



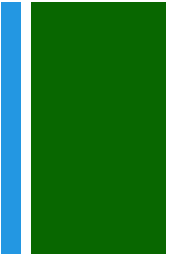
# Transitional Justice: An Overview

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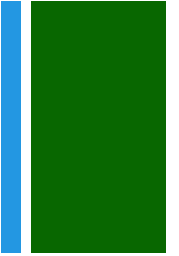
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# + Overview

- Types of Transition
- Definition of Transitional Justice
- Phases of Transitional Justice
- Transitional Justice Mechanisms
- Themes of Transitional Justice
- The Actors in Transitional Justice
- What is it for?
- Who is it for?



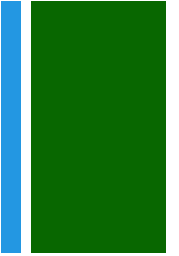
# + What is Transitional Justice?



‘compris[ing] the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.’

UN Secretary General 2004.

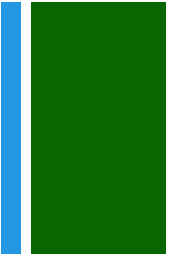
# + What is Transitional Justice?



- Teitel (2009) p69:
  - ‘the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoing of repressive predecessor regimes.’
- Democratisation and human rights
- Re-establishing the rule of law
- Interdisciplinary, but also mix of activists, practitioners and academics
- Bell (2009) – non-field, needs to decolonise law’s dominance

# + Goals of Transitional Justice

- Retribution
- Accountability
- Deterrence
- Acknowledgement
- Truth
- Memorialisation
- Reaffirming the Rule of Law
- Restoration and Healing
- Reconciliation



# COMPONENTS OF TRANSITIONAL JUSTICE



## AFRICAN UNION APPROACH

Based on the AU Panel of the Wise  
Report: African Union Draft  
Transitional Justice Policy  
Framework, February 2013.



### TRUTH COMMISSIONS

Both victims and perpetrators must be afforded the opportunity to reconcile their account of history in order to achieve closure.

### INVESTIGATIONS & PROSECUTIONS

Alongside formal courts, special hybrid tribunals are constituted for purpose of trying high-level crimes.

### TRADITIONAL JUSTICE

Traditional practices and customary norms in Africa complement the need for criminal prosecutions for certain categories of crimes.

### SOCIO-ECONOMIC & CULTURAL JUSTICE

Provision of protection and security, must be followed by a political settlement that can lead to an equitable distribution of wealth.

### REPARATION

Reparatory measures include compensatory, restitutory, rehabilitative, and/or symbolic measures.

### INSTITUTIONAL VETTING OR LUSTRATIONS

Exclude certain individuals deemed most responsible for the worst crimes from public offices and institutions.

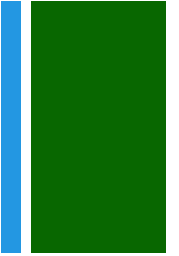
### CONSTITUTIONAL, LEGAL & INSTITUTIONAL REFORMS

Revitalize national legal arrangements and reform security forces and institutions to facilitate accountability and reconciliation.

### LIMITED CONDITIONAL AMNESTY

Amnesty processes are not used if they do not undermine the obligation to truth.

# + Phases of Transitional Justice



- Phase One – Post WW2.
  - International, top-down
  - Retributive
  - Context specific and linked to the development of human rights
- Phase Two – Post Cold War
  - National
  - Beyond retribution: amnesties, reparations and truth commissions
- Phase Three – '*Fin De Siecle*' - 'Transitional Justice all the time'
  - International/local - the permanent ICC
  - Blurring of the human rights/ humanitarian law distinction
  - Transitional justice 'from below'
  - Transitional justice normative in settled democracies.
  - Contemporary and forward looking, rather than backward corrective justice

# + Phases of Transitional Justice

Phase I



Post-WW2

Phase II



Post-Cold  
War

Phase III



Late 1990s-



# + Phases of Transitional Justice

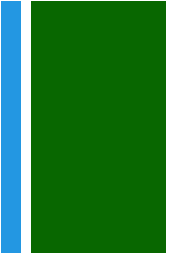
Teitel (2009) – law in TJ becoming more politicised and pragmatic

Phase I  
Retributive:  
Criminal  
Justice

Phase II  
Restorative:  
Justice, Truth  
and  
Reparations

Phase III  
Transformative:  
Beyond corrective  
justice to distributive  
justice and concerns  
over structures of  
criminalisation and  
victimisation

# + Generic Themes of Transitional Justice



- International structures (ICC, ICTY, ICTR) & national systems
- Truth Recovery, prosecutions, acknowledgement & amnesty
- Police, judicial, correctional reform
- Victim healing/reconciliation
- Prisoner release, DDR, ex-combatant resettlement & cultures of violence

## HOW THE TRC HELPS YOU



THE VICTIMS, THOSE WHO DID BAD TO THEM AND WITNESSES CAN REPORT THEIR STORY TO THE TRC



REPORT THE MATTER TO THE TRC AND TELL THE TRUTH



THE TRC WILL INVITE PERSON OR PERSONS MENTIONED IN YOUR REPORT



THE TRC WILL LOOK INTO THE CASE



THE TRC WILL ENCOURAGE ADMITTANCE TO WRONGDOINGS & FORGIVENESS



THE TRC WILL RECOMMEND PROSECUTION FOR CERTAIN CASES



# Transitional Justice Mechanisms

# + Transitional Justice Mechanisms

- Criminal trials
- Amnesties
- Truth commissions
- Reparations, memorials, and apologies
- Demobilisation, Disarmament and Reintegration
- Lustration and guarantees of non-repetition



