

Dealing with the Past - Transitional justice



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- This approach emerged in the late 1980s and early 1990s, mainly in response to political changes in Latin America and Eastern Europe—and to demands in these regions for justice.
 - At the time, human rights activists and others wanted to address systematic abuses by former regimes but without endangering the political transformations that were underway.
 - Since these changes were popularly called “transitions to democracy,” people began calling this new multidisciplinary field “transitional justice.”



What is “transitional justice”?

- How should a country, a society, deal with its history of human rights violations during an armed conflict or an authoritarian regime?
- What are the mechanisms available, what is the proper timing (which are the immediate needs vs. the long-term needs)?
- What are the rights of the victims and the obligations of states with respect to grave violations of human rights?



What is “transitional justice”?

- Dealing with widespread human rights violations raises large practical difficulties.
- A country’s political balance may be delicate, and a government may be unwilling to pursue wide-ranging initiatives, or it may be unable to do so without putting its own stability at risk.
- A holistic approach to deal with past abuses.
- “Peace is more than the cessation of hostilities”.

What is transitional justice?
Why does it matter in today's
world?

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What is “transitional justice”?

Four main “elements” or “pillars”

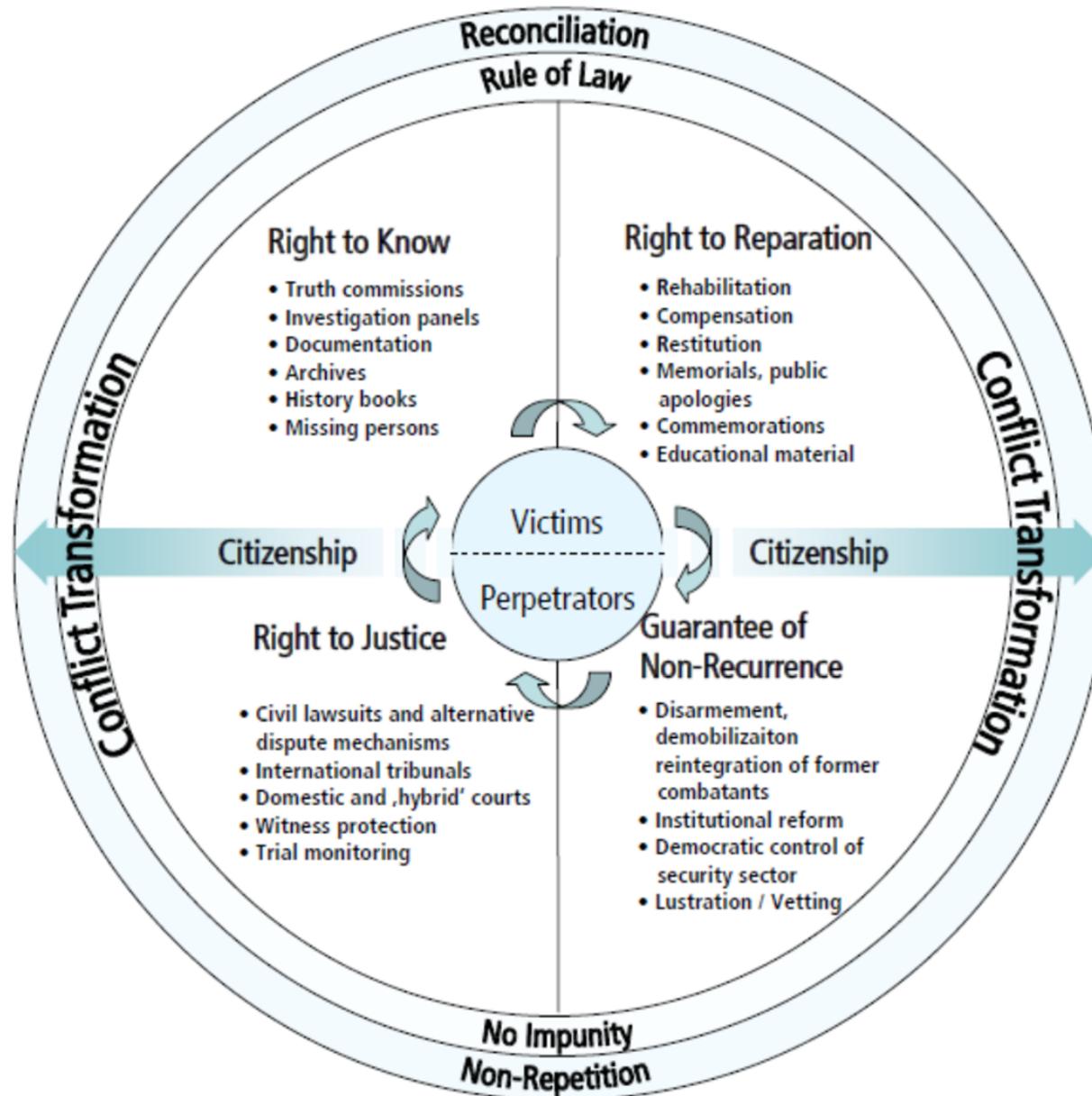
- Truth
- Justice
- Reparations
- Institutional reforms /
Guarantees of Non recurrence



