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

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

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

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

R. Possekel, Foundation Remembrance, Responsibility and Future (EVZ), Advisor to the Peace and Development Network – FriEnt (Bonn)

The concept of transitional justice arose in the 1990s as a response to the disintegration of authoritarian regimes and dictatorships in Latin America, Africa and Central and Eastern Europe. The fundamental conviction behind this concept is that such radical changes do not represent a "zero" hour, but rather that the past will also shape the future. In particular, this concerns trust in social order, which has been destroyed and must be restored, and without which the institutions of a modern society cannot function. Against this backdrop, the following objectives are usually mentioned:

- Preventing impunity, including by processing human rights violations and violations of international humanitarian law and punishing the perpetrators;
- Restoring and permanently securing of the rule of law;
- Bringing about reconciliation in a divided society.

Transitional justice is aimed at preventing past crimes from happening again. In this sense, the term describes a preventative approach. It was developed not as an approach for reflecting systematically on conflict transformation processes but originated from a real human rights impetus that continues to shape it even now. This impulse started from the attempts to prevent impunity for authoritarian regimes in Latin America in the 1980s, for instance for Pinochet's dictatorship in Chile. The starting point and focus of all considerations is therefore the struggle for the rights of victims; in this sense, it is a "victim-centred" approach.

At the start of the 1990s, the UN Commission on Human Rights appointed the French diplomat Louis Joinet to develop proposals on how to prevent impunity and protect victims. In 1997, he submitted a detailed report to the UN Commission on Human Rights that ruled out impunity in cases of political and civil human rights violations, as well as in cases of violations of international humanitarian law.[1] In its original form, the document described three rights:

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

The right to reparation also included three preventive measures, which were summarised as "guarantees of non-recurrence": the disbanding of paramilitary groups; the repeal of martial law and the dismissal of senior officials responsible for serious human rights violations. Joinet originally formulated a total of 42 principles for an effective enforcement of these rights. The principles were reconsidered in 2005 in an expert report to the UN Commission on Human Rights prepared by Diane Orentlicher. The new report listed 38 principles.[2] updated based on experiences from the past 15 years. Orentlicher's report formulated detailed regulations for individual areas, which are intended to ensure the enforcement of victims' rights and, at the same time, the observance of constitutional procedures as well as excluding the possibility of constitutional procedures being politically abused to obtains impunity. Principles, or rules, were formulated for the following areas:

1. **The right to know** (Principles 2-18):

Setting up and operating investigative and/or truth commissions; preserving archives and ensuring access to them;

2. **The right to justice** (Principles 19-30):

Questions of collaboration between national, foreign, international or hybrid courts; legal measures to prevent impunity;

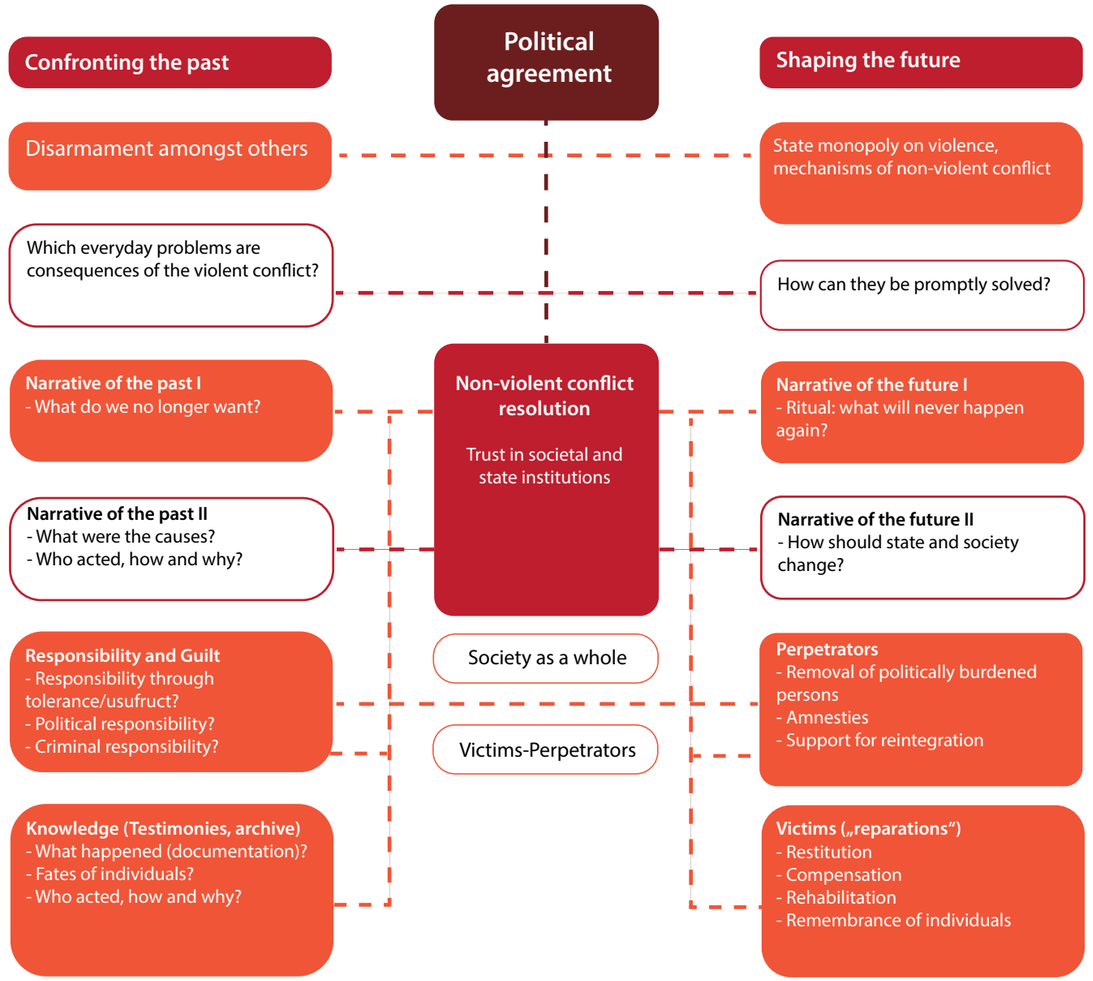
3. **The right to reparation** (Principles 31-38):

A. Rights and obligations; reparation procedures; publication requirements; scope of this right (Principles 31-34);

B. Guarantees of non-recurrence: reform of state institutions; disarmament and demobilisation of paramilitary units; social reintegration of children; reform of legislation to preclude impunity (Principles 35-38).

