

Transitional Justice and Human rights



Didokht Sadeghi, International Relations
Lecturer at Azad University



Zahra Mirabian
Researcher in International Relations



Amin Habibi
MA in International Relations

Abstract

Daesh terrorist group was born in Syria and Iraq in 2013 as a new phenomenon in international system and introduced an intermediate concept, which stood somewhere between government and terrorist groups.

Systematic violation of human rights started in an explicit manner by this self-proclaimed government since its inception in Iraq and Syria. Now, after the collapse of this self-proclaimed government, the concept of transitional justice and such issues as compensating the damage done by Daesh and punishment of criminals have been raised by human rights communities.

This paper aims to answer this question: How can world countries prevent violation of human rights and guarantee enforcement of those rights with regard to the crime of genocide and other war crimes? The focus is also on this issue that enforcement of human rights in the field of justice depends on the behavior and performance of governments in the face of crimes committed by such groups as Daesh. It underlines that in order to see justice administered, countries must cooperate with the International Criminal Court. Materialization of the doctrine of transitional justice can be a good response to genocide and Daesh's crimes against people. In the meantime, the role of the International Criminal Court (ICC) as well as the regional and international actors in administering various aspects of the transitional justice doctrine has been discussed by the authors.

Definition of transitional justice and its relationship with human rights

Transitional Justice is the overall modern concept describing approaches through which societies may address massive human rights violations, mass atrocities, or other forms of severe trauma in order to restore peace and positive relations within the society. Transitional Justice is mostly applied at a point of political transition from authoritarian, dictatorial regimes to democracy or after war and civil conflict. Transitional Justice has become an almost standard approach of reconciliation and coping with the past, especially since the mid 1990ies. Until the 1980ies, only courts had been used to that end. Since the 1990ies, truth commissions were frequently established. Transitional Justice today covers not only the judiciary approach to cope with the past, but also society-wide discussions and deliberations.¹

In March 2010, the United Nations Secretary-General released his “Guidance Note on the United Nations Approach to Transitional Justice”. Its principle calls on the United Nations to “strive to ensure Transitional justice processes and mechanisms take account of the root Causes of conflict and repressive rule, and address violations of all rights, including economic, social and cultural rights.”²

The Office of the United Nations High Commissioner for Human Rights (OHCHR) has also recognized this need. In 2006, the United Nations High Commissioner for Human Rights, Louise Arbour, already made call in this sense. She considered that “transitional justice must have the ambition to assist the transformation of oppressed societies into free ones by addressing the injustices of the past through measures that will procure an equitable future. It must reach to—but also beyond—the crimes and abuses committed during the conflict that led to the transition, and it must address the human rights violations that predated the conflict and caused or contributed to it.”³

The United Nations has defined transitional justice as “the full range of Processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”

The United Nations Human Rights Council considers four concepts for the enforcement of transitional justice:

- (a) the State obligation to investigate and prosecute alleged perpetrators of gross violations of human rights and serious violations of international humanitarian law, including sexual violence, and to punish those found guilty;
- (b) The right to know the truth about past abuses and the fate of disappeared persons;
- (c) The right to reparations for victims of gross violations of human rights and serious violations of international humanitarian law;
- (d) The State obligation to prevent, through different measures, the reoccurrence of such atrocities in the future.⁴

Other mechanisms used by the Human Rights Council to fulfill its obligations with regard to transitional justice include:

Human right council has been established Different mechanisms or measures to fulfil these obligations:

- Truth-seeking mechanisms such as truth commissions;
- Judicial mechanisms (national, international or hybrid); reparations; and
- Institutional reform, including vetting.

(Available from <http://www.ohchr.org/EN/Issues/RuleOfLaw/Pages/TransitionalJustice.aspx>)

Transitional justice is built on the assumption that social, economic and Political changes are possible when significant negotiations of power are taking place in a State.

Nevertheless, transitional justice emerged to deal only with a limited dimension of those changes: the legacy of large-scale atrocities and preventing their reoccurrence. While human rights law has strongly influenced transitional justice, the latter has focused on violations of civil and political rights. Transitional justice has, therefore, evolved in relative isolation from important developments in economic, social and cultural rights.⁵

The role played by law in the enforcement of transitional justice and its relationship with human rights are also very important.

Transitional justice consists of both judicial and non-judicial mechanisms, including prosecution initiatives, reparations, truth-seeking, institutional reform, and a combination thereof). Whatever combination is chosen must be in conformity with international legal standards and obligations.⁶

Main actors in transitional justice mechanisms

A) International actors

International actors must be divided into two groups: international courts and the United Nations Security Council.

