurisdiction of the ICC by assisting the victims to return to a dignified*

²⁶⁹ Resolution 60/147 of 16 December 2005.

²⁷⁰ Rule 85: For the purposes of the Statute and the Rules of Procedure and Evidence: (a) 'Victims' means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court; (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

and contributory life within their communities. In agreement with the data diffused by the ICC itself, in 2007/8 there were 42 proposals submitted to the TFV for consideration and 34 of this were diverted to the Chambers of the ICC for approval. These projects should involve in the immediate future at least 380,000 direct and indirect victims. As it stated in the ICC website: *The current TVF reparations Reserve is 1,000,000 euro, depending on how the ICC defines reparations (individual or collective) it would be possible to reach 200,000 beneficiaries with the current reserve if the same modalities for delivering the TFV assistance are applied*²⁷¹. The concrete limits that such a fund face are connected to the purely monetary nature which marks the reparation granted. As it has been already pointed out, the kind of remedies recognized by the international law which fall within the definition of reparation are far from being reducible to payments of lump sums. According to the Van Boven-Bassiouni Principles and Guidelines reparations include, besides compensation, restitution, satisfaction, guarantees of non-repetition and rehabilitation. The latter in particular is the target of this contribution, since I am personally convinced that the implementation of the right to education is an infeasible aspect of the rehabilitation of war-affected children.

Who are the child-victims?

The notion of reparation is intrinsically coupled with the idea of victim. According to the article 1 of the Convention on the Rights of the Child entered into force in September 1990: *child is every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.* The general definition of victim referred to in this contribution is the one contained in the above mentioned Basic Principles and Guidelines on the Right to Remedy and

Reparation: victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. The formulation of the latter sentence clearly highlights that there must be a direct causal link between victims and harms suffered: only whether this link exists and it is provable before the courts the right to reparation arises, when, instead, the connection requirement is not fully accomplished the acquisition of the status of victim will entirely depend on variable factors, such as the domestic laws of the different countries. It is, indeed, a matter of fact that many reparations programs aim to prioritize women's redress, especially in post-conflict countries where the female population usually constitutes the only resource left to the nation.²⁷² There is a widely recognized need to conceptualize in a proper way in the reparation debates the many forms of violence that target or affect women's reproductive function or capacity, because these kinds of wrongful acts commonly fall within the broader idea of rape or sexual abuses. Across the world currently a lot of non-judicial bodies such as truth and reconciliation commissions (TRC) are facing the challenge to let the voices of the women affected speak for themselves, but the same thing, for too many reasons doesn't

²⁷¹ For further information and data please visit the ICC website: www.icc-cpi.int

²⁷² For instance in Rwanda after the 1994 genocide there were twice as many women as men and while the gap has since narrowed, more than a third of households are still headed by women. According to the Rwandan Commerce Minister Monique Nsanabaganwa, actually women make up 55% of the workforce and own about 40% of businesses.

happen when we talk about child-victims of gross human right violations²⁷³.

The long path towards a child-sensitive approach

The right to a remedy is clearly a part of international law and therefore it is contained in global and regional human rights treaties. Article 8 of the Universal Declaration of Human Rights (hereinafter UDHR) provides that: *..everyone has the right to an effective remedy by the competent national tribunals for acted violating the fundamental rights granted him by the constitution or the laws..* The International Covenant on Civil and Political Rights (ICCPR) copes with the necessity to regulate and guarantee the right to reparation in a more comprehensive way. It evidences three different articles on remedies, addressing in article 2(3) the right to access to an authority competent to afford remedies and the right to an effective and enforceable remedy, whilst providing in article 9(5) and 14(6) that everyone unlawfully arrested, detained or convicted shall have an enforceable right to compensation or to be compensated according to law. Provisions on the right to a remedy are present also in the article 6 of the Convention on the Elimination of Racial Discrimination and in article 2(c) on the Convention on the Elimination of All Forms of Discrimination against Women. The UN Convention against Torture establishes in its article 14 that *each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act*

of torture, his dependents shall be entitled to compensation.

There are many provisions which embody the right to a remedy and reparation in general, but there is only one that de-als specifically with child-victims. According to Article 39 of the Convention on the Rights of the Child: *States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts.* Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child. This provision represents a key legal tool and also the first step for the implementation of the right to reparation for children, taking into account the fact the almost all the countries of the world are States Parties of the Convention. There are of course also other instruments which provide a certain support in order to guarantee a crescent number of positive results in this sensitive field, e.g. The Guidelines on Justice for Child Victims and Witnesses of Crimes adopted by the ECOSOC resolution 2005/20, that establish a set of principles which underlines the urgency to adopt a child-sensitive approach in the proceedings. These guidelines are mostly directed at professionals and others responsible for the well-being of the children and their main goal is to ensure justice for child-victims and witnesses trough implementing *ad hoc* procedures and adequate training in both formal and informal justice systems. As it has been clearly stressed, the efforts made to promote the growth of knowledge and practice on the purpose to assist properly the child victims before, during and after the trials need to achieve further developments. The children who experienced human rights violations and war crimes represent the most sensitive

²⁷³ A remarkable enhancement has been achieved in this sense by the Sierra Leonean TRC which presented in December 2004 the child-friendly version of its final report.

part of a deeply affected society, in a context characterized by *weak institutional capacity, fractured social relations, very low levels of trust and a scarcity of financial resources*²⁷⁴ the only way to redress the highest number of victims is to design a reparation program which can address not only material needs, such as restitution of properties and compensation, but also the need for health and education.

Child-victims in BiH

The awful civil war that occurred in BiH has caused more than 100.000 deaths and 2 millions of displaced persons, in alone Sarajevo 5410 children lost one of their parents and almost 400 lost both of them. In an ideal world these children should be able to claim their right to a remedy and reparation before both the ICTY and the domestic courts, in particular the Court established early in 2005.²⁷⁵ Instead child-victims are mostly left behind when it comes to legitimately promote their active participation and intervention in issues related to their wellbeing. An example of this sad condition is the absence of a complaints mechanism to the Convention on the Rights of the Child. The CRC, in fact, is the only international human rights treaty with a mandatory reporting procedure which doesn't include a complaints or communication mechanism on the purpose to allow individuals or groups to bring a formal complaint before the Committee when the rights protected in the convention are violated by the State

Parties. This *lacuna* can be seen as a serious act of discrimination against children and it is often justified through claiming that children are not able to act according to their best interest. The intervention of adult representatives is also rejected since it might entail a manipulation of the children's will. Taking part in this complex debate goes far beyond the goal of this contribution, although the issue of children participation is highly connected to the concrete impossibility for child-victims to independently ask and obtain remedy and reparation in the aftermath of a heinous conflict.

Unfortunately sensitive developments in ensuring the access to justice to child-victims are still far from being achieved, nonetheless the range of remedies provided by the international law is not limited to the possibility to take part in the criminal proceedings, but it goes much further enabling the victims to benefit from different types of reparation²⁷⁶. Although the main actors

²⁷⁶ According to the Basic Principles and Guidelines: *Restitution* should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property. *Compensation* should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as: (a) Physical or mental harm; (b) Lost opportunities, including employment, education and social benefits; (c) Material damages and loss of earnings, including loss of earning potential; (d) Moral damage; (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services. *Rehabilitation* should include medical and psychological care as well as legal and social services. *Satisfaction* should include, where applicable, any or all of the following: (a) Effective measures aimed at the cessation of continuing violations; (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have

²⁷⁴ See *Rule of Law Tools for Post-Conflict States: Reparations Programmes*, Office of the United Nations High Commissioner for Human Rights, New York 2008.

²⁷⁵ The NGO Women Victims of War campaigns for the rights of women victims of rape and other crimes committed during the Bosnian war, the association took over from the government the responsibility to collect evidences from the women injured by the conflict and provides key testimonies in the proceedings before the Court of Bosnia & Herzegovina, for further info please check <http://www.zena-zrtva-rata.ba/news.php>

involved in this process should be the local and national institutions providing to the children all the support and the help that they need, in the reality the most effective efforts are made by different stakeholders, such as NGOs and private foundations. This situation is clearly in contrast with the already quoted article 39 of the CRC, which indicates the State as being responsible for promoting the reintegration of child-victims adopting appropriate measures and setting all the premises for the creation of a peaceful

intervened to assist the victim or prevent the occurrence of further violations; (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities; (d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim; (e) Public apology, including acknowledgement of the facts and acceptance of responsibility; (f) Judicial and administrative sanctions against persons liable for the violations; (g) Commemorations and tributes to the victims; (h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels. *Guarantees of non-repetition* should include, where applicable, any or all of the following measures, which will also contribute to prevention: (a) Ensuring effective civilian control of military and security forces; (b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality; (c) Strengthening the independence of the judiciary; (d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders; (e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces; (f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises; (g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution; (h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

environment suitable for their recovery. Since the States are required to ensure that their domestic law is consistent with their international legal obligations and since the basic principles and guidelines on the right to a remedy and reparation *identify mechanisms, modalities procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law*, one of the main goals of a post-conflict State should be to *foster the health, self-respect and dignity of the child*; outcome which can be reached only through an implementation of the education system. According to article 29 of the CRC amongst the aims of education there is *the preparation of the child for responsible life in a free society, in the spirit of understanding, tolerance, equality of sexes and friendship among all people, ethnic, national and religious groups and persons of indigenous origin*. In the aftermath of a cruel civil war grasp the proper meaning of this provision becomes even more important: the commitment to teach children how to be tolerant must be one of the top-priorities of a society which is struggling for a new national identity and wants to overcome the adversities.

The right to education

In BiH there are 14 “Ministries of the Education”²⁷⁷, one in charge of the entire

²⁷⁷ The term Ministries of education is not precise, but emphasizes the fragmentation of the education system, according to the 2009 Report by UNICEF Divided Schools in BiH: *At the state level the Ministry of Civil Affairs of BiH (MoCA) is the only administrative authority with competency over education. In accordance with its legally specified competencies within the field of education the MoCA is responsible for the coordination of activities within education.. In addition, there are ministries of education at the level of both BiH entities: Republika Srpska (RS) and the Federation of BiH (FBiH). In accordance with constitutional responsibilities in the field of education, the Ministry of Education and Culture of Republika Srpska is responsible for education policy, legislation and assurance in RS. The same constitutional responsibilities in the field of education rests with the ten cantons in the Federation of Bosnia and*

BiH, one for each of the two entities established by the Dayton agreement, the Republic of Srpska and the Federation of Bosnia and Herzegovina, ten ministries for the ten cantons which compose the latter entity and one for the District of Brčko. The complexity of this situation affects beyond any reasonable doubt the linearity and the efficiency of the education system, fomenting the ethnic divisions and hindering the dialogue amongst different cultures. According to the article 13²⁷⁸ of the International

Herzegovina, while the role of the Ministry of Education and Science of the Federation of BiH is similar to that of the MoCA at the state level.

²⁷⁸Article 13:

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:(a) Primary education shall be compulsory and available free to all; (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education; (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education; (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education; (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved. 3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions. 4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the

Covenant on Economic, Social and Cultural Rights, hereinafter the ICESCR, ratified by BiH in 1993, the right to education shall *promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups*, in other words it is the most effective tool that the mankind has to ensure the acceptance and the reintegration of different people, especially in post-conflict societies. The Committee on Economic, Social and Cultural Rights in its General Comment No13 pinpoints that *education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.* Moreover it stresses that the education must be characterized by four main features: availability, accessibility, acceptability and adaptability; in particular when we talk about acceptability we have to consider three interrelated dimensions. The first one in the non-discrimination in the sense that *education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds.* The second and the third dimensions are physical accessibility and economic accessibility, the latest establishes that education must be accessible to all and that secondary and higher education need to become progressively “free to all”, while primary education should be already available and costless for all the citizens of the state parties. According to the Report submitted to the General Assembly by the Special Rapporteur on the right to education in May 2008 as the outcome of his mission in BiH, there are two main issues affecting the enjoyment of the right

observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

to education: *the excessive fragmentation and politicization of the education system and the segregation between ethnic groups*. This statement underlines the defects of the system and especially its lack of accessibility, considered in all of its three overlapping levels. In particular when it comes to the non-discrimination it's self-evident that the existence of many different curricula²⁷⁹ it's an obstacle to the mobility of the pupils and the dialogue amongst cultures. *Subjects such as math and sciences are almost entirely covered by the common curriculum, while language, literature, history, geography, nature and society and religious instruction are almost completely different, depending on the area of the country where they are taught and the ethnic majority*²⁸⁰, the gravity of this setting is even more detectable if we consider the importance of the education in a post-conflict context. The child-victims should be first enroll in a good school program and introduced in a finally safe and protected environment, where the possibility to gain a collective memory about the war occurred should be far from being a utopia²⁸¹. A report developed by OSCE²⁸² in 2007 underlines that in each of the ten cantons of the Federation the dominant majority

determines the contents of the education program²⁸³ and the same thing applies to the Republic of Srpska where the Serbs are the foremost ethnic group. This leads to *the negation of the ethnic and linguistic peculiarity of the weaker culture and its silent assimilation*²⁸⁴ and feeds in particular the discrimination²⁸⁵ and the marginalization of the children of the most vulnerable ethnic groups, like the Roma.

On 30 June 2003 the State Parliament adopted the Framework Law on Primary and Secondary Education, the adoption of such a law was an outcome of the pressure exerted by the international community on BiH, which had to make some commitments on its accession to the Council of Europe. The Law aims to regulate the principles of preschool, elementary and secondary education; according to its text the goal of education is *to contribute to the creation of a society based on the rule of law and respect of human rights through the optimum intellectual, physical and social development of the individual, according to*

²⁷⁹ On this point see the Report of the Special Rapporteur, Vernor Muñoz (A/HRC/8/10/Add.4 27 May 2008): *There is a variety of curricula in Bosnia and Herzegovina. Each ministry of education decides which curriculum should be taught in the schools under its jurisdiction. The Framework Law on Primary and Secondary Education attempted to address this situation, with the provisions of a common core curriculum (arts. 42 and 43). The objective was to ensure that students across the country learn a minimum of common elements and to facilitate the mobility of pupils. Nevertheless it has not been implemented in all schools of Bosnia and Herzegovina, in spite of its adoption in 2003.*

²⁸⁰ Ibidem p.18

²⁸¹Ibidem note 55: *there is another project of the canton of Mostar, jointly with the OSCE, aimed to issue **history textbooks**, which reflects different views on BiH's history, including representatives of constituent nationalities. However, due to a lack of consensus these textbooks skip the war period.*

²⁸² OSCE Mission to BiH, Background report: Education in BiH: A neglected security issue, Vienna, 28 June 2007, p. 4.

²⁸³ Ibidem: *five cantons are said to be Bosniak majority cantons, three are Croat majority cantons, and two are mixed and effectively divided among Bosniaks and Croats.*

²⁸⁴ Please see the 2009 report by UNICEF: Divided schools in BiH, available at <http://www.unicef.org/bih>

²⁸⁵On this point see the Report of the Special Rapporteur, Vernor Muñoz (A/HRC/8/10/Add.4 27 May 2008) p.22: *Non-discrimination is a fundamental human rights principle, enshrined in article 26 of the Universal Declaration of Human Rights and reaffirmed in many other treaties, including the International Covenant on Economic, Social and Cultural Rights, in which it is stated that the rights enunciated in the Covenant are to be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. With regard to the right to education, the specific issue of equal rights in education is addressed in different human rights instruments, such as the Convention against Discrimination in Education, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child. The right to education is also noted and protected by the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, equally binding on Bosnia and Herzegovina.*

each one's potential and abilities. Another peculiarity of the education system in BiH is the sad phenomenon of “two schools under one roof”: before the war BiH was famous for its multi-ethnic character and multiculturalism and therefore the education system was a mirror of this society, after the 1992-1995 war, political, nationalist and ideological pressures made segregation the main feature of the new trend. According to this practice children belonging to different ethnicities are attending the same school, but they are taught different curricula and they go to class at separate times. The Minister of Education of the Central Bosnian canton in 2007 gave a shocking statement during an interview about “two schools under one roof”, according to her *“the project won't be suspended because you cannot mix apples and peers. Apples with apples and peers with peers.”*²⁸⁶ Such a way of thinking and dealing with ethnic discrimination is even more dangerous when located in a post-conflict society where the risk of fomenting old hatreds is already extremely high, not mentioning the issue of re-victimizing children already affected by the war and eager to start a normal life and overcome the trauma suffered. In other words: not only the access to primary and secondary school should be “available”, or costless for all the children as it is stated in the international conventions ratified by BiH, but in order to satisfy, at least, the very basic principles on the right to reparation the education should be encouraged and supported by the government²⁸⁷ as the core of a wider and comprehensive reparation program on the purpose to help the reintegration of the youngest and weakest victims of the conflict. On the contrary the policies adopted by the BiH

governments, referring to both the national and the locals, seem to discourage the process of reconciliation and, instead, embitter the hostilities making the children even more vulnerable.

Conclusion

*Authorities should not disregard their obligation to repair victims by only providing them basic socioeconomic rights that every citizen is entitled to, and specific efforts should be made to improve the conditions of victims, individuals and communities... After the exclusion suffered by victims, expressed through violence and denial of their basic rights, societies have to make concrete efforts to make them feel included.*²⁸⁸ As Mr. Correa pointed out, enabling the citizen of a post-conflict state to fully enjoy their fundamental rights doesn't automatically fulfill their right to a remedy and reparation under international law. The BiH case is even more challenging since the war, which occurred almost 15 years ago, has left deep scars in the country: the present children are indirect victims of what happened and their families got devastated by the war, many places have been ethnically cleansed and when people started coming back to their homes they found a new hostile majority there ready to impose on the minorities their culture. The only option left to the parents or the foster families is to passively except the lack of any integration process and the segregation deriving from phenomena like “two schools under one roof”. The different books of history that circulate nowadays in BiH are nothing more than the proof of how far the country is from reaching a sustainable development. More than to the international covenants ratified, the country is internally bound to

²⁸⁶ This sadly famous statement has been given by Mrs Greta Kuna, Minister of education of Central Bosnian canton and member of the Croatian Democratic Union party.

²⁸⁷ *State should endeavour to establish national programmes for reparation and other assistance to the victims in the vents that the parties liable for the harm suffered are unable or unwilling to meet their obligations.*

²⁸⁸ Mr Cristian Correa, Senior Associate with the Reparation Unit of the International Centre of Transitional Justice, New York, interview available at <http://www.ictj.org/en/news/coverage/article/1966.html>, UNDP Development Times, No 17, Year IV-Sarajevo-Bosnia and Herzegovina-September 2008.

the necessity to wipe out all the discrimination factors and boost the rehabilitation of the war-affected children. In order to achieve these goals, significant changes need to be made both at the national and at the local levels. The struggle to eliminate the discrimination which affects children in BiH nowadays is inmost coupled with the need to effectively ensure them the enjoyment of the right to education not only through the fulfillment of the four criteria pinpointed by the international treaties, but also recognizing them as the most vulnerable victims of a cruel conflict, entitled to be fully rehabilitate and re-integrated into the Bosnian society. In such a case the aim of the institutions and the other actors involved must be to overcome the minimum standard drawn by the international law and go beyond providing the child-victims with *ad hoc* measures able to concretely bias the quality of their lives, placing a special emphasis on the restoration of their human dignity. *While under international law, gross violations of human rights and serious violations of international humanitarian law give rise to a right to reparations for victims implying a duty on the State to make reparations, implementing this right and corresponding duty is in essence a matter of domestic law and policy. In this respect, national Governments possess a good deal of discretion and flexibility.*²⁸⁹ Albeit the discretion is intrinsically coupled with the principle of state sovereignty and therefore is not going to be spoiled by the imposition of a pre-packaged model, the Governments should follow the Van Boven and Bassiouni principles and guidelines on the right to a remedy and reparation and refer to them as a tool to implement victim-oriented policies. Regarding the child-victims, in particular it's important to support their

participation in the reconciliation process, promoting their involvement in every related discussion and, most importantly, considering the education reform as a substantive part of a highly desirable national reparation program.

²⁸⁹ See *Rule of Law Tools for Post-Conflict States: Reparations Programmes*, Office of the United Nations High Commissioner for Human Rights, New York 2008, p.7.

