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Transitional Justice in Ongoing Conflicts and Post-War Reconstruction: Reintegrating Donbas into Ukraine

Abstract: The main aim of the paper is to analyse the potential transitional justice mechanisms, directed at reintegration of Donbas, a territory temporarily occupied by pro-Russian separatists, being under the combination of a direct and indirect control of Kremlin, with Ukraine. In the aftermath of the Revolution of Dignity and a remove of ex-President Viktor Yanukovich as a consequence of Euromaidan protests held in Kyiv, in the Winter 2013/14, Ukraine became a state involved in the international armed conflict covering its Eastern provinces as a result of an external aggression of the Russian Federation. Furthermore, since early-2014, Moscow is continuously using pro-Russian militants to form and uphold unrecognised, *de facto* regimes of the so-called ‘Donetsk’ and ‘Luhansk People’s Republic(s)’ affecting the territorial integrity of the Ukrainian state. It is argued that Kyiv shall take into consideration some of the peace and restoration models applied in similar conflict or post-conflict environments, such as the United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium (UNTAES) or the experience of numerous disarmament, demobilisation and reintegration (DDR) programs, filled with the transitional justice component. Moreover, by emphasising the context of a military (semi-frozen) conflict in Eastern Ukraine, the paper is going to shed more light on the possible application of transitional justice tool-kit in the ongoing conflicts scenarios and its potential contribution to the shift from a conflict to the post-war environment.

Keywords: *Ukraine; reintegration of Donbas; transitional justice; ongoing armed conflict; post-war reconstruction*

Introduction

In the aftermath of the Revolution of Dignity (or Euromaidan protests) held in Kyiv, in Winter 2013/14 that resulted in a remove of ex-President Viktor Yanukovych, the new post-Maidan Ukrainian authorities adopted some of the transitional justice mechanisms, directed at reckoning with the former regime (vetting measures in 2014) and the removal of Soviet Union legacy (decommunization package in 2015), at the same time pursuing the process of democratization and Europeanization of Ukraine. Nonetheless, the illegal annexation of the Crimean Peninsula by the Russian Federation in March 2014 and outbreak of an armed conflict in Eastern Ukraine with pro-Russian separatists (since April 2014), rejecting the pro-Western move of Kyiv, led to the creation of two unrecognized *de facto* regimes, the so-called ‘Donetsk’ and ‘Luhansk People’s Republic(s)’ (both being part of the region of Donbas), affecting the territorial integrity of the Ukrainian state. Since the very beginning of the conflict, pro-Russian militants were military, financially and logistically supported by Kremlin (which troops directly participate in hostilities), what created a situation of an external aggression of Moscow on Ukraine. Therefore, Kyiv became forced to implement the (post-)conflict justice and peace reconstruction mechanisms, aimed at resolving the issue of its Eastern provinces (bearing in mind an ongoing, but partially semi-frozen character of the warfare).

Considering the armed conflict, on April 13, 2014 the authorities in Kyiv decided to introduce the Anti-Terrorist Operation (ATO), being in force for the last three years, and attempted to regain the full control over the territory of Donbas by a combination of military means (ATO) and diplomatic efforts, notably realized in the so-called ‘Normandy Format’ with presence of the Russian Federation, Germany and France – both insufficient, up to date. In addition, on February 4, 2015 Ukraine called for the assistance of the International Criminal Court (ICC) to prosecute and punish the perpetrators of crimes against humanity and war crimes that occurred during the warfare in the East – soon after the removal of Yanukovych, on February 25, 2014 the ICC was invited by the Verkhovna Rada (the Ukrainian parliament) to adjudicate ‘the Maidan crimes’, at first. What is more, Kyiv seeks for a proper model of reintegration of Donbas with the rest of the country.

As a result, Ukraine became an unique example on the map of states implementing transitional justice, on the one hand, willing to enact backward-looking justice dealing with *ancient* régime structures (alongside the Soviet legacy), while on the other, being compelled to execute forward-looking justice, adjusted to the cases of ongoing conflicts and war-torn societies.

The paper is devoted to understanding the role played by transitional justice tool-kit in ongoing conflicts and post-war reconstruction, likewise, its practical application to the Ukrainian case, with special reference to the possible reintegration of Donbas. Thereupon, this study is composed of four parts. First, tries to shed more light on the today's understanding of transitional justice and its use in ongoing conflicts. Second, emphasises the interception of transitional justice with methods of post-conflict reconstruction and its contribution to the possible shift from a conflict to the post-conflict environment that enables further application of 'proper' transitional justice tools to deal with the legacy of war. The experience of some judicial (the ICC) and institutional (the UN transitional administrations) interventions in conflict and post-conflict scenarios may become useful for Kyiv in crafting its transitional policies. Third, outlines the complexity of transitional justice processes in Ukraine, as such, however with no intention of providing deep analysis into every policy, since it remains beyond the main aim of the paper. The last one attempts to determine a proper model of reintegration of Donbas with Ukraine within the transitional justice paradigm.

