

Transitional justice: a European perspective

María Avello
International consultant,
EU law and human rights

The concept of transitional justice is used to encompass a group of proceedings of a judicial or other nature that are carried out in societies undergoing a transition to democracy. It generally includes efforts to reconcile and bring justice in cases of human rights violations which occurred during the previous regime, thus facilitating a stable and lasting peace. The scope of possible action is broad and non-exclusive, since each society is free to choose how to deal with its past. The evolution of the concept and the most recent cases show that a combination of actions is often necessary. Europe - at the levels of both the European Union and individual member states - has been participating in the development of transitional justice for some time, although it still has no clear policy for action in this respect. Several actors and various lines of funding seem to indicate an increasing interest in transitional justice in post-conflict situations. This will require efforts to conceptualise and integrate this notion into the policies of the EU and of the member states themselves.

Transitional justice: a contemporary concept

It is possible that throughout history there have been cases of transitional justice¹ (for example in Athens in 404 BC. and in 411 during the democratic restoration), but the proceedings of Nuremberg and Tokyo at the end of the Second World War are usually cited as the origin of the current concept of transitional justice.² Subsequently, the trials of former members of the military juntas in Greece and Argentina in the 1980s contributed to the development of the idea of transitional justice. This was justified on the grounds of a universal conception of human rights which was mainly oriented towards the victims and “bringing justice”.

In the 1990s there was a change in this concept, from being a strictly legal issue to being considered a key aspect in democratisation processes. This allowed for the expansion of the concept of transitional justice, adding new instruments such as the truth commissions (in Argentina, Chile and South Africa, amongst others). In addition, the creation of international courts to deal with violations which occurred during the wars in the Balkans and Rwanda has led to the inclusion of international law in the field of transitional justice.³ And finally, the peace processes that have taken place since the mid-1990s, and continue to take place, consider transitional justice as a key aspect in peacebuilding and peacekeeping.

¹ Elster, Jon (2004). *Closing the Books: Transitional Justice in Historical Perspective*, Cambridge, UK: Cambridge University Press.

² *The Encyclopaedia of Genocide and Crimes Against Humanity*, USA: Macmillan Reference, 2004, vol. 3, pp. 1045-1047.

³ Leebaw, Bronwyn. “Transitional Justice, Conflict and Democratic Change: International interventions and domestic reconciliation”, 2005. <http://www.apsanet.org/imgtest/TaskForceDiffIneqLeebaw.pdf>

In a report to the Security Council,⁴ the United Nations (UN) Secretary General recommends an understanding of transitional justice that includes multiple approaches which are integrated and complementary. Contemplating judicial measures alone in a post-conflict situation may have an effect contrary to that which is intended and may prevent the achievement of peace and stability for the entire territory.

The concept of “transitional justice” generally refers to judicial and other strategies that are adopted in states where serious human rights violations have occurred, with the aim of achieving reconciliation and justice between the various parties and guaranteeing the development of a democratic society and lasting peace.

The different strategies can be grouped into different categories, according to the desired aims: justice, truth, rehabilitation of victims, institutional reform, memory or oblivion.⁵ Hence, the following are amongst the principal measures that are often adopted in the pursuit of transitional justice:⁶

- * Judicial proceedings, in national, international or special courts (with national and international legal experts), as well as transitional justice mechanisms - civil and criminal proceedings in foreign courts;
- * Traditional justice mechanisms (such as the so-called “Gacaca” courts in Rwanda, with a solid basis on the recognition of fault and the search for forgiveness in order to facilitate social reconciliation);
- * Truth commissions;
- * Background checks within the public administration (vetting);⁷
- * Reparations;
- * Amnesty;
- * Monuments and celebrations; and
- * Disarmament, demobilisation, and reintegration (DDR).

Europe, having been the place where the Nuremberg trials took place, and to a certain extent, where contemporary transitional justice originated, does not stay away from current initiatives to fight impunity. It promotes and encourages the use of the different strategies that can be adopted under the banner of transitional justice in states where the right to and respect for human life did not exist at all, or at least impartially. Even though each society should choose how to integrate a past of human rights violations, from the perspective of the EU and the Common Foreign and Security Policy (CFSP) this factor should always be taken into account as a key element to be integrated into its strategy of conflict resolution and prevention. Therefore, this paper will focus on transitional justice within the framework of the EU and its member states.

