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On the Topic of

RULE OF LAW IN TRANSITIONAL JUSTICE

The world has witnessed many political changes in recent years; and especially since the end of the cold war in 1989, governments have been overturned, and horrific wars fought to that end. There have been, therefore, many a **transitional phases** when such States and their people have stood at cross-roads. If the term 'transitional justice' is to be understood in the ordinary parlance, it means the justice that the international community endeavors to mete out to the people of such States undergoing transition and who have suffered in the conflicts.

Transitional justice is a term that is used in the international legal jurisprudence to mean mechanisms to provide redress to the victims, creating opportunities for the transformation and revival of the State's machinery, and addressing conditions that have been at the root of the conflict and abuses in a way that they do not occur again in the future. The field first emerged in the late 1980s and early 1990s, mainly in response to the political transitions that took place in Latin America and Eastern Europe—and when claims for justice were advanced during those transitions.

At the time the main concern that the human rights activists and others had in mind was how to address effectively the systematic abuses of former regimes, and at the same time reinforce—and not derail—the political transformations that were underway. Since these changes were popularly called "transitions to democracy," people started addressing this new multidisciplinary field as "transitional justice" or "justice in times of transition." Transitional justice measures that were adopted included prosecutions, usually of regime leaders; truth-telling initiatives, such as opening up State archives and establishing official truth commissions; the creation of reparations

programs for victims; and the vetting of public employees, especially (but not exclusively) members of the security forces.

Any discussion on international rule of law today, especially when it concerns developing countries would be incomplete without a discussion on how and to what extent transitional justice processes can establish Rule of Law in post-conflict societies (as it is mostly the developing countries that have undergone such transitions in the past, and continue to do so today). The purpose of the present talk is to have a discussion on how to achieve just that.

I'm going to begin addressing this complex topic by first giving an insight into the holistic objectives with which the transitional justice processes must begin in the post-conflict societies. Next in the lecture, I will deal with how the field of transitional justice has evolved over time, to include formal as well as informal components, in order to attempt at providing complete justice to people of such societies. Finally, in the last and main section of this discussion I will deal with the various institutional mechanisms that have evolved for the establishment of an effective system of transitional justice, so that the political and socio-economic institutions of such post-conflict societies may develop, and to ensure that a debacle of a similar kind does not occur therein in the future. The institutions covered would include namely, Truth Commissions, Reparations, Role of International Criminal Courts, Institutional Reform, and Reconciliation.

TWO BROAD GOALS BEFORE PROMOTERS OF TRANSITIONAL JUSTICE

It has been largely felt that a justice that has a massive purpose of not only providing remedies to people who have suffered in conflicts, but also essentially help a society get back on its feet, must be planned with at least two essential goals in mind:

a) To attain a fair and equitable justice for the victims; and

b) To reinforce the possibilities for peace, democracy, and reconciliation in the society.

Thus, it can be said that transitional justice must have a holistic objective; and therefore, it is also one of the most challenging tasks before the international community today. It would require combined measures of criminal, restorative and social justice.

Helping a post-conflict society come up to its feet can be a formidable task for international law actors, as it would involve transitioning from the international dimensions to the local grounds where the realities may be very different, and the tasks before them extremely complex. Even the

best application of international law in redressing these situations may fail or give rise to effects contrary to those desired, if they are divorced from the ground reality.

Transitional justice today is a diverse and vibrant field. As it has grown and evolved, it has found common grounds with myriad fields, such as social justice movements, the fields of conflict resolution, and peace building, etc., just to name a few.

Like I have stated earlier there are risks involved in intervening in transition processes in States coming out of conflicts; because such processes would involve complex exercises in reconciliation and compromise between antagonists in past conflicts. The question is to **what extent can supranational judicial and non-judicial interventions unblock or improve transitional justice processes**. Also, **in what situations would such intervention be appropriate and legitimate?**

EVOLUTION OF THE FIELD OF TRANSITIONAL JUSTICE

As transitional contexts have shifted from the post-authoritarian societies of Argentina and Chile to the post-conflict societies of Bosnia and Herzegovina, Liberia, and the Democratic Republic of the Congo, new practical challenges have forced the field of transitional justice to innovate and expand its boundaries. Ethnic cleansing and displacement, the reintegration of ex-combatants, reconciliation among communities, and the role of justice in peace building—these have all become important new issues for transitional justice practitioners to tackle[1].