B) National actors

When the process of transition to democracy takes place in a post-conflict society without intervention of foreign forces, it is national actors that play an important role in the enforcement of transitional justice and realization of mechanisms used for its enforcement.

C) Nongovernmental organizations and transitional justice

A) International actors⁷

The United Nations has adopted a number of resolutions on the rule of law, transitional justice in conflicts, conflicts in societies, supporting the rule of law and promoting human rights.⁸

- S/2004/616 - The rule of law and transitional justice in conflict and post-conflict societies

- S/2006/980 - Uniting our strengths: Enhancing United Nations support for the rule of law
- A/RES/60/147 - GA Resolution
- E/CN.4/2004/88 – Promotion and Protection of Human Rights: Impunity
- E/CN.4/2005/102/Add.1 - Promotion and Protection of Human Rights: Impunity
- E/CN.4/2006/91 – Promotion and Protection of Human Rights: Study on the right to the truth
- A/HRC/12/18 - Analytical study on human rights and transitional justice(Available from <http://www.ohchr.org/Documents/Publications/HR-PUB-13-05.pdf>)

In addition to the aforesaid resolutions, the United Nations has taken further steps with regard to transitional justice and the issue of Daesh.

On 21 SEPTEMBER 2017 Security Council asked the Secretary-General to establish an independent investigative team to support domestic efforts to hold Islamic State in Iraq and the Levant (ISIL/Da'esh) accountable for its actions in Iraq but not Syria.

By the terms of resolution 2379 (2017), adopted unanimously, the team should collect, preserve, and store evidence of acts that may amount to war crimes, crimes against humanity and genocide committed by the terrorist group in Iraq. The Council asked the Secretary-General to establish the team, to be headed by a Special Adviser, and to submit terms of reference acceptable to the Government of Iraq.⁹

The United Nations experts, highlighted several times Da'esh's horrific treatment of women and children, noting how they were executed in public, abducted, enslaved, raped and sold like livestock, as well as exploited as suicide bombers. The United States' representative on 21 September 2017 also addressed the treatment of women by Da'esh. She spoke of conversations she had had with Yazidi women who had been the victims of atrocities, noting how their stories would now be heard and perpetrators could be brought to face justice.¹⁰

In 2015, the United Nations released a report showing that ISIS committed widespread abuses, war crimes, and crimes against humanity in Iraq and called on the U.N. Security Council to take action. The report specifically highlighted the horrible abuses the Yazidi religious minority population suffered, naming it genocide.¹¹

2. Role of the ICC as a means to enforcement of transitional justice

The rise of Islamic State (IS) has fundamentally altered the conception of terrorism, a development which international criminal law is arguably unprepared for. Given the scale and gravity of the group's crimes, questions abound as to how those responsible will be held accountable. In the absence of significant domestic prosecutions and short of the establishment of a dedicated accountability mechanism, the International Criminal Court (ICC) stands as the forum of last

resort in which IS members could stand trial.¹²

The rise of Islamic State (IS) represents an unprecedented challenge to international criminal law. Unlike non-State actors carrying out serious but relatively contained periodic attacks, IS has succeeded in capturing and holding State-run territory using sustained and extreme violence. The group's stated aim of establishing a caliphate in western Iraq, eastern Syria and Libya is a cause to which thousands of foreign fighters have flocked.

Additionally, IS has advocated for the commission of attacks worldwide—with insurgent groups and individuals carrying out terrorist acts in the name of IS in Europe, South East Asia, Africa and North America. The scale and gravity of IS's crimes have been deemed a threat to international peace and security by the UN Security Council (UNSC), raising the legitimate expectation of a legal response. Nationally, while some IS members have been tried in domestic courts, prosecution invariably involves breaches of domestic anti-terror statutes which do not cover crimes committed in IS held territory.¹³

Though the UNSC has the power to establish an ad hoc tribunal that could adjudicate these crimes, as it did in the situations of Rwanda and the former Yugoslavia, the likelihood of that happening in the context of IS appears limited. Under these circumstances, it remains to be seen whether the International Criminal Court (ICC or Court)—set up to end impunity for the perpetrators of the most serious crimes of concern to the international community—should play a role.¹⁴