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ACCOMMODATING SOCIAL JUSTICE INTO TRANSITIONAL JUSTICE MECHANISMS THE CASE OF NORTHERN UGANDA

By Andreea Cristina Nowak*

ABSTRACT

This article advances the idea that post-conflict societies encounter a twofold challenge in the transitional context; the first challenge is the past – how to heal the wounds, whilst the second challenge is to look forward and provide solutions for a sustainable future, where human rights are promoted and respected. I argue that the complex legal, political, economic and social situation in northern Uganda requires the reconciliation between past, present and future, by merging transitional justice (past-oriented) with economic and social justice (future-oriented), so as to meet the victims' needs and in the same time secure a stable transitional regime. The first section of the article will deal with the interplay between conflict and poverty in Uganda and the governmental measures taken in this regard. The following two sections will briefly examine the various transitional justice mechanisms employed here as well as the unfortunate situation relating to socio-economic rights. Based on the arguments advanced in the previous sections, the final part outlines some measures to accommodate economic and social rights within transitional justice mechanisms, suggesting that the later must be part of a broader set of policies for socioeconomic development and reconciliation.

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Introduction

Recognizing the interdependence of human rights has become a crucial point to depart from when speaking about the development of a society, be it in a process requiring transitional justice mechanisms or in a period of fighting against poverty. Accordingly, we now see poverty as a violation of a human right (even if it refers to a socio-economic right). The ethical proposition that all humans are entitled to a certain standard of living, to access of basic needs, seems to be conceptually strong and even persuasive for many, as it implies social inclusion and much concern directed towards the vulnerable.

The rights based approach focuses more on entitlements than on needs; it refers more to realizing needs than meeting them and lastly, it implies obligations and responsibilities. But one of the most important points that the rights based approach makes is probably the necessity to address the root causes of human rights violations. And here is where transitional justice mechanisms employed in a society can intervene in order to guarantee a sustainable future (stable politics, accountability, reconciliation and ultimately growth). Transitional justice can contribute to achieving these broader objectives by addressing the spectrum of violations (political, civil, economic, etc) in an integrated and interdependent manner, emphasizing the universality and essence of human rights.

The end of a conflict does not mean the establishment of perpetual peace, sudden democratization or well-being of citizens. It means the beginning of a laborious work of reconciliation, rehabilitation and recovery. It implies setting up a complex and complicated mechanism that allows society to take up the safest path towards development.

The events that occurred in the past two decades in northern Uganda highlight the need of such an understanding. In this region, compared to the rather

prosperous rest of the country, traditional leaders had an important voice in the peaceful cessation of the conflict, insisting on the adoption of local solutions, dialogue and the reintegration of the combatants. Thus, the transitional process here demands different approaches than in the rest of the country. Massive violations of human rights, their source and effects on the population in northern Uganda require a careful and closer look at ways in which political and economical issues can be integrated in the peace and justice project.

Tensions in this part of the country have been now reduced and the government has begun introducing the policy of phasing out the camps of the internal displaced people (IDPs). But human rights violations by the Lord's Resistance Army (LRA) rebels and the military remain in place, which makes the situation in the region instable. If one can say that peace has been settled²⁹⁰ and there is no need to look for solutions anymore, talks on justice have gained a lot of momentum, as the population has continuously expressed its dissatisfaction with the government's measures to rehabilitate and compensate them²⁹¹.

In this paper, socio-economic rights (such as rights to education, food, health, land, water, environment, social security, housing, etc²⁹²) are considered part of the overall fight against social inequality and poverty. Economic and social justice refers here to both economic security and social equality, with human dignity put in the forefront. Louis Arbour uses the term

²⁹⁰ 'Peace' in northern Uganda has been understood by the locals as absence of violence, freedom from abduction, human development or return to the home village. See P. Pham, P. Vinck, E. Stover, A. Moss, M. Wierda, and R. Bailey, 'When the War Ends: A Population-Based Survey on Attitudes about Peace, Justice and Social Reconstruction in Northern Uganda', Human Rights Center, University of California, Berkeley, Payson Centre for International Development, and ICTJ, (December 2007), p.36

²⁹¹ *Ibidem*

²⁹² For a more comprehensive list, see the main international human rights instruments

'social justice' to refer to 'a combination of equality and decent standards in the fulfilment of the idea of freedom from want'²⁹³.

Despite the importance of this category of rights, transitional justice theorists tend to marginalize social justice, basing their reasoning on either the assumption that the pursuit of economic and social justice is related more to the development and post-reconstruction field or on the belief that positive obligations (socio-economic rights, for instance) require time and resources so as to be implemented²⁹⁴.

However, in post conflict societies, there is indisputably a need for using a holistic approach of transitional justice that delivers a broader understanding of the past violations, their roots and the mechanisms employed in order to combat and prevent the reoccurrence of such events and to trigger the reconciliation and rehabilitation process²⁹⁵. When addressing the past, I argue, mechanisms of replacing the former injustices with an equitable future should be implemented and promoted, going beyond the crimes and atrocities committed, towards practices that not only rehabilitate victims and provide them with reparations, but also have a critical contribution to their socio-economic development, in order to prevent vulnerability and instability to reoccur.

The advancement of the argument according to which social justice should be integrated into transitional justice mechanisms in post-conflict societies is

²⁹³ L. Arbour, 'Economic and Social Justice for Societies in Transition', *International Law and Politics* (2007), 5

²⁹⁴ Arbour argues that 'we would be mistaken to believe that these policies are better left solely to the responsibility of development actors. To the contrary, it is justice that is at stake, justice in its deepest sense. (*Ibidem*, 20)

²⁹⁵ As Shedrack and Agbakwa put it, 'The non-recognition...of economic and social rights potentials and/or possible role in triggering many conflicts...makes these conflicts more pervasive and intractable than they would have otherwise been' Agbakwa Shedrack, 'A Path Least Taken: Economic and Social Rights and the Prospects of Conflict Prevention and Peace Building in Africa', *Journal of African Law* (2003), 38-40

challenging and in the same time requires a strand of discussions. There is much to elaborate on the issue of the possibility of expanding the current scope of human rights courts or even international criminal law so as to address gross violations of economic and social rights²⁹⁶.

This paper is intended to analyze this possibility and the necessity of this phenomenon in northern Uganda. Does the political, socio-economical context in this region require a new approach to the transitional mechanisms? Why are the actual mechanisms not satisfactory? What can be done in order for these mechanisms to be more victims-oriented? What we know in advance is that attention should be given to violations of human rights, whether they are of political, economic, social or cultural nature. There should be no hierarchy of rights when dealing with post-conflict societies.

Northern Uganda: the Conflict - Poverty Trap

The conflict in Uganda originates in a rebellion of the Ugandan People's Democratic Army (UPDA) – initially formed by army officers that fled from Kampala when president Museveni²⁹⁷ came to power - that gradually turned into a highly organized rebel group and eventually took the name of Lord's Resistance Army (headed by Joseph Kony)²⁹⁸. With support from the Sudanese government in Khartoum and despite the scarce public support, the group started to instil terror, attacking Ugandan civilians (especially the Acholi tribe in the north); they were killed or subject to 'abductions, forced marriage, and horrific mutilations including amputating limbs

²⁹⁶ Rights such as access to food, health care, or drinkable water. Note that this paper will not focus on cultural rights, as these can be the subject of another debate.

²⁹⁷ Yoweri Museveni was then the leader of the National Resistance Army/Movement (NRA/M)

²⁹⁸ Z. Lomo and Lucy Hovil, *Behind the Violence: Causes, Consequences, and the Search for Solutions to the War in Northern Uganda*, Refugee Law Project Working Paper no.11, February 2004.

or cutting of ears, noses, or lips²⁹⁹. It has been documented that up to 75,000 have been abducted during the conflict and in 2005 the World Health Organization estimated 'an excess mortality rate of 1,000 a month'³⁰⁰. Support from the government was little and sometimes contradictory (an oscillation between military solutions and peace talks), whilst reliance on international humanitarian action was tremendous.

Following two decades of rebellions and civil strife, Northern Uganda faces economic stagnation and serious toll on the population living in the region; about 1.6 million people ended up in camps. In a document prepared by the Office of the Prime Minister in Kampala, the costs of the conflict has been estimated at \$ 1.3 billion (1986-2002), meaning 3 per cent of the overall annual gross domestic product (GDP) to the national economy³⁰¹. Northern Uganda remains the poorest region in the country - 'the gap between the national and northern poverty levels', states the report, 'widened from 17% in 1992 to 30% in 2005/6, with poverty in the north falling by less than any other region in the early 1990s'³⁰². The post conflict environment is now characterized by lack of or poor access to and utilization of social services (health, safe water, education), unemployment, low local governmental capacities, customary land tenure, sexual violence, high infection among the displaced population in the north.

The governmental development agenda reflected in *The Poverty Eradication Action Plan* (PEAP) is meant to improve the quality of life of over 28 million Ugandans, concentrating on 13 districts. In northern Uganda, United Nations Populations Fund (UNFPA)'s emergency reproductive health

project is implemented in Kitgum Amuru, Amolatar, Lira, Oyam, Dokolo, Apac, Kotido, Kaboong, Nakapiripirit, Moroto, and Abim districts³⁰³. The *Recovery and Development Plan* issued for the northern region by the Government of Uganda in order to respond to the reconstruction needs of the region aims at resettling the IDPs, and at investing in the infrastructure, water and the sanitation sector, in the re-establishment of health and education facilities³⁰⁴. However, this plan has not yet been evaluated.

Despite these developments, the difficulty lays in the fact that even in the aftermath of the Juba peace process, despite the dialogue between the LRA and the Government of Uganda (GoU), the parties still have hard times in agreeing upon what the origin of the conflict is, who started it, who committed the war crimes and the crimes against civilians.

In addition to this lack of consensus that blurs the heavens of peace, the high levels of rural poverty and increasing inequality suggest the need for a holistic approach to poverty reduction in the post-conflict northern Uganda, an approach that should be reached by the implementation of a national mechanism that involves the LRA, GoU and the broader civil society.

Transitional Justice Mechanisms in Uganda

Thus far Uganda has experienced several transitional processes³⁰⁵, the most recent of which is president Museveni's request to the International Criminal Court (ICC) to investigate the war crimes committed in northern Uganda by the LRA, as the government was unable to arrest LRA members since they were

²⁹⁹ M. Otim and M. Wierda, *Uganda: Impact of the Rome Statute and the International Criminal Court*, The Rome Statute Review Conference, Kampala, June 2010, 1

³⁰⁰ *Ibidem*, 2

³⁰¹ Northern Uganda Social Action Fund, *Environmental and Social Management Framework*, Kampala, 2009, 4

³⁰² *Ibidem*

³⁰³ United Nations Fund for Population, <http://countryoffice.unfpa.org/uganda/2009/09/10/1283/information/>

³⁰⁴ Northern Uganda Social Action Fund, *supra* n 12, at vii

³⁰⁵ C.M., Fombad, *Transitional Justice in Africa: The Experience with Truth Commissions*, New York: Hauser Global Law School Program, New York University School of Law, 2008, online version

outside the Ugandan territory³⁰⁶. Prior to this, the *Amnesty Act* dating back in 2000 established the Uganda Amnesty Commission (for the actions committed in January 1986), as a reconciliation mechanism that was supposed to open the debate on the Amnesty law, to promote 'dialogue and reconciliation', to provide 're-insertion support', 'tackle with amnesty applications and advance 'long-term social and economic reintegration'³⁰⁷. According to Fombad, although 'more than 15,300 combatants and abductees had received amnesty', it turned out that merely 4000 of them were provided with resettlement packages ('a lump sum of US \$ 150, a mattress, blanket, hoe and some seeds due to a shortage of funds')³⁰⁸.

The transitional process in Uganda was also marked by investigations against Joseph Kony and his commanders of the LRA, starting with July 2000, with the first arrest warrant against Kony and four others being issued on 8 July 2005³⁰⁹. The process was stifled, as the Government of Uganda which initiated the process had to resume its action due to LRA's warning that no peace agreement will be signed as long as arrest warrants are in place³¹⁰. However, charges against LRA remain in place, while amnesty for LRA members was granted in exchange for the cessation of the rebellion.

At local level there is acknowledged support for traditional Acholi justice mechanisms – usually applicable to murder crimes-, *mato oput* (drinking bitter

root) being the most common process³¹¹. Here elders act as neutral arbitrators of disputes. This use of traditional practices for achieving both reconciliation and justice has been documented, apart from Uganda, in countries like Rwanda, East Timor, Sierra Leone, Guatemala (Baines, Quinn³¹²). It has been argued that the restorative character of the process promotes 'principles of truth, acknowledgement and accountability and compensation and culminates in the reconciliation of the parties through symbolic traditional ceremonies'³¹³ and that tradition-based mechanisms, despite their male domination, bring victims and perpetrators face to face and makes accountable more personal than remote courts do³¹⁴.

In his work Mark Freeman³¹⁵ argues that mass abuses cannot bring about complete justice in transitional societies. Mass abuses, countless victims and perpetrators, corrupt political system, a constant wield of power, a failing justice system – all these account for a fragile justice delivery. In this frame, traditional mechanisms that stand for victim's rehabilitation are sometimes preferred, at least on the local level. The risk for taking these measures lays in people's unawareness about the atrocities caused during the conflict, in their lack of education regarding transitional justice mechanisms and their effectiveness for the transitional process. To that extent, there where this type of approach proves to be unable to deal with the extensive

³⁰⁶ This is a rather rare event, that a leader referred the country situation to the ICC, in order to 'attack' the adversaries. The problem here becomes the politicization of the ICC and the advancement of the assumptions according to which the 'ICC eagerly became an instrument of the Ugandan government's counterinsurgency so as to ensure Uganda's cooperation with its prosecution of the LRA' (Adam Branch, 'What the ICC Review Conference Can't Fix', In *Oxford Transitional Justice Research. Debating International Justice in Africa*, 2010, 33)

³⁰⁷ Fombad, supra n 16

³⁰⁸ *Ibidem*

³⁰⁹ *Ibidem*

³¹⁰ *Ibidem*

³¹¹ M. Otim, *Challenges in the pursuit of transitional justice: A case of northern Uganda*, Justice and Reconciliation Project, Gulu District NGO Forum, April 2007, 2

³¹² E. K. Baines, 'The haunting of Alice: Local approaches to justice and reconciliation in northern Uganda', *International Journal of Transitional Justice*, 2007; J.R. Quinn, 'Social reconstruction in Uganda: The role of customary mechanisms in transitional justice', *Human Rights Review*, 2007

³¹³ Otim, supra n 22 at 2

³¹⁴ L. Huyse, *Traditional justice and reconciliation after violent conflict: Learning from African experiences*, 2008, 188-191

³¹⁵ M. Freeman, (2006) *Truth commissions and procedural fairness*. New York: Cambridge University Press

number of abuses and crimes, national strategies become a preferred alternative³¹⁶.

The questions remain, of course, whether Western transitional justice mechanisms are suitable for the African context or whether the final goal to achieve peace (through dialogue and amnesty) is hampered by fight against impunity (through the ICC). On one hand amnesty granted to LRA commanders goes against international law, argues the international community, as it acquits violators from serious international crimes (like genocide, war crimes and crimes against humanity). But on the other hand, people often feel that they are just “footnotes” in the entire court process³¹⁷. Civil society in Uganda and critics agree that prosecutions might negatively influence the peace talks and undermine the *Amnesty Act* and that the ICC’s involvement in Uganda was inconsistent with the *Amnesty Act* and Acholi principles of traditional justice³¹⁸. Yet, the ICC does not recognize the *Amnesty Act* and it is up to it to decide the retraction of the accusations against the LRA commanders if this prevents the achievement of peace, under article 53 of the Rome Statute³¹⁹.

The *Amnesty Act* brought another issue on the table, namely the debate on complementarity. This began at the Juba Peace talks in 2006 with a proposal to adopt national procedures to deal with the LRA, which would allow the country to challenge the admissibility of the ICC case against the LRA leaders³²⁰. The later decision to follow the national solution (materialized in the *Agreement on Accountability and Reconciliation*, signed by the government and the LRA on June

29, 2007³²¹) enabled talks to continue. On March 2010, The Parliament passed the International Criminal Court Act, giving the High Court jurisdiction over Rome Statute crimes³²².

The problem seems more complex and complicated as the national legal system is thought to lack capacity and impartiality when dealing with the cases. Major violations of human rights have been caused by the soldiers of the Ugandan People’s Defence Forces (UPDF) (wilful killing, torture, and rape of civilians) or by the government itself (forcibly displacing the civilians of Acholiland into camps, on the pretext of protecting them from the LRA). Many people in northern Uganda either believe that the ICC has no jurisdiction over the cases and that Western traditions should not hamper the local mechanisms or they are strongly dissatisfied by the ways in which the government deals with them³²³. In a survey conducted in northern Uganda, 29 percent of the interviewed people preferred the ICC to deal with the LRA, whereas 28 percent agreed with the work to be done by the Ugandan national courts³²⁴.

Different cultures and political contexts makes it all the more difficult to account for a universal formula for transitional justice³²⁵. Apology, reparations, restitution, acknowledgement, prosecutions and other transitional mechanisms delineate the multidimensionality of the justice field. As Katherine Southwick noticed³²⁶, the

³¹⁶ Huyse, supra n 25

³¹⁷ H. Zehr, ‘Retributive justice, restorative justice’. In G. Johnstone (Ed.), *A restorative justice reader: Text, sources, context*, 2003, 69

³¹⁸ Sara Darehshori and Elizabeth Evenson, ‘Peace, Justice and the International Criminal Court’, In *Oxford Transitional Justice Research. Debating International Justice in Africa* (2010) 38

³¹⁹ Otim, supra n 22 at 3.

³²⁰ Otim et al, supra 9 at 3

³²¹ Note that a final peace agreement was not signed by the LRA, due to the ICC arrest warrants against them

³²² Otim et al, supra 9 at 4

³²³ For a detailed debate on the complementarity issue in Uganda, see Otim et al, supra 9

³²⁴ See P. Pham, supra n 1

³²⁵ D. Orentlicher, ‘Settling accounts revisited: Reconciling global norms with local agency’, *International Journal of Transitional Justice*, (2007), 10 – 22

³²⁶ Katherine Southwick, ‘Investigating War in Northern Uganda: Dilemmas for the International Criminal Court’, *Yale Journal of International Affairs*, 2005, 113-114.

difficulties faced in such post conflict societies remains at the level of identification, distinguishing, and merging the approaches to justice and to admit the importance of each other's role in the transitional process. But while debates like the ones on arrest warrants or complementarity augment, people leaving in or out of the camps get affected by both the political and economic situation in the region. The question on how to design a system that gets closer to the victims gains ground against any other transitional justice mechanism.

Economic and Social Rights in Northern Uganda

Post-conflict recovery in a country affected by serious human rights violations implies the recognition of the universality, as well as the importance of the indivisibility and interdependence of human rights, as expressed in the Universal Declaration of Human Rights and reaffirmed in the Vienna World Conference on Human Rights in 1993, and later Summits of Heads of State and Government. Thus, economic, social and cultural rights (or 'third generation rights') included in later Treaties, become part of the 'binding law'³²⁷.

The United Nations Covenant on Economic, Social and Cultural Rights recognizes the progressive realization of these types of human rights, given the different stages of economic development on which countries situate themselves and their inability to fully realise all the rights set out in the Covenant. This way, states are required to take steps in the progressive realization of these rights (to the maximum extent possible), in accordance with the available resources, but also to provide for basic needs, such as food, shelter, basic medical care and basic education. Thus, the niche for states to get away with such requirements when it comes to socio-economic rights is in place.

³²⁷ Arbour, supra n 4 at 7-8

Transitional mechanisms that should contribute to societal transformation and to the prevention of conflict reoccurrence should not be translated only in terms of building solid, stable and transparent institutions (that bear the mark of development towards a more democratic society), or ensuring accountability for the past gross violations of human rights. According to the Committee on Economic, Social, and Cultural Rights (CESCR), 'full realization of human rights can never be achieved as a mere by-product, or fortuitous consequence, of some other developments, no matter how positive'³²⁸. Conflicts that occur throughout the world have political as well as socio-economic or cultural roots. Political rights are closely connected with social, economic and cultural rights and violations of the former are linked to violations of the later³²⁹.

