

Reckoning with the Past in Eastern Europe

An International Approach

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Abstract

Reckoning with the past is always one of the most difficult tasks for transitional political elites and societies after the overthrow of the previous regime. Due to its many dimensions, it is a process highly interwoven with many aspects of public and private life, and the choices made have long-run repercussions in the future with respect to political competition, economic performance and social conscience. However, as transitology is an initiative primarily from the disciplines of law, economics and political science, relatively little weight has been given to the international aspects of transitions and of transitional justice. In this paper, I will thus attempt to contribute to the better understanding of the role international actors play in the process of Eastern European states coming to terms with their communist past.

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1. Introduction

1.1. Identification of the Problem

Reckoning with the past is always one of the most difficult tasks for transitional political elites and societies after the overthrow of the previous regime. Due to its many dimensions, it is a process highly interwoven with many aspects of public and private life, and the choices made have long-run repercussions in the future with respect to political competition, economic performance and social conscience. The number of variables to count with seems infinite; the historical legitimacy and the repressiveness of the previous regime, the nature of the change of regime, the bargaining position of the opposition elite, the political competition during transition, the geopolitical position, the international climate, just to mention some of the most important.

Despite the mere complexity of the task of grappling with such a wide-ranging subject together with other aspects of transitions, many researchers have attempted to dissect the chain of events, organise their thoughts and formulate theories. Thus the field of transitology has emerged in the process, which includes, but is not limited to the study of the above mentioned task of transitional societies to come to terms with their past. As it is an initiative primarily from the disciplines of law, economics and political science, relatively little weight has been given to the international aspects of transitions. It is especially true in the context of the former communist satellite states in Eastern Europe, in which case the global uncertainty prevailing on the eve of the collapse of the Soviet Union further blurred the, already hardly visible, influences of international factors on the transitional processes.

The idea to pay more attention to the international aspects of transitions is relatively new. At the Annual Meeting of the International Studies Association in 2005, George Lawson directly criticised the development of the field of transitology for neglecting the analysis of the international setting of transitions. Although recently some studies have attempted to address this issue (see Olsen et al. [2007] and Horne [2009b]), the literature on Eastern European states¹ is still very incomplete and descriptive in this respect.

¹ We must note, however, that concerning states where the international community was more active in the transition and in the building of democracy (e.g. South East Europe), the coverage on international influence is of course more detailed.

The importance of considering transitions in a broader context becomes all the more obvious as, contrary to initial expectations, past issues still stir up politics and everyday life from time to time, whose international context is little understood and is thus open to political exploitation². Also, as Lawson [2005] noted, transitology has been narrowing its scope down more and more to the analysis of “short-term political factors, in particular elite pacts” (p. 7) and to cross-country comparative studies of mostly domestic issues, while neglecting the international background of transitions. Moreover, transitional justice has been preoccupied with lustration recently (Stan 2009:12), which is a very narrow (but arguably the most controversial) element in the process of societies dealing with their past.

In this paper, I will thus attempt to contribute to the better understanding of the role international actors play in the process of Eastern European states coming to terms with their communist past. I believe that a thorough, methodical and carefully elaborated study may shed light on the obscure relations between the many variables of this topic, and thus enable me to draw conclusions based on a better comprehension of the international context of Eastern European transitions.

In the rest of this section, I will first define the most important concepts used in this study, then present my research methods, my hypotheses and a short summary of my results. In the second part, I will shortly address some general questions concerning the broader context of my topic: the theoretical background, the possible ethical concerns and finally its practical evaluation, for which the most important indicator is its influence on the process of democratisation. Then in the third part, which constitutes the core of my article, I will assess the international aspects of the different methods of reckoning with the past, each in turn. Lastly, I will conclude my findings and make some final remarks.

² Of which the most noteworthy is the “stolen revolution” concept of the Kaczyński brothers in Poland, while similar populist political agendas and conspiracy theories abound as to the international manipulation of transitions.

1.2. Conceptualisation

Before introducing my research methods, clear definitions of the most important concepts used in my study need to be given in order to ensure the common understanding of my statements.

Firstly, I will use the concepts of democratic transition and consolidation as explained by Rustow [1970]. He suggested that transition consists of three phases. In the preparatory phase, the “dynamic process of democratization itself is set off by a prolonged and inconclusive political struggle” (pre-condition crisis) (Rustow 1970:352). This crisis is followed by the decision phase (democratic transition), when a consensus is reached to continue with the new rules. Lastly, the habituation phase (democratic consolidation) takes the longest, when people effectively accustom themselves to the new system.

Secondly, reckoning with the past denotes the process through which communist legacies are evaluated and judged in the new order by the new set of norms. It is an important element of the above mentioned democratic transition and consolidation processes. It includes, but is not limited to transitional justice, which “refers to formal and informal procedures implemented by a group or institution of accepted legitimacy around the time of a transition out of an oppressive or violent social order, for rendering justice to perpetrators and their collaborators, as well as to their victims” (Kaminski 2006b:295). Coming to terms with the past, however, is a broader concept which also includes social conscience and memory (e.g. public opinion about the communist past, about the transition and thus about the process of transitional justice itself), the fate of former state symbols (e.g. statues, anthems) and the importance of the communist past in the public discourse.

Lustration or screening is one of the tools of transitional justice and is generally “understood as ascertaining whether an occupant of or candidate for a particular post worked for or collaborated with the communist security services” (Williams 2005:23) or with other organs of the communist regime. Moreover, vetting or decommunisation is the act of “disqualifying members of these groups from holding” these (usually high-level public sector) positions (Appel 2005:383).

Finally, the concept of political culture lies on a simple framework of Almond et al. [1989], and “thus refers to the specifically political orientations – attitudes toward the political system and its various parts, and attitudes towards the role of the self in the system” (Almond et al. 1989:12).

1.3. Methodology

Due to the shortness of this essay and for the sake of consistency, I will too have to limit the scope of my analysis. However, contrary to previous similar works addressing this issue, I will only limit the number of countries analysed, but will consider the concept of international influences and of coming to terms with the communist past in a very broad sense. I believe that limiting my scope this way will enable me to take into account all the relevant details of dealing with the past, a small but crucial element of a transition, and to give an insight into the overall international aspects of this complex process, albeit in a relatively small subset of countries. My study will take the middle ground between Olsen et al. [2007], who considered so many different countries and types of transition that the subtle nuances were inevitably lost³, and Horne [2009b], who only took into account the legal rulings of two international institutions, of the European Court of Human Rights (ECHR) and of the International Labour Organisation (ILO), on the narrow issue of lustration in Eastern Europe.

Firstly, my subset of countries examined will be nine Eastern European states (Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia) and the German Democratic Republic (East Germany). Seven of these states were Soviet satellites⁴, while the Baltic states were constituent republics of the Soviet Union. The nine states have joined the EU and the NATO recently, while East Germany became part of these organisations by reunification with the Federal Republic of Germany (West Germany) in 1990.

This seemingly arbitrary choice of countries is a result of a prudent selection process. States with very different pasts are omitted, as well as those in which the processes of democratic transition and of dealing with the past are very weak. Therefore, I will not consider other former republics of the Soviet Union, where reckoning with past issues was rather feeble or virtually non-existent, nor the former republics of the Socialist Federal Republic of Yugoslavia, which were not satellites and followed a unique path during

³ By focusing on some 80 countries in their study, Olsen et al. [2007] are subject to Lawson's remark that "generalities about transitions from authoritarian rule tend to overplay similarities and downplay differences" (Lawson 2005:7). I believe that their findings, as well as those of some other theoretical and empirical analyses which deal with the impact of international actors on national legislation in general (i.e. in as many countries as possible), are too broad and are thus not considered in this article, whose main aim is to pay sufficient attention to small details and country differences and therefore strictly limits the number of countries considered. For general theoretical frameworks on the importance of the international community in transitional justice see Finnemore (1998), Lutz et al. (2000, 2001), Synder (2004) or Wendt (2000).

⁴ The Czech Republic and Slovakia were constituent republics of Czechoslovakia until 1993.

communism and transition (most importantly, judging the atrocities of the Yugoslav Wars drew attention away from the communist era), nor Albania. Consequently, I will consider ten entities with common features and comparable memories of the past, which allows me to pay sufficient attention to the details, to the small differences and to the uniqueness of each case.

