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# The Role Of Judges In Dealing With The Legacies Of The Past

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## I. INTRODUCTION

How do countries pick up the pieces after armed conflict, repression and gross human rights violations? This is an immensely complex issue that has vexed, and is vexing, many societies. It requires adherence to fundamental principles, but also vision and thinking "out of the box", as well as foray into approaches and disciplines other than law. Dealing with the legacies of the past is much more than a question of criminal justice and atrocities, much more than "healing" or "truth and reconciliation". Among the enormous challenges that countries like post-conflict Sri Lanka face are social repair, rehabilitation of towns, villages and infrastructure, assisting reintegration and co-existence of estranged communities, institutional reform and effective remedies for victims. But the law and judges have a vital role in the realignment that must take place. This is too often overlooked in the current dominant approach, which many call "transitional justice". Return to the rule of law[1] is central when law and order has broken down, or the law and its practitioners have become tainted by their record in times of repression and abuse. The law, legal institutions and practitioners, are critical pillars in the healthy society that should be an aim of post-conflict or post-repression national strategies. In 1996, the Parliamentary Assembly of the Council of Europe described the goals of the post-communist

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[1] There are many definitions; this author's understanding of the term is consistent with that of the UN Secretary-General in his Report, "Rule of law and transitional justice in conflict and post-conflict societies", UN Doc. S/2004/616, para.6. By this, the rule of law is "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated and which are consistent with international human rights norms and standards. It requires as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency".

process as being to create pluralistic democracies, based on the rule of law and respect for human rights and diversity.[2] Judges have a key role in that critical journey of realignment and repair.

The "transitional justice" approach that is presented as the done thing these days is often a blinkered obsession with narrow and artificial discussions about truth versus justice, courts of law and truth commissions, victims rights etc. An internet search for "transitional justice", would show that this approach focuses on transition and transience, as opposed to stressing normality and regularization of institutions and the functioning of a society. It does not sufficiently emphasise the rule of law, structural reform, due process, equality and non-discrimination or accountable governance in the transformation of a nation, and invariably exists separately of reconstruction or development funded and implemented by the international community.[3] And, it does not sufficiently centralise judges' role in the restoration of "normality".

My purpose here is to address the role of judges in dealing with the baggage of armed conflict, repression and human rights violations. In the elaborate programmes that are drawn up for countries emerging from crises, there is now almost always a role for the criminal justice system. This role is usually for the judge as part of a criminal justice process that is unfortunately often compromised through *realpolitik*. But the judiciary's vital contribution goes well beyond that, and is rarely sufficiently thought through or given the centrality warranted. Some of this may be because there is, among many in the industry that has developed around helping repair states, a distaste for courts and the lawyerly approach. This in part is rooted in a misconception, which became prevalent after some members of the South African Truth Commission belittled criminal justice as harmful for being "retributive" and extolled the miraculous virtues of the alternative practices invented for that commission, described in glowing terms as "restorative justice".[4] This misunderstands the vital function of law and judicial systems in regulating society. There is also a fundamental misconception about retribution, for punishment only comes into play when facts have been determined according to well-established standards, responsibility allocated based on the evidence and the court considers sanctions appropriate for wrongdoing. The judge is not just a

[2] Parliamentary Assembly, Council of Europe, Resolution 1096 (1996)1 on measures to dismantle the heritage of former communist totalitarian systems, para. 2.
[3] These programmes are usually based on a rule of law template. Their record in Cambodia, East Timor, Kosovo, Haiti and Bosnia-Herzegovina, suggests that they are poor value for the investment. See for example, Scott N. Carlson, "Legal and Judicial Rule of Law Work in Multi-Dimensional Peacekeeping Operations: Lessons Learned Study", United Nations Peacekeeping Best Practice Section (2006).
[4] See for example, Desmond Tutu, NO FUTURE WITHOUT FORGIVENESS, Doubleday, 1999 and Pumla Gobodo-Madikizela, A HUMAN BEING DIED THAT NIGHT: A SOUTH AFRICAN STORY OF FORGIVENESS, Houghton Mifflin, 2003.

stern renderer of punishment. Judges can be fact-finders, or discerners of "truth". They can provide remedies, where they have such powers. Judges sometimes have powers to right wrongs. They have informed and relevant perspectives on the society which they are tasked to assist in governing. Rarely does anyone bother to ask the judges and the judicial officers about their views on the way forward. I will never forget having to be part of a United Nations delegation that went to the District Court of Dili in 2000 to explain new legislation passed by the mission on dealing with the past, and the outrage and frustration expressed by the East Timorese judges, prosecutors and lawyers at having been excluded until that stage, including from discussions on their roles.

My study on judges' role in dealing with the past is designed to clarify some of this. I do not wish to suggest that a legal approach on its own will suffice. In fact, I strongly oppose a purely legalistic approach to dealing with such situation. But, I see a serious imbalance in the sidelining of the rule of law in the current paradigm and I shall attempt to realign some of this by bringing to light the considerable role for judges in the recalibration of a society. My approach will be international and comparative, looking at the roles that judges have played in times of political change. I do not suggest that any of these are ideal, or that they should be emulated as they stand. However, I do hope to convey a range of ideas and possibilities that may be helpful in shaping the contribution of the judges and courts in countries such as Nepal in the journey out of the bad times. I begin with a general consideration of judges' role in a changing society. Then, I address the main types of activity for judges in dealing with the past, ranging from fact-finding to legal proceedings and then to vetting and lustration. This is about judges being tools for wider change. I move onto the issue of judges as subjects for change, where they themselves come under scrutiny. I wrap up with an overall analysis of what they can offer in these situations. My focus is on judges as judges, so I will not be studying their role as victims or in their private capacity.

## II. THE ROLE OF JUDGES IN A CHANGING SOCIETY

We know that judges are supposed to be impartial and independent arbitrators of disputes, determining the facts (or "truth"), applying just laws to these facts or "truths" in an even-handed manner in a process that is procedurally fair, and delivering a just outcome and sanction. This core role applies across the civil-common law divide. But the judge's role goes further than this mechanical process. Justice Michael Kirby of Australia has stirringly said: "*To be a judge, is to be concerned with something deeper, broader and more universal – the attainment of justice and*

*the respect for values common to civilised people*."[5] Ordinary people have come to expect more of their judges than to be mere arbiters of disputes. Judges are to protect their interests from encroachment by the state; as the embodiment of noble concepts such as "justice" and "rule of law", they are expected to "*provide a haven for those who are oppressed and bewildered*".[6] Judge McLachlin, Chief Justice of Canada, cautioned that modern judges must "*possess a keen appreciation of the importance of individual and group interests and rights. And they must be in touch with the society in which they work, understanding its values and its tensions*".[7]

Change is nothing new, in the justice system. Even in "normal times" – with peace and stability in society, with respect for the rule of law and the judicial function – there is natural change and evolution. Modernity and the digital age are creeping into justice systems. Courts and those who work in them are subjected to new standards such as those required by international human rights law, and the demanding expectations of a more informed society. Judiciaries have had to move with the times, for example in the basic tasks and responsibilities of judges, in the system of administration of justice, as well as in their appointment, removal and disciplining. They are in the spotlight in a way they never have been. There is greater media and professional scrutiny, including criticisms of the court, individual judges, their decisions and the legal system. One has only to think of the outcry following a case in Saudi Arabia in which a rape victim was punished with six months in jail and 200 lashes for being in a car with a man other than her husband and for "*her attempt to aggravate and influence the judiciary through the media*".[8] These days, huge numbers of people can, within a short period of time, scrutinise judges' conduct and decisions.

Now, what about extraordinary times? Armed conflict and repression often yield radical changes. Sometimes judges are attacked, or are killed and "disappeared"; they are replaced by those favoured by the new regime or who choose to go along with the repression and become an instrument by which unjust policies are enforced. Sometimes, the courts cannot function or do so in a way that fails to meet international standards, becoming sources of injustice and insecurity.

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[5] Michael Kirby, "To Judge is to Learn", 48 Harvard International Law Journal Online 36 (2007), p.47.
[6] Attributed to Justice Bhagwati.
[7] Remarks of the Right Honourable Beverley McLachlin, P.C., "The Role of Judges in Modern Society", May 5, 2001, Remarks of the Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada at the The Fourth Worldwide Common Law Judiciary Conference, Vancouver, British Columbia, Canada.
[8] Press Release, Human Rights Watch, "Saudi Arabia: Rape Victim Punished for Speaking Out: Court Doubles Sentence for Victim, Bans Her Lawyer From the Case", 17 November 2007.

If a society begins to shift away from a legacy of brutality, judges and their role in maintaining order in a society can also face new pressures and expectations. People look for stability, for security, for assurance from the courts. Victims and society demand "justice" from the courts and complain loudly when not satisfied. They will often not be confident about the integrity or fairness of the system and those who work for it. This mistrust can affect the attempted transformation. Judges can make a difference if they have the will, abilities and the wherewithal to do so. They will need a huge amount of support. Judges are not supermen or women capable of fixing the world's wrongs. They need strong laws, infrastructure, training and a great deal else to tackle the challenges of the past in their courts. Above all, they need to be part of a cohesive multi-pronged scheme for transformation. Speaking of ordinary times, Justice Kirby has stressed that judges have to conform to all validly made laws but that they have "*neither the authority nor the power to wave a magic wand and to cure all injustices in society*."[9] How much more so in times of change. Judges are an essential pillar in a nation's architecture, but if the nation is to be strong, the mortar and all else that comes with it must be provided.

As part of the break with the past, many new democracies have adopted new constitutions and created constitutional courts with the power to review the actions of the executive or parliament. In some countries, judges of the supreme court serve as the guardian of the constitution. Opponents see the danger of unelected judges overturning laws and decisions made by those who have been democratically elected, while supporters see judicial review as a bulwark against the tyranny of the majority. The original post-revolutionary constitution was that of the USA, with its jurisprudence developing from landmark cases such as *Marbury v. Madison*.[10] After World War II, many states, such as Germany, Austria and Italy, pursued constitutions that entrenched individual rights and allowed for courts to check executive or parliamentary powers. Some newly independent states also pursued the constitutional route, and used the drafting process for forging a national identity and a shared vision among the country's peoples. India's constitution was born of consultation. Its supreme court is vested with the power of supervising the constitution, and stands as an example of judicial activism and progressive approaches to the human rights challenges enshrined in the constitution. Another wave of constitution-making occurred after the collapse of communism and authoritarian regimes in the late 1980s, in Hungary for example, and in Asian countries such as South Korea, the Philippines and Indonesia.

[9] Michael Kirby, "Strengthening The Judicial Role In The Protection Of Human Rights – An Action Plan", Inter-Regional Conference On Justice Systems And Human Rights, Concluding Session, 20 September 2006.
[10] Marbury v. Madison 5 U.S. 137 (1803).

The judges' role is not easy, for these are particularly political and sensitive matters, requiring difficult legal and ethical decisions. For example, dealing with statutes of limitation and acts that were sanctioned by laws of a previous regime can be challenging. The rule of law needs to be entrenched, but that principle prohibits ex post facto laws the new regime often seeks to use to deal with the past. Judges in emerging democracies can take comfort from the fact that judicial review even in the USA emerged from a long process of a struggle for judicial independence. In post-communist countries such as Hungary, the constitutional court has emerged as a political actor in the shaping of a new constitutional order. The early members of the court were able to draw on the discipline of constitutional interpretation to tackle issues such as freedom of expression and association and right to property, and set Hungary on the road to membership of the European Union and Council of Europe.[11] These courts have tackled difficult issues surrounding lustration laws, and the applicability of statutes of limitations. The Czech constitutional court took the view that where statutes of limitations were part of a deliberate practice of unlawfulness, there is no obligation to respect them and bar prosecution on the grounds of legality.[12] The articulation of personal, civil and political rights has been "*the most visible and most obvious area in which the break with the authoritarian past could be made, and largely has been made*"; the work of the Eastern and Central European constitutional courts has "*been a real showcase of the role of constitutional courts in applying democratic and liberal standards to the interpretation of constitutions in post communist states*'.[13]

South Korea provides a useful lesson from Asia. Its constitutional court has had to tackle not just issues rife with politics but highly sensitive ones to do with gross violations of human rights from the past. In 1995, the court was seized of the prosecutions against two former presidents for crimes including the notorious Gwangju (also spelled Kwangju) massacre and arrests in May 1980. The specific constitutional law issues included the exercise of prosecutorial discretion in refusing to prosecute them and the 15 year statute of limitations.[14] The court held that the statute

[11] See generally, Laszlo Solyom and Georg Brunner, CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY: THE HUNGARIAN CONSTITUTIONAL COURT, University of Michigan Press, 2000.
[12] See Czech Republic: Constitutional Court Decision on the Act on the Illegality of the communist Regime, reprinted in Neil Kritz (Ed.), TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES, COUNTRY STUDIES, Vol. 2, pp. 550-51.
[13] Wojciech Sadurski, RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE, Springer, 2005, (hereafter "Sadurski, RIGHTS BEFORE COURTS"), p.169.
[14] James M. West, "Martial Lawlessness: the Legal Aftermath of Kwangju", 6 Pacific Rim Law and Policy Journal, 1997, pp.85-168, at p.105.

of limitations did apply and that the constitution forbade prosecution of sitting presidents for crimes other than treason or insurrection. This legalistic approach, rather different from that of the Czech court cited above, did however, allow the prosecution of crimes related to Gwangju. But the court did not declare the exercise of prosecutorial discretion to be unconstitutional. The influence of the court was such that rumours of an impending decision in favour of a petition from victims and thus forcing the government to prosecute, were apparently sufficient to persuade the prosecution to reopen investigations into the 1979 coup and the Gwangju massacre.[15] The rumours turned out to be false, but the victims' families withdrew the case after the decision to reopen investigations. Litigation before the constitutional court on Gwangju continued: in 1996, the court, in a sharply split decision, upheld two controversial acts of parliament which had, *inter alia*, extended the statute of limitations.[16] This led to the landmark prosecution of the two former presidents Chun and Roh.[17]Commentators have observed the degree to which the judges of this constitutional court have drawn from international laws and practice on retroactive justice, for example citing German practice after World War II and reunification, and the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.[18] The court has contributed to consolidating democracy and bringing the military under civilian control, having been active in dealing with the legislative legacies of the previous authoritarian regimes. For example, in 1992, it struck down Article 19 of the National Security Act of 1980, that allowed for extended pre-trial detention for up to 50 days (the norm being 48 hours under the Code of Criminal Procedure), restricted the applicability of certain offences in the 1980 Act and upheld the right to freedom of expression as against the Military Secrets Protection Act.[19]

A lesson from countries in post-conflict, post-repression or not-quite-over-the-bad-times situations is that the rule of law is of utmost importance. It is like a golden thread. Within the limits of their powers, judges have the ability to use this golden thread to mend the cloth of the nation. Their critical role in maintaining the rule of law must be prioritised. In reconstructing the Balkans, elections and political reforms were stressed, not the rule of law. A former High Representative to Bosnia-Herzegovina admitted that "*In hindsight we should have put the establishment of rule of law first, for everything else depends on it; a functioning economy, a free*

[15] C. W. Lim, "Student Clash with Riot Police over Kwangju Massacre", Agence France-Presse, 27 November 1995.
[16] Tom Ginsburg, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES, Cambridge University Press, 2003, p.231.
[17] *Ibid.*, p.231.
[18] *Ibid.*, p.232.
[19] *Ibid.*, p.236-237.