Current Understanding of Transitional Justice and its Application in Ongoing Conflicts

Transitional justice – since its emergence in an international academic and practical discourse at the beginning of 1990s focused on the political processes in Central and Eastern Europe of those days, in countries like Poland, Czechoslovakia (at that time) or Hungary, trying to reject the communist heritage (Kritz, 1995) – is seen as a composition of judicial and non-judicial mechanisms, such as criminal trials, truth and reconciliation commissions, reparation programs and vetting procedures, implemented by post-authoritarian or post-conflict societies (Report of the UN Secretary-General, 2004, para. 8). Thus, transitional justice toolbox is designed not only to set the individual accountability for crimes committed but also attempts to determine the pattern of structural violence and disclose the truth about the abusing practices of non-democratic regimes at the level of a state.

The UN definition of the notion is fully accepted and followed by leading scholars (Roht-Arriaza, 2006, p. 2) and practitioners (International Center for Transitional Justice, 2009) working on the issue. Similarly, one of the biggest experts on the topic, R. Teitel, indicates that transitional justice is composed of different sorts of regulations, such as retributive (criminal) justice, restorative (historical) justice, reparatory justice, administrative justice and constitutional justice, which shall be understood as complementary to each other (Teitel, 2000, pp. 6–9). In addition to previously mentioned definitions, C. Bell is reluctant to base transitional justice solely on its legal

pillar, accenting the value of political and social sciences' experience more precisely responding to the needs of transitional justice crucial actors, i.e. victims (Bell, 2009, p. 6).

With no doubts, at present, transitional justice is associated with the process of democratization, since every post-violence policy shall meet requirements set by international law and the value of the rule of law (*Rechtsstaat*) – otherwise all means applied in the aftermath of a rapid socio-political change ought to be construed as revolutionary or leading to non-democratic regimes, thus falling outside the ambit of today's understanding of transitional justice (see more Krotoszyński, 2017, pp. 225–268). Last but not least - considering theoretical approach to the analysed notion – some scholars emphasize that despite transitional justice in 'a narrow sense' (dealing with long-lasting abuses that directly preceded a transition itself) there is a need to point out the 'post-transitional justice' mechanisms adopted long time after a pro-democratic transition did really happen (Bachmann & Lyubashenko, 2017, p. 299). 'Post-transitional justice' may be easily exemplified by the post-Franco Spain and is also partially witnessed in the current Ukrainian case about some of the historical justice toolbox aimed at reckoning with the Soviet heritage.

Even though the first academic reflections on transitional justice underlined the Central and Eastern European challenges of their – except Romania – peaceful transformations (as well as those that commenced in Latin America a decade before, ousting military dictators), transitional justice discourse is very often traced back to the end of World War II and the legacy of the International Military Tribunal (IMT) in Nuremberg (however post-violence dilemmas appeared much earlier in the history; Elster, 2004). Bearing in mind all the legal and political restrictions of the IMT (like the emanation of victor's justice), functioning of the Nuremberg Tribunal clearly enshrined that war or - in a broader sense - heinous crimes committed in the course of warfare, are supposed to be adjudicated by a relevant international or domestic court (Teitel, 2006, p. 1618).

What is more, the work of the IMT and the subsequent establishment – although, after almost five decades of a hibernation of global justice – of international courts, such as the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) or the International Criminal Court (ICC),¹ outlined that even though transitional justice dilemmas were primary understood as an internal matter of a certain post-authoritarian or post-conflict society,

¹ Since the very unique legal construction of the Rome Statute (for instance, taking into consideration participation of victims in proceedings or the possibility of reparations for harm suffered), the ICC, still being the court of law with the primary aim of fighting against impunity

in extreme cases does appear a need of the international judicial and institutional interventions. The former is mirrored by the work of international courts, while the latter by the establishment of the UN transitional administrations. It is mainly caused by inability or unwillingness of an interested state to fulfil its obligations under international law to prosecute and punish the wrongdoers of international core crimes (genocide, crimes against humanity and war crimes) or other serious violations of human rights that affect the whole internal stability of a given post-war state.

The expansion of transitional justice architecture in the last twenty years emphasised a visible switch in the today's understanding of the analysed notion – from a solely backwards-looking justice to the instrument of forward-looking justice also applied in ongoing conflicts (Engstrom, 2013, pp. 41–61). Therefore, the interference of international criminal tribunals even during the conflict may serve not only as a way of exercising mandate of a certain supranational court but also as a (geo)political tool of the definitive cease of armed activities (Moreno-Ocampo, 2007, p. 8). It is worth mentioning that the ICTY was formed in the middle of the war in Western Balkans in the 1990s (although, most of the indictments were issued after the conflict has ended), while the ICC decisively intervened in the Libyan civil bloodshed in 2011, being seen as an additional mean of conflict resolution. Similarly, the former ICC Prosecutor, Luis Moreno-Ocampo, acting by *proprio motu* power, decided to investigate international crimes committed during the Russo-Georgian war of August 2008 still in the course of warfare (on 14 August 2008). Moreover, the peace process in Colombia finally concluded in October 2016, ending the internal war lasting since the mid-1960s, and national inquiries into crimes falling within the ambit of the Rome Statute were under the legal scrutiny of the ICC (see more Ambos, 2010). The current interference of the Hague-based Court into the armed conflict in Eastern Ukraine shall also be understood in the same direction, not only as a stream of criminal justice, but also affecting the possible models of reintegration of Donbas with Ukraine, for instance, by excluding the potential amnesty provisions covering belligerents who committed crimes against humanity or war crimes.

