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**A Burgeoning Community of Justice?**  
**The European Union as a Promoter of Transitional Justice\***

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ABSTRACT Emerging from Europe's age of total war, the European Union (EU) has a long-standing interest in promoting transitional justice. However, since this desire to become a community of justice has remained implicit, it has been overlooked by much of the literature. Despite internal tensions between east and west, over the last twenty years the EU has sought to actively promote justice both 'down' onto its member-states and 'out' into world affairs. Based on an analysis of legal texts and regulations, as well as demonstrative case studies, I argue the EU's record in this area is mixed. Although it has been able to use membership to force changes as part of the accession process, existing member-states and states outside of Europe have resisted these efforts. Despite its desire to incorporate transitional justice into its legal regime, I show that the EU's efforts in promoting transitional justice remain largely political.

KEYWORDS European Union, Transitional Justice, Politics of Memory, Colonialism, Memory Laws

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## *Introduction*

The creation of the European Union (EU) in the aftermath of the Second World War was a response to the collective memories of the continent's experience of total war (1914-1945). As the silence of immediate postwar years gave way to the activism and questioning of the 1960s, the project of European integration has gradually developed an approach to transitional justice that builds on a 'memory culture' (*Erinnerungskultur*) based on the idea of 'never again.' This regime of remembrance based on the two world wars and the Holocaust has been institutionalized in various ways, both within the member-states and at the supranational level. Perhaps the most visible example of the latter is the foundation of the House of European History in Brussels, which opened on the 50<sup>th</sup> anniversary of the Treaty of Rome in 2017.<sup>1</sup>

As a result of these considerations, it is possible to speak of the EU as 'a community of memory in which, after the unspeakable atrocities and horrors of the twentieth century, all histories of suffering are remembered, including precisely those one would most like to forget.'<sup>2</sup> Since the fall of communism in 1989, the EU has sought to make its loose, political norms of transitional justice into a legal requirement. This process started with Austria, which was forced to question its self-understanding as 'Hitler's first victim' during its accession in the early 1990s. In light of these changes, it

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<sup>1</sup> For more, see Peter J. Verovšek, *Memory and the Future of Europe: Rupture and Integration in the Wake of Total War* (Manchester: Manchester University Press, 2020); Annabelle Littoz-Monnet, 'The EU Politics of Remembrance: Can Europeans Remember Together?' *West European Politics* 35, no. 5 (2012); Catherine Guisan, *A Political Theory of Identity in European Integration: Memory and Policies* (New York: Routledge, 2012).

<sup>2</sup> Aleida Assmann, 'Europe: A Community of Memory?' *GHI Bulletin* 40 (Spring, 2007), 22-3.

is clear that transitional justice is increasingly becoming ‘part of the hidden agenda of the *acquis communautaire* and Europe’s new value system.’<sup>3</sup>

Since 2004, the accession of new member-states from the postcommunist region has complicated the EU’s relationship to memory and transitional justice. More specifically, this expansion has exposed a growing internal division between Western memory culture, which is based on the experience of fascism and the ‘zero hour’ (*Stunde Null*) of 1945, and the dominant culture of remembrance in Central and Eastern Europe, which emphasizes the renewed communist occupation that followed Nazi occupation and is therefore organized around the key date of 1989.<sup>4</sup> This bifurcation brings strikingly different lessons to bear on the politics of memory and transitional justice.

For Western Europeans, collective memories of 1945 serve as evidence that nationalism and the failure to protect individual rights is the primary danger to both peace and democracy. By contrast, for Central Europeans 1989 represents a repudiation of communism as a system imposed by external powers (i.e., the Soviet Union and the Communist Party), not of nationalism and national sovereignty. It therefore serves as the basis for resisting outside interference in what are perceived to be domestic affairs, including the EU and other European actors. As a result, the postcommunist member-states have increasingly resisted what they see as attempts by the EU to force them to adopt forms of transitional justice where the criterion for “success or failure i[s] living up to *Western* standards.”<sup>5</sup>

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<sup>3</sup> Günter Bischof, ‘Victims? Perpetrators? ‘Punching Bags’ of European Historical Memory? the Austrians and their World War II Legacies,’ *German Studies Review* 27, no. 1 (Feb., 2004), 23.

<sup>4</sup> See Peter J. Verovšek, ‘Caught between 1945 and 1989: Collective Memory and the Rise of Illiberal Democracy in Postcommunist Europe,’ *Journal of European Public Policy* (2020).

<sup>5</sup> Ivan Krastev and Stephen Holmes, ‘Explaining Eastern Europe: Imitation and its Discontents,’ *Journal of Democracy* 29, no. 3 (2018), 118.

Despite these difficulties, I argue that over the past few decades the EU has increasingly sought to become ‘community of justice’ (*Justizgemeinschaft*) that enforces the emerging global ‘anti-impunity norm’ within international criminal law.<sup>6</sup> This development is visible in the way that the Union’s adoption of transitional justice as a “soft” entrance criterion for joining the EU’ has gradually turned into a demand to confront state-sponsored crimes and atrocities criminal law within the broader ‘dynamics of international punishment.’<sup>7</sup> As a result, transitional justice has increasingly become a ‘*de facto* part of the programme and policy of the EU.’<sup>8</sup>

Since 1945 EU has played a crucial role in ‘the creation of supranational human rights protection mechanisms after World War II,’ which ‘can be considered a transitional justice effort, as they were intended to prevent repetition.’ However, its role has generally been overlooked. Instead, studies of the transnational promotion of transitional justice have focused on the European Convention of Human Rights (ECHR) and the European Court of Human Rights (ECtHR).<sup>9</sup>

By tracing the entrance of transitional justice into the European legal regime, I outline an important international development that has implications for both practitioners and theorists of transitional justice. My basic thesis is that the EU seeks to enforce this norm of transitional justice in two directions: ‘down’ onto its member-states and ‘out’ into world affairs. These activities are in keeping with EU self-image of itself as

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<sup>6</sup> Max Pensky, ‘Amnesty on Trial: Impunity, Accountability, and the Norms of International Law,’ *Ethics & Global Politics* 1, no. 1-2 (2008).

<sup>7</sup> Aline Sierp, *History, Memory, and Trans-European Identity: Unifying Divisions* (London: Routledge, 2017), 138.

<sup>8</sup> María Avello, ‘European Efforts in Transitional Justice,’ *FRIDE Working Papers* 58 (2008), 9.

<sup>9</sup> Eva Brems, ‘Transitional Justice in the Case Law of the European Court of Human Rights,’ *International Journal of Transitional Justice* 5, no. 2 (2011), 283; James Gallen, ‘The European Court of Human Rights, Transitional Justice and Historical Abuse in Consolidated Democracies,’ *Human Rights Law Review* 19, no. 4 (2019).

‘an area of shared values, values which are incompatible with crimes against humanity, genocide and war crimes.’<sup>10</sup>

Despite its efforts to promote transitional justice as a matter of law, I argue that the EU’s record of achievement in this area is mixed. On the one hand, it has had some success in promoting transitional justice through ‘agenda-setting’ and its desire to move ‘beyond power into a self-contained world of laws and rules and transnational negotiation and cooperation.’<sup>11</sup> However, as is often the case with applications of ‘civilian’ or ‘normative’ power, the EU has had less success in promoting transitional justice in areas where local actors are not responsive to international pressure or where the Union’s promise of future membership has been an ineffective carrot for promoting policy change.<sup>12</sup> Ironically, it has had trouble enforcing its expectations on existing member-states after post-accession, as ‘the EU lacks policies, operational guidelines and tools for implementing these commitments.’<sup>13</sup>

The argument is organized as follows. I start by outlining the history of the EU. This first section documents the origins of European integration in postwar Western memory culture and details the difficulties that have emerged since the accession of the new postcommunist member-states.<sup>14</sup> Part two then examines the European treaties,

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<sup>10</sup> Council of the European Union, *The Stockholm Programme – An open and secure Europe serving and protecting the citizens*, 2nd December 2009 Doc. 17024/09, p.12.

