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Transitional Justice and International Law
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Transitional Justice and International Law:
What Role is Played by the UN in Post-conflict Peacebuilding?[1]

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Ⅰ Introduction

The objective of this paper is twofold: to analyze the mechanisms and trends of transitional justice in the UN post-conflict peacebuilding processes, and to clarify some of their possible impacts on the international legal order.

United Nations peacekeeping has evolved into a complex multi-dimensional operations which are called upon to facilitate the political process through the promotion of national dialogue and reconciliation, protect civilians, assist in the disarmament, demobilization and reintegration of combatants, support the organization of elections, protect and promote human rights, and assist in restoring the rule of law. Most of these mandates belong to the category called "peacebuilding" which involves a

[1] This paper is for the presentation by the author at the Autumn Bi-Annual Meeting of the Japanese Society of International Law. It is a provisional version and, because of the shortage of time, many of the necessary reference footnotes have not been attached yet.

range of measures aimed to reduce the risk of lapsing or relapsing into conflict, by strengthening national capacities for conflict management, and laying the foundations for sustainable peace.

In this process of peacebuilding, problems of transitional justice are increasingly becoming important as crucial elements deciding the success or failure of a peacebuilding mission. The notion of "transitional justice" is generally used as comprising the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.

The phenomena of transitional justice, to which the UN has been related in various ways, could have the potential to bring about some major impacts on both individual norms and the structure of the international legal order. In fact, on the one hand, the international and hybrid criminal tribunals which are primary actors in transitional justice have brought about the development of individual criminal responsibility and international criminal law.

Central to the practice of post-conflict peacebuilding, on the other hand, has become the concept of democratic governance, due to the particular context and exigencies of societies emerging from violent conflict, usually accompanied by dysfunctional or unrepresentative government and a history of political repression. Here, a UN peacekeeping or peacebuilding mission is typically the most important single outside actor as it is involved on an ongoing and daily basis in the process of establishing democratic governance in a country recovering from conflict. Peacebuilding missions have become State-building missions promoting democratic governance because fragile States are seen as a risk to international security as well as their own people's security. Peacebuilding aims to transform all aspects of the State within a short time, expecting war-torn societies to achieve a level of development that took Western States decades or even centuries. These activities of intensive commitment in domestic governance of a State by international actors would inevitably contradict some of the traditional principles of international law based upon the order of international society made up of sovereign States.

We will first (Chapter II) look at the practice of post-conflict peacebuilding by UN peacekeeping or peacebuilding missions in order to grasp some of the political and practical constraints under which problems of transitional justice must be understood. We will then (Chapter III) examine problems of transitional justice in the UN post-conflict peacebuilding, and finally (Chapter IV) attempt to clarify some of the impacts of UN Activities in transitional justice on the international legal order.

A caveat is in order here: because the objective of this paper is such a huge one, we will inevitably aim to draw only a broad but rough sketch, and point out problems and challenges rather than solve or tackle them.

Ⅱ UN Post-conflict Peacebuilding as a Process of Transitional Justice

1 From "Peacekeeping" to "Peacebuilding"[2]

●Peacebuilding as an Extension of Peacekeeping

Since the end of the Cold War, the UN expanded its peace mission from security by monitoring and demilitarization activities in the aftermath of ceasefires or peace agreements to a broad range of measures aimed at the sustainable peaceful transformation of societies emerging from violent conflict.

Contemporary peacekeeping has changed in terms of its objectives and structure. Structure: a twofold composition of missions emerged, so-called "integrated missions" which comprise military and civilian components. Objectives: peace-keeping missions now pursue a multi-dimensional approach which also integrates peace-building. The latter covers to a lesser extent military options, but rather aims to foster socio-economic and political structures which, in turn, are presumed to strengthen peace and to avoid a relapse onto conflict[3].

● Peacebuilding as the Core Mandate of Multi-dimensional United Nations Peacekeeping Operations

Multi-dimensional United Nations peacekeeping operations deployed in the aftermath of an internal conflict face a particularly challenging environment. The State's capacity to provide security to its population and maintain public order is often weak, and violence may still be ongoing in various parts of the country. Basic infrastructure is likely to have been destroyed and large sections of the population may have been displaced. Society may be divided along ethnic, religious and regional lines and grave human rights abuses may have been committed during the conflict, further complicating efforts to achieve national reconciliation.

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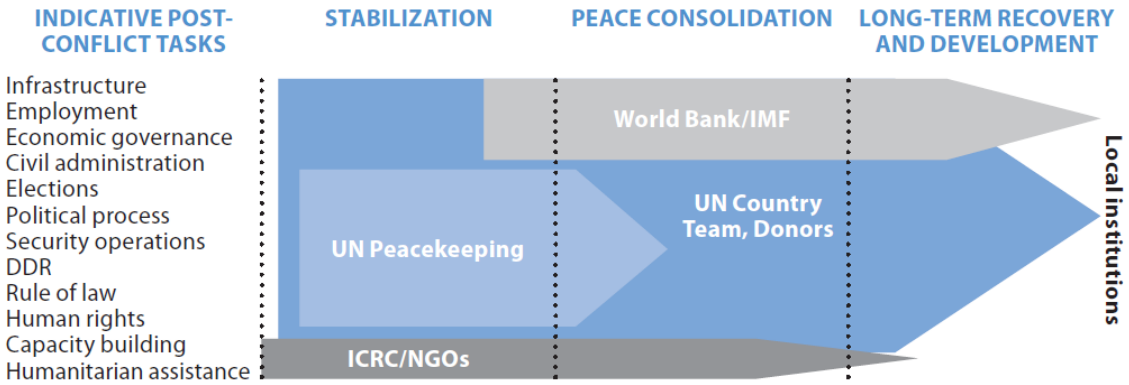
[2] This section relies on, among others, the following: United Nations, *United Nations Peacekeeping Operations: Principles and Guidelines* (2008); International Association for Humanitarian Policy and Conflict Research (aisbl), "Introduction to Peacebuilding: History," "Introduction to Peacebuilding: Operationalizing Peacebuilding," "Introduction to Peacebuilding: Debates," "Introduction to Peacebuilding: Actors," available at http://www.peacebuildinginitiative.org/index.cfm;

[3] Leininger, "Democracy and the UN Peace-Keeping – Conflict Resolution through State-Building and Democracy Promotion in Haiti," in *Max Planck Yearbook of United Nations Law*, Vol. 10 (2006), pp. 465, 470.

【Figure: The Core Business of Multi-dimensional United Nations Peacekeeping Operations】

(United Nations, *United Nations Peacekeeping Operations: Principles and Guidelines*, p. 23.)



Multi-dimensional United Nations peacekeeping operations are deployed as one part of a much broader international effort to help countries emerging from conflict make the transition to a sustainable peace. As shown in the above【Figure】, this effort consists of several phases and may involve an array of actors with separate, albeit overlapping, mandates and areas of expertise[4].

●Ratio of Peacebuilding Mandates in Peacekeeping and Ratio of Transitional Justice in Peacebuilding Mandates

In contrast to peacekeeping, peacebuilding[5] targets the reform of society as a whole and of all social institutions in the broadest sense, especially in so-called weak, failing or failed States.

According to a research[6] in 2009 for an inventory of UN peace missions since the end of the Cold War, we can get a rough idea of how prevalent the current peacebuilding missions are. During these about 20 years, the UN Security Council has mandated a total of 69 peace missions, including 50 missions with peacebuilding mandates as well as 19 missions with peacekeeping mandates. These 50 peacebuilding missions could be classified into the following categories:

(a) Peacebuilding consultation (17 missions): Small deployment/offices usually providing assistance and consultation to local governments and other actors.

(b) Specialized peacebuilding (5 missions): Small deployments, focused on a single issue area/task (e.g. the observation of elections, the return of refugees, security sector reform) only carrying out monitoring or implementing tasks.

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[4] United Nations, *United Nations Peacekeeping Operations: Principles and Guidelines*, *supra* note 2, at 22-23.

[5] For the concept of "peacebuilding" defined by the UN Secretariat, *see ibid.*, at 18.

[6] V. C. Franke and A. Warnecke, "Building Peace: An Inventory of UN Peace Missions since the End of the Cold War," in *International Peacekeeping*, Vol.16, No.3 (2009), pp. 407-436.

(c) Multidimensional peacebuilding (24 missions): Most civil–military peace operations with comprehensive tasks in one or more of the below-mentioned peacebuilding sectors. Despite the far-reaching mandates of these missions, the sovereignty of the local government is usually retained.

(d) International transitory government (4 missions): The local government is temporarily replaced by external actors.

A variety of peacebuilding mandates could be classified into the following 4 sectors in accordance with the "UN 2006 Peacebuilding Capacity Inventory[7]," and, out of the above-mentioned 50 peacebuilding missions, 39 missions have "(b) Justice and Reconciliation" including various problems of Transitional Justice.

(a) Security and Public Order: Security System Governance, Law Enforcement Agencies, Defense Reform, DDR, Mine Action

(b) Justice and Reconciliation: Transitional Justice, Judicial and Legal Reform, Corrections, Human Rights

(c) Governance and Participation: Good Offices and Mediation, Constitution-Making, Public Administration and Government Strengthening, Local Governance, Financial Transparency and Accountability, Elections, Electoral Systems and Processes / Political Parties, Public Information and Media Development

(d) Socio-Economic Well-Being: Protection of Vulnerable Groups, Basic Needs, Gender, Physical Infrastructure, Employment Generation, Economic Foundations for Growth and Development

These figures demonstrate that the predominant majority of peace missions are now peacebuilding missions, and most of them have transitional justice mandates.

●Peacebuilding as a Requisite of Sustainable Peace

While the deployment of a multi-dimensional United Nations peacekeeping operation may help to stem violence in the short-term, it is unlikely to result in a sustainable peace unless accompanied by programs designed to prevent the recurrence of conflict. Every situation invariably presents its own specific set of challenges. However, experience has shown that the achievement of a sustainable peace requires progress in at least four critical areas[8]:

a) Restoring the State's ability to provide security and maintain public order;

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[7] United Nations Executive Office of the Secretary-General, "Inventory: United Nations Capacity in Peacebuilding," 2006 (available at http://www.undp.org/cpr/iasc/content/docs/Oct_Links/doc_4.pdf).

[8] United Nations, *United Nations Peacekeeping Operations: Principles and Guidelines*, *supra* note 2, at 25.

b) Strengthening the rule of law and respect for human rights;

c) Supporting the emergence of legitimate political institutions and participatory processes;

d) Promoting social and economic recovery and development, including the safe return or resettlement of internally displaced persons and refugees uprooted by conflict.

●A New International Actor: The UN Peacebuilding Commission

The United Nations Peacebuilding Commission (PBC), which became operational in 2006, is a new intergovernmental advisory body of the United Nations specifically dedicated to helping countries make the transition from war to lasting peace. It has been created to marshal resources at the disposal of the international community to advise and propose integrated strategies for post-conflict recovery, focusing attention on reconstruction, institution-building and sustainable development, in countries emerging from conflict[9].

Until its creation, no part of the UN system had responsibility for helping countries make the transition from war to lasting peace. The Peacebuilding Commission is designed to help fill this gap by facilitating an institutional and systematic connection between peacekeeping and post-conflict operation, and bringing together all the relevant peacebuilding actors.

2 Exceptionally to "Territorial Administration"[10]

In exceptional circumstances, the Security Council has also authorized multi-dimensional United Nations peacekeeping operations to temporarily assume the legislative and administrate functions of the State, in order to support the transfer of authority from one sovereign entity to another, or until sovereignty questions are fully resolved, or to help the State to establish administrative structures that may not have existed previously[11].

