

Rule of Law and Reconciliation: 4 Scenarios for 2025

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State of play in 2018

As a complex set of processes that, after massive violations of human rights, build and renew relationships at the interpersonal, socio-political and institutional levels³, reconciliation⁴ is closely related to the intertwined concepts of transitional justice (TJ) and the rule of law (RoL). Both concepts are rights-based, seeking to empower victims and prevent recurrence of human rights violations. Their processes and actors often overlap, they may even be contesting⁵, but both remain technical pre-requisites to reconciliation.

On the other side we have a political pre-condition to reconciliation: the effect that the RoL and TJ instruments have on reconciliation depends on the extent to which the governments of the formerly conflicted countries are determined to prosecute war criminals, officially recognize the victims, provide ethnic-blind comprehensive reparations to veterans and civilians alike, and dismantle the structures and the culture of impunity for war-related violations of human rights⁶ during the course of reforms of the judiciary and police. The political will of the post-Yugoslav decision-makers has in the past been changeable, at the same time influenced by leaders' (lack of) predisposition to nationalistic ideology, by incentives from the European Union and other international players, and by public opinion polls.

Where does the region stand at present? According to the 2018 Communication on EU Enlargement Policy, "much work lies ahead" in reforming judicial systems towards professionalism, integrity and independence, and the February Strategy for the Western Balkans warns of the "state capture" and "sentiment of impunity". In view of TJ, according to May 2018 Impunity Watch report, "prosecutions are on the decline, truth-seeking is challenged

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⁴ The notion of reconciliation used in this text refers to the socio-political and institutional levels – the reconstruction and renewal of relations between post-Yugoslav countries, political and ethnic groups and communities, as well as the establishment of trust in new institutions.

⁵ According to Andersen, E., (2015), *Transitional Justice and the Rule of Law: Lessons from the Field*, Case Western Reserve. Vol. 47, Journal of Int'l Law. 307.

⁶ As in Research Report *Keeping the Promise – Addressing Impunity in the Western Balkans*, Impunity Watch, May 2018.

by a one-sided public discourse of denial and revisionism (...) reparations have been largely selective and politicised (and) judiciary (too) weak to guarantee the non-recurrence of violations". With the dwindling interest of the international community in reconciliation in the region (other than the past focus on criminal justice, or the current, almost exclusive interest in the forward-looking economic and youth cooperation), the civil society of the region, the engine of TJ efforts, has been losing the power to push the process forward. It is then to no surprise that in December 2017 the then Council of Europe Commissioner Muižnieks warned⁷ of stalled reconciliation and of "mounting ethnic divisions and polarisation", pointing to region-wide denial of genocide, glorification of war crimes and their perpetrators, historical revisionism, inflammatory discourse and ethnic segregation in the region. The increasingly state-controlled media proliferate the nationalistic narratives, further discouraging reconciliation, and endangering regional security and cooperation.

Aiming to explore the ways in which the (lack of) progress of the RoL and the (in)efficiency of TJ mechanisms could affect the process of regional reconciliation by the year 2025⁸, we have varied their key interrelated components⁹ and developed possible scenarios. This exercise has allowed us to single out the tendencies and factors¹⁰ that can swing the reconciliation process and address them by suggesting possible courses of action.

What 2025 looks like – 4 scenarios

Scenario 1: Entrenchment along nationalistic divides

State capture across the region has grown tighter over time. In most countries the reforms aimed at promotion of the RoL, including constitutional guards of independence, have been watered down to institutional changes with insignificant impact. Judiciaries have been left at the mercy of discretionary decisions of governments. Impartiality perceptions by both judges and citizens have been plummeting, and less than 30% of citizens trust the judicial system. Without fair and open recruitment, politicization remains the key principle of HR policies. Overall capacities of courts and prosecutors are in decline, adjudications take a lot of time and due process is not guaranteed.

