

PalArch's Journal of Archaeology of Egypt / Egyptology

IMPLICATIONS OF TRANSITIONAL JUSTICE IN SYRIA: EXAMINATION AND ANALYSIS

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Asal Haji Rezaei: Implications of Transitional Justice in Syria: Examination and Analysis -- Palarch's Journal Of Archaeology Of Egypt/Egyptology 18(7), ISSN 1567-214x

Keywords: Transitional Justice, Jus Post Bellum, Internal Armed Conflict

ABSTRACT

The Syrian crisis began in 2011, following popular protests over the Syrian government's performance, fueled by the suppression of the protests and the confrontation with the will of the society and with the intervention of foreign agents and governments; It became a scene of confrontation between the state and the nation, and then this crisis took on the color of armed conflict. One of the proposed mechanisms for overcoming the humanitarian crisis caused by the violation of international humanitarian law is transitional justice. Transitional justice includes a set of judicial and non-judicial mechanisms to compensate for the post-collapse human rights violations of a regime. The present study analyzes the effects of transitional justice in the Syrian crisis with an analytical-explanatory method and finally, considering the nature of the Syrian crisis, considers transitional justice as the only way to prevent any human danger in the future, except through the International Court of Justice. It will not be achieved through the establishment of a special branch of the ICC or the establishment of a special tribunal by the United Nations; In this regard, the Commission of Inquiry of the Syrian Arab Republic has provided the ground for the realization of transitional justice and the reform of political structures to restore the rule of law.

INTRODUCTION

The Syrian unrest, the consequences of which spread well beyond the international borders, garnered a great deal of global attention as the cradle to the most serious international crimes of concern as a whole since its inception. The inconceivable mayhems of the takfiri groups, meanwhile, have not only disrupted international peace and security but have also undermined the mental peace and security of the globe. However, despite the long years since the ignition of this fierce and inhumane war in Syria, criminal justice has not yet seen the opportunity to prosecute and convict the perpetrators of the crimes in this war.

The Syrian revolution is perceived to be partly the result of the people's demands for a more transparent and accountable society through

the rule of law. yet now it finds itself during a violent conflict that has led to crimes and serious human rights violations, itself requiring accountability and justice. Therefore, the need for a judicial mechanism for transitional justice in Syria is of paramount significance. Transitional justice is a comprehensive process that takes place in war-torn and newly-liberated countries (i.e., post-conflict societies) or countries embroiled in civil unrest in which law enforcement is at a standstill (i.e., societies in crisis). Transitional justice addresses war crimes and human rights abuses through comprehensive engagement, enabling these societies to move away from conflicts, widespread human rights abuses, and the spread of violent crime to the rule of law, social justice, and the perpetuation of lasting peace. Transitional justice can be thus perceived as the set of the most efficient responses to mass human tragedies and other forms of injustice that occur following armed conflict or during a political transition. The term refers to how human rights and humanitarian rights violators are dealt with in transitional societies, those that are in transition from conflict to peace or from authoritarianism to democracy. The emergence of this can be traced back to post-World War II courts. In the early phases of transitional justice, the prosecution of perpetrators of armed conflict violations was commonplace, but with the ubiquity of human rights norms in forming a government and providing the prerequisites for national reconciliation, historical-political analysis became prevalent and governments were torn between forgiveness and punishment.

There has been an extensive range of studies conducted in this regard. Zakerian et al. (2015) examined transitional justice concerning the events in Egypt as a part of the Arab Spring and following the fall of Mubarak. The authors sought to provide an overview of the realization of transitional justice in Egypt and a critique of selected methods in that country. Yazdian Jafari et al. (2015) discussed comprehensively the prosecution of international crimes and the protection of transitional justice. The authors sought to conceptualize transitional justice and introduce its various criminal and non-criminal mechanisms during the transition period while examining the acceptability of such mechanisms in transitional societies and their validity according to the International Criminal Court. Esmail-Nasab (2017) conducted a review in which transitional justice and its purposes were first outlined, followed by a discussion on the nature of transitional justice and long-term and short-term strategies that are effective in its full realization according to domestic and international factors. Qureshi et al. (2015) also sought to define and explain the characteristics of transitional justice. Moreover, various theories in this field and their subsequent implication for transitional justice have been studied. Sobhani (2017) discussed the ways to use the mechanisms of transitional justice in crisis resolution.

In recent years, owing to the prolongation of the civil war in Syria and the hence the proper grounds for the formation of terrorist groups, the need for a mechanism to support the victims of the war, and to compensate for their material and moral harms, along with the aforementioned mechanisms for transitional justice has gained ever-increasing relevance. Finding a suitable solution to end non-international armed conflicts in Syria, as well as ensuring peace and security for the resident population,

prosecuting perpetrators of crimes in Syria, and putting an end to the human rights violations as soon as possible, among others, are the most significant challenges that can only be alleviated through the mechanisms of transitional justice.

Therefore, employing mechanisms such as criminal prosecution and punishment of perpetrators of war crimes and crimes against humanity, formation of fact-finding commissions, compensation of victims, and institutional reforms, along with others are often common practice in the design and the implementation of a transitional justice process. These mechanisms must fit the social context of Syria, and the experiences of other nations can be employed in designing and implementing transitional justice. As goes without saying that peace will not be lasting without justice, even though realizing justice and bringing the perpetrators of international crimes before justice will take a considerable amount of time in the light of political and power-oriented considerations thereto. Accordingly, the purpose of this study was to examine and analyze the effects of transitional justice in Syria.