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[9] *See* "2005 World Summit Outcome," UN Doc. A/RES/60/1 of 24 October 2005, p. 24, para. 98.

[10] This section relies on the following. C Stahn, "The United Nations Transitional Administration in Kosovo and East Timor: A First Analysis," in *Max Planck Yearbook of United Nations Law*, Vol. 5 (2001), pp. 105-183; J. Friedrich, "UNMIK in Kosovo: Struggling with Uncertainty", in *Max Planck Yearbook of United Nations Law*, Vol. 9 (2005), pp. 225-293; M. Bothe and T. Marauhn, "UN Administration of Kosovo and East Timor: Concept, Legality and Limitations of Security Council-Mandated Trusteeship Administration," in C. Tomuschat ed., *Kosovo and the International Community* (Kluwer Law International, 2002), pp. 217-242.

[11] United Nations, *United Nations Peacekeeping Operations: Principles and Guidelines*, *supra* note 2, at 22.

The Security Council has entered new ground by placing Kosovo and East Timor under temporary UN administration[12]. Both the United Nations Interim Administration Mission in Kosovo (UNMIK) and the United Nations Transitional Administration in East Timor (UNTAET) were created on the basis of Chapter VII of the UN Charter.

The mandate of UNMIK was established by the Security Council Resolution 1244 (1999). In Regulation 1999/1 of 25 July 1999, the Special Representative of the Secretary-General (SRSG) outlines that the authority vested in UNMIK comprises all legislative and executive power, as well as the authority to administer the judiciary. The wide scope of powers claimed by the SRSG is reflected in the hierarchy of the legal norms. UNMIK Regulations as the primary legal instruments of the SRSG take precedence over the second source of law, which is the law that was in force in Kosovo before the withdrawal of autonomy on 22 of March 1989[13]. Military responsibilities were given to Member States as authorized to establish a security presence (KFOR) under the NATO leadership.

These powers and responsibilities of UNMIK reach unprecedented levels, but are not entirely new. Many similarities exist with the United Nations Transitional Authority in Cambodia (UNTAC) which was established by Security Council Resolution 745 in 1992. The scope of responsibilities as outlined in the Paris Agreements (Agreements on a Comprehensive Political Settlement of the Cambodia Conflict, signed in Paris on 23 October 1991), encompassed, *inter alia*, administration, law and order, security, reconstruction, humanitarian aid, human rights promotion and the organization of free elections. It was envisaged that UNTAC, according to the legal framework, would take over crucial administrative tasks for each of the different areas as well as judicial and legislative functions. Although comparable in original concept and approach as well as in the enormous scope of the mission, UNTAC's role was in practice more akin to one of supervision and monitoring. Kosovo in turn has served as a model for UNTAET.

In 1999, the United Nations Security Council established UNTAET as an integrated, multi-dimensional peacekeeping operation fully responsible for the administration of East Timor during its transition to independence. Resolution 1272 (1999) empowered UNTAET to exercise all legislative and executive authority, including

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12 C Stahn, "The United Nations Transitional Administration in Kosovo and East Timor: A First Analysis," *supra* note 10, at 106.

13 R. Wolfrum, "International Administration in Post-Conflict Situations by the United Nations and Other International Actors," in *Max Planck Yearbook of United Nations Law*, Vol. 9 (2005), pp. 649, 691, n. 151.

the administration of justice, and gave it a whole series of tasks similar to the UNTAC's.

UNTAET consisted of a governance and public administration component, a civilian police component of civilian police and an armed United Nations peacekeeping force, of equivalent size to the United Nations-mandated Australian-led multinational force INTERFET (International Force East Timor) which preceded UNTAET. In addition, humanitarian assistance and rehabilitation components were incorporated within the structures of the Transitional Administration.

3 Political Constraints of Peacebuilding and Transitional Justice[14]

●Problematique of Peacebuilding as an Extension of Peacekeeping

While peacebuilding has largely become an extension of peacekeeping, it remains unclear whether UN peacekeeping operations are an appropriate tool for peacebuilding activities. This has raised questions about the ability of peacekeepers to conduct peacebuilding activities. Hazen points out[15]:

> The UN has faced growing pains in responding to peacebuilding needs. The UN has yet to develop a framework for peacebuilding…. [W]hile peacekeepers are prime actors in post-conflict situations, they are poorly prepared for peacebuilding tasks and have a poor record on this score…. Peacekeeping missions are not designed for peacebuilding. Peacebuilding has been a secondary task of peacekeepers subsumed by peacekeeping missions because of their large presence on the ground, not as a result of their capacity to carry out peacebuilding tasks. Peacekeepers are not trained in peacebuilding, and often lack the necessary skills, local knowledge, and local languages to conduct peacebuilding activities.

This is a harsh criticism, but is, to some extent, conceded by the UN Secretariat as follows:

> Multi-dimensional United Nations peacekeeping operations generally lack the programme funding and technical expertise required to comprehensively implement effective peacebuilding programmes. Nevertheless, they are often mandated by the Security Council to play a catalytic role in the following critical peacebuilding activities: Disarmament, demobilization and reintegration (DDR) of combatants; Mine action; Security Sector Reform (SSR) and other rule of law-related activities; Protection and promotion of human rights; Electoral

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[14] This section relies on the following: J. M. Hazen, "Can Peacekeepers Be Peacebuilders?", in *International Peacekeeping*, Vol.14, No.3 (2007), pp. 323-338; E. Newman, "Transitional Justice': The Impact of Transnational Norms and the UN," in *International Peacekeeping*, Vol.9, No.2 (2002), pp. 31-50.

[15] J. M. Hazen, "Can Peacekeepers Be Peacebuilders?" *supra* note 14, at 327, 329.

assistance; Support to the restoration and extension of State authority[16].

Another concern is pointed out in regard to the approach taken by peacekeeping operations[17]. Peacekeeping missions are based on the premise of assisting war-torn countries to establish, or re-establish, democratic institutions. To this end, a first benchmark is the holding of democratic elections. Successful elections were once seen as a sign of a return to stability and therefore an exit point for peacekeepers. However, that is no longer the case, as there is widespread agreement that elections are insufficient for long-term stability. It is aptly pointed out as follows[18]:

> One of the most important lessons of UN electoral experience over the past decade is the evolution of a more realistic view of the role that elections can play in the creation of democracy. In the early 1990s many in the international community believed that the successful conduct of an election would establish the basis for the growth of a viable democracy. Experience demonstrated, however, that although elections contribute substantially to democratization, elections alone are not enough. Without effective democratic institutions and processes, such as fair and effective legal systems, a free press, and transparency in government, the impact of one round of elections may be short-term and negligible. In the most unfortunate cases, elections may be used to validate and maintain an undemocratic *status quo*.

More attention is now paid to the need for functioning government institutions, an independent and accessible judiciary and economic development. Furthermore, there is growing recognition of the need to address the attitudes and behaviors that underlie conflict, not just the institutions that exacerbate it.

●Transitional Justice in the UN Post-conflict Peacebuilding

Peacebuilding in post-conflict situations is conditioned by political compromises and practical constraints not present in normal societal situations. Accordingly, modalities of dealing with a past of human rights abuse and achieving justice and accountability are conditioned by the terms of peace settlements and political transitions within a society[19].

Justice is frequently a key issue in post-conflict situations, but often neglected

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16 United Nations, *United Nations Peacekeeping Operations: Principles and Guidelines*, *supra* note 2, at 25-26.
17 J. M. Hazen, "Can Peacekeepers Be Peacebuilders?" *supra* note 14, at 328-329.
18 R. Ludwig, The UN's electoral assistance: Challenges, accomplishments, prospects," in E. Newman and R. Rich eds., *The UN Role in Promoting Democracy: Between Ideals and Reality* (United Nations U. P., 2004), pp. 169, 179-180.
19 E. Newman, "Transitional Justice': The Impact of Transnational Norms and the UN," in *International Peacekeeping*, *supra* note 14, at 31.

in the interests of peace and stability. However, increasingly in recent years, international norms are influencing this process and there is a growing consensus that some form of justice and accountability is necessary for peace and stability. Some say that there has been a 'paradigm shift' in attitudes: it is increasingly accepted that accountability and justice are an essential part of peace in post-conflict societies[20].

The emergence of international regimes, tribunals and mixed courts is clearly having a significant impact upon transitional peacebuilding. It is pointed out, however, that the question of when and where international norms of accountability and justice are applied is still a function of essentially political, rather than legal or moral, factors. The presence of international processes and standards in transitional peacebuilding processes is not altering a well-established fact of social life: in terms of dealing with past human rights abuse, the question of who is held accountable remains largely a political issue. Justice is a variable among a balance of values that a particular society must come to terms with[21].

For the United Nations, 'justice' is an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs[22]. It is to be noted, however, that, in post-conflict countries, the vast majority of perpetrators of serious violations of human rights and international humanitarian law will never be tried, whether internationally or domestically. Therefore, other transitional justice mechanisms need to be put in place in order to overcome the inherent limitations of criminal justice processes — to do the things that courts do not do or do not do well — in particular to help satisfy the natural need of victim's relatives to trace their loved ones and clarify their fate; to ensure that victims and their relatives are able to obtain redress for the harm they have suffered; to meet the need for a full, comprehensive historical record of what happened during the period of conflict and why; to promote national reconciliation and encourage the emergence of moderate forces; and to ensure the removal from the justice and security sectors of those who may have connived in the violation of human rights or aided and abetted repression[23].

Not to realize these constraints and other problems will result in unrealistically high expectations and undermine the credibility of international norms

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[20] View of N. J. Kritz cited at *Ibid.*

[21] E. Newman, "Transitional Justice': The Impact of Transnational Norms and the UN," in *International Peacekeeping*, *supra* note 19, at 47.

[22] Report of the Secretary-General, "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies" (UN Doc. S/2004/616, 23 August 2004), p. 4, para. 7.

[23] *Ibid.*, pp. 15-16, paras. 46-47.

of justice and accountability[24].

Ⅲ Transitional Justice in the UN Post-conflict Peacebuilding

1 Processes and Mechanisms of Transitional Justice[25]

●Functions and Mechanisms

The notion of "transitional justice," as we referred to earlier, is generally used as comprising the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with different levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.

Transitional justice is generally thought to help prevent recurrence of violent conflict and foster sustainable peace by establishing a historical record and countering denial, ensuring accountability and ending impunity, and fostering reconciliation and socio-political reconstruction.

●A Brief History of Transitional Justice

The modern origin of transitional justice can be traced back to the post-World War II Europe, and especially International Military Tribunal at Nuremberg (1946-1949) and the de-nazification programs in Germany. The central feature of this first wave of transitional justice was the articulation and application of international law. Although the military tribunals were criticized by some as being an example of "victor's justice," they significantly influenced the development of international law and set a precedent for international justice efforts decades later.

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[24] E. Newman, "Transitional Justice': The Impact of Transnational Norms and the UN," in *International Peacekeeping*, *supra* note 19, at 48.

[25] This section, which is to explain some commonly shared knowledge of the basic concepts, history, approaches of transitional justice, is based upon the followings: Report of the Secretary-General, "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies" *supra* note 22; International Association for Humanitarian Policy and Conflict Research (aisbl), "Transitional Justice: Definitions & Conceptual Issues," "Transitional Justice: Transitional Justice & Peacebuilding Processes," "Transitional Justice: Actors & Activities," "Transitional Justice: Key Debates & Implementation Challenges," available at http://www.peacebuildinginitiative.org/index.cfm; M. C. Bassiouni, "Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights," in M. C. Bassiouni, ed., *Post-Conflict Justice* (Transnational Publishers, Inc., 2002), pp. 3-54.