The re-integration of ex-combatants, for example, is especially complicated. This is because in general ex-combatants often receive money and job training as incentives to disarm, whereas victims typically receive little or nothing at all in order to help rebuild their lives. Such imbalances can be unwise and even counter-effective in States undergoing transition. This may foster resentment, making receiving communities more reluctant to reintegrate ex-combatants, and also threaten post-conflict stability. Therefore, it is important that the re-integration of ex-combatants must be inclusive, and a part of wider recovery strategies. This socio-economic re-integration strategy needs to be further effectively linked to a long term, sustainable recovery process, by not only targeting individual ex-combatants, but also and more importantly, building

[1] "What is Transitional Justice? A Backgrounder" (2008) *available at*: www.un.org/en/peacebuilding/pdf/...**transition**/26_02_2008_background_note.pdf (Last Visited on Jul 19, 2016).

national capacities to ensure that re-integration evolves into further reconstruction and development[2].

Thereafter, as transitional contexts have shifted geographically from Latin America and Eastern Europe to Africa and Asia, transitional justice practitioners have more importantly engaged with local—sometimes called "traditional"—justice measures, which have offered an important complement to the traditional transitional justice mechanisms. For example, in some countries, such as Sierra Leone and Uganda, communities are free to use traditional rituals in order to foster reconciliation of warring parties or reintegrate ex-combatants. In such cases, the role of transitional justice is to ensure that a holistic approach is taken—one that may include the ritual, but that neither excludes the possibility of criminal justice for those most responsible for serious crimes, nor the implementation of other justice measures, such as reparations, to provide additional forms of redress[3].

Dr. Alexander Boraine, Deputy Chairman of the South African Truth and Reconciliation Commission defines the word 'transition' simply as "…the old order is dying but that the new order has not yet been born." And justice he says can be retributive, restorative or distributive, or even economic or social transformative. Transitional justice, according to him is not a contradiction of criminal justice. It is rather a process or a search for a just society in the wake of undemocratic, oppressive and even violent systems. **Therefore, transitional justice is not detraction from criminal justice, but rather a deeper, richer and broader vision of justice that seeks to confront perpetrators, address the need of victims, and assist in the process of re-conciliation and transformation.**

Very significantly he notes that where there are human rights violations on huge scale, it is impossible to prosecute everyone. That is, there are serious limits to what the courts can achieve. ICC's indictment of the head of State of Darfur, Omar Al Bashir was widely criticized as being counter-productive, as it allegedly harmed and deterred the peace process[4]. Political restraints have hampered the court's work too in many instances; for example, in the case of the Extraordinary Chambers in the Courts of Cambodia (ECCC), in examining the crimes of Khmer

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[2] ILO, "Socio-Economic Reintegration of Ex-Combatants", *ILO Programme for Crisis Response and Reconstruction (ILO/CRISIS)* (2009) at 9-17.
[3] *Supra* note 1.
[4] Alex Mundt, Jacqueline Geis, "When to Indict? The Impact of Timing of International Criminal Indictments on Peace Processes and Humanitarian Action" (Paper Presented at the World Humanitarian Studies Conference, Groningen, Netherlands, Feb, 2009) *available at*: www.brookings.edu/~/media/research/files/.../**peace**.../04_**peace**_and_justice_geis.pdf (Last Visited on Jul 18, 2016).

Rouge[5]. And for its part the ICC functions under alleged U.S opposition, and cannot begin to apply the universal rules to exactly half of the world's countries[6].

Therefore, there is a need for transitional justice with a holistic approach. There is a need to embrace a notion of justice that is wider, deeper and richer than retributive justice. Not only is it impossible to punish all offenders, but an overzealous focus on punishment will, as has been seen in the past, make it very difficult to secure sustainable peace and stability in the region. Documenting the truth about the past, restoring dignity to victims, and embarking on the process of reconstruction and reconciliation, are vital elements in the construction of a just society[7].

INSTITUTIONAL APPROACH TO TRANSITIONAL JUSTICE

The UN Secretary General in his Report of 2004 to the Security Council on the rule of law and transitional justice in conflict and post-conflict situations, defined transitional justice as "**the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include either both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof**."