When it comes to the African continent, the African Charter on Human and Peoples' Rights (the Banjul Charter) addresses the universality of rights, recognizing in its preamble that the 'satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights'³³⁰. However, mapping the conflicts and their roots on the continent as well as the gross human rights violations, one can see that economic and social rights become of

³²⁸ World Conference on Human Rights, Preparatory Committee, Apr. 19-30, 1993. See Arbour, supra n 4 at 10

³²⁹ Arbour, supra n 4 at 8. As well, the findings of the Timor-Leste Truth Commission endorse this affirmation regarding the interdependence and universality of human rights. In addition, the Commission showed that many actions of the Indonesian authorities had an enormous, negative impact on the socio-economic conditions of the people in Timor-Leste and that the state failed to realise the socio-economic rights to the maximum extent possible, providing non-retrogressive, non-discriminatory measures. The whole report can be read here: http://www.cavrtimorleste.org/chegaFiles/finalReportEng/07_9-Economic-and-Social-Rights.pdf

³³⁰ Banjul Charter (entered into force on 21 October 1986), available at <http://www1.umn.edu/humanrts/instree/z1afchar.htm>

utmost concern for the people living in the region.

In the case of Uganda, the Bill of Rights included within the supreme law of the country enacted in 1995, introduces Chapter Four, entitled 'Protection of Fundamental and other Human Rights and Freedoms'. Yet, there is minimal attention paid to the socio-economic rights³³¹, despite Uganda's obligation to the International Covenant on Economic, Social and Cultural Rights (ICESCR) to which it is party.

Other initiatives regarding the socio-economic rights are mentioned in the *National Objectives and Directive Principles of State Policy*: 'protection of the aged; provision of adequate resources for the various organs of government; prioritizing the right to development; recognition of the rights of persons with disabilities; promotion of free and compulsory basic education; ensuring the provision of basic medical services; promotion of a good water management system; and encouraging and promoting proper nutrition and food security'³³². Rights that relate to access to water, healthcare, food, natural resources, education or development are provided in this section.

In spite of the mentioning of these rights, the problem arises at the implementation level, as the courts in Uganda enjoy a rather marginal role and a specialized Constitutional Court that can deal exclusively with constitutional and human rights litigation is absent, being replaced with a Court of Appeal that actually enjoys the power of enforcing human rights³³³.

Judgements regarding socio-economic rights, scarce as they are, often lead to regretful results, when the cases are dealt

by the improvised Constitutional Court (the Court of Appeal). Mubangizi³³⁴ elaborates on the judicial power in Uganda, naming some other institutions that are responsible for the enforcement of human rights, such as: Uganda Human Rights Commission, the Office of the Inspector-General of Government, the Electoral Commission and the National Planning Authority. Invoking, *inter alia*, two cases in which the right to education has been violated, the author reaches the conclusion that the Commission can be more innovative and assertive in the enforcement of third-generation rights situations, which marks the inability of the appointed Court of Appeal to deal with cases as such and thus making it difficult for people in Uganda to rely on such rights³³⁵.

Although the arguments above are limited to the presentation of few situations and despite the vastness of the area of socio-economic rights in Uganda that is to be explored, one can notice the difficulty of addressing socio-economic rights as a means of achieving social justice. Even if integrated to some extents in the official documents of the state, when it comes to the question of who should interpret them and how, or how to develop a case-law in this field of these rights, they still represent a sad and failed reality.

³³¹ In this category of rights, the Ugandan Bill of Rights includes the protection from deprivation of property, the right to education, the right to work and participate in trade union activity and the right to a clean and healthy environment (J.C. Mubangizi, 'The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation', *African Journal of Legal Studies*, 2006

³³² Mubangizi, *Idem*, 12-13

³³³ *Ibidem*, 13

³³⁴ *Ibidem*, 14

³³⁵ In *Dimanche Sharon v. Makere University* the Court ruled out that the Seventh Day Adventist student was not subjected to violation of the right to education when he was expected to attend school events on Saturdays, as the school's policy did not prohibit him from attending religious activities. On the contrary, in *Emmanuel Mpondi v The Chairman, Board of Governors, Nguwana High School and Others*, the Commission admitted the presence of the right to education, when severely punished by some professors; a student is obliged to leave school, as his sponsors refuse to pay him unless punishment or other specific actions are taken against the teachers. See Mubangizi, *supra* n 38 at 14

Integrating Economic and Social Justice into Transitional Justice Mechanisms

It might be argued that reaching economic and social justice in Africa, particularly in post-conflict societies such as Uganda is a story to dream about, but not to make it happen. But we are not in search of means of completely eradicating poverty or levelling the standards on the continent. Solidarity and the satisfaction of basic needs (the right to living, access to education, healthcare, water, etc) add to the purpose of social justice. The development of the events in northern Uganda enables us to keep things in perspective. Getting closer to the victims' situation we can realize the importance of explaining the present by invoking the past and of reconciling the past, the present with the future by merging transitional justice with economic and social justice.

As a result of the conflict, communities in northern Uganda have been gravely affected and presently live in extreme poverty. As we have seen, socio-economic conditions are not viewed from a rights perspective. The challenge is how to design a mechanism that meets in the same time victims' compensation and expectations. Inequality and discrimination, if not addressed in the right time and with the right tools, can further lead to the development of new hostilities and clashes between the two parties. Therefore, the issue of social justice must not be disregarded when invoking transitional justice mechanisms.

The argument that I am trying to make here has been formerly formulated³³⁶ and it puts forward the importance of non-sequencing the addressing of human rights violations; that means that one should not categorize violations of political rights as the most important violations (and therefore concentrate the attention on finding solutions just for this issue), but one should address human

rights violations bearing in mind a holistic approach, whether they have economic, social or political roots.

Of course, the integration of socio-economic rights and the promotion of these can be sometimes considered a burdensome and costly process, which is highly dependent on the resources available in the country and therefore might be sometimes rather disregarded and left outside the promotion of political rights debate. Arbour explicitly elaborated on the most handy interpretation of political rights as freedoms 'in relation to which violations can be found' and the tendency to see economic, social, and cultural rights as 'entitlements, which depend on available resources and are provided by states over time, subject to priorities established in the political arena' or as 'merely aspirational goals whose achievement no one can be held accountable for'³³⁷. This leads to the disregard of this category of rights when identifying and adjudicating violations of social, economic or cultural and of the development of jurisprudence that is focused on these types of rights.

When endorsing the idea of integrating these rights in the complex and complicated system that addresses past violations so as to avoid the occurrence of new ones, one has to bear in mind that processes brought to the court are usually time consuming and as well very expensive (either if it means the forming of national or hybrid judicial regimes or if it involves the trials themselves). Noting this, investing in the health or the educational infrastructure might turn out to be more efficient and effective for post-conflict societies or developing societies. One has to take a look at the costs and the results achieved (are they directly proportional?) as well as to the target group whose needs should be met (do the measures taken respond to the real needs of the population?).

Another problem that is raised when it comes to realization of socio-

³³⁶ See Arbour, supra n 4

³³⁷ Arbour, supra n 4 at 11

economic rights in the context of transitional justice is the employment of individual or collective measures/reparations. Who should benefit from reparations? Is it politically and economically healthy to adopt measures that satisfy the whole community of victims? In the case of northern Uganda, the IDPs, whose socio-economic rights had been violated (cases of landlessness, uncertain tenure, plunder of resources, etc), account for the necessity of adopting such collective measures³³⁸.

When they do address economic issues, transitional justice mechanisms refer to compensation and reparations to victims belonging to certain groups. But this rarely happens, due to the costs involved. Yet, when they are adopted, they do not guarantee that the victims will no longer be subjected to further human rights violations, that social equality will start blossoming or that extreme poverty that has drawn forth or instilled the conflict will be eradicated once the peace talks started.

But a radical agenda of massive redistribution, compensation, state expropriation, and confiscation is highly unlikely and unrealistic. Political constraints, as well as limitations put by the international regime require for other types of solutions that are equally directed towards the population who has previously suffered human rights violations. An alternative would be, of course, the focus on economic and social rights, linked to fair and equitable economic and social capabilities.

³³⁸This argument can easily be debated, as the problem of measuring the decent shelter or the basic education arises. However, the aim of this paper is just to give an insight on the possibility of considering social justice as part of transitional justice mechanisms in post-conflict societies, encouraging further debate on the topic. Moreover, the realization of socio-economic rights in any country is indirectly influenced by the level of its economic development. This is because, as mentioned earlier, these rights have important social and economic dimensions as most of them reflect specific areas of basic needs or delivery of basic goods and services.

According to the same survey mentioned before, that has been conducted in northern Uganda in 2007, among people's priorities (after peace) were: 'health (45%), education for the children (31%), and livelihood concerns (including food, 43%; agricultural land, 37%; money and finances, 35%). Building a sustainable peace involves both defusing the LRA security threat and dealing with the structural inequalities that create a climate conducive to conflict'. But as peace has at least formally been settled, there is a strong need for projects and programs that must address emerging issues like education, employment, local leadership, land rights, and reconciliation³³⁹.

The solution to the real enjoyment of socio-economic rights in northern Uganda is, I argue, the implementation of long term socio-economic policies that aim to redress the victims (compensations within the reparations schemes) and prevent widespread inequalities and discrimination. That is, the formulation at the national level, of national agendas - strategies and action plans - that can meet the basic needs of a population that experienced serious violations in the past, and thus contribute to the eradication of extreme poverty.

Initiatives that should address the achievement of social justice goals and thus eliminate the structural inequalities that lead to violence in northern Uganda imply the focus on sectors like health (building of hospitals, providing them with specialized personnel and medicines), water supply (valley tanks, small valley dams, sewerage system), education (schools, teachers, sanitation facilities, water facilities), roads sector (community roads, bridges), draining facilities, re-forestation, land husbandry, agricultural production, etc.

After the cease of the conflict, the signing of peace agreements (including commitments to human rights protection) and the resettlement of the

³³⁹ P. Pham, et al, *supra* n 1, 46

IDPs, justice will open its eyes; one eye will scan the past (by employing transitional justice mechanisms); the other eye will scan the time to come (being more victim-friendly and in the same time more pragmatic, it will focus more on the socio-economic development). This means, in broad terms, anchoring economic and social rights in the domestic legal system, starting with the constitution (a state's obligation to fulfil the international human rights standards) and continuing with legislation that includes state accountability with regards to the socio-economic situation³⁴⁰. These are the basic, ideal steps I have in mind for a post-conflict society to follow throughout the transitional period.

Concluding Remarks

In the extensive discussion on transitional justice one cannot be silent on the economic issue. Not the economic boundary that accounts for the limited resources available for the transitional mechanisms, but the economic boundary of people who live in extreme poverty, who have their civil, political, social and economic rights violated is what interests us here.

Transitional justice mechanisms used in northern Uganda can be regarded as a rather passive means of solving out the problems related to human rights violations. Truth Commissions, for instance, usually resort to the identification and investigation of the ones responsible for the massive violations and crimes committed. An answer to this challenge is, of course, providing the victims with reparations, which makes the process become victim-

oriented at the same time more responsive to the real needs of the victims (implying as well an active involvement of all stakeholders). Yet again, the issue of providing reparations becomes debatable when it comes to the resources involved.

In this paper, I argued that national laws and strategies that address the socio-economic problems of a society recovering from conflicts and gross human rights violations should ideally come in line with transitional justice mechanisms. Let alone, transitional mechanisms, however country- or region-specific, they cannot act as binding mechanisms on state's authorities, nor can they act like warrants of human development. What one should learn from this paper is that post-conflict societies must not only look to the atrocities, but should search for means of recovering from them and start building a safer future. As Rosemary Nagy noted, in the contemporary debate on transitional justice the question has become 'not whether something should be done after atrocity but how it should be done'³⁴¹.

We have advocated the expansion of the scope of transitional justice in order to widen our horizons; that is, to be able to finally draw our eyes from the past, to the future; to look to the atrocities caused, to means of rehabilitating and compensating the victims and sanctioning the perpetrators but in the same time to make sure that those who suffered will be able to live in dignity in the future. Transitional justice will be lost sight of when a more democratic regime is in place, whilst social justice will not be a matter of history until social inequalities are annihilated; and this is not likely to happen in the near future.

³⁴⁰ Arbour advocates for such a step that can at least be the ground on which a more responsible regime can be build: 'If judicial resistance makes it difficult at first to offer appropriate judicial redress for massive violations of economic, social, and cultural rights, the demands of justice, as part of the transition to a peaceful society, would at the very least require that protective constitutional, legislative, and institutional measures be put in place to ensure that these violations will not be perpetuated in the future. See Arbour, *supra* n 4 at 26.

³⁴¹ Rosemary Nagy, 'Transitional Justice Global Project: Critical Reflections', *Third World Quarterly* (2008) 276

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TRANSITIONAL JUSTICE IN DEMOCRATIZATION PROCESSES: THE CASE OF SPAIN FROM AN INTERNATIONAL POINT OF VIEW

By Teresa Fernández Paredes*

ABSTRACT

The Spanish transition took place from 1975 to 1982 and was achieved with the consensus of all political parties to not talk about the past (Pact of Oblivion). It turned out that Spain peacefully developed into a strong and consolidated democracy where it seemed the problems of the past were solved. However, recently, different organizations are criticizing the way the transition was conducted and are demanding justice for the victims. This essay will analyze the measures taken during the Spanish transition to determine to what extent they complied with international transitional justice standards. Among other arguments, some examples of transitional justice processes in Chile and Argentina will be used, without an attempt to go into a deep comparative study of the three countries.

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"Injustice is human, but more human is to fight injustice."

Bertolt Brecht

Introduction

This paper will present a descriptive and short analysis of the Spanish transition to democracy. The Spanish democratization process was characterized by a pact among all the political parties to not talk about the past. It was in fact the reformist sector of the Francoist regime which led the first years of transition under the presidency of Adolfo Suarez, who was the first democratically elected president of Spain and previous Secretary General of the "Movimiento Nacional"³⁴² (National Movement).

Spain has yet to implement transitional justice measures to establish accountability for past human rights abuses. However, a democracy has been peacefully established and there is no doubt at the present time that a strong democracy has been consolidated. Nevertheless, in the past few years, associations of victims and other members of civil society started a campaign in order to clarify what has been silenced for years and to pay tribute to the victims.

Is Spain then an example that transitional justice measures are not necessarily the best or only option when moving from an authoritarian system to a democratic one? Or do recent events, which have reopened the debate about the crimes committed during Franco's regime, prove that sooner or later the past must be addressed?

This paper is divided into two parts. The first part offers a brief introduction to the violations committed in Spain from the end of the Civil War to the establishment of democracy and the way the transition to democracy was conducted. The second part focuses on the degree of success of the transitional justice approaches in

³⁴² Movimiento Nacional was the body that served as the sole political party during the Dictatorship until the end of it in 1975.

Spain, while briefly comparing them with those done in the Southern Cone (Argentina and Chile).

Spanish transitional process

the Spanish transition has been said to be a "model" example to those transitions that later took place in Latin America. It covers the period from General Francisco Franco³⁴³'s death in 1975 to the election of the Socialist government in the democratic elections of 1982. It was implemented thanks to the "pacto del olvido" (pact of oblivion), meaning that all the political parties, including those reformists coming from the fallen dictatorship, agreed to forget the civil war and the dictatorship in order to reach a "consensus".³⁴⁴ The maxim "never again", common in almost all transition processes, had the concrete meaning here of preventing the past from happening again but understood as the confrontation among Spanish nationals, instead of referring to the acts of injustice inflicted by the Francoist regime to part of the population.³⁴⁵ In other words, the main objective was to equalise the rights of the two sides without recognizing the unfairness and injustice lived by the victims of the Francoist regime or without paying moral tribute to their sufferance.

In this way, a "Law of Amnesty" was approved on 15th October 1977, by the first democratic Parliament after 40 years of authoritarian regime. It established amnesty for all the political crimes, whatever their result, committed before 1976.³⁴⁶ It was a "full stop" law that

³⁴³ Spanish military general and head of state of Spain from October 1936 until his death

³⁴⁴ Jo Labanyi, *Memory and Modernity in Democratic Spain: The Difficulty of Coming to Terms with the Spanish Civil War*, *Poetics Today*, 28:1, 2007, page 93.

³⁴⁵ Paloma Aguilar, *Transitional Justice in the Spanish, Argentinean and Chilean Case*, Study "Workshop 10 - Alternative Approaches to Dealing with the Past", Crisis Management Initiative, 2007, pages 2-25.

³⁴⁶ Javier Chinchón Álvarez, *Transición Española y Justicia Transicional: ¿Qué papel juega el ordenamiento jurídico internacional en un proceso de*

guaranteed the impunity of the Francoist regime, as no perpetrator could be prosecuted.

This law remains in force despite the important number of international treaties, ratified by Spain, which bind States to provide those who have suffered human rights violations with effective reparations. Among others, the following ones can be mentioned:

- The International Covenant on Civil and Political Rights³⁴⁷: in its article 7 avers that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.” Of special interest is the Human Rights Committee’s General Comment 20³⁴⁸, concerning prohibition of torture and cruel

transición? A propósito de la coherencia, buena fe y otros principios de derecho internacional postergados en la transición política en España”, *Entelequia*, Revista interdisciplinar, Monográfico, n°7, 2008, page 347.

The article 2 of the Amnesty Law is of special relevance as to the extent that it includes in the amnesty the crimes committed by the authorities, civil servants and state agents on the occasion of the investigation and prosecution of the acts included in the law; as well as the crimes committed by state agents and “functionaries” against the rights of people. This wording clearly violates international norms as the International Covenant on Civil and Political Rights, that was in force in Spain at the moment of passing the Amnesty law, and which states that 2.3 each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.

³⁴⁷ <http://www2.ohchr.org/english/law/ccpr.htm>

³⁴⁸

<http://www.unhcr.ch/tbs/doc.nsf/0/6924291970754969c12563ed004c8ae5?Opendocument>

treatment or punishment, which provides that “the aim of the provisions of article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individual. It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.” The prohibition in article 7 is complemented by the positive requirements of article 10, paragraph 1, of the Covenant, which stipulates that “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”. Finally, this general comment also mentions the issue of amnesties, specifically asserting that “amnesties are generally incompatible with the duty of states to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.”³⁴⁹

- The Convention on the Rights of the Child: Article 39 prescribes that “States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts.

³⁴⁹ *Ibid.*

Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.”

- The International Convention on All forms of Racial Discrimination lays down in article 6 that “States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination³⁵⁰.”
- The Convention against Torture³⁵¹ establishes in article 2 that “each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction” and, in article 4 that “1. each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.”

Thus, all these articles ensure legal and effective remedies to the victims of human rights violations, and, to the extent that Spain is a “monist” country³⁵² as well as a

party to the aforementioned treaties, it should comply with all their provisions.

With respect to them all, the issue of *ratione temporis* needs to be outlined. It is true that many provisions of these treaties cannot be invoked *post festum* if the treaty was ratified by the state after the crimes were committed. However, in the present case, if the crime is limited to the issue of “right to remedy”, there is an ongoing violation which started after the Civil War but that is still taking place because no judicial response has been given to the victims and their families due to the Amnesty Law. In the same sense, enforced disappearance is also an ongoing violation to the extent that the relatives of the victims still do not know the fate of their missing relatives. Following this argument, different judgements from the Inter-American Court on Human Rights should be mentioned as the Court found that enforced disappearances “may be prolonged continuously or permanently until such time as the victim’s fate or whereabouts are established”³⁵³

Furthermore, from a regional perspective, the European Convention on Human Rights should be mentioned. Article 13 states that “everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.” This has an outstanding relevance, as it means the violations committed in Spain could be justiciable before the European Court on Human Rights (hereinafter European Court).

In this sense, it is interesting to mention the European Court case *Varnava v. Turkey*, a case concerning the disappearance of nine individuals as a result of Turkish military operations in July and August 1974 and the continuing

³⁵⁰ <http://www2.ohchr.org/english/law/cerd.htm>

³⁵¹ <http://www.hrweb.org/legal/cat.html>

³⁵² For the monist system, international law and national law are part of a single legal order and the treaties become part of domestic law upon ratification³⁵², effectively, Art. 96 of the Spanish Constitution³⁵² establishes that “Validly concluded international treaties once officially published in Spain shall constitute part of the internal legal order”

³⁵³ Inter-American Court on Human Rights: *Blake v. Guatemala*, 2 July 1996, *Preliminary Objections*, § 39. See also *Serrano- Cruz Sisters v. El Salvador* (judgment of 23 November 2004, *Preliminary Objections*, § 95 and *Heliodoro Portugal v. Panama of 12 August 2008*

division of Cyprus. The European Court found here that a violation of Articles 2, 3, and 5 of the Convention on the right to life, the prohibition against torture or inhuman or degrading treatment or punishment, and the right to liberty and security of person, respectively, were committed, because of the following reasons:

- Article 2 because Turkish authorities failed to conduct an effective investigation into the whereabouts and fates of the missing;

- Article 3 for the failure to determine the fates of the missing constitutes continuous inhuman treatment of the relatives, and;

- Article 5 because the missing had been deprived of their liberty at the time of their disappearance, and Turkish authorities failed to conduct an effective investigation into that disappearance.

