

Revisiting the Past, Anticipating the Future

Strengthening European integration through the analysis of conflict discourses

14 March 2022

**RePAST Deliverable D5.3**

**Socio-legal analysis of EU transitional justice law and policy and recommendations for future EU policies on how to deal with traumatic pasts**

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**Contents**

[Summary 5](#_Toc96862357)

[Introduction 5](#_Toc96862358)

[1. The EU 8](#_Toc96862359)

[2. EU Citizenship and ‘Remembrance’ 12](#_Toc96862360)

[3. Common Foreign and Security Policy 22](#_Toc96862361)

[**3.1. Common Security and Defence Policy** 23](#_Toc96862362)

[**3.2 The ‘EU Policy Framework on Support to Transitional Justice’** 25](#_Toc96862363)

[4. Development, Conditionality, and Enlargement 27](#_Toc96862364)

[**4.1 Development within the EU** 28](#_Toc96862365)

[**4.2 International Development Cooperation** 29](#_Toc96862366)

[**4.3 Conditionality and Enlargement** 31](#_Toc96862367)

[5. Attitudes to the EU’s Approaches to Transitional Justice and Troubled Pasts 32](#_Toc96862368)

[Conclusions 33](#_Toc96862369)

[References 35](#_Toc96862370)

# Summary

This Deliverable sets out a socio-legal analysis of the EU’s approaches to the RePAST states’ ‘troubled pasts’, employing insights from the interdisciplinary field of ‘transitional justice’. By viewing the EU’s approaches to troubled pasts through the lens of transitional justice, it is identified that three broad policy areas have been invoked: EU policy on citizenship and ‘remembrance’; the Common Foreign and Security Policy (CFSP); and development, conditionality and enlargement policy. However, there are substantial differences between the EU’s legal ‘competence’ to act in respect of Member States and non-Member States; and, relatedly, there is, across the three policy areas identified, a marked lack of consistency in terminology and policy emphases (for example even as to whether or not particular EU actions are expressly labelled as ‘transitional justice’; and the extent to which criminal justice is seen as the principal reaction to troubled pasts). We also establish that, despite these significant transitional justice engagements with ‘troubled pasts’, the extent of the EU’s legal powers to act in this field, and the actions that it has in fact taken, seem poorly understood.

# Introduction

In accordance with the RePAST Grant Agreement, this Deliverable sets out a socio-legal analysis of the EU’s approaches to the RePAST states’ ‘troubled pasts’, employing insights from the interdisciplinary field of ‘transitional justice’. The RePAST states are Cyprus, Germany, Poland, Greece, Bosnia Herzegovina, Kosovo, Ireland (including Northern Ireland), and Spain.

Socio-legal studies is a subdiscipline of legal studies, focused on ‘law and society’, or ‘law in context’.[[1]](#footnote-2) It can be seen as the interdisciplinary study of legal phenomena, and a challenge to more traditional 'doctrinal' legal research. It is said in regard of ‘doctrinal’ research that it,

focuses heavily if not exclusively upon the law itself as an internal self-sustaining set of principles which can be accessed through reading court judgments and statutes with little or no reference to the world outside of the law.[[2]](#footnote-3)

However, it can be argued that even doctrinal research is, in a sense, qualitative; and the process of screening, selecting and reviewing relevant laws and cases, in order to synthesise conclusions from them, is the product of inductive reasoning.[[3]](#footnote-4)

Socio-legal studies, however, takes the qualitative analysis of legal phenomena a step further and engages with policy and law reform.[[4]](#footnote-5) It is about, 'examining the legal system in terms of whether legal reform brings about beneficial social effects and protects the interests of the public'.[[5]](#footnote-6) It should not be understood as a simple, self-contained mode of study, though. For the UK research funding-body the Economic and Social Research Council it,

displays considerable eclecticism in subject-matter, theorising and methodology, ranging from macro-theoretical scholarship through empirical analyses designed to test and generate theoretical propositions, to experimental designs and small-scale case studies.[[6]](#footnote-7)

It is for this reason that Cownie & Bradney have emphasised that ‘socio-legal’ research is not exclusively empirical research.[[7]](#footnote-8) It is the focus on law in its social context that is its key characteristic.

Within the socio-legal approach adopted here, the theoretical frame of ‘transitional justice’ is employed in order first to identify and then to analyse the EU’s approaches to the RePAST states’ troubled pasts. The UN has defined transitional justice as,

the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.[[8]](#footnote-9)

Transitional justice ‘processes and mechanisms’ commonly include criminal prosecutions, truth commissions and other forms of historical accounting or memorialisation, reparations programs, and various kinds of institutional reforms.[[9]](#footnote-10) Thus, in undertaking the identification and analysis of extant EU law and policy on troubled pasts, WP 5.3 searched within documented EU activities for the law, policies and practices that it has undertaken (or has facilitated others so to do) for functional equivalents to common transitional justice ‘processes and mechanisms’, whether or not they were labelled as such. This involved searching through the copious databases of EU law and policy, such as Eur-Lex, for evidence of relevant activities. WP 5.3 also scoured the EU institutions’ websites for traces of relevant activities e.g. in announcements, press releases, and other publications.

Next, we cross-referenced our initial findings with pre-existing legal-academic analyses of the EU and transitional justice (legal, socio-legal, or otherwise). There is plenty of legal research into the separate national approaches to transitional justice, and likewise into the facilitating role of the Council of Europe.[[10]](#footnote-11) However, by contrast, research into the EU and transitional justice is comparatively less developed.[[11]](#footnote-12)

Ultimately, by viewing the EU’s approaches to troubled pasts through the lens of transitional justice, we identified that three broad policy areas have been invoked: EU policy on citizenship and ‘remembrance’; the Common Foreign and Security Policy (CFSP); and development, conditionality and enlargement policy. These findings are set out in detail in what follows below.

Identifying ‘the law’, alone, is insufficient to provide a socio-legal analysis of the EU’s role in addressing troubled pasts, however. The next stage was to examine the extent to which the EU’s activities have had, or have had the potential to have, ‘beneficial social effects’. Again, studies into the design and evaluation of transitional justice ‘processes and practices’ provide a critical perspective from which to submit the EU’s activities to qualitative socio-legal analysis. Moreover, to the extent that it was possible, WP 5.3 also incorporated the empirical findings of WP 5.2 on the citizens of the RePAST states’ attitudes regarding the conflicts of the past and the EU’s approach to them. However, and as discussed further below, much less of the WP 5.2 survey data was relevant to WP 5.3 than had been envisioned.

It should now be emphasised, first, that this Working Paper does not advocate for ‘doing’ transitional justice as a self-evident and uncritical plan of action that will inevitably lead to justice regarding the RePAST states’ ‘troubled pasts’. Instead, we invoke it as a contested concept and an area of scholarship that can help first to identify and second to form a critical perspective upon the EU’s attempts to address the RePAST states’ troubled pasts. Second, we do not propose that the lens of transitional justice is the only, or even the best, perspective from which the EU’s approach to ‘troubled pasts’ can be examined; or that the lens of transitional justice should provide an overarching framework for the entire RePAST project. It is, instead, invoked in order to develop additional insights complementary to those gained elsewhere in RePAST.