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

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



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

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

The place for such a political commitment would be a "peace treaty", or a comparably **comprehensive agreement**, which up until now has not been in sight in Ukraine. An example of a more comprehensive approach would be the so-called Mitchell Principles,[3] which were important for the resolution of the Northern Ireland conflict:

All involved in negotiations had to affirm their commitment:

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

Another example of a comprehensive agreement is the Ohrid Agreement in Macedonia from 13.8.2001.[4]

Therefore, first of all, efforts must be strengthened to find a political formula for a genuine peace process. Importantly, a **political settlement must arise not only on a state level, but also on the level of civil society.**

Demilitarisation, or disarmament can be successful only when other sustainable **conflict management mechanisms** are implemented (in the terminology of transitional justice: "guarantees of non-recurrence".) As a rule, requirements usually do not go as far as to demand full rule of law, but they do create context-related mechanisms to enable non-violent handling of conflict. The Ohrid Agreement, for example, provided for "double majorities" (Badinter Principle); even more far-reaching are, for instance, approaches that refer to reaching consensus.[5]

Every setting that is shaped by violent conflict has very tangible effects on **everyday life**, whether it is checkpoints, demarcation lines, supply shortages or constraints on economic activity. Trust in a conflict transformation crucially depends on whether positive changes occur. This is outside the scope of transitional justice, but it significantly serves the restoration of trust in the social order. If there is no progress here, questions of justice will largely come to nothing.

Narratives of the past will always consist of some narratives that can reach a consensus and others that are controversial. **A narrative capable of reaching consensus** is generally negatively formulated: no violence, no despotism, no blanket retaliation or the like.[6]

A negative narrative outlaws all acts that cannot be justified by the violent form of conflict, e.g. the so-called "atrocity crimes". This negative narrative finds its verification in the numerous stories of victims. One task of shaping the future is then to translate this common thread into rituals that will be invoked periodically, e.g. on political holidays, and in this way, transform the past into action for the future.

There will always be different views, when it comes to the positive shaping of the future. This goes hand in hand with the fact that there will be **competing narratives** regarding the causes of the conflict in the past. Nevertheless, it can strive for a consensus on rules within the framework of which the discourse should move. In relation to the past, this can include orientation around scientifically proven facts, respect for the reports of those affected, the acceptance of different perspectives and a commitment to arguments aimed at plausibility. There are similar rules for memorial sites and such standards are also common practice for journalists.[7] Instead of the truth, it can only be about an ethics of political (and historical) discourse.

A "truth commission" can make a decisive difference when it comes to collecting information on the fates of people and the individual processes associated with them. At this point, an entitlement to having all human rights violations documented can also be pursued, i.e. forming a **discursive memory space** for all victims without exceptions and without hierarchies. Nevertheless, there must be an awareness that such inclusive remembrance as a result of political processes cannot be automatically translated one to one into reparations or criminal prosecution. All experience shows that these two processes will never be truly comprehensive.

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

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

Responsibility and guilt are issues that cannot be reduced from the outset to the prosecution of individual perpetrators. Thus, the "metaphysical" (Jaspers) question arises of guilt through toleration. This question is directed at mainstream society and is difficult to address. Guilt, or responsibility as result of toleration, or responsibility out of solidarity, can probably not be processed by an institution or on a project basis, rather it is something that a society must articulate from within. Political responsibility can only be established through a political discourse. Shared political responsibility is carried by all those who through their active participation contributed to the conflict. However, this shared responsibility does not necessarily and forever mean the exclusion of this group of people from all future public positions, although it can. This question can also be shaped, and the solutions range from permanent exclusion to forgiveness as a result of an admission of guilt and its corroboration through deeds.[8]

The question of **criminal prosecution** only arises in third place. Here, it is clear that any blanket ruling (such as is contained in Minsk II) to generally refrain from prosecution runs counter to international practice developed over the past 30 years and to the stated objectives of the UN. The Secretary General formulated the following statement in 2010: "The UN cannot endorse provisions in peace agreements that preclude accountability for genocide, war crimes, crimes against humanity, and gross violations of human rights and should seek to promote peace agreements that safeguard room for accountability and transitional justice measures in the post-conflict and transitional periods."[9] This list is not exhaustive.

However, it is also stated that it cannot be a matter of prosecuting **all** human rights violations, but rather only of "grave" ones. The following are named: "torture and similar cruel, inhuman or degrading treatment; extra-judicial, summary or arbitrary executions; slavery; enforced disappearances; rape and other forms of sexual violence of comparable gravity." This list is not exhaustive, rather it highlights the challenge that exists here of making a meaningful distinction.[10]

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

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

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

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

Dear friends,

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

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

As you know, in my most recent assignment, I have been dealing with questions of the then and now, through establishing facts. Facts, often misinterpreted, uncomfortable to read and for many inconvenient to digest.

I may not have all answers to the important questions you are planning to discuss. As many of you here, I came to Berlin to learn and listen and to contribute to a debate which is long overdue.

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

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

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

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

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

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

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

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

The main responsibility clearly lies in Moscow and Kyiv, as can be seen in the role they took on themselves in various Minsk agreements.

Dear friends,

The question I have been asked most often in the past years by decision-makers, mainly men in suits, often living far away from the harsh reality at the contact line, and the media is: "who it guilty for all this suffering?".

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

Any answer to the first question, in whatever format or context the question is asked, will further polarize an already emotionally and politically charged environment. The answer to the second set of question can be only given, at least partially, by those who ask the first question.

Let me be clear, I do understand the desire by many to point the finger to one or several culprits, it is a human reaction to injustice. Undoubtedly, however, the first question is best answered through an established process, the judiciary, a process defined by law or otherwise agreed.

Those who ask this question should also be willing to hold the culprits they control to account for violations of their commitments to end the violence. Asking the question only with the intention to blame others or to further fuel the conflict should be avoided.

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

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

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

Participation would provide a platform, a chance for the second set of questions to be considered in negotiations for further measures or the implementation of already agreed steps towards normalisation. It could ensure that these questions are at the core of the negotiations.

Accountability would ensure that the first question is not merely asked for the purpose of further fuelling the conflict.

Ladies and gentlemen,

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

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

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

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

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

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

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

Dear friends,

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

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

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

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

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

Yet – these efforts by the OSCE SMM are mere symptom treatment. Frequently, these very tangible results are being nullified by the continued fighting. The root causes are not being addressed and the questions that I outlined earlier have not been answered. While providing temporary relief – one arguably postpones (or avoids) to answer these questions. When will it end? Who is guilty?

