

# Promoting Transitional Justice in Post Conflict Societies

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## **‘LAWS ARE SILENT AMIDST CLASH OF ARMS’ Cicero**

### **Introduction**

What Cicero said is not entirely untrue. Where conflicts begin the Rule of Law ends and where the conflicts end, the Rule of Law begins. But in ‘failed states’ that have not known the Rule of Law for years at a stretch, if not decades, the Rule of Law principles remain only on paper even after cessation of hostilities. Therefore, when the process of ‘Nation Re-building’ is attempted one will find some incredible contradictions and some incredible truisms. I would, therefore, like to address some of the characteristics of contemporary conflicts vis-à-vis Rule of Law issues based mostly on lessons learned in the past. I also would like to outline the broad road map for promoting transitional justice as a tool for successful peace building.

### **Characteristics and Dynamics of Conflicts**

In terms of nature, dynamics and impact violent conflicts in the present day context are more regional and less national. The civil wars have transcended national boundaries; thanks to porous borders, and regional powers/neighbors have been sucked into the vortex of economic crisis, ethnicity, organised criminal net works, terrorism, genocide etc. Sierra Leone, former Yugoslavia and Rwanda are tell all examples. Therefore, tribunals like ICTR, ICTY had to address the economic, ethnic aspects of war crimes. The non-state actors i.e. mostly rebels have raised viable combatant structure and developed criminal net works replacing state actors. Resultantly, they have little or no respect for law. The Law of Armed Conflicts (LOAC) have no place in their dictionary. The criminal investigations in West African States have amply demonstrated this. In nutshell, the conventional warfare of defined armies is slowly becoming a thing of past confined to history books. In such scenario, for ‘Post-Conflict Peace Building’ to be set on an irrevocable course, one of the six well identified component’s is rule of law and respect for human rights, which must be seriously considered.<sup>2</sup>

### **Rule of Law**

Rule of Law is one of the core principles of good governance and no state can be an exception to this time tested fundamental doctrine. In war torn states or countries ravaged by internal strife, ethnic conflict and dissension strict adherence to Rule of Law need not be gainsaid. In order to make the transition from conflict to peace keeping to peace building to peace irreversible, strengthening the security sector to address the much broader agenda of ‘human security’ alone would not suffice. A stable lean, transparent, functional and effective Rule of Law system is imperative for peace building to succeed.

While strengthening the Rule of Law system, all its essential components or ‘pillars’ as one may call them, viz, the Police, the Judiciary, the Judicial Administration and the Correction System should be strengthened and issues concerning them should be addressed simultaneously.<sup>3</sup> Neglecting any of the components or tardy progress in any one may weaken or may even endanger the progress made in other areas.

### **Judiciary and Judicial Administration**

Addressing the issues concerning Administration of Justice towards successful peace building is not without its share of problems. In fact, promoting transitional justice is easier said than done. The problems could be due to varied reasons and may vary from state to state. The malaise undermining the judicial system can be categorised broadly under two heads, viz, one ‘Institutional’ and the other ‘Individual’, who make the system(s) work.

### **Institutional Malaise**

Stability and sustainable peace in a failed state would be a mirage if Rule of Law in general and a strong and vibrant Judiciary in particular are non-existent or weak. The problem would be further compounded where the laws are unfair, there is lack of appropriate legal institutions and trained personnel and the Judges who administer the law are ill trained and not impartial.

Former Yugoslavia and Kosovo are classic examples of negation of Rule of Law. Several years after the conflicts, judicial impartiality can by no means be taken for granted in these societies, which are split on ethnic lines. In politically sensitive cases local Jurists were often suspected of being biased against members of the other ethnic groups.

The basic structure and division of a country’s judicial set up coupled with the dichotomy between modern and traditional legal systems could also pose a key challenge to peace building efforts. The post conflict peace building in West Africa (Sierra Leone, Liberia to cite a few examples) is a case in point. These erstwhile colonial (ruled) states generally have a three tier legal system. The Magistrate Courts dealing mostly with criminal and commercial cases along with Local Courts applying customary law and courts operated by War Lords/Local Chiefs based on customs and traditions. While the Magistrate Courts apply outdated statutory laws, the Local and Chiefs Courts work on non-codified customary law.

In most of these states, 80 per cent of the population hail from rural areas and are illiterate. The legal disputes of fundamental importance to their basic sustenance and livelihood like lease, tenures, inheritance and family law issues like marriage, divorce etc. are decided based on customs. There is an inherent danger in deciding such legal cases by Local Courts and Paramount Chiefs

based on customs, and the standards are far from the absence of codified laws. Absence of avenues of appeal from the decision of community heads further adds to the problem.<sup>4</sup>

Lack of experience on the part of international community in implementation of Rule of Law in multi-dimensional peace operations has also contributed in equal measure to the cup of woes. In Kosovo, Bosnia and Herzegovina to restore judicial independence and impartiality, international judges and prosecutors were imported and appointed. While, handling of War Crimes, Human Rights violations Witness Protection Programs etc. showed considerable success, serious shortcomings also came to the forefront. English as a language barrier, lack of knowledge of local laws on the part of 'international actors' due to diverse law systems and backgrounds caused great impediments. Absence of skilled interpreters and lack of cohesive local capacity building plans, lack of job specific and country specific training programs leading to loss of institutional memory and clear exit strategy were not addressed.<sup>5</sup>

### **Individual Malaise**

At the individual level, the difficulties may be even more pressing. Absence of rule of law, exacerbated by corruption and culture of unaccountability of Judges, coupled with absence of formal legal training in handling sensitive and complex court cases is a major threat to the judicial system in post conflict societies. Discriminatory practices against women and children are also generally wide spread in such societies, particularly, in those areas where the influence of Islamic laws is predominant. Gender discrimination and cultural values make it difficult for the marginalised sections of the society to demand accountability from the Local Councillors/Chiefs/Judges.

