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Peace and Justice in EU foreign policy: from principles to practice

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The European Union is increasingly engaged in peace processes around the world.

The Treaty on European Union lists many principles the EU is to promote in its external relations. Two of these – peace and justice for human rights violations – may be in tension in fragile situations.

This article examines how the EU translates the principles of peace and justice into policy and puts them into practice. It draws on analysis of EU engagement in peace mediation, transitional justice and security sector reform at the general level, and on in-depth case studies of EU engagement in the Democratic Republic of Congo and Mali.

It then considers the European Union's (EU) Framework on support to Transitional Justice adopted in 2015 to consider the likely implications of the EU's Framework on the EU's role(s) in supporting justice-sensitive peace processes worldwide.

The European Union is increasingly engaged in conflicts around the world. According to the Treaty on European Union, the EU will promote the principles of peace, security, the protection of human rights, the strict observance and the development of international law, amongst others, in its relations with the wider world.¹ In 2011, the Council of the European Union declared that 'Preventing conflicts and relapses into conflict, in accordance with international law, is therefore a primary objective of the EU's external

¹ European Union (2008) Consolidated version of the Treaty on European Union, 2008, Article 3.5

action, in which it could take a leading role acting in conjunction with its global, regional, national and local partners.’²

The role of principles in the EU’s relations with the wider world is the subject of extensive scholarship, including civilian power Europe, a European civilizing process, normative power Europe, and the current ‘third wave’ of normative theorizing.³ Critical assessment of whether the EU does or does not pursue these normative objectives is important to avoid complacency.⁴

In this article, I focus on the ‘kind of power the EU wields and with what effect rather than debating what kind of power the EU *is*.’⁵ Specifically, I examine two of the principles in the Treaty: peace and justice for human rights violations, and assesses whether and how the EU translates them into policy and puts them into practice.

The search for peace and justice is an established area of academic interest that draws on

² Council of the EU (2011) ‘Council conclusions on conflict prevention. 3101st Foreign Affairs Council meeting (20 June 2011)’ Luxembourg: Council of the EU.

³ F. Duchêne, “Europe’s Role in World Peace” in R. Mayne (ed.), *Europe Tomorrow: Sixteen Europeans Look Ahead* (London: Fontana, 1972); Karen E. Smith, *European Union Foreign Policy in a Changing World* (Cambridge: Polity, 2003); A. Linklater, “A European Civilising Process?”, in C. Hill and M. Smith (eds.), *International Relations and the European Union*, (Oxford: Oxford University Press, 2005) pp.367-87; I. Manners, “Normative power Europe: A contradiction in terms?” *Journal of Common Market Studies* Vol.40, No. 2 (2002), pp. 235-258; R. G. Whitman, “The neo-normative turn in theorising the EU’s international presence”, *Cooperation and Conflict*, Vol. 28, No. 2 (2013), pp. 191-211.

⁴ H. Sjursen, “What kind of power?”, *Journal of European Public Policy*, Vol. 17, No. 2 (2006), pp.169-81.

⁵ K. E. Smith, “The European Union in the World: Future Research Agendas”, in M. Egan, N. Nugent and W.E. Paterson (eds.), *Research Agendas in EU Studies: Stalking the Elephant* (Basingstoke: Palgrave Macmillan, 2010), p.343, emphasis original.

research into and practice of peace mediation and transitional justice. There is also extensive literature on the EU's contribution to crisis management, peacebuilding and conflict prevention more broadly. Yet to date, there has to date been little scholarly appraisal of the EU's contribution to peace mediation and transitional justice; this paper seeks to contribute to this body of knowledge.⁶

The first part of the article presents the ways in which the EU may promote peace and justice in societies in or emerging from violent conflict. The second section analyses EU engagement in peace mediation and justice for human rights violations drawing on case studies of EU engagement in the Democratic Republic of Congo (DRC) and in Mali in the aftermath of the crisis in that country in 2012. The article closes by considering how the EU's Policy Framework on support to transitional justice, adopted in 2015,⁷ may affect the EU's ability to promote peace and justice in fragile situations worldwide.

Scholars are beginning to address the problems of Eurocentrism in approach and/or method generally in EU studies⁸ and these concerns are particularly relevant to scholars interested in whether and how the EU supports transitional justice and peace meditation.

⁶ This paper draws on L. Davis, 'Reform, or Business as Usual? EU security provision in complex contexts: Mali' *Global Security* (May 2015); *EU Foreign Policy, Transitional Justice and Mediation: Principle, Policy and Practice*, (Abingdon: Routledge, 2014); 'Make do, or Mend? EU security provision in complex conflicts: the Democratic Republic of Congo' *European Security* (2014).

⁷ Council of the European Union *The EU's policy framework on support to transitional justice* 13576/15 Brussels, 16 November 2015 (hereafter: EU transitional justice policy)

⁸ N. Fisher Onar and K. Nicolaïdis "The Decentring Agenda: Europe as a post-colonial power", *Cooperation and Conflict*, Vol. 48, No. 2 (2013), pp. 283-303. See also L. Davis, *EU Foreign Policy, Transitional Justice and Mediation: Principle, Policy and Practice*, (Abingdon: Routledge, 2014), pp. 8-10.

These problems may be magnified in country case studies if European/expatriate sources dominate so-called 'fieldwork'. The lack of cross-over between area-studies and EU-studies can be a serious limitation. These problems may be particularly acute when it comes to mediation if the views of expatriate officials, who may never or rarely leave large urban centres dominate analysis not only of the conflicts but also of the role of different actors. This may be exacerbated if national sources or indeed, non-European, or non-EU, expatriates in the country have little understanding or awareness of the EU, its institutions and policies. Researching EU mediation as a field presents even more challenges than other forms of EU external action because of the nature of the mediation. Bercovitch and others have commented on the tendency of mediators to maintain an air of mystery around their work.⁹ While this may be true of some individuals, mediators are often party to highly sensitive and confidential processes. As there are likely to be numerous negotiations ongoing at any one time, individuals are unlikely to be aware of all of the conversations in play. Finally, the nature of international mediation is such that individuals may claim success for themselves and/or their mandating organisations to increase their prestige and standing, or to justify the expense, while parties may have more of an interest in downplaying the contributions of mediators.

I have sought to mitigate these problems in the case studies by relying as much as possible on Congolese and Malian sources, and expatriates with either long-term knowledge of the country or with personal experience of the various processes described. Nonetheless, I am aware that a certain amount of 'Kinshasa-' and 'Bamako-bubble' influence likely

⁹ J.Bercovitch, 'Mediation in International Conflicts'. In I. W. Zartman, *Peacemaking in International Conflict: Methods and Techniques*. (Washington DC: United States Institute for Peace Press, 2007) 163-195.

remains. Yet ground-up perspectives on EU engagements in third countries, including readings of the context in which the EU seeks to operate, are important to counter 'Eurocentrism.'

The EU's contribution to peace and justice

Peace and justice

The 'peace versus justice' debates amongst practitioners, policy-makers and scholars engaged in peace mediation and transitional justice have largely evolved into 'peace and justice' discussions. Peace negotiations increasingly address questions of justice for human rights violations and include provisions intended to enhance accountability and protect human rights in the post-conflict period.¹⁰ Peace agreements that entrench impunity may influence other, otherwise unconnected processes.¹¹ For these reasons, mediators acting for the United Nations (UN) have been prohibited, since 1996, from witnessing peace deals that include amnesties that do not exclude the crimes of genocide, war crimes, crimes against humanity or serious human rights violations, and guidelines are becoming more common in other international organisations and non-governmental organisations. However, the ways in which parties and external actors address justice

¹⁰ C. Bell, *On the law of peace, peace agreements and the lex pacificatoria* (New York, NY: Oxford University Press, 2008); S. Aroussi and S. Vandeginste, "When interests meet norms: the relevance of human rights for peace and power-sharing" *The International Journal of Human Rights*, Vol.17, No.2 (2013), pp.183–203.