*and fair political system, the development of civil society and public confidence in police and courts.*"[20]

The Bosnian courts, used to entrench policies of ethnic cleansing during the war, continued to be deeply politicised long after the peace agreement signed at Dayton,[21] rendering the attainment of its objectives elusive. To this day, 12 years after the agreement, there is a lack of public confidence and trust in judges and their decision-making, which deters use of the justice system and degrades the rule of law. In East Timor too, the United Nations failed to appreciate the centrality of the rule of law in the rush to help the nascent nation to its feet. The justice system faced massive challenges, as the court buildings and the infrastructure were destroyed and the judicial personnel had departed with the Indonesians. There was no recognisable rule of law culture and there were problems with what law applied in liberated East Timor. The UN, faced with competing demands, created institutions without ensuring, through adequate support on all fronts, that they would function appropriately. The inability of the courts to offer a venue for peaceful resolution of disputes and hold the confidence of the public is clear in the sad degeneration that the world's newest country has seen in its first few years of independence.

To be a judge is to enjoy a great trust, Justice Michael Kirby has observed. [22] Judges are supposed to be the guardians of liberty and fundamental rights. My second point links to the first. Public approval and social acceptance of judicial institutions, so essential to the construct of a peaceful society abiding by the rule of law, is tied to confidence in the integrity of its participants. This is about transcending formal legitimacy, for a pedigree rooted in the past does not equate to a democratic, transparent or accountable institution. The justice system and those who work within it have often been discredited during the previous regime. Trust will have been lost, if it ever was there. The challenge for judges, when change comes, is to earn or restore public confidence in the courts and the legal and judicial systems. The correct handling of the process of dealing with the past is one way of restoring, or even earning, that confidence and trust. China affords an example. After the social and physical devastation of Mao's Cultural Revolution, the courts, instruments of repression during those times, were used as part of a redress and rehabilitation programme (see later discussion). This also allowed the courts to rehabilitate themselves. Travaskes describes how

[20] See Lord Paddy Ashdown , "What I learned in Bosnia", New York Times, 8 October 2002.
[21] The General Framework Agreement for Peace in Bosnia and Herzegovina, see www.ohr.int/dpa/default.asp?content_id=380.
[22] Michael Kirby, "To Judge is to Learn", 48 Harvard International Law Journal Online, 2007,pp.36-47, at p.36.

the decision to address the Cultural Revolution cases and rehabilitate victims was advocated as a sign that the courts had metamorphosed from a draconian mass-line institution to a modernist one, allowing them to become reformist agents.[23] The imperative for the courts in Deng's China was to "*create a new court culture by modifying their image of authority and modifying their authority relations with other government and party agencies and the wider community*".[24] Similarly, it was no accident that in the very first case before South Africa's constitutional court, established under its post-Apartheid interim constitution, it held that the mandatory death penalty, administered with rigour under the previous regime against political opponents with the judicial system's help, was unconstitutional.[25] The court held that the penalty violated the prohibition of cruel, inhuman and degrading punishment or treatment, and the right to life and dignity.[26]

The reality for countries struggling to find their feet is that one cannot cement a human rights culture and all the expectations of functioning systems that come with it, if the most important issues are constantly being resolved by specially created process and institutions. "Mainstreaming" is required; it is time to move away from the unhelpful fixation with the notion of "transition". Regular, everyday institutions need to be enhanced and strengthened so as to be able to meet these challenges. Courts are the prime example of such an everyday institution.

## III. JUDICIAL INVOLVEMENT IN PROCESSES OF DEALING WITH THE PAST

Before delving into the three categories of activity that judges are often drawn into in times of transition, I would like to underscore their contribution in two areas which span past and present, and the proper handling of which is essential to a successful transition and enduring peace.

The first relates to crimes or human rights violations from the past which reach into the present. I speak here of persons who continue to be held in arbitrary detention, and those who have been "disappeared" with no information given to the families. So long as this situation continues, unlawfulness continues and the victim and his family will be able to claim violation of the right to an effective remedy. It is here that the courts' role is instrumental. For example, on 1 June 2007, a landmark Supreme Court judgment in Nepal recommended that Parliament enact a law

[23] Sue Travaskes, "People's Justice and Injustice: Courts and the Redressing of Cultural Revolution Cases", China Information, Vol.16(1), pp.1-25 (hereafter "Travaskes, People's Justice and Injustice").
[24] *Ibid.* p.22.
[25] This was the case of S. v. Makwanyane and Another 1995 (3) SA 391 (SA); 1995(6) BCLR 665 (SA).
[26] *Ibid.*

criminalising enforced disappearance in line with the International Convention for the Protection of all Persons from Enforced Disappearance, and establish an investigation commission.[27] The court also required the government to prosecute those responsible for the death in custody of Chakra Bahadur Katuwal, and take administrative action against members of the security forces under investigation for involvement in Katuwal's death. In another landmark decision on 12 May 2008, the court ordered the government to enact a comprehensive law to address human rights violations and breach of humanitarian law to which Nepal is party so as to prosecute and provide reparation/compensation to victims. Justices Anup Raj Sharma and Bal Ram KC issued the order in response to a writ petition filed by families of victims of the infamous Kotwada (Kalikot) massacre in which 17 workers were gunned down by the army in November 2001.[28] The landmark nature of the rulings is clear, but the assertion of judicial powers pursuant to the constitution also sends an important signal to the authorities and the public that the highest Court in Nepal is willing to deal with the legacies of the past that stretch into the present.

Another matter deserving more attention is the court's role in controlling the growth of criminal activity as the participants in armed conflict lay down their arms and demobilise. Criminal activity flourishes in the fertile soil of chaos and disorder, and one major challenge is how to control criminality when things normalise. These crimes may have their roots in the conflict or tensions of the past, or evolve from petty crimes such as theft to become serious ones such as trafficking and smuggling of drugs and weapons, terrorist acts, human smuggling, money laundering and the like. These tend to be organised crimes, by Mafia and triad like groups, and can destabilise a post-conflict society. They can endanger "general security" and "establishment of post-conflict peace and order," jeopardise reforms and threaten to "undermine public trust in nascent criminal justice institutions".[29] This is the case where there are power and security vacuums, when law-and-order institutions are unable to function effectively. Criminal networks may form parallel power structures. Nepal, with its fragile peace and nascent democracy is one of the countries believed to be at risk from organised crime stepping into a security vacuum.[30]

[27] Decision of the Supreme Court on Disappearance Case, Order Re: Habeas Corpus, Writ no 3775 registration date 2055/10/7/5 B.S. (Jan 21, 1999 A.D.), Rabindra Prasad Dhakal on behalf of Rajendra Prasad Dhakal (Advocate), v. Nepal Government, Home Ministry and Others – Respondent.
[28] Birendra Thapaliya and others v. Office of the Prime Minister and Council of Ministers of Nepal, Supreme Court of Nepal, 12 May 2008, Writ no 0328 (Unpublished).
[29] Colette Rausch (Ed.), COMBATING SERIOUS CRIMES IN POSTCONFLICT SOCIETIES: A HANDBOOK FOR POLICYMAKERS AND PRACTITIONERS, US Institute of Peace Press, p.3.
[30] *Ibid.*, p.6.

## A. FACTFINDING

Uncovering the facts of what happened in the past is important: without an investigation, one cannot know if criminality has been committed, identify perpetrators and take action.

However, the complexity of situations of armed conflict and human rights violations require that fact-finding does more than establish what happened, where, when exactly and to whom. Atrocities like genocide do not emerge out of nowhere, but are cumulations of social, political and historical factors, often fuelled by disinformation and propaganda about the other side, as well as manipulation about impending threats therefrom. Often large numbers of persons are involved in conduct the law regards as criminal, such as direct perpetration, aiding and abetting, inciting or ordering and collectives of persons planning criminal acts. Some are in position of great influence, others are foot-soldiers. There are other layers of responsibility, which are not legal in nature, but involve moral guilt (the South African Truth and Reconciliation Commission used a range of categories of blameworthy conduct: official tolerance of violations, failure to resist the system in which they occurred, i.e. bystander complicity, political and moral accountability for gross violations, guilt through apathy, direct accountability and indirect responsibility).

Untangling the web is essential if one wants to go beyond guilt or innocence in the individual case. One would want to go beyond because the root causes of the abnormality remain; failing to deal with the causes and legacies of armed conflict and human rights violations increases the risks of recurrence. A recent study counsels realism in expectations from various approaches:

"*Post-conflict trials as well as other types of justice do lead to a more durable peace in democratic as well as non-democratic societies, but the results are weak and are therefore difficult to generalize. Forms of non-retributive justice (i.e. reparations to victims and truth commissions) are however, strongly associated with the duration of peace in democratic societies, but are not significant for non-democratic societies. Amnesty tends to be destabilizing and generally associated with shorter peace-duration, but exile tends to lead to a more durable peace*".[31]

## 1. THE MECHANISMS

[31] Tove Grete Lie, Helga Malmin Binningsbo and Scott Gates, "Post-Conflict Justice and Sustainable Peace", Post Conflict Transitions Working Paper No.5, abstract section (no page numbers).

*Judicial Commissions of Inquiry*

Many countries rely on the expertise of their senior judges to investigate gross violations in a neutral, non-partisan way. The judges conduct their investigations following their mandate, using fixed standards and procedures. They eventually issue a report that is usually made public.

Northern Ireland conducts investigations through legal provisions, such as section 44 of the Police (Northern Ireland) Act 1998, section 7 of the Prisons (Northern Ireland) Act 1953, and the new Inquiries Act 2005. It is still struggling to get the correct balance to ensure the investigations are consistent with international human rights standards. At the time of writing, there is an inquiry under the chairmanship of Sir Michael Morland into the 1999 murder of human rights lawyer Rosemary Nelson. Its terms of reference are to determine whether any wrongful act or omission by or within the Royal Ulster Constabulary, Northern Ireland Office, Army or other state agency facilitated her death or obstructed the investigation of it, or whether attempts were made to do so; whether any such act or omission was intentional or negligent; whether the investigation was carried out with due diligence; and to make recommendations.[32] This commission has heard testimony, including from former UN Special Rapporteur on Judicial Independence Dato' Param Cumaraswamy, to whom Nelson had complained about threats.[33]

Nepal has its 1969 Inquiry Commission Act, recently criticised by the supreme court in the Rajendra Prasad Dhakal case.[34] The act was used to set up the panel headed by Justice Mallik, looking into loss of life and property (1990). So too, the High Level Commission of Inquiry on Disappeared Persons, to investigate disappearances from 13 February 1996 to 21 November 2006.

[32] See the website of the inquiry at http://www.rosemarynelsoninquiry.org/.
[33] The Irish News Online, "Ex-UN rapporteur regrets 'not saving Nelson's life'", 6 June 2008.
[34] Decision of the Supreme Court on Disappearance Case, Order Re: Habeas Corpus, Writ no 3775 registration date 2055/10/7/5 B.S. (Jan 21, 1999 A.D.), Rabindra Prasad Dhakal on behalf of Rajendra Prasad Dhakal (Advocate), v. Nepal Government, Home Ministry and Others – Respondent, p.30. "The Commission of Inquiry Act that we have seems to have been issued only for establishing Probe Commission on the matter of public importance in normal situation. The Act does not seem to have imagined to include within its sweep special types of incidents arising during the time of conflict. This Act was not enacted to include such kinds of events. After studying the Act in totality, it seems to us that there are not reliable grounds to believe that an Inquiry Commission constituted in accordance with this Act to find out the status of disappeared citizens would be capable enough to carry out effective probe."

There are many issues of concern running throughout these judicial inquiries, not least, the often limited mandates, allegations of 'whitewash', the failure of the state to implement recommendations, or make them public. State failure would lead to violation of Article 2(3) of the International Covenant on Civil and Political Rights,[35] which lays down a clear duty in relation to the right to an effective remedy: The state has to provide an effective remedy, for example allowing access to competent judicial, administrative or legislative authority. Where none exists, the state is required to develop the possibilities of remedy and enforce remedies when granted. International human rights law sets down guidelines on investigations into violations. For example there are UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions[36] which give detailed guidance for conducting a thorough and professional investigation.

*Coroner inquiries*

Coroner inquiries are not usually included in the options available to countries in transition. But an Australian coroner has reminded the world of how doing things in a straightforward, old fashioned way produces fact-finding of immense value and import, even in matters going back decades.[37] In 2007, Magistrate Finch, Deputy Coroner of New South Wales, was able, over a six week period, to conduct a highly professional investigation using rigorous standards and the discipline and methodology of the law. She gathered evidence, including from witnesses who testified, rigorously tested it, and made definitive findings about the unlawful killing of Brian Peters and four other Australian journalists in the East Timorese town of Balibo in 1975. She summoned former ministers, including a former prime minister, intelligence and military officers and subpoenaed previously suppressed government documents. She sent summonses seeking the attendance of Indonesian army officers. This coroner's inquiry, an "ordinary" mechanism in many countries, was applied to an extraordinary situation to establish a reliable and comprehensive prima facie account of what happened. It has provided a dignified and serious proceeding with a reliable outcome that victims' families had sought for years, leading to the

[35] International Covenant on Civil and Political Rights, 19 December 1966, 999 U.N.T.S. 171, (entered into force 23 March 1976).
[36] Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, recommended by Economic and Social Council resolution 1989/65 of 24 May 1989.
[37] The text of the inquest report can be seen at http://www.etan.org/etanpdf/2007/Peterssinquest1.pdf. It is most instructive to compare this with the Truth Commission (CAVR) report on Balibo at paras.93-105 of the Section on Unlawful Killings and Enforced Disappearances, at http://www.cavr-timorleste.org/chegaFiles/finalReportEng/07.2-Unlawful-Killings-and-Enforced-Disappearances.pdf.

finding that the journalists were unlawfully killed by Indonesian Armed Forces. The words of the widow of one of the five men, whom the coroner declared to have been deliberately killed on the orders of a named Indonesian field commander, confirm the cathartic impact such a professional approach can have on family members: "*It shows that one thing that I've worked for all these years, is that proper respect would be paid and it never ever has been until today*".[38]

*Truth and Reconciliation Commissions*

There is now another mechanism, engaged in what could at one level be seen as fact-finding but which its proponents describe as "truth-seeking". This is the so-called "truth and reconciliation commission", designed for important social engineering and to take the country forward. Empirical, objective testing is emerging of many of the exuberant claims about the contributions of such mechanisms. Ten years of research on the work and the impact of the South African Truth and Reconciliation Commission led to a study by Chapman and van der Merwe showing the exaggerated nature of the claims about miraculous social repair, justice and healing.[39]

Nepal is the latest to join the club of nations with such a device. So what is the role of judges in such commissions? Some, such as the Indonesia-East Timor Truth and Friendship Commission, have sitting judges participating as commissioners. Judges – and in fact most lawyers – are likely to find the procedures and working practices of truth commissions to be unsettling. But to be fair, these are not legal mechanisms and looser standards apply across the board. As commissioners, judges would participate in all aspects of the commission's work, which include the gathering of information, through public hearings on thematic issues such as "political killings", "detentions" or examining the role of key institutions and sectors of society. They would participate in evaluating the product of the "truth-seeking", and in drafting a report giving as complete an account of the past as possible. They may sometimes identify perpetrators and victims, and make recommendations for prevention and further action in order to transform a nation and its people.