<sup>11</sup> Simon Reich and Richard Ned Lebow, *Good-Bye Hegemony: Power and Influence in the Global System* (Princeton: Princeton University Press, 2014), 59.

<sup>12</sup> Francois Dûchene, ‘Europe’s Role in World Peace’ in *Europe Tomorrow: Sixteen Europeans Look Ahead*, ed. Richard J. Mayne (London: Fontana, 1972); Ian Manners, ‘Normative Power Europe: A Contradiction in Terms?’ *Journal of Common Market Studies* 40, no. 2 (2002).

<sup>13</sup> Laura Davis, *The European Union and Transitional Justice* (Brussels: Initiative for Peacebuilding, 2010), 7.

<sup>14</sup> For more on memory cultures and the paradigm of collective memory, see Peter J. Verovšek, ‘Collective Memory, Politics, and the Influence of the Past: The Politics of Memory as a Research Paradigm,’ *Politics, Groups, and Identities* 4, no. 3 (2016), 529-43.

legislation and regulations that provide the foundation for enforcing transitional justice within the EU. The third section then briefly outlines the history of the EU's legal promotion of transitional justice 'down' on its own member-states, while the fourth focuses on its efforts to push similar measures 'out' into world politics more generally. This latter part also briefly reflects on the European legacy of colonialism, arguing that the EU's internal divisions have made it difficult to deal with its history of injustice globally. Building on this last point, the conclusion highlights the EU's failure to address the continent's colonial legacy and briefly compares its promotion of transitional justice to the measures adopted in this area by the African Union (AU).

#### *European Memory Culture between 1945 and 1989*

The EU – and the broader dream of 'a peaceful, cooperative Europe, open toward other cultures and capable of dialogue' – has its origins in the continent's age of total war (1914-45).<sup>15</sup> In the words used by French Foreign Minister Robert Schuman in announcing his eponymous plan for the European Coal and Steel Community (ECSC) on 9 May 1950, the goal of uniting Europe was to build on the collective memories forged in these conflicts to make war on the continent 'not only unthinkable but materially impossible.' In this sense, the foundation of the EU as a supranational organization designed to prevent future wars and atrocities on the continent by pooling the sovereignty of its members within institutions with their own autonomous decision-making powers outside the constitutional infrastructure of the nation-state can be considered a form of transitional justice in and of itself.

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<sup>15</sup> Alessandro Ferrara, 'Europe as a 'Special Area for Human Hope', *Constellations* 14, no. 3 (2007), 315.

Initially the European movement built on the anti-totalitarian unity that emerged from the Second World War. Immediately following the end of the war, key political leaders, including Robert Schuman, Konrad Adenauer and Alcide de Gasperi, argued that rampant nationalism had led Europe into two World Wars and the atrocities that occurred as a result. These agents of the trauma process concluded that the lack of protections for minority and individual rights enabled the persecution of Jews and other minorities throughout the continent, as well as the atrocities of the Holocaust. As a result, the leaders of western Europe agreed with Schuman that “renouncing sovereign rights...[is] the only means with which we can overcome national egoisms, antagonisms and the narrowness that is killing us.”<sup>16</sup>

Despite the fact that these initial developments can be interpreted retrospectively as a form of transitional justice, the period immediately following the end of the Second World War was actually defined by silence and of ‘vital forgetting.’<sup>17</sup> Over time, however, the centrality of the collective memories that emerged from total war necessitated an ever more active and critical ‘working through of the past’ (*Aufarbeitung der Vergangenheit*), a process that gradually replaced the ‘empty, cold forgetting’ that defined the first postwar decades.<sup>18</sup> As the silence that accompanied the ‘democratic renewal’ of the late 1940s and 1950s gave way to the activism and questioning of the

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<sup>16</sup> Schuman quoted in Daniel Christnacker, *Les Interventions de Robert Schuman au Conseil de l'Europe (1949-1951)* (Strasbourg: Mémoire IEP, 1975), 37.

<sup>17</sup> Dolf Sternberger, ‘Versuch zu einem Fazit,’ *Die Wandlung* 4 (1949); Dolf Sternberger, ‘Die Deutsche Frage,’ *Der Monat* 8/9 (1949).

<sup>18</sup> Theodor W. Adorno, ‘What does Coming to Terms with the Past Mean?’ in *Bitburg in Moral and Political Perspective*, ed. Geoffrey H. Hartman, trans. Timothy Bahti and Theodor W. Adorno (Bloomington: Indiana University Press, 1986), 124.

1960s, societies across Western Europe developed a shared collective memory based on ‘the deterrent horror of Auschwitz.’<sup>19</sup>

The form that the politics of memory took in postwar Western Europe has important consequences for the development of postwar democracy. Although popular sovereignty was still important, the lessons of 1945 show that that the will of the people could only function properly within a ‘constrained democracy’ that protected individual and group rights.<sup>20</sup> The postwar liberal-democratic order in western Europe thus sought to ensure that nation-states could not deploy national law to ‘kill the juridical person’ by taking away basic rights from unwanted individuals and minorities, which enabled the atrocities of the Holocaust.<sup>21</sup>

The project of supranational rights protection had a legal dimension as well. The development of European law, which takes precedence over national laws as a result of the doctrine of supremacy, is designed to protect human rights at the continental level. In addition to the EU, both the Council of Europe and the ECtHR in Strasbourg seek ensure the protection of the rights of persecuted individuals and minorities by giving them legal standing to report and even sue their states for both past and ongoing rights violations. Thus, in addition to constraining popular sovereignty domestically, the lessons of 1945 resulted in a broader skepticism of the nation-state as the appropriate sphere for transitional justice.

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<sup>19</sup> Elizabeth Pond, *The Rebirth of Europe* (Washington: Brookings Institution Press, 2002), 158.

<sup>20</sup> Benjamin A. Schupmann, *Carl Schmitt's State and Constitutional Theory: A Critical Analysis* (Oxford: Oxford University Press, 2017), conclusion; Peter J. Verovšek, ‘Memory, Narrative and Rupture: The Power of the Past as a Resource for Political Change,’ *Memory Studies* 13, no. 2 (2020), 208-22.

<sup>21</sup> Timothy Snyder and Luka Lisjak Gabrijelčič, ‘Beware the Destruction of the State!: An Interview with Timothy Snyder,’ *Eurozine* (9 September, 2016).

