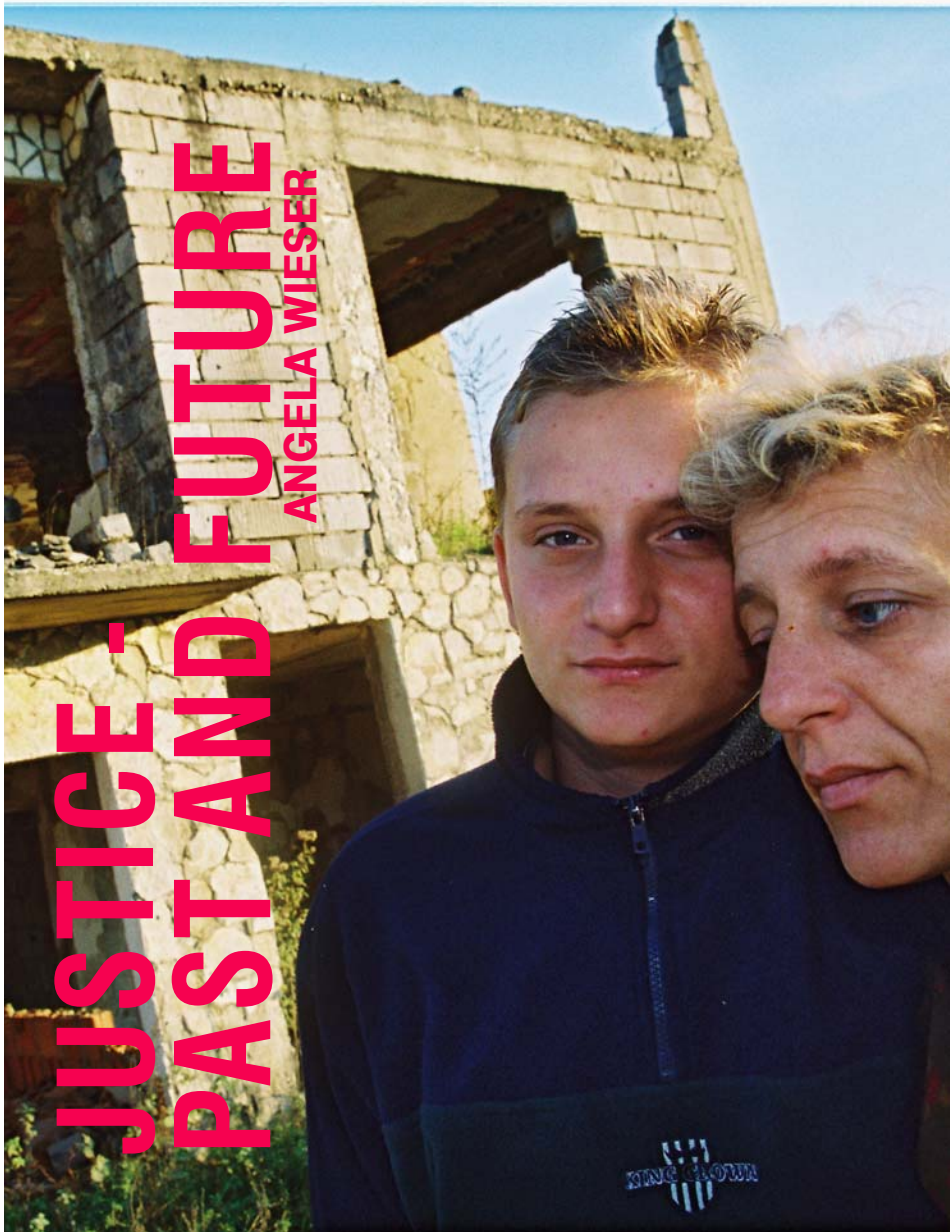
JUSTICE – PAST AND FUTURE

ANGELA WIESER



University of Sarajevo / Center for Interdisciplinary Postgraduate Studies / www.cps.edu.ba

The European Regional Master's Degree in Human Rights and Democracy in Southeast Europe/ERMA

Course War Crimes, Genocide and Memories
www.war-crimes-genocide-memories.org

Edition:
Listen/Talk/Reflect/Trust

Editors:
Janja Beč-Neumann & Dan Bar-On

Angela Wieser: Justice - Past and Future

Publisher:
University of Sarajevo / Center for Interdisciplinary Postgraduate Studies

On behalf of the publisher: Zdravko Grebo

Cover page photo:
Haris Memija

Design / prepress / e-book:
Nataša Teofilović

spring 2007 // copies 100

This e-book was published with support of Goethe Institute, Office Sarajevo and Open Society Fund Bosnia and Hercegovina

GOETHE-INSTITUT SARAJEVO

Open Society Fund Bosnia & Herzegovina

Fond otvoreno društvo Bosna i Hercegovina

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Justice - Past and Future

Sarajevo 2007

MA thesis "CAUGHT BETWEEN PAST AND FUTURE - EU-CONDITIONALITY AND TRANSITIONAL JUSTICE IN THE FORMER YUGOSLAVIA" done in Centre for Interdisciplinary Postgraduate Studies, University of Sarajevo, Bosnia and Hercegovina, European Regional Master in Human Rights and Democracy in Southeastern Europe, Universities Sarajevo and Bologna, 2005/2006

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INTRODUCTION

In the last years the Office of the Prosecutor of the International Criminal Tribunal for Former Yugoslavia (ICTY) cooperated consistently and effectively with representatives of the European Union (EU) in order to achieve the extradition of war criminals to The Hague. Political conditionality of the EU has thereby developed as a means to the accomplishment of the objectives of the Hague Tribunal. The most obvious example was the pressure exerted on the government of Croatia by the EU to extradite former General Ante Gotovina as a precondition for initiating accession talks with the country. Shortly thereafter, Gotovina was arrested and transferred to the Tribunal on December 10th 2005. But while he remains in The Hague expecting his trial, a large public campaign for his defence and the establishment of "the truth" about the "Croatian Homeland War" - *domovinski rat* - set off.[1] Although the campaign might not be supported by the Croatian government it seems to have at least some public support and certainly a strong public appearance. The campaign itself is undermining the assumption that the ICTY could estab-

lish "the truth" or at least the facts about the events and the crimes committed in the war on Croatian territory.

Recently, the EU-ICTY cooperation appeared again in the media with headlines about the proposed plan of Serbia to apprehend Ratko Mladić - Bosnian Serb general who is still at large and is among the primary responsible for the atrocities in Srebrenica. After the EU put enormous pressure on Serbia, as Belgrade failed to deliver the General to The Hague, the officials of the Union now welcomed the plan to capture the military leader and seem to be waiting for the Action Plan to be positively evaluated so cooperation with Serbia may continue.[2] Parallel to this, Serbia's EU scepticism appears to rise because of EU pressure to catch war criminals.[3] Generally cooperation with the ICTY by Serbia is viewed critically by its citizens as the court is perceived being anti-Serb biased. As in Croatia the Hague Tribunal is still viewed with a lot of scepticism while EU support to the institution does not seem to counter that problem.

Following the news about war criminals being transferred to The Hague one could get the impression that the ICTY is very much connected and depended on the EU. Faced with the difficulties the tribunal has in the conversion of its statute this fact does not seem to have only positive effects on the perception of the court in the region. Therefore, the following analysis is motivated by the intensely political processes surrounding the work of the Hague Tribunal and its contribution to transitional justice. By that, this paper is focussing on transitional justice in the Former Yugoslavia, with a specific focus on the ICTY and its cooperation with the EU. Consequently, the main subject of this analysis are the specificities of transitional justice and which position the ICTY as well as the EU as the main power behind the tribunal take in the process of transitional justice in the Former Yugoslavia. In regard to that the following study will first

examine the theory of transitional justice in order to determine how and to what extend international criminal justice contributes to transition to democracy in post-conflict societies and which other mechanisms of transitional justice could be applied. The development of international criminal responsibility from Nuremberg until the ICC offers the relevant context necessary to elaborate on criminal justice as the most developed form of transitional justice. Furthermore, the theoretical part of the analysis takes into account the development of EU-Conditionality and characteristics of the process of Europeanisation in the second chapter.

On the basis of the theoretical considerations on justice in transition and EU-Conditionality, the work of the ICTY will be analysed in order to see where the achievements and difficulties in the application of international criminal justice are in the case of Former Yugoslavia. Furthermore, already attempted complementary instruments of transitional justice in the region - as the Yugoslav Truth and Reconciliation Commission in Belgrade or the Srebrenica Commission in Bosnia and Herzegovina - will be discussed. The question hereby will be which mechanisms the ICTY is offering for transitional justice and which other instruments could be used to complement the strategy of maintenance of peace and reconciliation - which is one of the main declared goals of the ICTY.[4] The ladder of success for the ICTY is thereby set very high, especially when taking into account the controversial term of reconciliation and the fact that the process of achieving these objectives seems to be carried foremost by the Tribunal itself. Therefore, also other possible mechanisms of transitional justice which could help to accomplish these goals will be elaborated.

In the last chapter of the analysis the role of the EU in the transition process will be discussed. Here the focus will lie

on the question which position the EU takes in the transitional justice process. As the establishment of the rule of law is one of the main preconditions to EU membership and at the same time goal and result of transitional justice the EU can be a guiding force in fostering the latter in the region and by itself a mechanism for transitional justice. Although the European community cannot overtake and lead the process of transitional justice in Former Yugoslavia since this would have unwelcome implication on the democratization process itself the question of this part of the analysis will be how and to which extend EU-conditionality is taking into account considerations of transitional justice.

The analysis is supported by secondary literature on justice in transition and EU political conditionality as well as primary documents of the ICTY and international reports on the developments of transitional justice in the region. Talking about the ICTY, especially the examples of Croatia, Serbia and Bosnia and Herzegovina will be included, as these are the countries affected mostly by the work of the tribunal and as the wars in these countries were highly interconnected. However, the paper is not understood as a comparative analysis of the different mechanisms of transitional justice in the region but tries to focus on the ICTY's work as the main instrument of justice in this period of societal transition. Additionally, the perspective of the EU is included in order to determine which advantages and disadvantages the cooperation between the two institutions is carrying for the transition process and which role transitional justice considerations take in EU-conditionality.

Throughout the following elaboration, the analysis tries to stress the complexity of the issue of transitional justice out of which also the politicization of the issue results. Transitional justice is defined by different levels of transition, by various mechanisms of dealing with the past and by interconnected objectives. The decision which of these levels, mechanism and objectives will be applied is foremost a political one. An example is the relationship between procedural justice and substantive justice. In the understanding of procedural justice, cases of crimes committed several years ago, may be constrained by the statute of limitation and upholding such limitations and procedures is understood to be crucial to sustain the rule of law. Substantive justice, on the other hand, would argue that also such cases need to be prosecuted in order to promote the rule of law by bringing every perpetrator to justice. How such dilemmas are compromised always remains a political question. Yet, especially politics in transition are missing traditional norms on which they may call upon as a form of coping with the dilemmas of the societal change. Therefore, the following analysis is motivated by, and needs to be seen in, the context of the complexity and interconnectedness of issues of transitional justice, democratisation and Europeanisation in the Former Yugoslavia.

Notes

1 20 July 2006 <http://www.antegotovina.com>

2 BBC News "EU welcomes Mladic hunt plan" 18 July 2006. 20 July 2006 <http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/5186234.stm>

3 UPI "Serbs dislike EU pressure to arrest Mladic" 01 Aug. 2006. 28 Sep. 2006 <http://www.balkanpeace.org/hed/archive/aug06/hed7533.shtml>

4 Schabas, William *The UN International Criminal Tribunals*. 2006. Cambridge.org. 5 Sep 2006. <http://www.cambridge.org/catalogue/catalogue.asp?isbn=0521609089&ss=exc>

TRANSITIONAL JUSTICE

Why Transitional Justice

In the last 20 years societies all over the world societies entered a period of political, economic and social flux. Accompanying the slow end of the Cold War, state structures and systems from Europe to Latin America and Africa witnessed crucial changes. Totalitarian regimes and dictatorships were overthrown and illiberal rule was opposed by massive political movement. The changes not always happened to be peacefully achieved. In many countries the way out of oppression was a violent one. Latin America's military dictatorships were only slowly defeated and characterized by suffering of the citizens under the regime and during the struggle for freedom. On the opposite, the countries of Eastern Europe in most of the cases managed to peacefully transform from communist rule to democracy and surprisingly the collapse of the Soviet Union took place extremely peaceful. Yet, the breakdown of communist regimes was not always that non-violent which the dissolution of Yugoslavia is an example of. But whatever form the transition towards a more liberal regime took, one question is common to all of these examples: "How should societies deal with their evil pasts?"[1]

Definition of and Reasons for Transitional Justice

This question is obviously older than the events of the last decades. Pre-modern societies as Athens after the Peloponnesian war and France after the fall of Napoleons Empire developed specific forms of justice to deal with the legacies of their past.[2] However, in each transition, may it be pre-modern, modern, violent, or non-violent the question of confronting the past is motivated by the need to break with history: "(...) the need to assert discontinuity between past and present."[3] It is this need which makes justice in transition specific. Transitional justice is therefore defined as the way to deal with the legacies of a violent history. It is different approaches with the common goal of re-establishing the civic trust by confronting the past in the society and finding ways of dealing with it. These include classic criminal justice procedures, but also cases before the International Court of Justice (ICJ), truth commissions or other forms of historical inquiries, as well as restorative and retributive justice, amnesties and many other mechanisms which are used to acknowledge the past happenings. Also silence and forgetting is a mechanism to accommodate a societal transition, yet, it in comparison to other mechanisms it does not face past wrongdoings openly.

The major NGO working on the issue worldwide is the International Center for Transitional Justice (ICTJ). The ICTJ defines the main transitional justice approaches as: prosecution of perpetrators; truth-telling initiatives (as truth commissions), institutional reform (as vetting and screening of public officials) as well as different forms of remembrance. All these mechanisms together form what is understood under the term transitional justice. Working together with different UN organs and governmental organisations the ICTJ developed the following definition of the term: "Transitional Justice refers to a range of

approaches that societies undertake to reckon with legacies from widespread or systematic human rights abuses as they move from a period of violent conflict or oppression towards peace, democracy, the rule of law, and respect for individual and collective rights."[4] One of the leading scholars on transitional justice, Ruti Teitel, adopts a similar definition but expands it by emphasising the various possible ways to deal with legacies of a violent past: "*Transitional Justice* adopts a largely inductive method, and, exploring an array of legal responses, it describes a distinctive conception of law and justice in the context of political transformation. Transitional justice begins by rejecting the notion that the move toward a more liberal democratic political system implies a universal and ideal norm."[5] It is these two attributes which characterize transitional justice, namely the fact that it is transitional as it has to deal with a distinct past and thereby has to differentiate itself from the latter.

Oppression and injustice of past regimes or violent conflicts leave deep scars in a society. Very often such societies are strongly divided by political, ethnic or national lines depending on the character of the conflict itself. When the first stage to transitional justice, namely end-ing the violent aggression of a war or the collapse of an authoritarian regime, is reached the society mostly faces strong mistrust between their citizens and from them towards the state institutions. Trust in state institutions refers to the so called social capital of a country, e.g. the willingness of citizens to trust state institutions, but also other citizens and people in general. "Like other forms of capital, social capital is productive, making possible the achievement of certain ends that would not be attainable in its absence (...). For example, a group whose members manifest trustworthiness and place extensive trust in one another will be able to accomplish much more than a comparable group lacking trustworthiness

and trust (...)."[6] Therefore, social trust is regarded to be a crucial factor to civil society, democracy in general and therefore, also an important aspect of transition to liberal rule.

