JUDICIAL COMPLICITY IN HUMAN RIGHTS VIOLATIONS: AN EXPLORATION OF THE JUDICIAL VETTING PROCESS FROM A TRANSITIONAL JUSTICE AND COMPARATIVE PERSPECTIVE

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This article explores the vetting of judges following a judiciary's involvement and complicity in widespread human rights violations during times of conflict, repression and corruption. The article seeks to consolidate and build upon existing transitional justice and human rights literature by exploring the features, developments and challenges of the judicial vetting processes. It makes reference to the situations in Chile, South Africa, Greece, Bosnia and Herzegovina, Kenya and Albania.

"What is not resolved will always return."

- Nilmário Miranda and Roberto Valadão[1]

I INTRODUCTION

History has shown that a state's judiciary is sometimes unwilling, and at times unable, to act as the ultimate guardian of human rights and fundamental freedoms. This was recognised, for instance, when the Chilean Judges' Association publically apologised in 2013 for the inaction of the Chilean judiciary under the Pinochet

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1 Final Report of the Commission of Relatives of the Political Dead and Missing Persons (Comissão de Familiares dos Mortos e Desaparecidos Políticos) (1996), cited in Anthony W Pereira *Political (In)Justice. Authoritarianism and the Rule of Law in Brazil, Chile, and Argentina* (University of Pittsburgh Press, Pittsburgh, 2005) 159 at 159.

regime, stating, "it must be said and recognised clearly and completely: the court system, especially the Supreme Court at that time, failed in their roles as safeguards of basic human rights and to protect those who were victims of state abuse."[2]

The term "transitional justice" is commonly divided into four pillars. The first three are more widely considered and discussed: criminal justice prosecution; reparations; and the establishment of truth-telling.[3] However, from my own observations, and as evidenced in a simple Internet search, there is usually less attention paid to the fourth pillar of transitional justice, namely, guarantees of non-recurrence or non-repetition.

Guarantees of non-recurrence are closely associated with institutional reform and are complementary to the other three pillars of transitional justice. Over the past 30 years or so, all pillars have been pivotal in addressing mass violations of human rights law and humanitarian law after periods of conflict and repression.[4] Measures constituting guarantees of non-recurrence can include the vetting of public officials, educational measures, the disbanding of armed actors and paramilitary groups, the creation of public oversight and regulation, and the adoption of international human rights legislation.[5]

Within the context of the fourth pillar, there is – comparatively speaking – even less written about the complicity and involvement of the judiciary in human rights violations, and the judicial vetting process that has sought to address this involvement.[6] Keeping in mind the important role a judiciary plays in democratic governance, this article seeks to consolidate and build upon existing literature by exploring the features, developments, and challenges relating to judicial vetting processes. It begins by discussing the examples of Chile and South Africa, in

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2 "Chile judges apologise for Pinochet inaction" (6 September 2013) Al Jazeera <www.aljazeera.com>.

3 Ronli Sifris "The Four Pillars of Transitional Justice: A Gender-Sensitive Analysis" in Sarah Joseph and Adam McBeth (eds) *Research Handbook on International Human Rights Law* (Edward Elgar, Cheltenham (UK), 2010) 272 at 273. See also United Nations Security Council *The rule of law and transitional justice in conflict and post-conflict societies. Report of the Secretary-General* S/2004/616 (2004) [Report of the UN Secretary-General 2004] at [8].

4 See Naomi Roht-Arriaza "The New Landscape of Transitional Justice" in Naomi Roht-Arriaza and Javier Mariezcurrena (eds) *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (Cambridge University Press, New York, 2006) 1 at 1–3.

5 International Center for Transitional Justice "Institutional reform" <www.ictj.org>.

6 Roger Duthie "Introduction" in Alexander Mayer-Rieckh and Pablo de Greiff (eds) *Justice As Prevention: Vetting Public Employees in Transitional Societies* (Social Science Research Council, New York, 2007) 17 at 19.

respect of the type of behaviour of extreme judicial complicity in human rights abuses. A brief overview of the vetting processes and their application follows, with reference to Greece, Bosnia and Herzegovina and, more recently, Kenya. The article ends with a discussion of a number of the practical and theoretical challenges to the vetting process.

