



Transitional Justice: About & Main Challenges

An introductory guidebook

YIHR Croatia
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Disclaimer

This handbook is not devised as an all-encompassing, exhaustive overview of transitional justice, a literature review, or an academic paper discussing transitional justice and its implications. It is a handbook written with a purpose of increasing awareness of what transitional justice is, what are some of the key elements of transitional justice, as well as some of the principal challenges in ensuring that the mechanisms it prescribes have a positive effect on reconciliation, conflict-resolution and trust-building.

The handbook is primarily designed for use in countries and societies that have very limited experience of transitional justice, but are nevertheless in need of addressing systemic and mass human rights abuses against a particular group in the past.



A commemorative action by YIHR Croatia at a central square in Zagreb, June 2015

Youth Initiative for Human Rights Croatia – A Brief Description

Youth Initiative for Human Rights Croatia was founded in 2008 with a mission to prevent recurrence of wars of the 1990's in the region. YIHR has been leading the way in involving youth with dealing with the past, opening debates and demanding memorialization and commemoration for all civilian victims of wars, such as starting advocacy efforts to establish a museum dedicated to the memory of civilian victims of war in Petrinja but also through controversial street actions such as placing a commemorative plaque in Knin in 2010 with an inscribed citizen apology to the civilian victims of the Croatian military operation Storm. Since 2010, YIHR Croatia has been conducting non-formal investigations into war crime cases which due to political pressure were not being instigated and YIHR pressed charges which led to official investigations in several cases. Human rights monitoring and advocacy program is leading the widest monitoring program in the nation, covering over 500 measures in the fields of rights of national minorities, rights of LGBT people, transitional justice mechanisms, European Union's Charter on Fundamental Rights and Freedoms, combating racism, racial discrimination, xenophobia, anti-Semitism.

YIHR has organized youth exchanges between youth in the region, so far 15000 young people participated in exchanges aiming to foster reconciliation and broadening their horizons. In 2014, YIHR has facilitated a foundation of a cross-ideological network for young politicians, Political Youth Network, which serves as a platform for human rights policy development and regional advocacy for 24 young wings of political parties across 5 countries.

Transitional Justice Handbook

Despite the name implying that transitional justice is a set of laws, or legal mechanisms, it is important to note that its implications stretch beyond laws and legal means. In essence, transitional justice (hereafter TJ) is a set of mechanisms outlining some important processes for post-conflict, post-authoritarian and/or post-revolutionary countries in transition which experience the need for addressing gross human right violations and systematic injustices that have been committed in the past.

Transitional justice came to prominence in the late 1980s and early 1990s in response to often-violent political transitions in Eastern European countries and Latin America. Transitional justice, as a term is derived from the idea of justice in a transitional state/society. It is often associated with democratisation, building the rule of law and transition from 'authoritarian' regimes. Transitional justice is somewhat unique because it prescribes certain ideas, or measures that help post-conflict, post-authoritarian and/or post-revolutionary countries look back at the crimes committed, come to terms with them, and build a future based on the lessons from the past.

In that regard, TJ is an important part of the reconciliation process of countries and societies that are experiencing, or have experienced transitions during which certain ethnic, national, religious and/or political groups have witnessed systemic and widespread violations of their freedoms and rights. The main overall aim of TJ is to establish legal mechanisms for processing perpetrators and ensuring reparations to victims of abuses. Although different organisations have slightly different interpretations of what TJ consists of, they almost unanimously agree that transitional justice involves criminal prosecutions including judicial reform, various forms of reparations to victims of abuses, truth telling through truth commissions or other less formal models, and vetting to build assurances that these kinds of violations will not take place again. To this list, it is important to add the element of dealing with the past, as this has proven to be a key ingredient of TJ and reconciliation success over the years. Although TJ mechanisms encourage dealing with the past, they do not prescribe it. Nevertheless, success of TJ mechanisms contributing to conflict resolution and reconciliation, are usually reliant on the capacity of the society to deal with the past.

This report will deal with 3 topics. Firstly, it will elaborate on the different aspects of TJ with an aim of introducing them more thoroughly, secondly it will discuss some of the problematic assumptions of TJ and its drawbacks, and finally it will focus on examples of TJ from Croatia to give a brief overview of some of the more important processes, results and impact.

What is Transitional Justice?

As mentioned above, transitional justice consists of 4 main elements, which, in practice often work in unison and depend on one another. In other words, they do not follow one onto another but are temporally intertwined. Each of these will be explored in some detail below.

Criminal prosecution and judicial reform

A key component of addressing past violations is investigating crimes committed, identifying perpetrators and ensuring that legal mechanisms are in place to process the prosecutions as well as the processing of cases itself.