P. Engstrom is convinced that “(criminal) accountability ought to be part of efforts to end the ongoing conflict and to build peace” what brings much closer the area of transitional justice to the practical implementation of different peace-building instruments (Engstrom, 2013, p. 59). Recalling the possible combination of a judicial and non-judicial toolbox within a scope of the definition of transitional justice, it may be stressed that an introduction of any other non-retributive mechanism (like truth and

of the most responsible wrongdoers, became one of the streams of transitional justice for conflict and post-conflict societies (Lindenmann, 2007, p. 330).

reconciliation commissions) aimed at reintegrating brutally fragmented societies may appear as useful in the process of state-building in the aftermath of war (Laplante, 2009, pp. 916–984), as long as a state fulfils its primary obligation to prosecute and punish the most responsible wrongdoers (Schabas, 2003, p. 1051).

To summarise, the application of transitional justice in ongoing conflicts serves as an additional mean of conflict resolution (the subsidiary role of international criminal tribunals) and creates a framework for the subsequent implementation of ‘proper’ transitional justice instruments in the post-conflict period.

The Use of Transitional Justice Toolbox in Post-Conflict Reconstruction Efforts

Since the 1992 Agenda for Peace, issued by the UN Secretary-General, B.B. Ghali, the notion of peace-building (alongside activities undertaken under the label of peace-keeping or peace-making) is being constantly developed by its practical application (the UN Charter itself says nothing about this mechanism, though; compare Ghali, 1992, para. 20–22). Nowadays, international (military) interventions are much often strengthened by civil components and robust mandates, emphasizing the need for the promotion of human rights, increasing the capacity of local institutions (the value of local ownership of post-war reconstruction), as well as reintegration of former combatants into society and creation of conditions of possible reconciliation of the affected war-torn communities (Report of the UN Secretary-General, 1998, para. 63). Moreover, the famous ‘Brahimi report’ underlines the urgency of providing investigations into serious violations of human rights in the aftermath of a civil war as a peace-building tool (Report of the UN Secretary-General, 2000, para. 13). Eventually, the holistic concept of the Responsibility to Protect (R2P) designed to address mass atrocities, in its ‘responsibility to rebuild’ section, outlines the value of delivering justice and fostering reconciliation in conflict and post-conflict environments (Evans, 2008, p. 149), likewise, with the assistance of the UN Peacebuilding Commission (Thallinger, 2007, p. 699). All these mechanisms constitute components of different transitional justice strategies.

The international support for conflict and post-conflict societies can also be pursued by the establishment of the UN transitional administrations or introduction of disarmament, demobilisation and reintegration (DDR) programs.

International transitional administrations, established under the UN Security Council (UNSC) resolutions or on contractual basis with a given state, are exercising civil authority over a certain post-violence territory with the main aim of assisting in strengthening the capacity of state institutions and transferring the full sovereignty

to the local government at the end of its mission (Stahn, 2008, p. 44). It is necessary to underline that the UN transitional administrations formed in the 1990s – like those for Cambodia (UNTAC) in 1992; Eastern Slavonia, Baranja and Western Sirmium (UNTAES) in 1996; Timor-Leste (UNTAET) or Kosovo (UNMIK), both in 1999 – possessed mandates covering different aspects of peace reconstruction, as well as transitional justice elements. UNTAC mission led to the establishment of the Extraordinary Chambers in the Courts of Cambodia to try the leaders of the Khmer Rouge responsible for genocide, while UNTAET and UNMIK were able to found special criminal panels adjudicating war criminals in Timor-Leste and Kosovo (as well as Truth and Reconciliation Commission in East Timor) during the time of their mandates (Stahn, 2001, pp. 105–183). What is interesting for an analysed in this paper Ukrainian case, UNTAES functioning – legitimised by the agreement signed by the Croatian government and the local Serb leadership – created conditions for a peaceful restoration of the Croatian sovereignty over the Serb-dominated region of Eastern Slavonia (Wolfrum, 2005, p. 662). Moreover, all abovementioned examples were installed in the cases of military conflicts with heinous crimes committed and a state dissolution (at least partially) what makes them even more comparable to the current Kyiv's challenges of an ongoing armed conflict in Eastern Ukraine and a creation of two unrecognised regimes within the Ukrainian territory.

DDR programs are internationally-backed initiatives (for instance by the World Bank), notably directed at reducing the risk of war recurrence by decreasing the number (and availability) of weapons and assisting ex-combatants to reinsert into society by providing them with work or other economic opportunities unrelated to the war. They deal with a trauma of former militants, at the same time helping to increase the rate of civic and political participation among ex-combatants (Schulhofer-Wohl & Sambanis, 2010). Nonetheless, the impact of DDR programs, associated mostly with African post-conflict states, but also witnessed recently in the Colombian peace process, is very differentiated (and strongly depending on a political will of actors involved). In the long run, the significant international management over DDR instruments (for instance, they were partially installed by the mandate of UNTAES in Eastern Slovenia) positively affects the outcomes of introduced programs and prevention of war recurrence.