However, the original theoretical concept of social capital, developed by Pierre Bourdieu, emphasised individuals or small groups rather than communities as the element of analysis.[7] After Bourdieu and other theorists like Glen Loury a conceptual stretch of the concept of social capital took place. When talking about the negative impact of a lack of social capital and social trust between the citizens of a country we therefore refer to the mentioned theoretical stretch of the concept. With the new conceptualization introduced by Putman social capital of communities became associated with the level of "civicness"[8] and its positive consequences, respectively negative consequences when lacking, as described above. However, the positive effect of a high level of social capital between citizens is taken for granted, whereby a discussion on possible negative consequences (as the exclusion of outsiders) has not been taken into account. Portes however defines the logical circularity of social capital of communities as the main problem of the theoretical stretch in which social capital is simultaneously cause and effect: "It leads to positive outcomes, such as economic development and less crime, and its existence is inferred from the same outcomes."[9]

When talking about the positive impact of social capital we therefore have to take into account the fact that it is not absolute in its effect. Although the negative consequences of a lack of social capital are neither absolute nor proven Letki and Evans have shown that "(...) the introduction and consolidation of democracy and the market economy results in a "crowding out" of trust and trustworthiness (...)"[10] and therefore pose (at least) a challenge to the newly established regime. That means

that countries in transition in regard to the social trust of their citizens do not only have to overcome the experience of undemocratic rule, but that transition itself is challenging the security in consolidating democracy. Consequently, it is this two folded context which illustrates the challenge of transitional justice. Post-conflict societies do not only have to find a way to confront the past but also have to choose the right type of transitional justice to accommodate the challenges of the political and socio-economic flux. Furthermore, confronting the past may not only be conducive in increasing social trust as the central topic of it, are the wrongdoings of the past which divided the society. Therefore, dealing with legacies of a violent past may also complicate consolidating democracy which by itself is a difficult process.

Additionally to the fact, that societies in transition are characterized by a lack of social trust, the legacies of a violent history generally increase the difficulty of establishing essential features of democracy. It is the understanding of citizenship, the sense of a nation and thereby sovereignty which is in question after the experience of state terrorism or civil war. Especially the "ethnic framing" of conflicts as in the Former Yugoslavia hinders the process of reconstructing a more inclusive political community as citizenship becomes a question of belonging. Michael Humphrey distinguishes two types of sovereignty in transition from ethnic conflict: "'Fractured sovereignty' can be characterized as a situation where the state has disintegrated, the protagonists continue to live together, the basis for citizenship is unresolved and politically power is divided. (...) 'New sovereignty' refers to a situation where, through succession or a radical political break with the past, the new regime feels no responsibility for the past atrocity."[11] Both of these examples increase the

difficulty in confronting past happenings and promoting inclusive democracy.

Societal scars resulting out of legacies of violent conflict do not only lead to division among the lines of the conflict but also provoke strong economic and social differentiation. Oppression and injustice also impact the social and economic position of citizens and therefore mostly lead to the marginalisation of certain sectors in the post-conflict society. "Thus, a regime that inherits the legacy of past human rights violations is likely to inherit also other political, economic and social problems."[12] In other words, reasons for transitional justice focus on overcoming political, economic and social legacies of the past in order to ensure the establishment of a consolidated democracy. Unresolved problems of transitional justice often have lasting implications over a state's lifetime.[13] Additionally, transitional justice efforts do not only serve the community itself but also acknowledges personal suffering. It thereby tries to confront individual and collective trauma in order to help victims recover from it.[14] However, the variety of problems post-conflict societies are confronted with, ranging from extreme political to economic and social divisions on the individual and collective level, is difficult to address. One mechanism of transitional justice may be appropriate to deal with one specific need of facing the past, but it cannot address all problems of society and individuals and may give more importance to one than the other.

Dilemmas of Transitional Justice

The main characteristic of transitional justice, namely the fact that it is applied in a situation of societal flux illustrates as well the dilemma of it. Mechanisms of responses to confront the

wrongdoings of repressive predecessor regimes have to be adjusted to the specific situation of political change which is different to the previous power system and the one which is attempted to be achieved. In other words, transitional justice cannot build on experience of justice of the preceding regimes as it is the legacies of these which need to be overcome - it tries to undo what has happened. On the other hand, the actions taken should not have a long-lasting character but are in themselves transitional; instrumental to consolidate a new political system. "The threshold dilemma arises from the context of justice in political transformation: Law is caught between the past and the future, between backward-looking and forward-looking, between retrospective and prospective (...). Accordingly, transitional justice is that justice associated with this context and political circumstances."[15] This implies a paradigm shift in the understanding of law and justice. Justice in ordinary periods upholds order and stability. In periods of societal change its main purpose is also to secure order, however, it additionally enables the transformation itself to reach the stability of ordinary times.

As much as the context of transitional justice is unusual, its conceptualization also needs to be adapted to the specific consequences. This means that transitional justice also has to define which inheritance of the previous regime could assist the societal change and which are to be abandoned. "Because transition's defining feature is their normative shift, legal practices bridge a persistent struggle between two points: adherence to established convention and radical transformation."[16] The understanding of this distinctiveness has important implication not only on jurisprudence but on the establishment of democracy and features of democracy in the period. As jurisprudence does not follow basic principles of rule of law, namely legality as

regularity, also rule of law itself and with it features of democracy become transitional. Justice in periods of flux is therefore intensely political as it is defined by the goal of a new political system.

As already mentioned, the end of the Cold War brought about changes in political systems worldwide. Different than in the period between the construction of the Berlin Wall and the break-down of the Soviet Union the last decades were characterized by continuous flux and transition. This fact had also implications on the concept of transitional justice as transition to democracy and market economy and reconciliation with the past was the dominating paradigm of this period. Ruti Teitel distinguishes three phases of transitional justice.[17] According to her theory, Phase I of the transitional justice genealogy began with the end of the Second World War and its symbol, the Nuremberg Trials. It was mainly associated with interstate cooperation, war crimes trials, and sanctions. Yet, this phase quickly ended with the beginning of the bipolar system of the Cold War. In Phase II which was characterized by the slow ending of military rule in Latin America and the collapse of the Soviet Union transitional justice witnessed political fragmentation which resulted in a more local and national conception of transitional justice. In this period transitional justice understanding and the application of rule of law were tied to a more local and privatized justice which yet, was underpinned by international conceptions and international law.

It is the interaction of international and national conceptions of restorations unified by the common goal of re-establishing peace which defined the last two decades of the 20th Century. The dominating discourse of this period was the transition itself and it paved the ground for the third and current phase of transitional justice. This phase is associated with the

normalization of transition as with the beginning of the new Millennium it seemed that all justice became transitional and changing. "What was historically viewed as a phenomenon associated with extraordinary post-conflict conditions now increasingly appears to be a reflection of ordinary times."[18] In a world in which political fragmentation characterizes the global system and at the same time the interconnectedness and closeness of the world is growing transformation has become regular. The speeding up of transcontinental flows - in the economic, social or political sense - characterizes Globalisation.[19] General rapidity is thereby provoking also a generally faster change in political, social and economic systems. So called new wars[20] - which are among other things characterized by the impossibility to differentiate between times of war and times of peace - are a perfect example of the normalization of periods of instability and societal change. As societies are challenged by constant change also applied justice systems react on continuous transformation and transitional justice becomes normalized. This, on the global level, takes the form of an expansion of the law of war and the rise of humanitarian law and is additionally evident in the toleration of politicization in the uses of justice and the rise of irregular procedures.[21]

In other words transitional justice - normally understood as exceptional and transitional - has become regular. This also means that the characteristic of transitional justice as being highly politicized as it is caught between two periods of time and its application as a political decision is becoming normal. That may result in highly irregular procedures and explicit departures form prevailing law. In addition, it is difficult to resist this normalization: "There is a significant loss in vocabulary from which to make any critique, since in the expanded discourse of transitional justice law of war has merged with the law of human

rights."[22] The question therefore remains if transitional justice is still deployed with the motivation of securing the transformation to peace and security or if it by itself could also be used to undermine such interests.

Goals of Transitional Justice

Although the background of transitional justice seems to be changing we can point out some essential objectives of transitional justice for which it is applied or for which it is at least argued to be applied. These goals, set out on the following pages, should not be only understood as motivation for transitional justice but in themselves are instruments of it. However, in order to make the analysis coherent this section will concentrate on the background concepts of transitional justice - as accountability and reconciliation. Thereafter concrete examples of transitional justice as means of it will be discussed. As these examples are highly interconnected iteration of some arguments is possible but will only be implied in order to stress or account for the complexity of the topic.

Criminal accountability for the crimes committed is a main concept to be re-established by transition justice as it is negated in times of repression. It is a concept which makes it possible to draw a line between the last regime and the new one. Accountability thereby serves the core of transitional justice, namely to face the past and demonstrate that a new period begins. It is furthermore a crucial factor for the new regime to show that it differentiates itself from the previous one. It is a break of the new regime with the old one, which by confronting the past and reinterpreting it through legal patterns helps to establish new narratives which may legitimize the new regime

and the new political system. "(...) the state has a moral and legal responsibility not to ignore the violations of the past,(...) accountability for dealing with the perpetrators of gross human rights violations is seen as a sign of good faith, almost the most important test of the viability of the emerging democracy."[23] Furthermore, accountability does not only help to legitimate the power of the new government or state structure but also has the potential to bring some justice to the society and re-establish some balance between the members of the community.[24] Hence, accountability is crucial to the legitimacy of the new regime and as a basic principle of the rule of law central to consolidate democracy.

Accountability is directed against impunity. Issues raised by accountability also appear in what is the opposite of it, namely impunity. Impunity is characterizing the injustice of the previous regime and "(...) the normal state of affairs and the major object of human rights concern. Repression occurs precisely because the state allows its officials to act without accountability."[25] In order to overcome repression accountability counters impunity. Yet, not in every transition accountability is set through completely. Representatives of previous regimes may partly stay in power or still have an influence on decision-making in the country. That is why lack of political will or resources could hinder the confrontation of past crimes. This illustrates again that it is a highly political question of which parts of the past are being confronted and which are not. But as impunity could set the grounds for further human rights abuses "(...) accountability is the only sustainable solution: those who deny or forget the past are often condemned to repeat it."[26]

As justice is seen to be done in the application of the principle of criminal accountability, it may pave the grounds in the direction of reconciliation of a post-conflict society. Recon-

ciliation is probably to most often mentioned objective of transitional justice initiatives. Although commonly used the term bears as much interpretations as it enjoys popularity. Even at the Truth and Reconciliation Commission (TRC) in South Africa the term was not defined in the basic documents of the commission as there was no possibility to find a consensus on the meaning. "(...) the most basic, minimal understanding of reconciliation which NP and ANC negotiators could agree on was this: that reconciliation meant amnesty for violators of human rights."[27] However, this understanding may only apply in regard to the TRC in South Africa as not all truth commissions have amnesty granting powers. Therefore, the example of South Africa, although a much known one which coined the term strongly, does not provide more detailed elaborations on the term. Yet, the discussions in South Africa point to the fact what controversial discussions the term may provoke and where its minimum definition may lay. Wyand Malan, himself part of the TRC in South Africa, addressed the TRC Chair Bishop Desmond Tutu with the following assertion: "Reconciliation shouldn't be based on repentance and remorse...it is just a capacity to coexist as individuals. It shouldn't be based upon Christian ideas."[28]

The interpretation of the concept of reconciliation as a Christian value is relating to the terms Christian roots especially when linked with forgiveness. Such has been promoted in South Africa by representatives of the Christian Church as Bishop Desmond Tutu. In this understanding reconciliation is inevitably linked with forgiveness which in this comprehension is the only way to overcome the past and enter the future.[29] However, forgiveness or at least some kind of closure of the happenings may only happen if a truth is established, reparations and reconstruction provided and the trauma of the different sides of the conflict is overcome to some degree. And even if these circumstances are provided, forgiveness is a personal matter which can hardly be directed by transitional justice mechanisms and should not be the aim of it as it is a very personal and private matter. Therefore, this thesis wants to build on the mentioned interpretation of Wyand Malan who characterized reconciliation as co-existence and extend it through the definition by the ICTJ. The ICTJ developed a definition of reconciliation which especially looks at the social context of the term in transitional justice. The definition here is very similar to the understanding of social trust discussed before and thereby points to the importance of reconciliation in consolidating democracy: "In this view, reconciliation is the condition under which citizens can once again trust one another as citizens. That means that they are sufficiently committed to the norms and values that motivate their ruling institutions; sufficiently confident that those who operate those institutions do so also on this basis; and sufficiently secure about their fellow citizens' commitment to abide by these basic norms and values."[30]

On the basis of this definition the question of forgiveness is compensated with trust. It is the trust of the conflict parties towards each other that they will commit to basic norms and values of the new democracy. It is a civil concept of reconciliation which is especially linked to the acceptance of the political system by all its citizens; however, it is of course still linked to its religious roots. "Reconciliation is a quasi-religious term that became a guiding principle for new rituals of civic nationalism."[31] Therefore, the following analysis adopts a critical interpretation of civic reconciliation with the minimum understanding of co-existence which is in close relationship with the principle of accountability. Although one could argue that reconciliation is rhetorically the opposite of the "backward looking" character of

accountability the two concepts do not exclude each other.[32] It is not an either-or decision between the punishment and retribution of perpetrators and the reconciliation of the society as reconciliation does not imply the denial of what happened in the past but exactly the opposite, namely, facing the truth and finding a way of dealing with it. Reconciliation is not only forward-looking or backward-looking as it encounters concerns of the past, the future and the present: "Reconciliation as encounter, suggests that space for the acknowledging of the past and envisioning of the future is the necessary ingredient for reframing the present."[33] The principal appeal for reconciliation does not call for any denial as it depends on the full acknowledgment of the past. Hence, transitional justice is a way to enable opposing groups in the society to resolve their differences by non-violent means, and in this way it may take a first step in the direction of reconciliation. Therefore this "(...) should also be the minimum requirement set for any transitional justice method: reconciliation in terms of restoring relationship to the extend that makes co-existence of different groups possible."

Means of Transitional Justice

As the discussion on accountability and reconciliation has shown the goals and achievements of transitional justice cannot be easily separated from each other. As much as accountability relies on the establishment of a minimum consensus and a minimum stage of reconciliation, namely, the ending of the violent conflict, also reconciliation cannot be accomplished without the acknowledgment of wrongdoing and responsibilities of those. An exemplary discussion is the debate about war crimes trials on the one hand or truth and reconciliation commissions on the other. The disagreement between the two approaches lies

between a strict justice position, which argues that only the rule of law can lay grounds for transition and in itself must determine our action without being dependent on public consensus and another position, which is represented for example by Jose Zalaquett, former member of the Chilean Truth and Reconciliation commission. "In broad outline, his position is that peace should not be sacrificed at the expense of prosecution. Rather, governments should seek the truth and apply measures of justice appropriate to their situation which will not unduly jeopardise the peace process -- 'truth and as much justice as possible'."[34] However, the contradiction between the two positions may not be as sharp as it may seem. "The strict justice position is sensitive to political constraints, and the principled reconciliation position supports prosecution under certain circumstances. And both oppose forgetting (...)."[35]

Therefore, a combination of the two approaches can be even helpful and complementary. Yet, the question persists which approach or which means of transitional justice are to be chosen and implemented. As no transition is similar to the other and each post-conflict society has its specifies the approaches and combinations of means of transitional justice vary from case to case. The political compromise made during the transformation, namely the way in which it has come to the break of the previous regime defines and influences the choice of transitional justice mechanisms.[36] Therefore, the specific conception of transitional justice depends on the mechanisms adopted in the particular case. Respectively the choice of mechanisms is determined by the goals of transition. "(...) Goals setting and consequent selection of methods to deal with the conflict is perhaps the most important phase of the exercise. One chosen method cannot necessarily accomplish all the goals set. Alternatives and complementary methods can assist in the achieve-

ment of the goals. All these chosen methods together (...) form the discipline of transitional justice."[37] What connects the different mechanisms of transitional justice is their fundamental belief in human rights and the conviction that denial of historical happenings may threaten the maintenance of peace and the stability of democracy.