II JUDICIAL COMPLICITY AND INVOLVEMENT

The systemic nature and extent of judicial involvement in human rights abuses in times of repression or conflict is not as straightforward as the participation of a member of state's security forces or police. Given the inherent nature of the role of a judge and the rule of law, the involvement of the judiciary in human rights violations is arguably more nuanced than that of visible violence by police and security forces. In instances of a judiciary operating within a repressive or authoritarian regime, the level of judicial complicity in human rights violations varies, depending on factors such as the interests of the regime and the reliance that the usurping regime places on the judiciary.[7]

The role of the judiciary under the Pinochet dictatorship in the 1970s and 1980s provides a salient example of involvement and complicity by the judiciary in gross human rights violations. During this period, state crimes included murder, detention, disappearance, torture and the kidnapping of dissenting individuals.[8] Human rights expert Roberto Garretón is of the opinion that instead of acting as a guarantor of human rights, the judiciary did the exact opposite.[9] For instance, in addition to not meting out sanctions against guilty parties and disallowing investigation into state crimes, Chile's Supreme Court systematically rejected more than 10,000 habeas corpus actions that were submitted to it during the dictatorship. Garretón surmises that, overall, it was "precisely the lack of judicial action that was the major cause for the phenomenon of enforced disappearances of persons in Chile."[10]

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7 Tom Ginsburg and Tamir Moustafa "Introduction: The Functions of Courts in Authoritarian Politics" in Tom Ginsburg and Tamir Moustafa (eds) *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press, Cambridge, 2008) 1 at 12 and 17–18.

8 "Country Study: Chile" in Neil J Kritz (ed) *Transitional Justice. How Emerging Democracies Reckon with Former Regimes, Volume II: Country Studies* (United States Institute of Peace Press, Washington (DC), 1995) 453 at 468.

9 See Roberto Garretón "Chilean Tansitional Justice and the Legacy of the De Facto Regime" in Jessica Almqvist and Carlos Espósito (eds) *The Role of Courts in Transitional Justice: Voices from Latin America and Spain* (Routledge, Abingdon (Oxon), 2012) at ch 5.

10 At 84.

Similarly, the Chilean National Commission on Truth and Reconciliation (Chilean Truth Commission) publically stated that the Chilean judiciary did not respond "vigorously enough" to the human rights violations perpetrated by the military dictatorship, and thus aggravated the process of systematic gross human rights violations occurring at the time.[11] The Chilean Truth Commission considered that the judiciary could have prevented infringements upon individual detention and security rights by working within the boundaries of the law, regardless of the flaws in the regulative legislation.[12] Sitting judges could have done this through judicial discretion, and by making references to previous interpretations and human rights compliant norms and values that were embedded in the constitution.[13]

A similar complicity can be seen in the decisions of the South African judiciary throughout the apartheid era. In this instance, it has been argued that the South African judiciary was complicit in human rights violations by supporting the legislature's intention; an intention which was ostensibly aimed at subverting certain fundamental rights and freedoms[14] Professor Hakeem Yusuf contends that the majority of the judges in South Africa supported the apartheid policy of racial segregation between 1984 and 1994 through the interpretation of legal materials in a manner consistent with what is believed the legislature intended.[15]

David Dyzenhaus recalls an example of judicial support for apartheid in the case of *R v Pitje*, a case concerning the legality of racial segregation in a courtroom imposed by a magistrate.[16] Pitje, a law clerk, was instructed by the magistrate to sit at the "non-European" table for practitioners.[17] Pitje argued that the only reason he was instructed to do this was because he was African.[18] The presiding judge in *Pitje*, Judge Steyn, pointed out that this instruction could be denounced on grounds of unreasonableness, based on the perceived inequality in the treatment of legal

11 United States Institute of Peace *Report of the Chilean National Commission on Truth and Reconciliation* (University of Notre Dame Press, Notre Dame (IN), 1993) [*Report of the Chilean National Commission*] at 140–141.

12 See generally Lisa Hilbink "Agents of Anti-Politics: Courts in Pinochet's Chile" in Tom Ginsburg and Tamir Moustafa (eds) *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press, Cambridge, 2008) 102. See also *Report of the Chilean National Commission*, above n 12, at 143.

13 *Report of the Chilean National Commission*, above n 12, at 143.

14 David Dyzenhaus *Judging the Judges, Judging Ourselves* (Hart Publishing, Oxford, 1998) at 158.

15 Hakeem O Yusuf *Transitional Justice, Judicial Accountability and the Rule of Law* (Routledge, London, 2010) at 25.

16 *R v Pitje* [1960] (4) SA 709 (A), cited in Dyzenhaus, above n 14, at 155.