This case is interesting because Turkey was condemned for the forced disappearances that took place in that country before the European Convention on Human Rights entered into force.

To summarize, Spain is required to comply with its international obligations which are, among others, those of investigating human rights violations and provide effective remedies to the victims.

Account of the Francoist regime human rights abuses and crimes

A “coup d’état” started by a sector of the military army against the democratically elected government of the II Republic, led to a Civil War that lasted from 17th July 1936 to 1st April 1939. From then on, a dictatorial regime presided by General Francisco Franco carried on until his death on 20th November 1975.

During both the Civil War and the Dictatorship, gross and mass violations of human rights were committed, such as forced disappearances, extrajudicial killings, attacks on the civilian population, political arrests, torture and

death sentences in trials without basic guarantees as due process.³⁵⁴

Following a report prepared by the Commission of Political Affairs of the European Parliament, the official total number of casualties during the Civil War amounted to 500,000- 1 million people killed. But the violence continued after the victory of the Nationalist band, led by Francisco Franco. A martial law against all those who had supported the Republic provoked the following violations, among others:³⁵⁵

- Summary military trials against regime “opponents”, which applied to anyone who had fought for the Republican side or had shown a support to the Republic. Those trials, which lasted until 1962, stripped the defendants of all legal guarantees and rights and normally resulted to death sentences (especially during the first years after the end of the war) or long imprisonment sentences of 20-30 years.

- During the 1940s there was also a large political prisoner population. According to official resources, that historians considered underestimated, it reached 300,000 out of a population of 25.9 million.³⁵⁶ The condition of the prisons and forced labour camps³⁵⁷ did not comply with the

³⁵⁴ Jorge Errandonea, *Estudio Comparado de la anulación de sentencias injustas en España*, International Center for Transitional Justice, 18 July 2008, page 4.

³⁵⁵ It is interesting to read the report titled “Need for international condemnation of the Franco regime” also known as “Brincart report”, done by the Commission of Political Affairs and available in: <http://assembly.coe.int/Mainf.asp?link=/Documents/WorkingDocs/Doc05/EDOC10737.htm>:

³⁵⁶ The report “Brincart” that estimates that the number of prisoners per 100 000 inhabitants in 1940 was nearly as high as a corresponding figure in Nazi Germany (respectively 1158 and 1614).

³⁵⁷ Thousand of people, including women and children, were re-educated in forced labour camps, where they were used as slave labourers. For example, the “Valle de los caídos” (Valley of the Fallen), and impressive basilica made in honour of Franco’s victory and his supporters dead during the

minimum human rights guarantees, and situations of hunger, massive overcrowding, diseases, acts of torture, rape and sexual violence on the female detainees, experiments conducted by Military psychiatrists on prisoners trying to find the “red gene”³⁵⁸ and other inhuman acts and conditions were endured by political prisoners.

- Violence against the defeated was not limited to imprisonment, torture and execution; those who had supported the Republic were deprived of property, public employment and access to university (for them and their children). However, under the idea of “child protection”, the Francoist regime sent a huge amount of children born in republican families and working class families to “state institutions” as the regime considered their families unable to raise them. Furthermore, most of the children of female republican prisoners were taken from them and adopted into regime families, who changed their names and identities. Kidnappings of refugee children, sent to France to flee from the war and the repression, were repatriated by Francoist services and placed into those “state institutions”.

To conclude, the way in which the transition in Spain took place meant that violations which occurred under the Francoist Regime stayed out of public

civil war outside Madrid, was done using prisoners. It is interesting to mention that this monument as well as Franco’s grave are still in place.

³⁵⁸ The Republicans were also known as the “reds”. It was believed by the Francoist regime that having a socialist or communist ideology could be an illness due to a genetic issue, and that, therefore, finding the gen will enable their recovery. It was just in recent years, that the project “Biopsyche of Marxist fanaticism” done by Franco’s chief psychiatrist, Antonio Vellejo Nagera has been made public.

debate.³⁵⁹ No political actor or organisation from the civil society demanded accountability for these abuses of rights. It was believed that only in this way could a peaceful move towards democracy be achieved.³⁶⁰

However, the “model” character of the Spanish transition can be challenged. In the past few years, different associations and international organizations such as the “Asociación para la Recuperación de la Memoria Histórica” and Amnesty International, started denouncing the existence of mass graves and insisted on the right of the relatives of the victims to exhume their corpses and the right of families to know the fate of the disappearance of their relatives³⁶¹, as well as pressing the Government to adopt measures for the moral retribution of the victims and their heirs as well as triggering a social and political debate concerning the flaws in the measures of Transitional Justice taken.³⁶² However, this topic generally continues to be “taboo” in Spanish society.

The impact of the recent transitional justice movements in Spain by some sectors of civil society

³⁵⁹ It is true that both sides committed horrendous crimes during the Civil War, however, as it was seen, the “Republicans” were prosecuted during the dictatorship and condemned. The judicial and other measures taken during the Dictatorship to condemn and those who fight for the Republic can be seen in the compilation “España franquista: Causa general y actitudes sociales ante la dictadura”, Colección Estudios, Universidad Castilla de la Mancha, 1993, page 23 and et sqq.”

³⁶⁰ Paloma Aguilar, *Transitional Justice in the Spanish, Argentinean and Chilean Case*, page 4.

³⁶¹ This is Article 32 of the Protocol I to the Geneva Conventions, which was later on inserted into the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, in its art. 24: “Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the Disappeared person. Each State Party shall take appropriate measures in this regard.”

³⁶² Paloma Aguilar, Laia Balcells and Héctor Cebolla, *Determinants of attitudes towards transitional justice an empirical analysis of the Spanish case*, Working Paper 2009/243, June 2009, page 3.

The “Ley de la Memoria Histórica” (Law of the Historical Memory) was sanctioned in October 2007, incorporating necessary measures extending the rights of those who suffered prosecution or violence, 32 years after the end of the Francoist Regime. Regardless of the multiple flaws of this law, its content indicates that this is a first step towards justice.

But this Law and its impact continue to cause resentment among some sectors of society. A good example is the case opened against Judge Baltasar Garzón. Challenged with a complaint submitted by some victims of Franco’s repression, the Judge of the “Audiencia Nacional” used the principles, custom and norms of international law to establish the competence of the tribunal to investigate the case. Judge Baltasar Garzón limited it to locating and exhuming the bodies of the victims, categorizing them as crimes against humanity and genocide, but not to prosecute those responsible for the deaths. One of his main arguments was that crimes against humanity committed during the Francoist Regime did not have, following the jurisprudence of some International Tribunals³⁶³, a political nature, and therefore, could not be included in the Amnesty Law of 1977 which applied to “all the acts of political nature that were categorized as crimes or offences before December 15th, 1976.” In the end, Garzón’s ruling was appealed inside the “Audiencia Nacional” and sent to the ordinary regional courts to be dealt with.³⁶⁴ Against it, two Spanish right-wing

groups, “Manos Limpias” and “Falange Española de las JONS”³⁶⁵, brought a criminal suit before the Supreme Court against the ruling of Judge Garzón. They accused him of “prevaricación” (i.e. breach of legal obligations/abuse of power as a judge). The Supreme Court accepted the suit brought by the complainants and established the existence of substantive grounds to believe a crime of “prevaricación” could have been committed. Garzón will sit on the dock in a criminal trial to respond to his actuation regarding this issue. Many international actors have expressed that it is at least a paradox that the Judge who helped bringing justice to the victims of dictatorships similar in character to the Spanish regime, such as Pinochet Regime in Chile, is now being prosecuted for trying to do the same in his own country.³⁶⁶

TRANSITIONAL JUSTICE MEASURES

Transitional Justice and International Law

Following the words of the International Centre for Transitional Justice, Transitional Justice “is a response to systematic or widespread violations of human rights. It seeks recognition for victims and to promote possibilities for peace, reconciliation and democracy. Transitional justice is not a special form of justice but justice adapted to societies

³⁶³ See Inter-American Court of Human Rights, Case Barrios Altos de Peru, March 14, 2001, which denied the admissibility of amnesty laws towards grave human rights violations, such as torture, summary, arbitrary and illegal executions as well as forced disappearances. In the same vein, Inter-American Court on Human Rights, Caso Mascare de Mampiripan v. Colombia, September 5, 2005; Argentinean Federal Criminal Court, Judgment Turco Julian, August 11, 2006; Appeals Chamber Special Tribunal for Sierra Leone, Case Kondewa, May 25, 2004; South-African Constitutional Court, case Azapo and others v. President of the Republic of South Africa.

³⁶⁴ EQUIPO NIZOR, ‘Statement concerning the status of the criminal lawsuits pertaining to the victims of

Francoism that were filed with the Audiencia Nacional”, September 30, 2008. <http://www.derechos.org/nizkor/espana/doc/bgen.html> (accessed 21 July 2010)

³⁶⁵ “Manos Limpias” is a right-wing organization and “Falange Española de las JONS”, gathered during the dictatorship the fascist movement, it was also known as the “National Movement” and could be the Spanish equivalent to the National Socialist party in Germany. Since the democratization it remains as a small political party

³⁶⁶ See José Miguel Vivanco, Americas director at Human Rights Watch, declarations on <http://www.hrw.org/en/news/2010/03/19/spain-end-amnestv-franco-era-atrocities> (last time accessed 30th August 2010)

transforming themselves after a period of pervasive human rights abuse.”³⁶⁷

Since the 20th century a growing consensus has been reached among scholars about the basic framework of transitional justice at a national level to confront past human rights abuses in post-conflict situations. Contemporary international law has established a concrete mechanism of justice and human rights obligations to be taken into account while starting the transitional process of peace from authoritarian regimes. Bickford mentions some of them:³⁶⁸ prosecution of perpetrators by national, hybrid or international courts; creation of truth commissions or other national efforts; establishing reparations policies; remembering and honouring victims through different methods; reconciliation initiatives and reforming institutions, which have a history of abusive behaviour.

It is interesting to recall again that States have the obligation to comply with the international treaties they have signed and ratified. Concerning our topic here, the duty to investigate and repair the individual victims, the following international principles are worthy of being mentioned³⁶⁹:

- UN General Assembly Resolution 2625 (XXV) “Declaration on principles of international law friendly relations and co-operation among states in accordance with the charter of the United Nations”: “...All States shall comply in good faith with their obligations under the generally recognized principles and rules of international law...”³⁷⁰
- Commentaries to the draft articles on Responsibility of States for

internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001). **Article 1 Responsibility of a State for its internationally wrongful acts:** Every internationally wrongful act of a State entails the international responsibility of that State. **Article 30 Cessation and non-repetition:** The State responsible for the internationally wrongful act is under an obligation: (a) to cease that act, if it is continuing; (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require. **Article 31 Reparation:** 1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act **Article 32 Irrelevance of internal law:** The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part.³⁷¹

- Principles of Nuremberg: Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment.³⁷²

Transitional Justice in Spain

In order to analyze in a clearer way the public treatment of the dictatorial past in Spain, the different measures taken will be categorized into three groups, following the division of political analyst Aguilar³⁷³: A) Material reparations to the victims (pensions, pecuniary compensations and any other type of assistance); B) Symbolic reparations (monuments, public and

³⁶⁷ <http://www.ictj.org/en/tj/> (last time acceded 21 July 2010)

³⁶⁸ Louis Bickford, *Transitional Justice* inside “The Encyclopedia of Genocide and Crimes Against Humanity”, vol. 3, pp. 1045-1047.

³⁶⁹ Javier Chinchón Álvarez, *Transición Española y Justicia Transicional*, page 339-340.

³⁷⁰

http://www.oosa.unvienna.org/oosa/en/SpaceLaw/gares/html/gares_25_2625.html

³⁷¹

www.ilsa.org/jessup/jessup06/basicmats2/DASRco mm.pdf

³⁷² <http://www.icrc.org/ihl.nsf/full/390>

³⁷³ Paloma Aguilar, *Transitional Justice in the Spanish, Argentinean and Chilean Case*, pages 9-16.

official pardons to victims, condemnation of the past...); C) Criminal justice, amnesties and pardons.

However it is necessary to first explain some features that have probably affected the way the Spanish transition was managed in comparison with other transitional justice processes as the ones that took place in Chile and Argentina.

First of all, the length of the Spanish authoritarian regime as oppose to that in Chile and Argentina must be considered. Franco's Regime was the longest one, lasting almost 40 years (from 1936 to 1975) while the military dictatorships in Chile and Argentina lasted from 1973 to 1990 and 1976 to 1983, respectively. The issue of time is important as the time elapsed from the extreme repression to the end of the regime in the case of Spain was much longer. The climax of violence in Spain took place in the immediate years after the end of the Civil War. Therefore, once the regime ended, thirty years after the cruellest violations, most of the victims and perpetrators were dead and a generational change had taken place.³⁷⁴ On the contrary, in Chile and Argentina the dictatorships lasted less than 20 years, in the case of Argentina seven years, a small period in comparison with the Spanish dictatorship. This obviously implied that both victims and perpetrators were still alive and the memory of the violence suffered still very much present.³⁷⁵

Secondly, the human rights 'system' has increasingly become more prevalent during the last two decades (1980s), creating a human rights network of local, national and international human rights organizations that have been influential in the democratization processes in different countries. This international pressure did not exist during the Spanish transition.

A. Material reparations

³⁷⁴ Ulrike Cadpdepón, "Historical Memory and Democratization in Chile and Spain: Between local Discourses and international Norms", GIGA German Institute of Global and Area Studies, page 5

³⁷⁵ *Ibid.*

Material reparations were provided in Spain through legislation since 1975. In order to present a clearer presentation, they will be organized in two groups. First of all, the general rules approved during the first years of the transition and second, the recently adopted Law of the Historical Memory.³⁷⁶

a. Material reparations from 1975-2007

Apart from the Amnesty Law of 1977 other legislative measures were taken in the first years of the transition. First of all, in 1978 a Governmental Act (Real Decreto) granted retirement pensions to both members of the military and the Republican forces, or their heirs. The same year, another Government Act was passed extending the amnesty to officials. Second, one year later, pensions, medical care and social assistance were guaranteed to widows of those who had died during the war because of political activities, when the death was not the consequence of the execution of a sentence. Third, in 1984, two new laws were enacted, one recognising the years spent in prison as years contributing to Social Security, and the other extending this guarantee to those who had joined the army or public order forces during the war. Finally in 1986 those who had been members of the UNM³⁷⁷ were permitted to be reincorporated into the Army. During the 90s some laws were passed with regard to the payment to those who had spent some time in prison during Franco's regime. However, the first reference to the unfairness of the situation suffered to those who fought for democracy during and after the Civil War only appeared in a law in 1998, that, in the context of the restitution of confiscated goods, speaks of "restoring the legal situation that had been affected by illegitimate decisions

³⁷⁶ The Law of Historical Memory introduces provisions that address the other categories of reparations, but will be explained in this section.

³⁷⁷ Democratic Military Union, a sector of the military that was expelled from it for trying to spread democracy among the military forces from 1974

made with the protection of an unfair rule.”³⁷⁸

The problem of the aforementioned laws is that they did not distinguish among victims or sides and did not bring justice to certain collectives or demand pardon for those who suffered for fighting in support of the Republic. In recent years, Associations of Victims started putting pressure on the Government to develop new legislation on reparations focusing this time on the situation suffered by the victims. In this sense, the Governmental Act 1891/2004 (Real Decreto) of 2004³⁷⁹ that orders the creation of an Inter-ministerial Commission to analyze the situation of victims of Civil War and the Francoist regime, should be mentioned as it includes important innovations: for the first time “victims” were described as “those suffering repressive acts as a consequence of their support to democracy”; second, it states the need of moral satisfaction and compensation for the victims of the Civil War who fought for the legally established democracy³⁸⁰

b. Law of Historical Memory

The Law of the Historic Memory was approved by the Spanish Parliament on the 31st of October, 2007 under the socialist government of Jose Luis Rodríguez Zapatero. Its objective was that of “recognizing and extending rights for those who suffered persecution or violence for their political, ideological, or religious ideas during the Civil War and the Dictatorship, to promote moral reparation and restoration of their personal and family memory, and additional measures designed to remove elements of division among the citizens, all in order to promote cohesion and solidarity between different generations of Spanish people around the

principles, values and constitutional liberties.”³⁸¹

Among the most important provisions, the following should be mentioned:

- Summary Trials: the wording of the law averred the “radical unfairness of all the convictions, penalties and personal violence caused by political, ideological or religious reasons during the Civil War, as well as those suffered by the same reasons during the dictatorship.”³⁸²

Furthermore, all those tribunals, juries and any other criminal organs created during the Civil War or afterwards because political, ideological or religious beliefs are considered illegitimate.³⁸³

- Reparations: Victims or their heirs can ask for a “declaration of repair and personal acknowledgement.”³⁸⁴ In the same way the amount and scope of material reparations (pensions, pharmaceutical and medical-social care for widows, children and other relatives, compensations etc.) has been increased.³⁸⁵

- Location and exhumations: Public authorities will facilitate to the relatives of the victims, under their request, the location, identification and exhumation of the missing persons who disappeared during the Civil War and the Dictatorship.³⁸⁶

- Establishment of the “Centro Documental de la Memoria Histórica y Archivo General de la Guerra Civil” (Documental Center for the Historic Memory and General Archive about the Civil War) with the main objectives of “retrieving, collecting, organizing and making available to everyone the documents and secondary sources that may be of interest to study the Civil War, the Franco dictatorship, guerrilla resistance against it, the exile, the

³⁷⁸ Paloma Aguilar, *Transitional Justice in the Spanish, Argentinean and Chilean Case*, page 8

³⁷⁹ The text of the Governmental Act can be found in the following link <http://www.derechos.org/nizkor/espana/doc/decreto/civf.html>

³⁸⁰ Paloma Aguilar, *Transitional Justice in the Spanish, Argentinean and Chilean Case*, page 9

³⁸¹ Law 52/2007, of 26 2007, “Ley de la Memoria Histórica”, available at: http://ley Memoria.mjusticia.es/paginas/es/ley_memoria.html

³⁸² *Ibid.* Art.2.1

³⁸³ *Ibid.* Art. 3

³⁸⁴ *Ibid.* Art.4

³⁸⁵ *Ibid.* Arts. 5-10

³⁸⁶ *Ibid.* Arts. 11-14

detention in concentration camps during World War II and the transition; and, “promoting historical research about the Civil War, the Franco Regime, the exile and the Transition, and to contribute to the dissemination of the results.”³⁸⁷

This law has been strongly criticized by different sectors of society, as well as political parties. For example Mariano Rajoy the leader of the “Partido Popular” (People’s Party)³⁸⁸ criticized it, not only because of its flaws, but because he believes these measures will just reopen hate and quarrels from the past at the same time as divide the society.

However, until this moment, the Law of the Historical Memory is being slowly implemented. Many NGOs from different regions in Spain complaint that the families of the disappeared are not receiving enough institutional support and worthy recognition of the missing.³⁸⁹ Therefore, even if the government has heard the requests from different organizations (such as Amnesty International, Equipo Nikzor, among others) the balance is negative, there remain many things to do, and should be done quickly, as an important number of the people who can benefit from the measures of the Law of the Historical Memory are elderly persons.³⁹⁰

Similar reparations were provided in the Southern Cone. In Argentina from 1991 to 2004 different laws were passed to guarantee that economic assistance was provided to political detainees at the time of the dictatorship as well as the relatives

of the disappeared and to indemnify those subject to discrimination on political grounds.³⁹¹ In the same vein, in Chile economic reparations have been given to victims, detainees, their families and the children born of mothers in captivity. An “Office of Repatriation” was also created to help those persons forced to go into exile to return to Chile.³⁹²

B. Symbolic reparations

During the transition process and until the present time, no monuments have been built in Spain to pay tribute to the victims of both sides, with the exception of a small and recycled one in a square of Madrid.³⁹³ The case of the “Valle de los Caídos” (the Valley of the Fallen) that was built by republic prisoners to honour the nationalists dead during the civil war, is very significant. This monument, ordered by Franco, remains exactly as it was during the Dictatorship, as a legacy and important symbol from this period.³⁹⁴ Even more, it is the place where nationalist demonstrations and celebrations honouring and enhancing the Dictatorship and Franco’s figure have been taking place. However, since the Law of the Historic Memory entered into force, these acts are forbidden.