THEORETICAL FOUNDATIONS OF RESEARCH

The challenges facing transitional justice in the Syrian crisis

Transitional justice is a relatively new concept and is not indigenous to the ancient cultures of the Syrian nation. One of the most important challenges facing the realization of justice is the lack of awareness of the majority of the people regarding transitional justice and its significance in establishing peace and long-term stability within the country. Transitional justice is often perceived as a means for the transition from an authoritarian society to a democratic one.

Due to the characteristics of the ethnic, sectarian, and racial culture of the Syrian nation, the realization of justice is extremely challenging, even bordering on the impossible. In the Syrian culture, the interests of the tribes are of paramount significance to the people. Attitudes in the context of ethnic and tribal relations are rather formed based on dogma, violence, exclusivism, and revenge¹. Since the social structure of Syria is based on ethnic and sectarian culture, intra-sectarian issues generally lead to vengeful and competitive movements led by the command of the elders and based on ethnic and sectarian interests. Given that the observance of justice is up to individuals and is hence considered an individual right, the individual's right to justice is simply overlooked.²

The Syrian revolution has undoubtedly exacerbated the existing ethnic and sectarian tensions and has deepened the already-established social divisions and distrust. Currently, some people support the plan to divide the country to create separate Alawite, Sunni Arab, Druze, and Kurdish states. Such a plan could lead to a plethora of challenges for the political and security institutions that were already weakened and thus in

¹ Fischer, M. (2011). Transitional justice and reconciliation: theory and practice. In Austin, B., Fischer, M. & Giessmann, H.J. (Eds.) *Advancing Conflict Transformation: The Berghof Handbook* (pp. 406-430). Opladen/Framington Hills: Barbara Budrich Publishers.
<http://www.gsdr.org/go/display&type=Document&id=4240>

² Sepanta, Rangin Dadfar. (2009). *difficult years: a selection of articles*, by Manijeh Bakhtari, Parnian Publications.

search of the necessary legitimacy³. The most important challenge that has arisen as a result of this social situation in relation to transitional justice is that it is not even considered a national issue. As such, transitional justice is rather perceived to be in line with past policies, and ethnic and tribal divisions prevalent in Syria⁴.

On the other hand, the current conflict in Syria has significantly increased the number of weapons in this country. Many weapons are now freely available to civilians in many parts of Syria, and citizens are concerned for their safety and that of their families. Weapons and arms that were previously controlled by the country's official security forces have now fallen into the hands of militias and revolutionaries following the failure of military bases and buildings. Even after the war, many people will be reluctant to surrender their weapons and return to a peaceful life owing to feelings of insecurity and uncertainty. As a result, regaining the levels of control required to implement transitional justice would be exceptionally difficult for the established government⁵.

Post-conflict experiences in other countries have revealed that governments are highly committed to human rights values at the beginning of reforms or the formation of new regimes, as they assume to be more under the watchful eye of the international community. Yet as soon as these governments realized that they could decide for their national geography, they often turned to absolutism and totalitarianism. The Syrian government has sought to employ a similar approach to human rights. Another major political problem in the implementation of transitional justice and human rights in Syria is the presence of perpetrators and their supporters in power. This challenge is prevalent in almost all post-conflict countries that have chosen transitional justice as an efficient and national mechanism to achieve peace and democratization of governance, Syria being no exception.

Another important challenge facing transitional justice and human rights activities in the political dimension are the transformation of transitional justice as a political means. Government agencies and civil society organizations have not been spared from the influence of human rights violators. In this way, they were able to use the process to their advantage against each other, and have hence leveraged justice as a political weapon in a multifaceted battle. This issue has played a very important hand in the suppression of transitional justice and the discouragement of the people towards it⁶.

Owing to the destruction of the economic infrastructures in the crisis-stricken nation of Syria, transitional justice is faced with serious limitations in compensating the victims. As a result, the distribution of

³ Dawlaty & NPWJ (2013). Transitional justice in Syria. Dawlaty and No Peace Without Justice. http://www.npwj.org/sites/default/files/ressources/TJSyria_EN.pdf

⁴ Saramd, M. H. (2011). Handbook on transitional justice: network of civil society and human rights

⁵ Adibi Sedeh, M. (2002). Sociology of War and Military Forces, Tehran, Samt Publications, 2002.

⁶ Dawlaty & NPWJ (2013). Transitional justice in Syria. Dawlaty and No Peace Without Justice. http://www.npwj.org/sites/default/files/ressources/TJSyria_EN.pdf

resources must be pursued with careful policies and in hence include a wide range of highly innovative options⁷.

Another important problem that exists legally in the implementation of transitional justice is the existence of a law on the exemption of security forces from judiciary prosecution that has engulfed Syria for decades. Owing to the exemption from prosecution of criminals who are currently at the helm of the power structure at large, this law has on the one hand promoted a culture of impunity and unaccountability in the institutionalized society and thus a major obstacle to transitional justice. On the other hand, this law has made a large portion of the society, the one that has befallen victims to this legal attitude, distrustful of the government, itself inflicting damage to the perceived national sovereignty of the government. Given the aforementioned discussions, promoting a culture of impunity and unaccountability prevents the society from the past crises towards a stable, humane society and the establishment of lasting peace⁸.