17 At 155.

18 At 155.

practitioners. However, Judge Steyn held that the segregation in the courtroom was justified on the basis that it is "of a nature sanctioned by the legislature."[19]

Dyzenhaus contends that, like in the *Pitje* case, the majority of South African judicial decisions under apartheid demonstrate a complete dereliction of the judiciary's duty to uphold the rule of law and moral ideals.[20] Questions directed towards the judiciary at the Truth and Reconciliation hearing after the fall of apartheid indicate this dereliction:[21]

> How was it that you implemented without protest, and often with zeal, laws that were so manifestly unjust? And how was it that when you had some discretion as to how to interpret or apply the law, you consistently decided in a way that assisted the government and the security forces?

Dyzenhaus and Yusuf both agree that the South African judiciary had the time, occasion and, to a certain extent, the legal authority to resist apartheid laws by taking a human rights approach to interpretation, and by giving primacy to the principles of equality, equity and fairness.[22]

III ADDRESSING VIOLATIONS THROUGH VETTING

The United Nations (UN) Secretary-General describes vetting in the transitional context as entailing a "formal process for the identification and removal of individuals responsible for abuses, especially from the police, prison services, the army and the judiciary."[23] Vetting is often closely linked to establishing the legitimacy of a new democratic regime or post-conflict situation, and boosting public confidence in institutions that were previously viewed with distrust by citizens.[24] Vetting should be distinguished from criminal accountability or punishment. However, to some, the process of meting out unsuitable individuals may also serve as a sanction, albeit one of an administrative nature.[25]

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19 At 156. See also Dyzenhaus' discussion on conceptions of the rule of law (at 27).

20 At 158.

21 At 27.

22 At 25. See also Yusuf, above n 16, at 89.

23 Report of the UN Secretary-General 2004, above n 3, at [52].

24 Dimitri A Sotiropoulos "Swift Gradualism and Variable Outcomes: Vetting in Post-Authoritarian Greece" in Alexander Mayer-Rieckh and Pablo de Greiff (eds) *Justice As Prevention: Vetting Public Employees in Transitional Societies* (Social Science Research Council, New York, 2007) 120 at 122.

25 Pablo de Greiff "Vetting and Transitional Justice" in Alexander Mayer-Rieckh and Pablo de Greiff (eds) *Justice As Prevention: Vetting Public Employees in Transitional Societies* (Social Science Research Council, New York, 2007) 522 at 526.

The concepts of "vetting" and "lustration" are frequently used interchangeably, despite their crucial differences.[26] Lustration, for example, is a term typically associated with the processes undertaken by former communist Eastern European countries and the former Soviet Union after the collapses in 1989 and 1991, respectively.[27] Loosely defined, lustration refers to the banning of communist officials and informers from post-communist politics and state positions of influence, on account of their involvement in a political party or association within the previous administration.[28]

The practice of the lustration processes and laws is considered controversial, and has historically received substantial criticism. Human rights scholar Federico Andreu-Guzmán has stated that lustration laws stigmatised persons for the mere fact that such persons were associated with an authoritarian regime, without actually having been implicated, directly or indirectly, in violations of human rights.[29] The UN Secretary-General and Parliamentary Assembly of the Council of Europe have criticized lustration on the basis that it consists of wholesale purges, wide-scale dismissal and disqualification, rather than on individual records and responsibility.[30]

It follows that vetting and lustration differentiate in the focus that vetting procedures place on individual responsibility and records, as opposed to the focus on collective responsibility seen in lustration processes.[31] However, the nature and intricacy of a judge's role in interpreting the law means that it can be difficult to draw the line between being collectively associated with human rights violations and that of actively and individually supporting and facilitating human rights violations.

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26 Duthie, above n 6, at 18. A good example of the confusion of the definitions can be seen in Gary Bruce "East Germany" in Lavinia Stan (ed) *Transitional Justice in Eastern Europe and the Former Soviet Union: Reckoning with the communist past* (Routledge, New York, 2009) 15 at 27.

27 Duthie, above n 6, at 18.

28 Lavinia Stan "Introduction: post-communist transition, justice, and transitional justice" in Lavinia Stan (ed) *Transitional Justice in Eastern Europe and the Former Soviet Union: Reckoning with the communist past* (Routledge, New York, 2009) 1 at 11.