Dear friends,

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

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

Ladies and gentlemen,

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

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

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

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

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

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

Dear friends,

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

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

However, I was presented with their plan for the day when it does end: "We will build a long table, a very long table. We will organize a huge party and we will invite our friends from Marinka, located on the other side of the contact line, to that table."

These women made it clear that even after 4.5 years divided by an artificial contact line, exposed to relentless violence and subjected to endless portraits of the reality they live in: They have not forgotten how they were connected with their fellow Ukrainians in past. No ethnic or religious tensions divide them. It is not their conflict. Not now. Not yet. Time is precious.

Light at the end of the tunnel? Certainly, an indication that the time before the conflict still plays an important role in the thinking of many, that despite of all the suffering the gap between Ukrainians on either side of the contact line is not insurmountable. And it should be a clear and unmistakable sign that involving them and their societies in overcoming the conflict is possible and arguably desired. They want it to end. They believe it will end. They are a force to reckon with.

Dear friends,

What roles should the international community, the affected societies or decision makers play? Many avenues come to mind. I would like to offer three reflections here.

Preserving the facts: With so many indiscriminate weapons involved (from mines to howitzers), with such a large area affected and with so many civilians at risk – the horrific consequences are inevitable. With the competent Ukrainian authorities currently prevented from accessing the area and in the absence of the rule of law in areas beyond government control, preserving the facts is necessary to deal with the past in both a judicial and historical sense once normality has returned to these areas.

The OSCE SMM has painstakingly established facts and has recorded them in thousands of daily reports available to everyone, now and preserved for the future. These objective and bare facts, currently often ignored by those who should address them, may serve to document history books and be used by the competent authorities to examine the past in judicial processes (be they criminal or civil).

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

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

The civil society must be empowered and supported (also financially) in further contributing with its own testimonies on what is happening. Increasing the cooperation with the international community and vice-versa is also to consider. The recent creation of a Civilian Casualties Mitigation Team in Ukraine's Armed Forces in consultation with non-governmental organisation is one of many initiatives that demonstrates that such cooperation works.

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

These measures should contribute to preserve the facts, inquire into violations of agreements and prevent similar violations in future. The international community should contribute with best practices, funding and where needed personnel. In particular, the concept of establishing a commission to review committed violations of agreements and prevent new ones from occurring should be considered. Civil society should be contributing to such a mechanism either by a representation or contributions in the form of reporting of incidents that would fall within the framework of such a process.

Maintaining the dialogue: The five ladies in the Trudovski district have shown the way: The artificial line dividing government from non-government-controlled areas of eastern Ukraine, also referred to as the contact line, is not a division line between Ukrainians on one or the other side. Not now at least.

Throughout my 4.5 years working in eastern Ukraine I have been told over and over again: "This is not our conflict. We don't understand why it continues". Up to 40,000 Ukrainians are crossing this artificial line every day. Clearly, this is not a conflict between people.

Having the lives of Anna and Volodimir in mind, it seems vital that the impact of the contact line is kept minimal and that efforts are being undertaken to maintain dialogue across this artificial line. Involving civil society groups across the line would be one way to overcome the impasse of the dialogue in Minsk: workers could talk to workers, mothers to mothers, or doctors to doctors. Where decision makers can't talk for a variety of reasons, civilians can, do and want.

In this context I would like to underline that the societies in and around Ukraine bear responsibilities themselves. I believe that the ability to conduct dialogue, controlling decision makers, democratic solidarity and the avoidance of stereotypes is learnable.

In essence, this is the contribution of the civil society. This is the social contribution that is needed to materialize in Russia, Ukraine and in other European countries to ending the conflict.

Every conflict will end. So will the conflict in an around Ukraine. While silencing the guns seems not impossible and the OSCE SMM has documented that there is a relatively tight command and control on both sides of the contact line, dealing with the echoes of years spent in different realities, will take a lot of time and cannot be resolved as the armed violence by issuing orders to stop firing.

The not-so-new ideas I have outlined may help in overcoming the past. But much more work will be needed and some of this work can and arguably should start now.

As I mentioned before, a contribution by the affected societies is both possible and needed to accelerate this work. As long as paternalistic thinking and the lack of pluralism of opinion shape these societies, all control in dealing with this conflict remains in the hands of the decision makers.

Dear friends,

The ladies in the Trudovski district have a plan, they are prepared. Civilians on both sides of the contact line and elsewhere in and around Ukraine are prepared and long for the day when the violence ends to come. Including them and their needs in the process of getting there is a necessary step. Both the societies themselves and decision makers are needed to make this happen. Volodimir and Anna would certainly note.

Thank you.

1.3. Christoph Schaefgen – Judicial processing of the GDR past

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

I. Introduction

It is well known that, in the last century, Germany accomplished two transitions from a dictatorship into a democratic society. Both times, criminal law was utilised to address the injustice of the previous regime. The criminal prosecution of Nazi crimes, initially energetically driven by the victorious powers, almost came to a standstill after the founding of the Federal Republic due to the Germans' grave need for amnesty. That only changed 20-30 years after the end of the war. As a consequence of this long-lasting reluctance to prosecute, German criminal justice still has not fully dealt with this darkest chapter of German history. For instance, it was only in 2018 that a 94-year-old concentration camp guard finally went on trial in a Muenster district court. The prosecution of crimes committed by the state in Communist East Germany (GDR) was, at first de facto, and because of the Basic Treaty of 1972, legally impossible for the old Federal Republic of Germany until reunification. After the building of the wall in 1961, however, a state authority was established to record and document known incidents at the border and convictions made by the GDR judiciary. In the transitional period between the peaceful revolution in autumn 1989 and the unification with the FRG on 3 October 1990, prosecution lay in the hands of the GDR judiciary, which until then had been a pillar of the defunct regime. Accordingly, the focus was not on the human rights violations inherent to a dictatorship, but rather on tackling of the economic privileges of a leading class of functionaries and the election fraud which by then was undeniable. It was only under the justice system of the reunited Germany that all areas of state injustice in the GDR were examined under criminal law. Through prompt criminal prosecution, which was continually based on a broad political will, the mistakes made in prosecuting Nazi injustice could be avoided. As far as the prosecution of serious human rights violations is concerned, the legal principles developed for Nazi crimes could be applied.

