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# **EVROPSKA UNIJA I TRANZICIONA PRAVDA: OD RETRIBUTIVNE DO RESTORATIVNE PRAVDE NA ZAPADNOM BALKANU**

Uredila Denisa Kostovicova



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Denisa Kostovicova, Vesna Bojičić-Dželilović i Nataša Kandić

Dok vreme od sukoba na zapadnom Balkanu polako odmiče, napori na obnovi društava u regionu, koji će sprečiti da se istorija nasilja ikada ponovi, ubrzano se odvijaju. Da bi se taj cilj ostvario, pitanje tranzicione pravde, bez sumnje, nalazi se na samom vrhu dnevnog reda. Centar za izučavanje globalnog upravljanja (Centar) Londonske škole za ekonomiju i političke nauke (LSE), godinama je imao čelno mesto u akademskim raspravama i političkim inicijativama, usmerenim ka produbljivanju razumevanja u regionu i doprinosu definisanju međunarodne politike u cilju obnove mira i stabilnosti na zapadnom Balkanu. Centar sprovodi inovativna, među-disciplinarna istraživanja, i podučava o ključnim aspektima globalizacije: o globalnom upravljanju, globalnom civilnom društvu i globalnoj bezbednosti - usmeravajući se na nekoliko regionala, uključujući i zapadni Balkan. Saradnja s lokalnim partnerima ima istaknuto mesto u aktivnostima koje su organizovane u okviru Programa za Balkan. On pruža nezamenjive uvide u sadržaj života ljudi i njihovih iskustava u raspravi i političkoj akciji, koje Program teži da podstiče. Da bi odgovorio na pitanje tranzicione pravde i uloge procesa evropskih integracija, Centar je, u saradnji sa Fondom za humanitarno pravo, organizovao konferenciju „Evropske integracije i tranziciona pravda: od retributivne do restorativne pravde”, u Beogradu, 7. februara 2009. godine, i ona je okupila impresivne i raznovrsne učesnike, uključujući akademске stručnjake, praktičare, aktiviste NVO, ljudе na položajima, studente i novinare.

Cilj konferencije je bilo razmatranje nove dinamike u suočavanju s nasleđem masovnih zločina u bivšoj Jugoslaviji – pomak s retributivne ka restorativnoj pravdi, iz perspektive kritičkog ispitivanja politike uslovljavanja Evropske unije na zapadnom Balkanu. Posle 15 godina krivičnog suđenja pred Međunarodnim krivičnim sudom za bivšu Jugoslaviju (Tribunal), uključujući i procese pred domaćim sudovima širom regionala, ograničenja retributivne pravde su postala očigledna. Izručenja optuženih za ratne zločine i suđenja nisu doveli do pokretanja široke debate o prošlosti, niti su probudila zahtev za sveobuhvatnom tranzicionom pravdom; fokus državnih institucija u ostvarivanju politike tranzicione pravde je marginalizovao civilno društvo, de facto izolujući napore običnih ljudi u oblasti tranzicione pravde – od ukupnih ciljeva evropeizacije regionala; i, nacionalni fokus se pokazao kao nedovoljan da odgovori na među-državnu prirodu ratnih zločina i njihovog nasleđa. Ukupno posmatrano, proces evropeizacije, koji u svom centru sadrži haški uslov kao glavnu formu tranzicione pravde, odigravao se na odvojenom koloseku od inicijativa koje su poticale od običnih ljudi i zahteva za tranzicionom pravdom u regionu.

Skup učesnika zainteresovanih za tranzicionu pravdu u regionu, organizovan od strane Centra za izučavanje globalnog upravljanja, LSE i Fonda za humanitarno pravo, predstavljao je odgovor na potrebu da se pruži kritička procena retributivnih strategija tranzicione pravde, favorizovanih od strane Evropske unije, i preispitaju zahtevi za restorativnim pristupima tranzicionoj pravdi i neophodnost regionalnog pristupa. Posebna pažnja je posvećena

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na pitanju kako Koalicija za uspostavljanje Regionalne komisije za utvrđivanje činjenica o ratnim zločinima i ostatim grubim povredama ljudskih prava u bivšoj Jugoslaviji (Koalicija za REKOM), može najadekvatnije da odgovori na te praznine. Na kraju, cilj je bila rasprava o modalitetima tesnije integracije restorativnih pristupa tranzicionoj pravdi u okviru procesa i ciljeva evropske integracije zapadnog Balkana, kao i prepoznavanje mogućnosti za institucionalnu podršku Evropske unije sveobuhvatnom pristupu tranzacione pravde u regionu.

Ovo izdanje časopisa Forum za tranzicionu pravdu predstavlja priloge s konferencije, i oni su organizovani u četiri tematske sekcije. Prvi deo, „Strategija tranzacione pravde Evropske unije: kritički osvrt”, identificuje ograničenja oslanjanja Evropske unije na Međunarodni krivični sud za Jugoslaviju kao na jedini mehanizam tranzacione pravde u regionu. Denisa Kostovicova se osvrće na izmenjenu prirodu sukoba koji se vode u globalnom kontekstu, koja je, kako ona tvrdi, ključna za shvatanje post-konfliktnog i, posebno, neprekinutog uticaja prelaznih struktura koje su nastale u ratu. Kostovicova tvrdi da uzak pristup EU bavljenju tranzicionom pravdom kroz retributivnu pravdu, ne može dovesti do suočavanja s nasleđem ratnih zločina i grubih povreda ljudskih prava. Prema njoj, takav pristup na kraju može samo da doprinese polarizaciji interesa oličenih u transnacionalnim mrežama nastalim tokom sukoba i njihovom uticaju na državu posle sukoba. Dick Oosting ispituje da li EU uopšte ima strategiju za tranzicionu pravdu, uvezši u obzir nedostatak vizije za prelazak s retributivne na restorativnu pravdu. Zato, on tvrdi da EU treba da iskoristi svoj uticaj efikasnije, i da prevaziđe svoju usku perspektivu tumačenja pravde i saradnje s civilnim društvom. U svom prilogu, Merdijana Sadović zastupa stanovište da Tribunal jeste doprineo izmirenju na zapadnom Balkanu, ali istovremeno potvrđuje i kritike efekata retributivne pravde kao jedinog mehanizma tranzacione pravde.

Sledeći deo, naslovlen „Restorativna pravda: pristupi, preduslovi i instrumenti”, ispituje zahteve za restorativnom pravdom, i istražuje šta instrumenti restorativne pravde mogu da ostvare, kao i njihova ograničenja. Prilog Chandre Lekha Sriram istražuje odnos između pristupa restorativne pravde i širih ciljeva izmirenja u okviru zajednica, pozivajući se na primere izvan Balkana. Ona naglašava tenzije ili čak protivrečnosti između instrumenata restorativne pravde, kao što je pristup pravdi usmeren ka žrtvama s jedne strane, i društveno izmirenje i izmirenje u okviru zajednica, s druge. Nebojša Petrović nudi procenu napretka i prepreka u bavljenju nasleđem ratnih zločina na zapadnom Balkanu, i daje preporuku za proces izmirenja koji bi se odvijao na više koloseka. Uloga mladih ljudi u tom procesu je posebno naglašena. Pišući iz antropološke perspektive pogleda na tranzicionu pravdu, Stephanie Schwandner-Sievers zastupa de-konstrukciju kulturnog izraza kolektivnih emocija, kao esencijalnu za transformaciju konflikta i izgradnju mira.

Treći deo, naslovlen „Koalicija za REKOM: nastanak, ciljevi i ambicije”, uvodi perspektive Koalicije za REKOM. One pružaju uvid u smisao pokretanja te inicijative, njene ciljeve, proces konsultacija, kao i modalitete njenog rada. Nataša Kandić istražuje poreklo REKOM-a, kontekst i ograničenja mehanizama retributivne pravde, i potrebu za pristupom tranzicionoj pravdi koji bi bio usmeren ka žrtvama. Kroz pregled debata koje su pratile razvoj aktivnosti i ciljeva REKOM-a, od trenutka kada je inicijativa zvanično predstavljena u maju 2008. godine, Kandićeva ističe da je krajnji cilj REKOM-a, kao regionalne inicijative civilnog društva – da postane državni projekat koji bi prihvatile vlade država bivše Jugoslavije. U svom prilogu, Tea Gorjanc-Prelević zastupa stanovište da uticaj koji Evropska unija ima na oblikovanje reformi na zapadnom Balkanu, treba takođe da bude iskorišćen i u oblasti tranzacione pravde. Ona ilustruje potencijalne efekte koje bi EU mogla da izazove u kontekstu odluke crnogorske vlade da prizna svoju odgovornost za zločin počinjen nad izbeglicama iz Bosne i Hercegovine 1992. godine. Na kraju, Gorjanc-Prelević tvrdi da sposobnost država i društava da se izbore s nasleđem ratnih zločina, takođe demonstrira i njihovu sposobnost da ispune svoje obaveze, uključujući vladavinu prava i ekonomsku saradnju, koji su deo paketa približavanja i eventualnog priključenja Evropskoj uniji. Vesna Teršelić ispituje da li pristup Evropske unije tranzicionoj pravdi na zapadnom Balkanu može opravdano da se nazove strategijom, obzirom da mu nedostaju čak i jasno artikulisani ciljevi i mere za implementaciju. Ona upozorava na nelagodnost mnogih

članova Evropske unije prema svojoj kolaboratorskoj ulozi u Drugom svetskom ratu, i poziva na pravičniji dijalog između EU i njenih partnera sa zapadnog Balkana o pitanjima u vezi sa suočavanjem sa prošlošću. U svom prilogu, Valdete Idrizi se osvrće na specifične izazove s kojima je REKOM inicijativa suočena na Kosovu, s obzirom na njegovu delikatnu političku situaciju. Ističući rizike politizacije, ona zastupa tezu da će stepen u kom će REKOM biti u stanju da probudi osećanje pripadnosti i svojine, biti ključan za uspeh i održivost te inicijative.

Zaključni deo „Evropska unija i restorativna pravda: uloga civilnog društva“ nastavlja da razmatra perspektive politike EU. Konkretno, bavi se politikom EU u odnosu na tranzicionu pravdu, i ulogom civilnog društva u oblikovanju te politike. Prilog Florence Hartmann naglašava štetan efekat politike Evropske unije u regionu. Time što ne sprovodi do kraja svoju podršku mehanizmima retributivne pravde, niti ohrabruje i angažuje se u inicijativama civilnog društva u oblasti restorativne pravde, EU propušta priliku da pođe od ostvarenih postignuća u sferi tranzacione pravde, koliko god da su ona ograničena. Analizirajući efekte podrške EU domaćim nevladinim organizacijama i mrežama civilnog društva koje prate Proces stabilizacije i pridruživanja, Adam Fagan na primeru Srbije demonstrira da je korist bila samo indirektna i slučajna. On tvrdi da, iako je ta korist možda najopipljivija u oblasti pružanja usluga i spoljnje pomoći civilnom društvu, tj. konkretno, profesionalnim nevladinim organizacijama, ona ipak nije bila dovoljna da stimuliše strukturalnu post-konfliktnu reformu i demokratizaciju. Prilog Iavora Rangelova odjekuje sličnim tonovima kao i Faganov zaključak. Usmeravanje na potencijalni doprinos koji bi civilno društvo moglo da ima u unapređivanju post-konfliktne tranzacione pravde i, posebno, potencijalni doprinos EU tom procesu, Rangelov zaključuje da je ovaj potonji izostao iz dva razloga. S jedne strane, evropski pristupi tranzicionoj pravdi postavljeni su u okvir kompeticije između „demokratije“ i „stabilnosti“, što dovodi do izbora između pravde i bezbednosti, umesto istraživanja toga kako ta dva cilja mogu da budu komplementarna jedan drugome. S druge strane, Rangelov tvrdi da EU prihvata depolitizovan koncept civilnog društva, naglašavajući ulogu ne-državnih aktera kao izvora usluga i partnera vlasti. Na kraju, predstavljajući pozicije Evropske unije, Thomas Gnocchi ističe da je suočavanje s prošlošću nezamenjivo za pomirenje između zemalja i unutar njih. Naglašavajući značaj pune saradnje s Tribunalom za evropske integracije država bivše Jugoslavije, Gnocchi je naveo brojne modalitete u kojima je EU bila uključena u podršku procesima tranzacione pravde. Iako oni primarno uključuju razne aspekte retributivne pravde i institucionalne saradnje u pokretanju suđenja pred domaćim sudovima, on u svom zaključku potvrđuje značaj civilnog društva u suočavanju s prošlošću.

Pristup usvojen na konferenciji, a on je iznet u ovom posebnom izdanju - je eklektičan. Cilj organizatora je bilo okupljanje širokog spektra glasova, izraženim kroz akademske, aktivističke i političke stilove onih koji su dali svoje priloge u ovom izdanju. Raznovrsnost perspektiva se odrazila u jednoj bogatoj i plodotvornoj raspravi o pitanju evropskih integracija i restorativne pravde. Kritika EU, u vezi sa strategijama tranzacione pravde na zapadnom Balkanu, sadržane u haškom uslovu, već je izražena veoma vokalno u akademskim, nevladinim i političkim krugovima, kako u regionu, tako i međunarodno. Istovremeno, bilo je kritičkih procena mehanizama restorativne pravde, kao što su neuspeli pokušaji vlada u regionu da uspostave komisije za istinu i pomirenje. Uprkos kritičkim procenama pristupa EU tranzicionoj pravdi na zapadnom Balkanu i raznih mehanizama tranzacione pravde u regionu - nije bilo pokušaja da se preformuliše usko shvatnje tranzacione pravde, onakvo kakvim se u svojoj praksi rukovodi i koje promoviše Evropska unija. Nije bilo ni napora da se preispita i re-definiše uloga civilnog društva, imajući u vidu dvostruki cilj istovremenog unapređivanja restorativne pravde i promocije evropskih integracija. Konferencija se bavila upravo tom prazninom, ili, preciznije - počela je da se bavi tom prazninom. Naslanjajući se na kritiku fokusa EU na retributivnu pravdu, demonstrirala je i neophodnost i potrebu za restorativnom pravdom u regionu. Pokazala je da EU ne može da tvrdi da ima strategiju za tranzicionu pravdu u regionu, sve dok inicijative za restorativnu pravdu ostaju van njenog transformacionog plana za zapadni Balkan. Uz osrvt na pionirsку inicijativu Koalicije za REKOM, ubedljivo je demonstrirala potrebu za restorativnom pravdom, ali i potrebu za podrškom Evropske unije. U tom kontekstu, civilno društvo u regionu bi moglo da ima ključnu ulogu.

Međutim, njegov trenutni aktivizam nije ograničen samo politikom lokalnih vlada, već i primetnim nedostatkom angažovanja EU.

Na kraju, konferencija je iznела jedan novi plan i jedan novi izazov pred akademsku i političku zajednicu: kako institucionalna podrška Evropske unije inicijativama za restorativnu pravdu civilnog društva, može bolje da promoviše proces evropskih integracija zapadnog Balkana, zajedno s unapređivanjem tranzicione pravde? Odgovor na to pitanje, kao što prilozi koji slede u ovom izdanju pokazuju, ne leži samo u ponovnom osmišljavanju mogućnosti za ostvarivanje pravde na osnovu prepoznavanja onih čiji je to interes i njenih brojnih protivnika, već, takođe, i u hrabroj politici potpunog zaokreta, i to posebno onih koji rukovode instrumentima EU osmišljenim za zapadni Balkan.

I DEO

**Strategija tranzicione pravde  
Evropske unije: kritičan osvrt**



# Ratovi na Balkanu, Evropske integracije i uslovljavanje Haga

Denisa Kostovicova

**N**e možemo razumeti granice takozvane politike uslovljavanja saradnjom s Hagom, koja predstavlja osnovni mehanizam tranzicione pravde kojem je pribegla Evropska unija na zapadnom Balkanu, a da ne razmislimo o karakteru ratova tokom devedesetih godina i njihovim posledicama. Pišući o zločinima i masovnim kršenjima ljudskih prava, Cohen kaže da se zločini i povrede ne poklapaju određenim vremenom u istoriji.<sup>1</sup> Oni ne mogu zastareti. Drugim rečima, ne može se samo zaboraviti i krenuti dalje. Zločini kao oni počinjeni u Medačkom džepu, Srebrenici ili Račku izazivaju bol, uzavrela osećanja i tenzije kao da su juče počinjeni, a ne u prošloj deceniji. Cohen tvrdi da je priznajanje zločina jedini način koji vodi zatvaranju, i za žrtve i za počinioce.<sup>2</sup> Ovde se misli na mogućnost da se krene dalje, ali ne i pod obavezno da se zaboravi.

Zašto je potrebno da se usredsredimo na nasilje iz devedesetih, a ne jednostavno na posledice koje je ono ostavilo? Da li se u diskusijama o evropskim integracijama, koje su projekt kretanja unapred, treba razgovarati i o ratovima na Balkanu? U ovom tekstu se tvrdi da treba, jer je situacija nakon sukoba neodvojiva od samog sukoba. Tranziciona pravda i ocena prošlosti su od ključne važnosti za prelazak od negativnog mira do pozitivnog mira. Galtung je

napravio razliku između negativnog mira, pod njim podrazumevajući odsustvo nasilja, i pozitivnog mira, koji podrazumeva ‘integraciju ljudskog društva’ odnosno otklanjanje strukturnih razloga rata.<sup>3</sup>

Ratovi u bivšoj Jugoslaviji su u najvećoj meri vodili promeni načina razmišljanja o ratu u XXI veku. Još postoji neslaganje među naučnicima o ispravnom nazivu. Da li ove ratove treba zvati novi post-modernistički, nacionalno državni, mali ratovi, itd? Međutim, sve obimniji radovi se bave time koliko su ovi ratovi različiti.<sup>4</sup> Kaldor je tvrdila da, za razliku od Prvog i Drugog svetskog rata, u novim ratovima nema jasne objave rata, niti se u njima vode neke velike bitke, nema velikih vojski i vojnih okršaja. Takođe se razlikuju i od ‘tradicionalnih’ građanskih ratova, kao što je bio Španski građanski rat, u kojem su suprotstavljene strane pokušavale da preuzmu državnu vlast kako bi ostvarile svoje političke interese i ideje. Drugim rečima, u ovim ratovima se ne radi ‘samo’ o promeni državne politike.<sup>5</sup>

U takozvanim novim ratovima, frontovi su na sve strane. Nečija kuća postaje bojno polje. Neprijatelj će najverovatnije biti grupa neobuzdanih paravojski, a nacionalistička retorika, koja služi kao opravdanje za nasilje, je u najvećem

1 Cohen, S., *States of Denial: Knowing about Atrocities and Suffering* (Cambridge: Polity, 2001).

2 Ibid., pp. 238-239.

3 Galtung, J., ‘An Editorial’, *Journal of Peace Research*, Vol. 1, No. 1 (1964), pp. 1-4.

4 Ovaj tekst indirektno pristupa kritici ‘novih ratova’ poput Kalyvas-a, Newman-a i drugih, tako što se bavi složenošću situacije nakon sukoba. Vidi Kalyvas, S.N., ‘New’ and ‘old’ civil wars: a valid distinction’, *World Politics*, 4 (October 2001), pp. 99-118; Henderson, E.A. and Singer, J.A., ‘New wars’ and rumours of ‘new wars’’, *International Interactions*, Vol. 28, No. 2 (2002), pp. 165-190; Duveystein, I. and Jan Angstrom, J., *Rethinking the Nature of War* (London and New York: Frank Cass, 2005).

5 Kaldor, M., *New and Old Wars: Organised Violence in a Global Era* (Polity Press, Cambridge, 1999).

broju slučajeva samo maska za bogaćenje pojedinaca. Jedan od pripadnika ozloglašene jedinice Škorpioni je jednog od svojih drugova iz jedinice opisao sledećim rečima: 'On je bolesno bogat i to sve je došlo iz rata, on je najmanje patriota, on je uvek bio profiter. Njegova imovina broji 500 ovača, ne znam koliko konja, svinja, ... 2,5 miliona nemačkih maraka ...'<sup>6</sup>

Perspektiva rata iz ugla političke ekonomije objašnjava bogaćenje pojedinaca pod maskom izgradnje nacije koje se odvija u novim ratovima. Privatizacija nasilja, usavršena tokom ratova na Balkanu, podrazumeva pustošenje, pljačku, iznudivanje, krađu, koji postaju osnovni izvor finansiranja paramilitarnih jedinica i njihovih akcija. Lična dobit je takođe dominantna motivacija. Međutim, materijalna dobit ostvarena u ratu, ne znači da je nasilje propratna posledica prvenstveno ekonomske aktivnosti. Nasilje je od ključnog značaja za sticanje koristi. Münkler tvrdi da 'ekonomija pljačke i pustošenja skoro uvek počiva na širenju straha. Novi ratovi se odlikuju specifičnim upravljanjem strahom, koji zaraćene sile stvaraju i sprovode protiv nenaoružanog sveta.'<sup>7</sup> Stoga, rat kao izvor prihoda i nasilje kao uklanjanje etnički 'drugačijih' raseljavanjem ili ubijanjem postaju jedno. 'Politika nasilja i profita se preklapaju u novim ratovima,' zaključuje Duffield.<sup>8</sup>

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Teorija novih ratova je opovrgla konvencionalno razmišljanje o ratovima. Iz te perspective, nasilje nije iracionalno, niti je posledica nesporazuma i prekida komunikacije. Isto tako nije ni neizbežna posledica starih mržnji, već je sistemsко i racionalno, i posledica namerne akcije. Zato se rat ne može shvatiti kao takmičenje dve strane, od kojih svaka pokušava da pobedi. Pre bi se moglo reći da strane u sukobu imaju interes da odlože prekid rata. Prestanak rata je neizvestan jer rat, koji se javlja kao slom ili kolaps, je zapravo

alternativni sistem profita, moći i zaštite. Dokle god traje rat, dotle se stiče i profit. Naučnici su odlično pokazali da nema ničega iracionalnog, nepredvidivog niti nepromišljenog u vezi sa nasiljem u Bosni i Hercegovini, Hrvatskoj, kao i u Sierra Leone, Kongu ili Kavkazu.

Takva interpretacija rata predstavlja važan uvid u nasleđe koje ostaje iza rata, a koje se karakteriše instrumentalizacijom i manipulacijom nacionalizmom. Javlja se ironični kontrast između toga koliko je 'novim borcima' malo stalo do njihovog 'naroda' tokom rata i koliko postaje važno ovo značenje nacionalizma kao kolektivne kategorije nakon rata. Otpor osumnjičenih ratnih zločinaca i njihovih političkih pokrovitelja individualizaciji krivične odgovornosti je karakteristična za čitav Balkan. U isto vreme, period nakon rata se karakteriše mešanjem države i trasnacionalnih mreža niklih na etničkim i ekonomskim interesima tokom rata. One vode računa da država ostane slaba jer je slaba država garant njihovog opstanka i izvor ličnog bogatstva čak i nakon sukoba.<sup>9</sup> Jaka, demokratska, odgovorna i efikasna država njima predstavlja najveću pretnju, kao što je i pokazano atentatom na premijera Zorana Đindića u Beogradu 2003.

Izdeljene države i društva na zapadnom Balkanu su proizvele situaciju u koju je Evropska unija stupila sa svojom šargarepom u vidu članstva u EU.<sup>10</sup> Nakon pada Miloševićevog režima 2000. godine, za zemlje zapadnog Balkana potencijalne članove EU je osmišljen Proces stabilizacije i pridruživanja (SAP). Proširenje Evropske unije na zemlje druge strane hladnoratovske podele u Evropi predstavlja širenje Evrope kao projekta izgradnje mira: obezbedujući mir i bezbednost uz pomoć političke i ekonomske integracije.<sup>11</sup> Povezivanja industrija uglja i čelika u Francuskoj i Nemačkoj da bi se izbegao rat je model koji je izvezen i

6 'The Scorpions: A Home Movie' Documentary Film, Humanitarian Law Center, Documentation and Memory, Belgrade, 2007.

7 Münkler, M., *The New Wars* (Cambridge: Polity, 2005), p. 14.

8 Duffield, M., 'Globalization, Transborder Trade, and War Economies' in Berdal, M. and David M. Malone, D.M. (eds), *Greed and Grievance: Economic Agendas in Civil Wars* (Boulder, Colo.: Lynne Rienner Publishers, 2000), pp. 69-89.

9 Kostovicova, D. and Bojicic-Dzelilovic, V., 'Europeanizing the Balkans: Rethinking the Post-communist and Post-conflict Transition', *Ethnopolitics*, Vol. 5, No. 3 (2006), pp. 223-241.

10 Paragrafi koji slede se zasnivaju na Kostovicova, D. and Glasius, M., 'The European Union as a State-builder: Policies towards Serbia and Sri Lanka', *Suedosteuropa*, Special Issue: *Comparing the Balkans: War Legacies and State-Building in the Age of Globalisation*, Vol. 56, No. 1 (2008), pp. 84-114.

11 Smith, K.E., 'The Evolution and Application of EU Membership Conditionality' in Cremona, M., *The Enlargement of the European Union* (Oxford and New York: Oxford University Press, 2003), pp. 105-139, p. 107.

na Balkan. On je pružio viziju evropske budućnosti svim zemljama i entitetima na Zapadnom Balkanu kroz ugovorni odnos u formi Sporazuma o stabilizaciji i pridruživanju (SSP) praćenog programom pomoći i asimetrične liberalizacije trgovinskih odnosa.<sup>12</sup>

Međutim, zapadni Balkan predstavlja poseban izazov za EU. Ciljevi projekta stabilizacije i pridruživanja, posebno politike uslovljavanja u regionu, ovaj projekat razlikuju od pristupa pripajanja koji je primenjen na zemlje centralne i istočne Evrope. Kao politički instrument, projekat stabilizacije i pridruživanja je skrojen kako bi mogao da odgovori na dvostruki izazov, post-komunističke i post-konfliktne tranzicije na zapadnom Balkanu. Ovi instrumenti su se razvijali od modela primenjenih prema post-komunističkim zemljama u centralnoj i u istočnoj Evropi, ali je sam po sebi karakterističan zbog strožijih uslova prijema u EU postavljenih za ove zemlje nego što su bili postavljeni za zemlje koje su se prethodno pripojile EU.<sup>13</sup> Oni su takođe oblikovani obavezom da se suoče s političkim, ekonomskim i bezbednosnim posledicama etničkog sukoba na Balkanu.

Operacionalizacija tranzicione pravde od strane EU u smislu saradnje sa Međunarodnim krivičnim tribunalom za bivšu Jugoslaviju ima kontradiktoran uticaj u Srbiji. Dok uslovljavanje saradjnjom s Tribunalom jeste dovelo do isporučenja optuženih za ratne zločine (iako ne svih u vreme pisanja), ono što je još diskutabilnije jeste mera do koje je ono vodilo razmišljanju o skorijoj prošlosti. Pitanje tranzicione pravde je postalo tehničko pitanje ekstradicija pre nego sagledavanje i promišljanje ratnih zločina koje bi otvorilo mogućnost regionalnog pomirenja, priznanja žrtava ili konsenzusa o krvavoj deceniji. Optužene ratne zločince su

širom bivše Jugoslavije njihovi sunarodnici posmatrali kao patriote dok su se ukrcavali na avion za Hag. Ipak, EU je njihovo izručenje smatrala ispunjenim uslovom.

Vinjamuri tvrdi, ‘politika pravde mora biti sastavni deo politike mira’<sup>14</sup> Što se tiče projekta za Balkan, ključno pitanje je da li politika pravde može ili treba da bude ‘sastavni deo politike evropskih integracija’ možda više nego što je do sad bila. Uzmimo u obzir pretpostavku da EU nije u potpunosti iskoristila potencijale partnerstva. Njen pristup od vrha ka dole je vodio marginalizovanju ključnih donosioca odluka u tranzicionoj pravdi – a to su društva. Članstvo u EU kao vizija budućnosti ujedinjuje sve ljude na zapadnom Balkanu i u tome leži trajni uticaj EU. Međutim, čak ni EU projekat nije otporan na to da postane žrtva nerešenih pitanja iz prošlosti.

Kombinacija trajne etnifikacije političke sfere i obstrukcije demokratizacije i jačanja državnih kapaciteta širom regiona mogu da osakate ceo EU projekat. Drugačije osmišljavanje pristupa tranzicionoj pravdi predstavlja ključni korak u suočavanju s nasleđem novih ratova. Priznavanje zločina otvara vrata oslobođanju pojedinca od nametnute kolektivne interpretacije nacije i preokret prema liberalnom i inkluzivnom shvatanju nacionalne pripadnosti. Isto toliko, odgovornost za zločine iz prošlosti je od ključne važnosti za oporavak državnih institucija od mreža patronata i zaštite nastalih tokom sukoba i koji su se najviše razvili u periodu nakon sukoba. Drugačiji pristup tranzicionoj pravdi može da se pokaže kao odlučan za sposobnost EU da bude pokrećač transformacije zapadnog Balkana i težnjama zemalja u regionu da postanu članice EU.

12 Cameron, F. and Kintis, A., ‘Southeastern Europe and the European Union’, *Journal of South East European and Black Sea Studies*, Vol. 1 (2001), pp. 94-112, p. 94.

13 Smith, K.E., ‘Western actors and the promotion of democracy’, in: Jan Zielonka and Alex Pravda (eds.), *Democratic Consolidation in Eastern Europe: Volume 2 International and Transitional Actors* (Oxford, New York: Oxford University Press, 2001), pp. 31-57.

14 Vinjamuri, L., ‘Order and Justice in Iraq’, *Survival*, Vol. 45, No. 4 (2003), pp. 135-152.

# Strategija EU za tranzicionu pravdu: propusti i prilike

Dick Oosting

**Š**ta je strategija Evropske unije (EU) za tranzicionu pravdu? Kada razmatramo sliku zapadnog Balkana, ali i uopšteno, pitanje koje treba postaviti je: Da li EU *ima* strategiju za tranzicionu pravdu? Odgovor je: zapravo, ne. Da li bi trebalo da je ima? Da – to jest, ako je prepostavka da se mora izaći na kraj s nasleđem trauma iz prošlosti, kako bi se izgradila stabilna budućnost - posebna pažnja trebalo bi da bude posvećena potrebama i pravima ljudi, uključujući, pre svega, žrtve i preživele, i samo sveobuhvatan pristup može ponovo da izgradi poverenje između građana i države. Sve to je suština tranzicione pravde.

U bivšoj Jugoslaviji, fokus je bio na suđenjima odgovornima za ratne zločine. EU je to direktno postavila kao temelj svoje politike pridruživanja tim zemljama, uslovivši početak pregovora punom saradnjom sa Međunarodnim krivičnim tribunalom za bivšu Jugoslaviju (Tribunal). To je bio odgovarajući odgovor u pogledu ljudskih prava, ali nikada nije osmišljen da odražava širu strategiju, u okviru koje bi sudeњa za ratne zločine bila u vezi s ostalim ključnim elementima tranzicione pravde - utvrđivanjem istine, reparacijama i institucionalnim reformama. Nedostajala joj je šira vizija o tome kako preći sa retributivne na restorativnu pravdu.

Danas je, u kontekstu evoluirajuće evropske bezbednosne i odbrambene politike, generalno prihvaćeno da na nasleđu masovnih povreda ljudskih prava iz prošlosti treba na neki način odgovoriti. Međutim, to nije nešto više od generalnog načela, koje je u praksi ostalo uglavnom ograničeno, u najboljem slučaju, na shvatanje „pravde“ kao funkcije

pružanja primarne bezbednosti i stabilnosti. Fokus je na bavljenju neposrednom post-konfliktnom krizom i reformom bezbednosnog sektora. Dugoročno izgrađivanje mira i sprečavanje sukoba, koji uključuju tumačenje pravde u širem smislu, do sada su većim delom ostali van domašaja konkretnih političkih odluka.

Ujedinjene nacije su bile značajan lider u tom polju u nastanku, time što su uvele pristupe tranzicione pravde u svoje misije uspostavljanja i čuvanja mira. Izveštaj Generalnog sekretara UN-a iz 2004. godine o vladavini prava i tranzicione pravdi u društвima zahvaćenim sukobima ili post-konfliktnim društвима<sup>15</sup> označio je porast u prihvatanju i uključivanju koncepta i instrumenata tranzicione pravde. Iako su pojedinačne zemљe članice počele s primenom sveobuhvatnijeg pristupa (svih delova vlasti), EU tek treba da artikuliše koherentnu politiku o tome kako „pravda“, u širem smislu, treba da vodi i usmerava njene aktivnosti na uspostavljanju mira i sprečavanju sukoba.

Smisao svega toga nije poricanje dobrih namera, niti umanjivanje određenih postignуća. Na primer, poslednja i najveća misija u okviru evropske politike bezbednosti i odbrane, EULEX na Kosovu, odražava napredak u shvatanjima i pristupu EU, sa snažnim fokusom na vladavini prava i obezbeđivanju dadatnog podstrekа i podrške funkcionisanju i reformi pravosudnog sektora. Ali, sve to i dalje nije dovoljno za strategiju na Kosovu koja bi omogućila EU da primeni jači uticaj na vlast i pruži sistematicniju podršku celom društvu.

15 UN dokument S/2004/616

Činjenica da Evropskoj uniji nije prirodno da primenjuje širi pogled na ljudska prava kada se bavi prošlošću – možda nije toliko iznenadujuće koliko se čini. Kada razmatramo kako se Evropa bavila traumama svoje skore istorije, upadljivo je koliko nezavršenog posla je ostalo. Kontinent je uništen sukobima i represijom tokom celog XX veka, uz značajno nasleđe fašizma i komunizma, kao i specifičnih trauma koje u određenim zemljama tek treba da budu adekvatno razrešene – od Severne Irske do Kipra, Španije i bivše Jugoslavije. Samo se za Nemačku može reći da je odgovorila na Holokaust u svojoj prošlosti. Naravno, Evropa jeste dosta napredovala. Ali, pogled na meru u kojoj demoni prošlosti i dalje obeležavaju sadašnjost otrežnjuje, i sećanje je ponovo probudilo osećaj kolektivne krivice, kada je Evropa bespomoćno posmatrala, dok je u njenom okrilju Balkan bio pustošen ratom, etničkim čišćenjem i genocidom.

S mirom i stabilnošću kao narativnim osnovama evropskog projekta, i s prosperitetom kao obećanjem, EU je bila veoma uspešna u približavanju ka demokratiji onih zemalja koje su nedavno pretrpele opresivnu vlast. Ali, u procesu proširenja, dimenzija ljudskih prava je mogla biti produbljena primenom širokih kriterijuma Kopenhagena, koji bi se posebno bavili prošlošću. Postoji rastuće uverenje da su, s talasom pristupanja uniji zemalja iz bivšeg istočnog bloka 2004. godine, propuštene mnoge prilike, a to u još većoj meri važi za ulazak Rumunije i Bugarske 2007. godine.

Sve to bi sigurno trebalo da bude osnova za veću brigu kada se posmatraju odnosi sa ostalim zemljama bivše Jugoslavije koje žele da pristupe EU. To nije samo pitanje izbegavanja uvoza ozbiljnih problema u uniju (slučaj Kipra je još jedna poželjna lekcija u vezi sa tim). To, takođe, mora biti pitanje obezbeđivanja pravde ljudima u tim zemljama, i očigledna realnost je takva da je potrebno uraditi mnogo više, kako bi se ta društva promenila, od izvođenja najvećih ratnih zločinaca pred sud u Hagu.

To znači da bi EU trebalo da uzme u obzir kako da proširi i iskoristi svoj uticaj efikasnije. Nema sumnje da taj uticaj

ima ogromni potencijal. Ali, da bi se iskoristio u potpunosti, neophodna je sveobuhvatnija vizija, zasnovana na kriterijumima Kopenhagena, koja se koristi očiglednom potrebom da se potpunije odgovori na mnogostruka nasleđa ratova. Bez obzira da li se to zove tranziciona pravda, ili društvena rekonstrukcija, promovisanje savesnog vršenja vlasti ili, jednostavno, demokratizacija, posebna istorija ovog dela Evrope zahteva različit i dublji politički upliv.

Očigledno je da ti ratovi nisu razrešeni: mir se široko doživljava kao „negativan mir”; lečenje trauma izazvanim masovnim povredama ljudskih prava jedva da je počelo; nacionalistička naracija je snažna i isključiva kao i uvek; podele se produbljuju umesto da se smanjuju; i politička rešenja u Bosni i na Kosovu se oštrotosporavaju. Ta mešavina je otrovna. Kako će EU da „integriše” sve to?

Ovo nije zahtev za većim uslovljavanjem u formalnom smislu. Ali, zagovara jači politički angažman, koji je ukorenjen u sistematicnijoj analizi toga kako odgovoriti na prošlost. To zahteva pristup i strategiju, koji idu dalje od krivičnog gonjenja odgovornih za ratne zločine i ojačavanja pravosudnog sistema, insistiranja na savesnijoj vlasti i ekonomskoj reformi, ali i ulivanja novca – koliko god da sve to jeste važno. Zahteva posmatranje praznina u tranziciji iz šire pravne perspektive, pre svega u sferama početka utvrđivanja istine, poštenijih reparacija, šire institucionalne reforme i vraćanja dostojanstva žrtvama.

Neophodno je posegnuti izvan formalnih struktura i aktera, kako bi se videlo što još može da se uradi da bi se civilno društvo ojačalo. Treba se koristiti očiglednom snagom koju civilno društvo može da prikupi, kao što vidimo na primeru rastućih pokreta širom bivše Jugoslavije, kako bi se zahtevalo uspostavljanje regionalne komisije koja bi se bavila prošlošću. I, na kraju, a to ne znači da je i najmanje važno, potrebna je mera osvrta EU na samu sebe i skromnost s njene strane, jer sve to može, i mora biti više od jednostranog procesa.

# Doprinos Međunarodnog krivičnog tribunala za bivšu Jugoslaviju procesu pomirenja na Balkanu

Merdijana Sadović

Pre ego što je uopšte moguće raspravljati o doprinosu Međunarodnog krivičnog tribunala za bivšu Jugoslaviju (Tribunal) procesu izmirenja, neophodno je postaviti nekoliko pitanja: da li je postojala bilo kakva alternativa Tribunalu u ranim devedesetim; da li je postojala bilo koja druga institucija ili procesi, koji bi taj posao obavili uspešnije i ostvarili bolje rezultate? Moje čvrsto uverenje je da je Tribunal, koliko god da je nesavršen, bio najbolji način da se odgovori na pitanje ratnih zločina, u trenutku njegovog uspostavljanja, i u godinama po okončanju rata. Bez obzira da li želimo to da priznamo ili ne, on je doprineo utvrđivanju istorijskih činjenica o ratovima u bivšoj Jugoslaviji u devedesetim godinama. Da li je takođe doprineo i procesu pomirenja u regionu? Svakako da jeste, ali ne u onoj meri kojoj su se mnogi nadali.

Pravda i pomirenje ne idu uvek zajedno. Zapravo, često deluje kao da je upravo suprotno. Brojne presude Tribunal-a, potpuno su polarizovale društva na Balkanu, ali to ne znači da bi bilo bolje da te presude uopšte nisu ni izrečene. Kada ljudi govore o pomirenju, oni uglavnom prepostavljaju da ono uključuje pojedinačne, ili čak kolektivne gestove priznanja i oprاشtanja. Ali, ta vrsta pomirenja je retka u posle-ratnim situacijama, i, u kontekstu rasprave o Tribunalu i pomirenju na Balkanu, mnogi veruju da je korisno razgovarati o konceptima poput „društvene rekonstrukcije“. Pomirenje ne mora da bude duhovno pitanje, već može biti i veoma pragmatično. Ono ne podrazumeva nužno prestanak mržnje prema nekome, ili ljubav prema svima. Tiče se izgradnja funkcionalnih odnosa u politici i društvu. Dugoročno, takvi odnosi mogu dovesti do neke vrste pomirenja. To je jedan kompleksan proces, u koji moraju biti uključeni svi segmenti društva. Međutim, jasno je da i

dalje nema dovoljno spremnosti da se počne sa radom na pravi način i krene putem tog procesa. Kada je reč o Tribunalu i njegovoj ulozi u tom procesu, rekla bih da nju ne treba podcenjivati.

Tribunal je uspostavljen 1993. godine u cilju izvođenja najodgovornijih osoba za ratne zločine počinjene u bivšoj Jugoslaviji pred lice pravde. Sve od tada, Tribunal je naglašavao suđenja za ratne zločine kao svoj prioritet, a ne utvrđivanje istorijskih činjenica ili podršku procesima pomirenja na Balkanu. Njegov posao je trebalo da bude ograničen samo na to. Međutim, već godinama opstaju očekivanja da će rad Tribunal-a doprineti, ili da treba da doprinese pomirenju naroda Balkana i njihovom suočavanju sa svojom skrom nasilnom prošlošću, makar i samo kao sporedni efekat njegovih centralnih, konkretnih sudskih ciljeva. Tribunal je bio kritikovan zbog neispunjavanja takvih očekivanja, iako ne uvek opravданo.

Još jedan centralni zadatak u procesu pomirenja je i stvaranje tačnog istorijskog zapisa dogadaja koji su destabilizovali društvo. Naravno, pitanje istine u tom kontekstu je kompleksno, i bilo bi naivno očekivati da sve strane, umešane u ratove u bivšoj Jugoslaviji, brzo stignu do konsenzusa o tome šta ste tačno dogodilo tokom devedesetih. Prirodno je da u post-konfliktnim društvima svaka zajednica veruje da je žrtva, što dodatno otežava utvrđivanje zajedničke istine.

Ali, u kojoj meri je Tribunal doprineo tom procesu? U velikoj, rekla bih. Pre svega, neki nalazi u presudama Tribunal su prihvaćeni kao istina u skoro celom regionu. Najočigledniji primer je, naravno, genocid u Srebrenici. U svojoj istorijskoj presudi protiv Radislava Krstića, sudije Tribunal-a

su potvrstile da zločini počinjeni u Srebrenici 1995. godine predstavljaju genocid. Skoro niko na Balkanu danas to ne osporava. Neki od ostalih nalaza Tribunala i dalje nisu prihvaćeni među svim stranama u nedavnom sukobu, poput nalaza da je postojao plan za stvaranje Velike Srbije, i da je taj plan direktno doveo do etničkog čišćenja. Međutim, vremenom će te činjenice možda biti šire prihvaćene.

Proces utvrđivanja istine o sukobu u bivšoj Jugoslaviji je mukotrpno spor, ali izgleda da, korak po korak, Tribunal uspeva bar da suzi spektar dopustivih laži.

Poricanje je veoma jak neprijatelj bilo kog procesa pomirenja, i veoma teško ga je pobediti. Tribunal tvrdi da je, u svetu njegovog rada, „...danas neodrživo da bilo ko osporava realnost zločina koji su počinjeni u i oko Bratunca, Brčkog, Čelebića, Dubrovnika, Foče, Prijedora, Sarajeva, Srebrenice i Zvornika, kao i u brojnim drugim mestima.“ Ali, činjenica je da širom regiona, mnogi ljudi i dalje rade upravo to. Sve etničke grupe optužuju Tribunal da je pristrasan, čim se pokrene suđenje protiv neke osobe iz njihovih redova.

Drugi problem je činjenica da postoji puno onih koji nisu direktno učestvovali u zločinima, ali nisu uradili ništa ni da ih spreče. Takođe, mnogi pojedinci su u kontinuitetu podržavali počinioce tih zločina. Zato je očigledno zašto oni ne žele da prihvate istinu o ratu koju im predstavlja Tribunal – ukoliko bi to uradili, onda bi morali da snose i deo odgovornosti za počinjene zločine.

Jedan aspekt dogadaja u Hagu je i nadanje mnogih da će odluke brojnih bivših zvaničnika i vojnika da priznaju svoje učešće u zločinima - biti posebno snažna sila podrške pomirenju na Balkanu. Međutim, efekti takvih priznanja su se u stvarnosti pokazali kao veoma kompleksni. U početku su mnogi videli veliki napredak u činjenici da se Biljana Plavšić, bivši visoki zvaničnik bosanskih Srba, 2002. godine pred Sudom izjasnila da je kriva za progon nad ne-Srbima u Bosni. Zauzvrat, Tužilaštvo je povuklo sve ostale optužnice protiv nje, uključujući i optužbu za genocid. U izveštaju Međunarodnog centra za tranzicionu pravdu (ICTJ) iz oktobra 2004. godine, tvrdi se da je „njen izraz kajanja tokom i posle suđenja, zajedno sa odlukom da ne uloži žalbu na jedanaestogodišnju kaznu koja joj je izrečena, možda doprineo procesu pomirenja i ostvarivanja pravde“. Međutim, mnogi posmatrači su tada izrazili ozbiljne sumnje u iskrenost priznanja Plavšićeve. Nažlost, ispostavilo se da su bili u pravu, jer je, ranije ove godine, u jednom intervjuu koji je dala švedskim medijima, Plavšićeva priznala da

se izjasnila krivom u okviru nagodbe o povlačenju ostalih optužnica, i da je to bio jedini razlog.