Finally in this introduction, we need to foreground that the RePAST states include both Member States and non-Member States of the EU. As we shall see, the EU’s authorisation to act (its ‘competences’) are completely different within and outside its borders. There is also the thorny issue of what we mean when we say ‘the EU’: its three main legislative institutions are, by design, essentially in tension with each other (namely the European Commission, Council of the European Union, and European Parliament). Thus, this Working Paper begins by setting out, briefly, the nature of the EU and its institutions; the principle of ‘conferral’ of ‘competence’; and the legislative acts available to the EU in respect of its competences.

# The EU

The material in this section is a basic introduction to EU law. The most notable fully-fledged introduction in English is by Paul Craig and Gráinne de Búrca, now in its seventh edition.[[12]](#footnote-13) The purpose of this section is to introduce some legal concepts and terms that are deployed in the main part of this Working Paper.

The EU is at present governed by two international agreements, or treaties, between its Member States. Since the ‘Lisbon Treaty’[[13]](#footnote-14) came into effect in 2009, these are the Treaty on the Functioning of the European Union (TFEU)[[14]](#footnote-15) and the Treaty on European Union (TEU).[[15]](#footnote-16)

What is now the EU was established in 1957 by the ‘Treaty of Rome’, also known as the EEC Treaty.[[16]](#footnote-17) That treaty was amended several times and the name of the organisation was shortened to the European Community (EC), reflecting an ambition for it not solely to be about economic integration.[[17]](#footnote-18) In 1992 the ‘Maastricht Treaty’[[18]](#footnote-19) added the Treaty on European (TEU) alongside the Treaty of Rome (the latter by now usually referred to as the ‘Treaty Establishing the European Community’ or TEC). The present treaty arrangements, with the TFEU and TEU, still reflect to a certain degree the separation of ‘EC’ business from ‘EU’ business as established at Maastricht. This is important because the Maastricht arrangements created an overarching ‘three-pillar’ structure for the EU, with the EC as its first pillar and two new pillars: one on Common Foreign and Security Policy (CFSP); and the other on Justice and Home Affairs (then JHA). The third pillar was subsequently re-named ‘Police and Judicial Cooperation in Criminal Matters’ (PJCC).

The decision to keep the three pillars of the EU separate was due to concerns about pooling sovereignty on the topics covered by the second and third pillars. European integration on those topics was to be approached more cautiously, with fewer legal powers available to the EU in respect of them. Formally speaking, the Lisbon Treaty abolished the pillar structure, but we shall see that its legacy is still clearly visible. For example, the EU is still prohibited from adopting any legislative acts whatsoever in relation to the CFSP. The Lisbon Treaty also renamed the former PJCC to ‘The Area of Freedom, Security and Justice’.

We now turn to the principle of ‘conferral’, the nature of the EU’s legislative acts, and the way that EU law is made. This is necessary in order to understand what the EU can and *cannot* do in relation to transitional justice and the RePAST states’ troubled past.

The principle of ‘conferral’ is simply the idea that the EU can only legislate or act on topics on which it has been specifically authorised to act. The EU cannot autonomously extend its own authority. Thus, it can be said that the TFEU and TEU ‘confer’ upon the EU the legal ‘competence’ to legislate or to act on a finite range of topics. Every single EU legislative act must state within it the precise numbered article of the TFEU or TEU that provides the ‘legal basis’ to exercise the competence upon which it is claimed to be based. If the EU overreaches, then the Court of Justice of the European Union (CJEU) may be called upon to annul the offending legislative act. Crucially, the EU’s internal and external competences are totally separate and far from identical, unfortunately thereby preventing anything like a universal EU approach to troubled pasts, as we shall see further below. Now we must clarify what we mean when we say ‘the EU’ in order to appreciate the complex process of making EU law.

The EU is comprised of several institutions, which each promote different, and indeed oppositional, perspectives. The legislative process is designed with this in mind. Legislation will usually begin with a proposal by the European Commission,[[19]](#footnote-20) which is led by a ‘College of Commissioners’ appointed, not elected, to it. The Commission essentially provides the EU’s day-to-day political leadership, with occasional summits of the European Council, comprised of Member States’ heads of government,[[20]](#footnote-21) setting the ‘big picture’. The Commission’s role is to promote and to facilitate European integration. Whilst the Commission can propose legislation, it must be approved elsewhere to become law. In the early days of the EU (then EEC), the Council normally had the final say.[[21]](#footnote-22)

The Council (which is not the same as the European Council), is comprised of national politicians at ministerial level. The precise composition of the Council changes according to the topic on which legislation is proposed. So, if the issue is transport, the Council will comprise the Member States’ transport ministers. When the topic is the Common Foreign and Security Policy then it meets as the Foreign Affairs Council, comprised of all the Member States’ foreign ministers. And so on. The idea is that the Commission will promote European integration, but the Council safeguards national sovereignty. This central tension forms the backbone of the legislative process.

The so-called ‘ordinary legislative procedure’[[22]](#footnote-23) today also requires that the European Parliament give its express approval to any legislation proposed. When the EEC was created it had only a ‘European Assembly’ and not a Parliament, and its members were all also national members of parliament (MPs). It first held direct elections in 1979, after an amendment to the TEC. With its greater political legitimacy its power has increased with each successive reform of the EU. However, the European Parliament is still not the exclusive, or even the main, player in the EU legislative process. It can be said that it is part of a ‘legislative triangle’ where each of the three legislative actors represents a different, and as noted above, often oppositional, set of interests: the Commission continues to promote European integration; the Council continues to represent the Member States’ interests (both collectively, and often separately); and the Parliament represents the people of Europe (albeit often on a very low electoral turnout).[[23]](#footnote-24)

Finally in this section, we shall introduce different types of EU legislative acts. This is so that in what follows we can understand what does or does not constitute ‘EU law’. There are three types of legislative act: Regulations, Directives, and Decisions.[[24]](#footnote-25) Different legal bases confer the power to adopt specific types of legislative act only. If the institutions attempt to enact the wrong type of legislative act, or even use the wrong legislative process, then the resulting act can also be challenged at the CJEU.[[25]](#footnote-26)

Regulations are straightforwardly binding upon Member States and represent the most powerful form of EU law. They can be invoked in national legal proceedings without the further involvement of Member States’ own law-making institutions (they are ‘directly applicable’).[[26]](#footnote-27) Many will be familiar, for example, with the dreaded ‘General Data Protection Regulation’ or GDPR.[[27]](#footnote-28) Below we shall see various Regulations that have been adopted in order to establish financial instruments to disburse the EU’s budget in particular areas of policy, such as Regulation (EU) 2021/692 of the European Parliament and of the Council of 28 April 2021 establishing the Citizens, Equality, Rights and Values Programme.[[28]](#footnote-29)

Directives bind Member States as to a particular objective, but they leave some discretion as to the means of achieving it.[[29]](#footnote-30) They set a deadline for being ‘transposed’ into national law, after the passing of which under certain conditions specific parts of them may be invoked in national legal proceedings whether or not they have been transposed. This is the principle of ‘direct effect’, first established in the seminal *Van Gend en Loos* judgment of the CJEU.[[30]](#footnote-31)

Decisions issued by the EU institutions are binding upon to whomever they are addressed.[[31]](#footnote-32) For example, the Commission is empowered to take Decisions as to whether companies have violated EU competition law.