Secondly, the analysis of how transitional societies deal with their past will include a wide range of areas. Concerning transitional justice I will use the framework set out by Lavinia Stan, who distinguishes three areas of interest: lustration, public access to the archive of the communist secret police and trials launched against former communist officials (Stan 2009:11), but I will also include less obvious factors, notably the official condemnation of the communist regime, the public restitution and rehabilitation of the victims and initiatives to reveal historical truth (which is strongly dependent on file access and is thus included in that part). Additionally, another neglected but important element of reckoning with the past will be taken into consideration as well, the fate of communist symbols after transition⁵. It is vital to note, however, that historical memories and attitudes to other repressive regimes (e.g. Nazi legacies) fall out of the scope of our analysis.

Lastly, in evaluating the international context of the transitions, an approach incorporating all the possible actors of international relations would best serve my purpose, taking into account the actions of states, intergovernmental and international non-governmental organisations (IGOs and INGOs), and legal and natural persons. Three factors will be considered: their attitude, their intensity to advocate their views and their actual influence on the elements of the process of settling account with the past mentioned above.

To sum up, my essay will analyse each of these elements in turn and will attempt to find the reaction of international actors to them (their stance, level of activity and influence) in the ten entities specified. By the nature of this analysis and for the sake of authenticity, primary sources (laws, legal rulings, reports, political statements etc.) will be at the core of my study. Finally, I will draw conclusions and present the overall pattern observed with respect to the international context of transitions.

⁵ This list of methods of coming to terms with the past is similar to the framework used by Appel [2005], although he called these the elements of anti-communist programs, and did not consider truth revelation initiatives (p. 381-383).

1.4. Hypotheses

As stated above, in my study I will attempt to find the position, the intensity of advocacy and the effect of international actors on the six main elements of the process of reckoning with the past. Thus my hypotheses will build on this framework.

Firstly, my analysis aims to clarify the position of international actors by determining if an international consensus exists in the given subject. Therefore, my first hypothesis is the following:

H1a: The most relevant international actors largely agree on the given subject, and thus we can say that an international consensus exists.

Hence my alternative hypothesis:

H1b: The most relevant international actors disagree on the given subject, and thus we cannot say that an international consensus exists.

Secondly, my hypotheses about the intensity with which international actors advocate their position are the following:

H2a: The most relevant international actors advocate their position intensively about the given subject.

H2b: The most relevant international actors do not advocate their position intensively about the given subject.

Lastly, my third set of hypotheses concerns the impact of external forces on domestic practice.

H3a: External forces have had significant or measurable effect on domestic practice concerning the given subject.

H3b: External forces have had no measurable effect on domestic practice concerning the given subject.

In analysing the areas in turn, I will attempt to classify them according to this framework of hypotheses.

1.5. Results

In the rest of my study, I will show that, concerning my first hypothesis relating to the position of international actors, we can observe that a relatively strong international consensus exists on the subjects of file access and truth revelation, the condemnation of the communist regimes, and trials and court proceedings. However, in the matter of lustration, restitution and rehabilitation, and the fate of communist symbols, there is no consensus among international actors.

Upon testing my second hypothesis, it will be made clear that efforts of higher involvement have been mostly made by external agents with regard to the issues of lustration, file access and truth revelation, and the condemnation of communist regimes, while no such attempts are visible in the issues of trials, restitution and rehabilitation, and the fate of communist symbols.

Lastly, impact on domestic policies by international actors was only significant in the questions of lustration, trials and court proceedings, and file access and truth revelation, while no effect was perceptible with respect to restitution and rehabilitation, the condemnation of communism and the fate of communist symbols.

2. General Considerations

2.1. Theoretical Background

From the very beginning of the transitions in Eastern Europe, several studies have tried to explain why these states, which they deemed comparable due to the similarity of their authoritarian regimes and to the fact that they underwent transition in the same few years, apply so different approaches in dealing with the past. Many comparative explanations have appeared, but more accurate evaluations could only be carried out as democracies consolidated, time passed and historical data became available.

Huntington [1991] outlined three ways transition may occur. Transformation means that reformers in the authoritarian regime become dominant and transform the system from within. Transplacement occurs when change comes from the joint action of the government and the opposition, usually after negotiations. Huntington believes that in these cases the political costs of prosecuting authoritarian officials are disproportionately higher than moral gains (if any). In replacement, the third type of transition, the government essentially opposes any changes and the initiative for reform comes entirely from the opposition which, after gaining sufficient strength, overthrows the ruling elite. According to Huntington [1991:211-231], prosecution may be desirable in this situation, though it needs to be focused on high-ranking officials, and it needs to be implemented promptly.

According to Huntington, due to transformations in Hungary and Bulgaria and transplacements in Poland and Czechoslovakia, these countries chose to forgive and forget, while the replacements in East Germany and Romania resulted in more severe punishment to the former communist officials. Historical events soon refuted these ideas, as initial patterns which had prevailed at the time of the publication of *The Third Wave* changed rapidly⁶. However, we may still find that he identified one crucial point in the process, notably the importance of the behaviour of the Party at the time of transition.

Moran [1994] emphasised the repressiveness of the regime as a determining factor, noting that the leadership of “milder” authoritarian systems (Hungary, Poland) fared the transitions better than that of hard-line dictatorships (Czechoslovakia, Bulgaria). He argued

⁶ For instance, Romania soon became lenient, while the Czech Republic took a firmer stance against the communist past.

that exit (toleration of emigration) and voice (toleration of dissent) were the possible escape valves of anger in communist societies, and their inexistence paved the way for the accumulation of public hatred and thus to a tendency to retaliate after transition.

As these first two one-dimensional explanations soon became obsolete, transitologists increasingly turned to the analysis of post-transition political competition, known as the “politics of the present” approach.

Welsh [1996] was the first to propose a multi-casual model and to name the political power of the reformed communists in the new regime the decisive element in the enactment of lustration measures. Where the presence of the former Party in the political life was weak, for example in the Czech Republic, lustration was adopted fairly easily and fast, whereas it proved more difficult in Romania or Bulgaria, where the former communists performed consistently well in the elections.

Szczerbiak [2002] also attempted to find the balance between the influences of the past (repressiveness of the regime and the type of transition) and the present, and in the analysis of the relatively late Polish lustration noted that Welsh’s framework can also explain the recurrence of the question of transitional justice in the political agenda from time to time: it becomes politicised and a tool in the hand of politicians eager to discredit their rivals.

Nedelsky [2004] was more critical of Welsh’s theory, and argued for a more coherent view and for the stronger amalgamation of both ‘politics of the past’ and ‘politics of the present’ approaches. In the analysis of two countries with highly interwoven pasts but with strikingly different lustration regimes, the Czech Republic and Slovakia, she concluded that the past is an integral part of the present, and the legitimacy of the communist regime is the most important factor in addressing the issue of differing post-communist experiences of lustration.

Williams et al. [2005], building on Welsh’s framework which put the emphasis on post-communist political competition, proposed a theory rejecting that the past had any influence on the adoption of lustration laws. They found that although countries with relatively stringent lustration (e.g. the Czech Republic, Hungary and Poland) “had very different histories, there were identical demands for lustration in the early 1990s” (p. 22). Regardless of their past, all three countries opted for lustration, and Williams et al. explained the difference in its form and timing by the former opposition groups’ “differing access to political power, and their ability to assemble a pro-lustration coalition in the legislature” (p.

35). Consequently, they believe that the timing and form of lustration was subject to negotiation and compromise, and hence the difference between countries.

Stan [2009] criticised all previous studies for concentrating on a small subset of countries selected for their similarities and for relying heavily on lustration as the only indicator of transitional justice. She argued that “non-cases can tell us as much about the reasons for and against transitional justice” (p. 267) as countries which have faced their past to a certain degree, and that consequently a more inclusive selection of cases, a longer time span and a more comprehensive concept of transitional justice are essential to understand the path each state has taken.