Nedostatak ‘komunikacije sa širom javnošću’ (outreach-a) u ranom periodu uspostavljanja Tribunala, takođe je bio velika prepreka doprinosa Tribunala na Balkanu. U svetu činjenice da je Tribunal započeo taj program tek krajem 1999. godine, postoje tvrdnje da je Tribunal, u svom neuspehu da odgovori na pitanje odnosa naroda u regionu, pokazao ozbiljnu nebrigu. Kao posledica toga, lokalne zajednice imaju tendenciju da često zaključuju kako Tribunal favorizuje neke druge interese nad njihovim. U takvim okolnostima, političari su mogli da ‘pecaju u uzburkanom moru’, i koriste kritike upućene Tribunalu kako bi ostvarili svoje sopstvene ciljeve.

Još jedan veliki problem koji želim da pomenem je nedostatak transparentnosti Tribunala. Način na koji se Sud bavio transkriptima sa sednica Vrhovnog saveta odbrane Srbije, dodatno je hranio nepoverenje ljudi prema toj instituciji. Činjenica je da je odobravanjem mera poverljivosti za te dokumente, Tribunal postavio interes države iznad interesa žrtava, koje traže istinu.

U pogledu haškog uslova EU, on možda nije najbolji mogući pristup, ali ne možemo poreći da se pokazao kao veoma efektivan, i da je doveo do brojnih hapšenja. Naravno, glavni problem je nepostojanje šire strategije, i činjenica da je usmeren samo na hapšenja pojedinaca koji su optuženi da su počinili ratne zločine. Očigledno pitanje je kakav interes će EU videti u rešavanju pitanja ratnih zločina, onda kada Mladić i Hadžić budu uhapšeni, ili kada Tribunal završi sa radom, u zavisnosti od toga šta se bude dogodilo prvo.

Ukupno posmatrano, i pored slabosti Tribunala u vezi s utvrđivanjem istorije ratova na Balkanu ili doprinisu pomirenju u regionu, činjenica je da je on dugo bio jedna od malobrojnih institucija koje su se tim pitanjima bavile na tako velikoj skali. Međutim, vreme je za uspostavljanje drugih mehanizama, koji će biti komplementarni radu tog Suda, i koji će pomoći pomirenju u regionu. Kao zaključak, citiraću izveštaj Inicijative stručnjaka iz 2006. godine: „Izmirenje, ukoliko težimo tome da ga ostvarimo, predstavlja ogroman zadatak, koji će očigledno zahtevati više od sudske intervencije, i trajati duže od mandata Tribunala.“ Očigledno, ne možemo da se oslonimo samo na Tribunal i lokalne sudove za ratne zločine kako bismo završili taj posao – u tome treba da učestvujemo svi mi.



**II DEO**

**Restorativna pravda:  
pristupi, preduslovi i instrumenti**



# Šta je doprinos restorativne pravde? Lekcije izvan Balkana

Chandra Lekha Sriram

**T**ema moje diskusije je doprinos restorativne pravde u društvima posle sukoba koji će izložiti u komparativnoj perspektivi pozivajući se na iskustva izvan Balkana kako bih ukazala na mogućnosti ali i izazove ovakvog pristupa pravdi, koji se mogu očekivati i na Balkanu. U ovom radu razmatram da li, i kako, restorativna pravda (pojam koji će definisati kasnije) može biti, u nekiminstancama, poželjnija od retributivne pravde, koja se ostvaruje sudenjima i, u nekim slučajevima, komisijama za istinu. Bez obzira da li to jeste ili nije slučaj, ona svakako ima posledice na politiku i odluke Evropske unije o uslovljavanju evropskih integracija „Hagom“. Uvezši u obzir širok spektar globalnih iskustava u promociji restorativne pravde, i koristeći se svojim radom, koji je većim delom bio van Evrope, govoriću o iskustvima izvan Balkana.

Pre nego što budem govorila o relativnoj vrednosti takozvane restorativne pravde, neophodno je razjasniti razne svrhe za koje ona može biti uvedena, a time i razne instrumente koji mogu da budu korišćeni. Restorativna pravda može imati za svoj širi cilj društveno pomirenje, ali većim delom je osmišljena kao deo pristupa povredama u prošlosti usmerenog ka žrtvama.<sup>16</sup> Međutim, često ima dosta zabune o razlici između težnje ka pomirenju u društvu ili zajednicu, uključujući i povratak bivših boraca u mesta kojima su možda naneli zlo, i restorativne pravde, koja teži

tome da odgovori na potrebe žrtava i/ili povrati specifične društvene odnose (između žrtve i počinioca). To je znatnim delom zbog toga što su mnogi instrumenti slični, bar na površini. Počeće tako što će na brzinu objasniti argumente koji su izneti u prilog uspostavljanja pristupa povredama iz prošlosti koji su usmereni ka žrtvama, i koji koriste restorativne mere, pre nego što se okrenem raznim instrumenatima koji mogu biti korišćeni. Baviću se i time kako zabuna u pogledu instrumenata kojim se ostvaruje pomirenje u zajednicama i instrumenata restorativne pravde - može stvoriti probleme u praksi, pre svega kroz raspravu o pročišćenju i procesu pomirenja u severnoj Ugandi, upotrebi mehanizama izmirenja u Istočnom Timoru, i *gacaca* procesa u Ruandi. Na kraju, baviću se brojnim izazovima inherentnim težnjama ka restorativnoj pravdi.

## Restorativna pravda i pristup usmeren ka žrtvama

Oni koji zastupaju pristup usmeren ka žrtvama, poput Naomi Roht-Arriaza i ostalih, ne odbacuju druge instrumente tranzicione pravde, kao što su sudjenja ili komisije za istinu, već naglašavaju značaj potreba žrtava i bavljenja psihičkim traumama, izazvanim državnim terorom i zločinima. Konkretno, razmišljanje u tom pravcu naglašava potrebu pružanja pomoći žrtvama u umanjivanju njihovog osećanja povređenosti, i povraćaju osećaja kontrole. To

<sup>16</sup> O pristupima koji su usmereni ka žrtvama vidi Naomi Roht-Arriaza, "Punishment, Redress, and Pardon: Theoretical and Psychological approaches," in Impunity and Human Rights in International Law and Practice, ed. Naomi Roht-Arriaza, (Oxford: Oxford University Press, 1995), pp. 13-23. Debatama o reparacijama, restituciji i restoraciji se bavi John Torpey, ed., Politics and the Past: On Repairing Historical Injustices (Oxford: Rowman and Littlefield, 2003).

može ublažiti i često rasprostranjeno isključivanje žrtava na osnovu toga što su „sigurno nešto uradile”, što svaljuje krivicu na žrtve, umesto na počinioce. Neki od ljudi koji se bave tranzicionom pravdom dodatno naglašavaju potrebu žrtava za katarzom, i instrumente koji bi mogli da pomognu u službi podrške njihovom izlečenju. To može uključivati, ne samo pokušaje da se nadoknade konkretnе patnje, uključujući gubitak svojine, već, takođe, i bavljenje emocijama ožiljcima, uključujući i temeljne pokušaje da se posreduje u odnosima s počiniocima i pokušaje da se oni poprave.

Zašto zastupnici restorativne pravde smatraju njene metode poželjnijim od metoda retributivne pravde? Relativno je jasno da instrumenti, kao što su suđenja i komisije, ne služe nužno potrebama žrtava, već da mogu ponovo da ih traumatizuju, i da traumatizuju druge. Žrtve mogu osećati potrebu da ih neko čuje, i da njihove priče budu potvrđene, ali komisije za istinu i, posebno, suđenja, možda nisu najbolji ili jedini mehanizmi za to, i ne moraju u potpunosti odgovoriti na ostale patnje koje su žrtve proživele. Povrede iz prošlosti ostavljaju trajne psihičke i telesne ožiljke: izvinjenja i reparacije, pojedinačno ili zajedno, mogu da budu tek početak u odgovoru na traume žrtava. Međutim, to nije potpuno nova perspektiva. Reparacije i povraćaj su bili ponuđeni u brojnim situacijama koje su pratile zločine, a posebno u Latinskoj Americi.

### **Instrumenti restorativne pravde**

Dakle, šta su neki od konkretnih instrumenata restorativne pravde? Izvinjenja, reparacije, simboličke mere, kao što su spomenici, povraćaj, kao i stvaranje istorijske dokumentacije, može da posluže vraćanju dostojanstva žrtvama. Dok mere, kao što su povraćaj i reparacija, mogu biti osmišljene da koriste konkretnim žrtvama na pojedinačnom nivou, one takođe mogu biti upotrebljene kako bi koristile čitavim zajednicama, kao što je bio slučaj s Peruom.<sup>17</sup> Poredeći taj slučaj sa Kolumbijom, proces pokrenut Zakonom o pravdi i miru za porodice pripadnika paravojnih formacija podrazumeva pojedinačne reparacije žrtvama.

### **Nacionalno pomirenje, pomirenje zajednica ili pojedinačni restorativni proces?**

Restorativni procesi koji naglašavaju potrebe žrtava mogu biti komplementarni, ali i stopljeni s procesima koji teže promociji nacionalnog pomirenja, ili pomirenja na nivou zajednica. Tako, na primer, istražne komisije mogu pokušavati da odgovore na potrebe žrtava i, istovremeno, promociji nacionalnog pomirenja, ili, za šta se zalaže Međunarodni krivični tribunal za bivšu Jugoslaviju (Tribunal), promociji građanskog poverenja. Međutim, iako građansko poverenje može biti promovisano na opštem nivou, to ne znači da će biti prihvaćeno od strane mnogih, a pogotovo ne od svih žrtava. Slično tome, brojni procesi u vezi s povratkom počinilaca u pogodene zajednice, mogu da omoguće šire društveno pomirenje, ali ne nužno i da pomire pojedinačne žrtve sa počiniocima, ili da odgovore na potrebe žrtava kao pojedinaca.

To ne znači da ne postoje mehanizmi pomirenja koji mogu to da urade, jer oni postoje, i mnogi od njih predstavljaju takozvane tradicionalne mehanizme. Međutim, zabuna o odnosu između pomirenja i restorativnih procesa u praksi se jasno pojavljuje onda kada se bilo koji od tih mehanizama koristi kako bi odgovorio na najozbiljnije zločine. Ti problemi u praksi su pojačani uključivanjem mehanizama koji nisu osmišljeni da se bave najozbiljnijim zločinima. Zabuna oko procesa usmerenih na zajednicu, naspram procesa usmerenih ka pojedincu, može da znači da se tekući restorativni procesi odvijaju na način koji daje prioritet pomirenju u okviru zajednice, i koji nije konzistentan sa potrebama žrtava. Sada ću prokomentarisati brojne konkretnе primere kako bih to ilustrovala.

### *Zamena uloga u severnoj Ugandi*

Pokušaji da se bivši borci re-integrišu u svoje rodne zajednice u severnoj Ugandi dobro demonstriraju zabunu oko ceremonija osmišljenih da promovišu izmirenje u kontekstu zajednice, i onih usmerenih na odnos između žrtve i počinjoca.<sup>18</sup> U toj situaciji, procesi su uključivali javna pri-

<sup>17</sup> Pablo de Greiff, ed., *The Handbook of Reparations* (Oxford: Oxford University Press, 2006) je sveobuhvatna studija politika reparacije na globalnom nivou.

<sup>18</sup> Ova opažanja sa naslanjaju na analizu u Johanna Herman and Chandra Lekha Sriram "DDR and Transitional Justice: Bridging the Divide?" (rad pripremljen za projekt "The Political Economy of DDR", Tromso, 2008).

znanja, ceremonije pročišćenja, i druge rituale. Međutim, ceremonije ozdravljenja i pročišćenja deluju kao da su se stopile s ceremonijom okončanja konflikta, *mato oput*. Kao posledica toga, pročišćenje, koje su posmatrači greškom shvatili kao *mato oput*, korišćeno je za izmirenje na nivou zajednice, kao deo prihvatanja povratka bivših boraca. Međutim, to nije *mato oput*, koji tradicionalno podrazumeva dug proces izmirenja dve strane u vezi s jednim pojedincom. Dok mehanizmi poput *mato oput*-a u načelu mogu da zadovolje neke od žrtava i da budu osmišljeni kao restorativna pravda za žrtve, u nekiminstancama u praksi, većim delom su usmereni ka široj zajednici. Rasprave o odgovarajućoj upotrebi *mato oput*-a u tom kontekstu i dalje traju.

### *Kooptacija i prisiljavanje u Ruandi*

U Ruandi, tradicionalni proces zvani *gacaca*, bio je prihvачen kako bi obezbedio javna svedočanja i kažnjavanje manje ozbiljnih počiliaca za zločine u periodu genocida koji je ta zemlja proživila 1994. godine. Međutim, proces je takođe predstavljen i kao restorativan, nudeći priliku žrtvama da se suoči sa onima koji su ih povredili i da saslušaju njihova izvinjenja, ali i zato što su izrečene kazne mogle da uključuju javnu službu, a time možda i stepen restorativne pravde za čitavu zajednicu. Međutim, postoji puno nedostataka, uključujući i često prisustvo znatnog broja rođaka počinilaca tokom samog procesa, zbog čega su neke žrtve ukazale na to da se osećaju prisiljenim da prihvate izvinjenja. Dodatno, takav pristup deluje kao zbumujuća mešavina retributivne i restorativne pravde, i zajedničkog i pojedinačnog izmirenja. Pobornici restorative pravde trude da ona ima u vidu potrebe žrtava. Stoga ne može se trvditi da izvesnošću da je takav pristup sadržan u procesu *gacaca*.

### *Zajedničko ili pojedinačno pomirenje u Istočnom Timoru?*

U Istočnom Timoru, formalni retributivni proces režima za ozbiljne zločine, ko-egzistirao je sa još jednim mehanizmom tranzicione pravde, sa Komisijom za prihvatanje, istinu i pomirenje (CAVR). CAVR je imao mandat za utvrđivanje istine o povredama ljudskih prava u Timor-Leste-u, u periodu od 1974. do oktobra 1999. godine, ali je takođe uključivao i stavku za uspostavljanje Procedura izmirenja za zajednice (CRP), kroz koji su ljudi optuženi za relativno manje ozbiljne zločine - kao što su krađa, blaži napad, podmetanje požara (koji nisu za posledicu imali smrt ili povrede) i ubijanje stoke ili uništavanje zasada - mogli da zatraže da učestvuju u lokalnim svedočenjima, izgrađenim delom i na osnovu pristupa tradicionalne pravde pozna-

tom kao *adat*. Proces pomirenja je uključivao procedure za povratak počinilaca u zajednice, koje su bile usmerene i na žrtvu, i na zajednicu.

Iako su imali elemente restorativne pravde, u smislu da su žrtve mogle direktno da se obraćaju počiniocima, koji su bili spremni da priznaju svoja zlodela i izvine se, CRP procedure su uljučivale i odluku zajednice o tome da li konkretni počinilac može da se vратi u nju. Kao takve, procedure su zabunom mogле да замене pojedinačne restorativne ciljeve sa svrhom pomirenja u okviru šire zajednice. Slično, od počinilaca su se tražile reparacije i služba pojedinačnim žrtvama, ali je ponekad nametana i javna služba. Taj pristup je, takođe, bio i predmet brojnih drugih kritika, uključujući i to da su se neki počinioci provukli kroz pukotine koje nisu bile pokrivene ni formalnim pravnim procesom, niti procesom izmirenja.

### **Ograničenja restorativne pravde**

Restorativna pravda, kao što je ranije rečeno, može da uključuje izvinjenja, spomenike, restituciju i reparaciju. Ono što je ključno jeste to da ona odgovori na potrebe žrtava u svetu ozbiljnih povreda ljudskih prava. Ali, tu postoji jedna poteškoća. Prvo, u takvim situacijama, može postojati veliki broj žrtava, i sve one ne moraju nužno želeti iste mere. Reparacione mere nikada ne mogu biti skrojene za svaku pojedinačnu situaciju, već, kao što je slučaj s Peruom, žrtve bivaju svrstavane u različite kategorije (porodice ubijenih ili nestalih, žrtve torture, prinudno raseljena lica). Drugo, u mnogim društvima ne postoje jasno razgraničene kategorije žrtava ili počinilaca. Često, pojedinci su i žrtve i počinioci, a posebno tamo gde je prinudna mobilizacija bila široko rasprostranjena, ili upotreba dece kao vojnika, kao što je bio slučaj sa Siera Leoneom ili severnom Ugandom. Treće, mere koje žrtve smatraju poželjnijim često nisu ponuđene: simboličke mere mogu delovati nedovoljnim, a materijalne beneficije mogu biti shvaćene kao uvredljive ili premale, što je problem koji je često pogoršan time da vladama verovatno nedostaju resursi (ili interes) da bi ponudile značajnije reparacije. U Gvatemali, neke organizacije žrtava snažno odbacuju simboličke mere kao beskorisne. Mere restorativne pravde mogu, takođe, da se pokažu kao problematične, onda kada su deo asimetričnog ili nedemokratskog procesa tranzicije, za šta su kritičari tvrdili da je slučaj sa Kolumbijom, gde proces demobilizacije paravojnih jedinica, blisko povezanih sa vlašću, uopšte ne može biti definisan kao tranzicioni ili mirovni proces. Dodatno, tamo gde se restorativni procesi oslanjaju na takozvanu tradici-

onalnu pravdu ili tradicionalne metode razrešenja sukoba, takvi metodi mogu loše odgovarati reakciji na ozbiljne zločine. Konačno, pojam restorativna pravda podrazumeva pokušaj da se uradi nešto što je na određenom nivou nemoguće: da se povrati ono što je uništено zločinima. Očigledno je da smrt i povrede ne mogu biti preokrenuti, čime bi se povratio *status quo ante*. Slično, odnose poverenja između konkretnih pojedinaca, kao što su žrtve i počinioci, ili odnose šireg društvenog poverenja, u najboljem slučaju je teško ponovo uspostaviti.

### Zaključak

Ništa od ovoga ne predstavlja tvrdnju da restorativne mere nisu korisne. Zaista, pravo na reparacije i povraćaj,

kao i obaveza da se reparacije pruže, pravne su norme u nastanku, što je pokazano rezolucijom 2005 UNGA, koja je uspostavila Osnovne principe i smernice u vezi sa pravom na povraćaj i nadoknadu za grube povrede međunarodnog humanitarnog prava.<sup>19</sup> Kao što je poznato, kazne izrečene od strane Međunarodnog krivičnog suda (MKS) mogu da uključuju i novčane i zatvorske kazne, pri čemu se prve deponuju u fond za žrtve, koji takođe može da uključuje i donacije iz drugih izvora. Međutim, stručnjaci i tvorci takvih programa, u podjednakoj meri, treba jasno da odgovore na pitanje gde je mesto restorativnoj pravdi među ostalim mehanizmima tranzicione pravde; kada je ona konzistentna s ciljevima i instrumentima pomirenja zajednice u širem smislu, a kada ne; i koja ograničenja su joj inherentna.

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<sup>19</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and International Humanitarian Law, UN General Assembly Resolution 60/47 (16 December 2005), <http://www2.ohchr.org/english/law/remedy.htm>.

# Ljudski potencijali za ostvarivanje restorativne pravde na Balkanu

Nebojša Petrović

Deceniju i po posle ratova na Balkanu, mnogi aspekti njihovog nasledja i dalje opterećuju sećanja žrtava, savest počinilaca i svakodnevni život skoro svih ljudi. Pošto se tako velikim delom društva nije moguće baviti na uobičajene načine, kroz čitavu istoriju čovečanstva, ljudi su pokušavali da te probleme reše na neke druge načine. Koncept restorativne pravde oslanja se na praksi ostvarivanja pravde drevnih Arapa, Grka, Rimljana, kao i raznih religija, uključujući budizam, hinduizam, taoizam i konfučjanstvo, koje su prepoznale značaj vraćanja harmonije i ravnoteže zajednici, posle pretrpljenih nepravdi ili događaja koji su je uzdrmali<sup>20</sup>. To je zato što je restorativna pravda usmerena na pretrpljene gubitke i nadoknadu počinjene štete, i teži tome da zadovolji sve uključene strane, posmatrajući žrtve kao centralnu figuru u čitavom tom procesu<sup>21</sup>. Štaviše, restorativna pravda takođe uključuje i počinioce. Zato što je inkluzivna, restorativna pravda pruža žrtvama, počiniocima i pogodenim zajednicama priliku da na smislen način učestvuju u procesu re-integracije u zajednicu koja će uslediti.

Zbog toga treba ceniti činjenicu da su pristupi restorativne pravde konačno postali predmet rasprave i na Balkanu. Međutim, to nije zato što je retributivna pravda nešto pogrešno, već upravo suprotno. Upotreba restorativne

pravde je vid priznanja da potpuna pravda ne može biti ostvarena drugim sredstvima. Uprkos svemu tome, i obzirom da je moja struka socijalna i opšta psihologija, znam da je, kada neka osoba ima problem, priznavanje tog problema neophodan preduslov za njegovo rešavanje. Čak i ako se smatra zamenom za retributivnu pravdu, restorativna pravda nije loša zamena. Zapravo, uopšte nije loša. Ona deluje kao jedini preostali način (ili jedan od malobrojnih) da se pomogne oporavku društva, i, kao što je bišvi predsednik Čilea Patricio Aylwin rekao u svom inauguracionom govoru, „ona teži istini i pravdi u najvećoj mogućoj meri.”<sup>22</sup>

Kada postavimo post-konfliktnu situaciju na Balkanu u širi kontekst, treba primetiti da se ipak krećemo u pravom smeru, iako sporo (mada ne izgleda uvek tako). Ako bi se pregledali stručni članci koji sadrže spisak predloženih koraka kojima se stiže do pomirenja, moralo bi se reći da ljudi u takozvanom dejtonskom trouglu (koji uključuje Bosnu i Hercegovinu, Srbiju i Hrvatsku), u manjoj ili većoj meri ipak jesu ispunili te preporuke. Postoji zajednički trgovinski sporazum, CEFTA; zajednički kulturni prostor; uspostavljeni su nacionalni sudovi za ratne zločine; postoji mogućnost slobodnog kretanja za svakoga ko želi da putuje; nema novog naoružavanja; bosanski parlament je proglašio amnestiju za sve vojnike koji nisu počinili ratne zločine u

20 J. Braithwaite (1999) ‘Restorative Justice: Assessing Optimistic and Pessimistic Accounts’ in M. Tonry (ed.) *Crime and Justice: A Review of Research* (Chicago, Illinois: University of Chicago Press).

21 E. Weitekamp (2002) ‘Restorative justice: present prospects and future directions’ in E. Weitekamp and H.J. Kerner (eds.) *Restorative Justice: Theoretical Foundation*. (Uffculme, UK: Willan Publishing).

22 M. Minow (1998) ‘Between Vengeance and Forgiveness: South Africa’s Truth and Reconciliation Commission.’ *Negotiation Journal*, 14 (1998): 319-355.

prošlosti; mlađi ljudi ne žele da služe u vojnim kasarna-ma; postoji čak i zajednička košarkaška liga; i, skoro celo stanovništvo Srbije može da gleda hrvatske i bosanske TV kanale - što je važan faktor u re-humanizaciji i personalizaciji doživljaja ljudi s „druge strane“ granice, i dobar način za smanjivanje predrasuda.

Naravno, takođe postoje i problemi. Zapovednik Armije bosanskih Srba iz vremena rata, Ratko Mladić, i dalje je u bekstvu, dok su mnogi ljudi sa svih strana i dalje prepuni mržnje, besa i nezadovoljstva. Istovremeno, postoje pojedinci koji *status quo* koriste za sticanje materijalnih i drugih koristi. Mnogi od njih žele da izbegnu odgovornost. Činjenica da oni imaju društveni uticaj i političku moć je veoma značajna, i njihovi naporci usporavaju naš napredak. Svaki korak je napravljen uz ogromne teškoće, a to će važiti i za svaki sledeći korak na putu ka pomirenju. Međutim, ako poredimo situaciju iz 1995. godine sa situacijom u 2000. godine i, na kraju, sa situacijom koju imamo danas, ne može se poreći da je postignut očigledan napredak. Vreme prolazi. Ljudski životi prolaze. Nažalost, napredak jeste bio veoma spor, ali ni na drugim mestima u svetu se nije odvijao brže – primer toga je i Nemačka posle Drugog svetskog rata<sup>23</sup>. Za duboke promene u društvu, u psihološkom smislu i u pogledu vrednosnog sistema, potrebno je dosta vremena. Zato se može reći da smo, u ovom trenutku, u poodmakloj fazi post-konfliktne transformacije (poodmakloj u pogledu protoka vremena, jer su se ratovi u Hrvatskoj i Bosni i Hercegovini završili pre skoro deceniju i po). Ova faza zahteva neka nova rešenja. U nastavku ovog rada, pokušaću da ukažem na neke ideje.

Na početku, svoje izlaganje ovde ne ograničavam na neku posebnu grupu, poput žrtava, počinilaca, ili neke druge grupe. Ako uzmemo u obzir celo društvo, ili čak više društava, možemo da zaključimo da takve kompleksne okolnosti zahtevaju kompleksna rešenja. Paradoksalno je da neki aspekti tih rešenja među sobom mogu biti i protivrečni. Konkretno, imamo bar tri suverene države, i svaku od tih zemalja sačinjavaju različite grupe, sa različitim stepenom i vrstom interesa i angažovanja u procesu izmirenja. Zato

se zalažem za sistematski pristup, koji pomirenje posmatra kao rezultantu svih pozitivnih napora raznih osoba iz svih delova društva koje u njemu prepoznaju svoje interese – umanjenu uticajem svih postojećih prepreka, koje takođe mogu biti raznovrsne prirode. U okviru tog pristupa, svaki akt je bitan; mnogi od njih doprinose izmirenju, ali ih zato neki drugi remete. Takvi akti mogu da uključuju, na primer: članak iz lokalnih novina, propoved sveštenika, upoznavanje novog prijatelja iz druge etničke grupe – ali i simboličke gestove lidera ili među-zavisnost ekonomija. Pritom ne tvrdim da svaki akt ima podjednak uticaj, već da svaki od njih jeste bitan. Neki akti su namerni, ali puno veći broj njih nije. Međutim, kao i u fizičkom svetu, posle haosa, uspostavlja se ravnoteža. Problem je kako ubrzati taj proces, a posebno zato što se etničke grupe među sobom razlikuju u svojoj spremnosti za izmirenje.<sup>24</sup>

Zato je neophodno pokrenuti proces pomirenja *na više koloseka*. To podrazumeva podršku i ohrabruvanje svih onih koji žele da saraduju, razmenjuju ideje, vrednosti, emocije, itd. Ne sme se čekati da se i poslednja nepoverljiva osoba promeni, jer društvo ne može sebi da priušti da rasipa svoju energiju na taj način. Naprotiv, ljudi moraju biti motor društvenog oporavka. Oni koji oklevaju treba da budu ohrabreni, ali ne i primorani. Manjina koja se otvoreno suprotstavlja pozitivnim procesima, trebalo bi da bude marginalizovana u najvećoj mogućoj meri. Oni koji su najslabiji i u najviše pogodeni konfliktom i njegovim posledicama, treba da dobiju pomoć od svoje zajednice i čitavog društva, na isti način na koji imućni pojedinci pružaju ekonomsku podršku najsiročajnjim segmentima društva.

To je način za postizanje maksimalnih efekata. Opšta atmosfera u društvu uslovjava vrstu među-ljudskih odnosa. Negativna klima, prepuna sukoba, podstiče nepoverenje i sumnju, koji se odražavaju u medijima, obrazovanju i međusobnim odnosima u svakodnevnom životu. Takve poruke ojačavaju početno nepoverenje i negativna osećanja prema pripadnicima drugih grupa. Takva situacija obeshrabruje čak i one ljudе koji bi mogli da postanu zastupnici pomirenja. Međutim, ako omogućimo razvoj

23 G.A. Almond and S. Verba (1963) *The Civic Culture: Political Attitudes and Democracy in Five Nations* (Princeton: Princeton University Press).

24 N. Petrović (2005. godine) *Psihološke osnove pomirenja* (Beograd: Institut za psihologiju i Dokumentacioni centar „Ratovi 1991. – 1999. godine“)

na više koloseka svuda gde je to moguće, to će neizbežno popraviti ukupnu situaciju. Na osnovu principa pozitivne reakcije, otvorice se nove mogućnosti za neke nove institucije i pojedince. Tako se vraćam na pitanje pronalaženja odgovarajućih lidera-visionara, „pionira” - „onih koji prethode drugima, kako bi pripremili ili otvorili put koji bi ostali sledili; onih koji započinju, ili učestvuju u pokretanju nekog poduhvata ili pokreta”<sup>25</sup>. Koje su njihove poželjne osobine? Kako se mogu unaprediti one koje već postoje, i kako se može započeti razvoj ostalih? Mnogi strukturalni akti mogu da posluže kao podstrek za popravljanje situacije. Kao psiholog, uvek naglašavam ljudsku energiju.

Ko, onda, među takozvanim običnim ljudima, ima najveći interes u dugoročnim promenama? Odgovor, izgleda, leži u mladoj generaciji, i to iz sledećeg razloga - čak i u situaciji u kojoj su proživeli gubitak u podjednakoj meri kao i svi ostali, mlađi imaju manje uništen osećaj za život, jer imaju veće mogućnosti da započnu neki novi život, bez obzira na to koliko su gubici koje su pretrpeli ogromni. Zato je njihova nada za budućnost izražajnija, i nju je moguće razviti ranije i brže. To ne znači da ne treba da postoji podjednaka briga za sve ljude traumatizovane ratom, bez obzira na njihove godine. To samo znači da je lakše pronaći snažnije nosioce pozitivnih transformacija među mlađima, i da takve promene mogu da koriste svim članovima društva.

Jedan od mogućih načina za prevazilaženje prepreka jačanju mira (na subjektivnom planu) – jeste razvoj takvih budućih lidera kroz dodatnu stručnu obuku. Oni bi na taj način stekli neophodno znanje i veštine, koje bi bile korišćene za prevazilaženje prepreka u njihovim zajednicama. Znanje i veštine nisu jedini cilj i željeni ishod takve obuke. Ona će, takođe, stimulisati i inspirisati privrženost takvoj vrsti poduhvata. Kako bi postali uspešni i poštovani lideri u budućnosti, ti učenici treba da poseduju suštinsko teorijsko znanje o pojavnama i problemima sa kojima bi mogli da se suoče u svom radu. Sposobnost da inspirišu pozitivne osobine u drugima, zajedno sa privrženošću tom zadatku, takođe su važne osobine budućih lidera. Samo po sebi, znanje bi moglo da bude beskorisno, na isti način na koji motivacija bez prethodnog

znanja ne može biti plodotvorna. Uglavnom, organizacije iz tog polja organizuju radionice za motivisane pojedince, u kojima se primenjuju moderne tehnike, ali bez puno učenja o suštini činjenica kojima se bave. Zato, izgleda da rezultati ostvareni pod takvim okolnostima nisu pozitivni u meri u kojoj se to želi. Zbog svega toga, u obuku moramo uključiti sve navedene elemente. U prenošenju znanja, pored klasičnih metoda, veoma je važno primeniti i eksperimentalne tehnike učenja i razumevanja. Takvi novi lideri bi trebalo da budu „kritična”<sup>26</sup> u svojim zajednicama. Neophodno je uspešno razrešiti „problem uvećavanja.”<sup>27</sup> On se odnosi na način prelaska sa male grupe pojedinaca koji su transformisani nekim procesom, na sve veće grupe ljudi, koje bi bile podjednako transformisane, sve dok čitavo društvo ne bude u stanju da vidi budućnost na jedan novi i, nadam se, svetlij način. Naš zadatak bi, takođe, trebalo da bude i to da što je moguće više ljudi prevedemo na našu stranu - našu stranu u smislu ideja, vrednosti i političkog aktivizma - i da na taj način pomognemo da se naše društvo promeni.

Glavni efekat koji bi mlađi lideri trebalo da ostvare i rašire u čitavom društvu jeste širenje pozitivne vizije budućnosti. Puno vremena je već prošlo od kraja ratova na Balkanu, i krajnje je vreme da se u obzir uzme dugoročna perspektiva. Jedan od najvažnijih elemenata u tom pogledu je nada! Kada bih pomenuo nadu u prošlosti, ona bi mnogima u publici delovala kao preterano duhovni koncept za potrebe političke realnosti. Međutim, američki izbori su jasno pokazali da ona ipak može da bude delotvorna. Mogao bih da citiram razne pojmove - „vizija željene buduće države”, „društveno oslikavanje”, „potraga za budućnošću” – kako bih opisao proces kojim se pojedinci, grupe ili organizacije, ohrabruju da oslobode sebe od stega trenutne stvarnosti, kako bi razvili sliku o boljoj budućnosti. Takva slika, sama po sebi, ima veliku motivacionu snagu.

Želeo bih da završim tako što ću ponoviti da moramo biti svesni da je pomirenje jedan dug i spor proces, koji ima puno protivnika - ali mi ne smemo sebi da dozvolimo da tugujemo nad tim problemom, jer će Obraz (jedna nacionalistička ne-vladina organizacija mlađih u Srbiji), ili Srpska radikalna

25 P.Grenier, P. (2004) 'The New Pioneers. The People Behind Global Civil Society' u: H. Anheier, M.Glasius and M. Kaldor (eds). *Global Civil Society 2004/5* (London: Sage).

26 J.P.Lederach, (2005) *The Moral Imagination. The Art and Soul of Building Peace* (Oxford: Oxford University Press).

27 M.Maiese (April 2005) 'Scale-up Problem' Beyond Intractability. Ed. Guy Burgess and Heidi Burgess. DATE. Conflict Research Consortium, University of Colorado, Boulder, Colorado, USA. [http://www.beyondintractability.org/essay/scale\\_up/](http://www.beyondintractability.org/essay/scale_up/).

stranka (ekstremna nacionalistička partija u Srbiji), ili neko sličan, uvek biti tu, poput prirodne katastrofe ili oluje koja preti. Međutim, mi treba da se takmičimo i izademo na kraj

s njima, i ponudimo jednu moralno superiorniju i efikasniju viziju koja je u stanju da postepeno ubedi sve više ljudi da će prevazilaženje negativnog nasleđa rata koristiti svima.

# Emocije i tranziciona pravda: Restorativni potencijali simboličke komunikacije na Kosovu

Stephanie Schwandner-Sievers

**U**ovom radu zastupam teoriju da spoljna podrška izgrađeni mira i post-konfliktnoj društvenoj transformaciji, ne može biti ostvarena ukoliko se ne uzmu u obzir lokalne društveno-kulturne posebnosti, i ne obrati pažnja na lokalne procese društvenog izlečenja. Imajući na umu kulturni kontekst i promene, postavlja se pitanje na koji način takve posebnosti i procesi mogu biti identifikovani, prepoznati i integrirani u napore usmerene ka izmirenju širom regiona, bez produbljivanja podela podrškom spornoj lokalnoj politici nacionalnog sećanja i identiteta (tamo gde su to važni elementi lokalne kulture). Ovaj rad, na primeru Kosova po okončanju rata, teži tome da doprinese nekim društveno-antrpološkim i etnografskim zasnovanim pogledima na to pitanje. Ovde iznosim tvrdnju da se u istraživanju simboličkih gestova u kolektivnim ritualima i ratnoj naraciji, mogu pronaći kulturni izrazi kolektivnih emocija, i istražiti alternativni potencijali za izgradnju mira na kulturno senzitivan način. Inspirisana Münklervim teorijama o asimetričnim ratovima,<sup>28</sup> takođe pokušavam i da identifikujem postojeće praznine u komunikaciji i odnosima u kontekstu „post-herojske“ naspram „herojske“ društveno-kulturne orientacije u novonastalim društvenim grupama koje oblikuju širu kulturu Kosova u periodu posle rata. Ovaj pristup istražuje i pored standardne pretpostavke i poglede na kategoričke razlike u pogledu etničkih, nacionalnih, regionalnih ili

međunarodnih posebnosti, i preispituje standardne dihotomije, potput žrtve i počinioca, seoske i urbane sredine, društvenog i političkog procesa. To su dihotomije mišljenja koje mogu da sakriju stvarnu sliku na terenu. Zato u ovom radu zastupam princip kulturne refleksije svih uključenih strana, i potrebu za istraživanjem i obzirom prema lokalnoj kulturi, kao riznici alternativnih potencijala za izgradnju mira, kako bi se omogućila tranzicija iz herojske u post-herojsku ideološku orijentaciju.

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Pokazalo se da svi razvojni projekti, uključujući i projekte izmirenja, rizikuju neuspeh, ukoliko ignorišu način na koji istorija odražava „ishod borbe suprotstavljenih društvenih grupa u konkretnim društвима“<sup>29</sup> umesto da prate stazu napretka, na kojoj, „kao posle kvazi božanske intervencije“, kultura i politički procesi ne igraju nikakvu ulogu.<sup>30</sup> Akademski kritičari posleratnih intervencija i, kontretno, intervencije na Balkanu, upozoravaju da strani modeli koji su nametnuti spolja (poput terapijske paradigme psiho-socijalne intervencije zasnovane na individualističkoj, post-vijetnamskoj američkoj paradigmi) mogu imati neželjene i štetne posledice koje „sprečavaju post-konfliktni oporavak, tako što de-legitimisu lokalne strategije oporavka i slabe veze u zajednici“.<sup>31</sup> To se dogada zato što specifične lokalne društveno-kulturne norme, ne samo da oblikuju način na

28 Münklér, H., *Der Wandel des Krieges: Von der Symmetrie zur Asymmetrie*. Weilerswist: Velbrück Wissenschaft, 2006.

29 Edelman, M. and A. Haugerud. ‘Introduction: the Anthropology of Development and Globalization,’ u: M. Edelman and A. Haugerud (eds) *The Anthropology of Development and Globalization: From Classical Political Economy to Contemporary Neoliberalism*, Oxford: Blackwell, 2008, 14.

30 Ibid., 2.

31 Pupavac, V. ‘International Therapeutic Peace and Justice in Bosnia.’ *Social and Legal Studies* 13(3) (2004): 377–402, 389.

koji ljudi shvataju, doživaljavaju i izražavaju svoje patnje, već pružaju i lokalni resurs za društveno izlečenje. U skladu s tim, iako je „ključno prepoznati društveno tkivo kao metu modernog ratovanja”,<sup>32</sup> kao što je bio slučaj s ratovima u bivšoj Jugoslaviji,<sup>33</sup> nevladine organizacije usmerene ka post-konfliktnom oporavku treba da „podrže stрукture koje pomažu ljudima da izdrže i nastave dalje”.<sup>34</sup> Održiva rešenja zato moraju imati lokalne korene, „oslanjajući se na prioritete, sposobnosti i otpornost preživelih žrtava”.<sup>35</sup>

Na sličan način, teorije o konfliktnoj transformaciji zastupaju stav o potrebi restorativnih oblika pravde u procesima izgradnje mira. Prema Paulu Lederachu, jednom od naj-eminencijalnih stručnjaka u toj oblasti, restorativna pravda ima „sistemske, a ne linearne poglede na ljude, odnose, procese i kontekst”.<sup>36</sup> Ona mora da odgovori na činjenicu da „mir nije statičan ishod, već skup dinamičnih procesa, ukorenjenim u svakodnevnom kontekstu života ljudi, njihovih odnosa, pogleda, nada i strahova”.<sup>37</sup> On ne odbacuje retributivnu pravdu, jer se njom uspostavlja odgovornost i nadoknada, ali nas podseća da ona to čini isključivo kroz suđenja počiniocima za kršenje zakona države. Međutim, takav fokus isključuje žrtve iz čitavog procesa, i time ograničava mogućnosti za izgradnju održivog mira, koje moraju uzeti u obzir društveno-kulturno poreklo i kontekst sukoba, kako bi on bio transformisan. Prema Lederachu, pravda, kao deo procesa transformacije sukoba, treba da bude usmerena ka žrtvama i bavi se „konkretnim odnosima u kojima su pretrpljene patnje i šteta”.<sup>38</sup> Mir ne može biti održiv ako „žrtve nemaju pristup i mogućnost učešća u procesima koji se tiču upravo onih okolnosti koje su najviše uticale na njihove živote. Često nalazimo da se žrtve

osećaju nemoćnim i marginalizovanim, ne samo u okviru formalnog procesa, već, što je još važnije, i u procesima koji su usmereni ka njihovom izlečenju” u okviru sistema retributivne pravde.<sup>39</sup> Međutim, u stvarnosti, razlika između žrtava i počinilaca je često nejasna, jer žrtve mogu da postanu počinoci, i obrnuto.<sup>40</sup> Restorativna pravda prihvata da se zločin, u mnogim kulturama i zajednicama, doživljava kao „rana čitave zajednice, i kao cepanje mreže odnosa u zajednici”.<sup>41</sup> Zato ne može biti efikasne podrške transformaciji sukoba ili društvenom izlečenju, bez svesti o kompleksnosti sukoba i njegovom društveno-kulturnom kontekstu i području, na kojoj bi se zasnivalo bavljenje post-konfliktnim pitanjima.

Potreba za „kulturnim senzibilitetom” je postala priznata u brojnim programima post-konfliktnih intervencija, demokratizacije i razvoja. Na primer, obuka i literatura EULEX misije na Kosovu, rutinski naglašava potrebu za negovanjem kulturnog senzibiliteta među zaposlenima i lokalnim stanovništvom. Međutim, način na koji se takvi ideali primenjuju – osim uopštenih izraza poštovanja, standardnih formi pristojnosti i svesti o prirodi relevantne lokalne kulture – nije uvek jasan. To posebno važi za okolnosti u kojima se lokalne društveno-kultурне forme prevazilaženja gubitka i bola doživljavaju kao strane i, možda, neprijateljske, ili čak kao pretinja spoljnim akterima – zbog čega bivaju ignorisane, sprečene ili direktno odbačene. Na primer, iako ratno sećanje i zločini i dalje predstavljaju važna pitanja u političkoj areni i širem društvu Kosova, američka ambasadorka na Kosovu, Tina Kaidanow, izjavila je u jednom intervjuu za RTV Kosovo u februaru 2009. godine da „uopšte nema smisla razgovarati o istorijskim nepravadama bilo koje

32 Summerfield, D. ‘Assisting Survivors of War and Atrocity: Notes of “Psycho-social” Issues for NGO workers’, *Development in States of War*. London: Oxfam, 1996, 85-89, 89.

33 Npr. Sorabji, C. ‘A Very Modern War: Terror and Territory in Bosnia-Herzegovina’ in *War, a Cruel Necessity? The Bases of Institutionalized Violence*, ed. R. A. Hinde & H. E. Watson, London: Tauris, 1995; *Neighbors at War: Anthropological Perspectives on Yugoslav Ethnicity, Culture, and History*, ed. Halpern, J. M. and D. A. Kideckel, University Park: UP Pennsylvania, 2000.

34 Summerfield, op.cit., 88.

35 Ibid.

36 Lederach, J.P. ‘Civil Society and Reconciliation’ in *Turbulent Peace: The Challenges of Managing International Conflict*, ed. Ch. A. Crocker et al., Washington D.C.: US Institute of Peace Press, 2005, 854.

37 Ibid.

38 Ibid., 852.

39 Ibid.

40 E.g. Scheper-Hughes, N. and Ph. Bourgois, ‘Introduction: Making Sense of Violence’ u: *Violence in War and Peace: An Anthology*, ed. N. Scheper-Hughes and Ph. Bourgois, Oxford: Blackwell, 2004; Keen, D. *Complex Emergencies*, Cambridge (UK): Polity Press, 2008.