These legal, constitutional and political developments are rooted in the shared remembrance of two World Wars and the Holocaust. Over the course of the second half of the twentieth century, this collective memory was disseminated through the development of countless memorials and other ‘places of memory’ (*lieux de mémoire*) designed to remind individuals of the lessons of 1945 and teach them to the next generation. While some western states engaged in trials and other forms of transitional justice during the postwar period, the mechanism most often adopted was of public remembrance and memorialization based on the idea that ‘[m]emory is the ultimate form of justice.’<sup>22</sup>

The culture of remembrance that underlies Western Europe’s understanding of transitional justice has been formalized in various ways, including through the foundation of aforementioned House of European History as well as the creation of the European University Institute (EUI) and other initiatives to unify history curricula in schools across the continent.<sup>23</sup> As a result it is possible to speak of the ‘legitimation of Europe through the creation of a common conception of history.’<sup>24</sup> The fear of ‘another Auschwitz’ thus became the ultimate argument against any relapse, to the point where it is possible to speak of the Holocaust as ‘the European entry ticket,’ the *sine qua non* of European identity from the perspective of the western part of the continent.<sup>25</sup>

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<sup>22</sup> Roger Errera quoted in Michael Rosenfeld, Rudi Teitel and Roger Errera, ‘Dilemmas of Justice,’ *East European Constitutional Review* 1, no. 2 (Summer, 1992), 21-2.

<sup>23</sup> Chiara Bottici and Benoît Challand, *Imagining Europe: Myth, Memory, and Identity* (New York: Cambridge University Press, 2013).

<sup>24</sup> Konrad H. Jarausch, ‘Zeitgeschichte zwischen Nation und Europa. Eine transnationale Herausforderung,’ *Aus Politik und Zeitgeschichte* 54, no. B39 (2004), 3.

<sup>25</sup> Pierre Nora, *Les lieux de mémoire* (Paris: Gallimard, 1984); Tony Judt, *Postwar: A History of Europe since 1945* (New York: Penguin Press, 2005), 803; European Parliament, ‘Importance of European remembrance for the future of Europe,’ (19 September 2019) P9\_TA(2019)0021.

By contrast, the cultures of collective memory on the other side of the Iron Curtain developed very differently. While 1945 is also an important symbolic date in Central and Eastern Europe, for these postcommunist societies it instead represents ‘a transition from one occupation to another: from Nazi rule to Soviet rule.’ Whereas the Western narrative is one of liberation and learning from the past, postcommunist Europe experienced the end of the Second World War as a renewed occupation and loss of national sovereignty. In contrast to the centrality of fascism and the Holocaust in Western Europe’s historical imaginary, ‘the legacy of communism...[is] the most defining phenomenon of Central and Eastern Europe in the 20th century.’<sup>26</sup> As a result, in this region 1989 is the key date to understanding what comes before and after, not 1945.

The centrality of 1989 in the collective memory cultures of postcommunist Europe has important consequences for understandings of democracy and transitional justice in the region. Unlike in the West, where the specter of 1945 acts as a reminder the dangers of denying individuals and minorities certain fundamental human rights, the lessons of 1989 are less about rights protection and more about the importance of self-government and the repudiation of external interference in domestic affairs. This is not to say that the communist regimes in the east did not violate the civic and political rights of their inhabitants. However, in postcommunist Europe these violations are associated with Soviet interventions in the internal affairs of its satellites.

As a result of this framework of collective memory, in Central Europe ‘communism was associated with national enslavement.’ The postcommunist region’s aim in liberating itself from the Warsaw Pact was therefore not human rights protection, but ‘self-

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<sup>26</sup> Timothy Snyder, ‘Balancing the Books,’ *Index on Censorship* 34, no. 2 (2005), 72; Anna Wójcik and Jan Kubik, ‘Civil Society and Conflicting Narratives: The Pitfalls of Attempting to Carve Out a Central European Identity,’ *Visegrad Insight* (13 June, 2017).

government by virtuous republican citizens' represented in their desire to exercise their will through majoritarian elections.<sup>27</sup> In addition to their visibility in other policy areas, such as the EU's failed attempts to develop a new collective approach to migration, the different cultures of remembrance in Western and Central Europe have also affected debates about the politics of memory and transitional justice at the supranational level. In particular, the emphasis on national sovereignty in Eastern and Central Europe means that these regions are less likely to support the external imposition of measures designed to facilitate transitional justice by the EU, both on its own member states as well as in its external relations. For example, Hungary has adopted the view that 'the best way to deal with the past is to do better now' and that 'living well is the best revenge.'<sup>28</sup>

These differences broke out into the open in 2005, when the European Parliament (EP) considered a proposal that would have extended the German ban on Nazi symbols like the swastika throughout the EU. During the debate Jozsef Szájer, a Hungarian Member of the EP from Victor Orbán's *Fidesz* party, agreed with this idea, but argued that if 'the Union wishes to propose a ban on the swastika, I suggest adding the symbols of the hated and bloody communist dictatorship as well. [...] No more Nazism in Europe, no more communism in Europe!'<sup>29</sup> This suggestion produced a heated response,

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<sup>27</sup> Aleksander Smolar and Magdalena Potocka, 'History and Memory: The Revolutions of 1989-91,' *Journal of Democracy* 12, no. 3 (2001), 16, 12.

<sup>28</sup> Gábor Halmai, 'Facing with the Legacy of Human Rights Violations: Post-Communist Approaches to Transitional Justice' in *International Protection of Human Rights: Achievements and Challenges*, eds. Felipe Gómez Isa and Koen de Feyter (Bilbao: Publicaciones de la Universidad de Deusto, 2006), 641-2; Gábor Halmai and Kim Lane Scheppele, 'Living Well is the Best Revenge: The Hungarian Approach to Judging the Past' in *Transitional Justice and the Rule of Law in New Democracies*, ed. A. James McAdams (South Bend: University of Notre Dame Press, 1997).

<sup>29</sup> European Parliament, 'Report of Proceedings' P6\_CRE(2005)01-27, Thursday, 27 January, 2005).

especially among Western social democrats, who still draw on the ideals of socialism despite the failure of communism in Eastern and Central Europe.

After the uproar surrounding the debate on the banning of the swastika, the EP worked hard to create a consensus surrounding European memory by recognizing and emphasizing the evils of communism alongside those of Nazism. A series hearing and conferences organized by the European Commission and the Slovenian Presidency of the EU in April 2008 ‘brought to light a strong feeling that the Member States in Western Europe should be more aware of the tragic past of the Member States in Eastern Europe.’<sup>30</sup> In its declaration on ‘European conscience and totalitarianism’ (2009), the EP argued that ‘Europe will not be united unless it is able to form a common view of its history, recognizes Nazism, Stalinism and fascist and Communist regimes as a common legacy and brings about an honest and thorough debate on their crimes in the past century.’<sup>31</sup> Although this may begin to change as the generation with personal memories of 1945 begins to pass away, it is unlikely that Europe will be able to overcome its internal divisions and develop a truly unified understanding of transitional justice that can be consistently implemented and applied until it is able to build a unified memory culture that can integrate both the lessons of 1945 and 1989.<sup>32</sup>

### *Transitional Justice in Europe’s Legal Regime*

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<sup>30</sup> European Commission, ‘The Memory of the Crimes Committed by Totalitarian Regimes in Europe: Report from the Commission to the European Parliament and to the Council’ (Brussels, COM(2010) 783 final, 22 December, 2010), 6.

<sup>31</sup> European Parliament, ‘European Parliament Resolution of 2 April 2009 on European Conscience and Totalitarianism’ P6\_TA(2009)0213, 2 April, 2009), §K.

<sup>32</sup> For more, see Peter J. Verovšek, ‘Between 1945 and 1989: the rise of ‘illiberal democracy’ in post-Communist Europe,’ *Social Europe* (9 November 2019); Peter J. Verovšek, ‘The loss of European memory,’ *Social Europe* (12 February 2019).