Although she also believes that democratic political competition is the key to explain patterns of transitional justice in Eastern Europe, she concludes that the past is not simply another, less important factor, but is the defining element of the dynamics of this competition, thus embracing Nedelsky’s approach for a more comprehensive view of the past and the present. She identifies three main factors of the past which influence the political competition of the present: the position of the opposition during transition, the degree of repressiveness of the communist regime and the experience of the country with political pluralism before communist rule (p. 268).

While I find the evolution of the analysis of the sources and determining factors of transitional justice innovative and, as time passes, more and more exact, there are still some areas, in my opinion, where improvements are possible. I believe that Stan’s research is the most extensive and accurate so far, therefore I will build on her framework. However, there are some shortcomings I need to address in her approach. Even though she considered three methods of transitional justice instead of relying solely on lustration as previous studies mostly did, we still need to take into account many more dimensions to fully understand the underlying mechanism. A broader concept of reckoning with the past enables us to conduct a more comprehensive research. Moreover, and most importantly, all the studies mentioned above have focused on the events shaping the form of transitional justice within the domestic environment and paid no attention to the external forces with possible influences on the process. Although I admit that it is primarily a domestic phenomenon, I believe that there are some interesting international repercussions and impacts which are worth noting. Therefore my main goal in this essay will be to attempt to identify the sources, the intensity and the actual influence of the international factors affecting the process of reckoning with the past in Eastern Europe.

2.2. *Ethical Concerns*

As in many aspects of law and justice, moral dilemmas should not be neglected in this case either. A vast literature has emerged in the second half of the twentieth century which depicts life under totalitarian systems. The importance of memory and of a consensus on the past in thinking about such regimes is widely understood. In a seminal book, *The Book of Laughter and Forgetting*, Milan Kundera explained that “the struggle of man against power is the struggle of memory against forgetting”. As long as the memory of the old days, of crimes committed and of the possibility of doing things differently lives on in the mind of ordinary citizens, totalitarian power cannot take full control over the society. George Orwell stated in *1984* that “who controls the past controls the future”, so when history can be altered and rewritten, when memories can fade or be erased, the future is in the hand of the manipulators. In my opinion, the biggest miscalculation of Gorbachev was not that he thought that the communist economic system can be accelerated (*uskoreniye*), and when it failed, restructured (*perestroika*), but that he allowed thoughts float freely and memories resurface (*glasnost*), thus undermining the some 70-year old rhetoric and allowing the superpower to crumble away under the burden of its contradictions.

The question of remembrance, forgiving and forgetting after the massive overthrow of communist regimes is relatively new, having evolved only in the last two decades. But the importance of memory (or instead, of the lack of it) is also the reason why the more difficult questions about justice are the longer a repressive regime persists. Generations grew up in communist regimes for whom it was the “normal” and the only ideas they had of other times and possibilities were from the fragile and “subversive” whispers of their parents and grandparents. How do we condemn elderly people with failing health, practically at death’s door, for crimes committed in the 1940s? How do we make judgement in a system where a large part of the population was bargained, coerced or blackmailed to report on their friends and relatives? How do we make judgement in a system where, according to some interpretations, everyone was complicit in a way⁷? Can we treat as evidence the files of a corrupt secret police, which were in large part destroyed at the time of the transition (and thus contain information on some collaborators, but not on others)? Can we enact lustration and

⁷ Eyal [2004] notes in the context of the Czech Screening Law that “there was no simple distinction between victims and perpetrators because everybody were complicit in the crimes of communism, and everybody were victimized by it, especially victimized by their complicity” (p. 26).

vetting mechanisms reminiscent of communist-era purges based on ideological non-compliance?

Czarnota [2009] drew a parallel between these ethical questions and the double perception of justice of the ancient Greeks and Romans. The goddesses of Dike and Nemesis (respectively in Greek and Roman mythology) represented historical or divine justice, while Themis and Justitia human justice. The realisation of historical justice was in the hand of gods, as human reason could only apply to human justice (p. 308). In fact, in Western legal tradition, transitional justice is a relatively new tool with less experience and much more questions than the “human” dimension of justice. Nevertheless, in the past century, due to the scale of crimes and injustices committed, international norms have developed, whose application and effects in Eastern Europe form the basis of this study.

According to Dimitrijević [2006], the distinct nature of transitional justice is also the reason why “additional categories are introduced: political, compensatory, restorative, and transformative justice. Sometimes, these varieties of justice are seen as alternatives” (p. 370). The idea of this interchangeability raises another moral issue, namely that no human mind may be free of the limitations of reason to decide on a strategy and combination of transitional justice methods for a whole society.

I wish to make clear that I would not like to transmit any normative judgement with regard to these difficult moral questions in this article, and it is precisely for this reason that I wish to dedicate a small part of my essay to emphasise the ethical weight of the subject I am dealing with.

2.3. Reckoning with the Past and Democratisation

Perhaps the most important criterion in the evaluation of the methods of transitional justice is whether they support or undermine democratic consolidation. This eternal dilemma resurfaces every time real-world events seem to justify one side or the other, and most probably no single good answer exists, even if local characteristics are taken into account.

Early in the debate about Eastern European transitions, Welsh stated that “a policy of reconciliation might best serve the interests of an emerging democracy in transition periods but may become a liability during consolidation periods” (Welsh 1996:425), meaning that sooner or later societies must enact painful measures and come to terms with their past to

continue their process of democratic consolidation. On the other hand, Offe [1992, 1996] asserted that the overall effect of transitional justice methods is detrimental to the development of political institutions and of a free market economy.

Based on empirical data, Letki [2002] found a correlation between lustration measures and the consolidation process, but admitted that causality is hard to prove in this case. However, Williams [2003] stated that although lustration was an important tool in the Czech Republic to secure democracy, transitional justice methods did not prevent the periodic eruption of scandals about newly emerged secrets. Moreover, Letki's framework is inadequate to explain the late lustration measures enacted or renewed in recent years in Slovakia, Latvia, the Czech Republic, Poland and Romania. Horne [2009c] found that such initiatives, with wider scope and more transparency than the initial laws, serve to further democratic consolidation by dismissing public concerns about corruption and distrust, meaning that initial lustration attempts were regarded by the public as insufficient and manipulated. In an earlier article, she explained the nuanced difference between addressing distrust and lack of trust in public institutions. The difficulty of transitional justice usually is that its methods do not simply need to build public trust in institutions, but are essential in breaking down public distrust first. "As such, vetting and lustration in particular are crucial processes to break a cycle of distrust, and therefore allow the construction of trustworthy institutions" (Horne 2005:4). Nevertheless, she admitted that it remains to be seen if they are effective in practice in this respect.

With regard to trials, Murphy [2003] stated that it is not their intensity which is beneficial to democratic consolidation, but their implementation. He found that, in comparing the many court proceedings carried out thoroughly in East Germany and the few and incomplete trials of Poland, their impact was very similar. In both cases, the primary aim was symbolic, moral vindication and not punishment or imprisonment, which helped democratic consolidation in a similar way.

Personally, I do not think that I, who have never lived in the repressive communist system, can give assessment of any weight in this matter, especially bearing in mind the moral dilemmas discussed above. However, I think that I may give my opinion not on moral, but on practical questions. Therefore, I must say that it seems to me that states which pursued transitional justice methods more extensively early on were more successful in their democratic consolidation. It appears that the "communist past card" can be used more effectively in the political scene in states where transitional justice was more lenient, which

in turn triggered undemocratic and populist responses from every part of the political spectrum. Moreover, Horne [2009c] asserted that public concerns about economic inequality fueled late lustration programs, as former secret service networks had moved to the private sector and, using their contacts, had become successful entrepreneurs. Public distrust and feeling of injustice linger on in Eastern European societies, but probably are more prevalent in states with less strict methods of transitional justice.

I would like to stress that the above assertion does not mean at all that I support transitional justice methods in every possible way, only that it seems to me that in practice some well-conceived measures may help reconciliation and democratic consolidation. However, the moral weight of such questions and my inexperience makes me incapable of making a decision of weight about this issue, but it is not my aim in this paper anyway.

3. International Aspects

3.1. *Lustration and Vetting*

Lustration is perhaps one of the most commonly known and also one of the most controversial methods of transitional justice in Eastern Europe. It has triggered heated debates on both national and international levels, and nothing similar to consensus has emerged in the last two decades. The main points of disagreement are applicable to all areas of reckoning with the past, but are especially questionable in the case of lustration; whether it supports or undermines democratic transition, and whether historical justice is more important than rule-of-law concerns.