41 Zehr, H. *The Little Book of Restorative Justice*, Intercourse, PA: Good Books, 2002, 20.

vrste, ili nastojati da se prošlost iskoristi kao proces kojim bi se nametnula politika.<sup>42</sup> U svom govoru na konferenciji o suočavanju s prošlošću i izmirenju u Beču, u novembru 2008. godine, Wolfgang Petritsch<sup>43</sup> je izneo sličnu tvrdnju da „obični ljudi mogu da se pokrenu ka zajedničkoj budućnosti samo ako njihova svakodnevica prestane konstantno da ih podseća na bol iz prošlosti. Samo ako politički akteri prestanu da manipulišu prošlošću i prekrajaju je za potrebe svojih interesa - mogu se stvoriti uslovi za izmirenje“.<sup>44</sup>

U ovom radu ne poričem mogućnost politizacije ratnih sećanja i opasnosti koje to nosi, ali zastupam stav da treba istražiti da li su takva sećanja društveno udaljena od stvarnih lokalnih potreba, a ne jednostavno prepostaviti da je tako. Ovde takođe primećujem i da takvo stanovište predstavlja samo jedan od glasova u okviru globalizovanih društvenih odnosa koji čine posleratnu kulturu na Kosovu, iako taj glas ima privilegovan položaj u okviru asimetričnih struktura vlasti. Na osnovu pretpostavke o kategoričkoj razlici između realno društveno utemeljenih pitanja i političkog procesa, kao i očigledne opšte nelagodnosti prilikom bavljenja traumatičnom prošlošću, takvi glasovi mogu čak postati i deo razloga zašto izmirenje na Kosovu ne napreduje. Nelagodnost i kasnije učutkavanje žrtava kroz odbacivanje njihove kulture prevazilaženja bola, identifikovani su kao univerzalna pojava.<sup>45</sup> Ali, priče žrtava nije ni lako, ni udobno slušati, i, kao što antropološke studije o južno-afričkoj komisiji za istinu pokazuju, žrtva na taj način može biti izložena ponizju i nižerazrednom položaju u društvenom kontekstu zajednice iz koje potiče,<sup>46</sup> ukoliko se zanemare dostupne forme lokalne kulture kojima se takvi rizici zaobilaze. Međutim, pozivi spolja da se taj problem reši, u okolnostima u kojima se lokalno i dalje zahteva priznavanje zločina, gubitka i patnje - jednostavno deluju preuranjeno. Kao što je Human Rights Watch primetio:

*Da bi čitavo društvo krenulo napred, Kosovo mora da se suoči sa svojom prošlošću. Do danas nije bilo velikog napretka, uprkos naporima spoljnih aktera usmerenih ka izmirenju. Iako podsticaj izmirenju mora doći iznutra, međunarodni akteri mogu da pomognu u stvaranju uslova koji izmirenje čine verovatnim.<sup>47</sup>*

Etnografija je antropološki metod koji učenje o lokalnim kulturama tumači kao riznicu unutrašnjih, lokalnih društvenih procesa izleženja. Etnografsko istraživanje o posleratnom sećanju i stvaranju nacije na Kosovu, koje smo moje kolege i ja sproveli 2000. godine, ukazuje da je komemoracija rata na Kosovu prerasla u jedan sveprisutan proces, pokrenut od strane običnih ljudi, koji je ukorenjen i koji proistiće iz perifernih područja, u kojima su počinjeni najstrašniji zločini, iz kojih je kasnije prenesen na šire političke platforme. Važno je primetiti da spomenici nedavnoj prošlosti i prateći rituali nemaju samo političku ulogu, već i veoma važne društveno-psihološke funkcije za šire slojeve stanovništva. U slučaju Kosova, te dve funkcije nije moguće razdvojiti. S jedne strane, nicanje memorijala na Kosovu posle rata 1999. godine mora biti shvaćeno kao inverzija prethodne statutarne hegemonije Srbije, koja je devedesetih godina Albancima slala poruku da „Kosovo nije njihovo“.<sup>48</sup> S druge strane, nedugo po okončanju rata, sela, zaseoci i gradovi širom Kosova, izgleda da su se takmičili u podizanju spomenika palim lokalnim ratnim herojima („mučenicima“), čime utvrđuju svoj položaj u pogledu šireg nacionalnog panteona heroja, kroz simboličku internu komunikaciju među sobom. Političari su koristili mučenike iz svojih zajednica kako bi povećali svoj politički legitimitet. Ali, istovremeno, komemoracija rata možda ne bi bila tako važna i uživala toliku društvenu podršku, što je i dalje slučaj, da je spoljno priznanje patnji lokalnog stanovništva dato na smislen način i u dovoljnoj meri. Prema Sigmundu Freudu, moglo bi se reći da spomenici i memorijali i dalje služe kao

42 Intervju za RTK, 2. 3. 2009. godine, dostupan na <http://www.rtklive.com> (od 2. 5. 2009).

43 Stalni austrijski predstavnik pri OEBS-u i bivši Visoki predstavnik u Bosni i Hercegovini.

44 Petritsch, W. ‘What Future for the Past?: Moving on Requires Looking Back’, govor na međunarodnoj konferenciji, *Dealing with the Past and Reconciliation in the Western Balkans*, 10–11 November, Vienna, 2008, dostupno na [www.cdsee.org/pdf/2008\\_11\\_10\\_wp.pdf](http://www.cdsee.org/pdf/2008_11_10_wp.pdf) (od 9.4.2009.), 6.

45 Herman, J. L. *Trauma and Recovery: from Domestic Abuse to Political Terror*. London: Rivers Oram Press/Pandora List, 2001.

46 Humphrey, M. ‘From Terror to Trauma: Commissioning Truth for National Reconciliation’, *Social Identities* 6(1), 2000: 7–27.

47 Human Rights Watch. *A Human Rights Agenda for a New Kosovo*. New York: Human Rights Watch, 2008, dostupno na <http://www.hrw.org/en/reports/2008/02/14/human-rights-agenda-new-kosovo> (od 5.6. 2009.).

48 Clark, H. *Kosovo: Work in Progress: Closing the Cycle of Violence*. Coventry: Centre for the Study of Forgiveness and Reconciliation, 2002, 6.

„mnemetički simboli”, za koje su ljudi „emotivno vezani” sve dok se ne „oslobode tereta prošlosti”.<sup>49</sup> Novi albanski memorijali se pojavljuju u formama koje predstavljaju afirmaciju teritorijalnih prava, ali i simboličke zahteve za priznanjem na način koji nije isključivo politički; oni predstavljaju kompletно društveno sećanje. Ratno sećanje Kosova je i politički i društveno živo. Ono definiše to društvo kao „herojsko”, kroz teorijske termine koje je izneo Herfried Münkler.<sup>50</sup> Shodno tome, to su društva koja idealizuju sve-sno i voljno ljudsko samožrtvovanje za veće ciljeve, kao deo (politički i društveno) siveobuhvatne, religiozno inspirisane ideologije „mučeništva”. Nasuprot tome, Münkler definiše „post-herojska” društva kao desakralizovana (uključujući i pogled na svete koncepte nacije) društva koja odbacuju takvo žrtvovanje, sa tendencijom i preferencijom da u ratu koriste plaćenu vojsku. Post-herojska orijentacija je evoluirala, na primer, u Nemačkoj, posle Prvog i Drugog svetskog rata, iz užasa i odgovornosti za ogroman broj smrти. Ali, umesto da uvede nove, normativne dihotomije društvenog progresa, relativistički pristup antropologije naglašava razmišljanje o „herojskim” i „post-herojskim” orientacijama kao o delu kulturnog kontinuuma u okviru datog društva, a ne kao o pokazatelju kvalitativne razlike među društvima.

Na Kosovu postoji jedna specifična dominantna mesijanska naracija o oružanom otporu i žrtvovanju za naciju, tj. mučeništvu, koja služi kao osnivački mit te nove nacije među kosovskim Albancima. Tim pitanjem sam se bavila zajedno sa svojom koleginicom Annom Di Lellio.<sup>51</sup> Porodica Jashari se pominje u skoro svim političkim govorima i rutalima, poput zvaničnih godišnjih komemorativnih ceremonija, i njena privlačnost je duboko društveno-kulturno ukorenjena. Ta dominantna naracija je sagrađena oko nasilne smrti jednog od ranih voda Oslobodilačke vojske Kosova (OVK), Adema Jasharija, i njegove šire porodice. Muškarci,

žene i deca su poginuli u trodnevnom granatiranju porodične kuće od strane srpskih snaga u martu 1998. godine, branеći se lakim naoružanjem, i to je veoma važno za albansku naraciju o tom događaju. Njihovo mučeništvo se doživljava kao nešto što je dovelo do NATO intervencije, a time i do spaša nacije. Ta naracija se koristi standardnim figurama albanskih običaja, tradicije i porodičnih vrednosti,<sup>52</sup> kao što je, na primer, *besa* – kulturni koncept koji uključuje držanje date reči i solidarnost sa porodicom i prijateljima, čak i po cenu smrti. Na posleratnom Kosovu, poprište tog masakra je postalo popularan i masovno posećen hram nacije, i njegovo posećivanje se doživaljava kao hodočašće. Na tom sakralizovanom mestu, prepunom razrušenih kuća, nalaze se raznovrsni materijali, ritualne i ostale simboličke reproducije mučeničke ikonografije, i ono je privuklo stotine hiljada albanskih posetilaca, razne školske ekskurzije i organizovane posete. Te posete uključuju sakralne i profane aspekte, i mnogi posetioci, a pre svega oni koji su i sami pretrpeli gubitke u ratu, osećaju „strahopštovanje prema mestu koje otelotvoruje religiozne teme mučeništva i vaskrsenja”;<sup>53</sup> neki od njih, sa suzama u očima, iskazuju svoj bol i ponos.

U našem prethodnom radu u vezi sa posleratnim sećanjem, Di Lellio i ja smo identifikovale snažnu psihosocijalnu funkciju koju ta dominantna naracija ostvaruje. Sudbina čitave jedne porodice, koja se branila, pružala otpor i odbila da bude jednostavno žrtvovana, ima ogroman kolektivni potencijal za identifikaciju među svim preživelim žrtvama – i mladima i starima, i muškarcima i ženama. Ona omogućuje skretanje „fokusa sa „sramnih” iskustava viktimizacije i poniženja, na iskustva koja su izvor ponosa.”<sup>54</sup> Mit, rituali i spomenici kulta Jasharijevih, pojavljuju se kao javni izraz onoga o čemu društvo želi da govori - o hrabrima i časnima, kao izraz kolektivne želje da se ponos i sram u društvenom

49 Freud, S. *Two Short Accounts of Psycho-Analysis: Five Lectures on Psycho-Analysis – The Question of Lay Analysis*. Harmondsworth: Penguin, 1962, 39 and 40.

50 Freud, S. *Two Short Accounts of Psycho-Analysis: Five Lectures on Psycho-Analysis – The Question of Lay Analysis*. Harmondsworth: Penguin, 1962, 39 and 40.

51 Di Lellio, A. and S. Schwandner-Sievers. ‘The Legendary Commander: The Construction of an Albanian Master-Narrative in Post-war Kosovo’, *Nations and Nationalism* 12(3), 2006: 513–529; Di Lellio, A. and S. Schwandner-Sievers, ‘Sacred Journey to a Nation: The Construction of a Shrine in Postwar Kosovo’, *Journeys: the International Journal of Travel and Travel Writing* 7/1, 2006: 27–49.

52 Di Lellio, A. and S. Schwandner-Sievers. ‘Sacred Journey to a Nation’, op.cit., 39-42.

53 Ibid., 36.

54 Di Lellio, A. and S. Schwandner-Sievers. ‘The Legendary Commander’, op.cit., 527.

sećanju razdvoje. Ona omogućava hodočansicima/turistima da se identifikuju sa oružanim otporom, umesto da proživljavaju poniženja žrtava. Može se reći da je u pitanju samo-dignifikacija, umesto samo-viktimizacije, kao odgovor na iskustva poniženja i preprljene gubitke, a time i kao forma kolektivnog samoizlečenja.

Međutim, mnogi kojima je takvo iskustvo strano, ispoljavaju znatnu nelagodnost u vezi sa naracijom o Jasharijevima. Jedan razlog za to je i činjenica da se na albanske heroje, u srpskoj nacionalističkoj protiv-naraciji, gleda kao na teroriste, i zato ona ne deluje kao jedan prikidan, inkluzivan mit o osnivanju te nove nacije. Takva nelagodnost dodatno može biti objašnjena, bar u nekoj meri, rastućim klasnim razlikama (koje su pokazatelj uticaja različitih kulturnih centara), i koje su delimično simptomatične za post-socijalističke procese društvenog raslojavanja u širem regionu. One su proširile durštveno-kulturne podele između kulturne elite - i ekonomski, obrazovno ili na neki drugi način društveno-podređenih delova stanovništva. Taj efekat je u antropologiji razvoja i civilnog društva poznat kao efekat „poletanja”.<sup>55</sup> U skladu s tim, neki pripadnici, recimo, lokalne NVO, mogu biti kosmopolitski usmereni u podjednakoj meri kao i njihovi međunarodni partneri, ali i podjednako udaljeni od onih delova stanovništva koji su pretrpeli najveće nasilje tokom sukoba. Kao posledica toga, takvi nacionalni i međunarodni partneri nevladinih organizacija, mogu deliti opšte osećanje da im je strana takva estetika samo-heroizacije ili samo-viktimizacije, koja prožima mnoge izraze lokalnog identiteta i politike sećanja na širem prostoru bivše Jugoslavije. Tako neki pojedinci mogu pripadati grupama sa „post-herojskom” orientacijom u društvu, za koje je verovatnije očekivati da će se distancirati od ideje

namernog samo-žrtvovanja (u nastavku Münklerovog rada iz 2006. godine).<sup>56</sup> Kada smo Di Lellio i ja (tokom svog istraživanja 2005.)<sup>57</sup> pokušale da identifikujemo lokalne glasove neslaganja i kritike dominantne naracije o Jasharijevima i njenom militantnom stilu i poruci, naišli smo na takve pojedince u privatnim susretima sa kosmopolitskim urbanim elitama. Međutim, one su izgledale nedovoljno strukturirane da bi formirale efektivnu protiv-naraciju. Njihova suštinska kritika je uglavnom zasnovana na estetici, a ne na bilo kom obliku neslaganja sa centralnom porukom oružanog otpora represiji. Na kraju, oni su tu naraciju potvrdili. Skoriji etnografski pogledi sugerisu da je kult Jasharijevih privremeno izgubio na značaju sa proglašenjem nezavisnosti u februaru 2008. godine, kada su posteri i majice širom zemlje nosili poruke pokojnom Ademu Jashariju: „ujače, posao je završen” (*bac u kry*). Međutim, rastuće nezadovoljstvo razvojem situacije od tada, preokrenulo je tu simboličku poruku u ironične slogane, poput: „Ne, Mitrovica je otišla, nemojte lagati ujaka”, i, „Ujače, posao još nije završen”<sup>58</sup>. Sa generacijskim promenama, prihváćene su i neke nove forme komemoracije, poput pesama, na primer *Jeta Pa Ty* (život bez tebe), koja za temu ima odrstanje bez oca u periodu posle rata<sup>59</sup>. Kultura je dinamična, višeslojna i podložna promenama, i ako prihvatimo stav da se prošlost stvara u sadašnjosti, i da je kultura ishod, a ne uzrok ponašanja i okolnosti,<sup>60</sup> onda moramo uzeti u obzir i društveno-kulturne promene, kao i rizik od neželjenog, selektivnog jačanja određenih unutrašnjih interesnih grupa, kao posledicu spoljne intervencije u lokalnoj kulturi.<sup>61</sup> Imajući to na umu, pobliže ispitivanje lokalne kulture, kao riznice alternativnog znanja i formi komunikacije, može pomoći identifikaciji potencijala koji, ako su integrirani, mogu pružiti nove ideje za održiviju, kulturno senzitivnu transformaciju sukoba.

55 Mandel, R. ‘Seeding Civil Society’ in *Postsocialism. Ideals, Ideologies and Practices in Eurasia*, ed. C. Hann. London: Routledge, 2002; Sampson, S., ‘Beyond transition: Rethinking elite configurations in the Balkans’ u: *Postsocialism. Ideals, Ideologies and Practices in Eurasia*, ed. C. Hann. London: Routledge, 2002.

56 Münkler, op.cit.

57 Di Lellio, A. and S. Schwandner-Sievers. ‘The Legendary Commander’, 520-524.

58 Zahvaljujem se Eli Krasniqi i Isabelli Stroehle na informacijama o tome, i sličnim novijim sloganima koji ukazuju na upotrebu u raznim novim društvenim i političkim kontekstima. To, nažalost, ne može biti obradeno u ovom radu.

59 Zahvaljujem se Justinu Elliottu zato što mi je skrenuo pažnju na to. Scorpion feat, B-genius (Double G-Army), *Jeta pa Ty*, dostupno na [www.youtube.com/watch?v=vUuUheLhs10](http://www.youtube.com/watch?v=vUuUheLhs10) (od 2. 3. 2009).

60 Kuper, A. *Culture: The Anthropologist’s Account*. Cambridge, MA: Harvard University Press, 2001, xi.

61 Mandel, op.cit.

Mogućnost za to bi mogla da se pronađe u ispitivanju potencijala u okviru samog kulta Jasharijevih. Na primer, neki od preživelih članova porodice imaju ogroman prestiž među albanskim političarima i širom društva. To posebno važi za starijeg brata Adema Jasharija, Rifata, koji se vratio iz Nemačke po završetku rata (on je izgubio nekoliko svoje dece u masakru 1998.). On je imao smirujući uticaj na Albance, kada su se neprijateljstva između različitih grupa ponovo rasplamsala, kao što je bio slučaj u neredima na Kosovu u marta 2004. godine. On je takođe ispričao i jednu priču iz porodične istorije Jasharijevih - o Romu koji je, nedugo posle Drugog svetskog rata, spasao pretke Jasharijevih od gladi, kada je njegovom dedi dao džak brašna.<sup>62</sup> To je primer međuetničke podrške u okviru same naracije, koja sadrži potencijal za individualizaciju odgovornosti. Štaviše, iako je 2004. godine donet zakon (2004/39) kojim je memorijalnom kompleksu imanja Jasharijevih dat status „posebnog nacionalnog dobra”, samo to mesto je sagrađeno sa referencama na univerzalne ljudske vrednosti. Planovi predviđaju mirovni park,<sup>63</sup> i nekoliko komentara u knjizi utisaka ukazuje na katastrofičnu prirodu tih dogadaja u kontekstu širih ljudskih vrednosti, a ne isključivo etno-nacionalnih.

Ako duboke lokalne sisteme tumačenja - koji svojim simbolizmom upućuju na rituale društvenog izlečenja i predstavljaju izvor legitimite vlasti<sup>64</sup> - nije moguće ignorisati, onda bi sama ta lokalna kultura trebalo da bude istražena, jer ona može sadržati inovativne potencijale, koji mogu biti integrисani u procesu izgrađivanja mira i izmirenja. Potraga za pravdom i mirom treba da uzme u obzir durštene emocije i njihovu društveno-kulturnu lokaciju. Ako to ne učini, predstavljaće podršku procesima subverzije, i, na kraju, biti

osuđena na neuspeh. Snaga simbola i simboličkih gestova nije strana zapadnoj Evropi, i herojske društvene orijentacije su deo njene skorije istorije.<sup>65</sup> Willie Brandtovo klanjanje spomeniku Pobune u getu u Varšavi (1970. godine) je važan primer simboličke komunikacije u politici koja je izrodila proces izmirenja između dve nacije, posle rata koji je izazvao ogromne ljudske žrtve.<sup>66</sup> Mesta poput imanja Jasharijevih, deluju kao da mogu da ponude jedinstvenu priliku za raspravu o odgovornosti i zločinima u javnosti, bez rizika od javnog izlaganja pojedinačnih žrtava. Nažalost, izgleda da je i dalje suviše rano za očekivanje poniznih gestova balkanskih političara na takvim mestima društvenog sećanja. Međutim, pitam se da li svest o lekovitim potencijalima simboličke komunikacije predstavlja nešto što bi REKOM inicijativa trebalo da razmatra – na primer, predstavnici svih grupa uključenih u inicijative za izgradnju mira, mogli bi da posete komemorativna mesta u drugim bivšim republikama. Lokalni značaj zasnovan na živim iskustvima i neostvarenim željama za priznanjem patnje, čak i kada nam njihov kulturni izraz deluje nelagodno ili strano, ne sme biti ignorisan. On ima ogroman potencijal za smislenu razmenu iskustva patnje izvan etnonacionalnih granica, što Kosovu, ali i drugim lokalnim zajednicama, može obezbediti spoljno priznanje i potvrdu dostojanstva i nade. Tamo gde su kulturne podele između herojskih i post-herojskih kulturnih orijentacija otežavale takvu komunikaciju, samo-kritičniji stav bi mogao da pomogne prevazilaženju praznina u društvenoj interakciji. Jedan integrativniji pristup u okviru šireg konteksta ljudske bezbednosti, može da olakša proces u kom bi etno-nacionalistička politizacija društvenog sećanja postala suvišna, čime bi se otvorio prostor za alternativne, post-herojske glasove u društvu.

62 Hamzaj, B. and F. Hoti. *Jasharët: histori e rrëfyer nga Rifat, Besarta, Bashkim, Murat dhe Lulzim Jashari*. Prishtina: Zëri, 2003.

63 Di Lellio, A. and S. Schwandner-Sievers. ‘Sacred Journey to a Nation’, op.cit., 32.

64 Kostovicova, D. ‘Legitimacy and International Administration: The Ahtisaari Settlement for Kosovo from a Human Security Perspective. *International Peacekeeping* 15(5), 2008: 631–647.

65 Höpken, W. ‘Krieg und historische Erinnerung auf dem Balkan’, u: *Geschichtliche Mythen in den Literaturen und Kulturen Ostmittel- und Südosteupras*, ed. E. Behring et al Stuttgart: Franz Steiner Verlag, 1999.

66 Pogledati takođe Montville, J. ‘The Healing Function in Political Conflict Resolution’, u: *Conflict Resolution Theory and Practice: Integration and Application*, ed. D. Sandole and H. van der Merwe, Manchester: Manchester UP, 1993.

## **III DEO**

**Koalicija za REKOM:  
nastanak, ciljevi i ambicije**



# Inicijativa REKOM – od nevladinog izazova do državnog projekta

Nataša Kandić

**I**deja o Regionalnoj komisiji za utvrđivanje činjenica o ratnim zločinima u bivšoj Jugoslaviji potekla je u diskusiji o nedostacima i ograničenjima suđenja za ratne zločine, kao što je mali broj optuženih, mali broj osuđenih, nepoverenje žrtava u sudove države čiji su državlјani odgovorni za njihovu patnju, nepostojanje strategija za procesuiranje ratnih zločina, nedostatak regionalne saradnje, nedostupnost svedoka i oštećenih, bolest i smrt brojnih žrtava i svedoka, koju smo mi iz Fonda za humanitarno pravo (FHP) započeli sa našim regionalnim partnerima, Documentom (Hrvatska) i Istraživačko-dokumentacionim centrom (IDC, Bosna i Hercegovina) u septembru 2005. Već na početku lako smo se složili da je ključ za efikasnija i profesionalnija suđenja za ratne zločine u regionalnom pristupu odnosno jačanju regionalne saradnje između tužilaštava i sudova u regiji. Međutim, kada smo mi iz FHP predložili pokretanje regionalne debate o osnivanju regionalnog tela za dokumentovanje ratnih zločina odnosno za utvrđivanje činjenica o tome šta se desilo u prošlosti naši partneri smatrali su da je rano za to, da se u post-jugoslovenskim društвимa negativno gleda na komisije za istinu, te da je realnije da organizujemo dijalog o sušavanju s prošlošću na regionalnom nivou.

U tim našim diskusijama učestvovali su eksperti Međunarodnog centra za tranzicionu pravdu, najviše Mark Freeman a povremeno Juan Mendez, od kojih smo puno naučili o iskustvima drugih post-konfliktinih društava. Oni su nas ohrabrili da pokrenemo raspravu o mehanizmima za

utvrđivanje istine o prošlosti, i da otvoreno razgovaramo o prednostima i ograničenjima nacionalnih i regionalnih instrumenata za dokumentovanje istine. U maju 2006. organizovali smo Prvi regionalni forum za tranzicionu pravdu<sup>67</sup> na kojem smo razgovarali o inicijativama i perspektivama post-jugoslovenskih društava. U to vreme, u Bosni i Hercegovini (BiH) funkcionsala je radna grupa parlamentarnih političkih partija u Skupštini BiH, koja je uz pomoć Američkog instituta za mir pripremala nacrt zakona o osnivanju Komisije za istinu i pomirenje u BiH. Sudije i tužioци iz BiH, koji su učestvovali u radu foruma, veoma su podržali osnivanje komisije za istinu u BiH, s istim argumentima koje smo mi iz FHP koristili u zagovaranju regionalne komisije, kao napr. da su krivična suđenja usmerena na počinioce, da je žrtva isključivo u funkciji dokazivanja krivice optuženih, da nam je potrebna dokumentovana slika o svemu što se desilo u prošlosti, što ne mogu dati krivična suđenja, i dr. Brojni učesnici su iznosili konkretne primere da ukazuju da nacionalna komisija nema moć da utvrdi istinu o ratu koji se vodio preko granica, o žrtvama koje su u međuvremenu iz jedne države prešle u drugu, o počiniocima koji su prebegli u „matične države“ koje ih neće goniti, i dr. Članovi radne grupe, koji su takođe učestvovali na Prvom forumu za tranzicionu pravdu, pokazali su veliku samokritičnost u odnosu na zamerke da njihov rad nije transparentan. Tačno 11 dana nakon foruma, radna grupa je prestala sa radom, bez posebnog objašnjena.<sup>68</sup> Glavni rezultat Prvog regionalnog foruma za tranzicionu pravdu bila je jaka podrška

<sup>67</sup> Sarajevo, BiH, 5.-6.maj 2006.

<sup>68</sup> U javnosti se nagadalo da je to zbog toga što su njeni članovi, zahvaljujući raspravi na Prvom forumu za tranzicionu pravdu, shvatili da bez javne podrške i uključenosti udruženja žrtava u oblikovanje mandata, nijedna komisija nema izgleda na uspeh.

učesnika regionalnom pristupu u utvrđivanju činjenica o počinjenim ratnim zločinima. Mi u FHP nastavili smo da sa našim regionalnim partnerima razgovaramo o inicijativi za osnivanje Regionalne komisije za utvrđivanje činjenica o ratnim zločinima i drugim teškim povredama ljudskih prava.<sup>69</sup> Konačno u martu 2008.<sup>70</sup> uz podršku Međunarodnog centra za tranzicionu pravdu, složili smo se da je regionalna komisija za utvrđivanje činjenica naš [post-jugoslovenskih društava] izlaz iz prošlosti, da jedini omogućuje da, prvi put u istoriji, sačinimo tačan i činjenično precizan zapis o prošlosti i da u naslede budućim generacijama ostavimo činjenice i dokumentovan zveztaj o svemu što se desilo u prošlosti, počev od 1991. Sa inicijativom o osnivanju Regionalne komisije za utvrđivanje činjenica o ratnim zločinima i drugim teškim povredama ljudskih prava (REKOM), izlazimo u javnost u maju 2008. godine, na Regionalnim konsultacijama s predstvincima udruženja porodica nestalih i ubijenih, u kojima su učestvovali i veterani iz Hrvatske, BiH i Srbije. Inicijativa je naišla na nepodeljenu podršku učesnika iz regionala. Iskreno, pribjavali smo se reakcija, ali kada su žrtve, jedna za drugom, počele da daju podršku i da predlažu kako ojačati podršku, bili smo sigurni da je najvažnija bitka dobijena. Žrtve su zdušno podržali praksu foruma<sup>71</sup> da žrtve javno svedoče o onome što se njima dogodilo, da ispred njih sede ljudi koji ih slušaju i saosećaju s njima. U tome su videli javnu manifestaciju društva prema žrtvama.

Na tom skupu u Podgorici, žrtve su podržale suđenja za ratne zločine kao jedini način da se utvrdi odgovornost pojedinaca koji su počinili zločine ali su jasno poručile da im je potrebna posebna pažnja, da ih niko ne prekida, da budu slobodne da izgovore svoju patnju i prenesu drugima sliku nasilja kojem su bile izložene. Poruka je bila jasnă: žrtve podržavaju osnivanje regionalne komisije koja će biti fokusirana na žrtve kao i javno svedočenje žrtava kao glavnu komponentu komisije. Na istom skupu, FHP, Documenta i IDC, u skladu s prethodnim dogovorom, pokrenuli

su pitanje potrebe stvaranja Koalicije za podršku inicijativi za osnivanje regionalne komisije, koja bi postala vlasnik i glavni zagovarač ideje o formiranju regionalne komisije. Učesnici su podržali predlog kao dobar način da inicijativa postane njihova, kao i svih ljudi koji su spremni da sami nešto učine da se zločini ne ponove.

Do Četvrtog foruma za tranzicionu pravdu, održanog 28.-29. oktobra 2008. u Prištini, oko 100 nevladinih organizacija i udruženja žrtava priključilo se ideji o Koalicije za osnivanje Regionalne komisije za utvrđivanje činjenica o ratnim zločinima i drugim teškim povredama ljudskih prava počinjenim u bivšoj Jugoslaviji (REKOM), koji su postali članovi koalicije 29. oktobra 2008., drugog dana rada Četvrtog foruma za tranzicionu pravdu, kada je formalno osnovana Koalicija za osnivanje REKOM. Na pomenutom Četvrtom forumu za tranzicionu pravdu, kosovski učesnici iz redova udruženja žrtava [Albanci] pokazali su rezervisanost u odnosu na inicijativu REKOM, za razliku od predstavnika institucija i mladih Kosova, s obrazloženjem da Kosovo treba da ima nacionalnu komisiju koja će da predstavlja Kosovo u Regionalnoj komisiji. To je izazvalo raspravu o neuspelim inicijativama za osnivanje Komisije za istinu i pomirenje u BiH, promašenoj i nepriznatoj Komisiji za istinu u Srbiji [Savezna Republika Jugoslavija], Komisiji za Srebrenicu, o kojoj su učesnici imali različite stavove, od toga da je njen izveštaj najvažniji zvanični dokument o prošlosti, preko toga, da bi bilo dobro da ima više komisija fokusiranih na konkretne događaje, do potpunog negiranja njenih rezultata. Rasprava je završena jasnim stavom većine da je Regionalna komisija u interesu svih žrtava.

Nakon Četvrtog foruma za tranzicionu pravdu usledile su pripreme za organizovanje intenzivnog i širokog konsultativnog procesa o inicijativi REKOM, i za prenošenje nadležnosti za njegovo sprovođenje sa tri organizacije [FHP, Documenta, IDC] na Koaliciju za REKOM. Cilj konsultativnog procesa postaje sama debata o prošlosti, ali i

<sup>69</sup> Documenta je bila nova organizacija, koju su osnovali četiri organizacije za ljudska prava u Hrvatskoj, nakon dogovora FHP, IDC i Hrvatskog helsinskih odbora za ljudska prava, početkom 2004., o potrebi i značaju uspostavljanja regionalne saradnje u dokumentovanju ratnih zločina. Documenta nije bila sigurna kako će civilno društvo u Hrvatskoj reagovati na regionalnu inicijativu. Pokazalo se da je strah bio bezrazložan, da civilno društvo u Hrvatskoj vrlo aktivno učestvuje u zagovarnju Inicijative REKOM. Što se tiče IDC, organizacija se od početka lomila između nacionalnog i regionalnog, a kasnije, u decembru 2008., izašla je iz Koalicije zbog neslaganja oko koncepta razvoja same ideje, i mogućeg mandata REKOM.

<sup>70</sup> Sastanak u Bruxellesu, u organizaciji Međunarodnog centra za tranzicionu pravdu.

<sup>71</sup> Do februara 2009. kada je održan seminar, bila su četiri regionalna foruma za tranzicionu pravdu, a na trećem i četvrtom bila su organizovana su javna svedočenja žrtava, koja se mogu slušati i videti na [www.korekom.org](http://www.korekom.org).

izgradnja modela REKOM, koji će oblikovati učesnici konsultativnog procesa u periodu do sredine 2010. Završnica konsultativnog procesa je viđena kao kampanja *1.000.000 potpisa za REKOM*, koji treba da daju legitimitet i kredibilitet inicijativi.

U konsultacijama koje su usledile upoznavali smo učesnike sa iskustvima drugih post-konfliktnih društava, kako bismo im približili njihov zadatak u izgradnji modela REKOM. Učesnici su najpre pitali a potom su počeli da se bave kriterijuma za izbor članova komisije, koji kriterijumi treba da budu zastupljeni, da procenjuju da li žrtve treba da imenuju počinioce, da li bi u tom slučaju oni imali pravo da odgovore, zatim, o odnosu sudova za ratne zločine i komisije, i sl. Postavilo se pitanje da li će biti oficira, policije i vojske, koji će hteti da svedoče o počinjenim zločinima i na taj način da pomognu da se sagleda odgovornost institucija, pre svega, policije i vojske. Pomenula sam iskustvo FHP, koji je do

relevantne dokumentacije o ratnim zločinima došao zahvaljujući poverljivom svedočenju profesionalnih policijaca i vojnika, i moje očekivanje da će regionalni karakter komisije ohrabriti profesionalce da svedoče, ako ne na javnim onda na zatvorenim sednicama.

U januaru 2009. formirane su grupe za koordinaciju konsultacija u BiH, Hrvatskoj, Srbiji, Crnoj Gori i na Kosovu, koje imaju zadatak da pomažu članicama/ovima Koalicije za REKOM da organizuju lokalne, nacionalne i regionalne konsultacije na kojima će se raspravljati o mandatu, ciljevima i drugim elementima REKOM, koji treba da odgovori na pitanje šta se desilo tokom i nakon oružanih sukoba u bivšoj Jugoslaviji. Svi mi koji učestvujemo u konsultativnom procesu o inicijativi REKOM, čvrsto verujemo da smo akteri najizazovnijeg nevladinog pokušaja da se pripreme uslovi za osnivanje REKOM koji može da uspe samo kao državni projekat naslednica nekadašnje SFRJ.

# Uloga Evropske unije u unapređenju tranzicione pravde u regionu i napredak konsultacionog procesa za osnivanje REKOM

Tea Gorjanc Prelević

## Zašto Evropska unija treba da pomogne uspostavljanje tranzicione pravde na teritoriji bivše Jugoslavije

Muslim da, načelno, Evropska unija nema ništa protiv vladavine prava u smislu tranzicione pravde, suđenja za ratne zločine i obeštećenja žrtava, ali da njenim organima nije jasno u kojoj meri se od njih očekuje da se time bave i treba li uopšte time posebno da se bave. Evropska unija nije organizacija specijalizovana za razvoj demokratije, poštovanje ljudskih prava i vladavinu prava – to su teme koje ulaze u opis posla Saveta Evrope. Međutim, kako su sve države nastale na teritoriji bivše Jugoslavije odavno prebrinule prijem u Savet Evrope, ta je organizacija, koliko god da bolje razume ova pitanja, izgubila potencijal uticaja na vlasti. S druge strane, Evropska unija tek treba da odluči da nas primi. Svim ljudima koji smatraju da je ostvarivanje tranzicione pravde osnov regionalne saradnje i ekonomske nadgradnje, jasno je da bi Evropska unija trebalo da insistira na rešavanju tih osnovnih pitanja zato što jedina ima ozbiljan potencijal da na ta vrlo važna pitanja utiče.

Tu je slikovit primer Crne Gore. Kada se pregovaralo o prijemu Crne Gore u Savet Evrope kao samostalne države 2006. godine, crnogorske vlasti su se bez mnogo dvoumljeњa obavezale da «sprovedu delotvorne istrage, u skladu sa praksom Evropskog suda za ljudska prava, svih nerešenih slučajeva u vezi sa oružanim sukobima u bivšoj Jugoslaviji», da «obezbede stalni, bezbedni i održivi povratak izbeglica i raseljenih lica, i reparacije izbjegličkih porodica koje su pretrpjeli kršenja ljudskih prava». U praksi to nije u potpunosti zadovoljeno, a ono što jeste, mislim na priznanje državne odgovornosti za zločin nad bosanskim izbeglicama 1992.

godine i obeštećenje žrtava na kraju 2008. godine, desilo se verujem više zbog pokazanog interesa Evropske unije, nego Saveta Evrope, organizacije za koju se zna da nikoga neće izbaciti iz članstva zato što nedovoljno efikasno i temeljno istražuje ratne zločine i ne obezbeđuje delotvorno reparacije za žrtve.

Zašto zahtev za saradjnjom sa Haškim tribunalom nije dovoljan za ostvarivanje tranzicione pravde u regionu Sporazum o stabilizaciji i pridruživanju između EU i Crne Gore na 400 stranica, sadrži svega dva člana na temu poštovanja ljudskih prava, demokratije i vladavine prava, od kojih se u oba ističe značaj saradnje države sa Međunarodnim krivičnim sudom za bivšu Jugoslaviju (Haškim tribunalom). Ova saradnja državi uglavnom nije teško padala, zbog toga što Tribunal, osim za granatiranje Dubrovnika, nije stigao da pokaže interes za ostalih pet zločina koje bi Crna Gora morala temeljno da procesuirala ( deportacija bosanskih izbeglica njima neprijateljskoj vojsci 1992; logor Morinj 1992; zločini u Bukovici tokom devedesetih; otmica putnika u Štrpcima 1993; ubijanje civila u Kaluđerskom lazju 1999.). Najteža obaveza pred Crnom Gorom bila je da isporuči generala Strugara, optuženog za zločine prilikom napada na Dubrovnik, što je sa njim dogovorenio i učinjeno, pa je «obaveza saradnje sa Haškim tribunalom» lako prebrinuta. S druge strane, Haški tribunal je već odavno najavio da neće otvarati nove istrage i da na državama ostaje da procesuiraju ogroman broj zločinaca koji su još uvek na slobodi, kao i da se pobrinu za ogroman broj žrtava koje žive u izuzetno teškom materijalnom stanju pretežno zbog zločina koji su

pretrpeli. Međutim, ova ogromna obaveza ne ulazi u opis «saradnje sa Tribunalom», pa ta formula, bar u Crnoj Gori, ne doprinosi ostvarenju tranzicione pravde i ne obezbeđuje da će se zadovoljiti suštinski važan test za uspostavljanje vladavine prava – ispitivanje odgovornosti i procesuiranje svih odgovornih za ratne zločine, uključujući i državne službenike svih nivoa.

Pored korupcije i organizovanog kriminala, bolesti „moder ног doba“, koje su s pravom izborile svoje mesto u politici uslovljavanja Evropske unije, mislim da treba dokazati Evropskoj uniji zašto je važno da se založi za uspostavljanje regionalne pravde u regionu i to tako što će podržati i osnivanje Regionalne komisije za utvrđivanje činjenica o ratnim zločinima i drugim teškim kršenjima ljudskih prava na teritoriji bivše Jugoslavije (REKOM), ustanove koja bi mogla značajno da doprinese da se ubuduće na ovom evropskom prostoru zločini ne ponavljaju.

Na jednoj od konsultacija koje smo vodili, gospodin Mirko Kovačić iz Udruge *Vukovarske majke* na kraju jedne maratonske sesije, rekao je „pa dobro, a zašto mi ne bismo onda jednostavno rekli toj Evropskoj uniji, nemojte da nas primite, nemojte nikog od nas da primite dok ne pronademo sve svoje nestale, dok ne obeštetimo žrtve, dok im ne damo pravdu i dok ne kaznimo počinioce ili barem dok ozbiljno ne pokažemo da smo u stanju da to uradimo“. Ja se slažem s njegovim predlogom i sada ga podržavam.

Nekako u to vreme, na jednom od poslednjih skupova koje je organizovala misija Visokog komesara za ljudska prava Ujedinjenih nacija u Sarajevu 2006. godine, koji je bio posvećen tranzicionoj pravdi u regionu, dogovorili smo se da napravimo jednu zajedničku inicijativu civilnog društva na temu značaja ostvarenja ciljeva tranzicione pravde u potpunijem značenju od „saradnje s Haškim tribunalom“, u smislu ostvarenja reparacija kako su objašnjene u Rezoluciji Generalne skupštine Ujedinjenih nacija br. 60/147. „Osnovna načela i smernice za ostvarivanje prava na pravni lek i reparacije žrtava teških kršenja međunarodnog prava ljudskih prava i ozbiljnih povreda međunarodnog humanitarnog prava“ i uputimo je međunarodnim organizacijama, pogotovo Evropskoj uniji. Ta inicijativa je u formi nacrta i uskoro će biti upućena na potpisivanje. U njoj se konkretno navodi šta smatramo da je neophodno uspostaviti kao standard vladavine prava u pogledu tranzicione pravde da bismo bili primljeni u Evropsku uniju i da bismo pred sobom i svetom dokazali da smo sposobni za ekonomske i ostale integracije na zdravim i postojanim osnovama, koje su oslobođene taloga ratnih zločina.

Evropska unija mora da povede ozbiljno računa o tome da li u Uniju prima neke buduće ratnike, koji će opet i u odličnom ekonomskom savezu za 20 godina da urade isto što i 1991. godine, kada nije pomogla nikakva ekonomska šarga-repa. Morali bismo da dokažemo da smo sposobni da efikasno i nepristrasno rešimo neka osnovna pitanja pre nego što nastavimo da se ozbiljno ekonomski povezujemo, a što vidićemo da Evropska unija očekuje. Sve države u regionu moraju taj prvi član Sporazuma o pridruživanju o vladavini prava, demokratije i ljudskih prava, ozbiljno da razrade i dokažu da su uspostavile sistem koji obezbeđuje beskompromisno poštovanje ovih osnovnih obaveza, kako bi se kvalifikovale za procenu uspešne primene i svih ostalih. Uspostavljanje REKOM bi moglo da pomogne jačanju sistema u odnosu na sprovođenje tranzicione pravde, i uopšte, doveđe do okončanja „tranzicije“ u osnovnom, moralno-pravnom smislu.

#### *Potencijalni doprinos REKOM uspostavljanju vladavine prava, poštovanja ljudskih prava i regionalne saradnje na zdravim osnovama*

Završni izveštaj REKOM trebalo bi da, na osnovu utvrđenih činjenica, građanima država nastalih na teritoriji bivše Jugoslavije, a i svetu, predstavi zajednički prihvaćenu istinu o ratnim zločinima izvršenim na teritoriji bivše Jugoslavije, koja bi ostala i ovoj i budućim generacijama kao jedno razumno i ozbiljno upozorenje. Verujem da bi izveštaj jednog takvog međunarodnog tela doneo novi kvalitet pristojnosti u ophodenju među ljudima u regionu, solidarnost prema patnjama svih nevinih žrtava i sveukupno obezbedio ozbiljan zajednički temelj na pozitivnoj civilizacijskoj nuli, sa koga možemo dalje da zidamo sve vrste regionalne saradnje.

Kao pravnica mislim da treba da naglasim da se Koalicija za REKOM ne zalaže za to da Regionalna komisija za utvrđivanje činjenica o ratnim zločinima zameni sudenja ili da na bilo koji način ukloni nadležnost tužilaštava ili komisija za nestale žrtve, ili drugih tela ili sudova za određivanje odgovornosti za naknadu štete. Mislim da je važno da razgranicimo da mi smatramo da istrage i sudenja za ratne zločine, građanske postupke za obeštećenje žrtava koji su u toku, treba da se odvijaju zakonito, na najbolji mogući način i da se završe na zakonom pripisan način. Ali mislim da suđenja, sama po sebi, ni za žrtve, ni za sve nas, stanovnike regiona nisu dovoljna. Krivična suđenja su usmerena na utvrđivanje krivične odgovornosti optuženog pojedinca, a ne na utvrđivanje istine o celokupnom događaju i njegovim posledicama. Pored toga, kao što Osnovna načela UN o pravu na pravni lek i reparacije žrtava teških kršenja ljudskih prava i ozbiljnih

povreda međunarodnog humanitarnog prava to precizno opisuju, žrtve, ali i mi svi zaslužujemo spomenike, podsećanje, komemoracije, dopunu knjiga istorije, zaslužujemo preciznije, istinitije obrazovanje i vaspitanje naše dece koje će biti usmereno ka tome da im ne padne na pamet da tako nešto ikada ponove. A da bi znali šta to ne treba da ponove oni treba da znaju šta se dogodilo i do kakvih je posledica to dovelo. Verujem da većina ljudi ne zna da objasni šta je to ratni zločin, po čemu se to razlikuje od političke priče o tome ko je krv, ko je koga prvi napao. Zbog toga mislim da je važno da se na jednom regionalnom nivou uspostavi takvo jedno telo kome će državne vlasti dati legitimitet da ispriča tu priču, kaže koje su to činjenice, šta se sve događalo i da jednostavno nema opravdanja za ubijanje civila, nenaoružanih ljudi, žena i dece. Verujem da bi izveštaj Regionalne komisije, koji bi trebalo da ima kvalitet jednostavne razumljivosti, doprineo kulturi poznavanja i poštovanja humanitarnog prava i ljudskih prava, pored toga što bi nam pomogao da se suočimo s prošlošću i tako je i prevaziđemo.

Crna Gora je imala to iskustvo sa zločinom deportacije izbjeglica o kome sam govorila, to je bila jedna sistematska policijska akcija 1992. godine i država je priznala objektivnu odgovornost za tu državnu akciju. Žrtvama jako važno već to što je država rekla „država je odgovorna jer su naši službenici odgovorni“. Ko je sve za to pojedinačno krv, tek ostaje da se utvrdi. Za sada je devetoro ljudi optuženo u Crnoj Gori, međutim u Bosni i Hercegovini, gde su deportovani ljudi ubijeni, još uvek нико nije optužen za taj zločin. Upravo zbog ovakvih primera, mislim da bi izveštaj REKOM izvesno mogao da pomogne tužiocima u regionu, da pregledno predstavi tzv. „mapu zločina“ i otvori oči za neka nova pitanja. REKOM može da predloži programe reparacije i unapređenje institucija nadležnih za ostvarenje prava žrtava, a objavljivanje izveštaja može da pomogne smirivanje strasti i usvajanje vrednosti na koje se zaboravlja, kao što su jednakost svih pred zakonom i saosećajnost prema patnjama drugih.