Despite the internal divisions over memory politics that have emerged among its member-states since 2004, as a whole the EU has not abandoned its desire to spread transitional justice both ‘down’ to its member-states and ‘out’ into global affairs. The clearest statement of Europe’s commitment to transitional justice is contained within a document ratified in November 2015 by the Foreign Affairs Council of the EU. The ‘EU Policy Framework on Support to Transitional Justice’ (2015) defines the global justice norm in terms of four elements (criminal justice, truth, reparations, and guarantees of non-recurrence/institutional reform) and five basic objectives (ending impunity, providing recognition and redress to victims, fostering trust, strengthening the rule of law, and contributing to reconciliation). This document calls for the design and implementation of transitional justice to be ‘*nationally and locally-owned*’ based on a ‘victim centered approach.’<sup>33</sup>

Although the treaties that govern the operation of the organization do not make explicit reference to transitional justice, the EU has sought ‘to establish some kind of an *acquis historique communautaire* of a European memory framework.’<sup>34</sup> In this context, certain articles within them provide a *de facto* legal framework for its development, especially within European-level policies that promote human rights, development and democracy. For example, within the Maastricht Treaty (1992, officially the Treaty of the European Union, TEU), which formally created the EU from the looser organization of the European Communities, three articles deserve particular attention:

1. §177.2 specifies that European policy in the area of development cooperation will contribute to the general objective of the consolidation of

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<sup>33</sup> Foreign Affairs Council of the European Union, ‘The EU’s Policy Framework on Support to Transitional Justice,’ (16 November, 2015), 2, 8, 11.

<sup>34</sup> Paul Scheffer, ‘EU can no Longer Play the War Card’ *De Morgen*, 19 January, 2012; Sierp, *History, Memory, and Trans-European Identity*, 137.

- democracy and the rule of law, as well as respect for human rights and fundamental liberties;
2. §11.1 provides the legal basis for Europe's Common Foreign and Security Policy (CFSP), establishing democracy, the rule of law as well as respect for human rights and fundamental liberties as priorities for the EU's action in international affairs;
  3. §17.2 further specifies the content of the CFSP, highlighting 'humanitarian and rescue tasks, peacekeeping tasks, and tasks of combat forces in crisis management, including peace making'.<sup>35</sup>

As signaled in the first point, the EU's promotion of the global justice norm and the 'downward' pressure it exerts on its member-states to apply various transitional justice measures internally, are primarily contained within what used to be referred to as first 'Community' pillar of the EU. Additionally, some cooperation in gathering evidence and finding perpetrators is also carried out through the third 'Justice and Home Affairs' pillar. In this sense, claims to historical or transitional justice are implicitly nested.

One of the biggest problems in assessing the EU's engagement with this new global norm comes the Union's complex institutional infrastructure. As is the case in many areas, the EU has 'no singular executor' or clear institutional home for its policies.<sup>36</sup> However, as the name suggests, transitional justice is usually applied within newly democratizing states. This, combined with the fact that its influence is greatest during accession negotiations, means that the EU's demand for justice is most often pursued as part of its enlargement strategy coordinated through the European Commission's (EC) Directorate-General for Enlargement (DG Enlargement). In these cases, the emphasis is realized through pre-accession assistance, conditionality and the ability of candidate

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<sup>35</sup> Treaty on European Union, Signed at Maastricht on 7 February 1992, *Official Journal of the European Communities* 35, no. C191 (July, 1992).

<sup>36</sup> Carmen Gebhard, 'The Institutional Nature of the EU as a Global Conflict Manager' in *The European Union as a Global Conflict Manager*, eds. Richard G. Whitman and Stefan Wolff (London: Routledge, 2012), 7.

countries to meet general requirements for the protection of democracy and human rights outlined in the ‘Copenhagen Criteria.’<sup>37</sup>

In addition to exerting pressure from the transnational level ‘down’ onto potential members, the EU has sought to apply its influence ‘out’ into global affairs as part of its broader desire to move from being ‘a mere ‘structural factor’ to an active – and increasingly proactive – player on the international scene.’<sup>38</sup> As signaled by the second and third points from the TEU highlighted above, the Union has sought to achieve this goal in part by encouraging non-European states to engage in transition justice through its common foreign and security policy. In this area, the EU’s transitional justice policies have increasingly come to be coordinated through the EC’s Directorate-General for External Relations (DG RELEX). Funding is often managed through EuropeAid, the arm of the EC responsible for implementing external aid programs and projects around the world. Transitional justice mechanisms are thus embedded within other peace-building and security-oriented tasks, such as crisis-management, security sector reform, and disarmament, demobilization and reintegration.<sup>39</sup>

Unlike its internal activities, where transitional justice remains largely implicit within more general provisions for the promotion of democracy and human rights, the EU’s support for the global justice norm is explicit in its external affairs. For example, the Development Cooperation Policy contains two regulations that make explicit reference to transitional justice. The first, Regulation no. 1889/2006 of the European Parliament and Council (dated 20 December 2006), establishes a financial instrument for

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<sup>37</sup> Katy A. Crossley-Frolick, ‘The European Union and Transitional Justice: Human Rights and Post-Conflict Reconciliation in Europe and Beyond,’ *Contemporary Readings in Law and Social Justice* 3, no. 1 (2011), 38.

<sup>38</sup> Gebhard, ‘Institutional Nature of the EU,’ 31, 32.

<sup>39</sup> Crossley-Frolick, ‘The European Union and Transitional Justice,’ 38-41.

the promotion of global democracy and human rights, including the ‘strengthening the International Criminal Court (ICC), *ad hoc* international criminal tribunals and the processes of transitional justice and truth and reconciliation mechanisms.’<sup>40</sup> In a related fashion, the second, first passed on 15 November 2006, makes funding available to support various approaches to transitional justice. Reconfirmed as Regulation no. 230/2014 on 11 March 2014, it makes financing available for ‘international criminal tribunals and ad-hoc national tribunals, truth and reconciliation commissions, and mechanisms for the legal settlement of human rights claims.’<sup>41</sup>

Both regulations are the result of the EC’s efforts to lend coherence to its foreign aid programs. Mechanisms of transitional justice are explicitly mentioned in both. For example, the former notes the EU’s goals of ‘promoting and strengthening the International Criminal Court, *ad hoc* international criminal tribunals and the processes of transitional justice and truth and reconciliation mechanisms.’<sup>42</sup> Similarly, the latter makes funding available to support ‘international criminal tribunals and ad-hoc national tribunals, truth and reconciliation commissions, and mechanisms for the legal settlement of human rights claims and the assertion and adjudication of property rights, established in accordance with international human rights and rule of law standards.’<sup>43</sup>

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<sup>40</sup> Regulation (EC) no. 1889/2006 of the European Parliament and of the Council of 20 December 2006 on Establishing a Financing Instrument for the Promotion of Democracy and Human Rights Worldwide,’ *Official Journal of the European Union* L386/1 (29 December, 2006), §2.a.iii.

<sup>41</sup> Laura Davis, *EU Foreign Policy, Transitional Justice and Mediation: Principle, Policy and Practice* (New York: Routledge, 2014), 54; 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, *Official Journal of the European Union*, §III.2.e

<sup>42</sup> Regulation (EC) no. 1889/2006, §2.a.iii.

<sup>43</sup> European Union, ‘Regulation of the European Parliament and of the Council on Establishing an Instrument for Stability,’ *Official Journal of the European Union*, PE-CONS 3634/1/06 REV 1 (15 November, 2006), §3.2.d in Davis, *EU Foreign Policy*, 54.

