

RESPONSES TO GRAVE VIOLATION OF HUMAN RIGHTS

Mostly, the systematic & serious violations were/are committed by State officials as an instrument of achieving some policy, e.g., crushing opposition & sustaining their power, maintaining territorial integrity & the like. The serious & systematic violations in Chile during the Pinochet regime, Uganda during the Id Amin regime, South Africa during the Apartheid regime, in Ethiopia during the Dergue regime were all committed as part of State policy to achieve some result.

Section One: National responses - Transitional Justice

It is an accepted principle that violations of rights shall first be addressed at national level. This holds true even in case of systematic & gross violations. Thus, the perpetrators of such violations/crimes shall be brought to justice at national level. The international system of addressing such violations becomes relevant if the domestic system is unable /unwilling to provide remedies.

The term transitional justice has two meanings. In one sense, it means justice at the time of transition. It may also be

understood as justice in transition itself, i.e., referring to the idea that our conception of justice is not static but dynamic. We use the first meaning for the purpose of this teaching material. We use the term transitional justice broadly to signify the mechanisms by which societies in transition deal with past violations. It thus represents the various modalities of addressing past violations.

Transitional justice has to address the needs of societies in transition. Societies in transition may have variety of needs/concerns related to past violations. The three main needs that arise in societies in transition are the following:

1. The need for justice. Victims of violations or their relatives and the society at large need to see the perpetrators of the violations are brought to justice. It is thus necessary that transitional justice should provide a mechanism by which this need may be satisfied. One of the questions in this respect is: What does justice mean?

It is generally suggested that justice shall be rendered in order for a society to break with the past & move forward.

2. The need to know the truth. The society in general, and victims or relatives in particular, wants to know who among its members did participate in the violations. As the past violations were committed systematically & grossly, the society, even victims/relatives, may not know all that happened & all the perpetrators & the degree of their participation. Above all society needs to know why the violations happened. Thus, the need to know *who did what & why* is one of the basic issues that may arise at the time of transition. It is claimed that knowing the truth about the past is crucial to build a viable, rights-respecting & democratic society as well as to ensure that violations wouldn't happen again. Some commentators, however, argue that knowing the truth about is not desirable as it may lead to further suspicion & animosity between those that claim to be victims & their relatives on the one hand and alleged perpetrators, who are usually former officials, & their relatives (& even supporters) on the other hand, and

thereby motivating revenge & leading to further conflict. They thus suggest it is better to forget the past & move forward. Others criticize this by arguing society cannot move forward without knowing the past. Some rather propose 'you shall never forget but forgive'.

3. The need for conciliation. Society may also need to create conciliation among its members.

Thus, the main needs of societies in transition regarding past violations are the need for justice, the need to know the truth, & the need for conciliation. However, we have to make two remarks here. First, these needs are not exclusive of each other. In other words, they may overlap. Secondly, these needs are not exhaustive, i.e., there may be other needs for example, the need for compensation. These other needs may, however, be subsumed under any of the above main needs. For example, the need of victims/relatives for compensation may be considered as the need for justice. To conclude, societies should have a mechanism of addressing these different needs.

The modalities of transitional Justice

There are, however, certain modalities of transitional justice that are well known &

well utilized by different socialites. Three of them are worth discussing because of their usual application.

1. **Prosecution.** This is one of the modalities of transitional justice often employed by societies to address past violations. This process involves the apprehension, investigation & prosecution of alleged perpetrators, and imposition of penalty if found guilty. Thus, it involves the apprehension of perpetrators, the gathering of evidence, and the filing of criminal charges, judicial hearing and decision according to the law. The main concern here is to maintain the rule of law, which is considered as the cornerstone of democracy.
2. **Truth & reconciliation.** This modality is the mechanism by which a society may identify truth about the past & create conciliation among its members. For this purpose, societies may establish truth commissions or truth and reconciliation commissions. The main priority of this modality is to reveal truths about the past, create conciliation, and achieve a successful transition.

However, there are variations among these commission on their mandate & emphasis. Usually, the commission/authorized organ seeks & documents the truth about the past by this procedure. Members of the society are encouraged to come forward and speak their stories. Thus, both victims/relatives & perpetrators give their statements and such other information relating to the past.

3. **Amnesty.** The third modality of transitional justice is amnesty. The term amnesty refers to an official act, usually through law, prospectively barring prosecutions of a class of persons for a particular set of actions or events. Amnesty is often contrasted with pardons, which usually refer to the exemption of criminals from serving all or part of their sentences but do not expunge the conviction. It is stated that amnesties shield from prosecution and are not pardons. However, it is commented that 'these distinctions are inexact; pardons, like amnesties, can be used to foreclose prosecutions, and amnesties

sometimes cover persons serving prison terms’.

However, these modalities are neither exhaustive nor exclusive to each other.