With an ever-stronger state capture relying on support from public discourse, the mainstream media proliferate narratives fuelling nationalism and confrontation with "the other". This affects (and reflects) bilateral relations and regional cooperation, marked by intensifying mutual provocations. Due to the growing authoritarian pressure on the civil society and the lack of decisive involvement from the EU, the war crimes prosecution and the intergovernmental truth

⁷ Council of Europe Human Rights Comment, *Reconciliation Stalled in the Western Balkans*, Nov 21, 2017, <https://www.coe.int/hy/web/commissioner/-/reconciliation-stalled-in-the-western-balkans?inheritRedirect=true>

⁸ As the year marked in the EC's Strategy for the WB

⁹ We considered the technical pre-requisites to reconciliation, observing how one aspect of the RoL – reforms of the judiciary – affects war crimes prosecutions and the work of intergovernmental truth commission (reparations were left out due to limited space), and we also considered the political pre-requisite – the possible variations of factors guiding the governments' commitment to effective TJ (public discourse, pressure from the EU and the civil society, bilateral and regional relations).

¹⁰ Looking at the region as a whole required several generalizations.

commission are left out from public debate, except in the context of “the betrayal of national interests”.

As a result – the prosecution of war crimes is way behind the goals set in national strategies – a handful of indictments have been (poorly) prepared and not a single verdict has become final. The expired prosecutorial strategies have not been replaced, and civil society initiatives for a regional prosecutorial strategy have been unfruitful. The intergovernmental truth commission has not been established, and as the civil society pressure has subsided, the idea has been forgotten. A chance to reach a joint agreement on facts about war crimes and find out the fate of the missing persons has been missed.

Not only have the perpetrators not been prosecuted, but they are now being glorified, while the narrative of sole victimhood prevails in the memorisation of the past. The sufferings of the victims have not been recognized. The curricula dealing with recent history have been left without the factual base for reform and the education across the region is based on the mutually conflicted narratives.

Scenario 2: Not progressing is regressing (status quo)

There is no interest in “the liberation of institutions”. The countries are late in fulfilling obligations from strategic documents dealing with the RoL, while the most demanding reforms are swept under the rug, including, in some states, constitutional guarantees of judicial independence. Strong political influence on judiciary is ubiquitous. The impartiality assessments by judges are worsening year by year, and the degree of citizens’ confidence has declined to 50%. HR policies in the judiciary are as politicised as they were in 2018, while the capacities and the quality of adjudications remain unchanged.

With the state grip over mainstream media only slightly challenged by civil society media, the public discourse continues to be shaped by opportunistic use of nationalism. In the absence of civil society support to TJ, and with only lip-service from the EU, there is almost never any mention of war crimes trials and truth commission. As the public discourse merely mirrors (and amplifies) the official messages and continues to ignore the ever more silent critics, bilateral relations and regional cooperation are steadily declining.

The lack of impact of the cosmetic reforms of judiciary and the public discourse reinforcing the state capture have led to poor progress in TJ. Cooperation with the Mechanism for International Criminal Tribunals (MICT) has not taken off, the regional prosecutorial strategy has not been adopted, and the technical advancements in judiciary have not resulted in the implementation of national prosecutorial strategies. Even though four countries have been willing to set up the truth commission¹¹, no progress has been made, and as time goes by, evidence is becoming harder to gather. Civil society’s advocacy to establish this commission is growing weaker year by year, analogous to the unconvincing messages from the EU.

The impunity of war crimes perpetrators has become a norm. The chance to establish facts and avoid future manipulation as the root cause of conflict has been missed. The societies have failed to acknowledge all the victims. Without the factual basis, the curricula dealing with recent history remain the same as they used to be.

¹¹ In June 2018 these were Kosovo, Macedonia, Montenegro and Serbia.

Scenario 3: Wind in the sails of reconciliation

The political will to reform the judiciary is present, but while institutional design is improved, its impact is limited, with uneven progress across the region. In view of impartiality and independence both subjective (judges and citizens) and objective criteria indicate progress proportional to the progress in the accession process and to the results in dismantling of the state capture. Trust in the judicial impartiality is expressed by 60% of the region's citizens. Politicization of the HR policies is in (an uneven) decline. With improved capacities and independence of the judiciary, the efficiency and timeliness of adjudication are on the rise.

The EU conditionality and pressure from the civil society have encouraged leaders' commitment to solving open bilateral disputes and to strengthening regional economic and social ties. As both bilateral and regional relations have progressed, mainstream media echoed this good will, leaving little room for opposition to war crimes prosecutions and to regional fact-finding and truth-telling efforts.

