Justice and Law in Post-Conflict Societies? — European Experiences and Perspectives

Contributions and discussions from the Autumn Talks Conference, devoted to the issue of transitional justice in the context of conflict resolution in eastern Ukraine

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1. Selected Contributions

1.1. Ralf Possekel – Transitional justice – a contribution to a lasting peace in eastern Ukraine?

The concept of transitional justice arose in the 1990s as a response to the disintegration of authoritarian regimes and dictatorships in Latin America, Africa and Central and Eastern Europe. The fundamental conviction behind this concept is that such radical changes do not represent a “zero” hour, but rather that the past will also shape the future. In particular, this concerns trust in social order, which has been destroyed rather than the past will also shape the future. In particular, the observance of constitutional procedures as well as excluding the possibility of constitutional procedures being politically abused to obtain impunity. Principles, or rules, were formulated for the following areas:

1. The right to know
2. The right to justice
3. The right to reparation

The right to reparation also included three preventive measures, which were summarised as “guarantees of non-recurrence”: the disbanding of paramilitary groups; the repeal of martial law and the dismissal of senior officials responsible for serious human rights violations. Joint originally formulated a total of 42 principles for an effective enforcement of these rights. The principles were re-considered in 2005 in an expert report to the UN Commission on Human Rights prepared by Diane Orentlicher. The new report listed 38 principles, updated based on experiences from the past 15 years. Orentlicher’s report formulated detailed regulations for individual areas, which are intended to ensure the enforcement of victims’ rights and, at the same time, the observance of constitutional procedures as well as excluding the possibility of constitutional procedures being politically abused to obtain impunity. Principles, or rules, were formulated for the following areas:

1. The right to know (Principles 2-18): Setting up and operating investigative and/or truth commissions; preserving archives and ensuring access to them;
2. The right to justice (Principles 19-30): Questions of collaboration between national, foreign, international or hybrid courts; legal measures to prevent impunity;
3. The right to reparation (Principles 31-38): A. Rights and obligations; reparation procedures; publication requirements; scope of this right (Principles 31-34); B. Guarantees of non-recurrence: reform of state institutions; disarmament and demobilisation of paramilitary units; social reintegration of children; reform of legislation to preclude impunity (Principles 35-38).

Overall, it is a package of elaborated legal and non-legal measures. In this context, on the one hand, international and hybrid tribunals have gained a special importance, as have, on the other hand, so-called “truth commissions” as a non-legal means of dealing with the past.

For situations where no change of power has yet taken place, or where there is no peace agreement, it makes sense to place the concept of transitional justice into a broader framework focused on non-violent conflict resolution rather than on the victim rights.

In this broadened focus, various interdependent fundamental processes can be identified, which can strengthen, or hinder each other, being subject to their own dynamics, not taking place simultaneously, and having different stakeholders. Some processes essentially depend on state actions, others can be significantly advanced by civil society. The victim-perpetrator relationship is important, but not the sole focus. Victims and perpetrators are mostly a minority in society and thus have to translate their experiences and concerns into the language of society as a whole to become understandable for “bystanders” and “supporters”.

Central and fundamental to this however is the political commitment, which must build bridges in every area, in order to be able to see the past in a light that both generates and is supported by a certain expectation for the future. When one looks at the Minsk Agreements up until now against this background, two things immediately become apparent: in the “Political Agreement” field, there is indeed a ceasefire and technical measures to ensure it, but, other than lip service, there is no explicit commitment to nonviolence and exclusively peaceful conflict management.

The place for such a political commitment would be a “peace treaty” or a comparable comprehensive agreement, which up until now has not been in sight in Ukraine. An example of a more comprehensive approach would be the so-called Mitchell Principles, which were important for the resolution of the Northern Ireland conflict.

All involved in negotiations had to affirm their commitment:

1. To democratic and exclusively peaceful means of resolving political issues;
2. To the total disarmament of all paramilitary organisations;
3. To agree that such disarmament must be verifiable to the satisfaction of an independent commission;
4. To renounce for themselves, and to oppose any effort by others, to use force, or threaten to use force, to influence the course or the outcome of all-party negotiations;
5. To agree to abide by the terms of any agreement reached in all-party negotiations and to resort to democratic and exclusively peaceful methods in trying to alter any aspect of that outcome with which they may disagree; and,
6. To urge that ‘punishment’ killings and beatings stop and to take effective steps to prevent such actions.

R. Possekel, Foundation Remembrance, Responsibility and Future (EvZ), Advisor to the Peace and Development Network – FriEnt (Bonn)
Another example of a comprehensive agreement is the Ohrid Agreement in Macedonia from 13.8.2001. There, first of all, efforts must be strengthened to find a political formula for a genuine peace process. Importantly, a political settlement must arise not only on a state level, but also on the level of civil society.

Demilitarisation, or disarmament can be successful only when other sustainable conflict management mechanisms are implemented (in the terminology of transitional justice: “guarantees of non-recurrence”). As a rule, requirements usually do not go as far as to demand full rule of law, but they do create context-related mechanisms to enable non-violent handling of conflict. The Ohrid Agreement, for example, provided for “double majors” (Badinter Principle); even more far-reaching was, for instance, approaches that refer to reaching consensus.6

Every setting that is shaped by violent conflict has very tangible effects on everyday life, whether it is checkpoints, demarcation lines, supply shortages or constraints on economic activity. Trust in a conflict transformation crucially depends on whether positive changes occur. This is outside the scope of transitional justice, but it significantly serves the purpose of transitional justice, and the individual processes associated with them. At this point, an entitlement to having all human rights violations documented can also be pursued, i.e. forming a “truth commission” can make a decisive difference when it comes to collecting information on the fates of people and the individual processes associated with them. At this point, an entitlement to having all human rights violations documented can also be pursued, i.e. forming a “discourse memory space” for all those who have experienced conflict without hierarchies. Nevertheless, there must be an awareness that such inclusive remembrance as a result of political processes cannot be automatically translated one to one into reparations or criminal prosecution. All experience shows that these two processes will never be truly comprehensive.