Na konsultacijama sa udruženjima žrtava, održanim u Podgorici 2008. godine dogodio se jedan divan doživljaj. Tada

se po prvi put, kažu, desilo da predstavnici žrtava sa Kosova, albanske i srpske nacionalne pripadnosti, izraze žaljenje jedni drugima zbog onoga što im se dogodilo. Zapamtila sam taj spontani trenutak kao izuzetno potresan i mislim da on svedoči o tome da je već mnogo učinjeno pokretanjem ovog procesa, a nadam se da ćemo uspeti uz pomoć odgovornih građana ovog regiona, Evropske unije i drugih međunarodnih vladinih i nevladinih organizacija, da ubedimo i naše vlasti da REKOM i osnuju.

Jasno je da ozbiljni ljudi, koji pamte, nemaju iluzija da će osnivanje REKOM-a ići lako, pogotovo u sredinama u kojima su na vlasti isti pojedinci i političke partije koje su dejstvovali i u vreme sukoba. Međutim, i oni se menjaju. Na primer, predsednik Vlade Crne Gore, Milo Đukanović, iskazao je žaljenje zbog napada na Dubrovnik, a bio je i na čelu Vlade koja je prihvatile odgovornost za zločin deportacije iz 1992. godine i isplatila odštetu oštećenim porodicama na kraju 2008. godine, što je ohrabrujuće. O konsultacijama o osnivanju REKOM s nevladinim organizacijama za ljudska prava i istaknutim intelektualcima Crne Gore koji su pripadali anti-ratnom pokretu devedestih godina, državna televizija, koja se često optužuje za pristrasnost prema vlasti, izvestila je kao o prvoj vesti u večernjem dnevniku, što nas je sve zapanjilo. S druge strane, niko naivno ne očekuje da će u bilo kojoj od naših država, pa ni u Crnoj Gori, vlasti obetućke prihvati ovaj predlog, već će za to izvesno biti potreban značajan organizovan pritisak građanskog društva i jasno iskazana podrška ovoj inicijativi, u prvom redu Evropske unije.

U Crnoj Gori su osamnaest nevladinih organizacija i petnaest nezavisnih pojedinaca u članstvu Koalicije za REKOM posle prvih konsultacija održanih u oktobru prošle godine sa organizacijama za ljudska prava i istaknutim predstavnicima građanskog društva koji su se u kontinuitetu zalagali za ostvarenje tranzacione pravde. Očekujemo da se posle narednih konsultacija sa ostalim nevladinih organizacija broj članica Koalicije poveća, posebno posle Petog regionalnog foruma o tranzicionoj pravdi, koji će se održati u Crnoj Gori na kraju maja meseca.

# Kuda od ad hoc mjera prema strategiji suočavanja s prošlošću?

Vesna Teršelić

Za vrijeme priprema za Forum u Sarajevu, u svibnju 2006., činilo mi se da će ideja o potrebi utvrđivanja činjenica na regionalnoj razini vjerojatno najslabije biti prihvaćena baš u Hrvatskoj. No u Zagrebu smo Forum organizirali već u februaru 2007. godine. Debata je bila vrlo žestoka. Ispred dvorane je bio prosvјed, između ostalog jer smo nespretno odabrali naziv skupa *Utvrđivanje istine o ratnim zločinima*, u kojem su udruge žrtava i braniteljske veteranske udruge prepoznale nešto ugrožavajuće, smatrajući da nam trebaju poručiti, "Mi utvrđujemo istinu", na što smo odgovorili, "Nismo ovako nazvali skup jer mislimo da smo mi ti koji utvrđujemo istinu, nego da bismo razgovarali o putu do istine i zajednički se dogovorili kako se istini primaknuti". Poruka prosvјednika, udruga, bila je značajna svim organizatorima. Kada smo odlučivali o imenu naše inicijative, suzili smo područje i umjesto utvrđivanja istine odabrali utvrđivanje činjenica. Činilo nam se da o činjenicama ne bi trebalo biti spora. Naravno da prijepora i oko činjenica još uvijek ima, jer da ih nema, ne bi nam trebala ni Regionalna komisija, no ona nam je i te kako potrebni. Nužno je da sporenje o činjenicama postane nepristojno. Mislim da bi Regionalna komisija mogla dati ozbiljan doprinos kako bismo se svi zajedno našli u situaciji u kojoj bi takvi sukobi postali neprihvatljivi, a istovremeno bi barem sudionici u javnom dijalogu držali na pameti da ćemo se sporiti oko interpretacija, da će interpretacije biti različite i da je to zapravo supstrat demokracije.

Od vremena kad smo svjedočili prosvјedu pred Forumom u Zagrebu u veljači 2007. godine prošli smo dug put: nakon prosvjeda većina je prosvјednika ušla u dvoranu jer su, uostalom, i bili pozvani na forum pa se burna rasprava nastavila i u dvorani. Na dosadašnjim smo forumima i konzultacijama pripremili dijalog koji je doista katkad vrlo

bučan s raznovrsnim akterima. U Hrvatskoj su u taj dijalog stalno uključene i udruge žrtava, okupljene u obiteljima žrtava na hrvatskoj, ali i na srpskoj strani rata u Hrvatskoj. U tom su dijalogu kao promatrači, ali i kao aktivni sudionici ljudi iz braniteljskih udruga, iz veteranskih organizacija, znanstvenice i znanstvenici, umjetnice, umjetnici, ženske organizacije, organizacije za ljudska prava. Ne pamtim proces koji bi uključio raznovrsnije aktere. Pitanje utvrđivanja činjenica uistinu se tiče mnogih. Na prvom su mjestu, naravno, obitelji žrtava no ima i mnogih drugih. Godinama sam primjećivala da bi kad god bi se zametnuo razgovor o ratu u javnosti ili negdje za nekim privatnim stolom, često prva reakcija bila "pa nemojmo više o tome, ostavimo prošlost iza nas". No čim bismo nakon tri rečenice nastavili pričati o ratnim zbivanjima, ticala se ona 1990-ih ili pak razdoblja Drugoga svetskog rata, odjednom bi bilo jako puno zainteresiranih za razgovor, a oni koji su rekli "ostavimo to iza sebe, pustimo prošlost da počiva", bili su prvi koji se nisu mogli oduprijeti, koji se ne mogu oduprijeti diskutiranju baš o ovoj temi jer je to tema koja nas muči. U 1990-ima smo bili svjedocima kako se manipuliralo brojem stradalih u Drugom svjetskom ratu da bi se dodatno zaoštario sukob. Mislim da se to iskustvo nikako ne bi smjelo ponoviti i da je smisao utvrđivanja činjenica u primicanju pravdi za žrtve, ali i potreba da ne ostavljamo otvoreni prostor manipulacijama i da time što se dokumentiraju činjenice i da time što se stvara dodatni prostor za žrtve, koje su na različite načine marginalizirane u svim našim društвima, zapravo smanjujemo mogućnost manipulacija. Time se smanjuje i mogućnost stvaranja novih nasilnih sukoba koji nastaju upravo zbog manipulacije nepotpunim podacima.

Ne bih se više osvrtala na Hrvatsku i nešto bih rekla o Europskoj uniji jer ćemo danas govoriti o europskoj inte-

graciji i tranzicijskoj pravdi. Vrlo su mi zanimljive dosadašnje reakcije Europske unije na našu inicijativu. Unija je bila pragmatički otvorena za politiku poput Haaškog uvjetovanja, dakle za neke konkretnе korake kratkoročnog tipa, ali da je izostala prava strategija. Dakle, s jedne strane mislim da je Haaško uvjetovanje bilo vrlo korisno, kao i sam proces europskih integracija u kojem vladine institucije postjugoslovenskih zemalja dobivaju vrlo jasan redoslijed koraka koje trebaju slijediti da bi jednog dana postali članice Europske unije. Taj je prvi pragmatični korak u vidu uvjetovanja suradnje s Haagom, recimo prošle godine u Hrvatskoj, po prvi put dopunjeno i drugim pragmatičnim korakom gdje se inzistira na integritetu domaćih suđenja za ratne zločine. Ta se formulacija po prvi put našla u nekim dokumentima koji uređuju odnose Hrvatske i Europske unije početkom prošle godine. U sve to vrijeme kad imamo pragmatičnu otvorenost, međutim, istovremeno svjedočimo relativnoj nezainteresiranosti i zatvorenosti za bilo kakve strateške pomake, za bilo kakvo artikuliranje strategije. Osvjedočila sam se da postoji politika koja daje vrlo važan doprinos, a to je politika europske integracije, no ja je ne bih nazvala strategijom tranzicijske pravde, niti bih je nazvala strategijom suočavanja s prošlošću. Zapravo mi je bilo paradoksalno da je prostor predintegracijskog približavanja Europskoj uniji možda čak povoljniji za suočavanje s prošlošću za zemlje poput postjugoslovenskih nego za samu Europsku uniju. Držim da je Europa poslije Drugoga svjetskog rata činila vrlo bitne stvari u analiziranju sukoba i približavanju među zemljama koje su ratovale, ali da ni tada niti sada nije imala strategiju tranzicijske pravde, niti strategiju suočavanja s prošlošću i da to uopće nije slučajno.

Ovaj je proces možda prilika za Europsku uniju za dodatnu refleksiju ne samo o prijedlogu Regionalne komisije kao prijedlogu za postjugoslovenske zemlje, nego prilika za sagledavanje otvorenih pitanja. Zanimljivo mi je i važno upozoriti na nelagodu u suočavanju s vlastitim naslijedešem kolaboracijske prošlosti u praktično svim zemljama članica Europske unije i u zemljama koje nisu članice Europske unije. Kad kažem kolaboracijsku prošlost, mislim, naravno, na različite grupe koje su suradivale s nacističkim i fašističkim zločincima, u Hrvatskoj bi to bili ustaše i drugi surad-

nici okupatora. Isto tako mislim na nespremnost unutar europskih zemalja da se pogleda naslijede onih koji su suradivali s represivnim aparatom komunističkih partija. I samo hoću upozoriti da nije začudno što strategija ne postoji kad Europska unija nije bila spremna proći vlastito suočavanje s prošlošću baš u smislu prorade negativnog naslijeda. Bojim se da za proradu te prošlosti neće biti dostatno inzistiranje na vrijednostima slobode i ljudskih prava. Potreban je ravнопravniji dijalog o strategiji. Ono što se događa u dijalogu između postjugoslovenskih zemalja i Europske unije vrlo često može biti označeno dijalogom neravнопravnih partnera, što je možda evidentnije u Bosni i Hercegovini i na Kosovu gdje se, zapravo, institucionalno neke stvari rješavaju putem poluprotektorata ili protektorata. Vjerljatno netko misli da je situacija u Hrvatskoj ili nekoj drugoj zemlji puno bolja. Možda i jest malo bolja, ali ne u bitnom. Sukob između Slovenije i Hrvatske je ilustrativan. Način na koji se piše o tom sukobu, diskurs koji se koristi vrlo je zanimljiv. Kad se komentira to što se događa, govori se "pa šta se moglo očekivati od Balkana, ili od zapadnog Balkana". Na sukob se gleda kao na nešto što se događa na Balkanu i katkad prevladavaju paternalističko kolonijalni tonovi pa bih samo htjela upozoriti da mislim da Europska unija nema puno razloga da nas gleda kao da nam treba paternalističko kolonijalni ton jer u pogledu suočavanja s prošlošću nitko od nas još nije postao prvak svijeta. Ova bi inicijativa doista mogla biti i dodatna prilika da se unutar europskih institucija poput Europskog parlamenta ili Komisije postave pitanja koja se zapravo tiču prorade prošlosti, a tamo gdje su mnoga pitanja ostala otvorena i ja se toplo nadam da će ova naša inicijativa stvoriti više prostora za glas žrtve i stvoriti preduvjete za utvrđivanje činjenica u postjugoslovenskim zemljama, ali nadam se da će biti poticaj i nekim drugima u drugim zemljama, bilo u starim, bilo u novim članicama Europske unije kako bismo za 10 ili za 20 godina mogli voditi ravнопravniji dijalog u procesima suočavanja s naslijedešem prošlosti, bilo sa zločinima počinjenim u ratu 1990-ih, na različitim stranama rata ili pak sa zločinima počinjenim u vrijeme Drugoga svjetskog rata ili u osvetničkim izvansudskim egzekucijama nakon Drugoga svjetskog rata. Mislim da nam je potreban ravнопravniji dijalog i intenzivan proces učenja jedni od drugih.

# Kosovska perspektiva: značaj svojine

Valdete Idrizi

Priklučila sam se REKOM inicijativi pre više od godinu dana, kada su me pozvali na jedan od konsultativnih sastanaka s nevladinim organizacijama za ljudska prava. Bilo je malo ljudi sa Kosova. Ideja mi je delovala kao veoma interesantna i potrebna. Međutim, nisam oklevala da izrazim svoje nedoumice: Da li je ovo pravi trenutak? Da li je regionalni pristup najprikladniji? A nacionalni pristup? Šta će ljudi sa Kosova misliti? Odmah sam pomislila na žrtve, na udruženja žrtava i na vlast, i imala sam puno pitanja. Učestvujući u toj inicijativi, time što sam podelila svoje misli s ljudima iz regiona, i pošto sam, kada sam se vratila na Kosovo, pomogla u organizaciji nekoliko sastanaka tamo - shvatila sam da zaista moramo da budemo veoma pažljivi. Iznela sam svoju zabrinutost Koordinacionom veću [operativno telo Koalicije za REKOM], čiji sam član. Tvrđila sam da treba da budemo posebno pažljivi na Kosovu, jer тамо nije puno toga urađeno u pogledu suočavanja s prošlošću. Mora se uzeti u obzir broj nestalih osoba, ali i nedostatak dijaloga između udruženja žrtava na Kosovu (npr. albanskih i srpskih udruženja), kao i dijalog između udruženja žrtava, nevladinih organizacija i vlasti.

Neposredno pre nego što smo sazvali Četvrti forum za tranzicionu pravdu, krajem 2008. godine, organizovali smo nekoliko pripremnih sastanaka, na kojima smo okupili pričično veliki broj udruženja žrtava. U početku, ljudima se dopala ideja, jer su želeli da saznaju istinu. Izrazili su različita očekivanja od REKOM-a. Imali su puno pitanja u vezi s trajanjem mandata, kombinacijama regionalnog i nacionalnog pristupa, i pitali su da li će ta inicijativa ostati samo regionalna. Taj forum, koji je okupio preko 400 ljudi, bio je veoma uspešan. Pružio je prostor za iskazivanje različitih stavova i nedoumica u vezi samog procesa. Neki su otišli s

novim pitanjima. Na njihovim licima i u njihovim glasovima, moglo se nazreti puno nesigurnosti i zbumjenosti, koji bi veoma lako mogli da budu protumačeni kao opstrukcija, ili kao odbacivanje ili nespremnost za suočavanje s prošlošću i prihvatanje regionalne inicijative. Drago mi je da smo bili u stanju da saslušamo ono što je zabrinjavalo učesnike, uglavnom s albanske strane. Međutim, čuli smo i zabrinutost Srba. Zaključili smo da nam je potreban određeni prostor, i da bi trebalo da organizujemo diskusije na nacionalnom nivou, koje bi uključivale sve relevantne aktere. Pošto smo održali brojne formalne i neformalne konsultacije s raznim ljudima, a posebno u Mitrovici, izneto je puno kreativnih ideja. Na jednom događaju, koji je okupio Koaliciju za mir Mitrovice – nevladine organizacije sa severne i južne strane koje imaju zajedničke poglede i dele neke od zabrinutosti i strahova - predložili smo stvaranje Komisije za istinu u Mitrovici, koja bi se bavila podelom grada.

Da sumiram, potrebno je istaći da je vreme jedan veoma važan faktor, a to posebno važi za Kosovo. Kada se uzima u obzir delikatna situacija na Kosovu, veoma je lako pogrešno protumačiti nešto, i nama, koji smo iz Mitrovice, to je poznato bolje nego bilo kome drugome. Dodatno, treba podvući značaj pripadnosti i svojine. Bilo koja inicijativa koja potiče iz vrha društva i koja je nametnuta – neće biti održiva. Zato i dalje ne možemo biti sigurni oko toga koju formu će konsultacije imati, i kako će se tačno odvijati. To je predmet rasprave. Ali, veoma dobro znamo šta želimo da postignemo. To je razlog zašto želimo da čujemo sve glasove, i uključimo ih u proces. Snažno osećanje svojine koje se stiče učešćem u oblikovanju projekta će sprečiti politizaciju.



## **IV DEO**

**Evropska unija i restorativna pravda:  
uloga civilnog društva**



# Podrška Evropske unije „civilnom društvu” u Srbiji: politika, napredak, ili ništa od toga?

Adam Fagan

Podrška Evropske unije (EU) „zemljama potencijalnim kandidatima” na zapadnom Balkanu (Srbija, Bosna i Hercegovina, Albanija, Crna Gora i Kosovo), osmišljena je kroz saradnju s nevladinim organizacijama, privatnim sektorom, akterima civilnog društva i ostalim formalnim i neformalnim mrežama u okviru procesa donošenja političkih odluka, implementacije i poštovanja standarda. Kroz kratkoročno finansiranje projekata u vezi sa raznovrsnim pitanjima, od romskih prava do obrazovanja o zaštiti životne sredine, pružanja podrške žrtvama torture i obezbeđivanja stručne obuke u marginalizovanim zajednicama – osnovni cilj Komisije je saradnja sa ne-državnim akterima u stvaranju i implementaciji političkih okvira i procesa usklađenih sa politikom EU, i izgradnja isntitucionalnih i administrativnih kapaciteta. U pokušajima da ostvari te ciljeve, EU je, kao i većina multilateralnih donatora, svoju intervenciju postavila u okvir podrške „civilnom društvu”.

Ovaj rad polazi od empirijskog istraživanja o pomoći EU nevladinim organizacijama i drugim organizacijama civilnog društva (OCD), sprovedenog između 2006. i 2008. godine u Srbiji,<sup>72</sup> kao deo programa finansijske pomoći Rekonstrukciji, razvoju i stabilizaciji zajednica (CARDS) i Evropske inicijative za demokratiju i ljudska prava (EIDHR). To istraživanje je bilo usmereno na proces raspodele sredstava

za projekte, efekte i održivost kratkoročnih projekata, kao i na značaj te pomoći za domaće korisnike, NVO/OCD.

Osnovni cilj tog istraživanja je bilo istraživanje i procena efekata takve pomoći lokalnim nevladinim organizacijama i mrežama civilnog društva, kao i razmatranje svega što EU zaista postiže, kao posledice njenih raznovrsnih finansijskih inicijativa. U ovom radu zaključujem i iznosim hipotezu da pomoći EU koristi mrežama civilnog društva samo *indirektно i slučajno*, i da je upotreba pojma „civilno društvo“ pri opisu ciljeva i efekata takvih intervencija - zapravo *prazna odrednica*<sup>73</sup>, koja nejasno predstavlja projekte finansirane od strane EU, kojima rukovodi mali broj profesionalnih nevladinih organizacija..

## Pomoći civilnom društvu i kritičari takve pomoći

Najprominentniji aspekt pomoći EU Srbiji je, bez sumnje, podrška lokalnim nevladinim organizacijama i organizacijama koje se predstavljaju kao organizacije i mreže civilnog društva. Takva pomoći se pruža kroz grantove za kratkoročne projekte, i sredstva se obezbeđuju kao deo programa Pomoći rekonstrukciji, razvoju i stabilizaciji zajednica (CARDS), a od 2008. i programa u okviru Instrumenata pomoći pre pridruživanja (IPA). Na prvi pogled,

72 Istraživanje je finansirala Britanska akademija (SG 45257)

73 Pojam „prazna odrednica“ ovde ima onaj smisao s kojim su ga koristili Laclau i Mouffe, kao denotaciju odrednice koja nema normativan sadržaj, kojom se stvara ono što Daniel Chandler naziva odrednicama koje su „nejasne, veoma variabilne, i neodređene...“ Chandler, D., Semiotics: The Basics (London: Routledge, 2007), p.13.

takva pomoć deluje kao evropska verzija programa pomoći promociji demokratije ili razvoju civilnog društva, koju su godinama dostavljali brojni američki i evropski donatori širom post-komunističke Evrope. I, zaista, razvoj organizacija civilnog društva, kao ključni gest liberalne demokratije, već dugo je ključni cilj u okviru procesa proširenja/prikључivanja, još iz perioda ranih devedesetih i PHARE programa pomoći centralno-istočnim evropskim državama.

Kao sredstvo za ostvarenje suštinskih razvojnih ciljeva u skladu sa Procesom stabilizacije i pridruživanja (SAP), podrška Komisije civilnom društvu nije krajnji cilj, već je, pre svega, instrument za obezbeđivanje političkih mera i njihove implementacije u oblastima zaštite životne sredine, poštovanja prava manjina, povratka izbeglica, pružanja socijalne pomoći i službi za zapošljavanje, kao i ekonomskih, političkih i društvenih reformi, koje su postavljene kao preduslov za pridruživanje.

Procena takve intervencije mora biti data u skladu sa obimnom literaturom koja se bavi programima strane pomoći razvoju civilnog društva.<sup>74</sup> Na podršku Komisije nevladinih organizacija širom post-komunističke Evrope, uticalo je i naslede USAID-a i ostalih bilateralnih američkih donatora, koji su, od druge polovine devedesetih, ako ne i pre toga, usmeravali svoju pomoć razvoju civilnog društva kroz nevladine organizacije izgrađen na američkim modelima. Međutim, kao što primećuju Carothers i Ottaway, donatori su, početkom devedesetih, inicijalno pružali institucionalnu podršku, koja je bila usmerena na razvoj političkih partija i reformu državnih institucija. Prelaz na podršku razvoju civilnog društva poklopio se s periodom Clintonove administracije, i velikim delom je posledica ograničenog uspeha i komplikacija u vezi sa ostalim oblicima pomoći i podrške.<sup>75</sup> Usmerevanje pomoći kroz nevladine organizacije i davanje prioriteta jačanju civilnog društva

u okviru razvojne strategije, bilo je veoma primamljivo za donatore: pored udovoljavanja liberalnim i neo-liberalnim stavovima o potrebi za kontrolom državne vlasti i utvrđivanju odgovornosti vladajućih elita, takav pristup je bio i relativno jeftin – nevladine organizacije često sprovode svoje programe jeftino i efikasno, i imaju tendenciju da svoje operacije organizuju veoma profesionalno, bez nepotrebne birokratije. Međutim, najvažnije je da takva intervencija omogućuje donatorima da zaobidu otpor političkih elita u državama koje primaju pomoć.

Upravo taj akspekt pomoći razvoju civilnog društva pokazao je najviše anomalija i kontroverze: ono što deluje kao politički značajna pomoć, osmišljena kako bi podstakla konsolidaciju i pravu promenu režima, s velikim ambicijama i opterećena normativnim tonom („demokratija”, „civilno društvo”, „participacija građana”, itd.), u praksi funkcioniše kao politički neutralna tehnička podrška. Zbog zaobilazeњa političkih elita i davanja prioriteta podršci „mekanim” institucijama, umesto pokretanja institucionalnih reformi i suprotstavljanja „tvrdoj” vlasti (korumpiranim elitama, trans-nacionalnim mrežama koje pružaju otpor demokratskim reformama i liberalizaciji), donatori su bili kritikovani zbog zanemarivanja kritičnih neravnoteža u odnosima snaga i, u kontekstu post-konfliktnih i polu-autoritarnih država, ignorisanja činjenice da proces promene režima možda nije bio potpun. Carothers zastupa stanovište da tvrdnje donatora kako je zaista moguće izazvati promene i napredak „bez bavljenja duboko ukorenjenim interesima relevantnih aktera” – ne predstavljaju samo prečutno priznanje neuspeha ranijih intervencija, već su i očigledno pogrešne.<sup>76</sup>

Nameću su neka osnovna pitanja u vezi s tim da li normativna demokratska načela civilnog društva mogu biti izjednačena s delovanjem nevladinih organizacija koje

<sup>74</sup> Literatura je obimna. Posebno pogledati – Mandel, R., ‘Seeding Civil Society’, u: Hann, Chris M., *Postsocialism: Ideals, Ideologies and Practices in Eurasia* (London: Routledge, 2002); Wedel, J., *Collision and Collusion: The Strange Case of Western Aid to Eastern Europe, 1989–1998* (New York: St. Martin’s, 2001); Cellarius, B.A. and Staddon, C., ‘Environmental Nongovernmental Organisations, Civil Society and Democratization in Bulgaria’, *East European Politics and Societies*, Vol.16, No.1 (2002), pp.182–222; Sampson, S., ‘The Social Life of Projects: Importing Civil Society to Albania’, in Hann, C.M. and Dunn, E. (eds.), *Civil Society: Challenging Western Models* (London: Routledge, 1996), pp.121–142.

<sup>75</sup> Ottaway, M. and Carothers, T., *Funding Virtue: Civil Society Aid and Democracy Promotion* (Washington, D.C. ; [Great Britain], Carnegie Endowment for International Peace, 2000).

<sup>76</sup> Carothers, T., *Aiding Democracy Abroad: The Learning Curve* (Washington, DC, Carnegie Endowment for International Peace, 1999).

zavise od svojih donatora, o tome da li takve organizacije zaista odražavaju načela civilnog društva zapadnih demokratija, i da li, zapravo, takva načela mogu biti uspešno prenesena izvan specifičnog konteksta stabilnih liberalnih demokratija.<sup>77</sup> Ottaway i Carothers zastupaju stanovište da su nevladine organizacije koje uživaju podršku stranih donatora, uključujući i EU, „izgrađene na modelu američkih nevladinih organizacija... rukovodećim kadrom, stalnim osobljem, kancelarijama i programom delovanja.”<sup>78</sup> Takve nevladine organizacije utiču na vlast kroz lobiranje i zastupanje u američkom stilu, ali ne teže tome da i same postanu deo vlasti; funkcionišu izvan okvira partijske politike, i time održavaju duh *ne-stranačkih* donatorskih aktivnosti. To stvara utisak da nevladine organizacije, koje finansiraju strani donatori, imaju ulogu zastupanja javnih interesa, i da su privržene građanskim vrednostima, a ne partijskoj politici koja izaziva podele. Uloga takvih ne-stranačkih organizacija ima dodatan značaj u post-konfliktnim situacijama, kao protiv-teža nacionalističkoj stranačkoj politici, i kao sredstvo za sprovođenje građanskog obrazovanja. Iako takve organizacije mogu da predstavljaju jedan aspekt ili komponentu civilnog društva u državama zapadne Evrope, njihovi kritičari nisu spremni da svedu čitavo civilno društvo na takve manifestacije. I, zaista, studije o civilnom društvu u savremenim evropskim demokratijama naglašavaju raznovrsnost zvaničnih i nezvaničnih organizacionih formi, i rasprostranjene i ne-transparentne kolektive i društvene mreže, kao obeležja demokratskih građanskih društava.<sup>79</sup>

### **Paradigma tranzicije ka demokratiji: shvatanje civilnog društva kroz partnerstvo**

Vizija međunarodnih donatora o civilnom društvu, bez obzira da li je reč o post-komunističkoj Evropi, Latinskoj Americi ili delovima južne hemisfere, generalno je sadržana u konsolidaciji specifičnih odnosa koji pružaju podršku javnim političkim merama i njihovom sprovodenju<sup>80</sup>. Prema Pearce i Howell, takvo tumačenje civilnog društva kroz „partnerstvo”, „poziva se na specifičnu istoriju tog

koncepta, koja ga čini relevantnim za rešavanje problema”<sup>81</sup>. Zasnovano je na premisi da se rešenja mogu naći u okviru tržišnog konteskta, kroz partnerstvo s velikim korporacijama. Profesionalni odnosi, usmereni na konkretnе političke mere, na taj način imaju ključnu ulogu u neo-liberalnom shvatanju transformacije državne vlasti i rasterećivanju kapitala. Takvo tumačenje civilnog društva podržano je i u literaturi o racionalnoj tranziciji, kao paradigmom kojom se tumači i shvata proces promene režima i demokratizacije širom post-komunističke Evrope.

Civilno društvo se ne doživljava kao sredstvo ozbiljne političke kritike, kojim se osporava ekonomska i politička hegemonija, ili transformišu odnosi između države i društva. Njegovo delovanje se ograničava na podršku neo-liberalnoj rekonfiguraciji vlasti, jačanju statusa quo, i omogućavanju prenosa odgovornosti za regulaciju i društvenu zaštitu sa države na društveni sektor. Realistično posmatrano, civilno društvo je u stanju samo da preuzme deo prenesene odgovornosti države, snosi deo troškova delimičnog povlačenja države iz oblasti društvene zaštite, i olakša uspostavljanje simboličkih aspekata liberalne demokratije - slobodu govora i pravo na okupljanje. U suštini, promocija i razvoj nevladinih organizacija, kao reprezentata civilnog društva, zasnovani su na ideji da su takve organizacije apolitične, da pružaju tehničku podršku i predloge za političke mere i rešenja, ili na ideji da one predstavljaju van-stranačke institucije, koje teže promociji opšteg interesa nad uskim političkim i ideološkim interesima.

### **Promocija civilnog društva iz perspective „razvoja”**

Mnoge negativne ocene razvojne pomoći nevladim organizacijama i grupama koje se predstavljaju kao organizacije civilnog društva (OCD) u post-komunističkim, tranzicionim i post-konfliktim državama, ne uzimaju u obzir, ili jednostavno odbacuju razvojne aspekte takve forme intervencije kao politički relevantne. Postoji tendencija da

77 Hann, C.M. and Dunn, E. (eds.), *Civil Society: Challenging Western Models* (London: Routledge, 1996).

78 Ottaway and Carothers, op.cit.

79 Keane, J., *Civil Society and the State: New European Perspectives* (London, Verso, 1988); Hall, J. A., *Civil Society: Theory, History, Comparison* (Cambridge, Polity Press, 1995).

80 Pogledati Carothers, T., 'The End of the Transition Paradigm', *Journal of Democracy*, Vol. 13, No. 1 (2002), pp.5-21: 5-6.

81 Howell, J. and J. Pearce, J., *Civil Society & Development: A Critical Exploration* (Boulder, Colo.: L. Rienner Publishers, 2001), p.17.

se o političkim doprinosu nevadinih organizacija i organizacija civilnog društva sudi na osnovu njihove uloge u političkim procesima, njihove sposobnosti da osporavaju planove ili odluke o investicijama sredstava, i angažovanja na obezbeđivanju donatorske podrške za civilno društvo i marginalizovane zajednice, u kontekstu formalnih političkih procedura. Ako donatorska pomoć ne uspe da ostvari takve ambiciozne ciljeve, biće ocenjena kao politički neefikasna, i njen značaj će biti viđen samo kao površinski, ili čak nebitan. S druge strane, „razvojni“ okvir donatorske podrške nevladinim organizacijama i organizacijama civilnog društva, demokratsku tranziciju ne posmatra toliko u vezi s procedurama i institucijama, koliko s dugoročnim procesom koji zavisi od društvenih, kulturnih, ekonomskih i političkih promena.<sup>82</sup> Formalne demokratske procedure i politički proces, ne doživljavaju se kao krajnji ciljevi, već kao inicijalni aspekti ostvarivanja pravde i prava, savesne uprave i liberalizacije države. Uloga NVO i OCD u takvom kombinovanom procesu, ne može biti svedena na političko osporavanje u kontekstu donošenja političkih odluka ili otvorenog zastupanja određenih interesa u oblasti formalne politike. Umesto toga, kritički aspekt njihove uloge sastoji se od delovanja „iza kulisa“, i rada sa mrežom civilnih aktera. Takva perspektiva potvrđuje ulogu finansiranih nevladinih organizacija u razvojno orijentisanim programima i obezbeđivanju usluga. Ona takođe odražava i značaj donatorskih projekata, koji kroz takve nevladine organizacije formulišu strategije za smanjivanje siromaštva i artikulišu interes zajednice. To predstavlja specifičan kontrast konvencionalnijim perspektivama tumačenja takve intervencije, koje su uglavnom usvojene od strane stručnjaka za političke nauke, čiji fokus ima tendenciju da bude ograničen na formalnu politiku i institucionalizaciju interesnih grupa ili društvenih organizacija i pokreta. Takozvana „razvojna“ perspektiva pripisuje civilnom društvu i nevladnim organizacijama trajniju, ali manje političku ulogu, koja nije osmišljena kroz participaciju u uskim okvirima formalne politike. Razlikovanjem ta dva okvira, Carothers, izvodeći zaključak o efektima EU podrške na zapadnom Balkanu, u suštini naglašava značaj toga da se takva intervencija ne tumači preusko, kako kritični razvojni ciljevi i ishodi ne bi

postali nejasni, i kako ukupne procene ne bi slučajno bile postavljene u okvir uskih ciljeva u vezi s tranzicijom ka demokratiji.

### **Podrška EU Srbiji: efekti i nalazi istraživanja**

Tokom perioda od 2004. do 2007. godine, kancelarija Evropske komisije u Beogradu je finansirala raznovrsne projekte lokalnih nevladinih organizacija koji su bili obuhvaćeni širokim spektrom prioriteta CARDS (jačanje demokratskih institucija i vladavine prava; reforma javne administracije; promocija ljudskih prava i polne jednakosti; održivi razvoj i smanjivanje siromaštva; razvoj civilnog društva i regionalne saradnje). Projekti su takođe finansirani i u okviru EIDHR, sa posebnim naglaskom na razvoju civilnog društva.

U okviru oba ta programa, većina finansiranih projekata je uključivala obuku, obrazovanje ili razvoj stručnih veština za zapošljavanje, i pomoć je obično bila usmerena ka konkretnim marginalizovanim zajednicama, ili se posebno bavila internim raseljenim osobama (DPs) u nekoj oblasti<sup>83</sup>. Nekoliko projekata je uključivalo prikupljanje i obezbeđivanje podataka – na primer, prikupljanje statističkih podataka o DPs<sup>84</sup> i stopi nezaposlenosti – ili pružanje socijalne i zdravstvene zaštite nekim delovima društva – na primer, programi psihološke podrške žrtvama torture i programi rehabilitacije bivših logoraša<sup>85</sup>. Drugi projekti su bili u vezi sa nevladnim organizacijama koje obezbeđuju javne usluge (poput postrojenja za reciklažu) ili pomažu opštinama u osmišljavanju političkih mera ili prikupljanju podataka. Osim jednog projekta koji je bio osmišljen da promoviše vrednosti EU među mladima<sup>86</sup>, nije bilo drugih finansiranih političkih projekata. I, zaista, ogromna većina tih programa se može opisati kao podrška službama socijalne zaštite ili procesima osmišljavanja političkih mera. Većina njih je uključivala i neku vrstu birokratskog odnosa s državnim agencijama i zvaničnicima, ali ni u jednom slučaju nije postojalo partnerstvo između nevladinih organizacija, primalaca pomoći, i neke privatne kompanije. Tipična delatnost finansiranih projekata je uključivala obuku kroz seminare u lokalnim

82 Carothers, T., ‘Democracy Assistance: Political vs. Developmental?’ *Journal of Democracy*, Vol. 20, No. 1 (2009), pp.5-19.

83 Srpski demokratski forum i Međunarodna mreža podrške (Beograd).

84 Međunarodna mreža podrške i Srpski demokratski forum (Beograd).

85 Međunarodna mreža podrške (Beograd).

86 Evropski pokret (Beograd).

zajednicama, nacrte planova i izveštaje koji se dostavljaju lokalnim ministarstvima i državnim agencijama (kako bi se koristili u pripremi strateških planova i strategija za smanjenje siromaštva), štampanje priručnika i materijala za obuku, utvrđivanje najuspešnije prakse u pogledu obrazovanja, zaštite životne sredine, održivog turizma, bavljenje žrtvama porodičnog nasilja, kao i pružanje stručnih saveta i podrške romskim zajednicama, interno reseljenim osobama i ostalim marginalizovanim delovima društva.

### Komentar i zaključak

Čini se da je glavna korist i najkonkretniji efekat podrške EU Srbiji kroz nevladine organizacije, obezbeđivanje raznovrsnih socijalnih i obrazovnih usluga, programa obuke, pružanje materijalne pomoći ugroženim područjima i društveno-ekonomskom razvoju zajednica. U većini slučajeva, te usluge ne bi bile obezbeđene na neki drugi način, a to je posebno značajno za zemlju u kojoj su nadzor države i slobodno tržište oskudni, ili jednostavno nepostojeći. Uprkos tome što je u stručnoj literaturi izražena zabrinutost oko rasipanja i preklapanja donatorskih sredstava, i sugestije da novčana pomoć više koristi organizacijama i pojedincima u njima, nego siromašnima i onima kojima je pomoć najpotrebnija, nalazi sprovedenih istraživanja sugerisu da gore-opisane usluge i podrška, od kojih većina zahteva sredstva u iznosima od 50.000 do 100.000 evra, predstavlja, ukupno posmatrano, isplativu investiciju.

Takva intervencija deluje kao neuspešna u pogledu saradnje sa sitnjim organizacijama i mrežama civilnog društva, i u pogledu pružanja bilo kakve podrške organizacijama koje su usmerene ka artikulisanju političkog otpora režimu. Pomoć civilnom društvu u Srbiji, kao i u ostatku regiona, podrazumeva kratkoročne projekte; ona uključuje organizacije koje razvijaju kapacitete za rukovođenje, čime postaju profesionalnije i unapređuju svoje mogućnosti za pružanje usluga. Primaoci treba da budu fleksibilni; organizacije ne bi smeće da budu glomazne, niti da budu previše specijalizovane ili ideološki angažvoane.

Iz razvojne perspektive, saradnja sa relativno mladim i profesionalnim nevladnim organizacijama u oblasti pružanja usluga i komunalnih aktivnosti, zaista može da stimuliše dugoročni razvoj civilnog društva, tako što će doprineti mobilisanju zajednica da izraze svoje interesе i potrebe, i da ostvare određeni stepen autonomije u pogledu korišćenja društveno-ekonomskih resursa, što se, opet, može odraziti na političke procese i institucije. Međutim, takav scenario zavisi od određenih strukturalnih okolnosti: u post-tranziционном kontekstu, u kom je demokratija relativno stabilna (na primer, centralna i istočna Evropa i baltičke države), podrška nevladnim organizacijama zaista može da obogati demokratiju, tako što će proširiti društvenu reprezentaciju i pluralizam, čime će doprineti liberalizaciji društva. U Srbiji, gde je potpuna promena režima i dalje pod znakom pitanja, i u kojoj je ostvaren stepen liberalizacije javne sfere od pada Miloševića s vlasti i dalje osporen (ne samo od strane aktivista za ljudska prava i ostalih zastupnika marginalizovanog civilnog društva), fokus EU na podršci profesionalnim nevladnim organizacijama, kao izrazu civilnog društva – ne deluje kao da može da pokrene demokratske promene.

Napori za izgrađivanje savesne uprave i uključivanju nevladinih organizacija i civilnog društva u procese sprovođenja političkih mera, posebno su ograničeni istražnošću onoga što Kostovicova i Bojičić-Dželilovićeva nazivaju „trans-nacionalnim mrežama”, koji održavaju i koriste se slabim kapacitetima državne vlasti.<sup>87</sup> Prema tim autorkama, takve mreže je teško definisati, i one su posledica kombinacije naslednih faktora: neformalne distribucije bogatstva i paralelnih ekonomskih mreža iz socijalističkog perioda, ratova u bivšoj Jugoslaviji tokom devedesetih i (spornog) prekravanja državnih granica, međunarodne intervencije i liberalnih ekonomskih reformi. Tim netransparentnim mrežama pogoduje neregulisani ekonomski i politički prostor, državna slabost i birokratska inertnost; njih sačinjavaju brojne nacionalističke elite i državne birokrate, „kriminalne grupe, dijaspora i obični trgovci”<sup>88</sup> Međunarodna pomoć tokom i posle ratova u bivšoj Jugoslaviji, nije bila u stanju da umanji moć tih mreža; EU, koja je sada dominantni izvor razvojne pomoći, izgleda,

<sup>87</sup> Kostovicova, D. and V. Bojičić-Dželilović, V., ‘Europeanizing the Balkans: Rethinking the Post-communist and Post-conflict Transition’, *Ethnopolitics*, Vol. 5, No. 3, pp.223-241.

<sup>88</sup> Ibid., p.232.

nije uspela da prodre kroz te mreže i doveđe do opadanja njihovog uticaja i kontrole nad državom i ekonomijom. Umesto toga, i to tvrdim u ovom radu, pomoć je služila kao podrška statusu quo, ili ga barem nije osporavala; razvojna pomoć usmerena kroz lokalne nevladine organizacije nadoknađuje nedostatke državnih službi i nizak stepen otvorenosti tržista. Iako finansijska pomoć raznim projektima omogućuje građanima da dođu do usluga koje inače ne bi bile dostupne, ona ponekad nesvesno daje legitimitet i jača te trans-nacionalne

mreže i korumpirane elite, rešene da očuvaju slabost države, nedostatak zakonske regulative i nizak stepen poštovanja zakona. To ne znači da je značaj pomoći EU, usmerene kroz nevladine organizacije, u potpunosti bezvredan i neefikasan. Usluge koje su obezbeđene kroz CARDS/IPA/EIDHR projekte su vredne i veoma potrebne; kritika takve intervencije je u suštini dvojaka: 1) da li je takva kratkoročna pomoć održiva i da li zaista doprinosi razvoju? 2) da li intervencija zaista stimuliše civilno društvo?

# Evropski pristupi tranzicijonoj pravdi i civilnom društву

Iavor Rangelov

Ovaj članak ispituje evropske pristupe tranzicijonoj pravdi i civilnom društvu na zapadnom Balkanu, oslanjajući se na široka istraživanja o pitanjima u vezi s pravdom, u okviru Zajedničke spoljne i bezbednosne politike (CFSP) i Evropske bezbednosne i odbrambene politike (ESDP) EU.<sup>89</sup> U tom smislu, analiza evropskog angažovanja u bivšoj Jugoslaviji naglašava dileme koje nisu jedinstvene za taj region, i koje su generalno sadržane u spoljnoj politici EU. Pre svega, ova rasprava ima za cilj da rasvetli određene zajedničke teme koje se mogu vezati za proces proširenja EU i izgradnje mira na zapadnom Balkanu, kao i ostale političke mere i instrumente koji se vezuju za CFSP i ESDP.

Zahvaljujući pokrenutoj inicijativi za uspostavljanje Regionalne komisije za utvrđivanje činjenica u bivšoj Jugoslaviji - REKOM, koja za svoj cilj ima rasvetljavanje činjenica u vezi sa ratnim zločinima i pitanjem nestalih osoba tokom balkanskih ratova devedesetih godina - imamo priliku da ponovo razmatramo evropske pristupe civilnom društvu i tranzicijonoj pravdi. Ta inicijativa je pokrenuta od strane Koalicije civilnog društva za osnivanje REKOM, i ona uključuje široke konsultacije s raznim segmentima civilnog društva u Bosni i Hercegovini, Hrvatskoj, na Kosovu, u Crnoj Gori i Srbiji. Dok kampanja za REKOM ulazi u kritičnu fazu stvaranja javne podrške i obezbeđivanja da bude zvanično sankcionisana, jedno od ključnih pitanja na dnevnom redu

se tiče uloge EU u tom procesu, i mogućnosti za obezbeđivanje njene podrške.

U ovom radu bavim se tim pitanjem tako što ispitujem evropske pristupe tranzicijonoj pravdi i civilnom društvu, i u tom kontekstu naglašavam dva glavna pitanja. Prvo razmatram dominantna shvatana pravde u okolnostima posle počinjenih masovnih zločina i povreda ljudskih prava, koja su sadržana u stavovima i političkim odlukama EU o post-konfliktnim situacijama, i koja naglašavaju nešto što se doživljava kao trgovina između pravde i demokratizacije, s jedne strane, i bezbednosti i stabilnosti, s druge. Drugo, ispitujem koncepte civilnog društva koji prožimaju evropske stavove i političke odluke o zemaljama izvan EU, stvarajući kontrast između političkog shvatana uloge civilnog društva, i koncepcije o depolitizovanom civilnom društvu, koje je partner vlade i izvor usluga društvu. Na kraju, ovaj rad sadrži razmišljanja i zaključke o prilici koju REKOM inicijativa pruža za to da se ponovo razmotre pristupi EU civilnom društvu i tranzicijonoj pravdi, kao i za preispitivanje nekih prepostavki koje grade evropske stavove na polju spoljne i bezbednosne politike.