# EU Citizenship and ‘Remembrance’

Within the field of transitional justice, historical accounting or ‘historical justice’ holds an especially important position. The claim, as Ruti Teitel observed, ‘is that establishing the “truth” about the state’s past wrongs, like successor constitutions or trials, can serve to lay the foundation of the new political order’.[[32]](#footnote-33) This (albeit contested) observation allows us to identify EU policy towards what it terms ‘remembrance’ as an element of its approach to ‘troubled pasts’, and opens the door to applying critical insights from the field of transitional justice. Relatedly, the claim has been made that promoting a truly *European* form of remembrance and a shared ‘Europeanmemory[[33]](#footnote-34) encompassing Member States’ troubled pasts, will increase European citizens’ identification with the EU. This section examines EU ‘remembrance’ policies and practices, their connection to the notion of European identity, and their foundation upon the notion of EU citizenship.

The first major step towards greater promotion of a European identity through common approaches to heritage and history was the Copenhagen Declaration on European Identity of 1973.[[34]](#footnote-35) The Declaration was promulgated by the Heads of State of the then nine Member States. In it the Heads of State proclaimed that defining ‘European identity’ involves,

— reviewing the common heritage, interests and special obligations of the Nine, as well as the degree of unity so far achieved within the Community,

— assessing the extent to which the Nine are already acting together in relation to the rest of the world and the responsibilities which result from this,

— taking into consideration the dynamic nature of European unification.

The timing and motives of the Declaration are moot,[[35]](#footnote-36) but of importance for this Working Paper is the purported connection between ‘*the* common heritage’ (singular) and ‘European identity’. The linkage was implicit also in the subsequent 1975 Tindemans Report, which set out an ambitious possible future for European integration in the context of the economic malaise of the 1970s.[[36]](#footnote-37)

Littoz-Monnet has observed that, just like in the Copenhagen Declaration, the EU continues to invoke remembrance as a ‘vector of identification’ with the EU.[[37]](#footnote-38) She applies insights from agenda-setting and framing literature on the emergence and fluctuation of dominant ‘memory frames’ to the EU’s approach to remembrance.[[38]](#footnote-39) ‘Memory frames’ are defined by Littoz-Monnet as, ‘interpretative lenses through which certain actors make sense of the past.’[[39]](#footnote-40) She has observed that alongside the post-Cold War enlargement of the EU the previously dominant ‘uniqueness of the Holocaust’ memory frame has been challenged by a ‘Nazism and Stalinism as equally evil’ memory frame, advocated by politicians from the newer Member States[[40]](#footnote-41) (on which more below). That the former communist states’ transition to democracy has led to a re-evaluation of their history, and a desire to have it recognised supranationally, chimes with Teitel’s observation that, ‘transitions are vivid instances of conscious historical production’.[[41]](#footnote-42) They, transitions, provide the opportunity for changes in what Teitel terms ‘truth regimes’, akin to Littoz-Monnet’s ‘memory frames’.

The research for WP 5.3 found that one of the key ways in which the EU has attempted to promote a common history, or shared memory frame, as a vector of identification is through its policies on EU citizenship, a concept introduced by the Maastricht Treaty. This has been because the Member States have simply not conferred upon the EU the competence more directly to address their troubled pasts (the situation regarding non-Member States is discussed in relation to CFSP and development assistance below). As an illustration of the EU’s limited competence in action, on the 25th May 2012, the Czech MEP Zuzana Roithová submitted the following written questions to the European Commission:

A number of history teachers and lecturers feel the need for a general, common and unified textbook of European history.

I wish to ask:

Does the Commission plan to support or coordinate the creation and introduction of a general, common textbook of European history?

Does it consider the creation and support of such a textbook to be a good way of introducing the idea of European unity and shared history as a positive idea?[[42]](#footnote-43)

An official of the Commission responded that, ‘in accordance with Article 165 of the Treaty on the Functioning of the European Union, the responsibility for the content and organisation of education and training systems rests entirely with Member States’.[[43]](#footnote-44) That is a clear indication that there is no legal basis in the TFEU for the EU, *itself*, to develop a common European historical textbook. However, under legal bases connected to citizenship it *has* authorised the allocation of funding to *third parties* to undertake precisely such work. This has included funding the European Association of History Teachers to undertake an 18-month project on ‘Connecting Europe through History’, leading to the publication of a multi-authored textbook with that title.[[44]](#footnote-45) The implications of the EU necessarily acting through the funding of third parties is a running theme in this Working Paper, and is also discussed again in its conclusion.

The current most relevant EU legislative act on remembrance is Regulation (EU) 2021/692 of the European Parliament and of the Council of 28 April 2021 establishing the Citizens, Equality, Rights and Values Programme (CERV).[[45]](#footnote-46) The legal basis for the Regulation is principally Article 167 TFEU, which authorises the EU to, ‘contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore’.[[46]](#footnote-47)

The preamble to the Regulation refers to fostering, ‘a sense of belonging to the Union and of a common citizenship under a European identity, based on a shared understanding of our common European values, culture, history and heritage.’ More specifically, it continues:

Remembrance activities should reflect on the causes of totalitarian regimes in Europe’s modern history, in particular Nazism, which led to the Holocaust; fascism; Stalinism and totalitarian communist regimes, and should commemorate the victims of their crimes. They should also encompass activities concerning other defining moments and reference points in recent European history. The relevance of historical, social, cultural and intercultural factors should also be taken into account *in order to create a European identity* based on common values and a sense of common belonging. [emphasis added]

In practical terms the CERV provides for the Commission to administer funding from an initial financial envelope of some EUR 641,705,000,[[47]](#footnote-48) to which a further EUR 800,000,000 can be added at a later date.[[48]](#footnote-49)

The CERV is based upon four ‘strands’: the ‘Union values’ strand; the ‘equality, rights and gender equality’ strand; the ‘citizens’ engagement and participation’ strand; and the so-called ‘Daphne strand’ on combatting violence, including gender-based violence.[[49]](#footnote-50) It is within the ‘citizens’ engagement and participation strand’ that we find a particular focus upon, ‘supporting projects aimed at remembering defining moments in modern European history, such as the coming to power of authoritarian and totalitarian regimes’.[[50]](#footnote-51) Significant as this is, it is disappointing that just 27% of the initial overall budget is allocated to that strand; and that of *that* allocation only 15% is set aside for remembrance activities (EUR 25,989,052).[[51]](#footnote-52) Thus, whilst remembrance activities may facilitate historical justice and, arguably, promote the elusive sense ’European identity‘, remembrance is far from the most significant issue for the CERV.