There are many formats of investigations of crimes, which usually begin with gathering evidence of mass and/or systemic human rights violations. Sometimes, evidence is already present, and it is a matter of obtaining it, processing it and investigating missing parts. For this reason, in many conflict zones around the world today, increased efforts are focused on systemic and usable documentation of abuses while the violence is still active, and well before transitional justice elements can begin to take shape.

ICTY, The Hague, The Netherlands



Investigations can involve forensic work of excavating remains and identifying bodies to prove these persons were killed and buried, while it can also involve investigating complex command responsibility processes to determine who made what decisions, and therefore who is to be held accountable for particular decisions and actions. Although the focus on trials and investigations is mostly on perpetrators, victim's testimonies are sometimes also an important part of the process. Given the sensitivity of many issues that the victims testify on, it is of utmost importance to ensure the protection of their identity, and they should not, almost under any circumstances come face to face with the perpetrators to ensure non-retribution.

In order to process the perpetrators, it is important to ensure that there are credible courts to hold national, international or hybrid (combination of international and international courts), which investigate allegations, gather evidence, and process cases. In some instances, some civil society organisations play an important role in gathering evidence. Trials need to meet standards prescribed by the International Covenant on Civil and Political Rights in order to ensure that they are fair, transparent, independent and conducted by qualified experts, who have not only an understanding of legal mechanisms, but also an in-depth knowledge of the history of the state/region, and the political, social and military details of the context. Consequently, local courts are usually found to be ill equipped to deal with the burden of huge amounts of evidence that needs to be processed, while national level courts are often found lacking in political impartiality with respect to the regime that has committed the crimes. Hybrid models, that involve national and international experts and courts are a good mechanism to ensure transparent and credible prosecutions, and can have a positive impact on reforming the rule of law in the country whose crimes/involvement is being investigated. Hybrid courts also usually have a greater degree of credibility, although in practice a certain degree of politicization of the process is rarely avoided.

Due to the high cost of prosecutions and political difficulties it could cause, usually not all perpetrators are processed. Nevertheless, the prosecutions and trials need to serve as a clear example that impunity is condemned, and that those responsible will be put into trial. Prosecutions and judicial reform are also important to ensure lawless revenge and retaliation is avoided in sensitive transitional contexts. It is of utmost importance to use the process of prosecutions to build up credibility of the legal mechanisms in the country, and make a break with the abusive past. As a consequence, transparent procedures and minimal political interference are key prerequisites for successful prosecutions and building a society based on respecting the rule of law.

Reparations

As a mechanism for helping victims overcome the traumas of the past, victims of systemic and gross human rights violations need to see reparations for the crimes committed against those groups or societies. The main aim of reparations is to ensure that victims of these abuses are able to find, at least some level of satisfaction by repairing material and moral consequences of past abuses and losses.

Prosecutions, themselves are very important in addressing the issues of reparations at one level, as they provide a sense of justice and help in building up the trust in national institutions towards groups and individuals that have been victims of abuses.

However, reparations are intended not only to build up trust, but also to ensure that the group or groups' dignity is restored, and are helped to become a part of society without discrimination on all levels. Consequently, when considering reparation mechanisms, it is hugely important not to re-victimise the victims. This would likely serve to create a sense of distance from the society to which they belong, and inhibit the process of ensuring they become active and accepted members of society.

Reparations can be roughly divided into two categories; one is financial reparation to groups or individuals, while the other is moral reparation. Financial reparation can come in form of restitutions, which includes return of property, repairing damage to the property to establish a situation before the abuses were committed. Another element of financial reparation is in form of compensation with cash, or social service provision enabling access (sometimes priority access) to education and healthcare. Particularly in terms of education, it is not uncommon that quotas are established for the members of the victim group through which they have priority access to educational institutions, material and other benefits. One of the key problems of financial reparations in some contexts has been the claim that they are used to buy victim silence, which in essence provides grounds for impunity and impedes the process of truth telling.

Moral reparations are composed of more symbolic measures such as declarations and apologies from state officials, and sometimes perpetrators, for the crimes committed. Commemoration of the victim's suffering through raising memorials, or holding annual commemorations is another important form of moral reparation. Moral reparation is a hugely important factor in restoring the dignity of the group, and needs to be addressed seriously in order to avoid a backlash and antagonism, particularly if there is a credible danger that the perpetrators, or the public by-and-large, would feel that it is prioritising the victims at some else's expense. In essence, moral reparation must not be perceived as special treatment, but reparation for the wrongs that have been committed on a grand and systemic scale in the past. Therefore, clear and unreserved political commitment is of essence in these situations.