The growth of transitional justice as a field of inquiry and practice (and its articulation as such) occurred in the 1980s and 1990s, primarily due to the growing number of democratizing States as well as States in post-conflict contexts around the world, and the resulting question of how, and whether, to address the human rights violations committed by previous regimes or fighting warlords in the civil wars. Other contributory factors would include the increasing prominence of human rights and human rights organizations as well as the end of the Cold War.

The central feature of this second wave of transitional justice was the truth commission. Truth commissions emerged within the particular context of negotiated transitions from authoritarianism to democracy in South America. In these settings, criminal prosecutions were either impossible or extremely dangerous because the outgoing regime still retained considerable power and had the ability to derail the democratization process. The truth about the previous regimes' abuses would be established and acknowledged at the expense of prosecuting suspected perpetrators. As a result, people started referring to the so-called "truth versus justice" debate[26].

Parallel to these developments, the brutal wars in the former Yugoslavia and the genocide in Rwanda led to the creation of two *ad hoc* international tribunals: the International Criminal Tribunal for the former Yugoslavia (ICTY), based in The Hague, Netherlands, and the International Criminal Tribunal for Rwanda (ICTR), based in Arusha, Tanzania. International justice was further institutionalized by the establishment of the International Criminal Court (ICC) in 2002 as well as a series of "hybrid" and internationalized courts, such as the Special Court for Sierra Leone or the Extraordinary Chambers of the Cambodian Criminal Court, whose benches include both national and international judges.

●Approaches of Transitional Justice

It would be useful at the beginning to make some brief explanations on each of a set of approaches: (1) criminal prosecutions, (2) truth commissions, (3) reparations, (4) institutional reform, especially vetting, and (5) amnesties.

(1) Criminal Prosecutions: Criminal prosecutions usually target what are called the "big fish", i.e., suspects considered most responsible for massive or systematic human rights violations. This has led to significant advances in international justice efforts, such as the creation of ad hoc international criminal tribunals, various hybrid courts, and the International Criminal Court (ICC). They are considered to advance a

[26] In 1995, South Africa established a Truth and Reconciliation Commission (TRC) as a central component of its negotiated transition from apartheid to democracy. The South African TRC is perhaps the most written-about single transitional justice endeavor.

number of objectives, among which are bringing to justice those responsible for serious violations of human rights and humanitarian law, putting an end to such violations and preventing their recurrence, securing justice and dignity for victims, establishing a record of past events, promoting national reconciliation, re-establishing the rule of law and contributing to the restoration of peace.

(2) Truth Commissions: Truth commissions are official, temporary, non-judicial fact-finding bodies that investigate a pattern of abuses of human rights or humanitarian law committed over a number of years. These bodies take a victim-centred approach and conclude their work with a final report of findings of fact and recommendations. Truth commissions have the potential to be of great benefit in helping post-conflict societies establish the facts about past human rights violations, foster accountability, preserve evidence, identify perpetrators and recommend reparations and institutional reforms.

(3) Reparations: Reparation programs usually distribute a combination of material and symbolic benefits to victims, including financial compensation and official acknowledgement of and apology for the wrongs committed against the victims as well as memorialization initiatives. No single form of reparation is likely to be satisfactory to victims. Instead, appropriately conceived combinations of reparation measures will usually be required, as a complement to the proceedings of criminal tribunals and truth commissions.

(4) Institutional Reform, especially Vetting: Vetting, for which the assistance of the United Nations has frequently been sought, refers to processes for screening public employees or candidates for public employment to determine if their prior conduct (especially their lack of respect for human rights standards) warrants their exclusion from public institutions. The vetting of security agencies and judicial systems is particularly important from a transitional justice perspective as it aims to make those institutions more trustworthy in the eyes of the general population.

(5) Amnesties: Amnesty can be defined as immunity in law, from either criminal or civil legal consequences, or from both, for wrongs committed in the past in a political context. Immunity may derive either from an amnesty law or an exercise of power founded in law. More generally, it refers to a State policy of or a societal preference for overlooking or forgetting the violent past. Although the very idea that amnesties are transitional justice mechanisms can be highly contentious as they may appear as "do nothing" approaches, amnesties have been part of many peace agreements and remain widely applied internationally.

●Choices of Institutional Design[27]

The search for appropriate institutional designs to deal with mass atrocities is still very much 'a work in progress'. Experience has shown that there is no one-size-fits-all formula, but a need for individual and country-specific solutions.

Transitional justice requires a plurality of approaches. As different symptoms require distinct treatments, different scenarios of transition need individual institutional designs. Solutions applied in one country will not necessarily work in a different country. The choices depend on a variety of factors, including the nature of the conflict, the political environment in the country, the capacity of the domestic judiciary, the security situation and the involvement of international actors. These factors influence the design of both judicial and quasi- or non-judicial mechanisms of justice. Some of the factors could be explained as follows.

(1) Truth and Reconciliation Commissions: While some commissions were international in the sense that they were established on the basis of a UN-sponsored peace accord or international agreements, other commissions were domestic in the sense that they were established by domestic laws. Experience shows that domestic approaches may produce beneficial results in situations in which there is a clear break between the old and the new regime and where both the new government and the local judiciary enjoy the trust of the population. On the other hand, international approaches appear to be better suited to address scenarios of transition in which ethnic conflicts or group-oriented oppression continue to divide a society, where there is no clear break in regime and where the justice system lacks capacity, legitimacy or independence.

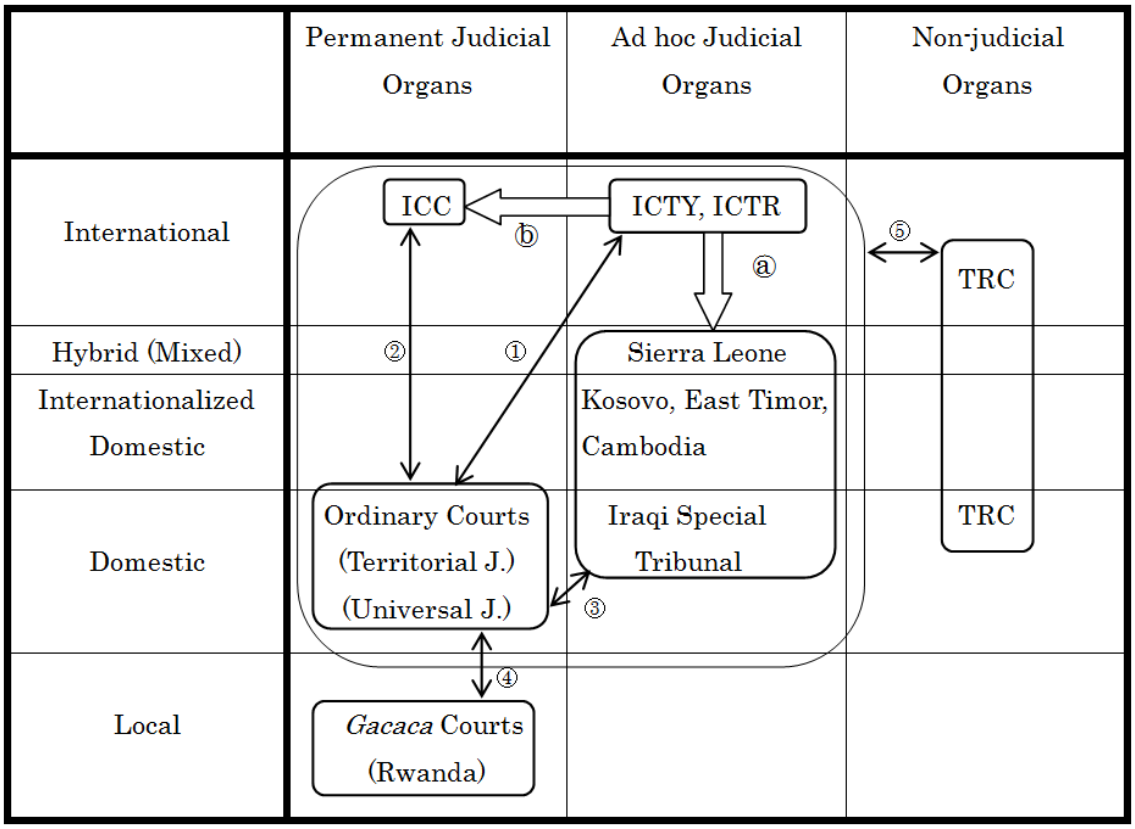
(2) International Judicial Institutions: We have witnessed several models of international judicial institutions as follows. Fully international justice: the ICTY, the ICTR, and the ICC. Hybrid court: the Special Court for Sierra Leone (established as a treaty-based court). Internationalized domestic courts: Kosovo – the use of international judges and prosecutors in the courts of Kosovo, pursuant to regulations of UNMIK; East Timor – a Panel with Exclusive Jurisdiction over Serious Criminal Offences in Timor-Leste; Cambodia – Extraordinary Court Chambers for the prosecution of serious crimes. The choice of the specific design appears to be determined by a number of general factors such as domestic capacity (in situations where domestic authorities are unable to try perpetrators, and where domestic institutions are not sufficiently legitimate and independent to conduct trials and prosecutions), stage of transition (full

[27] This portion relies on C. Stahn, "The Geometry of Transitional Justice: Choices of Institutional Design," in *Leiden Journal of International Law*, Vol. 18 (2005), pp. 425-466.

internationalization of domestic judicial systems may be required in the immediate aftermath of conflicts in order to fill a rule-of-law vacuum, such as in the early phase of the UNMIK presence in Kosovo, where no domestic institutions existed), type of conflict (in the context of ethnic violence and systematic oppression, domestic institutions encounter legitimacy problems, because they have often been used by one group or party to the conflict for the purpose of oppression of the other side).

●Functional Problems in Operation

【Figure of Transitional Justice】



Transitional justice now exhibits an increasingly complex set of linkages between the local, national and international levels, with different mechanisms functioning simultaneously. The coexistence of multiple mechanisms results in synergies and tensions, duplications and gaps. The relationships between different institutions necessarily become complicated, as they must navigate issues of evidence- and witness-sharing, division of labors, sequencing, and the similarities and differences in the narratives they produce[28].

【Figure of Transitional Justice】 indicates several points. First, ⓐand ⓑ

[28] International Association for Humanitarian Policy and Conflict Research (aisbl), "Transitional Justice: Definitions & Conceptual Issues, *supra* note 25.

show the trend from ICTY and ICTR (International *Ad hoc* Judicial Organs) to Hybrid (Mixed) or Internationalized Domestic *Ad hoc* Judicial Organs and to ICC (International Permanent Judicial Organ). This is not only a chronological phenomenon but also based upon some substantial reasons[29]. ICTY and ICTR certainly played a crucial role in advancing the cause of justice and developed a rich jurisprudence in the area of international criminal law. These gains, however, came with significant costs, and the stark differential between cost and number of cases processed was noted. Furthermore, their locations outside the countries where the crimes were committed were noted to have sacrificed a number of important benefits, such as easier interaction with the local population, closer proximity to the evidence and witnesses and being more accessible to victims. Locating tribunals inside the countries concerned would allow victims and their families to witness the processes in which their former tormentors are brought to account, enhance the national capacity-building contribution of the ad hoc tribunals, by allowing them to bequeath their physical infrastructure (including buildings, equipment and furniture) to national justice systems and to build the skills of national justice personnel.

Secondly, as is well known, the relationship between jurisdictions of international criminal courts and those of national courts are regulated by particular principles. In the case of ICTY and ICTR (①), it is the principle of "primacy" of ICTY and ICTR, and in the case of ICC (②), it is the principle of "complementarity" of ICC.