In this respect, it is a particular challenge to communicate knowledge of crimes to mainstream society, which often indirectly, if not directly tend to it. More than that, in times of fake news and with conspiracy theories flourishing, this is a large task in its own right. But this is the only way to generate the necessary political support for reparations and prosecution.

Yet here too, there is an opportunity for dialogue that cannot be resolved into a truth. This dialogue always gains validity usually does more to move the narrative involved in certain processes. In this respect, “investigative commissions” are probably more suitable, since by their nature they can document different perspectives. Whether they are actually listened to in society depends, on the one hand, on whether they have backing on a high-profile political level, that is, from a parliament or a head of state, and whether they consist of people of integrity from all political camps. On the other hand, it also depends on the resources available to get public attention.

Responsibility and guilt are issues that cannot be reduced from the outset to the prosecution of individual perpetrators. Thus, the “metaphysical” (Jaspers) question arises of guilt through toleration. This question is directed at mainstream society and is difficult to address. Guilt, or responsibility as result of toleration, or responsibility out of solidarity, can probably not be constructed by an institution or on a project basis, rather it is something that a society must articulate from within. Political responsibility can only be established through a political discourse. Shared political responsibility is carried by all those who through their active participation contributed to the conflict. However, this shared responsibility does not necessarily and forever mean the exclusion of this group of people from all future public positions, although it can. This question can also be shaped, and the solutions range from permanent exclusion to forgiveness as a result of an admission of guilt and its corroboration through deeds.

The question of criminal prosecution only arises in third place. Here, it is clear that any blanket ruling (such as is contained in Minsk II) to generally refrain from prosecuting runs counter to international practice developed over the past 30 years and to the stated objectives of the UN. The Secretary General formulated the following statement in 2010: “The UN cannot endorse provisions in peace agreements that preclude accountability for genocide, war crimes, crimes against humanity, and gross violations of human rights and should seek to promote peace agreements that safeguard room for accountability and transitional justice measures in the post-conflict and transitional periods.” This list is not exhaustive.

However, it is also stated that it cannot be a matter of prosecuting all human rights violations, but rather only of “grave” ones. The following are named: “torture and similar cruel, inhuman or degrading treatment; extra-judicial, summary or arbitrary executions; slavery; enforced disappearances; rape and other forms of sexual violence of comparable gravity.” This list is not exhaustive, rather it highlights the challenge that exists here of making a meaningful distinction.

It must be a question of making punishable those acts which cannot be legitimised even in the context of a violent conflict and whose prosecution is in everyone’s interests – including combatants. Specialised investigative units and criminal chambers can be a way to effectively prosecute such acts within manageable time frames. Even when prosecuting authorities in third countries play a role in this, the extent of the prosecution will depend to a large extent on whether there is a firm – documented – political will on behalf of the parties to the conflict.

The differentiated use of various transitional justice tools with a clear awareness of their limits in a more widely understood transformation process can strengthen the conflict transformation process, in which every victim-centred area is processed, which is essential for trust in social coexistence without large-scale violence.

1.2. Alexander Hug – The situation in the Donbas and possible ways to resolve it

A. Hug, former Deputy Chief of the OSCE Special Monitoring Mission in Eastern Ukraine

Dear friends,

I would like to thank the organizers for inviting me here today to contribute to the Autumn Talks 2018 on: “Justice and Law in Post-Conflict Societies? – European Experiences and Perspectives.”

I am honoured to participate alongside so many who have been dealing with the core questions of these talks. Forward looking questions, Questions of justice, of the rule of law and of dealing with the past.

As you know, in my most recent assignment, I have been dealing with questions of the then and now, through establishing facts. Facts, often misinterpreted, uncomfortable to read and for many inconvenient to digest. I may not have all answers to the important questions you are planning to discuss. As many of you here, I came to Berlin to learn and listen and to contribute to a debate which is long overdue.

Too many opportunities have been missed, too many chances have been dropped. Time is precious and the passage of time is not on the side of those who seek to end the violence sustainably and irreversibly.

Regular readers of the reports of the OSCE Special Monitoring Mission know that despite the promises made, the conflict continues unabated in eastern Ukraine – the conflict in and around Ukraine as the Organization for Security and Cooperation in Europe, the OSCE, describes the violence that continues to cause the death and injury of civilians and destroy their homes and the infrastructure they depend on.

Since the beginning of this year, the OSCE SMM has been registering more than 265,000 ceasefire violations, many of them committed with heavy weapons, weapons that should have long been withdrawn according to the Minsk agreements.

Heavy weapons, this includes tanks, mortars, and artillery including multiple launch rocket systems, have been observed over 3,200 times in violation of agreed withdrawal lines – in most cases in firing position.

The OSCE SMM observes regularly new mine fields and establishes that previously laid mines have not been removed despite several promises made to remove these indiscriminate weapons.

Despite signatures on the dotted line, this catalogue of non-compliance has led to over 210 civilian casualties in 2018 – deaths and injuries of civilians, not counting casualties among members of the Ukraine Armed Forces and armed men on the other side of the contact line.

On top of this, entire streets, suburbs, or entire villages have been destroyed, civilian infrastructure has been rendered unusable and places of work have been wiped out.

Thus, unlike in the title of this year’s autumn talks, the societies affected by the conflict and around Ukraine are not post-conflict societies in that they are still exposed to armed violence, death, injury and destruction. It is an active conflict and a sustainable resolution has yet to be found.

The main responsibility clearly lies in Moscow and Kyiv, as can not be seen in the role they took on themselves in various Minsk agreements.

Dear friends,

The question I have been asked most often in the past years by deciding, many, or often, residents of villages and cities from the harsh reality at the contact line, and the media is: “who guilty for all this suffering?”