## Tranzicijona pravda

Evropska unija često izgleda kao unitarni akter u međunarodnoj politici. Međutim, ona teži tome da projektuje

<sup>89</sup> Istraživanje se sprovodi u okviru Programa studija o evropskoj spoljnoj i bezbednosnoj politici, koju finansiraju Riksbankens Jubileumsfond, Compagnia di San Paolo i Volkswagen Stiftung.

skup diskretnih, ili čak alternativnih stavova i političkih ideja u međunarodnoj areni, artikulisanih kroz evropske institucije i države članice, Savet i Komisiju Evropske unije, kao i kroz svoj opšti zakonodavni okvir, konkretnе političke instrumente i mehanizme. CFSP i ESDP su dinamični politički okviri o kojima se i dalje raspravlja; predstavljaju, u najboljem slučaju, napredak koji je možda protivrećan sistematskoj proceni i konceptualizaciji. Tranziciona pravda je takođe jedna nova pojava, i tek je nedavno nastala kao oblast u okviru spoljne politike EU. Zato ne bi trebalo da iznenađuje to da su evropski pristupi pitanjima kao što su krivična gonjenja ili restorativna pravda, u okolnostima posle konflikta i počinjenih zločina - pogrešno predstavljeni, inkoherentni ili protivrečni. Bez obzira na to, želim da iznesem dva različita pristupa tranzicionoj pravdi, koji bi mogli da budu prepoznati kao dominantni u evropskim shvatanjima i političkim odlukama, i da naglasim da ta dva pristupa, zatim, reflektuju široke stavove o ulozi pravde u mirovnim i tranzicionim procesima, prisutnim u celom tom polju.

S jedne strane, EU se zalagala za nešto što se može nazvati "demokratizacionim" pristupom tranzicionoj pravdi. Taj pristup shvata tranzicionu pravdu kao deo evropskih naporâ na promociji demokratije, ljudskih prava i vladavine prava. Na primer, evropska Politika o razvoju i saradnji, postavila je novčanu podršku Međunarodnom krivičnom sudu i pratećim aktivnostima u okviru globalnog plana Evrope za promociju demokratije i ljudskih prava<sup>90</sup>. U kontekstu proširenja EU, uključivanjem zapadnog Balkana, „demokratizacioni“ pristup je uslovljen saradnjom sa Međunarodnim krivičnim tribunalom za bivšu Jugoslaviju (Tribunal) u Hagu. „Obrnutim“ prenosom slučajeva Tribunalâ na domaće sudstvo, sudjenja optuženima za ratne zločine na nacionalnom nivou postala su, u sve većoj meri, vezana i za uslove pristupanja EU. Ključna ideja je to da „demokratizacioni“ pristup tranzicionoj pravdi odražava načelne argumente o primatu demokratije i ljudskih prava, i etičkoj podlozi evropske spoljne politike.

S druge strane, postoji „stabilizacioni“ pristup tranzicionoj pravdi. Prema tom pristupu, ciljevi održavanja javnog reda i mira i političke stabilnosti imaju prioritet u odnosu na etičke obzire, i, samim tim, argumenti za i protiv tranzicione pravde - treba da budu procenjivani u odnosu na te ciljeve. „Stabilizacioni“ pristup je bio implicitan učešcu EU u mirovnim pregovorima i stvaranju mandata ESDP misija, koje su razmeštane u zemljama nastalim posle oružanih sukoba i počinjenih povreda ljudskih prava. To je, takođe, bilo svojstveno i evropskoj politici prema zapadnom Balkanu. Jedan primer toga je i pokretanje pregovora EU o priključenju sa Srbijom, na luksemburškom samitu u oktobru 2005. godine, uprkos činjenici da Srbija nije uhapsila najznačajnijeg haškog begunca, generala Ratka Mladića, što je, opet, opravdano u kontekstu političke izvodivosti i stabilnosti. Drugi primer pruža angažovanje EU u Bosni i Hercegovini, gde je tranziciona pravda uglavnom shvaćena kao pitanje koje izaziva sukobe, i koje je u okviru mirovnog mandata ESDP misije i u procesu priključenja koji vodi Komisija<sup>91</sup>, - zanemareno. Ukupno posmatrano, „stabilizacioni“ pristup tranzicionoj pravdi reflektuje pragmatične obzire i prioritetizuje javni red i mir i političku stabilnost kao ciljeve politike EU van svojih granica.

Moja analiza predlaže to da evropska shvatanja i političke mere na polju tranzicione pravde treba shvatiti kao „pregovore“ između ta dva pristupa, „demokratizacionog“ i „stabilizacionog“. Ti pristupi su među sobom ko-egzistirali, ali su se takođe u određenim situacijama i sukobljavali, kao što je bio slučaj tokom rasprava o uslovima vezanim za Tribunal i suspenziji pregovora EU sa Hrvatskom i Srbijom o priključenju. Tenzija zmeđu „demokratije“ i „stabilnosti“ i trgovina koju ta tensija podrazumeva, odraz su šire dileme koja teži tome da čitavo polje stavi u okvir izbora između pravde i bezbednosti. Pod okolnostima tekućeg sukoba, ta dilema je nazvana dilemom *Mir protiv Pravde*, i o njoj se beskrajno raspravljalio, bar od trenutka kada je Savet bezbednosti UN odlučio da uspostavi Tribunal usred bosanskog rata u 1993. godini. U post-konfliktnim tranzicijama,

<sup>90</sup> Savet Evrope i Evropski parlament, odluka broj 1889/2006, od 20. decembra 2006. godine.

<sup>91</sup> Pogledati rad Iavora Rangelova i Marike Theros, "Transitional Justice in Bosnia and Herzegovina: Coherence and Complementarity of EU Institutions and Civil Society," u: Kai Ambos et al., eds., *Building a Future on Peace and Justice: Studies on Transitional Justice, Conflict Resolution and Development* (Berlin: Springer 2009).

ona je bila ponovo artikulisana kao izbor između „principa“ i „pragmatizma“, procenjujući zahteve za pravdom naspram rizika od radikalizacije i negativnih reakcija<sup>92</sup>. U tom smislu, evropski pristupi tranzicionoj pravdi su odražavali argumente prisutne u stručnim i političkim debatama, u kojima su ponovo istaknute neke od najukorenjenijih pretpostavki i kognitivnih paradigmi u tom polju.

## Civilno društvo

Civilno društvo je pojam čija tumačenja se oštro osporavaju, i konsenzus u vezi s njegovim značenjem i implikacijama je i dalje redak među stručnjacima i onima koji donose političke odluke. Uprkos svojoj višesmislenosti, njegov značaj u post-konfliktnoj rekonstrukciji i demokratizaciji je široko priznat. U tom kontekstu se pojavljuju dva alternativna shvatanja civilnog društva. S jedne strane, postoji ideja o civilnom društvu kao nezavisnom od države i tržista, zamisljenom kao prostor za one aktere koji služe kao protiv-teža državnoj moći. To je političko shvatanje civilnog društva, koje teži tome da naglasi njegovu ulogu u kritici i kontroli vlasti i institucija države. Drugim rečima, civilno društvo se shvata u vezi s kritičkim javnim debatama i kritikom političkih odluka. S druge strane, postoji shvatanje civilnog društva kao „trećeg sektora“, pored države i tržista, koji postoji kako bi se reagovalo na nedostatke i neuspene prva dva sektora. U tom smislu, postoji tendencija da se civilno društvo shvati u kontekstu pružanja usluga vlasti, ili kao njen pratner, stvarajući tako sliku jedne politički neutralne, profesionalne nevladine organizacije, kroz terminologiju društvenog i ekonomskog razvoja. To je jedna, uglavnom, depolitizovana konцепција o civilnom društvu, koja ga stavlja na stranu države ili ga tumači kao zamenu za državu.

Hteo bih da iznesem tvrdnju da su evropski pristupi civilnom društvu uglavnom odražavali to drugo, depolitizovano shvatanje njegovog koncepta. U polju tranzicione pravde, bilo je određenog prihvatanja ideje da bi aktivnosti civilnog društva trebalo podržati, čak i onda kada osporavaju državu i njenu politiku. Na primer, u *Instrumentima za*

*ostvarivanje stabilnosti*, eksplicitno se navodi da podrška EU civilnom društvu ne zavisi od „sporazuma između vlasti ili drugih javnih institucija trećih zemalja (zemalja van EU)“<sup>93</sup>. Međutim, ukupni pristup Evrope civilnom društvu naglašava njegovu ulogu kao partnera vlade i izvora usluga. Ta tendencija je preovladivala i u kontekstu proširenja EU na zapadnom Balkanu. Planovi za novačanu pomoć civilnom društvu u regionu su konzistentno davali prednost onim nevladinim organizacijama koje se bave društvenim pitanjima i pružaju usluge raznim ugroženim i marginalizovanim grupama, dok su, u najvećoj meri, zanemarivali delove civilnog društva koji su se upuštali u politički napete diskusije, poput onih o tranzicionoj pravdi.

Proteklih godina, evropske institucije su počele aktivnije da saraduju s civilnim društvom u ovom regionu. Evropska komisija je sprovela brojne napore „mapiranja“, kako bi identifikovala ne-državne aktere i uspostavila novi mehanizam *Dijaloga o politici*, s namerom da on posluži kao interfejs između civilnog društva i vlasta zemalja koje pregovaraju o priključenju. Međutim, oni segmenti civilnog društva koji su smatrani „radikalnim“ ili „politizovanim“, bili su isključeni iz *Dijaloga o politici*, poput udruženja žrtava, ratnih veterana, i glasnijih organizacija za ljudska prava<sup>94</sup>. Ukupno posmatrano, evropski pristupi civilnom društvu u bivšoj Jugoslaviji teže tome da odraze depolitizovano shvatanje civilnog društva, i daju prednost ne-državnim akterima, koji se uklapaju u uloge partnera vlasti, i koji joj pružaju usluge.

## Zaključak: REKOM i EU?

Ovaj rad naglašava dve glavne teme u evropskoj spoljnoj i bezbednosnoj politici u vezi s pitanjima tranzicione pravde i civilnog društva. Zastupao sam tezu da evropski pristupi tranzicionoj pravdi mogu da budu shvaćeni kao „pregovor“ između „demokratije“ i „stabilnosti“, i da izražavaju širu dilemu koja je prisutna u tom polju, koja predstavlja pravdu i bezbednost kao suprotstavljene ciljeve u post-konfliktnim društvima. Takođe sam izneo ideju da evropski pristupi

92 Jack Snyder i Leslie Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice," 28 *International Security* 5 (2003).

93 Savet Evrope i Evropski parlament, odluka broj 1717/2006, od 15. novembra 2006. godine.

94 Rangelov i Theros, op.cit., str. 22-24.

civilnom društvu teže i tome da unaprede depolitizovan koncept civilnog društva, naglašavajući ulogu ne-državnih aktera kao izvora usluga i partnera vlasti. Na kraju, implicirao sam i da te teme i pristupi tranzicionej pravdi i civilnom društvu nisu svojstveni samo EU i njenom bavljenju zapadnim Balkanom, već da odražavaju određene prepostavke i kognitivne paradigme koje su duboko ukorenjene u stručnim i poitičkim debatama u celom tom polju.

REKOM inicijativa u bivšoj Jugoslaviji pruža priliku da se ponovo razmotre neki od ustaljenih obrazaca mišljenja o pravdi i civilnom društvu, koji su dominirali evropskom spolnjom i bezbednosnom politikom u post-konfliktnim

situacijama. REKOM pruža posebnu priliku za preispitivanje argumenata da je polje kojim se tranziciona pravda bavi zapravo trgovina između „demokratije” i „stabilnosti”, i, uopštenije, trgovina između pravde i bezbednosti. Štaviše, ova inicijativa naglašava ograničenja depolitizovanog koncepta civilnog društva i postavlja pitanje o civilnom društvu kao autonomnom političkom akteru i izvoru legitimnosti u post-konfliktnoj tranziciji. U tom smislu, pitanje o vezi REKOM i EU pruža priliku za kritičku procenu napora EU na proširivanju i izgradnji mira na zapadnom Balkanu, ali takođe i priliku da se ponovo razmisli o širem polju evropske spoljne i bezbednosne politike. Moja analiza teži da razjasni to pitanje i postavi ga u okvir šire rasprave.

# Evropa i neophodnost prihvatanja transnacionalnog pristupa restorativnoj pravdi u državama bivše Jugoslavije

Florence Hartmann

Tranzicionalna pravda, koju treba posmatrati kao jedan proces, razvija se u više faza. Ima za cilj identifikaciju zla, zatim kazivanje istine preko pravnih institucija koje rekonstruišu narativ zločina i tragedije i koje konačno nude rešenje u cilju obnove društvene veze raskinute tokom rata i masovnih zločina. Ovaj dugoročni proces treba da doveđe do javnog priznavanja i prihvatanja zločina i suočavanja celog društva s tim. Taj proces svakako se ne ograničava na retributivnu fazu, odnosno na kažnjavanje osoba koje su počinile zločine, nego obuhvata i rekonstruktivnu fazu u kojoj se društvo u celini suočava s počinjenim zločinima tako da prevaziđe taj deo sopstvene istorije, da ga savlada a time i prevaziđe i razreši, što je suprotno zaboravu jer sećanje je prisutno ali strašna prošlost tako je savladana i oslobođena svojeg nasilnog potencijala. Pomirenje se ne ograničava na međunarodno pomirenje nego zahteva pomirenje sa sopstvenom nacionalnom istorijom.

U tom procesu Međunarodni krivični tribunal za bivšu Jugoslaviju (Tribunal) učinio je mnogo, ma koliko kritika se može uputiti Haškom tribunalu. Započeo je i time omogućio proces utvrđivanja činjenica o zločinima koji se možda ili, da kažemo najverovatnije, ne bi ni desio da je sudska faza bila ostavljena isključivo domaćim sudovima. Sam rad Haškog tribunala je ohrabrio da se retributivna faza proširi i prenosi postepeno na lokalne sudove, kao komplementarni proces. Mada pasivna na početku, međunarodna zajednica je igrala ulogu u tom proširenju retributivnog procesa time što je podržavala i finansirala upostavljanje domaćih sudova za ratne zločine u regionu. Međutim, ta podrška je došla kao posledica završetka mandata Haškog tribunala,

započeta 2002. godine, umesto da bude sastavni deo jedne dobro razrađene strategije sa ciljem jačanja demokratije, stabilizacije i pomirenja u regionu.

Dugo, pa i dan danas, međunarodna zajednica je pristupala toj problematiki na sledeće načine: od postojanja Haškog tribunala, više od stotinu osoba je procesuirano, lokalni sudovi su otvorili dodatne predmete, zločin nije ostao nekažnen, sada idemo dalje jer gledanje u prošlost sprečava društvo da se okrene prema budućnosti. Frustracije žrtava, tenzije u društvu i međunarodne podele kao i sporo pomirenje često se ocenjuju kao znak neuspeha ili bar ograničenog dometa i umeća Haškog tribunala i delimično nezrelost lokalnih društava, a ne kao izraz nezavršene pravde, odnosno nezavršen proces kao što je definisan na početku teksta. Pod izgovorom da je upostavila, finansirala i saradivala s Haškim tribunalom, međunarodna zajednica se oslobođila definisanja šire strategije koja bi doprinela pomirenju, smatrajući da je to dužnost Haškog tribunala i deo njegovog mandata. Njene neretke primedbe da je Haški tribunal institucija koja mnogo košta i koja nije dobila „očekivanu dobit od investicije“ ukazuju na njeno nerazumevanje ili bar na njenu nezainteresovanost za proces tranzicione pravde.

Pogrešno bi bilo uvrstiti politiku uslovljavanja koju je upostavila Evropska unija u vezi s potpunom saradnjom s HAGOM među pokušaje kreiranja dugoročne politike tranzicione pravde na Balkanu. Politika uslovljavanja se pojavila negde oko 2003. odnosno 2004. godine kao instrument podrške i ubrzavanja politike završavanja rada Haškog tribunala («completion strategy») ali takođe kao deo politike

usklađivanja sa evropskim standardima, time što zemlje koje krše svoje međunarodne pravne obaveze – saradnje sa Tribunalom – ne ispunjavaju uslove za približavanje Evropskoj Uniji. Ona je više inspirisana željom da se otklopane zaostala pitanja iz prošlosti nego željom da se ohrabri suočavanje s prošlošću. To je *ad hoc* politika koja je stvorena da bi se Haškom tribunalu izručili optuženici koji su izmakli pravdi i nalaze se u bekstvu. Ta politika u svojoj primeni nije imala drugi cilj niti je razradila druge ambicije. Taj mehanizam se prvi put koristio u slučaju Hrvatske i izručenja Ante Gotovine. Posle je primjenjen u Srbiji, koja je tada bila utočište zaoko 30 begunaca koje je tražio Haški tribunal. Treba podsetiti na jednu polugu te politike koja se zasnivala na poruci koja je manje više glasila: ako izručite preostale haške begunce, brže ćete moći sami procesuirati vaše ratne zločinice. To jeste cenjanje, pragmatizam, više biznis između država koje se nekako razumeju da treba zaboraviti ta pitanja i prošlost zato što su konfliktni.

Evropa nije ni tada ni sada razvijala politiku koja omogućava i pomaže da se države bivše Jugoslavije približe putem procesa suočavanja s prošlošću. I kad visoki predstavnik Saveta Evrope za ljudska prava Thomas Hammarberg, raskidajući s dosadašnjim pristupom kaže u svom izveštaju podnetom 11. marta ove godine [2009] da „Srbija treba da usvoji zvaničnu strategiju za prihvatanje i kazivanje istine o konfliktu u regionu i odnos prema žrtvama i počiniocima“ on ipak ne daje nikakvu preporuku u vezi s tim pitanjem. Neverovatno je da je Evropa proglašila svoj cilj da sve države bivše Jugoslavije uđu u Evropsku uniju, a da prethodno nije obezbedila postojanje mehanizama koji će težiti da se rešavaju konfliktni odnosi koji dele ovdašnja društva pre nego što će se ta društva uključiti u Uniju. Žalosno je u tom pogledu da Evropska unija još nije našla za shodno da bez odlaganja ohrabri Balkan da koristi njeno sopstveno iskustvo u prevazilaženju svojih starih podela, kako bi se međusobno pomirene države bivše Jugoslavije prikučile Uniji kao demokratski i stabilni prostor. Upravo suprotno, izgleda da Evropska unija računa da će se samim ulaskom država bivše Jugoslavije u Uniju rešavati njihovi problemi i podele.

Jasna politika podrške Evropske unije suđenjima za ratne zločine, u okviru Međunarodnog krivičnog tribunalu za bivšu Jugoslaviju ili pred domaćim sudovima, nije dovoljna da bi se omogućilo rešavanje strašne nedavne prošlosti. Jasno smo videli da ukazivanje na zločine ili utvrđene činjenice u presudama često ostanu mrtvo slovo na papiru u regionu. Svako, pričajući o svom viđenju tih sudenja, odbija utvrđene činjenice i tako ostaje konfliktno viđenje prošlosti. Kao i lokalne države, Evropska unija ne stavlja akcent na podršku inicijativi restorativne pravde i time spečava pojačani efekat

već uloženih sredstava u procesu tranzicione pravde. Jer bez retributivne faze, restorativna faza nema većih dometa. Do sada je dosta postignuto, prva faza je dosta postigla samim tim što je uopšte započeta, i to zahvaljući jasnoj poziciji međunarodne zajednice. Zato hitno treba formulariti jasnu politiku koja bi omogućila nastavak procesa i dati odgovarajuću podršku drugoj fazi i nevladinom sektoru koji je taj proces započeo, kao i programima koji se već izrađuju u celom regionu.

Bez iskrene podrške institucija, druga faza ne može postići svoj cilj i tako omogućiti i završetak pocesa tranzicione pravde. Nevladin sektor nema načina da sam nosi restorativnu fazu, koja bi se u tom slučaju razvijala mimo celokupnog društva i ostala bez neophodnog uticaja. Ali svakako je nevladin sektor nesumnjivo najbolji pokretač, kao što je uostalom bio ključni pokretač prve faze. Zato treba da bude taj posrednik koji će navesti Evropsku uniju da u skladu sa svojom istorijom i svojim vrednostima uključuje procese tranzicione pravde, uključujući restorativnu fazu, u procese integracije i da smatra integralnim i bitnim delom celokupnog procesa demokratizacije i europeizacije regiona.

Pogrešno bi, međutim, bilo zaboraviti ključnu ulogu koju same države bivše Jugoslavije moraju imati u toj fazi restorativne pravde. Bez nevladinih organizacija glas žrtvata ne bi se čuo i masovni zločini bi bili zataškani tada i sada. One su prve sakupile dokumentaciju i upoznale svet sa zlom koje je tada zahvatilo Balkan, ukazale na obim zločina i pobedile skepticizam i sumnje koji na početku uvek vladaju i odlažu adekvatnu reakciju u zaustavljanju zločina. U procesu pravde, glas žrtvata i dokumentacija o zločinima koji su počinjeni nad njima ključni su segment, ali ne jedine arhive koji će omogućiti rekonstrukciju događaja i upostavljanje istinske kolektivne memorije. Pored arhive žrtvata, postoji dodatni i komplementarni materijal, a to su arhive zločinačkih i represivnih sistema bez kojih nije moguće razumeti kako je narušen vrednosni sistem i kako je došlo do masovnog nasilja između komšija. A razumeti «kako je do toga došlo» ključno je pitanje koje treba rešavati da bi podeljene zajednice i društva mogla da se oslobođe tereta zločina i osećaja kolektivne odgovornosti, kao i da priznaju patnje nanete drugima.

Arhive zločinačkih sistema nalaze se u raznim telima i institucijama – policije, tajne policije, vojske, uprave, komande, nekad i sudske, bolničke, zatvorske, transportne službe, itd. Svedoče o ciničnoj i cepidlačkoj birokratiji bez koje ne funkcionišu diktatorski i represivni režimi. One su pored arhive patnje konstitutivni deo tragične istorije jednog područja, one su dokazi koje treba čuvati i koji će jednom omogućiti

da pravda bude zadovoljena, da žrtve budu rehabilitovane i da društva nađu put ka stabilnoj i čvrstoj demokratiji.

Međutim, arhive zločinačkih sistema su najosetljivije jer su jedinstvene. Njima preti uništavanje, sakrivanje, falsifikovanje ili nestatak zbog nemara. Pošto je njihova vrednost za utvrđivanje istine o događajima dragocena, te arhive se smatraju delom «baštine kolektivne memorije čovečanstva». Zato postoji, kao za zaštitu kulturne baštine, program UNESCO-a kojim se štite arhive terora, koji se zove «Memorija sveta». Čile, na primer, registrovao je sedam svojih arhiva u tom programu, tako da mogu biti prenesene narednim generacijama koje će moći da ih prouče i time spreče ponavljanje nasilja. Isto tako se smatralo od velike važnosti sačuvati i zaštititi arhive Stasi-ja, KGB i sličnih službi posle pada Berlinskog zida. Bez učešća države, te arhive nasilja i terora nedostupne su jer se jedino nalaze u institucijama i telima ranije uključenim u zločinački poduhvat. Član 29 Statuta Haškog tribunalala, koji obavezuje države na saradnju sa Sudom, omogućio je da deo te arhive bude dostupan i dostavljen u predmetima koji se vode pred Tribunalom. Ta dokumentacija je takođe neophodna u fazi restorativne pravde i nastavku procesa utvrđivanja činjenica. Pošto je važan deo strašne i bolne memorije u njihovim rukama, ključno je uključiti državne institucije u razvijanje restorativnih strategija. I zato Evropska unija treba da razvija strategiju kojom bi ohrabriла donošenje zakonodavnih i drugih administrativnih mera da se sačuvaju i dugoročno zaštite te arhive, da se ne uništavaju i da se ne sakrivaju pod izgovorom da su one izvor nekih konflikata između država ili da mogu dovesti do isplate velike novčane naknade u ime reparacija. Sudbina arhive terora ne tiče se samo država koji su učestovale u zločinačkim poduhvatima, nego celokupne međunarodne zajednice koja možda takođe poseduje elemente te arhive ili znanje o njima i koja je dužna da osigura

zaštitu tog dokaznog materijala, koji će omogućiti da se narodi oslobole prošlosti sa kojom su se suočavali i time stvorili uslove da se što bolje spreči njeno ponavljanje.

Sve dok politički vrh Evropske unije bude smatrao da prošlost smeta, da je prošlost izvor zavada i da sve to treba gurnuti pod sto, on neće shvatiti važnost nastavka procesa tranzicione pravde i ulogu koju Evropa može igrati u restorativnoj fazi. Jer toj fazi je mnogo više potreban transnacionalni pristup nego retributivnoj fazi, u kojoj su Haški tribunal ili domaći sudovi radili po predmetima, vertikalno i odvojeno od celokupne slike kao prema nekoj vrsti izučavanju slučajeva dok restorativna faza zahteva transversalni i celokupni pristup i time podrazumeva aktivno učešće aktera iz više država. Iako Evropska unija javno izbegava da promoviše zaborav na konfliktnu prošlost, brojni njeni potezi do sada ukazuju na to. Ona još uvek ne vidi da je suprotno njenim interesima to što duboko veruje da će vreme lečiti rane i da će ih integracija Balkana u Uniju potpuno izbrisati. Takvo mišljenje je potpuno suprotno iskustvima kroz koja je prošla Evropa. Već i sama opsesija brojnih članica bivšeg sovjetskog bloka nedavnom istorijom ponovo ukazuje da je nerešena bolna prošlost izvor tenzija. U tom kontekstu može se kazati da nevladin sektor u bivšoj Jugoslaviji može da pomogne Evropi da nekako sačuva svoju zajednicu, jer je rešavanje nasleda prošlosti u ovom regionu jedan od glavnih principa koji može dugoročno sačuvati Evropu i kreirati jedno društvo gde svi imamo zajednički interes. Jer interesi Evropske zajednice ne mogu biti samo ekonomski, iako su svakako vrlo bitni, ako želi da nastavi da bude demokratički i stabilni prostor. Podržavajući dovršavanje procesa tranzicione pravde u regionu bivše Jugoslavije, Evropa će i sama sebi pomoći. Zato ona treba brzo da se angažuje uz inicijative koje su u toku sa ciljem da što pre države bivše Jugoslavije dovede do prihvatanja transnacionalnog pristupa restorativnoj pravdi.

# Stav Evropske unije

Thomas Gnocchi

Zahvaljujemo se na ovoj prilici da govorimo o pitanjima u vezi s tranzicionom pravdom na zapadnom Balkanu, i o tome kako naporu u toj oblasti mogu da doprinesu održivom miru i post-konfliktnom izmirenju.

Suočavanje s prošlošću i istinom je nezamenjivo za pomirenje zemalja zapadnog Balkana, kao i za izmirenje unutar tih zemalja.

Izmirenje, dobrosusedski odnosi i regionalna saradnja - centralni su elementi u okviru Procesa stabilizacije i pridruživanja. Zemlje zapadnog Balkana su privržene ostvarenju tih ciljeva, sadržanim u Sporazumu o stabilizaciji i pridruživanju.

Puna saradnja sa Međunarodnim krivičnim tribunalom za bivšu Jugoslaviju (Tribunal) je ključna za procese evropskih integracija i priključenja. Kapaciteti i mogućnosti nacionalnih sudova da se bave ratnim zločinima su podjednako važni. Mi intenziviramo naše napore u tom pravcu.

Mogućnost budućeg članstva u EU je jak pokretač za reforme u zemljama koje su kandidati ili potencijalni kandidati. Jasne poruke EU u vezi s tim će pomoći učvršćivanju napretka u zemljama zapadnog Balkana, koji je ostvaren u prethodnim godinama, i ohrabriti ih u ostvarivanju neophodnih reformi.

Zaključci koje je, u svom izveštaju Savetu bezbednosti UN-a u vezi sa Hrvatskom, dao Glavni tužilac Tribunal, Serge Brammertz, o tome da je saradnja Hrvatske sa Tribunalom samo delimično zadovoljavajuća – vrše pritisak na Hrvatsku u okviru njenih pregovora o priključivanju EU.

Puna saradnja Srbije sa Tribunalom je jedan od glavnih prioriteta za unapređivanje odnosa Srbije i EU. Komisija smatra da je hapšenje Radovana Karadžića u julu 2008. godine

bio značajan napredak i jasna indikacija obnovljene privrženosti Srbije svojoj obavezi da sarađuje sa MKTJ.

Vlada Srbije bi trebalo odlučno da se posveti nastavku saradnje sa Tribunalom i hapšenju preostalih begunaca. EU je ratifikovala Sporazum o stabilizaciji i pridruživanju sa Srbijom i primenu Prelaznog sporazuma, pod uslovom da Savet Evropske unije jednoglasno oceni da je Srbija ostrvila punu saradnju sa Tribunalom.

Napredak u pregovorima o priključivanju i, uopšteno, napredak u evropskim integracijama, takođe zavisi i od toga kako se te zemlje interno bave slučajevima ratnih zločina. Tokom proteklih nekoliko meseci, ostvaren je napredak, i saradnja između tužilaca se bitno popravila. Međutim, preostaje dosta izazova u vezi sa uklanjanjem etničkih predrasuda u presudama, pružanjem zaštite svedocima i primenom opštih standarda krivične odgovornosti.

Postoji puno slučajeva ratnih zločina koji su pokrenuti pred nacionalnim sudovima, ali suđenja za te zločine još uvek nisu počela. Kapaciteti za bavljenje tako velikim brojem domaćih slučajeva ratnih zločina su ograničeni. To je posebno problematično u Bosni i Hercegovini, u kojoj ima daleko najviše slučajeva ratnih zločina na čija suđenja se još uvek čeka.

Mi pružamo značajnu novčanu pomoć Posebnom odelu za ratne zločine Suda Bosne i Hercegovine.

Komisija je nedavno odobrila finansiranje projekta obuke tužilaca za ratne zločine i mlađih profesionalaca iz zemalja zapadnog Balkana pri kancelariji Tužilaštva Međunarodnog krivičnog tribunala za bivšu Jugoslaviju, koji je pokrenuo gospodin Brammertz. Taj projekat će početi u aprilu 2009. godine.

Komisija će, kroz svoju TAIEK kancelariju (Odeljenje za tehničku saradnju i razmenu informacija), i u saradnji sa Kancelarijom glavnog tužioca, takođe organizovati i dve godišnje regionalne konferencije za tužioce za ratne zločine sa zapadnog Balkana.

Naša podrška naglašava značaj koji pridajemo takvim razmenama iskustava s domaćim tužiocima i profesionalcima u okviru tekućih aktivnosti Tribunala.

Novčana pordška EU je obezbeđena i za projekte saradnje međunarodne policije i lokalnih tužilaštava, kako bi se unapredila borba protiv međunarodnog organizovanog kriminala i ostalih oblika opasnog kriminala. Takva vrsta saradnje će tim zemljama dati priliku da podrže jedna drugu u svojim naporima na evropskim integracijama.

Na početku svoje prezentacije, rekao sam da su suočavanje s prošlošću i istinom nezamenjivi za proces pomirenja. Treba održati živim sećanje o tome što se dogodilo tokom ratova, uključujući i najozbiljnije zločine. Zato novčano pordžavamo Centar za istraživanje i dokumentaciju u Sarajevu. Komisija je, takođe, spremna da razmotri i podršku ovoj regionalnoj inicijativi civilnog društva.

Pomirenje, očigledno, zahteva hrabre političke lidere, koji su u stanju da prevaziđu krute stereotipe u društvu. Ono takođe zahteva i snažno učešće civilnog društva. Hteo bih da odam priznanje svim pojedincima i nevladinim organizacijama, koji se bore za istinu i pomirenje, i koji su ponekad izloženi ozbiljnim pretnjama, rizikujući čak i svoje živote. Hteo bih posebno da čestitam organizacijama koje stoje iza Koalicije za osnivanje REKOM - na njihovoј odlučnosti, profesionalizmu i posvećenosti.



**THE EUROPEAN UNION  
AND TRANSITIONAL JUSTICE:  
FROM RETRIBUTIVE TO RESTORATIVE  
JUSTICE IN THE WESTERN BALKANS**

Edited by Denisa Kostovicova



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# Introduction<sup>1</sup>

Denisa Kostovicova, Vesna Bojicic-Dzelilovic and Nataša Kandić

As the turmoil of conflicts in the Western Balkans gradually fades away, the efforts to rebuild the region's societies so that the history of violence is never repeated again, continue apace. If this goal is to be achieved, the issue of transitional justice undoubtedly comes at the very top of this agenda. Over the years the Centre for the Study of Global Governance at the London School of Economics and Political Science has been at the forefront of the academic debates and policy initiatives aimed at furthering the understanding of the region and contributing to the formulation of international policies towards rebuilding peace and stability in Western Balkans. The Centre conducts innovative, interdisciplinary research and teaching on key aspects of globalization: global governance, global civil society and global security, focusing on several regions, including the Western Balkans. The collaboration with local partners features prominently in the activities organized within the framework of the Centre's Balkans Programme. It provides invaluable insights and real life content and experience to the debate and policy action that the Programme aims to stimulate. To address the theme of transitional justice and the role of the European Integration process, the Centre, in collaboration with the Humanitarian Law Center in Belgrade, organized a conference on 'European Integration and Transitional Justice: From Retributive to Restorative Justice' in Belgrade on 7 February 2009 that gathered an impressive and diverse audience, including academics, activists, NGOs, policy makers, practitioners, students and journalists.

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The aim of the conference was to consider a novel dynamic of dealing with the legacy of mass atrocity in the former Yugoslavia: the move from retributive to restorative justice, from the perspective of a critical examination of the European Union (EU) conditionality policy in the Western Balkans. After fifteen years of criminal prosecutions at the International Criminal Tribunal for the former Yugoslavia (ICTY), including those in domestic courts across the region, the limits of retributive justice are evident. The extraditions or war crimes suspects and trials have not precipitated a wide-ranging debate about the past or created a demand for comprehensive transitional justice; the focus on state institutions in pursuing the policy of transitional justice has marginalised civil society, *de facto* isolating grass-roots efforts in the field of transitional justice from the overall aims of Europeanisation of the region; and, the national focus has proved insufficient in addressing the cross-border nature of war crimes and their legacy. In sum, the process of Europeanisation centred on the EU's Hague conditionality as *the* form of transitional justice has unfolded on a separate track from bottom-up initiatives and demands for transitional justice in the region.

A diverse gathering of multiple stakeholders in transitional justice in the region, organized by the Centre for the Study of Global Governance, LSE, and the Humanitarian Law Center, was a response to a need to provide a critical assessment of retributive strategies of transitional justice favoured by the European Union, examine the calls

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<sup>1</sup> The Centre for the Study of Global Governance at London School of Economics and Political Science and the Humanitarian Law Center gratefully acknowledge the support of the Open Society Institute (OSI) and the Organisation for Security and Cooperation in Europe (OSCE) that made this event possible.

for restorative approaches to transitional justice, and the need for a regional approach. Particular attention was given to the question how these gaps can be most adequately addressed by the recently-founded Coalition for the Establishment of a Regional Commission to Establish and Disclose the Facts about War Crimes and other Serious Human Rights Violations in the former Yugoslavia [Coalition for RECOM]. Ultimately, the goal was to discuss modalities of integrating restorative approaches to transitional justice more closely with the process and aim of European integration of the Western Balkans, as well as discuss and identify possibilities for the EU's institutional support for comprehensive transitional justice approach in the region.

This issue of the Forum for Transitional Justice presents the contributions to the conference organized in four thematic sections. The first part, 'Transitional Justice Strategy of the European Union: A Critical Assessment', identifies the limitations of the European Union's reliance on the International Criminal Tribunal for the former Yugoslavia as the sole mechanism of transitional justice in the region. Denisa Kostovicova reflects on the changed nature of conflict fought in the global context, which, as she argues, is critical for understanding the post-conflict and, in particular, the continued impact of transnational networks forged in the war. Kostovicova argues that the European Union's narrow pursuit of transitional justice in terms of retributive justice cannot lead to reckoning with the legacy of war crimes and gross human rights violations. According to her it can ultimately only help entrench partial interests embodied by transnational networks and their hold on the state in the aftermath of the conflict. Dick Oosting queries whether the EU has a transitional justice strategy at all, given a lack of vision to move from retributive to restorative justice. Therefore, he argues that the EU should use its leverage more effectively while overcoming its narrow perspective on justice and engaging with civil society. In her contribution, Merdijana Sadovic argues that the ICTY has made a contribution to reconciliation in the Western Balkans, whilst acknowledging criticism of the impact of the retributive justice as the sole mechanism of transitional justice.

The following part, entitled 'Restorative Justice: Approaches, Preconditions and Tools' examines the demand for restorative justice, and explores what restorative justice instruments can achieve as well as their limitations. Chandra Lekha Sriram's contribution explores the relationship between restorative justice approaches and the broader goal of community reconciliation by drawing on examples outside the Balkans. She highlights tensions and even contradictions between the tools of restorative justice, as a victim-oriented approach to justice, and social as well as community reconciliation. Nebojša Petrović's assessment of the progress and obstacles in dealing with the legacy of war crimes in Western Balkans is accompanied by a call for multi-track reconciliation. The role of young people in this process is particularly singled out. Writing from the anthropological perspective on transitional justice, Stephanie Schwandner-Sievers makes the case for a deconstruction of the cultural expression of collective emotion as essential to conflict transformation and peace-building.

The third part, entitled 'Coalition for RECOM: Origins, Aims and Ambitions' brings in the perspectives penned by the members of the Coalition for RECOM. They provide insight into the rationale behind the launching of the initiative, its goals, the consultation process as well as the modalities of its work. Nataša Kandić traces the origins of the RECOM idea, in the context of the limitations of the retributive justice mechanisms and the need for a victim-centred approach to transitional justice. The overview of the debates that accompanied the development of the Coalition for RECOM's goals and activities since the initiative was presented officially in May 2008, Kandić points out that the ultimate aim of the RECOM initiative, which is a regional civil society initiative, is to become a state project embraced by the governments in the post-Yugoslav states. In her contribution Tea Gorjanc-Prelević argues that the lever that the European Union has in shaping reforms in the Western Balkans ought to be used also in the sphere of transitional justice. She illustrated the potential impact that the EU could have with the decision of Montenegro's government to admit its responsibility for a crime committed against refugees from Bosnia and Herzegovina in 1992. Ultimately, Gorjanc-Prelević contends that the ability of the states and societies to deal with the legacy of war crimes also demonstrates their ability to live up to other obligations inclu-

ding the exercise of the rule of law and economic cooperation that are part and parcel of approximation to, and the eventual membership in the European Union. Vesna Teršelić queried whether the European Union approach to transitional justice in the Western Balkans can justifiably be discussed as a strategy given that it lacks clearly articulated objectives and implementation measures. She warned of an uneasy relationship that many members of the European Union to their own legacies of collaboration during the second world war, and called for a more equitable dialogue between the EU and its Western Balkan partners about issues related to dealing with the past. In her contribution, Valdete Idrizi reflects on the particular challenges that the RECOM initiative faces in Kosovo given the delicate political situation there. Pointing out the risks of politicization, she argues that the degree to which the RECOM will be able to foster a sense of ownership will be critical to the initiative's success and sustainability.

The concluding part, 'EU and Restorative Justice: The Role of Civil Society', builds on previous contributions from the EU's policy perspective. In particular, it addresses the EU's policy on transitional justice and the role of civil society in shaping that policy. Florence Hartmann's contribution highlights a counterproductive effect of the European Union's policy in the region. By failing to follow through on its support of retributive justice mechanisms and encourage and engage with civil society initiatives in the area of restorative justice, the EU is missing an opportunity to build on achievement in the area of transitional justice, however limited they may be. Analysing the impact of EU assistance on domestic NGOs and civil society networks accompanying the Stabilisation and Association process, Adam Fagan demonstrates referring to the Serbian case that the benefits have been indirect and incidental. He argues that while the benefits may be most tangible in the area of service provision, the external assistance to local civil society, and, more specifically to professional NGOs has fallen short of stimulating structural post-conflict reform and democratisation. Iavor Rangelov's contribution echoes Fagan's conclusion. Focusing on the potential contribution that civil society could make to advancing post-conflict transitional justice and, in particular, on the potential contribution of the EU to this process, Rangelov suggests that the latter has been missing for two reasons. On the one hand, the European approaches to transitional justice are framed as a competition between 'democracy' and 'stability' which leads to a choice between justice and security as opposed to investigate how the two could be mutually-reinforcing. On the other, Rangelov argues the EU embraces a depoliticized concept of civil society, emphasizing the role of non-state actors as service providers and partners of government. Lastly, presenting the European Union position, Thomas Gnocchi pointed out that facing the past is indispensable for reconciliation between countries and within countries. Emphasizing the importance of full cooperation with the ICTY for the European integration of post-Yugoslav states, Gnocchi listed a number of modalities in which the EU has been involved in supporting transitional justice processes. While these include primarily various aspects of retributive justice and institutional cooperation in support of domestic trials, he concluded by acknowledging the importance of civil society in facing the past.

The approach adopted by the conference, which is reflected in this special issue, is eclectic. The aim of the organizers was to bring together a range of voices, expressed in the academic, activist and policy styles adopted by the contributors to this volume. The diversity of perspectives was reflected in a rich and fruitful discussion about the question of European integration and restorative justice. The criticism of the EU's transitional justice strategy in the Western Balkans, embodied by the ICTY conditionality, has already been expressed vocally both in the academic, NGO and policy circles both in the region and internationally. At the same time, there have been critical assessments of restorative justice mechanisms, such as failed attempts by governments in the region to establish truth and reconciliation commissions. Despite critical assessments of the EU's approach to transitional justice in the Western Balkans and various transitional justice mechanisms in the region, there have been no attempts to reframe a narrow understanding of transitional justice as practiced and promoted by the European Union. Neither have there been efforts to rethink and redefine the role of the civil society with a view of a twin-goal of furthering restorative justice while promoting European integration. The conference has precisely addressed this gap,

or, more precisely, begun to address this gap. Building on the criticism of the EU's focus on retributive justice, it demonstrated both the necessity and the need for restorative justice in the region. It showed that the EU cannot claim to have a transitional justice strategy in the region as long as restorative justice initiatives remain outside its transformative agenda in the Western Balkans. The path-breaking initiative of the Coalition for RECOM, demonstrated persuasively a need for restorative justice as well as a need for the EU's support. In this context, civil society in the region could play a critical role. However, its current activism is not only constrained by the policies of local governments, but also by a notable lack of engagement by the EU.

Ultimately, the conference has put a new agenda and new challenge on the table both for the academic and the policy community: how can institutional support of the European Union for civil society restorative justice initiatives better promote both the process of European integration of the Western Balkans alongside furthering transitional justice? The answer to this question, as the contributions that follow in this volume show, lies not just in reconceptualising possibilities for justice based on recognition of its multiple stakeholder as well as opponents, but also in bold policy U-turns especially those within the EU's toolkit designed for the Western Balkans.

## **Part I**

# **The Transitional Justice Strategy of the European Union: A Critical Assessment**



# Balkan Wars, European Integration and Hague Conditionality

Denisa Kostovicova

We cannot understand the limits of the so-called Hague conditionality, which is the primary approach to transitional justice pursued by the European Union in the Western Balkans, without reflecting on the nature of the wars of the 1990s and their aftermath. Writing about crimes and gross human rights violations, Cohen argues that crimes and injuries do not comply with a historical time.<sup>1</sup> They cannot be outdated. In other words, one cannot simply forget and move on. Crimes such as those committed in Medak Pocket, Srebrenica or Racak, incite hurt, passions and tensions as if committed yesterday and not in a previous decade. Cohen says that the acknowledgment of the crimes is the only way that leads to closure, both for victims and perpetrators.<sup>2</sup> This means the ability to move on, but not necessarily to forget.

Why a need to focus on the violence of the 1990s and not simply on its consequences and its aftermath? Do Balkan wars need to be brought into a discussion of European integration, which is a forward-looking project? This paper argues that they do because the nature of post-conflict is inseparable from conflict. Transitional justice and

reckoning with the past are critical for a transition from negative peace to positive peace. Galtung distinguished between negative peace, understood in terms of the absence of violence, and positive peace, which implies the 'the integration of human society', and, effectively, is underwritten by a removal of structural causes of war.<sup>3</sup>

The wars fought in former Yugoslavia have led to the major change in the way we think about war in the twenty-first century. There is still disagreement among scholars about the appropriate terminology. Should these wars be called new post-modern, post nation-state wars, small wars, etc.? Nonetheless, a growing literature looks at how different these wars are.<sup>4</sup> Kaldor has argued that, unlike the first and second world wars, new wars do not start with a clear declaration of war, neither are they conducted through big battles, big armies and military encounters. They also differ from 'traditional' civil wars, such as the Spanish civil war, where parties seek control of their state power in order to assert their political interests and ideas. In other words, these wars are not 'just' about changing the politics of the state.<sup>5</sup>

1 Cohen, S., *States of Denial: Knowing about Atrocities and Suffering* (Cambridge: Polity, 2001).

2 Ibid., pp. 238-239.

3 Galtung, J., 'An Editorial', *Journal of Peace Research*, Vol. 1, No. 1 (1964), pp. 1-4.

4 This paper implicitly deals with the opponents of the 'new war' approach such as Kalyvas, Newman, etc. by looking at the complexity of the post-conflict context. Cf. Kalyvas, S.N., 'New' and 'old' civil wars: a valid distinction', *World Politics*, 4 (October 2001), pp. 99-118; Henderson, E.A. and Singer, J.A., 'New wars' and rumours of 'new wars', *International Interactions*, Vol. 28, No. 2 (2002), pp. 165-190; Duveystein, I. and Jan Angstrom, J., *Rethinking the Nature of War* (London and New York: Frank Cass, 2005).