In the same way, other monuments or symbols from the Dictatorship (statues of Franco, names of streets and squares) are still standing today or have been removed recently. The main equestrian statues of Franco of Madrid, Zaragoza, Santander

³⁸⁷ *Ibid.* Art. 20

³⁸⁸ The right-wing Popular Party is now the largest opposition party at the Parliament.

³⁸⁹ The “Asociación por la Recuperación de la Memoria Histórica en Aragón” (Association for the Historic Memory in Aragón, brought all these complaints to the Commission on Human Rights of the Autonomical Parliament in Aragón.
http://www.cortesaragon.es/Nota_de_Prensa.364.0.html?tx_ttnews%5Btt_news%5D=2251

³⁹⁰ Ángeles Egido León, *La historia y la gestión de la memoria. Apuntes para un balance*, page 18 published in *Generaciones y Memoria de la represión franquista: Un balance de los movimientos por la memoria*, Revista de Historia Contemporánea. Número 6 (2006) <http://hispanianova.rediris.es>

³⁹¹ Andrea Ugalde – Natalia Luterstein, *The Argentinean Reparations programme for grave violations of human rights violations perpetrated during the last military dictatorship (1976-1983)*, page 13, published in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity Systems in Place and Systems in the Making*, Martinus Nijhoff Publishers, 2009.

³⁹² Paloma Aguilar, *Transitional Justice in the Spanish, Argentinean and Chilean Case*, page 15- 16

³⁹³ It is located in the “Plaza de la Lealtad” in Madrid, and it was “recycled” during the anniversary of the crowning of the King to pay tribute to all the fallen during the Civil War and before.

³⁹⁴ Paloma Aguilar, *Transitional Justice in the Spanish, Argentinean and Chilean Case*, page 11.

and El Ferrol were not pulled down until 2005, 2006, 2008 and the current year (2010) respectively. The removing of a statute in Melilla is still under discussion. These recent measures are in accordance with the new Law of Historic Memory, specifically in its article 15.1-2³⁹⁵. Since this law entered into force, the Ministry of Defence, has removed 355 of the 408 monuments that are officially in their facilities.³⁹⁶ The same measure has slowly started concerning the names of the streets. In most of the churches and cathedrals around the country, there were, and still are, lists of the people dead on the nationalist side, under the sentence “*fallen for God and Spain*”, which give an excessive tribute only to these victims in comparison to the ones dead on the republican side.³⁹⁷

With regards to the mortal remains of the democratic president illegally and forcibly deposed by Franco’s forces, Manuela Azaña, lays in a small cemetery in France and no Head of State or Spanish President has ever rendered a visit to pay tribute to his tomb.³⁹⁸

Concerning the official acts to condemn the dictatorship, some motions were passed in the Spanish Parliament condemning the victims who died during the Civil War and Dictatorship. However, one of the two main political parties, the Partido Popular (right wing) has always rejected them and denied to officially condemn the military coup of 1936 and the Dictatorship that follows it. Furthermore, no Head of States have ever asked the victims of the war and Franco’s Regime for forgiveness on behalf of Spain, as was done by President Aylwin in Chile on the 4th of March 1991.³⁹⁹ Also in Argentina several laws have been passed

rejecting the dictatorship and the abuses committed during this period of time. Neither any members of the Military or the Catholic Church⁴⁰⁰ in Spain have ever apologised for the atrocities committed and their participation on them.⁴⁰¹

A clear difference can be seen from the measures taken by Spain and those taken by the two countries used in comparison. Both in Argentina and Chile, different measures have been taken in order to remember the past and the atrocities committed as well as paying tribute to the victims:

In Argentina, the “Federal Network of Places of Memory” was created to manage the different “memory sites” throughout the country. For example, commemorative sites were established, such as the “Parque de la Memoria en el Río de la Plata” (Memory Park on the bank of the De La Plata River) a place with an important symbolic value as many people were thrown from planes into the river during the dictatorship. This park was inaugurated in 2007. In the city of Rosario a Museum was opened, “Museo de la Memoria”, honouring the victims of forced disappearances and condemning terrorism. Furthermore in this country only a few symbols from the dictatorship remain, mainly name of streets or plaques in memory of the fallen in small cities or barracks.⁴⁰² On 24th March 2004, the President of Argentina, Nestor Kirchner, converted the clandestine detention centre known as “ESMA” (the Navy Mechanics School) into a “Place of Memory and Promotion of the Defence of Human Rights”. Many other clandestine detention centres have been restored, especially, in the City of Buenos Aires and the province of Cordoba. On a national level, the “National Memory Archive” was created in December 2003 with the goal of “obtaining, centralising and preserving

³⁹⁵ The law of Historic Memory is available in the following website:
http://levmemoria.mjusticia.es/paginas/es/lev_memo.html (last accessed July 23, 2010)

³⁹⁶ <http://www.larepublica.es/spip.php?article19606>

³⁹⁷ Paloma Aguilar, *Transitional Justice in the Spanish, Argentinean and Chilean Case*, page 13.

³⁹⁸ *Ibid.* at page 11.

³⁹⁹ *Ibid.* at page 13.

⁴⁰⁰ Which during the Civil War and the following Dictatorship supported the national movement

⁴⁰¹ Paloma Aguilar, *Transitional Justice in the Spanish, Argentinean and Chilean Case*, page 14

⁴⁰² Paloma Aguilar, *Transitional Justice in the Spanish, Argentinean and Chilean Case*, page 10-12

information, testimonies and documents on the violations of human rights and fundamental freedoms.”⁴⁰³

In Chile, among the many monuments built to pay tribute to the victims, a few can be mentioned. In 1991, the government, in cooperation with two associations for the disappeared and executed, built a mausoleum and memorial in Chile’s general cemetery to pay tribute and give a dignified burial to the victims of the Pinochet Regime. In the same way, in 2003 the “National Stadium” that was used as a centre of illegal detention and torture was declared a national monument. Furthermore, the corpse of the previous President of Chile, Salvador Allende, who was killed in the “coup d’état” of Pinochet, was transferred from its private grave to the Chilean General Cemetery, the place where most of the democratic presidents of the country rest.⁴⁰⁴ Regarding the naming of streets, in the capital of Chile, there is still a public avenue named after the date Allende’s government was overthrown, “Avenida 11 de Septiembre.”

C. Criminal justice, Truth Commissions, amnesties and pardons.

Amnesties

As it was mentioned before, the first democratic Parliament in Spain after the Civil War voted an Amnesty Law in 1977, approved by both the Francoist’s reformists and the democratic opposition, which gave amnesty to all the crimes committed during the Dictatorship and the Civil War. This Amnesty put at the same level victims and victimizers but denied the option of punishing the perpetrators of human rights violations. In Chile and Argentina, Amnesty Laws were passed as well, the first 1978 and

1982, respectively. The main difference among these two and the one in Spain is that the Spanish one was democratically voted, once the authoritarian regime was finished while the Chilean and Argentinean were adopted by the Military just before the regime ended, as a “shield of impunity” to them.⁴⁰⁵ Furthermore, in Argentina, during the first democratic government two laws were passed also granting amnesties. These were the “Ley de Punto Final” (The Final Stop Law) in 1986; and the “Ley de Obediencia Debida” (The Law of Due Obedience) in 1987.⁴⁰⁶ In December 1990, the president at the time, Carlos Saúl Menem, granted a presidential pardon to the Military Juntas.⁴⁰⁷ Finally, at the end of 1983 the new democratic government, presided by Alfonsín, revoked the Auto-Amnesty law passed by the Military, however the “Final Stop Law” and the “Law of Due Obedience” remained until the law No 25.779 was adopted, declaring null and void the aforementioned laws and reopening the possibility of prosecuting those who had committed horrendous crimes.⁴⁰⁸ The main arguments to nullify these laws were that they went against the Inter-American Human Rights Convention, the International Convention on Civil and Political Rights, the Convention Against Torture and the state’s duty to prosecute crimes against humanity⁴⁰⁹ (these same arguments could be applied in the case of the Spanish Amnesty Law.)

⁴⁰⁵ Ulrike Capdepón, “Historical Memory and Democratization in Chile and Spain”, page 6.

⁴⁰⁶ Andrea Ugalde – Natalia Luterstein, *The Argentinean Reparations programme for grave violations of human rights violations perpetrated during the last military dictatorship (1976-1983)*, page 2.

⁴⁰⁷ *Ibid.*

⁴⁰⁸ Andrea Ugalde – Natalia Luterstein, *The Argentinean Reparations programme for grave violations of human rights violations perpetrated during the last military dictatorship (1976-1983)*, page 2.

⁴⁰⁹ Pablo F. Parenti, *La jurisprudencia argentina frente a los crímenes de derecho internacional*, *Lateinamerika Analysen* 18, 3/2007, S. 61-93. Hamburg: ILAS, page 27 *et seq.*

⁴⁰³ Andrea Ugalde – Natalia Luterstein, *The Argentinean Reparations programme for grave violations of human rights violations perpetrated during the last military dictatorship (1976-1983)*, page 13.

⁴⁰⁴ Paloma Aguilar, *Transitional Justice in the Spanish, Argentinean and Chilean Case*, page 11.

The Spanish and Chilean Amnesties are still in force today. However it is interesting to mention another important aspect. Contrary to Spain⁴¹⁰, in Chile the legitimation of this law was publicly discussed as well as the issue that admitting that a general amnesty covers human rights violations will undermine the international norms. In this sense, some judges in Chile decided to start investigations in cases of torture and forced disappearances, even if, because of the Amnesty law, they were obliged to not condemn the culprits.

Truth commissions

Contrary to Chile and Argentina, the transitional mechanism of Truth Commissions was not used in Spain, as the strategy was that of “oblivion”. However, in the two Latin-American countries their governments decided to establish official commissions to investigate and clarify the human rights violations that took place during their dictatorships.⁴¹¹

On February 1991, the Chilean “National Commission for Truth and Reconciliation” disclosed the information about the crimes committed, the name of the victims and the recommended reparations, while maintaining in secret the name of the perpetrators in a document known as “Retting Report”. Recently, in 2003, a “National Commission on Political Prison and Torture” has been established to investigate only those crimes related to torture and political imprisonment.⁴¹²

In Argentina, the “National Commission on the Disappearance of Persons” (CONADEP, in Spanish) was created,

which prepared a report named “Never Again”, where, even if the names of the oppressors were not included, a careful and detailed list of people “disappeared” and the horrors committed in the secret detention units was documented.⁴¹³ Therefore, the aim of this Truth Commission was not determining criminal responsibility but disclosing the truth, as the Amnesty Laws remained in force. However, the information they gathered is an important basis for future judicial cases. “Truth Trials” have been taking place in this country from 1999 in federal chambers all over the country. The aim of these trials was not to sentence the perpetrators but to guarantee the rights to truth and to pay tribute to the victims by continuing with the investigations started by the CONADEP.⁴¹⁴

Conclusion

This essay highlights the insufficiency of transitional justice policies during the Spanish transition process. Chile and Argentina, countries that took the Spanish transition as an example to achieve a peaceful democracy as strong and stable as the one reached in Spain. However, developed much more concrete actions complying with international law. Both Latin-American countries established Truth Commissions and other truth-seeking mechanisms right after the end of their Dictatorships and their governments firmly and publicly condemned the abuses of human rights committed during the said military dictatorships. As was seen before in Chile, a country where the Amnesty Law is still in force, the judiciary power has challenged the international legitimacy of this law. None of those measures have been taken in Spain.

It is true that Spain managed to move on and that a democracy was undoubtedly established but the new developments from civil society and some judiciary

⁴¹⁰ As it was seen before, the decision of Judge Baltasar Garzón to declare itself competent to investigate the crimes against humanity committed in Spain during the Francoist regime as they were not covered by the Amnesty Law, have lead to a criminal case of abuse of power (“prevaricación” in its Spanish terms) against him.

⁴¹¹ Ulrike Capdepón, “Historical Memory and Democratization in Chile and Spain”, page 6.

⁴¹² *Ibid.* at page 7

⁴¹³ Paloma Aguilar, *Transitional Justice in the Spanish, Argentinean and Chilean Case*, page 12.

⁴¹⁴ *Ibid.* at page 17.

forces asking for justice, was just a matter of time.

Transitional justice measures are necessary in order to rebuild social trust, without any resentment from the past. And the core element to achieve this is justice. Victims in Spain have not obtained justice yet, and the transition process will not finish until this justice is completely brought to them. It is just a question of humanity towards part of our population which thus far has been ignored. Probably measures such as Truth Trials or Commissions are disproportionate in the current context of Spain, but other forms of justice definitely must be taken. The Law of Historical Memory is a good start, but this law has many flaws that should be improved and the fear of part of the population overcome. Furthermore, both the national government and the different regional governments should make more efforts in enforcing the provisions established by this law. It should not be seen as attempt to open “wounds already closed” but an act of justice to those who did not get it when they should have. “Wounds will not close until they are properly clean”. As Walter Benjamin said “la memoria abre expedientes que el derecho considera archivados” (memory opens records law considers archived).

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LUSTRATION LAW IN POST-COMMUNIST ROMANIA CASE STUDY: COUNCIL FOR THE STUDY OF SECURITY ARCHIVES

By Cristian Gherasim*

ABSTRACT

After the demise of communism the question of ethical and juridical responsibility arose. Romanian society seems to be reluctant to sanction those with criminal culpability for the wrongdoings of the former communist regime. Also, when trying to overcome this reluctance, policy makers were facing another dilemma as Romania's secret police files are used more to fight current political battles rather than to expiate the crimes of the totalitarian regime. A sample of the moral cleansing mechanisms, use for less than moral political purposes, is offered by the 2000 Romanian presidential elections and The Council for the Study of Security Archives ambiguous actions towards the leading presidential candidate, Ion Iliescu. Instead of erring on the side of caution and employing materials and evidence from a variety of sources, the Council set a dangerous precedent of sloppy research and contradictory declarations, forgetting that any moral reform must start within the Council itself. In 2008 The Romanian Constitutional Court ruled against the laws governing the functioning of the Council, declaring them unconstitutional. A major setback, the constitutional aspect has raised questions about the decisions previously taken by the Council. Normally, such decisions would lack relevance as they were made according to a law that acted against the state constitution.

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Introduction

It appears that the post-communist Romanian society has compelled a total amnesty, both moral and legal. Nobody seems to be really responsible. This lack of ethics has been mirrored by the actions of present day politicians. So, the grind of transition and the lack of economic efficiency are seen as unaccountable facts. It is only the fault of communism itself, and communism itself is portrayed as an artificial experiment, something that comes from nowhere and ends on December 1989, taking with it all its caretakers, leaving behind a new-born and innocent nation.

Following this line of thought, the only ones responsible for the regime's crimes are the Romanian Communist Party, an ideological construct, and the supreme leader, Nicolae Ceaușescu. Nothing could be further from the truth. We have to understand that the communist regime existed and acted through the will and actions of the Romanian people. The few Romanians that were arrested, executed, persecuted and exiled, approximately six percent of the total population, weren't executed and persecuted by impersonal courts. They were the victims of other Romanians who accepted collaboration with the regime, acting on behalf of their own individual or collective interest. Political utopia can deceive, but not kill, ideology can lie, but not maim and humiliate. Only people can do that. All these people were killed by other people. It is a truism, but one that seem to be elusive, consciously, the reasoning of today's anticommunists.

Also, we might note that the so called crypto-communists, the present political elite in Romania, are none other than former Communist Party members. But today, they managed to fill the same high ranks of power as they did in the past. Their power doesn't reside in the existence of one particular political party or ideology. Their power resides in what Anna Grymala-Busse called

administrative practice. A bureaucratic understating of power explains 'the ease with which the ex-communist renounced their ideological belief and manage to attain success in post-communist politics'.⁴¹⁵

A question of ethical indifference

The fall of communism and emergence of a democratic nation-building process was seen by many as an opportunity to reinvent the state on the principles of freedom and political accountability. As Daniel Barbu points out, in the case of Italy and West Germany after World War Second, the method of 'historic ignorance was a means by which Germans and Italians hoped to break the alliance between state and nation, in hope of redeeming the nation and rebuilding the state on whole new principles'⁴¹⁶. This mechanism allowed them to condemn *post factum* the totalitarian state without incriminating the nation. That was the desired and accepted effect: to built with the help of a once compliant nation a new state. That wasn't the case in post-communist Romania. 'Nobody here bothered to declare that he didn't know what had happened, nobody here acted surprised. The general feeling was that the past didn't matter and a debate concerning individual and collective responsibility would be a waste of time'⁴¹⁷. The experience of the communist regime didn't seem to have left any noticeable marks in the collective conscience of the Romanian people. Nobody hoped for a thorough debate on the responsibilities of the new state. Nobody wanted a total brake with the past. Most of today's politicians and many of the famous intellectuals, who now criticize the

⁴¹⁵ Anna Grzymala-Busse, *Redeeming the Communist Past. The Regeneration of Communist Parties In East Central Europe*, (Cambridge: Cambridge University Press 2002), p.256

⁴¹⁶ Daniel Barbu, *Republica absentă. Politică și societate în România postcomunistă* (București: Nemira 2004), p24

⁴¹⁷ Barbu, *Republica absentă.*, p.25

current administration and want to be seen as champions of the civil society, were members of the Communist Party. Regardless of their present stance, all of them seem to be in denial not only of their communist past but of communism itself. They can't accept the fact that their carriers and prestige were determined by the loyalty they showed to the Communist Party, stating that their position of dominance was only determined by their personal qualities and merits.

Communists and neo-communists accepted as scapegoats for their actions notions of indefinite abstraction, both to consolidate power and to dodge responsibility. If the communist turned to Marxist-Leninist, the Communist Party and the Supreme Leader, the anticommunist, actually collaborationists and former nomenklatura members, claimed that communism was something of foreign origin, something that was enforced through will of outside powers. So, they decided that privately they should hold in abhorrence the regime, but in public to collaborate with it.

It appears that we are dealing with a society that was totally absent during the communist regime, only to reemerge, clueless of what had happened, after December 1989. Without any victims or villains, the post-communist society found itself lacking any social and collective trauma. Their total disinterest in resisting the communist regime had found its correspondent in the ignorance which governs present day Romania. Totalitarianism, as a political regime, can't be prosecuted, only people can. The problem of guilt rests in the idea that every man is responsible for the way he is governed. The question of ethical responsibility gave way to a hotly debate regarding the extent to which a ban on the political accession of former communist members can be applied. The process of uncovering the truth and developing reconciliation in the countries of the former communist bloc has tried, to some degree, mimicking 'the process of transitional justice played out in post-

authoritarian Latin America'.⁴¹⁸ Again, the limits of the culpability establishing process became the focal point of debate.

Using the Hirschmanian model of thought we might say that the way in which the post-communist society dealt with its past can be trace to two variables, two types of transition that a society undergoes: the "exit" strategy can be assimilate to the passive act of emigration; the "voice" strategy is the proactive approach of criticizing politicians and official policies. Regardless of the chosen strategy, the ousting of former communist and high-ranking secret police officers was determined by the efficacy of the new legislation and the political will to implement it. This has inevitably led to a process of political bargaining.

Studies of lustration falsely presume that the enactment of laws and the building of research institutions and other enforcement mechanisms are the outcomes of a successful moral cleansing process. But rarely is the question asked: Are the verdicts handed down by these agencies correct? Can we establish historical truth only on these kinds of decisions? Also, there are no reasons to believe that the transitional-justice laws have equal success in addressing the problem of moral cleansing in post-communist countries.

The Legal Framework

Romania was a late comer to the whole transitional justice process, adopting the necessary legal framework well after other countries of Eastern Europe. The Social-Democrat Party stayed in power from the fall of Ceausescu until 1996 and, being made up of former communist officials, had tried to block the transition and transitional justice from coming to

⁴¹⁸ Daniel Nina, *Learning from Experience of the Past: Reflections on the Truth and Reconciliation Commissions in Latin America and the Situation in Eastern Europe* (Cape Town: University of Cape Town, 1994), p 74

Romania. First proposed as a draft by Ticu Dumitrescu, a former political prisoner, the design of the proposal was continued by a parliamentary draft version. As Mark S. Ellis mentions in his 1997 study, the Romanian Parliament proposed a draft law on Access of Former Communist Officials and Members of the Totalitarian Regime to Public and Political Positions.

Major positions within the Communist Party include members of the Central Committee, members of government, members of the government, members of the judiciary, officers of the Securitate, and officers of the army⁴¹⁹. Also, members of the judiciary cannot, for the next eight years, hold the following positions: prime minister, member of the government, public prosecutor, president of the court, governor, governor deputy, director of the national television company, or ambassador. In addition, these people cannot be elected for the Constitutional Court, Supreme Court, Superior Council of Magistrates, Romanian Academy, of the Audio-Visual Media National Council.