¹¹ I.W. Zartman and S. Touval 'International Mediation', in C.A. Crocker F. Olser Hampson, and P. Aall (eds), *Leashing the Dogs of War: Conflict management in a divided world*, (Washington DC: United States Institute for Peace, 2007).

issues during peace negotiations and broader peacebuilding is complex and efforts to promote justice may risk destabilizing a fragile context.

In societies emerging from violent conflict, parties may choose to include justice provisions in the peace agreement itself, and/or pursue transitional justice initiatives as part of a broader (liberal) peacebuilding agenda.¹² Transitional justice – which includes criminal prosecution of offenders, truth-seeking initiatives, reparations for victims and institutional reform - has emerged as a way in which a society may address the legacy of large-scale human rights violations, particularly after violent conflict and/or authoritarian rule.¹³ These initiatives may involve international bodies, such as the International Criminal Court, national state institutions and civil society organizations.

There may be particular connections between transitional justice initiatives and broader institutional reform processes, although these may also come into tension.¹⁴ Reforming

¹² R. Paris, *At War's End: Building Peace after Civil Conflict*. (Cambridge: Cambridge University Press, 2004); E. Newman, R. Paris, O.P. Richmond. *New perspectives on liberal peacebuilding* (Tokyo: United Nations University, 2012)

¹³ See, for example: T. Carothers, "The end of the transition paradigm", *Journal of Democracy*, Vol.13, No. 1 (2002), pp. 5–21; R. Teitel, "Transitional justice genealogy", *Harvard Human Rights Journal*, Vol. 16 (2003), pp. 69–94.; C. Bell "Transitional justice, interdisciplinarity and the state of the 'field' or 'non-field.'" *International Journal of Transitional Justice*, Vol. 3, No. 1, (2009), pp. 5–27; P. Arthur, "How 'transitions' reshaped human rights: a conceptual history of transitional justice", *Human Rights Quarterly*, Vol. 31, No. 2 (2009), pp. 321–367.

¹⁴ J. Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge: Cambridge University Press, 2004); C.L. Sriram, *Confronting past human rights violations: justice vs. peace in times of transition* (London: Frank Cass, 2004); C. L. Sriram, "Justice as peace? Liberal Peacebuilding and Strategies of Transitional Justice" *Global Society*, Vol. 21, No. 4 (2007), pp. 579–591.

public institutions- particularly in the security sector - to uphold the rule of law is a particular concern for accountability and human rights protection. Accountability measures such as the prosecution of perpetrators of human rights violations may depend on effective reform of public institutions to remove spoilers or least reduce their ability to block justice initiatives.¹⁵ Security sector reform (SSR) and rule of law initiatives may therefore represent important opportunities for transitional justice.

Although most justice interventions (including SSR) focus on state institutions, society develops and protects standards in many ways, including and beyond the formal state institutions.¹⁶ Even when human rights are enshrined in law, these rights may be under-enforced for some parts of the population, such as minorities and women.¹⁷ Activism aimed at social change to respect and protect human rights as ethical standards is therefore an important component of a justice agenda.

Peace and justice, and the EU

In societies in or emerging from violent conflict, the EU may therefore support a range of initiatives with different state and non-state actors to contribute to peace and justice. The EU's pursuit of justice for human rights violations may therefore be understood as:

¹⁵ J. Snyder and L. Vinjamuri, "Trials and errors: principle and pragmatism in strategies of international justice" *International Security*, Vol. 28, No. 3 (2004), pp. 5-44.; P. de Greiff, "Vetting and transitional justice" in A. Mayer-Rieckh and P. de Greiff, (eds.)

Justice as Prevention: Vetting Public Employees in Transitional Societies. New York: Social Research Council, 2007) pp. 522-544.

¹⁶ J. Griffiths, "What is Legal Pluralism?" *Journal of Legal Pluralism* Vol. 24 (1986), pp.15-29.

¹⁷ F. Ní Aoláin and E. Rooney 'Underenforcement and Intersectionality: Gendered Aspects of Transition for Women.' In *The International Journal of Transitional Justice*, Vol. 1 (2007), pp.338-354.

interventions that support the pursuit of justice for human rights abuse in line with international law, standards and norms through international justice institutions, national political-legal institutions and the security system, and through civil society and other social actors and mechanisms.¹⁸

Just as the EU's engagement with justice initiatives involves multiple layers in society, from state institutions to community-based initiatives, so too should the EU's role in peace mediation be understood as multilayered. Diamond and Macdonald's concept of multitrack diplomacy, is a useful model as it underscores the multiple layers of peace mediation, without necessarily privileging formal, 'track I' over other forms of mediation.¹⁹

While justice may be pursued separately from peace negotiations, the ways in which justice issues are addressed – or not – during peace negotiations may have lasting consequences for subsequent peace- and state-building measures, as discussed above. This article will analyze the EU's interventions in DRC and Mali and consider how the EU engaged in peace mediation in different levels of society. It then assesses how the EU promoted justice agenda at the international level, through national institutions (especially the justice and security systems) and non-state actors, including civil society, including through the peace talks that followed the crisis. Before doing so, however, this section considers the policy provisions the EU has had at its disposal to pursue peace and justice, prior to the adoption of the 2015 transitional justice framework.

¹⁸ L. Davis, *EU foreign policy op. cit.*, p.32.

¹⁹ L. Diamond and J. Macdonald. *Multi-track Diplomacy: a Systems Approach to Peace*. (West Hartford: Kumarian Press, 1996).

Peace and justice in EU foreign policy prior to 2015

The EU and transitional justice in policy

Before the Council adopted the framework to support transitional justice, the EU had no policy for either transitional justice or mediation. Yet before the framework was adopted, there were however numerous references across policy documents from the different organs of the EU (the Commission, Council, Council Secretariat, EEAS, Common Foreign and Security Policy (CFSP) and Parliament) supporting different transitional justice mechanisms.²⁰

The EU and transitional justice in policy

As the EU did not have a definition or conceptualisation of 'transitional justice' until the policy framework was adopted in 2015, it is useful to refer to the UN Secretary General's definition of 2004, and the revised version in 2010:

Transitional justice consists of both judicial and non-judicial mechanisms, including prosecution initiatives, facilitating initiatives in respect of the right to truth, delivering reparations, institutional reform and national consultations. Whatever combination is chosen must be in conformity with international legal standards and obligations.²¹

While scholars and practitioners may dispute aspects of this definition, it provides a

²⁰ Davis, *EU Foreign Policy*, *op. cit.* pp. 48-78.

²¹ United Nations Secretary General Guidance Note of the Secretary-General 'United Nations Approach to Transitional Justice', New York, p.2. The UNSG had also offered a definition in 2004.

useful reference in assessing EU policy on transitional justice because it was in operation throughout most of the timeframe covered by this research, and because the EU is committed to multilateralism and to universal values and standards, rather than specifically 'EU' values in its external actions.