The work of the United Nations on transitional justice is based on a wide spectrum of international laws, including international human rights law, international humanitarian law, international criminal law and international refugee law. In particular, four tenets of international human rights law have framed its approach towards transitional justice and the fight against impunity, namely:

(a) The State's obligation to investigate and prosecute alleged perpetrators of gross violations of human rights and serious violations of international humanitarian law, including sexual violence, and to punish those found guilty;

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[5] "Political Interference at the Extraordinary Chambers in the Courts of Cambodia", Open Society Justice Initiative (2010) *available at*: https://www.opensocietyfoundations.org/.../**political**-interference-**courts-cambodia**-20... (Last Visited on Jul 18, 2016).

[6] Alexander L. Boraine, "Transitional Justice: A Holistic Interpretation", *Journal of International Affairs*, Vol. 60, No. 1 (2006) at 19.

[7] *Id* at 17-27.

(b) The right to know the truth about past abuses and the fate of disappeared persons;

(c) The right to reparations for victims of gross violations of human rights and serious violations of international humanitarian law; and

(d) The State obligation to prevent, through different measures, the reoccurrence of such atrocities in the future[8].

INSTITUTIONAL MECHANISMS

The different mechanisms or measures that have evolved over time in the direction to fulfill these obligations are:

a) truth-seeking mechanisms such as truth commissions;
b) judicial mechanisms (national, international or hybrid);
c) reparations;
d) Institutional reform, including vetting; and
e) Reconciliation.

I will now discuss each of the mechanisms briefly:

Truth Commissions

"Truth is the cornerstone of rule of law, and it will point towards individuals and not peoples as perpetrators of war crimes. And it is only the truth that can cleanse the ethnic and religious hatreds and begin the healing process" – Madeleine Albright, 1993[9]

Truth commissions are official, temporary, non-judicial fact-finding bodies that investigate a pattern of abuses of human rights or humanitarian law committed over a number of years[10]. They

[8] Report of the Secretary-General to the Security Council, 2004. *See* "Rule of Law and Transitional Justice in Conflict and Post-Conflict Situations", UN Doc. S/2004/616.
[9] Madeleine Albright is a former United States politician and diplomat. This quotation was given by her at the time of her service as the US Ambassador to the UN.
[10] *Supra* note 7 at 17.

mostly have the mandate to examine the causes, consequences and nature of gross human rights violations. They are thus suitable platforms for considering the root causes of conflict or repression and violations of economic, social and cultural rights, given their aim to uncover the truth about past events. They provide an opportunity for oppressed societies to begin the process of rebuilding civic trust among citizens and in the institutions already in place so that they can serve them in the real sense. The utility of Truth Commissions thus lies in the fact that their findings and recommendations can contribute to criminal justice, reparations, and institutional reform processes to redress past abuses and prevent new ones from occurring. Some of these Commissions even have mandates of the Security Council Resolutions backing them[11] and there is an increasing involvement and support of the UN in their functioning[12].

Truth commissions have the potential to be of great benefit in helping post-conflict societies establish the facts about past human rights violations, foster accountability, preserve evidence, identify perpetrators and recommend reparations and institutional reforms. They can also provide a public platform for victims to address the nation directly with their personal stories and can facilitate public debate about how to come to terms with the past.

However, it has been observed that certain shortcomings such as a weak civil society, political instability, a weak or corrupt judicial system, insufficient time to carry out investigations, lack of public support and inadequate funding can seriously handicap the functioning of these Commissions. The Secretary-General's Report to the Security Council on Transitional Justice as early as 2004 had suggested that truth commissions would be invariably compromised if appointed through a rushed or politicized process. They are best formed through consultative processes that incorporate public views on their mandates and on commissioner selection. To be successful, they must enjoy meaningful independence and have credible commissioner selection criteria and processes. Strong public information and communication strategies are essential to manage public and victim expectations and to advance credibility and transparency. Their gender sensitivity and responsiveness to victims and to victims of discrimination must be assured. Finally, many such commissions will require strong international support to function, as well as respect by international partners for their operational independence[13].