The ICC operates on the basis of complementarity, with the primary responsibility for exercising criminal jurisdiction over those responsible for international crimes resting on States Parties. The ICC will only step in where there are no national proceedings occurring in States with jurisdiction, or where such States are unable or unwilling genuinely to investigate or prosecute.¹⁵

The main point is that perhaps terrorism has not been defined as a form of war crime in international law yet and this issue may hamper the ICC's effort to see into these crimes. However, when it comes to Daesh, as admitted by all international institutions, this group has committed such war crimes as genocide and crimes against humanity in Iraq and Syria.

the ICC cannot deal with all of the world's ills and, indeed, is specifically designed to be complementary to national jurisdictions, the threat posed by IS and clear lack of serious judicial reckoning for its crimes inexorably leads to the conclusion that the ICC should pursue all possible avenues to ensure justice is done.¹⁶

National actors

Role of countries in enforcement of transitional justice

It is in this stage that the role played by the international community and neighboring countries of Daesh in the realization of transitional justice becomes clear.

Human rights crimes, crimes against humanity, and systematic violation of human rights by Daesh are no secret to anyone. This issue has also kicked off efforts aimed at investigating crimes committed by Daesh terrorists. The main problem

and reality, however, is the absence of a political will among countries to punish this group and enforce transitional justice in the case of Daesh's crimes. Transitional justice is built on the assumption that social, economic and political changes are possible when significant negotiations of power are taking place in a State.

Therefore, countries play an important role in enforcing transitional justice with regard to Daesh. In view of the mechanisms that the UN Human Rights Council has devised for enforcement of transitional justice, including establishment of fact-finding committees, referring this issue to local or international courts by these countries can play an important role in the enforcement of transitional justice. Prosecuting war criminals is the minimal requirement that countries must meet in order to pave the way for enforcement of human rights. On the other hand, applying double standards by countries to enforcement of human rights will damage realization of transitional justice (in both judicial and non-judicial forms). According to available evidence, some governments have been either directly or indirectly involved in helping "Daesh leaders," who were mostly responsible for the crime of genocide and other war crimes in Iraq and Syria, to escape punishment. Following the defeat of Daesh, many reports about organized escape of "Daesh leaders" appeared in media, which challenged the human rights stances of those governments, which had in any form helped transfer of these war criminals to other places and supported them.

The BBC news network released an in-depth report in November 2017 about how the leaders of Daesh escaped with support of the US-led coalition. The report, which was actually a case study, proved lack of the necessary political will on the part of governments to investigate war crimes by the terrorist groups and administer transitional justice.

Organized escape of Daesh forces and support of some governments

In late September 2017, the BBC revealed the details of a secret deal, which allowed hundreds of Daesh terrorists and their families to escape Syrian city of Raqqa under the eyes of the US-led coalition, British forces and the Syrian Democratic Forces (SDF). According to the BBC report, in addition to ordinary members of Daesh and their families, leaders of the terrorist group were also among those who left the Syrian city and crossed the Syrian border into Turkey with US-led coalition being fully aware of this.

Based on the BBC report, the deal allowed hundreds of Daesh terrorists to escape the city. At that time, neither the United States, nor Britain, nor the SDF were willing to admit to their part in that deal. Isn't the secret deal of Raqqa, which allowed Daesh terrorists to cross the crisis-ridden country's borders into other regions, a blatant violation of international law and disregard for the concept of transitional justice and principles that require prosecution of war criminals?¹⁷

B) Nongovernmental organizations and transitional justice

There are some nongovernmental institutions at international level, including the International Center for Transitional Justice, which help harmonize local

needs with global knowledge. These local and international institutions can play an important role in promoting human rights and encouraging use of transitional justice mechanisms and also to raise awareness about the fact that these mechanisms are necessary to the establishment of international peace and stability.

Since forming fact-finding committees is a preliminary step toward enforcement of transitional justice, every fact-finding committee would need humanitarian and human rights nongovernmental organizations in order to complete its investigations.

Despite their current popularity, truth commissions are best understood as one of many complementary strategies for addressing legacies of abuse and violence.

Every truth commission is different and all have reflected, to one degree or another, their national context.