It is interesting to note that at the same time, those who are directly affected by the continued armed violence at the contact line, but also those members of the societies in and around Ukraine indirectly affected by this conflict have, with only some exceptions, asked a clear and straightforward set of questions: “When will it end? When can we return? When will we have our lives back? Why does it not stop?”

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The main responsibility clearly lies in Moscow and Kyiv, as can not be seen in the role they took on themselves in various Minsk agreements.
Any answer to the first question, in whatever format or context the question is asked, will further polarize an already emotionally and politically charged environment. The answer to the second set of question can be only given, at least partially, by those who ask the first question.

Let me be clear, I do understand the desire by many to point the finger to one or several culprits, it is a human reaction to injustice. Undoubtedly, however, the first question is best answered through an established process, the judiciary, a process defined by law or otherwise agreed. Those who ask this question should also be willing to hold the culprits they control to account for violations of their commitments to end the violence. Asking the question only with the intention to blame others or to further fuel the conflict should be avoided.

The conflict in and around Ukraine. A conflict that is perceived very differently – a common ground on how to deal with this common experience has seemingly not yet been found. Not for 4.5 long years.

The affected societies and decision-makers speak different languages. In light of these very different questions and correlating diverse needs for answers, it appears to me that one should consider ways of combining the genuine efforts of these vaguely defined groups. Civil societies and decision makers in and around Ukraine.

How can this be achieved? Certainly, increased participation of these civil societies in decision-making and implementation of agreed measures on one hand and holding decision makers accountable on the other hand.

Participation would provide a platform, a chance for the second set of questions to be considered in negotiations for further measures or the implementation of already agreed. One question that certainly deserves more analysis is how to involve the groups of society directly or indirectly affected by the fighting in the ongoing talks about implementing these measures.

In countless operations, the OSCE facilitated the repair of critical infrastructure, enabled the delivery of humanitarian aid and improved the freedom of movement for civilians living near the contact line. All of this, despite the apparent stalemate in Minsk, despite the emotionally charged, polarized and toxic political environment.

Involving groups of the society in the process though can help because they will have a chance to deposit demands for their living conditions. It appears that addressing their needs can be a driving factor, it can be a factor that unites the sides who would otherwise not stick to agreements.

Ladies and gentlemen,

I would like to highlight another important point. The question of how to deal with the consequences of 4.5 years of fighting, thousands of injured, traumatized and killed civilians is hardly ever being asked.

The question of how to address the large-scale destruction, displacement, disempowerment and economic degradation is not on the top of the agenda of those who have promised to end this madness.

Lady and gentlemen,

There is no comprehensive mechanism, on both sides of the contact line, for reparations, compensation, or restitution for the victims of this conflict, for injuries and disabilities sustained, for families of those killed, for destruction and damage of property. These are the direct effects of hostilities and prevents or delays recovery.

The central question is the question as to when this work should start. Only when the guns have gone silent or even while the violence continues?

Yes, measures aimed at stopping the fighting and returning normality have been agreed, and not only in the various Minsk agreements.

What concerns the measures to end the fighting, the language of the Minsk agreements is clear. The promises made are straightforward: cease fire, withdraw heavy weapons beyond engagement distance (and keep them there), disengage personnel and hardware where they stand too close together. Disengagement frameworks signed by OSCE SMM speak for themselves. Read any report by the OSCE SMM and it becomes clear that these measures have only been partially been implemented, if at all.

Very regular questions, relating to the sequencing of these security related and other measures, as the ones pertaining to political, humanitarian or economic matters as well as resulting conditionality hinder the implementation of these measures. Some refer to a stalemate in Minsk. A stalemate at the contact line. A very violent stalemate. Far from frozen.

Dear friends,

One question that certainly deserves more analysis is how to involve the groups of society directly or indirectly affected by the fighting in the ongoing talks about implementing these measures.

Measures agreed by those who claim to protect these very same groups. Giving these groups a voice and a say in how to implement these measures may be worthwhile trying, not least in light of the impasse that these talks have found themselves in.

Addressing the needs of those directly affected can lead to tangible results. This has also been documented by the OSCE SMM. Listening to their needs have, for instance, led to local initiatives to improve the lives of civilians.

Unilateral measures, the OSCE SMM facilitated the repair of critical infrastructure, enabled the delivery of humanitarian aid and improved the freedom of movement for civilians living near the contact line. All of this, despite the apparent stalemate in Minsk, despite the emotionally charged, polarized and toxic political environment.

Involving groups of the society in the process though can help because they will have a chance to deposit demands for their living conditions. It appears that addressing their needs can be a driving factor, it can be a factor that unites the sides who would otherwise not stick to agreements.

Yet – these efforts by the OSCE SMM are mere symptom treatment. Frequently, these very tangible results are being nullified by the continued fighting. Short-term causes are not being addressed and the questions that I outlined earlier have not been answered. While providing temporary relief – one arguably postpones (or avoids) to answer these questions.

When will it end? Who is guilty?

Dear friends,

While Ukraine’s sovereignty and territorial integrity must be first fully restored before any comprehensive judicial process can take hold, dealing with the effects of the armed violence, dealing with the past should start while this past is the present, while the conflict it still ongoing. It should be on the agenda now.

If such processes start at the very outset of armed conflicts can they act as a soothing/calming factor? Can they help avoid escalations and proliferation?

Ladies and gentlemen,

As mentioned earlier, time is not on the side of who genuinely seek to end the conflict, who seek honest answers to the questions that matter. The conflict lasts, the more difficult it will be to end it, or to overcome the emerging divisions.

Take a child living on Olimpiiska Street in government-controlled Mariupol, let us call him Volodimir, who was 5 years old at the outset of the conflict and a girl of the same age, let us call her Anna, growing up in the Kievskiy district of non-government controlled Donetsk. Both have lived the past 4.5 years on the contact line witnessing armed violence every day, Volodimir and Anna are now ten years old. By all means, they will not remember how it was before the conflict took hold of their lives and that of their families and friends.