Examining the ways in which transitional justice has been addressed directly and indirectly in EU policy documents prior to 2015 shows serious discrepancies between the references to transitional justice in EU policy and the way in which scholars and practitioners have conceptualized transitional justice, including with the UN Secretary General's definition. Early provisions in the European Commission's 2001 Communication on Conflict Prevention supporting truth and reconciliation commissions emphasize reconciliation over truth-seeking and are not accompanied by references to criminal justice or broader initiatives against impunity.²² The 2008 implementation report on the European Security Strategy noted EU support to the ICC 'alongside broader EU efforts to strengthen international justice and human rights'²³ without defining what these other efforts might be and suggesting that, for the EU, prosecutions are parallel, rather than integral to transitional justice. EU Strategic Framework on Human Rights and Democracy (2012) does not mention transitional justice, although it states that the EU

will fight vigorously against impunity for serious crimes of concern to the international community, including sexual violence committed in connection

²² European Commission 2001, *Communication from the European Commission on Conflict Prevention 11 March 2001 COM (2001) 211 Final*. European Commission, Brussels. See L. Davis *EU foreign policy op.cit.* p.50

²³ European Council 2008, *Report on the implementation of the European Security Strategy – providing security in a changing world. December 2008. Doc. S407/08*, Brussels.

with armed conflict, not least through its commitment to the International Criminal Court.²⁴

The accompanying Action Plan does however reference transitional justice, stating the intention to develop a policy – which was realised in the 2015 framework to support transitional justice, examined in section 3. It is important to note however, that the commitment in the Action plan overlooks a key aspect of transitional justice: institutional reform, particularly in the security sector.²⁵

As the EU had no policy for or definition of transitional justice at this time, it is worth examining the policy provisions it made in relation to individual transitional justice mechanisms. These also prove to be uneven. EU policy in support of criminal justice, and particularly the International Criminal Court, is far stronger than for any other transitional justice mechanism. The EU made compliance with the ICTY a condition for developing closer relationships with the countries in the Western Balkans. When it comes to the ICC, all EU member states have ratified the Rome Statute and the EU claims ‘unwavering support to the Court’²⁶, which is expressed in a range of documents, including the European Security Strategy (2003), and its implementation report (2008).²⁷

²⁴ Council of the EU *EU Strategic Framework and Action Plan on Human Rights and Democracy Luxembourg 25 June 2012 11855/12* p.2

²⁵ Council of the EU *EU Strategic Framework and Action Plan on Human Rights and Democracy Luxembourg 25 June 2012 11855/12* Point 27.

²⁶ European Council (2010). *Council Conclusions on the Review Conference of the Rome Statute of the International Criminal Court*. Brussels, 25 May 2010.

²⁷ European Council (2003). *A Secure Europe in a Better World: European Security Strategy*; European Council 2008, *Report on the Implementation of the European Security Strategy - providing security in a*

Although the EU institutions have little influence in the Assembly of State Parties, where EU member states may be divided on key issues such as the relationship of the Court to the UN Security Council, EU institutions have considerable policy provisions for furthering universality of the Rome Statute and complementarity with the court in third countries. The Cooperation and Assistance Agreement between the EU and the ICC²⁸ is ground-breaking as it legally obliges the EU to cooperate with the court, and is the first agreement to bind the EU and an international organisation in this way.²⁹

Support to the ICC is also found in a range of geographical policies, such as the Africa-EU strategic partnership of 2007,³⁰ and the revised Cotonou Agreement of 2005, in which the EU and 79 African, Caribbean and Pacific (ACP) countries commit to ‘fight against international crime in accordance with international law, giving due regard to the Rome Statute’ and to ‘seek to take steps towards ratifying and implementing the Rome Statute and related instruments.’³¹

changing world.

²⁸ Council of the European Union *Agreement between the International Criminal Court and the European Union on cooperation and assistance*, ICC-PRES/01-01-06 1 May 2006.

²⁹ M. Groenleer & D. Rijks, 2009, ‘The European Union and the International Criminal Court: the politics of international criminal justice’ in KE Jørgensen, *The European Union and International Organizations*, Routledge, Abingdon, pp. 167-187.

³⁰ European Communities 2008, *The Africa-European Union strategic partnership Lisbon Declaration 8-9 December 2007*, European Communities, Luxembourg., p.24.

³¹ African, Caribbean and Pacific Group of States and European Community Member States 2005, *Agreement amending the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 - Final Act 22 December 2005* Article 10.6

This article has become the model for ICC clauses in a range of other agreements, and demonstrates significant political support, at the time at least, for the Court from African and EU leaders. This article has bite: as the Government of Sudan refused to ratify the revised Cotonou Agreement because of this clause and the outstanding ICC warrant for the arrest of president Al-Bashir and other members of the government. As a result, Sudan is ineligible for European Development Funds, estimated at around €300 million for the 10th EDF alone.³²

References to EU support for the ICC can be found in a wide range of foreign policy documents, including EU guidelines on promoting compliance with international humanitarian law, and geographic policies, particularly those addressing Sub-Saharan Africa which have significant implications for EU delegations, EU Special Representatives and Common Security and Defence Policy (CSDP) missions. Yet support for the ICC is also missing from several key documents from this time, notably the Development Cooperation Instrument (DCI) and the 'Agenda for Change,' which set out the Commission's new Development strategy in 2011, and from many geographical policies outside Sub-Saharan Africa. This suggests that the EU's commitment to support the ICC has only partially been translated into policy.

While there are quite extensive policy provisions for criminal prosecutions, and particularly in support of the ICC, there are far fewer for truth-seeking, reparations and institutional reform. Most of these are to be found in geographically-specific policies, such

³² European Parliament *Answer given by Commissioner De Gucht on behalf of the European Commission to a written question 4 February 2010* <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2009-6327&language=EN> accessed 12 April 2016

as support for Morocco's Fairness and Reconciliation Commission (IER), including regarding reparations for victims,³³ and to transitional justice endeavours in Cambodia and Sierra Leone.³⁴

Beyond country-specific policies, EU human rights guidelines also offer some piecemeal guidance, although none cover transitional justice holistically. A notable policy is the concept for EU support for disarmament, demobilization and reintegration (DDR) processes that calls for active pursuit of accountability and prosecution of the perpetrators of at least the most serious crimes:

The EU should ensure respect for Human Rights and carry out DDR support in relation to efforts in the area of reconciliation and transitional justice.

[...]Human rights of all, both victims and offenders, should be ensured at all stages of the process and at all times. This requires ending the culture of impunity, such as granting a role to war criminals in a national army or political bodies. All war crimes, crimes against humanity and other offences must be duly and timely investigated and the perpetrators brought into a fair trial. Sufficient support should be given to the International Criminal Court (ICC), International Criminal

³³ European Commission *Commission Staff Working Document Accompanying the Communication from the Commission to the European Parliament and the Council Implementation of the European Neighbourhood Policy in 2008: Progress Report Morocco SEC(2009)520/2 23 April 2009*

³⁴ Cambodia – European Community *Country Strategy Paper 2007-2013*; Sierra Leone – European Community *Country Strategy Paper and National Indicative Programme for the period 2008-2013*

Tribunal for Rwanda (ICTR), International Criminal Tribunal for Yugoslavia (ICTY),
Special Court for Sierra Leone (SCSL) and other similar structures.³⁵

This concept goes so far as to suggest that the EU could engage in, or otherwise support, vetting processes for candidates for public office in political as well as security institutions, and suggests a potentially significant role for the EU in providing extensive support to national, hybrid or international tribunals in the context of DDR programming.

A notable omission in EU policy provisions for supporting transitional justice during this period is the gender aspect to transitional justice; this has to be inferred from the EU's support for the UNSCRs on women, peace and security.

While the EU's policy provisions for transitional justice prior to 2015 are numerous, in the absence of an overarching policy supporting transitional justice, they are piecemeal. Given the complexity of transitional justice in fragile contexts, the importance that practitioners attach to addressing transitional justice in a holistic manner, and the tensions that may arise between strategies to forward peace and justice, this piecemeal approach may pose significant challenges to effective engagement in transitional justice. Analysis of the 2015 policy framework therefore has to address to what extent the challenges posed by this inconsistent approach have been remedied.