To sum up this part of deliberations, it is necessary to determine that even though transitional justice has recently embedded in peace-building activities, this two notions will remain a distinct field of interest and (partially) practical application. Main goal of transitional justice is still to deliver justice (although not necessarily in its criminal dimension), while post-conflict reconstruction is always about bringing peace. Nevertheless, a classic dilemma of *peace v. justice* ought to be solved, firstly, by

means of international law. Therefore, all perpetrators of international core crimes shall be held accountable, while other ex-militants may be subjected to reintegration tool-kit (based, for instance, on amnesty provisions). Secondly, the peace process may craft a framework for the further application of ‘proper’ transitional justice policies, such as comprehensive investigations into human rights violations and grave breaches of humanitarian law that occurred during warfare or means of truth-telling and truth-seeking directed at fostering reconciliation in the divided society. As it seems, this scenario is observed in Eastern Ukraine, at present.

Ukraine and its Post-2014 Transitional Justice Policies

Ukraine is an independent state since 1991, however, prior to the 2013/14 Revolution of Dignity, the implementation of transitional justice policies aimed at addressing the historical injustices was rather limited. In the aftermath of the Soviet Union dissolution, like most of the other post-USSR republics, Ukraine became a state characterized by the notion of ‘unconsolidated democracy’ where the representatives of the former regime maintained their strong political position (see more Huntington, 1991), either directly participating in power (the first Ukrainian President, Leonid Kravchuk, was the ex-head of the *agitprop* department of the Central Committee of the Communist Party of Ukraine), or being able to establish a close relationship between the world of politics and big business. As a consequence, political parties started to be dependent on money supplies of big business players and, at the same time, not interested in raising questions about dealing with the legacy of Soviet times. L. Stan underlines that in “Ukraine, transitional justice was not in the cards as long as Leonid Kuchma (the second Ukrainian President), a former Soviet Communist Party leader, was President of the Republic” (Stan, 2009, p. 238). Ukraine developed in the direction of the so-called ‘oligarchic democracy’ (Bachmann & Lyubashenko, 2017, p. 298), still belonging to the ‘Eastern world’, at that time.

A first visible change came with the outcomes of the ‘Orange Revolution’ in November 2004, opposing the results of the corrupted 2004 presidential elections that were primarily supposed to be won by Viktor Yanukovich. Nonetheless, massive protests on *Maidan Nezalezhnosti* (Independence Square) in Kyiv led to the Supreme Court’s decision to revoke that eventually gave power to Viktor Yushchenko, who immediately reshaped a direction of Ukrainian foreign politics to become more pro-Western.

Regarding transitional justice, as a President, Yushchenko paid special attention to the issue of historical justice and reorienting the Ukrainian collective memory from a Soviet-centred to the one based on the Ukrainian nation experience, and

harm suffered. In order to implement the historical justice pillar, Viktor Yushchenko established the Ukrainian Institute of National Remembrance (UINR) and succeeded in convincing the Verkhovna Rada to adopt the special Law No. 376-V: 'On the 'Great Famine' (*Holodomor*) of 1932–1933 in Ukraine' in November 2006 that recognized the Great Famine as a genocide committed by the Bolsheviks against the Ukrainian nation (Nuzov, 2014). Nonetheless, the political tensions that occurred within 'the Orange fractions' led to the upcoming victory of Viktor Yanukovich in the presidential elections in 2010, who re-emerged the pro-Russian (and pro-Soviet) vision of the history, decreased the role of the UINR and practically closed a question of further transitional justice application by Ukraine to reckon with evils of the USSR.

The direct reason that moved Ukrainians again to the *Maidan Nezalezhnosti* in Kyiv in November 2013 was the refusal of Yanukovich to sign the EU-Ukraine Association Agreement. Although, the brutal use of the special forces *Berkut* and snipers to pacify protesters by the highest officials (that resulted in nearly 130 victims) has promptly switched Euromaidan manifestations into the Revolution of Dignity with the aim of 'rebooting of the corrupted authorities', starting with president Yanukovich, at first (Bachmann & Lyubashenko, 2017, p. 299). In the aftermath of the victory of Maidan protesters (22 February 2014) and a subsequent escape of Viktor Yanukovich to Russia, most of the postulates articulated in extraordinary Winter 2013/2014 in Kyiv, were presumed to be formed into the transitional justice policies. What is more, they ought to become a part of the democratisation and Europeanization of a country, not as a simple revenge on the *ancien régime* structures – eventually, the EU-Ukraine Association Agreement fully entered into force on 1 September 2017.

