Memory & Knowledge for Studies



Concept Paper on Combatting Impunity

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Impunity
Introduction



Social peace of any society is based on the security and safety of its members and institutions, which means protection from any infringement on their safety or rights by others. This protection is achieved through the law by means of deterrence, represented in the arrangement of appropriate penalties for all acts that violate the safety and rights of others. The success of this legal deterrent in achieving its objectives prevents individuals or institutions from resorting to any other means to protect their safety or rights, including violence, and thus it is one of the main components of the state's unilateralism using violence within the borders of the territory covered by its sovereignty. Since this unilateral use of violence is by definition one of the foundations upon which the modern state is based, the legal deterrent remains a main pillar for the establishment and survival of this state, and any major defect in it represents an imminent danger to it.

Impunity, in its simplest definition, is simply that the legal deterrent fails to materialize on the ground. The legal text on paper is just a promise, that if an action takes place, the perpetrator must be held accountable and punished in the manner specified by the legal text. On the ground, the text comes alive by applying it. If the legal text is not implemented, it would not be worth the ink in which it was written. It should be made clear here to emphasize that, contrary to what the phrase "impunity" implies, that it relates to a perpetrator who manages to evade the law's pursuit for punishment, the concept that concerns us here is related to the failure of the executive mechanism of the law. The success of the perpetrator of a crime in escaping the law or circumventing its implementation procedures, which is possible, does not threaten the legal deterrent, but rather represents the exception that confirms the rule. However, the failure of the executive and judicial system to hold accountable and punish the perpetrators of crimes without the need for them to flee or deceive, is what constitutes a defect that threatens the legal deterrent in principle. In other words, legal deterrence is achieved by the availability of community members' confidence in the system based on its implementation, specifically the principle that the perpetrators should not escape accountability and punishment, and this trust is not shaken by sporadic transient cases, but it collapses completely when the failure of this system is frequent, systematic, and has clear and predictable patterns.

Thus, this paper addresses impunity as a phenomenon and not as isolated and scattered cases, and seeks to understand the factors that lead to the spread of impunity in a society, and to clarify the impact of this on society and the state. Since impunity is primarily a negative concept, meaning that it refers to the absence of something and not to its independent existence, we are discussing it here in the context of two main positive concepts with which it is closely related, namely the rule of law and transitional justice. While the first concept is a fundamental pillar of the existence and continuity of the modern state, the second has established its existence as a major tool to restore the existence of this state and ensure its continuity when it is in danger of collapse or actually collapses under the weight of systematic gross violations of the rights of its citizens and the absence of civil peace, and its replacement by armed conflict and civil war.

The essence of the paper aims to go beyond the simplified traditional understanding of impunity, and to show the complexity of this phenomenon and its intertwining with many aspects of institutional corruption, societal division and oppression, and then invites the reader to understand the phenomenon in a deeper way and feel its danger to society, the state and individuals.

Impunity and the rule of law



The rule of law according to the United Nations is "a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are equally accountable in accordance with the declared and applied laws, independently litigated in each case, consistent with international human rights standards[1] and rules." In other words, the rule of law is its representation and realization in practice, through the submission of all to its dictates and their ability to be held accountable before it. Under the principle of the rule of law, we can define impunity as the exclusion of certain individuals, institutions, or entities from being accountable to the law. According to this definition, impunity is the fundamental antithesis of the rule of law, and it is the relay that can destroy this sovereignty. Sovereignty requires full inclusion and submission to the rule of law without exception.

1. United Nations, What is the Rule of Law, no date, https://www.un.org/ruleoflaw/what-is-the-rule-of-law/#:~:text=For%20the%20United%20Nations%20

The aforementioned definition of the rule of law also demonstrates its close association with the principle of equality before the law. The rule of law should transcend all forms of disparity between the components of society in terms of the influence that can come from power, wealth, or strictness in its religious, tribal or regional forms. And because these forms of inequality are strongly effective in daily reality, and they have their institutional forms through which they operate, overcoming them is not an easy task in many societies. Therefore, the main entry point for the existence of impunity on the ground is the success of attempts to exploit the influence provided by the aforementioned disparities to commit acts that involve assault on others without being held accountable to the law.

