

Transitional Justice

Lessons from the Western Balkans

Martina Fischer

Berghof Policy Brief 05

February 2016

What is the policy brief about?

The wars that accompanied the dissolution of the former Yugoslavia in the 1990s were marked by numerous war crimes and atrocities. The brief examines transitional justice initiatives from the past two decades. It highlights achievements as well as shortcomings and obstacles, building on insights presented by scholars and practitioners in a book recently published by Routledge (Fischer and Simić, 2016). It also draws on findings from an empirical research project conducted at the Berghof Foundation between 2010 and 2012 (Fischer and Petrović-Ziemer, 2013).¹

Why is the topic relevant?

Coming to terms with the past is a challenge for societies emerging from violent conflict. As different stakeholders have opposing interpretations of history, addressing the past always bears a risk of deepening divides. However, not facing the past and leaving crimes and human rights violations unaccounted for would obstruct efforts to envision a common future. Transitional justice has therefore become an important element of the post-war assistance provided by international organisations and donors, and is a task for state and non-state actors alike. No blueprints can be transferred from one region to another, as strategies for dealing with the past have to consider the cultural specifics of a society. Nevertheless, experiences from the Western Balkans may inspire scholars and practitioners in other parts of the world.

For whom is it important?

The policy brief addresses practitioners and policy makers, and also scholars engaged in peace studies, human rights advocacy, transitional or restorative justice and development cooperation. The final recommendations are particularly relevant for international actors assisting societies emerging from war.

Conclusions

- ≡ 20 years after the Dayton Peace Accords (DPA) ended the war in Bosnia, the states that signed the agreement continue to struggle with the legacies of the violent past. There is a need to complete the search for the missing and to investigate crimes and human rights violations related to the wars of the 1990s. As the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY) is running out, much work still needs to be done by the courts and prosecutors, state institutions and civil society organisations (CSOs) in these countries.
- ≡ Experience from the Western Balkans shows that advancement in justice and truth recovery benefits from close cooperation with civil society actors and local communities. Indeed, in some areas, success is dependent on interaction across levels.
- ≡ Initiatives for prosecution of crimes and fact-finding on atrocities need to be accompanied by victim-centred transitional justice strategies. Rule of law and functioning institutions for its implementation are therefore a must. Furthermore, retributive approaches need to be complemented by restorative approaches from the very beginning, in order to pave the way for a long-term process of reconciliation.

¹ The study was based on 150 interviews conducted among transitional justice experts in 28 municipalities in Serbia, Croatia and BiH in 2010-2012 and funded by the German Foundation for Peace Research.

Content

- 1 **Introduction**
- 2 **Ending Impunity - War Crimes Trials at the ICTY and Domestic Courts**
- 3 **Establishing Facts and Finding the Missing**
- 4 **Lessons from the Western Balkans**
- 5 **Conclusions: The Need for Restorative Approaches to Truth and Justice**
- 6 **Policy Recommendations**

About the Author

Dr Martina Fischer is a peace researcher and political scientist. She is Programme Director at the Berghof Foundation in Berlin and co-editor of the Berghof Handbook for Conflict Transformation. She has published extensively on peacebuilding in post-war societies and on the role of civil society. Furthermore, she has longstanding experience in evaluation of peace practice and has provided policy advice for political parties, government institutions and NGOs. She has published 12 books and more than 200 articles; relevant titles are: M. Fischer & O. Simić (eds.): *Transitional Justice and Reconciliation. Lessons from the Balkans*, London/New York: Routledge, 2016; (with B. Austin & H. J. Giessmann) (eds.): *Advancing Conflict Transformation. The Berghof Handbook II*. Opladen, Farmington Hills, 2011; M. Fischer (ed.): *Ten Years after Dayton. Peacebuilding and Civil Society in Bosnia-Herzegovina*. Berlin, Münster, London: Lit, 2007.

Citation

Martina Fischer 2016. Transitional Justice. Lessons from the Western Balkans. Berghof Policy Brief 05. Berlin: Berghof Foundation Operations. <http://neu.berghof-foundation.org/publications/policy-briefs/>

1 Introduction

The dissolution of the former Yugoslavia in the 1990s was marked by ethnopolitical polarisation, various wars and numerous atrocities. In particular, Bosnia and Herzegovina (BiH), Croatia and Serbia look back to a common history of confrontation and violent struggles over power, property and territory. When Croatia proclaimed its sovereignty in 1991, a war began between the Croatian forces and the army of the Federal Republic of Yugoslavia (FRY).² One year later, BiH’s proclamation of sovereignty was followed by more than three years of war, mass killings and systematic ethnic persecution. The wars ended in 1995 when the Dayton Peace Accords were negotiated between the conflicting parties by international brokers.

Due to the establishment of an international mechanism for the prosecution of war crimes, transitional justice processes started quite early in the Western Balkans compared with many other war-torn societies. The International Criminal Tribunal for the former Yugoslavia (ICTY), created by the United Nations in 1993, had a leading role in this process.³ According to UN Resolution 1534, the Tribunal was set up to render justice and to contribute to “lasting peace and security and national reconciliation” in the region. By signing the DPA, the governments of BiH, Croatia and the FRY committed to mutual recognition and the peaceful settlement of disputes. They also agreed to adhere to the provisions on dealing with the consequences of the war, notably the return of refugees and the prosecution of war crimes. In particular, the agreement obliged the governments to cooperate with the ICTY.