Another major problem facing the implementation of transitional justice is the weakness of the rule of law. The reasons mentioned for this weakness include the widespread financial and administrative corruption within the government structure, and the existence of various ethnic, sectarian, linguistic, religious, and sexual, prejudices and discrimination.

International actors have an important role to play in scenarios where countries, due to the destruction of social institutions and weak infrastructures following wars, are unable to establish mechanisms for justice on their own, and national institutions are unable to deliver fair and impartial justice to the socially weak⁹. International actors must consider valuable local resources to achieve transitional justice goals in the Syrian crisis, namely, emerging civil society organizations, ongoing Syrian civil society initiatives, civil society activities, and the developing judicial structure of the countries involved.

Another challenge that international actors are faced with in the process of transitional justice is the unintended political consequences within the internal borders of the war-torn country. Therefore, international actors must be as inclusive as possible to avoid political inclinations. International actors must also truly understand the cultural sensitivities of each nation and religion, and aim accordingly to achieve long-lasting justice and peace. However, if transitional justice takes place in a short matter of time, the powerful actors affiliated with the previous regime may react rather aggressively, hence fueling the vicious cycle of violence.

Judicial mechanisms of transitional justice in the Syrian crisis

One of the most important mechanisms of transitional justice is to deal with impunity and immunity from criminal prosecution of crimes of war and human rights by the parties involved in Syria.

As the transitional governments are often faced with high levels of chaos and disorder during the transition period, prosecuting high-ranking

⁷ Al-Momani, H. & Rennick, S.A. (2011). EU's peace building efforts in the Middle East: political and cultural dilemmas. DJUCO - Working Papers No. 2.

⁸ Eramo, G. (2012). Yemen: transitional justice is needed to build a democratic future. No Peace Without Justice. Retrieved September 4, 2013 from <http://www.npwj.org/node/4809>

⁹ Even, Gareth, "when is it right to fight? Legality. Legitimacy and the use of Military Force, (London, lecture in the Oxford University), 10may 2004

perpetrators of international crimes would prove to be at first extremely challenge. In many scenarios, a democratic transition requires an agreement with the perpetrators of international crimes who are often high-ranking officials of the former regime. The challenges to arriving at a political agreement may pave the way for the recurrence of international crimes.

A fundamental distinction between weak and stable governments can be found in these unexpected effects of international persecution. In stable governments, the executive branch can prosecute political perpetrators without fear of further insurgencies, yet in transitional states, which are nascent and thus shaky, this can further fuel the vicious cycle of violence. In such governments, it is the individuals, rather than structures and institutions, who have the final say in the stability and authority of society. For this reason, their persecution and detention can lead to the protraction of the armed conflict between the parties thereto¹⁰. In addition, during domestic conflicts, perpetrators of international crimes are less likely to take steps toward peace and a cessation of hostilities if they are certain that they would be prosecuted for the crimes committed during the war in the peace-era future. Advocates of the international criminal courts may, of course, argue here that they would never have done so if they had known from the outset that they would be prosecuted by the international courts. But it is noteworthy that such an outcome is unlikely for two reasons. First, perpetrators will be subjected to harsher punishments if they are detained and tried at home, such that punishments sentences by the international courts would be less harsh compared to them. Second, the perceived benefits of committing these crimes may be so high to the eyes of the offender that the damages of the international punishment would be irrelevant compared thereto.

Although the right to justice for victims is not recognized in the international judicial system if there is even criminal justice for victims in domestic systems, can it be extended to the events of transitional societies? Despite the prevalence of international crimes in transitional society, can each of the victims be given a personal right to litigate for criminal charges against the perpetrators of international crimes?

It should be noted in response that, even if punishment is considered part of the right to justice that every victim must enjoy, the two cases must be distinguished. Under normal circumstances, that is, in societies in peace and stability, the victim or his family can be given the right to seek criminal justice concerning the perpetrator(s). The victim and his family should be deemed a beneficiary in filing criminal charges against the accused. Furthermore, the society itself must also be considered a beneficiary in the administration of criminal justice, given the disruption of public order, and the attorney general must also seek to litigate on the behalf of the society. However, even in this case, experts often argue that the actors involved in criminal justice can employ an “interest-oriented” approach to comprehensively evaluate the public interest in the prosecution of criminal cases, and even abruptly postpone the prosecution of some criminals in cases of expediency. This approach, which derives from the rule of “proportionality in the prosecution of criminal proceedings”, considers the

¹⁰ Ibid.

criminal procedure as only one of the mechanisms for responding to criminal behaviors. In the light of this rule, the criminal procedure is deemed to be pursuant to its expediency - which can be rooted in individual and public interests.

Therefore, in transitional societies, the consequences are perceived to be mixed, both because of the difference in the crimes committed and the difference in the expected benefits of criminal prosecution. In such societies, some acts were committed during the previous regime that were assumed be borne out of the policies adopted by the government itself, or as a result of the abuse of the existing laws, widespread and organized human rights violations had taken place, or that society had been embroiled in an all-out civil war. The enormous scale of these crimes makes the situation distinguishable from that of societies in peace and stability. It should be always borne in mind that the transitional government has come to power as a fledgling force under certain conditions. In the conflict of interests between the transitional community and the victims, if the personal rights of the victims conflict with the collective interests of the transitional society, the collective interests should seemingly be given priority.

Although international criminal courts do not recognize the right of victims to administer criminal justice, advocates of criminal mechanisms argue that they can meet the rudimentary needs of the victims of international crimes. Courts achieve this by providing an opportunity for victims to tell their stories and recount crimes committed against them.