Impunity, based on a sharp disparity in power between groups in society in particular, appears more frequently and clearer in societies that fail, through their legislation and the institutions entrusted with their implementation, to protect minorities or the most vulnerable. The main examples include violence against women as a phenomenon where perpetrators of violence systematically enjoy impunity, due to the varying degrees of patriarchal nature of societies. Also, in many societies perpetrators of crimes of sectarian and racial violence repeatedly and systematically escape being held accountable. Violence against sexual minorities is also among these examples.

Impunity, based on discrimination between social groups, undermines in particular the central role of the rule of law as a tool for achieving unity and internal cohesion of society under the modern state based on the principle of citizenship. In societies experiencing severe sectarian and ethnic tensions and conflicts, systematic impunity, especially if it reflects a clear bias by state institutions, is a major cause of escalation of sectarian and ethnic conflicts in particular into more severe forms of civil strife.

The disparity in power, as mentioned, can be embodied through institutional forms, the clearest of which are state institutions that enjoy power in view of the authority granted them mainly to exercise their functional role. It is difficult to deal with violations and crimes committed by employees of state institutions, especially those that embody the state's monopoly on practicing violence such as security and military institutions. First of all, these violations and crimes may take place in a gray area that includes the performance of members of these institutions of their normal work. The vagueness of these attitudes is clearly evident in the legal terminology used to refer to criminal acts, such as "excessive use of force" and such as "extrajudicial killing." These terms indicate that the intended act was originally legal, but exceptionally deviated from the legal cover granted to it. This is in

contrast to what would be the case if the same act was committed by individuals who are not state employees. In the latter case it is an explicit and clear offense, an infringement or murder.

The vagueness in defining acts as lawless when it comes to state institutions also extends to accountability and punishment measures. The accountability process usually goes through an internal investigation process before reaching the judicial institutions to which all citizens are subjected. In some cases, all stages of accountability and punishment do not go beyond the walls of the institution itself. This is the case for example with the military institution that holds its members fully accountable through a judicial system of its own. In fact, this institution may insist that civilians be held accountable and punished if they commit acts that it considers encroaching upon them. Security and military institutions, even in normal circumstances, often consider creating a balance between the need to hold their members accountable and punished when they commit transgressions, violations or crimes, and their need to ensure the loyalty of their members to the institution, which leads to a measure of leniency that becomes systematic when the separation is made between transgressions against outsiders and internal transgressions such as disobeying orders or trespassing seniority, etc.

Impunity, in relation to crimes by employees of state institutions, deviates from the scope of these same institutions' indulgence with their members, to become the approach of the state itself under the oppressive regimes that use the state's security and military institutions to suppress their opponents and protect the existing order. First, the violations and crimes committed by these institutions extend to a wider scope, and most of them deviate from the gray zone provided by the law. Secondly, the oversight of other state institutions, whether representative or judicial, over these institutions is severely weakened or completely eliminated. To the extent that democratic practices are absent, the legislative authority becomes a mere tool for elaborating laws in favor of the ruling regime, and parliamentarians voluntarily abandon their oversight role over state institutions, or they pretend to play this role and use it to beautify the image of the regime and its security and military institutions. As far as the independence of the judicial institution is absent, its ability to hold accountable and punish members of security and military institutions for committing violations or crimes diminishes, and the matter may amount to outright complicity or even full submission to the dictates of these institutions.

Under repressive regimes, and to the extent that these regimes control the various state institutions, impunity turns into a normal approach that extends to all practices of officials of different institutions: in exchange for their services outside the framework of the law for the ruling regime, they are expected to achieve their personal interests without being held accountable for any crimes or violations. The matter is necessarily exacerbated for employees of security institutions whose practices become generally protected and the distinction between practices that serve the interests of the regime and those that serve individual interests are forestalled, as it is usually difficult and sometimes impossible to characterize the immunity granted to them.

The notion of achieving interests outside the framework of the law is transmitted to other groups other than employees of state institutions in light of the erosion of the rule of law with widespread impunity as a systematic phenomenon. The various stakeholders seek to achieve them by approaching the employees of state institutions who have immunity from accountability and punishment, and by linking the interests of these employees with theirs. In this way, intertwined networks of interest-based relationships are created that often achieve their purposes by transgressing laws, and hence the rule of law disappears from the practical reality of the daily life of society.