Horne [2009b], in analysing the reaction to lustration laws of the ECHR and of the ILO Committee of Experts in details, identified four main problem areas: concerns about access to information, due process, bureaucratic loyalty and employment discrimination⁸. The ECHR mainly considered lustration laws in the light of the first three questionable aspects, while the ILO was naturally more active in cases of employment discrimination.

From the beginning, the Council of Europe upheld the legality of lustration measures. In Resolution 1096 on *Measures to Dismantle the Heritage of Former Communist Totalitarian Systems*, the Parliamentary Assembly stressed that, “in general, these measures can be compatible with a democratic state under the rule of law if several criteria are met” (Council of Europe 1996, Art. 12). These criteria mainly demanded adherence to certain rule-of-law concerns, such as the principle of selectivity (individual guilt), the presumption of innocence until proven guilty and the right of defence and of appeal.

The practice of the ECHR built on these interpretations, and never questioned the legality of lustration. Even in the *Case of Matyjek v. Poland*, when the legal framework of lustration was directly challenged by the applicant, the Court commented only on the accessibility of information and on the absence of some procedural guarantees, but was “not persuaded that the applicant [...] could have successfully challenged the domestic law in force” (ECHR 2007b, Art. 64).

⁸ Her useful observations form an important part of this section of my article. However, my findings rest on a broader scope of analysis, and are thus more general but less detailed.

Furthermore, the Court only objected to the inaccessibility of certain information, and even asserted in the *Case of Turek v. Slovakia* that “it cannot be assumed that there remains a continuing and actual public interest in imposing limitations on access to materials classified as confidential under former regimes” (ECHR 2006c, Art. 115). However, it is important to notice that the admissibility of secret police files as evidence was not questioned directly, and the Court only noted that “the assessment of evidence [...] is also open to criticism” (Art. 116).

These asymmetries in access to information also meant insufficient procedural guarantees and the breach of the principle of equality of arms, as the accused had very limited means to prove their innocence [ECHR 2007a, 2007b, 2008b]. In connection with due process violations, states were also accused of the lack of selectivity in lustration laws, but the Court ruled in the *Case of Rainys and Gasparavičius v. Lithuania* that no collective responsibility was imposed on KGB officers (ECHR 2005, Art. 32).

With respect to questions about bureaucratic loyalty, the Court concluded in the same case that “there existed a well-founded suspicion that the applicants lacked loyalty to the Lithuanian State” (Art. 32), but that the exclusion from the private sector “constitutes a disproportionate and thus discriminatory measure” (Art. 36). In the *Case of Ždanoka v. Latvia*, the Court “considered that barring the leading figures of the former regime from standing as parliamentary candidates could be considered a legitimate and balanced measure during the early years following the re-establishment of Latvia’s independence” (ECHR 2006d, Art. 74), but “after a certain time it became necessary to establish whether other factors [...] continued to justify his or her ineligibility” (Art. 75). Moreover, the Court also stated that “the criterion of “political neutrality” cannot be applied to members of parliament in the same way as it pertains to other State officials, given that the former cannot be “politically neutral” by definition” (Art. 117, confirmed in ECHR 2008a, Art. 112).

To sum up, the ECHR accepted lustration laws as legitimate measures on behalf of the state, but demanded more equal access to information and respect for procedural guarantees (especially for equality of arms and for the right of appeal). The Court dismissed accusations of collective guilt and even upheld the states’ concerns about the loyalty of the public sector and about state secrets, but raised attention to the inapplicability of such criteria to certain positions (such as members of parliament), to the long interval after the transition and to the need for adaptation and reconciliation.

It is worth noting, however, that the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, expressed his concern about formulating evidence “relying on illegally collected information, stored in incomplete secret services files” and joined the ECHR in urging Eastern European states to open their secret archives (Hammarberg 2007a). In the more formal *Memorandum to the Polish Government*, he directly criticised the Polish lustration law of 2006 for a scope too wide, as it included several positions in the private sector, for unreliable information used as evidence, and for the harsh sanctions which posed a threat to certain human rights (Hammarberg 2007b, Art. 125, 127, 128).

The ILO adopted a much more critical approach to the lustration processes very early. Its report on the Czech Screening Law stressed the “arbitrariness of [...] irrefutable reliance on records kept by the State Security” (ILO 1994, Art. 88), and thus questioned the admissibility of such evidence. It criticised lustration laws for discrimination based on political opinion and past activity which violated the ILO Convention No. 111 by disproportionately limiting employment opportunities (ILO 2002, Art. 5; 2005a, Art. 4; 2005b, Art. 2, 6).

Moreover, the ILO also called for a more refined selectivity criteria as lustration “measures should be applied only to persons who are actually engaged in or justifiably suspected of activities prejudicial to the security of the State” (ILO 1994, Art. 79). Nonetheless, it accepted the need of bureaucratic loyalty to a certain degree, by stating that “in the public service [...] a certain obligation of neutrality and loyalty can be required” (ILO 1996, Art. 46). Therefore, the main complaint of the ILO was not discrimination in itself, but the disproportionate restrictions on certain positions. It thus affirmed “that requirements of a political nature can be set for a particular job, [...] but they should be limited to the characteristics of a particular post and be in proportion to its labour requirements” (ILO 2002, Art. 6).

All in all, we can conclude that the ILO was highly critical of the whole lustration process, and objected to inconsistencies in the accessibility and admissibility of information from secret police files and to the lack of sufficient selectivity criteria. Most importantly, while it upheld the right of the states to set requirements of loyalty and neutrality to public sector jobs, it criticised disproportional restrictions based on past activities and political opinion. Contrary to Horne, who believed that the ILO thus “attacked the very heart of the process of lustration” and effectively renounced it as a tool of transitional justice (Horne

2009b:730), I do not think that this way the ILO directly or indirectly questioned the legality and the very essence of lustration, but only limited its scope to the level it deemed justifiable.

Horne [2009b] found that although these two international organisations have ruled against the states in all the relevant cases, their criticism had almost no effect on national legislation. The Czech Republic, for example, in the face of harsh condemnation from the ILO and other international actors, extended the expiry of its lustration law twice (for five years in 1995, and indefinitely in 2000), and even expanded its scope to the police in 2007. Even if their concerns were heeded (as in the cases of Bulgaria and Slovakia), it happened most likely because they served the interest of domestic anti-lustration forces by legitimising their agendas. “The potential for political manipulation of international rulings remains a real concern” (p. 729).

While I mostly agree with the above observation, it seems that certain international incentives are sufficient to curb the excesses of national lustration laws. In the case of Latvia, for example, the European Parliament Election Law in 2003 defined a more lenient criteria for candidates than the law for national elections, and thus allowed Latvians who remained secret agents or Party members after independence to run (Stan 2009:235), presumably to avoid legal clashes with EU norms.

In another article, Horne analysed late lustration programmes in Poland and Romania and suggested another way external forces might affect lustration programmes. In her view, the recently renewed lustration effort in some countries can be a tool to signal reform initiatives to international agents (Horne 2009c:351). As lustration is globally viewed as an effective method to counter corruption (as stated below), it is not surprising that Poland, which saw a rapid deterioration of its Freedom House corruption ratings, and Romania, which had been constantly criticised by the EU for its high level of corruption since its accession, chose to enact tough lustration measures in 2006⁹.

Recently, the UN has taken a clear stance on the question of lustration. A UN report in 2006 classified lustration measures as rule-of-law tools which “aim at excluding from public service persons with serious integrity deficits in order to (re-)establish civic trust and (re-)legitimize public institutions” (UN 2006:4). In the same year, Maina Kiai, the UN High Commissioner for Human Rights (OHCHR), stated that lustration is “one of the most

⁹ We must note, however, that both initiatives were overturned by their respective national constitutional courts.

effective tools [...] against public officials found to have been involved in corruption” (Kiai 2006, Art. 20).