Peace mediation in EU policy

The EU has even less policy for peace mediation and none at all for addressing justice for human rights violations in peace processes. The Concept on Strengthening EU Mediation

³⁵ Council of the European Union *EU Concept for Support to Disarmament, Demobilisation and Reintegration (DDR)* 16387/06 14 December 2006.

and Dialogue Capacities of 2009, the only EU document to date addressing mediation, is largely descriptive and does not offer policy guidance.³⁶ The United Nations and other international organizations provide guidelines to their mediators, including on whether and how to address issues concerning justice for human rights violations during peace talks, but the EU does not. Nonetheless, the EEAS claims that ‘mediation is ... an integral component of the EU’s comprehensive toolbox for conflict prevention and peace building,’³⁷ The concept indicates that EU mediators are expected to address human rights violations in peace processes, yet gives no indication for how they may do so. The UN Secretary General has issued guidelines stating that UN-endorsed peace deals can never include amnesties that cover genocide, war crimes, crimes against humanity or gross violations of human rights (United Nations Security Council 2004, p.5) but EU mediators have no such guidelines to follow.

EU human rights policies give only limited guidance regarding justice options in peacemaking. It is unusual for there to be direct reference to prosecutions during peacemaking, but criminal justice is often present in the form of amnesties, which spare certain perpetrators from prosecution.

EU policy on amnesty is piecemeal: on the question of ‘individual responsibility’, the EU guidelines on promoting compliance with international humanitarian law state that ‘while, in post-conflict situations it is sometimes difficult to balance the overall aim of establishing peace and the need to combat impunity, the European Union should ensure

³⁶ Davis, *EU Foreign Policy*, *op. cit.* pp. 69-71. Hereafter: the mediation concept.

³⁷ EEAS *Factsheet: EU Mediation Support Team February 2014*, Available at

http://eeas.europa.eu/factsheets/docs/factsheet_eu-mediation-support-team_en.pdf Accessed 22 March 2015.

that there is no impunity for war crimes'.³⁸ These guidelines only cover war crimes, and do not address crimes against humanity or other serious human rights violations. Explicit provisions on amnesty are laid out in the updated EU guidelines on children and armed conflict:

The EU will seek to ensure that specific needs of children will be taken into account in early-warning and preventive approaches as well as actual conflict situations, peace negotiations, peace agreements, ensuring that crimes committed against children be excluded from all amnesties.³⁹

The EU has policy provisions that rule out amnesties for certain crimes (war crimes) or against certain victims (children). The guidelines on compliance with IHL point to the peace and justice dilemma at the heart of peacemaking, before apparently excluding the possibility for amnesty for war crimes. Despite the EU's statements and policy provisions supporting international justice, there is no central statement of EU policy on amnesty for the three of the core international crimes: genocide, war crimes and crimes against humanity, let alone the fourth category of crimes excluded from amnesty in the UN mediator's guidelines – serious human rights violations.

Peace and justice in EU policy

³⁸ Council of the European Union, *The European Union guidelines on compliance with International Humanitarian Law (IHL) Document 15246/05 III 5 December 2005*, article B16g.

³⁹ Council of the European Union, *The European Union guidelines on children and armed conflict Document. 10019/08 II. July 2008*.

This review of policy provisions for transitional justice and peace mediation prior to 2015 has shown that although the EU had numerous provisions scattered across a range of policy documents supporting transitional justice. This would appear to suggest that transitional justice is important for the EU even if it does not define it conceptually. Yet the provisions in EU policies supporting transitional justice diverge from each other and from the UN's definition. The difference in approach between the different organs of the EU (the pillars pre-Lisbon, the institutions and EEAS post-Lisbon) are less marked than the differences and inconsistencies in policy provisions developed within each part of the EU's architecture.

There are quite extensive policy provisions for criminal prosecutions, far fewer for truth-seeking, reparations and institutional reform. There are more far reaching provisions for children than for any other group, and gender considerations are missing and have to be inferred from the EU's support for the UNSCRs on women, peace and security.

The provisions for transitional justice are numerous yet piecemeal, and suggest that the EU is not equipped to deal with some of the complexities of supporting transitional justice, such as the sensitivity of processes in fragile contexts, the desirability of a holistic approach, and the tensions that may arise between strategies to forward peace and justice. When it comes to promoting justice in peace mediation, there are far fewer provisions. There are no guidelines for EU mediators or coherent policies on amnesties. Although the mediation support concept states that mediators should address transitional justice issues, it gives no indication for how they may do so.

EU support to transitional justice in practice

Before turning to the case studies, this section briefly presents an overview of the instruments at the EU's disposal to promote peace and justice.

EU instruments to support transitional justice

In addition to the policy areas discussed above, the EU has at its disposal a broad array of policy instruments it can use to support transitional justice initiatives in third countries. This support may be political, technical and/or financial. It may come primarily from funding instruments, such as the Country Strategy Papers (CSPs), the European Initiative for Democracy and Human Rights (EIDHR), the Instrument for Stability (IfS) and its successor, the Instrument contributing to Stability and Peace (IcSP), and/or from Common Foreign and Security (CFSP) instruments such as EU Special Representatives (EUSRs) and CSDP missions. The EU established a transitional justice facility of €12 million within the IfS in 2008 to support a wide range of transitional justice activities.⁴⁰ The facility was dissolved with the internal reforms accompanying the creation of the European External Action Service and the IfS was replaced in 2014 by the Instrument contributing to Stability and Peace.⁴¹ Its support may target international justice institutions, national legal-political institutions and civil society and other non-state actors, and it may be direct and/or indirect.

⁴⁰ European Commission *Commission Staff Working Document SEC(2009) 932: Accompanying document to the Annual Report from the European Commission on the Instrument for Stability in 2008 COM(2009) 341 9 July 2009*

⁴¹ Established by *Regulation (EU) No 230/2014 of the European Parliament and of the Council of 11 March 2014 establishing an instrument contributing to stability and peace*

Support to international justice The EU's policy support to the ICC is discussed above. It is also a major financial supporter of the court: the European Initiative for Democracy and Human Rights (EIDHR) has contributed over €40 million to the ICC since 1995.⁴² However, member states are divided on key issues, particularly the relationship between the Court and the UN Security Council, and the EU does not necessarily put its support for the Court into practice as effectively as it could.⁴³

Support to hybrid tribunals Compliance with the International Criminal Tribunal for the former Yugoslavia conditioned relations between the countries of the region and the EU.⁴⁴ The Special Court in Sierra Leone, for example, received around €5.5million from the EIDHR and European Development Fund.⁴⁵ The Extraordinary Chambers in the Courts of Cambodia, the trial of the former Chadian president Hissène Habré in Senegal and the Special Tribunal for Lebanon have all received significant EU funding.⁴⁶

⁴² European Commission (2013). *The International Criminal Court and the fight against impunity* Available from: http://ec.europa.eu/external_relations/human_rights/icc/

⁴³ L. Davis (2014). 'Discreet effectiveness: the EU and the ICC' in E. Drieskens & L. G. van Schaik *The EU and Effective Multilateralism: Internal and external reform practices* Abingdon: Routledge, pp. 84-100.

⁴⁴ General Affairs and External Relations Council (2003). *Extracts from successive General Affairs & External Relations Councils 16 June 2003*.

⁴⁵ Sierra Leone – European Community (2007). *Country Strategy Paper and National Indicative Programme for the period 2008-2013*

⁴⁶ Extraordinary Chambers in the Courts of Cambodia website http://www.eccc.gov.kh/english/finances_pledging.aspx; European Commission (2008). *Commission staff working document Accompanying document to the Report from the Commission to the Council and the European Parliament Annual Report from the European Commission on the Instrument for Stability in 2007 COM (2008) 181 Final*. Brussels, 2008; European Commission (2009). *Commission Staff Working Document Accompanying the Communication from*

Beyond criminal justice, there are far fewer references in policy to the other transitional justice mechanisms. The Communication on Situations of Fragility discusses supporting transitional justice and reconciliation processes.⁴⁷ But even if there are few references in policy, the EU provides nonetheless considerable financial support to a wide range of initiatives. The EIDHR has supported the creation of a truth commission in Indonesia; the *gacaca* process in Rwanda; the International Commission on Missing Persons in Bosnia-Herzegovina; projects promoting criminal prosecutions, gender justice and security sector reform in Eastern Africa, Peru and Haiti; monitoring war crimes trials in Croatia and a project to help trace the disappeared in Guatemala, amongst others.⁴⁸ As noted above, the IfS transitional justice facility provided €12 million to a range of transitional justice efforts across the world.⁴⁹ Geographical instruments have also contributed. The Liberian truth commission received technical assistance, equipment and operating costs from the 9th EDF; the EDF and European Neighbourhood Policy were used to support Morocco's Fairness and Reconciliation Commission and the Development Cooperation Instrument (DCI) funds the European-Philippines Justice Program is designed to build

the Commission to the European Parliament and the Council Implementation of the European Neighbourhood Policy in 2008: Progress Report Lebanon COM(2009) 188.