This has reflected on the adoption of the regional prosecutorial strategy and on coordination of the national efforts. Cooperation with the MICT has helped the quality of indictments, and progress in implementation of the regional strategy has been made, albeit with delays. Serbia and Croatia have signed a bilateral agreement on prosecution of war crimes, and Bosnia and Herzegovina have relinquished the principle of territorial jurisdiction. The regional truth commission has started its work – first with the four willing countries, while the others joined in the process, but due to postponements, prolongation of mandate is required.

As a result, the societies of post-Yugoslav space are slowly coming to terms with the past. Fact-finding has set the grounds for reforms of recent history curricula and victim-centred memorialisation, and institutional opposition across the region to redesign the old curricula is slowly subsiding.

Scenario 4: Reconciliation is “the new normal”

All the countries are advancing towards independent judiciary – the technical conditions have been met, the capacities strengthened, the transparency improved. Due to professionalisation of HR policies and to the passage of time, the structures ensuring impunity for war-related violations of human rights are being dismantled. Over 70% of citizens trust judicial impartiality, and the judges concur. Adjudications are timely and efficient, and due process is guaranteed.

The civil society advocacy for TJ and reconciliation, and a fully committed EU's involvement have created a favourable climate for progress both in the RoL and in TJ mechanisms. The grip that the governments held on the media in 2018 is almost gone. The democratic orientation of the regional leaders has led to solution of bilateral disputes and to intensification of regional cooperation, including the fruitful work of the truth commission.

Post-Yugoslav countries are closing down the implementation of the current national strategies for prosecution of war crime cases, with an implementation rate of over 85%. The regional prosecutorial strategy has proven to be a useful mechanism in defining the intergovernmental

co-operation framework. Statistics on the prosecution of war crimes and on judgements is encouraging. Bilateral co-operation in war crimes cases has also been substantially improved; all of the states are taking swift actions with satisfactory dynamics.

The intergovernmental truth commission has completed its three-year mandate and the results of its work are satisfactory. All the post-Yugoslav countries have committed to use the established facts in the further prosecution of war crimes, as well as for the preparation of a single curriculum in recent history. Educational institutions in four countries are working with civil society on textbook preparations. Memorialisation policies are contributing to the culture of solidarity, tolerance and respect of human rights.

Key uncertainties: what can swing the reconciliation process?

- State capture and authoritarian ways, including containment of critical voices of the civil society and media and tacit support of the EU are key factors stalling the RoL reforms and the progress of TJ mechanisms, thus affecting reconciliation.
- The lapse of time reduces the prospects of reconciliation based on attainment of the RoL through TJ mechanisms
- The EU's renewed interest in the Western Balkans, and its commitments from the recent EU's Policy Framework on support to TJ¹² could be used to encourage the determination of the post-Yugoslav leaders to further reconciliation through TJ and RoL mechanisms

How to make the reconciliation “the new normal”: Recommendations

- The EU and member states should:
 - Update benchmarks and guidelines regarding the progress in the RoL and reconciliation annually, in accordance with Flagship Initiatives 1 and 6, and condition their fulfilment
 - Intensify consultations with the civil society when elaborating the Flagship Initiatives, but also when preparing annual country reports and other reports regarding the rule of law
 - Support the regional civil society as key partner in generating the political climate for reconciliation through TJ/RoL mechanisms
 - Encourage the post-Yugoslav EU members to progress in prosecution of war crimes and to actively engage in setup and work of the regional truth commission, in line with the recent EU policy framework on TJ
- The post-Yugoslav countries should:

¹² The EU's Policy Framework on support to transitional justice (2015), Foreign Affairs Council, European External Action Service

- Strengthen the capacities of domestic judiciaries and encourage regional cooperation in prosecution of war crimes and other war-related violations of human rights
- Cooperate with the MICT in preparation of the regional prosecutorial strategy and seek its support in access to evidence collected by the ICTY in investigations and in preparation of indictments
- Regularly and transparently report on the implementation of the national prosecutorial strategies
- Proceed with the steps necessary to step up the establishment and work of the regional, intergovernmental truth commission
- Civil society should:
 - Develop its own, independent media and devise communication strategies to oppose populist nationalist narratives, campaign for the adoption of a regional prosecutorial strategy and promote the RoL
 - Increase its impact through:
 - Professionalisation of policy alternatives advocacy
 - Intensified monitoring and reporting to public on the reforms of RoL and on progress of TJ mechanisms reform, and
 - Regional networking

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