Truth Commissions/Truth Telling

Truth commissions, and truth telling, are a hugely important aspect of transitional justice, which seeks to create conditions for the society, as a whole, including both perpetrators and victims to speak about and deal with the past. The overall aim of truth commissions is finding out the facts about the events, and creation of a single narrative about the past founded on truth-based evidence. This is a key step in the acceptance of facts at all levels of society.

While truth telling can be done through more informal mechanisms such as civil society projects, truth commission's main aim is truth telling through official bodies comprised of experts whose job is not only to facilitate truth telling, but also investigate and report on gross human rights abuses. The result of truth commissions is an official account comprised of testimonies by the victims and perpetrators, and is used in drawing a line under, and establishing facts about what has happened as well as making recommendations for political, economic and judicial reform with the purpose of preventing systemic and gross human rights abuses in the future.

Truth commissions differ to prosecutions in that they do not necessarily focus on specific crimes committed, but are more focused on discovering the types of abuses and the reasons for those abuses. Establishing facts, and acknowledging wrongdoings of the past are an integral part of truth commission work, and are in that sense very important in restoring victims' dignity as well as learning about how to respond to the concrete needs of victim groups. Although truth commissions usually have a fixed mandate, they are able to engage a wider number of perpetrators, suspect perpetrators and victims to put together a more complete overall story of abuses than would be possible as part of prosecutions. Findings of truth commissions can, of course also serve as a basis for criminal investigation of certain individuals.

Given that truth commissions are more inclusive in a sense of involving a greater number of people they are comparatively expensive. This is particularly challenging in post-conflict countries where wide-ranging reconstruction needs to be funded. In sensitive cases of political and social divisions truth commissions can contribute to a backlash from some groups, and can even result in violence. This can pose security risks to all involved, and a number of post-conflict, post-authoritarian and post-revolutionary countries have opted not to establish truth commissions, either because they could be destabilizing, but sometimes also due to lack of political, public or international pressure. Just as with prosecutions, work on sensitizing the public about the importance of dealing with the past is of huge importance in creating the groundwork for establishing truth commissions.

With respect to the purpose of truth commissions, the process of setting them up needs to be as inclusive as possible, involving ruling party(ies), opposition, civil society organisations

and, domestic and international experts. It is important to ensure that there is legal background to the establishment of these commissions as well as a clear mandate in order for them not to be disassembled when sensitive issues appear, and be able to have concrete objectives and outputs.

Even if the establishment of the truth commission is feasible and ensured, there are many issues that can create difficulties for its operation and fulfilling the objectives set out in the mandate. As mentioned earlier, political will and pressure may play an important part in how the truth commissions function. Although external pressure is not necessarily desirable, truth commissions should be credible attempts at finding out what has happened through engaging victims and perpetrators as well as implementing the recommendations that come out in the final report. At the inception, and for the duration of the truth commission mandate, it is important not to forget the main purpose of the commission, which is to find out the truth. Every truth commission has seen quite an intense dose of public expectation, and in some cases it is exactly due to the huge expectation of different sides to be 'declared victims', that some truth commissions have never taken place. They must not be devised as a 'winners' attempt to (re)create history and seek one-sided 'justice', but provide a comprehensive overview of the violations that have taken place.

Activists collecting signatures for the establishment of a regional truth commission (REKOM) in the states of former Yugoslavia, April 2011 (photo courtesy of Radio Free Europe / Radio Liberty, Author: Midhat Poturovic)



Vetting

Vetting is a process of ensuring that the employees in government institutions, agencies or other state bodies have passed checks that certify they are competent to do the job that they are in, or have been nominated to be assigned to. In terms of transitional justice, vetting is applied most commonly to security forces such as the police and the military, as well as the judiciary. The aim of vetting is to ensure that public service officials are not corrupt, abusive or incompetent for the job that they are assigned, and have not been directly implicated in gross and systemic human rights abuses. It is assumed that personnel that have adequate qualifications, are not abusive or corrupt are important in preventing the possibility of human rights abuses from recurring.

Vetting is designed to ensure that the public, and particularly the victims (re)gain trust in state institutions, because it aims at excluding those who were implicated in human rights abuses and those who hold views contrary to the laws and constitutional set-up of that state, or are involved in some kind of unlawful activities. Depending on cases, vetting can be conducted retrospectively to review whether a public service official is suitable to continue work in a certain position, or as a part of the employment process.