The draft law also mentions that persons who, irrespective of their positions, were 'arrested, convicted, or suffered any other consequence due to "anti-soviet" or "anti-communist" opinions between March 6, 1945 and December 22, 1989 are exempted from the provisions of the proposed law.⁴²⁰ This provision could also act as rehabilitation mechanism for those that became victims of the changes which occurred during the communist regime. So, when the Romanian communist regime decided to make a transition from internationalist communism to a more nationalist approach, a cleansing and physical removal of those who were formerly internationalists took place. However this provision of the draft law can't be considered as a form of amnesty given the fact that most of the former high

ranking officials are all ready dead. So, the law only refers to non party members that had tried to stand against the Communist Party. Also, persons holding any of the positions mentioned in the draft law must submit a statement attesting that they did not collaborate with the former communist regime. 'Members of the Romanian Intelligence Service, the ministry of Internal Affairs, or other selected government institutions must answer within thirty days upon being notified.'⁴²¹

Article 2 of the Law No. 187 gives Romanian citizens the possibility of obtaining the names of the police agents and collaborators who contributed in giving information to their secret files⁴²². Citizens can read and obtain copies their files at the Council. Also, those dissatisfied with the response of the Council for the Study of Security Archives may petition the Court of Appeals for a review. Civil society has criticized the Council for the Study of Security Archives because of the fact that the so called list of "positions of responsibility" does not include members of the secret services. So, candidates elected to or nominated for almost every position of responsibility in the state at central and local levels and who, by the occupations they had, qualified as subjects of Lustration must withdraw or renounce the post within fifteen days of the beginning of an investigation. Regarding the investigation process, it is stated that ordinary citizens as well as members of the press, political parties, civic organizations, and public administration bodies must be informed, on request, of any collaboration with the Securitate by elected or nominated candidates.

The law defines the political police as including all Securitate agencies whose activities infringed on fundamental human rights and liberties. A secret agent

⁴¹⁹ Draft law regarding the access of the former communist officials and members of the totalitarian regimes to public and political positions, 1996

⁴²⁰ Draft law

⁴²¹ Draft law

⁴²² Gabriel Andreescu, *Law 187/1999 and the First year of Activity of the National Council for the Study of Securitate Archives*, The Romanian Magazine for Human Rights, no 20 (2001): 38-56

is defined as a person who worked overtly or covertly for the political police between 1945 and 1989, when Romania was under communist rule. Actually, the law distinguishes several kinds of informers but does not recognize degrees of involvement, for everyone involved with the Securitate, regardless of the nature of the involvement, must be indentified publicly. In article 5 a collaborator is defined as a person who received an honorarium, was a Securitate resident, - not qualified and trusted yet to be a full-time collaborator was enlisted by the secret political police to offer information that infringed on human rights, or facilitated in any way the transmission of such information. Collaborators are those who had decisional, juridical, or political responsibilities, whether at the central or local level, related to the activities of the Securitatea or other totalitarian structures of representation.

While the law does not clearly distinguish different types of Securitate employment, the political police are known to have employed both full-time officers and part-time informers. A simple informer would become a collaborator upon joining the Communist party, then a paid collaborator, and finally a paid referent and finally a paid referent contemplating promotion to the rank of Securitate officer. An officer's identity could be uncovered, partly covered, or completely covered, with the latter being the highest honor within the Securitate organizational structure. Add to this the largest network of informers in Eastern Europe, believed to have included some 600,000 to 700,000 people from a total of 23 million. Monetary and non-monetary perks alike were available for informers. Romanians in all walks of life enrolled as Securitate informers in hope of being granted a passport, permission to work abroad, transfer to a big city or a better job. Of course, not all collaborations were voluntary and opportunistic, but it is simply impossible to say how many informers spied out of fear, revenge, or blackmail. To further complicate things,

some of the victims who were reported on were themselves spying on others, making it difficult to differentiate victims and perpetrators.

Some reliable estimates regarding the number of informers is placed around 700,000, Of whom 100,000 were Communist Party members.⁴²³ Another analysis regarding the number of informers and their background was offered by Ticu Dumitrecu. According to one socio-economic analysis Dumitrescu said that for 3,007 new informers, 39 percent had university education, and another 37 percent high school education, 18 percent were engineers, researchers, or scholars, 17 percent were professionals, 19 percent public servants, and 32 percent military officers, workers or peasants. Around 97 percent had been recruited voluntarily because of their 'political and patriotic sentiment'⁴²⁴, 1,5 percent though offers of financial compensation, and 1,5 percent were being blackmailed with compromising evidence. The Council for the Study of Securitate Archives, an autonomous public agency under parliamentary supervision, serves as custodian of the archive and ultimate judge of the involvement of Romanian citizens with the communist political police. The council is led by an eleven-member college whose members, nominated by the legislature, can serve for two six-year terms. Civil-society groups object to the college, arguing that the council should be independent of the politicians whose past it is supposed to investigate. The balance of forces in the upper chamber of the Romanian parliament determined the composition of the college in the spring of 2000. The government won the right to nominate seven members of the college, including the president and the deputy president,

⁴²³ Silviu Brucan, *Generația irosită: memorii (Wasted generation)*, (Bucharest: Editura Univers, 1992), p.142

⁴²⁴ Ticu Dumitrecu, 'Ticu Dumitrescu Report', *Ziua*, 21 January 2002, 7

while the opposition nominated the remaining four.⁴²⁵

By law candidates must not have been Securitate agents, cannot be members of any political party, and cannot be occupants of a state office when nominated. But despite protests by the opposition, the parliamentary majority ignores these restrictions, nominating philosopher and former foreign minister Andrei Pleșu and the former dissident poet Mircea Dinescu. Both men had surrendered their Communist Party cards more than twenty year earlier, but the taint of past membership remained.

The council has access to everything in the Securitate archive except files whose release might jepordize the vague concept of “national security”. Before they referred to the council in late 2001, the Securitate files had been scattered throughout the country in the archives of the Ministry of Defense, the Ministry of Justice, the Romanian Information Service, and the External Information Service. Nobody knows exactly how many files the Securitate produced, how many were destroyed and whether the council now has custody of all the exact files. Since its inception in 1990, the Information Service, which housed the bulk of the Securitate files in its Bucharest headquarters and forty country branches, has offered contradictory information on the number and contents of the files and refused to grant public access to them. In 1993, according to Information Service date obtained by Ticu Dumitrescu, there were 1,901,503 Securitate files. Whether the files realized to the council are authentic or were fabricated since December 1989 by unknown hands eager to compromise local luminaries is still an open question.

⁴²⁵ The seats were divided as follows: the Christian democrats, social democrats, and main government and opposition party got three seats each; the Democracy Party, a junior ruling partner , got two; and the National Liberal Party , the Democratic Union of Magyars in Romania, and the Greater Romanian Party, one each

The college meets twice weekly in closed – door session, works with a quorum of at least eight of its eleven members, and makes decisions and gives verdicts with a simple majority of those present.⁴²⁶ If someone is absent and the vote is split, the meeting chair, usually the council chair breaks the tie. Collaborator verdicts are based on evidence from files and, when the files are missing or incomplete, on written documents submitted by interested parties. The council’s personnel are public servants who must preserve the secrecy of the information contained in the files even after retiring of transferring to another job. Destroying, falsifying, or concealing Securitate files and documents is punishable with a two-year prison term. Leaking or misrepresenting information in the files is punishable with a prison term of six months to five years. Publishing false information to slander a person’s life, dignity and reputation is punishable with three moths the three years. The law and the statutes, however, do not clearly specify the punishments applicable to regular council employees and to the college members, and there is no provision for dismissing college members found guilty of misconduct.

Council for the Study of Security Archives: moral judge or instrument of political revenge?

To carry out its mission, the National Council for the Study of Securitate Archives must hand down well-researched verdicts based on as much information as possible, including archival and non-archival materials and personal interviews with suspected Securitate collaborators. Before publicly labeling someone as an informer it should clearly explain any limitations on the investigation. To fend off possible criticism, and be faithful to the spirit of the law, the council should list the archives it consulted and should identify,

⁴²⁶ *Monitorul Oficial al Romaniei*, June 2, 2000

in general terms, the documents supporting a guilty verdict. More generally, it should clearly spell out, for its members if not for the public, the type of materials that would prove beyond any doubt a person's involvement with the political police. And the council should realize that its verdicts and its work in general, will be taken seriously only to the extent that it takes seriously the legal stipulations governing its activities, especially regarding the interview and appeal procedures.

During its first year, the council undoubtedly worked under tremendous pressure to demonstrate the utility of its existence and justify the public money it spent. The late adoption of Law No. 187 delayed the appointment of college members. When the time came to launch the candidate verifications, the council had too few personnel, no office space, and no official access to the archive. But the many reversals, the careless and contradictory remarks made by many of its members, and the fundamental mistakes it could have easily avoided shed serious doubt about the council's competency. The strategy of shifting the blame to the Information Service, the conservative political parties, the electoral candidates, the press and even the general public, combined with the hasty excuses its leaders came up with every time their verdicts were questioned, denote an unexplainable lack of responsibility.

Some cases analyzed by the council had provoked criticism. For example candidate Mircea Bleahu complained about not being interviewed before his name was made public. Another candidate labeled a Securitate informer pointed out that he had a different middle name that the person design by the council. When the Caras-Severin press published documents indicating that certain Social Democrat and Liberal candidates running in local elections had been associated with the secret police, the council refused to label them as Securitate informers, claiming that the documents were inconclusive.

Similarly, it refused to name as an officer of the political police Ristea Priboi, the head of the parliamentary committee in charge of supervising the activity of the Information Service, on grounds that 'the institutions housing the Securitate archives reported that Priboi did not engage in political police activities.'⁴²⁷ But as head of a Securitate service supervising dissident activities abroad during the 1980s, Priboi had ordered the monitoring and the physical assault of some Radio Free Europe collaborators. Two council employees pursuing advanced research degrees, Mircea Stanescu and Gabriel Catalan, were fired after divulging the intimidation they had been subjected to by unnamed persons both inside and outside the council. The college, however, refused to discuss the dismissal of Mircea Dinescu, a member who had openly supported a presidential candidate despite regulations barring college members from political activity.

Some of the council's problems stem from the legal framework governing its activities. The law lists several categories of Securitate agents and informers, failing to recognize that more often than not there was no clear-cut difference between informers and those informed upon. Furthermore, individual actions on behalf of the Securitate are difficult to categorize, and neither the law nor the council's statutes distinguishes between actions in terms of the damage they caused their victims. As Gabriel Andreescu points out, 'a measure of the council's performance is its capacity to identify the presence of the political police in those cases when that presence is not apparent.'⁴²⁸

Probably the most serious legal difficulty is the absence of clear guidelines regarding the type of written documents that could attest to collaboration. Does collaboration rest in the quantity or the

⁴²⁷ *Ziua*, February 13, 2001

⁴²⁸ Gabriel Andreescu, 'Legea 187/1999 și primul an de activitate a Consiliului Național pentru Studierea Arhivelor Securității', *Revista Română de Drepturile Omului*, no.20 (2001), 38

quality of the information given to the political police? If both matter, is one more important than the other? Was a person who signed a pledge of allegiance a Securitate informer? In some cases such pledges were not followed by active involvement, while in others information was given to the political police even in the absence of a written pledge. Then was a person who periodically signed information reports a Securitate informer? Often these contained worthless information already in the public domain. What about someone who was praised by the secret police for the quality of his or her collaboration? An automatic guilty verdict in such cases would mean that the council was giving up its function as ultimate judge and deferring to evaluations made by the very political police whose evildoings it is supposed to undo. Even more important, can the archive be trusted? What guarantee is there that materials in the files are authentic and were not altered after the collapse of the Ceaușescu regime? Perhaps the greatest challenge facing transitional justice in Romania is the delay that occurred before the Securitate archive was transferred to the custody of an independent agency. Because of the delay, Romania was the only East European country where the destruction of political police files continued after the demise of communism.

The verdicts handed down by the council seem more provisional than the agency is ready to admit. As the two cases detailed here suggest, neither a guilty nor a non-guilty verdict is ever definitive. Part of the blame rests with the elusory relationship between reality and recorded material. Archival verifications do not uncover an individual's real involvement with Securitate, but only whether an archive heavily altered during the last decade lists him or her as an informer. Over the years, press reports have documented the buying and selling of files on the Bucharest black market, and the more or less skillful addition and subtraction of

archival materials. But most of the blame rests with the council itself and the way in which it misunderstands its mission. Fearful of being unable to justify their expensive headquarters and lavish wages, the council's leaders hurriedly published the results of incomplete investigations as definitive verdicts. Instead of erring on the side of caution and employing materials from a variety of sources, the council set a dangerous precedent of sloppy research and contradictory declarations, forgetting that any moral reform must start with the council itself.

Conclusion

During these last pages we tried to identify the reasons why lustration cannot proceed as it was supposed to. After underlining the shortcomings of the Council for the Study of Security Archives, we should, in the end, offer a more holistic approach to the whole process of legal accountability and moral cleansing. The post-totalitarian Romanian society seems to be reluctant to sanction those with criminal culpability for the crimes of the former regime. One of the main arguments upholding this kind of ethical and legal approach is the so called 'power vacuum' theory. By and large, it is assumed that communism as a hole had simply disappeared. Because of that, the old state structures and former political elites don't have to be changed as they have already vanished. The so called regime change was in fact closely followed by continuity at individual level. As of that former party officials and activists had switched sides, becoming overnight democracy enthusiasts. These new advocates of democracy immediately renounced communism just after the regime fell. This was a means of denying the very fact that their public careers had begun before the fall of communism and had been tightly linked to upholding and overtly declaring allegiance to the Communist Party and to state socialism. Due to these reasons, post-communist politicians and present day intellectuals

are quite motivated to create an abstract and distorted interpretation of communism. They are favored by an explanatory model of communism seen as a foreign political phenomenon which was imposed in Romania by force and

brutality. As of that, nobody can be culpable in communist atrocities and, aside from Ceaușescu and few high party officials, no other Romanian can be found responsible of such deeds.

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BIH FROM DAYTON TO THE EUROPEAN UNION

By Nicola Sibona*

ABSTRACT

The present paper aims at describing the need for a reform of the Dayton Constitution, given the prospective accession of BiH to the European Union. Notwithstanding the signing in June 2008 of the Stabilization and Association Agreement with the European Union, the country is still threatened in its unity and in its political life by ethnic nationalism; moreover, its inefficient and cumbersome institutional framework requires heavy intervention from the international community in order to function, through the Office of the High Representative, thereby impeding the development of proper self-government. The only possible solution which would not endanger the unity of the state seems to consist in a federalist choice, which could go beyond the “institutional racism” enacted by the Dayton Constitution, without risking jeopardizing the considerable autonomy enjoyed by the cantons and entities. Such a solution has to be reached with the utmost urgency, because an efficient state based on European perspectives and values is not an overly ambitious goal, which could be pursued once the political situation is finally stabilized, but it rather represents one essential condition to allow Bosnian society to develop, rejecting nationalism and ethnic hatred.

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Introduction

When the Dayton Peace Agreement (hereinafter, the “DPA”) was signed in 1995, in an American military base in Ohio, by Slobodan Milosevic, representing the Serbs, Franjo Tudjman for the Croats and Alija Izetbegovic for the Bosniacs,⁴²⁹ it had the ambition to represent more than a simple peace treaty for the territory of Bosnia and Herzegovina: indeed, in addition to the usual content of a peace treaty (cease-fire, definition of the borders, army control), it tried to lay down the basis of the Bosnian State. The actual Constitution of Bosnia and Herzegovina, contained in Annex IV to the DPA, cannot be fully understood if it is not collocated in that framework, where the institutional compromise reached also tried to represent on a political level the equilibrium reached on the battlefield by the armies:⁴³⁰ the result is a byzantine institutional framework, divided along ethnic lines, which has proven to be successful at maintaining peace but which still requires constant international tutelage.

With the turn of the century, the European Union enlargement strategy has started considering the Western Balkans countries as potential candidates for accession to the European Union:⁴³¹ with the two ‘Eastern enlargements’, completed in 2004 and 2007 respectively, the Western Balkans became even more a strategic territory for the European Union. The prospective of an accession to the EU for all the countries of the region is officially stated for the first time at the Zagreb Summit of 24 November 2000⁴³².

⁴²⁹ This term is used with reference to Bosnian Muslims.

⁴³⁰ ROSSINI, Andrea Oskari and Davide SIGHELE, “La Bosnia dopo Dayton”, in *LIMES - Rivista Italiana di Geopolitica*, supplement to no. 4/2005, pag. 105

⁴³¹ EU Western Balkans Summit Declaration, Thessaloniki, 21 June 2003, available at: http://ec.europa.eu/enlargement/enlargement_process/accesion_process/how_does_a_country_join_the_eu/sap/thessaloniki_summit_en.htm

⁴³² A text of the final declaration of the Summit is available at:

In view of this, the instrument for the development of the integration process is identified in the Stabilization and Association Process (“SAP”). The SAP elaborates on the basic requirement to respect the Copenhagen criteria, adding other conditions specifically tailored for the needs of Western Balkan countries. These conditions are partly common to all the countries of the region and partly specific to each State: for Bosnia and Herzegovina, the document mentions the establishment of functioning institutions among the fundamental conditions for the future relations between Bosnia and Europe.⁴³³

On 16 June 2008, by signing the Stabilization and Association Agreement (SAA), Bosnia and Herzegovina made an important step in its march towards integration in the European Union. However, the process of integration of the Western Balkans into the EU necessarily requires Bosnia to undertake a deep process of institutional reforms, and faces Europe with new and unexplored challenges. For the first time since its establishment, the European Union action in the Western Balkans will necessarily imply a certain extent of state building and Bosnia and Herzegovina represents the most relevant and, unfortunately, thorny example of this statement.

In the frame of this paper, we will in turn analyse the most relevant issues related to the Dayton Constitutional framework, in order to be able to have a prospective outlook on the future expectations, risks and challenges which pave Bosnia’s way towards institutional reforms and European membership.

http://ec.europa.eu/enlargement/enlargement_process/accesion_process/how_does_a_country_join_the_eu/sap/zagreb_summit_en.htm

⁴³³ See Council of the EU, General Affairs Council Conclusions, 29 April 1997, available at: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/en/gena/028a0057.htm

The Dayton Constitution and its limits

As a result of the implementation of the Dayton constitution, the institutions of Bosnia and Herzegovina (“BiH”) appear as follows. The State is composed of two Entities, the Republika Srpska and the Federation of Bosnia and Herzegovina, to which it should be added the peculiar situation of the Brcko District. The Republika Srpska includes territories which after the war were occupied by the Serbian Army, now having an ethnic-Serb majority. The Federation was originally conceived as an independent federal state, including territories inhabited mostly by ethnic Bosniaks and Croats, and is composed of 10 Cantons. Finally, the Brcko District has been declared a District of BiH following the result of an arbitrate, prescribed by the DPA and finally delivered in 1999.

The Dayton Constitution has shaped the country following political criteria which were not necessarily led by the overriding target of efficiency and long term governability of the country’s institutional structure. In this sense, the most striking feature of the Dayton Constitution is that, according to it, many institutions of the BiH choose its members according to a form of ‘institutional racism’:⁴³⁴ for instance, the Presidency is a three member-institution, whose members are chosen by the citizens divided along ethnic lines among Bosnia’s three constituent ethnic groups, so that each citizen votes only for the member of the Presidency corresponding to its ethnicity.

This partition along ethnic lines is clearly the source of several problems for the country, because it means that the institutions represent the citizens only as members of one of the three ethnicities (“Constituent People” in the Dayton Constitution). Moreover, without mentioning the fact that people who are

not part of those ethnicities need to declare themselves as belonging to one of the three if they want to participate to the public life of the country, this institutional framework is clearly in contrast to the development of a sense of public interest among the population. Indeed, the ethnic partitioning contributes to keeping the public interest as a rather neglected concern for the population, much weaker if compared to the sense of ethnic belonging.⁴³⁵ For this reason, the system has represented and continues to represent the ideal habitat for the most nationalistic and extremist political forces, which can cultivate their political support along ethnic lines, and be rewarded for their most extremist positions.