⁴⁷ European Commission (2007). *European Commission Communication: Towards an EU response to situations of fragility – engaging in difficult environments for sustainable development, stability and peace* COM (2007) 643 Final.

⁴⁸ EuropeAid (undated). *List of projects financed under EIDHR 2009*; European Commission (2009). *The European Instrument for Democracy and Human Rights (EIDHR) Compendium January 2007*.

⁴⁹ European Commission (2009). *Commission Staff Working Document SEC(2009) 932: Accompanying document to the Annual report from the European Commission on the Instrument for Stability in 2008* COM(2009) 341.

capacity to respond to the massive increase in enforced disappearances and extrajudicial killings in the Philippines even though the Instrument regulation makes no reference to transitional justice.⁵⁰ This overview is summarised in table 1 below.

Table 1: EU support to transitional justice in policy and practice: overview

	Policy	Practice
International justice institutions		
ICC	Common Position (2002) Agreement on Privileges and Immunities of the International Criminal Court (2003) European Security Strategy (2003) Cotonou Agreement (2005) Guidelines EU support for DDR processes (2006) Agreement on Cooperation and Assistance (2006) Instrument for Stability (2006) EU Guidelines Children and Armed Conflict (2008) European Security Strategy Implementation Report (2008) Guidelines on implementing IHL (2009) Stockholm Programme (2009) EU Africa Strategy (2010) Action Plans (2004), (2011)	2 EUSRs (Sudan to 2013, not continued in mandate EUSR Horn of Africa; Sahel) of 11 mandated to work with ICC. No CSDP mission to date mandated to support ICC Reference to ICC in all relevant CSPs in ICC situations except CAR, Libya. (There is no CSP for Sudan, as Cotonou (2005) not ratified, Demarches ICC clauses in some Partnership Cooperation Agreements Direct funding (EIDHR)

⁵⁰ Republic of Liberia – European Community (2007). *Country Strategy Paper and Indicative Programme for the period 2008-2013* p.88; European Commission (2009). *Commission Staff Working Document Accompanying the Communication from the Commission to the European Parliament and the Council Implementation of the European Neighbourhood Policy in 2008: Progress Report Morocco SEC(2009)520/2*. 2009; Delegation of the European Union to the Philippines (2009). *EU News*. December 2009; European Parliament and Council (2006). *Regulation (EC) No 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation OJ 378/42*.

	Joint Communication on Human Rights & Democracy (2011) EU Action Plan on Human Rights and Democracy (2012)	
Tribunals	Thessaloniki Agenda for Western Balkans (2003) Guidelines EU support for DDR processes (2006) Instrument for Stability (2006) Instrument contributing to Stability and Peace (2014)	Direct funding (EIDHR, IfS, IcSP, EDF) CSDP mission EULEX Kosovo to contribute to investigating war crimes.
National political-legal		
Truth & Reconciliation Commissions; 'Reconciliation'	Communication Conflict Prevention (2001) Instrument for Stability (2006) Joint Communication on Human Rights & Democracy (2011) Instrument contributing to Stability and Peace (2014)	CSPs for ICC situations DRC, Cote d'Ivoire, Kenya, Central African Republic include funding for complementary SSR/ Rule of Law reform.
Reparations	Joint Communication on Human Rights & Democracy (2011)	
National Prosecutions & Complementary Rule of Law	Common Position (2002) Communication on Situations of Fragility (2007) Guidelines on implementing IHL (2009) Joint Communication on Human Rights & Democracy (2011) EU Action Plan on Human Rights and Democracy (2012)	Transitional justice processes included in EU/Morocco Action Plan; CSPs for Sierra Leone, Cambodia. Direct funding TRCs (EDF, IfS) and other TJ activities (including DCI funding)
Security system (TJ related) Vetting	Instrument for Stability (2006) Joint Communication on Human Rights & Democracy (2011)	
Civil society/ non-state actors		
Civil society & other social actors/ mechanisms		Direct funding EIDHR, IfS, IcSP Direct and indirect funding IfS, IcSP EIDHR

Source: Updated and adapted version of Table 5.1 Justice in a multilayered environment in EU policy and

practice, L. Davis *EU Foreign Policy op. cit.*, pp. 182-3

The EU can also support peace mediation in at various levels in the multilayered environment, or Tracks, to follow Diamond and Macdonald. The instruments it has at its disposal to do this are presented in Table 2. Support in these cases might be direct – a representative of the EU participates in talks – or indirect, such as supporting mediation undertaken by other diplomats, international organisations or grass-roots organisations.

Table 2: EU peace mediation instruments

Track	Nature of support	Instrument
Track I	Direct	High Representative ⁵¹ Commissioner European Union Special Representatives, Envoys EEAS senior staff Heads of EU Delegation Presidency, troika CSDP mission
	Indirect	Financial support: e.g. IfS/IcSP, European Development Fund
Track II	Direct	European Union Special Representatives, Envoys Heads of EU Delegation CSDP mission
	Indirect	Financial support: IfS/IcSP, European Development Fund
Track III	Indirect	European Instrument for Democracy and Human Rights, IfS/IcSP

⁵¹ Taken here to include the High Representative for CFSP/Secretary General of the European Council prior to the entry into force of the Lisbon Treaty and the High Representative for Foreign Affairs and Security Policy/Vice President of the European Commission subsequently.

Source: Updated from L. Davis *Make do or Mend* 2014, op.cit

The EU, peace and justice in DRC and Mali

Peace and Justice in EU policies

Although the focus on this article is firmly on EU policy and practice, rather than internal policy-making processes, the influence of member states are critical in shaping EU and European responses to crises. The circumstances in both the Democratic Republic of Congo, a former Belgian colony and in Mali, a former French colony, meant that member states allowed a certain level of *EU* foreign policy to emerge. In DRC, this was partly due to Belgian activism to get DRC onto the EU agenda. In Mali, France, and to a lesser extent, Spain, pushed for more EU engagement for some time without much success until the deaths of European hostages and a greater concern for regional extremism prompted more interest from other states, notably the UK. It is beyond the scope of this section to examine in detail these processes, yet the EU has engaged most of its peacebuilding instruments at different times in each case.⁵² The International Criminal Court was active in both situations during the periods under consideration.

Review of the policy documents regarding DRC and Mali from this time period reveals reference to transitional justice, usually through specific mechanisms, and the use of specific instruments to achieve what might be termed justice objectives, but without

⁵² This section draws on the case studies L. Davis, 'Reform, or Business as Usual? *Op. cit.* (2015); *EU Foreign Policy*, *op cit.*, (2014) chapter 4; and 'Make do, or Mend? *Op.cit.* (2014).

suggesting that the EU's objectives were exclusively, or even primarily justice-related. These are summarized in Table 3.