K. Bachmann and I. Lyubashenko emphasise the post-Maidan 'transitional justice in a narrow sense' applied in Ukraine (laws designed to delegitimise the rule of Yanukovich), as well as the elements of 'post-transitional justice' paradigm to address the repressive Soviet legacy (Bachmann & Lyubashenko, 2017, pp. 299–300). Pro-Russian oriented inhabitants of Ukraine (not necessarily those leaving in self-proclaimed 'republics'), even though being in the minority, are dissatisfied with both transitional justice policies (Lyubashenko, 2016, pp. 84–87). Furthermore, the subsequent outbreak of an armed conflict in Donbas (that followed the illegal annexation of Crimea by the Russian Federation), forced Kyiv to seek for means that may cease the war and create a framework of a future reintegration of Donbas with the rest of country – some of the transitional justice toolbox applied in ongoing conflicts and a process of post-conflict reconstruction may appear as appropriate.

To the first group of policies belong (I) domestic investigations into Maidan-related crimes of the former highest officials or, above all else, members of *Berkut* units involved in perishing the protesters in Kyiv – it is necessary to underline the *ad hoc*

declaration of the Verkhovna Rada of 25 February 2014 submitted under Article 12 (3) of the Rome Statute and lodged in the Hague on 9 April 2014 inviting the ICC to assist in prosecuting and punishing the perpetrators of crimes committed during the Revolution of Dignity (Ukraine is still not the party to the Rome Statute).² Furthermore, (II) the main part of vetting measures,³ aimed at screening the officials closely connected to the former regime of Yanukovich and (III) institutional reforms (in the sector of justice or the replacement of militia by new police forces) serving as a guarantee of non-recurrence of highly corrupted regime illustrated by the figure of the Ukrainian ex-President. It cannot be forgotten that the ‘oligarchic system’ highly relied on corruption (rooted in not cutting ties with the Soviet legacy) as a way of maintaining power, thus fighting against corruption, for instance, as a part of lustration, became one of the crucial post-Maidan transitional policies, what clearly differentiates Ukraine from other countries of the region (just to mention Poland, Czech Republic or Hungary), moving through their democratic transformations in early 1990s (Lyubashenko, 2016, pp. 28–33).

Taking into consideration the aim of rejecting the Soviet legacy, symbolised by *Leninopad*, i.e. Vladimir Lenin’s statues toppled by pro-Western oriented Ukrainians commenced during the Euromaidan protests, it is worth revoking the ‘decommunization package’ consisting of four statutes enacted by the Verkhovna Rada on 9 April 2015.⁴ They were supposed to replace the Soviet narrative of the history by the Ukrainian vision of the past, as well as to rename nearly 1000 localities up to date commemorating the Soviet heroes or a totalitarian system. What is more, part of the 2014 lustration law was framed to remove from public life individuals who occupied high positions in the Communist Party or Komsomol or who worked or cooperated with the KGB during the Soviet Ukraine period.

The impact assessment of introduced policies is very differentiated, but still far from being satisfactory. Domestic inquiries into Maidan-related crimes are difficult to

² The declaration directly mentioned a need of holding accountable Viktor Yanukovich, Viktor Pshonka (the former prosecutor general) and Vitalii Zakharchenko (the former minister of internal affairs) by the ICC, however with no binding force, affecting the subsequent work of the Hague Court.

³ Vetting policies’ legal ground are Law ‘On the restoration of trust in the judiciary of Ukraine’ of 8 April 2014 and Law No. 1682-VII ‘On Government Cleansing’ of 16 September 2014.

⁴ (I) Law No. 2558: ‘On the condemnation of the communist and national socialist (Nazi) regimes, and prohibition of propaganda of their symbols’; (II) Law No. 2538–1: ‘On the legal status and honouring of fighters for Ukraine’s independence in the 20th century’; (III) Law No. 2539: ‘On remembering the victory over Nazism in the Second World War’ and (IV) Law No. 2540: ‘On access to the archives of repressive bodies of the communist totalitarian regime from 1917–1991’.

pursue since many former *Berkut* officers were able to escape to the Russian Federation (due to the same reasons the criminal trial against Yanukovich is being proceeded *in absentia*). What is more, Fatou Bensouda, the current ICC Prosecutor, announced that Maidan crimes fell to meet the requirement of ‘widespread and systematic attack on a civil population’ that constitutes crime(s) against humanity, thus most probably will be dropped (the decision may be revised if new evidence appears; compare ICC, 2015, para. 95). Nonetheless, it is worth outlining that by the EU-Ukraine Association Agreement, since January 2015 – when the first bill was presented – Ukraine took a path of altering its Constitution eventually leading to the ratification of the Rome Statute by Kyiv. Although, despite the final adoption of the constitutional amendment on 2 June 2016, the full implementation of the ICC Statute to the domestic law is going to be postponed for the next three years, at least (Marchuk, 2016, p. 335).