Criminal Justice

The appliance of prosecution and criminal justice is the most common and known form of transitional justice. This can take the form of international or national/local trials. The main purpose of criminal justice trials is the punishment of representatives of the previous power system responsible for committed human rights violations. To hold trials is obviously linked to the concept of criminal accountability and it tries to restore the victim's dignity and increase the public confidence in the rule of law. Criminal justice and punishment thereby play a significant role in laying the basis of a new liberal order. "Criminal Justice offers normative legalism that helps to bridge periods of diminished rule of law. Trials offer a way to express both public condemnation of past violence and the legitimation of the rule of law necessary to the consolidation of future democracy."[38] Therefore, the benefit of criminal responsibility and accountability is that it counters the non-democratic violent past with the principle instruments of a democratic system and thereby already takes the first step in the direction of this system.

Although criminal justice carries a high potential for justice seeking and rule of law in post-conflict societies it also holds some limits in its application. Because of the high number of perpetrators when talking about the individualizing of responsibility in regard to systematic human rights violations as war crimes, crimes against humanity, torture or genocide it is difficult to prosecute everybody involved in the issues. Therefore, decisions have to be taken about who is to be prosecuted first and on grounds of which accusations. This is again a political decision motivated and depended on considerations about the transition itself as well as the interest and the resources of the political and judicial elite. As the prosecution of large-scale atrocity is necessarily selective and can never be universal it turns prosecutions into politically and symbolically managed events.[39] This involves the danger of inequality before the law as some of the perpetrators could and could not be persecuted. However, especially trials of transitional justice have to be fair and equally applied otherwise they could backfire and undermine their own goals. Thereby they walk a thin line between the fulfilment of the rule of law and the continuation of political justice. "(...) its strengths are normative machinery with the capacity to comprehend extraordinary political violence deployed outside the ordinary legal order. (...) Paradoxically, its strength is also its weakness, for its extraordinary nature clearly, at least to some extent, falls outside conventional legality and, therefore, ultimately does not sufficiently adhere to ordinary understandings of the rule of law to affirm democratizing transformation."[40]

The decision whom to prosecute was also one of the main challenges of the first international criminal trials, namely the proceedings of the Nuremberg Tribunal. When the British government in 1942 began thinking about post-war solutions and punishment of the leaders of the Third Reich the only realistic solution seemed to avoid a trial altogether and to subject the enemy leaders to a firing squad.[41] Yet, after long debates about the way of punishing the Axis leaders the decision was taken to put them before the court and the Nuremberg Trials

were held between 1945 and 1949. The decision was mainly based on the consideration that justice needed to be public and visible as much as based on democratic notions. That the cases were held in front of a military tribunal resulted out of the interpretation that the crimes committed were military affairs. Although international criminal law thereby moved a great step forward from the post-World War I conceptions of transitional justice in Versailles, the international tribunal was still confronted with lots of challenges as it was characterized by doing-by-making.

This was also one of the main objections towards the Nuremberg Trials, namely that the crimes prosecuted - conspiracy to wage aggressive war; crimes against peace; war crimes and crimes against humanity - were not considered as crimes in the time when they have been committed. This question was never properly confronted. "The idea of retrospective justice was foreign to most legal traditions. The idea that the Tribunal would be both legislator and judge, creating crimes in order to punish them, was something that Western legal opinion also found difficult."[42] The argument in favour of retrospective jurisdiction was that the crimes committed were known to be criminal, yet, the political context of dictatorship in Germany did not allow a determination in legal terms. However, the Prosecution of the Tribunal did not respond detailed to these objections - especially not to the fact that legislative and judicative power were represented by one and the same organ.

Another challenge in establishing the first international war crime trials was the question of whom to sue. As the main actors of the Third Reich, Hitler, Himmler and Goebbels committed suicide, it was a question of interpretation of whom to put before trial. After the crimes prosecuted were determined the indictees and a list of accused had to be defined. This was very

much subject to discussion about the power structure of the Nazi regime. The result was that Adolf Eichmann, main operator of deportations, was not to be found on that list of accused, but other persons as Julius Streicher, editor of the anti-Semitic propaganda gazette "Der StÏrmer", were charged by the Tribunal. Benjamin Ferencz, chief prosecuter in the Einsatzgruppen case at Nuremberg describes the selection of defendants: "We had only twenty-two seats in the dock, so we chose only a sampling of the highest ranking defendants available at the time. Some of those escaped and showed up years later. We aimed to do justice knowing we could not do perfect justice."[43] These examples show to what a high extend the preparations and implementation of the Nuremberg Tribunal was carried by political considerations. However, the Tribunal laid the grounds for international criminal justice in many different aspects.

The main achievement of Nuremberg was probably the establishment of individual criminal responsibility in international criminal law. Principles as these formed the core for the development of international criminal law after the Second World War. Post-World War I conception of international criminal justice was based on collective responsibility of the state, but showed to be ineffective. "War-related guilt borne by the country as a whole was deemed to prevent a transition to lasting democracy."[44] Nuremberg significant invention was that it for the first time introduced individual responsibility on the international level and thereby redefined the relationship between the individual, the state and the international community as for example head of states could not be covered by impunity anymore. Next to the conception of responsibility of the individual under international law and the fact that this is implemented regardless the official position of the individual, additional principles connected to that stand out: "(...) responsibility reaches the individual

regardless of whether national law is silent, condones, or actually requires the behaviour in question (...). [Furthermore] this form of criminal responsibility gives rise to the potential for enforcement through international (...) tribunals as well as through national courts exercising universal jurisdiction."[45] Although states still continued to be the main subjects to international law, it is due to the jurisdiction of Nuremberg that also individuals are now carrying obligations and rights in the international law sphere.

This paradigm shift was a very radical moment in regard to the development of human rights and humanitarian law. It established a complexity of responsibilities, as not only states and individuals were now subject to international law but also individuals from public and private life as organisations could now be considered as criminal. This complexity of responsibility was reaffirmed by following international war crimes trials as in Tokyo, The Hague or Arusha.[46] Furthermore the crimes prosecuted in Nuremberg were not formulated very precisely which again increased the complexity of international criminal law. Andrew Clapham highlights these two levels of complexity which characterized international criminal law after Nuremberg and adds as a third level of complexity, "(...) the fact that trials can take place in various forms at both the international and national levels."[47] The importance of national trials as a form of transitional justice was especially significant after the beginning of the Cold War and between the end of the Tokyo Trials and the establishment of the ICTY, as international jurisprudence was in this period paralyzed by the bipolar power structure in the world.

The next crucial step in developing a comprehensive international criminal justice system was the setting up of the *ad hoc* Tribunal for Former Yugoslavia by the United Nations (UN).

Although the UN did not play such a fundamental role at Nuremberg they were the main force in pushing towards the establishment of a permanent international court after the war crime trials in Germany. "For a few years, the United Nations encouraged the development of an international criminal court through a treaty, a measure called for in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. In 1954, it suspended work on the project for more than three decades. (...) Then, within a few weeks, in early 1993, as war raged in Europe for the first time since 1945, a proposal that the Security Council create an *ad hoc* international criminal tribunal gained inexorable momentum."[48] The ICTY was established on February 22nd 1993 by the UN and shortly after the International Criminal Tribunal for Rwanda (ICTR) was created. The main contributions of the *ad hoc* tribunals for development of international criminal justice were the affirmation of the principle of the international criminal liability, the furthering of definitions of crimes in international criminal law and their execution as much as the fact that the tribunals provided strongest support for the idea that a permanent international criminal court was desirable and practical.[49] As a sole chapter of this analysis is dedicated to the ICTY details of its jurisprudence and contribution to transitional justice will elaborated later. Yet, it is important to note that the development of the tribunals and the drafting of the Rome Statute to establish a permanent international court occurred because states failed to live up the international human rights obligations they signed and ratified.[50]

The post-Cold War period therefore re-opened the possibility of complementing national mechanisms of transitional justice with the international level. As already mentioned the core dilemma of transitional justice is how to conceptualize legal norms in the face of a massive normative shift. "This problem is

mitigated within international law, for international law offers a degree of continuity in law and, particularly, in standards of accountability."[51] In other words the international criminal tribunals are not setting only standards on the global level but as they offer continuity in the application of law they also promote the implementation of their legal basis on the national level. This is confirmed by the trend to support national courts to enforce international law in preference to international judicial intervention.[52] Furthermore, the application of international criminal law can only be selective as shown in the practice of the Nuremberg Tribunal and the *ad hoc* tribunals. Therefore, the principle of complementarity between national and international courts in transitional criminal justice is inevitable and has been established also by the ICC. "In brief, it reflects the idea that priority must be given to trials for international crimes at national level rather than at the new Court [ICC]. Only if a state with jurisdiction is unable or unwilling to genuinely prosecute will the new Court be able to assert jurisdiction over the case."[53]

The application of national and international criminal justice enables a highly controlled and very specific investigation of past happenings. But even if both levels are applied, it offers only a selective picture of the past as not all of the crimes can be prosecuted. This fact is very much reflected by discussions about indictments against main political leaders as Slobodan Milošević and currently Saddam Hussein. What the indictee will be accused of is very much subject to considerations about which accusations can be comprehensively proven on the one hand and which could establish a relatively complete picture and facts about the crimes committed by a regime, on the other hand. Therefore, criminal justice by itself may paint an authoritative picture of the past if the tribunal commands general acceptance and respect. However, it can hardly paint a whole

picture of past happenings as it refers only to some cases. Furthermore, it comes to a potential conflict between the aim of a tribunal to provide a judicial process about the innocence or guilt of the accused and the attempt of establishing an authoritative narrative about the past. Consequently, the question of picturing the past through a criminal tribunal is first constrained by the fact that it can only establish such picture through certain cases, these cases can only establish part of the truth and if they should serve a comprehensive narrative of the past they may be in conflict with the legal procedures or the case itself may suffer from it. "Even if certain methods of international justice, notably international criminal justice assist in dealing with atrocities, a single method alone can never deal with the whole task and accomplish all the goals of transitional justice."[54]

Truth and Reconciliation Commissions and other Means of Transitional Justice

One way of establishing historical justice, namely collective history making to establish the truth about past wrongdoings of a state or regime are trials as discussed above. In addition to criminal justice, so called Truth and Reconciliation Commissions (TRC) are regarded as another effective measure for historical justice. The truth seeking process of historical justice may take different forms and it does not need to be established in the framework of a TRC, yet this can be regarded as the most common type of it. Truth and Reconciliation Commissions are "official inquiries into patterns of past abuse that seek to establish an accurate historical record of events."[55] As other means of transitional justice the main aim of truth seeking initiatives as TRCs is to lay the foundation of a new democratic system by

establishing collective history and acknowledging past violations of human rights. TRCs has been established in Peru, Guatemala, East Timor, Sierra Leone, Congo, Morocco, Liberia and other places all around the globe.

The probably most known and most discussed TRC was established in South Africa after the breakdown of the apartheid regime, to which we referred already in regard to the concept of reconciliation: "The greatest innovation of the TRC, and the most controversial of its powers, was its ability to grant individual amnesty for politically motivated crimes."[56] The TRC received this power due to the specific circumstances in South Africa which made criminal processes as the only form of transitional justice impossible because of the involvement of so many layers of the society into the regime and opposition movement. Yet, the TRC was not the only transitional justice mechanism adopted in South Africa. Additionally to the 7,000 applications for amnesty which the TRC received and their huge work effort in the country also criminal justice was applied and a few high-profile trials were successfully held. After the TRC in South Africa finished its work with a concluding report published in March 2003 the legacies of the Apartheid regime are still to be felt in the country, yet, this cannot be attributed to a failure of the TRC. "Such a legacy cannot be fully addressed, nor the damage rectified, in a few short years. New initiatives - possibly including long-overdue prosecutions of persons implicated by the TRC - will probably be required to fully consolidate democracy and human rights in the new South Africa."[57]

The most common critique towards TRCs is that it is a weak form of justice and the concepts of accountability and responsibility are not applied directly as in the form of criminal justice. This critique is based on the fact that the investigative powers of TRCs are varying. However, most of them do not

have judicial powers. In other words, a truth commission or a truth report most probably cannot convict anybody in legal terms. But what if the scale of the atrocities and crimes committed is very large and systematically spanning over some years or decades as in the case of South Africa? Then this form of truth seeking could help to compensate the limits of criminal justice. "The problem of proof leads to the advent of the so-called truth commissions. The scope of truth commission's investigation lends itself to establishing the facts of bureaucratic mass murder, with its overwhelming scale of violence, of incidents often numbering in the tens of thousands."[58] In addition, the work of a TRC can lay the grounds for further criminal investigation and can thereby assist to implement a comprehensive long-term process of transitional justice. Furthermore, TRCs are not depending on the specific cases before the courts. They may help to establish a broad picture of the evil events in the past. However, even if the TRC may enable further criminal investigation and tries to address the problem of the broad-scale human rights violations it also has its disadvantages as it may avert compensation to victims because of amnesty towards perpetrators. The experience of TRCs showed that "(...) impartial and objective truth is essential, but it does not lead directly to reconciliation because the victims are left with no compensation for their suffering."[59]

Yet, the argument that truth seeking in the form of commissions, reports or similar does not do justice is wrong. Truth telling has a high potential for reconciliation as it establishes truth based on comprehensive investigations. "These proceedings generate a democratizing truth that helps construct a sense of societal consensus. The truth reports are not generalized accounts but detailed documentary records. The reports are a sea of details. (...) The more precise the documentation, the less

is left to interpretation and even to denial."[60] In addition such reports are often accompanied by official statements or apologies of governments and therefore, offer a basis for political accountability and set standards for future claims. This fact is very crucial and interesting in regard to post-civil war countries, or divided societies, in which both histories are needed to be taken into account. Elin Skaar has shown that truth commissions are the most likely outcome of transitional justice policy when the relative strength of the conflicting demands is roughly equal.[61] In order to promote the reconciliation of the conflicting sides post-civil war commissions are often charged with mandates to create a unitary historical account which is jointly representing both sides.[62] Hence, truth seeking initiatives can paint a common picture of the history and at the same time establishes political accountability of the transition regime.