International actors have put a great deal of emphasis on legal accountability, in particular the prosecution of war crimes and fact-finding, with finding missing persons a clear priority. They have also put some pressure on the governments in the region to fulfil the obligations mentioned in the DPA. The cooperation with the ICTY was one of the main criteria set by the European Union (EU) for accession negotiations with the governments in the region. International actors also assisted the governments of Croatia, BiH and Serbia to establish domestic war crimes chambers and transitional justice strategies, which are expected to serve both accountability and fact-finding. The Organization for Security and Co-operation in Europe (OSCE) has overseen this process in all three countries.

2 Ending Impunity: War Crimes Trials at the ICTY and Domestic Courts

The conflict resulted in grave human rights violations and severe breaches of international law. The ICTY was mandated to try the war crimes, crimes against humanity, and genocide committed in the former Yugoslavia since January 1, 1991. In all, the ICTY has indicted 161 persons for serious violations of international humanitarian law. Proceedings have been concluded against 147 accused, 80 persons have been sentenced, and proceedings against 14 accused (including the former General Ratko Mladić and the former leader of the self-proclaimed Serb Republic in BiH, Radovan Karadžić) are ongoing (see *Figure 1*).

² Yugoslavia at that time consisted of Serbia and Montenegro; as well as paramilitary units from Serbia, the Yugoslav People’s Army (JNA) was involved in the fighting in Croatia and Bosnia. Bosnian Croats could rely on military support from Croatia.

³ For an overview of its importance for international law and transitional justice see Schabas 2013.

Figure 1: International Criminal Tribunal for the former Yugoslavia (ICTY)⁴: Key Figures (161 accused)

Ongoing proceedings for 14 accused			
14 in custody (UN Detention Unit)		4 currently at trial	10 before the Appeals Chamber
Concluded proceedings for 147 accused			
80 sentenced	18 acquitted	13 referred to national jurisdiction	36 accused had their indictments withdrawn or are deceased
2 awaiting transfer 17 transferred 55 served sentence 6 deceased after trial			20 indictments withdrawn 10 deceased before transfer to the ICTY 6 deceased after transfer to the ICTY

Source: <http://www.icty.org/en/cases/key-figures-cases>; accessed 8 December 2015.

It is widely acknowledged that at a time when local institutions were unwilling or unable to investigate war-related crimes, the ICTY has made an important contribution to establishing legal accountability and fact-finding. At the same time, the legitimacy of the International Tribunal has always been controversial in the region. Its legitimacy was particularly questioned by relevant political leaders. Although the Governments of BiH, Croatia and the FRY had committed to peaceful settlement of conflicts and cooperation on issues related to transitional justice by signing the DPA in 1995, it took more than a decade for these states to fully cooperate with the Tribunal (the Governments of Croatia and Serbia in particular proved less than cooperative in the post-war era), and it took nearly two decades until all war criminal suspects were delivered to The Hague.⁴

Several scholars have argued that the ICTY has countered the trend towards silencing or denying atrocities (Orentlicher, 2010) and that its decisions have enhanced public discussions on war events. However, others have demonstrated that the Tribunal’s sentences have also fuelled nationalistic discourses (Allcock, 2009) and fostered hostility in some local communities (Meernik, 2005). A majority of citizens in Serbia and in the Republika Srpska in BiH have regarded the ICTY as being biased and as a distant mechanism imposed from outside (McMahon and Forsythe, 2008). Similar reactions were reported from Croatia (Banjeglav, 2016). Opinion polls revealed a huge acceptance deficit (Subotić, 2009; Mertus, 2007). Distorted media reporting contributed to the poor image of the Tribunal, as did a lack of outreach and problems of communication between the ICTY and its local publics: in the first years of its existence, its publications were not even translated into the local languages. The lack of acceptance prompted the ICTY to set up regional offices in Sarajevo, Belgrade and Zagreb, and to start an ambitious public relations campaign (“outreach strategy”) to maintain closer contact to the media and civil society. Although the ICTY was created to establish individual guilt and responsibility for war-related crimes, it has been largely unable to communicate these guiding principles of its work in a transparent way to the people in the region. Many people considered the Tribunal to be biased and politicised, and in a situation where discussions on political responsibility for crimes were almost absent, its verdicts have all too often been perceived as sentences that aim to establish collective guilt, holding entire nations or countries responsible rather than individuals (Aptel, 2011, 172-17).