Table 3: EU tools and instruments used to support transitional justice in DRC, Mali

	Policy	Practice
<i>International justice institutions (ICC)</i>		
DRC	Council Conclusions Country Strategy Papers Parliament Resolutions Strategic Framework for the Great Lakes Region 2013	EUSR 9 th , 10 th EDF
Mali	Council Conclusions Parliament resolutions	EUSR
<i>National political-legal (rule of law, justice sector reform, human rights)</i>		
DRC	Council Conclusions Country Strategy Papers Parliament Resolutions Strategic Framework for the Great Lakes Region 2013	9 th , 10 th , 11 th EDF Rejusco ARTEMIS (2003) EUPOL
Mali	Strategy for Security and Development in the Sahel Council Conclusions Parliament Resolutions National Indicative Programme (NIP) 2014 -2020	EUSR
<i>Security system reform (defence, police)</i>		
DRC	EU SSR Roadmaps (2006, 2010, 2011) Strategic Framework for the Great Lakes Region 2013	9 th , 10 th , 11 th EDF EUSEC, EUPOL IfS, IcSP
Mali	Strategy for Security and Development in the Sahel NIP 2014 -2020	EUSR EUTM, EUCAP 11 th EDF
<i>Civil society, other social actors/ mechanisms</i>		

DRC		EIDHR, IFS, IcSP
Mali		EIDHR, IcSP

The EU and peace mediation in DRC and Mali

The EU has been directly and indirectly involved in peace mediation in DRC (from around 1996 to 2013) and in Mali in the aftermath of the crisis of 2012. In both places, the EU engaged high-level envoys to support international mediation efforts at the most formal diplomatic levels. This is not to suggest that the EU should act alone in mediation. The EU is committed to multilateralism, as well as regional responses (African solutions for African problems). It is the only regional power that intervenes beyond its borders, and therefore supporting other international, regional and local actors is likely to be the most appropriate form of support, especially when mediation fields can get very crowded, as was the case in both DRC and Mali. This multilateral, supporting role is reflected in policy documents from the time.

EU Special Representatives were engaged in mediation in DRC (from 1996 to around 2009), and in Mali from 2012. Other key mediation actors in the DRC during the height of the EUSR's engagement were the UN mission to that country, and the USA. After the Goma agreement of 2008 fell part, the EUSR was much less involved in peace mediation in DRC and by the time of the latest settlement, the Addis Agreement of 2013, the EU was no longer involved; the African Union (AU), the International Conference on the Great Lakes Region (ICGLR) and the Southern African Development Community (SADC) took the leading roles. In Mali, key mediation actors included the Economic Community of West African States (ECOWAS), the AU, the UN and their missions, the Organisation of the

Islamic Conference, Algeria, Niger and Mauritania and other interested states in the region and states such as France, Switzerland and the USA.

It is important to note that the EUSRs had regional mandates, as EUSR for the Great Lakes Region and for the Sahel respectively. The EUSR for the Great Lakes, Roeland van der Geer, was not mandated to engage in mediation in DRC, but was a member of the core International Facilitation Team in the process leading up to and beyond the Goma peace conference of 2008. The Council appointed Michel Dominique Reveyrand-de Menthon EUSR for the Sahel in March 2013. He is to 'contribute to regional and international efforts to facilitate the resolution of the crisis in Mali, in particular the adoption and implementation of the roadmap for the political transition, a free and transparent electoral process and a credible national inclusive dialogue.'⁵³

During the Goma process in DRC, the EUSR took the position that there could be no amnesty for war crimes, crimes against humanity or genocide. In the absence of EU policy guidance, this was a position he derived from the UN guidelines to mediators and from the EU's support to the ICC. The eventual agreement contained an amnesty limited in line with the UN guidelines, although prosecuting anyone for the crimes committed in DRC remains a challenge.

The Ouagadougou Accord does not contain an amnesty, yet the government commits to suspend prosecutions of members of signatory armed groups. The suspension is for acts of war: war crimes, crimes against humanity, genocide, crimes of sexual violence and grave violations of international human right and humanitarian law are explicitly

⁵³ Council of the European Union *Council decision 2013/133/CFSP of 18 March 2013 appointing the European Union Special Representative for the Sahel*, Brussels, 2013, article 3 (h).

excluded.⁵⁴ It is, therefore, it is in line with UN policy on amnesty. However, the Accord specifies not an amnesty, but a ‘suspension’ that has no standing in Malian law or practice, leading observers to suggest that the leaders of the armed groups had negotiated impunity for themselves.⁵⁵

It is beyond the scope of this paper to enter into the detail of the processes, but in both DRC and Mali, security arrangements have been among the most pressing details in the settlements.⁵⁶ In addition to EUSRs, CSDP missions may play an important role in mediation, particularly but not limited to negotiations with security institutions and armed groups, and on subjects such as security arrangements. In both DRC and Mali, EU policy reflected the wider concern with the urgent need to reform the security services, including installing adequate discipline, as a precondition for the state to be able to improve its ability to protect the public, not just the elites, ensure public safety and bring organized crime under control. In Mali and in DRC, the desertion of previously integrated ex-rebels into the army contributed to the occupation of the north (in Mali) and the recurrent violence in the east (in DRC) and was highly sensitive politically. Integrating fighters from armed groups (back) into the army would pose a significant challenge for SSR. In both countries, violations committed by state security services cause concern amongst rights activists and international observers, and are reflected in EU policy statements from the time. The ways in which the personal records of individuals – particularly those after leadership positions – are scrutinized is likely to have lasting

⁵⁴ *L’Accord préliminaire de Ougadougou* June 2013, Article 16.

⁵⁵ Interviews, diplomats and civil society members Bamako November 2013, January 2014.

⁵⁶ Interviews, European, African officials, Bamako, December 2013; January 2014.

consequences on the role security institutions and agents play in society.

Two CSDP missions in DRC have been involved in process aiming to reach agreement on security arrangements: the mandates of both EUPOL (which worked on reforming the police) and EUSEC (defence reform) were altered after the 2008 Goma agreement to support its implementation in these areas. One might reasonably expect, therefore, a CSDP mission in Mali to engage on these issues, especially with a EUSR in place contributing to a peace processes. EUTM (EU training mission) was not, however, mandated to do so.⁵⁷ This omission may prove to be a significant lost opportunity, given the importance of future security arrangements in settling the current crisis and preventing future conflicts in the region, and EU commitments to SSR. However, EUTM may make some contribution to justice-sensitive security reform for although its mandate is to provide advice and train Malian combat troops, it screens potential participants on a range of criteria, including age (to identify minors) and for allegations of human rights abuse.⁵⁸ It may therefore contribute over time to the exclusion of abusive officers. EU officials and European diplomats have reportedly also raised the question of excluding certain officers from the army in the future.⁵⁹

There is policy at the global level that enables CSDP missions to support war crimes investigations, including by the International Criminal Court (ICC).⁶⁰ The CSDP missions

⁵⁷ Council of the European Union *Council decision 2013/34/CFSP of 17 January 2013 on a European Union military mission to contribute to the training of the Malian Armed Forces (EUTM Mali)*, Brussels, 2013.

⁵⁸ Interviews, EU training mission, Bamako, November 2013.

⁵⁹ Interviews, Bamako, December 2013.

⁶⁰ Davis, *EU foreign policy op. cit.*, pp. 89-90.

in DRC and in Mali might have been well-placed to support these investigations but they have not been mandated to do so.

Beyond the formal talks, whether at Track I or at Track II, the EU has also supported considerable efforts by civil society to resolve conflicts. These type of processes usually do not directly include references to justice initiatives as they lack the power to bind the relevant national or international authorities.

Lessons from DRC and Mali for EU support to peace and justice

The analysis of EU engagement in DRC and in Mali in the previous sections has demonstrated that despite the absence of EU policy for interpreting the principles of peace and justice for human rights violations, in both DRC and Mali the various policy documents from the EEAS, Council, Commission and Parliament resolutions from this time suggest that the EU developed a policy approach that sought to address peace and justice. These policy commitments were supported by financial and technical assistance.

While documents reveal a range of references to justice for human rights violations, calling for perpetrators of abuse across the country, including state security agents, to be held to account for their crimes through national courts and urging cooperation with the International Criminal Court, these case studies also reveal certain missteps.