The narratives of the transition are important, but they also change depending on the time, the political constellation etc. As holocaust-denial shows, even the most detailed attempts to confront the past cannot prevent reinterpretation and denial of happenings. Therefore a comprehensive policy of transitional justice using different methods of truth-seeking are often needed. In regard to the transition itself it is crucial that the re-writing of history enables the transition of the system itself. "Narratives of transition suggest that minimally what is at stake in the transformation from an oppressive to a more liberal system is a change in interpretation. Societies begin to change politically when citizens' understanding of the ambient events changes."[63]

In addition to the two main forms of transitional justice - criminal justice and truth and reconciliation initiatives - the ICTJ defines also other mechanism of dealing with legacies of a violent past. Other mechanisms to foster reconciliation and consol-

idating democracy are for example reparations for the victims. These can take the form of financial compensation for the loss suffered by the victim but may also be given through educational programs, through social and legal assistance or through rebuilding destroyed property and other actions. The form chosen depends very much on the country's context and the resources available, but the main challenges to reparation initiatives stay similar: "(...) defining concepts and objectives clearly; addressing financial questions; responding fairly to massive numbers of victims and a range of violations; overcoming disparities in isolated judicial remedies; and reinforcing victims' dignity by relating reparations to truth-seeking, accountability, and reform."[64] This includes also the fact that before comprehensive steps of reparation can be taken, the truth must have been established to some point. Although this is not an absolute prerequisite as, for example, refugee return can be promoted even if the committed crimes or happenings have not been yet investigated, it may be a helpful factor if financial reparation is considered.

Other mechanisms are very much in connection with the establishment of democratic institutions in the post-conflict society. Societies of systematic and mass human rights violations are very often confronted with the fact that people involved in these crimes may continue to hold their position in public offices. But in order to increase the legality of democratic institutions and overcome the legacy of the past such incidents need to be reduced and countered. Vetting is a mechanism of screening public officials and assessing their individual integrity in order to determine their suitability for such employment. This process may also be called lustration. "(...) lustration, as defined by most experts, means the procedures of screening individuals who aspire for certain public positions."[65] As implicated above,

such processes are needed in order to break with the legacy of a violent past and prevent representative of the former regime involved in human rights abuses to continue to hold an official post. "The screening and vetting of individuals, particularly in the security and justice sector, is widely recognized as a key measure of governance reform essential to: overcoming legacies of past conflict or authoritarian rule; preventing the recurrence of abuses; and building fair and efficient public institutions."[66]

However, the question remains, if the consolidation of democracy can be build on exclusion and if lustrations do not run the risk of being used as a political tool of the new elite for dealing with opponents.[67] Therefore, it is especially important that such procedures are in themselves in accordance with legal principles in order to make sure that through this mechanism fair and legitimate can be build. At the same time it is important to strengthen the institutions and their capacity in order to make sure they can fulfil their duties and obligations and thereby increase their legitimization: "It is only independent and efficient institutions that can resist attempts of political influence. Moreover, strengthened institutions in a post-conflict society contribute to the stability - and sustainability - of any solution."[68] As a consolidated democracy is also reflected by the effectiveness of its institutions it is especially important to insure the fair execution of law. Hence, this kind of capacity building is particularly crucial in regard to legal, security and police institutions.

In addition to the mentioned mechanisms for transitional justice, also other means can be applied. Remembrance and commemoration of the happenings are for example an important way of acknowledging the suffering of the victims and educate future generations about the evil past. But whatever form transitional justice takes, a crucial factor for the achievement of consolidating democracy is time. Transitional justice is a slow

process in which results are not to be expected rapidly. It is a process which varies depending on the context of the transition. None of the transitional justice models can be applied in the same way in different circumstances. "As a conflict generally is preceded by a long history and complex root causes, it would not be realistic to expect that any transitional justice model or individual method chosen to mend profound injustice would bring about an immediate, total transformation of views or alter opinions. Transitional justice does not attain perfection overnight. It needs to be built step by step, involving all sectors of society at every stage, discussing, consulting, explaining, informing, raising awareness."[69]

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EU-CONDITIONALITY AND EUROPEANISATION

Regarding the analysis of the ICTY and its contribution to the transitional justice we need to consider the characteristics and dilemmas of transitional justice set out in the first chapter. We need to bear in mind that transitional justice is caught between two systems of law and justice. It by definition rejects the notions of the previous system, tries to overcome it and establish a new one and yet, does have broader and different meanings which go beyond the ordinary (not old, not new) understanding of justice. Hence, the main feature of transitional justice is that it is not transitional in itself, which in its goal also defines its (relative) endings. Thereby transitional justice is highly political as it is applied in periods of societal flux on the basis of the need or wish to establish a new political system. It is an instrument to deal with the past and in doing so it shapes the future. The political constellation on the global level and globalisation in general brought about the curious attribute of the normalization of transitional justice. Therewith the politicization in the use of transitional justice increased which furthermore

raised irregular procedures in international law. To neutralize this strongly politicized context of transitional justice, plurality of transitional justice means may be applied. However, even the variety of transitional justice depends on the determinate power behind it and on the political will to apply a broad range of transitional justice means, namely on the political context of the transitional justice in general.

In the last years the EU became the main political authority behind the extradition of indictees from the Former Yugoslavia to The Hague. This was achieved and done with the application of conditionality of the EU towards the countries in the region. Conditionality in general is understood as set of rules and provisions defined by a political or financial authority which need to be fulfilled by the addressed country before it receives the advantages it aims to be given by the authority. It developed as a political concept after the Second World War and was primarily associated with financial aid: "Conditionality has been defined as 'a basic strategy through which international institutions promote compliance by national governments' (...). Studies have demonstrated the shift in the nature of conditionality in the post-World War II era from economic conditionality (...) to democracy promoting political conditionality in the late 1980s and early 1990s."[1] Economic conditionality is very much associated with international organisations such as the IMF or the World Bank. Furthermore, these different stages of conditionality need to be seen as interconnected as it is still primarily economic development which is promoted by such institutions. Political changes are in the fist place aims which ensure the economic integration. The EU is probably the best known institution which after the fall of the Soviet block developed a comprehensive form of conditionality implying the economical, legal and

political level as part of its own transformation from a primarily financial to a political organisation.

Political conditionality for applicant states has been introduced for the first time into the framework of the EU (EC) in the 1960s.[2] Back then, conditionality was connected to the South European Enlargement of the EU, i.e. Greece, Spain and Portugal becoming full members of the association. However, concrete criteria of accession have not yet been defined as political principles so far were not part of European competences. This was changed through the establishment of the Treaties on the European Union (TEU) in Maastricht and Amsterdam which laid the grounds for the political sphere of the state union. Build upon Article 6(1) TEU which says that the "(...) Union is founded on the principles of liberty, democracy, respect of human rights and fundamental freedoms, and the rule of law (...)"[3] the EU defined its common political principles and expanded conditionality of accession to the political sphere. After the Maastricht and Amsterdam treaties political conditionality was classified in detail at the European Council Summit in 1993.

At this summit the so called Copenhagen Criteria, which defined preconditions of accession to the EU, were set into practice. "In addition to the relevant economic and legal criteria (above all, the acceptance of the *acquis communitaire*), the European Council decided (...) on a number of 'political criteria' for accession to be met by the candidate countries in Central and Eastern Europe."[4] These political criteria involved, similar to Article 6(1) the guarantee of democracy, a state under the rule of law, human rights and the protection of minorities. Back then the conditions set out at the summit were primarily connected to the Central European Countries which had applied for membership already. On the basis of these criteria the performance of

the applicant states was observed and assessed by the European Commission which reported to the European Council in 1997, evaluating and expressing its opinion on the fulfilment of the requirement by the candidate countries. The goal of the Copenhagen Criteria was to define clear conditions for EU membership and criteria for measuring the development of a country in transition to market economy and democracy. However, soon after the summit first critique was raised towards the EU's accession policy.

At face value, the accession conditions set out by the EU seem to be straightforward and relatively clear. Yet, the criteria are not set out in detail and seem to rely on the interpretation of the Commission. "On closer inspection, (...) the membership conditions are more confusing, and 'readiness to join' lies in the eye of the beholder. The conditions are very general: they do not, for example, define what constitutes a market economy or a stable democracy."[5] This critique became especially obvious during the last enlargement round of the EU when the question was raised if the old member states of the Union could join themselves as they did not seem to fulfil the criteria as well as expected from the candidate countries. However, the motivation of formulating the Copenhagen Criteria and the development of political conditionality since the 1980ies generally resulted out of security considerations. They were motivated out of ideological and practical reasons from the old member states which feared a destabilization of the Union without any assurance. "The conditions set out at the Copenhagen European Council were designed to minimize the risk of new entrants becoming politically unstable and economically burdensome to the existing Union, and to ensure that the countries joining were ready to meet all the EU rules, with only minimal and temporary exceptions."[6] It is this special hierarchy which

characterizes political conditionality, namely that the condition-setting power may vary the criteria it sets.

As the EU is not endowed with an army, although the European Security and Defence Policy (ESDP) has been developed in the framework of a more political Union, it builds its power especially on the civil and normative level. Civilian elements as trade, cooperation and diplomacy gained importance after the Second World War and developed to be the foundation of the Unions power. "(...) analyses of the EU tend to characterize it as a "civilian power", that is, an actor in the international scene which exerts its influence by means that do not imply the use of military force, i.e. mainly by diplomatic and economic instruments."[7] It was these elements which secured the peace in Europe and which after the collapse of the Soviet regime were again applied to monitor the transition to market economy and democracy. With the transformation of the Union to a political organisation and the promotion of principles as the rule of law and democracy the EU also became characterized as a normative power. It is the so-called process of Europeanisation which is promoting these principles inside and outside the Union.

Claudio M. Radaelli defines Europeanisation as: "Processes of (a) construction, (b) diffusion, and (c) institutionalization of formal and informal rules, procedures, policy paradigms, 'ways of doing things', and shared beliefs and norms which are first defined and consolidated in the making of EU public policy and politics and then incorporated in the logic of domestic discourse, identities, political structures, and public policies."[8] It is a process defined on the EU level, shaped by the main actors of the EU, namely the member states representatives as well as the EU institutions and thereby introduced in the domestic discourse. Foremost this happens through "(...) the spread and inculcation of EU regulatory norms, practices and

capacity in the governance system (...)"[9]. Domestic discourses and governance systems influenced by the EU level may be political systems of member state as well as applicant states or any other political entity cooperating with the EU. This is especially true in regard to the use of EU-conditionality towards candidate countries which fosters the incorporation of EU norms, procedures, policy paradigms, etc.; in the domestic systems. "Europeanisation mechanisms identified in the literature on the EU are likely to operate for the applicants too, given that the same policy structures and implementation procedures are used."[10]

Therefore, EU-conditionality can be understood as an instrument to foster, promote and control Europeanisation to the inside and to the outside of the Union. With the fall of communism the Europeanisation process which was before constricted primarily to the member states, now stretched also towards the east. "The scope of Europeanization expanded, covering the impact of EU integration on countries with previously different political and economic experiences. 'Europeanization, Eastern style' is linked with the transition to democracy and a market economy, and adaptation to the exigencies of the advanced models of the West."[11] This is also the moment when political conditionality became part of the Europeanisation process. Since the Central European Countries in May 2004 entered the EU the process is not anymore primarily connected to eastward enlargement, but its focus lies now on the Western Balkans (especially Bulgaria, Croatia and Romania) and Turkey. However, every country which enters into a partnership with the EU and in which conditionality is applied, like the Mediterranean countries through Euro-Mediterranean Partnership, the can be added. Hence, also Bosnia and Herzegovina and Serbia who are part of the Stabilization and Association

Process (SAP) of the Union are part of an Europeanisation process to the outside.

Although the term Europeanisation has become very fashionable in the scientific and general discourse it describes a very broad and differentiated process, or as Othon Anastasakis puts it: "(...) Its meaning can be concrete and specific and, at the same time, elusive and all-encompassing. Europeanization is a means and an end; it is method as well as substance; it is a project and a vision. It signifies a certain political, socioeconomic, and cultural reality, but it is also an ideology, *a* symbol, and a myth."[12] In the Western Balkans and in the enlargement process in general Europeanisation has become a symbol for democratic values, the establishment of the rule of law and, of course, economic development and prosperity. Since also criminal justice and criminal punishment constitutes a symbol of the rule of law[13], the two processes of transitional justice and Europeanisation are interlinked and in the case of the Former Yugoslavia depended on each other. Furthermore, transitional justice is a multidimensional process and so is the process of Europeanisation.

The multidimensional character of Europeanisation is reflected in the EU-conditionality as it builds on the three main criteria of Copenhagen, the economic, the legal and the political criteria. In regard to the first political criterion of democracy and the rule of law - which also transitional justice approaches aim to establish - the EU set out main topics connected to the issue. "To summarise, according to the documents released by the Union regarding the application of the Copenhagen criteria, it is possible to outline five main areas of scrutiny related to the assessment of the Democracy and the Rule of Law criterion: elections; the functioning of the legislature; the functioning of the executive; the functioning of the judiciary; as well as anti-

corruption measures."[14] Yet, the political criterion of democracy and the rule of law remains very broad in its formulation and thereby does not include specific instructions or directives how to reach it. The question how to reach the set out goals is specific in each country and the criterion leaves room for interpretation. However, the last enlargement process suffered in its development from the ambiguity and vagueness of the criterion as the threshold of achieving the criterion was thereby set low.[15] Although the Copenhagen political criterion formulates the main goals of transitional justice of democracy and rule of law as a precondition for EU membership it nonetheless does not specifically constitute a guide for transitional justice approaches.

In post-conflict societies as the countries the ICTY is concerned with, inequalities and insecurities in the social and economic life are characterizing the life of citizens. As mentioned above transitional justice also has to address this social and economic reality of a post-conflict society. It is therefore not only concerned with civil and political rights of its citizens, but also needs to take into account economic and social rights.[16] However, Europeanisation and the political criterion of EU-membership focus on human rights of the first generation, whereby the second generation is left aside and not specifically emphasised. Although the EU might declare the principle of the indivisibility of human rights in its documents, ESCR (economic, social and cultural rights) suffer from a secondary position in the EU itself and therefore also in the application of EU-conditionality. The Copenhagen Criteria do not mention economic and/or social rights nor does any other document concerned with EU-conditionality and cooperation. In combination with the primarily economic sphere of European integration this could have negative influences on the already unsatisfying economic and social situation of post-conflict societies.

Notes

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14 Kochenov, Dimitry "Between the Copenhagen façade. The meaning and structure of the Copenhagen political criterion of democracy and the rule of law" *European Integration Online Paper*. 25 Sep 2006 <http://www.eiop.or.at/eiop/texte/2004-010.htm>

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TRANSITIONAL JUSTICE IN THE FORMER YUGOSLAVIA

Based on the elaborations in the previous chapter the following section will try to identify the main transitional justice mechanisms in the Former Yugoslavia, focussing especially on the ICTY as the main mean of transitional criminal justice applied in Bosnia and Herzegovina, Croatia and Serbia. This will take into account the specific dilemmas of transitional justice in how to deal with the evil past in the post-conflict societies in the region in order to achieve accountability of the happenings and promote reconciliation inside the divided communities. Consequently, the main question of the following chapter will be how the ICTY deals with this challenge of transitional justice and which other mechanisms are or could complement the work of the *ad hoc* tribunal.