What is “transitional justice”?

The final objectives of TJ are:

- Reconciliation of a war-torn society
- The prevention of impunity
- The non-recurrence of past violations





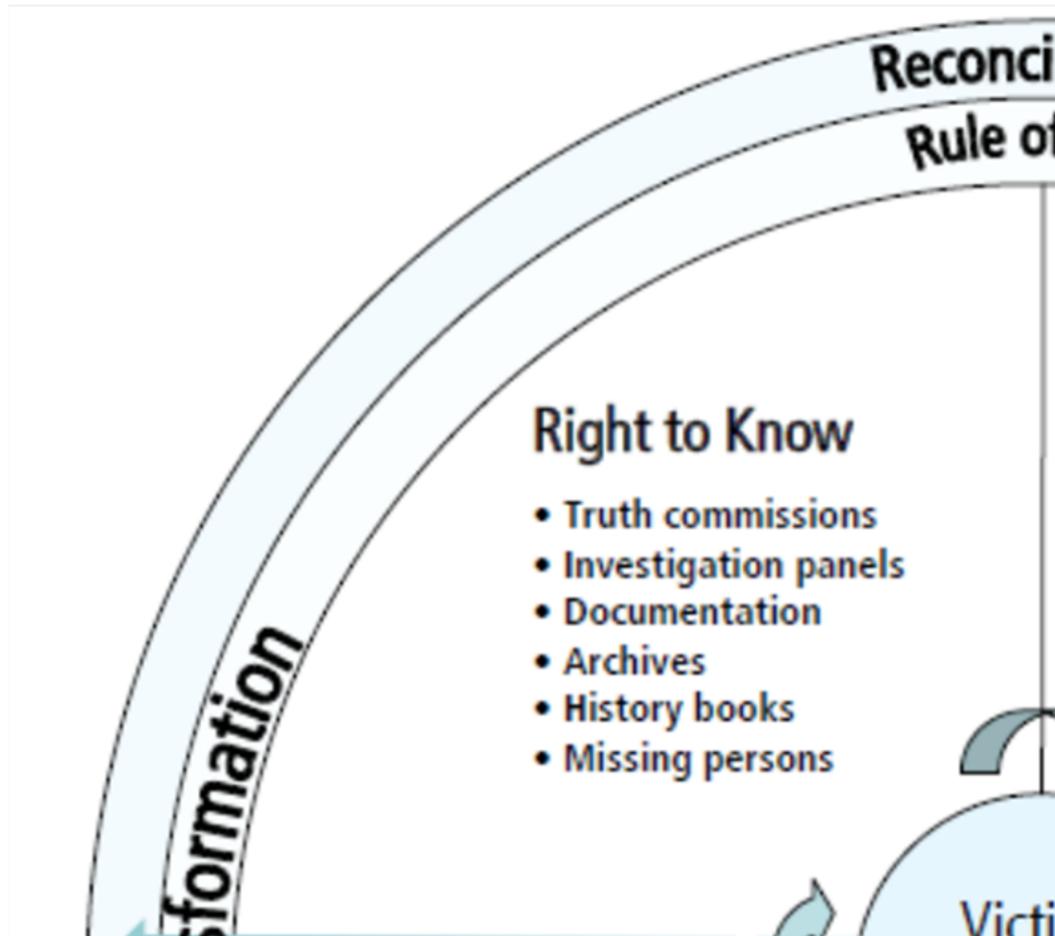
Normative foundation of TJ

- **Various UN instruments, as well as other legal documents, enshrine rights and obligations** relative to the right to justice, the right to truth, the right to reparations, and guarantees of non-recurrence of violations.
- In addition, treaty bodies and jurisprudence, as well as a number of declarations, principles, and guidelines have been instrumental in ensuring the implementation of relevant treaty obligations.