5 Kaldor, M., *New and Old Wars: Organised Violence in a Global Era* (Polity Press, Cambridge, 1999).

In the so-called new wars, the frontline is everywhere. One's home becomes a battlefield. The enemy is most likely to be a band of marauding paramilitaries, while the nationalist rhetoric, used as a justification for violence, is most often only a cover for personal enrichment. Describing one of his comrades in the infamous Scorpion unit, one of its members says: 'He's filthy rich and it all came from the war, he's least of a patriot, he was always a profiteer.' The assets therefore include '500 sheep, I don't know how many horses, pigs...2.5 million (German) Marks...'<sup>6</sup>

The political economy of war perspective provides a critical explanation of personal profit making disguised as nation-building that unfolds in new wars. The privatisation of violence, as it was mastered in the wars in the Balkans, implies that pillage, looting, extortion and robbery become the main source of funding for paramilitary units and their activities. Private gain is also a dominant motivation. However, the prominence of material benefits accrued in the war, does not imply that violence is a side-effect of what is primarily an economic activity. Violence is critical for war as a form of income generation. Münkler argues that, 'The economy of robbery and plunder nearly always rests upon an extensive organisation of fear. The new wars exhibit a distinctive management of fear, which the armed side constructs and organises against the unarmed'.<sup>7</sup> Thus, the war as income generation and violence as a removal of the ethnic 'other' through displacement or killing become one. 'The politics of violence and profit merge' in new wars, as Duffield sums it up.<sup>8</sup>

The new wars approach has challenged the conventional thinking about wars. From the new wars perspective, violence is not irrational, nor is it a result of misunderstanding and communication breakdown. Similarly, it is not an inevitable result of ancient hatreds. Rather, it is constructed and rational, itself a result of deliberate action. Therefore, the war cannot be understood as a contest between two

sides, each trying to win. Rather the sides have an interest in putting off the resolution of the war. The resolution of war is elusive because the war, which appears as a breakdown or collapse, is actually an alternative system of profit, power and protection. As long as a war goes on so does profit-making. Scholars have demonstrated powerfully that there is nothing irrational, unpredictable, medieval or even mindless about the violence committed Bosnia-Herzegovina, Kosovo or Croatia, as well as those in Sierra Leone, the Congo or the Caucasus.

Such an interpretation of war is an important insight into the post-war legacy that is characterised by the instrumentalisation and manipulation of nationhood. There is an ironic contrast between how little the 'new fighters' care about their 'nation' during the war and how important this sense of nationhood as a collective category becomes after the war. The resistance of war crimes suspects and their political patrons to individualisation of criminal responsibility throughout the Balkans is a case in point. At the same time, the post-war context is defined by the permeation of the state with the networks formed along ethnic and economic interests in the wars. These ensure that the state remains weak, for it is state weakness that is a guarantee of their survival and source of personal enrichment even after the conflict.<sup>9</sup> A strong, democratic, accountable and effective state is their biggest threat, as was demonstrated by the assassination of Prime Minister Zoran Djindjić in Belgrade in 2003.

Fragmented states and societies in the Western Balkans provide a context into which the EU stepped with its carrot of EU membership.<sup>10</sup> Following Milošević's downfall in 2000, the Stabilisation and Association process (SAp) was designed for the Western Balkan aspirants to EU membership. The EU's enlargement to the countries on the other side of the Cold War divide in Europe was the extension of Europe-as-a-peace project model: ensuring peace and

6 'The Scorpions: A Home Movie,' Documentary Film, Humanitarian Law Center, Documentation and Memory, Belgrade, 2007.

7 Münkler, M., *The New Wars* (Cambridge: Polity, 2005), p. 14.

8 Duffield, M., 'Globalization, Transborder Trade, and War Economies,' in Berdal, M. and David M. Malone, D.M. (eds), *Greed and Grief: Economic Agendas in Civil Wars* (Boulder, Colo.: Lynne Rienner Publishers, 2000), pp. 69-89.

9 Kostovicova, D. and Bojicic-Dzelilovic, V., 'Europeanizing the Balkans: Rethinking the Post-communist and Post-conflict Transition', *Ethnopolitics*, Vol. 5, No. 3 (2006), pp. 223-241.

10 The following section draws on Kostovicova, D. and Glasius, M., 'The European Union as a State-builder: Policies towards Serbia and Sri Lanka,' *Suedosteuropa*, Special Issue: *Comparing the Balkans: War Legacies and State-Building in the Age of Globalisation*, Vol. 56, No. 1 (2008), pp. 84-114.

security via political and economic integration.<sup>11</sup> Locking the coal and steel industries of France and Germany to avoid war was the model exported to the Balkans. It offered a prospect of a European future to all countries and entities of the Western Balkans through a contractual relationship in the form of the Stabilisation and Association Agreement (SAA) accompanied by a programme of assistance and asymmetric trade liberalisation.<sup>12</sup>

However, the Western Balkans provided a unique challenge for the EU. The SAp's objectives, and in particular conditionality in the region, distinguished it from the accession approach applied to Central and Eastern Europe. As a policy instrument the SAp was tailored to match a double challenge of post-Communist and post-conflict transition in the Western Balkans. These instruments evolved from the model applied towards the post-Communist countries in Central and Eastern Europe, itself characterised by stricter conditions for accession than the previous new comers to the EU.<sup>13</sup> They were also shaped by an imperative to deal with the political, economic and security consequences of ethnic conflict in the Balkans.

The EU's operationalisation of transitional justice in terms of cooperation with the International Criminal Tribunal for the former Yugoslavia has had a contradictory impact in Serbia. While the ICTY conditionality did lead to the extradition of war crimes suspects (albeit not all at the time of writing), what is more debatable is the extent to which it has led to reflection on the recent past. The issue of transitional justice became a technical issue of extraditions, rather than reckoning with war crimes that would open up a possibility either of regional reconciliation, recognition of victims or consensus on the bloody decade. Throughout the former

Yugoslavia, suspected war criminals were hailed as patriots by their ethnic constituencies as they boarded a plane for the Hague. Nonetheless, the EU rubberstamped their extradition as a fulfilled condition.

Vinjamuri argues that the politics of justice must be integrated with the politics of peace.<sup>14</sup> In view of the EU's Balkan project, the key question is whether the politics of justice can or should be 'integrated with the politics of European integration' much more closely than it has been so far. Arguably, the EU has not fully exploited the potential partnership. Its top-down approach has led to the sidelining of critical stakeholders in transitional justice – that is societies. EU membership as a future vision unifies all peoples in the Western Balkans, and therein lies the EU's enduring leverage. Nonetheless, even the EU project is not immune to becoming a victim of the unresolved issues of the past.

A combination of continuing ethnification of the political sphere with obstructions of democratisation and strengthening of state capacity throughout the region can yet cripple the EU project. Rethinking the approach to transitional justice is a key step to tackling the legacy of new wars. The acknowledgment of crimes opens the door to the liberation of an individual from the imposed collective interpretation of nationhood, and a shift towards liberal and inclusive understanding of national affiliation. As importantly, accountability for past wrongs is critical for institutional recovery of the state from the networks of patronage and protection steeped in the conflict and thriving in the post-conflict environment. Rethinking its approach to transitional justice could prove decisive for the EU's ability to be the motor of transformation of the Western Balkans and the region's approximation to membership in the EU.

11 Smith, K.E., 'The Evolution and Application of EU Membership Conditionality', in Cremona, M., *The Enlargement of the European Union* (Oxford and New York: Oxford University Press, 2003), pp. 105-139, p. 107.

12 Cameron, F. and Kintis, A., 'Southeastern Europe and the European Union', *Journal of South East European and Black Sea Studies*, Vol. 1 (2001), pp. 94-112, p. 94.

13 Smith, K.E., 'Western actors and the promotion of democracy', in: Jan Zielonka and Alex Pravda (eds.), *Democratic Consolidation in Eastern Europe: Volume 2 International and Transitional Actors* (Oxford, New York: Oxford University Press, 2001), pp. 31-57.

14 Vinjamuri, L., 'Order and Justice in Iraq', *Survival*, Vol. 45, No. 4 (2003), pp. 135-152.

# The EU's Transitional Justice Strategy: Gaps and Opportunities

Dick Oosting

What is the European Union's transitional justice strategy? When considering the picture in the former Yugoslavia but also generally, the question should be: does the European Union (EU) *have* a strategy on transitional justice? The answer is: not really. Should it have one? Yes - that is to say, if the assumption is that you have to deal with the traumatic legacies of the past in order to build a stable future; that special attention should go to the needs and rights of people including in particular victims; and that only a comprehensive approach will rebuild trust among citizens and between citizens and the state. All of which is the essence of transitional justice.

In the former Yugoslavia, the focus has been on prosecution of war crimes. The EU made this a cornerstone of its accession policy vis-à-vis the countries concerned, making the start of negotiations conditional on full cooperation with the International Criminal Tribunal for the former Yugoslavia (ICTY). A proper human rights response, but it was never conceived to reflect a broader strategy in which war crimes prosecution links up with other key elements of transitional justice: truth-seeking, reparations, institutional reform. It has lacked the larger vision how to move from retributive to restorative justice.

That legacies of past massive human rights violations should somehow be addressed is now generally recognized in the context of the evolving European Security and Defence Policy (ESDP). However, it is not much more than a general notion, which in practice has remained largely limited to seeing "justice" at best as a function of providing primary security and stability. The focus is on immediate post-conflict crisis management and security sector reform. Lon-

ger-term peacebuilding and conflict prevention that incorporates a wider sense of justice have so far largely remained beyond the reach of concrete policymaking.

The UN has provided significant leadership in this emerging field by introducing transitional justice approaches into its peacekeeping and peacebuilding operations. The UN Secretary-General's 2004 report on The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (UN Doc. S/2004/616) marked growing understanding and application of transitional justice concepts and instruments. While some individual member states have begun to apply a more comprehensive ("whole-of-government") approach, the EU has yet to articulate a coherent policy on how "justice" in the broader sense ought to guide and direct its activities in peacebuilding and conflict prevention.

All of which is not to deny good intentions, nor to belittle certain achievements. For example, the latest and largest ESDP mission, EULEX in Kosovo, reflects steady progress in the EU's understanding and approach, with a strong focus on rule of law and providing further impetus and support for the functioning and reform of the justice sector. But that still does not add up to an overall strategy in Kosovo, which would enable the EU to apply stronger leverage on the authorities and more systematic support to society at large.

That it does not come so natural to the EU to apply a broader human rights lens to dealing with the past is perhaps not as surprising as it may seem. When considering how "Europe" has dealt with the traumas of its recent history, it is striking to see how much unfinished business there is. The continent has been wracked by conflict and repression

throughout the twentieth century, with major legacies of fascism and communism, as well as specific country traumas that have yet to be resolved properly - from Northern Ireland to Cyprus, from Spain to the former Yugoslavia. Only Germany can be said to have addressed its Holocaust past in a satisfactory manner. Of course Europe has come a long way. But it is sobering to see the extent to which the demons of the past still put their mark on the present. And how memory revived collective guilt when Europe – notably the EU – stood powerless as in its midst the Balkans were ravaged by war, ethnic cleansing and genocide.

With peace and stability the founding narrative of the European project, and prosperity it promises, the EU has been remarkably successful in bringing countries that only recently suffered oppressive rule on track towards democracy. But in the enlargement process, the rights dimension could have been deepened by applying the broad Copenhagen criteria more specifically to deal with the past. There is growing realization that opportunities have been missed with the wave of countries from the former Eastern block that joined in 2004, and even more so with the entry of Romania and Bulgaria in 2007.

Surely all that should be cause for greater care when viewing the engagement for the remaining countries of the former Yugoslavia to join the EU. This is not just a matter of avoiding that serious problems are imported into the Union (the case of Cyprus is another salutary lesson in that respect). It should also be a matter of doing justice to the people in these countries, and of the evident reality that far more is needed to transform these societies than seeing the main war criminals in The Hague.

This means that the EU should consider how to extend its influence and use its leverage more effectively. There is no doubt that that leverage has enormous potential. But to exert it to the full requires a more comprehensive vision,

based on the Copenhagen criteria, that draws on the evident need to address the multiple legacies of the wars more fully. Call it transitional justice, or call it social reconstruction, promoting good governance or simply democratization, the particular history of this part of Europe demands a different and deeper political engagement.

It is stating the obvious, but the wars have not been resolved: the peace is widely regarded a “negative peace”, the traumas of massive human rights violations have hardly begun to heal, the nationalist narratives remain strong and exclusive as ever, divisions are deepening rather than closing, political arrangements in Bosnia and Herzegovina and in Kosovo are contested fiercely. The mix is poisonous. How is the EU going to “integrate” all that?

This is no plea for more conditionality in the formal sense. But it does argue for stronger political engagement that is rooted in a more systematic analysis of how the past has been addressed. This requires an approach, a strategy that goes beyond prosecution of war crimes and shoring up the justice system, pushing for better governance and economic reform, and pouring in money – however important all that is. It requires looking at the gaps in the transition from a broader justice point of view, notably in the spheres of seeking truth, more equitable reparations, wider institutional reform, and restoring the dignity of victims.

It is necessary to reach beyond the formal structures and actors, to see what more can be done to empower civil society. To draw on the evident strength that civil society can muster as we see in the growing movement spreading across the former Yugoslavia to call for the establishment of a regional commission to establish and disclose facts about war crimes committed in the region. And last but not least, it requires a measure of self-reflection and modesty on the part of the EU, for this can and must be more than a one-way process.

# ICTY's Contribution to the Reconciliation Process in the Balkans

Merdijana Sadović

Before one can even start discussing the contribution of the International Criminal Tribunal for the former Yugoslavia (ICTY) to the reconciliation process, a few questions must be raised: was there any alternative to it in the early 1990s? Was there any other institution or process that would have done this job more successfully and achieved better results? It is my firm belief that the ICTY, as imperfect as it is, was the best way to address the problem of war crimes at the time it was set up and in many years after the war. Whether we want to admit it or not, it helped establish historical facts about the wars in the former Yugoslavia in the 1990s. Did it also help the reconciliation process in the region? It certainly did, but not as much as many hoped it would.

Justice and reconciliation do not always go hand in hand. As a matter of fact, very often it seems to be quite the opposite. Many judgements handed down by the tribunal actually completely polarized society in the Balkans, but that does not mean we would be better off without these verdicts in the first place. When people speak about reconciliation, they usually assume that it has to involve individual or even collective acts of confession and forgiveness. But this kind of reconciliation is rare in post-war situations, and in the context of discussions about the ICTY and reconciliation in the Balkans, many find it more useful to speak about concepts such as "social reconstruction". Reconciliation does not have to be a spiritual thing, it can be very pragmatic. It does not necessarily mean stopping hating anybody, or starting to love some. It's about building working relations in politics and society. And in the long run, it is possible that these relations could give rise to some kind of reconciliation. This is a complex process in which all segments of society have to be involved. However, it is clear that there still is not enough willingness to embark on it and start

working on it properly. When it comes to the tribunal and its role in this process, I would say that it should not be underestimated.

The ICTY was established in 1993 with the aim of bringing to justice those most responsible for war crimes committed in the former Yugoslavia. And ever since, the tribunal has been emphasizing that prosecuting war crimes is its priority, not establishing the historical facts or helping reconciliation processes in the Balkans. Its work was supposed to start and finish there. However, over the years an expectation has persisted that the ICTY's work would or should help to reconcile the peoples of the Balkans with their violent recent history, even if only as a by-product of its central, specifically judicial aims. The more the tribunal failed to meet these expectations, the more it was criticized, although not always justly.

Another task, which is central to the process of reconciliation, is establishing an accurate historical record of the events that have disrupted a society. Of course, the question of truth in this context is complex and it would be naive to expect all sides involved in the wars in the former Yugoslavia to quickly arrive at a consensus on what exactly occurred here in the 1990s. It is natural that in post conflict societies every community feels victimised and it is that much harder to establish a shared truth.

But how much did the ICTY contribute to this process? I would say a lot. First of all, some of the findings in the ICTY's judgements have been accepted as truth by almost everyone in the region. The most obvious example is, of course, the Srebrenica genocide. In its historic ruling in the case against Radislav Krstić, the ICTY judges confirmed that crimes committed in Srebrenica in 1995 amounted to genocide. Almost no one in the Balkans disputes that now.

Some of its other findings have still not been accepted by all sides in the recent conflicts, such as that a plan to create a greater Serbia existed and that ethnic cleansing occurred as a direct consequence of that plan. But wider acceptance of these facts may come in time. The process of establishing the truth about the Yugoslav conflicts is painfully slow, but it seems that, step by step, the tribunal is at least narrowing the scope of permissible lies.

Denial is a tough enemy of any reconciliation process and is very hard to defeat. The tribunal claims that in the light of its work, "It is now not tenable for anyone to dispute the reality of the crimes that were committed in and around Bratunac, Brčko, Čelebići, Dubrovnik, Foča, Prijedor, Sarajevo, Srebrenica, and Zvornik, to name but a few." But the fact is that across the region, many people continue to do just that. Every ethnic group accuses the ICTY of being biased as soon as people from their ranks are put on trial.

Another problem is that there are many of those who did not participate directly in the crimes, but they did nothing to stop them either. Others have continuously supported the perpetrators of those crimes. Therefore, it is obvious why they do not want to accept the truth about the war that the ICTY is presenting to them – if they did, then they would have to share responsibility for the crimes committed.

One aspect of events in The Hague that many hoped would be an especially powerful force in helping to foster reconciliation in the Balkans were the decisions by a number of former officials and soldiers to admit their involvement in atrocities. Inevitably, however, the reality of such confessions has been very complex. Many initially saw it as a breakthrough when former high-ranking Bosnian Serb official Biljana Plavšić pleaded guilty in 2002 to persecuting non-Serbs in Bosnia. In return, prosecutors dropped other charges against her, including genocide. A report by the International Centre for Transitional Justice argued in October 2004 that "her expressions of remorse during and after the hearing, combined with her decision not to appeal her 11-year sentence, may have contributed to the process of justice and reconciliation." However, many observers at the time expressed serious doubts about the sincerity of Biljana Plavšić's confession. Unfortunately, they proved to be right, because earlier this year Plavšić apparently admitted in an interview she gave to Swedish media that the only reason she pleaded guilty was so that she could bargain for the other charges.

The lack of outreach in the early years of the ICTY has also been a major obstacle to its chances of contributing to reconciliation in the Balkans. Given the fact that the ICTY started its outreach programme only in late 1999, some argue that the ICTY was seriously negligent in its failure to address people in the region. As a result, local communities often tended to the conclusion that the tribunal favours other interests than their own. In these circumstances, it has been possible for politicians to 'fish in troubled waters' and seek to use criticism of the tribunal to achieve their own goals.

Another major problem I want to mention is the tribunal's lack of transparency. The way this court has dealt with the transcripts of Serbia's Supreme Defence Council's meetings further fueled distrust people have in this institution. The fact is that by providing confidential measures to these documents the tribunal put the interest of the state above the interest of the victims who seek the truth.

With regard to the European Union's Hague conditionality, maybe this was not the best possible approach, but we can not deny that it was very effective and resulted in many arrests. Of course, the main problem is that there is no wider strategy, and the focus is only on the arrests of individuals suspected of war crimes. The obvious question is how much interest the EU will have in the issue of war crimes or transitional justice once former Bosnian Serb Army Commander Ratko Mladić and former Croatian Serb leader Goran Hadžić are detained, or the tribunal closes down, whatever comes first.

To sum it up, whatever weaknesses the ICTY has when it comes to mapping the history of the Balkan wars or reconciliation in the region, the fact is that for a long time it has been one of only a limited number of institutions carrying out such work on such a large scale. However, it is time for other mechanisms to be put in place that will be complementary to the work of this court and which would help reconciliation in the region. As a conclusion, let me quote from the report issued by the Scholars' Initiative in 2006: "Reconciliation, if it is to be achieved, is an immense task which will clearly require more than judicial intervention, and will extend well beyond the lifetime of the tribunal." Obviously, we cannot rely only on the ICTY or local war crimes courts to do that job – we all have to take part in it.



## **PART II**

### **Restorative Justice: Approaches, Preconditions and Tools**



# What can Restorative Justice Contribute? Lessons from beyond the Balkans

Chandra Lekha Sriram

In this short note, I seek to consider what restorative justice can contribute in post-conflict and post-atrocity societies. I develop this discussion in comparative perspective, drawing upon experiences outside the Balkans in an attempt to shed light upon the recurrent opportunities and challenges of this approach to justice, which are likely to arise in the Balkans as well. In so doing, I consider whether and if so why restorative justice (which I will define below), might be preferable in some instances to retributive justice such as that pursued by trials or in some cases truth commissions. If this is, or is not, the case, it certainly has policy ramifications for decisions by the European Union (EU) about conditioning EU integration on the ICTY. Given the wide range of global experiences with the promotion of restorative justice, and drawing on my own work, which is largely outside Europe, I will discuss experiences from outside the Balkans.

Before discussing the relative merits of so-called restorative justice, it is essential to be clear about the various purposes for which it may be developed, as well as therefore the various tools which might be used. Restorative justice may have as a broader aim social reconciliation, but in large part it is conceived of as part of a victim-oriented approach to past abuses.<sup>1</sup> However, there often appears to be some confu-

sion about the difference between the pursuit of social and community reconciliation, including the return of former combatants to communities which they may have wronged, and restorative justice, which seeks to address the needs of victims and/or restore specific social relations (between victim and perpetrator). This in significant part is because many of the tools are similar, at least superficially. I will begin by quickly explaining the arguments which have been made for victim-centred approaches to past abuses that utilize restorative tools, before turning to the range of tools which might be used. I consider how the confusion between tools of community reconciliation and restorative justice may be problematic in practice, specifically through a discussion of cleansing and reconciliation processes in Northern Uganda, the use of reconciliation mechanisms in East Timor, and the *gacaca* process in Rwanda. Finally, I consider a number of challenges inherent in pursuing restorative justice.

## Why restorative justice? The victim-centred approach

Those who advocate a victim oriented approach, such as Naomi Roht-Arriaza and others, do not reject other tools of transitional justice such as trials or truth commissions, but emphasize the importance of victims' needs, and of dealing

<sup>1</sup> On victim-centred approaches, see Naomi Roht-Arriaza, "Punishment, Redress, and Pardon: Theoretical and Psychological approaches," in *Impunity and Human Rights in International Law and Practice*, ed. Naomi Roht-Arriaza, (Oxford: Oxford University Press, 1995), pp. 13-23. On debates about reparation, restitution, and restoration, see John Torpey, ed., *Politics and the Past: On Repairing Historical Injustices* (Oxford: Rowman and Littlefield, 2003).

with the psychological trauma inflicted by state terror and atrocity. In particular, this strain of thought has emphasized the need to assist victims in lessening their own sense of victimization and regaining a sense of control. This may mitigate the often widespread ostracizing of apparent victims on the grounds that “there is something they must have done,” which places the blame on victims rather than the perpetrators. Some practitioners of transitional justice further emphasize the need of victims for catharsis, and on the need to utilize tools that might help serve to support their healing. These may include not only processes that seek to repair specific harm, including through the return of stolen property, but also that seek to address emotional scars, including through attempts to mediate and repair relations between victims and perpetrators.

Why do its advocates prefer restorative justice methods to retributive justice? In some circumstances, they argue, tools such as trials and commissions might not always serve the needs of victims particularly well. Indeed, they suggest, victims who act as witnesses in such processes may well be re-traumatized in so doing. Victims may feel the need to be listened to and have their stories validated, but truth commissions and particularly trials may not be the best or only mechanisms to do this and may not fully address the other harms that the victims suffered. Past abuses leave enduring psychological and material scars: apologies and reparations, alone or jointly, advocates argue, may begin to address victims’ trauma. However, while the arguments for restorative justice have grown in the transitional justice literature recently, processes of restoration are not particularly new. Reparations and restitution have been offered in a number of post-atrocity situations, particularly in Latin America.

### Tools of restorative justice

So, what are some of the specific tools of restorative justice? Apologies, reparations, symbolic measures such as memorials, and restitution, as well as the development of historical records, may be designed to restore dignity to victims. While measures such as restitution and reparation might be

designed to benefit specific victims on an individual basis, they may also be used to benefit whole communities, as in Peru.<sup>2</sup> By comparison, in Colombia, the process initiated by the Justice and Peace Law for the Disarmament, Demobilization and Reintegration (DDR) of members of the paramilitaries entails individual reparations to victims.

### National/community reconciliation or individual restorative process?

Restorative processes emphasizing the needs of victims may be complementary to, but also may be conflated with, processes which seek to promote national or community-level reconciliation. Thus, for example, commissions of inquiry may seek to address needs of victims and simultaneously to promote national reconciliation, or what the International Center for Transitional Justice (ICTJ) advocates as the promotion of civic trust. However, while it might well be important to seek to promote civic trust generally, it cannot be assumed therefore that it has been embraced by many, much less all, victims. Similarly, a range of processes for return of individual perpetrators to affected communities may enable wider social reconciliation, but not necessarily reconcile specific victims with perpetrators or address the needs of specific individual victims.

This is not to say that there aren’t conciliation mechanisms that could do the latter, because there are, many of them so-called traditional mechanisms. However, confusion about the relation between reconciliation and restorative processes emerges quite clearly in practice when such mechanisms are used to address serious atrocities. These problems in practice are exacerbated by the cooptation of mechanisms, which were not designed to cope with serious atrocities. The confusion of community-oriented vs. individually-oriented processes may mean that while restorative processes are developed by those promoting transitional justice, they are designed in ways that, placing a premium on community reconciliation, may be inconsistent with victim preferences. I turn now to a number of concrete examples to illustrate this point.

<sup>2</sup> For a comprehensive study of reparations policies globally, see Pablo de Greiff, ed., *The Handbook of Reparations* (Oxford: Oxford University Press, 2006).

<sup>3</sup> These points draw upon an analysis developed in Johanna Herman and Chandra Lekha Sriram “DDR and Transitional Justice: Bridging the Divide?” (paper prepared for “The Political Economy of DDR” project, Tromso, 2008).

### *Confusion of roles in Northern Uganda*

Attempts to reintegrate former combatants into their home communities in northern Uganda demonstrate well the confusion between ceremonies designed to promote reconciliation in a community context, and between a victim and perpetrator.<sup>3</sup> In this situation, processes have included public confession, cleansing ceremonies, and other rituals. However, healing and cleansing ceremonies appear to have been conflated with the conflict resolution ceremony of *mato oput*. As a result, cleansing, which observers have mistakenly believed to be *mato oput*, has been utilized at a community reconciliation level, as part of accepting a returning combatant. However, this is not *mato oput*, which traditionally entails a more extensive process of reconciliation between parties concerning one individual. Thus while in principle mechanisms like *mato oput* might satisfy some victims and be conceived of as restorative justice for victims, in some instances in practice it may be largely oriented towards the broader community. Discussions continue about the appropriate use of *mato oput* in this context.

### Cooptation and coercion in Rwanda

In Rwanda, the so-called traditional process called *gacaca* has been coopted to provide for public hearing and punishment of lower-level perpetrators of crimes in that country's 1994 genocide. However, the process is also presented at times as restorative, offering the opportunity for victims to face those who harmed them and hear apologies, and because the punishment meted out can include community service, or possibly therefore a measure of restorative justice for a community. However, there are a number of flaws, including the frequent presence of significant numbers of perpetrators' relatives at the proceedings, such that some victims have indicated that they felt coerced into accepting apologies. Further, this approach appears to be a somewhat confused mixture of both retributive and restorative justice, and of community with individual reconciliation. If, as advocates of restorative justice argue, processes should be designed with victims' needs in mind, it is not clear that *gacaca* as practiced here truly does this.

### *Community or individual reconciliation in East Timor?*

In East Timor, the formal retributive process Serious Crimes Regime co-existed with another transitional justice mechanism, the Commission for Reception, Truth and Reconciliation (CAVR). The CAVR had a mandate to establish the truth regarding human rights violations in Timor-Leste between 1974 and October 1999, but it also included a provision for

the establishment of Community Reconciliation Procedures (CRP), through which people accused of relatively less serious crimes, such as theft, minor assault, arson (other than resulting in death or injury), and the killing of livestock or destruction of crops could seek to take part in a local hearing, modelled in part on a traditional justice approach known as *adat*. Reconciliation processes included procedures for the return of perpetrators to communities which were both victim and community focused. While they included elements of restorative justice in that victims could directly address perpetrators, who were to admit their wrongs and apologize, CRP procedures involved a decision by the community regarding whether a specific perpetrator could return to it. As such, then, these processes may well have confused individual restorative purposes with broader community reconciliation. Similarly, reparations and service to individual victims were required of perpetrators, while service to communities was also sometimes imposed. This approach was subject to a range of other criticisms as well, including that some perpetrators fell between the cracks, neither addressed by the formal justice process or the reconciliation process.

### Limits to restorative justice

Restorative justice, as discussed above, could involve apology, memorial, restitution, and reparation. What is essential is that it seeks to address the needs of victims in the wake of serious human rights abuses. But there is a difficulty here. First, in such situations, there may be a great number of victims, and they may not all prefer the same measures. Reparations policies can never be tailored to respond to every individual situation—rather, as in Peru, victims will be placed into different categories (families of those killed or disappeared; victims of torture; persons who were forcibly displaced). Second, in many societies there are not simply clear-cut categories of victims or perpetrators. Often, individuals will be both victims and perpetrators, particularly, as in Sierra Leone or northern Uganda, where there has been widespread forcible recruitment of both children and adults as fighters. Third, often the measure which victims might prefer may not be on offer: symbolic measures may seem insufficient, and material benefits may be viewed as insulting or too small, a problem exacerbated by the likelihood that governments may lack resources (or interest) to offer significant reparations. In Guatemala, some victims' groups emphatically rejected symbolic measures as useless. Restorative justice measures may also prove problematic where they are part of an asymmetrical or undemocratic process of transition, as critics have argued is the case in Colombia, where the process of demobilizing the paramilitaries, closely aligned with the government, cannot be defined as a transition or

peace process at all. Further, where restorative processes rely upon so-called traditional justice or conflict resolution methods, these methods may not be well-suited to addressing serious crimes. Finally, the term restorative justice implies an attempt to do something which is at some level impossible: restore what has been damaged by atrocities. It is self-evident that death and injury cannot be reversed, restoring the *status quo ante*. Similarly, relationships of trust, whether between specific individuals such as victims and perpetrators, or broader social trust, are at best difficult to restore.

### **Conclusion**

None of this is to suggest that restorative measures are without utility. And indeed, the right to remedy and reparation

and the obligation to provide reparations is an emergent legal norm, as evidenced by the 2005 UNGA resolution setting out *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and International Humanitarian Law*.<sup>4</sup> Further, as is well-known, punishments imposed by the ICC can include fines as well as imprisonment, with the former being deposited in a victims' trust fund, which can also receive donations from other sources. However, what practitioners and scholars alike need to do is to be clear what the place of restorative justice is amongst other transitional justice measures, to understand where it is and is not consistent with broader community reconciliation goals and tools or with the needs of individual victims, and to grasp some of the limitations inherent in restorative justice.

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<sup>4</sup> *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and International Humanitarian Law*, UN General Assembly Resolution 60/47 (16 December 2005), at <http://www2.ohchr.org/english/law/remedy.htm>.

# Human Potential for Restorative Justice in the Balkans

Nebojša Petrović

One and a half decades after the Balkans wars, many aspects of their legacy continue to burden the memories of the victims, the conscience of the perpetrators and nearly everyone's daily lives. As such great social upheaval cannot be handled in the usual ways. Throughout human history people have tried to resolve them in some other ways. The roots of the concept of restorative justice lie in justice practices of the ancient Arabs, Greeks, Romans as well as those of various religions, including Buddhism, Hinduism, Taoism and Confucianism, that recognized the importance of restoring community harmony and balance after wrongdoing or disruptive events.<sup>5</sup> This is because restorative justice focuses on losses, repairs the damage inflicted, seeks to satisfy the parties involved and views the victims as the central person in the whole process.<sup>6</sup> Furthermore, restorative justice involves offenders, too. By being inclusive, restorative justice gives the victims, offenders and the affected communities the opportunity to participate meaningfully in the subsequent reintegration of the community.

Therefore, it is praiseworthy that the restorative justice approach is finally being discussed in the Balkans as well.

This is not because retributive justice is something wrong, quite the opposite. Resorting to restorative justice is a kind of acknowledgement that full justice cannot be achieved by other means. Nevertheless, as I have been trained in social and general psychology, I know that when a person has a problem, the acknowledgement of the problem is a necessary prerequisite to resolving it. Even if one considers it as a substitute for retributive justice, restorative justice is not a bad one. It is not bad at all. It seems to be the only (or among a few) remaining ways to help societies recover. As former president of Chile Patricio Aylwin stated at his inaugural speech, to "strive for all truth and justice in so far as it [is] possible".<sup>7</sup>

When the post-conflict situation in the Balkans is viewed in a wider context, it ought to be noted that we are going in the right direction albeit slowly (even though it does not always seem like that). If one were to review scholarly articles and come up with a list of proposed steps leading towards reconciliation, one would have to state that the people, in the so-called Dayton triangle (including Bosnia and Herzegovina, Serbia and Croatia) have fulfilled all those recommendations to a greater or lesser degree. They

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5 J. Braithwaite (1999) 'Restorative Justice: Assessing Optimistic and Pessimistic Accounts' in M. Tonry (ed.) *Crime and Justice: A Review of Research* (Chicago, Illinois: University of Chicago Press).

6 E. Weitekamp (2002) 'Restorative justice: present prospects and future directions' in E. Weitekamp and H.J. Kerner (eds.) *Restorative Justice: Theoretical Foundation*. (Uffculme, UK: Willan Publishing).

7 M. Minow (1998) 'Between Vengeance and Forgiveness: South Africa's Truth and Reconciliation Commission.' *Negotiation Journal*, 14 (1998): 319-355.

have a common trade agreement - the Central European Free Trade Agreement (CEFTA); they share a common cultural space; they have national courts for war crimes; there is a possibility for free travel and cooperation for everybody who wants to; there is no rearmament; the Bosnian Parliament provided amnesty for all soldiers who did not commit war crimes long ago; young men do not want to serve in military garrisons; there is even a common basketball league; almost the whole population of Serbia can watch Croatian and Bosnian TV programmes – which is an important factor in the rehumanization and personalization of people from ‘the other side’ and a good way to reduce prejudice.

Of course, there are problems, too. War-time commander of the Bosnian Serb Army Ratko Mladic is still at large; Serbia and Bosnia are still not included in the Schengen white list; many people on all sides are still full of hatred, anger or resentment. At the same time, there are people who reap benefits from retaining the *status quo*, in material and other ways. Many of them want to evade responsibility. Importantly, they hold social and political power, and their efforts are slowing down our progress. Each step has been made with great difficulty and each new step towards reconciliation will be the same. However, if we compare the situation in 1995, to that in 2000 and, ultimately, to today’s situation, it cannot be denied that obvious progress has been made. Time is passing. Human lives are passing. Unfortunately, this progress has been very slow, but it has not been faster elsewhere either, for example in Germany after the second world war.<sup>8</sup> It takes a lot of time for a deep change in a society, in a psychological sense and in terms of a value system, to take place. Thus, it is possible to say that we are currently at an advanced phase of post-conflict transformation (advanced in terms of the passage of time, the wars in Croatia and Bosnia and Herzegovina ended nearly a decade and a half ago). This phase requires new solutions. In the rest of this paper, I will try to outline some ideas.

Firstly, we did not restrict our discussion here to some particular group, such as victims or offenders, or some other group. If we take into account the whole society or even societies we can conclude that complex circumstances

require complex solutions. Paradoxically, some aspects of these solutions may even contradict each other. Namely, we have at least three sovereign countries, and each country consists of different groups whose degrees and kind of involvement as well as interest in reconciliation differ. Therefore, I would argue for a systemic approach, that views reconciliation as a sum of all positive efforts of different stakeholders from all parts of a society minus all obstacles. In this approach, each act counts; many acts reinforce, while others, interfere with others, etc. These acts include: an article in a local newspaper, a priest’s sermon meeting a new friend from the other side, as well as leaders’ symbolic gestures or economic interdependence. I did not say that each act has the same power but just that each act counts. Some acts are intentional, many more are unintentional. However, as in the physical world, the balance has to be restored after turbulence. The problem is how to accelerate that process, especially since ethnic groups differ in their readiness for reconciliation.<sup>9</sup>

Therefore, what is necessary is *multi-track reconciliation*. This implies support and encouragement for all who wants to cooperate, exchange ideas, goods, emotions, etc. One cannot wait for the last distrustful person to change their mind because society cannot afford to lose its energy. On the contrary, they should be an engine for social recovery. Those who hesitate should be encouraged but not forced. The minority that openly opposes positive processes should be marginalized as much as possible. Those who are weakest and worst affected by the conflict should be helped by their community and the entire society, just as economic support is given by those better-off to the poorest segments of society.

That is the way to achieve maximum impact. A general atmosphere in a society causes a given type of interpersonal relations. A negative climate full of conflict incites distrust and doubt, which is reflected in the media, education and mutual interactions in every-day life. Such messages reinforce initial distrust and negative feelings towards the other side. Such a situation discourages even those people who could become proponents of reconciliation. However, if we

<sup>8</sup> G.A. Almond and S. Verba (1963) *The Civic Culture: Political Attitudes and Democracy in Five Nations* (Princeton: Princeton University Press).

<sup>9</sup> N. Petrović (2005) *Psihološke osnove pomirenja* (Beograd: Institut za psihologiju & Dokumentacioni centar „Ratovi 1991-99“).

allow multi-track developments where ever that is possible, this will be bound to improve the overall situation. Following the principle of positive feedback, this will create new opportunities for new institutions and individuals. And I come back to the problem of finding appropriate visionary leaders, 'pioneers' - "one who goes first to prepare or open up the way for others to follow; one who initiates, or takes part in initiating an enterprise or a course of action."<sup>10</sup> What are their desirable characteristics? How to enhance those already existing and how to initiate the development of others? Many structural acts can serve as an incentive to improve a situation. As a psychologist, I always emphasize human energy.

Who, then, of the so-called ordinary people is most interested in changes in the long run? The answer seems to lie in the young generation for the following reason. Even in situations where they have the same degree of experienced loss, the young have a less destroyed sense of life, because they have greater opportunities to begin a new life, no matter how great their previous losses have been. Thus, their hope for the future is more expressive and it can be developed earlier and faster. This does not mean that people of all ages with war traumas should not be treated with equal care. It only means that it is easier to find stronger bearers of positive transformation in the young, while all members of a society could benefit from these changes.

One of the possible ways to overcome obstacles in strengthening peace (on a subjective level) is by nurturing such future leaders through additional professional training. They would thus gain the necessary knowledge and skills that will be used to overcome impediments in their communities. Knowledge and skill will not be the only goal and the desired outcome of such training. It will also stimulate and inspire dedication for such tasks. In order to become successful and respectable future leaders, trainees should have a core theoretical knowledge of the phenomena and problems they could face during their work. The skill to inspire positive qualities in others, together with dedication to this work, is also an important feature of future leaders. The

knowledge itself could remain futile, just as motivation that is without any previous knowledge cannot bear any fruitful results. Usually, organisations in this field arrange workshops with motivated people, where modern techniques are applied without much knowledge about the essence of the facts that are discussed. Therefore, it seems that in such circumstances the result is not as good as desired. Hence, all the aforementioned elements must be included. In conveying knowledge, apart from the classical methods, it is very important to apply both experiential learning and experiential understanding. Such new leaders should be 'critical yeast'<sup>11</sup> in their communities. It is necessary to resolve the 'scale-up problem' successfully.<sup>12</sup> This refers to the manner of moving from a small group of people who are transformed by a process to ever larger groups of people, equally transformed, until the whole society can see the future in a new and hopefully brighter light. It should also be our task to bring over to our side, in terms of values, ideas and political activism, as many people as possible, and help change the society that way.

The main effect that the young leaders should create and disseminate is a positive vision of the future. A lot of time has already passed since the end of the wars in the Balkans and it is high time to take a long-term perspective into consideration. One of the most important elements in that sense is hope. When I used to mention hope in the past, many of my listeners thought this was a much too spiritual a concept for political reality. However, the last U.S. elections have clearly shown that it can work. I can quote various terms – 'envisioning the desired future state,' 'social imaging,' 'future search' – to characterise the process by which individuals, groups, or organisations are encouraged to free themselves from the constraints of current reality to develop an image of a better future. And such an image has, by itself, a powerful motivational strength.

Therefore, I would like to conclude by repeating that we must be aware that reconciliation is a long and slow process, that it has many adversaries, but we cannot afford only to lament over the problem, because Obraz (an nationalist

10 P.Grenier, P. (2004) 'The New Pioneers. The People Behind Global Civil Society' in H. Anheier, M.Glasius and M. Kaldor (eds). *Global Civil Society 2004/5* (London: Sage).

11 J.P.Lederach, (2005) *The Moral Imagination. The Art and Soul of Building Peace* (Oxford: Oxford University Press).

12 M.Maiese (April 2005) 'Scale-up Problem' *Beyond Intractability*. Ed. Guy Burgess and Heidi Burgess. DATE. Conflict Research Consortium, University of Colorado, Boulder, Colorado, USA. [http://www.beyondintractability.org/essay/scale\\_up/](http://www.beyondintractability.org/essay/scale_up/).

non-governmental youth organisation in Serbia), or the Serbian Radical Party (the extreme nationalist party in Serbia), or someone else with similar outlook will always be here. They are like a natural disaster, like a bad weather or a storm.

However, we should come to grips with them, compete with them and offer a morally superior and more effective vision that can persuade gradually more and more people that overcoming the negative war legacy will bring benefits to all.

# Emotions and Transitional Justice: On the Restorative Potentials of Symbolic Communication in Kosovo

Stephanie Schwandner-Sievers

This contribution agrees with those theorists who claim that there cannot be any form of externally-facilitated conflict transformation and peace building which does not take local socio-cultural specificity into account and which does not pay attention to local processes of social healing. With due concern for cultural contextuality and change the question is, thus, in what ways can such specificity and processes be identified, recognized and integrated into region-wide reconciliation efforts without perpetuating local, divisive politics of memory and identity (where these form an important part of local culture)? Using the case study of post-war Kosovo this paper aims to contribute some socio-anthropological and ethnographically grounded perspectives to this question. It suggests that one site in which the cultural expression of collective emotions can be located and alternative potentials for culturally sensitive peace-building be explored, would be through investigating symbolic expressions of concerns in collective rituals and narratives of the war. Inspired by Münkler's theories on asymmetric wars, it also identifies existing gaps of communication and interaction along a continuum of 'post-heroic' vs 'heroic' socio-cultural orientations in the new assemblages of population groups that shape the wider post-war culture in Kosovo.<sup>13</sup> This approach cross-cuts standard assumptions and perceptions of categorical difference in terms of

ethnic, national, regional or international difference and questions standard dichotomies such as victim vs perpetrator; rural vs urban; social vs political process. These are the dichotomies of thought that may conceal realities as actually experienced on the ground. The paper thus advocates cultural reflexivity for all sides involved in addition to the exploration of and respect for local culture as a repository of alternative peace-building potentials, if a transition from heroic to more post-heroic ideological orientations is to be made possible.

Development projects anywhere, including reconciliation projects, have been demonstrated as liable to fail if they ignore the ways in which history reflects 'outcomes of struggles between contending social groups located in concrete social formations'<sup>14</sup> rather than following a single pathway of progress, quasi 'simply a *deus ex machina*, in which culture and political processes play no role'.<sup>15</sup> Critical academic observers of intervention after war, anywhere, and for the Balkans specifically, have warned that externally-imposed and alien models (such as the therapeutic paradigm of psycho-social intervention based on the individualist, US post-Vietnam paradigm) can have unintended and adverse consequences that 'impede post-conflict recovery by delegitimising local coping strategies and weakening commu-

13 Münkler, H., *Der Wandel des Krieges: Von der Symmetrie zur Asymmetrie*. Weilerswist: Velbrück Wissenschaft, 2006.

14 Edelman, M. and A. Haugerud. 'Introduction: the Anthropology of Development and Globalization,' in M. Edelman and A. Haugerud (eds) *The Anthropology of Development and Globalization: From Classical Political Economy to Contemporary Neoliberalism*, Oxford: Blackwell, 2008, 14.