The International Criminal Tribunal for Former Yugoslavia

The ICTY is the main mechanism of criminal transitional justice for the Former Yugoslavia. It was established in May 1993 by the United Nations Security Council as a reaction to grave violations of international humanitarian law in the war going on in the region. In the statute of the tribunal its purpose and competence are defined. Article I highlights the fact that the court is limited to violations in the territory of the Former Yugoslavia committed since 1991. The following articles of the document define the crimes over which the tribunal has jurisdiction, namely, grave breaches of the Geneva Conventions of 1949 (Article II), violations of the laws or customs of war (Article III), genocide (Article IV) and crimes against humanity (Article V). Thereby the jurisdiction is not only limited in time and territory but also to the main concepts of human rights violations in international humanitarian law. It is important to note that the work of the ICTY was crucial to the significant extension of international humanitarian law to internal conflicts as the Yugoslav Tribunal exercises also jurisdiction over the internal phases of the wars in the region.[1]

The next parts of the statute are concerned with the question on the court's jurisdiction: "[Article VI] The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute."[2] Furthermore, Article VII defines individual criminal responsibility of persons who planned, ordered, committed or otherwise aided in the crimes referred to. The official position of a person and also the fact that he/she acted pursuant to a command cannot relieve him/her from responsibility, although the latter might be considered in the mitigation of the punishment. At the same time Article VII establishes command responsibility as a principle to the ICTY,

in other words the responsibility of higher military officers towards the crimes committees by subordinates. Article IX of the statute defines the primacy over national courts. The following articles are concerned with the organisation of the court, the composition of the chamber, qualification and election of judges, not significantly relevant to this study.

The statute of the Yugoslav Tribunal is crucial as it sets out the rules of procedure of the court and sheds some light upon the motivation of establishing it, which is also defined in Security Council Resolution 827. "In harmony with the purpose of its founding resolution, the ICTY's mission is twofold: to bring to justice persons allegedly responsible for violations of international humanitarian law; to render justice to the victims; to deter future crimes and to contribute to the restoration of peace by promoting reconciliation in the former Yugoslavia."[3] However, in fact reconciliation as an aim of the ICTY is not mentioned in any official document, not in the founding or related resolutions, nor in the statute of the court. "Nevertheless, reconciliation is widely considered, even by the Tribunal's judges and prosecutors, to be an important objective, albeit an implicit one."[4] In addition to that, the ICTY on its homepage highlights its achievements in establishing accountability and the rule of law as a basic principle of establishing justice in the Former Yugoslavia.[5]

Difficulties of and critique towards the ICTY

In other words, the pattern for the accomplishment of the Tribunals objectives has been set very high. The fact that the controversial term of reconciliation is somehow incorporated in the understanding of the ICTY's objectives results in the difficulty of misinterpretation and misunderstanding of the tribunals work.

"For many witnesses, reconciliation would only take hold once their neigbors from the opposing group had acknowledged their complicity in war crimes. These are, of course, matters over which the ICTY has little if any influence. But they remind us that tribunal justice should never be regarded as a panacea for communities divided by genocide and ethnic cleansing."[6] It is therefore difficult to expect reconciliation to be delivered by a tribunal as this may only set a precondition of the establishment of truth and punishment of perpetrators for reconciliation which at the end stays a factor dependent on various issues, some of these personal psychological trauma which cannot be only overcome by criminal justice or any other transitional justice mechanism in itself.

The formulation of the purpose of the Yugoslav Tribunal to contribute to the restoration and maintenance of peace associates this judicial initiative with the principles and purposes of the UN, and justifies the engagement of the institution as a whole.[7] Yet, the critique towards the tribunal and its purposes also needs to be seen in the in the context of the general engagement of the UN and the international community in the region. Already the setting up of the tribunal and its mandate has been viewed with quite some reservation and scepticism, as one of the Bosnian international law experts writes: "It [the establishment of the tribunal] appeared to me, at the time, as a 'smoke screen' or a 'fig leaf' by which the international community wanted to cover its lack of leadership and political will to stop the war in the region and prevent an unforeseen tragedy."[8]

The lack of political will, but especially financial will, was also reflected in the first years of the court's work as the first challenge of the ICTY was related to finance. This challenge mainly characterized the starting years of the tribunal which was back then dominated by the fight to find funds in an insolvent

organisation as the UN. When the first prosecutor of the Yugoslav Tribunal came to The Hague, the institution did not have yet a budget. He describes the situation: "So that was a huge diplomatic battle to see that we got sufficient to do our work, knowing that every dollar we got was a dollar less for some other important United Nations agency. This was the political situation, the factual situation, into which I was placed."[9] The scale the ICTY and the ICTR would reach could not have been imagined in these first moments of the tribunal. "By 2004, the United Nations *ad hoc* criminal tribunals consumed more than $250 million per annum, roughly 15 per cent of the total UN general budget. They have nearly 2,000 employees."[10] Such figures reflect the development of the international tribunals throughout their existence but also high lightens the starting troubles the courts had and the political framework of transitional justice, which is always forming transitional justice initiatives, may they be international or national.

In addition to the financial but also practical and structural problems in the beginning[11], ICTY work was especially shaped by the fact that war in the concerned region was still going on. Decision about who to indict depended on political considerations about the course of the events in the Former Yugoslavia. An example of this was the indictment of General Ratko Mladić and Bosnian Serb leader Radovan Karadžić, which was issued in 1995 in the context of the peace negotiations for Bosnia and Herzegovina in Dayton. Furthermore, collecting evidence and finding witnesses for the cases was constrained and complicated by the ongoing conflict. Unlike the Nuremberg Trials or other war crime trials after the Second World War - as the Eichmann case in Jerusalem - in which the prosecutors and judges could rely on documents of the Third Reich like the transcripts of the Wannsee Conference, the cases of the ICTY were build on circumstantial evidence. The challenge to the prosecutors' office to establish a course of conduct by circumstantial evidence was additionally constrained by governments which only very slowly responded to the request for critical intelligence information.[12] Determined by these circumstances the task of the ICTY to contribute to the maintenance or establishment of peace by posing the threat of criminal responsibility was seriously hampered.

In 1994 the first indictment was issued. The task of the ICTY was to bring to justice the most responsible persons for the atrocities in the wars in the Former Yugoslavia. However, the first years of the tribunals work were characterized by the difficulty of arresting the main characters of human rights violations. Although thirty-three people had been detained at The Hague by the end of 1998, only two of them - Slavko Dokmanovic and Milan Kovacevic - were indicted for genocide and could be considered highly responsible.[13] Most of the other co-detainees played smaller roles; others who had even more responsibility were still at large. The incapability to detain suspects and those most responsible stayed a main feature and point of critique towards the tribunal until today. Especially the after-war period between 1995 and 1998 was determined by the lack of political and military will to arrest indictees. Radovan Karadžić was walking the streets of Pale and holding an official political position until he was forced to withdraw by his own party in 1997. It was not until that year that the NATO-led forces in Bosnia increased pressure on war criminals and significant arrest were made in the following period. "December 1998 marked the start of a more robust international approach to indicting and arresting the major war-time leaders."[14] Yet, the lack of police and military power stayed the main feature of the Yugoslav Tribunal.

Until today the two main war criminals are still at large. The ICTY's main problem of detaining its indictees is a somehow atypical example of the fact that the court is a political project (as any transitional justice initiative), which however does not have the political nor the executive power to set through its laws. The main forces behind the establishment of the tribunal were seemingly lacking the resources or will to secure the proper realization of the courts statute. The ICTY therefore find itself in the classical dilemma 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.[15] In the case of the Former Yugoslavia this obviously does not refer only to transitional justice measures in the countries affected but also to the discrepancy of political declarations and their realization on the international level. It is the classical disadvantage of international law which may offer continuity in the legal sense but on the level of protection and promotion of established laws suffers from political interest. "(...) there is a large gap, in the international community certainly, between what governments are obliged to do by the law and what they do in fact."[16]

In addition to the problem of arresting war criminals, the ICTY was and still is struggling with acceptance in the region. These two problems are highly connected as victims in the region are still confronted with war criminals or perpetrators they know being at large.[17]

On the opposite, the rejection of the Hague Tribunal's work is also resulting out of the detention of persons who are seen to be heroes. "Throughout history of warfare, from ancient to the present, it has been quite common to find a 'hero' and a 'criminal' embodied in the same person. (...) As much as this phenomenon may seem absurd, it is part of the post-war reality and is still persisting."[18] It is out of this reality that criminal justice

and transitional justice are trying to establish facts about past happenings in order to counter propaganda and collective guilt by relying on individual criminal responsibility. "(...) the ICTY was established with the promise of dismantling the ethnic biases and nationalist ideologies that instigated the conflicts in ex-Yugoslavia. An important aspect of the Tribunal's mandate was to punish those most responsible for the atrocities by singling out individuals at the top, thereby precluding collective responsibility and guilt by association. (...) In this way, it was argued, the Tribunal would trigger reconciliation (...)."[19]

The main challenge towards the tribunal promoting reconciliation is the understanding in the region that the court would be biased, specifically Serb-biased. Especially in Serbia public opinion is very critical in regard to the impartiality of the court as a survey conducted by the Belgrade Centre for Human Rights illustrates: "Over two-thirds of the population have consistently believed that ICTY trials of indictees of Serb nationality are biased and have cited the greater number of indictments against Serbs as the main reason for their opinion."[20] The scepticism also undermines the possibility of the Tribunal of being understood as a legitimate institution. In Serbia and Croatia disagreement with the ICTY's interference into internal affairs of the state prevailed. The establishment of fact finding and sentencing by the tribunal was strongly objected and could barely trigger the perception of war criminals being national heroes. This became clear when Croat General Tihomir Blaskic, convicted by the tribunal for war crimes, returned to Zagreb airport where he was received by a crowd of war veterans and government officials. Croatian deputy prime minister also welcomed the convicted criminal on his return and promised that the government would pay for the schooling of Blaskic's and all other indictees' children.[21] The criticism in Bosnia - especially in the first years of

the courts existence - was divided between the ethnic communities. Whereby most Croats and Serbs viewed the Tribunal as strongly biased against their communities, a large part of the Bosniak community for their part was ultimately disappointed by the Tribunal of failing to realize its statute.[22]

The scepticism and disagreement with the Tribunal's work partly resulted out of its location in The Hague and its complexity. "The distant and complex proceedings at the Tribunal often fail to resonate with local audiences and to provide closure for victims (...)."[23] This was especially obvious in the first years, when the court itself did not have an outreach strategy and did not publish it reports in the local languages. The sixth annual report of the court in 1999 stated: "The Tribunal is viewed negatively by large segments of the population of the former Yugoslavia. Its work is frequently politicised and used for propaganda purposes by its opponents, who portray the Tribunal as persecuting one or other ethnic groups and mistreating persons detained under its authority."[24] As the court, due to its physical location, was viewed as remote and disconnected to the population which could hardly come to witness the proceedings although they were public, the court desperately needed a strategy to present itself and its work to the communities. Therefore, the outreach programme of the ICTY was finally launched in October 1999, based on the insight that the populations understanding about the tribunals work is crucial to the promotion of acceptance. With local offices in the region the ICTY has been since then trying to counter its negative perception by distributing information materials, media-monitoring and organisation of visits to the tribunal.

Although the public opinion in the Former Yugoslavia witnessed a trend of improvement (especially in Bosnia and Herzegovina) the problem of the cooperation with local authorities has persisted. In the Federation of Bosnia and Herzegovina the Hague Tribunal has achieved a certain level of trust among the Bosniak and Croat communities. Yet, the negation and rejection of the tribunal persists in the Republika Srpska. "Although the RS Parliament passed a law on cooperation with the ICTY in September 2001, in practice there has been continuous resistance. The RS is the only authority within the former Yugoslavia that has not handed over a single war crimes suspect to the Tribunal."[25] Widespread distrust therefore continues to pose a problem. As it is on the one hand a general rejection of the ICTY as a biased organisation, it is the discontent with the tribunal's sentencing that provokes criticism on the other hand.[26] In this sense the principle of accountability is challenged by a general neglect of responsibility and/or the disagreement with low sentencing.

The disaffection with the Yugoslav Tribunal is also challenging the contribution of the ICTY to the establishment of the rule of law in the region, as it has primacy over domestic courts but its jurisdiction is partly understood as illegitimate or not well-adjusted. Part of the misunderstanding of the tribunal's jurisdiction may also be due to the fact that it is substantially built on the common law system. This system is completely unfamiliar - even to the legal community - in the region.[27] Hence, the tribunal is not caught only in the different interpretations of justice by the communities and individuals in the Former Yugoslavia but also has to balance between two forms of legal organization. Its contribution to justice and reconciliation is challenged and undermined by the criticism regarding the lack of political and military power to arrest war criminals, the accusation of ethnic bias, the objection of low sentencing, the undermining of its jurisdiction through local authorities or the misunderstanding with the legal system applied. However, as mentioned above

the transitional justice process has a long-term character and results should not be expected overnight. The tribunal's work needs to be set in the context of the horrifying atrocities committed in the Former Yugoslavia after which reconciliation cannot be forced or expected quickly.

Achievements of the ICTY

Although the Yugoslav Tribunal is struggling with a lot of challenges also some achievements of the court must be acknowledged due to which the countries in the Former Yugoslavia have reached the point at which they are today. While improvements in the work of the court can be applied, its important impact on changes in the region cannot be neglected. At first we have to recognize the fact that the establishment of such court would not have been possible in the region at the time of its setting up. Even after the war in Bosnia and Herzegovina violent incidents characterized the first post-war years in which a war crime court or chamber would have added fuel to the fire of the divided society. In Croatia or Serbia the establishment of a tribunal would not have been realistic due to the Tuđman and Milošević regimes in power. In this sense the physical location in The Hague which poses difficulties in regard to the perception of its work, was needed in order to apply principles of accountability and criminal responsibility directly after the war.

In general, the ICTY played an important and critical role in advancing the cause of justice and questioning prevailing deadlocked beliefs about the causes and incidents of the war. "Without it, there would have been a massive justice deficit in the region, as few cases have been pursued in domestic courts."[28] The Milošević case was for example the attempt to

establish an over-all picture and facts about the wars in Bosnia and Herzegovina and in Kosovo/a. Although the length of the case and the death of Slobodan Milošević without a final judgment of his responsibility have constricted the possibility of legally elaborating on the happenings of the 1990s, the collection of information and documents may set the grounds for a public debate and reckoning of Serbian and ex-Yugoslavian history. The case of General Ante Gotovina is a similar one. Although public outcry against his deterrence was loud in Croatia and public campaigns for his innocence are persisting, his case brought about a stronger discussion in the media and the commitment of the government to fully cooperate with the tribunal. Here again, the elaboration on the events in Operation Storm through the ICTY could bring above a more differentiated discussion about the happenings in the so called "Croatian Homeland War".

The arrest of persons indicted for major war crimes and crimes against humanity may promote reconciliation in the sense of providing facts about past happenings and thereby reducing the danger of revisionism. It generally contributes to the establishment of a sense of justice and the rule of law by implementing the principle of accountability. In regard to Bosnia and Herzegovina - but also concerning Croatia and Serbia - additional processes of reconciliation to which the ICTY has contributed may be drawn: "First, the indictment, and the fear of indictments, have undeniably contributed to the neutralization of some of the leading ethnic cleansers."[29] This has lead to the fact that war crime suspects had to withdrawn from their public positions and it has contributed to a more "moderate" approach of some politicians. The second "reconciliation process" which the tribunal fosters, is the promotion of the refugee-return by arresting war crime suspects. Although this may not be the primary

reason for return as especially the reconstruction of housing, reducing of administrative constraints and the financial assistance play a crucial role in the return of displaced persons, it can contribute to a sense of security in the region. "For instance, the arrest of six persons indicted for the 1992 massacre of residents of the village of Ahimici, and the conviction of five of them in January 2000, has reduced the influence of the remaining ethnic separatists; since the arrest, hundreds of Bosniaks have returned to the area."[30]

However, the contribution of the ICTY to reconciliation is limited and the question remains if the aspiration of some diplomats, media and supporters to expand the tribunal's mandate to reconciliation was not unrealistic.[31] The processes mentioned above can be accounted for as supporting processes which may stimulate the co-existence and civil reconciliation between the conflict groups in a society. However, research has shown that international or local trials have little relevance to reconciliation as communities understand justice and reconciliation far more broadly than what the trials may deliver. As Weinstein and Stover have proven, for witnesses full justice is understood more broadly than criminal trials and included the return of stolen property, locating and identifying the bodies of the missing, securing reparations and apologies, leading lives devoid of fear, securing meaningful jobs, providing their children with good schools, etc.[32] The ICTY may contribute to such processes as shown above, but cannot provide the whole range of transitional justice and therefore may hardly lay all the needed grounds for reconciliation on the basis of justice.

