

[illegible]

Transitional Justice (TJ)

Definitions and concepts of TJ

➤ There is no universally accepted definition. Differs depending on how the transition happened and the socio-economic and political factors.

➤ **Roht Arriaza:**

“TJ involves anything that a society devises to deal with a legacy of conflict and/or widespread human rights violations, from changes in criminal codes to those in high school textbooks, from creation of memorials, museums and days of mourning, to police and court reform, to tackling the distributional inequities that underlie conflict”. (*Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (2006)).

➤ **UN definition:**

“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.” (2004).

- ✓ TJ is a process of dealing with past gross human rights violations and humanitarian abuses in order to transit to democracy.

Basic elements:

- Gross HR & IHL violations (under repressive regime/ civil war),
- Transition to peace, reconciliation and democracy and
- Mechanisms used to ensure the transition.

TJ Accountability Mechanisms

1. Prosecution
2. Amnesty
3. Truth commission
4. Reparation
5. Institutional Reform- Purging/vetting/lustration

- ❖ There is no hard rule as to how these mechanisms should be used.
- ❖ There is no “one size fit all.”

1. Prosecution

- Prosecution is a criminal action; a proceeding instituted and carried on by due process of law, before a competent tribunal, for the purpose of determining the guilt or innocence of the person charged with crime.” (Black’s Law Dictionary).
- *Repressive regimes are often defined by criminal behaviour, such as torture, arbitrary detention, disappearances, and extrajudicial executions, all substantially state-sponsored; even when past evil is perpetrated by private actors.*
- The state is often, nevertheless, still implicated, whether in policies of persecution, by acts of omission in failure to protect its citizens, or, finally, in the cover-up of criminal acts and impunity.
- *Prosecution is a criminal justice response to past HR violations.*
- Based on the retribution principle, i.e. perpetrators must be punished.
- Suspected of “victors’ justice”. E.g. Nuremberg trial.

Prosecution can take place:

- At the local level (e.g. Gacaca court in Rwanda),
- At the national level (e.g. Ethiopia. Don't confuse with Special Prosecutors' office),
- Special court (e.g. Special Court for Sierra Leone) &
- At the international level (e.g. ICTY & ICTR). These are *ad hoc* and *post facto* tribunals established by UNSC Resolutions;
- At ICC- E.g. Bemba case, Lubanga case, Katanga case, etc.
- In Africa, ACJHR (Malabo Protocol), has not yet been realized!

Issues to be addressed before going for prosecution

- **Capacity of the judiciary.** Institutional independence & and capacity in terms of human resources and finance. E.g. Ethiopia: court lacking independence & experienced judges
- **Interest of the victims:** Case of Guatemala and South Africa-the victims preferred reparation than prosecution of the perpetrators.
- **Moral authority and legitimacy to conduct the trial:**
 - ✓ Criminals should not prosecute criminals.
 - ✓ EPRDF case in conducting red terror trial while they themselves committed crimes of comparable gravity & and continued in HR violations after holding power.
- **Number of perpetrators:** If the crimes are committed on large scale by large number of perpetrators, it is better to focus on the masterminds (Rwanda in 1994.) When the accused and the charges are a lot, it results in justice delayed. E.g. red terror prosecution.

...

- **Issues to consider:**

1. Which crime should be prosecuted:

- ✓ Serious/grave violation of IHRL & IHL v. all kinds of violations?

2. Whom to prosecute?

- ✓ Major perpetrators (mastermind) v. all perpetrators?

3. Who should prosecute?

- ✓ Establishing Special Investigation and Prosecution Office v. Using experienced investigators and prosecutors within the existing police/prosecution office?

4. Which court should try the matter?

- ✓ Special Bench (using experienced judges from High and Supreme Courts) v. Establishing a Special Criminal Tribunal

- ✓ Constitutionality of Special Court -FDRE Constitution, Art 78(4))

2. Amnesty

- Amnesty is immunity in law from either criminal or civil legal consequences, or from both, for wrongs committed in the past in a political context.
- It is a mechanism that close everything occurred in the past in order to go forward. In some countries, it is unconditional (Mozambique) while other countries follow a conditional amnesty (South Africa: full disclosure of facts).
- **The principal justifications:** transition, peace, reconciliation, forgiveness, and truth.
- The counter-amnesty argument is Justice i.e. giving everyone what they deserve.
- When the old regime officials are in office, granting amnesty becomes a necessary evil. E.g. Augusto Pinochet remained in control of the army, i.e. compromised justice.

Are states free to give amnesty as they like?

- ✓ Self amnesty? There is no hard rule but less acceptable especially in other jurisdictions. E.g Spain prosecuted Pinochet while he was enjoying amnesty in his country.

-Barrios Altos v Peru case: Self amnesty laws result in the defencelessness of victims of human rights abuses and promote impunity for perpetrators.

“The so-called self-amnesties are, in sum an inadmissible offense against the right to truth and the right to justice. It is incompatible with states obligation to respect and protect HR, and affects rights to judicial guarantees and right to judicial protection. Their legality at domestic law level in leading to impunity and injustice is in flagrant incompatibility with the norms of protection of the Int’l law of HR bringing about violations *de jure* of the rights of human person.”