⁴ United Nations, Security Council, *The Rule of law and transitional justice in conflict and post-conflict societies*, S/2004/616.

⁵ Gloppen, Siri, “Reconciliation and Democratisation: Outlining the Research Field”, Chr. Michelsen Institute, *Development Studies and Human Rights*, 2002, <http://www.cmi.no/publications/file/?781=reconciliation-and-democratisation>

⁶ Op. Cit., Leebaw, 2005.

⁷ United Nations, *Rule of Law tools for post-conflict states*. Vetting: an operational framework, New York and Geneva, 2006. “Vetting” is defined as the assessment of the integrity of public officers with the aim of determining whether they meet the necessary conditions to be a part of state institutions. Integrity refers to the level of compliance of the employee with international human rights principles, as well as his/her professional behaviour.

What does the EU understand by transitional justice?

One might answer this question by saying that currently there is no clear definition of what is considered transitional justice. However, the institutional complexity of the EU and of how member states act within or outside its framework prevents affirming that, in the case of transitional justice, the lack of clear concepts implies a lack of action. The EU's foundational treaties⁸ do not refer to transitional justice as an aspect to be developed within the different policies of the European Union. They simply establish a general action framework in which transitional justice is presumably another aspect to be developed within policies that affect third countries, such as the development policy or the CFSP. It could also be included in the EU domestic policies, particularly those relating to justice and the interior.

Policies towards third countries

With regards to development policy, the EU foundational texts do not expressly mention transitional justice as an aspect to be considered. Nonetheless, in subsequent basic regulations relating to the funding of some key aspects of development policy, transitional justice⁹ is specifically included as an aspect of the promotion of democracy and human rights. The European Commission is responsible for implementing the development cooperation policy and, consequently, for effective execution of programmes that include transitional justice as one of the instruments to be used.

The **Common Foreign and Security Policy**¹⁰ also has the objective of promoting democracy and human rights. Although in this case it is the Council, an inter-governmental body, which defines the fields of action, including matters relating to transitional justice. In this respect, two main lines of action could be identified:

(1) Direct support for International Criminal Justice, through a series of framework decisions and guidelines which encompass commitments in favour of the fight against impunity within the framework of the CFSP.¹¹ One of the most important of these is the EU-International Criminal Court Cooperation and Assistance Agreement,¹² of 10 April 2006.¹³

It seems that in this field the CFSP and the development policy are complementary: on the one hand, the Council has legal personnel in charge of ensuring compliance with the Agreement; and on the other hand, the Commission funds the Court, although its programme is broader and includes funding of other international courts. This de facto partnership does not always

⁸ Article 177.2 of the Treaty on European Union specifies that the policy of the European Community in the area of development cooperation will contribute to the general objective of democracy and the rule of law, as well as the objective of respect for human rights and fundamental liberties. Article 11.1 of the Treaty on European Union, the legal basis of the development of the Common Foreign and Security Policy (CFSP), also establishes that one of the general objectives of the CFSP is the development and consolidation of democracy and the rule of law, as well as respect for human rights and fundamental liberties. This objective is complemented by Article 17.2 of the Treaty, which describes the content of the CFSP, including "humanitarian and rescue missions, peacekeeping missions, and missions where combat forces intervene in crisis management, including peace re-establishing missions". This last aspect is relevant to the issue of transitional justice given that it is usually exercised within the first phase in states in crisis situations or in a period of peace re-establishment.

⁹ On the one hand, regulation 1889/2006 of the European Parliament and the Council of 20 December 2006 establishing a financial instrument for the promotion of democracy and human rights in the world; and on the other hand, regulation of the European Parliament and the Council of 15 November 2006 establishing a Stability Instrument.

¹⁰ European Security Strategy.

¹¹ Other decisions refer to: 1) Decision 11 (2003/335/JHA) of 8 May 2003 for the investigation and prosecution of the crime of genocide, crimes against humanity and war crimes; 2) Guidelines for the promotion of International Humanitarian Law or guidelines on torture and other cruel, inhuman or degrading treatment.