Amnesty was the price to pay for peace in South Africa. The Truth and Reconciliation Commission was the vehicle through which the amnesty was implemented. In order to ensure an adequate degree of rigour, the important Amnesty Committee included six high court judges, five

[38] ABC News, "Balibo 5 deliberately killed, coroner finds", 16 November 2007.
[39] Audrey R. Chapman and Hugo van der Merwe, TRUTH AND RECONCILIATION IN SOUTH AFRICA: DID THE TRC DELIVER?, University of Pennsylvania Press, 2008.

attorneys and eight advocates.[40] This was one of the few areas where the legal methodology and standards were clearly discernable in the commission's work. As the commission points out in its final report, "*applications were analysed by lawyers and judges on a strictly legal basis*".[41]

Another important contribution that judges can make to truth and reconciliation commissions lies in their judicial role. In South Africa, the commission devoted an entire chapter to the legal challenges it faced, lamenting that during its lifetime, "*the Commission was so often involved in litigation that one could be forgiven for thinking that it was under siege*'.[42] These challenges, heard by judges of High Courts, Provincial Appeals Courts, and the Constitutional Court, can be sorted into nine categories: applications challenging the constitutionality of the Act that created the Commission, including its powers to grant amnesty; applications to prevent the granting of amnesty; challenges to the Commission's procedure, to its impartiality and to amnesty decisions; requests for information; complaints to the Public Protector; requests for judicial review of the Commission's decision and challenges further to refusal to appear before it.

The ability to access the newly restructured courts in this manner provided checks and balances against the Truth and Reconciliation Commission and served as an important form of public accountability. This resort to the courts also reveals the instinctive resort to the rule of law – here one stresses these are the courts of law of the new Rainbow Nation – for the defence of one's entitlements against perceived encroachments by a powerful state sanctioned entity. Some parties were used to relying on force to settle disputes: they included the National Party, the African National Congress, the Inkatha Freedom Party and a group of South African generals. Regardless of how one may view the judgments of the South African courts in individual cases, this, to my mind, underlines the important role judges have to play in cementing the rule of law and facilitating the transition. I would suggest that this safeguard should be available for every such commission, and especially so when it has the powers of the kind the South African one had.

## B. JUDICIAL PROCEEDINGS

Judicial proceedings lie at the heart of the judicial function within the legal system. International law imposes several obligations that require access to, and use of, the mechanism to deal with

[40] South African TRC Report, Vol. 6, Ch.2, pp. 18-19.
[41] South African Truth Commission Report, Vol.1, Ch.11, p.368.
[42] South African Truth Commission Report, Vol.1, Ch.7, p.175.

past crimes. In relation to violations committed by the state, international law requires that the state provide an effective remedy to victims (see for example, Article 2(3) of the ICCPR). If there has, for example, been an allegation of torture, the authorities are required to conduct a bona fide investigation and take action against the perpetrator if unlawful conduct is found to have occurred. The state must also provide a remedy to the victim, usually in the form of reparation (compensation). In international humanitarian law, the language is not of remedies for the victim, but of obligations on the state for breaches. The four Geneva Conventions of 1949 and Additional Protocol I impose obligations to investigate, prosecute and punish, or otherwise extradite for trial, those accused of committing grave breaches of the rules set out therein.[43]

While trials of civilians before military courts are deemed problematic by the official human rights monitoring bodies, international law does not spell out the kind of court required, only that trials be fair, with due process, before independent and impartial tribunals. The choice of mechanism is essentially political. A state may not wish to surrender its sovereignty to another or to an international court, as in the cases of Cambodia and post-Saddam Iraq. The International Criminal Court (ICC) structure[44] is premised on the primary jurisdiction resting with the state, i.e. the country where the crimes took place. Thus, the principle of complementarity: the ICC only steps in when accountability goes wrong at the domestic level. The choice may also be imposed on a country, for example in the case of the ad hoc courts for former Yugoslavia and Rwanda.

There are situations where judges and the judicial process are excluded, thanks to amnesties providing either blanket protection from accountability before a court of law, or be conditional. An example of the latter was in South Africa, where the amnesty was the price to be paid for transformation from Apartheid to Rainbow Nation. The deal was that those who did not receive it, either because they did not apply or were rejected for failed to meet relevant legal standards, faced the possibility of trial. South African judges have tried just a handful of cases, such as that of former cabinet minister Magnus Malan and others (all acquitted) and former cabinet minister Adriaan Vlok (who entered a guilty plea), Johannes van der Merwe and others. Overall, the

[43] Geneva Conventions I (75 U.N.T.S. 31), II (75 U.N.T.S. 85), III (75 U.N.T.S. 135) & IV (75 U.N.T.S. 287), entered into force 21 October 1950; and their Additional Protocol I (1125 U.N.T.S. 3) & II (1125 U.N.T.S 609), entered in force 7 December 1978).
[44] International Criminal Court Statute 2187 U.N.T.S. 90, entered in force 1 July 2002.

dearth of a judicial role in relation to Apartheid-era accountability is not to do with the amnesty as such, but with the policy of the Mbeki government.[45]

1. Administrative hearings and civil procedures

Judges' role in resolving civil disputes arising out of the past is usually overlooked in "transitional justice" literature. Restitution of properties is the most compelling example of the role civil courts may play in righting historical wrongs. It is not widely known that after World War II, the allied powers established restitution courts to handle the thousands of cases where victims of religious, racial and political persecution were compelled to sell their assets under duress or where such assets were confiscated by the National Socialist regime. In the US zone of occupation, there was a US Court of Restitution Appeals, and later a Supreme Restitution Court, composed of five Justices, including two Americans, two Germans, and a "neutral" president.[46]

After the fall of communism, courts across Eastern Europe, including Lithuania and Bulgaria, grappled with the complex issue of property ownership. In the aftermath of the Balkan wars arising from the disintegration of a socialist federal republic, domestic courts have been working through complicated issues of ownership; in Bosnia-Herzegovina, this is done under the supervision of the constitutional court, the Human Rights Chamber and the international community. A number of Eastern European restitution cases have reached the European Court of Human Rights.[47] In Germany restitution was codified in the treaty of reunification, and put into effect through a series of laws, most notably the Law on the Regulation of Unsolved Property Questions. Restitution claims could be registered at one of the 221 local branches of the *Amt zur Regulung offener Vermögensfrage;* after exhausting layers of internal appeal, the applicant could appeal to the local administrative court. These claims offices and administrative courts have found themselves in the unenviable position of having to determine whether literally millions of homes and apartments, parcels of land, and country gardens, should remain with people who had occupied them for years or decades under the socialist system or be returned to their original

[45] See National Director of Public Prosecutions, Prosecuting Policy and Directives Relating To The Prosecution Of Offences Emanating From Conflicts Of The Past And Which Were Committed On Or Before 11 May 1994, 2005. This effectively revives the amnesty process of the Truth and Reconciliation Commission, and provides perpetrators with a "second bite at the cherry".

[46] The Harvard Law School Library has digitised the 12 volumes of opinions and other documents of these two courts. They are available through the Harvard University Library's Page Delivery Service. See http://www.law.harvard.edu/library/collections/digital/court_of_restitution.php.

[47] See for example, Malhous v. Czech Republic, Gratzinger and Gratzingerova v. Czech Republic; Broniowski v. Poland; Kopecky v. Slovakia; Jantner v. Slovakia.

owners.[48] Most of the cases that have gone to the administrative courts have involved overlapping claims to the same property, some going back to the period of National Socialism (unlike West Germany, East Germany lacked a scheme for reparation for victims of Nazism).[49]

2. Retrial and procedures for rehabilitation of victims

As already noted, courts in China had a role in redressing Cultural Revolution cases. This was part of a nationally stage-managed process rooted in the Chinese Communist Party's Third Plenum in 1978, which called for a new approach to socialist legality, and the Eighth National Judicial Conference in 1978 which produced a basic policy for redressing Cultural Revolution cases: "*if a case was wrongly judged from beginning to end, the judgment of the whole case should be corrected. If part of the judgment is incorrect, only the erroneous part should be corrected and if no mistakes were made in the original instances, no corrections should be made*".[50] The process of re-examination and correction lasted until 1983. According to Travaskes: "*in all, approximately three million individuals involved in cases not only from the Cultural Revolution but spanning the years 1949 to 1976 had been rehabilitated by the party, government or by the courts. There were 1.2 million cases from 1949 to 1978 that were reexamined by courts during the drive and, of these, 301, 748 cases were redressed. Of the total number of re-examined cases, 1.13 million were cases from the Cultural Revolution. There were 251,000 Cultural Revolution cases wrongly, falsely or incorrectly charged and sentenced (involving 267,000 individuals).Of these, 175,000 were counterrevolutionary cases (involving 184,000 individuals) and 76,000 were common criminal cases (involving 82,000 individuals)".*[51]

The redress of these injustices had to involve more than overturning or correcting judgments. Compensation was a major challenge, as was medical care and support, and ensuring that the victims of the Cultural Revolution and other administrative excesses could obtain work, housing,

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[48] A. James McAdams, JUDGING THE PAST IN UNIFIED GERMANY, Cambridge University Press, 2001, (hereafter "McAdams, JUDGING THE PAST IN UNIFIED GERMANY"), p.4.

[49] McAdams describes the Sonnethal case before the Potsdam Administrative Court involving transactions in the 1930s, while Mostert details a leading case that went from the Berlin Administrative Court to the German Federal Administrative Court's Seventh Senate where the property originally belonged to a person of the Jewish faith prior to World War II, was sold in 1936 to one R.Z., whose heirs were the applicants in the present case. Parts of the land were converted into so-called "Volkseigentum" in 1958, whilst the rest was expropriated in approximately 1984. See McAdams, JUDGING THE PAST IN UNIFIED GERMANY, p.140 and Hanri Mostert, "Lost Information and Competing Interests in Restoring Germany's Dispossessed Property – The Recent Decision of the German Federal Administrative Court", German Law Journal No.1 (1 January 2004).

[50] Travaskes, People's Justice and Injustice, p.5. This section on China draws on the work of Travaskes. I am grateful to my colleague Professor Fu Hualing for drawing this insightful work to my attention.

[51] *Ibid*, p. 6, citing a range of official and unofficial statistics.

residency permits and social security, and be spared discriminatory treatment. Travaskes' targeted study of the Baotou People's Court reveals it was active in trying to ensure that victims' socio-economic conditions was borne in mind and inter alia, ordered the local government to find them work and provide social support. Her study of the court's records show that from 1980 to 1981, the municipal government repaid approximately RMB119,400 in lost earnings, RMB104,392 was paid out in welfare allowances for those in financial difficulty and 437 people were found jobs.[52] Given that post-Cultural Revolution redress and rehabilitation was a national policy, the example of the Baotou court is presumably illustrative of a nationwide practice from 1979 to1983.

Judges in South Korea have been involved in an important process of rehabilitation of victims. "Honor-restoration" refers to restoration of legal status and social position to those who had been found guilty and those stigmatised as rebels or rioters or labelled communists under earlier authoritarian regimes.[53] For example, a Special Act of 1995 allowed any citizen "who had been convicted of certain acts in support of the Gwangju Democratization Movement" to petition for retrial. Even a citizen who had already been pardoned in the 1980s was now entitled to ask for retrial and seek a final judgment of innocence.[54] Han has detailed a number of important retrials leading to acquittal, including one where the conviction before a military court had been based on fabricated evidence, others where those convicted had been engaged in lawful exercise of their rights and some where the applicants had exercised their right to resist against the military and defend the constitution.[55] In January 2008, the Seoul Central District Court exonerated Cho Yong-soo, the late head of the Minjok Ilbo newspaper.[56] His brother had complained to the Truth and Reconciliation Commission alleging his late brother had not supported the communist North, had been wrongfully convicted and executed. The commission recommended the court review the ruling that led to the execution. The Seoul District Court found that "*the deceased did not participate in espionage for the North. And there is no evidence proving that he sided with the communist state*." The ruling came 47 years after he was executed in December 1961.

3. Domestic trials for breaches of domestic criminal law

[52] *Ibid.*, p.19.
[53] In Sop Han, "Gwangju and Beyond: Coping With Past State Atrocities in South Korea", Human Rights Quarterly, 27(2005), p.1033
[54] *Ibid.*, p.1035
[55] *Ibid.*, p.1035-1036.
[56] Details are from Park Si-soo, "Executed Daily Head Cleared by Court", The Korea Times, 16 January 2008.

Although they are rare, domestic courts also try cases of atrocities using domestic criminal laws.[57] One may, with good reason, object that to charge international crimes as domestic crimes is to downplay their seriousness. But sometimes there is no legal framework for the prosecution of international crimes in domestic courts, and it may be a choice between this or no prosecution. And, dealing with the legacies of the past is not just a question of atrocities. Murder, rape and abduction can be committed without reaching the realm of international crimes.

I would like to examine a country that is never included in studies of how nations have dealt with the past. I do this because, whether the judges went along with it or not, the story of how Israel came to terms with the Holocaust vividly shows the significance of the judicial process in nation-building and the creation of a national identity in an emerging nation with a burdened past.[58]

One of the flaws of Nuremberg was that it approached World War II only from the perspective of the victorious Allied Powers. The emphasis was on the prosecution of Gemany's wars of aggression and conduct of these wars. The tragedy of European Jewry and other targeted groups was peripheral, used simply as evidence of the general criminality of the Nazi regime, rather than as extraordinary crimes in their own right. The Holocaust (Shoah) and its immensity were subsumed within the Allies' wider prosecutorial strategy. In 1950, the Israeli Knesset adopted the Nazi and Nazi Collaborators Law, drawing heavily from the new Genocide Convention.[59] It probably never crossed the lawmakers' minds that one day a Nazi would stand trial in an Israeli court on the basis of this law. What was real at the time was the growing tension in Israel about the role Jews had played in the Holocaust. To understand some of this, one has to go back to the 1930s and 1940s. As Nazism was rising in Europe, Zionists in Palestine were struggling for an

[57] See for example, the trials of the Young Turks and the German trials at the Leipzig court after World War I, the post-World War II trials in German courts involving cases such as that of the Auschwitz and Majdanek guards, the French trials of Barbie, Touvier and Papon, the trials of the Greek torturers of the military junta, the trials of the East German border guards, the trials concerning the use of force at the Gdansk shipyard in 1970, the South African attempt at trying Magnus Malan and others for Apartheid era atrocities or the evolving processes in Latin America.