(Concurring Opinion of Judge Antônio Augusto Cançado Trindade).

- **No amnesty for international crimes:**

-*Almonacid-Arellano et al v Chile case*: Crimes against humanity, including the State's crime against Mr. Almonacid Arellano, are not subject to amnesty; rather, they are intolerable in the international community and no one state can immunize itself against punishment through domestic law.

-*Prosecutor v. Kallon & Kamara*: Where jurisdiction is universal, a State cannot deprive another State of its jurisdiction to prosecute the offender by the grant of amnesty. It is unrealistic to regard as universally effective the grant of amnesty by a State in regard to grave international crimes in which there exists universal jurisdiction. A State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive, remember, and have jurisdiction to prosecute by reason of the fact that the obligation to protect human dignity is a peremptory norm and has assumed the nature of obligation *erga omnes*.

(Read "Amnesty for crime in international law and practice" by Andreas O'Shea.)

3. Truth Commission (TC)

Nomenclature:

- South Africa: Truth and Reconciliation Commission,
- Guatemala: Historical Clarification Commission,
- Kenya: Truth, Justice and Reconciliation Commission
- Ghana: National Reconciliation Commission.

Definition:

- a TC is an *ad hoc*, autonomous, and victim-centred commission of inquiry, set-up in and authorized by state for the primary purpose of:

- a) investigating & reporting on principal causes and consequences of broad and relatively recent patterns of violence or repression; and
- b) making recommendations for their redress and future prevention. **Freeman M (2006).**

- TCs are non-judicial or quasi-judicial investigative bodies, which map patterns of past violence, and unearth the causes and consequences of these destructive events. (UNSG, 2010)

-TCs are also defined as official non-judicial bodies established to investigate a country's past period of HRs abuses or violations of IHL and have usually emerged out of a political compromise between a strong outgoing regime and strong public demand for accountability. (AU, 2016).

- The primary purpose of TC is to uncover the past HR violations and humanitarian abuses. The ultimate goal of such disclosure must be to bring about healing to the victims and reconciliation (E.g. STRC).
- **Without truth there is no real reconciliation!!**
- Perpetrators kill secretly, there are unofficial death squads, disappearance. All the covered activities must be uncovered to establish accurate record of history.
- TC often helps to reveal who did what to whom, why, how and when. In doing so, a TC indicates who should be prosecuted and who should get reparations.
- A well-run commission could accomplish things no trial could provide.
- ***Respice-prospice: look back look ahead!!***
- The need to have an accurate record of history as opposed to history written as per the rulers dictation.
- **Forgive and forget or forgive without forgetting.**

- In the case *Velázquez v. Honduras*, the IAHRC laid a bench mark to the right to truth by stating that victim family has right to know the whereabouts of the disappeared by stressing on the state of Honduras's duty to ensure the fulfilment of this right. The state duties include duty to:
 - a) investigate the involuntary disappearance;
 - b) punish the perpetrators;
 - c) to condemn the practice in making public statement; and
 - d) pay both material and moral compensation.
- The IACHR, in the case of *Barrios Altos v Peru*, clearly re-affirmed the victims' or next of kin's right to truth and right to obtain clarification of the events that violated human rights.
- **TC as a means to make an official acknowledgment of past injustice i.e. breaking the chain of continuous denial.**
- Truth commissions are also a compass in conducting lustration.

Read Priscilla B Hayner "Fifteen Truth Commissions- 1974-1994: A Comparative Study".

Reparation

Definition

“measures taken by states to redress gross and systematic violations of international human rights law and/or international humanitarian law through the administration of some form of compensation or restitution to the victims.” AU TJ Framework (2016) 23.

- Redress is for victims.
- Victims are defined as:

“persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law.” UNGA Resolution 60/147.

Right to remedy under international law:

➤ UDHR- Art 8:

“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”

➤ ICCPR- Art 3(a):

“State party shall ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.”

➤ Art 14 CAT:

“Each State Party shall ensure... that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation....”

➤ “It is well established in general international law that a State which bears responsibility for an internationally wrongful act is under an obligation to make full reparation for the injury caused by that act.” *Democratic Republic of the Congo v Uganda* Judgement of ICJ (2005), Para 259.

The forms of reparations can be categorized as:

- ❖ material (which can be measured in monetary terms) and
- ❖ non-material (non-monetary).

Issues to consider:

- ✓ The interest of the victims
- ✓ Capacity of the government
- Reparation should be: **adequate, effective, and prompt**;
- Reparations can be also categorized as individual or collective reparations
- **Modalities:** restitution, compensation, rehabilitation, satisfaction, & guarantees for non-repetition.
- Restitution includes:
 - ✓ restoration of liberty,
 - ✓ enjoyment of human rights, identity, family life and citizenship,
 - ✓ return to one's place of residence,
 - ✓ restoration of employment, and return of property.
- .

...