With respect to this, it should be noted that a recent judgment from the European Court of Human Rights⁴³⁶ has also condemned BiH because of its constitutional structure, which leads to citizens who do not identify themselves with one of the three “constituent peoples” being ineligible to stand for election to the House of Peoples and for the Presidency. Following the application of two citizens, Mr. Sejdić and Mr. Finci, respectively of Roma and Jewish origin, the Court decided that their ineligibility for the two above-mentioned constitutional bodies constituted a violation of the European Convention on Human Rights, which at its article 14 states that “*the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or*

⁴³⁴ The expression is of ROSSINI and SIGHELE, cit., pag. 105

⁴³⁵ SEBASTIAN, Sofia, *Leaving Dayton Behind: Constitutional Reform in Bosnia-Herzegovina*, Fundacion par las Relaciones Internacionales y el Dialogo Exterior (FRIDE), 2007, pag. 2, available at: <http://www.fride.org/publication/291/leaving-dayton-behind-constitutional-reform-in-bosnia-and-herzegovina>

⁴³⁶ See European Court of Human Rights, judgement of 22 December of 2009 in case of *Sejdić and Finci v. Bosnia and Herzegovina* (applications nos. 27996/06 and 34836/06).

*other opinion, national or social origin, association with a national minority, property, birth or other status.”*⁴³⁷

To comply with the decision of the Court, the authorities of Bosnia and Herzegovina must implement a constitutional reform. However, two subsequent attempts of the Bosnian political forces to agree on institutional reforms have failed to reach the expected results.⁴³⁸ In this framework, the recent parliamentary elections of October 2010 have been governed by the same rules already condemned by the Court in Strasbourg, leading to the result that the country representatives in the institutions have been selected once more in violation of the Convention.

In addition to this, BiH as a result of the Dayton Constitution is an extremely complex and cumbersome state, which comprises two entities, a special district (Brcko), fourteen prime ministers, over 180 ministers, 760 members of legislative bodies, 148 municipalities, five levels of authority, three official languages and two alphabets,⁴³⁹ all in a country of 4 million

⁴³⁷ This article has been taken in consideration by the Court in conjunction with Article 3 of Protocol No. 1, according to which “*The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature*”, and with Article 1 of Protocol No. 12 to the Convention, which provides for a general prohibition of discrimination, and reads the following: “*1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.*”

⁴³⁸ We refer to the so-called “Butmir process”, which consisted in high-level meetings on the future of Bosnia, and which took place at the military base of Butmir, on the outskirts of Sarajevo, in the autumn of 2009. Previously, another package of reforms called the “April 2006” package, from the date in which the discussion process was initiated, did not manage to raise the necessary consensus among all political forces.

⁴³⁹ Council of Europe Parliamentary Assembly, “*Honouring of Obligations and commitments by*

citizens. This huge public machinery absorbs about 60 percent of the GDP of the whole state, which increases to 70 percent if we only consider the Federation:⁴⁴⁰ this means that only 30-40 percent of the GDP can be spent on services and infrastructures, which is clearly unsustainable.

The failure of the OHR ‘devolution’

Annex X of the DPA provides for “a High Representative to facilitate [...] mobilise [...] and, as appropriate, coordinate the activities of the organisations and agencies involved in the civilian aspects of the peace settlement”. It designates the holder of that office as “the final authority in theatre regarding interpretation of this Agreement on the civilian implementation of the peace settlement”. With the Peace Implementation Meeting of 10 December 1997, held in Bonn,⁴⁴¹ the Office of the High Representative was granted very effective powers to enhance the institutional framework of BiH and isolate the most extremist elements: these powers included the power to impose legislation and remove public officers which could endanger the peace process, and they have been used extensively by all the people covering the charge. In the period between 1998 and 2005, 119 public officers were removed and 286 laws or amendments to laws passed: according to the Venice Commission of the Council of Europe many achievements accomplished by BiH in that period, such as the setting up of a court at BiH level and the transfer or assumption of responsibilities in the fields of defence, intelligence, judiciary power and indirect taxation “were unlikely to have happened

Bosnia and Herzegovina”, Report Doc 10200, 4 June 2004, available at:

http://assembly.coe.int//main.asp?link=http://assembly.coe.int/documents/WorkingDocs/doc04/ED_OC10200.htm

⁴⁴⁰ *ibid.*

⁴⁴¹ The Conclusions of the Meeting are available at: http://www.ohr.int/pic/default.asp?content_id=5182#11

without the High Representative having taken the lead”⁴⁴². These methods, however effective, are not exempt from side effects: as noted by Rupnik, the major contradiction of the protectorate lies in the wish to ensure the environment for the emergence of a democracy by applying authoritarian methods.⁴⁴³

Aware of this paradox, and convinced that the use of the Bonn powers was counterproductive to the creation of a functional democracy, Mr. Christian Schwarz Schilling, appointed as High Representative on 31 January 2006, decided that he would not make use of the Bonn powers unless they would prove necessary to maintain peace and stability. Moreover, he set as a target the progressive downsizing of the OHR in order to leave Bosnia’s politicians to sort out their own problems.⁴⁴⁴ Nonetheless, maybe due to the unfeasibility of that project, or rather to the abruptness of the withdrawal plan, which did not take into consideration the “dependency culture”⁴⁴⁵ developed by several years of massive interventions by the OHR, the intentions of Mr. Schwarz Schilling had to be radically revised, and his successor, Mr. Miroslav Lajcak had to go back to the previous interventionist strategy, although not as extensively as his predecessors. It is commonly recognised that many recent reforms of BiH, including the police reform, which were necessary conditions for the signing of the

SAA, would not have been possible without the role played by the OHR.

A federalist proposal for BiH

Even after having achieved a historical target such as the signing of the SAA, BiH and the international community should think carefully about the future of the country, in order for Bosnia to pursue successfully its road towards a functional and democratic state, within the framework of the European Union. To do so, BiH urgently needs to review the institutional framework designed by the Dayton Constitution, and adopt a more efficient structure which is respectful of the interests of all the ethnic groups, and at the same time makes it possible for all of them to cooperate within the framework of a unitary construction. An enhanced model of a federal state seems to be the only possible structure able to fulfill those conditions.⁴⁴⁶

An interesting proposal in this sense is worth of note. According to the provocative proposal of the European Stability Initiative,⁴⁴⁷ a radical reform could be pursued by simply abolishing the Federation, while conserving all the other existing structures: the Republika Srpska and the Brcko district would become cantons of this newly established federalist structure, together with all the other ten cantons of the Federation. This plan would have the advantage of being able to be put into effect rather easily, because it would not require major institutional changes. Moreover, this structure would radically cut the institutional costs and the complexity of BiH’s structure, by eliminating an entity,

⁴⁴² Venice Commission of the Council of Europe, *Opinion on the Constitutional Situation in Bosnia and Herzegovina*, 11 March 2005, available at: [http://www.venice.coe.int/docs/2005/CDL-AD\(2005\)004-e.pdf](http://www.venice.coe.int/docs/2005/CDL-AD(2005)004-e.pdf)

⁴⁴³ RUPNIK, Jacques, “Les Balkans et la Pax Europea : Entre Protectorats et Intégration”, in RUPNIK, Jacques (ed.), *Les Banlieues de l’Europe : Les Politiques de Voisinage de l’Union Européenne*, Paris, Sciences Po, 2007, pag. 143

⁴⁴⁴ INTERNATIONAL CRISIS GROUP, *Ensuring Bosnia’s Future: A New International Engagement Strategy*, 15 February 2007, pag. 6, available at:

http://www.crisisgroup.org/library/documents/eur_ope/balkans/180_ensuring_bosnias_future.pdf

⁴⁴⁵ Venice Commission of the Council of Europe, cit., pag. 22

⁴⁴⁶ MRDUILJASE, Sasa and Marin SOPTA, “Una, due, tre Bosnie”, in *Limes Online – Rivista Italiana di Geopolitica*, available at: http://limes.espresso.repubblica.it/2008/04/01/un_a-due-tre-bosnie/?p=545

⁴⁴⁷ EUROPEAN STABILITY INITIATIVE, *Making Federalism Work – A Radical Proposal. For Practical Reform*. 8 January 2004, available at: http://www.esiweb.org/pdf/esi_document_id_48.pdf

the Federation, whose tasks could be given, according to the principle of subsidiarity, either to the cantons or to the federal state.

On the other hand, the main weakness of this plan would be that both Bosnian Serbs and Croats may view with suspicion a central state in which they would be minorities, and, for the Bosnian Serbs, in which they would have to renounce part of the autonomy acquired by the Republika Srpska. These objections and reluctances are however rebutted by the supporters of the proposal, who note that the federalist model is the perfect model where differences can coexist and be respected by a “minimal” central government: in this sense, Switzerland can serve as an example.

The Swiss Constitution is indeed the product of a complex history of conflict and cooperation. This system, which has been developed by the Swiss over centuries for dealing with the diversity of a country with strong local identities based on different languages and dialects, and different political traditions, perfectly integrates very different realities; for instance, Italian, French and German-speaking cantons peacefully coexist, as to urban and rural areas, or to protestant and catholic communities. Moreover, in Switzerland there is no conflict between strong municipalities (communes) and autonomous cantons. It can be argued that this model works because Switzerland is a wealthy country: however, this argument cannot be used to put into doubt the applicability of the model, given that, in that country, the federal model predates the present affluent economic condition by centuries. In the case of Switzerland, “it was not wealth that generated federalism, rather federalism which provided the stability that enabled Switzerland to prosper”.⁴⁴⁸

The state resulting from this reform would then be perfectly in line with the requests of the European Union and of the Council of Europe, and would avoid any drastic sequence of events, which are possible in the precarious framework of the DPA and which could complicate and slow down Bosnia’s path towards European integration. Moreover, the federalist model, by concentrating all possible decisions at cantonal level, would render recourse to ethnic nationalist parties less and less appealing, triggering a virtuous cycle, from which the governance of the country cannot but benefit.

In the absence of an agreement on a constitutional reform, the risk of secession of the Republika Srpska from BiH is becoming more and more present: many signs are now leading to the suspicion that the Republika Srpska, under Prime Minister Milorad Dodik, is taking steps to prepare the international community to the fact that its independence would not just be an inevitable but also, ultimately, a desirable outcome. Mr. William Montgomery, former US ambassador to Belgrade, has qualified this strategy as the “Montenegro Strategy”.⁴⁴⁹ According to Mr. Montgomery, the strategy includes, on the international level, a relationship of collaboration with the EU and with the international community, and, on the national level, a sort of “passive resistance” which is functional to the establishment of a parallel *quasi*-state; in the long term, the international community will be presented with evidence of a *de facto* independent state and will have to accept the independence of the Republika Srpska as a reasonable and even desirable outcome.

Conclusions

⁴⁴⁹ MONTGOMERY, William, *A role model for the Bosnian Serbs*, in B-92, 13 July 2008, available at: http://www.b92.net/eng/insight/opinions.php?yyyy=2008&mm=07&nav_id=51876

⁴⁴⁸ *ibid.*, p. 9

When Mr. Schwarz Schilling tried his experiment for OHR 'devolution', he hoped that the BiH could emancipate itself from the support provided by the international community, and start benefiting from the 'pull' of the prospective of European integration. As we have seen, his forecast has shown to be largely too optimistic,⁴⁵⁰ but his intuition regarding the needs of Bosnia has proven valid.

The need for Europe has wrongfully been portrayed as a far-off prospective for Bosnia, provided with a rather economical and technical character: on the contrary, the need for Europe is, at this phase, much more urgent, and political and social in kind. Its benefits go beyond those provided by economic integration, and include, most importantly, much tangible elements such as visa liberalization, university exchanges for its students and cultural reunification with the rest of Europe. In order to achieve this, Bosnia needs to continue on the European path with determination and pursuing its race, which is also a race against the time, provided that the more the Dayton Constitution remains in place with its current limits, the more the problems affecting its society (division along ethnic lines, nationalism, economic stagnation) will worsen.

In the last years the political scene in Bosnia has shown contradictory signs with respect to a possible shared plan among the main political leaders for reforming the existing Dayton Constitution, in order to make the institutional framework of BiH more efficient, in full respect of the ECHR, and able to function autonomously without the need for international tutorage. It is difficult to establish if a real step towards the future of the country can be pursued by the current political leaders, or if the occasional meetings only constitute an

opportunity to pay lip service to the intention of reforming the Dayton Constitution, hiding the intention, especially for the Serbian leaders, to pursue the "Montenegro strategy".

The recent elections which took place in October 2010 have shown some positive and encouraging progress by the non-nationalistic political forces. Although it is at this stage too early to understand if these positive developments would be sufficient to re-launch a process of constitutional reforms, what is beyond every doubt is that if BiH wants to continue its way towards European integration, civil and economic growth, without renouncing to the unity of the country, action has to be taken now to reform the Dayton Constitution.

Such action needs to be undertaken in first place by the national political leaders, because only in this way would the new institutions benefit from the precious legitimacy before the citizens that an externally imposed reform, by its very nature, would lack. In this sense, the proposal of a federalist model could be the right basis for a new departure of the negotiations, as it could be able to win the hesitations of the national leaders, reassuring them and the Bosnian population that the specificity and the needs of each entity would continue to be respected, without the need to renounce to a properly functioning state and to the legitimate aim of integrating Bosnia into the European Union.

⁴⁵⁰ MAGANZA, Florian, *EU Conditionality and State-Building in Bosnia: An Uneasy Relationship*, Master Thesis, College of Europe, Bruges, 2008, pag. 25

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THE EUROPEAN UNION AND SECURITY SECTOR REFORM IN THE DEMOCRATIC REPUBLIC OF CONGO

By Ian Bausback*

ABSTRACT

In recent years the Democratic Republic of Congo (DRC) has attracted a considerable amount of attention from international actors with regards to security sector reform (SSR). The conflict-ridden state has been engaged by a wide array of players in the field, but perhaps none more so than the EU. The organization has recognized a role for itself in transitional justice processes and has been increasing SSR efforts outside its borders. The case of the DRC, where the EU has established a substantial presence, presents a particularly challenging environment for reform of the security sector. This paper examines the effectiveness of EU efforts in the DRC and its development as an SSR actor.

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Introduction

Security sector reform (SSR) – the process of reforming abusive institutions in transitional societies, in particular the army, police, and judiciary – plays a key role for other processes of transitional justice. Indeed, it has been suggested that SSR is a “necessary pre-condition” for transitional justice endeavors to succeed as a whole.⁴⁵¹ The Organization for Economic Cooperation and Development’s (OECD) Development Assistance Committee determined in its SSR concept that the aims should be: “the establishment of effective governance, oversight and accountability in the security system...improved delivery of security and justice needs...development of local leadership and ownership of reform processes...[and] sustainability of justice and security service delivery.”⁴⁵²

Post-conflict environments, in which security is a key problem, present perhaps the most challenging context for the implementation of SSR.⁴⁵³ One such environment is the Democratic Republic of Congo (DRC). Given its recent past and current state of affairs, the DRC is a compelling case for the necessity of effective SSR in post-conflict transitional societies. The EU has been one of the most prominent SSR actors in the DRC, having identified reform of the security sector as a precondition to establish lasting peace and stability in the country,⁴⁵⁴ and has launched several SSR-driven missions there that shed considerable light on EU policy regarding this area of transitional justice. This paper seeks to analyze the effectiveness of

EU efforts in the DRC and its development as an SSR actor.

The SSR approach to transitional justice focuses on institutional reform and supports one of the core purposes of a transitional justice policy – preventing the recurrence of human rights abuses.⁴⁵⁵ In societies in which state institutions were past tools of repression and corruption, reform of these institutions is necessary to instill integrity and the notion of public service.⁴⁵⁶ The security sector is crucial in this regard, as its institutions are responsible for ensuring the rule of law and domestic accountability for past human rights violations. Unreformed institutions threaten efforts to build peace and the rule of law, and without reformed state security institutions efforts to provide domestic criminal accountability for past abuses may prove futile.⁴⁵⁷ Pivotal to effective institutional reform in a post-conflict setting is the reintegration of ex-combatants and the involvement of domestic actors. The success of disarmament and demobilization rests on having a credible reintegration program and local ownership of the reform process provides a more legitimate basis for citizens to regain trust in the institutions.⁴⁵⁸ The challenging nature of post-conflict situations means that the international community can play a valuable role in institutional reform, as international actors can “bring the necessary leverage and impartiality” to ensure the effectiveness of the process.⁴⁵⁹

The security sector in the DRC: Historical context

⁴⁵¹ Laura Davis, ‘The European Union and Transitional Justice,’ *Initiative for Peacebuilding* (2010) 9.

⁴⁵² *Ibid.* 11.

⁴⁵³ Heiner Hänggi, ‘Conceptualising Security Sector Reform and Reconstruction,’ *Reform and Reconstruction of the Security Sector*, eds. Alan Brydan and Heiner Hänggi (Münster: LIT, 2004) 5-6.

⁴⁵⁴ UK Presidency in conjunction with the European Commission, ‘Developing a common security sector reform strategy for the EU,’ *Safer World and International Alert*, Post-seminar paper (2005) 3.

⁴⁵⁵ Office of the UN High Commissioner for Human Rights, ‘Rule-of-Law Tools for Post-Conflict States: Vetting: an operational framework,’ HR/PUB/06/5 (2006) 1.

⁴⁵⁶ International Center for Transitional Justice, ‘What is Transitional Justice?,’ (2008) 1.

⁴⁵⁷ OHCHR, ‘Rule-of-Law Tools,’ 3.

⁴⁵⁸ James Katorobo, ‘Democratic Institution Building in Post-Conflict Societies,’ *UNDESA Commissioned Paper* (2003) 10.

⁴⁵⁹ OHCHR, ‘Rule-of-Law Tools,’ 7.

The DRC has been racked by instability for the last two decades and has a precarious legacy extending even further back, which has been detrimental to the development of its security sector. Having gained its independence from Belgium in 1960, the DRC experienced a military coup in 1965 that plunged the country into some thirty years of dictatorship under General Mobutu. The security services became tools of repression under the firm control of the presidency and matters of security and defense were the exclusive prerogative of the executive power. Parliament and other civilian institutions – not to mention civil society – completely lacked oversight of the security sector. Accountability and transparency were wholly absent, which created a rift between the dominant security forces and the civilian population.⁴⁶⁰

Such was the status of the security sector in the DRC when the country descended into chaos in the 1990s. An opposition movement within the military launched a seven-month war that ended with the overthrow of Mobutu's regime in 1997,⁴⁶¹ resulting in the total collapse of the state security forces. The situation further deteriorated when a second war broke out in 1998, involving the armies of numerous African countries, rebel movements, and militias.⁴⁶² The war was not brought to an end until the signing of the General and All-Inclusive Agreement late in 2002 and the formation of a transitional government the following year consisting of the leaders of the three major armed groups in the DRC.⁴⁶³

The agreement included an entire chapter on the issue of SSR. It established an

integrated national army to bring the main rebel movements in the DRC under one umbrella and formed a Superior Council of Defense to oversee SSR. However, a lack of political will coupled with insufficient funding and logistical support made for slow progress. In the absence of a clear and comprehensive plan, the process largely ground to a halt.⁴⁶⁴ This in part reflected the politically sensitive nature of SSR and the reluctance of international actors to engage in such efforts concertedly.⁴⁶⁵ Moreover, "the sheer magnitude of SSR in the DRC, as well as the number and variety of donors involved, made any SSR effort daunting."⁴⁶⁶ Harmonization of donor activities has been a real problem, one detrimental to the reform process. The major international actors involved are as wide-ranging as the UN, World Bank, US, Angola, South Africa, China, and, of course, the EU.⁴⁶⁷

The EU and security sector reform in the DRC: Steps taken

Since the establishment of the DRC transitional government in 2003 the EU has been working to support its institutions in a number of ways,⁴⁶⁸ perhaps most notably with regards to SSR. Although it has engaged in all main areas of the security sector – police, defense, and justice – it has placed overwhelming emphasis on the former two. As such, this paper will focus on the EU's efforts in police and defense reform in the DRC.

The EU made reform of the police sector a priority area for its involvement in the

⁴⁶⁰ Dylan Hendrickson and Missak Kasongo, 'Security Sector Reform in the Democratic Republic of the Congo: Strategic Issues,' *African Security Sector Network*, Issue Paper No. 4 (2009) 3.

⁴⁶¹ Laura Davis, 'Small Steps, Large Hurdles: The EU's role in promoting justice in peacemaking in the DRC,' *Initiative for Peacebuilding* (2009) 8.

⁴⁶² Hendrickson and Kasongo, 'Strategic Issues,' 4.