29 Federico Andreu-Guzmán "Due Process and Vetting" in Alexander Mayer-Rieckh and Pablo de Greiff (eds) *Justice As Prevention: Vetting Public Employees in Transitional Societies* (Social Science Research Council, New York, 2007) 448 at 454.

30 See Report of the UN Secretary-General 2004, above n 3, at [53]; and *Measures to dismantle the heritage of former community totalitarian regimes* Council of Europe Parliamentary Assembly Resolution 1096 (1996) at [12].

31 Report of the UN Secretary-General 2004, above n 3, at [53].

Two principal methods of vetting developed in the wake of the lustration practices in Eastern Europe were the processes of review and reappointment. The primary aim of a review process, the more common of the two vetting methods to date, is to remove those considered unfit for public office through screening.[32] This screening process fulfils a preventative function by working at plucking out individuals who lack the necessary integrity, or capacity, required for the effective and law-abiding functioning of the organisation.[33]

A review process was undertaken in Greece in 1974 after the collapse of the junta government.[34] At the same time as the judges that had been purged by the junta regime were recalled back to their posts, judges who had been promoted by the junta were referred to the Higher Disciplinary Council to have their suitability reviewed.[35] The criteria applied by the Higher Disciplinary Council included conditions of promotion, an examination of the professional conduct of the judges and their conduct outside the confines of the justice system.[36] In retrospect, the outcome of this review process was not very successful. Commentators, such as Dimitri Sotiropoulos, have observed that the vetting laws were inadequate in that most middle and high-ranking judges were exempted from the screening and remained untouched.[37] Furthermore, in addition to the narrow scope of the vetting law, Sotiropoulos contends that the actual application of the criteria by the Higher Disciplinary Council was not consistent or systematic in the meting out of sanctions.[38]

In contrast to the review process, a reappointment process requires an entire new slate – all employees are disbanded and then required to reapply for their positions.[39] The emphasis is, therefore, on selecting suitable personnel, rather than removing individuals. Some suggest that the reappointment process is the preferable method of vetting, given the scope and potential for accompanying

32 OHCHR *Rule of Law Tools for Post-Conflict States – Vetting: an operational framework* (United Nations, 2006) at 25.

33 At 25.

34 Sotiropoulos, above n 25, at 130.

35 At 130.

36 United Nations Development Programme *Vetting Public Employees in Post-Conflict Settings: Operational Guidelines* (Bureau for Crisis Prevention and Recovery, New York, 2006) [*UNDP Operation Guidelines*] at 59.

37 Sotiropoulos, above n 25, at 133.

38 At 133.

39 *UNDP Operation Guidelines*, above n 37, at 16.

institutional reform opportunities, such as gender and ethnicity balance.[40] For instance, a predominant aim in the reappointment of the judges and prosecutors in Bosnia and Herzegovina by the High Judicial and Prosecutorial Councils was to create a balanced ethnic representation in the two entities, the Federation of Bosnia and Herzegovina and the Republika Srpska, after the 1992–1995 conflict along ethnic lines.[41] It was believed that a more balanced ethnic composition would in turn improve the public perception of judicial independence and impartiality, as justice had previously, in the post-Dayton judicial system, "all too often depended on an individual's national identity."[42]

The reappointment procedure in Bosnia and Herzegovina required that each judge wanting a position within the new judicial structure prove their suitability by revealing information on their compliance with national human rights laws, political affiliation and past military and paramilitary involvement.[43] The outcome of this reappointment process ensured the ethnic balance envisioned: the percentage of Serb judges in the Republika Srpska fell from 91 per cent to 65 per cent and the number of Bosniak judges fell from 65 per cent to 56 per cent in the Federation of Bosnia and Herzegovina.[44] Nevertheless, the judiciary in Bosnia and Herzegovina continues to suffer from low public confidence, and the vetting efforts are arguably marred by political interference in the functioning of the judicial system.[45]

Interestingly, prior to the reappointment process, an international and independent judicial commission tried to vet the Bosnian judiciary using a review

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40 Alexander Mayer-Rieckh "On Preventing Abuse: Vetting and Other Transitional Reforms" in Alexander Mayer-Rieckh and Pablo de Greiff (eds) *Justice As Prevention: Vetting Public Employees in Transitional Societies* (Social Science Research Council, New York, 2007) 482 at 490.

41 *UNDP Operation Guidelines*, above n 37, at 39.