[58] My understanding of the situation in Israel portrayed in these pages is drawn from many sources over a period of time. Readers wishing to pursue this matter may find the following to be particularly helpful: Tom Segev, THE SEVENTH MILLION: THE ISRAELIS AND THE HOLOCAUST, Hill & Wang, 1993; Leora Bilsky, TRANSFORMATIVE JUSTICE: ISRAELI IDENTITY ON TRIAL (LAW, MEANING AND VIOLENCE), University of Michigan Press, 2004; Yechiam Weitz, "The Holocaust on trial: The impact of the Kasztner and Eichmann trials on Israeli society", Israel Studies 1(2), 1996, 1-26; Hannah Arendt, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL, Revised Edition, Viking, 1963 (hereafter "Arendt, EICHMANN IN JERUSALEM");.

[59] Nazis and Nazi Collaborators-Punishment-Law-5710-1950, 1 August 1950; Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, entered into force 12 January 1951.

independent homeland for the Jews. This became a struggle for self-determination through armed force. After the European war was over, and the State of Israel came into existence in a sea of hostile neighbours and stateless Palestinians, one of the difficulties the Zionists had was understanding how so many millions seemingly went to their deaths in the concentration and extermination camps without resistance. Events such as the Warsaw Uprising were rare.[60] It seemed to the Zionists as if their European brethren had gone like lambs to the slaughter, rather than as brave warriors. Some had even participated in the brutalization of the camp inmates (*kapo*), and others manned the gas chambers and dealt with human remains (*Sonderkommando*). As noted earlier, Nuremberg was not about the Holocaust but about the Allies' war with Germany. There was uncertainty over the roles the Jewish elders and elites in the *Judenrat* had played in negotiating with the Nazis. There were tensions over what exactly had happened, and its scale. Understandably, not many of the traumatised survivors were keen to relive the horrors. They were caught up in the struggle to survive in a new nation facing threats to its existence. Two trials before Israeli courts were critical in reshaping the understanding of the Holocaust in Israel and in redefining the relationship of the survivors as citizens of the new state.

The libel action brought by Rudolf Kastner against Malchiel Gruenwald saw Israel come face to face with what Jewish leaders did during the Holocaust.[61] It was one of those cases in what Primo Levi has called the "*gray zone*", as illustrated by the *kapos* and *sonderkommandos*, who sometimes had no choice but to cooperate with the Germans in the struggle to stay alive.[62] Kastner had been a member of the Hungarian Aid and Rescue Committee, engaged in trying to save Jews and send them to Palestine. As the Nazis turned their attention to Hungary to implement the extermination of its Jews, Kastner was approached by Adolf Eichmann, the SS bureaucrat in charge of the deportations. Eichmann offered to allow a limited number of Jews to escape a certain death in the extermination camps in return for money, gold and diamonds (the terms of the precise "deal" are unclear)[63]. At one stage, there was a negotiation of about 10,000

[60] From January to May 1943, the Jewish resistance in the Warsaw Ghetto rose up against the German efforts to transfer the population to the Treblinka extermination camp.

[61] This section on the Kastner trial draws from Leora Bilsky, "Judging Evil in the Trial of Kastner", Law and History Review, Vol 19, No. 1, Spring 2001 (hereafter "Bilsky, Judging Evil in the Trial of Kastner''); David Luban, "A Man Lost in the Gray Zone", Law and History Review, Vol 19, No. 1, Spring 2001 (hereafter "Luban, A Man Lost in the Gray Zone''); Anna Porter, KASTNER'S TRAIN, Douglas & MacIntyre, 2007; Ladislaus Löb, DEALING WITH SATAN, Jonathan Cape, 2008.

[62] Primo Levi, THE DROWNED AND THE SAVED, Vintage, 1988.

[63] Luban points out that there were two differing accounts of the deal. "Kastner said that it was a Nazi offer to sell six hundred Hungarian Jews--later bumped to almost 1700--for six million pengö (about $1.6 million), which the Jewish community succeeded in raising. Eichmann reported the terms of the deal differently (although this was not known at the time of the Kastner trial): Kastner, said Eichmann, 'agreed

trucks for one million human lives. Kastner entered into the arrangement with Eichmann and some 1,700 Jews were sent to Switzerland via Bergen-Belsen, including "important" Jews, persons from his own town and several members of his own family. Kastner was later to testify for one of Eichmann's assistants at his trial after the way, saying the man had saved 85,000 Jews. Gruenwald was one of those whose family was sent to Auschwitz. In Israel, he wrote a pamphlet denouncing Kastner, who was then an influential figure in the government. Kastner sued for libel, but then had to defend his own actions during the War. At first, Judge Benjamin Halevy saw the situation in terms of a contract and issued an exceptionally strongly worded judgment, rejecting the libel action and describing Kastner as someone who had "*sold his soul to the devil*":

> *"The temptation was great. K. was offered the opportunity to save six hundred souls from the impending Holocaust…. To rescue them would be both a personal achievement and a Zionist victory… No wonder he accepted the offer without hesitation. But 'timeo Danaos et dona ferentis' [beware of Greeks bearing gifts]. In accepting the offer, K. sold his soul to the devil."*[64]

Kastner appealed, but shortly before the supreme court judgment was issued, he was assassinated by extremist Jews outside his home for being a traitor. The court vindicated him. Led by Justice Agranat, the court took an administrative law approach. It considered him as if he were in an official position, and as such was required to balance the risks and benefits of different policies in a reasonable way, given the information available to him at the time. It reversed the decision of the lower court; Kastner had acted reasonably in the circumstances.

On 11 April 1961, Eichmann, Kastner's protagonist in the case discussed above, who had emerged during the Nuremberg trials as being the central figure in the process of transporting Jews from across Europe to the death camps, was brought before three judges of the District Court of Jerusalem. His capture and abduction from Argentina gave the Israeli government an exceptional opportunity to use (manipulate, some would argue) the Israeli judicial system to engage in social engineering.[65] This trial afforded the first occasion by which the Holocaust itself could be put on trial, an occasion for some of the many Holocaust survivors, who arrived as refugees in Israel, to testify about what had been done to Europe's Jews. Eichmann's trial and the

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to keep the Jews from resisting deportation – and even keep order in the camps – if I would close my eyes and let a few hundred or a few thousand young Jews emigrate illegally to Palestine. It was a good bargain.'." See Luban, "A Man Lost in the Gray Zone", p.164.

[64] Attorney General v. Gruenwald, Judgment, cited in Luban, "A Man Lost in the Gray Zone", p. 167.

[65] For a detailed study of the use of the law and these high profile trials for social engineering, see Mark Osiel, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW, Transaction Publishers, 1997. He argues, inter alia, that the predominant purpose of such trials is the development of a coherent collective memory of a people; this is a way of historically, legally and societally examining a painful history and using it to create a more open, classically liberal society.

judgment would be the record of the Holocaust. This was the opportunity to draw the new and vulnerable nation together around a common tragedy and to forge an identity (others, such as the 1967 War, would follow). The significance of having him tried in the controversially created State of Israel, before Israeli judges (Justice Moshe Landau, Dr. Benjamin Halevy who had delivered the Kastner trial decision and Dr. Yitzhak Raveh), cannot be underestimated. Zertal has argued this trial was about a national display of power, sovereignty and control, countering the Jewish helplessness during the World War II.[66] Declassified documents show that the Attorney-General stressed, at one cabinet meeting, that he would seek "*to emphasise the existence of the Jewish state, the existence of the settlement in the land. This country is the last and essential refuge,that is the lesson that has to emerge from the trial*".[67] He did, during the trial, ask survivors why they did not rebel against their Nazi persecutors.[68]

The philosopher Hannah Arendt, who sat through the trial, complained that rather than judging Eichmann as the banal Nazi functionary he was, the prosecutor cast him as a monster, the lead character in a morality play aimed at memorializing the Holocaust and promoting the Zionist agenda. Her assessment was, and remains, controversial. The witnesses for the prosecution, she alleged, were not those who could implicate Eichmann, but were usually Zionists who spoke of "*the huge panorama of Jewish suffering*" and told the story of the Zionist struggle in Israel.[69] To her the trial was not about Eichmann, but "*history that, as far as the prosecution was concerned, stood in the center of the trial*." [70] She argued that the bulk of the witnesses came from countries where Eichmann's competence and authority had almost been nil (Poland and Lithuania).[71] In fact, many of the major trials, from Nuremberg to Milosevic to Saddam Hussein, are theatrical in nature and are accompanied by wider socio-political objectives. Sometimes, the person in the box stands for the entire system that was maintained by many more not called to account. Often, it is the victor judging the vanquished. Buruma has wisely cautioned that *"Just as belief belongs in church, surely history education belongs in school.When the court of law is used for history*

[66] Idith Zertal, ISRAEL'S HOLOCAUST AND THE POLITICS OF NATIONHOOD, Cambridge University Press, 2005.
[67] Yehiam Weitz, "Trying Eichmann, Not Jewish Disputes", Haaretz, 19 April 2007, available in English at http://www.wzo.org.il/en/resources/view.asp?id=2278.
[68] See Arendt's views on this, Arendt, EICHMANN IN JERUSALEM, pp.124-125.
[69] *Ibid.* pp.224-225.
[70] *Ibid.* p.19.
[71] *Ibid.*pp.224-225.

*lessons, then the risk of show trials cannot be far off. It may be that show trials can be good politics… but good politics don't necessarily serve the truth".*[72]

In a revealing article in the New York Times in 1960, prime minister David Ben-Gurion, described as the invisible stage manager of the process, listed reasons why the Eichmann trial should be held in Israel. One of the motives was to "*make the details of his case known to the generations of Israelis who have grown up since the holocaust. It is necessary that our youth remember what happened to the Jewish people….They should be taught the lesson that Jews are not sheep to be slaughtered but a people who can hit back – as Jews did in the War of Independence".*[73] In his speech on the 13th anniversary of the establishment of the State of Israel, which occurred during the trial, the prime minister observed that

> "*This… is not an ordinary trial…Here for the first time in Jewish history, historical justice is being done by the sovereign Jewish people. For many generations it was we who suffered, who were tortured, who were killed – and were judges.Our adversaries and our murderers were also our judges. For the first time, Israel is judging the killers of the Jewish people. It is not an individual that is at the dock at this historic trial, and it is not the Nazi regime alone, but anti-Semitism throughout history. The judges whose business is the law and who may be trusted to adhere to it will judge Eichmann the man for his horrible crimes, but responsible public opinion in the world will be judging anti-Semitism, which paved the way for this most atrocious crime in the history of mankind. And let us bear in mind that only the independence of Israel could create the necessary conditions for the historic act of justice.*"[74]

The Attorney-General, Gideon Hausner, opened the trial with one of the most powerful and moving speeches ever. In line with governmental policy, it depicted Jews as a long persecuted people. He set the stage for a prosecutorial approach whose objectives went beyond Eichmann:

> "*When I stand before you, judges of Israel, to lead the prosecution of Adolf Eichmann, I do not stand alone. With me here are six million accusers. But they cannot rise to their feet and point their finger at the man in the dock with the cry "J'accuse!" on their lips. For they are now only ashes -- ashes piled high on the hills of Auschwitz and the fields of Treblinka and strewn in the forests of Poland. Their graves are scattered throughout Europe. Their blood cries out, but their voice is stilled. Therefore will I be their spokesman. In their name will I unfold this terrible indictment."*[75]

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[72] Ian Buruma, THE WAGES OF GUILT: MEMORIES OF WAR IN GERMANY AND JAPAN, Farar Strauss, Giroux, 1994, p. 142.

[73] David Ben-Gurion, "The Eichmann Case as Seen by Ben-Gurion", New York Times, 18 December 1960. For more such statements, see Arendt, EICHMANN IN JERUSALEM, pp.9-10.

[74] David Ben-Gurion, Speech on 13th Independence Day celebrations, cited in Shoshana Felman, "Theaters of Justice: Arendt in Jerusalem, the Eichmann Trial, and the Redefinition of Legal meaning in the Wake of the Holocaust", Critical Inquiry, Vol.27(2), Winter 2001, pp.201-238, at pp. 221-222.

[75] "6,000,000 Accusers, Israel's Case Against Eichmann: The Opening Speech and Legal Argument of Mr. Gideon Hausner, Attorney-General", Jerusalem Post, 1961.

There were 14 weeks of testimony by witnesses and written depositions from across Europe, and extensive documentation.[76] The judges of the District Court of Jerusalem refused to be drawn into anything but the charges against Eichmann. In his memoirs, Hausner complained that they did not allow him to present some of the evidence, such as about the Jewish resistance, deeming them extraneous to the charges.[77] The three Israeli judges gave Eichmann a scrupulously fair trial. Theirs was indeed a monumental judgment.[78] In its second paragraph, it sets out the court's role: to determine if the charges are proven, and if so, what punishment to impose, and provides a roadmap for judges in similar situations, faced with the protagonists seeking to use the the judicial process for wider socio-political engineering. The paragraph is therefore quoted in full:

> *"2.In this maze of insistent questions, the path of the Court was and remains clear. It cannot allow itself to be enticed into provinces which are outside its sphere. The judicial process has ways of its own, laid down by law, and which do not change, whatever the subject of the trial may be. Otherwise, the processes of law and of court procedure are bound to be impaired, whereas they must be adhered to punctiliously, since they are in themselves of considerable social and educational significance, and the trial would otherwise resemble a rudderless ship tossed about by the waves*
>
> *It is the purpose of every criminal trial to clarify whether the charges in the prosecution's indictment against the accused who is on trial are true, and if the accused is convicted, to mete out due punishment to him. Everything which requires clarification in order that these purposes may be achieved, must be determined at the trial, and everything which is foreign to these purposes must be entirely eliminated from the court procedure. Not only is any pretension to overstep these limits forbidden to the court – it would certainly end in complete failure. The court does not have at its disposal the tools required for the investigation of general questions of the kind referred to above. For example, in connection with the description of the historical background of the Holocaust, a great amount of material was brought before us in the form of documents and evidence, collected most painstakingly, and certainly in a genuine attempt to delineate as complete a picture as possible. Even so, all this material is but a tiny fraction of all that is extant on this subject. According to our legal system, the court is by its very nature "passive," for it does not itself initiate the bringing of proof before it, as is the custom with an enquiry commission. Accordingly, its ability to describe general events is inevitably limited. As for questions of principle which are outside the realm of law, no one has made us judges of them, and therefore no greater weight is to be attached to our opinion on them than to that of any person devoting study and thought to these questions. These prefatory remarks do not mean that we are unaware of the great educational value, implicit in the very holding of this trial, for those who live in Israel as well as for those beyond the confines of this state. To the extent that this result has been achieved in the course of the proceedings, it is to be welcomed. Without a doubt, the testimony given at this trial by survivors of the Holocaust, who poured out their hearts as they stood in the*

[76] Complete transcripts of the trial can be viewed online at http://www.nizkor.org/hweb/people/e/eichmann-adolf/. There is a nine-volume record of the proceedings of the Trial of Adolf Eichmann, including all documents and witness statements, compiled by the Ministry of Justice, The Trust for the Publication of the Proceedings of the Eichmann Trial in co-operation with the Israel State Archives and Yad Vashem, The Holocaust Martyrs' and Heroes' Remembrance Authority.