Anna and Volodimir may still recall accounts of their parents and grandparents of how the Donbas was before but these stories become rare and fade. The relentless news cycle, pretending to answer the questions of guilt and responsibility and, as a result, new, much different realities – they both grow up in – will dominate their memories.

For them, dealing with the past is exposure to these harsh realities without a reference point. Add another 5 years of the same realities to their young lives and Anna and Volodimir will represent a new generation of Ukrainians with an entirely different perception of their past.

Unless the questions of when the violence ends, of guilt and responsibility are being dealt with carefully and comprehensively. I am afraid, the scenario that Anna and Volodimir and their generation face is not a too distant reality.

Arguably, the task of silencing the guns at the contact line today seems to be dwarfed by the almost insurmountable prospect of dealing with a divided generation tomorrow. With a divided society.

Dear friends,

That it is not too late I learned during my last visit to eastern Ukraine at the end of October.

Visiting the Trudovski district to the west of Donetsk city (equally exposed to the continued armed violence as the Kievskiy district where Anna lives) I was approached by five women on the central street, once connecting the district with Marinka – just across the contact line. I expected that the ladies would ask: Alexander, tell us when does the conflict end? Or Why does it not end?

However, I was presented with their plan for the day when it does end: “We will build a long table, a very long table. We will make our decisions and build our own opinions based on the facts. Everyone, now and preserved for the future. These objective and bare facts, currently often ignored by those who should address them, may serve to document history books and be used by the competent and examine the past in judicial processes (be they criminal or civil).

Other actors such as the UN Human Rights Monitoring Mission document individual cases of human rights violations, also with a view to future accountability. Their quarterly public reports also give a voice to victims.

After all, Anna in Donetsk and Volodimir in Maripol should be given chance to know. To know the facts so that they can make their own decisions and build their own opinions based on these facts.

The civil society must be empowered and supported (also financially) in further contributing with its own testimonies on what is happening. Increasing the cooperation with the international organizations and the diplomatic ‘venue’ is also to consider.

The recent creation of a Civilian Casualties Mitigation Team in Ukraine’s Armed Forces in consultation with non-governmental organisation is one of many initiatives that demonstrates that such cooperation works.

Establishing a minimum level of accountability: The absence of accountability leads to impunity. Impunity in return leads to more violence. A vicious circle. Even without proper rule of law in place on one side of the contact line, mechanisms should be developed, below the threshold of a judicial process, to hold those to account who violated the agreed principles.
I. Introduction

Judicial processing of the GDR past

Ch. Schaeufgen, former Attorney General for Government Criminality East and GDR Misdemeanors of Justice (Berlin)

The unification with the FRG on 3 October 1990, prosecution lay in the hands of the GDR judiciary, which until then had been solutions to points of content, so to say. Accordingly, this is not

on the human rights violations inherent to a dictatorship, but rather on tackling of the economic privileges of a leading state and party leadership of the GDR. This decision was taken because prosecution of systemic injustice was blocked during GDR time by the will of the state and party leadership of the GDR. Through two further laws on limitations, the start of the limitation period for criminal prosecution was postponed by three and five years respectively.19

There were however limits set by the constitution that had to be observed. According to it, an act or an omission can only be punished if its culpability was already determined by law and that was still the case at the time of the decision. Determining which law was in force in the GDR at the time of the crime's commission was not easy. Very different legal opinions were held on this issue. Upon this very question depended the culpability of soldiers and political and military commanders for the dead and injured at the border, as well as members of the GDR judiciary for handing down death sentences and jail terms.

The Border Law, which allowed officers to shoot dead people trying to flee, the GDR had created a legal permit to kill and injure so-called “border violators”. The politicised criminal law of the GDR, through which the practice of political freedoms was criminalised, such as the right of exit, expression, assembly and demonstration, allowed the GDR judiciary to extend harsh prison sentences to citizens critical...
The fundamental conviction common to all civilised peoples suspended on probation.

To up to seven and a half years' imprisonment. The soldiers regime, and other high-level military leaders were sentenced the Defence Council, who had organised the deadly border massacre or attempted manslaughter. 275 defendants indicted by the public prosecutor's office on charges of homicide. Those responsible for the killing of escapees could therefore be punished. 26 Since the judiciary of the GDR had also been responsible, into the life and physical integrity of its citizens. When violating other citizens' rights, on the other hand, especially rights to freedom, they have little fear. The national law created by them offers them protection. Something must change about that. Without freedom of expression there are no other rights.23 The Berlin Trials contain a new lesson that international law still has to learn. The withholding of fundamental rights is criminal.24 It remains to be hoped that this insight will prevail in the international community in the long term and find its place in supranational criminal law.

V. Lessons learnt

Criminal justice has made a contribution to the legal protection of fundamental human rights. The punishment and individual attribution of serious human rights violations was possible despite the GDRs legal practice to the contrary. The prohibition of retroactivity did not prevent this. Arbitrarily state killings cannot be justified by domestic legislation. A further central benefit of the criminal proceedings is the clarification and recognition of the GDR past. The judicial findings, irrespective of their legal assessment, can claim a high degree of reliability.

On the other hand, two things have negatively affected the duration of the overall process and the consistency of prosecution practice: on the one hand, that legislators said nothing about the content of the applicable criminal law and left this to practice, and on the other hand, that the jurisdiction for prosecution was not adapted to the specific nature of the task needing to be performed. The establishment of a central police and law enforcement authority, generously equipped with personnel and resources, would have sped up the process and would have avoided divergences in the prosecution practice.