In legal terms and in regard to rule of law the tribunal was relating to the common law system which is not well known in the region. Still, it highlightened a legal principle which is crucial to the accountability of human rights violations, namely

command responsibility. This legal and military principle is part of the ICTY's statute and defined in Article VII. It provoked discussions in the region although it was an acknowledged military principle also in the Former Yugoslavia. Especially the indictments against Nebojša Pavković, Vladimir Lazarević, Sreten Lukić, and Vlastimir Đorđević for their criminal responsibility in crimes committed in Kosovo/a in the years 1998-1999 were criticised by politicians in Serbia as being based only on command responsibility. "This statement implies that the indictment does not accuse them of personally committing any crimes, but that their responsibility stems solely from the fact that they were military commanders."[33] Although it would be legally possible to indict somebody only on the grounds of command responsibility, the ICTY emphasised the fact that the four accused were also participating in the criminal enterprise as co-perpetrators. Three of the accused were transferred to The Hague in 2005, Vlastimir Đorđević remains at large.

The legal pattern of command responsibility was constantly discussed in the Serbian media and there was practically no state official who did not offer his/hers comment on the doctrine of international law.[34] However, the topic was also discussed in regard to the reconciliation process in the region. In the framework of a conference organised by the Belgrade Humanitarian Law Center on "Dealing with the Past" a workshop was held on command responsibility in international law and the legal system of Serbia.[35] Yet, not only the legal community responded to the discussion but also in the broad public the issue received strong attention. Therefore emphasising command responsibility as part of legal accountability can be regarded as one of the main achievements in by the ICTY. The real success and the difference between 1995 and 2005 is that the major legal patterns as command responsibility were

accepted by the public in the region, and a legal formula thereby became an element of public morality.[36] With achievements like this a slow change in the rhetoric of public officials and the public perception in general can be stimulated in order to deconstruct deadlocked pictures of war heroes established by ethno-nationalist ideology.

Other transitional justice approaches in the region

The ICTY has for some time been the only transitional justice initiative in the Former Yugoslavia. In the beginning only criminal justice seemed the proper and possible way to face the violent past of the region. International criminal justice - as a legal continuum throughout and after a lawless period - offered the possibility to confront the violent happenings in a structural framework of a legal system, when no other mechanism was yet imaginable. In the war torn region initiatives as truth and reconciliation commissions or institutional approaches were not possible as the main concern was the reconstruction and reorganisation of the countries. This is also reflected in difficulties the ICTY has. These challenges to the Yugoslav Tribunal are still persisting. However, international criminal justice paved the way for further approaches of transitional justice and established a basic level of accountability and fact-finding for the region. In the course of the last 10 years the topic was also slowly approached by other initiatives which will be presented and discussed in the following section.

Bosnia and Herzegovina

In 1999 the newly elected president of the ICTY addressed the public in this first press release with the question of what timeframe the court sets itself for fulfilling its mission.[37] He posed the question with the background of growing criticism in the international community of the value for money derived from a war-crimes tribunal, absorbing a large amount of UN resources disproportionate to its geographical focus.[38] The statement set the start for the so called completion strategy of the ICTY by which a "deadline" was set on the court's work. After correspondence between the ICTY presidency, office of the prosecutor and the Security Council, resolution 1503 (2003) was adopted and thereby the first concrete document on the completion strategy published. It called upon the ICTY to "(...) take all possible measures to complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010."[39] In regard to Bosnia and Herzegovina the resolution called upon donors to support the creation of a special chamber, within the state court of Bosnia and Herzegovina to which cases of the ICTY may be transferred and new cases investigated and opened. The transfer of cases would thereby free up the ICTY resources and complement trials in The Hague by nationalizing the process of accountability, which in turn could have also greater resonance in the region.[40]

In December 2004 the government of Bosnia and Herzegovina enacted legislation to establish a war crimes chamber which started its work on the 9th of March 2005. "The concept underlying the WCC [War Crimes Chamber] initiative is that accountability for gross violations of human rights that took place during the conflict ultimately remains the responsibility of the people of Bosnia. Thus, although it presently contains a significant international component, the WCC is essentially a

domestic institution operating under national law."[41] Located in Sarajevo, the war crimes chamber should increase the accessibility of Bosnians to witness the trials. As the cases of the main war crimes suspect as Mladić and Karadžić will stay under ICTY jurisdiction, the war crimes chamber is mainly concerned with mid and low-level perpetrators and cases which has been transferred by the authorities from The Hague or indictments which has been reviewed and are consistent with standards of the Yugoslav Tribunal. The chamber's work receives a lot of attention as its establishment and work is also reflecting on the independence and ability of the legal system of Bosnia and Herzegovina. It took until 2005 for the establishment of the court because the situation in Bosnia and Herzegovina was compounded by complexities in the legal framework, inappropriate procedural laws as much as the bias of judges and prosecutors and ineffective witness protection mechanisms.[42] However, the court is still perceived critically and different NGO's articulated their concerns that the chamber appeared to be based on short term planning. Victim groups criticized the need to increase victim participation.[43]

In addition to the established working groups of the ICTY, the Office of the High Representative and the Bosnian government, the Organisation for Security and Cooperation in Europe (OSCE) is monitoring the work of the chamber as well as different NGO's. Human Rights Watch (HRW) conducted and published a detailed report on the initial working phase of the chamber in February 2006. The report states that the chamber offers a tremendous promise to justice in Bosnia and gives a generally positive evaluation on the solid foundation of the court to conduct fair and effective trial, including initiatives to promote sustainable local capacity. As the real challenges of the court seem to lie ahead the report focuses on making recommendations to the institution itself and to the international community to continue efforts of realizing the full potential of the court. Since the mandate and resources of the chamber in Sarajevo are limited and numerous trials will take place at district courts HRW emphasises the need to monitor and finance also these prosecutions as "(...) without adequate support for these courts, there is a real risk of the accomplishments of the WCC will, at best, only have limited impact."[44]

National proceedings of war crimes in Bosnia and Herzegovina as a mechanism for transitional justice remained subject to the influence of nationalist elements and ethnic bias over the period of the last decade.[45] That an improvement of the legal system, especially at entity and district courts, in cases where the war crimes chamber does not have jurisdiction, is crucially needed became obvious with the first war crimes trial conducted in the Republika Srpska (RS) Although the majority of crimes committed between 1992 and 1995 in Bosnia and Herzegovina were taking place in this part of the country only two war crime trials have been completed by November 2005.[46] Eleven police officers were accused of illegal detention of the Matovic family during the armed conflict in the town of Prijedor. The accused were acquitted on the grounds of lack of evidence. The Belgrade Humanitarian Law Center, the Center for Peace, Non-violence and Human Rights Osijek and the Research and Documentation Center Sarajevo while monitoring the trials, concluded that the trial did not bring justice. "The Trial Chamber based its acquitting decision on the lack of evidence, which speaks more in favor of an inadequate investigation and the passive role of the Prosecutor's Office and the Trial Chamber in collecting evidence."[47] Since then, three other war crime trials were completed in November and December 2005. In all the cases the accused were convicted and sentenced. "The

increase in the number of prosecutions reflects a greater willingness on the part of Republika Srpska authorities to bring war crimes suspects to trial, as the result of the loosening grip of extreme nationalists on politics in the entity."[48] Yet, the prosecutions have been hampered by obstacles as the lack of cooperation with the RS police, limited prosecutorial resources, as well as witness intimidation and non-availability of suspects.[49] Continued monitoring and financing, focussing also on trials outside Sarajevo, is therefore inevitable and crucial in order to increase the public attention and promotion of reconciliation through local trials as a form of transitional justice.

In addition to fact-finding and truth-seeking through national trials, Bosnia and Herzegovina also witnessed an attempt of a truth commissions concerned with the investigation of crimes committed in Srebrenica. The Commission was established in January 2004 by the RS authorities after the Human Rights Chamber[50] had ordered a detailed investigation of the events which took place in and around Srebrenica between the 10th and 19th of July 1995. The Srebrenica Commission was composed by seven members, five of them appointed by the RS government and two by the OHR. "After the Commission's preliminary report in April highlighted systematic obstruction by the RS military, police and intelligence authorities, the High Representative ordered a number of measures to support the work of the Commission, including the dismissal of the Commission's Chairman and other RS officials."[51] As the commission has been unable to submit the interim report due to obstructions through the RS authorities, several RS officials were removed from their duties by the OHR which was together with the ICTY monitoring the process. After these measures the final report was published in June 2004. "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 (...)."[52] Despite the difficulties of the Srebrenica Commission it was the only truth seeking initiative regarding historical justice established and completed in Bosnia and Herzegovina. Although the case of Srebrenica was investigated in detail by the ICTY in the Krstić case, the Commission represents a first step of investigating and acknowledging what has happened by the authorities of Bosnia and Herzegovina themselves.

A possible establishing of Truth and Reconciliation Commission for Bosnia and Herzegovina has been discussed several times. Initially the discussion on a TRC was initiated by the US Institute for Peace (USIP). Together with the Association of Citizens for Truth and Reconciliation the USIP developed a proposal for a TRC which, "(...) they hoped, could help to establish the facts about the nature and scale of past violations and serve as a safeguard against nationalist or revisionist approaches."[53] The initiative to set up such a commission over the last years developed to be supported by 150 NGO's from Bosnia and Herzegovina.[54] However, ICTY officials rejected the establishment of such a commission at the beginning of the initiative as it could interfere with the prosecution and especially investigation of the Yugoslav Tribunal. In the course of the years the ICTY slowly committed to the idea. In a speech in May 2001 the Tribunal's president Claude Jorda concluded that the Hague Tribunal has its limitations in regard to the reconciliation process in the region and a TRC could be helpful to overcome these. Yet, he emphasised, such a TRC needed to be complementary to the ICTY while its mandate must not be similar to the tribunal's one.[55]

Shortly after his speech a draft law on a TRC for Bosnia and Herzegovina was established. "The proposed TRC would

operate for two years, and would have no court-like attributes or powers and no amnesty-granting power. (...) For better or worse, almost three years later there is still no TRC (...). Past and current governments, still dominated by nationalist parties, have been unwilling to introduce the draft law before the parliament."[56] In addition, the civil society sector seems divided on the topic. Especially victim groups do not seem confident and a general scepticism towards the initiative is being expressed. Furthermore, the question remains if the findings of such a TRC would be credible outside the country. Therefore the "(...) real challenge in the former Yugoslavia is how to devise a mechanism for truth-telling that will be credible across the region."[57]

As mentioned above another crucial element of transitional justice mechanisms is the (re-)establishment of democratic institutions. The screening and vetting or lustration process of public official is an important part of that. In Bosnia and Herzegovina the High Representative, currently Christian Schwarz Schilling, is holding the so-called Bonn Powers with which he is authorized to dismiss public officials, including nationalist war time politicians. Next to this instrument of the High Representative which strongly shaped the political development of Bosnia and Herzegovina in the last years the UN Mission to Bosnia and Herzegovina undertook a screening process of the police forces. "Police reform carried out by the United Nations Mission in BiH (UNMIBH) included a rigorous screening process of police officers but wide-spread lustration within the political and military sphere did not take place. (...) However, there are still alleged to be war criminals holding public office."[58] The situation of institutional reform is atypical for the transitional justice process in general. Although there have been some achievements, there does not seem to be a comprehensive vision between the different international and national institutions and

civil society engaged. "Ultimately, however, the OHR and other international institutions will need to pull back from BiH and let the country run its own affairs. Only when that happens, it will be evident whether the tremendous investment of attention and resources in BiH has effectively advanced the causes of justice and reconciliation."[59]

Croatia

Differently to Bosnia and Herzegovina, Croatia did not experience such a strong international involvement into its transition than its neighbouring country. Therefore, approaches of confronting the violent past were defined by the national regimes in power and only to some extend by the EU and other international powers. In the course of the 1990s when Croatia was still ruled by Franjo Tuđman and his regime the discourse about the "Croatian Homeland War" was an easy and dictated one. The main principle concerning the recent Croatian past was that the country fought for its independence and no war crimes has been committed in the period from 1991 until 1995. "Back then, the official doctrine held that the Croats could not have committed war crimes because they had only waged a defensive war. (...) Everything that stood in opposition to this position, which was backed by the highest legal authority in the state, was considered a denigration of the Homeland War, as the Croats named the armed conflict triggered by the dissolution of Yugoslavia in 1991."[60] A public discussion about the happenings during the break-up of the Yugoslav Federation was hardly possible and persons challenging this doctrine were under surveillance of and threatened by the Secret Police. Since the death of Franjo Tuđman in the end of 1999 the authorities of the country have no longer denied that war crimes have been com-

mitted, yet, "(...) it is not easy to write about it even today. It's a topic that makes no one popular."[61]

But although the power framework and the involvement of international actors in the transitional justice process in Croatia is much lower, Croatia set up a similar system of national or local war crimes prosecution as in Bosnia and Herzegovina. The war crimes chamber as a special court of war crimes prosecution was established in Sarajevo, yet, the cantonal and district courts have tried cases and will continue to do so. Similarly, in Croatia ordinary courts may try war crimes cases, although special courts have been established. "In Croatia, all county courts have jurisdiction over war crimes cases, but legislation adopted in October 2000 permits the transfer of war crimes cases from the county courts with territorial jurisdiction to county courts in Croatia's four biggest cities Zagreb, Osijek, Rijeka, and Split."[62] To make a transfer to theses courts possible, the prosecutor has to demonstrate certain circumstances and the supreme court of Croatia also needs to consent the transfer. In addition, the ICTY may transfer cases to these courts in accordance with its regulations and provision. This has happened in the indictment against Rahim Ademi and Mirko Norac. The ICTY transferred the two cases to the Croatian authorities in November 2005.

Rahim Ademi and Mirko Novac were indicted by the ICTY for war crimes against Croatian Serbs. The two cases may be regarded as two exceptions as they were held against ethnic Croatians, whereby there are especially crimes committed by Croatian Serbs which normally dominate the national courts. Monitoring of domestic war crime trials shows that the vast majority of charges are run against Croatian Serbs, whereby the number of convictions is significantly higher than in the cases than in other cases. "While 83 percent of Serbs were found

guilty in 2002, only 18 percent of Croats were convicted during that period. Conversely, 17 percent of Serb defendants were acquitted or the prosecution was dropped, while 82 percent of Croats were found not guilty or the charges were dropped."[63] Although the situation seems to improve, the ethnic bias of the Croatian courts persisted also through the last years. Even though the number of war crimes proceedings was generally decreasing in the first month of 2005, Croatian Serbs continue to represent the majority of the accused. Therefore, the OSCE mission to Croatia monitoring the trials therefore concluded that there are still disparities on the basis of the national origin. "Most noticeable is the difference in the type of conduct for which Serbs and Croats are charged, with Serbs being accused for a wide range of conduct while Croats are almost exclusively charged for killings. Croatian courts also continue to prosecute Serbs for genocide on the basis of acts that were not of the gravity usually associated with verdicts of international tribunals ascribing genocidal intent and conduct."[64]

Apart from the fact that national courts proceedings of war crimes are documented to be ethnically biased, a broad range of cases against Croatian Serbs are conducted in absentia, in other words, in the absence of the accused.[65] Hence, the criminal justice approach of the Croatian authorities still seems to lack objectivity and proportionality. Yet, war crime cases in front of domestic courts are the only official inquiry of the past happenings. No other approaches towards historical justice, as investigative commissions or truth and reconciliation commissions, have been established. Until now, Croatian truth-seeking, aside of criminal justice proceedings, was dependent on civil society initiatives. As there was no and is no planned official investigation of the happenings during the period between 1991 and 1995, such inquiries rely on NGO investigation. One of the

main initiatives in this regard is a project of the Belgrade Humanitarian Law Center, the Center for Peace, Non-violence and Human Rights Osijek and the Research and Documentation Center Sarajevo. The three organisations signed a Protocol for the Regional Cooperation in Researching and Documenting War Crimes in the Post-Yugoslavian Countries on 6th of April 2004.[66] In addition, publications investigating the events in the war have been released by active NGO's. Yet, an official document analysing what has happened is still missing.