For this reason, except for a few proceedings that lasted until 2005, the judicial processing could be regarded as completed after a good ten years. Today, it is already history.

II. What was the human rights situation in the GDR until 1989?

The constitution of the GDR also had provisions for human and civil rights. They were not to be understood as individual freedoms that the state could not violate, but rather as rights to participate in and shape the development of the communist state and social order. The intrinsic barrier to such an understanding of fundamental rights was the notion of "societal interests", which were interpreted by the party (SED) as binding by virtue of its monopoly on knowledge and leadership.[11]

From the very beginning until the end of the GDR, the population was prevented from shaping their lives according to their own ideas and, from 1961, was also confined by a militarily secured border. An attempt was made to establish the first anti-fascist and socialist state on German soil by force, which was not derived from the will of the people and was based on the infallibility of the party as the leader of the working and peasant class. Serious human rights violations, which were classified under criminal law in the categories of murder, manslaughter and unlawful detention, were committed systematically and on a huge scale by the military in securing the state border, by the judiciary in politically motivated criminal proceedings and by the State Security in their actions towards so-called "enemies of the GDR". At least 265 people were killed by firearms and mines and several hundred seriously injured in escape attempts.[12] According to reliable estimates, at least 150,000 to 200,000 people were victims of the politicised judiciary.[13] Death sentences were handed down 72 times. They were carried out in 52 cases.[14] Political prisoners, especially in the early years, were kept in inhumane conditions, were forced to testify and were often abused. Prosecution of these violations as criminal offences was deliberately prevented.

People who fled abroad were persecuted by the Ministry for State Security, who wanted to eliminate those people for the "damage" they caused to GDR. Hundreds of people were kidnapped from the West and taken to the GDR to be put on trial. In order to combat so-called "hostile negative forces", nationwide surveillance of telephone, postal and parcel communication was organised, which served both the "Zersetzung [decomposition] of character" of those under surveillance and to procure foreign currency.

The former included the systematic discrediting and undermining of individuals' self-confidence and convictions.[15] The high value that competitive sport had for the GDR's reputation in the world and its internal stabilisation also led the GDR to a state-controlled doping system, deliberately accepting damage to the health not only of adults, but also of unsuspecting underage athletes.

III. Opportunities and limits to prosecution

With the accession of the GDR to the FRG on 3 October 1990, the scope of the legal system of the - old – FRG was extended to the region of the former GDR.[16] A transitional arrangement was made for crimes committed in the GDR before its accession.[17] This made no provision for an amnesty for criminal acts made by members of the state apparatus of the GDR. For this reason, the public prosecutor's office had to follow up on every suspicion of a criminal act. Criminal law was seen as indispensable for the success of the unification process, reconciliation of perpetrators and victims, as well as for the formation and consolidation of trust in the constitutional state.

On the other hand, all those responsible were aware that while criminal law had an important role to play in the unification process, it could not play the main role. It was foreseeable that criminal law could respond, at most, to only a part of the injustice. Alongside criminal investigation, rehabilitation and compensation of the victims, the reparation of financial losses suffered, as well as the historical and political investigation, which was also carried out, had to take place. In 1992, high-profile civil rights activists from the former GDR wrote a call for a tribunal for the resolution of state injustice in the GDR in the form of public hearings and negotiations. Yet nothing came of it.

Criminal prosecution was subject to a restriction only within the framework of the statute of limitations. In this case, it was made clear by jurisdiction and legislators that the statute of limitations had been suspended for the duration of the GDR's existence. This decision was taken because prosecution of systemic injustice was blocked during GDR time by the will of the state and party leadership of the GDR.[18] Through two further laws on limitations, the start of the limitation period for criminal prosecution was postponed by three and five years respectively.[19]

There were however limits set by the constitution that had to be observed. According to it, an act or an omission can only be punished if its culpability was already determined by law and that was still the case at the time of the decision.

Determining which law was in force in the GDR at the time of the crime's commission was not easy. Very different legal opinions were held on this issue. Upon this very question depended the culpability of soldiers and political and military commanders for the dead and injured at the border, as well as members of the GDR judiciary for handing down death sentences and jail terms.

With the Border Law,[20] which allowed officers to shoot dead people trying to flee, the GDR had created a legal permit to kill and injure so-called "border violators". The politicised criminal law of the GDR, through which the practice of political freedoms was criminalised, such as the right of exit, expression, assembly and demonstration, allowed the GDR judiciary to extend harsh prison sentences to citizens critical

of the regime and those wishing to leave and even the death penalty to "traitors".

Over the course of a years-long clarification process as part of criminal proceedings against those responsible for the killing of escapees at the border, in which defendants had also called upon the Federal Constitutional Court and the European Court of Human Rights, it was established, that laws from the GDR and their interpretation did not merit recognition and should not be taken into consideration in the assessment of the cases, if the state had, through these laws, "crossed the outermost boundary, which is set by general belief in each land".[21] In doing so, the Federal Court of Justice (BGH) drew upon its case law for the processing of national socialist injustice[22] in which the legal principle was developed that the written law, exceptionally, must give way as "false law", if it has contradicted justice to an "intolerable extent". The human rights pacts signed by the GDR and the 1948 UN Declaration of Human Rights were the yardstick for such a state "border crossing" of legislation. The aim was to ensure that the right to life in the international community is superior to all other values, in which the state may only interfere in strictly limited exceptional cases. Through the Border Law and its interpretation, in practice, the protection of the state border was granted priority over human life. This was an arbitrary restriction of the right to life that could no longer be justified. This case law, through which limits can be put on the right of the state "to regulate its internal affairs", can be seen as pioneering and ground-breaking for future legal dealings with the misuse of the state monopoly on violence. The judiciary of the united Germany became the "pace maker of human rights protection".[23]

Those responsible for the killing of escapees could therefore be prosecuted and punished. Around 500 people were indicted by the public prosecutor's office on charges of manslaughter or attempted manslaughter. 275 defendants were convicted.[24] Members of the Politburo and the National Defence Council, who had organised the deadly border regime, and other high-level military leaders were sentenced to up to seven and a half years' imprisonment. The soldiers acting on orders, most of whom were in a state of avoidable ignorance regarding the prohibited nature of their actions, were sentenced to imprisonment, with the sentences being suspended on probation.