[77] Gideon Hausner, JUSTICE IN JERUSALEM: THE TRIAL OF ADOLF EICHMANN, Thomas Nelson & Sons, 1966, p.333.

[78] Attorney-General of the State of Israel v. Adolf Eichmann, Judgment of the District Court of Jerusalam, 12 December 1961, 36 ILR 5.

> *witness box, will provide valuable material for research workers and historians, but as far as this Court is concerned, they are to be regarded as by-products of the trial."*

The Supreme Court confirmed Eichmann's conviction on all counts and the death sentence. [79]

2. International Crimes

The term "international crimes" refers to Genocide, War Crimes and Crimes against Humanity. These are all crimes within the jurisdiction of the ICC (see below). There are of course other crimes, such as hijacking of aircraft, narcotics offences, terrorist bombings etc, usually subsumed under other categories of international crime, or prosecuted under domestic law, if at all.

*The ICC*

The ICC came into existence 1 July 2002. It has several persons in custody and is engaged on its first trial, of one Thomas Lubanga from the Democratic Republic of the Congo, accused of recruiting and using child soldiers as a war crime. It has also issued a controversial warrant of arrest for the president of Sudan.

The judges of countries burdened with the past that are parties to the Rome Statute of the ICC may be elected by the Assembly of States Parties, the court's governing body, as judges. Article 36 of the statute requires that judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective states for appointment to the highest judicial offices. Every candidate is required either to have established competence in criminal law and procedure, and the experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or have established competence in relevant areas of international law such as humanitarian law and human rights law, and extensive experience in a professional legal capacity of relevance to the the Court; All candidates are required to be fluent in one of the working languages of the court (English and French).

It is unlikely, in the absence of a prior referral of a situation in a country by the Security Council, that the crimes of the past could be tried in the ICC. In the unfortunate event of slippage back into repression and armed conflict during political change, leading to cases from the country at the

[79] Attorney-General of the Government of Israel v. Eichmann, Judgment of the Supreme Court of Israel, 29 May 1962, 36 ILR 27.

court, there is no specific prohibition against a judge working on a case from his or her own country. There are however provisions in the Statute and Rules of Procedure that could indirectly prevent a judge from sitting on such a case. A provision in Article 41(2) states that a judge shall not participate in any case in which his or her impartiality might reasonably be doubted. A judge shall be disqualified from a case in accordance with this paragraph if, inter alia, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted. A judge shall be disqualified on other grounds as provided for in the Rules of Procedure and Evidence (Rule 34).

If we think of wider issues of how nations deal with legacies of the past, it is clear that the ICC's potential is as a catalyst. The mere fact of a trial at the ICC is not going to repair a torn society. But it opens a space within which other processes can develop. An example of the "boomerang effect" from transnational litigation is the Pinochet case.[80] Trying the former general in Spain or anywhere else would not have contributed to Chile's social repair. The attempt to extradite him to Spain galvanised a stalled process in Chile, unleashing a torrent of legal activity. Were Pinochet alive today, he would most likely have had to face a court of law in his own country.

*Ad Hoc tribunals*

In 1993 and 1994, the Security Council felt compelled to act in the face of egregious violations of international humanitarian law in the former Yugoslavia and Rwanda by creating two separate but similar tribunals.[81] This was several years before the adoption of the Rome Statute. Both tribunals will, barring an extension of the term, be wound up in 2010. They have cost billions of dollars (with the ICTY at its peak requiring some USD250 million a year). This has led to reluctance to establish other such tribunals, especially now that there is a permanent ICC.

Judges from the affected countries of the former Yugoslavia and Rwanda are not permitted to hear these matters, as the fear at the time was that they could not be impartial. The two tribunals are now in their completion phase and further judicial appointments are unlikely.

*Domestic courts and internationalised courts*

[80] The notion of the "boomerang effect" created at home when activists go abroad was first elaborated in Margaret Keck and Kathryn Sikkink, TRANSNATIONAL ADVOCACY NETWORKS IN INTERNATIONAL POLITICS, Cornell University Press, 1998.

[81] The ICTY was created by Security Council Resolution 827; the ICTR by Resolution 955.

International crimes are tried in domestic courts when a state has legislation allowing it to do so.

For example, several countries such as Germany and Denmark have been able to try persons from the Balkans accused of international crimes in their courts.[82] Belgium has tried Rwandan nationals present in Belgium in its courts, in relation to the Rwandan genocide of 1994.[83] There is currently a case alleging genocide in Tibet being heard in Spain.[84]

Indonesia is an example from Asia. It has established four permanent Human Rights Courts across its archipelago.[85] They each have jurisdiction over genocide and crimes against humanity. There has to date been just one trial, for alleged crimes against humanity committed in the eastern province of Papua. The accused were acquitted. There have also been trials for crimes against humanity arising out of the violence in East Timor, and from a case in the 1980s in Tanjung Priok, Jakarta. These cases have been heard by a special ad hoc court established by parliament, as they concern conduct arising before the human rights courts were established.

There are several models of internationalised domestic court. The first such was in East Timor, established by the United Nations when it was running the country, but as a special panel of the District Court of Dili.[86] In other words, it was a *sui generis* panel within a local court. International and local judges were on it, with the foreigners in the majority. The law used was heavily borrowed from the Rome Statute of the ICC, and gave the court jurisdiction over

[82] For example, Refik Saric was tried and convicted in Denmark; Nicola Jorgic was tried and convicted in Germany.
[83] In 2001, two Catholic nuns, a university professor and a businessman, all Rwandese, were convicted for their participation in the Rwandan genocide.
[84] The complaint about China's activities in Tibet, described as genocide, was filed in a Spanish court by the Comite de Apoyo al Tibet. See Voice of America News, "Tibetan Monks Testify Against China in Spanish Court", 25 May 2008.
[85] See Suzannah Linton, "Accounting for Atrocities in Indonesia", Singapore Year Book of International Law, 2006, pp. 199-231.
[86] For more, see Suzannah Linton, "East Timor and Accountability for Serious Crimes", in Cherif Bassiouni (Ed.), INTERNATIONAL CRIMINAL LAW, 3rd Edition, Martinus Nijhoff Publishers, 2008 pp.257-283; Suzannah Linton, "Putting Things Into Perspective: The Realities of Accountability in East Timor, Indonesia and Cambodia", Maryland Series in Contemporary Asian Studies Vol. 3, 2005 (entire volume); Suzannah Linton, "New Approaches to International Justice in Cambodia and East Timor", International Review of the Red Cross No. 845, 31 March 2002, pp.93-119; Suzannah Linton, "Cambodia, East Timor and Sierra Leone: Experiments in International Justice", Criminal Law Forum Volume 12(2) 2001 pp.185-246; Suzannah Linton, "Prosecuting Atrocities At The District Court Of Dili", Melbourne Journal of International Law, Volume 2(2), 2001, pp. 414-458; Suzannah Linton, "Rising From The Ashes: The Creation Of A Viable Criminal Justice System In East Timor", Melbourne University Law Review Volume 25(1), 2001, p.122-180.

international crimes as well as some crimes under domestic law such as murder and rape. The Special Panels were wound up three years after East Timor became independent. The next such court to be created was in Sierra Leone. It was more of a partnership between the United Nations and the government, based on a treaty for the establishment of a court to try certain atrocities under international and domestic (Sierra Leonean) law.[87]

In Sarajevo, a domestic war crimes court has been taking over the cases referred to it by the ICTY and will eventually be a 100% local court.[88] In Kosovo, foreign judges have been working in the local courts on sensitive cases since 2000, when the United Nations first placed international staff in the District Court of Mitrovica. Pursuant to its Regulation 2000/61, the United Nations has since regularly placed international judges and prosecutors in district courts throughout Kosovo and the supreme court. They work on cases dealing primarily with sensitive matters of alleged war crimes or inter-ethnic violence, and on privatization. Cambodia's process of legal accountability for the crimes of the Khmer Rouge is now into its 3rd year of what was supposed to be a three-year-long process; the first case (of the commander of the notorious S-21 torture centre) is now on trial.[89] This court is part of the Cambodian structure, but functions with UN assistance, including international staff on the bench and in the prosecution, defence and court management.

Judges who serve on internationalised processes in other countries cannot just swan into the foreign society and behave as if they were in courts in their own countries. They need to be sensitive to and understand local dynamics. Failure to do so could lead to misunderstanding and to serious injustice. East Timor provides an example. The vast majority of persons appearing before the Special Panel of the District Court of Dili on Serious Crimes charges entered guilty pleas, and they would often raise the issue of superior orders and duress. The practice of the Special Panels on dealing with this was problematic.[90] Many times, moral judgments were made

[87] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, signed on 16 January 2002, see www.sc-sl.org/documents.html.
[88] The Court of Bosnia and Herzegovina, see the website at http://www.sudbih.gov.ba/?jezik=e.
[89] For more, see Suzannah Linton, "Putting Cambodia's Extraordinary Chambers in Perspective", Singapore Year Book of International Law, Vol. XI, 2007, pp.195-259; Suzannah Linton,: "Putting Things Into Perspective: The Realities of Accountability in East Timor, Indonesia and Cambodia", Maryland Series in Contemporary Asian Studies Vol. 3, 2005, pp.1-90; Suzannah Linton, "Safeguarding the independence and integrity of the Cambodian Extraordinary Chambers", Journal of International Criminal Justice Volume 4(2) 2006, pp.327-341; Suzannah Linton, "Cambodia, East Timor and Sierra Leone: Experiments in International Justice", Criminal Law Forum Volume 12(2) 2001 pp.185-246.
[90] The following comments on East Timor are drawn from Suzannah Linton and Caitlin Reiger, "The Evolving Jurisprudence And Practice Of East Timor's Special Panels For Serious Crimes On Admissions

about people without examining the subjective circumstances that led to their association with the militias who caused tremendous damage. In order that the doctrine of superior orders is justly implemented in a society such as East Timor's, it would seem essential to consider local concepts of power and authority. Traditional East Timorese society was a structured one, with hereditary villager elders (*liurai* and *dato*) commanding deep respect and loyalty from a predominantly rural community. In occupied East Timor, and elsewhere across Suharto's Indonesia, the cultural norms of the dominant Javanese were introduced. The hereditary leaders were replaced with hand-picked *kepala desa* [village leaders] who were civil servants. Javanese culture emphasises conflict avoidance, extreme respect for hierarchy and authority, as well as a specific concept of centralised power in the figure of authority.[91] The cultural imperative was either consensus decision-making where some consultation was in order, by way of a practice called *musyawarah*, or for people in higher positions to be respected and never contradicted.[92] This meant that one had to follow the instructions of a person in a higher position; one did not consider whether there was formal legal obligation flowing either from the capacity of the person to give orders or one's own duties. In such an environment, the majority of those tried by the special panels (low-ranking, non-hardcore militia members whose association may not have been voluntary), would have felt obliged to obey *kepala desa, babinsa* and others in authority, such as Indonesian soldiers and policemen, probably also the militia members, who had open and blatant support from those in power. Further incentive to obey would have come from the fact that the East Timorese were living in an occupied territory, where brute force was used to impose authority. So, the judges do need to consider what a reasonable man in East Timor in such a situation would consider to be a valid superior order.[93] This is not about cultural relativitism, but an argument that the reality of life in such societies is a relevant factor particularly when considering the actions of civilians.

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Of Guilt, Duress And Superior Orders", Yearbook of International Humanitarian Law, Vol.4, 2001, pp.167-212, at pp.210-211.

[91] F. Magnis-Suseno, "Langsir Keprabon: New Order leadership, Javanese culture, and the prospects for democracy in Indonesia", in G. Forrester (Ed.), POST SUHARTO INDONESIA: RENEWAL OR CHAOS?, Institute of Southeast Asian Studies, 1999, p. 218.

[92] *Ibid.*, at p. 219: "In the Javanese conception, behaving in a respectful and rukun [avoidance of open conflict] way will in the end always pay dividends since the community will live in harmony and be free from disturbances, and individuals are protected and provided for by their community and their leaders."

[93] L.C. Green suggests that "the standard of measurement cannot be universal, but must depend on whether the accused is a civilian or a serviceman and whether the offence is of a kind that can be considered as being civil in character though committed by a soldier. If the act is essentially military in character and has been committed in war conditions, then the palpability must be looked at from the point of view of the reasonable soldier ...", L.C. Green, SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW, Sijthoff, 1976, at p. 281.

Then, we have the issue of international judges respecting the country and its people. At least one judgment reveals a contemptuous attitude toward the East Timorese victims and witnesses who took part in the work of the Special Panel of the District Court of Dili. This occurred in the case of Florencio Tacaqui, concerning the massacre at remote Passabe, in the district of Oecussi. The judgment included derisory remarks about East Timorese witnesses in the case who the judge said had used the "*paucity of their culture*" as an excuse, by making claims such as "*I don't know; we are simple people; we didn't go to school; we are illiterate; we are not like big people; we are son of God*".[94] This was written by an international judge and agreed to by his fellow judges (one other international and one local). Here it is worth recalling the exhortations in the Basic Principles And Guidelines On The Right To A Remedy And Reparation and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power calling upon states to treat victims with compassion and respect for their dignity and human rights.

Despite the legal obligations laid down in international law, the decision on whether to prosecute is ultimately a political one, as with the shape and form of the mechanism. Judges should be aware of the challenges if the decision is taken to pursue the rule of law approach and prosecute perpetrators of atrocity. A harsh reality is that these processes rarely satisfy everyone and too often there are well substantiated claims of violation of fair trial and due process rights (for example, in Kosovo, in East Timor, at the ICTR (Rwamakuba, Nahimana), at the ICTY (Kupreskic)). The decision to go down the route of criminal justice is the easy part. There are abundant lessons to be learned, but yet have persistently failed to be learned or implemented in the work of accountability mechanisms. For example, it goes without saying that there must be adequate resources to do the job. Political support from the state and/or the United Nations is essential. But talk is not enough. The legal basis must be adequate in terms of law and procedure. An issue that often requires careful consideration when dealing with the legacies of the past is the principle of legality. The underlying system must be able to cope with the planned mechanism. There must be judges, prosecutor and investigators with appropriate qualifications, skills and experience. At all stages, there must be adequate infrastructure and resources for the mechanism to function properly. Protective measures for victims and witnesses must be provided, and must be realistic in the situation, as well as effective. Protection of judges too needs careful attention. Decision-makers have to plan in advance – what needs to be done to prepare courts and judges for holding trials? What else is required to complement the process and use the windows of opportunity created by a forensic unraveling of the past? If foreigners are involved, everyone has

[94] The Prosecutor v. Florencio Tacaqui, Case No. 20/2001, Judgment, 12 September 2004, p.5.

to be prepared for the dynamics of international-domestic interplay. For example interpretation and translation services must be arranged. Protection from undue influence, whether from the state or NGOs exercising undue influence through provision of "assistance", has to be ensured.