In practice, however, these guidelines have not been completely followed. The truth commissions have faltered where they were introduced too early in the political process, were

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[11] As for example, the United Nations Transitional Administration in East Timor established on 25 October, 1999.
[12] The Commissions of El Salvador, Guatemala, Timor-Leste and Sierra Leone have seen significant United Nations involvement and support. And the United Nations missions in Liberia and the Democratic Republic of Congo are now engaged in supporting consultative processes for truth commissions in those countries.
[13] *Supra* note 9.

manipulated for political gain or involved insufficient efforts to solicit stakeholder input, including such hard to reach populations as displaced persons and refugees. Strong national ownership is essential for their success. Unfortunately, Governments have a mixed record of compliance with truth commission recommendations, evidencing the need for follow-up mechanisms and active and long-term political engagement from the international community and civil society. United Nations support for the implementation of recommendations needs to be incorporated early in planning processes. There is growing recognition that truth commissions should also address the economic, social and cultural rights dimensions of conflict to enhance long-term peace and security[14].

Reparations

The 2004 report of the Secretary-General, stressing on the importance of reparations noted that States have an obligation to act both against perpetrators and on behalf of victims. It is a part of the newly conceived holistic approach to transitional justice that signifies that the new justice will not only focus on the perpetrators, but also on the victims who suffer at their hands. In fact, from the victim point of view the reparation program perhaps occupies the most important place as it is the most tangible manifestation of the State's efforts in remedying the harm that they have suffered[15].

The Sub-Commission on Prevention of Discrimination and Protection of Minorities entrusted in 1989, by its resolution 1989/13 of 31 August 1989, a Special Rapporteur with the task of undertaking a study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms with a view to exploring the possibility of developing basic principles and guidelines on the issue. The study originated at a time of political change on various continents with prospects of a higher degree of human rights advancement. It was also a time of the creation of transitional justice mechanisms in a series of countries. As a result of many a concerted efforts following this, the United Nations General Assembly finally adopted in 2005 by consensus the **Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International**

[14] Report of the Secretary-General to the Security Council, 2011, 'Rule of Law and Transitional Justice in Conflict and Post-Conflict Situations' (S/2011/634) at 7.
[15] *Supra* note 7 at 18-19.

Human Rights Law and Serious Violations of International Humanitarian Law (reparation principles).

The Principles and Guidelines are divided into thirteen sections, containing a total of twenty seven articles, and broadly entail the following provisions:

a) Obligations of States and legal implications in connection with gross violations of international human rights law and serious violations of international humanitarian law, notably:
   1) The obligation to prevent violations,
   2) The obligation to investigate, prosecute and punish perpetrators,
   3) The obligation to provide effective access to justice to all persons alleging a violation,
   4) The obligation to afford full reparation to victims[16]

b) The legal implications relating to and qualifying universal jurisdiction, extradition, judicial assistance and cooperation as well as statutes of limitations in connection with reparation[17].

c) The rights of victims, corresponding to the title of the document as it refers to the right of victims to a remedy and reparation (with strong domestic law implications)[18].

d) The principles describing the various forms of reparation that denote a broad range of material and symbolic means to afford reparation to victims (These were formulated with the Articles on State Responsibility of the International Law Commission in mind)[19].

Reparations today usually consist of both monetary and non-monetary elements. Non-monetary elements include restitution of victims, legal rights, programmes of rehabilitation for victims and symbolic measures, such as official apologies, monuments and commemorative ceremonies. The restoration of property rights, or just compensation where this cannot be done, is another common aspect of reparations in post-conflict countries. Material forms of reparation present perhaps the greatest challenges, especially when administered through mass government programmes.

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[16] Principles 1-4 of the Reparation Principles.
[17] Principles 5-7 of the Reparation Principles.
[18] Principles 11-23 of the Reparation Principles.
[19] Theo Van Boven, 'The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', *United Nations Audio-Visual Library of International Law*, 2010, *available at: **legal**.un.org/avl/pdf/ha/ga_60-147/ga_60-147_e.pdf* (Last Visited on: Jul 20, 2016).

Other difficult questions include who is included among the victims to be compensated, how much compensation is to be rewarded, what kinds of harms are to be covered, how harms are to be quantified, how different kinds of harms are to be compared and compensated and how compensation is to be distributed. No single form of reparation is likely to be satisfactory to victims. Instead, appropriately conceived combinations of reparation measures will usually be required, as a complement to the proceedings of criminal tribunals and truth commissions[20].