The right to know Truth and Reconciliation Commissions

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The right to know



- The right of the victims to know what happened.
- The right of the society to know what happened.
- The duty of the state to search for the truth and make it public.



The right to know - mechanisms

- Truth (and reconciliation) commissions
- Commissions of inquiry
- Historic commissions
- Parliamentary investigations
- Search for missing persons
- Documentation / Archives
- Memorialization
- History books

Truth Commissions

- More than 30 countries have created truth commissions to investigate and report on human rights abuses.
- Different format and set-up, but all are non-judicial, independent panels of inquiry
 - [The South African Truth and Reconciliation Commission](#)
 - [The Argentinean National Commission on the Disappeared](#)
 - [The Peruvian Truth and Reconciliation Commission](#)
 - [The Tunisian Truth and Dignity Commission](#)
 - [The Colombian Truth, Coexistence and Non-Repetition Commission](#)



Truth Commissions - mandate

Truth Commissions are being set up to

- discover, clarify and formally establish the facts and context of serious human rights violations in a country's past,
- formally acknowledge past abuses and seek recognition for victims,
- recommend institutional reforms, sometimes also to prepare the way for prosecutions,
- pave the path to peace, reconciliation and democracy.



Truth Commissions - tools

- Public hearings
- Testimonies
- Exhumations
- Final reports
- Memorials
- Policy recommendations
- Collaboration with judiciary
- Documentation centers



Truth Commissions

- some elements to consider -

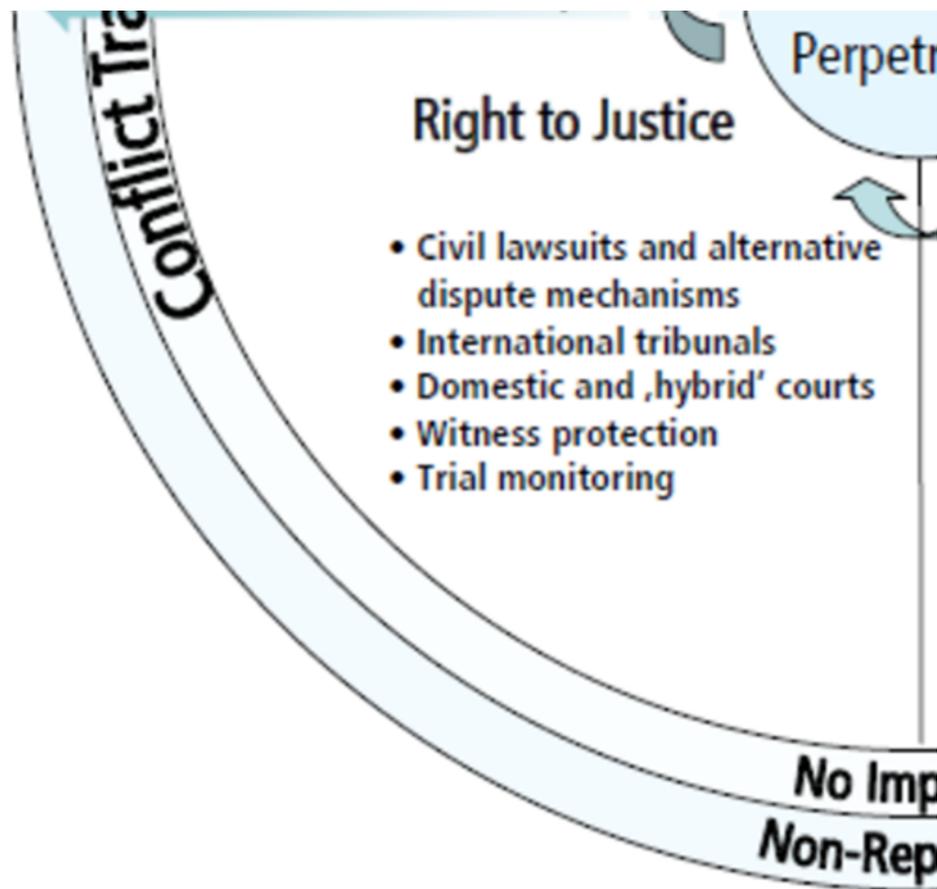
- Sponsorship / established by which authority?
- Time of establishment and timeframe?
- Composition?
- Legal powers?
- Tools at disposal?
- Mandate and goal?
- Cooperation with judiciary?
- Victim-centered? Reparations?