Compared to other elements of transitional justice, vetting is a relatively low-cost mechanism. Nevertheless, the political circumstances following revolutions, dictatorship or conflict, are rarely fully conducive of vetting because of political instability and resistance to reform by those in power. In practice, corruption, nepotism and weak, or incomplete legal and institutional frameworks are a strong deterrent in efforts to establish and implement vetting mechanisms.

If applied, because of the nature of vetting, and the fact that it has potential to hold futures of public service officials in its hands, it is a system that has great potential for manipulation. Not only can the employees be misleading in their statements and description of activities, but the officials carrying out evaluations as part of vetting need to be able to demonstrate the highest level of integrity.

TJ Drawbacks and Assumptions

One of the main drawbacks of TJ is the fact that it is implemented in societies that have most often been witness to recent revolutions, conflict or oppressive authoritarian rule. Although it is necessary to look at the past, deal with it, learn lessons from and construct a society that can move on with new values, it is also understandable that many parts of society may not wish to deal with it because of the pain it has caused them and the desire to move on. This is not exclusive to perpetrators or victims of gross and/or systemic human rights violations, but can also be applied to the wider society. Of course, in many instances there is greater desire from the victims to have their voices heard, while the perpetrators would be more inclined to forget about the past and not be faced with the prospect of punishment. It is important that all aspects of TJ are treated equally, and that along with prosecutions and judicial reform, there is a clear context of the importance of dealing with the past and ensuring that atrocities do not happen again.

Transitional justice prescribes very important elements that need to be addressed in transitional societies, and without which it will be more difficult for these societies to move forward, but it does not work on the 'softer' elements of helping the society to understand why these mechanisms are important. It is often this lack of understanding, and the resulting reluctance of societies (as a whole, or particular groups, perpetrators or victims) to open up some difficult issues from the past, that have been causing divisions in many transitional societies around the world. Therefore, a focus on criminal prosecutions, as a key element of TJ is insufficient. To achieve success, TJ needs to employ a more holistic approach, not only within the scope and range of mechanisms that are most often noted as a part of TJ (and elaborated in some detail above), but also ensure that the society, and particular groups, are not alienated or stigmatized as part of the process.

As much inclusion and understanding of the complexity of processes there needs to be from the society, it is important not to forget that no system functions in a political theory vacuum. Transitional justice is therefore not immune to political influence, as was outlined when describing the key elements of TJ above, and political manipulation is a particularly important element to consider in fragile societies that have seen dramatic changes. Although building up national ownership of the project of implementing transitional justice mechanisms is key, not only in ensuring that the mechanisms will be implemented, but that the public will be more involved, international assistance can be important in overseeing the process. TJ should not be used as justice dealing by the victors, but needs to be a process of establishing facts and dealing with the reality.

Truth commissions are good mechanisms for creating conditions for speaking the truth about the past from both the perpetrator and victim side. However, despite their importance for dealing with the past and relevance for drawing a comprehensive overview of what happened,

truth commissions, just like criminal prosecutions, can suffer from a lack of political legitimacy. Depending on the political situation, and whether there is a clear victor, they can be used to denigrate and delegitimise certain groups that are seen as perpetrators. Consequently there is greater potential for not portraying the full complexity of the crimes. Another significant problem that truth commissions have faced is with calls for 'truth for amnesty'. Perpetrators, and in some cases warlords, would come out and speak the truth, only if prior amnesty for crimes was granted to them. The fact that there are no instances where all the perpetrators can be tried in court is in itself understandable, although a serious drawback because it fails to award comprehensive justice. Moreover, questions always remain as to the standards by which some suspect perpetrators were chosen, while some were omitted. With the 'amnesty for truth' concept, the situation is even more controversial, because it enables impunity for perpetrators, while fighting against impunity is one of the central aspects of the appeal of transitional justice implementation.

As a set of mechanisms designed for post-conflict, post-authoritarian and post-revolutionary societies, it is a process that is unique to each context, and whose ultimate aim is to contribute to reconciliation, peacebuilding efforts and trust-building. Some of the more important conditions for TJ to achieve fulfill its role in that regard is a depoliticised process, and national ownership and implementation of all its applicable elements in tandem with other important transitional processes. Otherwise, due to its nature of opening up some difficult issues from the past, or ignoring some others, it may serve to stir up more violence, exclusion and human rights abuses.

Some of the critique described above is in no way intended to undermine the importance of transitional justice mechanisms. It is nevertheless important to shed at least some light on some of the drawbacks and problematic assumptions surrounding transitional justice theory and practice. Transitional justice prescribes a very important set of tools, which are very useful for dealing with past, and gross and systemic human rights abuses. Nevertheless, it does not function in a vacuum, and is very much shaped by the political climate and public perception. In that regard, TJ needs to be combined with other mechanisms such as DDR (disarmament, demobilization and reintegration) of combatants, freeing media from state control, education on citizenship and inclusion topics, and creating an enabling environment for civil society development.