Yet, owing to the pervasiveness of international crimes and a large number of victims and defendants, and thus the criminal proceedings to crimes being limited to few perpetrators of international crimes, the opportunity to participate in criminal mechanisms, both domestic and international, are not provided for many victims of international crimes. Thus, criminal courts cannot meet the needs of many of the victims in this regard.

Another criticism of this view lies in the hypothesis of the remedial nature of trials. This hypothesis is based on the notion that trials are psychologically beneficial and essential for the victims of crimes. On the contrary, the opposing view states the criminalization and persecution of perpetrators is not the most appropriate option for all victims or their survivors in remedying their past pains¹¹. Furthermore, given the impact that culture has on the beliefs of individuals in various societies, the absoluteness of this view is often seriously scrutinized. The culture of a nation offers the basis for a collective or individual interpretation of that nation's history¹². One of the shortcomings of applying the classical criminal justice system in transitional societies is that they do not take into account the cultural diversity of such societies. To better understand the effects of criminal trials, and thus to be able to speak more confidently regarding their psychological effects, more studies are needed. Moreover, one can argue that trials are not the only places that provide victims with an

¹¹ Aukerman Human Rights Center and International Human Rights Law Clinic, University of California, Berkeley, and the Centre for Human Rights University of Sarajevo, *op.cit*, pp. 150-51; Fletcher, Weinstein, *op.cit*, pp. 593-95

¹² Laurence J. Kirmayer, "Cultural Variations in the Response to Psychiatric Disorders and Emotional Distress", 29 Soc. Sci. Med. 327, 1989, In Fletcher, Weinstein, *op.cit*, p. 595

opportunity to recount past events and compensate victims, as institutions such as fact-finding commissions and compensation schemes may offer similar services¹³.

In criticism to the performance of international criminal courts in providing the rights of victims, it should be noted that the trial procedure in these courts, like the courts in the domestic criminal justice systems, is accusatorial, in which the accused is brought before the attorney general, a representative of public order. The prosecutor then seeks ways to convict the accused. With the conviction of the accused or his/her acquittance, one party loses and the other party wins the lawsuit. This process can not only lead to a final compromise between the victim and the accused but also deepen the conflicts. Such that, after the termination of the judicial procedure, the communities are divided into two groups: one that stands by the accused, and the other that stands by the victim(s).¹⁴

The compromise between the victim and the accused, which is the core concept of transitional justice, is essentially incompatible with the mechanism of criminal courts. Another issue is that in the statutes of these courts, although the victims of crimes are mentioned, they are mostly just considered as the witnesses of the crimes providing evidence to prove the case¹⁵. The statutes of the international criminal courts for the former Yugoslavia and Rwanda are evidence to this claim. Therefore, the presence of victims in these courts is only for the sake of proving the charges in a judicial proceeding, and not to meet the demands and needs of the victims.

Another criticism is that owing to the existing limitations, the international criminal courts mostly delegate the handling of the crimes committed by perpetrators of lower levels of the power hierarchy to the domestic criminal courts, while the victims are directly affected by the actions of such perpetrators. Furthermore, allowing a high number of witnesses to recount the whole story and take an active part in the trial simply runs the risk of providing evidence far greater than what would be reflective of the defendant's charges, in turn leading to prejudice towards the allegations of the defendant.¹⁶ Focusing on the victim during the trial diverts the trials from its main objective of judging the accused and the crime committed, and leads to the negligence of the guarantees outlined in the trial procedure to protect the rights of the accused.¹⁷

Despite international commitment to prosecute and punish perpetrators of international crimes, criminal justice can only be exercised when the perpetrators of international crimes are first removed from power. This, in turn, creates the assumption that international criminal justice has acted in a one-sided manner. The another side may have committed international crimes to overthrow the ruling regime. In such a scenario, given that the triumphant government is accountable for administering justice, it will never prosecute crimes committed by its forces. The implementation of criminal justice in such a situation is perceived to have adverse effects on transitional societies. The international criminal justice

¹³ Osiel, "Ever Again: Legal Remembrance of Administrative Massacre", *op.cit*, pp. 471-72

¹⁴ Minow, *op.cit*, p. 1971

¹⁵ Minow, *op.cit*, p. 1972

¹⁶ Damaska, "What Is the Point of International Criminal Justice?", *op.cit*, p. 334

¹⁷ *Ibid*, pp. 333-34

system in this situation takes on a political face rather than reflecting legal principles.

One of the most important criticisms of the performance of international criminal courts is their function as a mechanism for the justice of the victors. According to these criticisms, the criminal courts are not a step towards enforcing the rule of law, but only an opportunity for the victors to punish the losers of the war for the damage they have inflicted upon the triumphant side. What is striking about the practice of international courts is that citizens of powerful governments have never been tried in any of these courts. Therefore, if the victors are the ones who determine the political power, the executors, and the subjects of justice, this criticism applies to such courts.

Criminal courts: a case study of the Syrian crisis

In addition to the implementation of criminal justice and the fruition of its primary effects such as the rehabilitation of offenders, punishment, and intimidation of potential offenders, international criminal justice pursues other goals as well, the most important of which would probably be to provide grounds for peace based on solidarity in the affected nation, and avoiding blind vengeance borne out of hatred.¹⁸ In the current system of international law, there are various solutions to prosecute these crimes according to conventions and treaties, as well as the legal precedents in a similar event.