VI. Recommendations

The question as to whether and how prosecution should follow a pre-democratic past after a system change, or as in Ukraine's case, the events of an armed conflict, cannot be answered in advance. The decisive factors for an answer are the type of transition into democracy, as well as the balance of power before and after the upheaval. Prosecute and punish or forgive and forget are the two poles of the debate, which up to the present day are discussed in every democracy after the fall of a dictatorship. The alternative paths that can be taken are those of compensation and reparation, which can be effectively achieved by effectively not prosecuting, a full or partial amnesty as enacted by law or the formation of a truth and reconciliation commission. Experience shows that the option a state chooses depends on whether a change of elites has taken place and what effects the decision will have on the internal peace and stability of the still young democracy. For this reason, it is impossible to make a blanket recommendation on the correct way of dealing with a dictatorial past cannot be made. However, from the perspective of a constitutional state, punishment is the normal reaction to a violation of the law. Furthermore, the discussions in many new democracies that have been trying to argue to the contrary and suppressed the fact that people's needs for perpetrators to be punished and clarification of the victims' fates cannot be stifled in the long term. States that do decide to prosecute should, however, keep in mind the experience of the German criminal justice system, namely that, in cases other than intrusion into the life of citizens, it is very difficult to prove the personal guilt required for punishment in criminal offences that are committed by henchmen under command of the defunct regime. In this respect, a partial amnesty should be avoided as well.

VI. Recommendations

The notion of transitional justice is relatively new for Ukraine. Depending on peculiarities of a given country and historical circumstances, different instruments of transitional justice are applied. In this regard, there is a need to define the scope of this concept specifically for the context of the conflict in eastern Ukraine.

Speaking at the conference, A. Pavlichenko, director of the Ukrainian Helsinki Human Rights Union outlined a number of steps which can be taken in Ukraine in regards to the four strategic areas of transitional justice: the right to justice, the right to know, the right to compensation for damages and assistance to victims of the conflict, and guarantees of non-recurrence.

1. the right to justice:

- Collection of materials (for the International Criminal Court or other international or national legal institutions), proving instances of war crimes and of failure of the states to comply with their obligations to investigate cases in the conflict zone,
- Legal proceedings against war criminals,
- Provision of legal aid and strategic litigations,
- Monitoring of legal proceedings (methodology and practical experience),
- Improving legislation and the rule of law during the conflict,
- Development of amnesty provisions, ensuring in law
2. the right to know:
- Declassification and opening of the archives,
- Documentation of war crimes,
- Factual reconstruction of events in the conflict zone.
3. the right to compensation for damages and assistance to victims of the conflict:
- Creation of a register of damaged or destroyed property (which can be based on the database of the Kharkiv Human Rights Group, which was presented by Evgeny Zakharov),
- Development of draft laws aimed at providing social support to IDPs, housing assistance to citizens whose accommodation has been ruined/damaged/destroyed as a result of the armed conflict; restoration of political rights,
- Development of legal practices (court precedents) protecting the property rights of victims of the conflict,
- Preserving the memory on the victims of the conflict – publicly accessible visual objects devoted to the facts of deaths of civilians and combatants from all sides of the conflict (“Map of Memory,” “Book of Memory of those Fallen for Ukraine”),
- Search for missing persons.
4. guarantees of non-recurrence:
- Reform of the judicial system,
- Reform of the security sector – training personnel on international standards, trainings for the police regarding de-occupation,
- Supporting draft laws in the sphere of transitional justice,
- Increasing the level of qualification of experts who are working with victims of the conflict regarding documentation and investigation of war crimes,
- Learning experience of other countries.

Discussing the legal aspects of transitional justice, participants mentioned the following:
- Documentation of all crimes and human rights violations according to international standards is of immense importance. Even if the court procedures are delayed in time, documented facts will help to prevent forgetfulness and impunity.
- Justice doesn’t necessarily lead to truth. A courts ability to find the truth is limited by its structure, composition, jurisdictional limitations and other procedural/legal limitations created as a result of political compromise. The objective of justice is to determine the criminal responsibility of individuals, not to establish the full picture of what happened.
- Another important aspect of transitional justice is socio-historical reflection on the past and dealing with the past. Discussing the transitional justice processes after the reunification of Germany, participants noted the following:
- Unlike the GDR, Eastern European countries did not have a clear model, in the form of the FRG, that could serve as a basis for the transition from dictatorship to democracy.
- An important milestone in Germany’s democratic transition was the opening of the archives of the GDR’s Ministry for State Security.
- Speaking of Ukraine, there is a serious danger that the legacy of USSR dictatorship is and will be subject to political manipulation.
- In the 1990s, given Ukrainian society’s general disorientation during the period of acquiring independence, it was difficult to launch economic and political reforms, as well as to give a quick start to democratic transformation. Ukrainian society was unable to replace the political elites and implement the decommunization process.
- In this context, the impossibility of accessing case files in Ukraine was also noted. The reason for this is that most of the operational records and classified documents have been destroyed since April 1989, and a significant part of the archive was transferred to the KGB Central Archive between 1989-91. Access to the archive of investigative files into rehabilitated persons was closed until 2014.
- In the context of working with memory, it is essential to consider the historical narratives in the Donbas. The USSR was never considered by a majority of the region’s population to be a “dictatorship”, since the region’s best years took place during this time.

An important place in transitional justice is given to the personal, which encompasses the human dimension of the conflict – the specific, stories and destinies of individuals and families on both sides of the demarcation line.

A study carried out as part of the project Women’s Initiatives for Peace in Donbas, showed that after the events of 2013-14, politics and the private sector have become more interdependent. Personal experience influences the formation of political sentiments, which, in turn, are highly polarized. However, after 2015, a tendency towards disillusionment in politics has been observed; priority in society is given to good social sentiment. In the conflict zone, this is manifested in the fact that the human rights issues are not always compatible and the justice system does not always lead to the establishment of truth, the effectiveness of the “victim and executioner” model of transitional justice is questionable, it should contain broader context and more room for reconciliation.