While EU policy on criminal justice has been clear, its position on ‘reconciliation’ is much more problematic. Policy references to reconciliation have long been inconsistent, and in Mali they generally positioned reconciliation with dialogue and separate from addressing human rights violations. In a statement in May 2013, however, the Council stated unambiguously that ‘The fight against impunity and the full implementation of justice

must constitute a fundamental element of reconciliation'⁶¹ unambiguously aligning the EU with UN policy.

As transitional justice is highly sensitive and may be very politicized and complex, endeavours may serve primarily to legitimize a particular regime, or whitewash the past, even while establishing greater accountability.⁶² Trials, or other transitional justice initiatives, may reinforce divisions in society or transitional justice initiatives may be externally imposed and culturally inappropriate.⁶³ Analysis of policy alone cannot tell us whether the initiatives that the EU supported in Mali and DRC were appropriate mechanisms, or whether the EU missed opportunities to further transitional justice. Case studies reveal missteps: In Mali, for example, the EU supported the national commission for reconciliation and dialogue (CRD) politically through Council Conclusions, financially with €1 million for capacity building and technical assistance, and with technical assistance from the EEAS.⁶⁴ But the CRD lacked credibility and legitimacy and was

⁶¹ Council of the European Union *Council Conclusions on Mali, 27 May 2013, op. cit.*

⁶² B. A. Leebaw, 'The Irreconcilable Goals of Transitional Justice' in *Human Rights Quarterly* 3.1 2008

⁶³ C.L. Sriram 'Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice' *Global Society* 2007 21.4 pp.579-91

⁶⁴ Council of the European Union *Council Conclusions on Mali, 3222nd Foreign Affairs Council meeting, 18 February 2013; Council Conclusions on Mali Doc. 9780/13 Brussels, 27 May 2013. Brussels, 2013; EU Delegation to Mali Engagements de l'Union européenne sur les zones post-conflit Août 2013 Bamako, 2013. p.3. Available at*

www.eeas.europa.eu/delegations/mali/documents/eu_mali/eu_regions_post_conflit_fr.pdf Accessed 19

April 2016; EEAS *Factsheet: EU Mediation Support Team February 2014*, Available at

http://eeas.europa.eu/factsheets/docs/factsheet_eu-mediation-support-team_en.pdf Accessed 22 March 2015.

perceived by many as contributing to, rather than tackling impunity. It was quickly dissolved and replaced by the Truth, Justice and Reconciliation Commission. In DRC, the EU supported an innovative project, Rejusco, that aimed to establish a functioning justice sector in the east of the country, but the project lacked the necessary diplomatic support from EU officials and member state embassies for it to function in a very challenging environment.

The potential role for CSDP missions in promoting peace and justice worldwide was discussed in the first section. The cases of DRC and Mali underscore how CSDP could contribute to negotiating security arrangements that include justice-sensitive elements, such as excluding abusive officers. Although the EUSR and the CSDP missions participated in these discussions in a limited way in DRC, in Mali neither the EUSR nor the EUTM did, meaning they have no influence over security arrangements, arguably one of the most crucial aspects of the post-conflict settlement. However, EUTM's practice of screening suspected human rights abusers from its training programme may contribute to improving the behaviour of officers and soldiers, although without robust disciplinary mechanisms in place this may be overly optimistic. This is, however, reportedly accompanied by requests to exclude abusive state agents from the armed forces, which may have more effect in the longer term.

The 2015 EU Framework for support to transitional justice

The paper has shown that for the EU, transitional justice is a field encompasses peacebuilding, human rights protection, crisis management, state-building and development, areas in which the EU is heavily engaged across the world, and for which the EU has a broad tool box ranging from more classical development assistance through

to crisis management missions. EU support to transitional justice may overlap with its engagements in peace mediation.

The references to transitional justice in the policy documents prior to 2015 are patchy and inconsistent. A transitional justice policy should help clarify how the EU understands transitional justice and it should also spell out how the different (existing) EU instruments can contribute to it. The EU does not lack the necessary instruments for political, technical and financial support for transitional justice initiatives in third countries. Funding is an important component of that support and a range of funding instruments have been used to support efforts ranging from the International Criminal Court and internationalized courts through to civil society efforts to help victims access reparations programmes or trace the disappeared. EIDHR, IcSP and the geographic instruments remain the most likely source of funding for transitional justice initiatives. Political tools such as Council conclusions, geographic tools and country specific policies have also supported transitional justice endeavours, again, most notably the ICC but the EU could maximize its approach by ensuring that other interventions, including CSDP missions and EUSR engagements, contribute to transitional justice, particularly in the areas of rule of law, security sector reform, and disarmament, demobilization, and reintegration.

Disarmament, demobilization and reintegration (DDR) and security sector reform (SSR) are major areas of EU intervention and important for transitional justice. Security arrangements made as part of a transitional process may have more impact on human rights, justice and the durability of a peace agreement than any other transitional justice initiative. The DDR concept presents a potentially radical role for the EU, which has never been put into practice, and the SSR concepts do not mention transitional justice. DDR and SSR will also be important for the EU's engagement in transitional justice because it is in

these policy areas (and rule of law) that the CSDP missions usually engage, therefore coherence and consistency, including towards transitional justice objectives, between CSDP operations and other EU interventions in a given context will be important component of effective EU support.

In the same vein, the EU supports considerable rule of law projects across the world through different instruments (EDF, the Neighbourhood Policy, DCI, EIDHR). Rule of law reform and transitional justice may intersect, but are also distinct policy areas. They may also be distinct from peace mediation efforts. Nonetheless, many of the EU's rule of law projects can be classified as transitional justice initiatives in their own right and/or they may enable future initiatives. Alternatively, they may run in parallel to other transitional justice initiatives, missing opportunities for a holistic transitional justice approach and undermining EU coherence. A key criticism of the EU and other actors is the tendency to treat rule of law reform as a technical exercise, when it is highly political, with insufficient engagement from the delegation and member state embassies. Finally, the EU is able to support a range of non-state actors involved in transitional justice activities.

The challenges for effective EU support to transitional justice are compounded when this support may be needed in the context of peace mediation, due to the EU's lack of mediation policy or guidelines.

This analysis suggests that the EU faces certain key challenges in effectively supporting transitional justice, particularly in the context of peace mediation:

1. A common understanding of transitional justice is, what it is intended to achieve and what the EU seeks to achieve in supporting transitional justice;
2. How transitional justice initiatives may interact with, support or detract from peace mediation efforts, and vice versa;

3. Capacity for analysis-driven decision-making to determine i) whether proposed transitional justice mechanisms are in good faith or otherwise appropriate and ii) the most effective form of EU support for good faith initiatives;
4. The extent to which the EU can use its different tools comprehensively to support transitional justice holistically; and
5. Implicit in all of the above: that the EU learn from its own experience and the experiences of other international actors. Robust methods of evaluation, lessons learnt and adopted will help the EU refine and improve its support to transitional justice.

This final section considers how the EU's 2015 policy on support for transitional justice responds to the five challenges identified above.