Both basic transitional policies, i.e. lustration and decommunization, almost completed at the time of writing, are being criticized internationally and internally. The 2014 lustration law was examined by the Venice Commission in 2014 and 2015. An advisory body of the Council of Europe has approved screening as a possible way of dealing with past evils (and not inconsistent with international law *per se*), however pointed out that not all provisions of the 2014 law guarantee protection of human rights of lustrated individuals. What is more, the Venice Commission undermined the legal construction of mixing the classic vetting with anti-corruption measures in the same act, as well as questioned the necessity of screening the former Soviet officials 25 years after the fall of communism and the dissolution of the USSR, since most probably their presence does not constitute a threat to a democratic regime in Ukraine (Venice Commission, 2015).⁵

On the contrary, decommunization laws are challenged on the basis of not pursuing enough consultations with local populations in terms of changing names of particular cities or not listening to critical voices rejecting the proposals issued by Kyiv (via the UINR), if consultations did really take place (Kozyrska, 2016, pp. 135–138). Furthermore, I. Nuzov (2016, pp. 150–153) believes that are relying memory laws simply on the antithesis of Russia may turn out to be dangerous at the end of the day and would not succeed in reconciling the diverse Ukrainian society, if post-Maidan policies fail, by so, increasing the level of disappointment among common Ukrainians. Scholar proposes to start the real dialogue on the history and politics of memory, shaped by the potential establishment of a national truth commission.

⁵ Up to date 929 individuals had undergone lustration, according to the database of the Ministry of Justice of Ukraine, <https://lustration.minjust.gov.ua/register>.

To sum up, in fact, except an unusual for the region case of dealing with the problem of corruption as a measure of transitional justice, most of the abovementioned policies, even though materialising the main desires of Euromaidan protests, are not affecting people's minds in a daily life. In his research, I. Lyubashenko revokes two public surveys conducted a year and two after the Revolution of Dignity, illustrating that the issues of punishing the former officials, either by means of criminal or administrative justice, likewise the decommunization policy, are mainly overshadowed by the need of putting an end to the conflict in Donbas (Lyubashenko, 2016, pp. 42–43). Undoubtedly, the unresolved situation concerning the armed conflict in Eastern Ukraine is affecting the whole process of institutional reforms and a proper completion of 'transitional justice in a narrow sense' and 'post-transitional justice' policies by the Ukrainian authorities.

Reintegration of Donbas as a Transitional Justice Mechanism

The outbreak of an armed conflict in Eastern Ukraine in April 2014 – that followed the illegal annexation of the Crimean Peninsula by the Russian Federation finalized on March 18, 2014 – caused the factual loss of a part of territory of two *oblasts* (provinces) of Donetsk and Luhansk (Donbas) by Kyiv and the subsequent establishment of two unrecognized republics (*de facto* regimes), the so-called 'Donetsk People's Republic' (DPR) and 'Luhansk People's Republic' (LPR) by pro-Russian separatists. On April 13, 2014, the Ukrainian authorities decided to launch the Anti-Terrorist Operation (ATO), trying to regain the control over lost territories. What is interesting, even though officially the label of ATO suggests the fight against terrorism or the internal character of warfare, since the direct military and financial support of Moscow, as well as direct involvement of the Russian troops and generals during combat in Donbas, the analysed war shall be named as an international armed conflict, with the Russian Federation as an external aggressor.

In addition to ATO, Ukraine commenced the diplomatic efforts to restore its full jurisdiction over Donbas and guarantee cease-fire, firstly under the Trilateral Contact Group on Ukraine (Ukraine, the Russian Federation and the Organization for Security and Co-operation in Europe, OSCE), later on in the 'Normandy Format', involving representatives of Ukraine, Russia, Germany and France (Hurak, 2015, pp. 124–140). Functioning of the Normandy Format led to the signature of Minsk Protocol to halt fighting on September 5, 2014 (that collapsed very soon), and Minsk II agreed on February 12, 2015. Although, the latter in a much more efficient way secured the situation in Donbas, conflict in Eastern Ukraine is still ongoing, at odd times being semi-frozen.

Considering transitional justice mechanisms applicable in ongoing conflicts, on February 4, 2015 the Verkhovna Rada issued a second *ad hoc* resolution under the Article 12 (3) of Rome Statute to affirm the ICC jurisdiction over crimes against humanity and war crimes committed on the whole territory of Ukraine (with special focus on Crimea and Donbas) since February 20, 2014 without indicating the closing date. This resolution was finally lodged in the Hague on September 8, 2015. As a result, the ICC Prosecutor decided to extend the temporal scope of the existing preliminary examination ('Maidan crimes' under the first *ad hoc* resolution) to include any crimes falling within the scope of Rome Statute allegedly committed on the whole Ukrainian territory. It is worth outlining the Fatou Bensouda's report of November 2016 that named the ongoing war in Eastern Ukraine as most probably meeting the requirements of an international armed conflict and a permanent state of occupation of Crimea, directly involving the Russian army (alongside the pro-Russian militants; ICC, 2016, para. 33–42). Even though the ICC Prosecutor report is not a legally binding document, it affected the Russian President's, Vladimir Putin, decided to withdraw his signature from the Rome Statute (Russia has never ratified it). Nonetheless, this gesture cannot block the international criminal trials of the Russian representatives, if the ICC finds it as appropriate. As it seems, Putin's conduct was influenced by the work of the Hague Court, serving as a mean of (geo)political pressure, as was already indicated in the paper.