3. Experience of transitional justice in European countries and its applicability to the conflict in Ukraine

3.1. Law and justice in post-conflict societies

This section presents the results of the discussions in working groups. Experts from different European countries discussed the particularities of conflicts in post-Yugoslavian and post-So-viet space, as well as in Northern Ireland and Catalonia. Furthermore, the main problems and dynamics of post-conflict transformation were outlined.

Countries of the former Yugoslavia

During the discussion on the topic “Ending post-imperial violence through intercultural understanding and international institutions? Yugoslavia since 1992”, models of international conflict management with elements of international control and prosecution of war criminals were discussed. Experts identified such tools of transitional justice in the countries of the former Yugoslavia:
- the most important tool was the engagement of international courts.
- It has also become established practice to prosecute within the framework of both national and international jurisdictions.
- In addition to this, measures to provide additional specialized education to judges have played a major role, an academy has been created, where trainings for judges with a focus on the development of skills in international humanitarian law take place.
- A panel of judges specialising in war crimes was created.
- A special place in the countries of the former Yugoslavia is given to dealing with the past. In Serbia,

Lessons for eastern Ukraine

- Transitional justice processes need to be launched as soon as possible, even when the conflict is not over yet. Good start is civic education and improving the functioning of law enforcement agencies and courts (trainings, education).
- Given that investigations of international courts are lengthy and given that there are few lawyers in Ukraine specialising in working with international courts, it is important to initiate the prosecution process in the national jurisdiction.
- At the same time, the problem arises of whether national courts are qualified, particularly given their lack of experience of working with humanitarian law.
- Thus there is the need for trainings for judges, as well as for law enforcement agencies to guarantee the legitimacy of legal proceedings.
- In this context, the process of documenting war crimes and human rights violations is extremely important, since this will guarantee the effectiveness of investigations and prosecutions.
- The need for adequate protection for the victims of crime.
- It would be worthwhile to consider the possibility of establishing a hybrid court, as well as to work on strengthening the effectiveness of cooperation between the judicial authorities of Ukraine, as well as other countries, and international courts in order to use the possibilities of national, universal and international jurisdictions.
- The concept of transitional justice could become a new philosophy, which could unite all reform initiatives with a comprehensive vision for the future.
- In the context of working with memory, it would be important to include information about the armed conflict in textbooks used in schools and universities, as well as in reading lists. A state approach to dealing with the past is needed.
At the working group “Conflict resolution through small compromises on all sides? Northern Ireland 1998 and Catalonia 2018 in comparison”, participants discussed the struggle of certain groups of the population for greater autonomy within their respective states – United Kingdom and Spain.

The experience of Catalonia is interesting given the recent independence referendum.

• The Catalan conflict seems to be in a deadlock since the Catalan government, supported by the pro-independence parties, holds a majority in the Catalan Parliament, called for a self-determination referendum on October 1st 2017 that was declared to be unconstitutional by both the Spanish Government and the Constitutional Court. However, the referendum moved ahead, with more than 90% of votes in favour on independence and a turnout of around 43%.

• The Catalan Government claims that hundreds of thousands of citizens could not vote because the Police closed dozens of polling stations. On 27th October, the Catalan Parliament declared the independence of Catalonia. Then, the Spanish Parliament authorised the direct rule of Madrid over certain competences of the Catalan self-Government and the Spanish President called for fresh regional elections on December 2017.

• At the international level, not a single country has recognised the declaration of independence by the Catalan Parliament. On the other hand, some Governments have criticised the use of force to suppress dissent and have encouraged the Spanish Government to engage in a genuine dialogue process to settle the conflict and to accommodate the demands and aspirations of a part of the Catalan society.

• Any proposal to settle or deescalate the conflict should take into account the following variables: the opposition to independence of all Spanish political parties and a large majority of Spanish society; the strong opposition of the Spanish Government to authorise a referendum on the independence of Catalonia; the reluctance of the international community to grant the right to self-determination to Catalonia and its preference to solve the conflict within the framework of the Spanish Constitution; and the strong support independence has among a quite significant part of the Catalan society and the possibility that it becomes larger in the near future.

• The political polarisation that has been in Catalonia in recent years, thus preventing forging an arrangement based on broader consensus.

• According to the Spanish Government and to those who are opposed to independence, Catalonia already enjoy a high degree of self-governance, since Spain is one of the more decentralised countries in Western Europe. Besides, the Constitution does not allow for unilateral independence and does not recognise the right to self-determination to any of its constituent units. Accordingly, the solution to the problem is not about political will of the Central Government, it is a matter of legality and constitutionality.

North and South Caucasus

The discussion of the working group on the North and South Caucasus took place under the title “Mission Impossible? The failure of conflict management in the North and South Caucasus”, reflecting the problem that not one of the numerous ethnic and territorial conflicts in this region has been completely resolved.

Among the common features of these conflicts is the complexity of the inter-ethnic relations and the involvement of Russia. The latter makes it possible to draw parallels with the conflict in eastern Ukraine.

Within the discussion, the following particularities of the examined conflicts were noted:

• Until 1991, Russia, as a part of the USSR, had the position of maintaining the status quo, both in the Nagorno-Karabakh conflict and in Abkhazia; after the collapse of the USSR, the position of Russia changed so that it was supporting separatist movements.

• Peace negotiations in the region have low efficiency in the absence of external factors in their support

Lessons for eastern Ukraine

It is important to note that it is difficult to draw direct parallels between the situation in Catalonia and eastern Ukraine, given that the historical and economic context, as well as the context surrounding national identity, are different. In Ukraine’s case, the aggression is a catalyst for a conflict situation.

With regards to eastern Ukraine, attention should be paid to the following aspects:

• Interrelatedness of the degree of centralization of the regions and their identity.

• Interrelatedness of the language question, self-identification of a region’s population and support for the separation of the region.

• Readiness of the government to carry out dialogue with those who support the resolution of the conflict.