The right to justice

The different justice mechanisms

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The right to justice



- The right of victims and society to justice.
- Duty of the State to prosecute.
- Prohibition of general amnesties (for “core crimes”).
- National, international and hybrid justice mechanisms.

The Right to Justice

1. The Right to Justice implies that any victim can assert his or her **rights and receive a fair and effective remedy**, including the expectation that the person or persons responsible will be held accountable by judicial means.
2. The Right to Justice also entails **obligations on the part of the State** to investigate violations, to arrest and prosecute the perpetrators and, if their guilt is established, to punish them. This obligation is contained in important international conventions.

The Right to Justice

- 3. Domestic courts have primary responsibility to exercise jurisdiction**, but international criminal tribunals may exercise concurrent or complementary jurisdiction, and other states may exercise universal jurisdiction, in case the domestic courts fail.
- 4. The Right to Justice imposes restrictions upon certain rules of law** pertaining to prescription, amnesty, right to asylum, extradition, non bis in idem, due obedience, official immunity, and in so far as **they may be abused to obstruct justice and benefit impunity.**



Right to justice - different mechanisms

- National mechanisms
 - Criminal proceedings in national courts
- International mechanisms
 - International courts
 - Hybrid (mixed) mechanisms
- Universal jurisdiction
 - Prosecution in domestic courts of another state
- Traditional justice mechanisms
 - Gacaca Courts