15 Ibid., 2.

nal bonds.<sup>16</sup> This is because locally specific socio-cultural norms not only shape the ways in which people understand, experience and express their suffering, but they also provide an indigenous resource for social healing. Accordingly, while 'it is pivotal to recognise that the social fabric is a core target of modern warfare'<sup>17</sup>, as it was in the Yugoslav successor wars,<sup>18</sup> NGOs aiming to deal with post-war recovery also effectively 'need to support the structures which help these people to endure and keep going'.<sup>19</sup> Sustainable solutions must thus be locally sourced, 'trading on survivors' resilience, skills, and priorities'.<sup>20</sup>

In a similar vein, theories of conflict transformation advocate the need for restorative forms of justice in peace building processes. According to Paul Lederach, one of the most eminent scholars and practitioners in this field, restorative justice recognizes 'systemic rather than linear perspectives on people, relationships, processes, and context'.<sup>21</sup> It must respond to the fact that 'peace is not a static outcome but rather a set of dynamic processes embedded in the real-life context of people's lives and relationship, perceptions, hopes, and fears'.<sup>22</sup> He does not dismiss retributive justice, for it establishes accountability and recompense, but reminds us that it does so exclusively through prosecuting perpetrators for crimes against the laws of the state. This focus, however, excludes the victims from the process and thus restricts the chances of a sustainable peace building, which has to take into account the socio-cultural origins and context of conflict in order to transform it. According to Lederach, justice as part of conflict transformation processes needs to be victim-centred and not removed 'from

the actual relationship where the damage and harm were done'.<sup>23</sup> Peace cannot be sustainable 'when the victims are placed at a distance from access to and participation in the very thing that most affected their lives. Often we find that the victims feel powerless and marginalized, not only from the formal process but more important from the process of their own healing' in retributive systems of justice.<sup>24</sup> However, on the ground the distinction between victims and perpetrators is often blurred, as victims can become perpetrators and vice versa.<sup>25</sup> Restorative justice acknowledges that in many cultures and communities, crime is perceived as a 'wound in the community, a tear in the web of relationships'.<sup>26</sup> There can thus be no effective facilitation of conflict transformation or social healing which is not aware of the complexity of conflict and its socio-culturally embedded context and location which inform subsequent post-conflict concerns at stake.

The need for 'cultural sensitivity' has become acknowledged in many contemporary post-conflict intervention, democratization and development projects. For example, the training and employment literature of the EULEX mission in Kosovo routinely emphasizes the need to foster local ownership and cultural sensitivity among its employees. However, the ways in which such ideals should be applied - apart from general expressions of respect and standard forms of politeness - and what this culture that is to be taken into account consists of, does not always appear to be clear. Particularly, when local socio-cultural forms of coping with loss and grief are perceived as culturally alien and, perhaps, of adverse intent or even threatening to the

16 Pupavac, V. 'International Therapeutic Peace and Justice in Bosnia.' *Social and Legal Studies* 13(3) (2004): 377–402, 389.

17 Summerfield, D. 'Assisting Survivors of War and Atrocity: Notes of "Psycho-social" Issues for NGO workers', *Development in States of War*. London: Oxfam, 1996, 85-89, 89.

18 E.g. Sorabji, C. 'A Very Modern War: Terror and Territory in Bosnia-Herzegovina' in *War, a Cruel Necessity? The Bases of Institutionalized Violence*, ed. R. A. Hinde & H. E. Watson, London: Tauris, 1995; *Neighbors at War: Anthropological Perspectives on Yugoslav Ethnicity, Culture, and History*, ed. Halpern, J. M. and D. A. Kideckel, University Park: UP Pennsylvania, 2000.

19 Summerfield, op.cit., 88.

20 Ibid.

21 Lederach, J.P. 'Civil Society and Reconciliation' in *Turbulent Peace: The Challenges of Managing International Conflict*, ed. Ch. A. Crocker et al., Washington D.C.: US Institute of Peace Press, 2005, 854.

22 Ibid.

23 Ibid., 852.

24 Ibid.

25 E.g. Scheper-Hughes, N. and Ph. Bourgois, 'Introduction: Making Sense of Violence' in *Violence in War and Peace: An Anthology*, ed. N. Scheper-Hughes and Ph. Bourgois, Oxford: Blackwell, 2004; Keen, D. *Complex Emergencies*, Cambridge (UK): Polity Press, 2008.

26 Zehr, H. *The Little Book of Restorative Justice*, Intercourse, PA: Good Books, 2002, 20.

external actors, they become ignored, blocked or outright rejected. For example, while war memory and crimes are still important issues of concern negotiated in both politics and wider society in Kosovo, the US ambassador to Kosovo, Tina Kaidanow, stated in an interview with Radio Television Kosova in February 2009, ‘it makes no sense, none whatsoever, to talk about the historical wrongs of one variety or another or try to use the past as a process in ways that would dictate politics.’<sup>27</sup> In his key note address at a conference on *Dealing with the Past and Reconciliation* in Vienna in November 2008, Wolfgang Petritsch<sup>28</sup> similarly suggested that ‘ordinary people can start to move towards a shared future only if their everyday life stops to constantly reminding them of the pain of the past. Only if political stakeholders stop reinventing and manipulating the past for their own purposes will they create conditions for reconciliation.’<sup>29</sup>

This paper does not dispute the possibility of the politicisation of war memories and its pitfalls, but it argues that whether these are socially detached from grounded local concerns should be investigated rather than simply be assumed. It also notes that such voices form just one of the discourses within the globalised social assemblages which constitutes the post-war culture in Kosovo, even though one marked by its privileged positionality within asymmetric structures of power. Based on assumptions of a categorical difference between socially-grounded concerns and the political process, as well as apparently underpinned by a general discomfort of dealing with traumatic pasts, such voices may even become part of the reason why reconciliation fails to progress in Kosovo. Discomfort and a consequential silencing of victims through rejection of their cultures of grief has been identified as a universal phenomenon.<sup>30</sup> Yet the telling of, and listening to, victims’

stories is neither easy nor comfortable and, as anthropological studies of the South African Truth Commissions have shown, can even expose the victim to low status assignments and shame within their social home context,<sup>31</sup> if culturally available local means of circum-navigating such risks are ignored. But external voices demanding closure where local voices still call out for the recognition of crime, loss and grief through such means, appear simply premature. As Human Rights Watch pointedly noted:

In order to move forward as a society, Kosovo must come to terms with its past. To date, little progress has been made, despite reconciliation efforts by outside actors. While the impulse for reconciliation must come from within, international actors can help to create the conditions in which reconciliation is likely to take place.<sup>32</sup>

Ethnography is an anthropological method that allows for learning about local culture as a repository of indigenous social healing processes from within. My and my colleagues’ ethnographic research into post-war memory and nation-building in Kosovo from 2000 suggests that war commemoration in Kosovo emerged as a ubiquitous, bottom-up process, rooted in and emanating from the country side, where the worst atrocities happened, and from there emerging onto wider political platforms. Importantly, the rituals and memorials to the recent past fulfil not just political but also very important socio-psychological functions for the wider population on the ground. These two functions can hardly be separated in the case of Kosovo. On the one hand, the mushrooming of memorials in post-1999-war Kosovo must be seen as an inversion of the previous Serb statuary hegemony, which during the 1990s communicated to Albanians ‘this is not your place.’<sup>33</sup> On the other, from soon after the war, villages, hamlets and cities across

27 RTK interview, 03/02/09, <http://www.rtklive.com> (accessed 5 February 2009).

28 Austria’s permanent representative to the OSCE and former High Representative in Bosnia and Herzegovina.

29 Petritsch, W. ‘What Future for the Past?: Moving on Requires Looking Back’, keynote address at the international conference, *Dealing with the Past and Reconciliation in the Western Balkans*, 10 – 11 November, Vienna, 2008, [www.cdsee.org/pdf/2008\\_11\\_10\\_wp.pdf](http://www.cdsee.org/pdf/2008_11_10_wp.pdf) (accessed 09 April 2009), 6.

30 Herman, J. L. *Trauma and Recovery: from Domestic Abuse to Political Terror*. London: Rivers Oram Press/Pandora List, 2001.

31 Humphrey, M. ‘From Terror to Trauma: Commissioning Truth for National Reconciliation’, *Social Identities* 6(1), 2000: 7 – 27.

32 Human Rights Watch. *A Human Rights Agenda for a New Kosovo*. New York: Human Rights Watch, 2008, <http://www.hrw.org/en/reports/2008/02/14/human-rights-agenda-new-kosovo> (accessed 5 June 2009).

33 Clark, H. *Kosovo: Work in Progress: Closing the Cycle of Violence*. Coventry: Centre for the Study of Forgiveness and Reconciliation, 2002, 6.

Kosovo appeared to compete in erecting status to fallen local war heroes ('martyr'), thereby asserting their local status in relation to the wider national pantheon of heroes in symbolic communication amongst themselves. Politicians used the martyrs of their constituencies to boost their political legitimacy. Yet, at the same time, war commemoration would perhaps not be as important and socially supported, as it continues to be, if an external recognition of local grief had been sufficiently accomplished in any meaningful way. With Sigmund Freud it could be said that the monuments and memorials still serve as 'mnemic symbols,' to which people 'cling emotionally' until they can 'get [themselves] free of the past'.<sup>34</sup> The new Albanian memorials appear both as affirmations of claims on territory as well as symbolic outcries for recognition in more ways than simply political; they represent bottom-up, social memory. Kosovo's war memory is both socially and politically alive, defining this society as a 'heroic' one in the theoretical terms suggested by Herfried Münkler.<sup>35</sup> Accordingly, these are societies that idealise the willing and conscious human self-sacrifice for a wider cause as part of a (both politically and socially) comprehensive, religiously inspired, ideology of 'martyrdom'. 'Post-heroic' societies, in contrast, Münkler defines as resentful of such self-sacrifice, more de-sacralised (including in regard to sacred concepts of the nation) and, in tendency, preferring to pay mercenaries for the work of war. Post-heroic orientations evolved, for example in Germany after the first and the second world war, from the horror of, and responsibility for, deaths on overwhelming industrial scales. But rather than introducing new, normative, dichotomies of societal progress a more relativist approach of anthropology would emphasize thinking of 'heroic' and 'post-heroic' orientations as part of a cultural continuum within any given society rather than as a marker of qualitative difference between societies.

In Kosovo, as I have previously explored with my colleague Anna Di Lellio,<sup>36</sup> one particular messianic master-narrative

tive of militant resistance and sacrifice for the nation, i.e. martyrdom, has come to serve as the new nation's founding myth for the Albanians in Kosovo. Reference to the Jashari family is evoked in most Albanian political speeches and rituals, such as in the formal annual commemoration ceremonies, but its appeal is also deeply socio-culturally grounded. The master narrative evolves around the violent deaths of an early Kosovo Liberation Army (KLA) leader, Adem Jashari, and his extended family. Men, women and children died in three days of Serb shell-fire of the family's homes in March 1998, while, importantly for the Albanian discourse, fighting back with guns in their hands. Their martyrdom is perceived to have brought salvation through prompting NATO intervention. The narrative employs standard tropes of Albanian customary traditions and family ideals<sup>37</sup> such as, for example, *besa*, a cultural concept including the faithfulness to the given word and solidarity with one's family and friends even at the cost of death. In post-war Kosovo the site of the massacre has become a popular and mass-frequented pilgrimage centre and shrine to the nation. Various material, ritual and other symbolic reproductions of the iconic martyrdom emanate from the sacralised site of the destroyed houses, which has attracted hundreds of thousands of private Albanian visitors, school classes and organized travel groups. There are both profane and sacred aspects to these visit, and many pilgrims-tourists, specifically those who themselves suffered losses during the war, stand 'in awe at the place that embodies the religious themes of martyrdom and resurrection'<sup>38</sup>; some with tears in their eyes, uttering expressions of both pride and grief.

In our previous work on post-war memory Di Lellio and I identified the strong psycho-social function fulfilled by this master narrative. The fate of an entire family who fought back and resisted rather than being simply victimized, has a great collective identification potential for young and old, male and female survivors alike. It allows shifting 'the focus from "shameful" experiences of victimisation/humiliation

<sup>34</sup> Freud, S. *Two Short Accounts of Psycho-Analysis: Five Lectures on Psycho-Analysis – The Question of Lay Analysis*. Harmondsworth: Penguin, 1962, 39 and 40.

<sup>35</sup> Münkler, op.cit.

<sup>36</sup> Di Lellio, A. and S. Schwandner-Sievers. 'The Legendary Commander: The Construction of an Albanian Master-Narrative in Post-war Kosovo', *Nations and Nationalism* 12(3), 2006: 513 – 529; Di Lellio, A. and S. Schwandner-Sievers, 'Sacred Journey to a Nation: The Construction of a Shrine in Postwar Kosovo', *Journeys: the International Journal of Travel and Travel Writing* 7/1, 2006: 27 – 49.

<sup>37</sup> Di Lellio, A. and S. Schwandner-Sievers. 'Sacred Journey to a Nation', op.cit., 39-42.

<sup>38</sup> Ibid., 36.

to imparting pride.<sup>39</sup> The myth, rituals and monuments of the Jashari cult appear as a public expression of 'the speakable'; the brave and honourable, of this collective desire to distinguish pride from shame, in social memory. It allows the pilgrim-tourists the identification with agency through militant resistance, rather than reliving the humiliation of objectification experienced by victims. Arguably, this is about self-dignification rather than self-victimisation in response to experiences of humiliations and losses suffered and thus a form of collective self-healing.

However, many outsiders to such experience of suffering display considerable discomfort with the Jashari narrative and site. One reason is the fact that the Albanian heroes were regarded as terrorists in the Serb nationalist counter-narrative and it thus appears unsuitable as an inclusive founding myth of the new nation. Such discomfort can further be explained, to some extent, at least, with the growing class differences (indicative of access to different cultural capital) that are partly symptomatic of the post-socialist processes of social differentiation across the wider region. These have widened socio-cultural gaps between the cultural elites and the more economically, educationally or otherwise socially disadvantaged population groups, an effect also known as 'lift-off' effect in the anthropologies of development and civil society.<sup>40</sup> Accordingly some members of, for example, the local NGOs may be as cosmopolitan as their non-local (international) partners of cooperation and as distanced from those strata of the population who tend to have suffered most violence during the recent war as their 'Western' counterparts. In consequence, such national and international NGO partners' may share a general feeling of

alienation from the aesthetics of self-heroisation or self-victimisation that underpin many expressions of local identity and the local politics of memory in the wider post-Yugoslav space. Some local people may thus belong to groups of a 'post-heroic' orientation within wider society who are more likely to be distanced from the notion of intentional human self-sacrifice (in extension of Münkler).<sup>41</sup> When Di Lellio and I (at the time of our research in 2005) attempted to identify local, discordant and critical voices to the Jashari master-narrative and its militant style and message, we found these in private encounters with cosmopolitan urban elites. However, these appeared too unstructured to form an effective counter-narrative. Their core critique was mainly one of aesthetic distinction rather than of any dissent from the central message of militant resistance to oppression.<sup>42</sup> Ultimately they affirmed the narrative. More recent ethnographic observations suggest that the Jashari cult temporarily lost some of its significance with the independence declaration in February 2008, when posters and T-Shirts across the country called out to Adem Jashari, 'uncle: it has been done' (*bac u kry*). Growing resentment with developments since, however, revert this symbolic conversation in ironic slogans such as, for example: 'Not really, Mitrovica has gone. Don't lie to the uncle!' or 'Uncle, it has yet to be done'.<sup>43</sup> With generational change additionally new forms of commemoration win appeal, for example in pop songs, e.g. *Jeta Pa Ty*, 'Life without you', which tackles the subject of growing up without a father after the war.<sup>44</sup> Culture is dynamic, multi-layered and subject to change, and if we uphold the view that the past is made in the present, and that culture is an outcome rather a cause of conduct and circumstances,<sup>45</sup> we have to take notice of

39 Di Lellio, A. and S. Schwandner-Sievers. 'The Legendary Commander', op.cit., 527.

40 Mandel, R. 'Seeding Civil Society', in *Postsocialism. Ideals, Ideologies and Practices in Eurasia*, ed. C. Hann. London: Routledge, 2002; Sampson, S., 'Beyond transition: Rethinking elite configurations in the Balkans', in *Postsocialism. Ideals, Ideologies and Practices in Eurasia*, ed. C. Hann. London: Routledge, 2002.

41 Münkler, op.cit.

42 Di Lellio, A. and S. Schwandner-Sievers. 'The Legendary Commander', 520-524.

43 Thanks to Eli Krasniqi and Isabel Stroehle for informing me of this and similar new slogans which indicate new use in a variety of new social and political contexts on different scale that, unfortunately, cannot sufficiently be explored within the scope of this paper.

44 Thanks for pointing my attention to this to Justin Elliott; Scorpion feat, B-genius (Double G-Army), *Jeta pa Ty*, <http://www.youtube.com/watch?v=vUuUheLhS10> (accessed 3 February 2009).

45 Kuper, A. *Culture: The Anthropologist's Account*. Cambridge, MA: Harvard University Press, 2001, xi.

socio-cultural changes as well as of the risk of unintended, selective empowerment of specific internal interest groups through any outside intervention in local culture.<sup>46</sup> Having this in mind, a close look at local culture as a repository of alternative knowledge and forms of communication can help identify potentials that, if integrated, may provide new ideas for more sustainable, culturally sensitive, conflict transformation.

A possibility of this would be an exploration of the potentials within the Jashari cult itself. It emerges, for example, that some of the surviving family members hold great prestige among Albanian politicians and within wider society. Particularly Adem Jashari's older brother, Rifat, who returned from Germany after the war (he had, himself, lost several children in the 1998 massacre) had a calming influence among the Albanians when inter-group animosity was re-ignited, for example in the aftermath of the March 2004 riots in Kosovo. As part of the Jashari family history he also told the story of a Roma man who, soon after the second world war, saved the Jashari ancestors from starvation by given the grandfather a sack of flour.<sup>47</sup> This shows an example of inter-ethnic support within the narrative which holds the potential for individualizing responsibility. Furthermore, although a law (2004/39) was passed that assigns to the memorial complex of the Jashari compound the status of 'special national interest', the site itself is constructed with reference to universal human concerns. Plans envisage a peace park,<sup>48</sup> and several visitors' book entries point to the catastrophic nature of the events in term of wider concerns of humanity rather than to exclusively ethno-nationally ones.

If deep local systems of meaning that both inform social healing rituals and engender the legitimacy of positions of power<sup>49</sup> through their symbolism cannot be ignored, such local culture itself should be explored for innovative potentials that can be integrated into peace building and recon-

ciliation processes. The quest for justice and peace needs to take into account social emotion and its socio-cultural location. If it does not, it will be doomed to encourage processes of subversion and, ultimately, failure. The power of symbols and symbolic acts are not alien to Western Europe and heroic societal orientations are part of recent European history.<sup>50</sup> Willie Brandt's genuflection at the monument of the Ghetto Uprising in Warsaw (1970) is an important example of symbolic communication in politics that fostered the reconciliation process between two nations after war involving overwhelming human sacrifice.<sup>51</sup> Sites like that of the Jasharis would seem to offer unique opportunities to negotiate responsibility and crime on a public stage without the risk of exposing individual victims. Unfortunately it still seems too early to expect any Balkan politicians to perform acts of humility at such sites of social memory. But I wonder whether taking into account the healing potentials of symbolic communication is something which could be considered by the RECOM initiative, for example by representatives of all groups involved in peace-building initiatives visiting each other's sites of commemoration. Local webs of significance based on lived experience and unfulfilled desires of recognition of suffering, even if their cultural expression appears uncomfortable or alien to us, cannot simply be ignored. They offer great potential for a meaningful sharing of pain beyond ethno-national divides, which could provide Kosovo's, as well as other, local communities with external recognition and affirmation of dignity and hope. Where cultural divides between heroic and post-heroic cultural orientations have hindered such communication, a more self-reflexive stance might help to overcome the gaps of social interaction. A more integrative approach within a wider context of human security may help facilitate a process in which the ethno-nationalist politicisation of social memory becomes redundant and provide the space where alternative, post-heroic, voices within wider society can be heard.

46 Mandel, op.cit.

47 Hamzaj, B. and F. Hoti. *Jasharët: histori e rrëfyer nga Rifat, Besarta, Bashkim, Murat dhe Lulzim Jashari*. Prishtina: Zëri, 2003.

48 Di Lellio, A. and S. Schwandner-Sievers. 'Sacred Journey to a Nation', op.cit., 32.

49 Kostovicova, D. 'Legitimacy and International Administration: The Ahtisaari Settlement for Kosovo from a Human Security Perspective'. *International Peacekeeping* 15(5), 2008: 631–647.

50 Höpken, W. 'Krieg und historische Erinnerung auf dem Balkan', in *Geschichtliche Mythen in den Literaturen und Kulturen Ostmittel- und Südosteeuropas*, ed. E. Behring et al Stuttgart: Franz Steiner Verlag, 1999.

51 Montville, J. 'The Healing Function in Political Conflict Resolution', in *Conflict Resolution Theory and Practice: Integration and Application*, ed. D. Sandole and H. van der Merwe, Manchester: Manchester UP, 1993.

## **PART III**

### **Coalition for RECOM: Origins, Aims and Ambitions**



# The RECOM Initiative: From a Non-governmental Challenge to a State Project

Nataša Kandić

The idea for a regional commission for establishing the facts about war crimes committed in the former Yugoslavia, appeared during a discussion on the shortcomings and limitations of war crimes trials (the small number of indicted and convicted individuals, lack of victims' trust in courts of the state whose citizens are responsible for their suffering, lack of a strategy for processing war crimes, lack of regional cooperation, inaccessibility of witnesses and, generally, those that have suffered, illness and death of numerous victims and witnesses, etc.) - a discussion that we, from the Humanitarian Law Center (HLC), started with our regional partners, Documenta (Croatia) and the Research and Documentation Center (RDC, Bosnia and Herzegovina) in September 2005. At the very outset, we were easily able to come to an agreement that the key to more effective and professional war crimes trials lies in the regional approach; that is, the strengthening of regional cooperation between the prosecuting authorities and among the courts in the region. However, when we [HLC] suggested a debate on the establishment of a regional body (regional commission) which would document war crimes; that is, establish the facts about what happened in the past, our partners believed that it was still too early for that, and that there is a negative perception of truth commissions in the post-Yugoslav societies, and because of all that, we should stick to safe territory, such as a debate on facing the past. In those discussions of ours, which lasted about a year

and a half, experts from the International Center for Transitional Justice took part, namely Mark Freeman, and occasionally Juan Mendez, from whom we were able to learn a lot about the experiences of other post-conflict societies. They encouraged us to start a debate on non-judicial instruments for establishing facts, and advised us to carefully analyze the experiences and initiatives of other post-conflict societies, but also the failed initiatives for establishing a Truth and Reconciliation Commission in Bosnia and Herzegovina (BiH) and a Truth and Reconciliation Commission in the Federal Republic of Yugoslavia. In May 2006, we organized the First Regional Forum on Transitional Justice<sup>52</sup>, where we talked about initiatives in, and the future prospects of, the post-Yugoslav societies. At that time, the Assembly of BiH had a working group comprised of political parties that was drafting a bill for the establishment of a Truth and Reconciliation Commission in BiH with help from the United States Institute of Peace. Judges and prosecutors from BiH, who took part in the aforementioned forum, strongly supported the establishment of a truth commission in BiH, with the same arguments that we, from the HLC, used to advocate a regional commission, such as, for example, the fact that criminal trials are focused on perpetrators, that the victim almost exclusively serves the purpose of proving that the accused is (or is not) guilty, that we need a documented picture of everything that happened in the past, which criminal trials cannot provide, etc. Numerous participants

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52 Sarajevo, BH, May 5-6th, 2006

brought up examples to point out that a national commission does not have the power to establish the truth about a war that was fought across that nation's borders, about the victims who have, in the meantime, moved from one country to another, or about the perpetrators who fled to their "countries of origin" which would not prosecute them, etc. Members of the working group, who also took part in the First Regional Forum on Transitional Justice, showed great self-criticism with regards to the objections of the participants that their work is not transparent. Exactly 11 days after the forum, the working group ceased its work without providing a specific explanation<sup>53</sup>. The main achievement of the First Regional Forum on Transitional Justice was the participants' expression of strong support for a regional approach in establishing the facts about crimes that were committed. We, at the HLC, continued to discuss with our regional partners the initiative for a regional commission for establishing the facts about war crimes and other gross violations of human rights<sup>54</sup>. Finally, in March 2008<sup>55</sup>, supported by the International Center for Transitional Justice, we agreed that a regional commission for establishing facts is our exit from the past. Such a commission would allow us - for the first time in our history - to compile a precise and factually accurate account of the past and thus pass on to the future generations facts and a report supported by evidence about all that took place since 1991. We presented the idea about a regional commission for establishing the facts about war crimes and other gross violations of human rights (RECOM) to the public in May 2008, on the occasion of the regional consultation with representatives of the associations of the families of the killed and missing persons, in which veterans from Croatia, BiH and Serbia also took part. The initiative was given undivided support by all the participants from the region. To be honest, we feared the reactions, but when the victims, one after another,

started to propose what needed to be done to boost the support for our initiative, it was clear to us that we were on the right path. The victims unequivocally supported convening for public testimonies,<sup>56</sup> which would provide them with a platform to talk about what happened to them, while people can sit, listen and feel compassion for them. In that, they saw a public manifestation of society's relationship towards the victims.

At that gathering in Podgorica, victims supported war crimes trials as the only way to establish the responsibility of those individuals who committed crimes, but they, also, very clearly, sent out a message that they needed special attention, that they did not want anyone to interrupt them, and wanted to be free to express their suffering and convey to others the images of violence that they were subjected to. The message was clear: the victims support the establishment of a regional commission which will be focused on victims, as well as the public testimony of victims, as the commission's main component. At the same event, HLC, Documenta and RDC, in accordance with their previous agreement, raised the question of the need to create a coalition to support the initiative for the establishment of a regional commission, which would then become the proprietor and the main advocate of the RECOM initiative. The participants supported that proposal as a good way of assuming ownership of the initiative, which would belong to them and to everyone else prepared to personally do something, so that the crimes do not happen again.

By the Fourth Forum on Transitional Justice took place in Prishtina on October 28th and 29th 2008, some 100 NGOs and victims' organizations supported the idea of a Coalition for RECOM, and they became members of that coalition on the October 29th 2008, on the second day of the Fourth

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<sup>53</sup> There was speculation in the public that it happened because some of its members, thanks to a debate that took place at the First Forum on Transitional Justice, realized that, without public support and participation of victims' organizations in shaping the mandate, no commission stands a chance of being successful.

<sup>54</sup> Documenta was a new organization, founded by four human rights organizations in Croatia, after HLC, IDC and the Croatian Helsinki Committee, in the beginning of 2004, agreed on a need and the importance of establishing regional cooperation in documenting war crimes. Documenta was not certain how the Croatian civil society will react to a regional initiative. Such fears were later proved to be unfounded, as civil society in Croatia now takes an active part in advocating the RECOM initiative. By contrast, the IDC was unable to decide whether a national or regional approach was preferable from the very beginning. In December 2008, it left the Coalition for RECOM due to objections to the idea itself and a possible mandate for RECOM.

<sup>55</sup> Meeting in Brussels, organized by the International Center for Transitional Justice.

<sup>56</sup> By February 2009, when the seminar took place, four regional fora on transitional justice had taken place. During the third and the fourth, we organized public victims' testimonies, which can be accessed at [www.korekom.org](http://www.korekom.org).

Regional Forum on Transitional Justice, when the Coalition for RECOM was officially created. At that Fourth Regional Forum on Transitional Justice, representatives of some (Albanian) victims' organizations expressed their reservations about the RECOM initiative, unlike the representatives of the institutions and youth organizations in Kosovo. Their explanation was that Kosovo should have a national commission, which would represent Kosovo in the regional commission. That sparked a debate on the failed initiatives for the establishment of a Truth and Reconciliation Commission in Bosnia and Herzegovina, the Truth Commission in Serbia (Federal Republic of Yugoslavia), and the Srebrenica Commission, whose participants held opposing views, including a belief that its report is the most important official document about the past, as well as the notion that it would be good to have more commissions focusing on particular events, as well as those rejecting its findings in their entirety. The debate was concluded with a clear majority opinion that a regional commission was in the interest of all victims.

The Fourth Regional Forum on Transitional Justice was followed by preparations for organizing an intensive and broad process of consultations about the RECOM initiative, as well as for the transfer of responsibility for that process from the three organizations (HLC, Documenta, RDC) to the Coalition for RECOM. The goal of the process of consultations became not only the debate about the past, but also, the development of a model for RECOM, which will be shaped by the participants of the process in the period up to the middle of 2010. The final phase of the process of consultations is envisioned as a campaign for 1 million signatures for RECOM, which will give the initiative legitimacy and regional credibility.

In the consultations that ensued, we familiarized the participants with the experiences of other post-conflict societies, in order to facilitate their task of developing the RECOM model. At first, the participants asked questions, and then, after they felt more self-assured, offered their opinions – on who should be a commissioner, what criteria to apply, whether the victims should name perpetrators (and if so, should the perpetrators have an opportunity to respond), the relationship between war crimes courts and the commission, etc. A question was raised about whether any military and police officers would be willing to testify about the crimes that were committed, and, thus help us understand the scope of the responsibility of institutions, and, in particular, that of the army and the police. I mentioned the HLC's experience of obtaining relevant documentation on war crimes through confidential testimonies of professional soldiers and policemen, and my expectation that the regional character of the commission will encourage professionals to come forward and testify, even if it does not happen in public hearings, but in closed ones.

In January 2009, groups for the coordination of consultations were formed in BiH, Croatia, Serbia, Montenegro and Kosovo. They were tasked with helping the members of the Coalition for RECOM in organizing local, national and regional consultations, dealing with the mandate, the goals, and other elements of RECOM, which is supposed to provide answers to the question of what happened during and after the armed conflict in the former Yugoslavia. All of us who are a part of the process of consultations about the RECOM initiative, firmly believe that we have initiated and taken part in the largest non-governmental initiative in the region to date, whose goal is to become a state project of the countries in the region.

# The Role of the European Union in the Advancement of Transitional Justice in the Region and the Progress of the Consultation Process within the Initiative to Create RECOM

Tea Gorjanc-Prelević

*Why should the European Union help establish transitional justice former Yugoslav states?*

Generally speaking, the European Union is not against the rule of law in terms of transitional justice, war crimes trials, and victims' compensation, but its judicial system does not quite understand what it is expected to do in this context, how much it is expected to get involved and whether it should at all. The European Union is not an organization specializing in democracy promotion, human rights or the rule of law – these are the issues tackled by the Council of Europe. However, since all states formed on the territory of the former Yugoslavia have already become members of the Council of Europe, it has lost the ability to exercise its influence in these countries. By contrast, we are still aspiring to become members of the European Union. All those who believe that the implementation of transitional justice goals is the foundation for regional cooperation and economic prosperity, understand that the European Union should insist on solving these issues because only the EU has a serious potential to influence the governments in the region to take these issues more seriously. Montenegro's example is illustrative: while negotiating its membership with the Council of Europe, the Montenegrin government was quick to promise to "conduct efficient investigations of all unsolved cases concerning the armed conflicts in the former Yugoslavia in compliance with the practice of the European Court of Human Rights" and "provide safe, per-

manent, and sustainable return of refugees and displaced persons, as well as reparations to the refugees who were victims of human rights violations". In reality, the government did very little and the only reason it decided to admit its responsibility for a crime committed against refugees from Bosnia and Herzegovina in 1992 and offer compensation to the victims at the end of 2008 was because the European Union showed an increased interest in this matter, not the Council of Europe – an organization which is known will not exclude a member for not being efficient or thorough enough in investigating war crimes and for failing to provide prompt compensation for victims of war crimes.

*Why the required cooperation with the ICTY is insufficient for implementing transitional justice in the region?*

The 400-page Stabilization and Association Agreement signed between the European Union and the Republic of Montenegro contains only two articles concerning respect for human rights, democracy, and the rule of law, both of which insist on cooperation with the International Criminal Tribunal for the former Yugoslavia (ICTY). This cooperation was not a difficult task mainly because the tribunal, apart from the shelling of Dubrovnik case, did not have time to show any interest in five other crimes Montenegro should have processed thoroughly (the deportation of Bosnian refugees to the enemy army in 1992, the 1992 Morinj prison camp, war crimes committed in the Bukovi-

ca region in the 1990s, the kidnapping of bus passengers in Štrpce in 1993, the execution of civilians in Kaluđerski laz in 1999). The most difficult obligation for Montenegro was to extradite General Pavle Strugar, charged with war crimes committed during the attack on Dubrovnik. General Strugar agreed to be extradited and Montenegro “quickly fulfilled its obligation to cooperate with the ICTY”.

The ICTY announced a while ago that it would not start new investigations and that it is now up to the states formed on the territory of the former Yugoslavia to process an enormous number of war crimes perpetrators still at large, as well as to take care of a huge number of victims still living in poverty mostly caused by war crimes committed against them. However, this incredibly important obligation is not contained in the “cooperation with the tribunal” clause. Therefore, this formula does not contribute to the implementation of transitional justice in Montenegro and it certainly does not lead to the implementation of the most important pillar in the establishment of the rule of law – investigating responsibility and processing of all responsible for war crimes including state employees at all levels.

In addition to combating widespread corruption and organized crime, “modern era” problems causing the European Union to apply the carrot and stick policy, I think it is also necessary to demonstrate to the EU why it is very important to engage with transitional justice in the region by supporting the creation of a Regional Commission for Investigating and Disclosing the Facts about War Crimes and Other Serious Violations of Human Rights Committed on the Territory of the former Yugoslavia (RECOM), an institution which could make a significant contribution to preventing such crimes from happening in this part of Europe again.

At the end of a very long session during recent consultations Mirko Kovačić of the *Mothers of Vukovar* association said: “... all right, why don’t we tell the European Union officials not to grant membership to any of us until we find all our missing, provide compensation to all victims, satisfy justice and punish perpetrators, or at least until we demonstrate that we are able to do that.” I agree with his proposal and I now support it.

At about the same time, during one of our gatherings organized by the mission of the United Nations Office of the High Commissioner for Human Rights in Sarajevo in 2006, which was dedicated to transitional justice in the region, we agreed to create a common civil society initiative whose goal would be to explain the importance of implementing

the objectives of transitional justice in a broader context than just “cooperation with the ICTY”, in terms of providing reparations as stipulated by the United Nations General Assembly Resolution No. 60/147 titled “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of the Humanitarian Law” and send it to various international organizations, primarily to the European Union. That initiative currently exists in a draft form and it will soon enter the signing procedure. The initiative contains a precise definition of what we believe is necessary to determine as the rule of law standard in terms of implementation of transitional justice, so that we can be admitted to the European Union and so that we can prove to ourselves and the rest of the world that we are perfectly capable of conducting economic and other forms of integration on solid foundations free of the legacy of war crimes.

The European Union must seriously consider admitting into its membership some adversaries who will be able to do the same thing in 20 years’ time even if they live in a prosperous economic environment, when it is clear that the incentives offered through its carrot and stick policy have not yielded any results. We have to give solid proof that we are able to solve certain basic issues in an efficient and impartial manner before we continue with serious economic integration, which is something the European Union expects us to do. All countries in the region must carefully analyse the first article of the Stabilization and Association Agreement and prove that they are capable of establishing a system, which will guarantee respect for all basic requirements in order to qualify for a positive assessment of the implementation of all others. The establishment of RECOM could help strengthen the entire system with respect to the implementation of principles of transitional justice and, generally speaking, it could help finalize the “transition” process in a basic, morally-legal sense.

#### *Potential contribution of RECOM to the process of establishing the rule of law, respect for human rights and successful regional cooperation*

The final RECOM report compiled on the basis of established facts, should present, not only to the citizens of the former Yugoslav states but also to the rest of the world, a jointly accepted truth about the war crimes committed in the former Yugoslavia to be used by current and future generations as a reasonable and serious warning. I believe that the report made by such an international body would give a new dimension to the sense of decency in dealing with other people in the region, a sense of solidarity with

respect to the suffering of all innocent victims and a serious common milestone on the road to reaching a positive civilizational zero. From that point on we will be able to build multiple ways of regional cooperation.

As a lawyer, I should stress that the Coalition for RECOM is not advocating the idea of a regional commission for establishing the facts about war crimes to replace war crimes trials or that it should in any way adversely influence the jurisdiction of offices of prosecutors, missing persons' commissions, or any other bodies or courts competent to establish responsibility in compensation lawsuits. I think it is very important to make clear that we believe that investigations and war crimes trials, and civil compensation lawsuits which are underway, should be conducted in accordance with the law, in the best possible way, and that they should be concluded in a lawful manner. However, I think that trials as such are not sufficient for the victims or for all of us who live in this region. Criminal trials are expected to establish criminal responsibility of an accused individual and not to establish the truth about the entire event and its consequences. In addition to this, in a manner described in the "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of the Humanitarian Law", victims and everybody else deserve to have memorials, commemorations, remembering, supplements to history books, etc. We deserve to have a more precise, a more truthful education and upbringing of our children which will be aimed at the prevention of the recurrence of the horrible past. And, in order to know what it is that they should not do again, they have to know the truth about what happened and what consequences it produced. I believe that most people cannot explain what a war crime is and how is it different from a political narrative about who is to blame and who attacked whom first. For that reason, it is important to have a regional-level body like this which will be given legitimacy to tell the story, present the facts, explain what happened and simply tell everybody that there can be no justification for killing civilians, innocent and unarmed men, women, and children. I believe that the Report compiled by the Regional Commission, which should be universally understandable, would contribute to creating a culture of understanding and respect for human rights and humanitarian law, in addition to helping us deal with the past in our effort to finally leave it behind.

Montenegro has had a specific experience with the war crime of deportation of refugees. It was a systematic police action conducted in 1992 and the state recognized its responsibility for it. It is very important to the victims that

the government of Montenegro said "the state is responsible because our employees are responsible". It is yet to establish who is individually guilty of that crime. For the time being nine people are charged with this crime in Montenegro. However, in Bosnia and Herzegovina where the refugees were killed after they had been deported from Montenegro, no one has been indicted yet. This example best illustrates why it is more than certain that RECOM could help prosecutors in the region by posting a so-called "crime-map" and make them receptive to some new issues. RECOM can suggest new reparation programmes and the advancement of institutions competent for helping victims exercise their right to reparations. The Report itself can help reduce the tension in the region and lead to the adoption of easily forgotten values such as equality before the law and compassion for those that suffer.

During the regional consultation round with the associations of victims held in Podgorica in 2008, something unusual happened: for the first time, representatives of victims from Kosovo, members of the Albanian and Serbian community, expressed empathy towards each other for what had happened to them in the course of the armed conflict. That moment was very emotional and speaks best about how much has already been achieved just by initiating this process. I do hope that with the support of responsible citizens from the entire region, the European Union and other international governmental and non-governmental organizations we will be successful in convincing our respective governments to establish RECOM.

It is clear that serious people who remember things, have no illusions that the establishment of RECOM will be an easy task, especially in communities whose governments are made of the same individuals and political parties who were active during the war. However, they, too, are changing. For example the Prime Minister of Montenegro, Milo Đukanović, expressed regret for the attack on Dubrovnik. He was also Prime Minister of the government which accepted responsibility for the crime of deportation of refugees in 1992 and paid compensation to the families of the victims in 2008, which is very encouraging. Montenegro State Television, often criticized for its partiality towards the government, to our astonishment, reported at the beginning of its evening news about the consultation on the establishment of RECOM held in Podgorica with non-governmental human rights organizations and prominent politicians active in the anti-war movement in the 1990s. In spite of that, we are not so naive as to expect that in Montenegro, or in any of the states formed on the territory of the former Yugoslavia, that all will go smoothly and that our

governments will gladly accept the idea. We know that in order to achieve that, we need to exert the strong and organized pressure of civil society. We also need to demonstrate the unwavering support of international factors, primarily the European Union.

There are 18 non-governmental organizations and 15 independent individuals from Montenegro who became

members of the Coalition for RECOM after the first round of consultations held in October 2008 with human rights organizations and prominent representatives of the civil society who have been persistent in advocating the implementation of transitional justice. We expect that the number of Coalition members will increase, especially after the Fifth Regional Forum on Transitional Justice scheduled for the end of May 2009 in Montenegro.

# From Ad Hoc Measures to the Strategy of Facing the Past

Vesna Teršelič

While we were preparing for the Forum in Sarajevo in May 2006, it seemed to me that Croatia would be least receptive to the idea of truth-seeking at the regional level. Nonetheless, we went ahead and organized the Forum in Zagreb as early as February 2007. The debate was very intense. There was a protest in front of the venue among other things because we clumsily named the gathering "The Truth about War Crimes." Associations of victims and associations of war veterans took offence, claiming that the gathering was sending out the message, "We will establish the truth". We replied to this by saying, "We did not use this name because we believe that we will establish the truth, but to discuss the road to the truth and find a mutual understanding about how to get closer to the truth." The message of the protestors and associations' was important for all the organizers. When deciding the name of our initiative, we narrowed it down from truth-finding to fact-finding. We thought that the term 'facts' would not raise any objections. Of course, disagreements always exist, even when it comes to facts, because if the conflict had not happened, then we would not need a regional commission. However, we do very much need one. Contesting facts must become unacceptable. I think a regional commission could contribute to a situation where such debates about facts become inappropriate, while, at the same time, at least participants in a public dialogue would keep in mind that we can disagree about interpretations, that will be different, but, which after all is the essence of democracy.

We have gone a long way from the time we witnessed the protest in front of the Forum in Zagreb in February 2007: after the protest most of the demonstrators entered the auditorium because, they had all been invited to the Forum and the intense discussion continued inside. In the fora and consultations held to date, the dialogues were indeed very

heated on occasion with various actors. This dialogue in Croatia always includes associations of victims, gathering victims' families not only on the Croat, but also on the Serb side of the war. Members of associations of war veterans' scientists, artists, women's organizations, and human rights organizations took part in this dialogue as observers and as active participants. I cannot remember a process that involved a greater range of actors. The issue of fact-finding touches many people. Primarily, it concerns the victims' families, but others as well. I have been noticing for years that whenever a topic about war was broached in public or in private, very often the initial reaction would be "come on, let's not talk about it anymore, let's just leave the past behind". However, as soon as we continued the discussion about the war, after the first three sentences, regardless of whether we were talking about the 1990s or the second world war, all of a sudden a lot of people became interested in the topic. At the same time, those who said, "let's leave it be, let's leave the past behind", were the ones who could not resist discussing this topic because it is controversial. During the 1990s we witnessed the manipulation with the number of second world war victims used to enflame the conflict. I think this experience must not be repeated and that the purpose of the fact-finding process is to get closer to justice for the victims, as well as the need not to leave space open for manipulation. And, by documenting the facts and creating more space for victims, who have been neglected in many ways in all of our societies, we actually diminish the possibilities for manipulation. Thus, we decrease the possibility for creating new violent conflicts, which take place precisely because of manipulation with incomplete information.

I do not wish to talk about Croatia anymore; instead I would like to turn to the European Union because today we

are going to speak about European integration and transitional justice. The reactions of the European Union to our initiative have been very interesting so far. The European Union was pragmatically open to policies such as Hague conditionality, in other words, to some concrete short-term steps. However, there has been a lack of a strategy. Therefore, on the one hand, I think that the Hague conditionality policy has been very useful, just like the process of European integration in which institutions in the post-Yugoslav states are given a very clear sequence of steps to follow in order to become members of the European Union one day. The first pragmatic step, which is the condition of cooperation with The Hague, was for the first time amended last year in Croatia with another pragmatic step, which insists on the integrity of domestic war crimes trials. This formulation was found for the first time in documents, which regulate the relations between Croatia and the European Union at the beginning of last year. At the same time, while we have this pragmatic openness, we are faced with relative indifference and reluctance towards any advance in a strategic sense, towards any articulation of a strategy. The EU has a policy that makes a very important impact, and that is the policy of European integration. However, this does not amount to a strategy of transitional justice, nor is it a strategy of dealing with the past. As a matter of fact, I think it is paradoxical that the space for the pre-integration approximation to the European Union may even be more conducive to dealing with the past for the countries such as the post-Yugoslav ones than for the European Union itself. I believe that Europe did some very important things in the aftermath of the second world war in analyzing the conflicts and bringing closer former warring parties, but it has never had a strategy of transitional justice, nor has it had a strategy of dealing with the past, and I believe that this is not an accident.