• Readiness to consider the question of decentralisation.

• The need to develop agendas for effective dialogue.

Lessons for eastern Ukraine

The conflicts in the Caucasus and eastern Ukraine are different in their origins, they differ in their roots and actors. Nevertheless, the role of Russia is similar in these conflicts.

In this way, in the context of the conflict in eastern Ukraine it is important:

• To support communication channels between the official government and the occupied territories.

• To work towards prosecuting war criminals. In turn, this is connected with the documentation of war crimes and human rights violations. The role of civil society is central, especially human rights organisations.

• To stimulate the political will of key actors to resolve the conflict.

• To develop humanitarian activities and programmes to support the population of the occupied territories.

• To involve international organisations in the process of resolving the conflict, not only in an observational function, but also through more active efforts.

• The example of Abkhazia allows to trace the widespread problems, including human rights violations:

• Children from Georgian families have to attend Russian school and are denied the right to education in their own language.

• The right to health is infringed – it is impossible to enter Georgia to visit a doctor, yet Georgia provides the opportunity for medical insurance.

• Significant part of the population does not possess civil documentation.

• There is a need for targeted action to prevent future conflicts and crimes.

• There is a problem of rejecting a dialogue as a tool to establish relationships between representatives of conflict groups was noted.

• Involvement of Russia in the conflicts in Caucasus and at the same time its detachment from the peace-building processes makes the latter inefficient.
On behalf of Ukrainian civil society, the following representatives from Ukraine, Russia and Germany, cooperation for post-Soviet space, the perspectives of civil society actors? Chances and limits of European Union’s activities in the post-Soviet space" was presented.

Representatives from German civil society see the need to take the following steps:

- Development of a strategy to unite the efforts of civil society actors from different countries and the areas of activity for the resolution of the conflict in Ukraine.
- Strengthening of local civil society structures.
- Networking of activists on a local and international level. It is necessary to unite the efforts of civil society from different countries to strengthen its role in resolving the conflict.
- Focusing on the personal level of the conflict: ensuring that civil society has chance and is able to demand that political bodies take the issue of people’s fates more seriously.
- Focus on the restoration of the conflict affected region, of small settlements in the conflict zone, since the living conditions of people in these towns and villages significantly influences their political preferences.
- Ensuring unhindered communication and dialogue among the population of the conflict affected region across the contact line. In this way, sharing of interests and problems should take place, which are not hugely different on both sides of the line. This, in turn, prepares the ground for joint problem-solving initiatives.

From the point of view of Russian civil society, it is necessary to find a solution to the following issues:

- Release of political prisoners an important step to overcome the conflict.
- It is important to use conflict-sensitive vocabulary.
- There is a need for another dimension of conflict resolution – the level of the individual person. The situation must be prevented where victims become simply numbers. It is important to forget about the human dimension and that one person (for instance, Oleg Sentsov) can do a lot.

3.2. Results of the expert roundtable “Challenges, issues and perspectives of transitional justice in Ukraine”

On 15 November 2018, an expert roundtable took place to allow a more detailed discussion of European experience of transitional justice and possibilities for its use in Ukraine.

During the session, the challenges and problems of the Ukrainian justice system, the role of international courts in the process of prosecuting war crimes and human rights violations and challenges for civil society organisations connected with working in the sphere of the Ukrainian justice system were all considered. The following main problems surrounding the Ukrainian justice system were identified:

1. The unfinished harmonization of Ukrainian legislation with the norms of international criminal and humanitarian law.
2. The status of the conflict and the perpetrators of crimes are not defined and accountability mechanisms are not in place, leading to impunity.
3. Threats to the impartiality of judges from the uncontrolled territories due to the possible danger to their families and property still in the uncontrolled territories.
4. Low efficiency of international institutions: the length of the International Criminal Court’s preliminary investigation, the refusal of Interpol to cooperate in the search for war criminals.
5. Insufficient competency of Ukrainian judges: the need to carry out additional education for judges, procurators and lawyers who are investigating the conflict. Investigators do not have the appropriate training and/or resources to collect evidence without delay and to identify suspects. As a result, there is a lack of an evidence base with which it would be possible to produce on national and international levels. For the collection and processing of evidence, as well as the coordination of work with the courts, it is essential that civil society organisations from Ukraine, Russia, and Europe as well as the appropriate state institutions, work together.

6. Within the framework of international courts there is the issue of inadmissibility. The majority of incidents of human rights violations took place in 2014-2015. If, in the following years, the victims did not file their case with the national court it is highly likely that it is already too late to initiate proceedings, an international court (for instance, the ECtHR) will not likely find such case admissible.

7. Given the lack of access to the territory not under the control of Ukrainian authorities, the documentation of part of the crimes connected with the conflict in the eastern Ukraine is impossible.

8. Problem with an amnesty law; to date, it has not been possible to develop an acceptable draft law, as the development of a quality bill requires extensive investigations with civil society with the involvement of residents of non-government controlled areas. It is possible, that the search for an alternative to the word “amnesty” is necessary, as the term is rejected by a significant part of the population.

9. On an individual level, there is the problem of fear amongst victims to report violations.

The following possibilities were suggested in regards to the legal aspects of transitional justice:

- The possibility of prosecution in other European countries (use of universal jurisdiction). For this purpose, a clear link to the country where the investigation should take place is desirable. A large group of victims of the conflict living in the country could serve as a link.

- The possibility of a joint investigation with European bodies in prosecuting war crimes with the aim of collecting evidence and collaborating with the International Criminal Court.

- The documentation of victims’ testimonies in accordance with international standards.

From the perspective of the Federal Foreign Office voiced by Andreas Prothmann the following key elements for achieving reconciliation and rehabilitation were pointed out:

- Uniting the legal and diplomatic efforts through participation in normative and political formats such as expert level dialogue formats, for example discussing the local elections regarding the Minsk agreements. In this context the amnesty law is a case in point – it is difficult to find a balance between reconciliation efforts and punishment.