An important lesson from the post-war period in the Balkans is therefore that *courts need effective communication strategies from the very beginning, in order to connect with the general public and to guarantee that their principles and decisions are broadly understood. Furthermore, the work of the courts needs to be embedded in a broader transitional justice strategy that aims at institutional reforms and involves civil*

⁴ The ICTY was established as a temporary institution in 1993. By 2003, the ICTY’s judges had developed a Completion Strategy to guarantee that the Tribunal’s mission could successfully be fulfilled in coordination with the newly established legal systems in the region. Initially, the ICTY had intended to have all its investigations completed by 31 December 2004. Due to the late arrest of several prominent fugitives (Ratko Mladić and Goran Hadžić were arrested in 2011) and also due to the complexity of some of the cases, the process was delayed. For ongoing cases, a special Mechanism for International Criminal Tribunals (MICT) was established in 2010. Judgment in the case of Ratko Mladić is expected in 2017. All cases relating to intermediate or lower-level accused have been transferred to national jurisdictions. See <http://www.icty.org/sid/10016> (accessed 10 December 2015).

society. Such strategies could counter the risk of facts and verdicts being distorted by media and political groups that are interested in perpetuating divisions and in maintaining the conflict. This is an important challenge both for international and national transitional justice strategies. It is necessary to train judges and prosecutors in how to communicate with the media and involve investigative journalists. Furthermore, institutional reforms are necessary to guarantee that functioning legal mechanisms for detention, prosecution and defence can be established (Hoffmann, 2016). At the same time, although courts need to work independently from governments, they can work much more effectively if they can count on general respect from political institutions that need to provide the legal basis and shape the public discourse accordingly. In a direct post-war period, if communities are sharply divided along ethnopolitical lines, the political discourse tends to focus on commemorating “own” victims and heroes of war and silencing “own” crimes and the suffering of the “others”. Backing for the work of the courts is often lacking, although there is a chance that it will develop at a later stage.

The lack of formal procedural law for victims and victims’ organisations and the practice of plea bargaining also damaged the ICTY’s reputation in the region and aroused criticism, particularly from human rights activists and lawyers (Hoffmann, 2016). However, at the same time, the ICTY has contributed to advancing the practice of international law, and this has been very much appreciated by legal experts and activists.

ICTY: Advancements on prosecuting sexual violence

The ICTY (similar to the International Tribunals for Rwanda and Sierra Leone) has recognised sexual violence as a grave breach of the Geneva Convention and a crime against humanity. As a consequence, gender-based violence in armed conflict has been recognised as a war crime in international law and prosecutions have been secured. Furthermore, courtroom procedures have been reformed to ensure that victims of sexual violence are not re-traumatised by adversarial legal processes. Finally, the ICTY has also introduced changes to the practice of investigation and to the rules on evidence, limiting the extent to which consent can be presented as a defence for sexual assault and prohibiting the use of evidence of a victim’s past sexual conduct (Bell and O’Rourke, 2007, 27). Due to the harsh criticism from women’s groups, gaps in ICTY practice were finally constructively addressed. Appeals to respect the rights, needs and inclusion of victims were taken into account when the International Tribunal for Lebanon and the International Criminal Court (ICC) were set up, and these courts have introduced procedural law for victims.⁵

As the ICTY for a long period served as the only comprehensive cross-border mechanism for fact-finding and prosecution of war crimes in the Western Balkans, it became an important point of reference for human rights and victims’ groups and also for peace activists (Petrović-Ziemer, 2013, 50). Even critical activists agree that the International Tribunal was of great assistance in uncovering mass graves and finding missing persons and that it has made an important contribution to establishing facts about atrocities. The database that it has compiled is considered of indispensable value in informing future generations. It is also widely appreciated that the ICTY, together with the OSCE and EU, has substantially supported the advancement of domestic institutions for war crimes prosecution, which will continue to take on a central responsibility with regard to fact-finding and accountability in the future as the ICTY’s mandate comes to an end.

War crimes investigation and prosecution by domestic courts

A Section for War Crimes at the Court of BiH was established in 2005 as a permanent state-level organ. It initially included international judicial experts, who were phased out after five years. A witness protection unit has been established within the Bosnia-Herzegovina State Investigation and Protection Agency. In

⁵ See www.iccwomen.org/publications/resources/docs/Gender_Integration_in_the_Rome_Statute.doc (accessed 17 December 2015). Women’s Initiative for Gender Justice, Gender Report Card 2008 on the International Criminal Court, The Hague 2008.

Croatia, four specialised war crimes chambers were set up in 2003 within the County Courts in Zagreb, Osijek, Rijeka and Split. A department for witness support was formed within the Ministry of Justice in 2005. In Serbia, a specialised War Crimes Chamber of the Belgrade District Court and a War Crimes Prosecutor’s Office were established in 2003 and a witness protection unit was set up within Serbia’s Interior Ministry. A couple of cases have been transferred by the ICTY to the domestic courts (see Figures 1 and 2). As the ICTY was designed to deal with the most severe atrocities and human rights violations, and as its mandate is running out, more than 3,000 cases of war crimes from the 1990s need to be concluded by the war crimes chambers in Serbia, Croatia, and BiH (see *Figure 2*)

Figure 2: Cases to be Concluded by the War Crimes Chambers in Serbia, Croatia and BiH

Croatia	Serbia	Bosnia-Herzegovina
241 investigations ongoing	1,200 cases to be concluded, involving several thousand suspects	20 formal investigations
613 cases pending before first instance courts		1,100 cases in a pre-investigative phase

Source: K. Hoffmann (2016, 65) based on information from the Office of the State Attorney in Croatia; OSCE Mission to BiH; OSCE Mission to Serbia.