Thirdly, one of the problems in the relationship between national and international courts on the one hand and truth and reconciliation commissions on the other (⑤) would be "information sharing" between them. To what extent, for example, the material in the possession of the TRC including evidence given in confidence should be available to the Prosecutor, the Defense Council, or the Judges of the Court would bring about various consequences on the effective functioning of the TRC as well as judgments of the Court[30].

2 UN Policy of Transitional Justice as Indicated by the Secretary-General's Report

The Security Council met at the ministerial level in 2003 to discuss the United

[29] Report of the Secretary-General, "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies," *supra* note 22, pp. 14-15, paras. 41-44.
[30] *See*, for example, W. A. Schabas, "Internationalized Courts and their Relationship with Alternative Accountability Mechanisms: The Case of Sierra Leone," in C. P. R. Romano et al., eds., *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford U. P., 2004), pp. 157, 170-171.

Nations role in establishing justice and the rule of law in post-conflict societies. In the light of the wealth of relevant expertise and experience within the United Nations system, the Security Council, in its meeting on "Post-conflict national reconciliation: the role of the United Nations", requested the Secretary-General to submit a report on this question. This is the Report of the Secretary-General, "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies."[31] We will briefly examine the content of this report which could be considered as the current UN policy of transitional justice. (Paragraph numbers are indicated in parentheses.)

●Essentiality of Transitional Justice for Peace

The Report, at the beginning (2), emphasizes the essentiality of transitional justice for peace both in the immediate post-conflict period as well as in the long term by stating that the consolidation and maintenance of peace cannot be achieved unless the population is confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair administration of justice.

●Normative Foundation of United Nations Activities for Justice and the Rule of Law

The Report, also at the beginning (9), confirms its position that the UN must stand on international legal ground. It says:

> The normative foundation for our work in advancing the rule of law is the Charter of the United Nations itself, together with the four pillars of the modern international legal system: international human rights law; international humanitarian law; international criminal law; and international refugee law…. These represent universally applicable standards adopted under the auspices of the United Nations and must therefore serve as the normative basis for all United Nations activities in support of justice and the rule of law.

It is noted (10) that these standards bring about certain consequences, such as, that United Nations tribunals can never allow for capital punishment, that United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights, and, that where we are mandated to undertake executive or judicial functions, United Nations-operated facilities must scrupulously comply with international standards for human rights in the administration of justice.

●Host-Country-Centered Perspective: Needs and Capacities

The Report, then (14), adopts a host-country-centered perspective by stating that it is imperative that both the Security Council and the United Nations system

[31] UN Doc. S/2004/616, 23 August 2004.

carefully consider the particular rule of law and justice needs in each host country.

Accordingly, myriad factors must be assessed, such as the nature of the underlying conflict, the will of the parties, any history of widespread abuse, the identification of vulnerable groups, such as minorities and displaced persons, the situation and role of women, the situation of children, rule of law implications of peace agreements and the condition and nature of the country's legal system, traditions and institutions.

Unfortunately (15), the international community has not always provided rule of law assistance that is appropriate to the country context. Too often, the emphasis has been on foreign experts, foreign models and foreign-conceived solutions to the detriment of durable improvements and sustainable capacity.

●Host-Country-Centered Perspective: Local Ownership

The Report, thus (17), refers to the importance of local ownership, local leadership and a local constituency for reform.

Ultimately, no rule of law reform, justice reconstruction, or transitional justice initiative imposed from the outside can hope to be successful or sustainable. Countless pre-designed or imported projects, however meticulously well-reasoned and elegantly packaged, have failed the test of justice sector reform.

The role of the United Nations and the international community should be solidarity, not substitution. The most important role the UN can play is to facilitate the processes through which various stakeholders debate and outline the elements of their country's plan to address the injustices of the past and to secure sustainable justice for the future, in accordance with international standards, domestic legal traditions and national aspirations.

●Due Attention to Political Context

Due attention (19), however, must be paid to the political context and political elements as well, because, in some cases, State authorities have been more concerned with consolidation of power than with strengthening the rule of law, with the latter often perceived as a threat to the former.

Equally important (21) is the fact that rule of law reforms and transitional justice activities often occur simultaneously with post-conflict elections, as well as with the unfolding of fragile peace processes. Careful sequencing of such processes is vital to their success and legitimacy.

Justice and peace are not contradictory forces. Rather, properly pursued, they promote and sustain one another. The question, then, can never be whether to pursue justice and accountability, but rather when and how. This means recognizing that

United Nations peace operations, with some notable exceptions, are planned as short-term interventions, while accounting for the past, building the rule of law and fostering democracy are long-term processes.

●Integrated and Complementary Approaches

The Report, ultimately (23), adopts integrated and complementary approaches by stating that a piecemeal approach to the rule of law and transitional justice will not bring satisfactory results in a war-torn or atrocity-scarred nation.

Effective rule of law and justice strategies must be comprehensive, engaging all institutions of the justice sector, both official and non-governmental, in the development and implementation of a single nationally owned and led strategic plan for the sector.

The Report refers to hard-learned lessons (24) drawn from decades of United Nations experience on the ground. For example (25), the international community must see transitional justice in a way that extends well beyond courts and tribunals; the challenges of post-conflict environments necessitate an approach that balances a variety of goals, including the pursuit of accountability, truth and reparation, the preservation of peace and the building of democracy and the rule of law.

Accordingly (26), strategies must be holistic, incorporating integrated attention to individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or an appropriately conceived combination thereof.

The United Nations must consider through advance planning and consultation how different transitional justice mechanisms will interact to ensure that they do not conflict with one another.

●Some Warnings

Some more additional warnings are to be kept in mind.

In post-conflict settings (27), legislative frameworks often contain discriminatory elements and, in some cases (28), there are no functioning criminal justice mechanisms at all.

In some situations (29), civilian police in peace missions have been mandated to undertake executive functions, including powers of arrest and detention. In the long term, however, no ad hoc, temporary or external measures can ever replace a functioning national justice system.

●Secretary-General's Report as the UN Policy of Transitional Justice

"Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice[32]" was made in 2010. This Note, which provides the guiding

[32] Available at http://www.unrol.org/files/TJ_Guidance_Note_March_2010FINAL.pdf

principles and framework for United Nations approach to transitional justice processes and mechanisms, basically reiterates the above Report. Also made from the perspective of this Report is the "Analytical study on human rights and transitional justice[33]" submitted in 2009 pursuant to a resolution of the Human Rights Council, which contains an overview of activities undertaken by the Office of the United Nations High Commissioner for Human Rights (OHCHR) field presences and human rights components of United Nations peacekeeping and political missions.

These instruments would confirm that the current position of the UN on transitional justice in the post-conflict period is summarized in the perspective of this Report.

3 Reality of Transitional Justice as Indicated by State and UN Practice[34]

●A Conundrum of Transitional Justice

A conundrum of transitional justice in peace building could be explained as follows[35]: If you exclude those responsible for war crimes, then you are unlikely to secure a negotiated peace. If you include them in the process, you legitimize them as individuals as well as their agenda, and likely increase the possibility of continued atrocities or of a fundamentally flawed peace agreement which encourage additional ethnic aggression.

●Prevalent was the Claim that Peace Comes First

In the short-term, it is easy to understand the temptation to forego justice in an effort to end a war. They argue that leaders facing the possibility of trial and likely conviction have little incentive to lay down their arms. Instead, they contend, these leaders will cling all the more tenaciously to power. The prospect of arrest may even spur them to continue to fight a war in an effort to maintain their position. Others express the fear that delicate peace negotiations will be upset by insistence on accountability[36].

●One Possible Solution: Overwhelming Engagement by the International Community

One possible solution to this conundrum is to more readily employ the use of

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33 UN Doc. A/HRC/12/18, 6 August 2009.

34 This section, which refers to various cases in the past 20years, significantly benefits from the research done by the Human Rights Watch in *Selling Justice Short: Why Accountability Matters for Peace* in 2009 (available at http://www.hrw.org/reports/2009/07/07/selling-justice-short-0).

35 P. R. Williams, "The Role of Justice in Peace Negotiations," in M. C. Bassiouni, ed., *Post-Conflict Justice* (Transnational Publishers, Inc., 2002), pp. 115, 117.

36 Human Rights Watch, *Selling Justice Short*, *supra* note 34, at 18.

force against those responsible for war crimes and to limit contact with these individuals to the extent necessary to secure the implementation of dictated terms of peace[37].

This is indeed demonstrated by several examples[38]. When democratically elected President Aristide was removed from office by a military coup d'état in Haiti, the Security Council imposed a mandatory economic embargo by Resolution 841 (1993), and authorized Member States to form a multinational force and use all necessary measures to facilitate the prompt return of the elected President by Resolution940 (1994). It is to be noted that Resolution940 also referred to the reform of the Haitian armed forces and the creation of a separate police force as well as the organization of free and fair legislative elections (to be monitored by the United Nations).

The NATO-led military campaign in accordance with Security Council Resolutions 824 (1993), 836 (1993), and 844 (1993) against Bosnian Serb forces in Bosnia Herzegovina played an important role in bringing about the signing of the Dayton Agreement, Dayton Peace Accords in 1995. These Accords decided the detailed structure of Bosnia Herzegovina as a State as well as specified that no one indicted for war crimes, such as Radovan Karadžić, could participate in the elections scheduled for 1996.

The Security Council Resolution 1244 (1999) adopted after NATO's bombing on Serbia, as was explained earlier, authorized the Secretary-General to establish UNMIK in Kosovo in order to provide an interim administration for Kosovo.

However, this solution depends on the political will of the international community, particularly those major powers capable of sending their armies. In fact, those three cases demonstrate that all of them belong to the scope of western powers' national interests and that no case in Africa will belong to it.

●Peace Agreement, Amnesty and Vetting

If mediators do decide to include in the negotiation process individuals suspected of responsibility for war crimes, the next question becomes whether those individuals might be offered immunity from prosecution as part of a strategy of accommodation designed to induce them into signing and implementing the agreement.

Indeed, to get parties to the table, blanket amnesties have often in the past been offered to those responsible for horrific human rights abuses. Supporters of amnesties argue that those bearing the greatest responsibility for atrocities have no

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[37] P. R. Williams, "The Role of Justice in Peace Negotiations," *supra* note 35, at 117.
[38] H. Shinoda, *Heiwa-Kochiku to Ho-no-Shihai* (*Peacebuilding and the Rule of Law*) (Sobunsha, 2003), pp. 67-68.

interest in laying down their arms unless they believe that they will not face criminal charges.

In fact, in Sierra Leone, for example, a blanket amnesty provision was inserted in each of the three different peace accords respectively in 1996, 1997 and 1999. Also in Angola, several amnesties were successively given in 1991, 1994, 1996, 2000 and 2002.

Furthermore, negotiators feel, in some situations, that turning a blind eye to crimes is not enough and that alleged war criminals must be granted official positions in order to persuade them to lay down their arms.

In Sierra Leone, for example, when Kabbah's government and the Revolutionary United Front (RUF) rebels signed a peace agreement in Lomé, Togo, in 1999, the accord, brokered by the UN, the Organization of African Unity, and the Economic Community of West African States (ECOWAS), committed the RUF/AFRC (Armed Forces Revolutionary Council) to lay down its arms in exchange for representation in a new government. Rather than being held to account for abuses, RUF leader Foday Sankoh was rewarded with the chairmanship of the board of the Commission for the Management of Strategic Resources, National Reconstruction and Development (which gave him access to the country's extremely lucrative diamond mines) and the status of vice-president. AFRC leader Johnny Paul Koroma was made the chairman of the Commission for the Consolidation of Peace provided for under article 6 of the peace agreement[39].