⁴⁶³ Caty Clément, 'Security Sector Reform in the DRC: Forward to the Past,' *Security Sector Reform in Challenging Environments*, eds. Hans Born and Albrecht Schnabel (Münster: LIT, 2009) 91.

⁴⁶⁴ *Ibid.* 91.

⁴⁶⁵ Chris Ferguson, 'Police Reform, Peacekeeping and SSR: The Need for Closer Synthesis,' *Journal of Security Sector Management* 2.3 (2004) 8.

⁴⁶⁶ Clément, 'Forward to the Past,' 93.

⁴⁶⁷ Laura Davis, 'Justice-Sensitive Security System Reform in the Democratic Republic of Congo,' *Initiative for Peacebuilding* (2009) 27.

⁴⁶⁸ Hans Hoebeker, Stéphanie Carrette and Koen Vlassenroot, 'EU Support to the Democratic Republic of Congo,' *Centre D'Analyse Stratégique* (2007) 3.

DRC from the outset. The Political and Security Committee of the EU decided to provide support for the establishment of the Integrated Police Unit (IPU), a specialized unit of the Congolese National Police (CNP) charged with protecting the transitional institutions and reinforcing the internal security system.⁴⁶⁹ As an integrated unit, its officers were recruited from among the various political factions of the transitional government.⁴⁷⁰ The EU provided technical assistance, trained the officers, and monitored the implementation of the IPU's mandate. The provision of technical assistance and training was undertaken by the EU Commission. Financed by both the European Development Fund and member state contributions, nearly 9 million Euro was spent to rehabilitate a training center and provide basic operational equipment such as weapons and law enforcement gear for 1,050 IPU officers and 40 Congolese trainers. The Commission also rehabilitated the IPU operational base in Kinshasa for an additional 1.05 million Euro.

The EU Council took charge of the task of monitoring, namely through a European Security and Defense Policy (ESDP) civilian mission, the first to be deployed in Africa.⁴⁷¹ Launched in 2005, the EU Police Mission in Kinshasa (DRC) (EUPOL Kinshasa) accompanied the IPU's deployment to ensure that they acted according to the standards of their training as well as international best practices in the field.⁴⁷² It also participated in the CNP census and recording operation, as well as the Mixed Reflection Group on the Reform and Reorganization of the CNP (GMRRR). During the 2006 electoral period the

mission became a "police coordination support element" to ensure a proper response by the Congolese crowd control units in Kinshasa in case of disturbances.⁴⁷³ EUPOL Kinshasa was succeeded in 2006 by the EU Police Mission for the Democratic Republic of Congo (EUPOL DR Congo), which was given a broadened mandate to focus on overall structural reform of the CNP and strengthen its links to the justice sector.⁴⁷⁴ This mission has, for instance, provided its expertise to the Auditing Inspectorate, the body of the DRC Ministry of the Interior that covers any criminal, administrative, or financial offenses committed by the police.⁴⁷⁵

In terms of defense reform, the Commission has pledged a considerable amount of financial aid to support the project of army integration in the DRC. It made an initial contribution of 20 million Euro to the Multi-Country Demobilization and Reintegration Program of Central Africa, which aims at demobilizing ex-combatants and reintegrating them either within the Armed Forces of the DRC (FARDC) or back into society. Additionally, it financed the renovation of several *brassage* centers where ex-combatants are integrated into newly formed brigades of the FARDC.⁴⁷⁶ The Commission has also assisted the families of soldiers through 'flanking measures,' such as rehabilitating housing and improving access to clean water and sanitation.⁴⁷⁷

The Council has paralleled the Commission's efforts in defense reform, launching a second ESDP mission in the DRC in 2005 – the EU Mission to provide

⁴⁶⁹ Ibid. 9.

⁴⁷⁰ Natalie Pauwels, 'EUPOL 'Kinshasa': testing EU co-ordination, coherence and commitment to Africa,' *European Security Review* 25 (2005) 2.

⁴⁷¹ EU Council Secretariat, 'EU Police Mission for the DRC (EUPOL RD Congo),' EUPOL RDC/08 (2010).

⁴⁷² International Crisis Group, 'Security Sector Reform in the Congo,' Africa Report No. 104 (2006) 8.

⁴⁷³ Hoebeke, Carette, and Vlassenroot, 'EU Support,' 9-10.

⁴⁷⁴ Quentin Weiler, 'The European Union and Security Sector Reform in Africa: a Leader in Theory, a Laggard in Reality?,' *Bruges Regional Integration and Global Governance Papers* (2009) 17.

⁴⁷⁵ EU Council Secretariat, 'EUPOL RD Congo'.

⁴⁷⁶ Weiler, 'Laggard in Reality?,' 16-17.

⁴⁷⁷ International Crisis Group, 'SSR in the Congo,' 20.

advice and assistance for security sector reform in the DRC (EUSEC DR Congo). Focusing on the FARDC, its initial mandate was to support the integration of the army and carry out a 'chain of payments' project.⁴⁷⁸ The placement of EU military personnel within the administration has enabled the mission to closely monitor the reform process.⁴⁷⁹ It has directly provided the competent DRC authorities with technical expertise in areas such as command and control, training, accountancy, and budgetary and financial management.⁴⁸⁰ It has also worked to separate the FARDC chain of command from the chain of payment.⁴⁸¹ In doing so, it has addressed one of the key sources of corruption in the FARDC – the embezzlement of soldiers' salaries by senior officers and the use of 'ghost soldiers' by commanders to inflate salary payments.⁴⁸² To ensure increased transparency in financial flows the mission has been supervising the disbursement of soldiers' wages,⁴⁸³ which has been complemented by higher-level efforts to reform the central administration in charge of the payroll.⁴⁸⁴ In conjunction with the 'chain of payments' project, the mission provided technical, financial, and logistics support to conduct a biometric census and an operational audit of the FARDC, both necessary tasks for the reform of personnel administration and defense spending. Most recently, it has launched a 'training of trainers' scheme for FARDC staff in administration, which involved the rehabilitation of a Non-Commissioned Officer Training School.⁴⁸⁵

The EU has thus undertaken considerable efforts to reform the security sector in the DRC, particularly its police and defense institutions. This has been carried out through the parallel activities of the Commission and the Council – the provision of financial support in the case of the former and the launching of ESDP missions in the case of the latter.

The EU and security sector reform in the DRC: Evaluating its effectiveness

The process of reforming the security sector in the DRC presents a number of challenges for all those involved. Donor harmonization, superficial reform approaches, and lack of local ownership of the process have particularly plagued efforts. For the EU, the situation has been further complicated by its own internal difficulties regarding SSR policy.

The large number of national and international actors involved in the SSR process in the DRC has created substantial difficulties and donor harmonization has been an issue throughout.⁴⁸⁶ The size of the country and the magnitude of the problems it faces in its security sector make it hardly possible for any donor to tackle the issues on its own, yet given the particularly sensitive nature of SSR the various donors have been reluctant to cooperate. They often have differing SSR doctrines and are averse to sharing information concerning the security sector.⁴⁸⁷ This situation hinders effective coordination and makes it tempting for DRC authorities to exploit the differences between international actors.⁴⁸⁸ Operating on a bilateral basis offers the government the opportunity to 'cherry pick' between the various donor aid programs in the interest of its own

⁴⁷⁸ EU Council Secretariat, 'EU Mission to provide advice and assistance for security sector reform in the Democratic Republic of Congo (EUSEC DR CONGO),' EUSEC RDC/08 (2010).

⁴⁷⁹ Weiler, 'Laggard in Reality?,' 17.

⁴⁸⁰ Hoebeke, Carette, and Vlassenroot, 'EU Support,' 10-11.

⁴⁸¹ Clément, 'Forward to the Past,' 102.

⁴⁸² Hoebeke, Carette, and Vlassenroot, 'EU Support,' 11.

⁴⁸³ EU Council Secretariat, 'EUSEC DR Congo'.

⁴⁸⁴ Weiler, 'Laggard in Reality?,' 17.

⁴⁸⁵ EU Council Secretariat, 'EUSEC DR Congo'.

⁴⁸⁶ Hoebeke, Carette, and Vlassenroot, 'EU Support,' 11.

⁴⁸⁷ Clément, 'Forward to the Past,' 98.

⁴⁸⁸ Hoebeke, Carette, and Vlassenroot, 'EU Support,' 11.

agenda.⁴⁸⁹ It is difficult to convince the DRC authorities of the necessity for a more integrated approach to SSR when international coordination is itself lacking.⁴⁹⁰

The EU, for its part, has gone some way in addressing this issue. One success of EUSEC DR Congo is its occupation of a strategic position among the various international actors involved, which enables it – certainly to a higher degree than any other actor – to prevent blockages in the process and take advantage of opportunities for action.⁴⁹¹ At the domestic level, advisors from EUSEC DR Congo liaise with all of the competent government institutions, allowing for enhanced coordination and the development of increased coherency among the various domestic bodies dealing with defense reform.⁴⁹²

The EU has, however, faced its own internal problems of coordination. The Commission and the Council, despite their mutually reinforcing activities in the field, have tended to diverge considerably when it comes to the development of a strategic vision for SSR. The Commission takes a longer-term view of the situation, focusing on good governance and transparency, while the Council is more concerned with short-term accomplishments, being operationally driven by the need for immediate stabilization.⁴⁹³ Each rely on their own analyses produced by different sources and thus lack a common “situational awareness,”⁴⁹⁴ which clearly has a negative impact on the development of a coherent SSR policy. The problems that can arise from such a divergence were demonstrated by the delay in launching

EUPOL Kinshasa, which reflected internal disagreement over the mission’s form. The Commission favored a small mission with a longer-term mandate, while the Council preferred a rapid crisis-management approach, and it took nearly 15 months for the dispute to be resolved and for the mission to be deployed.⁴⁹⁵

To complicate the matter, tension between member states has further fragmented the EU’s approach to SSR policy. Although from the outset police reform was generally seen quite favorably, some members were reluctant to become involved in defense reform. As a result, two separate ESDP missions – EUPOL and EUSEC – were launched in the DRC and have operated in parallel.⁴⁹⁶ This has come at the expense of taking a more integrated approach to SSR.⁴⁹⁷

In the DRC, the EU has at least made noticeable progress in coordinating the divergent strategies of the Commission and the Council. Though still lacking structural coordination, personal contacts between actors on the ground – such as the EU Special Representative, the Commission Delegation, and the Heads of Mission – have filled an operational gap. This has enhanced mutual support between the crisis management capabilities of the Council and the reconstruction capacities of the Commission.⁴⁹⁸

Despite these internal difficulties, positive developments have been seen as a result of EU efforts. In defense reform, rather than limiting its engagement to training and equipping, the EU has identified the major weaknesses of the FARDC and has developed schemes to address them⁴⁹⁹ – the ‘flanking measures’ financed by the Commission target the poor living conditions of soldiers; the ‘chain of

⁴⁸⁹ Weiler, ‘Laggard in Reality?’, 21.

⁴⁹⁰ Hendrickson and Kasongo, ‘Strategic Issues,’ 9.

⁴⁹¹ Hoebeke, Carette, and Vlassenroot, ‘EU Support,’ 11.

⁴⁹² International Crisis Group, ‘SSR in the Congo,’ 19.

⁴⁹³ Hoebeke, Carette, and Vlassenroot, ‘EU Support,’ 14.

⁴⁹⁴ Ibid. 14.

⁴⁹⁵ Ibid. 10.

⁴⁹⁶ Clément, ‘Forward to the Past,’ 104.

⁴⁹⁷ Katorobo, ‘Democratic Institution Building,’ 13.

⁴⁹⁸ Weiler, ‘Laggard in Reality?’, 14.

⁴⁹⁹ Clément, ‘Forward to the Past,’ 109.

payments' project has tackled corruption in the command structure; and the biometric census and operational audit of the FARDC dealt with the lack of centralized information.

In this regard, the EU has made constructive contributions to SSR in the DRC by moving it beyond the "traditional 'training and equipment' approach."⁵⁰⁰ As Clément notes, "without centralised information on human resources, funding allocation and, most importantly, weapons allotment, oversight is virtually impossible."⁵⁰¹ The biometric census and operational audit were thus crucial tasks for addressing the issue of oversight in the DRC defense sector. A further concrete step was the implementation of the 'chain of payments' project, which provided oversight where none had previously existed. Unfortunately, embezzlement in the army has merely shifted to other budget lines, namely food rations and logistical support,⁵⁰² but the EU can hardly be blamed for this unintended consequence encountered in the course of taking necessary measures to address corruption.

Indeed, it must be noted that the EU has to deal with a government that is often reluctant to engage in meaningful SSR. The DRC government prefers instead to place other domestic priorities ahead of institutional reform, such as military operations against rebel movements in the eastern part of the country. Such prioritizing is understandable given that continuing conflict creates obvious difficulties for SSR, but it has come at the expense of the long-term reform process.⁵⁰³ Enforcing a 'post-modern' SSR rationale based on transparency and accountability in a 'pre-modern' state presents a considerable challenge when the state is unstable and unwilling to

implement reform.⁵⁰⁴ Coupled with the EU's internal difficulties regarding SSR policy, this helps to explain why the results have been limited.⁵⁰⁵

Limited though it may be, the positive impact of EU efforts remains. In police reform, local ownership of the process has been a particular challenge and the EU has been able to achieve some progress on the issue. The GMRRR – established in 2005 to deal with the reform and reorganization of the CNP – was comprised of both Congolese and foreign police officers, as well as representatives of international institutions. Of the twenty-three members, three were from EUPOL DR Congo and two were from the Commission. Only six of the total were Congolese and their participation was weak, as they took a back seat while the international members dominated the debates. Civilian participation was also lacking, with only four civilian participants and none of them Congolese.⁵⁰⁶

The EU made commendable efforts concerning civil society participation and local ownership. Of the four civilians that did participate, two were from the EU – one from the Commission and one from EUPOL DR Congo. The EU representatives pushed for a more transparent and inclusive national consultation for the reform proposals, advocating for the participation of civil society. They were in favor of convening a national seminar involving Parliamentarians, civil society, media, the CNP, and other government departments. In the end, it was the Commission that provided the financial support for the seminar to take place and the event was noteworthy for being the first "at which police reform in the DRC was discussed

⁵⁰⁰ Ibid. 112.

⁵⁰¹ Ibid. 102.

⁵⁰² Ibid. 102.

⁵⁰³ Hendrickson and Kasongo, 'Strategic Issues,' 1.

⁵⁰⁴ Weiler, 'Laggard in Reality?,' 4.

⁵⁰⁵ Ibid. 18.

⁵⁰⁶ Janine Rauch, 'Donor-Promoted SSR: Early Steps Towards Police Reform in the Democratic Republic of Congo,' *Global Consortium on Security Transformation*, Working Paper No. 3 (2008) 4-12.

publicly outside of the police organization.”⁵⁰⁷ It had a noticeable effect given that “civil society representatives were [subsequently] invited to become permanent participants in the process.”⁵⁰⁸

The EU has thus made notable progress in tackling the challenges facing SSR efforts in the DRC. Through its EUSEC and EUPOL missions it has enhanced coordination in the field at both the national and international level. It has begun to deal with its internal problems regarding inter-institutional cooperation and coherency. It has also taken context-specific measures to address the needs of the DRC, thus moving beyond more traditional – and largely ineffective – approaches to SSR. In the case of the DRC, therefore, it seems that the EU is taking steps in the right direction regarding SSR policy.

Conclusion

Reforming the security sector in transitional societies is a formidable task, particularly in post-conflict settings. The process is not immune from a range of pitfalls, including ineffective coordination, superficial reforms, and lack of local ownership. All these obstacles have confronted SSR efforts in the DRC and the persistence of the EU has allowed it to make headway on addressing these issues.

The EU has taken steps to streamline the various efforts of the numerous SSR actors in the DRC, at both the national and international level. The number of international actors involved and the accompanying problems of coordination has been a severe weakness for the SSR process, given that it affords DRC authorities the opportunity to exploit differences among the actors for their own purposes, and the EU has made considerable strides to remedy this in the area of defense reform. EUSEC DR Congo broadened its framework document for

SSR in 2006 to include a cooperation strategy at the international level, focusing on developing closer working ties with other international actors so as to improve coordination. The mission has been able to assume a strategic position in the reform process that enables it to enhance donor harmonization and its routine involvement in the meetings of the various international and domestic actors has made it perhaps “the best informed security sector reform institution” in the DRC.⁵⁰⁹ The mission has employed this advantage at the national level by regularly liaising with the competent DRC authorities, which has allowed for the development of increased coherency among the various domestic institutions involved. The impact of these coordination efforts has been noticeable. Indeed, it has been reported that prior to EUSEC DR Congo’s arrival international actors were unable to coordinate effectively with the DRC institutions responsible for defense reform.⁵¹⁰ The EU has thus stepped into an important coordinating role in DRC defense reform. It has also made progress in dealing with its own issue of internal coherency. The differing competencies of the Council and the Commission, tension between member states, and lack of a unified strategic vision have hampered the development of a coherent SSR policy. In the case of the DRC, the EU has begun to tackle this issue via ad hoc measures. While no structural coordination such as that which exists in Brussels has been achieved, the development of personal contacts between various Council and Commission representatives has at least improved the dialogue between the two bodies. Not as much can be said though for the prospect of merging the two ESDP missions into one SSR-driven mission – political disagreements between member states continue to thwart any attempt to do so.⁵¹¹ Still, in certain regards the EU

⁵⁰⁷ Ibid. 4-12.

⁵⁰⁸ Ibid. 12.

⁵⁰⁹ International Crisis Group, ‘SSR in the Congo,’ 20.

⁵¹⁰ Ibid. 19.

⁵¹¹ Weiler, ‘Laggard in Reality?’, 18.

has made promising moves forward on the issue of internal coordination.

On the issue of superficial reform approaches, the EU has become a driving force in the DRC for moving SSR beyond a traditional training and equipment approach that focuses narrowly on the operational aspects of the security sector and has little impact on underlying structural concerns. The DRC government has been fairly reluctant to implement the structural components of SSR, such as oversight and command mechanisms, which has been all the easier to avoid given that many donors prefer bilateral dealings that center on the provision of training and equipment. The main advocate of structural reform in the DRC has been the EU,⁵¹² most noticeably in defense reform. The Commission's 'flanking measures' target the basic needs of soldiers and their families; EUSEC DR Congo has taken on the issues of oversight and command through its 'chain of payments' project, biometric census, and operational audit; and the mission's advisors, rather than simply provide external support, have been embedded in the FARDC administration to monitor and drive the process from within. This does not mean that the EU has not engaged in the traditional approach. The IPU, which the EU trained and equipped, had the explicit objective of safeguarding transitional government officials prior to the elections rather than protecting ordinary civilians.⁵¹³ In the run-up to the elections the security of the electoral process was made the priority. Though necessary to support democratic governance in the DRC, the overwhelming emphasis placed on operational measures such as forming crowd control units represented a diversion of resources from long-term SSR efforts.⁵¹⁴ Still, the EU has

been the firmest promoter of structural SSR in the DRC.

It has also been more active than others in supporting local ownership of the SSR process. Those who prefer to engage with the DRC authorities on the bilateral level tend to push their own interests while ignoring those of the DRC.⁵¹⁵ The EU, perhaps because it operates at the multilateral level, has taken steps to bolster local ownership and civilian participation, most evidently in police reform. It sought to make the GMRRR more transparent and advocated for the involvement of civil society. The Commission provided the financial support to convene an unprecedented national seminar on police reform, which initiated the participation of civil society in the process. The EU has thus set a precedent for engaging civilians and promoting local ownership of SSR in the DRC.

To be sure, much work remains to be done to effectively reform the security sector in the DRC and there is a great deal of room for the EU to improve as an SSR actor. Donor harmonization is still far from smooth, oversight continues to be a major obstacle in defense reform, local ownership needs to be further strengthened, and the EU's internal coordination and coherency in SSR policy remains wanting. Yet it must be noted that the EU is undergoing a capacity building process of its own in the DRC. It is a relatively young transitional justice actor and is still gaining the know-how and experience needed in foreign missions. That said, the EU has indeed been making progress on addressing the issues facing SSR in the DRC and the benefits this brings to the process should not go unnoticed.

⁵¹² Hans Hoebeke, Henri Boshoff and Koen Vlassenroot, 'Assessing Security Sector Reform and its Impact on the Kivu Provinces,' *Institute for Security Studies*, Situation Report (2008) 4.

⁵¹³ Pauwels, 'EUPOL 'Kinshasa'.

⁵¹⁴ UK Presidency, 'Developing a common,' 5.

⁵¹⁵ Clément, 'Forward to the Past,' 103.

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