Among the cases that have to be investigated are several relating to crimes committed in the Krajina region. International actors have emphasised that in Croatia in particular, considerable progress is needed on accountability, especially with regard to the events during and after Operation Storm, the military operation led by the Croatian army on the territory of the Krajina, at that time (1995) occupied by Yugoslav forces.⁶ Croatian officials had for a long time downplayed these crimes as “defensive acts” within a homeland war. However, according to internationals, the “ultimate indication that Croatia is dealing seriously with its past will be the willingness to consider the 33 cases of murder and convert them into war crimes trials. Furthermore, the judiciary will have to find out what happened to the 677 civilians [killed in the aftermath of the military operation]. This is of particular importance because the ICTY will not pursue any other case in the context of Operation Storm” (Fischer, 2013, 76).

3 Establishing Facts and Finding the Missing

Together with legal accountability, establishing facts and finding the missing was a priority task and was supported by international actors in cooperation with the Commissions for the Missing Persons formed in various countries. The International Commission on Missing Persons (ICMP)⁷ was tasked to facilitate cooperation among the entity authorities in BiH, and cooperation was also enhanced at the regional level with the establishment of the Commission for Missing Persons of the then Federal Republic of Yugoslavia and the Office for Detained or Missing Persons in Croatia. The EU has substantially supported exhumation

⁶ Figures relating to these events are highly contested. While human rights NGOs refer to 677 persons killed in the aftermath of the military operation, the state attorney argued that there were only 114 victims after 1995 and only recently accepted the higher number (Fischer, 2013, 75).

⁷ The ICMP was established in Sarajevo in 1996 at the initiative of US President Clinton to support the DPA and to ensure the cooperation of governments in locating and identifying the missing. Today, the ICMP assists institutions around the world to address the issue of missing persons from armed conflict, disasters and organised crime.

activities in the Western Balkans since 1995, with further funding agreements signed in 2012.⁸ Thanks to these joint regional and international efforts, of the 40,000 persons missing as a result of the armed conflicts of the 1990s in the former Yugoslavia, over 70% have been accounted for.⁹ Facilitated by the OSCE and the ICMP, the Chairman of the Presidency of BiH Bakir Izetbegović, the President of the Republic of Croatia Ivo Josipović, the President of Montenegro Filip Vujanović and the President of the Republic of Serbia Tomislav Nikolić signed a “Declaration on the Role of the State in Addressing the Issue of Persons Missing as a Consequence of Armed Conflict and Human Rights Abuses” in Mostar in August 2014.¹⁰ Beyond tracing the missing, governments and parliaments have not been very proactive in supporting other forms of truth recovery. Initiatives to set up fact-finding commissions at a national level have been either half-hearted from the outset or lacking political support (Nikolić-Ristanović and Čopić 2016; Kritz and Finci, 2001).

In both areas of transitional justice, in judicial proceedings and fact-finding activities, CSOs proved to be important partners, due to their different approaches and networks and particular capacities for trust- and relationship-building on the ground in local communities. International and local CSOs assisted experts in the region in detecting mass graves, storing the human remains and identifying the missing, and have also provided support with documentation of human rights violations, providing facts and evidence.

Our research revealed that effective legal prosecution could strongly benefit from proactive cooperation with local CSOs, groups and individuals engaged in war crimes reporting, trial monitoring, support for victims and witnesses or documentation (see Fischer and Petrović-Ziemer, 2013). An example is the Population Loss Project set up by the *Research and Documentation Centre* (IDC) in Sarajevo. IDC corrected the figures of an estimated 200,000-250,000 Bosnians killed, which were generally cited by official sources, and presented a total of 97,920 war-related deaths for which data have been verified (Tokača, 2008, 60). Data were collected and presented on the internet. The project has since become well-known as the “Bosnian Book of Dead” (BBD database).¹¹ Although the initiative faced harsh criticism from nationalistic Bosniak politicians, it had an impact on the discourse, and most official institutions finally accepted the figures.

Our empirical research has also revealed that CSOs, transitional justice institutions and international actors have a common commitment towards legal accountability (Fischer and Petrović-Ziemer, 2013). Representatives of the judiciary, the commissions for missing persons, peace and human rights groups, victims’ associations, and international organisations clearly shared the understanding that impunity cannot be tolerated, in view of the gross human rights violations committed in the territory of former Yugoslavia. However, all of these actors also clearly mentioned the limits of legal prosecution and the need for additional approaches to complement the work of the courts. In particular, the OSCE and UNDP were eager to give incentives for parliaments and governments to advance more inclusive transitional justice processes at a national and regional level. However, there are still many obstacles, especially in BiH, given that state institutions – including the State Court of BiH – have come in for severe criticism from Bosnian Serb political representatives in the past years. Although some legislation has been developed for the compensation of former combatants who were injured or disabled by the war, there is still a lack of compensation schemes for civilian victims. Many victims (e.g. survivors of rape; see Simić 2016) have never received substantial support from state institutions.