These regulations also highlight the EU's support for the ICC, which was created under the auspices of the United Nations in 1998. Supporting this tribunal and its prosecutions is a central part of Europe's foreign policy and is formalized through a number of mechanisms, including the Agreement between the International Criminal Court and the European Union in cooperation and support (6 December 2005) and Decision (2003/335/JHA) by the Council of the EU on the investigation and prosecution of genocide, crimes against humanity and war crimes (8 May 2003), as well as a number of guidelines promoting compliance with international humanitarian law or the guidelines on torture and other cruel, inhumane and degrading practices.<sup>44</sup>

The EU has also made support for the global justice norm an integral part of the peacekeeping missions it has conducted as part of its emerging foreign policy. The so-called 'Petersburg tasks,' which refer to military actions in which combat forces intervene in order to fulfill missions of a humanitarian, disarming, peacemaking and/or peacekeeping nature, were incorporated into the TEU. While the legal resolutions underpinning these missions rarely mention transitional justice explicitly, they are designed to encourage the foundation of a practical legal and prison framework in accordance with the fundamental standards of the rule of law and global models of human rights.

Since the turn of the millennium the EU has taken further steps to formalize the role of transitional justice in its foreign policy. For instance, the Political and Security Committee held a seminar in 2006 that led to the drafting of a specific document on transitional justice with recommendations on how to include it in European foreign policy. The recommendations include: taking UN guidelines into account; adopting a

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<sup>44</sup> Avello, 'European Efforts in Transitional Justice,' 5.

flexible understanding of transitional justice that includes both judicial and non-judicial measures; exploring how aspects of transitional justice can be linked to the planning of European missions; and including training in mechanisms of transitional justice for personnel in both civilian crisis management and the rapid response teams.<sup>45</sup> In order to assess the EU's success achieving its stated aims, in the two sections I address its promotion of transitional justice internally 'down' on its members and potential member-states, as well as externally 'out' into world politics.

### *The EU's Internal Promotion of Transitional Justice*

In its 2015 'Policy Framework on Support to Transitional Justice' the EU notes that it supports transitional justice 'both in our engagement with partner countries and with international and regional organisations.'<sup>46</sup> Its promotion of transitional justice has been most visible and most successful in case where it has pushed these measures 'down' on potential member-states as part of the accession process. I have already mentioned the example of Austria, where the revelation that President Kurt Waldheim had lied about his wartime service as an officer for German Army Group E in Greece forced a broader confrontation within a country that had always considered itself as 'Hitler's first victim,' not as a perpetrator of the Holocaust.<sup>47</sup> In the aftermath of the 'Waldheim Affair,' the EU played an important role in ensuring 'Austria's more candid confrontation with her World War II past.'<sup>48</sup>

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<sup>45</sup> Ibid., 7.

<sup>46</sup> 'EU's Policy Framework on Support to Transitional Justice,' 1.

<sup>47</sup> Avi Becker, 'Building Up a Memory: Austria, Switzerland, and Europe Face the Holocaust' in *Power and the Past: Collective Memory and International Relations*, eds. Eric Langenbacher and Yossi Shain (Washington: Georgetown University Press, 2010), 102-5.

<sup>48</sup> Bischof, 'Victims? Perpetrators?,' 23.

Despite its success in putting transitional justice on the political agenda as part of the accession process, the EU has been less effective in cases where it has sought to transform its promotion of transitional justice from a political norm into a formal legal requirement of joining the Union. The violent disintegration of Yugoslavia is a particularly important case due to its proximity to the EU and the expectation that this region would eventually accede to the Union. The Balkans thus represent ‘the first real push for European foreign policy makers more actively to seek to develop a common European Union approach to dealing with violent ethnic conflicts.’<sup>49</sup>

Unfortunately for the EU, it is difficult to view the its reaction to the disintegration of Yugoslavia as a success. Initially, the leaders of the EU attempted to keep this multi-ethnic polity together by offering it fast-track to membership to the EU if it remained unified. After this attempt failed, the EU committed itself to the eventual accession of all of the former Socialist Federal Republics of Yugoslavia, but this too failed to prevent the outbreak of armed conflict.<sup>50</sup> This caught the EU off guard, which meant that as a result the United States had to lead the initial military intervention. To add insult to injury, the peacekeeping operations led by EU member-states also failed to prevent the genocide in Srebrenica.

The EU’s attempts to provide for transitional justice following the conflict have also been problematic. In line with its developing policy in favor of international criminal justice, the EU called for the extradition of *génocidaires* from the region to the *ad hoc* International Criminal Tribunal for the former Yugoslavia (ICTY), whose creation it also

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<sup>49</sup> Annemarie Peen Rodt and Stefan Wolff, ‘EU Conflict Management in Bosnia and Herzegovina and Macedonia’ in *The European Union as a Global Conflict Manager*, eds. Richard G. Whitman and Stefan Wolff (London: Routledge, 2012), 138.

<sup>50</sup> C.f. Josip Glaurdić, *The Hour of Europe: Western Powers and the Breakup of Yugoslavia* (New Haven: Yale University Press, 2011).

supported financially.<sup>51</sup> Given his status and the most high profile aggressor, the EU pushed particularly hard for the trial of Serbian President Slobodan Milošević in The Hague, even though the leader of the domestic opposition, Vojislav Koštunica, as well as most of the Serbian public opposed this move. Given its financial power, whose denial can quickly turn this carrot into a stick, the EU was able to overcome Serbian reluctance by threatening to take away the aid it was providing the country from its development funds for potential members.<sup>52</sup>

This is unfortunate, as there was considerable support for prosecuting the former president domestically on charges of abuse of power, corruption, stealing elections, and terrorizing political opponents.<sup>53</sup> Despite the many deficiencies of Serbia's judicial system, Emir Suljagić points out that 'it is likely that Milošević would have been found guilty of abuse of power if he had been tried in Belgrade. In an atmosphere in which he was seen by many in Serbia as the reason for the misery that had befallen them, a domestic trial would have made him a perfect scapegoat for the woes of the country.'<sup>54</sup> However, by the time he was formally indicted in Serbia in 2003, Milošević had already been turned over to The Hague.

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<sup>51</sup> For more, see Peter J. Verovšek, 'Against International Criminal Tribunals: Reconciling the Global Transitional Justice Norm with Local Agency,' *Critical Review of International Social & Political Philosophy* 22, no. 6 (2019), 703-24; Anja Mihr, 'Transitional Justice Research in Post-Totalitarian Societies in the OSCE Region' in *Transformation and Development: Studies in the Organization for Security and Cooperation in Europe (OSCE) Member States*, ed. Anja Mihr (Cham, Switzerland: Springer Open, 2020), 147.

<sup>52</sup> For more on this case and its problems, see Peter J. Verovšek, 'The lessons of the ICTY for transitional justice,' *Eurozine* (12 January 2018).

<sup>53</sup> Dimitrije Boarov, 'Serbs Await Western Aid,' *Institute for War and Peace Reporting*, Balkan Crisis Report No. 260, June 29, 2001; Michael Ignatieff, 'The Right Trial for Milosevic,' *New York Times*, October 10, 2000, 27.

<sup>54</sup> Emir Suljagić, 'Justice Squandered? the Trial of Slobodan Milošević' in *Prosecuting Heads of State*, eds. Ellen L. Lutz and Caitlin Reiger (Cambridge: Cambridge University Press, 2009), 182.