Role of ICC and other National and Hybrid Tribunals in Post-Conflict Societies

The role of international courts in restoring peace and rule of law in post-conflict societies has largely focused on, if not restricting itself to, criminal prosecution of atrocity perpetrators during conflicts involving large-scale violence against civilians. These complex and important trials undoubtedly require substantial time, financial support, dedication and expertise. Yet, the international community has recently been of the opinion that the courts should also enhance their rule of law impact in societies such as that (for example, through early and well-planned outreach to local populations), so that they can potentially make a real difference in building public understanding and confidence that the law will be fair. This most importantly includes capacity-building, as in the long term it is the domestic justice systems that are most likely to prove to be curative. Domestic justice systems that are capable of delivering reasonably fair justice and that enjoy public confidence are crucial to preventing future atrocities and to building a stable rule of law.

Indeed, the ultimate impact of international and hybrid courts will be uncertain if their work is completely disconnected from the challenges of strengthening the rule of law domestically in post-conflict societies. Furthermore, if these tribunals fail to address public concerns about their work and ignore local perceptions about justice, they may undermine public confidence in fair justice; reinforcing cynicism and despair, rather than helping to build public trust in justice and the rule of law[21].

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[20] *Supra* note 14.

[21] Jane Stromseth, "Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post Conflict Societies?" *1. Hague J. on Rule L.* (CUP, 2009) at 87-90.

DOMESTIC IMPACT STRATEGY

International and hybrid criminal courts have real potential to contribute more significantly to justice on the ground in societies recovering from atrocities. Hybrid tribunals[22], in particular, have some built-in advantages over international courts in contributing to the domestic capacity – by virtue of both their location and the direct participation of national judges, prosecutors, defense counsel, investigators, administrators and other staff in their work. But realizing the benefits of an in-country hybrid does not happen automatically; it requires astute planning, resources, and sensitivity to the many practical and political challenges that can arise when a tribunal locates directly in the country most affected by the atrocities.

ICC too has the capacity to influence and prod domestic justice systems to improve their capacity to investigate and prosecute atrocity crimes. However, in terms of resources international and hybrid trials are expensive and often compete for international funding and attention with struggling domestic justice systems. If national governments feel their domestic needs are shortchanged, this can create tensions and resentments, as in Rwanda.

The concept, therefore, that is increasingly gaining popularity in this regard is that of '**domestic impact strategy'**. The three components of this domestic impact strategy include:

1. Understanding the local terrain more deeply and fully;

2. Thinking systematically about the tribunal's demonstration effects and be creative about outreach; and

3. Being proactive about capacity-building and looking for synergies[23]

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[22] Hybrid domestic-international tribunals offer an important approach to transitional justice. Hybrid courts are courts in which both the institution and the applicable law consist of a blend of the international and the domestic: foreign judges sit alongside their domestic counterparts to try cases prosecuted and defended by teams of local lawyers working with those from other countries. And at the same time judges apply domestic law that has been reformed to include international standards. They are also known by the increasingly popular term, 'third-generation' criminal bodies (the Nuremberg and Tokyo Tribunals being the first, and the ICTY, ICTR and ICC being the second generation) (The Project on International Courts and Tribunals *available at*: http://www.pict-pcti.org/courts/hybrid.html (Last Visited on Jul 29, 2016)). These courts have developed in an ad hoc way, a result of on-the-ground innovation rather than grand institutional design. Typically, they have emerged in post-conflict situations to address cases involving mass atrocity, usually where no politically viable full-fledged international tribunal exists. Examples of Hybrid Tribunals are the Crimes Panels of the District Court of Dili, Regulation 64 Panels in the Courts of Kosovo, Court for Sierra Leone, and the Extraordinary Chambers in the Courts of Cambodia.

[23] *Supra* note 20 at 90-97.

Institutional Reform Including Vetting

One of the major problems that prevent a country from transitioning from its past into a brighter future is that the institutions continue to remain almost exactly the same. The same policemen control the forces and the same generals control the army. There is no doubt that unless and until the institutions are radically restructured, there can only be limited opportunity for growth, development and peace. However, such reforms in deeply divided societies need to be very carefully managed.

Individual responsibility in such cases may be a better idea than collective incrimination. For example, immediately after the invasion of Iraq the Baath party had been totally banned. This move did little to help in the social and economic upliftment and re-structuring of the society as many ordinary citizens had joined the Baath party just in the hopes for survival. Many Zimbabweans too had joined the Zimbabwe African National Union Patriotic Front for the safety and security of themselves and their families. An approach of individual responsibility was better there too[24].