It is significant that the CERV Regulation, as we saw, refers to ‘Nazism, […]; fascism; Stalinism and totalitarian communist regimes’. This is notable because earlier instances of EU remembrance focused more exclusively upon World War II as the inspiration for integration and the foundation of a European collective memory (and identity). As RePAST Deliverable 6.16 Policy Recommendations for the EU (PRfEU) put it, this ‘peace narrative’,[[52]](#footnote-53) was the dominant early memory frame (or truth regime) applied to European memory and identity. This continued, with varying degrees of visibility, well into the 1980s with the European Parliament adopting Resolutions in 1985 on ‘Commemorating the 40th Anniversary of the Cessation of Hostilities in Europe,’ and on the ‘Commemoration of 8 May 1945’. This focus on WWII is also what RePAST Deliverable 6.16 PRfEU described as a ‘negative founding myth’, albeit one that it concluded did not receive especial attention or contestation by the existing Member States.[[53]](#footnote-54)

Littoz-Monnet has made the important observation that, to the extent that the EU was becoming engaged in memory politics rooted in the events of WWII, its emphasis subtly changed in the 1990s to focus more specifically upon the Holocaust, rather than the war more generally.[[54]](#footnote-55) She points to the 1993 Resolution of the European Parliament on, ‘European and International Protection for Nazi Concentration Camps as Historical Monuments’ as part of her evidence.[[55]](#footnote-56) Crucially, she identifies at this point the extent to which the ‘distinctiveness’ of the Holocaust was emphasised and preserved, for example by the rejection of a similar Resolution regarding sites related to Stalinist crimes.[[56]](#footnote-57) She also cites the 1995 EP Resolution that proposed the establishment of a European Holocaust Remembrance Day.[[57]](#footnote-58) Indeed she goes so far as to say that, ‘Defining the Holocaust as unique in its monstrosity became the only acceptable way of referring to the event’.[[58]](#footnote-59) This is the background against which the ‘Nazism and Stalinism as equally evil’ memory frame has emerged as a challenge to ‘the Holocaust as unique’ memory frame.

The first sign of the challenge was the reaction to a proposal to ban, within the EU, the display of the swastika Nazi symbol. Using the law to ban certain symbols, or to prohibit the denial of certain events, such as the Holocaust, is another manifestation of historical justice frequently seen during or after a transition of regime.[[59]](#footnote-60) Toth identified that a group of, ‘mostly conservative East European,’ MEPs sought to enlarge the swastika ban to include display of the red star and the hammer and sickle (i.e. key Soviet symbols), lest there be an appearance of double standards.[[60]](#footnote-61) No agreement was reached, and the proposal was eventually abandoned.[[61]](#footnote-62)

The 2006 Decision of the Council and European Parliament ‘establishing for the period 2007 to 2013 the programme “Europe for Citizens” to promote active European citizenship’ was the first successful attempt to achieve a shift in the EU’s perspective on a European memory frame.[[62]](#footnote-63) It included an ‘Action’ on ‘Active European Remembrance’ that provided project funding:

- for the preservation of the main sites and memorials associated with the mass deportations, the former concentration camps and other large-scale martyrdom and extermination sites of Nazism, as well as the archives documenting these events and for keeping alive the memory of the victims, as well as the memory of those who, under extreme conditions, rescued people from the Holocaust;

- for the commemoration of the victims of mass exterminations and mass deportations associated with Stalinism, as well as the preservation of the memorials and archives documenting these events.[[63]](#footnote-64)

This Decision is the precursor first to Council Regulation (EU) No 390/2014 of 14 April 2014 ‘establishing the “Europe for Citizens” programme for the period 2014-2020’, and now also to the currently operative 2021 CERV Regulation, introduced above.

It is too early to assess the activities of the CERV, but it is pertinent to note some observations about its forebears. Littoz-Monnet observed that in 2009 just 25% of the funding awarded under the ‘Active European Remembrance’ Action went to projects that examined the crimes of Stalinism (or both Stalinism and Nazism).[[64]](#footnote-65) The most recent data, covering 2014-2021, shows a similar emphasis.[[65]](#footnote-66) Research undertaken for this Working Paper identified that the data list some 321 projects on ‘European Remembrance’. However, we also found that just 28 of them contain any reference at all to ‘Stalin’, ‘Stalinism, ‘communist’ or ‘communism’ in their descriptions.[[66]](#footnote-67)

It is for our purposes also important to observe that Active European Remembrance has engaged directly with projects involving *all* the RePAST states, and not just those that are EU Member States. These projects have included, for example, the ‘Youth and memory activism’ project, which examined the legacy of Francoist Spain, the division of Cyprus, and transitional justice in Bosnia Herzegovina.[[67]](#footnote-68) Another relevant example is the project '1989: Fall of Communism in Eastern Europe, Development of the strategic game for the young Europeans’, which involved Poland, Germany, Spain, and the UK, amongst others.[[68]](#footnote-69) Space and sanity preclude presenting *all* the 28 relevant projects of the 321 that have been funded from 2014-2021.

If Active European Remembrance led to at least *some* funding to be allocated through a memory frame other than ‘the Holocaust as unique’, that does not mean that attempts to argue for the ‘equivalence’ of the experiences under communism and Stalinism have succeeded. This is despite the best efforts of the ‘Reconciliation of European Histories Group’[[69]](#footnote-70) of mostly right-of-centre, mostly East European, MEPs in the European Parliament[[70]](#footnote-71)(i.e. those identified by Toth) and non-EU initiatives such as the 2008 Prague Declaration on European Conscience and Communism (the result of a conference of European politicians, former political prisoners, and historians; organised by the government of the Czech Republic / Czechia).[[71]](#footnote-72) On this point, the present Working Paper would therefore draw slightly different conclusions to Deliverable 6.16 PRfEU.

D6.16 PRfEU states that,

the creation of common EU mnemonic structures [in this paper, ‘memory frames’] intensified and reached its peak in 2009 when the EP Resolution on European conscience on totalitarianism was adopted. This resolution, for the first time in history, put the atrocities of Communism *on the same level* as those committed by Nazism and Fascism; it also labelled Communism an *equally brutal* totalitarian and authoritarian regime.[[72]](#footnote-73) [emphasis added]

First, we must recall that Resolutions of the European Parliament do not represent the view of the EU as a whole. They are not legislative acts but rather, often self-serving, political statements adopted by an absolute majority vote. Thus, they may not even represent the view of the Parliament as a whole. We consider that the EU’s work in respect of Active European Remembrance discussed here and the Stockholm Programme, CFSP and development cooperation policies discussed below, to be much more significant.

Second, and although the Resolution is not a ‘law’, it can be subject to the type of close textual analysis typically employed by lawyers. The Resolution *does* state that, ‘Europe will not be united unless it is able to form a common view of its history, recognises Nazism, Stalinism and fascist and Communist regimes as a common legacy’,[[73]](#footnote-74) but it pointedly does *not* make any *direct* comparison between the horrors of those regimes. In fact, in the typically awkward legal-ese associated with the preambles to some legal texts, the preamble states that:

whereas millions of victims were deported, imprisoned, tortured and murdered by totalitarian and authoritarian regimes during the 20th century in Europe; *whereas the uniqueness of the Holocaust must nevertheless be acknowledged* [emphasis added][[74]](#footnote-75)

This would seem expressly to reaffirm the ‘Holocaust as unique’ memory frame and to reject that any other events have been equivalent to the Holocaust.

Likewise, in the operative part of the Resolution, as adopted, the European Parliament proclaimed 23 August as ‘a Europe-wide Day of Remembrance for the victims of all totalitarian and authoritarian regimes’, whereas the earlier non-EU Prague Declaration had proposed the same date as, ‘a day of remembrance of the victims of both Nazi and Communist totalitarian regimes, *in the same way* Europe remembers the victims of the Holocaust on January 27’ [emphasis added].[[75]](#footnote-76) The latter formulation would have more clearly indicated the acceptance that the Holocaust was not unique, and its rejection by the Parliament simply cannot be accidental.