●Trend Not to Apply Amnesty to Core Crimes

On the other hand, it is asserted that international law and practice has evolved over the last 15 years to the point where both peace and justice should be the objectives of negotiations aimed to end a conflict where the most serious crimes under international law have been committed. At the very least, peace agreements should not foreclose the possibility of justice at a later date[40].

United Nations' bodies have, in fact, repeatedly stood on this position against amnesties regarding the most serious crimes. For example, regarding the 1999 Lomé Peace Accord, despite the opposition of Sierra Leone President Kabbah, the UN special representative attached a reservation to the agreement stating, "The United Nations holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law."[41]

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[39] Human Rights Watch, *Selling Justice Short*, *supra* note 34, at 59.
[40] *Ibid.*, at 8.
[41] *Ibid.*, at 16. The same is a case in Angola (*Ibid.*, at 67-68.).

●Making Peace and Justice Compatible: Marginalization

In practice, the anticipated negative consequences of pressing for accountability often do not happen. Insisting on justice, for example, does not necessarily mean an end to peace talks or result in renewed instability as some predict. Peace agreements and ceasefires in the Democratic Republic of Congo (DRC) did not include amnesty provisions for war crimes, crimes against humanity, and genocide, despite the fear of many that not granting total amnesty would mean the collapse of negotiations. In each of the peace talks (1999, 2002, 2006, and 2008), rebels put forward proposals for broad amnesties covering the worst crimes, but the government successfully resisted these demands without ending the talks. The inclusion of provisions for justice in negotiations with the Lord's Resistance Army (LRA) in Uganda that resulted from the ICC's pursuit of LRA leaders likewise did not scuttle those peace talks, despite the concerns of many who advocated an amnesty[42].

The potential value of justice has generally been underestimated. Rather than scuttle peace talks or undermine a transition to democracy, an indictment may facilitate them by altering the power dynamics. Indicting a leader for atrocities makes it harder for him to deny that the crimes have occurred. It may also make it more difficult for the leader to travel or obtain international or national support—his associates may seek to distance themselves from him in an effort to avoid a similar fate. Criminal indictment of abusive leaders and the resulting stigmatization can, therefore, lead to marginalizing a suspected war criminal and may ultimately facilitate peace and stability[43].

Some examples can be presented as follows. In Bosnia and Herzegovina the indictment of Radovan Karadzic by the ICTY marginalized him and prevented his participation in the peace talks leading to the success of the Dayton negotiations to end the Bosnian war. Similarly, the unsealing of the arrest warrant for Liberian President Charles Taylor at the opening of talks to end the Liberian civil war was ultimately viewed as helpful in moving negotiations forward. By delegitimizing Taylor both domestically and internationally, the indictment helped make clear that he would have to leave office, an issue that had been a potential sticking point in negotiations. He left Liberia's capital, Monrovia, a few months later[44].

●Peace Without Justice Cannot be Sustainable

Carla Del Ponte, former International Criminal Tribunal for the former

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[42] *Ibid.*, at 3.
[43] *Ibid.*, at 19-20.
[44] *Ibid.*, at 20-34.

Yugoslavia prosecutor, stated as follows[45].

> Peace without justice cannot be sustainable. It is a terrible mistake to believe that people will simply forget. Even after a hundred years, sometimes even after several hundred years, unpunished crimes continue to represent huge stumbling blocks in establishing peaceful, normal relations between some States.

Foregoing accountability often does not result in the hoped-for benefits. Instead of putting a conflict to rest, an explicit *de jure* amnesty that grants immunity for war crimes, crimes against humanity, or genocide may effectively approve the commission of grave crimes to the international community without resulting in the desired objective of peace. All too often a peace that is conditioned on providing impunity for these most serious crimes is not sustainable. Even worse, it sets a precedent of impunity for atrocities that encourages future abuses. Peace premised on a blanket amnesty may be a short-lived respite before the resumption of further armed conflict and its attendant crimes. In Sierra Leone, for example, three blanket amnesty provisions in different accords failed to consolidate the hoped-for peace, and in Angola six successive amnesties did not lead to the peace either. In both places, war and war crimes resumed within a short period after peace agreements had been reached. The precedent of impunity meant that would-be criminals had no reason to curtail their unlawful tactics going forward[46].

Furthermore, inclusion of alleged perpetrators in government has not proved to be the panacea that it was thought to be. While efforts to bring human rights abusers to justice undoubtedly present challenges, making deals with criminal suspects in order to achieve peace can have far-reaching negative consequences. Rather than achieving the hoped-for end of violence in post-conflict situations, incorporating leaders with records of past abuse into the military or government has resulted in further abuses and has allowed lawlessness to persist or return. In Afghanistan, the result of incorporating many of the worst perpetrators from its recent past into the Hamid Karzai government has been continuing violence and abuse of power by some of the warlords who now wield governmental authority. Inclusion of those with blood on their hands in the new order eroded the legitimacy of the government for many Afghans and has been used by opponents of the government to discredit it. In the Democratic Republic of Congo, in an effort to buy compliance with the transition process, dozens of people suspected of committing human rights violations were given posts of national or local responsibility, including in the army. Rather than end the conflict, this has resulted in a proliferation

[45] Cited at *Ibid.*, at 75.
[46] *Ibid.*, at 4-5, 57.

of rebel groups who see no downside to taking up arms[47].

Rewarding alleged war criminals with government positions might actually encourage others to engage in criminal activity in the hope of receiving similar treatment. Furthermore, inclusion of criminal suspects in government erodes public confidence in the new order by sending a message to the population about the acceptance of such abuses and by further entrenching impunity[48].

●Realistic Warning

In spite of some of the progressive perspectives[49] mentioned above, we must pay much attention to the warning that, in *Post-conflict Peacebuilding: A Lexicon* in 2009, Chetail, editor and a core member of the authors, concluded as follows[50]:

> The existence of legal norms should not hide the fundamentally political essence of peacebuilding processes. The means of achieving a sustainable peace are well known. They demand an unfailing determination from the international community, the mobilization of resources over the long term, and a better understanding of the true needs of the population involved. One cannot, however, help but notice that the concept of post-conflict peacebuilding is still struggling to move from rhetoric to reality.

While this conclusion is on post-conflict peacebuilding, we should keep in mind that a similar conclusion would probably apply to post-conflict transitional justice as crucial elements in the process of peacebuilding.

Ⅳ UN Activities in Transitional Justice and the International Legal Order

1 Impacts on the International Legal Order

(1) From "Transitional Justice"

●From Impunity to Accountability and towards International Rule of Law.

The establishment and operation of the international and hybrid criminal tribunals of the last decade represent historic achievements in establishing

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47 *Ibid.*, at 5.
48 *Ibid.*, at 35.
49 Although it argues that justice should not be shortchanged in peace negotiations and that the cost of overlooking impunity is high, Human Rights Watch acknowledges that there is not one formula that is suitable to all situations, and that well-known counter-examples do exist. On the whole, however, Human Rights Watch asserts that, rather than solidify peace, successive amnesties had the opposite effect in Sierra Leone. *Ibid.*, at 7. 61.
50 V. Chetail, "Introduction: Post-conflict Peacebuilding − Ambiguity and Identity," in V. Chetail ed., *Post-conflict Peacebuilding: A Lexicon* (Oxford U.P., 2009), pp. 1, 25.

accountability for serious violations of international human rights and humanitarian law by civilian and military leaders.

Criminal trials can play an important role in transitional contexts. For example, they express public denunciation of criminal behavior; they can provide a direct form of accountability for perpetrators and ensure a measure of justice for victims by giving them the chance to see their former tormentors made to answer for their crimes; insofar as relevant procedural rules enable them to present their views and concerns at trial, they can also help victims to reclaim their dignity; criminal trials can also contribute to greater public confidence in the State's ability and willingness to enforce the law; they can also help societies to emerge from periods of conflict by establishing detailed and well-substantiated records of particular incidents and events; they can help to de-legitimize extremist elements, ensure their removal from the national political process and contribute to the restoration of civility and peace and to deterrence[51].

They have also made a global contribution by developing a rich jurisprudence in the area of international criminal law: greater clarity on questions of rape as a war crime and a crime against humanity, the elements of genocide, the definition of torture, the nature of individual criminal responsibility, the doctrine of command responsibility and appropriate sentencing[52].

With the functioning of international criminal courts, national tribunals, and, increasingly, trials abroad, the context of amnesty discussions is said to be already very different from a decade ago; it is now generally recognized that international law obligates countries to prosecute genocide, crimes against humanity, and war crimes; international tribunals and national courts applying universal jurisdiction are likely to reject de jure amnesties for the most serious human rights abuses[53].

The 2005 World Summit Outcome states that "[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity"[54]. Thus, "[i]t is now well established in international law and practice that sovereignty does not bestow impunity on those who organize, incite or commit"[55] one of the core crimes.

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51 Report of the Secretary-General, "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies" *supra* note 22, p. 13, para. 39.
52 *Ibid.*, p. 14, para. 41.
53 Human Rights Watch in *Selling Justice Short: Why Accountability Matters for Peace*, *supra* note 34, at 1.
54 "2005 World Summit Outcome," *supra* note 9, p. 30, para. 138.
55 Report of the Secretary-General, "Implementing the Responsibility to Protect," UN Doc. A/63/677, 12 January 2009, p. 23, para. 54.

This is also confirmed by the fact that the Sierra Leone Special Court held as follows:

> The grant of amnesty or pardon is undoubtedly an exercise of sovereign power which, essentially, is closely linked, as far as crime is concerned, to the criminal jurisdiction of the State exercising such sovereign power. Where jurisdiction is universal, a State cannot deprive another State of its jurisdiction to prosecute the offender by the grant of amnesty. It is for this reason unrealistic to regard as universally effective the grant of amnesty by a State in regard to grave international crimes in which there exists universal jurisdiction. A State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember[56].

The Court also stated that "the amnesty granted by Sierra Leone cannot cover crimes under international law that are the subject of universal jurisdiction" because "it stands to reason that a State cannot sweep such crimes into oblivion and forgetfulness which other States have jurisdiction to prosecute by reason of the fact that the obligation to protect human dignity is a peremptory norm and has assumed the nature of obligation *erga omnes*."[57]

Thus, it is pointed out that they reflect a growing shift in the international community, away from a tolerance for impunity and amnesty, and towards the creation of an international rule of law; despite their limitations and imperfections, international and hybrid criminal tribunals have changed the character of international justice and enhanced the global character of the rule of law[58].

●Development of Individual Criminal Responsibility and Its Relationship with State responsibility

> "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."

This is the famous statement by the Nuremberg Tribunal which reversed the logic of the traditional rules of the law on international responsibility of States. Under

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[56] Prosecutor v. Morris Kallon and Brima Bazzy Kamara, Special Court for Sierra Leone, Case No. SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, March 13, 2004, para. 67.

[57] *Ibid.*, para. 71. The ICTY has also indicated that amnesties for internationally recognized crimes would not be accorded international legal recognition. Prosecutor v. Anto Furundzija, ICTY, Case No. IT-95-17/1-T, Judgment, December 10, 1998, para. 155.

[58] Report of the Secretary-General, "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies," *supra* note 22, p. 14, para. 40.

the law of State responsibility, responsibility attaches only to States by ignoring individuals who actually acted on their behalf. Individuals do not exist independently of the States to which they serve as their organs. The international individual responsibility of natural persons who have committed crimes in international law has increasingly been clarified by the statutes and the case law of the international criminal courts and tribunals.