According to the United Nations Secretary General's Report to the Security Council of 2004, vetting as an institutional reformative measure usually comprises of a formal process for the identification and removal of individuals responsible for abuses, especially from police, prison services, the army and the judiciary. As noted above, this can be a pretty complex phenomenon. It involves the process of assessing integrity to determine suitability for public service engagement. However, vetting entails not only identification and removal of individuals responsible for past abuses, but also aims at screening of integrity and capacity of new candidates for public employment. The vetting process to have any positive effect on the transition of the post-conflict societies must be formal and properly regulated. That is, vetting process should include some essential elements, and should not be a wholesale purging practice followed in some countries which includes wide-scale dismissal and disqualification based not on individual records, but rather on party affiliation, political opinion, or association with a prior State institution. Parties under investigation ought to be notified of the allegations against them

[24] Alexander L. Boraine, "Transitional Justice: A Holistic Interpretation", *Journal of International Affairs,* Vol. 60, No. 1 (2006) at 23-24.

and given an opportunity to respond before a body administering the vetting process. Those charged should be entitled to reasonable notice of the case against them, the right to contest the case and the right to appeal an adverse decision to a court or other independent body[25].

Academicians and practitioners widely agree that certain strategies ought to be necessarily followed while carrying out the process of vetting, in order for the transitional mechanism to be successful in post-conflict regions. There are three vital steps that are essential to this process: the first is to identify the institutions and positions that should be subjected to vetting, the second is to identify the individuals who ought to be vetted, and the final step is to determine the design of the vetting process.

1) Identifying the Institutions and Positions

Vetting processes are mostly implemented in the police sector and judiciary; however, it has been seen that in places where less violent misconducts took place, like Poland and Hungary, vetting was focused at the broader range of targets, including electoral posts, universities, and the media. In the Czech Republic, for instance, lustration procedure reached wide range of public offices such as all ranks of the judiciary and prosecution office, civil service, all ranks of senior administrative positions in all constitutional bodies, the army, the police, all intelligence service specialized in political surveillance and prosecutions, State media, press agencies, State corporations, university administrative positions of head of academic departments, etc[26]. In Hungary, subject to lustration were members of parliament, ombudsmen, members of Constitutional Court, the president and vice president of the Supreme Court, the chief prosecutor, the public administration of highest level, including the president and the members of the cabinet, the police and the media[27].

2) Identifying Individuals

Even within the institution individuals or a target group ought to be identified. A failure to identify a target group prior to running vetting process would allow circumvention and might render the whole process obsolete. Personnel identification will also assist in planning realistic and feasible reform process and might be used for establishing a proper personnel management system for the institution in question. However, identification as a sole measure is not enough.

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[25] UN Doc (S/2004/616) at 18.
[26] Alexander Mayer Reickh, Pablo De Greiff (Ed.), *Justice As Prevention: Vetting Public Employees in Transitional Societies* (Social Science Research Council, New York, 2007) at 21.
[27] *Ibid*.

Reliable records about the integrity of the persons subject to vetting are condition of any successful vetting process and thus need to be established. In order to collect reliable integrity data, background information might have to be collected from variety of sources which include, among others, personnel files, court records, truth commission reports, media reports, party files, United Nations reports and NGO reports available. On the other hand, public should be given opportunity to come forward with information as a useful tool for checking on the integrity serving public employees[28].

3) Design of the Vetting Process

Resistance to reform is a regular feature in the countries emerging from conflict or authoritarian rule. Especially, individuals and groups that risk losing power and influence through reform process often resist its implementation. However, any particular transition has its own characteristics and context in which it operates that might make it either more or less open to vetting.

Vetting processes regulate access to ruling positions and are highly political undertakings, notably in the post-conflict settings. In order to assess external conditions to implement vetting process, it is necessary to screen concrete political conditions and assess possible risks that might obstruct the vetting process. That is to say, the nature of transition should be carefully analyzed, potential resistance to the vetting process should be considered in advance, and reform oriented human capacities that may assist in the design and implementation of a vetting process should be identified. Furthermore, a firm legal basis is necessary for establishment of vetting processes. Depending on specific settings in which vetting processes are to be implemented, international or national legal frame should be followed in order to run the reform processes. As argued above, any vetting process will be contested and will create political resistance, but if an explicit commitment to vetting in a peace agreement or Security Council resolution exists then it will be far more difficult to circumvent vetting process. If special national legislation is required, which is the most regular case, it should be clear, precise and in compliance with constitutional requirements and international standards.