Where the 2009 Resolution *does* both follow the Prague Declaration and achieve something tangible is by calling for the creation of a ‘Platform of European Memory and Conscience’ in order to coordinate pan-European research into all totalitarian regimes.[[76]](#footnote-77) The Platform was legally established in the Czech Republic / Czechia in 2011 as a non-profit international NGO linking together currently 62 public and private organisations across 20 states, including 14 from the EU.[[77]](#footnote-78) Its founding agreement stated that the organisations it will support will specialise in, ‘the subject of the history of totalitarian regimes, with special emphasis on National socialism, Communism and other totalitarian ideologies’.[[78]](#footnote-79) It is, therefore, on the face of it, neutral as to its focus upon a particular form or era of totalitarianism.

In fulfilling its mandate, the Platform undertakes many innovative activities not unlike those recommended in D6.16 PRfEU, including organising conferences and holding education and commemoration events. Notably, it has prepared an international travelling exhibition entitled ‘Totalitarianism in Europe’ which has so far been presented in 22 cities in 19 countries in Europe and North America.[[79]](#footnote-80)

However neutral its founding agreement is, it becomes obvious, and quickly, from even a brief study of the Platform’s activities that the Platform is, in fact, much more concerned with the legacy of communism and Stalinism than any other form of totalitarianism. Indeed, of the 14 participating EU Member States only Sweden, the Netherlands and France are not former communist or Stalinist states (we include Germany as a former communist state due to the pre-unification regime of the GDR). At work here is the so-called ‘memory wars’ and some have, like D6.16 PRfEU, linked their eventuation to the influx of new Member States to the EU with vastly different post-war experiences.[[80]](#footnote-81) However, Toth makes the valuable point that the challenges to the ‘Holocaust as unique’ memory frame can be attributed to a small number of specific individuals whose participation in the Reconciliation of European Histories Group, role in the adoption of the Prague Declaration, promotion of the 2009 EP Resolution, and support for the Platform of European Memory and Conscience overlap to a very significant degree. Thus, Toth cautions against equating, ‘the theme of a small but loud interest group with the collective memory of half a continent’.[[81]](#footnote-82)

Perhaps of more significance than the 2009 EP Resolution was the adoption by the European Council, later the same year, of the ‘The Stockholm Programme – An open and secure Europe serving and protecting the citizens’.[[82]](#footnote-83) The significance is that this was a formal statement of the Member States’ heads of government, sitting as the European Council. The European Council is given by Article 15 TEU the task of providing, ‘the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof’. More specifically, Article 68 specifies that the European Council shall define, ‘the strategic guidelines for legislative and operational planning within the area of freedom, security and justice.’ When the European Council ‘defines’ the other institutions and the Member States are compelled to listen. It is important, therefore, that the Programme contained the following passage:

The Union is an area of shared values, values which are incompatible with crimes against humanity, genocide and war crimes, including crimes committed by totalitarian regimes. Each Member State has its own approach to this issue but, in the interests of reconciliation, the memory of those crimes must be a collective memory, shared and promoted, where possible, by us all. The Union must play the role of facilitator.[[83]](#footnote-84)

The European Council continued by ‘inviting’ the Commission to,

Examine […] whether there is a need for additional [legislative] proposals covering publicly condoning, denying or grossly trivializing crimes of genocide, crimes against humanity and war crimes directed against a group of persons defined by reference to criteria other than race, colour, religion, descent on national or ethnic origin, *such as social status or political convictions*.[[84]](#footnote-85) [emphasis added]

In other words, this was an invitation to consider legislative proposals regarding those victimised by communism and Stalinism on social or political grounds. It is, therefore, quite clearly a call to arms regarding a memory frame other than the ‘Holocaust as unique’, and is the progenitor of all contemporary EU remembrance policies.

In this section we have seen that through its innovative use of legal bases connected to citizenship, and in particular by developing ‘Active European Remembrance’, the EU has spent hundreds of millions of Euros toward promoting historical justice projects that have engaged all the RePAST states’ troubled pasts. From a transitional justice perspective, though, it is debatable whether this has been, ever could be, or even *should be* successful in creating a collective ‘European memory’ as a foundation for a consolidated ‘European identity’. Teitel has cautioned that the, ‘attempt to entrench an identity based on a particular historical view for all time is […] an illiberal vision […]’.[[85]](#footnote-86) Thus, it is not self-evident that enshrining a particular view of the past will lead to ‘beneficial social effects’. Likewise, even if undertaken with the best of intentions, Littoz-Monnet’s work on competing memory frames suggests that such an attempted entrenchment is significantly more complex than the assumptions underpinning ‘Active European Remembrance’ (as we also saw in relation to the EP Resolutions). We saw that this ‘Active European Remembrance’ has manifested as the provision of EU funding to third-parties to undertake activities of remembrance. That, due to its legal competences, the EU is compelled to act mostly indirectly regarding troubled pasts is a recurring theme of the paper, and in its conclusion we will return to the consequences of this reality.

# Common Foreign and Security Policy

The second major policy area in which, by employing the lens of transitional justice, WP 5.3 identified the EU engaging with the troubled pasts of RePAST states is through its Common Foreign and Security Policy (CFSP). Like the notion of ‘European citizenship’, the CFSP was part of the huge package of innovations established by the Maastricht Treaty of 1992.[[86]](#footnote-87) It should be noted that actions via the CFSP can only have engaged with transitional justice and the troubled pasts of RePAST states that are not, or were not at the material time, Member States of the EU.

According to Article 21 TEU the CFSP shall seek,

to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

As we saw above, the CFSP formed the ‘second pillar’ of the new three-pillar European Union. We also saw above that whilst the pillar structure was dismantled by the Lisbon Treaty, its presence can still be felt in the relative lack of EU legal powers in this area: Article 24 TEU prohibits the EU from adopting any legislative acts whatsoever in relation to the CFSP (a point that is curiously repeated in Article 31 TEU). Instead, Article 25 TEU specifies that the CFSP is to be conducted by,

(a) defining the general *guidelines*;

(b) adopting *decisions* defining:

(i) *actions* to be undertaken by the Union;

(ii) *positions* to be taken by the Union;

(iii) *arrangements* for the implementation of the decisions referred to in points (i) and (ii); and by

(c) strengthening systematic cooperation between Member States in the conduct of policy. [emphasis added]

These rather vague forms of conduct are wholly political, in the sense that they can have no binding legal effect on the Member States. Thus, the ‘decisions’ mentioned here are not the legislative acts also known as ‘decisions’ as defined in Article 288 TFEU.

It is additionally important that according to Article 24 TEU the CFSP must be, ‘defined and implemented by the European Council and the Council acting unanimously’. That is significant in two ways. First, the European Council and Council (the latter sitting as ‘the Foreign Affairs Council’ again) are the most Member State-centric institutions of the EU: they are entirely comprised of national politicians and not EU appointees or electees (although the High Representative that chairs the Foreign Affairs Council is also a Vice-President of the Commission). Second, the requirement of unanimity, of course, means that no state can be outvoted in respect of any CFSP conduct. Both these characteristics are designed to protect national sovereignty in this most sensitive of areas of supranational cooperation, and echo the functions of the former pillar structure of the EU. It has also been observed that due to the prominence of the European Council and the Council in this policy area, the actions carried out pursuant to it are more prone to party and national politicisation than areas where the Commission is more dominant (such as development policy, discussed further below).[[87]](#footnote-88)

The only area where the EU is empowered to undertake any legally binding CFSP conduct is that, through Article 216 TFEU it, ‘may conclude an agreement with one or more third countries or international organisations’. This is the EU’s legal basis for entering into internationally legally binding treaties, such as the 2006 ‘Agreement between the International Criminal Court and the European Union on Cooperation and Assistance’. There are separate provisions on the enlargement of the EU, which are more connected to the development policies discussed in the subsequent section of this Working Paper.