The fundamental conviction common to all civilised peoples of the general prohibition of killing also prompted the courts to only accept the death penalties handed out by the GDR judiciary as lawful in those cases where it was a question of punishing the gravest injustices and the gravest degrees of guilt.[25] The judge, blunted by legal blindness as a result of political conviction and submissiveness to political rulers, could not invoke a lack of intent, or claim to have made mistakes, which would create grounds for a mitigation of punishment.[26] Since the judiciary of the GDR had also pronounced and carried out the death penalty in cases where the punishable crime – mostly sabotage or espionage – had brought about no serious damage, the judges and prosecutors who were responsible for it were convicted of perversion of the court of justice and manslaughter. Members of the judiciary who had contributed to the fact that citizens of the GDR were convicted in huge numbers for practicing their human rights to freedom of exit, freedom of expression, freedom of assembly and freedom of association, could however hardly be prosecuted, given the prohibition of retrospective legislation. Mild convictions were secured only in the cases of less than 200 judges and prosecutors who had passed sentences seen as intolerably disproportionate to the offences committed.

Punishment of the members of the Ministry for State Security (MfS) for measures disregarding the lives and freedom of people was mainly hampered by difficulties obtaining evidence and the age-related poor state of health of the perpetrators. On the other hand, it was mainly legal difficulties that prevented criminal prosecution of those repressive measures that did not rise to the level of violations of the life, health and freedom of citizens. Only 69 employees of the MfS were convicted.

IV. Concluding Observations

The obligation existing under the given legal situation, on the one hand having to initiate proceedings even in the case of a minor suspicion of an offence, yet on the other hand, due to the prohibition of retrospective legislation, having to use the written law of the GDR almost without exception, as well as upholding the procedural rights of defendants in a constitutional state, led to a large discrepancy between the high number of roughly 74,000 preliminary investigations concerning around 100,000 suspects and the low number of 753 who were eventually convicted. It is understandable that today most victims are still disappointed by this result. For Germany, it was politically right to opt for criminal proceedings and to decide against an amnesty. In a constitutional state, the punishment of legal violations is the norm. Unlike in many other countries which are affected by systemic upheaval, there was no cause to fear civil war-like circumstances, nor even social discord. The overwhelming majority of the population in both German states was against an amnesty. Opinion polls have shown this again and again. The political ruling powers of the former GDR and the successor party of the Socialist Unity Party of Germany, the PDS, were too weak to be able to exert a decisive influence on the political decision-making process in the reunited Germany. To a great extent, a change of elites could take place in the region of the former GDR, including in the justice system, since in the west of Germany, a large pool of unencumbered and competent personnel was available to apply the legal and administrative system of the old Federal Republic to the region of the former GDR. It was these favourable circumstances connected with reunification, which both allowed, and obliged, Germany to attempt to deal with all manifestations of communist injustice in the GDR by penal means. This was the only way to clarify what was criminally punishable and what not.

The gravest crimes, the acts of killing at the inner-German border, through which the communist regime in the GDR showed most clearly its inhumane face, could be punished. Beyond the cases that have been sentenced, fundamental statements have been made about where the limits of a dictatorship for encroachments on human rights lie. At present, however, the current legal situation only threatens those in power with punishment following a change of system in cases of arbitrary intrusions, which serve only to maintain power, into the life and physical integrity of its citizens. When violating other citizens' rights on the other hand, especially rights to freedoms, they have little to fear. The national law created by them offers them protection. Something must change about that. Without freedom of expression there are no other rights.[27] The Berlin Trials contain a new lesson that international law still has to learn. The withholding of fundamental rights is criminal.[28] It remains to be hoped that this insight will prevail in the international community in the long term and find its place in supranational criminal law.

V. Lessons learnt

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

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

VI. Recommendations

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

2. Approaches to the concept of "transitional justice" in the context of Ukraine. A brief overview of the issues discussed by conference participants

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

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

1. the right to justice:

- Collection of materials (for the International Criminal Court or other international or national legal institutions), proving instances of war crimes and of failure of the states to comply with their obligations to investigate cases in the conflict zone,
- Legal proceedings against war criminals,
- Provision of legal aid and strategic litigations,
- Monitoring of legal proceedings (methodology and practical experience),
- Improving legislation and the rule of law during the conflict,
- Development of amnesty provisions, enshrining in law

a clear interpretation of what constitutes a war crime and what is covered by an amnesty,

- Development and advocacy of draft laws on transparent mechanisms for the release of hostages,
- Anti-collaborationism laws.

2. the right to know:

- Declassification and opening of the archives,
- Documentation of war crimes,
- Factual reconstruction of events in the conflict zone.

3. the right to compensation for damages and assistance to victims of the conflict:

- Creation of a register of damaged or destroyed property (which can be based on the database of the Kharkiv Human Rights Group, which was presented by Evgeny Zakharov),
- Development of draft laws aimed at providing social support to IDPs, housing assistance to citizens whose accommodation has been ruined/damaged/destroyed as a result of the armed conflict; restoration of political rights,
- Development of legal practices (court precedents) protecting the property rights of victims of the conflict,
- Preserving the memory on the victims of the conflict – publicly accessible visual projects devoted to the facts of deaths of civilians and combatants from all sides of the conflict ("Map of Memory", "Book of Memory of those Fallen for Ukraine"),
- Search for missing persons.

4. guarantees of non-recurrence:

- Reform of the judicial system,
- Reform of the security sector – training personnel on international standards, trainings for the police regarding de-occupation,
- Supporting draft laws in the sphere of transitional justice,
- Increasing the level of qualification of experts who are working with victims of the conflict regarding documentation and investigation of war crimes,
- Learning experience of other countries.[29]

Discussing the legal aspects of transitional justice, participants mentioned the following:

- Documentation of all crimes and human rights violations according to international standards is of immense importance. Even if the court procedures are delayed in time, documented facts will help to prevent forgetfulness and impunity.
- Justice doesn›t necessarily lead to truth. A court›s ability to find ‹the truth› is limited by its structure, composition, jurisdictional limitations and other procedural/legal limitations created as a result of political compromise. The objective of justice is to determine the criminal responsibility of individuals, not to establish the full picture of what happened.