42 Alexander Mayer-Rieckh "Vetting to Prevent Future Abuses: Reforming the Police, Courts, and Prosecutor's Offices in Bosnia and Herzegovina" in Alexander Mayer-Rieckh and Pablo de Greiff (eds) *Justice As Prevention: Vetting Public Employees in Transitional Societies* (Social Science Research Council, New York, 2007) [Mayer-Rieckh "Vetting to Prevent Future Abuses"] 180 at 195.

43 *UNDP Operation Guidelines*, above n 37, at 39.

44 Sven Marius Urke *Establishment of An Independent and Accountable Judiciary in Countries of Transition – Bosnia and Herzegovina as a Case Study* (Conference paper delivered at High Judicial and Prosecutorial Council of Bosnia and Herzegovina Conference on 20 October 2013, Sarajevo) at 15.

45 See Genoveva Ruiz Calavera "BiH Citizens need an independent and accountable judiciary" (Op-ed, 15 June 2017) published on the website of the Delegation to the EU to Bosnia and Herzegovina and European Union Special Representative in BiH <http://europa.ba>.

process.[46] The review process failed due to the absence of resources and tools available to the Independent Judicial Commission to establish the burden of proof necessary to remove individual judges.[47] The latter reappointment process carried out in 2002–2004 was considered remarkably more successful, as it meant that instead of the Councils trying to prove the unsuitability of a candidate, the burden of proof rested on the applicant to establish their suitability.

More recently, the judiciary in Kenya underwent an institutional reform programme that involved vetting following post-election violence in 2007–2008. Vetting commenced in 2012 with the long-term objective of addressing the inefficiency, incompetence and corruption in the judiciary and re-establishing public trust.[48]

After determining that a reappointment process would be too disruptive and potentially lead to large-scale instability, the procedure adopted in Kenya was one of review based on verification of questionnaires submitted by judges and magistrates to the vetting board.[49] One recent study found that trust levels in the judiciary increased initially, but later reduced towards the end of the vetting programme.[50] Gloria Vukulu identifies the resistance from the judiciary itself and the lack of attendant institutional reforms to reinforce the vetting process as factors in the decrease in public trust.[51] Like that of Bosnia and Herzegovina, the example of Kenya illustrates the need to ensure that vetting occurs within a coherent and complementary institutional reform framework.

IV CONSIDERATIONS AND CHALLENGES

A number of practical and theoretical challenges arise when one considers a judicial vetting programme. These include questions relating to the existence of an over-arching obligation on states to vet judiciaries under international law as well as discussions in respect of conflicting normative principles. For instance, with respect to the latter, does the process of vetting a judiciary conflict with other normative principles, such as the separation of powers and judicial independence?

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46 Mayer-Rieckh "Vetting to Prevent Future Abuses", above n 43, at 181.

47 Urke, above n 45, at 11.

48 Gloria Mmoji Vuluk "Assessing the Impact of Vetting on Trust in Public Institutions: A Case of the Judiciary in Kenya" (University of Nairobi, 2015) at 7.

49 At 24–25, 50.

50 At 90.

51 At 90.

A A Binding Obligation on States?

Very little attention has been paid to the question of the existence of a binding international law obligation to vet a judiciary in times of transition. It is clear that each of the major international and regional human rights covenants, such as the International Covenant on Civil and Political Rights,[52] the American Convention on Human Rights (American Convention)[53] and the European Convention on Human Rights (ECHR)[54] guarantees the right to a fair hearing in judicial proceedings before an independent and impartial tribunal or court. Thus, one question that needs to be asked is whether these broad but fundamental rights are enough to compel or oblige states to vet their judiciary in transitional contexts. Another related question is whether a judiciary, either post-conflict or post-regime change, can really be perceived as independent and impartial.

Even after the fall of Pinochet, the Chilean courts refused to open up investigations into the human rights abuses that occurred under the Pinochet regime, and consequently continued to demonstrate partiality towards the previous regime.[55] For example, the Chilean judiciary continued to uphold an amnesty law until Pinochet's arrest in 1999, despite the full incorporation of international human rights into domestic law and the lack of any formal legal obstacles to the investigation of alleged violators.[56]

Neil Kritz alludes to this point by providing the example of post-war Nazi Germany where victims of Nazi persecution were stunned to find that their claims for damages were assigned to the very same judge who had sentenced their relatives in the first place.[57] It is on this basis, and with reference to the international law on judicial independence and the rendering of justice impartiality, that there is a strong argument to suggest that there is an obligation on states to vet judiciaries that have been involved in human rights violations within the transitional context. There is arguably no guarantee that a judiciary associated with,

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52 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976), art 14.