## C. VETTING AND LUSTRATION

Vetting and lustration did not begin with Eastern Europe, but have come to prominence because of their use in many countries from that region as they exited from communism. The experience of the Czech Republic, with sweeping lustrations laws, is said to have been the most extreme. Its widest use was in reunified Germany, made possible by the particular circumstances of the absorption of the one Germany into the other. It is used as a way of identifying and exposing those who collaborated with the former regime and removing them or preventing them from holding public office. The word "*lustration*" is derived from the Latin "*lustare*" meaning "*to review, survey, observe, examine*."[95] Some see it as truth revelation, others as a form of collective punishment, even witch-hunting. According to Teitel, "*lustration*" is the same term the Czech secret police used for their background checks into the loyalty of citizens during the communist era, and it thus has a negative connotation and linkage with the old.[96] Vetting is a more general term. It is about reviewing persons in office and isolating those who were engaged in conduct of the kind under scrutiny by the new regime. Lustration and vetting processes are not all the same.[97] Lustration laws are special public employment laws that regulate the access of members of the former repressive apparatus to positions in new democracies.[98] Scholars have argued that the form lustration has taken in each country has been influenced by its experience of communism and the nature of the transition, as well as the dynamics of post-communist politics.[99]

System-wide lustration is the fastest and most efficient way of ensuring changes within institutions. But complex moral, political and practical challenges arise. Due process and the notions of individualised, rather than collective, responsibility render this a suspect process. It is seen as an illiberal means to a liberal end. The notion of "guilt" or "culpability" is highly

[95] Roman David, "From Prague to Baghdad: Lustration Systems and their Political Effects", Government and Opposition, Vol.41(4), 2006 (hereafter "David, From Prague to Baghdad''), pp.347-372, p.350.
[96] Ruti Teitel, TRANSITIONAL JUSTICE, Oxford University Press, 2000 (hereafter "Teitel, TRANSITIONAL JUSTICE"), p.172.
[97] For an attempt at classification of the different systems, see David, From Prague to Baghdad, pp.347-372.
[98] David, From Prague to Baghdad, p.350.
[99] Eric Brahm, Peace and Conflict Studies, University of California at Boulder, at http://www.beyondintractability.org/essay/lustration/.

challenging where repression went on for long periods of time and was entrenched in everyday life. In extreme situations, difficult choices have to be made: do those who were blackmailed or coerced into acquiescence deserve opprobrium or understanding? Another concern is that states have often had to use the sometimes incomplete and unreliable files of the former secret police, thus potentially compromising the legal and constitutional attributes of the new regime.

In view of the extent of the practice and legitimate concerns, in 1996, the Parliamentary Assembly of the Council of Europe adopted guidelines on how lustration procedures should be designed to meet international human rights obligations, including due process and wider democracy and rule of law concerns.[100] Crucial to it is the principle of individual, rather than collective guilt, to be proven in each case, and also the principle that lustration may only be used for the protection of the democratization process, and not for punishment, retribution or revenge.

One way of injecting greater legitimacy into these processes is to ensure a role for the judiciary. This can be illustrated through the experiences of Czech and Slovak Federal Republic (now the Czech Republic and the Slovak Republic), and Poland. The Czech and Slovak Federal Republic, as it then was, was one of the first countries to adopt a stringent lustration code. Passed by the National Assembly on 4 October 1991, the original Lustration Law barred former Party officials, members of the People's Militia and of the National Security Corps, as well as suspected collaborators, from holding a range of elected and appointed posts in state-owned companies, academia, and the media for a period of five years (until January 30, 1996). The law focused on those whose names appeared in the files of the former Czechoslovak Secret Police. "*Each employee or prospective employee within the range of categories covered by lustration was required to ask for a certificate of 'negative lustration' that would be submitted to the relevant employer, or in the case of elected officials, to the parliament. (In the years that followed, there were 310,000 requests for lustration vetting, and of these, 15,000 were 'positive')*...".[101] In 1996, Parliament extended the law until 2000, overriding a veto by President Vaclav Havel.

Judges of the constitutional court of the Czech and Slovak Republic had an extremely significant role in testing the lustration law and practices against the constitution, so much so that its

[100] Resolution of the Parliamentary Assembly of the Council of Europe No.1096 on measures to dismantle the heritage of former communist totalitarian systems, 27 June 1996.
[101] Sadurski, RIGHTS BEFORE COURTS, p. 236.

President at the time has, on reflection, called it a "*constitutional moment"*.[102] In 1992, the law was reviewed by the constitutional court.[103] It led to a decision that stressed "*while there is continuity of 'old laws' there is a discontinuity of values from the 'old regime'*"". The law itself was found to be constitutional, a decision the judges justified on the grounds of security and democracy, noting the extraordinary nature of transition periods, during which the institutions are much more susceptible to a relapse towards the totalitarian system.[104] What seems to have made the law acceptable was the temporary, transitional nature of lustration. A provision allowing for wide range of "*potential candidates for collaboration*" was so vague that it was declared unconstitutional. The decision contains some interesting discussion on lustration and its correct use in the prevailing circumstances, as well as calls to natural human rights over procedural formalities. It also examined the lustration in the light of the Charter of Fundamental Rights and Human Freedoms, and the International Covenant on Civil and Political Rights.

The controversy continued in the two republics that emerged from the Czech and Slovak Republic. The judges of the Czech constitutional court were seized of the matter of changes to the law made in 2000, which removed the time restrictions for the validity of lustration provisions. They determined that it was necessary to review the entire law.[105] This court declared that the law remained valid.[106] It acknowledged that the 1992 decision was partly, but not exclusively, motivated by the extraordinary times that the then Czech and Slovak Republic faced.[107] This time, a major justification for these exceptional actions was that in all democratic systems, and not just in the time of transition, the state should be able to require of its officials loyalty to the democratic system and principles; it should be able to lay down conditions to safeguard these and further democratic development.[108] Thus, the extraordinary measures once justified because of the transition, were now viewed as something normal in a democratic state. The Court held that

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[102] Marek Safjan, "Transitional Justice: The Polish Example, the Case of Lustration", Vol. 1 European Journal of Legal Studies, No.2, (hereafter "Safjan, Transitional Justice: The Polish Example, the Case of Lustration"), p.15

[103] See Czech Republic: Constitutional Court Decision on the Act on the Illegality of the communist Regime, reprinted in Neil Kritz (Ed.), TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES, COUNTRY STUDIES, Vol. 2 (Country Studies), United States Institute for Peace, 1995, pp. 550-51. It can be viewed online in English at http://angl.concourt.cz/angl_verze/doc/p-1-92.php.

[104] *Ibid.* Also see, Sadurski, RIGHTS BEFORE COURTS, p.237. For a succinct overview of the decision, see pp.237-240.

[105] *Ibid.*, p.239.

[106] The decision ( PI.US 9/01) can be viewed in English online at http://angl.concourt.cz/angl_verze/doc/p-9-01.php.

[107] *Ibid.*

[108] *Ibid.*

"*certain behaviour or a certain position of an individual in a totalitarian state is generally considered, from the viewpoint of the interest of a democratic state, to be a risk to impartiality and trustworthiness of its public services, and therefore has a restrictive influence on the possibility and manner of including 'positively lustrated' persons in them.*"[109]

Some time after its neighbours, Poland decided to go down the lustration route as a way of addressing its communist past.[110] Its judges, ironically among the first to be lustrated in Poland,[111] have also come to play a central role in the process. Polish judges were, by way of a 1997 Law Revealing People who were Public Servants in State Security Organs or Cooperated with Them from 1944-1990, to participate in a lustration court. A special public prosecutor would lay a complaint against a high-level public official about whom there was evidence from the remaining secret files. The court, comprising appellate and provincial level judges, would verify the statutory declaration, which would explain or deny the person's involvement with the former communist secret services. It was only in the case of false declarations (known as "lustration lies"), as established by the court, that such persons could lose the right to hold public office, or run in elections, for a period of 10 years. The court, however, was not constituted because of inability to fill one outstanding seat out of 21 seats on the court. Few judges had actually been lustrated, so those who were in office were holdovers from the past; it is said that they were therefore unwilling to expose SB (secret political police) collaborators, or to become involved in the process.[112] The matter was then resolved by parliament's designation of a chamber of the Warsaw District Appeal Court as the relevant lustration court. The court would step in at the request of the lustration prosecutor and review suspect declarations on the basis of the secret police files. One account is that the judges were very cautious, and often "*verified negatively the accusations made on the basis of the documents registered in the communist secret service*".[113] Another is that this was a hybrid process that combined characteristics of the criminal and civil administrative procedures that often could be incompatible.[114] Legal issues arising from at least one lustration case before the Warsaw court reached the constitutional court; it was decided on in June 2000 that continuing lustration proceedings against someone who had resigned would be

[109] *Ibid.*
[110] See Poland Update, EECR, Vol. 6, No. 4, Fall 1997; AFP, "Polish anti-communist vetting law breaches constitution, court says", 11 May 2007.
[111] Lavinia Stan, "The Politics of Memory in Poland: Lustration, File Access and Court Proceedings", Studies in Post-Communism, Occasional paper no.10 (2006), (hereafter "Stan, The Politics of Memory in Poland"), p.18. Few judges were banned from their position.
[112] *Ibid.*, p.18.
[113] Safjan,"Transitional Justice: The Polish Example, the Case of Lustration", p.10
[114] Sadurski, RIGHTS BEFORE COURTS, p.246.

unconstitutional.[115] The decision in that case has been criticised for avoiding dealing with the more important question of presumption of innocence in the lustration process.

The 1997 law was challenged before the constitutional court by many parliamentarians. On the whole the court found the law to be constitutional: "*it found that the statute did not require individuals to incriminate themselves because only those who admitted their prior collaboration were not eo ipso barred from office; only those who made the false statements were*".[116] The court did however find a provision for resumption of proceedings should new facts become known about the person's past to be unconstitutional, as it introduced a "*state of permanent uncertainty on the part of a lustrated person…and therefore unconstitutionally violated his/her liberty* ".[117]

The judges of the Polish constitutional court have had several other chances to review the lustration law, notably in June 2002,[118] and most recently the newly adopted law replacing the 1992 one. The new law abolished the Vetting Court, moved the supervision over the process to the Institute of National Remembrance, embraced an extremely wide range of persons engaged in public and non-public life, and allowed greater access to the files of communist secret services. In May 2007, the court ruled against the government, finding that much of the new law was unconstitutional.[119] Among the provisions declared unconstitutional were those that would have required journalists, managers of listed state-owned firms and principals of private schools to declare whether they had collaborated with the communist-era secret police. Likewise, a provision that would have allowed the names of all former "*informal collaborators*" with the communist secret police to be published on the Internet. Also found to be unconstitutional was the provision that anyone found to have made a false statement could be banned from his or her job for 10 years whether or not the person was a collaborator. The court cautioned that "*a democratic state based on the rule of law must use only the formal legal means which could be accepted in the framework of axiology of such a state. No other means can be accepted because such a state would not be better than a typical totalitarian regime, which must be eliminated.*".[120] The presiding judge, Jerzy Stepien, said "*A democratic state of law ... cannot be driven by vengeance…. The vetting law can only be applied to individuals, not collectively*."[121] According

[115] *Ibid.*, p.246.
[116] *Ibid.*, p.245.
[117] *Ibid.*, p.245.
[118] *Ibid.*, p.247.
[119] Safjan, "Transitional Justice: The Polish Example, the Case of Lustration", p.17
[120] *Ibid.*
[121] Cited in BBC News, "Polish court strikes down spy law", 11 May 2007.

to the court, the need to disclose the totalitarian past can never justify the violation of democratic standards, which include respect for fundamental rights, such as the right to a fair process, the right to a hearing before an independent court and the right to defend oneself.[122] The judges also laid down guidelines for ensuring lustration remains within the limits of the law.[123]

I do not mean to suggest that these judicial decisions and practices were ideal, or that the story of the past is finished in Eastern Europe. I use these examples to illustrate the rigorous contribution that judges and the courts can make in dealing with the past. Taking a country beyond its burdened past is not just about prosecutions and truth commissions. Regardless of the importance of these decisions, and they have been extremely significant, what the examples show is how societies resort to the courts for constitutional protection or review, thus enabling the judges to contribute towards stabilization by creating and enhancing a system based on the rule of law.

## IV. JUDGES AND JUDICIAL INSTITUTIONS AS TARGETS OF SCRUTINY, REFORM AND ACCOUNTABILITY

Judicial institutions and those who serve in them are also sometimes the targets of scrutiny, reform and accountability. This represents a means by which the new regime asserts its legitimacy by removing from office those who have been tainted by their role in past troubles. In Nazi Germany and in Apartheid South Africa, but in other less exceptional situations too, the morally illegitimate but procedurally correctly adopted laws were used to control the population and repress dissenters or opponents. German judges, apart from those tried at Nuremberg (see later), were able to evade liability in the new Germany by claiming that they were obliged to apply Nazi law because it was the law of the land and they were doing their job. The civil law judge, it was argued, is tasked to implement laws, not question them.

The responsibility of judges in times of repression is an issue that goes beyond law into matters of morality and ethics. Are judges just to apply the law to the facts before them? Are they entitled to consider the law in a moral sense or the political context in which it is being used? The discussion

[122] Safyan, "Transitional Justice: The Polish Example, the Case of Lustration", p.18.
[123] *Ibid.* Lustration procedures cannot involve those who work in private organisations; Lustration has to be proportionate, and the sanction cannot be longer than a rationally defined period; The penalties provided by lustration laws (including the above mentioned sanctions) should be addressed only to the people who were engaged in the activity which violated human rights or ordered such activity; Lustration procedures must provide a precise and transparent definition of the cooperation (or collaboration); The necessary judicial procedural guarantees must be observed in respect of the people subjected to lustration.

on what judges should do in extreme situations such as Nazi Germany and Apartheid Africa resonates with the classical jurisprudential debates on their role, as well as the natural law v. positive law dispute. Here, I can only mark this important and controversial matter for closer consideration, and direct interested readers to the works of Hart, Radbruch, Fuller and Dworkin.

## INQUIRING INTO THE ROLE PLAYED BY THE LEGAL AND JUDICIAL SYSTEM

Dyzenhaus argues that inquiring into the role of judges in the previous system risks politicizing the judiciary in a way that compromises their role for the future.[124] But truth and reconciliation commissions have the opportunity to focus on the role of the judges, courts and the wider judicial system in the previous regime. There are three such examples that will be studied here: South Africa, Indonesian-occupied East Timor and South Korea.

Obviously, the South African legal system was paramount in the preservation of Apartheid over the decades since it was introduced.[125] But what was the judges' role? What could the judge actually do? The explanation of leading human rights lawyer, Arthur Chaskalson S.C., as he then was, at an international conference in 1989, recognised the dilemma: he conceded that more could have been done by South Africa's judges but he also pointed out that:

> "*despite all the paradoxes they have somehow held to the infrastructure and had kept alive the principles of freedom and justice which permeate the common law. True at times no more than lip service has been paid to these principles and there have been land-mark cases where opportunities to give substance to and uphold fundamental rights have been allowed to pass without even an expression of discomfort, let alone a vindication of the rights. Yet the notion that freedom and fairness are inherent qualities of law lives on and if not reflected in all decisions is nonetheless acknowledged and reinforced in numerous judgments of the courts. That is an important legacy and one which deserves neither to be diminished nor squandered."* [126]

In October 1997, the Truth and Reconciliation Commission held a one day hearing purely on the judiciary. It was part of several days that also spanned the legal profession, the law schools, the Ministry of Justice and other institutions in the legal and justice system. Archbishop Tutu, the

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[124] David Dyzenhaus, "Judicial Independence, Transitional Justice and the Rule of Law", Otago Law Journal, 2003, Vol..4, pp. 345-369, p. 8 of 22 online version.