In comparison to Bosnia and Herzegovina, which due to its multiethnic structure was forced to take at least some official steps in regard to truth-seeking, Croatia's path to reconciliation between the ethnic groups depends more on the protection and cooperation with the Serb minority in the country and fostering refugee return. The difficulties on this way are already illustrated by the example of ethnic bias in war crime trials. However, this is only one difficulty the Serb minority, especially the Serb returnees are facing. In the period between 1991 and 1995 at least 300 000 Croatian Serbs left or fled Croatia. "As of 1 July 2005, i.e. ten years later, 117,448 Croatian Serbs have been registered by the authorities as having returned to or within Croatia (...)."[67] Although an agreement between the ministries responsible for refugee return of Bosnia and Herzegovina, Croatia and Serbia has been signed in January 2005 in Sarajevo, the situation of Serb returnees in the country is still very unsatisfactory. In the course of summer months 2006 reports about attacks on houses of Serb returnees were again dominating the Croatian newspaper headlines. Human rights concerns in regard to Serb returnees are especially connected with the increase in number of incidents of ethnically motivated harassment against the minority and under-representation of Croatian Serbs in state organs. "Other concerns include discrimination in

the supply of electricity to Serb returnee communities, slow progress in repair and reconstruction of Serb houses damaged or destroyed in the war, and, in one part of the country, the continuing inability of the Serbs to have full access to their agricultural land."[68] Subsequently, HRW demanded the EU to include progress on security, housing and employment for Serbs in Croatians accession negotiations.[69]

On that basis transitional justice in regard to the reform of state institutions also lacks a screening, vetting or the lustration of the public officials on the one hand and the adaptation of minority involvement in the administration on the other hand. As there has not been any official inquiry or debate about the participation of state officials in past crimes there also has not been much pressure on officials to reckon any past wrong-doing. Debates about the former regimes, especially the Tuđman regime of the 1990s, are still suffering from political pressure and influence. "In December 2005, members of Parliament debated a television talk show on the legacy of former president Franjo Tuđman. Members of the ruling party attacked the program as anti-Croatian, and the HTV program council subsequently suspended the program's editor and host."[70] Furthermore, two journalists received death treats in the course of the affair. The apparent difficulty of ruling Croatian politicians to face the past is additionally manifested by their policies towards the Serb minority representation as made obvious in the local elections in May 2005. "Before and even after the local elections, there was a serious lack of clarity regarding the allocation of reserved seats for minority representatives. Instead of taking into account updated voter lists, the government used the 2001 census list, thus neglecting changes registered in certain local units, particularly in return areas."[71] Consequently, the official Croatia, next to the lack of official inquiry of the past and

ethnic bias in war crimes proceedings, also seems to be missing institutional reform as an approach towards transitional justice.

Serbia

National approaches towards transitional justice in Serbia are limited by similar constraints as in the neighbouring countries. Reckoning the past is characterized by strong influence of ethno-nationalists in all three countries. "Persisting ideologies of nationalism and victimhood, as well as competing narratives of historical and 'judicialized' truth about the conflicts and their atrocities, prevent inclusive debate and genuine interaction across the post-conflict societies in the region."[72] Serbia is no exception. Some may even say that the persistence of ethno-nationalism in the country is even stronger than in Croatia or Bosnia and Herzegovina, as the country's former leaders are characterized as the most responsible for war crimes in the last war and the country therefore has to deal with the seemingly most destructive nationalism in the region. Yet, although the countries are building their transition on different contexts in regard to the ethnic structure, political composition and historical experience there sill remain crucial similarities in transitional justice approaches as national war crimes trials.

The most obvious example of similarities is the criminal justice system for war crimes in Serbia, which is comparable to the structure in the neighbouring countries. As in Bosnia and Herzegovina and in Croatia, every court in Serbia is authorised to hold war crime proceedings. However, additionally to the possibility of prosecutions at ordinary national courts the War Crimes Panel at the Belgrade District Court was established on the basis of a law passed in June 2003 creating the Office of the

War Crimes Prosecutor and the Panel itself. Before the establishment of the Panel, war crimes held in the country were handled by local courts, as in the Sjeverin case before the Belgrade District court prior to the creation of the War Crimes Panel. In the trial four Serbs were accused to have kidnapped, tortured and killed seventeen Muslims from Serbia in 1992. The trial was held in absentia of two of the indictees, which raised concerns of human rights activists in regard to fair trial rights.[73] The case was generally seen as a test for the Serbian judiciary and although the four indictees were sentenced to 15 until 20 years of imprisonment, critique towards the handling of the biggest known crime committed on the territory of Serbia during the war in 1991 and 1995 was lasting. The critique towards this major war crimes case in Serbia focused especially on the witness protection during the proceedings. "During the first stage of the Sjeverin trial, the prosecutor, the police, and the court improvised to achieve some degree of witness protection, but the proceedings highlighted a general need for more thorough witness protection mechanisms."[74]

Furthermore, the assessment of the trial by human rights organisations highlighted the negation of command responsibility as a legal principle. Even though the jurisprudence of the ICTY has contributed significantly to the acceptance of the principle by the public and the legal community the Sjeverin trial shows that it yet did not enter the legal system in Serbia. "Although the testimony in the trial plausibly suggested possible command responsibility of the superiors in the Bosnian Serb army and the then - Yugoslav army who failed to prevent the commission of the crime and punish its perpetrators, the prosecutor did not pursue that issue."[75] This case is an example of the fact that Serbia criminal law still does not provide command responsibility. An inclusion of the principle into the legal

system may be in near future, yet, a national law establishing command responsibility will however not be applicable to past crimes due to the constitutional prohibition of retroactivity.[76]

The establishment of the War Crimes Panel at Belgrade rose hopes of human rights observers that difficulties in witness protection, but especially in regard to the investigative powers of the prosecutor could be overcome. "The legislation which created the chamber also mandated a specialized prosecutor for war crimes, a special detention unit, and a special war crimes investigation service within the Ministry of Internal Affairs."[77] These offices came for the first time into action at the Ovcara case, the first case in front of the Belgrade War Crimes Panel. The trial is concerned with seventeen members of the Vukovar Territorial Defence of 1991, which was back then part of the Yugoslav People's Army (JNA) and who between the 20th and 21st November had organized and ordered the murder and inhuman treatment of prisoners of war, killing 192 persons. Another indictment issued by the War Crimes Panel in October 2005 is the so-called Skorpioni case, in which four members of the paramilitary unit called Skorpioni as part of the Army of Republika Srpska are accused of war crimes committed during the war in Bosnia and Herzegovina. The only closed case the Belgrade War Crimes Panel counts is the trial to Anton Lekaj. The Kosovo Albanian Lekaj was accused and sentenced by the court to 13 years imprisonment in September 2006 for war crimes committed against the civilian population in the Kosovo conflict in 1999. It is these cases and their closure which will evaluate on the development of the fairness and legality of war crime trials in Serbia.

Although only one of the cases before the War Crimes Panel in Belgrade has been closed, its work of the last three years has been monitored and evaluated by different human

rights groups. What stands out in the assessment of the courts work is that the only completed case is one against a Kosovo Albanian. When in 2003 HRW could not assess any ethnic bias of Serbian war crime trials this was due to the fact that no case has yet been brought against a non-Serb.[78] The Belgrade Humanitarian Law Center expressed the view that Lekaj should have been tried in Kosovo, before the International Panel which has jurisdiction over citizens of Kosovo in this regard. However, the Center also assessed the trial in Belgrade as fair and the decision of the Trial Chamber as legally founded.[79] What according to the Center also remained a problem in the case of the trial to Anton Lekaj were difficulties with respect to witness providing and witness protection. The lack of witness protection is already a striking feature of war crime trials before ordinary national courts therefore does not seem to be solved by the War Crimes Panel. In connection to this, also the difficulties in taking witness assertions seriously and applying command responsibility seems to be persisting in the War Crimes Panel as high lightened by the Ovcara trial. Although strong evidence and indications for the criminal responsibility of JNA officers was established, the indictment did not encompass the former officers. Therefore, the difficulties of Serb national war crime trials seem to be persisting in spite of the establishment of the Belgrade War Crimes Panel.

That transitional justice approaches in Serbia similarly to Croatia depend on civil society initiatives is made obvious in the Podujevo case in which especially witness protection was secured by the Humanitarian Law Center and not by the authorities responsible. The case which deals with the killing of 19 civilians in Kosovo by a Serb paramilitary unit probably would not have been possible without the initiation of civil society initiatives. "The HLC successfully lobbied for transferring the case to

Belgrade, represented the victims at the trial serving as Victim Advocate Council, facilitated witness testimony of Kosovo Albanians and provided them with protection during their stay in Serbia, requested and presented evidence, and ensured that procedural and substantive legal standards were not compromised by the proceedings."[80] The inability or unwillingness of the Serb authorities to provide transitional justice approaches is furthermore proven by the lack of other transitional justice initiatives than criminal justice in the country. Although Serbia was the only country in the region to establish a truth and reconciliation commission, this must be assessed as a poor and failed attempt to provide a truth-seeking initiative by the authorities.

The Yugoslav Truth and Reconciliation Commission was established by a decision of President Koštunica in 2001. The Commission was set up without any public discussion or consultation on the issue. Furthermore, the members of the Commission included only two representatives of ethnic minorities and no member of a religious community other than the Serb Orthodox Church. In addition to that, the mandate of the Commission was problematic. "It was charged with the task of organizing research 'on the uncovering of evidence on the social, inter-ethnic and political conflicts which led to the war and to shed light on the casual links among these events'."[81] Moreover NGO's concerned with the issue were not consulted or involved in the process as also the documents used for the Commissions report would not rely on investigation of civil society organisations. However, the Commission never finished its work as it was abolished together with the office of the federal presidency in 2003. Official and balanced truth-telling efforts in Serbia are therefore still missing. The task to initiate such initiatives still remains on the level of civil society.

In regard to screening, vetting or the lustration of public officials or the reform of state institution the "Accountability for Human Rights Violations Act"[82] needs to be mentioned. The law which was passed by the Serbian parliament in 2003 defines procedures and principles in investigating the accountability of human rights violations and also calls for the establishment of a commission authorized to investigate the cases. Although, this is an important step towards reforming the national institutions and holding public officials responsible and the law defines human rights violations broadly what is easing its appliance, the conversion of the law into practice remains the crucial problem. The secret police, organized crime and selected businessmen are still controlling the public and economic sector. None of the successor states of the Milošević regime was willing or able to remove their agents from their assets. "Thus, while a vetting process remains as necessary as ever, the political conditions to implement the vetting law do not appear to exists."[83]

Notes

1 Cases before the ICTY were very often dominated by discussions about the characterization of the conflict. On the elaboration of the topic see the declaration of Judge Shahabuddeen concerning the Blaksic judgment: <http://www.un.org/icty/blaskic/trialc1/judgement/bla-tjdsha000303e.htm>

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THE EU AS THE MAIN POLITICAL POWER BEHIND THE ICTY AND TRANSITIONAL JUSTICE IN THE FORMER YUGOSLAVIA

In chapter one and two the specificities of transitional justice and its political connotation have been discussed. Furthermore, the specificities of EU-Conditionality and the Europeanisation process has been sketched out, followed by the analysis of the existing transitional justice approaches in the region in the third part of this work. This chapter aims to analyse the EU as the main political power behind the main transitional justice initiative (ICTY) in the Former Yugoslavia and thereby attempts to link the conclusions of the different chapters.

The main instrument of the EU to influence the development of an applicant country is its conditionality. Criteria and preconditions for membership are primarily defined by the EU, without input from civil society in the specific country. This unequal relationship is made obvious in the implementation of

the legal criterion of Copenhagen Criteria, namely, the adoption of the *acquis communautaire* by the country. It is an asymmetrical relationship between the EU and applicant countries which characterizes Europeanisation to the outside as Heather Grabbe identifies: "The applicants cannot influence EU policy making form the inside and they have a stronger incentive than existing member states to implement EU policies because they are trying to gain admission."[1] Furthermore, the EU does not use its power in all areas to the same extent. The experience of the largest enlargement round of 2004 has shown that the use of rule-setting by the EU fluctuates from one policy area to the other. In several major policy areas - minority protection, social policy, macroeconomic policies - the Union has not used its routes of influence persistently to enforce a particular policy agenda."[2]

"This is particularly problematic in SEE [South East Europe], a region that has not pursued the 'classic' transition path and that is constrained by the scarcity of human and financial resources. The adoption of the acquis may contradict, in some cases, the wider 'development and growth' agenda in these countries."[3] Similar is the situation in regard to the economic criterion of EU-membership. The adoption of economic prerequisites defined by the EU may contradict the specific situation and development of a country, especially in post-conflict societies. "In FYR Macedonia, for instance, it is feared that IMF and EU demands for cuts in the administration expenditure contradicts the goal of inter-ethnic reconciliation and strengthening of Albanian representation in the central and local institutions."[4] This reflects the shortcomings of the unbalanced relationship between the EU and the specific country in shaping the accession process.

In addition to the one-sided character of Europeanisation, the process of European integration has also shown to have a differentiated impact on the countries concerned. In the last round of European enlargement the 10 new member states witnessed different achievements in their economic and democratic development. The EU requirements have promoted the differentiation of the countries which in the process of EU accession split into groups of frontrunners and those, who did not that well in achieving the EU criteria. "The same dynamic is even more visible in the Balkan region, with the division between Bulgaria and Romania, on the one hand, and the Western Balkans, on the other. In the latter, differentiation and heterogeneity is even greater, as a result of various factors, one of them being their capacity to meet the Stabilisation and Association Process (SAP) criteria."[5] This does not only contradict the fact that the EU is at the same time promoting regional cooperation between the countries, but also is not in favour of a regional approach towards transitional justice. Although it is entirely reasonable that Croatia is going to join the Union sooner than Bosnia and Herzegovina or Serbia, the connection the countries have through their common (violent) past, would need to be taken into account if rule of law and democracy, as the main principles of the political criterion of the EU, wants to be achieved in the region.