1. Conceptual definition of transitional justice and the EU's objectives in supporting it

The policy framework opens by referring to the UN Secretary General's report on transitional justice and the rule of law (2004), identifying the main elements of transitional justice as criminal justice, truth, reparations and guarantees of non-recurrence/institutional reform. It states that this is the definition that the EU applies, and does not offer an alternative definition. It states that the EU's support for transitional justice aims to achieve the objectives of ending impunity, providing recognition and redress to victims, fostering trust, strengthening the rule of law and contributing to reconciliation.⁶⁵ This provides clarity and addresses one of the lacuna of EU support to transitional justice identified above, namely the lack of clarity between reconciliation and

⁶⁵ EU policy on transitional justice (2015) *op. cit.*, pp.7-9

impunity. The document states that ‘transitional justice is a core part of the reconciliation process.’⁶⁶

2. The relationships between transitional justice initiatives and peace mediation

This paper has identified how EU instruments could be used to further transitional justice during peace settlements, in particular around questions connected to amnesty and to security arrangements. The framework to support transitional justice addressed transitional justice more broadly, nonetheless, one could reasonably expect that the policy would address this area of EU engagement. The Council Conclusions accompanying the framework refer directly to transitional justice as ‘an important part of state and peace building’⁶⁷ and ‘welcomes the United Nations policy on amnesties in this regard.’⁶⁸ It goes on to state that ‘The Council recognizes the desirability of integrating transitional justice into crisis response and peacebuilding including in any peace negotiations which the EU supports... [and] encourages EU Special Representatives ...to promote accountability and the fight against impunity for violations and abuses.’⁶⁹ It acknowledges that ‘the EU should consider on a case-by-case basis how best to support transitional justice mechanisms, including how to best address impunity... EU mediation efforts must be fully in line with and supportive of the principles of international human rights and humanitarian law.’⁷⁰ The policy also repeats the EU’s support for the ICC, but this is applicable to only very few peace processes.

The framework therefore reflects some evolution on the EU’s position towards amnesties, even if these are ‘desirable’ rather than necessary. Yet EUSRs are only ‘encouraged’, rather

⁶⁶ *Idem*, p.9

⁶⁷ Council of the European Union *Council Conclusions on EU’s support to transitional justice* 13576/15 p. 2

⁶⁸ *ibid.* p.3

⁶⁹ *idem*, p. 4

⁷⁰ *idem*. p.12

than required, to promote the fight against impunity in peace processes, which suggests a position considerably weaker than that of the UN.

The framework also discusses the potential role for DDR and SSR efforts in promoting accountability. Yet the treatment 'peace and justice' in the framework is limited. By only referring to EUSRs in relation to peace processes, the policy misses the opportunity to refer, even briefly, to the potential contributions of other EU instruments. It also fails to mention how the EU, through these various instruments, may also contribute to promoting accountability in peace settlements more broadly than only by ensuring amnesties are limited in line with UN policy.

3. Analysis-driven decision-making

The policy stresses that EU will strive to base its support for transitional justice on 'a **genuine understanding of specific contexts and needs and the viability** of meaningful transitional justice processes.'⁷¹ It presents nine guiding principles for EU intervention:

- i. Processes must be nationally-owned, participative, consultative and include outreach;
- ii. The EU must apply a context-specific approach;
- iii. The EU's approach should be comprehensive, paying due regard to timing;
- iv. It will comply with international norms and standards;
- v. It will apply a rights-based approach to transitional justice;
- vi. It will encourage a victim-centred approach;
- vii. It will integrate 'a gender dimension';
- viii. It will adopt a child sensitive approach; and

⁷¹ *Idem*, p. 22

- ix. It will situate transitional justice within the security – development paradigm.

The policy appears to meet the need for an analysis-based decision-making process that will take into account existing forms of analysis (such as conflict analysis, Post Conflict Needs Assessment and Transitional Results Frameworks) as well as the potential international dimensions of a given conflict. It also states clearly that analysis will draw on consultation, which in principle, should help provide the data to make an evidence-based decision, although how and when this consultation would happen, and with whom, is not clear.

4. A comprehensive EU approach

The framework is intended to ‘promote **a comprehensive approach** to transitional justice.’⁷² But although the policy recognises the need for ‘a coherent strategy in which each element of a transitional justice strategy acknowledges the need for, and provides space for, other initiatives’⁷³ it does not provide any information about how planning from the EU side may be made more coherent or strategic in reference to transitional justice. A key challenge to EU support to transitional justice – namely ensuring that different instruments can be used to complement each other towards common transitional justice objectives – remains unaddressed by the policy.

5. Evaluation and learning

The policy states that implementation of the transitional justice framework will be supported by an informal network on transitional justice, which will include addressing lessons learnt, best practice and indicators to evaluate results. It also states that missions

⁷² *Idem*, p.14 emphasis original

⁷³ *Idem*, p.14

will report on implementation; Council Working Groups and project evaluation will evaluate implementation regularly.

The extent to which these different evaluation methods are joined up, or can present an overview of the (potentially wide) range of EU interventions, is not addressed. This suggests that the framework does not provide the necessary infrastructure to enable a complete overview of the different interventions, let alone provide meaningful evaluation of them. Moreover, the emphasis on evaluation is on *implementation*, rather than effects on the processes themselves, suggesting this will be partial, at best, and limited in what officials and others can learn from the experience.

This analysis suggests that some of the main challenges for effective EU support to transitional justice remain unaddressed by the new transitional justice policy. It is not possible to predict how the policy will be implemented, and further research, particularly field based research, examining the effect of EU support on transitional justice initiatives, particularly in the context of peace mediation, is necessary to determine whether this policy framework is likely to strengthen the EU's role as a transitional justice actor, or whether it will have little practical effect.

Conclusion

The European Union claims to promote peace and human rights in its external action, and declares itself a staunch supporter of the International Criminal Court. The EU only adopted a transitional justice policy in 2015, but prior to this there were numerous policy provisions in a wide range of policy papers, and the EU had been providing considerable financial and technical support to transitional justice initiatives around the world. It is also increasingly engaged in peace mediation, yet it lacks policy guidance for its mediators.

Analysis of policy and practice before 2015 shows that although the EU had numerous policy provisions that would enable it to support transitional justice initiatives across the world, there were not always put into practice. Conversely, the EU supported a wide range of transitional justice endeavours in the absence of a policy framework. At times, this support was inappropriate, as in the case of the CRD in Mali, and in the absence of a policy framework or guidelines to inform decision-making, practice seemed ad hoc.

Examining EU policy and practice prior to 2015 identified five key challenges for effective EU support to transitional justice: a common definition of transitional justice and of the EU's objectives in supporting it; how transitional justice may interact with peace mediation efforts; analysis-driven decision-making; comprehensive EU support to transitional justice; and a robust evaluation process for the EU to learn from its own experiences and those of other actors, in order to refine its support.

The 2015 transitional justice policy addresses some of these challenges. It provides a detailed definition of transitional justice, based on the UN Secretary General's definition. This adoption of the UN SG's definition is important as it underlines that the EU is part of a multilateral effort to support transitional justice, which is based on universal, rather than 'EU' values. It also details the objectives for EU support to transitional justice. It identifies the need for analysis, and provides nine guidelines to shape that analysis, but little clarity on how, institutionally, that analysis would be generated and adopted. It states the need for consultation, but with no detail with whom or on what basis. The policy also identifies the need for a comprehensive approach, but this is framed in the context of a holistic transitional justice strategy rather than describing how the EU could develop a comprehensive and coherent EU strategy that would engage the relevant EU instruments in supporting transitional justice endeavours. Finally, the policy discusses the need for

evaluation, but this is evaluation of implementation rather than of effect on the transitional justice processes themselves. It is inward looking and relies on a range of internal EU reporting mechanisms without considering how these would relate to each other.

From a transitional justice perspective, broadly seen, therefore, the policy framework is a useful contribution as it provides a clear definition of what transitional justice is and why the EU should support good transitional justice mechanisms, and provides guidelines to inform decision-making. However, significant challenges remain unaddressed and further research, particularly from the field, is necessary to determine whether or not this policy will help the EU overcome some of its institutional obstacles to effective support for transitional justice worldwide.

When it comes to the relationships between transitional justice and peace mediation, however, the policy is extremely thin. Although it affirms support for the UN policy on amnesties, it makes no mention of other ways through which EU instruments could further the possibility for justice provisions during peace negotiations. References to the instruments involved in peace mediation are limited to EUSRs, yet this paper has demonstrated the breadth of instruments potentially involved, from CSDP missions through financial and technical assistance. The policy is therefore a missed opportunity for shaping how the EU may promote peace and justice in peace processes around the world.