Another important aspect of transitional justice is **socio-historical reflection on the past and dealing with the past.** Discussing the transitional justice processes after the reunification of Germany, participants noted the following:

- Unlike the GDR, Eastern European countries did not have a clear model, in the form of the FRG, that could serve as a basis for the transition from dictatorship to democracy.
- An important milestone in Germany's democratic transition was the opening of the archives of the GDR's Ministry for State Security.
- Speaking of Ukraine, there is a serious danger that the legacy of USSR dictatorship is and will be subject to political manipulation.
- In the 1990s, given Ukrainian society's general disorientation during the period of acquiring independence, it was difficult to launch economic and political reforms, as well as to give a quick start to democratic transformation. Ukrainian society was unable to replace the political elites and implement the decommunization process.
- In this context, the impossibility of accessing case files in Ukraine was also noted. The reason for this is that most of the operational records and classified documents have been destroyed since April 1989, and a significant part of the archive was transferred to the KGB Central Archive between 1989-91. Access to the archive of investigative files into rehabilitated persons was closed until 2014.
- In the context of working with memory, it is essential to consider the historical narratives in the Donbas. The USSR was never considered by a majority of the region's population to be a "dictatorship", since the region's best years took place during this time.

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

A study, carried out as part of the project Women's Initiatives for Peace in Donbas, showed that after the events of 2013-14, politics and the private sector have become more interdependent. Personal experience influences the formation of political sentiments, which, in turn, are highly polarized. However, after 2015, a tendency towards disillusionment in politics has been observed; priority in society is given to maintaining friendly contacts, rather than trying to prove one's own right. And since truth and reconciliation are not always compatible and the justice system does not always lead to the establishment of truth, the effectiveness of the "victim and executioner" model of transitional justice is questionable, it should contain broader context and more room for reconsilliation.[30]

3. Experience of transitional justice in European countries and it's applicability to the conflict in Ukraine

3.1. Law and justice in post-conflict societies

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

Countries of the former Yugoslavia

During the discussion on the topic "Ending post-imperial violence through intercultural understanding and international institutions? Yugoslavia since 1992", models of international conflict management with elements of international control and prosecution of war criminals were discussed. Experts identified such **tools of transitional justice in the countries of the former Yugoslavia:**

- the most important tool was the engagement of international courts.
- It has also become established practice to prosecute within the framework of both national and international jurisdictions.
- In addition to this, measures to provide additional specialized education to judges have played a major role, an academy has been created, where trainings for judges with a focus on the development of skills in international humanitarian law take place.
- A panel of judges specialising in war crimes was created.
- A special place in the countries of the former Yugoslavia is given to dealing with the past. In Serbia, non-formal educational schools for young people, students and teachers of history were set up. A study programme to familiarise people with transitional justice tools, human rights topics, the process of documenting crimes, as well as how to use materials from the International Criminal Tribunal for the former Yugoslavia in research was developed. In such a way, civic education is actively pursued.

Lessons for eastern Ukraine

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

Catalonia

At the working group "Conflict resolution through small compromises on all sides? Northern Ireland 1998 and Catalonia 2018 in comparison", participants discussed the struggle of certain groups of the population for greater autonomy within their respective states – United Kingdom and Spain.

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

- The Catalan conflict seems to be in a deadlock since the Catalan government, supported by the pro-independence parties that hold a majority in the Catalan Parliament, called for a self-determination referendum on October 1st 2017 that was declared to be unconstitutional by both the Spanish Government and the Constitutional Court. However, the referendum moved ahead, with more than 90% of votes in favour on independence and a turnout of around 43%. The Catalan Government claims that hundreds of thousands of citizens could not vote because the Police closed dozens of polling stations. On 27th October, the Catalan Parliament declared the independence of Catalonia. Then, the Spanish Parliament authorised the direct rule of Madrid over certain competences of the Catalan self-Government and the Spanish President called for fresh regional elections on December 2017, in which the independence parties revalidated a majority. One year after the referendum, some Catalan leaders are in preventive prison facing charges of rebellion and sedition, among others, while others, including the former President of Catalonia, fled.
- Even if it is not clear that independence enjoys the support of the majority of the society, it is quite clear that the independence movement is politically mobilised and socially very active, with a stated capacity of organising massive demonstrations.
- According to several polls, there seems to be a quite clear consensus in Catalonia that a constitutional, binding, agreed referendum could probably be the best solution to settle the conflict. Some critics say that this is simply constitutionally not possible; while others argue that certain interpretations of the current Constitutional framework would allow for such a referendum. Apart from this the legal, Constitutional debate, others consider that the outcome of a referendum cannot offer a sustainable solution to such a divisive issue, because it would probably reinforce the political polarisation that has been in Catalonia in recent years, thus preventing forging an arrangement based on broader consensus.
- According to the Spanish Government and to those who are opposed to independence, Catalonia already enjoy a high degree of self-governance, since Spain is one of the more decentralised countries in Western Europe. Besides, the Constitution does not allow for unilateral independence and does not recognise the right to self-determination to any of its constituent units. Accordingly, the solution to the problem is not about political will of the Central Government, it is a matter of legality and constitutionality.
- At the international level, not a single country has recognised the declaration of independence by the Catalan Parliament. On the other hand, some Governments have criticised the use of force to supress dissent and have encouraged the Spanish Government to engage in a genuine dialogue process to settle the conflict and to accommodate the demands and aspirations of a part of the Catalan society.
- Any proposal to settle or deescalate the conflict should take into account the following variables: the opposition to independence of all Spanish political parties and a large majority of Spanish society; the strong opposition of the Spanish Government to authorise a referendum on the independence of Catalonia; the reluctance of the international community to grant the right to self-determination to Catalonia and its preference to solve the conflict within the framework of the Spanish Constitution; and the strong support independence has among a quite significant part of the Catalan society and the possibility that it becomes larger in the near future because of generational change, the prison sentences that some political and social leader could be given for their alleged role in the referendum and the demonstrations in the previous days, or the lack of political solutions or alternatives to the status quo by the Spanish Government.

Lessons for eastern Ukraine

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

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

- Interrelatedness of the degree of centralization of the regions and their identity.
- Interrelatedness of the language question, self-identification of a region's population and support for the separation of the region.
- Readiness of the government to carry out dialogue with those who support the resolution of the conflict.
- Readiness to consider the question of decentralisation.
- The need to develop agendas for effective dialogue.

North and South Caucasus

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

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

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

- Until 1991, Russia, as a part of the USSR, had the position of maintaining the status quo, both in the Nagorno-Karabakh conflict and in Abkhazia; after the collapse of the USSR, the position of Russia changed so that it was supporting separatist movements.
- Peace negotiations in the region have low efficiency in the absence of external factors in their support
- The example of Abkhazia allows to trace the widespread problems, including human rights violations:
  - Children from Georgian families have to attend Russian school and are denied the right to education in their own language.
  - The right to health is infringed – it is impossible to enter Georgia to visit a doctor, yet Georgia provides the opportunity for medical insurance.
  - Significant part of the population does not possess civil documentation.
- There is a need for targeted action to prevent future conflicts and crimes.
- There is a problem of rejecting a dialogue as a tool to establish relationships between representatives of conflict groups was noted.
- Involvement of Russia in the conflicts in Caucasus and at the same time its detachment from the peace-building processes makes the latter inefficient.