The establishment of local courts in post-conflict societies is one of the more significant mechanisms of transitional justice in dealing with past crimes and cases of human rights violations. Given that the implementation of transitional justice and dealing with human rights violations in countries an internal matter at the onset, national courts are more referred to than other courts. National courts can be established with or without the help of the international community. They are also free to employ international judges. They can apply only local law or use a form of transitional law that may include international regulations on human rights or UN conventions and treaties.¹⁹ Given their knowledge of the prevailing culture in Syria, courts and national judges can play an important role in fashioning a culture of accountability, the rule of law, preventing future human rights violations, and building trust between the people and the newly-formed government. Prosecution in the national courts of Syria will make the process of administering justice more tangible to the victims. At the same time, the formation of national courts can positively influence the process of political transition and cultural dynamics.²⁰

But administering justice through the domestic courts of the Syrian judiciary and convicting the real perpetrators of war crimes may not be a realistic expectation. The main precondition for this to happen is, first of all, the necessary political will among the government of the Syrian men, which, given that he and the commanders of the armed forces are accused of involvement in war crimes, is unlikely to come to fruition.

¹⁸ Jones, Annika, "Seeking International Criminal Justice in Syria" INT'LL STUD. 89, 2013, P.803

¹⁹ Mobekk, Eirin (2005), Transitional Justice in Post-Conflict Societies-Approaches to Reconciliation Reconciliation

²⁰ Higonnet Ethel (2005), Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform, Yale Law School,(2005:8)

A country like Syria, which has been long embroiled in devastating and brutal civil war, deeply suffers from a lack of efficient laws, shortage of experienced judicial staff, and many other challenges that greatly hinder the possibility of war crimes being tried in the domestic courts without international assistance.²¹

On the other hand, the establishment of the International Criminal Court (ICC) is the most significant progress in the recent memory of any type of justice, including the transitional one, and hence a turning point. Referral of crimes to the ICC brings about a plethora of advantages. First and foremost, the involvement of this international body, in this case, sends a clear message to the parties involved in the war, and that is that war crimes and gross violations of human rights will not be tolerated and their perpetration will have serious consequences. On the other hand, handing out indictments against high-ranking state and military officials, as well as the leaders of the opposing armed groups, their legitimacy, and their once untouchable status would be severely undermined, rendering peace negotiations far more effective. Moreover, the grounds for a fair trial away from the pressures of political officials are readily available in this tribunal compared to the courts of the war-torn country in question.

Despite the aforementioned benefits to referring to the international tribunals, there are some challenges and drawbacks therein as well. The first problem is how investigations are conducted in this institution. Since the Syrian government is not yet a party to the International Criminal Court, the court needs the approval of the Security Council to exercise its jurisdiction thereon. Yet, owing to numerous political discrepancies among the permanent members, the council has not succeeded in passing the necessary resolutions for referring this case to the ICC. Another problem that the ICC may face about the case of Syria is the non-cooperation of the Syrian authorities with this court, the ICC requires the full cooperation of the Syrian authorities to gather evidence, and extradite the accused, among other issues. The precedents, however, reveals that in spite of the UN Security Council resolution necessitating the cooperation of the government(s) concerned, this cooperation has not always been fully realized.²² Another drawback of the International Criminal Court is that it emphasizes the administration of justice rather than the establishment of peace as its statute emphasizes the prosecution of criminals. The ICC has barely brought about peace in the cases it has handled.

Transitional justice can also be pursued in hybrid (internationalized) criminal courts. The formation of a hybrid court at the scene of the crimes potentially leads to the swift introduction of the perpetrators of human rights violations in Syria to the public, itself posing as a cause for the reunification of the society and a source of remedy for the victims and their families. Hybrid courts, while highly effective in better administering the justice process, are perceived as an opportunity for local judges and forces to gain international experience, and therefore strengthening and developing

²¹ Higonnet Ethel (2005:9-11)

²² Sluiter, Goran, "Obtaining Cooperation from Sudan- Where is the Law?" *Journal of International Criminal Justice* 6, no.5 (2008), PP. 871-884

the legal system of the host country. All of these advantages can be traced back to the cultural affiliation between the court and the nation.²³

In transitional societies, there is often no adequate judicial infrastructure due to the rulership of dictatorial regimes, which have prevented the thorough establishment of such infrastructures, or the history of war and crime. Hybrid courts can strengthen or alter altogether the judicial infrastructure of any given country. They are also rightfully perceived to be more cost-effective compared to other types of courts. Yet, they have their flaws and drawbacks. The history of hybrid courts over the past few decades has readily shown that the issue of lack of resources and budget has been among the main challenges facing these courts. Hybrid courts have significant missions burdened on what they should, yet they lack the resources they need.

Overall, the establishment of an international court to deal with the crimes committed in Syria seems to bring about a plethora of positives. However, to ensure high efficiency and the desired outcomes, it must be also ensured that the Syrian members of the court are handling the legal matter with utmost impartiality, while the resources and budget required for this court must be provided sustainably.²⁴

Non-judicial mechanisms of transitional justice in the Syrian crisis

Discovering the truth along with the administration of justice and compensation is one of the essential solutions to realize transitional justice. The establishment of fact-finding commissions in transitional societies has been extremely common over the past three decades or so. Emphasizing the investigative nature of the commission, by which it is distinguished from the judiciary, Freeman defines fact-finding commission as “a special, independent, and victim-centered commission formed by the government to pursue two objectives, namely (1) investigate and report on the causes and consequences of serious human rights violations that have recently occurred in a particular period of tyranny or conflict, (2) prepare letters of recommendation to compensate and prevent recurrence of similar cases in the future

Fact-finding commissions are “formal” but “non-judicial” institutions. Fact-finding commissions are formed by governments and typically during or following a period of political transition in a country, such as after the fall of a regime or the end of an armed conflict. These entities are retrospective in nature focus and examine past events, investigating the facts, causes, and consequences of past human rights violations. That is, fact-finding commissions provide an overview of human rights abuses in the country over a while.