## **3.1. Common Security and Defence Policy**

Transitional justice is becoming a more and more expressly important element within the EU’s foreign and security goals.[[88]](#footnote-89) As part of the CFSP a Common Security and Defence Policy (CSDP) has been established which, according to Article 42 TEU,

[…] shall provide the Union with an operational capacity drawing on civilian and military assets. The Union may use them on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter.

Article 42(4) also reiterates that in relation CSDP any decisions of the Council must be adopted unanimously. This includes the decision to launch a mission in the first place. The significance of the requirement for unanimity should never be under-estimated.

The RePAST states most clearly impacted by CSDP are Bosnia Herzegovina and Kosovo. Three CSDP missions are significant in connection with these two states: the European Union Police Mission in Bosnia and Herzegovina (EUPM), from 2003 to 2012; the EU Military Operation in Bosnia and Herzegovina (EUFOR-Althea BiH), starting in 2004 and ongoing; and the European Union Rule of Law Mission in Kosovo (EULEX KOSOVO), from 2008 and ongoing. Each was established, and periodically renewed, by a Decision of the Council pursuant to Article 42 TEU. EUPM was the very first CSDP mission, and EULEX KOSOVO remains the largest.[[89]](#footnote-90)

EUPM was established in order to complete the work of the UN's International Police Task Force in establishing sustainable and multi-ethnic policing arrangements under Bosnian ownership. This was, of course, one way in which the EU assisted Bosnia to address its troubled past. However, it did not directly engage in transitional justice practices such as vetting or lustration, but it *is* recognised as having helped the police to gain the trust of much of the population.[[90]](#footnote-91) It has not always been straightforward though. For example, in 2015 the Republika Srpska (Bosnia’s autonomous Serb Republic) briefly broke all ties with the national police force after its officers ‘raided’ a police station in the Republika.[[91]](#footnote-92)

EUFOR-Althea BiH is engaged in training the armed forces of Bosnia toward NATO standards. It began with a force level of some 7000 troops, but that number has since decreased to around 600 from 2012.[[92]](#footnote-93) Despite its broad training mandate, it is recognised that its main focus was to support the International Criminal Tribunal for the Former Yugoslavia (ICTY), and Bosnian authorities to detain persons suspected of international crimes under the jurisdiction of the ICTY.[[93]](#footnote-94) The prosecution of people for mass atrocities committed in a prior regime or subsequent to an armed conflict is archetypical transitional justice practice. Thus, EUFOR-Althea BiH may be deemed to have facilitated transitional criminal justice directed toward Bosnia’s troubled past. However, broader and more creative policies and practices of transitional justice have been, unfortunately, largely absent. The same is true for EULEX KOSOVO, which has again put the focus on transitional criminal justice. This has manifested through EULEX-led prosecutions in Kosovo, compulsion to cooperate with the ICTY, and most recently with the controversial establishment of the controversial Kosovo Specialist Chambers.[[94]](#footnote-95) The strong emphasis of CFSP in the former Yugoslavia on transitional criminal justice is replicated in the EU’s development, conditionality, and enlargement policies discussed further below.

The CFSP’s focus on transitional criminal justice, especially in respect of international courts and tribunals, has not been unequivocally accepted as having ‘beneficial social effects’. This is tied to difficult questions in transitional justice scholarship as what the legacy of the ICTY actually is, including as to *what* should be measured and *how* to measure it. There have been variegated impacts upon perpetrators, victims, and wider society in the former Yugoslavia.[[95]](#footnote-96) Before the EU continues to prioritise transitional criminal justice, it should consider its goals and whether they can be achieved.

## **3.2 The ‘EU Policy Framework on Support to Transitional Justice’**

In 2015 the Council of the EU, again sitting as the Foreign Affairs Council, went some way to broadening the EU’s potential role regarding transitional justice. First, it adopted its ‘Conclusions on the Action Plan on Human Rights and Democracy 2015 – 2019’, which, by new Objective 22(b), committed it to developing and implementing an EU policy on transitional justice.[[96]](#footnote-97) Second, and pursuant to the Conclusions, it adopted the ‘EU Policy Framework on Support to Transitional Justice’.[[97]](#footnote-98) This now underpins all areas of the CFSP that engage with transitional justice, including CSDP. It should be apparent from the above that neither of these constitute legally binding ‘EU law’. Yet they *do* have some political significance.

The Framework adopts the definition of transitional justice proposed in 2004 by the UN Secretary General, which was noted in the introduction above.[[98]](#footnote-99) It then sets out the ‘four essential elements of transitional justice’ as:

* criminal justice;
* truth;
* reparations; and
* guarantees of non-recurrence/institutional reform.

In this way it *has* accepted that there is more to transitional justice than merely transitional criminal justice.

The Framework also makes the valuable point that EU Member States have, ‘a wealth of experience in dealing with the past’ and that in some transitional justice processes ‘remain ongoing’.[[99]](#footnote-100) There is also the observation that several, ‘European countries continue to deal with their own legacies in third countries.’[[100]](#footnote-101) That *must* be taken as a reference to colonialism, and is interesting given the almost complete absence of colonialism as a memory frame in debates about European history at the EU. In terms of monitoring, the Framework commits the EU to reporting on its implementation principally through the EU’s Annual Reports on Human Rights and Democracy.

The Annual Reports on Human Rights and Democracy have been a feature of CFSP since 1999. Presently, the Annual Report is actually comprised of two documents: a thematic report about human rights generally; and an ‘Annual Report (country report)’, which contains a short summary about the situation in each non-Member State that the EU is monitoring.[[101]](#footnote-102)

The 2020 thematic Annual Report simply states, rather vaguely, that,

the EU continued to implement its policy framework on support to transitional justice. This included raising the topic with non-EU countries, such as Nepal, in bilateral dialogues as well as with regional organisations, such as the African Union.[[102]](#footnote-103)

It then gives an example of EU-African Union dialogue and an update on the EU Instrument Contributing to Stability and Peace (IcSP). IcSP was a financial instrument adopted through development policy, and is discussed further below.

Disappointingly, none of the relevant 2020 country reports on Human Rights and Democracy contains any express reference to transitional justice in general or the Framework in particular. Or indeed any tangible reference to troubled pasts even most generously defined. The 2020 country report on Bosnia Herzegovina does at least implicitly engage with transitional justice, though. There is a reference to the need to, ‘overcome the practice of “two schools under one roof” so as to ensure inclusive and quality education for all children’. This is a reference to the practice of segregating school children on ethnic grounds. There is also mention of the need to, ‘promote an environment conducive to reconciliation.’ Additionally, the adoption of a revised war crimes processing strategy is noted. The 2020 Kosovo report mentions nothing specifically, other than a general need to ‘promote and ensure full implementation of human rights legislation and policies’.[[103]](#footnote-104) The UK report does not discuss Northern Ireland. All of this suggests that we are still some way from a coherent approach in the CFSP to transitional justice regarding the RePAST, and indeed any, states, that would maximise any beneficial social effects.