Bearing in mind the legal construction of the Rome Statute (the complementarity principle) and a simple reality (the ICC has no police or army forces to execute its decisions), the efficiency of international criminal justice heavily relies on the legal obligation of a cooperation between the Hague and a given state (which also exists under the Article 12 (3) of the Statute). Ukraine moved a step towards the full ratification of the Statute by amending its Constitution in June 2016, however is still reluctant to cooperate much closer with the ICC Prosecutor in gathering evidences of crimes committed (on the other hand, this attitude can be partially understood by the lack of reciprocity of the Russian Federation to adjudicate the cases of crimes of pro-Russian separatists or regular Russian troops that occurred in Donbas). Needless to say, most significant materials were collected by civil society, such as the Ukrainian Euromaidan SOS group or a team coordinated by the Member of Polish Parliament, Małgorzata Gosiewska, that prepared the Report on 'Russian War Crimes in Eastern Ukraine in 2014' (2016) and handled it to the Hague later on. In addition to international endeavours, Ukraine is trying to proceed a policy of domestic trials into the crimes committed in Eastern *oblasts*, although it seems to be a bit problematic since the Ukrainian criminal code does not penalise 'an act of separatism'. Moreover, the Minsk and Minsk II accords call for amnesty for belligerents of both sides (Minsk Agreement, 2015).

Peace process shaped by two Minsk agreements is intended to stop violence and pursue the disarmament policy as its main goals. However it still leaves some room for further application of transitional justice toolbox. As it was previously stated, it talks about a necessity of introducing the amnesty provisions for militants, as well as enshrines imperative of constitutional process, including the viewpoint of inhabitants of DPR and LPR, based on a value of national dialogue. As it seems, truth-telling and truth-seeking mechanisms strengthened by virtue of reconciliation, falling within the ambit of restorative justice paradigm, may meet the requirement set by both accords signed in the Belarusian capital. The problem remains, though, on what grounds a region of Donbas can be restored within the full jurisdiction of Kyiv, since the majority of the Ukrainian population is rather against giving a special constitutional status to the current DPR and LPR ‘republics’ (compare Lyubashenko, 2016, pp. 120–121).

From the very beginning, experts outlined the possibility of a successful establishment of the UN peacekeeping mission, serving as a legal and political framework for the full implementation of Minsk agreements – to a large extent the experience of UNTAES for Eastern Slavonia seemed to be adjusted to the Ukrainian scenario (Bildt, 2015). In the early stages, in 2015 Ukraine’s President Petro Poroshenko sent an official letter to the UN headquarters, asking for the deployment of peacekeeping forces under the auspices of the UN, however, was at the outset sabotaged by Russia. Two years later, in 2017 the Croatian authorities formed a contact group and sent a proposal to their Ukrainian partners of assisting in shaping the peacekeeping and peace-building mission based on the UNTAES legacy for Donbas (Pavlic, 2017). What is interesting, in spite of his initial concerns, in early September 2017 Vladimir Putin announced that the international stabilization mission for Donbas is a proper mean of ending hostilities, however deployed only on the demarcation line between the Ukrainian forces and pro-Russian militants (Strzelecki, Konończuk, Iwański, 2017), moreover, as it can be presumed, including the Russian troops as peacekeeping forces (what is a clear sign of politically motivated move to undermine Poroshenko’s plan to deploy the UN peacekeeping mission in accordance with the Ukrainian strategy; Zoria, 2017).

Nevertheless, is it possible to adopt all measures undertaken by UNTAES in the Ukrainian scenario? UNTAES was established in 1996 under the UNSC resolution but double legitimized by the agreement signed by the Croatian government and the local Serb leadership⁶. Kyiv is reluctant to enter into any official relations with the representatives of self-proclaimed ‘republics’, what is more, it is hard to point out any

⁶ See more Doyle & Sambanis, 2006.

‘national minority’ or even ‘different nation’ leaving on the territories of DPR and LPR (people there are either Ukrainian or Russian citizens) what would justify the same pattern as used in post-war Croatia in 1996. Whatsoever, UNTAES mandate assumed holding elections after the full disarmament and the return of the refugees to their properties, what most probably would not be accepted by DPR and LPR ‘officials’ and Kremlin, as such. Last but not least, at the time of writing, on October 6, 2017 a special law regarding Donbas as temporarily occupied territories of the Russian Federation, naming Putin’s state as an external aggressor (and by so leaving the formula of ATO), passed the first reading in the Verkhovna Rada.⁷ In fact, it impedes deployment of the Russian peacekeepers if, at the same time, they are treated as aggressors (rightly). In such circumstances, the creation of mission under the legally binding UNSC resolution can be seen as externally imposed on Ukraine (even though its consent would not be demanded), thus with no real perspective of the successful completion of a mission’s mandate. Therefore, the withdrawal of Russian troops and military equipment is a necessary precondition to the possible implementation of UNTAES peace scenario in Donbas.