The most vociferous opponents of lustration initiatives were perhaps international human rights NGOs, most of which objected to such measures from the very beginning. The first lustration law in the region, adopted by Czechoslovakia, was severely criticised by the Helsinki Watch on every conceivable grounds, such as retroactivity and violation of the state’s international commitments guaranteeing the right to work, to participate in public life, to expression, to associate, to be free from discrimination and to fair and impartial hearing (Helsinki Watch 1992). More recently, the Helsinki Committee of Poland raised similar objections to the new lustration law in 2007. Needless to say, such voices were heeded even less than that of the above mentioned more influential international organisations.

In conclusion, we can assess that there is nothing close to an international consensus on the matter of lustration. Among international actors, views differ from open support (UN, OHCHR), mild criticism (ECHR, Parliamentary Assembly of the Council of Europe), strong criticism (ILO, Council of Europe Commissioner for Human Rights) to outright rejection (Helsinki Watch, Helsinki Committee of Poland). The effect of international objections to lustration laws on national legislation is identifiable but limited, as they are mostly abused by domestic political forces to legitimise their own interests with very few precedents of positive impact. Additionally, lustration may also be a way to signal reform efforts to external observers. We can conclude that there is no clear sign that the controversy around lustration will be solved in the short run as democracies consolidate further, due to the periodic return of public support to the issue and to its use as an effective political weapon.

3.2. Trials and Court Proceedings

Trials of the highest-rank human rights offenders of repressive regimes may be the most widely used tools of transitional justice in general, but they are relatively rare in Eastern European transitions, and are mostly limited to a few distinct periods of the long communist rule. In view of the alleged human rights violations committed, the number of court proceedings initiated is definitely inadequate, while concluded trials are very hard to find, and the number of sentences actually carried out is even more insignificant. The long time period, the high level of public involvement and the difficulties with providing evidence may

be reasons for such leniency, and constitute a part of the peculiarity of the Eastern European transitions in the history of transitional justice.

As explained earlier, a crucial element in the definition of transitional justice is legitimacy on behalf of those who judge the past, which distinguishes it from “victor’s justice” (Kaminski 2006b:296). Carefully avoiding falling into the trap of retribution, transitional political elites and judiciary organs usually kept the scope of trials quite narrow. In most trials, charges were based on the illegality of the acts at the time they were committed (i.e. even under communist-era domestic law) to exclude the possible accusations arising from the application of retroactive justice. Even in cases where acts confronted the state’s international human rights commitments under the communist regime, reference to these international norms was used rather sparingly. However, there are some cases of international importance which are worth examining.

For Western politicians, the trials of the leaders of the highest offices were somewhat embarrassing. In the process of détente, the relationships between the members of the two blocs became almost friendly, which also meant high-profile visits on both sides. It is especially true for the satellite states, which were able to pursue their foreign policies with relatively little interference from Moscow. Most notably, the rapprochement between the “two Germanies” meant the *de facto* recognition of the government of the “other Germany”. Therefore, the application of international norms in the trial of Erich Honecker (and of other East German leaders) a few years after the transition, who had received a warm welcome in Bonn in 1987, would have hardly been politically possible (Stan 2009:25). Charges had to be based on acts deemed illegal even under communist law, while convictions were mild and pardons widespread (the sentence of Honecker was suspended on medical grounds).

Another interesting case from an international perspective is that of General Wojciech Jaruzelski and of the judgement on the introduction of martial law in Poland. The debate was mainly about the necessity of martial law, whether it saved the country from Soviet intervention and thus maintained its hard-won sovereignty or betrayed and stemmed the revolution at hand. Due to the lack of evidence, to Jaruzelski’s cleverness in positioning himself as saviour of precious Polish sovereignty and to the electoral victory of the Democratic Left Alliance in 1993, he was not convicted for the charges of treason (Rosenberg 1996:256). Recently, however, new evidence has resurfaced confirming that he had acted more in his own interest than in that of Polish state sovereignty, but the reopening of the case is very unlikely (Mitrovits 2006, Sobczyk 2009).

Moreover, there are other ways the international environment may hinder the trial of communist perpetrators. This is most apparent in the Baltic states which have continuous conflicts with Russia over court proceedings, which are, surprisingly, limited to the perpetrators of the deportations of 1940s and of the struggle for independence in 1991. However, no Party official was indicted, and in general the accused were former NKVD or KGB officers, often with Russian nationality. This further complicated the situation, as Russia repeatedly criticised the Baltic states for seeking revenge on elderly, ill men who merely followed orders and acted legally at that time (its voice was most notable in the cases of Latvian Nicolai Tess in 2001 and of Estonian Karl-Leonhard Paulov in 2005) and even denied the extradition of Lithuanian Petras Raslanas in 2001, who held a Russian passport and had fled to Russia in 1990 (Stan 2009:236-237). Furthermore, it refused to provide the Baltic states with requested KGB files, which had been shipped to Moscow in the wake of the independence movement and could have been used as evidence in trials.

However, external forces sometimes played a positive role in bringing communist perpetrators to justice. For instance, in Romania, in the trial of the only recorded murder of a political prisoner, Gheorghe Ursu, two Militia officers were found guilty in 2003, but the verdict was in jeopardy as both officers and the prosecutor general appealed to it. However, the Supreme Court upheld the verdict, a decision which was largely influenced by the pressure applied by EU ambassadors after a Finnish member of the European Parliament, Astrid Thor raised their attention to the issue (Olaru 2004:42). On another occasion, upon pressure from the UK the Bulgarian authorities launched an investigation into the murder of Georgi Markov, a Bulgarian writer who had fled to London from the repressive regime and was supposedly assassinated by the Bulgarian secret service in 1978. The investigation in 1992 had little success, as all related secret service files had been destroyed. In 2008¹⁰, the Scotland Yard renewed its efforts to solve the case and expected further co-operation from the Bulgarian authorities (Edwards 2008), but the case remains unsolved.

In its Resolution 1096, the Parliamentary Assembly of the Council of Europe clarified that the states must respect “the right to due process and the right to be heard, and [...] must apply them even to those people who, when they were in power, did not apply them themselves” (Art. 4). The European Court of Human Rights thus watched over due process and other legal requirements. In 1992, former Bulgarian prime minister Andrey Lukanov was

¹⁰ The timing of the launch of the new investigation was not accidental, as according to the Bulgarian statute of limitations, the prosecutability of crimes expires after 30 years of unsuccessful investigation.

accused and arrested for secretly providing guerrilla movements with arms. Because he spent several months in prison during investigations which turned out to be unsuccessful due to the lack of evidence, the ECHR fined Bulgaria (ECHR 1997). The Bulgarian trial of the perpetrators of the Revival Process, who oversaw the mass deportation of ethnic Turks in the 1980s, could not be initiated due to technical hurdles, but the ECHR rejected a request on the issue in April 2005 on the grounds that Bulgaria had not been a signatory of the European Convention of Human Rights at the time of the crimes (Stan 2009:165).

One of the greatest impediments to trials against former communist leaders was the statute of limitations, especially because the most serious crimes had been committed at the time of the communist takeover. Resolution 1096 gave a very vague guideline about retroactive justice, open to many interpretations, as it stated that “passing and applying retroactive criminal laws is [...] not permitted”, but prosecution for a crime “which was considered criminal according to the general principles of law recognised by civilised nations, is permitted.” (Art. 7). Constitutional courts repeatedly rejected laws allowing for the prosecutability of communist crimes in many countries, but in some cases the international practice of the imprescriptibility of crimes against humanity implicitly played a part in their eventual approval. Direct reference was only made in the case of Hungary, where the president and the constitutional court was especially reluctant to allow such initiatives. After several failed attempts by the parliament (e.g. Hungary 1992), the court partially approved the *Law on Procedures Concerning Certain Crimes Committed During the 1956 Revolution*, which explicitly called for the exclusion of certain crimes (which it interpreted as war crimes and crimes against humanity) from the statute of limitations under the provisions of the Geneva Conventions and of the New York Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (Hungary 1993).¹¹

In general, the insistence on due process and the reluctance to invoke international norms at a larger scale mostly crippled this method of transitional justice, but helped to dismiss any accusations of revenge and of “victor’s justice”, while the impact on rule of law and reconciliation is ambiguous. However, we can conclude that most international actors favoured limited prosecution and expressed concern about possible revenge and retribution in this respect. There were very few instances when external forces raised their voice in support of certain trials, and they mostly encouraged moderation because of due process and rule-of-

¹¹ However, in 1996 the court ruled the law unconstitutional on the grounds that it failed to specify sufficiently clear legal procedures (Hungary 1996).

law (retroactivity) concerns, political embarrassment (in the case of former communist leaders) or nationalistic pride (Russia). Nevertheless, they kept a relatively low profile and advocated this view silently (perhaps because they were not perfectly sure that their stance was in accord of human rights principles).