Satisfaction includes:

- ✓ Cessation of continuing violations;
- ✓ Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim;
- ✓ The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed;
- ✓ An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;
- ✓ Public apology, including acknowledgment of the facts and acceptance of responsibility;
- ✓ Judicial and administrative sanctions against persons liable for the violations;
- ✓ Commemorations and tributes to the victims;
- ✓ Inclusion of an accurate account of the violations that occurred in IHRL and IHL training and in educational material at all levels

...

- **Guarantees of non-repetition** should include:
 - ✓ Ensuring effective civilian control of military and security forces;
 - ✓ Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
 - ✓ Strengthening the independence of the judiciary;
 - ✓ Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;
 - ✓ Providing, on a priority and continued basis, human rights and IHL education to all sectors of society and training for law enforcement officials, military and security forces;
 - ✓ Promoting the observance of codes of conduct and ethical norms, in
 - ✓ Promoting mechanisms for preventing and monitoring social conflicts and their resolution;

Lustration/vetting/purging

- Lustration is a measure barring officials and collaborators of a former regime from position of public influence in a country after transition from dictatorial regime.
- the victims want not to see the perpetrators and collaborators in holding crucial public office.
- **It is wrong to put new wine in the old wineskins.**
- Lustration was widely applied in the Eastern Europe after the collapse of USSR.

Issues to consider:

- Focus on important positions such as, military, police, academia, security, media, state owned companies.
- Experience accumulated over years might be lost.
- Purging for how long?
- The right to work?

Peace vs Justice (Peace or Justice)

Pro-Justice

- The prosecution of human rights violations as a necessary step for providing recognition for victims and pacifying desires for revenge that fuel cycles of violence.
- The pursuit of accountability fosters democratization by reinstating the rule of law;
- Increased human rights violations & exacerbation of conflicts are not the result of trial, rather they are the outcomes of failure to prosecute;
- Recurrence of violations come to an end when the victims see the punishment of the perpetrators.
- **Justice is a prerequisite for a durable peace and democracy!**

Pro-Peace

- The systematic prosecution of human rights violations can potentially undermine peace processes and democratic transitions, thus causing additional rounds of violence and atrocities.
- Choices about punishment of past abuses must be made through the application of resolutely forward looking criteria designed to avert atrocities and secure human rights, not backward-looking strategies based on rigid rule following system or on what feels right and just.
- **Justice is a consequence rather than a cause of democratization.**
- Sometimes justice has to wait.

Peace and Justice not Peace vs Justice (current discourse)

- ✓ Transitional governments can draw on a range of alternative accountability mechanisms, such as purges or commissions of inquiry, in order to mitigate the tensions between justice and peace.
- ✓ The pursuit of justice in transitions to democracy is as much a question of political feasibility as it is one of moral desirability.
- ✓ An international duty to prosecute past human rights violations would undermine efforts to secure democracy and, hence, human rights for the future.
- ✓ **Peace and justice are not contradictory concepts. They are complementary.**
- ✓ There is no peace without justice and one cannot ensure justice in the absence of peace.
- ✓ Both can be achieved simultaneously. However, the success depends on several factors such as, the capacity of the old guys, the strength of the new forces, the ability of institutions.
- ✓ Focusing only on peace and waiting for a more suitable time of doing justice may result in loss of evidences.

- ✓ **Justice delayed is not always justice denied.** There are situations where time gives the opportunity of collecting strong evidences than a early rush with weak evidences.
- ✓ Transitional governments must counterbalance the goal of prosecuting perpetrators with the aim of building a stable democratic system.
- ✓ Both peace and justice should aim at creating a consolidated self-defending democracy.
- ✓ TJ should await the development of a judicial and policing system that is transparent and legitimate.
- ✓ By understanding peace as more than just the cessation of immediate violence, and understanding justice in more than retributive terms, we see justice as a necessary and fundamental aspect of attaining peace.
- ✓ **Justice must be both retributive and restorative.**

Concluding remarks

- There is “no one size fits all.”
- For a better result, it is advisable to combine two or more mechanisms.
- How the transition came about determines which mechanisms to apply. E.g. Ethiopia (Red terror prosecution b/c of complete defeat of durgue), South Africa (Amnesty b/c the old officials were in power).
- There are no “off-the-shelf” answers.
- There are some essential prerequisites to any accountability process.
- Without some level of security, transitional justice processes are doomed to fail.
- Moreover, an infrastructure and the requisite political will to create the conditions in which genuine accountability can take place must precede any such measures.

- There can be no public acknowledgement of wrongs committed in the past if there is no legitimate representative political body able to listen to and acknowledge them.
- There can be no truth-telling without protection from retaliation for those who desire to do so.
- There can be no trials without laws, and judges, and lawyers, and courthouses, and the means to gather and protect evidence.
- Preventing perpetrators from reasserting power or terrorizing the population must be prioritized.
- Sometimes justice has to come in creative forms. E.g. Gacaca Court.
- Processes that are largely insider designed and managed have the highest levels of legitimacy.
- Outsider-run processes tend to have less internal legitimacy. E.g. STRC