⁸ See <http://www.ic-mp.org/press-releases/eu-and-icmp-donation-agreement/#more-1493> (accessed 17 December 2015).

⁹ See <http://www.ic-mp.org/icmp-worldwide/southeast-europe/bosnia-and-herzegovina> (accessed 6 April 2014).

¹⁰ See <http://www.ic-mp.org/press-releases/bosnia-and-herzegovina-croatia-montenegro-and-serbia-sign-icmps-declaration-on-missing-persons/> (accessed 17 December 2015).

¹¹ For detailed analysis of the methodology and impact, see Nettelfield, 2011.

4 Lessons from the Western Balkans

The need for interaction with civil society actors

In sum, CSOs have substantially supported fact-finding and by doing so, complemented the work of the ICTY and the domestic courts in establishing accountability. Journalists and experts from CSOs were involved in war crimes trials monitoring and reporting (together with investigative journalists and independent media experts, e.g. the Balkan Investigative Reporting Network). In some instances, they also played a key role in explaining the courts' verdicts to the public and correcting distorted media reports on the courts' activities. CSOs have actively collaborated with the courts in fact-finding and documentation, and in several cases also provided evidence on war crimes; the Belgrade-based Humanitarian Law Center, for instance, uncovered videos that proved an active involvement of special military units from Serbia in the murders committed after the fall of Srebrenica. As experience from the Balkans shows, close cooperation between CSOs and legal experts, as well as the work of investigative journalists, is indispensable for implementing effective transitional justice strategies. Cooperation across levels is also necessary to provide war crimes monitoring and support for victims and witnesses. Furthermore, CSOs are needed to pressure state institutions to open cases and conduct reliable investigations. Finally, experts from civil society and independent media have served as important brokers, translating the complex work of the ICTY for society at large.

The limitations of legal instruments and retributive approaches to justice

As lessons from the Balkans, three major limitations of legal approaches can be outlined:

- ≡ *The ICTY had great difficulty in apprehending several of the most notorious war crimes suspects (including Ratko Mladić and Radovan Karadžić). In the first years after the war, international forces were not equipped with a mandate to detect and arrest fugitives. Furthermore, international law does not contain any general and binding rules for this process. Unfortunately, several prominent war crimes suspects indicted by the ICTY remained at large for a number of years, being celebrated as heroes by nationalist groups in several areas.*
- ≡ *Two decades after the 1990s wars, only a small number of war crimes cases have been concluded and most of them were related to mass crimes. More than 3,000 minor cases are still pending and need to be investigated by the courts in the region, as outlined above. However, it is very unlikely that all of these cases can be dealt with and concluded during the lifetime of the accused, the victims and the witnesses.*
- ≡ *Unfortunately, the work of the courts has not been complemented by programmes that provide compensation for the victims. This deficit was also mentioned by the former President of the ICTY, Patrick Robinson, who in a speech before the UN Security Council in December 2009 suggested establishing a "claims commission".¹² In his address before the UN General Assembly on 9 October 2009, he concluded "that the international community has forgotten [the victims]. Currently, there is no effective mechanism by which victims can seek compensation for their injuries, despite the fact that their right to such compensation is firmly rooted in international law."¹³ Robinson insisted that "justice is not only about punishing perpetrators but also about restoring dignity to victims by ensuring that they have concrete means to rebuild their lives" (ibid.). He called upon the UN Member States to support the creation of a trust fund to provide adequate assistance to the victims for their suffering.¹⁴*

The limitations of retributive justice, mentioned above, were the reason why human rights organisations, peace activists and victims' groups in the Western Balkans called for additional approaches to address the victims' and families' needs for truth acknowledgement. The campaign for a Regional Commission

¹² See <http://www.icty.org/sid/10280> (accessed 10 December, 2015).

¹³ See <http://www.icty.org/sid/10244> (accessed 10 December, 2015).

¹⁴ See <http://www.icty.org/sid/10850> (accessed 10 December, 2015).

for Truth-seeking and Truth-telling about War Crimes in the Former Yugoslavia (RECOM)¹⁵ evolved as a reaction to some of the shortcomings mentioned above. The promoters do not discuss a regional truth commission as an alternative but as a complementary mechanism to the work of the courts that should give a voice to the victims and enhances debate on how symbolic or material compensation could be provided. It is unclear, to date, whether the idea will gain the necessary political support; however, both promoters and international observers agree that the campaign was important in raising public awareness.