# Development, Conditionality, and Enlargement

We saw in the previous section that the EU’s legislative capacity is very limited in respect of the CFSP. In order to achieve what might at first glance to be quintessential issues of ‘foreign policy’, WP 5.3 has found that the EU’s institutions have instead relied upon ‘competences’ and ‘legal bases’ in the field of development cooperation. Like both citizenship and the CFSP, EU development cooperation policy is based on innovations first introduced by the Maastricht Treaty.[[104]](#footnote-105) Indeed, development cooperation is particularly connected to CFSP: for example, the Annual Report on Human Rights and Democracy noted in the previous section actually *also* reports on relevant development funding that the EU has provided; and cross refers to the Commission’s annual reports on non-Member States’ progress towards accession (including Bosnia Herzegovina and Kosovo; and, previously, the East European states that have now joined the EU, including Poland).

Discussion of EU development cooperation in the literature is generally focused upon the various financial instruments on development cooperation adopted under TFEU Title III, ‘Cooperation with third countries and humanitarian aid’.[[105]](#footnote-106) By ‘third countries’ the treaty means non-EU Member States. However, before we continue with development cooperation in respect of non-EU Member States, we must briefly examine the EU’s development policies *within* its borders because, by applying the lens of transitional justice it WP 5.3 has identified the EU has engaged to a considerable extent with RePAST states’ troubled pasts (even where it does not expressly acknowledge that it is facilitating transitional justice).

## **4.1 Development within the EU**

Amongst the aims of the EU, there is a commitment to promoting the well-being of its people and economic, social and territorial cohesion amongst its Member States.[[106]](#footnote-107) The EU’s socio-economic development policies, broadly defined, encompass many areas of activity including agriculture, climate action, competition policy, communications networks and communications technologies, education and culture, energy, enterprise, environment, health and consumers, home affairs, justice, research and development, maritime affairs and fisheries, taxation and the customs union, transport, and regional and urban policy. WP 5.3 found that the EU has employed a complex combination of these policies as the basis for allocating substantial funding to those RePAST states recovering from the impact of authoritarianism or armed conflict, and thereby to address that element of their troubled pasts.

For example, there is a treaty commitment to, ‘reducing disparities between the levels of development of the various regions.’[[107]](#footnote-108) In terms of the RePAST states this has involved promoting an increase in living standards across the former East Germany, and also amongst the states that have joined it in the various waves of enlargement, such as Greece, Spain, Poland and Cyprus.

Socio-economic development policies have also underpinned attempts by the EU to promote the re-unification of Cyprus;[[108]](#footnote-109) and, perhaps most prominently, to assist in the Northern Ireland peace process.[[109]](#footnote-110) It is therefore the EU’s socio-economic development policies for its Member States that provided the legal context for the EU activities detailed in the D16.6 ‘Policy Recommendations’ for Germany, Greece, Spain, Poland, Cyprus, and Ireland. We do not intend to repeat that detail here. Instead, we shall turn to international development cooperation with non-Member States of the EU.

## **4.2 International Development Cooperation**

The EU’s international development cooperation policy is said to be conducted within the framework of the principles and objectives of the Union's external action.[[110]](#footnote-111) However, unlike in relation to CFSP, the TFEU confers upon the EU the power to adopt legislative acts in this field[[111]](#footnote-112) (meaning Regulations, Directives and Decisions, as introduced above). The lens of transitional justice facilitated WP 5.3 to identify a range of EU international development cooperation activity that addresses the troubled pasts of RePAST’s non-EU Member States

The EU’s various policies on international development cooperation have recently been consolidated into one overarching Regulation: Regulation (EU) 2021/947 of the European Parliament and the Council ‘establishing the Neighbourhood, Development and International Cooperation Instrument – Global Europe’ (hereafter NDICI Regulation) [[112]](#footnote-113) Put simply, the NDICI Regulation entrusts the Commission with allocating an eyewatering EUR 79,462,000,000 of funding for development cooperation activities from its adoption and up to the year 2027.

The NDICI Regulation builds upon earlier legislation including Regulation (EC) No 1717/2006 which established the ‘Instrument for Stability’ (IfS); and Regulation (EC) No 1889/2006 which established the ‘European Instrument for Democracy and Human Rights’ (EIDHR). Before the 2021 consolidation these were updated or renewed more than once, and the IfS became instead the ‘Instrument Contributing to Peace and Security’ (IcPS).

Davis has characterised the IfS / IcPS as having been being more directed at rapid response actions, whereas EIDHR could engage or invest in longer-term interventions.[[113]](#footnote-114) This type of distinction is maintained in the NDICI Regulation, in so far as it distinguishes between ‘geographical’ and ‘thematic’ programmes on the one hand (like EIDHR) and ‘rapid response actions’ on the other (like IfS / IcPS).

Within the EU’s international development cooperation policies WP 5.3 found both implicit and explicit references to transitional justice processes and mechanisms in respect of troubled pasts. Relevant ‘Areas of Cooperation’ for the ‘Geographic Programmes’ include, for example, ‘supporting ad hoc, local, national, regional and international tribunals, truth and reconciliation commissions and mechanisms’.[[114]](#footnote-115) This is a pleasingly holistic range of transitional justice measures, which is for from limited exclusively to transitional criminal justice. It must be observed, however, that the geographic scope of the ‘Geographic Programmes’ does not cover either of the RePAST non-Member States (Bosnia Herzegovina and Kosovo).

WP 5.3 also identified relevant ‘Areas of Intervention’ within ‘Thematic Programmes’ and ‘Rapid Response Actions’. These cover all non-EU Member States and therefore *could* include Bosnia and Kosovo. However, in practice, to the extent that the EU has addressed their troubled pasts at all it has tended to be through its enlargement policies (see below). Nevertheless, the EU does have competence within its development policies in regard to:

* Improving post-conflict recovery as well as post-disaster recovery, with relevance to the political and security situation;
* Supporting stabilisation, safety of individuals and human security restoration measures, including mine action, demining and transitional justice in line with relevant multilateral agreements;
* Supporting peacebuilding and state-building actions, involving, where appropriate, civil;
* Supporting international criminal tribunals and ad hoc national tribunals, truth and reconciliation commissions, transitional justice and other mechanisms for the legal settlement of human rights claims and the assertion and adjudication of property rights (this is also listed as an ‘Area of Intervention’ for ‘Rapid Response Actions’).[[115]](#footnote-116)

## **4.3 Conditionality and Enlargement**

In addition to international development cooperation, the other main area where the EU can address states’ troubled pasts is through enlargement of the Union itself. By this we mean less about Member States’ post-accession experiences (on that see above), but rather the conditions imposed on non-Member States in return for the prospect of potential membership of the EU. To a lesser extent the EU has also sometimes attempted to insist, in return for aid, upon the implementation of certain measures of transitional justice in respect of states that have no prospect of joining the EU. However, that form of conditionality has not affected, nor does affect, any of the RePAST states and so shall not be discussed further here.[[116]](#footnote-117)

The so-called, ‘Copenhagen Criteria’ for accession to the EU were adopted by the European Council in 1993.[[117]](#footnote-118) Spain, Portugal, Greece, the UK and Ireland had already joined. The EU was also already well into negotiations with Austria, Finland, Sweden and Norway – all consolidated democracies with functioning free-market economies. Discussions were also under way with Cyprus and Malta. However, looking to the East, the European Council envisioned the membership of the states, ‘weakened by 40 years of central planning’, but required *inter alia* that they would have to demonstrate the, ‘stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and the protection of minorities’.[[118]](#footnote-119) This is essentially a requirement for the type of institutional reform typical in periods of transition.