3.3. File Access and Truth Revelation

Contrary to the heated domestic debates it generated, access to the archives of the former secret police was probably the method of transitional justice to which most international actors agreed. The first international voice in this issue was again the Parliamentary Assembly of the Council of Europe, which stated in its Resolution 1096 that it “welcomes the opening of secret service files for public examination in some former communist totalitarian countries” (Art. 9), which is a very courteous suggestion. Later, as mentioned above, the ECHR was more determined and repeatedly requested the declassification of most of the documents of the former secret service in order to ensure equality in arms in lustration cases. In its *Resolution on Divided Europe Reunited*, the Parliamentary Assembly of the Organisation for Security and Co-operation in Europe (OSCE) reiterated “its call upon all participating States to open their historical and political archives” (OSCE 2009, Art. 16). The European Parliament called “for a genuine effort in all Member States towards opening up archives” in its *Resolution on European Conscience and Totalitarianism* (EU 2009, Art. 6). Moreover, the Commissioners for Human Rights of both the UN and the Council of Europe supported this initiative, stating that “access to information is critical” (Kiai 2006, Art. 11) with respect to lustration, and that “all persons affected should be able to examine the files kept on them by the former secret services” (Hammarberg 2007).

Nevertheless, in practice external factors often acted more like drawbacks to the process. Perhaps the best example is Germany, where surprisingly the first and only freely elected parliament of East Germany decided in August 1990 to open the Stasi archive, naturally within limitations and legal safeguards. This law was not implemented, but formed the basis of the Stasi Files Law of 1991. Strangely, West German legislators were the ones who wanted the files to be destroyed, as it was the normal procedure with files containing information gathered contrary to the dignity of the individual, while the new East German parliament strongly supported the opening of the archives, advocating the citizens’ right to know the historical truth and the sensitive information collected about them. The

commitment for a comprehensive law on the Stasi Files was even included, among other anti-communist measures, in the Unification Treaty (Appel 2005:384). The Archive was subject to controversy again later, in the File Debate beginning in 2000, when personal information about the former Chancellor Helmut Kohl surfaced. He subsequently sued the Archive on the grounds of privacy infringement, and thus the Stasi Files Law was amended in 2002 so that access to information about public figures was significantly curtailed (Germany 2002) (Müller-Neuhof 2004a, 2004b).

An interesting case is the evolution of file access in Bulgaria, where a law in 1997 allowed limited access to the archives, but its implementation proceeded very slowly, and in 2002 the Bulgarian parliament passed a law which effectively sealed the archives from the public (Bulgaria 2002). The official reasoning was that the access of officials in the public service needed to be more tightly controlled for the sake of NATO integration. On the other hand, the new law restricted access to the files which are the main source of evidence for initiatives of lustration and trials.

Finally, another international controversy is the secret files of the KGB operating on the soil of Baltic states. As these countries had no independent secret police, and almost all the KGB documents were shipped to Moscow on the eve of the independence process, file access is not an option and they have very few evidence left to conduct lustration and trials on the basis of the files of the secret police.

To sum up, access to the archives of the former secret police is a crucial element of transitional justice as it provides the basis of lustration, trials and truth revelation procedures. Its importance has only recently been realised on an international level, and a consensus seems to have emerged in these circles. However, many international actors were not very eager to support file access initiatives in practice, probably for fears that they might reveal compromising information about them (e.g. Helmut Kohl or Russia), and there is a precedent that this inactivity on behalf of international actors can be exploited for political gains and result in the restriction of file access (e.g. Bulgaria).

Truth revelation is one of the subjects in which all the three great European international organisations relevant in this question agreed, namely that memories and the knowledge of truth are a crucial element of reconciliation¹². The OSCE even explicitly urged

¹² “memories [...] must be kept alive in order to [...] lay the foundations for reconciliation based on truth and remembrance” (EU 2009, point F)

“the participating States to continue research into and raise public awareness of the totalitarian legacy” (OSCE 2009, Art. 13a). Even though most states have established institutes and committees for the documentation of communist crimes and for other purposes, there has been very little sign of a genuine commitment to reveal historical truth. In many other transitions, truth committees played a crucial role in national reconciliation, but in the case of Eastern Europe, their role is very limited mainly due to the insufficient and controversial access to secret files. It seems possible that the declassification of most of these documents will occur only when their relevance is much diminished. However, the Romanian government recently announced that it intends to make public the files related to the 1989 Revolution, in compliance with the request of the ECHR, which may offer a glimmer of hope for truth revelation prospects and for the effectiveness of international influence (Ciocoiu 2010).

3.4. Restitution and Rehabilitation of Victims

Apart from punishment and condemnation, another, perhaps equally important and not less controversial, method of transitional justice is the rehabilitation and indemnification of victims and the restitution of lost property. It was especially difficult to implement with regard to arbitrarily nationalised property. Even though the right to hold property is apparently becoming ever more embedded in international human rights regimes, the right to restitution of expropriated property is less obvious.

Even though the Parliamentary Assembly of the Council of Europe advised transitional states to embark on programs of rehabilitation and restitution in Resolution 1096 (Art. 8, 10), it failed to provide guidelines for the cases when the claimants in restitution cases are not nationals of the particular country. The ECHR had rejected such requests several times on the grounds that Article 1 on the Protection of Property of *Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms* does not include the right to restitution, and additionally, that the Court lacks *ratione temporis* to be competent in these issues, as the rights guaranteed in the Convention and in the protocols do not apply retroactively (Karadjova 2004:353).

“an honest and thorough debate on history will facilitate reconciliation based on truth and remembrance” (OSCE 2009, Art. 6)

“this clear position of the international community will pave the way to further reconciliation” (Council of Europe 2006, Art. 14)

While this statement is true for the cases of foreign claimants, we must note that in the cases where the Court did have sufficient authority and legal basis, it acted decisively. For instance, in the *Case of Brumarescu v. Romania* it ruled strongly in favour of the claimant following a legally questionable action of the Supreme Court of Justice. The expropriation, which happened in 1950, was clearly illegal even at that time, and thus the Court of First Instance could order the return of the property to the applicant in 1993 relatively easily, but the Supreme Court overturned this decision. Thus the ECHR could attack the legality of the decision of the Supreme Court, without reference to the right to restitution and without applying the provisions of the Convention retroactively (ECHR 1999). Similarly, in the *Case of Broniowski v. Poland*, the Court could successfully challenge domestic legal decisions on the basis that “the violation [of Article 1 of Protocol No. 1] has originated in a systemic problem connected with the malfunctioning of domestic legislation and practice” (ECHR 2004a, Decision Art. 3).

With respect to the controversial cases of foreign claimants, Karadjova, along with other observers, also expressed hope that the practice of the Court would change with the adoption of Protocol 12, which prohibits many types of discrimination, including that based on nationality. Therefore, restitution laws, most of which discriminate against foreigners at the moment, would need to treat foreign claimants the same way as nationals. However, out of the countries concerned in this article, only Romania ratified Protocol 12 so far, while Bulgaria and Poland did not even sign it since its adoption in 2000.

In fact, discriminative national legislation has been the source of much of the international controversy about restitution measures. The Baltic states, for example, enacted extensive restitution laws which strongly favoured the majority ethnic group. Most probably, they tried to encourage their dissidents to return to their home country (and bring their capital and expertise with them), while at the same time force Russians, who had mostly immigrated to these countries during communist rule, to leave (Blacksell 2002:187). The reluctance of Bulgaria to sign Protocol 12 is also understandable, as many ethnic Turks, who were victims of the Revival Process and fled to Turkey, may make claims.