With regard to the outreach of legal instruments, three more lessons can be learnt from the Balkans:

- ≡ *Even if criminal justice (prosecution of war-related crimes) is in place at a very early stage (as was the case in the Balkans), this does not necessarily add to a broader societal dialogue on the past that would lead to a questioning or transforming of selective forms of remembrance. War crimes tribunals have very limited, if any, direct reconciliatory effects on war-affected societies in the short term. This does not mean that they cannot have indirect reconciliatory effects in the long term, as the data established by the courts will help to inform future generations that may have a stronger desire for reconciliation, as Hazan (2006) outlined with reference to the Nuremberg trials in Germany.*
- ≡ *Although tribunals give victims a chance to speak out, the space they can provide for acknowledgement of their suffering is limited. Courtrooms are not the places where people can tell their story in a protected setting, and where acknowledgement or “healing” of trauma and grievances (Hamber, 2009) takes place. In order to minimise the negative effects for those who testify, institutions for the prosecution of war crimes need to take particular care and prepare them properly so that they know what they will experience during the trial, and what they can expect as a result.*
- ≡ *Experience from the Balkans shows that in order to be effective, tribunals need to give priority to the protection of victims and witnesses and to guarantee the physical safety of those who decide to testify. This can only be done by state authorities, based on institutional reforms that establish the rule of law and a functioning police. Protection of victims and witnesses before, during and after the trials is crucial but very cost-intensive. In a setting where the violence had regional scope, and where crimes have to be tried in different countries (as in the Balkans), effective cooperation between courts and police across borders is a must to guarantee a maximum of protection. Otherwise, if victims and witnesses risk their lives and health and put their families in danger, they will shy away from testifying.*

5 Conclusions: The Need for Restorative Approaches to Truth and Justice

Although joint efforts by international organisations, state and non-state actors in the region of former Yugoslavia have contributed to finding most of the missing, there is still a need for continuous efforts.¹⁶ Investigations of war-related crimes also need to be considered as a long-term challenge. Political pressure

¹⁵ See <http://www.zarekom.org/The-Coalition-for-RECOM.en.html> (accessed 31 March 2015). Around 1,900 CSOs and numerous individuals from various ex-Yugoslav countries have set up new networking arrangements across different levels of action and established new formats of debate, including public hearings, workshops and regional conferences (see Fischer 2016b).

¹⁶ In BiH, for instance, the authorities have managed to locate nearly 15,400 missing people, by exhuming and identifying mortal remains. However, according to the records held by the International Committee of the Red Cross, 6,955 people are still missing. At present, the biggest obstacle is the lack of new information about the locations of individual and mass graves. See <http://www.recom.link/icrc-urging-bh-institutions-to-determine-destiny-of-nearly-7000-people/> (accessed 15 December 2015).

and monitoring of the performance of state institutions by civil society actors and independent media will be necessary to guarantee that new cases will be opened.

As experience in the Western Balkans has shown, it takes more than prosecution of the perpetrators for societies to recover from atrocities and come to terms with a violent past. A holistic understanding of transitional justice is necessary in order to address forensic, narrative and dialogical truth, legal accountability, material and symbolic compensations, institutional reforms and reconciliation (Boraine, 2006). Apart from retributive justice, restorative approaches are needed to pave the way for processes of healing, trust- and relationship-building. Naming the victims and giving the victims a voice, as well as acknowledgement of their suffering, is a prerequisite, and cultures of memory need to address the suffering of the people from the different sides of the wars (Tokača, 2008). Reconciliation after violent conflict is a long-term process that requires initiatives from the top down and bottom up (Kritz, 2009; Kriesberg 2004). It needs to build on pragmatic expectations (Bloomfield, 2006), free from religious notions (i.e. “forgiveness”) but at the same encompassing empathy and acknowledgement for those who suffered from war-related violence and repression, along with a readiness to take political responsibility for crimes committed in the name of nations.

Public apologies in which political actors take responsibility for past injustice and violence can be an important contribution to acknowledgement. Several apologies have been made by a number of politicians but with very limited reconciliatory effects, as more often than not, there was an absence of reciprocity (Fischer, 2016). Furthermore, various notions of victimhood continue to shape the political discourse(s) and collective remembrance in the region and form a major obstacle to reconciliation. Nevertheless, incentives for more inclusive forms of remembrance have been developed on the grassroots level (Simić and Volčić, 2013). Peace activists, together with war veterans, have found creative ways of dealing with this challenge, so this policy brief ends with an encouraging set of examples: several veterans from Bosnia and Serbia decided to speak out about their experiences of the war and to enter a dialogue with former enemies. They also began to launch practical initiatives for inclusive cultures of remembrance, visiting atrocity sites¹⁷ and paying their respects to the victims from different sides, empowered by the Centre for Nonviolent Action (Sarajevo/Belgrade). Further peacebuilding activities involving ex-combatants have been developed by the Center for Trauma in Novi Sad (Serbia), aimed at dialogue with youth on the past and peace education in schools (Simić and Milojević, 2014). The group “*Hajde da...*” in Belgrade has involved former soldiers in cultural initiatives and brought them onto the stage in a theatre production to share their combat-related experiences with a broader audience and open a space for a dialogue about the past (Simić, 2013). Such activities could serve as incentives for political actors to advance political reconciliation. International actors should therefore continue to support initiatives for commemoration both in local communities at the grassroots level and at the regional level. In addition, they should support initiatives for textbook reform and alternative forms of history education (Subotić, 2016, 133). Furthermore, international actors should make efforts to improve the general conditions by enhancing economic development in the region, to provide hope for a better future for new generations, and to help create opportunities for a process of reconciliation (Bartlett, 2016). As reconciliation is a long-term process and takes more than one generation, there is an ongoing need for international commitment and engagement in the region, today, 20 years after Dayton, and beyond.