There is no “science” of truth commissions, and indeed there should not be. National actors-victim associations, democratic leaders, NGOs, individual victims, religious institutions, and a host of others-should debate and ultimately decide whether to create a truth commission and, if they choose to do so, what it should look like.¹⁸

The NGOs also show potential autonomy. Motivated to join the process for their belief in the TJ norms and the opportunities they get from their participation, they are nevertheless local context-bound agents that partly contribute to the dysfunctions, or pathologies, of the TJ institution. It is largely because of the role of the NGOs as agents, which requires them to work within the parameter of justice--what justice means and how it is achieved.¹⁹

Conclusion

As announced by the UN Human Rights Council, attention to the concept of transitional justice and undertaking structural reforms are necessary:

“Institutional reform is one of the most under researched and unexplored areas of transitional justice despite being necessary to achieve lasting change after conflict or repression. While institutional reform has largely focused on legislative reform, security sector reform and vetting and undergoing transition the go further and deal with the root causes of conflict and economic, social and cultural rights”²⁰

In addition to the impact of transitional justice on promoting social and cultural rights, it is noteworthy that in a world where human rights ideals were defined following World War II to prevent these crimes, genocide and crimes against humanity must not be allowed to go unpunished and their perpetrators must not be able to escape justice anywhere in the world.

Enforcement of transitional justice will be possible when international and regional cooperation is in line with demand of the nation in any given country where this justice is to be enforced. However, giving refuge to human rights violators such as the leaders of Daesh, offering them overt and covert support, and reluctance of some regional and transregional governments to cooperate with fact-

finding committees have depicted a bleak future outlook for the administration of transitional justice.

To administer transitional justice in a society, which is going through transition from a human rights violating regime to a democratic society based on human rights, the following prerequisites must be met first:

1. Providing social and cultural grounds for administration of justice;
2. Launching fact-finding missions and documentation of committed crimes as well as their perpetrators and victims; and

Existence of a political will among governments to administer this form of justice.

At the present time, there are good social and cultural grounds for administration of transitional justice in the post-Daesh era. On the other hand, fact finding and documentation will be carried out by the United Nations and its fact-finding missions. In the meantime, nongovernmental organizations, which demand administration of transitional justice, can be of great help in this regard.²¹

Administration of transitional justice, however, will take place when, first of all, there is a political will to do this, so that, international institutions and the United Nations could join hands with governments and put perpetrators of international and human rights crimes to trial in the post-Daesh era.

In fact, the most important factor in this regard is political determination of governments for investigating the issue of genocide and other war crimes. Unfortunately, the present conditions regarding this issue have largely dashed any hopes about the ability of governments to administer transitional justice

1.(Available from http://www.claiminghumanrights.org/transitional_justice.html)

2.(Available from <http://www.ohchr.org/Documents/Publications/HR-PUB-13-05.pdf>)

3.(Available from <http://www.ohchr.org/Documents/Publications/HR-PUB-13-05.>)

4.(Available from <http://www.securitycouncilreport.org/un-documents/terrorism/>)

5.(Available from <http://www.ohchr.org/Documents/Publications/HR-PUB-13-05.pdf>)

6.(Available from https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf)

7. Mahdi Zakerian. transitional justice and international security. Page 77

8. In this paper, international actors include the International Criminal Court and the United Nations Security Council

9.(Available from <https://www.un.org/press/en/2017/sc12998.doc.htm>)

10.(Available from <https://www.un.org/press/en/2017/sc12998.doc.htm>)

11.(Available from <https://www.humanrightsfirst.org/blog/iraq-finally-holds-isis-responsible-crimes-against-humanity>)

12.(Available from <http://natoassociation.ca/why-the-icc-cannot-prosecute-isis/>)

13.(Available from "War Against Terrorism" (2002) 78 International Affairs Prosecuting Crimes of International Concern: Islamic State at the ICC?. Author: C6man Kenny available from file:///C:/Users/60/Downloads/vandermerwe_transformative_2012.pdf)

14.(Available from Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome)

15.(Available from <http://www.ohchr.org/EN/Issues/RuleOfLaw/Pages/TransitionalJustice.aspx>)

16.(Available from Prosecuting Crimes of International Concern: Islamic State at the ICC? Author: C6man Kenny)

17.(Available from http://www.bbc.co.uk/news/resources/ids-sh/raqqas_dirty_secret)

18.(Available from <https://www.ictj.org/sites/default/files/ICTJ-Global-TRC-Guidelines-2004-English.pdf>)

19.(Available from <https://scholarspace.manoa.hawaii.edu/handle/10125/101683>)

20.(Available from <http://www.ohchr.org/EN/Issues/RuleOfLaw/Pages/TransitionalJustice.aspx>)

21. (<https://www.ictj.org/sites/default/files/ICTJ-Global-TRC-Guidelines-2004-English.pdf>).