Germany was the only state whose restitution law was not limited based on nationality, which is mainly due to historical reasons, namely the continuation of the West German practice after the Holocaust, but may also have been aimed to encourage other states, such as the Czech Republic and Poland, to adopt similar measures and thus to accept the claims of German nationals whose property in these countries was expropriated after the

Second World War (Appel 2005:391). However, Czech restitution measures are stubbornly limited to nationals, and the Beneš decrees, which removed the citizenship and expropriated the property of the German and Hungarian minorities in Czechoslovakia after 1945, have been upheld several times by parliament. Even in face of souring relationship with Germany, the Czech parliament resisted to make Sudeten Germans eligible under the restitution laws. There were even fears that this may jeopardise their accession to the EU, but finally both the Commission and the Parliament decided that this posed no threat to the Czech membership. The reasoning was that although the Beneš decrees violated several EU principles, these do not apply retroactively. The Commission also noted that historical injustices do not form a legal basis for disqualification, but “any continuing application of the decrees in Czech law would be incompatible with the anti-discrimination provisions in the treaties” (Karadjova 2004:331), which is a way of saying that the decrees will not threaten membership prospects but should be condemned after accession as soon as possible. However, the decrees have not been repealed, and even returned to haunt EU integration prospects in 2009, when the Czech President Václav Klaus was reluctant to sign the Lisbon Treaty into law as he believed that the provisions of the Charter of Fundamental Rights could be the basis of Sudeten German claims for expropriated property. He finally agreed to sign the treaty when was promised an opt-out from the Charter.¹³

Contrary to the Council of Europe and to the EU, the UN has been firmer in this respect. The right to effective remedy was even included in the Universal Declaration of Human Rights in 1948 (Art. 8). The Human Rights Committee has ruled in many cases that discrimination based on nationality in restitution cases violate Article 26 of the *International Covenant on Civil and Political Rights*. The Commission on Human Rights reaffirmed the right to restitution and rehabilitation in many instances (UN 2003) (Karadjova 2004:355-359). However, the effect of the complaints of these human rights bodies has been even more insignificant than that of the Council of Europe and of the EU.

The choice of restitution policy also carries economic importance. Foreign investors are more likely to invest in states with reparation policies than in those which favour restitution in kind, as this means more uncertainty in property rights. Rapid privatisation and thus the influx of foreign capital could be most easily accomplished with a system of money compensation.

¹³ Strictly speaking, the decrees are not the result of the Czech communist era, but they are considered here because of their present-day relevance.

All in all, international organisations generally lacked the legal basis to influence restitution policies, especially in the matter of discrimination against foreigners. Although some weak international voices could be heard, they have had virtually no impact on domestic policies. Such unanswered questions continue to poison relations between certain countries, but there is no sign that the problem is about to be solved.

3.5. Official Condemnation of the Communist Regime

The official condemnation of the communist regime seemed one of the first and most obvious motions the new democracies would adopt. However, the “politics of the present” once again overrode expectations, as a declaration was passed very late in most countries, if at all. The Czech Republic was the first to officially rule the communist regime illegitimate and the Party a “criminal and contemptible organization” in 1993 (Czech Republic 1993, Article 2). The successor of the Communist Party protested against its criminalisation and turned to international actors, like the ECHR and Amnesty International, without success (Letki 2002:539). Slovakia followed suit in 1996 with its own law on the illegality of communism. Nevertheless, its final version included a much weaker condemnation by changing the text of the original proposal, which called for the criminalisation of the Party and held it directly responsible for human rights abuses, to the reproach of the Party for not having prevented its members from committing crimes (Stan 2009:60). In 1998, the Polish parliament opted for the moral condemnation of the regime. Hungary and Bulgaria have never passed an official declaration on the criminality of the regime, and a presidential condemnation by Traian Basescu in 2006 was as far as Romania got (McLaughlin 2006).

Outright bans on the successors of the former Communist Parties were rare and short-lived. Even though the Czech Republic criminalised the Party, the law which called for its ban was rejected by the Constitutional Court on the grounds that the successor of the Party operated according to democratic rules (Rosenberg 1996:110). The Communist Party thus continues to function and to be an important political force, while its representatives in parliament are exempt from lustration. More recently, the ECHR ruled against Bulgaria and the Czech Republic for refusing to register parties openly affiliated with the communist regime and with the former ruling Party (ECHR 2006b, 2006a).

Even the Baltic states, which needed to gain their independence from the Soviet Union, were relatively slow to condemn the communist regime which took their sovereignty (Lithuania in 1998 and Latvia in 2005). What is even more interesting is the stance of Western Europe and the US on the Soviet occupation of the Baltic states. Throughout the Cold War, they consistently refused to recognise their status as constituent republics of the Soviet Union. However, once independence drew ever nearer in 1989-1990, and was declared in March-May 1990, the great Western powers hesitated over relations with the Soviet Union, the power base of Gorbachev and his support for the intervention in Kuwait, and were thus reluctant to recognise their independence *de jure* until August-September 1991 (moreover, they raised few objections to an unsuccessful Soviet military intervention) (Trapans 1994:163-164). Even though in 1989 the Congress of Soviets passed a declaration “admitting the existence of the secret protocols [to the Soviet-German Pact], condemning and denouncing them” (Borejsza 2006:521), Gorbachev was reluctant to agree to the independence of the Baltic states. The international condemnation of the occupation of the Baltic states gained renewed impetus only recently, when in 2005 the U.S. Congress and the European Parliament both passed such a resolution, and urged Russia to admit the crimes committed.

Similarly, international denunciation of totalitarian communist regimes also appeared on the political agenda only recently. Although in 1990 in the Copenhagen Meeting of the Conference for Security and Co-operation in Europe (CSCE) “the participating States clearly and unequivocally condemn[ed] totalitarianism” (CSCE 1990, Art. 40), no direct reference was made to communist regimes. It was in as late as 2006 that the first international voice was heard by the Parliamentary Assembly of the Council of Europe, which condemned the crimes and the ideology of communism (Council of Europe 2006). In 2009, the *Resolution on European Conscience and Totalitarianism* of the European Parliament and the *Resolution on Divided Europe Reunited* of the Parliamentary Assembly of the OSCE both explicitly condemned communist regimes and the crimes they had committed. Also, the EP resolution called for the proclamation of 23 August (the date the Soviet-German Pact was signed) as a Remembrance Day for all the victims of totalitarian regimes. As mentioned above, all these three documents state the importance of memory and truth in the process of historical reconciliation, but the Russian response to them was anything but conciliatory.

All in all, in the question of the condemnation of the communist regimes and crimes, a solid European consensus has evolved recently. Even in the face of Russian fury, Western

European states have advocated human rights, have taken the side of their Eastern neighbours and have adopted important international resolutions. Also, Russia's turn to an ever more nationalistic and Neo-Soviet ideology has played a role in a more united European voice against totalitarian communist regimes. Additionally, civil initiatives have also appeared in recent years denouncing communism: the Prague Declaration on European Conscience and Communism¹⁴, signed by leading European intellectuals in 2008, and the International Conference on the Crimes of the Communist Regimes¹⁵, which was also held in Prague in 2010.

3.6. Fate of Communist Symbols and Memorials

Removing communist-era symbols was one of the first actions of the transitional governments in the states in question. The renaming of streets, squares and other public places, the removal of numerous monuments etc. were relatively easy to implement and did not conflict with any human rights considerations or similar constraints. It was also one of the most obviously popular public decision as people could well feel the change in their everyday lives. Later, most states have tried to pass laws prohibiting the use and display of communist symbols, such as the hammer and sickle, the red star, the anthem etc., but only Hungary, Latvia and Poland have succeeded. Although dealing with former state symbols went relatively smoothly at the time of transitions, it has been recently sparking off debates on a European level.