53 American Convention on Human Rights "Pact of San José, Costa Rica" 1144 UNTS 123 (opened for signature 22 November 1969, entered into force 18 July 1978) [American Convention on Human Rights], art 8.

54 Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953), art 6.

55 Garretón, above n 9, at 86.

56 At 90–92.

57 Kritz, above n 8, at xxxv.

or loyal to, the old regime or government, will swiftly adopt an impartial and a new human rights compliant outlook.

In the context of the forced disappearances in Honduras, the Inter-American Court of Human Rights discussed the notion of a state's legal duty to prevent human rights violations in *Velasquez Rodriguez v Honduras*.[58] In that case, by interpreting the "respect and ensure [the rights stipulated]" clause in the American Convention,[59] the Court held that a state has a legal duty to take reasonable steps to prevent human rights violations, including any legal, political, administrative and cultural measures that promote the protection of human rights.[60] Although the Court does not specifically mention the vetting process, the reference to administrative processes could reasonably be interpreted to support a broad obligation incumbent on states to vet public officials as a step to prevent human rights violations.[61]

There are also a number of soft-law instruments citing the value and importance of vetting public officials for human rights abuses. For instance, the *Updated Set of Principles for the Promotion and Protection of Human Rights through Action to Combat Impunity* contains a principle specifically targeting institutional reform in respect of guarantees of non-recurrence. It stipulates that, at a minimum, legislative and administrative reform should ensure that "public officials and employees who are personally responsible for gross violations of human rights, in particular those involved in military, security, intelligence and judicial sectors, shall not continue to serve in State institutions."[62] This principle is part of a more general obligation requiring states to effectively combat impunity by investigating violations and by taking appropriate measures in respect of the perpetrators.

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58 *Velasquez Rodriguez v Honduras* Judgment, (Ser C) No 4 (Inter-American Court of Human Rights 1988), 29 July 1988 at [173]–[175]. See also *Godinez Cruz v Honduras* (Ser C) No 5 (Inter-American Court of Human Rights 1989), 20 January 1989 at [175], [176] and [184].

59 American Convention on Human Rights, above 54, art 1(1).

60 At [174].

61 At [175].

62 Commission on Human Rights *Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher – Updated Set of principles for the protection and promotion of human rights through action to combat impunity* E/CN.4/2005/102/Add.1 (2005) at principle 36. See also *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* GA Res 60/147, A/RES/60/147 (2006) (also known as the "Van Boven Principles"); and Economic and Social Council *Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* E/RES/1989/65 (24 May 1989), annex at art 15.

However, despite these instruments, an overarching and binding obligation to vet under international law has arguably not yet materialised. Although international treaties require an independent and impartial judiciary and the protection of human rights, there remains, in reality, a wide margin of appreciation held by states in respect of the implementation of measures of transitional justice.[63] For instance, instead of reforming the judiciary, a state may order the investigation and criminal prosecution of a select few alleged perpetrators. In parallel, a state may combat perceived impartiality of the judiciary through comprehensive and ongoing human rights training and education. This may be enough to ensure a guarantee of non-recurrence for a public sector that has had limited involvement in human rights violations. It is also clear that pragmatic considerations, such as a limited pool of qualified persons or lack of resources, are also likely to play a part in these decisions.[64]

B Conflicting Normative Principles?

One might query whether an executive's decision to vet the judiciary on the basis of human rights allegations undermines the fundamental principle of an institutionally independent judiciary. An argument along these lines was invoked by the judiciary in post-apartheid South Africa, when they challenged a request to attend a special judicial hearing held by the Truth and Reconciliation Committee (TRC).[65] The purpose of the hearing was to inquire and examine the involvement and alleged bias of the judiciary under apartheid.[66] Despite the fact that the aim of the hearing was not to point fingers at certain individuals, or ascertain collective guilt, the judiciary refused to attend and participate in the hearing.[67]

The South African Chief Justice, Michael Corbett, argued that calling judges to account before the TRC was not "feasible" on the grounds that such an act by governmental bodies or commissions infringed upon judicial independence and the constitutional separation of powers.[68] In response, Kadar Asmal, commenting on the judiciary's challenge to the hearing, stated that it was ironic that arguments based on judicial independence should be used to defeat an inquiry into the

63 Paul Seils "Restoring Civic Confidence Through Transitional Justice" in Jessica Almqvist and Carlos Espósito (eds) *The Role of Courts in Transitional Justice: Voices from Latin America and Spain* (Routledge, Abingdon (Oxon), 2012) 264 at 273–274.