[125] For more on this matter of the South African judiciary see the work of David Dyzenhaus: HARD CASES IN WICKED SYSTEMS: SOUTH AFRICAN LAW IN THE PERSPECTIVE OF LEGAL PHILOSOPHY, Clarendon Press, 1991; JUDGING THE JUDGES, JUDGING OURSELVES: TRUTH, RECONCILIATION AND THE APARTHEID LEGAL ORDER, Hart Publishing, 1997.

[126] Cited in testimony at the Legal Hearing, see Transcript of the Legal Hearing, at http://www.doj.gov.za/trc/special/legal/legal.htm (no page numbers).

Chairman, minced no words in accusing the judges of having been derelict in their duties, and chastised them for failing to resist the injustices of the Apartheid system and subverting the rule of law.[127] He was particularly angered that none of the judges saw fit to appear before the commission, raising arguments about their independence and impartiality.[128] Several judges sent in submissions, the most significant of which was the joint submission by Arthur Chaskalson, President of the Constitutional Court, Ismail Mahomed, Chief Justice, Pius Langa, Deputy President of the Constitutional Court, Hert van Heerden, Deputy Chief Justice and former Chief Justice Corbett. This submission stressed the notion of parliamentary sovereignty, under which a law could not be challenged in court and which applied regardless of whether there was full democracy in South Africa. The submission resonated with the perspective put forward by Chaskalson in 1989 and cited above. "*For all the deep injustices perpetuated by law, there remained a real sense in which the techniques and procedures of law remained independent from the gross manipulation of the executive and in which justice was seen to be done. No account of those years would be accurate if it were not accepted that justice was done and seen to be done in some cases. In this way, principles and values central to the rule of law and a just legal system were not entirely lost.*"[129] Their position was encapsulated in a 1998 speech by the then Deputy President of the Court, Justice Langa, who stressed that the doctrine of parliamentary sovereignty, despite its undemocratic and immoral origins in the Apartheid system, limited judges' options. The doctrine *"was abused by the enactment of laws that violated rights that were taken for granted elsewhere in the civilized world. The courts and other structures that were in existence then were simply powerless to check this abuse…."*[130]

Professor Dyzenhaus argued that the hearing underlined how few people stood up to Apartheid. He pointed out that even:

> "*those who did oppose, especially the judges, could not help but be complicit in sustaining apartheid. Even the judges who gave the most innovative common law judgments of the apartheid era had for the most part to give the stamp of legality to apartheid law — if the government were prepared to be completely explicit about the "facts" in its drafting of legislation, judges had to defer. And even when they were successful in mitigating statutes by resort to the common law, they lent legitimacy to the apartheid government's claim to be part of the family*

[127] Transcript of the Legal Hearing, at http://www.doj.gov.za/trc/special/legal/legal.htm, pp.3-4.
[128] Transcript of the Legal Hearing, at http://www.doj.gov.za/trc/special/legal/legal.htm, pp.3-4.
[129] Written Submission to the Legal Hearing of the Truth and Reconciliation Commission, Judges Chaskalson Mahomed, Langa, van Heerden and Corbett.
[130] Pius Nkonzo Langa, Alfred P. Murrah Lecture, "The Protection of Human Rights by the Judiciary and Other Structures in South Africa", Southern Methodist University School of Law, 1999, Vol.52, pp.1531-1538, at p.1532.

> *of legal orders that is committed to the rule of law. In sum, even the best efforts by some lawyers to blunt apartheid both involved them in the business of implementing injustice through law and lent legitimacy to the regime*".[131]

Witnesses who testified, such as Dyzenhaus himself[132] and Professor Hinds[133] raised the matter of the oath the judges had taken when being sworn into office, to "*administer justice to all persons alike without fear, favour or prejudice, and, as the circumstances of any particular case may require, in accordance with the laws and customs of the Republic of South Africa*". Commission witness Ms. Paula McBride was particularly damning, accusing judges of enforcing every aspect of apartheid and the brutality of the system created to enforce that. They stamped the respectability of their learning onto the oppressive system, she said.[134]

In its final report, the commission came to a number of conclusions about the legal profession and the functioning of the judicial system.[135] In a lost opportunity, it did not engage in a deep analysis of the difficult moral and ethical issues raised in the hearing or in the judges' written submissions. It concluded that the courts and the organised legal profession connived in the legislative and executive pursuit of injustice.[136] Some of this could have been subconscious or unwitting, but some individuals actively contributed to the entrenchment of apartheid. The final report acknowledged the contribution of the few, including judges, who had been prepared to break with the norm "*Had their number been greater, had they not been so harassed and isolated, the moral bankruptcy of apartheid would have been more quickly and starkly exposed for the evil that it*

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[131] David Dyzenhaus, "Judicial Independence, Transitional Justice and the Rule of Law", Otago Law Journal, 2003, Vol..4, p.8of 22 online version at http://www.austlii.edu.au/nz/journals/OtaLRev/2003/4.html

[132] Transcript of the Legal Hearing at http://www.doj.gov.za/trc/special/legal/legal.htm (no page numbers).

[133] *Ibid.*

[134] *Ibid.*

[135] Final Report of the Truth and Reconciliation Commission, Vol. 4, Ch. 4, Institutional Hearing: The Legal Community.

[136] Rombouts posits that several assumptions about the judicial role generally, and in South Africa under Apartheid, underpin the findings of the commission. Judges were able to exercise a choice in almost all circumstances. Choices of a different and more far-reaching nature were available to legal practitioner, law-teachers and students. The values of an organisation play an important part in shaping individual and corporate responses in situations where choices have to be made. In the rare circumstances where little or no judicial choice exists, certain steps short of resignation are open to the judge, such as the criticising of legislative policy. The doctrine of the separation of powers was applied imperfectly. The independence of the judiciary was undermined. This inhibited their will and authority to exercise a real checking and balancing of the other two branches. The judiciary is vital in the day-to-day execution of policy and enforcement of current law. This also involves the removal of a sense of injustice. The "space" available to the judiciary and to lawyers should be used to preserve basic equity and decency in a legal system. The adherence to legalism serves as a powerful legitimating mechanism for unjust governments. The interdependence between all parts of the legal profession implies that no one who participates in an evil system can be entirely free of responsibility. (H. Rombouts, The Legal Profession and the TRC: A Study of a Tense Relationship. Research report written for the Centre for the Study of Violence and Reconciliation, South Africa, February 2002.)

*was*."[137] Parliamentary sovereignty was not accepted as an excuse or an explanation for the judicial failures, because there was no democracy. The judges did have a choice to act differently, it noted. Members of the legal profession should have used their skills and knowledge instead of hiding behind principles that did not apply. But, the report was also clear that those judges who were 'moral' should not have resigned because the alleviation of suffering achieved by their being within the system substantially outweighed the harm done by their participation.

In East Timor, the CAVR (Reception, Truth and Reconciliation Commission) focused on a number of political trials as a means of examining the right to fair trial and due process before the Indonesian-run courts of the occupation.[138] The work of the CAVR was important, for it brought to light the history of an occupation and the resistance to it through documented cases in the Indonesian courts. The District Court of Dili holds several hundred case files spanning the period of Indonesian rule in East Timor, including full files of some of the most important cases, such as the trials that came out of the 1991 protests culminating in the massacre at the Santa Cruz cemetery. In its Report, entitled Chega!, the commission concluded, *inter alia*, that:

> *18.Judges presiding over the political trials failed in their duties to provide an independent and objective adjudication. These judges significantly contributed to the overall corruption of the legal system by allowing their positions of authority to be manipulated as a political tool of the military intelligence services.*
> *19.The judges who presided over the political trials allowed obviously fabricated evidence to be admitted without objection. They did not consider allegations of torture and intimidation of witnesses to be a serious issue. They routinely based their verdicts of guilty on Records of Interview that had been signed as a result of torture, under illegal conditions. The judges also ignored defendants' requests to be represented by counsel of their choice.*
> *20.Judges handed down sentences to persons convicted of political crimes that were disproportionate to the degree of criminality of the acts allegedly perpetrated. In some cases this involved sentences of years of imprisonment for actions such as supplying cigarettes or small quantities of food to persons suspected of being opponents to the occupation. Time served in military detention, up to seven years in the most extreme case, was generally not taken into account when determining sentences* [139]

For various reasons, including an unrealistic mandate and an impossible timeframe, the CAVR was unable to get to grips with the institutional aspects of a repressive regime. The commission did not examine what the roles of judges should have been and what was possible in that environment. No Indonesian judges were interviewed about their role in occupied East Timor,

[137] Final Report of the Truth and Reconciliation Commission, Institutional Hearing: The Legal Community, Vol. 4, Ch. 4, para.37.
[138] The author declares her participation in the process in that she served as an international legal advisor to the commission, and was closely engaged in the drafting of the Political Trials section of the Report.
[139] Chega! Chapter 7.6, Political Trials.

and how they perceived the role of the judge in a contested territory facing armed resistance. It is possible that the explanation would have been that they served the Republic of Indonesia, and as far as they were concerned, East Timor was an Indonesian province. Indonesian laws applied, and the role of the Indonesian judge in East Timor was just to implement those laws. Indonesian judges would presumably have shared the state's perception that the East Timorese resistance was not a just struggle against unlawful invasion and occupation pursuant to the right to self-determination, but an armed insurrection threatening the authority and integrity of the republic. As to why they would have pursued professional practices of the kind identified by the CAVR in its study of political trials, including ignoring obvious evidence of confessions extracted under torture and fabricated evidence, the answer would presumably be that it was the role of the judge in Soeharto's New Order to enforce the will of the leadership. This was not a place or a time for notions of judicial independence, impartiality and ethics. The Indonesian judges may well have also have said that not to have toed the line then would have endangered them and their families.

Finally, in South Korea too, the judiciary has been a target of the Truth and Reconciliation Commission. In January 2007, the commission controversially identified a number of judges for having made "arbitrary rulings" during the regime of former President Park Chung-hee. It is reported that "*492 judges decided 1,412 cases of emergency decree violations in the 1970s, and 12 of them are currently in high-ranking positions including justices at the Constitutional Court and the Supreme Court and heads at district courts. More than 100 former high-ranking judges who are currently working as lawyers were also included on the list. One example is an incumbent Constitutional Court justice, who sentenced a college student who led an anti-Yushin Constitution rally in 1978, to 30 years in prison. Another is a current Supreme Court justice who gave an 18-month jail term to a person for spreading rumors about Park's government in 1976*."[140] In September 2008, the Chief Justice of Korea apologised to the nation for the past failures of the judiciary, admitting there were times when judges had failed to maintain independence and to protect citizens' basic rights as well as the rule of law.[141] Decisions incompatible with constitutional values or procedural justice were made. "I, as the Chief Justice, would like to take this opportunity to apologize to the general public for the disappointment and pain that the Judiciary caused in the past by failing to fully perform its constitutional duties".

[140] Korea Times, "Past Arbitrary Rulings Hits Judges", 30 January 2007.
[141] Hon. Justice Lee Yong-hoon, Chief Justice,Supreme Court of the Republic of Korea, Speech by the Chief Justice of the Supreme Court of the Republic of Korea in Commemoration of the 60th Anniversary of the Judiciary, September 26, 2008. The following extracts draw from this speech. I am grateful to Hon. Justice Kim Ye Young for providing an English copy of the speech to me.

Justice Lee underscored the importance of "recovering judicial justice, while maintaining balance with other constitutional values such as judicial independence or legal stability." The "most effective way to correct the past mistakes made in trials that is true to the legal principle is to hold a new trial". In this regard, he drew attention to corrections already made, in the Minjok Ilbo case, the Inhyuk Party Rebuilding Committee case, the Democratic Youth and Students League case, and cases related to the Gwangju Democratic Movement. The supreme court was already reviewing many decisions delivered during the dictatorial rule. The result of the analysis is to be included in the commemorative work for the South Korean judiciary's 60th anniversary.

## A. HOLDING JUDGES ACCOUNTABLE

South Africa went from Apartheid to Rainbow Nation with essentially the same judges. Under the new constitution, they were joined by a few new ones with strong human rights credentials. In Spain, Franco's judges escaped vetting and lustration. But there have been situations where judges were held to account for their conduct during periods of conflict or repression. Judicial security of tenure is not a bar to holding judges to account for serious misconduct.

### 1. PROSECUTING JUDGES

Following the end of World War II Germany's defeat, several judges, prosecutors and justice officials were tried in the American zone of occupation, on the basis of a law known as Control Council Law #10. This case was that of Joseph Altstoetter and 15 others, also known as the Justice Trial.[142] They were charged with war crimes and/or crimes against humanity arising from enacting and enforcing statutes, decrees and orders; working with the German Security Police for essentially criminal purposes in the course of which, by distortion and denial of judicial process, they committed crimes against civilians in occupied territories, prisoners of war and German nationals; using extraordinary courts for creating a reign of terror in order to suppress opposition; subjecting Jews of all nationalities, nationals of Eastern countries, gypsies etc to discriminatory laws and trials. Officials of the justice ministry were accused of having aided and implemented the unlawful annexation of Czechoslovakia and parts of Poland and France, by creating special courts to facilitate the extermination of Polish nationals and Jews and uppressing the opposition.

[142] *United States of America vs.Josef Altstoetter* (Case 3), Reports of Trials of War Criminals, United Nations War Crimes Commission, Year, Vol.VI, pp. 1-110.

The essence of the case was that the legal system was one of the means for sustaining the Nazi regime. The judges convicted 10 of the accused and acquitted four. The court described how the judges had colluded in the implementation of the unlawful "Nacht und Nebel" decree.

> "*Many accused Nacht und Nebel persons were arrested and secretly transported to Germany and other countries for trial. Often they were denied the right to introduce evidence, to be confronted by witnesses against them, or to present witnesses on their own behalf. They were denied the right of counsel of their own choice, and were sometimes denied the aid of any counsel. No indictment was served in many instances and in such cases the accused learned only a few moments before the trial of the nature of the alleged crime for which he was to be tried. The entire proceedings were secret*".[143]

The evidence satisfied the court of the existence of two processes by which the Ministry of Justice and the courts were equipped for what it called the "*terroristic functions in support of the Nazi regime*": "*By the first, the power of life and death was even more broadly vested in the courts. By the second, the penal laws were extended in such inclusive and indefinite terms as to vest in the judges the widest discretion in choice of law to be applied, and in the construction of the chosen law in any case"*[144] Thus, it was not that the judges had no choice, but they chose to enthusiastically further the Nazi regime's objectives. The judges of the US Military Tribunal also dismissed the defence of prescription by law. They did not tackle the substantial issue of what to do when the law is unjust, and when to apply the law. Instead, the court avoided the matter by referring to the international nature of the process and laws under which this case was brought.[145]

## 2. VETTING AND LUSTRATION OF JUDGES

Judges in countries such as Poland, Germany and Greece have faced administrative action.