The mentioned difficulties for transitional justice in the course of Europeanisation, namely, the fact that the application of the Copenhagen criteria without country-specific input, the differentiation of neighbouring countries as well as an indifferent social and economic impact on the countries, may have a negative effect on the consolidation of democracy. Furthermore, these problems are aggravated by the fact that the specific background of the war in the three countries is not considered

concretely by these criteria. The only transitional justice approach which is mentioned in EU-conditionality towards the Balkans is the cooperation with the ICTY. The cooperation with the ICTY as a precondition for EU membership for the countries in the Former Yugoslavia is not mentioned in the Copenhagen Criteria, but was introduced with the SAP. In April 1997 the European Council defined the SAP conditions which added the ICTY cooperation, regional cooperation and other related issues to the package of criteria. To involve ICTY cooperation as one of the main political preconditions meant that the EU linked the issue to the already established criteria of democracy, human rights and rule of law. "Arguably, sheltering war crimes suspects from prosecution at the ICTY and domestic courts does not demonstrate commitment to the rule of law on the part of any country."[6] Indeed, this standpoint has been confirmed by documents of the European Council and other EU institutions which defined collaboration with the tribunal as crucial to the consolidation of democracy and the rule of law: "Full co-operation with ICTY is also essential for the consolidation, in all countries concerned, of well functioning democratic institutions."[7]

This standpoint of the Union was incorporated into the SAP with all of the three countries, mainly concerned with the ICTY. Talks with the countries and signing a Stabilization and Association Agreement was conditioned by the criteria of the SAP set out in 1997. In the specific progress reports assessing the countries cooperation with the Hague Tribunal was always analysed and included into the statement. The progress report for Bosnia and Herzegovina from 2005 stated that the cooperation with the ICTY had seen improvements, especially as a result of international pressure. "However, further efforts should be made to achieve full co-operation with the Tribunal so that all indictees be brought to justice."[8] Regarding other transitional

justice approaches the War Crimes Chamber in Sarajevo was mentioned as part of the cooperation with the tribunal. Under regional issues and international obligation also the Srebrenica Commission and the return of refugees was taken into account when assessing the progress of the country. Similarly, the 2005 progress report for Serbia (and Montenegro) was stating that the state-federation made progress in regard to ICTY cooperation and mentioned that on that basis the SA Agreement talks were opened on 10th of October 2005. As in the report on Bosnia and Herzegovina also local trials were mentioned, yet, again their work was not critically assessed and only pointed out in regard to the transfer of cases from the tribunal. Other transitional justice approaches were not taken into account.[9]

In comparison to its neighbouring countries, Croatia already signed the SA Agreement with the EU and received the status of a candidate country. The decision of the European Council to accept Croatia as a candidate country was taken already in December 2004 and included the provision that the country needs to fully cooperate with the Tribunal. But as the confirmation of full cooperation was not given by the ICTY, the EU decided to cancel accession negotiations. "(...) in the absence of confirmation of the (...) full cooperation, the General Affairs and External Relations Council (GAERC) of 16 March 2005 decided to postpone the opening of accession negotiations (...)."[10] The postponing of accession negotiations was based on the fact that General Ante Gotovina was still at large. When he was finally arrested in December 2005 negotiation talks were reopened. The progress from 2005 also revisited crucial issues of transitional justice as the development of war crime trials and refugee return. Opposite to the report on Bosnia and Herzegovina or Serbia, the report on war crime trials in Croatia is including the problem of ethnic bias. The vagueness

of the political criteria set out in Copenhagen and in the SAP conditions is filled with content the rule of law and other basic political principles of the Union in the progress reports.

The EU's interpretation of the cooperation with the ICTY as essential to the consolidation of a country is based on the consideration that the application of criminal justice may break with the injustice of the past and help to re-establish the rule of law. This perception of international criminal law is reflected in the self-representation of the Hague Tribunal[11] and has been adopted by other UN organs and also the EU. Indeed, as discussed in the first chapter, the application of (international) criminal justice can help to restore the rule of law and thereby lay the grounds for a functioning democracy. It is in fact the task of transitional justice to make sure that rule of law is established as a first step of the transition. In turn the assurance of rule of law gives the transitional justice approach its legitimacy. It is a twofold relationship in which the two elements are tied up closely to each other. As mentioned before international criminal justice provides the possibility to facilitate a basic legal system to which a post-conflict society can rely on. "An essential requirement for the rule of law is that justice needs to rely on legal rules. In other words, the law must provide rule on which decisions are based. Also international instruments appropriately ratified or acceded to by a State in accordance with its domestic lay provide for legal rules. As a matter of post-conflict situations international law can provide for an important - or only - source of rules which is in accordance with the rule of law."[12]

However, the rule of law and the application of law in transition are in general specific to its situation, namely the transition or post-conflict society, as set out in the first chapter. Therefore transitional justice trials must also be held very cautious in accordance with legal rules. In order to re-establish the

rule of law the transitional justice approach has to fulfil several prerequisites, namely: the comprehensiveness, lucidity, accessibility and legitimacy of law, as well as equality before the law, institutional independence and the assurance of legal rights.[13] In applying criminal justice as transitional justice approach these prerequisites need to be fulfilled in order to legitimize the trials themselves and neutralize critique in the background of the fact that transitional justice is always a political decision. "For trials to realize their constructive potential they need to be prosecuted in keeping with the full legality associated with working democracies during ordinary times. Must be fair otherwise they can backfire. They walk a thin line between the fulfilment of the potential for a renewed adherence to the rule of law and the risk of perpetuating political justice."[14]

On the grounds of its political criteria of the rule of law, it is understandable that the EU chose to include ICTY-cooperation as a precondition for accession since the aim of the ICTY is to restore the rule of law in the Former Yugoslavia. However, the EU put itself also in the position to be the main political power behind the ICTY and therefore, also has to face the dilemma of transitional justice connected to this. Together with the ICTY the EU now walks the thin line between the re-establishment of the rule of law and the perpetration of political justice in the region or rather the accusation of perpetrating political justice. This fact was reflected especially in nationalist discourses in the region where the EU was attacked as an unfair and patronising power.

An obvious example were the discussions on EU-accession in Croatia during the 1990s, but especially after the Tuđman regime in which the main parties tried to position themselves between the strong and prevailing post-war national consciousness and a pro-EU policies. Similarly as in the 1990s the

EU and pro EU-policies were criticized by nationalist media regarding the fact that Croatia needed to enter the Union via The Hague, whereby Germany or Italy never had to face a similar precondition.[15] On these grounds the EU was criticized as an unreliable and hypocritical authority which seemingly used its power with double standards. Although the two governments after the fall of the Tuđman regime implemented pro-European policies, they were strongly attacked by associations of war veterans when it came to the extradition of war criminals to the ICTY. The peak of the nationalist discourse was reached during the pressure of the Union to extradite General Ante Gotovina to The Hague. Against the background of the implied dissimulation, blackmailing and inequity which the transfer of Gotovina to The Hague was demonstrating and the EU was blamed of, the competence and credibility of the EU and the ICTY as instances which decide upon Europeanisation and EU-accession, was strongly undermined.[16]

Differently than in Croatia the elites in Serbia only slowly started to proclaim officially EU cooperation as a desirable goal for the country. Whereby in Croatia the official policies of the parties are all more or less pro-European, the situation in Serbia was determined by strong scepticism in different spheres of the political level. The politics after the fall of the Milošević regime where characterized by traditional versus reformist standpoints which exploited the question of European integration for the battle of political power.[17] In comparison to the reformist approach which generally welcomed and supported Europeanisation, the traditional parties, especially rejected the forced cooperation with the Hague Tribunal. Under reference to the myth of Serbian victimhood the legitimacy of the UN-Tribunal is neglected in order to obtain privileges and positions of power.[18] The EU-ICTY cooperation is used as source of political

argumentation to support the myth of Serbian victim hood and nationalism, as well as the illegitimacy of the Tribunal and the Union itself.

The accusation of specifically nationalist elites towards the EU as a patronizing and hypocrite power with double standards on the issue of war crime trials reflects the antagonism of an external power or institution attempting to promote transitional justice approaches. But that the Union is not absolute in its precondition of ICTY membership was shown by the fact that in opposite to the case of Ante Gotovina, SAP talks with Serbia were continued in April 2005 despite the negative evaluation by the ICTY.[19] In the following months Serbia addressed the EU with a plan to catch the war criminals Ratko Mladić and Radovan Karadžić and continued talks with the Union. This fact demonstrates the broad space for interpretation and political manoeuvring which EU conditionality leaves in the context of transitional justice. Although, the EU is the main and strongest political power behind the ICTY it is still a power with its own objectives and goals in the region and we may observe a liability to vague legal conditions which are interpreted politically depending on the specific situation and background.

By including ICTY-cooperation as a precondition to EU membership the Union is assisting the Tribunal fundamentally in fulfilling its mandate of bringing the most responsible for crimes committed in the Yugoslav wars of the 1990s to justice. Since its establishment the ICTY's work always suffered from the difficulty in arresting suspects and extraditing them to The Hague. The judicial power of the Tribunal was lacking an executive and political power which may insure the fulfilment of the court's provisions and jurisprudence as a senior official of the ICTY stated: "It was only when the formal judicial power was complemented by a de facto political power that the Tribunal could begin contemplating a successful achievement of its mandate. The pressure of the European Union and the United States eventually moved Croatia and Serbia and Montenegro to work closely with the Tribunal on the transfer of indictees and on access to documents and witnesses."[20] The help the ICTY got from the Union is especially crucial in regard to its completion strategy as the time left to achieve the extradition of the main war criminals who are still at large is limited and only political power may help to compete its goals. However, the EU conditionality is focusing mainly on the tribunal an instrument of transitional justice. But as it leaves space to interpretation of its conditions, the EU in the future could also contribute to other transitional justice approaches by promoting and fostering them in its conditionality regarding the rule of law, human rights and minority rights. This would be especially important in the face of the relative failure and lack of political will and leadership of the EU and the international community to prevent or stop the wars in the Former Yugoslavia.[21]

Notes

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CONCLUSION

This analysis was motivated by the discussions surrounding the work of the Hague Tribunal and its cooperation with the EU. As the first international *ad-hoc* tribunal, the ICTY has been facing a lot of challenges ever since its establishment, a main one among them being the scepticism towards the court in the region which did not seem to be countered by its cooperation with the Union. On the grounds of these considerations the leading question of the examination was how and if the ICTY is a successful means of transitional justice. In order to answer this question, we had to look at transitional justice and at the various theories conceptualizing its forms and outcomes so as to determine with which specific issues justice in periods of societal flux is faced with. The term transitional justice encompasses different approaches which societies establish to face a violent past and deal with the legacies of human rights abuses. It begins by rejecting the illegal regime and moves towards a more liberal democratic system. The ordinary function of justice to uphold order and stability is broadened in periods of transition. In time of societal change justice additionally legitimizes the transformation and builds the foundation of a new democratic system. Hence, its application is motivated by the political goal of a new system. The choice of which form of transitional justice is applied is therefore also a political one which needs take into account the specific context of the case. As one instrument of transitional justice can only address one part of the violent past it may be helpful to find different forms of transitional justice which complement each other in trying in re-establishing the rule of law and democracy.

The ICTY was set up in 1993 by the UN-Security Council as a reaction to the large-scale human rights abuses in the wars in Former Yugoslavia. Its establishment was accompanied by criticism towards the international community that stood accused of failing to prevent or stop the war by military or diplomatic means. The lack of political and financial will to support this attempt of the international community to prevent human rights violations was also obvious in the first years of the tribunals work. This problem was especially reflected in the difficulty of the ICTY to bring perpetrators to justice respectively to the court in The Hague as it lacked political and military assistance of the international community. The result of it was that in the first year of its existence only mid-level perpetrators were brought to the tribunal and criticism of the ineffectiveness of the tribunal was rising. Scepticism and criticism towards The Hague was also caused by the fact that the tribunal only established an outreach programme in the end of the 1990s, which finally started to translate the legal documents into the local languages, provided media monitoring and organized visits to the court in order to compensate its distant physical location. Although the scepticism towards the tribunal in the region has decreased in the last years, discontent with its work is still persisting through accusations of ethnic-bias or infectivity, which of course has

negative influence on the legitimacy of the court as the only transitional justice mechanism applied.

Due to the completion strategy of the tribunal the acceptance of additional and complementary mechanisms of transitional justice has risen at the ICTY. In the course of its limited timeframe the court started to transfer cases from The Hague to domestic courts in the region and did not oppose the idea of the establishment of a truth and reconciliation commission anymore. However, domestic war crime trials in the region suffer from ethnic bias and a lack of investigative rigour. A truth commission has not been established and official reports which were concerned with truth-seeking regarding past happenings were tainted by political influence. Taking into account these facts, the ICTY may be described as an international attempt to transitional justice in the region which was the only one possible after the end of the wars in the Former Yugoslavia. The international position helped to compensate the impossibility of establishing a similar court in the region and thereby offered a way to take first steps of transitional justice for the Former Yugoslavia. However, these efforts were partially undermined by the fact that the ICTY lacked political and military power behind itself which resulted in the main problem of the court, namely, the difficulty of arresting war crimes suspects. Lack of acceptance in the region as a result of the physical - and as it is an international court also psychologically - distant position of the tribunal was underpinned by the incoherent policy of the international community to establish an ad-hoc tribunal without providing it with political and military assistance. The ICTY can be described as a partially successful mechanism of transitional justice which laid grounds for establishing truth about the happenings in the wars; however, it struggled with the main dilemma of transitional justice, namely, the politicization of the

process. Additionally, the ICTY was for a long time the only transitional justice approach in the region and although it was maybe too early for any other mechanisms, the need for a comprehensive and complementary approach of different instruments of transitional justice became obvious especially due to the completion strategy of the tribunal.

Parallel to the question of the ICTY and its potential as a means of transitional justice the analysis also looked at how the political assistance of the EU may help to overcome the shortcomings of the ICTY. Political conditionality of the Union developed as a way to compensate the main problem of the Hague Tribunal, namely, the arrest of the leading war crimes suspects. Based on the Copenhagen Criteria and the conditions out for the Stabilization and Association Process the Union pressed for full commitment to the ICTY if a country in the region wanted to start negotiations with the organisation. This, on the one hand, resulted in the fact that suspects who were at large were finally brought to The Hague and, on the other side, it gave new grounds to accusations and criticism towards the tribunal and the EU itself as illegitimate and hypocrite institutions. The political, economic and legal criteria for EU membership set out by the Union stay very broad in their wording and do not offer guidelines for transitional justice approaches. Respectively they might even be co-productive to the process and specificities of transitional justice. The vagueness of the criteria is filled with content by the Union depending on the context and the situation of negotiations. Regarding transitional justice this was primarily focussing on the cooperation with the ICTY, although, also this criteria was not applied absolutely. Therefore, the cooperation between the Union and the ad-hoc tribunal is compensating the lack of political power behind the tribunal while increasing the dilemma of politicization of the transitional justice

process and through its vagueness does not offer a framework for a comprehensive approach in fostering transitional justice in the Former Yugoslavia.

However, promoting a comprehensive transitional justice approach is generally needed. After the ethnic conflicts in the region it is the challenge for transitional justice to paint a relatively unitary picture of the past and a historical account which is presenting all sides. In the first place, this means cross-border approaches of transitional justice instruments and although the EU cannot play the main role in establishing these, it may support and finance such. Furthermore, already established transitional justice mechanisms like domestic war crime trials must be continuously monitored and financed as demanded by NGOs in the region. In addition, the question remains what will happen with all the information and documents gathered by the ICTY and how the EU may contribute and foster sociological and historical analysis of these files. Without patronizing the transitional justice process in Former Yugoslavia there remains lots of possibilities for the EU to support a comprehensive and regional transitional justice approach and in the Unions own interest these should be analysed and elaborated beyond ICTY-cooperation in order to stabilize the democratisation and accession process in the region.

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