64 Kritz above n 8, at xxv.

65 Dyzenhaus, above n 14, at 28.

66 At 28.

67 At 30.

68 At 37.

exercise of judicial independence given that "a major part of the indictment of the apartheid judiciary was exactly that it failed to exercise available areas of independence in ways that would have curtailed apartheid".[69] Dyzenhaus agrees with Asmal, and proposes that, "it follows that when judges make themselves complicit in state oppression, they cannot cite their independence as an 'insurmountable obstacle' to their being made accountable."[70]

More recently, an argument of the same nature arose in Albania in relation to a new vetting law made in response to allegations of widespread judicial corruption and organised crime.[71] At the request of the Constitutional Court in Albania, the Venice Commission delivered an amicus curiae brief in December 2016 relating to a claim that a new vetting law for judges and prosecutors be declared unconstitutional and incompatible with the ECHR.[72]

One of the questions facing the Venice Commission was whether the new vetting law endangers judicial independence and the fundamental principles of the rule of law and the separation of powers.[73] The essence of the argument advanced was that the separation of powers may be compromised because the entire vetting process was seen to fall under the power of the executive. The Venice Commission did not agree. In their response, they pointed out that the two bodies (the independent commission and the appeals chamber) undertaking the review possessed characteristics of impartial judicial bodies, and that the members of such bodies were subject to strict disclosure and monitoring measures.[74] The Venice Commission emphasized that, ultimately, decision-making remains with the independent bodies set up to oversee the vetting process; consequently, there was no interference with the separation of powers.[75]

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69 Kadar Asmal "Foreword" in David Dyzenhaus *Judging the Judges, Judging Ourselves* (Hart Publishing, Oxford, 1998) vii at ix.

70 Dyzenhaus, above n 14, at 146.

71 Republic of Albania Parliament, Law no 84/2016 "On the Transitional re-evaluation of judges and prosecutors in the Republic of Albania", adopted on 30 August 2016, as discussed in European Commission for Democracy Through Law (Venice Commission) *Amicus Curiae Brief for the Constitutional Court on the Law on the Transitional Re-evaluation of Judges and Prosecutors (the Vetting Law)* (Opinion No 868/2016, adopted 109th plenary session, Venice, 9-10 December 2016).

72 At 3–6.

73 At 9.

74 At 9.

75 At 11.

In addition to challenging a vetting programme by raising the issue of institutional independence, there could be room to argue that vetting the judiciary conflicts with a number of important safeguards that work to maintain institutional independence. For instance, soft law documents such as the *UN Basic Principles on the Independence of the Judiciary* and the *Universal Charter of the Judge* spell out special safeguards protecting against the arbitrary removal of judges, such as the security of tenure, conditions of service including pension and age of retirement, and specific disciplinary and removal procedures that guarantee independent review.[76] These types of safeguards work to ensure that the judiciary is politically insulated and protected from the whims and wills of the executive or legislature, should those in power be dissatisfied with particular judicial decisions and findings.[77] At first glance, a vetting process may interfere and conflict with these safeguards.

This issue was raised by a number of Court of Appeal judges in Kenya who were subject to Kenya's recent review of the judiciary on the grounds of corruption and bias.[78] The judges argued that security of tenure was an international norm of judicial independence and thus personnel issues of removal should be limited to the normal disciplinary procedures stipulated in the likes of the *Basic Principles on the Independence of the Judiciary*.[79] The Kenyan Judges and Magistrates Vetting Board's response to this challenge was that:[80]

> … internationally, it has been recognised that states in which the judiciary has lost public confidence are in a uniquely different position, and a number of different

76 "Basic Principles on the Independence of the Judiciary Adopted by the United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985" at principles 11–14 <www.ohchr.org>; and International Association of Judges "The Universal Charter of the Judge" (17 November 1999), arts 8, 9, 11 and 13.

77 The Center for Constitutional Transitions at NYU Law "International Standards for the Independence of the Judiciary" (Briefing paper 41, September 2013) at [3.1.2].

78 Kenya established a vetting programme for the judiciary in 2011, following a post-election crisis claiming 11,000 deaths and displacement of 300,000 people. See Judges and Magistrates Vetting Board "Interim Report September 2011–February 2013" Restoring Confidence in the Judiciary" (Nairobi, 2013).