The autonomy of individual criminal responsibility vis-à-vis the State's responsibility for the commission of the same crimes is indicated by the system of removal of immunity from accused persons who could, in principle, shelter from criminal prosecution because of the public nature of the positions they occupied such as Heads of State or government[59]. As the ICTY stated in the *Blaskic* case[60] after referring to the ordinary system of immunities, it is the essence of international criminal law that these immunities be set aside in relation to war crimes, crimes against humanity and genocide, even if those responsible for those crimes carry them out in connection with their official functions.

Once the autonomy of individual criminal responsibility is recognized, the next question is how the respective systems of responsibility of the individual and the State for international crimes could be differentiated. On this question of differentiation between two systems of responsibility, Dupuy, for example, contends[61] that intention is essentially individual and the primary foundation of the responsibility of the individual, while intention is a subsidiary element in State responsibility to be found in only a limited number of wrongful acts; the individual's responsibility is fundamentally penal while the State's responsibility is essentially reparational.

We are thus seeing an evolution towards the individualization of penal responsibility in the international order that closely parallels the one that municipal legal systems underwent long ago. The same type of wrongful acts, like aggression or genocide, can give rise to two distinct types of responsibility coming under mutually autonomous legal regimes, the first constituting the individual responsibility of physical persons who are the culprits or the givers of the orders, the second that of the State in

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59 P.-M. Dupuy, "International Criminal Responsibility of the Individual and International Responsibility of the State," in A. Cassese et al. eds., *The Rome Statute of the International Criminal Court: A Commentary, Volume II* (Oxford, U.P., 2002), pp. 1085, 1093-1094.

60 Prosecutor v. Tihomir Blaskic, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Case No. IT-95-14, 29 October 1997, at para. 41.

61 P.-M. Dupuy, *supra* note 59, at 1095-1096.

the name of which these same acts were committed[62].

Another question is what the relationship between two systems of responsibility will be. In the judgment of the Case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro) in 2007, the ICJ reached the conclusion that Contracting Parties are bound not to commit genocide themselves[63] although such an obligation is not expressly imposed by the actual terms of the Convention. Thus, the Court faced the situation that the commission of some international crimes can involve both individual criminal responsibility of the perpetrators and the responsibility of a State for the violation of its treaty obligations, i.e., overlapping between two systems of responsibility. International criminal courts and tribunals are to apply the same substantive rules as the ICJ. However, because the proceedings are quite different between the ICJ and criminal courts, there is no guarantee that they will reach the same conclusion. A series of difficult problems and dilemmas could occur from this and other similar situations[64].

●"The Individual" as a "Subject" of International Law

It could also be pointed out that "the individual" as a "subject" of international law has greatly developed into a balanced entity having both rights and obligations. International human rights law developed under the activities of the UN, thus leading to the flourishing rights of individuals under international law on the one hand. International humanitarian law and international criminal law, particularly since the end of the Cold War, developed under the establishment and operation of international criminal courts and tribunals, thus leading to the consolidation of certain obligations of individuals.

The futility of dichotomy between "subjects" and "objects" has been pointed out by some scholars[65], who suggest instead "participants" or "stakeholders." Furthermore, it is claimed that the functions and roles that individuals play in the whole process of international law norms from formation to implementation are to be analyzed in a

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62 *Ibid.*, at 1098.

63 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, page 63, para. 166.

64 V.-D. Degan, "Genocide and other International Crimes," in I. Buffard et al., eds., *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (Martinus Nijhoff Publishers, 2008), pp. 511, 528-534.

65 R. Higgins, *Problems and Process: International Law and How We Use It* (Oxford U. P., 1994), p. 50; Y. Onuma, *International Law* (Toshindo Publishing Co., Ltd., 2005), p. 129.

systematic manner. These criticisms on the concept of "subjects" are appropriate with regard to individuals in the sense that it does not reflect the importance of individuals in the contemporary international society.

On the other hand, the nature of an open system of international law was pointed out by the International Court of Justice in the *Reparation* case when it noted that:

> The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States[66].

The Court made this important statement with regard to international organizations in general and the United Nations in particular. However, it also applies to individuals as developing subjects of international law. Thus, it would indicate a gradual transformation of international law in the sense that the system is getting less State-centric and the individuals have a more prominent role to play. In order to hold a balanced perspective as a whole, however, it is to be noted that, even today, States still have a dominant role in the international legal system, as autonomous and independent subjects of international law, while individuals, although also subjects, have much more limited capacities to engage in the international legal system, and that States are not about to wither away[67].

●Obligation to Cooperate with International Criminal Courts and Tribunals[68]

The ICTY and ICTR as well as the ICC have jurisdiction directly over individuals who commit crimes falling within their competence, and, in this sense, their

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66 Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I. C. J. Reports 1949, pp. 174, 178. *See also* J. Crawford, "International Law as an Open System," in J. Crawford, *International Law as an Open System* (Cameron May Ltd, 2002), pp. 17, 20.

67 K. Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (Cambridge U. P., 2011), pp. 365-372.

68 This section relies on the following. V. Gowlland-Debbas, "Implementing Sanctions Resolutions in Domestic Law," in V. Gowlland-Debbas ed., *National Implementation of United Nations sanctions : A Comparative Study* (Martinus Nijhoff Publishers, 2004), pp. 33, 65-68; S. Furuya, "Legal Effect of Rules of the International Criminal Tribunals and Court upon Individuals: Emerging International Law of Direct Effect," *Netherlands International Law Review*, Vol. 47 (2000), pp. 111-145; A. Ciampi, "The Obligation to Cooperate," in A. Cassese et al. eds., *The Rome Statute of the International Criminal Court: A Commentary, Volume II* (Oxford, U.P., 2002), pp. 1607-1638.

statutes do not require domestic law in order to apply directly to such persons. The rules of these courts also apply directly to individuals other than the accused, such as the rules relating to the summoning of witnesses or the production of evidence.

For the ICTY and ICTR, SC Resolution 827 (1993) and Resolution 955 (1994) imposed specific obligations on Member States in the field of cooperation and judicial assistance. States have the obligation to take any measures necessary under their domestic law to comply with requests for assistance or orders issued by the trial Chambers, such as identification and location of persons, the taking of testimony, the production of evidence, the arrest or detention of persons and their surrender or transfer to the International Tribunals, but also the recognition of judgments passed by the Tribunals, and if necessary, cooperation in their execution. Domestic authorities must establish procedures for dealing with requests emanating from either of the Tribunals and render executory their arrest warrants[69].

For the ICC, the general obligation to cooperate fully with the Court is expressly stated in the opening article of Part 9 of the Rome Statute. Article 86 provides that "States Parties shall … cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court."

The relationship between jurisdictions of international criminal courts and that of national courts are regulated by the principle of "primacy" (ICTY and ICTR) or that of "complementarity" (ICC). These principles, however, merely deal with the coordination of their jurisdiction over the accused, and, in practice, these courts address their rules directly to other individuals ranging from witnesses to evidence-holders and occupants of victim's property[70].

As a matter of policy, these courts would rely on the national authority for their cooperation. However, if a State refuses to cooperate with the courts for the purposes of preventing them from fulfilling their functions, rules of direct effect will have such practical significance as to be executed vis-à-vis an individual directly by the courts[71]. The Appeals Chamber of the ICTY, in *Blaskic* Appeals Judgment, held that the Tribunal may enter directly into contact with a private individual without any specific consent of the State concerned when the latter, having been requested to comply with an order, prevent the ICTY from fulfilling its functions[72]. For the ICC, article 57 (3) (d) of the

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[69] V. Gowlland-Debbas, "Implementing Sanctions Resolutions in Domestic Law," *supra* note 68, at 66-67.
[70] S. Furuya, "Legal Effect of Rules of the International Criminal Tribunals and Court upon Individuals: Emerging International Law of Direct Effect," *supra* note 68, at 144.
[71] *Ibid.*, at 138.
[72] Prosecutor v. Tihomir Blaskic, Judgement on the Request of the Republic of Croatia

Statute allows the Prosecutor to take "specific investigative steps" on the territory of a State Party without having secured its cooperation under certain circumstances. This provision was described as probably the first treaty provision in the history of international law that explicitly allows an international organization to act directly in the territory of a so-called "failed State[73]."

We could note, in our context, that such cooperation requested or imposed by international criminal courts and tribunals are rather intrusive into domestic legal order and directly influence domestic judicial organs[74].

(2) To "Peacebuilding"

●From Peacebuilding to Democracy Promotion and the Right of Political Participation

Until the end of the Cold War, 'democracy[75]' was a word rarely found in the writings of international lawyers. Most legal scholars, and certainly most States, accepted the position that 'international law does not generally address domestic constitutional issues, such as how a national government is formed'. In fact, it once seemed incontrovertible that, given the range of ideologies and institutional structures of member States, the international system was, by its very nature, neutral on the subject of the internal character, let alone legitimacy, of domestic regimes[76].

The end of the Cold War, however, brought about a challenging new role for international organizations as architects for the rebuilding of shattered States in the developing world. In many countries of Africa, Asia, Central America and Eastern Europe, it has become almost a given that international organizations will culminate their efforts at national reconciliation with the holding of democratic elections.

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for Review of the Decision of Trial Chamber II of 18 July 1997, Case No. IT-95-14, 29 October 1997, para. 55.

73 S. Furuya, "Legal Effect of Rules of the International Criminal Tribunals and Court upon Individuals: Emerging International Law of Direct Effect," *supra* note 68, at 142.

74 M. Delmas-Marty, "The ICC and the Interaction of International and National Legal Systems, in A. Cassese et al. eds., *The Rome Statute of the International Criminal Court: A Commentary, Volume II* (Oxford, U.P., 2002), pp. 1915-1929.

75 What is meant by democracy? Cassese summarizes the current situation as follows (A. Cassese, *International Law* (Oxford U. P., Second ed., 2005), p. 395, n. 19.): Many non-Western States have opposed the Western model. This opposition leads one to believe that only some features of that model are now widely accepted: representative governance based on regular, free, and fair elections, and accountable to the electorate; respect for human rights; rule of law. It would seem that instead the notion of a multiparty political system is not yet agreeable to many States and therefore has not become part of the emerging international notion of democracy.

76 G. H. Fox and B. R. Roth, "Democracy and international law," in *Review of International Studies*, Vol. 27 (2001), pp. 327, 330.

The UN in particular has been instrumental in promoting the spread of democracy in the world. By providing electoral advice, assistance, and monitoring of electoral consultations, it has assisted people in many countries to participate in free and fair elections. External efforts to support State-building often cannot be distinguished from democracy promotion due to the interdependence between both processes. However, the United Nation frequently "label" their civilian measures as "State-building[77]", although these also include aspects of democracy promotion[78].

As it is now clear that international law and international organizations are no longer indifferent to the internal character of governments exercising effective control within sovereign States, legal scholars have begun to assess these developments and to ask whether there can meaningfully be said to be, in Thomas Franck's pioneering words, a "democratic entitlement" in international law[79]. Franck defines the democratic entitlement by referring to the proposition: governments, instituted to secure the "unalienable rights" of their citizens, derive "their just powers from the consent of the governed[80]." This assertion of a 'democratic entitlement' in international law is grounded in the right to political participation as established in Article 21 of the Universal Declaration of Human Rights (UDHR), Article 25 of the International Covenant on Civil and Political Rights (ICCPR), and the counterpart articles of regional human rights instruments.

What is to be noted in our context is the fact that these phenomena are closely related to peacebuilding activities including the UN's.