17 See <http://nenasilje.org/en/2012/former-enemies-visit-srebrenica-memorial/> (accessed 18 December 2015).

6 Policy Recommendations

International actors should continue to assist the governments in the Western Balkans to establish and complete a record of war-related deaths and disappearances.

In particular, they should

- ≡ urge state institutions and local authorities in all countries to resolve the pending cases of war-related disappearance, in accordance with the Geneva Conventions, the International Convention for the Protection of All Persons from Enforced Disappearance, and the European Convention on Human Rights
- ≡ continue to provide the funds to accelerate the search for grave sites, exhumations and identification of human remains
- ≡ push for intensive regional cooperation and information exchange on these issues

International actors should assist the governments in implementing transitional justice mechanisms at the national level and support initiatives for regional cooperation.

In this context, they should

- ≡ assist the governments and legal institutions in the Western Balkans in advancing judicial and non-judicial transitional justice strategies
- ≡ ensure that the war crimes chambers are equipped with the necessary expertise, staff and resources for investigation, prosecution and victims' protection
- ≡ support efforts by domestic courts to establish cross-border systems for regional cooperation in all the above-mentioned areas
- ≡ continue to push for reforms that strengthen the rule of law and reliability of police institutions in implementation of the law
- ≡ support domestic transitional justice institutions in developing convincing information policies and cooperation with media
- ≡ support investigative journalists in proper reporting on war crimes proceedings
- ≡ continue to support the work of CSOs that monitor war crimes proceedings and implementation of transitional justice strategies
- ≡ secure a minimum of international monitoring and scrutiny of state institutions via the OSCE (in BiH and Serbia) and EU institutions (in Croatia)

International actors should support restorative forms of justice aiming to improve the situation of those whose life perspectives were most severely affected by the war.

In particular they need to

- ≡ urge authorities to provide redress for the victims of war crimes and crimes against humanity; to ensure reparations in line with the principles established by international law; to provide social protection; and to overcome unequal treatment of civilian and military war victims
- ≡ assist the governments to establish the legal conditions for compensation of victims, with a specific focus on gender justice and gender-specific and sexual violence
- ≡ assist legal institutions to develop programmes for convicted war criminals to facilitate their reintegration into society after release
- ≡ take measures to increase security for refugees and minorities

International state- and non-state actors should support initiatives aimed at trust- and relationship-building and improve framework conditions for reconciliation.

In particular, they should

- ≡ continue to support regional cooperation in dealing with the past (including a regional truth commission, should it materialise)
- ≡ help to foster initiatives that aim to promote inclusive cultures of remembrance, also at local level (oral history projects, marking of atrocity sites)
- ≡ continue to support academic, cultural and arts initiatives that create space for reflecting on different experiences of the past (including alternative history textbooks and training for teachers in using such material)
- ≡ assist initiatives that broaden remembrance of recent history, by naming crimes and violent events but also pointing to nonviolent engagement and peace movements as important elements of social reality during the 1990s
- ≡ offer young people opportunities for exchange in order to prevent radicalisation and foster regional reconciliation
- ≡ ensure that the accession process for the Balkan countries is accompanied by strategies that promote economic development.

References

- Allcock, John B.** (2009). The International Criminal Tribunal for the Former Yugoslavia. In Charles Ingrao and Thomas A. Emmert (eds.) *Confronting the Yugoslav Controversies. A Scholars' Initiative*. West Lafayette: Purdue University Press, 347-389.
- Aptel, Cécile** (2011). International and Hybrid Criminal Tribunals: Reconciling or Stigmatizing? In Paige Arthur (ed.) *Identities in Transition. Challenges for Transitional Justice in Divided Societies*. Cambridge/New York: Cambridge University Press and International Center for Transitional Justice.
- Banjeglav, Tamara** (2016). The Micro-legacy of the ICTY in Croatia – a Case Study on Vukovar. In Fischer and Simić (eds.) (2016), 81-101.
- Bartlett, Will** (2016). Economic Development and Perspectives for Reconciliation. In Fischer and Simić (eds.) (2016), 224-242.
- Bell, Christine and Christine O'Rourke** (2007). Does Feminism Need a Theory of Transitional Justice? *International Journal of Transitional Justice*, 1(1) 23-44.
- Bloomfield, David** (2006). *On Good Terms. Clarifying Reconciliation*. Berghof Report No 14. Berlin: Berghof Research Center.
- Boraine, Alex** (2006). Transitional Justice. A Holistic Interpretation. *Journal of International Affairs*, 60(1), 17-27.
- Fischer, Martina** (ed.) (2007). *Peacebuilding and Civil Society in Bosnia-Herzegovina. Ten Years after Dayton*. 2nd Edition. Münster/Hamburg/London: Lit-Verlag.
- Fischer, Martina** (2011). Transitional Justice and Reconciliation - Theory and Practice. In Beatrix Austin, Martina Fischer and Hans. J. Giessmann (eds.) *Advancing Conflict Transformation. The Berghof Handbook II*. Opladen/Farmington Hills: Barbara Budrich, 405-430.
- Fischer, Martina** (2013). Analysis of Interviews with International Actors. In Fischer and Petrović-Ziemer (eds.) (2013), 71-87.
- Fischer, Martina** (2016). Dealing with the Past from the Top down and Bottom up - Challenges for State and Non-state Actors. In Fischer and Simić (eds.) (2016), 25-60.
- Fischer, Martina and Ljubinka Petrović-Ziemer** (eds.) (2013). *Dealing with the Past in the Western Balkans. Initiatives for Peacebuilding and Transitional Justice in Bosnia-Herzegovina, Serbia and Croatia*. Berghof Report 18. Berlin: Berghof Foundation.
- Fischer, Martina and Olivera Simić** (eds.) (2016). *Transitional Justice and Reconciliation. Lessons from the Balkans*. London/New York: Routledge.
- Hazan, Pierre** (2006). Measuring the Impact of Punishment and Forgiveness. A Framework for Evaluating Transitional Justice. *International Review of the Red Cross*, 88, 861, 19-47.
- Hamber, Brandon** (2009). *Transforming Societies after Political Violence: Truth, Reconciliation, and Mental Health*. New York: Springer.