Fact-finding commissions are of paramount significance to societies in transition, such as the crisis-stricken Syrian society, some of the most important reasons for which are:

- **Revealing the facts:** The fact-finding commission would seek to examine cases of human rights violations, those accused of human

²³ Lindsey, Raub, Positioning Hybrid Tribunals in International Criminal Justice” N.Y.U. J. Int’l L & Pol, 41, no.4(2009), P.1042

²⁴ Lindsey, Raub, Op. Cit. P.813

rights violations, and the type and extent of crimes committed, through which it assists the transitional communities to discover the facts regarding the crimes committed in the armed conflict in Syria.²⁵

- Reinstating the rights of the victims of human rights violations: What distinguishes fact-finding commissions from the courts is their focus on victims. Fact-finding commissions are the voice of the silent victims who have suffered for years by human rights abusers but have never been recognized for the harm and pain they have suffered.
- Return of reconciliation and peace to society: The results of the performance of the fact-finding commission could accelerate the process of reconciliation in society and build trust among the people, especially that of the victims and the newly-formed government. Remaining silent on the crimes of the previous officials or denying them altogether simply heightens the mistrust between the people and the new government.²⁶

challenges facing the fact-finding commission in the Syrian humanitarian crisis include the inability to access all information and witnesses for the fact-finding subgroups, selective approach to facts and events, lack of sufficient funding for the commission to function, escalating tensions and crises during the functioning of the commission, the possibility of witnesses being subjected to threat and actual harm during the testimony, protraction of activities of the commission.

Another mechanism of transitional justice is amnesty, during which some criminals are pardoned and not punished by the government. There is no theoretical consensus among jurists on the mechanism of amnesty. Proponents of amnesty argue that in such a situation, transient restrictions should be acknowledged with a realistic view. In any transition, there are opposition groups that see their interests at stake and thus resort to violence to interrupt the transition process. During this period, the country's political institutions are weak, and the power of the reformist forces is unstable. It is difficult to prevent the arrangements of opposition groups without compromise and integrate them into political alliances. As such, the prospect of punishment further fuels the incentive of these groups to resist. Amnesty is therefore a vital tool for advancing reconciliation and realizing cooperation.

When speaking about transitional justice, governments should not only be committed to taking action against human rights abusers but also should have the rights of victims in their sight. Compensation is one of the strategies required for achieving transitional justice. At the same time, it is a general principle of international law that any breach of an obligation results in an obligation to pay compensation. Article 8 of the Universal Declaration of Human Rights refers to the right of every person to effective redress in respect of acts that violate his or her rights. Article 2 (3) of the 1966 International Covenant on Civil and Political Rights and Article 7 of the Declaration on the Elimination of All Forms of Racial Discrimination

²⁵ Hayner P.B, 1994, "fifteen truth commission: 1974 to 1994, a comparative study", Human right quarterly, Vol.16, No.4, pages 597-655.

²⁶ Mobekk E, 2005, "transitional justice in post conflict societies-approaches to reconciliation", available from: www.bmlv.gn.pdf.

have also cited the right to compensation/remedy for victims. In addition to human rights treaties, humanitarian law treaties have also referred to the right to compensation for victims. Article 68 of the Geneva Convention Relative to The Treatment of Prisoners of War Of 12 August 1949 contains special rules governing the payment of compensation to prisoners of war whose rights have been violated under these conventions.

The UN General Assembly introduced five forms of compensation for victims in its resolution, namely repatriation, financial compensation, satisfaction, rehabilitation, and a guarantee of non-recurrence.

Compensation of the victims of the Syrian crisis is faced with significant challenges, some of which are:

- **Lack of serious political will to compensate the victims:** Political will is the main factor in the pursuance of compensation schemes for victims of human rights violations. Although the right to compensation has been recognized by important conventions of international law, some governments do not still exhibit the serious will required to implement compensation schemes.
- **Lack of adequate financial resources for compensation:** In some countries, especially the developing ones, even in cases of political will, financial resources required for the compensation schemes are few and far between.
- **Assumed non-precedence of compensation schemes:** In some countries, there might be some levels of political desire and the relative resources required to implement compensation programs, but the compensation schemes are way down the line in precedence various, as governments highly prioritize other matters over compensation. For example, the South African government has made it a priority to provide submarines for its naval fleet but has rejected the fact-finding commission inquiry for implementing compensation schemes.