In fact, although human rights instruments such as the ICCPR had long provided for a right to political participation, it is only after the end of the Cold War and against the backdrop of an overwhelming number of peacebuilding missions, that the status and determinacy of the right to political participation have been enhanced by a series of progressive pronouncements by such organs as the ICCPR Human Rights

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77 M. Daoudy, "State-building," in V. Chetail ed., *Post-conflict Peacebuilding: A Lexicon*, *supra* note 50, at 350-358.

78 This is considered to derive from two circumstances (Leininger, "Democracy and the UN Peace-Keeping – Conflict Resolution through State-Building and Democracy Promotion in Haiti," *supra* note 3, at 475.). First, democracy is often perceived as "the Western model" of government to be imposed upon developing countries, and opposed by their political elites and populations. Secondly, in the light of the right of self-determination, States tend to be reluctant to democracy promotion which might lead to interference in internal matters of States as the form of government is at the core of the internal matters of each State.

79 G. H. Fox and B. R. Roth, "Democracy and international law," *supra* note 76, at 328.

80 T. M. Franck, "The Emerging Right to Democratic Governance," in *American Journal of International Law*, Vol. 86 (1992), No. 1, p. 46.

Committee, the UN Human Rights Commission (now the Human Rights Council), the European and Inter-American Commissions on Human Rights, the Organization of American States (OAS), the Organization for Security and Cooperation in Europe (OSCE), and the UN General Assembly[81]. The UN and other intergovernmental organizations have, in parallel, invested heavily in the crafting and monitoring of electoral processes in many nations across the globe. Indeed as Fox notes[82], while the legitimacy of the right of political participation suffered from its lack of determinacy during the Cold War period, this indeterminacy no longer exists by drawing clarity from such above-mentioned sources including over forty years of UN election monitoring reports.

●Implications of the Right of Political Participation

There can be little doubt that this unprecedented international attention to the internal governing structures of States has significant implications for the current content and future direction of international law, although there remains substantial disagreement as to what those implications are[83].

Franck contends[84] that we are witnessing a sea change in international law, as a result of which the legitimacy of each government will one day be measured definitively by international rules and processes; We are not quite there yet, but the outlines are emerging of such a new world, in which the citizens of each State will look to international law and organization to guarantee them fair access to political power and participation in societal decisions.

Certainly, the right to political participation, at least as interpreted through the lens of the democratic entitlement, is unlike other human rights, because its individual enjoyment is inseparable from its collective effect. From the liberal-democratic perspective, to have the individual right to political participation is to have the collective right to oust a political leadership that fails to garner the support

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81 Human Rights Committee, General Comment 25, UN Doc. CPR/C/21/Rev.1/Add.7 (1996) (elaborating the nature of the right to political participation in ICCPR, Article 25); Promotion of the Right to Democracy, Commission on Human Rights Resolution 1999/57 (27 April 1999). *See*, for other examples, G. H. Fox and B. R. Roth, "Democracy and international law," *supra* note 76, at 328-329. *See also* G. H. Fox, "The right to political participation in international law," in G. H. Fox and B. R. Roth eds., *Democratic Governance and International Law* (Cambridge U. P., 2000), pp. 48, 53-69, 70-89.

82 G. H. Fox, "The right to political participation in international law," in G. H. Fox and B. R. Roth eds., *Democratic Governance and International Law*, *supra* note 81, at 89-90.

83 G. H. Fox and B. R. Roth, "Democracy and international law," *supra* note 76, at 329.

84 T. M. Franck, "Legitimacy and the democratic entitlement," in G. H. Fox and B. R. Roth eds., *Democratic Governance and International Law*, *supra* note 81, at 25, 29.

of at least a plurality of one's fellows[85]. Article 21 of the UDHR speaks not merely of the individual right to take part in government, but also of the principle that '[t]he will of the people shall be the basis of the authority of government'[86].

However, such an emergent right to democratic governance, if established, is so thoroughly at odds with traditional conceptions of State sovereignty as to bring about a major transformation of the ground rules of the international system.

Some scholars have expressed doubts about it. The case against the democratic entitlement rests in part on a more conservative juridical assessment of the instruments, practices, and pronouncements associated with democratization, with more emphasis accorded to the foundational presumption against derogations of the political independence of sovereign States[87]. Although the international community has, through UN electoral assistance projects and General Assembly pronouncements, manifested support for liberal democratic electoral processes around the world, the assistance has been rendered only in cases where host States have requested it or where extraordinary measures such as those by the Security Council under Chapter VII have already been taken on independent grounds.

As Franck concedes that we are not quite there yet, the current situation would be more or less in the process of gradual transformation of relevant basic norms of international law.

●From Democracy Promotion to Legitimacy and Accountability

Since the end of the Cold War, democracy and human rights have come to take on the aspect of global values. While there has been a sharp increase in the operational activities of electoral assistance by the UN for States that have experienced civil wars, it seems natural that this trend of valuing democracy has also been applied to universal international organizations centering on the United Nations system which play important roles in global governance, and that this has resulted in discussion on the democracy deficit and legitimacy deficit.

A typical example is UNMIK and UNTAET. Just as they are planning to establish democratic structures, both UNMIK and UNTAET are expected to have mechanisms and procedures ensuring their accountability and legitimacy. Here, one must distinguish between accountability vis-à-vis the institution having mandated the respective takeover of administrative functions (for example the Security Council) and

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85 G. H. Fox and B. R. Roth, "Democracy and international law," *supra* note 76, at 335.
86 A. Rosas, "Article 21," in A. Eide et al., eds., *The Universal Declaration of Human Rights: A Commentary* (Scandinavian U. P., 1992), pp. 299.
87 G. H. Fox and B. R. Roth, "Democracy and international law," *supra* note 76, at 344.

the accountability towards the respective populations[88]. Both have a different basis, whereas the former derives from the mandate, the latter derives from the right of self-determination of the population concerned. For that reason accountability towards the Security Council or any other institution having mandated the establishment of that international administration (internal accountability), cannot supplement democratic accountability. It is pointed out that accountability is the area where international administration is deficient in the sense that internal accountability is ineffective and democratic accountability is missing totally[89].

(3) Ultimately to the "Structure of the International Legal Order"

Any analysis of the current structure of the international legal order must more or less take into consideration the rapidly growing reality of globalization as a process of societal integration of the world, which is transforming international society qua society. Judge Owada aptly pointed out[90] that the new reality of societal integration of the world known as "globalization" must be distinguished from the traditional process of growing interstate interdependence called "internationalization." Internationalization is a widening process of contacts and interaction between States against the background of growing degree of interdependence of States in international society qua society of State activities. Globalization, by contrast, is a deepening process of activities of human individuals against the background of transformation of world society qua society of human individuals, who move freely beyond the national borders and operate on a global scale, thus defying the existing system of governance based on a network of respective national regulatory frameworks. In this situation, these activities of individuals would have some new significant impacts on whatever problems closely related to the structure of the international legal order.

Development of individual criminal responsibility and obligation to cooperate with international criminal courts and tribunals, as noted in the previous section, are rather intrusive into domestic legal order and directly influence domestic judicial

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88 R. Wolfrum, "International Administration in Post-Conflict Situations by the United Nations and Other International Actors," *supra* note 13, at 685.

89 In both cases of Kosovo and East Timor, the office of ombudsperson was established although their functions were not enough in the sense that their findings were mere recommendations and their jurisdictions were restricted. *See* C. Stahn, *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond* (Cambridge U. P., 2008), pp. 621-625.

90 H. Owada, "Some Reflections on the Problem of International Public Order," in *Kokusaiho Gaiko Zassi* (*The Journal of International Law and Diplomacy*), Vol. 102, No. 3 (2003), pp. 1, 17.

organs. Interpenetration between international law and domestic laws would be deepened under the general impacts of globalization, and could promote other possible changes, leading to the fundamental transformation of the structure of the international legal order.

As is well known, the principle of sovereign independence and the principle of non-intervention in the internal or external affairs of a State are the twin pillars of the traditional international system based on the Westphalian legal order, essentially an inter-State system in accordance with the principle of voluntarism based on the consent of States.

With regard to the principle of sovereign independence, much has been discussed in relation to the concept of "Responsibility to Protect," as stimulated by the report of the International Commission on Intervention and State Sovereignty in 2001. While this concept still remains ambiguous in its application to concrete cases[91], the principle of sovereignty has clearly been transformed from State-oriented to human-oriented principle. 2005 World Summit Outcome stated as follows[92]:

> Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

●Principle of Non-intervention in the Domestic Jurisdiction of Other States

With regard to the principle of non-intervention in the internal or external affairs of a State, the UN activities of promoting democracy as discussed in the previous section will have a strong impact on its transformation against the background of globalization as a process of societal integration of the world.

This principle, more generally called as principle (or duty) of non-intervention in the domestic jurisdiction of other States, is a fundamental principle of general international law, and consists of two elements: non-intervention and the domestic jurisdiction of States. The domestic jurisdiction of States is generally considered as the domain of State activities where the jurisdiction of the State is not bound by

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91 H. Owada, "The United Nations and the Maintenance of International Peace and Security − The Current Debate in the Light of Reform Proposals −," in *The Japanese Annual of International Law*, No. 48 (2005), pp. 1, 10.
92 "2005 World Summit Outcome," *supra* note 9, p. 30, para. 138.

international law. Thus, the extent of this domain depends on international law, and varies according to its development. It is essentially a relative concept. Since the cooperation and interdependence among States increasingly developed in the latter half of the 20th century, this "reserved domain" kept shrinking.

We should also note, however, that the core area of "reserved domain" has specifically been protected by the international community. For example, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, in its section of the duty not to intervene in matters within the domestic jurisdiction of any State, refers to "the personality of the State [and] its political, economic and cultural elements," and specifically provides that "[e]very State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State."

However, this core area of "reserved domain" is exactly the area directly touched upon by the UN activities of promoting democracy. Furthermore, this trend of democracy promotion has been strongly supported by a series of organs based upon human rights treaties particularly since the end of the Cold War as noted above.

Of course we must note that both of the UN activities of promoting democracy and human rights organs progressively evolving their own treaties presuppose the acceptance and consent of the relevant States, and, to that extent, do not constitute prohibited interventions. Theoretically, these might not bring about any legal problem. Practically, however, the concept of "reserved domain" might be finally losing its last remained core. The following comment by Franck[93] is well taken:

> It thus appears that there is increasing support (even, or perhaps *especially*, among former totalitarian States) for the proposition that the democratic entitlement, abetted by links with other basic human rights and the accompanying international monitoring of compliance, has trumped the principle of non-interference. What validly remains of past inhibitions against interference in national sovereignty is a concern that such intervention be, and be seen to be, *bona fide* aid to democratic self-governance. Thus, actions to reinforce or reinstate democratic rule taken on behalf of the international system and in accordance with its legitimate collective decision-making procedures are likely to be generally welcomed, whereas unilateral acts by a State, unauthorized by its global (or regional) peers, will be treated with deserved suspicion and alarm.

[93] T. M. Franck, "Legitimacy and the democratic entitlement," *supra* note 84, at 46.

●Other State Practice[94]

The infiltration of concerns for democratic legitimacy could be noticed in various areas of international law such as:

· Recognition of New States or Governments: The factual conditions many States require for recognition have changed from effective control over a human community and the territory where such community lives. Following the break-up of the Soviet Union and the former Yugoslavia, the European Community and its Member States adopted a Declaration on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union[95]." In this Declaration, they, among other things, required for the formal recognition of new States in Eastern Europe, respect for the Charter, the Helsinki Final Act, and the Charter of Paris, "especially with regard to the rule of law, democracy and human rights.