79 Jan van Zyl Smit "Vetting the Kenyan Judiciary – The Urgency of Institutional Renewal in Tension with the Value of Showing the Rule of Law" (Presentation to ASIL Interest Group on Transitional Justice and the Rule of Law, New York, November 2013, provided through personal email correspondence 11 November 2013) [ASIL Presentation of Jan van Zyl Smit].

80 ASIL Presentation of Jan van Zyl Smit, above n 80.

approaches to vetting the entire judiciary, as opposed to initiating disciplinary proceedings against individuals, have been tried.

The Board concluded that the exceptional circumstances of transitional societies outweigh the rights, such as security of tenure, that normally safeguard judicial independence.[81] The Special Rapporteur on the Independence of Judges and Lawyers has also favoured this approach in transitional contexts. Leandro Despouy states that, for the sake of combating impunity and preventing a reoccurrence of serious human rights violations, "it may be necessary to limit and restrict certain rules of law relating to the actual irremovability of judges."[82] This approach takes heed of the gravity of the previous regime's violations, and gives preference to the wider human rights aims incumbent on states, such as the duty to prevent further abuses, combat impunity, and to provide effective remedies to victims. In practice, this might mean a curtailment of norms related to security of tenure or conditions of service, but with a guarantee that they will be gradually reintroduced and extended after the vetting process is concluded.[83]

V CONCLUSION

Analysing the vetting of judges through a transitional justice lens reveals many permutations of the relevancy of human rights and the rule of law. First, it is clear that in times of heavy corruption, conflict situations and authoritarian regimes, the courts are not always innocent bystanders in systematic and widespread human rights violations. Apart from affirming a judiciary's potential involvement in human rights violations, the examples of Chile and South Africa also make plain the subtleties in discerning the precise nature of judicial involvement in these types of violations. This discernment necessitates knowledge of how the law works (or is supposed to work), the use of judicial discretion, judicial interpretation tools and techniques, and also depends on one's understanding of a judges' role and their relationship with the executive and legislature. In many instances, the role and responsibilities of a judge in times of repression and crisis strays into areas of ethics, morality and jurisprudence.[84]

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81 ASIL Presentation of Jan van Zyl Smit, above n 80.

82 Commission on Human Rights "Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy" E/CN.4/2006/52 (2006) at [52].

83 Human Rights Council "Report of the Special Rapporteur on the independence of judges and lawyers, Leonardo Despouy" A/HRC/11/41 (2009) at [55].

84 Suzannah Linton and Firew Kebede Tiba "Judges and Rule of Law in Times of Political Change or Transition" in Cherif M Bassiouni and others (eds) *The Global Community Yearbook of International Law and Jurisprudence: Global Trends: Law, Policy & Justice Essays in Honour of Professor Giuliana Ziccardi Capaldo* (Oxford University Press, Oxford, 2013) 173 at 215.

A second theme of this article has been the need to frame the obligation to vet against the context at hand, given that it is challenging to articulate that an overarching obligation to vet public officials exists in international human rights law without knowing more about the respective holistic transitional justice strategy of the emerging state, if any. Fair trial rights, independence and impartiality, need to be key considerations when dealing with vetting the judiciary as a specific subset of public officials. Generally speaking, not only should the vetting process of the judiciary in post-conflict and post-authoritarian situations abide by due process and fair trial principles, but such principles should also be the driving force behind the obligation of a state to vet the judiciary in the first place. An impartial judiciary is crucial to ensuring international human rights are respected, violations are prevented, and effective remedies are allocated. It is also fundamental to ensuring that perpetrators are held to account through the criminal justice system, in order to avoid an ongoing impunity gap.

Lastly, it needs to be acknowledged that an obvious lacuna still exists within current transitional justice and comparative law literature – that which addresses vetting, and in particular, the vetting of judiciaries. This is despite the important, and increasingly powerful, role courts play in consolidating the rule of law in democratic regimes. It needs to be said that although the scope of this article has been largely limited to situations where an entire judiciary has been, or was thought to have been, implicated in human rights abuses in instances of conflict and repression, the underlying themes are arguably equally relevant to a judiciary in *any* society and region. A strong independent and impartial judiciary is an important safeguard for us all. And ultimately, further research and literature on this topic will not only serve to fill a much-needed gap in the study of transitional justice, but will also assist to ensure that those who have been let down once by a judiciary during a conflict or authoritarian situation do not have to suffer twice.