Section Two: International Responses

The international response is premised on the conviction that such violations constitutes crimes against the whole nations/international community, and results from the inadequacy/ non-existence of national responses. Thus, certain crimes do constitute international crimes for which the perpetrators are held individually responsible. The criminal responsibility of individuals under international law contributes to fight impunity, however, limited it is. The underlying idea is that the perpetrators of such crime shall not go free. The mechanism by which international law ensures that has taken different forms. These include: (1) the recognition & application of the principle of universal jurisdiction, (2) prosecution and trial by *ad hoc* international tribunal, and (3) prosecution & trial by a permanent international tribunal called the International Criminal Court.

- (1) Application of the principle of Universal Jurisdiction.

The principle of universal jurisdiction is classically defined as ‘a legal principle allowing or requiring a State to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim’. This principle is said to derogate from the ordinary rules of criminal jurisdiction requiring a territorial or personal link with the crime, the perpetrator or the victim. The rationale behind it is broader: ‘it is based on the notion that certain crimes are so harmful to international interests that states are entitled-and even obliged to bring proceedings against the perpetrator, regardless of the crime and the nationality of the perpetrator or the victim’. Universal jurisdiction allows for the trial of international crimes committed by anybody, anywhere in the world. There are offences recognized by international law as punishable by any country. Traditionally, piracy on the high seas is regarded as one of the first international crimes, grounded on the violation of international customary law.

After the Second World War, the London Agreement of 8 August 1945 establishing the International Military Tribunal at Nuremberg set out international crimes issuing from both treaty law & customary

law (crimes against peace, war crimes & crimes against humanity). Later treaties & international conventions specified various forms of prohibited behaviour recognized as international crimes. Principle 2 of the Princeton Principles on Universal Jurisdiction reads: (1) for purpose of these principles, serious crimes under international law include (i) piracy, (ii) slavery, (iii) war crimes, (iv), crimes against peace, (v) crimes against humanity, (vi) genocide, and (vii) torture. Paragraph 2 provides the application of universal jurisdiction the crimes listed in paragraph 1 is without prejudice to the application of universal jurisdiction to other crimes under international law.

The derogation from the ordinary rules of criminal jurisdiction is traditionally justified by two main ideas. First, some crimes are so grave that they harm the entire international community. Secondly, no safe havens must be available for those who committed them.

(2) Prosecution and trial by *Ad hoc* tribunal

Another mechanism by which the international community has been responding to gross violations is through prosecution of perpetrators before an

international tribunal. Until recently, international prosecution has primarily been conducted before ad hoc tribunal. These tribunals have specific/limited jurisdiction over crimes listed under the instrument creating the tribunal. The first among these tribunals is the International Military Tribunal at Nuremberg established by the London Agreement of August 1945. The London Agreement has defined the jurisdiction of the tribunal. Many Nazi officials were prosecuted before this tribunal. Other ad hoc tribunal includes the International Criminal Tribunal for the former Yugoslavia & for Rwanda (ICTY & ICTR respectively). These tribunals are established pursuant to the Decision of the UN Security Council. The Statutes establishing these tribunals set out the crimes that fall within the jurisdiction of each tribunal. These are ad hoc tribunals established to address certain crimes committed in certain geographic location or during specific period. However, we can understand that this is employed as a means of ending impunity.

(3) The procedure under the ICC

One of the most significant developments made in the direction of dealing with grave violations & fighting impunity is the

establishment of the International Criminal Court. It is established pursuant to the Rome Statute of the International Criminal Court, which was adopted at a diplomatic conference in Rome, on 17 July 1998. The Statute entered in to force on 1 July 2002 and the Court is now fully functional at its seat in The Hague. Governments, legal experts and civil society all hailed the treaty as the most significant development in international law since the adoption of the United Nations Charter.

The Rome Statute provides for the creation of a permanent international criminal court to prosecute people accused of genocide, crimes against humanity and war crimes. The Court will be of particular importance because:

- It will serve as a permanent deterrent to people considering these crimes. In most cases in the last fifty years international mechanisms to prosecute people accused of these crimes have only been set up after the crimes have occurred;
- It will have a much wider jurisdiction than existing ad hoc tribunals. For example, the work of the International Criminal Tribunals for the former Yugoslavia and

Rwanda have been limited to crimes committed in a particular territory while crimes committed in other territories have not been addressed; and

- The Statute contains advanced provisions for the protection of victims from retraumatization as well as provision that the Court may order a convicted person to provide reparation, in the form of compensation, restitution, rehabilitation, satisfaction, guarantees of non-repetition, and any other type of reparation the Court deems appropriate.

As specified under Article 5 of the Rome Statute, the Court has jurisdiction over the most serious crimes to the international community. These crimes are genocide, crimes against humanity, war crimes & war of aggression. However, the court functions as complementary organ. Thus, the Rome Statute embodies the principle of complementarity. The principle of complementarity can be defined as a functional principle aimed at granting jurisdiction to a subsidiary body when the main body fails to exercise its primary function. The principle of complementarity in international criminal law requires the

existence of both national and international criminal justice systems functioning in a subsidiary manner for curbing crimes of international law: when the former fails to do so, the latter intervenes and ensures that the perpetrators do not go unpunished.