The aforementioned contexts of impunity vis-à-vis the principle of the rule of law are marked and closely linked to various mechanisms, through which impunity is entrenched as a systematic phenomenon. The following is a summarized review of those mechanisms.

1- Legislative failure: Meaning that the state's legislation does not cover some acts that represent an infringement on individuals or groups, or a violation of their rights. This is the absence of the rule of law in principle, as the relationship between the law and the concept of justice and equity is broken. Legislative failure may occur simply because societies are unable to keep pace with their social development by enacting legislation that faces emerging phenomena, or to deal with chronic problems that have been overlooked by the evolving human consciousness in the face of inherited traditions and customs. It may occur when legislative institutions reflect an agenda that is openly hostile to human rights, particularly with regard to minorities and vulnerable groups. Finally, legislative failure occurs in its crudest form under repressive regimes, when the legislative institution works in the service of these regimes, up to issuing laws that legalize crimes and violations committed by the system, granting the executive authorities' broader powers, impeding accountability for their members, or granting them explicit legal immunity.

2- Failure of the judiciary institution: i.e. the judiciary is not able, is hesitant, or altogether abstaining from fulfilling its basic role, which is to achieve the rule of law through its enforcement and implementation even in the face of violations of other state institutions. The failure of the judiciary to perform its role is usually due to a diminution or absence of its independence. However, at other times the lack of judicial independence is due to the overlap of the factional interests of members of the judiciary with interests of other state employees, or their explicit bias towards some agenda of the ruling system, which undermines their impartiality.

3- Failure of executive institutions: It is the most common pattern among the mechanisms of impunity, where executive institutions are not able, reluctant, or refrain from performing their role in law enforcement, and in particular in holding accountable and punishing their members if they violate the law while performing their duties. The matter develops, as we mentioned earlier, into a systematic failure with the persistence of the executive institutions to immunize their members against accountability and punishment to ensure their loyalty. It then becomes an institutional policy under repressive regimes when the systematic violation of the law becomes one of the tools that the institution uses in its daily performance.

4- Societal failure: it is the involvement of different social actors in practices that depend on deepening sectarian, ethnic, class and gender discrimination, etc., which creates a fertile environment for the growth of practices of impunity. In many cases, various civil activities use their popular counterparts to press for impunity for the representatives of their biases. It also involves lobbying for the use of arbitration mechanisms outside the framework of the law that lack any guarantees of justice. Such practices and others create close relationships between representatives of different popular groups and employees of state institutions to exchange support in achieving narrow interests, which misses the opportunity for the forces of society itself to exercise any role to press for the establishment of the rule of law and confront policies of impunity.

Impunity and the process of transitional justice



In 2004[2], the United Nations Secretary-General defined "transitional justice" as encompassing "the entire range of processes and mechanisms associated with the attempts made by society to understand the legacy of widespread past abuses, in order to ensure accountability, justice and reconciliation." The Secretary-General also stressed that the strategies pursued in the context of transitional justice must be comprehensive, so that it includes an integrated interest in individual trials, means of reparation, truth-seeking, institutional reform, and personnel screening for appointment or dismissal, or an appropriately developed combination of these elements. Whatever mixture is chosen, it must be consistent with international legal standards and obligations. Transitional justice should seek to look more comprehensively at the root causes of conflicts and the associated violations of all human rights, including economic, social and cultural rights, as well as civil and political rights. The Office of the United Nations High Commissioner for Human Rights has indicated, "Transitional justice must be aspired by measures that achieve a just future. This justice must also address the crimes and violations committed during the conflict period that led to the transitional justice process, and go beyond it to deal with human rights violations that preceded the conflict period and caused or contributed to it.[3] "

2. Security Council: Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies Issued on August 23, 2004. Paragraphs 8 and 26.

3. Louise Arion, "Economic and Social Justice for Societies in Transition, the Second Annual Lecture on Transitional Justice hosted by the Center for Human Rights and Global Justice of the New York University Law School. In partnership with the International Center for Transitional Justice. New York October 25, 2006 Paragraph 16

Transitional justice is thus the other aspect of the process of preserving the rule of law to preserve the cohesion of society and ensure the sustainability of the state. It deals with that situation that failed to achieve its goals, and thus led the state to disintegrate, collapse, or fall under the weight of dictatorial rule for a prolonged period of time. Conflicts often arise as a result of the failure of the state's legal system to protect rights and punish perpetrators of human rights violations. Discrimination, corruption, and abuse of power by law enforcement officials, and often by military forces, fuel and exacerbate conflicts and make it more difficult to achieve post-conflict reconciliation[4].