In 2003 the Council adopted the ‘Thessaloniki Agenda for the Western Balkans,’ in which it stated that, ‘full co-operation with ICTY, in particular with regard to the transfer to The Hague of all indictees and full access to documents and witnesses, is vital for further movement towards the EU’.[[119]](#footnote-120) In this way, it has unfortunately mirrored the CDSP’s focus on transitional criminal justice in respect of Bosnia Herzegovina and Kosovo. By contrast, Davis has identified significant funding for non-judicial approaches to transitional justice through the IfS / IcPS and EIDHR – just not in relation to the RePAST states.[[120]](#footnote-121)

# Attitudes to the EU’s Approaches to Transitional Justice and Troubled Pasts

Thus far, by employing the lens of transitional justice, we have seen several different ways in which the EU can address, and has in fact addressed, states’ troubled pasts in general and the RePAST states’ troubled pasts in particular. This has been through funding for citizenship policies aimed at remembrance; through aspects of the Common Foreign and Security Policy; and through its approach to development cooperation, conditionality and enlargement.

The intent, as expressed in the RePAST grant agreement, was to use empirical data collected in other components of WP 5 to measure the impact of the EU’s approaches to troubled pasts as identified and critiqued above. However, whilst the survey data is very valuable in its own right, only one question really addressed the central concern of WP 5.3.

RePAST WP5.2 had undertaken a ‘Representative Survey’ about attitudes of regular people to the events being studied by RePAST, and the EU’s approach to them: see Deliverable D5.2 ‘Representative Survey Analysis’. We do not intend here to replicate the explanation of the scope and methodology of WP5.2, but we will rather focus on answers to the question most relevant to WP5.3. This was where the survey asked, at Q30, for an opinion on whether the EU had helped to ‘overcome the divisions’ related to the focal event.

The results make for interesting reading. For Greece, Germany, Spain, the most popular response was ‘neither agree nor disagree’, which is hardly a ringing endorsement. On the plus side, more than 30% of respondents from Kosovo, Poland and Ireland ‘agreed’ – with Kosovo having the most favourable view: 46% of the Kosovo respondents ‘completely agreed’ that the EU had helped to overcome divisions. We shall return to Kosovo shortly.

The respondents from Cyprus were the most negative. Only 12% ‘agreed’; 33% ‘disagreed’ and 28% ‘completely disagreed’. The closest competitor to Cyprus for negativity was Bosnia, which ‘disagreed’ at 38%. However, the negativity reduces at the strongest levels, in that only 2% ‘completely disagreed’.

The Cypriot negativity is interesting because if ‘overcoming the divisions’ is taken as the reunification of Cyprus and an end to Turkish military occupation of the north, then the impact of the EU on the current sorry state of affairs, or its potential in the future, must have been vastly over-estimated by the survey respondents. As shown in D6.16 ‘Policy Recommendations for Cyprus’, the EU actually supported the Annan plan, but it was rejected in the 2004 Greek Cypriot referendum.[[121]](#footnote-122) This shows that the EU was, and remains, in fact relatively powerless to influence a solution to the problems of Cyprus.[[122]](#footnote-123) Of course, the EU bears the responsibility for permitting the accession of Cyprus to the EU without first there being a solution to its partition; but that is not the same as having principal responsibility for failing to secure a *solution* to its partition. Moreover, through the accession process and then the citizenship and socio-economic development policies discussed above, the EU has in fact invested in a great many projects that, if not aimed at ending partition, have nevertheless played a valuable role in addressing the troubled past (and present) of Cyprus. This includes, for example, funding the work carried out by the International Center for Transitional Justice Cyprus program from 2009 to 2011.[[123]](#footnote-124)

In terms now of positivity, we have already noted that it is Kosovo that stands out, in that 46% of respondents ‘completely agreed’ that the EU had helped to ‘overcome’ its ‘divisions’; with a further 30% also ‘agreeing’. Of course, since the largely Milošević-instigated awfulness of the 1990s and Kosovo’s declaration of independence in 2008, there are far fewer ethnic Serbs present in Kosovo with which the majority ethnic Albanians could remain ‘divided’. Where there *are* strong ethnic Serb communities, such as in Northern Mitrovica, there is little sign of divisions being comprehensively ‘overcome’ (although there are some positive projects such as the ‘Mitrovica Rock School’ noted in D6.16 ‘Policy Recommendations for Kosovo’, and which was in the past at least in part funded by the EU).

# Conclusions

This Working Paper has identified, via employing the critical frame of transitional justice, three main foci of engagement between the EU and the RePAST (and other) states’ troubled pasts: citizenship and remembrance; CFSP; and development cooperation, conditionality, and enlargement.

Insights from the field of transitional justice have led us to question the extent to which promoting a common history, as attempted through ‘Active European Remembrance’ is a liberalising process. We also saw that the emergence of and competition between memory frames, or truth regimes, is far more complex than the underpinning assumptions behind the instrumentalization of a common history as a vector of identification with the EU. The tension between the ‘Holocaust as unique’ and ‘Nazism and Stalinism as equally evil’ is emblematic of this. Moreover, although the critical framework of transitional justice facilitated the identification of relevant foreign and development policies, we saw a marked tendency to focus upon support for transitional criminal justice within those policies. We would recommend a more holistic approach, aligning more closely with the received wisdom on transitional justice.

We also saw that perceptions of the EU’s powers to act, and the acts that it has undertaken, are mixed. A potential explanation for this is that in each of these areas, and despite several interesting statements of policy like the EU Framework for Transitional Justice or the Stockholm Programme, the EU’s activities have largely been limited to allocating (albeit quite substantial) pots of funding to third-parties (with the exception of the very much boots-on-the-ground CSDP missions). The work in actually addressing troubled pasts has thus largely been carried out by the recipients of EU funding rather than by the EU itself. This has obscured the extent of the EU’s involvement. We would recommend increasing the visibility of these efforts, in order to ensure that it is not only those that regularly seek EU funding who understand the sheer amount of activity undertaken in respect of states’ troubled pasts.

The reliance on funding third-parties is, of course, due to the way the TFEU and TEU confer, or rather generally do not confer, upon the EU the competence to legislate on transitional justice and troubled pasts. This very substantial limitation needs to be considered when policy proposals are contemplated for what the EU should do in the future regarding troubled pasts. More ambitious, coherent, and effective EU actions on transitional justice and troubled pasts might require further amendment of its founding treaties, for which it is doubted that there is any great appetite at present.

Furthermore, in the treaties, legislation, and myriad policy documents as they are today, there is a notable lack of coherence in the way that transitional justice appears or is even labelled. This observation is not new: both Avello and Crossley-Frolick arrived at the same conclusion. Davis, likewise, sought to ‘piece together’ an implicit EU transitional justice policy from existing measures that did not necessarily refer to transitional justice explicitly. Of course, since those studies were published the EU Council has at least adopted the 2014 ‘EU’s Framework on Support to Transitional Justice’ – but that document is not legislative in nature, and applies only in the context of CFSP. This means that the EU remains without an overarching universal approach to understanding or facilitating transitional justice, which spans both its internal and external competences. Until it does, the EU will not be able to unlock its full potential to address states’ troubled pasts. We thus recommend bringing a greater level of coherence and cooperation in the EU’s approach to troubled pasts, right across its relevant competences.

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