Overall, the important point about compensating victims is that in case the compensation is administered without the use of other transitional justice mechanisms, such as the fact-finding commission or the prosecution of human rights violators, it is often criticized as an attempt to bribe the victims.²⁷

Complementary methods for achieving transitional justice

One of the mechanisms of transitional justice is institutional reform. Countries in transition must reform their institutions, their judiciary, and their political system to be able to achieve the long-term socio-economic-political goals they set. According to the International Center for Transitional Justice, institutional reform is defined as the process of reviewing and rebuilding government institutions with the sole aim of having them respect human rights, adhere to the rule of law, and be accountable for their representatives and acts. As a mechanism and a means to the justice procedure, the reform of public institutions that have participated in human rights violations, such as the police, military forces, or judicial, political, and security staff, among others, must focus on past

²⁷ Sandoval Villalba Clara (2011), Transitional Justice: Key Concepts; Processes and Challenges, content/uploads/2010/09/07_11.pdf

crimes and human rights violations, and hence play a major role in achieving democracy and preventing the recurrence of crimes.

The institutional reforms of the transition period mainly focus on the political system, security forces, public administration, and the judiciary, some of which are discussed below:

1. Reform of the political system

The focal point in the reform of the political structure is to improve the laws and institutions in a way that can satisfy the public, regardless of their affiliations and differences. One of the most important issues in the rehabilitation of the political structure is creating a transparent and accountable system.

2. Reform of the security system

Countries experiencing a period of turmoil need to reform their security systems to ensure that such crimes are not reiterated.

3. Reform and cleansing of public government, judicial and security offices

Owing to their direct interaction with the citizens, government departments and organizations are considered highly important in the process of institutional reform of Syria. Reforming the public sector requires altering and revising the rules and principles related to the attitude of this section of the government. Modification programs on these institutions should mostly focus on legislative policies.

In carrying out the relevant reforms, the newly-shaped government must identify the best practices with a comparative view, employ to be in line with the global trend of moving towards reforming government departments in pursuing the goals of transparency, oversight, and citizen satisfaction, among others. Notably, the lack of political will or the intrusion of political officials in the process of institutional reform of Syria is one of the many challenges that the aforementioned mechanism is faced with, which can lead to the loss of an important opportunity during the transition period in the form of preventing recurrence of human rights violations shortly. If done gracefully, exercising transitional justice in Syria can restore trust in society and also reduce the fear people have of government agents, and also prevent the recurrence of human rights violations. Nevertheless, this mechanism faces an important challenge, in that the emotions of the transition period might overwhelm the justice process, which can lead to the victimization of individuals with lesser roles in human rights violations, hence heavily polarizing the society and affecting the families of the victims.

CONCLUSION

The Syrian crisis began in the wake of popular movements and developments in the Middle East known as the 2011 Arab Spring. At the onset of the crisis, it was assumed that the Syrian unrest, like other countries involved in the Arab Spring protests, was an internal affair with the aims of putting an end to corruption, elimination of repression, and the improvement of the social and economic situation, but these protests quickly escalated into a civil war with the rivalry of opposition groups, and the arrival of regional and international actors. Factors such as ethnic, religious, sectarian divisions that led to the Syrian crisis further aggravated

the crisis, which had irreversible consequences for the Syrian people and the international community. Scrutinizing the timeline of the Syrian crisis from the perspective of international law indicates that these systematic violations are perpetrated by all the parties involved, and the Syrian government is unable to protect the fundamental rights of its citizens that are violated by opposition groups, in particular, the terrorists.

One of the proposed mechanisms to fundamentally solve the crisis of protecting the victims after the war is transitional justice. Although there are several definitions offered for transitional justice, this study has employed the 2006 UN definition. The United Nations has defined transitional justice as a comprehensive set of judicial and non-judicial procedures and mechanisms that are integrated with the efforts of the society in overcoming the legacy of past human rights abuses to ensure accountability, realize justice, and achieve reconciliation. Previous studies have indicated that transitional justice is a means by which Syria can confront its past and initiate the process of rebuilding enduring peace. This process can help break the vicious cycle of violence, provide a basis for the reform of the political structure, restore the rule of law, and provide the foundations for reconciliation-based plans. The concept of transitional justice is multifaceted and flexible, and each of the mechanisms of transitional justice must be designed and implemented in a way befitting the social context of the Syrian nation. The grounds for the implementation of transitional justice have been provided by the General Assembly with the establishment of the fact-finding commission of the Syrian Arab Republic.

The judicial mechanisms of transitional justice should not be subjected to a prescriptive period in the case of the Syrian crisis, a challenge that can be addressed through exercising the jurisdiction of the ICC and the formation of hybrid courts as the courts of the third instance. If the country was a signatory to the statute of the ICC, the Court could directly hear the cases of these countries, otherwise, the Security Council can refer these cases to the ICC.

Non-judicial mechanisms, such as the fact-finding commission, can prevent the escalation of the crisis in Syria by organized troubleshooting. This research could pave the way for institutional reform to guarantee the rule of law and to avoid the recurrence of similar abuses in the future. The victims should be primarily compensated for the people to trust the newly-formed government after which, it would then be the time to deal with human rights violations during the previous regime by forming another fact-finding commission, and rather than focusing on the material dimension of compensating the victims, psychological goals and using past experiences should be considered to prevent recurrence of similar catastrophes in the future.