According to the Secretary-General in his report on "Post-conflict peacebuilding," the driving motives behind conflict are often related to chronic impunity and lack of accountability. The fight against impunity is necessary to restore or maintain the rule of law. Moreover, terrorism continues to grow wherever conflicts are endemic and where human rights, including economic, social and cultural rights, are not protected, and impunity prevails. Law enforcement and criminal justice systems 'response to terrorism in a manner that violates human rights has been shown to reverse the intended results.

Impunity occurs as a result of states' breach of their obligations to investigate violations, and to take appropriate measures against the perpetrators of these violations, especially in the judiciary, by ensuring the prosecution and trial of persons suspected of criminal responsibility, imposing appropriate penalties on them, providing effective remedies to victims and ensuring that they receive compensation for the harm suffered, as well as to ensure the inalienable right to know the truth about the violations, and to take other necessary steps to prevent their recurrence[5].

Therefore, it is difficult to talk about combating impunity and achieving justice without focusing on and paying attention to the justice system and its essential role in prosecuting perpetrators of human rights violations.

To re-establish the rule of law and settle past excesses, in light of destroyed institutions, imperfect security, depleted resources, and a divided and traumatized population, is a heavy task that requires attention and addressing the lack of political will for reform, the lack of institutional independence within the justice sector, the public's lack of confidence in the

4. Office of the United Nations High Commissioner for Human Rights: Rule of Law Tools for Post-Conflict Countries, Justice Sector Map 2006, p.1.

5. Ibid

government, and the lack of official respect for human rights. There are many challenges that must be dealt with[6].

The transitional justice process has two main roles in relation to the phenomenon of impunity. First, it is concerned with healing the rift arising from long systematic practices of impunity, through accountability and reconciliation initiatives, which track past violations and ensure that the perpetrators are held accountable, and either punish them or reach a reconciliation formula that satisfies victims without their coercion. There are related initiatives to redress the harm inflicted on victims, if possible, or to compensate them for this harm. Secondly, the transitional justice process must ensure that violations and crimes do not recur, and in particular that the phenomenon of impunity does not re-emerge and take root.

To close the impunity gap, it will be required that litigation initiatives build constructive relationships with other transitional justice mechanisms. Large-scale human rights violations require a complex and integrated response consisting of a different set of integrated mechanisms, including prosecution, truth-seeking mechanisms, institutional reforms and reparations. When designing these mechanisms, efforts should be made to ensure that each complements the other and does not undermine it[7].

The investigation techniques for regime crimes differ from those related to ordinary crimes. The work of the Public Prosecutor when investigating and bringing to trial most ordinary crimes can be likened to the work of a film director, whose mission consists of providing a clear description of the way in which a particular incident occurred, and his main interest is in describing the execution of a specific criminal act. The clearer the description, the easier it will be for the court to determine responsibility. But investigating regime crimes requires an approach that resembles the work of an architect. The task is not simply a description of the execution of the criminal act but an explanation of the manner in which the various elements operate. Investigating regime crimes, whether in relation to a series of criminal acts or a single incident, requires a detailed examination of the system itself, and not only the results, as appears in the fundamental crimes that make up the so-called crime base (such as murder, torture, rape and deportation). Still, few investigative agencies

6. Security Council: Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies. Issued August 23, 2004. p. 5

7. United Nations Commission: Rule of Law Tools for Post-Conflict Countries, Prosecution Initiatives, New York and Geneva 2006, p. 18.

have successfully developed the technologies and resources needed to effectively investigate regime crimes[8].

On the other hand, there is a need to transform the public institutions that helped perpetuate the oppressive rule into institutions that respect and protect human rights and work to consolidate a culture of respect for the rule of law. By reforming or building fair and efficient public institutions, institutional reform becomes a factor that helps prevent recurrence of human rights violations in the future. The rigorous testing of government officials, especially in the security and justice sectors, is of critical importance to facilitate this transformation, by removing from their positions of government officials responsible in their personal capacity for gross violations of human rights. This may also include disbanding military, police or other security units that may be systematically responsible for human rights violations. Exclusion of these persons should comply with due process and the principle of non-discrimination[9].