2. Support of reforms in Ukraine with particular focus on justice, legal security, avoiding impunity and providing for internal pacification. This implies also educational measures for judges. Within this framework it was mentioned that it is indeed essential for Ukraine to establish mechanisms of cooperation with international courts.

3. Stabilization efforts to support the reconciliation process by fostering civil society development and civil society projects.

The second session focused on the opportunities for socio-political reflection: declassification of documentation and the events of the war, multilateral support and the organization of a dignified commemoration of the victims of the conflict, preparation programmes, development of dialogue formats to discuss contentious narratives of events.

In this context, the following problems and recommendations were voiced:

- Creation of tools by the state to facilitate communication between the population on both sides of the demarcation line.

- Ensuring access to the uncontrolled territories, not only for documentation but also to search for the dead and to return the bodies to families.

- Professional burnout prevention is important for activists working on the conflict, that is, the provision of psychological assistance not only to direct victims, but also to civil society activists. It is also important to counteract discrimination against internally displaced people (IDPs) in educational institutions and in the workplace.

- Strengthening the efficiency of the state in providing space for communication and support/installment of relation, development of this activity as a focus of domestic policy. Organization of trust-building measures.

- The question of vocabulary – it would be more appropriate to use the term “line of contact», rather than “line of demarcation”, as it semantically implies communication, connection and dialogue.

- Target reconciliation efforts not only specific groups of the population and geographical space, but also Ukrainian society as a whole to prevent the emergence of separatist sentiments in the future.

Sources

1. On 26 June 1997, Janet presented the essential principles in the US Economic and Social Council (ECS) Agenda 21/1997/20. The revised version was dated 2.10.1997

2. Parallel to this, EU Film Gaspard presented on 22 June 1997: the Final report on the question of the impunity of perpetrators of human rights violations (economic, social and cultural rights), which in the further development of the concept of TJ should not play a role.

3. In the section on Guarantee of Non-“Reaccessibility”, greater attention was paid to institutional reforms and at the same time, the question of administrative measures was less detailed. E/1994/305/92/AD1 from 1 February 2005.


6. e.g. the “anti-totalitarian fundamental consensus” sworn in Germany after 1989. In practice, Germany memory culture centers predominately, when not exclusively, around the negative narrative, which formed as to be the one capable of building a consensus. For this reason, the head of the Buchenwald Memorial, Volkerth Krieger, coined the term “negative memory” - Negaive commemoration – according to content, not aims – means the preservation of a public, self-critical memory of state or social crimes committed by both own against others and the associated assumption of responsibility, including the drawing of practical consequences.” Volkerth Krieger: Zur Zukunft der Erinnerung: In: Aus Politik und Zeitgeschichte, AP/25-26(2011)001 http://www.zentrum.de/geschichte/geschichte- und-erinnerung/1960/40/1/1.html/
Punkt 3.2.2

7. A voluntary press standards code, for instance, for Germany: https://www.presswett.de/pressekod/Pressenkod. For more details see the International Memorial Museums Charter http://www.zentrum.de/geschichte/geschichte- und-erinnerung/1960/4-0/1.html/
Punkt 3.2.2.2

8. Transformative justice, which aims at overcoming victimhood and perpetrator-hood is strongly emphasised in the African context, for instance. For this reason, the head of the Buchenwald Memorial, Volkerth Krieger, coined the term “negative memory” - Negaive commemoration – according to content, not aims – means the preservation of a public, self-critical memory of state or social crimes committed by both own against others and the associated assumption of responsibility, including the drawing of practical consequences.”


10. The line can also be drawn with reference to the concept of “atrocity crimes” , which is strongly emphasised in the African context, for instance.


15. Attachment I Chapter 6 Field C Paragraphs III to V to the Unification Treaty.


20. BGBl. 234/44.


25. BGBl. 41, 317.

26. BGBl. 41, 317, 339.


29. From the contribution of A. Parzivenchik, Ukrainische Verfolgungen Unser Human Rights.

30. From the contribution of E. Tchernoved, Women of the Don Foundation.
ПРАВО НА КОМПЕНСАЦИЮ УЩЕРБА
This brochure was prepared as a result of the Autumn Talks conference (Berlin, 2018) to summarise the main issues and views expressed during the discussions. The topic of the Autumn Talks in 2018 was transitional justice — the experience of past conflicts in Europe and their lessons for the present and the future — for Ukraine and other countries affected by the conflicts.

More than 200 civil society representatives from Ukraine, Russia, Germany and many other European countries met in Berlin’s Rotes Rathaus to discuss approaches to introducing transitional justice in post-conflict societies, particularly in Ukraine. Discussing the experience of different countries, participants reflected on whether it was possible to use it to resolve the conflict in the Donbas.

The conference took place on 14–17 November 2018 in Berlin as part of the First International Forum on eastern Ukraine, organised by the DRA and the International Civil Society Platform CivilM+ for the overcoming of the conflict in the Donbas. Looking at the experience of various countries, participants discussed which ideas and in what way could contribute to the work on overcoming the consequences of the conflict not only after the conflict ends but while the fighting is still going on.

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DRA e.V. is a non-profit, non-governmental organization based in Berlin, working since 1992 with the aim of promoting democratic developments in East European countries through cooperation with Russian, Belarusian, Ukrainian and other European NGOs, with independent mass media and in cross-sectoral cooperation. The DRA offers youth and other exchange programs in the field of political education, democracy and active citizenship and works to establish links with Western partners. Moreover, the DRA acts as an agency for volunteers between Eastern and Western Europe.

CivilM+ is an independent international civil society platform, which mission is to active integration of civil initiatives to restore the Donetsk and Luhansk oblasts as peaceful, integrated and developed regions as part of a democratic Ukraine and a united European space, with the active participation of the region’s population and those who have left the region due to the conflict.