¹² Official Journal, 28.4.2006, L 115/50-56, http://eurlex.europa.eu/LexUriServ/site/en/oj/2006/l_115/l_11520060428en00500056.pdf

¹³ Previous steps include the Council Common Position on the International Criminal Court, 2003/444/PESC, of June 2003, and the 2004 Action Plan.

manage to function in the pursuit of common objectives, given the tensions that arise, especially considering that funds come from a supra-national body and policy guidelines are still in the hands of member states.¹⁴

(2) CFSP stability and peacekeeping missions, known as “Petersberg Missions”,¹⁵ humanitarian or rescue missions, peacekeeping missions, or crisis management missions where combat forces intervene, including missions to re-establish peace. The missions carried out so far have been within the framework of the European Security and Defence Policy (ESDP), as part of its crisis response aspect. It is noteworthy that the mandates for each mission have as their main objective to contribute to the establishment of peace and stability in a determined area by supporting the creation of democratic police forces – a very important aspect of the rule of law.¹⁶

Police components take priority over judicial components or those relating to the rule of law. However, a growing tendency towards conferring more importance on issues of a judicial nature or relating to the “rule of law” can be observed. In principle, only two missions have focussed on the “rule of law”, and none contains transitional justice components. This is the case of EUJUST THEMIS (Georgia) – already finished –, to advise Georgian authorities on the reform of the criminal system, and EUJUST LEX, whose mandate will possibly be renewed until 2008 and which has the objective of training Iraqi official personnel on crime management and investigation, mainly through courses taught in Brussels.

The question remains of how transitional justice issues will be dealt with in Kosovo, where the EU will deploy the largest mission within the ESDP. From the steps taken thus far it can be concluded that the mission will be oriented principally towards supporting the establishment of the rule of law in Kosovo, with 1,800 troops – police and judicial – deployed. However, it does not look like transitional justice strategies will be followed beyond those within the framework of support for the International Criminal Court’s work in the former Yugoslavia.¹⁷

In the political context of the province, the priority for Albanian-Kosovars is to achieve independence and avoid throwing any light on the possible human rights violations that occurred during the conflict. Proof of this can be found in the fact that no mechanism has been created to deal with the issue, even though the establishment of a court with that end was contemplated at the beginning of the UN mission in Kosovo.¹⁸ With regard to the possibility of independence, initially supervised by the international community, the EU could consider the use of some transitional justice strategies that could serve as a basis for reconciliation between the Albanian majority and the Serbian minority, especially as a guarantee for the latter. In this sense, the use of the principle of co-location¹⁹ of international judges, positioned together with Albanian-Kosovar or Serbian-Kosovar judges, could clearly contribute to addressing sensitive cases, thereby allowing for the development of transitional justice actions.

Even though the missions already carried out and those that currently exist within the ESDP framework do not include strictly transitional justice strategies, these have been concretely implemented on the ground by means of arresting people prosecuted by international courts, advising on the reform of the interior sector and on vetting processes within the Public Administration. It is obvious that the mandates of the missions within the framework of the

¹⁴Telephone interview by the author with a European Council officer.

¹⁵Article 17, Treaty on European Union, see “Basic Legal Framework”, p.3.

¹⁶Joint Actions are the legal instruments that confer legal status to each one of the missions within the framework of the ESDP. The joint actions of each mission are available at: http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=268&lang=EN&m ode=g

¹⁷Telephone interview by the author with a member of the EU planning team, June 2007.

¹⁸Based on the author’s personal experience, United Nations Mission in Kosovo in 1999/2000.

¹⁹According to this principle, an international and a local judge would be assigned, the former in charge of guiding and advising local judges but without substituting them in their responsibilities. This way of working was used in other EU missions under the CFSP framework, such as EUPOL-PROXIMA, in the former Yugoslav Republic of Macedonia.