### **The Road Map**

In the recent past, the UN as part of its overall efforts to enhance the efficacy of post conflict peace building measures took decisive steps concerning Rule of Law issues in 'failed states'. While such steps were at executive level in respect of some missions, for example, United Nations Mission in Kosovo (UNMIK), it was broad based Rule of Law mandates in respect of few missions, sans executive authority for example, Liberia and Sierra Leone. In other words, the former what one may call as "trustee - ship approach", witnessed take over of full or partial governmental authority for an interim phase including but not limited to the responsibility for Securing Sector Reforms (SSR) based on Rule of Law principles. Whereas, in respect of the latter called 'light foot print' approach, it was only to assist, guide and cooperate with the National government(s) towards good governance and restore its authority as a viable state. I must however, hasten to add here that the results of both the approaches in the field have been mixed neither providing an assured success route. One may, therefore, think in terms of 'longer and leaner approach' after identifying the areas that require urgent remedial measures and take on the rest after stability is ensured.

### **Suggestions**

- (a) Any attempt towards re-establishing judicial system as part of transitional justice programme must first begin with a thorough stock taking capabilities, the infrastructure if any, available including the 'Judicial Structure Tree' and statues remaining in the area of conflict. But such an attempt should not be aimed at recreating the old or pre-conflict institutions, which were the root causes for failure. Simply restoring such institutions will not bring sustainable peace.
- (b) While revamping the judicial system in a post conflict scenario, it should not be merely country specific approach, but global, regional and sub regional issues and their systems need to be studied cumulatively and the problems should be addressed. Most importantly, the gap between local concepts of Rule of Law and global concept ie internationally acceptable standards must be taken cognizance of, and the solution should be found, lest the approach may turn inadequate. 'The way things are done at home' approach may be inappropriate, and even damaging in a post-conflict society.
- (c) A comprehensive law reform to codify the laws in conformity with international standards should be carried out to promote stability and security. This in turn will lead to economic development. If necessary, international legal experts on specialised fields like Constitutional Law, Criminal Laws (substantive and procedural) should be brought to enact codify the laws.
- (d) Infrastructure needs in terms of proper buildings to house courtrooms, accommodation for judges and staff, equipment and connected facilities matched by availability of sufficient funds must be established.
- (e) Recruitment and promotion of Judges should be codified and corps of jurists be created to provide necessary skills throughout the period of transformation. Systematic, practical and effective legal training to Judges and court staff must be instituted to improve the efficiency of judicial service. A Judicial training institute to develop the professional abilities of Judges may even be the need of hour. Professional abilities cannot be allowed to be practiced by lawyers alone.
- (f) Proper anti-corruption measures aimed at prevention as well as eradication of corruption, which has many faces including culture of UN accountability, should be ensured by regular monitoring and oversight.
- (g) Arresting root causes of crime and crime prevention should be one of the core themes instead of focusing on visible symptoms of organised crime. The space in which criminals thrive must be minimised to a great extent, if not, altogether eliminated.
- (h) The issue of restoring Rule of Law should be addressed as a rule immediately and simultaneously with the peace building process. And not as Mission Creep at a later stage. The international community in Bosnia-Herzegovina launched judicial reform programs in 2002, seven years after Dayton Agreement was concluded in 1995. But by then valuable time had been lost.<sup>6</sup>
- (i) Legal kits' should be conceived, prepared and used as a tool at the start up process, since the Rule of Law is virtually non-existent in early phase of post conflict situations. For example in East Timor as well as in Kosovo, there was no law for a period of six to eighteen months.
- (j) The Brahmi Report has advocated and called for integrated approach on Rule of Law issues. A classic example of multifaceted planning is seen in United Nations Social Conflict Report (UNSCR) 1509 concerning Liberia. Therefore, Peace Keepers in general and law enforcement agencies in particular must act as catalysts for change. They must not only work to restore the Rule of Law but should also aim to create legacies towards local capacity building in terms of well trained lawyers, judges, prosecutors, police etc. Because, ultimately, the 'sons of the soil' can alone bring in stability and peace albeit in a painful, slow and phased manner.

(k) Confidence in a functioning judicial system can only grow where the rule of equality and equal protection under law are practiced without discrimination on grounds of color, creed, race, religion, sex etc.

## Conclusion

Let me conclude by stating that there are no ready made or easy solutions to these challenges. It should be the ultimate objective of international community to visibly, clearly and firmly demonstrate and establish that 'Pen is mightier than Sword'. Further, reforming the customary legal system would be much more complex and challenging task, for it would involve a fundamental transformation of strong social and cultural traditions and values which contributed to the root causes of the conflict.

If peace building has to succeed, Justice and Rule of Law with all its vigour and efficiency must co-exist side by side. The examples of, Haiti, Liberia, East Timor should serve as a warning to planners and policy makers.

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