As a result, instead of destroying his political legacy and bolstering the legitimacy of the Serbian judiciary, the ICTY instead succeeded in turning Milošević into a national hero and martyr.<sup>55</sup> This event also helped to sour the EU's reputation within Serbia. By making membership less desirable, the trial of Milošević also robbed the EU of its remaining leverage within Serbia. In the end, it probably would have been better if the EU had followed article 17 of the Rome Statute, which on international actors to respect the primacy of national courts, instead of pushing for transitional justice via an international criminal law.<sup>56</sup>

Despite the furor surrounding the trials of Milošević and the other war criminals at the ICTY, to date Croatia is the only country involved in the Yugoslavian civil wars of the 1990s that has successfully acceded to the EU (Slovenia, which was also a part of the former Yugoslavia and joined the EU in 2004, managed to escape these conflicts). As a result, the Union's attempts to legalize a requirement of transitional justice are most visible in Croatia, which became a member of the EU in 2013. One of the pre-accession conditions in this case was the implementation of the European Arrest Warrant (EAW), which requires member-states to extradite individuals charged with serious crimes in another EU state quickly and with minimal administrative burden.<sup>57</sup> Croatia implemented this requirement in 2010 and accession negotiations were concluded and ratified on this basis.

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<sup>55</sup> Ellen L. Lutz and Caitlin Reiger, 'Introduction' in *Prosecuting Heads of State*, eds. Ellen L. Lutz and Caitlin Reiger (Cambridge: Cambridge University Press, 2009), 21.

<sup>56</sup> Allison Marston Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court,' *American Journal of International Law* 97, no. 3 (July, 2003), 522; Antonio Franceschet, 'The International Criminal Court's Provisional Authority to Coerce,' *Ethics & International Affairs* 26, no. 1 (2012), 93-101.

<sup>57</sup> See Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *Official Journal of the European Union*, 2002/584/JHA..

At first glance, this case appears to have little to do with transitional justice. However, it opened the door to the possibility that Croatians who had committed state-sponsored crimes within the rest of the EU would have to be extradited. Most notably, Germany had long been seeking to extradite Josip Perković, a Croatian operative of the Yugoslavian intelligence service (UDBA, *Uprava državne bezbednosti*), for his alleged involvement in the 1983 assassination of the Croatian dissident Stjepan Đureković in Munich. The Federal Republic therefore issued arrest warrants for Perković, an important ally of former Presidents Franjo Tuđman and Stjepan Mesić, and his accomplice, Zdravko Mustac, in 2005 and 2009.<sup>58</sup>

In order to shield Perković from prosecution for the state-sponsored crimes he had committed under communism, the Croatian parliament amended its extradition regime three days before its official accession to ensure that anyone accused or convicted of a crime before 7 August 2002 could not be transferred abroad. Vivien Reding, the EU's Justice Commissioner, accused Zagreb of abrogating the trust of its partners 'on the day it entered the European Union.' She noted that a refusal to make a swift and unconditional correction of the legislation would make the imposition of sanctions 'rather clear.'<sup>59</sup>

As expected, the EU treated the so-called 'Lex Perković' as a violation of European law. Facing the intransigence of the authorities in Zagreb, the European Commission launched what it refers to as an 'Article 39 procedure' against Croatia, a measure that allows it to legally block the payment of European financial aid to a member-state that is in violation of EU law. In the most public rebuke to Croatia, German Chancellor Angela

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<sup>58</sup> 'Mustać na Plesu predan njemačkim vlastima,' *Jutarnji list*, 17 April 2017.

<sup>59</sup> Reding quoted in Caroline Bauman and Joshua Chaffin, 'EU Threatens to Withhold Funds for Croatia in Extradition Dispute,' *Financial Times*, 18 September, 2013.

Merkel refused to attend the country's accession party, despite previously announcing that she would be present to celebrate its entry into the EU.<sup>60</sup>

As a result of the financial and political pressure put on Croatia by the EU, the Croatian parliament (*Hrvatski sabor*) eventually relented and abolished the legislation that had time-capped the extradition of Croatian citizens via the EAW. The warrants on Perković and Mustac were then executed and both suspects were transferred to Germany to face trial. In 2016 they were both sentenced to life in prison in Germany.<sup>61</sup> Although the EU eventually succeeded in forcing Croatia to fulfill its obligations by extraditing war criminals from the previous regime to face trial, this case shows that extra-judicial political pressure and the threat of financial sanction are often still necessary to ensure legal compliance, even among EU member-states.

Finally, the EU's powerlessness in enforcing its emerging *acquis historique communautaire* is most visible in the rise of the restrictive and historically misleading memory laws in postcommunist Europe. For example, in 2018 Poland adopted a law that imposes a jail sentence of up to three years for anyone who 'accuses, publicly and against the facts, the Polish nation, or the Polish state, of being responsible or complicit in the Nazi crimes committed by the German Third Reich...or any other war crimes, crimes against humanity or crimes against peace' is particularly worrying.<sup>62</sup> Although the Polish parliament watered down the law and reclassified violations as a civil, not a criminal offence due to international pressure, it is still highly problematic given the EU's

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<sup>60</sup> Jelena Džankić, 'The Unbearable Lightness of Europeanisation: Extradition Policies and the Erosion of Sovereignty in the Post-Yugoslav States,' *European Politics and Society* 16, no. 3 (2015), 347.

<sup>61</sup> Sven Milekic, 'Yugoslav Spy Chiefs Jailed for Life,' *Balkan Insight*, 3 August 2016.

<sup>62</sup> 'What's in Poland's New Memory Law?' *The Economist* (19 February, 2018).

commitment to enforcing transitional justice ‘down’ onto its member-states in its internal affairs.<sup>63</sup>

### *The EU’s External Promotion of Transitional Justice*

In addition to its attempts to enforce legal requirements of transitional justice internally ‘down’ on its member-states, particularly during the accession process, the EU has also sought to use its influence externally to push for the adoption of mechanisms of transitional justice ‘out’ as a global norm. On one hand, it is difficult to expect much success justice promotion in the its external affairs, as the Union cannot dangle the carrot of membership in this area. However, on the other, ‘this is the area in which the EU institutions have most competence’ given that ‘the pursuit of transitional justice within the EU will for the most part remain the domain of the Member States.’<sup>64</sup>

In seeking to promote transitional justice globally, ‘The EU has, for all intents and purposes, followed the UN’s lead.’<sup>65</sup> The UN’s own activities in this area are based on a 2004 report to the Security Council on the ‘Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies,’ which called for the adoption of ‘international norms and standards’ of transitional justice. The report argued that ‘strategies must be holistic, incorporating integrated attention to individual prosecutions.’<sup>66</sup> In order to fulfill this goal, the UN has sponsored the creation of a number of international criminal tribunals, like the ICTY, culminating with its support for the ICC in 2002.

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<sup>63</sup> For more on this case, see Peter J. Verovšek, ‘Memory, myth and “post-truth,”’ *Social Europe* (2 April 2019).

<sup>64</sup> Davis, *The European Union and Transitional Justice*, 11.

<sup>65</sup> Crossley-Frolick, ‘European Union and Transitional Justice,’ 45.

<sup>66</sup> United Nations Security Council, ‘Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary General,’ S/2004/616 (2004).