In 2005, several conservative members of the European Parliament, led by Lithuanian Vytautas Landsbergis and Hungarian József Szájer, proposed the inclusion of a ban in all the European Union of communist symbols in a draft EU law on racism¹⁶. These calls were rejected along with plans of an EU-wide ban on Nazi symbols. However, the latter gathered much more support and was taken more seriously, which raised the question of double standards. Obviously, the fact that the latter plan was backed by Germany, the biggest member state of the EU, while the ban on communist symbols was backed by smaller Eastern European members, played a part in the warmer reception of the ban on Nazi symbols. However, as some of the group proposing the ban on communist symbols noticed in

¹⁴ See <http://praguedeclaration.org/>

¹⁵ See <http://www.crimesofcommunism.eu/>

¹⁶ In fact, they did not directly support a ban on totalitarian symbols at an EU level, but after the ban on Nazi symbols gained impetus, they demanded the "equal treatment of the other evil totalitarian regime of the communist system" (József Szájer).

criticism, it is also important to see that a ban on communist symbols would have infuriated Russia and other states which take a more favourable view of the communist past or still have a communist regime, a move most EU members were anxious to avoid (Lungescu 2005).

In an important legal decision, the ECHR ruled in 2008 in the *Case of Vajnai v. Hungary* that the ban on the use of the five-pointed red star limits the freedom of expression. The main argument of the Court for deciding in favour of Mr Vajnai was that the red star does not necessarily refer to the Soviet communist repressive system, but is a legitimate symbol of political parties in many other member states and of the international labour movement. Therefore, by failing to make a difference in its meaning, the ban is too broad in a democratic society (ECHR 2008c). However, the Court failed to provide any suggestions on how to distinguish between the different meanings of the symbol. Moreover, the Court has never condemned the strict ban on Nazi symbols, such as the swastika, in countries like Germany and Austria, even though it too has many other meanings (for example to Hindu minorities). Again, the question of double standards arises. Although its international responsibilities compel Hungary to honour this decision, no progress has yet been made to address the issue.

All in all, we can conclude that communist symbols are not treated as equal to Nazi ones on a European level. This double standard may be due to the different historical experiences and to the different levels by which Western and Eastern Europe were affected by these totalitarian regimes, but also to considerations of present international relations. Nowadays, maybe no external country would protest against a European ban on Nazi symbols, simply because their one-time user, Germany, is the most ardent promoter of the ban. However, there are many countries with ideological or historical connections to communism which would be angered by a ban on communist symbols. For instance, an equal condemnation would surely provoke a harsh Russian response.

Actually, Russia, which is becoming more and more nationalistic and at the same time ever more nostalgic about the superpower communist past, is the crucial element in the debate on the survival of communist symbols. In an emblematic event, in April 2007 high-level Russian officials protested firmly against the relocation of the Bronze Soldier in Tallinn, and withheld natural gas supplies for days in retaliation (Economist 2007). Alarming, no measurable response from Western European states was perceptible, despite Russia's overreaction, bullying, cut of gas and blockade of the Estonian embassy in Moscow. Therefore, this conflict has a more general story to tell about all Europe. Despite the EU and

NATO membership of Estonia, Western European states did not take its side in fear of confronting Russia. In the end, the conflict ascended from the level of symbols to the failure of the commitment of Western European states to one of their Eastern neighbours. Compared to the ease with which resolutions condemning communist regimes mentioned above have been accepted by Western European states, even in the face of confrontation with Russia, the disappointingly weak response in this case may be due to the fact that whereas in the case of human rights and democracy a European commitment is obvious, no consensus exists on monuments erected by totalitarian regimes.

Another interesting issue connected to symbols and the communist era is the continuous refusal of Russia to return the presidential seal and regalia, seized in the 1940 annexation, to Estonia. This behaviour raises doubts, at least on the level of symbols, about an unreserved Russian commitment to the independence of the Baltic states.

In order to address the problems mentioned above and to promote the forming of consensus, the Parliamentary Assembly of the Council of Europe passed the *Resolution on Attitude to Memorials Exposed to Different Historical Interpretations in Council of Europe Member States*, which confirms that the “final decision on the fate of such memorials is a sovereign one of the state” (Council of Europe 2009, Art. 4.), but calls for the “broadest and most inclusive possible debate about the fate of memorials” (Council of Europe 2009, Art. 9.1), and for other possible measures to minimise future related conflicts.

4. Results

Having analysed all the chosen aspects of the process of reckoning with the past, we are now ready to address our hypotheses. The first considers the position of international actors in the different subjects. I believe that it is quite clear from the above that a relatively strong international consensus exists with regard to file access and truth revelation, and to the condemnation of the communist regimes and crimes. Moreover, I argued that a tacit agreement between international actors existed in the question of trials and court proceedings, as they mostly favoured limited prosecution after transition, albeit for very different reasons. On the other hand, no consensus has emerged in the questions of lustration, restitution and rehabilitation, and the fate of communist symbols.

Secondly, international voices have been mostly raised concerning the issues of lustration, file access and truth revelation, and the condemnation of communist regimes, while they were relatively quiet in the subjects of trials, restitution and rehabilitation, and the fate of communist symbols.

Thirdly, it was only in the matters of lustration, trials and file access and truth revelation that we have perceived any measurable impact on domestic policies. We must note, however, that the nature of the impact differed in all of these three methods of transitional justice. With regard to lustration, the overall effect of external factors was the moderation of the excesses of national lustration laws, while with respect to file access and truth revelation, the result of international pressure was more activity by the state in the issue. Lastly, in the question of trials, the generally idle international attitude was perfectly in line with the mostly lenient national policies, and could be interpreted more like a justification than a factor determining the outcome in any direction.

Lastly, no effect of international origin was observable in connection with policies of restitution and rehabilitation, the condemnation of communism and the fate of communist symbols. Strangely, the first is mostly economic and the latter two are mostly symbolic elements of reckoning with the past, but perhaps these are the areas which caused the most international tension since the transitions. It is possible then that it was because of the very sensitive nature of these policy areas that external forces were largely ineffective in influencing them.

5. Conclusion

There are some interesting remarks to be made on the findings presented above (for a summary, see Appendix). Firstly, in order to influence national policies, it does not seem absolutely necessary that international actors agree and act in concert (as in the case of lustration), or that they promote their united opinion particularly intensively (as we have seen in the issue of trials). Moreover, on such a politically sensitive issue as file access and truth revelation, even a strongly advocated international consensus can hardly affect national policies. However, the same combination of strongly supported united voice has had no effect on the condemnation of communist regimes, but it is most probably due to the fact that the consensus has been forming relatively recently and that many countries had already enacted the measures in question before (thus there was no domestic policy to influence further). Naturally, a divided international community whose members weakly supported their ideas could not affect policies such as restitution and rehabilitation and the fate of communist symbols (although some signs of forming an agreement may be emerging in the latter issue).

In conclusion, we have seen that international actors can and do influence the process of reckoning with the past in Eastern Europe. Although their importance should not be exaggerated, they are an important factor in the democratic consolidation process. Moreover, it appears that they do not need to be on the same opinion and advocate this vehemently at the same time to be successful in affecting domestic legislation. However, at least one of the these two factors, consensus or intensity, is necessary, because if none of these exists the chance of successful influence is very slim.

I am lucky enough to be part of probably the first generation which has no memories of the communist past, but still sees the legacies of the past regime surviving, transforming or vanishing, and receives second-hand memories constantly from parents, grandparents etc. This “transitional generation” therefore may be in the best situation to form an honest view of the past regime and to assess the way our ancestors dealt with it.

Throughout this study, we have seen the importance of the international dimensions of reckoning with the past in Eastern Europe. Perhaps the most emblematic symbol of these could be the popular “Back to Europe” slogan in Prague on the eve of the first democratic elections for decades. Most people in Eastern Europe viewed the transitions as a way of return to the community and to the civilisation to which their countries naturally belonged and of breaking the cycle of constant indecisiveness between West and East once and forever¹⁷. However, to achieve this complete break with the past, they needed to come to terms with it first; either by the approach of forgive and forget or of prosecute and punish. But also the very international environment they wished to join had some say in this process, and this was the part of the story analysed in this article.

¹⁷ This was advocated as well in the famous theory of István Bibó.

Appendix

	Consensus	Intensity	Effect
1. Lustration and Vetting	No	Yes	Yes
2. Trials and Court Proceedings	Yes	No	Yes
3. File Access and Truth Revelation	Yes	Yes	Yes
4. Restitution and Rehabilitation of Victims	No	No	No
5. Condemnation of the Communist Regime	Yes	Yes	No
6. Fate of Communist Symbols and Memorials	No	No	No

Table Summarising the International Aspects of Reckoning with the Past
in Eastern Europe

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