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[28] Maja Kova, "Vetting as an element of Institutional Reform and Transitional Justice", *Zbornik IKSI* (2007) at 53-75 *available at*:
https://www.academia.edu/2565556/Vetting_as_an_Element_of_Institutional_Reform_and_Transitional_Justice
(Last Visited on Jul 20, 2016).

Vetting is a complex, time-consuming and resource-intensive process. Therefore the success or failure of it depends on thorough evaluation of operational requirements, and external factors that will influence it, as well as provision of adequate time and resources. It is of crucial importance, though, to avoid possible undesirable consequences of a vetting process such as political misuse, governance gap and destabilization. Vetting process can be misused in political purposes. Removals of the public servants can be based on group or party affiliation, rather than on individual conduct, target political opponents, and even degenerate to political purges. On the other hand, vetting, by removing larger number of public employees (notably, senior or expert) may create governance gap if the functioning of the institution is disrupted. Thus, vetting processes if they are likely to cause the risk of governance gap, should be implemented in phases in order to prevent this risk. Furthermore, the potential risk of destabilizing effects of removals from public service should be assessed prior to designing a vetting process. In particular, if large number of security sector employees has been removed they may turn to armed opposition or organized crime and create security threat[29].

Reconciliation

A number of commissions till today have talked not just about truth but also about reconciliation. Even though reconciliation has religious connotations, and it has been preferred that they be not used by Commissions whose purpose is to recover the truth, the concept has nevertheless been used by the Commissions to get to the core of the problem and the conflict. Some measure of reconciliation has been achieved in deeply divided societies by creating a common memory that can be acknowledged by those who created and implemented the unjust system, those who fought against it, and also the neutral civilians.

The process can often be very dangerous as it may involve demilitarization, handing over of arms and re-integration of former rebel armies. Reconciliation usually begins at different points in the process of transition. In some instances it may begin at the negotiating table, for some at the stage when the perpetrators are indicted and prosecuted, for others when prisoners are being released or a new constitution is being adopted, and still others when for the first time free and open elections are being held. But once the process begins it goes on, often for a pretty long time, especially in countries where the oppression has been deep and lasting.

[29] *Ibid*.

Gaining the trust of citizens in such processes is the most important, as otherwise they will not be ready to invest their energies in the consolidation of democracy. Victims have to believe that their grievances will be addressed, that their cries will be heard, and that the silence will be broken. Therefore, the best point when reconciliation can begin is when the perpetrators are held to account, need for reparations is acknowledged and acted upon, truth is sought openly and fearlessly, or institutional reform commences[30].

CONCLUSION

There is no doubt that transitional justice has mostly focused on remedying violations of civil and political rights, and thus, has to an extent evolved in relative isolation from important developments in the area of economic, social and cultural rights. Through the myriad General Assembly Resolutions and Reports of the Secretary Generals, and the proactive work of the United Nations in this regard, however, the importance of violations of economic, social and cultural rights has been realized as being a major part of the root causes of such conflicts. Therefore, the focus of the UN as well as other regional institutes has extended, and continues to do so, beyond addressing only the crimes and abuses committed during the conflict that led to the transition.

When enormous difficulties can commonly arise to achieve justice even in normal situations, the intensity of the problems that can appear during transitions of post-conflict societies, when the justice aims at not just trying and punishing the perpetrators of violence and crimes - but re-building the entire society, can at the least be said to be massive and tremendous.

Establishment of Rule of Law in such societies has two major goals: one is to prosecute the offenders and the second is to rebuild the societies and embark on the journey of reconciliation. There is a need therefore, to follow a holistic approach to achieve justice in such societies, which must additionally also be institutional in character and well regulated - in order to gain the confidence of the citizens.

It is of great importance that at first the political and socio-economic situation of the society should be properly analyzed before any corrective steps are taken. For example, when the bombing stopped in Afghanistan it was widely held within the international community that trials and prosecutions should immediately start, whereas the pressing need was security, food,

[30] *Supra* note 23 at 22-23.

return of the refugees, and establishment of good governance. The same would hold true for most other countries undergoing transition. Therefore, it is the well thought-out and combined effects of judicial and non-judicial measures which is needed for a true transitional justice to prevail.