8. Ibid, p.21.

9. See Principle 36, E / CN.4 / 2005/102 / Add

General mechanisms for the combat of impunity



In contrast to the mechanisms of transitional justice processes that we discussed in the previous section, there are general mechanisms and conditions for facing impunity, and it is logical that these mechanisms would aim to reverse those that led to its inception. With regard to preserving the rule of law, or restoring it when exposed to widespread or systematic erosion, the necessary mechanisms can be summarized as follows:

1. **Legislative reform:** First of all, there is no substitute for legislative reform to be carried out by an elected body through a free and transparent electoral process. This legislative body will have to address several roles, the first of which is to cleanse existing legislation from the suspicion of unconstitutionality, or what violates the state's obligations in accordance with international human rights treaties and agreements, and secondly to achieve the aforementioned commitment, this legislative body will have to add more legislation to address crimes and violations, for which the laws did not provide appropriate penalties. They will also have to enact the necessary legislation to ensure appropriate oversight of the work of the executive institutions, and finally for themselves to undertake their supervisory role in a comprehensive and diligent manner.

2. **Judicial Reform:** This first requires ensuring complete independence of the judiciary, as any role that the judicial authority can play cannot be achieved if its individuals and institutions do not enjoy complete independence from the executive authority and immunity against any external influences that may undermine their impartiality, including the trends in public opinion and pressure from influential people. The reform of the judiciary requires that access to its positions have clear, open and transparent criteria, and in particular the separation of interests of judges and their associations from the interests of other categories of state employees or other actors. Judicial reform also requires the separation of investigation powers and public prosecution, as well as multiple levels of litigation, the existence of clear and effective channels for grievance and complaints, and mechanisms for investigation and accountability in the event that the judges themselves violate the requirements of their profession.

3. **Reform of executive institutions:** Unlike judicial institutions, it should be ensured that executive institutions do not enjoy a measure of independence that goes beyond what is required to effectively fulfill their role. Executive institutions should be subject to the control of both the representative authority (parliament) and the judiciary, and this control should be through permanent mechanisms that ensure that the executive institutions do not misuse

the powers granted to them, or fail to hold their members accountable and punished if they violate laws and regulations of their jobs.

4. **Social reform:** Societies torn apart by class inequalities and sectarian and racial conflicts are a fertile environment for the growth of impunity, as previously indicated in this paper. There is no doubt that social reform is a difficult and long process, but achieving the rule of law through the previous mechanisms would greatly help limiting the effects of social divisions and directing society towards overcoming them. However, the rule of law alone is not sufficient. Social reform requires educational policies of tolerance and acceptance of difference, and encouragement of the role of civil society and other community activities through an open public space that provides protection for freedom of religion and freedom of opinion and expression.

Conclusion



This paper sought to present the concept of impunity as a phenomenon that poses a grave threat to the principle of the rule of law and thus to social peace and the stability of society and the state, as well as a major challenge to transitional justice processes that seek to restore societies and the stability of its state institutions after going through crises of internal conflict or being subject to dictatorial rule for a long time. The paper reviewed the various social and institutional contexts that contribute to providing an appropriate environment for the emergence of impunity, its extension and its transformation into a systematic and institutional pattern, as well as the mechanisms through which impunity is spread and becomes an obstacle to the rule of law. The paper then addressed the challenges posed by impunity, which is rampant in countries that have witnessed internal conflicts or dictatorial rule, challenges for transitional justice processes, and clarified some of the tools on which the transitional justice process relies on facing impunity, its manifestations in the past, and its re-emergence in the future. Finally, the paper briefly dealt with general mechanisms for confronting impunity and preventing its spread, expansion and transformation into a systematic policy.

Finally, we can only emphasize that the main prevention of the phenomenon of impunity is the establishment of a sound democratic system in a free society whose members enjoy protection of their political, civil and economic rights, and then cooperate in overcoming class, gender, sectarian and ethnic differences among them, to reach a full arbitration of the principle of citizenship and full equality before laws that abide by the principles of human rights.