# + Criminal Trials

- Investigate, prosecute and punish international crimes
- Criticised as leaving victims outside of the process, only used as witnesses
- Growing proliferation with the International Criminal Court



Hissene Habré trial

# + Amnesties

- Provided for under Additional Protocol II, Geneva Conventions (Article 6(5))
- Can be blanket, conditional or limited
- Conditional – permissible only when ex-combatant complies with condition, i.e. engages with truth commission
- Limited – for certain crimes and perpetrators



# + Truth Commissions

- Body to investigate and recover the truth
- Four main types of truth:
  - Forensic
  - Narrative
  - Social
  - Healing and restorative truth
- Over forty truth commissions since mid-1980s



# + Reparations

- Measures to remedy, acknowledge and alleviate victims' suffering
- Forms:
  - Restitution
  - Compensation
  - Rehabilitation
  - Satisfaction (memorials/apologies)
  - Guarantee of non-repetition





# + Demobilisation, Disarmament and Reintegration

- Effectively incentive based system for combatants to abandon fighting and return home
- Usually used in conjunction with amnesties and financial packages
- Prosecutions should generally target HR violators, not rank and file combatants – i.e. perpetration of crimes, not participation in conflict criminalised
- Hazan ‘transactional’ – balanced with reparations



# + Lustration and Guarantees of Non-Repetition

- Lustration - removal of staff of past regime
  - Prevents perpetrators from committing further abuse
  - Structural commitment to the rule of law
- Guarantees of non-repetition
  - Structural reforms to prevent recurrence of violations



# + International obligations on states

- Different treaties and conventions impose specific obligations on states
  - 123 state parties to Rome Statute of International Criminal Court
    - Obligations to investigate and prosecute international crimes
- No transitional justice treaty and no UN guiding principles (yet)
  - But there are Chicago Principles on Post-Conflict Justice (2003)
  - UN OHCHR Impunity Principles 2005
  - UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law 2005
- Legal limits – temporal – when does the transition begin/end?
  - Unresolved issues of colonialism and slavery

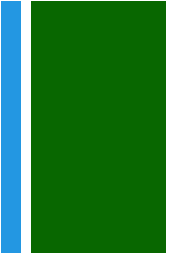
# + Distinction from domestic crimes

1. Mass victimisation
2. Mass perpetration
  - Genocide – intent to destroy in whole/part a ethnic, racial or religious group
  - War Crimes - a plan or policy' or a 'large-scale commission' as part of an armed conflict
  - Crimes Against Humanity - 'widespread or systematic attack' directed against a civilian 'population'
3. Ideological driven perpetration
4. State action/inaction
5. Impact of the crime/impunity on victims and their families



# + Who is transitional justice for?

- Victims
- Perpetrators
- Communities
- The state
- Lawyers
- The TJ industrial complex?



# + Identities

- Victims recognition is integral to accessing justice/support mechanisms
- Identifying perpetrators for demobilisation or prosecution
- Identities are not always binary
  - Complex victims – individuals victimised, but are responsible for victimising others

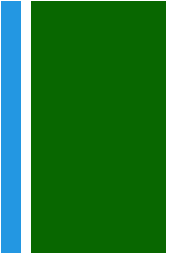


# Advantages and Limits of Transitional Justice



# + What are the advantages of TJ?

- Bespoke, context appropriate responses to mass violence
- Local 'ownership' – 'bottom up' and 'top down/elite' approaches
- A number of processes and reforms aimed at tackling different constituencies and causes of conflict
- Tackle violations, causes and consequences
- Transformation of conflict from violence to political – legal – contested narratives





# + Transitional Justice and Ownership

- Historically transitional justice – western orientated and retributive
- Over the past two decades promotion of more pluralist ‘local justice’. For example:
  - Rwandan *gacaca*
  - South African Truth and Reconciliation Commission & ‘ubuntu’
  - N. Uganda traditional justice – *culo kwor* and *mato oput*
  - Restorative justice’ rather than retributive
- Requires both local and international justice
- Perhaps also transformational justice – tackle socio-economic inequalities



# + Limits of local Transitional Justice

- Local justice may not have procedural protections for victims, witnesses or vulnerable groups
- May be no relationship to restore between individual victims and perpetrators
- Limits of the law in encouraging individual or community reconciliation
- Retributive justice serves not only to punish, but to also incapacitate perpetrators and provide security to victims
- Traditional justice can be more punitive and gender biased
- Can perpetuate official narrative of the conflict – e.g. Rwanda
- Can be abused by local elites
- These limitations can apply to top down approaches as well

# Transitional Justice as 'Exotic' and Political

- Posner and Vermeule transitional justice as 'ordinary justice'
- Political compromises?
- Cultural relativism
- Transitional justice becoming 'ordinary'?
- What role for international guidance/law?



# + Conclusion

- Transitional justice is an ever expanding field
- Becoming more nuanced – retributive and reparative
- Law is becoming more sensitive to the local needs for justice
- Continues to be tensions over amnesties, prosecutions and peace