Transitional Justice in Croatia

Since the end of the war in Croatia in 1995, the state, sometimes under a certain degree of international pressure, began adopting and implementing some aspects of transitional justice to deal with war crimes committed in Croatia and by Croatian armed forces. In fact, the ICTY (International Criminal Tribunal for Former Yugoslavia) was established already in 1993 by a UN Security Council Resolution, and was designed to cover not only the war in Croatia but also Bosnia and Herzegovina, while later with new conflicts appearing, it has come to cover the conflict in Kosovo and the Former Yugoslav Republic of Macedonia.

The main focus of efforts in Croatia was on investigating and prosecuting war crimes of individual perpetrators. Although most of the work of bringing up charges and holding trials was initially done by the ICTY, progressively, some smaller, simpler and less controversial cases were handled by Croatian legal authorities. High profile cases, such as for General Ante Gotovina, who was charged with crimes against humanity following activity after the 'Operation Storm', which liberated a significant proportion of Croatian territory in August 1995, were still processed by the ICTY. After the initial guilty verdict, an appeal was launched and Gotovina was freed in late 2012 much to the joy of a significant proportion of the Croatian public. Many war veterans gathered from around the country to greet him upon his arrival to Zagreb. Questions remain over the role of politics in reversing the initial verdict.

As of the end of 2013, according to the figures from the State Attorney's Office of Croatia (Državno odvjetništvo Republike Hrvatske – DORH) it processed or was processing 490 cases, of which 80% were committed by members of the Yugoslav National Army (Jugoslavenska narodna armija – JNA) or by members of the SAO Krajina (Serbian Autonomous Oblast). Investigations were instigated for 3699 persons, out of which, according to DORH 1978 were charged, 608, sentenced and 757 freed. There are no reliable numbers on how many of the persons were Croatian, and how many were Serbs, or Croatian-Serbs. Overall, nearly 80% of cases have been closed, but there is a feeling from some commentators that the focus was on closing cases, rather than actually finding out the real details of war crimes.

Since early 2000's, Croatia has made strong efforts in ensuring returns of Serbs that have escaped in 1995 as a part of two operations to free occupied territories of Croatia. Reconstruction and return of houses was ensured, although in some cases ownership was difficult to prove and legal proceeding sometimes took a number of years to complete. Despite the efforts, out of an estimated 370,000 Serbs that fled Croatia, approximately 130,000 returned according to the official figures compiled by the Croatian Government. The Constitutional Law on the Rights of Minorities makes provisions for respect for a wide range of minority rights, while quotas prescribing proportional employment of minorities in state bodies also exist. In practice, these quotas are not yet met, although efforts are being made to

ensure them, and significant funds are allocated annually to address issues of rights, and to a lesser degree (re)integration of the Serb national minority.

Although there is a regional initiative to start a truth commission (RECOM – Regional Commission for Establishing Facts about War Crimes in Former Yugoslavia), it has not been met with a great deal of political enthusiasm across all the countries in the region. Campaigns to collect signatures for the establishment of REKOM took place several years ago, but despite their successes, the overwhelming feeling is that the majority of the public is against this idea. This has not helped in drawing the line under the events of the 1990s, and has in-fact spurred on nationalist sentiment across the region. Given that Yugoslavia broke up into several states over the last 25 years, it is perhaps unsurprising that little political will has been shown to address issues that are popularly seen as belonging to a different country and a different era. Much of the impetus on moving the case of REKOM forward lies on the European Union, and given that all former Yugoslav countries are prospective members, it is to be seen whether REKOM, or another format of truth commission will come into life.

Transitional justice elements in Croatia were applied selectively, while vetting was not implemented at all. Given that the Croatian context was specific in terms of the breaking up of Yugoslavia, it is clear that dealing with some past issues could have been seen as problematic due to competing claims and accusations of different sides, and the potential violent outbursts that could escalate as a consequence. Overall, the Croatian experience of transitional justice has had some notable positive experiences, despite a lack of a truth commission and continuing concerns about the level of integration of Serbs in the society. More work needs to be done in sensitizing the public and implementing laws concerned with rights for Serb, and other national minorities.

A gathering in support of war crime indictee Branimir Glavaš, Osijek, Croatia, February 2015 (photo courtesy of MaxPortal.hr)



Youth Initiative for Human Rights - Croatia

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