Turning to the EU, in March 2006 the Political and Security Committee held a seminar specifically devoted to examining how the Union could integrate transitional justice into its crisis management, conflict resolution and peacebuilding activities. The resulting document notes that EU foreign policy missions should ‘take full account of the developing international standards which provide parameters and guidance on policy options for justice and accountability, in particular guidelines established by the UN in this field.’<sup>67</sup> It also explicitly recommended that all EU foreign policy initiatives incorporate transitional justice mechanisms, including prosecutions, truth and reconciliation commissions, reparations programs, and lustration procedures to vet individuals involved in the public sphere for their past crimes into their planning.

Given the EU’s focus on ‘soft’ power, it has usually relied on the incentives provided by the offer financial support. The importance of aid in the Union’s strategy is visible in the public emphasis the Union places on the fact that it is ‘one of the biggest financial contributors to transitional justice initiatives worldwide,’ particular to the ICC, to which all 27 members of the EU are party.<sup>68</sup> Supporting this tribunal and its prosecutions is actually a central part of Europe’s foreign policy and is formalized through a number of mechanisms, including the Agreement between the International Criminal Court and the European Union in cooperation and support (6 December 2005) and Decision (2003/335/JHA) by the Council of the EU on the investigation and prosecution of genocide, crimes against humanity and war crimes (8 May 2003), as well

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<sup>67</sup> Committee for Civilian Aspects of Crisis Management, ‘Transitional Justice and ESDP,’ Political and Security Committee meeting, 10674/06, 19 June 2006, §4.

<sup>68</sup> EU’s Policy Framework on Support to Transitional Justice,<sup>4</sup>; European Council, ‘Council Decision 2011/168/CFSP of 21 March 2011 on the International Criminal Court and Repealing Common Position 2003/444/CFSP,’ *Official Journal of the European Union*, §2.3. For more, see Laura Davis, *The European Union: Transitional Justice and Peace Mediation* (Brussels: Initiative for Peacebuilding, 2010), 10-11.

as a number of guidelines promoting compliance with international humanitarian law or the guidelines on torture and other cruel, inhumane and degrading practices.<sup>69</sup>

Unfortunately, these efforts to encourage the spread of transitional justice ‘out’ beyond the borders of the EU suffer from many of the same problems that plague Europe’s ‘downward’ attempts at norm promotion. Most notably, although the EU increasingly sees itself as a ‘community of justice,’ where supranational law rules with power that supersedes the domestic laws of sovereign member-states, both its efforts at justice promotion remain firmly rooted in politics. Instead of relying on formal legal sanction, the EU usually is forced to rely on naming-and-shaming, agenda setting and financial incentives to enforce the application of justice for state sponsored international crimes.

The internal problems contained within the EU’s external strategy for promoting transitional justice is perhaps most visible in the case of Turkey. For a long time this state was considered a candidate for accession, as the two parties signed an Agreement of Association in September 1963. At the time, the President of the European Commission, Walter Hallstein, declared, ‘Turkey is part of Europe.’<sup>70</sup> However, the internal politics of the EU, as well as the recent rightward, authoritarian turn within Turkey, mean that Turkish membership is no longer on the political agenda.

That said, the Turkish case is still very important, both during its time as a candidate and in its relations with the EU since the abandonment of this goal. Over the past several decades, the EU’s relations with Turkey have been plagued by a whole host of economic, social and political problems. However, the fact that the Armenian genocide

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<sup>69</sup> Avello, ‘European Efforts in Transitional Justice,’ 5.

<sup>70</sup> Walter Hallstein, *Europäische Reden*, eds. Thomas Oppermann and Joachim Kohler (Stuttgart: Deutsche Verlags-Anstalt, 1979), 439.

has been a major stumbling block highlights the increasing importance of transitional justice within the EU's foreign policy.

This question of the Armenian genocide is very explosive in Turkey. Although the Turks recognize that many Armenians died in a regrettable 'massacre' (*katliam* or *kiyim*), they strongly deny that this constituted a planned, government orchestrated 'genocide.' To date, the EU's demands for recognition of this historical event – as a first step in a broader process of transitional justice – have largely remained implicit, even though there 'was even talk in 2006 of making Turkish recognition of the genocide as a precondition for entry.'<sup>71</sup> Turkish Prime Minister Recep Tayyip Erdoğan has always beaten back such demands – including very public appeals by both French President Jacques Chirac and his successor Nicolas Sarkozy, insisting that if Turkey wants to join the EU it should accept the genocide – by arguing that Turkey deserves 'to be treated in the same way as the other candidate countries.'<sup>72</sup>

Erdoğan's reaction is understandable, at least from a certain perspective. Like the East-Central Europeans, many Turks resent being told what to think of their past by the west. This is doubly true given the West's long-standing history of intervention and violence in this area of the world dating back to the Crusades. Additionally – and in light of their experience of postcommunist expansion – more recently the leaders of the EU have also been more wary of the paternalism involved in teaching other nations their history.

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<sup>71</sup> Eric Langenbacher, 'Collective Memory as a Factor in Political Culture and International Relations' in *Power and the Past: Collective Memory and International Relations*, eds. Eric Langenbacher and Yossi Shain (Washington: Georgetown University Press, 2010), 21.

<sup>72</sup> *Frankfurter Allgemeine Zeitung*, 13 March 2008, translation mine.

Insofar as a confrontation with the past has become ‘an informal membership criterion’ and ‘part of the hidden agenda of the *acquis communautaire*,’ then it indeed appears that Turkey is being treated like other candidate countries in being forced to confront the Armenian genocide.<sup>73</sup> In the words of the European Council’s report on totalitarian crimes, the connection ‘memory [of the horrors of the past] nourishes the commitment of the European Union to democracy and the respect of fundamental rights, and to fight against modern manifestations of intolerance and extremism.’<sup>74</sup> While the process has been ridden with rhetorical conflict, there is evidence that the EU’s transformative power has already had an some limited effect on the politics of memory in Turkey. Despite his protests, Erdoğan has proposed that a group of Turkish and Armenian historians gather to discuss the issues surrounding the massacre of 1915.<sup>75</sup>

The case of Turkey also highlights the Western-centric perspective adopted the EU in its promotion of transitional justice. This raises what is perhaps the biggest issue with the EU’s existing attempts to address past wrongs: its failure to address the crimes of European colonialism.<sup>76</sup> Although the EU has sought to push and to facility transitional justice within its member-states and between them, its origins in the twentieth century memory culture of total war mean that its focus has largely been on recent events, as well as on crimes committed within Europe. This focus has been further reinforced by the difficult and divisive internal debates brought about by the clash of memory between

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<sup>73</sup> Günter Bischof, ‘Victims? Perpetrators?’, 23.

<sup>74</sup> European Commission, ‘The Memory of the Crimes Committed by Totalitarian Regimes,’ 10.

<sup>75</sup> Camiel Eurlings, ‘Report on Turkey’s Progress Towards Accession’ (European Parliament, Committee on Foreign Affairs, A6-0269/2006, 13 September, 2006), art. 50.

<sup>76</sup> Aline Sierp, ‘EU Memory Politics and Europe’s Forgotten Colonial Past,’ *Interventions* (2020).

Western Europe and the postcommunist member-states from the continent's central and eastern portions.

As a result, in pushing its developing support for transitional justice 'out' globally, the EU has done little to address the crimes that its member-states committed abroad over the course of the colonial era, which stretches through France's brutal interventions in the Algerian War of Independence to the present. For example, the EU has done nothing to push the Federal Republic of Germany to engage in transitional justice for its mass killings of the Herero people of Namibia, a genocide which it only acknowledged in 2016.<sup>77</sup> This is a major problem that undercuts the EU's moral authority and its credibility as a promoter of transitional justice around the world.