ESDP have to be very broad and flexible in order to be accepted by the recipient country, and that the term transitional justice could turn out to be “not diplomatic enough”. To use the various existing instruments in this field in order to include them as a concrete strategy on the ground implies being sophisticated with regard to terminology. In this sense, it seems that since mid-2006 some steps have been taken towards the development and the introduction of transitional justice aspects in the framework of ESDP missions. It is too early to know whether this will prove effective, but the Political and Security Committee (PSC)²⁰ held a seminar on this issue that resulted in the drafting of a document on transitional justice suggesting how to include transitional justice in the context of the ESDP.²¹

In this respect, it is worth noting that references are made to specific areas of implementation and development of transitional justice aspects with regards to the planning of ESDP missions as well as the training of personnel and the support of peace processes. In principle, it seems that the step from theory - inclusion in the texts - to practise is not being taken in the two missions currently under construction - Kosovo and Afghanistan. Transitional justice measures can be observed in the absence of a previous strategic framework. Given that the EU is a world actor and that it participates in peace processes, it would be important to take into account the possibility of encouraging transitional justice processes in the places of intervention, from a strategic and analytical perspective facilitating a posteriori the achievement of the objectives of each mission it deploys.

EU domestic policies

Transitional justice should not only be considered within the framework of EU foreign interventions. Fighting against impunity, as the basis for a stable and lasting peace, or pursuing social reconciliation are objectives that could be included in the policies developed within the framework of justice and interior issues in the EU. However, the **Hague Programme** for strengthening freedom, security and justice in the EU does not mention international criminal justice, currently a key aspect of the different strategies included under the transitional justice concept.

Why this vacuum? It can only be explained by the lack of a clear concept of transitional justice that could be used in the different EU policies. Once again, the way in which the European political identity advances can be observed: small steps taken in order to avoid provoking national sensibilities and to appease the wishes of some member states that don't want to hand over interior or justice competencies at supra-national levels.

Nonetheless, within justice and interior policies there are important measures that facilitate the exercise of international criminal justice, an issue which has more and more advocates on the European continent as well as further afield. This is demonstrated by the recent extradition of Alberto Fujimori from Chile and the subsequent legal proceedings that continue to unfold in Peru.²²

This new tendency can also be seen in the establishment of a **European Contact Network** for the exchange of information regarding individuals responsible for acts of genocide, crimes against humanity and war crimes.²³ Along the same lines is the so-called **European Arrest Warrant**,²⁴ which has the overarching objective of facilitating classic extradition procedures among member states. The EAW has also benefited the exercise of the principle of universal jurisdiction, although the latter was not an end in itself, but rather a result of the improved internal functioning of European justice.

²⁰ <http://europa.eu/scadplus/leg/es/lvb/r00005.htm>

²¹ Council of the EU, 10674/06, 19 June 2006.

²² Reed Brody, *El País*, 30 September 2007.

²³ European Council, 2002/494/JHA, of 13 June 2002.

²⁴ 2002/584/JHA, Official Journal L 190, 18/07/2002 P. 0001 - 0020

It is clear that these advances are not in themselves sufficient to combat impunity. It will be interesting to see if in the near future the EU uses the reform of the Hague Programme in order to turn the fight against impunity in cases of grave international crimes into a key aspect in the creation of the European Justice Space.²⁵ It would be little more than a coherence and complementarity exercise to match its clear support for the International Criminal Court and human rights.

The role of member states

EU membership does not prevent some of the states most involved in conflict resolution and prevention issues from taking the initiative in this area. On the contrary: on several occasions they have been the basis for the development of initiatives at the level of the EU. In addition, increasing interest can be observed with regards to transitional justice in the different initiatives.

On the one hand, increasingly frequent exercise of the principle of universal jurisdiction by national courts can be observed. This was almost unknown until the Pinochet case in 1998. This being an exceptional jurisdiction, only applicable to grave human rights violations or crimes against humanity, it has been used by at least 7 European states - including Switzerland - in recent years.²⁶ This does not imply a previously designed strategy for transitional justice, but simply the fact that each state uses existing international and European legislation through its national courts of justice.

On the other hand, there are a series of initiatives within the framework of strategies for conflict prevention and peacekeeping, which are sometimes taken together with development issues. These tend to consider transitional justice as a broad concept which includes judicial and non-judicial strategies. They are, however, scarce and not explicitly directed at developing transitional justice as part of these strategies. In the case of England,²⁷ the UK Department for International Development (DFID) as well as the Foreign and Commonwealth Office implement links between "security and development" and "security and human rights", according key importance to the reconstruction of judicial systems, where there is room for transitional justice elements. More explicitly, Norway²⁸ mentions the need to include transitional justice elements in peacekeeping processes through judicial and non-judicial measures.