Surveys have revealed that many Syrians are calling for institutional reforms and the removal from power of those who have abused their authority in government institutions. The most typical way to confront abuses by government officials is to reform formal institutions, which can be done by reviewing the records of individuals who have acted for government officials. As such, transitional justice should not be considered as a “short-term” resolution, as fair and constructive transitional justice is not possible if it is to be exercised only in the short run. The authors of this

research argue that a fair and constructive implementation of transitional justice will require two to five years of continuous efforts. Therefore, although the pressure of public opinion should be met with high regards in the implementation of transitional justice, it must not lead to the hasty implementation of the aforesaid procedure, thus leading to unfavorable results. However, that Syria must quickly come up with the right mechanism to implement the procedure of transitional justice. Undoubtedly, there will be many challenges up ahead that can be anticipated by carefully reviewing similar processes in other countries. The first and most important step towards success is to ensure the broad support of the people and to fathom the process of transitional justice from the onset, as it is the Syrians who are the final judges of this process and its achievements.

REFERENCES

- Adibi Sedeh, Mehdi, "Sociology of War and Military Forces", Tehran, Samat Publications, 2002.
- Esmaeil Nasab, Hossein, Different Strategies Governing the Realization of the Transitional Justice Process, International Studies, Summer 2017, No. 53
- Zakerian, Mehdi, Bagheri Hamed, Yousef; The Concept of Transitional Justice in the International Human Rights System with Emphasis on the Case of Egypt, Quarterly Journal of International Studies, Twelfth Year, No. 2, 2015.
- Sobhani, Mahin, Efficient and Legitimate Mechanisms of Transitional Justice, Journal of Criminal Law, Year 8, Issue 1, 2017.
- Spanta, Rangin Dadfar., difficult years: a selection of articles, by Manijeh Bakhtari, Parnian Publications 2009.
- Sarmad, Mohammad Hossein et al., "Transitional Justice Educational Manual: Civil Society and Human Rights Network", 2011.
- Qureshi, Najmuddin, Kadkhodai, Abbas Ali, Babaei, Mojtaba, Sohanian, Fatemeh, An Introduction to the Concept of Transitional Justice in the Field of International Law and the Role of Human and Moral Dignity in Its Development, Journal of Ethical Research, Eighth Year, No. 4, 1397.
- Yazdian Jafari, Jafar, Dirbaz, Marzieh, Transitional Justice: Methods of Dealing with International Crimes in Transitional Societies, Journal of Criminal Law and Criminology Studies, Volume 48, Number 2, 2016
- Al-Momani, H. & Rennick, S.A. (2011). EU's peace building efforts in the Middle East: political and cultural dilemmas. DJUCO - Working Papers No. 2.
- Aukerman Human Rights Center and International Human Rights Law Clinic, University of California, Berkeley, and the Centre for Human Rights University of Sarajevo, *op.cit*, pp. 150-51.
- Damaska, "What Is the Point of International Criminal Justice?", *op.cit*, p. 334
- Dawlaty & NPWJ (2013). Transitional justice in Syria. Dawlaty and No Peace Without Justice.

- Eramo, G. (2012). Yemen: transitional justice is needed to build a democratic future. No Peace Without Justice. Retrieved September 4, 2013 from <http://www.npwj.org/node/4809>
- Even, Gareth, (2004). "when is it right to fight? Legality. Legitimacy and the use of Military Force, (London, lecture in the Oxford University), 10may 2004
- Fischer, M. (2011). Transitional justice and reconciliation: theory and practice. In Austin, B., Fischer, M. & Giessmann, H.J. (Eds.) *Advancing Conflict Transformation: The Berghof Handbook* (pp. 406-430). Opladen/Framington Hills: Barbara Budrich Publishers.
- Hayner P.B, 1994, "fifteen truth commission: 1974 to 1994, a comparative study", *Human right quarterly*, Vol.16, No.4, pages 597-655.
- Higonnet Ethel (2005), *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, Yale Law School, (2005:8)
- Jones, Annika, "Seeking International Criminal Justice in Syria" *INT'LL STUD.* 89, 2013, P.803
- Laurence J. Kirmayer, "*Cultural Variations in the Response to Psychiatric Disorders and Emotional Distress*", 29 Soc. Sci. MED. 327, 1989, In Fletcher, Weinstein, *op.cit*, p. 595
- Lindsey, Raub, "Positioning Hybrid Tribunals in International Criminal Justice" *N.Y.U. J. Int'l L & Pol*, 41, no.4(2009), P.1042
- Minow, Between Vengeance and Forgiveness, p. 26, In Daly, *op.cit*, p. 106 294 "The Promises of International Prosecution", *op.cit*, p. 1971.
- Minow, Between Vengeance and Forgiveness, p. 26, In Daly, *op.cit*, p. 106 294 "The Promises of International Prosecution", *op.cit*, p. 1971.
- Mobekk E, 2005, "transitional justice in post conflict societies-approaches to reconciliation", available from: www.bmlv.gn.pdf
- Mobekk, Eirin (2005), *Transitional Justice in Post-Conflict Societies- Approaches to Reconciliation*, http://www.bmlv.gv.at/pdf_pool/publikationen/10_wg12_psm_100.pdf
- Osiel, "*Ever Again: Legal Rememberance of Administrative Massacre*", *op.cit*, pp. 471-72
- Sandoval Villalba Clara (2011), *Transitional Justice: Key Concepts; Processes and Challenges*, content/uploads/2010/09/07_11.pdf
- Sluiter, Goran, "Obtaining Cooperation from Sudan- Where is the Law?" *Journal of International Criminal Justice* 6, no.5 (2008), PP. 871-884
- Sottas E, 2008, "Transitional justice and sanctions", *International review of the Red Cross*, Vol.90, No.870, page 370-398.
- Syria: Criminal Justice for Serious Crimes under International Law, Human Rights Watch, 2013, P.5