In 2020 the European protests in support of Black Lives Matter, which have targeted the statues of colonial oppressors erected in cities across the continent, have highlighted the issue of European colonialism and the enduring legacy of the slave trade, through which the continent enriched itself. Although many colonial atrocities lie too far in the past to be dealt with through the prism of international criminal justice, crimes associated with the decolonization of Asia and Africa between 1945 and 1960 could still be addressed within the broader paradigm of transitional justice by other means. At the very least the EU can and should do more to explore forms of reparation to its former colonies through preferential trade policies and other forms of economic and political support if it wishes to be taken seriously as a global promoter of transitional justice.<sup>78</sup>

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<sup>77</sup> Rachel J. Anderson, 'Redressing Colonial Genocide Under International Law: The Hereros' Cause of Action Against Germany,' *California Law Review* 93 (2005); Kate Brady, 'Germany Officially Refers to Herero Massacre as Genocide,' *Deutsche Welle*, 13 July, 2016.

<sup>78</sup> R. F. Holland, *European Decolonization, 1918–1981: An Introductory Survey* (London: Macmillan International Higher Education, 1985); Morten Broberg, 'The EU's Legal Ties with its Former Colonies: When Old Love Never Dies,' *DIIS Working Paper* (2011).

## *Conclusion*

In this article I have shown that promoting transitional justice has indeed become a key part of the EU's 'new' strategic narrative.<sup>79</sup> While the EU has devoted significant political, legal, diplomatic and financial resources to this goal both internally and externally, its record of achievement in both of these areas is mixed. Although Europe has had some success in promoting transitional justice 'down' onto future member-states as part of its accession process, the Lex Perković demonstrate the political and legal limitations of this approach. Similarly, the EU has had great difficulties in pushing for the adoption of transitional justice externally, notwithstanding its financial support for many UN initiatives in this area.

Despite the EU's mixed record in promoting and legalizing the global justice norm – as well as the lacuna that exists in these efforts in regard to the continent's colonial legacy – these efforts are still important. The number of Truth and Reconciliation Commissions, truth-telling initiatives, lustration and other vetting laws designed to screen collaborators with the previous regime, as well as criminal trials for past crimes, have grown exponentially since 1990. However, in order to live up to its stated desire to develop a flexible notion of transitional justice that does not merely replicate existing hierarchies of power by imposing norms from the outside or by assuming which mechanism would be most appropriate based on a static interpretations of culture, the EU needs to focus on empowering local communities instead of enforcing European ideals.

Insofar as the creation of 'supranational human rights protection mechanisms after World War II...can be considered a transitional justice effort,' the EU's failure is

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<sup>79</sup> Crossley-Frolick, 'European Union and Transitional Justice,' 38.

particularly notable in its inability to prevent or effectively punish democratic backsliding among the postcommunist member-states of Central Europe, particularly Hungary and Poland.<sup>80</sup> Similarly, although the EU has provided significant support for international tribunals like the ICC, it has been less successful in promoting transitional justice ‘out’ into the global arena in areas where local actors are not responsive to international pressure. In focusing so heavily on justice understood in legal terms as requiring criminal prosecution of war criminals, Europe has undermined its own goals of developing a form of transitional justice that is ‘holistic’ and ‘victim centered.’ This emphasis on trials also raises the specter of Eurocentrism and accusations of neo-colonialism, as local communities outside of Europe are forced to adopt the principles of Western legalism in their tribunals in order to be able to access EU funding.

The African Union (AU), the closest analogue to the EU as a ‘regional or continental regime’ designed to fill the political and legal gap between the local and the global, has also placed the pursuit for justice high on its own institutional agenda.<sup>81</sup> Thus, the preamble of the AU’s constitutive act states that it commits ‘to promot[ing] peace and security, human rights and ending impunity.’<sup>82</sup> Like the EU, the AU has also achieved some success in setting norms and establishing continental institutions to address impunity over the last fifty years. However – once again mirroring the European experience – implementation has proved more difficult, especially as the African

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<sup>80</sup> Brems, ‘Transitional Justice in the Case Law of ECHR,’ 282.

<sup>81</sup> Jürgen Habermas, *Between Naturalism and Religion: Philosophical Essays* (Cambridge: Polity Press, 2008), 324-5, emphasis removed.

<sup>82</sup> Quoted in George Mukundi Wachira, ‘The African Union Transitional Justice Policy Framework and how it Fits into the African Governance Architecture: Promise and Prospects for the African Court of Justice and Human Rights’ in *The African Court of Justice and Human and Peoples’ Rights in Context: Development and Challenges*, eds. Charles C. Jalloh, Kamari M. Clarke and Vincent O. Nmeielle (Cambridge: Cambridge University Press, 2019), 147.

continent has had to deal with a number of more recent conflicts that have given rise to active demands for justice.

The AU's push to promote transitional justice was given a great push forward by its adoption of a principle of non-indifference, which provides for the 'the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.'<sup>83</sup> This declaration presents a remarkable shift from the very strict interpretation of the principle of state sovereignty adopted by its predecessor, the Organization of African Unity. This new approach is being codified in a number of different ways, including the preparation of a 'African Union Transitional Justice Policy' framework, which was adopted in February 2019.<sup>84</sup> As this document makes clear, the AU is seeking to build and expand on the EU's relative success in pushing demands for transitional justice 'down' onto its member-states.

This move also potentially signals a reduction in the need for the EU to take an active role in promoting justice 'out' into the broader world, as regional actors like the AU, with greater legitimacy and knowledge of local memory cultures, can take charge of these issues. This would allow the EU to continue to take advantage of its successful financial support transitional justice initiatives abroad, without having to get involved in these issues directly, an approach which will also help it to avoid charges of neo-colonialism. Unfortunately, such a development will do little to push the EU to confront its own legacy of colonialism, which remains largely unexplored despite recent protests highlighting the colonial legacies of important figures in European history, such calls for

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<sup>83</sup> African Union, Constitutive Act, article 4(h).

<sup>84</sup> Executive Council of the African Union, 'Draft African Union Transitional Justice Policy,' Thirty-Fourth Ordinary Session, 7-8 February 2019, EX.CL/1145(XXXIV).

the removal of statues of Leopold II of Belgium for the atrocities he directed in the Congo.

More generally, a greater appreciation for the importance of local cultures of remembrance in shaping the politics of transitional justice in the present has important implications for international development and attempts to consolidate democracy around the world. The difficulties the EU has experienced in spreading its understanding of liberal democracy to Central Europe – a region which despite its differing experience of the postwar period, still much of the European historical legacy of Christianity, the Enlightenment and nationalism – puts attempts by the West writ large to export its political systems globally in a very different light. Most notably, highlighting importance of history and memory might also help development agencies to realize that terms like democracy and justice mean different things to different people because of their different historical backgrounds.<sup>85</sup> Paying more attention to the role that memory cultures play in shaping how individuals and communities interpret and respond to demands for transitional justice thus has important implications for international development, as well as for political science as a whole.

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<sup>85</sup> Katrin Flickschuh, 'The State as a Failed Universal' in *What is Orientation in Global Thinking?: A Kantian Inquiry* (Cambridge: Cambridge University Press, 2017); Peter J. Verovšek, 'Historical Criticism without Progress: Memory as an Emancipatory Resource for Critical Theory,' *Constellations* 26, no. 1 (2019), 132-147.