Nonetheless, the legacy of UNTAES main policies – not just peacekeeping, but also peace-building efforts (transitional administration) – such as the management of the DDR program, a return of refugees or internally displaced persons, an introduction of transitional police consisting of representatives of both sides of the conflict or creation of a local transitional council formed of Croats and Serbs, shall be taken very seriously into consideration by the Ukrainian authorities. The UN mission in Eastern Slavonia helped to restore not only the full Croat jurisdiction over Serb-dominated region, being a part of the self-proclaimed Republic of Serbian Krajina during the war (which remained until the completion of UNTAES mandate), but also managed to reintegrate most of the ex-combatants into society.

To sum up, it is necessary to underline that even though UNTAES promoted the value of peace and security (prevailing over the question of delivering justice), it created conditions for (inter-)national dialogue and reconciliation for both parties to the previous conflict. It cannot be forgotten that the functioning of the ICTY, aimed at bringing to justice most responsible perpetrators of heinous crimes committed,

⁷ Bill ‘On the specifics of the state policy to ensure the state sovereignty of Ukraine over temporarily occupied territories in the Donetsk and Luhansk oblasts’. Moreover, on 6 October 2017, one more bill (‘On the special order of local self-governance in the occupied areas of Donetsk and Luhansk oblasts’) was adopted by the Ukrainian Parliament, coming into force on 10 October 2017. The law extends for one more year the law ‘On the special order of local self-governance in the occupied areas of Donetsk and Luhansk oblasts’ of 2014 and, by so, reflects the Ukrainian intentions to comply with the peace process conditions stipulated by Minsk accords.

prevented reintegration into a war-torn society those whose conduct stood in contradiction with international (criminal) law. Thus, a combination of the international criminal justice (the ICC), domestic efforts and restorative justice realised in the scheme of DDR programs (under the umbrella of a potential international assistance or transitional administration), seems to be a precondition of a successful reintegration of Donbas into Ukraine.

Conclusion

Transitional justice is a constantly developing field of research and its practical application. In addition to the initially analysed contexts of post-authoritarian states dealing with the legacy of restrictive rules and fostering a process of democratisation, the last decade of 20th Century emphasised the need for implementation of some transitional justice toolbox also by post-conflict societies, with possible assistance provided by the international community. Furthermore, the aim of preventing or halting heinous crimes at the time when they occur, likewise, a necessity of investigating serious violations of human rights seen as a mean of stabilisation of war-torn environment, moved transitional justice to the cases of ongoing conflicts and post-war reconstruction. The international judicial (for instance, mirrored by the ICC) or institutional (UN transitional administrations) interventions including the transitional justice component, alongside peace-building activities, may determine the peaceful transitions of post-violence states and fragmented societies in the aftermath of a bloodshed.

Undoubtedly, the current case of post-Maidan Ukraine, at the same time, trying to reckon with historical injustices symbolized by the regime of ex-President, Viktor Yanukovich (transitional justice ‘in a narrow sense’), or eventually reject the Soviet legacy (‘post-transitional justice’), and being challenged by the necessity to stop violence happening in the course of international armed conflict in Donbas (and restore its full control over Eastern *oblasts*), falls within the ambit of the analysed matter in this paper.

Transitional justice perspective definitely cannot be lost, while discussing the possible methods of reintegration of Donbas with Ukraine. Heritage of other unrecognized, *de facto* Kremlin-backed regimes in the post-USSR space, existing for more than 25 years like Transnistria (*de iure* part of Moldova), Abkhazia or South Ossetia (integral parts of Georgia), clearly shows that lack of transitional justice mechanisms (to foster reconciliation and mutual dialogue) leads to cultivation of past evils or petrification of hostile narratives between post-war divided societies (compare Lachowski, 2016, pp. 185–186). In such conditions, political or diplomatic efforts directed at reintegrating abovementioned territories are doomed to failure – the legacy

of other post-Soviet unrecognised self-proclaimed republics shall be treated as a living laboratory for Kyiv.

To achieve its goal, Ukraine shall take the two-fold approach. First, to strengthen the criminal justice pillar by final ratification of the Rome Statute (what is expected to happen in 2019) and efficient cooperation with the Hague to prosecute and punish perpetrators of international core crimes committed in Eastern Ukraine (bearing in mind also the conduct of the Ukrainian troops). Second, to trigger the establishment of the UN peacekeeping mission with a robust mandate, including the DDR program and other peace-building tools, as well as transitional justice component in its restorative justice section. Whatsoever, successful reintegration of Donbas may accelerate the other transitional justice processes, such as decommunization, at present, just theoretically, covering the Crimean Peninsula or Eastern *oblasts*. Nonetheless, it is argued that some views of the DPR and LPR inhabitants on the Ukrainian further development shall not be excluded by Kyiv in shaping its strategy – as it seems, truth-telling and truth-seeking instruments may appear as useful.

Beyond the shadow of a doubt, the Ukrainian case is a highly arduous and politicised issue, however, if succeeds, it may serve as a turning point in the history of peace-building activities, likewise, contribute to the development of transitional justice policies applied in ongoing conflicts and post-war reconstruction.

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