- Hoffmann, Klaus** (2016). The ICTY after 20 Years of Experience – Assessments from an Insider’s View. In Fischer and Simić (eds.) (2016), 61-80.
- Kriesberg, Louis** (2004). From Conflict Resolution to Reconciliation. In Yaacov Bar-Siman-Tov (ed.) *From Conflict Resolution to Reconciliation*. Oxford/New York: Oxford University Press, 81-110.
- Kritz, Neil J.** (2009). Policy Implications of Empirical Research on Transitional Justice, in: Hugo van der Merwe, Victoria Baxter and Audrey R. Chapman (eds.) *Assessing the Impact of Transitional Justice. Challenges for Empirical Research*. Washington DC: USIP, 13-22.
- Kritz, Neil J. and Jakob Finci** (2001). A Truth and Reconciliation Commission in Bosnia and Herzegovina. An Idea Whose Time Has Come. *International Law FORUM du Droit International*, 3, 50-58.
- McMahon, Patrice C. and David P. Forsythe** (2008). The ICTY’s impact on Serbia. Judicial Romanticism Meets Network Politics. *Human Rights Quarterly*, 30, 2, 412-435.
- Meernik, James** (2005). Justice and Peace? How the International Criminal Tribunal Affects Societal Peace in Bosnia. *Journal of Peace Research*, 43(3), 271-287.
- Mertus, Juli** (2007). Findings from Focus Group Research on Public Perceptions of the ICTY. *Südosteuropa*, 55 (1), 107-117.
- Nettelfield, Lara** (2010). *Courting Democracy in Bosnia and Herzegovina: The Hague Tribunal’s Impact in a Postwar State*. Cambridge, Mass.: Cambridge Studies in Law and Society.
- Nettelfield, Lara** (2011). Bridging the Divide with Numbers? The Case of the Bosnian Book of Dead (BBD). In Peter Andreas and Kelly M. Greenhill (eds.) *Sex, Drugs and Body Counts: The Politics of Numbers in Crime and Conflict*. London: Cornell University Press, 159-187.
- Nikolić-Ristanović, Vesna and Sanja Čopić** (2016). Dealing With the Past in Serbia – Achievements in the Past 20 Years. In Fischer and Simić (eds.) (2016), 141-168.
- Orentlicher, Diane** (2010). *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia*. New York: Open Society Institute.
- Petrović-Ziemer, Ljubinka** (2013). Analysis of Interviews with CSOs. In Fischer and Petrović-Ziemer (eds.) (2013), 45-70.
- Schabas, William A.** (2013). *Kein Frieden ohne Gerechtigkeit? Die Rolle der internationalen Straffjustiz*. Hamburg: Hamburger Edition.
- Simić, Olivera** (2013). The Day After: Ex-Combatants Perform Live in Belgrade Theatre. *History of Communism in Europe*, 4, 65-86.
- Simić, Olivera** (2016). Rape, Silence and Denial. In Fischer and Simić (eds.) (2016), 102-120.
- Simić, Olivera and Zala Volčić** (eds.) (2013). *Transitional Justice and Civil Society in the Balkans*. New York: Springer Series in Transitional Justice.
- Simić, Olivera and Ivana Milojević** (2014). Dialogues Between Ex-combatants and Youth in Serbia: A Constructive Use of War Experience. *Peacebuilding*, 2 (3) 2014, 322-335.
- Subotić, Jelena** (2009). *Hijacked Justice. Dealing with the Past in the Balkans*. Ithaca: Cornell University Press.
- Subotić, Jelena** (2016). Political Memory as an Obstacle to Justice in Serbia, Croatia and Bosnia-Herzegovina. In Fischer and Simić (eds.) (2016), 121-137.
- Tokača, Mirsad** (2008). The Importance of Every Victim. In Osservatorio Balcani e Caucaso (ed.) *Bad Memories. Sites, Symbols and Narrations of the Wars in the Balkans*. Rovereto: Osservatorio Balcani e Caucaso/Provincia Autonoma di Trento, 59-62.