· Membership of International Organizations: The NATO, the Council of Europe, the EU, the OAS and MERCOSUR now condition full membership on the maintenance of political democracy.

2 Impacts on the UN Security Council

The Security Council may not successfully restore peace and security if the exigencies of justice during and after the termination of armed conflict are not met. The objective of peace restoration can only be attained by enforcement actions under Chapter VII if the war terminating measures do not contradict basic requirements of justice[96]. Demands of justice after war would demand that the Security Council, when taking enforcement actions under Chapter VII, should also respect basic requirements of humanitarian law and human rights law, thus bridging the gap regarding the applicable law for transitional international administration.

Applicable law to international organizations in general and applicability of human rights law to Security Council activities in particular have increasingly been at issue[97]. This could be seen against the background of the increasing importance of

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94 G. H. Fox and B. R. Roth, "Democracy and international law," *supra* note 76, at 331-333; J. Wouters et al., "Democracy and International Law," in *Netherlands Yearbook of International Law*, Vol. 34 (2003), pp. 137, 156-177.

95 *European Journal of International Law*, Vol. 4 (1993), No. 1, p. 72. *See also* A. Cassese, *International Law*, *supra* note 75, at 75.

96 W. Weiß, "Security Council Powers and the Exigencies of Justice after War," in *Max Planck Yearbook of United Nations Law*, Vol. 12 (2008), pp. 45, 94.

97 T. Sato, "Legitimacy of International Organizations and their Decisions – Challenges that International Organizations Face in the 21st Century," in *Hitotsubashi Journal of Law and Politics*, Vol. 37 (2009), pp. 11-30.

legitimacy for international organizations.

●Legitimacy of International Organizations at Issue

The fact that the activities and decisions of international organizations have had more direct influence on private persons and companies seems to be noteworthy as a distinct reason why legitimacy has become a controversial issue, although this trend can be considered as an aspect of the overall increase in the influence of international organizations. For example, we may recall that it was not the ruling class but the people in Iraq who suffered from a lack of food and medicine as a result of the economic sanctions imposed on Iraq by the UN Security Council in 1990's; sanctions which were criticized by many as a violation of human rights by the UN. These and other cases indicate that the influence of decisions of the Security Council on domestic society has increasingly become substantial.

Thus, the main focus of the substantial decision-making powers on policies is shifting from the domestic to the international level, while the decisions of international organizations are also having more influence on private persons and companies which have traditionally been regulated by domestic law. Moreover, while member States are represented by their governments (executive bodies) in international organizations, domestic legislative bodies generally lack enough influence on domestic executive bodies in these matters, and, as a result, executive bodies are in a position to exert more influence over the decisions of international organizations. Thus, from the viewpoint of the people, being subject to the unilateral impact of decisions made at an international level over which they are allowed no significant input, it is pertinent to question not only the legitimacy of the decisions made by international organizations, but even the legitimacy of the organizations themselves.

●Applicability of Human Rights Law to Security Council Activities

If a private individual suffered damage as a result of Security Council activities, especially if there was a violation of human rights, it is desirable that a legal responsibility be assumed and that some kind of relief be given to the victim. To apply a system of legal responsibility, however, it is necessary that international organizations be bound by related international law, especially by the norms of human rights, and this point has not necessarily been made clear.

For example, as to the question whether international humanitarian law applies to UN military activities, the UN took a negative attitude by saying, among other things, that the 1949 Geneva Conventions, which comprise the core regulations of international humanitarian law, are formulated as treaties among States to which the UN cannot be a party and that the UN does not have a system of criminal punishment

for violations committed by its forces. The International Committee of the Red Cross disagreed with the UN on these and other points. In 1999, the UN Secretary-General issued a Bulletin entitled 'Observance by United Nations forces of international humanitarian law', in which he set out fundamental principles and rules of international humanitarian law applicable to United Nations forces conducting operations under United Nations command and control.

With regard to the economic sanctions imposed on Iraq by the UN Security Council in 1990's, the Committee on Economic, Social and Cultural Rights stated in its General Comment No. 8 (1997), a report which can be regarded as an interpretational guideline by the Committee of the International Covenant on Economic, Social and Cultural Rights, that insufficient attention was being paid to the impact of sanctions on some of the core content of the economic, social and cultural rights of the people in Iraq, particularly the poor vulnerable groups, in the sense that they lacked basic humanitarian supplies such as drinking water, food and pharmaceuticals as a result of the economic sanctions by the Security Council.

The issue of applicability of human rights law has been involved in recent cases in different forms, such as the *Behrami* and *Saramati* cases (2007) of the European Court of Human Rights in relation to KFOR and UNMIK, the *Kadi* and *Al Barakaat* cases (2008) of the European Court of Justice regarding the Security Council targeted sanctions.

Thus, there is an increase in the perception that international organizations are subjects of international law, and in principle regulated by customary international law, which is the general international law that binds all subjects of international law, and that human rights norms will be applied to the activities of international organizations to the extent that they have become customary international law[98]. On the other hand, when it comes to specific relief for victims, which is one of the ultimate objectives of the system of legal responsibility, there are almost no mechanisms or procedures at present.

●Applicability of Human Rights Law in Peacebuilding and Territorial Administration

With regard to the applicable law in the sense of being applicable not to the Security Council but to the people under the UN administration, Report of the Panel on United Nations Peace Operations (so-called Brahimi Report) in 2000 already pointed out the issue of "applicable law." While both UNMIK and UNTAET had law enforcement

[98] *See, e.g.*, Philip Alston, *Non-State Actors and Human Rights* (Oxford, Oxford U.P., 2005); Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford, Oxford U.P., 2006).

responsibility, local judicial and legal capacity was found to be non-existent, out of practice or subject to intimidation by armed elements. Moreover, in both places, the law and legal systems prevailing prior to the conflict were questioned or rejected by key groups considered to be the victims of the conflicts. In fact, these cases show that it is often difficult to simply rely on existing domestic law which is frequently inappropriate because it is discriminatory.

The Panel suggested creating a common United Nations justice package that would allow a mission's justice team to apply an interim legal code while the final answer to the "applicable law" question was being worked out. This would be a code that contains the basics of both law and procedure to enable an operation to apply due process using international jurists and internationally agreed standards in the case of such crimes as murder, rape, arson, kidnapping and aggravated assault. Thus, one might say that the core problem is the lack of a coherent international legal framework for the organization of justice in post-conflict societies[99]. It is only noted here that a concept of *jus post bellum*, as distinct from *jus ad bellum* and *jus in bello*, has increasingly been discussed as a framework to deal with the challenges of State-building and transformation when the international community engages in a post-conflict society[100].

●A Possible Transformation of *Opinio Juris* on Applicability of Human Rights Law?

With regard to UNMIK and KFOR, a generic question is whether UNMIK and KFOR, in exercising their functions, have to respect international human rights standards[101]. Several arguments could be put forward. Human Rights Committee, in the General Comment No. 26 (1997), noted that human rights obligations under the Covenant are attached to the people rather than the State and remain in force in a specific territory despite a change in government of the State party, as the case of Kosovo in relation to the former Yugoslavia. Another argument is that international human rights instruments apply to the extra-territorial acts of organs of its States parties, and the national contingents, while integrated in KFOR, remain under the authority of the sending States and thus are bound by the obligations their governments are committed to, although this reasoning might not be consonant with

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99 C. Stahn, "Justice under Transitional Administration: Contours and Critique of a Paradigm," in *Houston Journal of International Law*, Vol. 27 (2005), pp. 311, 318.
100 C. Stahn, "'Jus ad bellum', 'jus in bello' … 'jus post bellum'? –Rethinking the Conception of the Law of Armed Force–," in *European Journal of International Law*, Vol. 17 (2006), No. 5, pp. 921-943.
101 Wolfrum, "International Administration in Post-Conflict Situations by the United Nations and Other International Actors," *supra* note 13, at 649, 689.

the position that the European Court of Human Rights took in the *Behrami* and *Saramati* cases.

Based upon these and other arguments, Wolfrum contended[102] that, since UNMIK and KFOR act as public authorities in place of the State government, the exercise of their functions faces the same human rights restraints as the latter. What is noteworthy in our context is the following statement Wolfrum made in a somewhat broad perspective:

> If the United Nations performs the functions of a state it should act within the same legal framework as democratic states committed to human rights and the rule of law."

This is not an isolated view. Cassese, from a broader perspective, pointed out as follows[103]:

> The UN, by strongly and unflinchingly promoting human rights, has introduced a new ethos in the international community. It has gradually brought about a sort of Copernican revolution: while previously, the whole international system hinged on State sovereignty, at present individuals make up the linchpin of that community. To be sure, States still play a crucial role in international dealings. However, now they are no longer looked upon as perfect and self-centred entities. They are now viewed as structures primarily geared to the furtherance of interests and concerns of individuals.

As international organizations and international law frequently function in the same manner as domestic governing bodies and domestic law in terms of their influence on private persons and companies, international organizations and their decisions are increasingly demanded to satisfy the same requirements for legitimacy, such as transparency and accountability, that the latter are subject to. This logic would apply to human rights law, and promote the applicability of human rights law to Security Council activities. Thus, we might be witnessing a Copernican revolution of international law as indicated by the changing basis of legally binding human rights law: moving from "based upon traditional sources of international law" to simply "applicable to any exercise of governmental powers and functions by whatever entity influencing private persons."

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[102] *Ibid.*, at 690, 696. Similarly, Stahn states (C. Stahn, *The Law and Practice of International Territorial Administration*, *supra* note 89, at 510-511.) that it is increasingly acknowledged that international entities are subject to basic forms of accountability and responsibility vis-à-vis domestic stakeholders the more they exercise direct control over local politics in the era of globalization.

[103] A. Cassese, *International Law*, *supra* note 75, at 333.

V Conclusions

Many of the peace missions deployed by the UN since the end of the Cold War, are multi-dimensional, and include a variety of peacebuilding mandates. These peacebuilding mandates are quite important in the sense that the achievement of a sustainable peace requires progress in at least some of their core areas. In this process of peacebuilding, transitional justice is increasing its importance with international and hybrid criminal tribunals, although due attention must be paid to political and practical constraints.

The growth of transitional justice and its articulation as such occurred in the 1980s and 1990s, and now exhibits an increasingly complex set of different mechanisms functioning simultaneously. The coexistence of multiple mechanisms results in various problems to be solved in order for these organs to function effectively, including, *inter alia*, delicate relationships among them.

The UN, after many trials and errors, seems to have finally set a coherent policy to post-conflict national reconciliation as indicated by the Secretary-General's Report, which basically adopts a host-country-centered perspective symbolized by the importance of local ownership, although confirming its position to advance the rule of law and not to apply amnesty to core crimes. The reality of transitional justice as indicated by State and UN practice is variegated in the sense that peacebuilding and transitional justice are fundamentally political process. However, steadfastly pushed by the operation of international and hybrid criminal tribunals, it seems that we are witnessing a historic process, away from a tolerance for impunity and amnesty, and towards the creation of an international rule of law.

Under these circumstances, the international legal order is being affected on various levels including individual norms and the structure itself. A trend from impunity to accountability is accompanied by the development of individual criminal responsibility as well as the interpenetration between international law and domestic laws. The activities of intensive commitment in domestic governance of a State by the UN and other international actors in peacebuilding and transitional justice processes have brought about, against the background of globalization, a situation where the legitimacy of a government is increasingly being discussed in terms of international rules and processes. We might be witnessing a Copernican revolution of the international legal order as exemplified by the deteriorating concept of domestic jurisdiction and the prevailing concept of human rights as such.

【Thank you for your patience.】