Specific recommendations included:

- Effective measures to counteract propaganda need to be taken.
- The need to attract the interest of the German government to the conflicts, which implies the development of a European perspective in these regions.
- Solving the problem of impunity. It is important to prosecute the perpetrators of past conflicts, given that they are part of the pre-history of current conflicts.

Lessons for eastern Ukraine

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

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

- To support communication channels between the official government and the occupied territories.
- To work towards prosecuting war criminals. In turn, this is connected with the documentation of war crimes and human rights violations. The role of civil society is central, especially human rights organisations.
- To stimulate the political will of key actors to resolve the conflict.
- To develop humanitarian activities and programmes to support the population of the occupied territories.
- To involve international organisations in the process of resolving the conflict, not only in an observational function, but also through more active efforts.

Role of civil society in the conflict resolution

During the final panel discussion "Conflict resolution through civil society actors? Chances and limits of European cooperation for post-Soviet space", the perspectives of civil society representatives from Ukraine, Russia and Germany, as well as representatives from official bodies – the European External Action Service and the German Federal Foreign Office – were presented.

On behalf of Ukrainian civil society, the following recommendations were voiced:

- To move away from the category of "exchange" and promote the concept of "simultaneous release" of all people held by the parties to the conflict. People are not a commodity, they are not exchanged, but freed. Since the negotiation process has reached an impasse, pressure from the international community is needed.
- To develop ways of involving civil society representatives in the process of peaceful conflict resolution and international negotiations. To study the experiences from other conflicts, for instance, the participation of parents of those missing and victims of war crimes in peaceful negotiations in Colombia.
- To support various types of connection with people in the occupied territories, to give them chance to receive an education in displaced Ukrainian universities, develop special procedures for the provision of administrative services by the Ukrainian government and similar actions.
- To carry out work with society, both Ukrainian and Russia, to reduce intolerance and exclude any form of discrimination. Awareness-raising campaigns are needed to overcome resentment and stereotypes. In this context, it is especially important to maintain Russian-Ukrainian human rights dialogue.
- To consider as a priority the restoration of rule of law institutions in areas affected by the conflict, to support the establishment of truth about the war, to establish a reparation scheme, carry out the effective investigation to hold war criminals to account.
- Crimea should be a separate element of the strategy, in as much as the occupation of the peninsula and the hybrid war in Donbas are links in the same chain. Without its resolution, a complete resolution of this international conflict is impossible.

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

- Development of a strategy to unite the efforts of civil society actors from different countries and the areas of activity for the resolution of the conflict in Ukraine.
- Strengthening of local civil society structures.
- Networking of activists on a local and international level. It is necessary to unite the efforts of civil society.

  from different countries to strengthen its role in resolving the conflict.
- Focusing on the personal level of the conflict: ensuring that civil society has chance and is able to demand that political bodies take the issue of people's fates more seriously.
- Focus on the restoration of the conflict affected region, of small settlements in the conflict zone, since the living conditions of people in these towns and villages significantly influences their political preferences.
- Ensuring unhindered communication and dialogue among the population of the conflict affected region across the contact line. In this way, sharing of interests and problems should take place, which are not hugely different on both sides of the line. This, in turn, prepares the ground for joint problem-solving initiatives.
- Counteracting propaganda. The tense situation is used by political elites to realise their own interests. It is essential to continue efforts to convince people making political decisions, that they can influence the management of the conflict.

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

- Release of political prisoners an important step to overcome the conflict.
- It is important to use conflict-sensitive vocabulary.
- There is a need for another dimension of conflict resolution – the level of the individual person. The situation must be prevented where victims become simply numbers. It is important ot to forget about the human dimension and that one person (for instance, Oleg Sentsov) can do a lot.
- The need for a comprehensive response to challenges, i.e. not only to mechanically pay material compensation, but to also justify each action by referring to human rights and freedoms, emphasizing the values behind them.
- It is important to take into account experiences from other conflicts in the region when developing a strategy to resolve the current one.

The representative of the EEAS Russia Division **Maria Wozniak** shared the 5 principles of the EU approach towards Russia that are linked to the conflict and are founded on:

- The necessity for implementing the Minsk Agreements.
- Strengthening cooperation within the framework of the Eastern Partnership, supporting corresponding states.
- Raising tenacity and stability against disinformation within a broader context of strengthening resilience.
- Interaction with Russia focusing on cooperation on the technical level.
- Supporting civil society in Russia.

The perspective of the Federal Republic of Germany was voiced by **Hans-Peter Hinrichsen** - a representative from the Federal Foreign Office, putting focus on:

- The need to implement the Minsk Agreements.
- Strengthening measures to fight corruption in Ukraine as a fundamental step, opening the possibility for other changes to be successful.
- The need for an amnesty law.
- Criminal responsibility for war criminals.
- The need for compromise on both sides of the conflict.
- Support for civil society in Ukraine.

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

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

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

1. The unfinished harmonization of Ukrainian legislation with the norms of international criminal and humanitarian law.
2. The status of the conflict and the perpetrators of crimes are not defined and accountability mechanisms are not in place, leading to impunity.
3. Threats to the impartiality of judges from the uncontrolled territories due to the possible danger to their families and property still in the uncontrolled territories.
4. Low efficiency of international institutions: the length of the International Criminal Court's preliminary investigation, the refusal of Interpol to cooperate in the search for war criminals.

5. Insufficient competency of Ukrainian judges: the need to carry out additional education for judges, procurators and investigators who are investigating the conflict. Investigators do not have the appropriate training and/or resources to collect evidence without delay and to identify suspects. As a result, there is a lack of an evidence base with which it would be possible to work on national and international levels. For the collection and processing of evidence, as well as the coordination of work with the courts, it is essential that civil society organisations from Ukraine, Russia and Europe, as well as the appropriate state institutions, work together.

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

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

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

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

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

- The possibility of prosecution in other European countries (use of universal jurisdiction). For this purpose, a clear link to the country where the investigation should take place is desirable. A large group of victims of the conflict living in the country could serve as a link.
- The possibility of a joint investigation with European bodies in prosecuting war crimes with the aim of collecting evidence and collaborating with the International Criminal Court.
- The documentation of victims' testimonies in accordance with international standards.