This process may be an opportunity for the European Union to consider the Regional Commission as a proposal for post-Yugoslav states, but also as an opportunity to reconsider some open issues. I find it interesting and important to warn about discomfort in facing one's own legacy of collaboration in the past in practically all countries of the European Union and in those countries that are not members of the European Union. When I speak about collaboration, I mean, of course, various groups that coope-

rated with Nazi and Fascist criminals. In Croatia these were Ustashes and other collaborators with the occupier. What I also have in mind is the unwillingness within European countries to examine the legacy of those who cooperated with the repressive mechanisms of the Communist Parties. I would add that it is no surprise that there is no strategy as the European Union was not ready to undergo its own reckoning with the past in the sense of working through the negative legacy. I fear that insistence on the values such as freedom and human rights is not enough for dealing with that past. There is a need for a more equitable dialogue about the strategy. What is happening in the dialogue between the post-Yugoslav states and the European Union can often be described as a dialogue of unequal partners. This might be more evident in Bosnia and Herzegovina, and in Kosovo where the institutional approach to resolving issues is a kind of semi-protectorate or protectorate. One may think that the situation in Croatia or some other country is much better. It may be a little better, but not essentially. A recent conflict between Slovenia and Croatia is a case in point. It is very interesting how people write about this conflict and what discourse is used. Commenting on the events, they usually say, "What else could one expect from the Balkans or from the Western Balkans." Conflict is described as something that happens in the Balkans and sometimes a paternalistic colonial tone is used. I would like to note that I believe that the European Union cannot justifiably address us with a paternalistic colonial tone because none of us has become a world champion in dealing with the past. This initiative could really become an opportunity to ask questions about processing the past within European institutions like the European Parliament or the Commission and in places where many issues have remained open. I hope that this initiative will create more space for the voice of the victims and create prerequisites for truth-seeking in the post-Yugoslav space. But, I also hope that this will inspire people in other countries, whether in old or new members of the European Union, so that we will be able to have a more equal dialogue about dealing with the past in some ten or twenty years' time, whether about the crimes committed in the 1990s or those perpetrated during the second world war or during the vengeful extra-judicial executions after that war. I believe we need an equal dialogue and a more intensive learning process in which we learn from each other.

# The Kosovo Perspective: The Importance of Ownership

Valdete Idrizi

I joined the RECOM initiative over a year ago when I was invited to one of the consultations with human rights NGOs. There were few people from Kosovo present. I found the idea very interesting and needed. However, I did not hesitate to express my dilemmas: Is this the right time? Is the regional approach most appropriate? What about a national approach? What will people in Kosovo think? I immediately thought about the victims, the victims' associations, and the governments, and had many questions. By participating in the initiative and by sharing my thoughts with many people in the region, and after returning to Kosovo and helping organize several meetings there, I realized that, indeed, we have to be very careful. I voiced my concerns in the Coordination Council (of the RECOM coalition) that I am part of. I argued that we need to be more careful especially in Kosovo because not much had been done there in dealing with the past. One has to take into account the number of missing persons, but also a lack of dialogue between the associations in Kosovo (i.e. Albanian and Serbian associations) as well as between associations of victims and NGOs and the government.

Just before we convened the Fourth Forum at the end of 2008, we organized several preparatory meetings where we gathered quite a large number of victims associations. Initially people liked the idea because they want to know the truth. They expressed different expectations about RECOM. They had a lot of questions concerning the time-frame, the combination between a national and regional approach, and asked whether the initiative will remain only regional. The Forum gathered over 400 people and was very successful. It provided a space to express different

opinions and dilemmas concerning the process. Some left with questions. One could see in their faces and hear in the their voices that there was some confusion and uncertainty that could be very easily misinterpreted as obstruction, as a rejection or as a lack of readiness to deal with the past and to accept a regional initiative. I am pleased that we were able to hear the concerns coming mostly from the Albanian side. However, we also heard the Serbs' concerns. We concluded that we need some space for ourselves and should organize national-level discussions with all relevant actors. Having held a number of formal and informal consultations with people, especially in Mitrovica, many creative ideas were put on the table. At an event that brought together the Mitrovica Peace Coalition, the NGOs from the north and the south that have a common outlook and share the same concerns and fears, we proposed a Mitrovica truth commission to deal with the division of the city.

In sum, one needs to point out that time is a very important factor especially in Kosovo. Taking into account the delicate situation in Kosovo, it is very easy to misinterpret everything, and we who are from Mitrovica know that better than anyone else. Further, one ought to underscore the importance of ownership. Any initiative that is top-down, that is imposed, will not be sustainable. This is why we still cannot be certain as to what form the consultations will take and how exactly they will unfold. This is the subject of discussion. But, we know very well what we want to achieve. That is the reason why we want to hear all voices and make them part of the process. A strong sense of ownership will prevent politicization.

## **PART IV**

### **The EU and Restorative Justice: The role of Civil Society**



# EU Support for 'Civil Society' in Serbia: Politics, Development or Neither?

Adam Fagan

EU assistance to the so-called 'potential candidate countries' of the Western Balkans (Serbia, Bosnia-Herzegovina, Albania, Montenegro and Kosovo) is designed to engage non-governmental organisations (NGOs), the private sector, civil society actors and other formal and informal networks within the process of policy-making, implementation and compliance. Through short-term project grants on themes ranging from Roma rights, environmental education and protection, support for victims of torture, to the provision of employment training in marginalised communities, the fundamental aim of the Commission is to engage state and non-state actors in the construction and implementation of EU-compliant policy frameworks and processes, and to build institutional and administrative capacity. In attempting to realise such objectives the EU, like most multilateral donors, frames its intervention in terms of supporting 'civil society'.

The article draws on empirical research undertaken between 2006 and 2008<sup>57</sup> in Serbia on EU assistance channelled through NGOs and civil society organisations (CSOs) as part of CARDS (Community Assistance for Reconstruction, Development and Stabilization) and EIDHR (European Initiative for Democracy and Human rights) financial assistance programmes. The research focused on the process of allocating project grants, the focus of assistance, the outcome and sustainability of short-term projects, and the impact of grants on recipient domestic NGOs/CSOs.

The core objective of the research was to explore and evaluate the impact of such assistance on domestic NGOs and civil society networks and to consider what the EU is actually achieving as a consequence of its various financial initiatives. The conclusion reached in this article and the hypothesis offered for further research is that EU assistance benefits civil society networks only *indirectly* and *incidentally*; use of the term 'civil society' to describe the aims and impact of such intervention is an *empty signifier*<sup>58</sup> that obfuscates the reality of EU-funded projects managed by a small core of professional NGOs.

## Civil Society Assistance and its Critics

The most salient aspect of EU assistance in Serbia is undoubtedly the support channelled through local NGOs and what purport to be civil society organisations and networks. Such assistance is delivered via short-term project grants, and the resources provided as part of the Community Assistance for Reconstruction, Development and Stabilization (CARDS) programme, and from 2008 onwards, the Instrument for Pre-accession Assistance (IPA).

At first glance, such assistance appears to be the EU's version of the sort of democracy promotion assistance or civil society development aid delivered over the years by a host of American and European donors across post-socialist Europe. Indeed, developing civil society organisations as a

57 The research was funded by the British Academy (SG 45257).

58 The term 'empty signifier' is used here in the Laclau and Mouffe sense to denote the emptying of a signifier of normative content, to create what Daniel Chandler refers to as signifiers that are 'vague, highly variable, and unspecifiable...' Chandler, D., *Semiotics: The Basics* (London: Routledge, 2007), p.13.

vital expression of liberal democracy is, and has long been, a key objective of the accession/enlargement process dating back to the early 1990s and PHARE assistance to the central east European states. As vehicles for the realisation of core development objectives aligned to the Stabilization and Association process (SAp), the Commission support for civil society is not just an end in itself; it is first and foremost instrumental in delivering policy development and implementation in the realms of environmental protection, minority rights and refugee return, welfare provision and employment services, as well as economic, political and social reforms required as conditions for accession.

An evaluation of such intervention must situate itself within what now constitutes an extensive literature critiquing foreign donor assistance for civil society development.<sup>59</sup> The Commission's support for NGOs across post-socialist Europe has been influenced by the legacy of USAID and other bi-lateral American donors who have since the second part of the 1990s, if not before, channelled their civil society development aid through American-style advocacy NGOs. However, as Carothers and Ottaway point out, in the early 1990s donors initially provided institutional support focusing on political party development and reform of state institutions. The shift towards civil society development coincided with the Clinton presidency and occurred in large part due to the limited success and complications associated with other forms of assistance and support.<sup>60</sup> Channelling aid through NGOs and prioritizing civil society development as a development strategy has considerable appeal for donors: apart from pandering to liberal and neo-liberal concerns about checking the power of the state and holding governing elites to account, it is relatively cost-effective – NGOs often deliver projects and services cheaply and efficiently, they tend to be non-bureaucratic and

highly professional in their operations. Most importantly, such intervention enables donors to circumvent resistant political elites within the recipient states.

It is this aspect of civil society development assistance that is quite anomalous and has courted most controversy: what purports to be politically significant assistance, designed to drive consolidation and genuine regime change, with lofty ambitions and loaded with normative overtones ('democracy', 'civil society', citizen participation etc.) in practice seem to function as apolitical technical support. By side-stepping political elites and prioritizing support for 'soft' institutions of power (i.e. NGOs) rather than driving institutional reform and challenging 'hard' power (corrupt elites, transnational networks resistant to democratic reform and liberalization), donors have been criticised for ignoring critical disparities in power relations and, in the context of post-conflict or semi-authoritarian states, the fact that the process of regime change may be incomplete. Carothers argues that donors' tendency to purport that it is indeed possible to bring about change and improvement "without grappling with the deep-seated interests of the actors involved" is not just a tacit admission of the failure of earlier interventions, but is also plainly wrong in its conviction.<sup>61</sup>

Fundamental questions have been raised concerning whether normative democratic notions of civil society can be equated with donor-dependent NGOs, or whether the organisations that donors support reflect the realities of civil society in established western democracies, or indeed can be successfully transported beyond the specific context of established liberal democracies.<sup>62</sup> Ottaway and Carothers contend that the NGOs favoured by foreign donors, including the EU, are 'set up along the lines of advocacy NGOs in the United States...with designated manage-

59 This is an extensive literature. See, in particular, Mandel, R., 'Seeding Civil Society', in Hann, Chris M., *Postsocialism: Ideals, Ideologies and Practices in Eurasia* (London: Routledge, 2002); Wedel, J., *Collision and Collusion: The Strange Case of Western Aid to Eastern Europe, 1989–1998* (New York: St. Martin's, 2001); Cellarius, B.A. and Staddon, C., 'Environmental Nongovernmental Organisations, Civil Society and Democratization in Bulgaria', *East European Politics and Societies*, Vol.16, No.1 (2002), pp.182–222; Sampson, S., 'The Social Life of Projects: Importing Civil Society to Albania', in Hann, C.M. and Dunn, E. (eds.), *Civil Society: Challenging Western Models* (London: Routledge, 1996), pp.121–142.

60 Ottaway, M. and Carothers, T., *Funding Virtue: Civil Society Aid and Democracy Promotion* (Washington, D.C. ; [Great Britain], Carnegie Endowment for International Peace, 2000).

61 Carothers, T., *Aiding Democracy Abroad: The Learning Curve* (Washington, DC, Carnegie Endowment for International Peace, 1999).

62 Hann, C.M. and Dunn, E. (eds.), *Civil Society: Challenging Western Models* (London: Routledge, 1996).

63 Ottaway and Carothers, op.cit.

ment, full-time staff, an office, and a charter or statement of mission.<sup>63</sup> Such NGOs will engage government through US-style advocacy and lobbying, but will not themselves seek political office; they will operate above the cut and thrust of party politics thus preserving the veneer of *non-partisan* donor activity. What this essentially creates is a sense of donor-funded NGOs pursuing a public interest role, committed to civic values rather than divisive party politics. The role of such non-partisan organisations takes on additional relevance in post-conflict situations, both as a counterbalance to nationalist-ridden party politics, and as a means of driving civic education. Whilst such advocacy organisations may well represent an aspect or component of civil society in western European states, critics would hardly reduce civil society in its entirety to such manifestations. Indeed, studies of civil society in contemporary European democracies place great emphasis on the diversity of formal and informal organisational forms; on dispersed and opaque collectivities and enmeshed networks as the hallmark of democratic civil society.<sup>64</sup>

#### **The Transition to Democracy paradigm: a Partnership Interpretation of Civil Society**

The vision of civil society envisaged by international donors, whether in post-communist Europe, Latin America or parts of the Global South, has generally been the consolidation of a distinct arena of associations assisting in the development of public policy and the enactment of regulation.<sup>65</sup> According to Pearce and Howell, this 'partnership' interpretation of civil society 'draws on a particular history of the concept that makes it relevant to a problem solving agenda'.<sup>66</sup> It is based on the premise that solutions are to be found within the context of the market through partnership with big business. Professional, policy-focussed associations thus perform a key role in the neo-liberal scheme of transforming state power and freeing capital. Such an interpretation of civil society finds endorsement

within the rational-choice influenced transitions literature, the paradigm through which regime change and democratization across post-socialist Europe is generally analysed and understood.

Civil society is not seen as a vehicle for serious political critique, for challenging economic and political hegemony, or for transforming state-society relations. Its remit is restricted to strengthening the status quo, assisting the neo-liberal reconfiguration of power, and enabling the state to transfer some responsibility for regulation and social protection to the voluntary sector. All civil society can realistically do is to assume some of the discarded responsibilities of the state, shoulder the costs of the state's partial withdrawal from social protection, and facilitate the symbolic aspects of liberal democracy: freedom of speech and association. In essence the promotion and development of NGOs as a representation of civil society is based either on the notion that such organisations are apolitical, offering technical assistance and policy solutions, or they are non-partisan institutions seeking to promote the public interest over and above narrow political and ideological interests.

#### **Civil Society Promotion: A 'Development' Lens**

Many of the negative assessments of development aid channelled through NGOs and what purport to be civil society organisations (CSOs) in post-socialist, transitional and post-conflict states fail to recognise or simply reject as politically relevant the development aspects of this form of intervention. There is a tendency to judge the political impact of NGOs and CSOs in terms of their role in policy processes, in their ability to contest planning or investment decisions, and in terms of donor aid providing agency for civil society and marginalised communities in the context of formal political spaces. If donor aid fails to deliver such heady objectives then it is deemed to be politically deficient and its impact superficial or even inconsequential.

64 Keane, J., *Civil Society and the State: New European Perspectives* (London, Verso, 1988); Hall, J. A., *Civil Society: Theory, History, Comparison* (Cambridge, Polity Press, 1995).

65 For a succinct overview of the objectives and rationale behind donor funding of civil society, see Carothers, T., 'The End of the Transition Paradigm', *Journal of Democracy*, Vol. 13, No. 1 (2002), pp.5-21: 5-6.

66 Howell, J. and J. Pearce, J., *Civil Society & Development: A Critical Exploration* (Boulder, Colo.: L. Rienner Publishers, 2001), p.17.

A ‘development’ framing of donor assistance for NGOs and CSOs on the other hand views democratic transformation less in terms of procedures and institutions and more as a long term process dependent upon social and cultural as well as economic and political change.<sup>67</sup> Formal democratic procedures and the policy process are not seen as ends in themselves, but initial aspects of the installation of justice and rights, governance and the liberalisation of the state. The role of NGOs and CSOs in such an eclectic process cannot be reduced to political challenge in the context of policy development or the overt defence of particular interests in the realm of formal politics. Rather, a critical aspect of their role is to act ‘behind the scenes’ and to work with enmeshed civil society actors. Such a perspective validates the role of donor-supported NGOs in development-oriented projects and service provision. It also captures the value of donor projects that engage NGOs in the formulation of poverty reduction strategies and in the articulation of community interests.

This marks a distinct contrast to the more conventional perspectives on such intervention, adopted mostly by political scientists, whose focus tends to be formal politics and the institutionalisation of interest group or social movement organisations. The so-called ‘development’ perspective accredits NGOs and civil society with a more sustained but less overt political role, and one that is not conceptualised in terms of participation within the narrow confines of policy development and formal politics. By distinguishing between the two frameworks, Carothers essentially alerts us to the importance, when drawing conclusions regarding the impact of EU assistance in the Western Balkans, of not viewing such intervention too narrowly, so that critical development objectives and outcomes do not become obscured and overall evaluations become framed, inadvertently, in terms of narrow ‘transition to democracy’ objectives.

### **EU Assistance to Serbia: Impact and Findings of the Research**

During the period 2004-7, the EAR field office in Belgrade funded local NGOs to undertake a wide variety of projects that fell broadly within the CARDS priorities (strengthening democratic institutions and the rule of law; reform of public administration; promotion of human rights and gender equality; sustainable development and poverty reduction; development of civil society and regional co-operation). Projects were also funded as part of EIDHR, with a specific emphasis on civil society development. Under both programmes the majority of funded projects included an education, training or employment skills component, usually targeting a specific marginalised community, or working specifically with internally displaced persons (IDPs) in a particular area.<sup>68</sup> Several projects involved the provision and collection of data – for example, gathering employment data and statistics on IDPs<sup>69</sup> – or providing social and medical services to sections of the community – for example, psychosocial support for victims of torture and the rehabilitation of concentration camp victims.<sup>70</sup> Other projects involved NGOs either providing public services (such as recycling facilities) or helping municipalities to construct policy plans or gather data. Apart from a project designed to promote the EU amongst young people,<sup>71</sup> there were no projects funded that were overtly political. Indeed, the vast majority can be described as providing either policy-related or social welfare related services in communities. The majority involved some form of bureaucratic interaction with state agencies and government officials, but in not a single case was there a partnership between a recipient NGO and a private company. Typical outputs from the funded projects included training seminars in local communities, plans and other reports delivered to local ministries and state agencies to be used as part of the preparation of strategic plans and poverty reduction strategies, the production of booklets and training manuals, codification of

67 Carothers, T., ‘Democracy Assistance: Political vs. Developmental?’ *Journal of Democracy*, Vol. 20, No. 1 (2009), pp.5-19.

68 Srpski demokratski forum and International Aid Network (Belgrade).

69 International Aid Network and Srpski demokratski forum (Belgrade).

70 International Aid Network (Belgrade).

71 European Movement (Belgrade).

best practice with regard to teaching, protecting the environment, sustainable tourism and dealing with victims of domestic violence, and the provision of advice and support to Roma communities, IDPs and other marginalised sections of society.

### **Comment and Conclusion**

The over-riding benefit and most tangible impact of EU assistance channelled through NGOs in Serbia appears to be the provision of an array of social and educational services, training programmes, relief efforts and socio-economic development projects in communities. In most cases these services would not otherwise be provided and this is particularly significant in a country in which both state provision and market proliferation are depleted or simply absent. Despite concerns within the academic literature regarding waste and duplication of donor resources and the suggestion that funding benefit organisations and the individuals within them more than the poor and needy, the findings of the research suggest that the services described above, most of which are typically delivered for sums of money in the region of €50-100k, represent, on the whole, good value for money.

Where the intervention appears to fail is with regard to engaging small organisations, more enmeshed manifestations of civil society, and in providing any kind of support for organisations intent on articulating a political challenge to the regime. Civil society assistance in Serbia, as elsewhere in the region, means short-term projects; it involves organisations developing management expertise, becoming more professional and building an increased capacity for service provision. Recipients need to be flexible; organisations must be lean, not too ideologically committed or intent on becoming too specialised.

From a development perspective, engaging relatively new and professional NGOs in service provision and community action may indeed stimulate civil society development in the longer term by helping to mobilise communities to

express their interests and needs, to exercise a degree of autonomy over the deployment of socio-economic resources, which may in turn lead to an engagement with political processes and institutions. However, such a scenario is contingent upon certain structural realities: in a post-transitional context in which democracy is relatively consolidated (for example, Central and Eastern Europe and the Baltic states), supporting NGOs can indeed enrich democracy by extending representation and pluralism, thereby contributing to the liberalisation of society. In Serbia, where the completion of regime change remains in dispute and the extent to which there has been a liberalisation of the public sphere since the fall of Milosevic is contested (not least by Human Rights activists and other marginalised civil society actors), the EU's focus on supporting professional NGOs as manifestations of civil society seems unlikely to trigger democratic change.

In particular, efforts to build good governance and to engage NGOs and civil society in political and policy networks are constrained by the persistence of what Kostovicova and Bojicic-Dzelilovic refer to as 'trans-national networks' that thrive upon and reinforce weak state capacity.<sup>72</sup> According to the authors, these networks are hard to define and are the product of a combination of legacies: the informal distribution and parallel economy networks of the socialist period, the wars of Yugoslav succession during the 1990s and the (contested) reconfiguration of state borders, international intervention and liberal economic reforms. These opaque networks prosper in the unregulated economic and political spaces and thrive on state weakness and bureaucratic inertia; they comprise a melee of nationalist elites and state bureaucrats, 'criminal gangs, diasporas and ordinary trades people'.<sup>73</sup>

International assistance both during and since the wars has been incapable of dislodging the power of these networks; the EU, now the dominant source of development aid, has, it would seem, also failed to penetrate and bring forth a decline in their influence and their control over both the state and the economy. Instead, as suggested by this rese-

<sup>72</sup> Kostovicova, D. and V. Bojicic-Dzelilovic, V., 'Europeanizing the Balkans: Rethinking the Post-communist and Post-conflict Transition,' *Ethnopolitics*, Vol. 5, No. 3, pp.223-241.

<sup>73</sup> Ibid., p.232.

arch, assistance serves to reinforce, or at least not challenge, the status quo; development aid channelled through local NGOs compensates for failings in state provision and low levels of market penetration. Whilst project grants do enable citizens to access services that would otherwise not be provided, this inadvertently legitimises and at times empowers the trans-national networks and corrupt elites intent on sustaining state weakness and a pervasive climate of

poor regulation and compliance. This is not to suggest that the impact of EU assistance channelled through NGOs is entirely unworthy and ineffective. The services provided as a consequence of CARDS/IPA/EIDHR projects are valuable and much needed; the critique of this intervention is essentially twofold: whether such short term aid is sustainable and truly developmental, and whether the intervention is really about stimulating civil society.

# European Approaches to Transitional Justice and Civil Society

Iavor Rangelov

This paper examines European approaches to transitional justice and civil society in the Western Balkans by drawing on a broader investigation of justice issues in the Common Foreign and Security Policy (CFSP) and the European Security and Defence Policy (ESDP) of the European Union (EU).<sup>74</sup> In this sense, the analysis of European engagement in the former Yugoslavia highlights dilemmas that are not unique to that region but could be seen as salient in external relations of the European Union more generally. In particular, the discussion seeks to illuminate certain common themes that could be traced both to the process of EU Enlargement and peace-building in the Western Balkans and other policies and instruments associated with the CFSP and the ESDP.

The opportunity to reconsider European approaches to transitional justice and civil society is afforded by the ongoing initiative for the establishment of a regional fact-finding commission for the former Yugoslavia, commonly referred to as RECOM, which is intended to clarify the facts of war crimes committed in the course of the Balkan conflicts during the 1990s and to address the question of missing persons from that period. The initiative has been driven by a regional civil society Coalition for RECOM and has involved broad consultations and engagement with various segments of civil society in Bosnia and Herzegovina, Croatia, Kosovo, Montenegro and Serbia. As the campaign for RECOM enters a critical stage of seeking public support and official sanction, one of the key questions on the agen-

da concerns the role of the European Union in that process and the prospect of securing its support.

My discussion addresses that question by examining European approaches to transitional justice and civil society and raises two main issues in that context. First, the paper considers the dominant understandings of justice after mass atrocity and human rights abuse, which have become salient in EU discourses and policies in post-conflict settings, and emphasizes the perceived trade-off between justice and democratization, on the one side, and security and stability, on the other. Secondly, it examines the concepts of civil society that permeate European thinking and policy-making in relations with third countries and contrasts a depoliticized conception of civil society, one that depicts it as a partner of government and service provider, with more political understandings of the meaning and role of civil society. Finally, the article concludes with some observations about the opportunity that the RECOM initiative affords to rethink EU approaches to civil society and transitional justice and to interrogate some of the assumptions that underpin European thinking in the field of foreign and security policy.

## Transitional Justice

The European Union often appears to betray the image of a unitary actor in international politics. Instead, it tends to project a set of discreet and even competing discourses

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<sup>74</sup> The research project is conducted within the Programme on European Foreign & Security Policy Studies, funded by Riksbankens Jubileumsfond, Compagnia di San Paolo and Volkswagen Stiftung.

and policies in the international arena, articulated through the European institutions and member states, the Council and the Commission, the general legislative framework and specific policy instruments and mechanisms. The CFSP and ESDP are dynamic policy frameworks and subject to ongoing elaboration; they represent, at best, works in progress that might defy systematic assessment and conceptualization. Transitional justice is also a novel development and has only recently emerged as a policy area in the external relations of the European Union. Therefore, it shouldn't come as a surprise that European approaches to issues such as criminal prosecutions or restorative justice in the aftermath of conflict and atrocity are disarticulated, incoherent or conflicting. Nevertheless, I want to suggest that two distinct approaches to transitional justice could be identified as dominant in European thinking and policy-making and that these approaches, in turn, reflect broader arguments about the role of justice in peace and transitional processes that circulate in the field.

On the one side, the European Union has advanced what could be termed a 'democratization' approach to transitional justice. This approach conceives of transitional justice as part of European efforts to promote democracy, human rights and the rule of law. For example, the Development and Cooperation Policy of the European Union has framed financial support for the International Criminal Court and related activities as elements of Europe's global agenda for promotion of democracy and human rights.<sup>75</sup> In the context of EU Enlargement in the Western Balkans, the 'democratization' approach has been linked to conditionality for cooperation with the International Criminal Tribunal for the Former Yugoslavia (ICTY) in The Hague. With the inception of 'reverse' transfers of cases from the Tribunal to domestic jurisdictions, the prosecution of war crimes at the national level has become increasingly tied to accession conditionality as well. The key point is that the 'democratization' approach to transitional justice reflects principled arguments about the primacy of democracy and

human rights and the ethical underpinnings of European foreign policy.

On the other side, there is the 'stabilization' approach to transitional justice. According to this approach, the objectives of public order and political stability take precedence over ethical considerations and, therefore, arguments for and against transitional justice should be assessed in relation to these objectives. The 'stabilization' approach has been implicit in EU involvement in peace negotiations and in designing the mandates of ESDP missions deployed to countries emerging from armed conflict and human rights abuse. It has been salient also in European policy towards the Western Balkans. One example is the initiation of accession talks with Serbia at the Luxembourg summit in October 2005 despite its failure to apprehend a top ICTY fugitive, General Ratko Mladić, which was justified in terms of political expediency and stability. Another example is provided by EU involvement in Bosnia and Herzegovina, where transitional justice has been perceived mostly as a conflict-generating issue and neglected in the peace-building mandate of ESDP missions and the accession process driven by the Commission.<sup>76</sup> In sum, the 'stabilization' approach to transitional justice reflects pragmatic considerations and prioritizes public order and political stability as objectives of EU policy beyond its borders.

My analysis suggests that European thinking and policy-making in the field of transitional justice should be understood as negotiating between the two approaches of 'democratization' and 'stabilization'. These approaches have coexisted but also competed with each other at particular junctures, for example in debates about ICTY conditionality and the suspension of EU accession negotiations with Croatia and Serbia in recent years. The tension between 'democracy' and 'stability' and the trade-off that this tension implies echo a broader dilemma that tends to frame the entire field as a choice between justice and security. In situations of ongoing conflict, the dilemma has been dubbed *Justice v. Peace* and endlessly debated at least since the UN Security

<sup>75</sup> European Council and European Parliament, Regulation No. 1889/2006, 20 December 2006.

<sup>76</sup> See Iavor Rangelov and Marika Theros, "Transitional Justice in Bosnia and Herzegovina: Coherence and Complementarity of EU Institutions and Civil Society," in Kai Ambos et al., eds., *Building a Future on Peace and Justice: Studies on Transitional Justice, Conflict Resolution and Development* (Berlin: Springer 2009).

<sup>77</sup> Jack Snyder and Leslie Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice," 28 *International Security* 5 (2003).

Council decided to establish the ICTY in the midst of the Bosnian war back in 1993. In post-conflict transitions, it has been rearticulated as a choice between ‘principle’ and ‘pragmatism’, assessing demands for justice against the risk of radicalization and backlash.<sup>77</sup> In this sense, European approaches to transitional justice have reflected arguments that circulate in scholarly and policy debates, reproducing some of the deeply rooted assumptions and cognitive paradigms in the field.

### Civil Society

Civil society is a contested concept and consensus on its meaning and implications remains scant among scholars and policy-makers. Despite this ambiguity, there is widespread recognition of its importance in post-conflict reconstruction and democratization efforts. Two competing understandings of civil society have been invoked in this context. On the one side, there is the idea of civil society as autonomous from the state and the market, conceived as a space or set of actors that serve as counterweight to state power. This is a political conception of civil society, one that tends to emphasize its role in contesting and keeping in check the power and institutions of the state. Civil society, in other words, is about critical public debate and contested politics. On the other side, there is the notion of civil society as the ‘third sector’ alongside the state and the market, deployed to redress their failures and shortcomings. On this account, civil society tends to be portrayed as a service provider or partner of government, invoking the image of politically neutral, professional NGOs and the vocabulary of social and economic development. This is a largely depoliticized conception of civil society, one that aligns civil society with the state or conceives of it as a substitute for the state.

I want to suggest that European approaches to civil society have mostly reflected the second, depoliticized understanding of the concept. In the field of transitional justice, there has been some acknowledgement that civil society activities should be supported even when they challenge the state and its policies. For example, the Instrument for Stability

explicitly states that EU support for civil society does not depend on the “agreement of the governments or other public institutions of third party countries.”<sup>78</sup> Europe’s overall approach to civil society, however, has emphasized its role as a service provider and partner of government. This tendency has been prevalent in the context of EU Enlargement in the Western Balkans. Financial assistance schemes for civil society in the region have consistently favoured NGOs that tackle social issues and provide services to various disadvantaged and vulnerable groups, while largely neglecting civil society engaged in advocacy on politically charged issues, such as transitional justice.

In recent years, European institutions have begun to engage more actively with civil society in the region. The European Commission has conducted a number of ‘mapping exercises’ to identify non-state actors and has established a new mechanism of Policy Dialogues, intended to serve as an interface between civil society and governments in the accession countries. However, those segments of civil society that are considered ‘radical’ or ‘political’ have been excluded from the Policy Dialogues, for example associations of victims, war veterans, and more vocal human rights groups.<sup>79</sup> In sum, European approaches to civil society in the former Yugoslavia tend to reflect the depoliticized understanding of civil society and to favour non-state actors that fit the roles of service providers and partners of government.

### Conclusion: RECOM and the European Union?

This paper has highlighted two main themes in European foreign and security policy on issues of transitional justice and civil society. I have argued that European approaches to transitional justice could be understood as negotiating between ‘democracy’ and ‘stability’ and expressing a broader dilemma prevalent in the field, which depicts justice and security as competing objectives in post-conflict societies. I have also suggested that European approaches to civil society tend to advance a depoliticized concept of civil society, emphasizing the role of non-state actors as service providers and partners of government. Finally, I have

78 European Council and European Parliament, Regulation No. 1717/2006, 15 November 2006.

79 Rangelov and Theros, op.cit., pp. 22-24.

implied that these themes and approaches to transitional justice and civil society are not specific to the European Union or its engagement in the Western Balkans, that they reflect certain assumptions and cognitive paradigms that are deeply entrenched in scholarly and policy debates in the field as a whole.

The RECOM initiative in the former Yugoslavia affords an opportunity to reconsider some of the settled patterns of thinking about justice and civil society that have dominated European foreign and security policy in post-conflict settings. In particular, RECOM offers a chance to call into question the merits of arguments that frame the field of

# Europe and the Necessity of Adopting a Transnational Approach to Restorative Justice in the States of Former Yugoslavia

Florence Hartmann

**T**ransitional justice, which should be observed as a process, develops in several phases. Its objective is to identify evil, by establishing the truth through judicial institutions that reconstruct the narrative of a crime and tragedy, which ultimately provides a resolution restoring the social connections ruined by war and mass crimes. This long-term process should bring about public acknowledgement of crimes and societal reckoning with the past. Of course this process is not limited to the retributive phase, i.e. to punishing perpetrators of crimes, but also includes a restorative phase in which a society as a whole deals with the crimes committed and thus reckons with this part of its own history. This is the opposite to oblivion because memory is present, but the terrible history has been overcome and freed from its violent potential. Reconciliation is not limited to inter-national reconciliation, but requires reconciliation with one's own history.

In this respect, the International Criminal Tribunal for the former Yugoslavia (ICTY) has achieved a great deal, regardless of all the criticisms that can be levelled at it. It initiated and thus enabled the process of establishing facts about crimes, which may not have happened (or let's say most likely would not have happened) if criminal prosecutions were left exclusively to the domestic courts. The work of the Hague tribunal itself facilitated the expansion of the retributive phase through its gradual transfer of cases to local courts as a complementary process. Although passive in the beginning, the international community has played a role in the extension of the retributive process by supporting and financing the establishment of domestic courts for war crimes in the region. However, this support came as a consequence of the Hague tribunal completion strategy

that began in 2002 instead of being a part of a well developed strategy aimed at strengthening democracy, stabilization and reconciliation in the region.

For a very long time now the international community has been approaching this issue in the following way: more than one hundred people have been prosecuted since the Hague tribunal was established, local courts have initiated additional cases, crimes have not gone unpunished, and now we can move on because dwelling on the past prevents a society from looking into the future. Victims' frustrations, tensions in a society, interethnic divisions, and slow reconciliation are often viewed as a sign of the tribunal's failure, and, partly, as a sign of immaturity of societies in the region but never as an incomplete process in the sense it was defined at the beginning of my paper. Under the pretext that it established, financed, and cooperated with the Hague Tribunal, the international community liberated itself from defining a broader strategy that would contribute to reconciliation, considering the latter to be one of the duties of the Hague Tribunal and a part of its mandate. Its frequent remarks that the Hague Tribunal is an institution, which costs a lot and which has not delivered "the expected profit compared to the investment" points to the international community's lack of understanding or at least to its indifference to the process of transitional justice.

It would be wrong to include the policy of conditionality introduced by the European Union in a form of full cooperation with the Hague tribunal among attempts to create long-term policies of transitional justice in the Balkans. The policy of conditionality appeared around 2003 or 2004 as an instrument of support and acceleration of the Hague tribu-

nal completion strategy, but also as an aspect of the policy of harmonisation with European standards in the sense that countries that violate their international legal obligations, such as cooperation with the ICTY, also fail to meet the requirements for joining the European Union. This approach is driven by a desire to set aside the remaining issues from the past rather than by a desire to encourage dealing with the past. It is an *ad hoc* policy that was created in order to extradite to the Hague tribunal indictees that have not been brought to justice and who are still at large. The application of this policy had no other purpose or aims. This mechanism was used for the first time in the case of Croatia and the extradition of Ante Gotovina. It was subsequently applied in Serbia, where some 30 fugitives that the Hague Tribunal was after had taken refuge. One lever of that policy is notable. It was underpinned by the following message: if you extradite all remaining Hague fugitives, you will be able to prosecute your war criminals much faster. That is bargaining, pragmatism; it is more like business between countries that understand that these issues and the past should be left behind because they induce conflict.

Europe has never developed a policy to enable and assist former Yugoslav states to get closer to each other through the process of dealing with the past. When the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, abandons this practise and says in his report submitted on March 11th this year [2009] that "Serbia should adopt an official strategy for acknowledging and telling the truth about the conflict in the region and towards victims and perpetrators", he still falls short of recommending the future course of action on this issue. It defies belief that Europe has proclaimed that its goal is to have all successor states to the former Yugoslavia in the European Union, and yet it has not put in place a mechanism that would aim at resolving conflict-ridden relations dividing the societies in the Balkans before they join the European Union. It is sad in this respect that the European Union has still not found it necessary to encourage the Balkans to apply the European experience in overcoming old divisions so that reconciled former Yugoslav states would join the Union as a democratic and stable space. On the contrary, it seems as if the European Union believes that problems and divisions will be resolved by the accession of former Yugoslav states to the European Union.

A clear policy of the European Union's support for war crimes trials before the International Criminal Tribunal for the former Yugoslavia or before domestic courts is not sufficient to come to terms with the terrible recent past. We have clearly seen that pointing to crimes and facts establis-

hed in judgements is often only a dead letter in the region. Everyone presents his or her own interpretation of trials and rejects the established facts, thus leaving a conflict-ridden view of the past. Just like the countries in the region, the European Union does not stress support for restorative justice and so it prevents amplifying the effect of the means already invested in the process of transitional justice. Without a restorative phase, the retributive phase has a narrow reach. A lot has been achieved thus far. The first phase has achieved a great deal merely by starting the process owing to the clear position of the international community on the issue. That is why there is an urgent need for the formulation of a clear policy that would enable the continuation of the process and provide appropriate support for the second phase and the non-governmental sector, which initiated this process, and for programmes created throughout the entire region.

Without the sincere support of the institutions, the second phase cannot achieve its goal and thereby help complement and complete the process of transitional justice. The non-governmental sector is unable to carry out the restorative phase on its own. If it were to do so, the restorative phase would unfold outside the rest of the society and lack a necessary impact. Nonetheless, the non-governmental sector is still the best initiator, just as it was critical in the first phase. For this reason, the non-governmental sector should be a mediator that would convince the European Union to include the process of transitional justice, including the restorative phase, into integration processes, in line with its history and values, and to consider them an integral and essential part of the democratization and Europeanization of the region.

However, it would be wrong to forget the essential role that the successor states to the former Yugoslavia must have in this phase of restorative justice. The voices of victims would not be heard without non-governmental organizations and mass crimes would have remained concealed then and now. They were the first to collect evidence and inform the world about the evil that consumed the Balkans at the time, they pointed to the gravity of crimes and fought scepticism and doubts, which usually prevail in the beginning and delay an adequate response to stop the crimes being committed. The voice of victims and documenting of crimes represent an essential segment of the justice process. However, they are not the only archives that would enable the reconstruction of events and creation of a genuine collective memory. Besides victims' archives, there is additional complementary material: the archives of the criminal and repressive systems, without which it would be impossible to comprehend

how the system of values was undermined and how mass violence among neighbours occurred. To understand "how all this happened", is the key issue that should be resolved in order to free the divided communities and societies of the burden of the crimes and the feeling of collective responsibility, and to admit the suffering caused to others.

The archives of criminal systems are located in various bodies and institutions – the police, the secret police, the army, the authorities, the high command, sometimes judicial institutions, hospitals, prisons, transport services, etc. They are a testimony to the cynical bureaucracy, without which dictatorships and repressive regimes cannot operate. Besides the archives of suffering, they are a constituent part of the tragic history of the region; they contain evidence that should be preserved which will allow justice to be served, victims to be repaired, and societies to find a way towards a stable and solid democracy.

However, the archives of criminal systems are the most sensitive because they are unique. They are under constant threat of being destroyed, concealed, counterfeited, or lost due to negligence. Since their value for truth-seeking about events is invaluable, these archives are perceived as a part of the "legacy of the humanity's collective memory". Therefore, UNESCO has a programme for preservation of terror archives called the "Memory of the World" just as it has a programme for the preservation of cultural legacy. Chile, for example, registered seven of its archives in this programme, so they can be transferred to future generations, that will be able to study them and prevent the recurrence of violence. Likewise, it was very important to preserve and protect the Stasi, KGB, and other secret services' archives after the fall of the Berlin Wall. These archives of violence and terror are inaccessible without the participation of the state because they are exclusively located within institutions and bodies previously involved in the criminal enterprise. Article 29 of the Statute of the Hague Tribunal, which obliges countries to cooperate with the tribunal, made it possible for a part of this archive to be accessible and delivered in cases prosecuted before the tribunal. These documents are also necessary in the phase of restorative justice and the continuation of the process of establishing facts. It is essential to involve state institutions in the development of restorative strategies since a large part of the horrific and painful memory is in their hands. That is why the European Union should develop a strategy that would encourage legislative and administrative measures to be passed in order to preserve

and protect these archives in the long term, not to destroy and conceal them under the pretext that they represent a source of conflict between countries or that they could lead to obligations to pay large amounts of money as reparations. The destiny of the terror archive does not only concern states that took part in criminal enterprises, but the entire international community, which may also possess elements of this archive or information about them, and which is obliged to provide protection for such evidence that will enable nations to liberate themselves from the past they were dealing with and thus create conditions to prevent its recurrence more effectively.

As long as the political leadership of the European Union believes that the past stands in the way, that the past is a source of conflict, and that all should be swept under the carpet, it will not understand the significance of the continuation of the transitional justice process and the role that Europe can play in the restorative phase. A transnational approach is much more necessary in this phase than in the retributive phase, in which the Hague Tribunal or local courts worked on cases vertically and in isolation from the overall picture. By contrast, the restorative phase requires a horizontal and comprehensive approach, and thus entails active participation of actors from several countries. Although the European Union publicly avoids promoting oblivion with regard to the conflict-ridden past, its numerous moves thus far point to this. It still fails to see that it is contrary to its interests to believe that time will heal all wounds and that the integration of the Balkans into the Union will completely erase them. This opinion goes against the experiences that Europe itself had. The obsession of many members of the former Soviet bloc with the recent past demonstrates that an unresolved painful past is a source of tension. It could be said in that context that the non-governmental sector in the former Yugoslavia can help Europe preserve its community since resolving the issues of the legacy of the past in this region is one of the main principles that could save Europe in the long run and create a society where we all have a common interest. If it wishes to remain a democratic and stable space, the interests of the European community surely cannot be economic alone, even though they are very important. By supporting the completion of the transitional justice process in the region of the former Yugoslavia, Europe will also help itself. For this reason it has to engage promptly with ongoing initiatives with the aim of bringing former Yugoslav states to accept a transnational approach to restorative justice as soon as possible.

# The European Union Position

Thomas Gnocchi

We are grateful for this opportunity to discuss the issue of transitional justice in the Western Balkans and how the efforts in this area can contribute to lasting peace and post-conflict reconciliation.

Looking at the past and facing the truth is indispensable for reconciliation between the countries in the Western Balkans and for the reconciliation within the countries.

Reconciliation, good neighbourly relations and regional cooperation are central elements in the Stabilisation and Association Process. The Western Balkan countries have committed themselves to pursue these objectives in the Stabilisation and Association Agreements.

Full cooperation with ICTY is decisive for progress in the European Integration process and for the EU accession process. The capacity and capability of national jurisdictions to handle war crime cases is equally important. We are intensifying our efforts to that end.

The prospect of future EU membership is a strong driving force for the reform process in the candidate and potential candidate countries. The EU's clear signals in this respect will help consolidate the progress the Western Balkan countries achieved in recent years and encourage them to pursue the necessary reforms.

The conclusions drawn by the Chief Prosecutor at ICTY, Mr. Serge Brammertz, concerning Croatia, in his report to the UN Security Council that cooperation with ICTY is only partly satisfactorily putting pressure on Croatia in the EU accession negotiations.

Ensuring Serbia's full cooperation with ICTY is one of the main priorities for the deepening of EU-Serbia *relations*.

The Commission considers that the arrest of Radovan Karadzic in July last year was a significant development and a clear indication of Serbia's renewed commitment to cooperate with the ICTY.

The Serbian government should continue to pursue cooperation with the ICTY with full determination and arrest the remaining fugitives. The EU-side has made the ratification of the Stabilisation and Association Agreement with Serbia and the implementation of its Interim Agreement conditional on a unanimous decision by the Council that Serbia can be considered to have established full cooperation with ICTY.

Progress in accession negotiations and in general on EU integration depend also on how the countries handle war crimes cases domestically. Progress has been achieved over the past months and cooperation between prosecutors has improved greatly. However, many challenges remain in terms of removing ethnic bias in judgements, ensuring witness protection and applying common standards of criminal responsibility.

There is a large number of war crime cases which have been initiated at national level and in which trials have not yet started. The capacities to handle this significant number of domestic war crime cases are limited. This is in particular problematic in Bosnia and Herzegovina which has by far the highest number of pending cases.

To assist the special war crimes chamber at the State Court of Bosnia and Herzegovina we are providing it with substantial financial support.

The Commission has recently approved the financing of a project initiated by Mr. Brammertz on internships at the

Prosecutor's Office at the ICTY. The project will finance training at the Prosecutor's Office of visiting war crime prosecutors and young professionals from the Western Balkan countries. The project will start in April 2009.

The Commission will also organise through its TAIEX Office in collaboration with the Chief Prosecutor's Office two annual regional conferences for war crime prosecutors from the Western Balkans.

Our support highlights the importance we attach to such exchanges of experience with domestic prosecutors and professionals while full activities are still ongoing at the ICTY.

Regional and international police and prosecutor cooperation to improve the combating of trans-border organised crime and other forms of serious crime are also supported by Community financial assistance. This kind of cooperation will give the countries the opportunity to support each other in their European integration efforts.

I said in the beginning of my presentation that looking at the past and facing the truth is indispensable for reconciliation. We need to keep the memory alive of what happened during the wars including the most severe atrocities. That is why we support with our financial assistance the Research and Documentation Centre in Sarajevo. The Commission is also ready to consider support to this regional initiative from civil society.

Reconciliation obviously requires courageous political leaders who can overcome stereotypes and rigidity. It also requires a strong involvement of civil society. I would like to pay tribute to all those NGOs and individuals who strive to search for the truth and for reconciliation, sometimes at under significant threat and with their lives at risk. I would wish to congratulate in particular the organisations behind the Coalition for RECOM for their resolve, professionalism, and dedication.



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