Although not an EU member state, it is worth highlighting the case of Switzerland. The country, which has developed this concept more than most of its neighbours, has a unit within the Ministry of Foreign Affairs in charge of disseminating and supporting the implementation of transitional justice measures in peace processes. In its intervention strategy, Switzerland grants relevance to non-judicial measures such as those oriented towards facilitating processes of negotiation and dialogue between parties and advising local actors on transitional justice and its relevance to the peace process. Due to the structure of contents and the approach, Switzerland could serve as an example of how European states should work in this area.

Crises response measures require the availability of instruments that can be deployed in an easy and rapid manner. In the case of transitional justice there are hardly any instruments of this type. Hence the great interest in the so-called Justice Rapid Response initiative, carried out by a group of European states - Sweden, Finland, Germany, Liechtenstein, Switzerland and England - as well as the EU and Canada. Justice Rapid Response intends to develop a rapid response

²⁵ *Fostering a European approach to accountability for genocide, crimes against humanity, war crimes and torture. Extraterritorial Jurisdiction and the European Union*, Final Report, April 2007, http://www.fidh.org/IMG/pdf/FINAL_FIDH-REDRESS_REPORT.pdf

²⁶ See Council of the EU, 10674/06, 19 June 2006, p. 15.

²⁷ The Global Conflict Prevention Tool, <http://www.dfid.gov.uk/pubs/files/global-conflict-prevention-pool.pdf>

²⁸ *Peacebuilding: a development perspective*, <http://www.regjeringen.no/upload/kilde/ud/bro/2004/0012/ddd/pdfv/221493-peace-engelsk.pdf>

capacity in the field of justice support. This mechanism would serve to provide specialised personnel and other resources to support the gathering and maintenance of information relating to allegations of genocide, war crimes and crimes against humanity.²⁹ This would prevent the loss of evidence of such crimes and facilitate a posteriori victims' access to justice. Once again, this is a concept under construction in the field of transitional justice.

Consequently, the policies of the different European states are not very explicit with regards to transitional justice in its different variables. Meanwhile, states continue to promote seminars, conferences and debates - some very recently³⁰ - that appear to set the scene for further development. Let us hope that meaningful developments will follow, with experienced actors capable of making a difference in the pursuit of peace and justice in transitional states.

Some recommendations

Transitional justice, applied from domestic and international courts, as well as through other measures that seek to bring stability to a society on the road to peace and democracy, has to be understood as part of a political process. This implies that transitional justice does not consist of an isolated strategy, but is part of a group of measures within the overarching objective of building stable, peaceful, democratic societies.

It is thus important that Europe, at the level of the EU as well as at the level of member states, understands the relevance of taking this concept into account in conflict resolution and prevention, ensuring that there are precise measures to prosecute grave human rights violations. The following are some ideas that may serve towards this end:

- * The EU should define and integrate transitional justice in the key texts of its development policy and within the CFSP in a coherent and complementary manner;
- * The Council should put into practise the existing recommendations with regards to transitional justice, especially within the framework of the ESDP missions, be they in Kosovo or Afghanistan or other places where a realistic transitional justice strategy could be an important element of processes of peace and national reconciliation;
- * The European justice and security space has to include the fight against impunity in cases of grave international crimes as one of its basic components, including it as one of the objectives of the Hague Programme;
- * European states have the responsibility to define valid instruments to achieve and maintain peace, complementing existing measures within the EU. The establishment of a network of contact points on transitional justice at the level of the Ministry of Foreign Affairs and Cooperation could serve to channel existing initiatives and advance future ones.

²⁹ Justice Rapid Response, meeting in New York, March 2007.

³⁰ This is the case of conferences held in Norway, Switzerland and Germany on transitional justice in different contexts. It is worth highlighting the conference "Truth and Reconciliation Processes" held in Norway in April 2007; the conference "Justice and Peace" held in June 2007 in Germany, more precisely in Nüremberg.

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Fundación para las Relaciones Internacionales y el Diálogo Exterior
C/ Goya, 5-7 pasaje 2ª - 28001 Madrid - Telf: 91 244 47 40 - Fax: 91 244 47 41 - E-mail : fride@fride.org
www.fride.org