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[143] *Ibid.*, p.9.
[144] *Ibid.*, p.6.
[145] Quoted in the case report from the Annual Digest and Reports of Public International Law Cases, 1947, Ed. H. Lauterpacht, pp.286-287. "*The argument that compliance with German law is a defence to the charge rests upon a misconception of the basic theory which supports our entire proceedings. The Nuremberg Tribunals are not German courts. They are not enforcing German law. The charges are not based on violations by the defendants of German law. On the contrary, the jurisdiction of this Tribunal rests on international authority, and, within the limitations of the power conferred, it enforces international law as superior in authority to any German statute or decree. It is true, as defendants contend, that German courts under the Third Reich were required to follow German law (i.e.. the expressed will of Hitler) even when it was contrary to international law. But no such limitation can be applied to this Tribunal. Here we have the paramount substantive law, plus a Tribunal authorized and required to apply it notwithstanding the inconsistent provisions of German local law. The very essence of the prosecution case is that the laws, the Hitler decrees and the draconic, corrupt and perverted Nazi judicial system themselves constituted the substance of war crimes and crimes against humanity and that participation in the enactment and enforcement of them amounts to a complicity in crime.*"

In 1997, the Polish Parliament amended the 1985 Act on the Courts of General Jurisdiction, allowing for sanctions against judges who had collaborated with the previous regime, ranging from vetting/lustration to freezing of salaries.[146] Judges could be removed for violating judicial independence by having issued unjust verdicts between 1944-1989 at the request of communist authorities. This matter went to the constitutional court, which in a split decision, ruled against the procedural aspects of Article 6 of the law dealing with the limitation period. The National Council of the Judiciary established a disciplinary court to address ethical infringements by judges. It could also investigate "*acts of disloyalty against judicial independence*". The verification procedure of an individual judge could be administered by the disciplinary court, following a triggering application by the Minister of Justice, the National Council of Judiciary, and anyone allegedly victimized by the judge's actions. The activities of 16 judges were scrutinized; and retirement pensions of seven Stalinist-era judges were cancelled.[147]

Germany has seen two waves of vetting and lustration. The first was the denazification after World War II. This was justifiable by the heinousness of the acts of the previous regime, and the promise of a transformed, democratic Germany.[148] Neither this, nor wholesale prosecutions triggered through Nuremberg, were embraced by the Federal Republic of Germany that emerged from the war. Commentators claim that by all standard accounts, denazification failed. "*Most persons vetted under the scheme were dubbed 'followers' – the lowest level of political responsibility. Those sanctioned were subject to fines only; few were excluded from public office and then only for short periods. Long after the denazification, many of the collaborationist elite still held on to jobs they had under the Nazi regime; even institutions like the judiciary remained dominated by former Nazis…Nazi Party membership was so pervasive that continuing denazification would have mean eliminating many of the sitting judges*".[149] The newly established republic did not prosecute any of its own judges. Rosenberg asserts that:

> "*In 1970 about 7,500 judges – fully half the country's bench – were still Third Reich holdovers. In Hamburg, seventeen of the judges who had presided over the Nazis' infamous Race Law trials were still alive after the war. Eleven were rehired to the bench… In 1976 Dr. Hans Puvogel, who had advocated the killing*

[146] Sadurski, RIGHTS BEFORE COURTS, p.244.
[147] Lavinia Stan, "The Politics of Memory in Poland: Lustration, File Access and Court Proceedings", Studies in Post-Communism, Occasional paper no.10 (2006), p.33.
[148] See Tina Rosenberg, THE HAUNTED LAND: FACING EUROPE'S GHOSTS AFTER COMMUNISM, Random House, 1989, (hereafter "Rosenberg, THE HAUNTED LAND"), Ch.8 (Official Exorcism) for details of the denazification process.
[149] Teitel, TRANSITIONAL JUSTICE, p.159.

> *of 'inferior beings', was named minister of justice in Lower Saxony. When a judge made the information public, it was the judge, not Puvogel, who was punished – for lacking proper respect for his superior*".[150]

McAdams describes denazification in the east as being far worse than in the west. After a spurt of prosecutions, the German Democratic Republic (GDR) regime became "*willing to absolve its citizens, including many National Socialists and sympathizers, of any further need to wrestle with the implications of the Nazi period*".[151] Rosenberg says judges were only able to keep their jobs if they could *prove* they had been in the resistance. He alleges that "*of 1,129 judges at the war's end, only 10 remained by 1947. They were replaced by 'people's judges' – the qualification being a primary school degree and the endorsement of a local Communist group. Later these judges were trained in Communist law and ideology in six-to nine-month crash courses.*"[152]

The second wave of lustration followed reunification. The GDR was absorbed into the Federal Republic of Germany. The reunification treaty provided for dismissing any officials who had collaborated with the Stasi or could be linked to human rights violations.[153] A law passed on 20 December 1991 allowed for checking of the former GDR secret police files, leading to thousands of public officials, judges, university professors and schoolteachers losing their jobs.[154] A purge of the communist legal system followed. The West at least had no shortage of technocrats and was able to replace East German jurists with suitably trained ones. For important positions "*in terms of instilling the legal order – judges, law professors, and other lawyers – the East Germans were able to sweep away the old, corrupted, and compromised legal personnel whose ability and training were suspect to begin with, and whose loyalty to the new regime could never be fully relied upon. All or most of them were replaced with fully trained, competent, uncompromised, and trustworthy personnel, who in any case knew the German legal system better than the persons they replaced*."[155]

The purge was intense and thorough. The judges had to reapply for their jobs. Blankenburg explains how the judiciary was screened: "*Every judge and especially every prosecutor had to undergo a test of being 'worthy of the Rechtsstaat'. Apart from the check with secret service files*

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[150] Rosenberg, THE HAUNTED LAND, p.313.
[151] McAdams, JUDGING THE PAST IN UNIFIED GERMANY, p.5.
[152] Rosenberg, THE HAUNTED LAND, p.316.
[153] See generally, McAdams, JUDGING THE PAST IN UNIFIED GERMANY.
[154] Sadurski, RIGHTS BEFORE COURTS, p.233.
[155] Vojtech Cepl, "Bottlenecks in the transformation of Eastern Europe", Washington University Journal of Law & Policy, vol. 4, 2000, p. 23.

*that applied to all civil servants, their professional activity was reconstructed by consulting the court files for their entire careers. Politically sensitive cases did not even have to be unearthed: committed to Prussian traditions of orderliness, the GDR bureaucracy had kept a copy of all files of political trials in a special archive at a prison in Berlin-Rummelsburg*".[156] The risks of being uncovered were great: "*Many former magistrates therefore chose not to apply: some accepted early retirement, the choice being between unemployment benefits or a retirement pension. Especially in Berlin where Cold War sentiments are still high, only 10% of the judges and prosecutors were reappointed; in other East German states, former GDR judges had a reappointment chance of 55%, prosecutors 45%*".[157]

Following reunification, denazification in the East was revived. The first trials of officials of the former regime tackled what was seen, in the dominant West at least, as inadequate denazification in the GDR. The very first criminal trial for what the West German lawyers considered "abuse of law" concerned a former lay judge who tried alleged Nazis in the course of a process that has come to be known as the "Waldheim process": "*meant to establish proletarian justice, the 'Waldheim process' had put on a Stalinist trial against 3,390 alleged Nazis, ignoring any and all defence rights and sentencing 34 of the accused to death*".[158] In another early case, a High Court judge who had imposed death sentence in trials of a similar nature, was sentenced to three years and nine months for "*contributing to manslaughter and abuse of law*".[159]

In Greece, prominent judges were closely connected with the military junta that took power in 1967. For a while, a high-ranking judge headed the government, and members of the judiciary served as ministers of the junta.[160] Vetting the judiciary was made possible through specialised legislation passed after the shift to a new regime, allowing for the creation of the Highest Disciplinary Council (on which were two law professors, two high judges from the Council of the State, two high judges from the Court of Cassation and two high judges from the Audit Office). Another law was passed to "*restore legality to the justice system and to restitute those judges who*

[156] Erhard Blankenburg, "The Purge of Lawyers after the Breakdown of the East German Communist Regime", Law and Social Inquiry, Vol. 20(1), Winter 1995, pp.223-24, at p.236.
[157] *Ibid.*, at p.240-241.
[158] *Ibid.*, at p.230, citing K.W. Fricke, "Geschichte und Legende der Waldheim Prozess**"**, Deutschland Arkiv 1980, 1172-1183.
[159] *Ibid.*, at p.230-231.
[160] This section is drawn from the work of Dimitri A. Sotiropoulos, "Swift Gradualism and Variable Outcomes: Vetting in Post-Authoritarian Greece",in VETTING AND TRANSITIONAL JUSTICE, JUSTICE AS PREVENTION: VETTING PUBLIC EMPLOYEES IN TRANSITIONAL SOCIETIES A. Mayer-Rieckh and P. de Greiff (Eds), Social Science Research Council, 2007.

*had been dismissed during 1967-1974*", in other words recalling into service approximately 40 judges who had been forced to resign, or had done so in protest at the junta's interference in the administration of justice. It also served to refer the judges who were appointed, or promoted at the most senior level, during the junta's reign to the Highest Disciplinary Council. These judges were assessed by consideration of the conditions of their promotion, their professional conduct and conduct outside of the judicial sphere, i.e. relations with the junta. In the end, the following were dismissed: leading judges of all three high courts, the president and vice-presidents of the Council of the State, the president of the Court of Cassation, the general prosecutor, president and vice-presidents of the Audit Office; 23 judges were charged with disciplinary offences – five were absolved, 12 sanctioned in other ways such as early retirement, and one temporarily suspended.

## V. CLOSING OBSERVATIONS

Dealing with the legacies of atrocity, armed conflict and serious human rights violations is a long process. Nations and divided societies cannot be transformed overnight. The process will have ups and downs, progress and regress. There has been a tendency to run down the contribution that courts and judges can play in the process. I believe that I have demonstrated how central a role the judicial body has in realigning the emphasis to respect for the rule of law in a fragile society. Judges too may have to go through a period of institutional change and transformation, as part of the wider socio-political changes. They have to adapt and learn the ways of the new environment, for example, the obligations imposed on them by the state's accession to, or ratification of, human rights treaties. The courts have to become more representative, with a greater ethnic, racial and gender balance. They have to adapt to the vision set out in a new constitution.

Judges may have to take on a variety of roles in the means and methods deployed to deal with legacies of the past. They can be factfinders, whether as investigators or commissioners on truth commissions or coroners. They can be placed on sensitive committees deciding on amnesty. Judges can also decide challenges to legal issues arising from truth and reconciliation commissions, such as occurred in South Africa. They may, in the course of civil proceedings, make decisions of great importance for victims of abuses. Judges may also process criminal trials, in a variety of settings, whether a domestic court, an international tribunal or an internationalised court. If a state chooses to go down the lustration route, they may also decide on whether individual persons may be purged from the system. Of immense importance is the role of review

that constitutional courts have come to play in this area, declaring in a number of instances that the means and methods proposed by states for dealing with the past were unconstitutional.

Some judges may be too compromised to be part of the new system and find themselves on the receiving end. The judiciary as a whole may find itself under scrutiny, individual judges vetted, and sometimes, albeit rarely, prosecuted. The purging may be seen as essential in the case of judges too closely allied with the past, who failed to perform in an appropriate manner.

In this study, I have attempted to show there is a tremendous power to be harnessed when judges in countries seeking to deal with a burdened past realise their challenges are not unique and that they have much to learn from their colleagues elsewhere. There are common problems that judges all over the world, and particularly those in transition, face. Judges are a key link in the wider movement to promote the rule of law. There is an "invisible college" of judges, meeting regularly, through for example, the International Bar Association and the American Bar Association's International Judicial Institute. Connecting to this network facilitates transnational dialogue that is beneficial for individual judges, the fraternity as a whole and the quality of a country's judicial system. This is not about slavishly following some new fad, but about linking to international best practices, learning the experience of others who have faced such situations and a security and solidarity of one's peers. Take the interpretation of constitutional human rights provisions. Where they reflect a fundamental and universal human right, declared in an international or regional instrument, it is natural and useful for judges to draw upon the growing body of jurisprudence. A global jurisprudence of human rights is being developed, alongside a global judicial best practice.

One cannot overlook the potential role of the judges in current matters, for they can contribute towards a society that operates in accordance with the rule of law by ensuring that the courts, in their everyday decisions and activities, act to promote and protect individual rights. They can do this through upholding the fundamental rights of individuals in their courts and in their decisions, and contribute towards creation of a human rights culture. They can enhance the delivery of justice – judges need to make the courts and the justice system an accessible and satisfactory venue for resolving conflict peacefully. They have the potential to contribute towards reduction of violence or armed force and the rights violations that take place in such situations. Judges need to make the justice system user-friendly; treat people who use it with dignity; ensuring the court is and is seen as a place where rights of individuals are upheld. Judges need to operate in a human rights framework in all their activities. It is not just about Art.14 of the ICCPR and fair trial/due

process, although respect for this is essential. It is about creating and operating a system that is fair and equitable, that does not discriminate between the parties appearing before it. It is about judges and courts becoming sensitized to silent discrimination, such as that which exists for those with disabilities. It includes judges dealing with matters in a gender sensitive way, that respects women as equal and entitled to the same rights as men, and sometimes needing more protection and special measures. The rights of victim and witnesses need to be sufficiently protected. Finally, judges must ensure that victims of human rights violations receive an effective remedy.

The judges' role in processes of dealing with the past to take a country forward adds a seriousness and gravity to the proceedings, injects independence and impartiality and stamps the imprint of the rule of law. The most significant contribution in the instances surveyed arises when the judges sit as judges – whether reviewing challenges to truth and reconciliation commissions; testing legislation, policies and acts of government against the constitution, trying criminal cases or adjudicating civil matters such as property restitution claims. This is where they can contribute towards the creation of a new legal order, putting a nation firmly on its path towards the rule of law and constitutional democracy. Their role in making the processes of dealing with the past open and accountable is essential. Courageous and well reasoned decisions that have credibility and esteem in the public eye, that uphold the rule of law and the rights of individuals, can mark the break with the past in and meaningful way. The consequences can be far reaching.

Last but not least, it needs to be stressed that judges can enter into public debate. They are entitled to have views and to express them. Eminent judges, such as Mr. Justice Bhagwati from India, Mr. Justice Lallah from Mauritius, Mr. Justice Kirby from Australia, Mrs.Justice Sandra Day O'Connor from the USA and many other leading judges, regularly contribute their perspectives in domestic and international fora. They do so carefully, in line with judicial ethics and propriety, but do not hesitate to say what has to be said. And when a nation is seeking to overcome the bad times and move forward, it is even more important that their reasoned voices be heard.