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

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

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

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

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

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

- Creation of tools by the state to facilitate communication between the population on both sides of the demarcation line.
- Ensuring access to the uncontrolled territories, not only for documentation but also to search for the dead and to return the bodies to families.
- Professional burnout prevention is important for activists working on the conflict, that is, the provision of psychological assistance not only to direct victims, but also to civil society activists. It is also important to counteract discrimination against internally displaced people (IDPs) in educational institutions and in the workplace.
- Strengthening the efficiency of the state in providing space for communication and support/establishment of relation, development of this activity as a focus of domestic policy. Organization of trust-building measures.
- The question of vocabulary – it would be more appropriate to use the term "line of contact», rather than "line of demarcation", as it semantically implies communication, connection and dialogue.
- Target reconciliation efforts not only specific groups of the population and geographical space, but at Ukrainian society as a whole to prevent the emergence of separatist sentiments in the future.

Sources

1. On 26 June 1997, Joinet presented the essential principles in the UN Economic and Social Council. (E/CN.4/Sub.2/1997/20). The revised version is dated 2.10.1997. Parallel to this, El Hadji Guissé presented on 27 June 1997 the Final report on the question of the impunity of perpetrators of human rights violations (economic, social and cultural rights), which in the further development of the concept of TJ should not play a role.
2. In the section on Guarantees of "Non-Recurrence", greater attention was paid to institutional reforms and at the same time, the question of administrative measures was less detailed. E/CN4/2005/102/Add.1 from 8 February 2005.
3. https://en.wikipedia.org/wiki/Mitchell_Principles.
4. http://www.ucd.ie/ibis/filestore/Ohrid%20Framework%20Agreement.pdf.
5. https://en.wikipedia.org/wiki/Consociationalism.
6. e.g. the "anti-totalitarian fundamental consensus" sworn in Germany after 1989. In practice, German memory culture centres predominantly, when not exclusively, around this negative narrative, which turned out to be the one capable of building a consensus. For this reason, the head of the Buchenwald Memorial, Volkhardt Knigge, coined the term "negative memory": "Negative commemoration – according to content, not aims – means the preservation of a public, self-critical memory of state or social crimes committed by one's own against others and the associated assumption of responsibility, including the drawing of practical consequences." Volkhardt Knigge: Zur Zukunft der Erinnerung. In: Aus Politik und Zeitgeschichte (APuZ 25-26/2010) or http://www.bpb.de/geschichte/zeitgeschichte/geschichte-und-erinnerung/39870/zukunft-der-erinnerung?p=all.
7. A voluntary press standards code, for instance, for Germany https://www.presserat.de/pressekodex/pressekodex. For memorial centres see the International Memorial Museums Charta from IC Memo http://network.icom.museum/fileadmin/user_upload/minisites/icmemo/pdf/IC_MEMO_charter.pdf.
8. Transformative justice, which aims at overcoming victimhood and perpetrator-hood is strongly emphasised in the African context, for instance.
9. Guidance Note on the Secretary-General: United Nations Approach to Transitional Justice, March 2010. Abschnitt A, Punkt 2. https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf.
10. The line can also be drawn with reference to the concept of "atrocity crimes", which additionally includes "ethnic cleansing" and were defined by the UN in 2005 in Resolution A/Res/60/1.
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12. Falco Werkentin in„Justiz im Dienste der Parteiherrschaft", Berlin 1999, S. 184; Karl Wilhelm Fricke, Politik und Justiz, Köln 1990, S. 525. The number of death sentences totals at least 205 - see Fricke, Politische Straf- Justiz im SED-Staat in„Aus Politik und Zeitgeschichte" (supplement to the weekly newspaper„Das Parlament" B 4/93 22.01.1993 S. 22), at least 170 executions were carried out, see BMJ Exhibition Catalogue„Im Namen des Volkes" Leipzig 1994, S. 217.
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14. Falco Werkentin in„Justiz im Dienste der Parteiherrschaft", Berlin 1999, S. 184; Karl Wilhelm Fricke, Politik und Justiz, Köln 1990, S. 525. The number of death sentences totals at least 205 - see Fricke, Politische Straf- Justiz im SED-Staat in„Aus Politik und Zeitgeschichte" (supplement to the weekly newspaper„Das Parlament" B 4/93 22.01.1993 S. 22), at least 170 executions were carried out, see BMJ Exhibition Catalogue„Im Namen des Volkes" Leipzig 1994, S. 217.
15. Guideline 1/76; BStU, ZA, DSt, BdL-Dok. 3235.
16. Art.8 of the Unification Treaty from 31.8.1990 BGBl. II, 889ff, as amended by the law from 23.9.1990 on the Treaty from 31.8.1990 between the Federal Republic of Germany and the German Democratic Republic regarding the Establishment of the Unity of Germany – Unification Treaty – and the agreement from 18.9.1990, BGBl. II 1990 885 ff.
17. Attachment I Chapter III Field C Paragraph II No. b) to the Unification Treaty.
18. Statute of Limitations Act from 26.3.1993 (BGBl I 1993 S 392), BGHSt Bd. 40, S.113 ff.
19. Art. 315a EGStGB; 2nd and 3rd Statute of Limitations Act from 27.9.1993 (BGBl 1993 I S.1657) and 22.12.1997 (BGBl 1997 I S. 3223).
20. § 27 GDR Border Law from 25.3.1982.
21. BGHSt 39, 1 ff.; 168 ff., 353 ff.; 40, 218 ff. last judgements from 20.03.1995 – 5 StR 111/94 – and from 24.04.1996 – 5 StR 322/95 –, in which the BGH deals with all objections raised against its case law.
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25. BGHSt 41, 317.
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27. Salman Rushdie on the occassion of the opening of the 67th Frankfurter Buchmesse; see: Volker Breidecker in„Alle Grenze offen" Süddeutsche Zeitung, 14.10.2015.
28. Prantl, Heribert: Honecker, Mielke et al. In: Süddeutsche Zeitung (01.09.1999), S. 4.
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ПРАВО НА КОМПЕНСАЦИЮ УЩЕРБА

This brochure was prepared as a result of the Autumn Talks conference (Berlin, 2018) to summarise the main issues and views expressed during the discussions. The topic of the Autumn Talks in 2018 was transitional justice – the experience of past conflicts in Europe and their lessons for the present and the future – for Ukraine and other countries affected by the conflicts.

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

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

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

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