Right to justice - different mechanisms

- National mechanisms
 - Criminal proceedings in national courts

National mechanisms

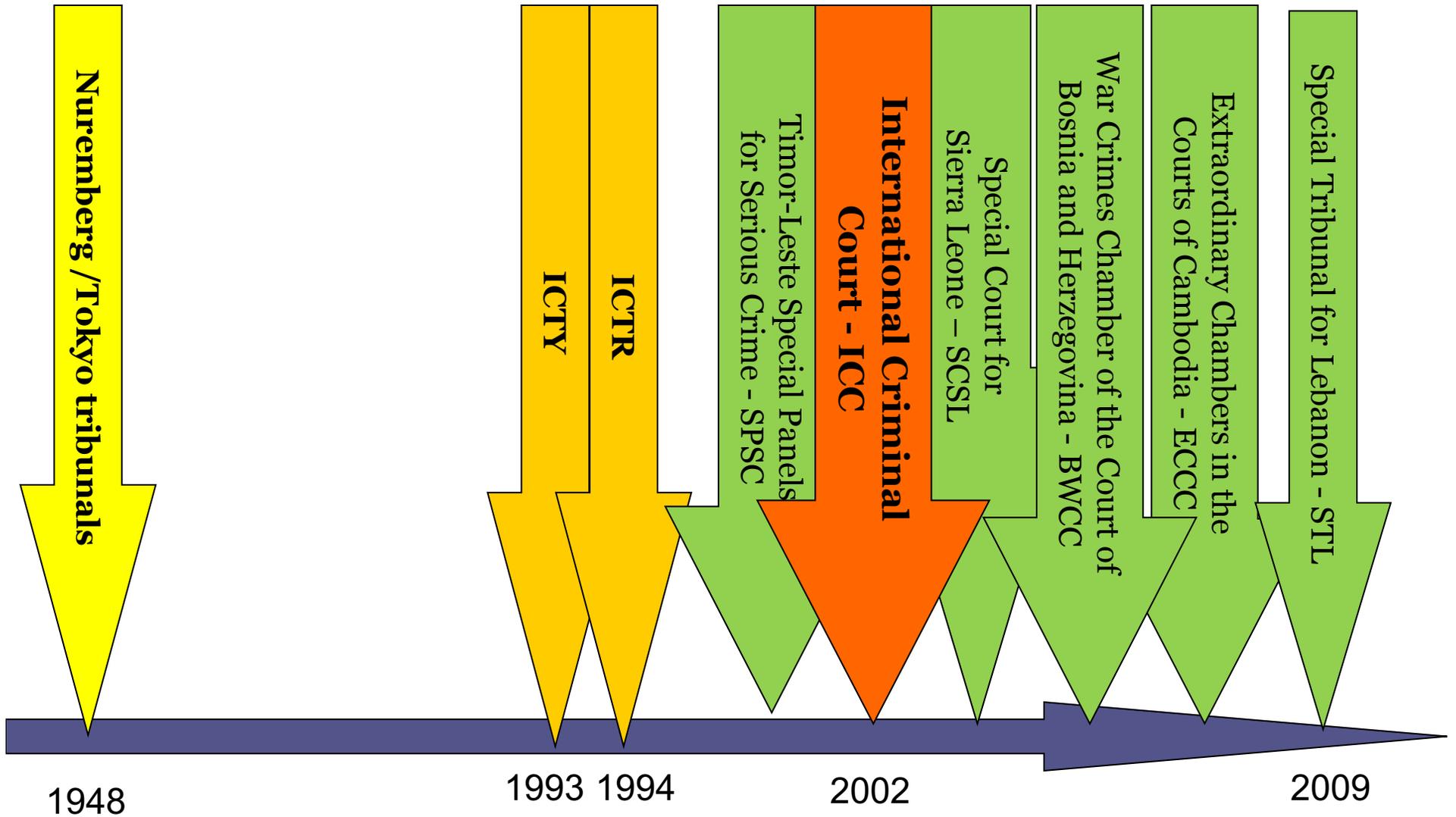




Right to justice - different mechanisms

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International mechanisms





Through its cornerstone principle of **complementarity**, the ICC Statute highlights the fact that **international prosecutions alone will never be sufficient to achieve justice and emphasizes the crucial role of national legal systems** in bringing an end to impunity.

The sad reality is that territorial states often fail to investigate and prosecute serious human rights abuses. The application of universal jurisdiction is therefore a crucial means of justice.

Exercise of jurisdiction of the ICC

- The Prosecutor can initiate an investigation into a situation on the basis of
 - a referral from any State Party,
 - a referral from the United Nations Security Council, or
 - proprio motu on the basis of information on crimes within the jurisdiction of the Court received from individuals or organisations (“communications”).



Principle of complementarity

- The ICC does not replace national criminal justice systems; rather, it complements them.
- It can investigate, prosecute and try individuals only if the State concerned does not, cannot or is unwilling genuinely to do so. This might occur where proceedings are unduly delayed or are intended to shield individuals from their criminal responsibility.
- States retain primary responsibility for trying the perpetrators of the most serious of crimes.



Right to justice - different mechanisms

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- Universal jurisdiction



Universal Jurisdiction

Universal jurisdiction establishes that certain crimes are so harmful to international interests that states are entitled—and even obliged—to bring proceedings against the perpetrator, regardless of the location of the crime or the nationality of the perpetrator or the victim.



Universal Jurisdiction

- National legislation may enable national authorities to investigate and prosecute any person suspected of those particular international crimes, regardless of where the crime was committed or the nationality of the accused and the victim and to award reparations to victims and their families.



Universal Jurisdiction

International crimes:

- genocide
- war crimes
- crimes against humanity
- (torture)
- (extrajudicial executions)
- (enforced disappearances)

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- Recognizes that impunity exists mainly when the national authorities of countries affected by the crimes fail to act.
 - Therefore it is important that the national criminal and civil justice systems of all countries can step in to prosecute the crimes on behalf of the international community and award reparations to victims.



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Belgium / Rwanda

- Criminal proceedings against two nuns in Belgium
- The two nuns had encouraged and collaborated with the Hutu mob that attacked Tutsis seeking shelter at the Sovu convent.
- They were found responsible for the massacre of some 7000 people seeking refuge at the convent.
- Convicted of War Crimes to 12 and 15 years in prison.



Universal Jurisdiction in practice

- Israel: Adolf Eichmann
- Spain: Augusto Pinochet
- Belgium: two Catholic nuns from Rwanda (Sister Maria Kisito and Sister Gertrude)
- Switzerland: Adolf Sperisen
- U.S.: e.g. Filartiga (Alien Tort Statute)



Universal Jurisdiction

- Since the end of the Second World War, more than 15 countries have exercised universal jurisdiction in investigations or prosecutions of persons suspected of crimes under international law, including Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Netherlands, Norway, Senegal, Spain, Switzerland, the United Kingdom and the United States of America.

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- Rwanda's Government welcomed the guilty verdict.
 - "It is highly positive that Belgium, a foreign country, pursues and punishes crimes against humanity committed in Rwanda," Rwandan Justice Minister Jean de Dieu Mucyo told the Reuters news agency.
 - "Other countries should follow this example."

“Universal jurisdiction” in the U.S.

- In the United States, the Alien Tort Statute and the Torture Victim Protection Act, offer victims of human rights violations from anywhere in the world a mechanism to seek justice in U.S. courts.
- The CJA files civil lawsuits against human rights abusers who reside in or visit the country.
- The U.S. Immigration and Customs Enforcement (ICE) places a high priority on combating illegal immigration, including targeting illegal aliens with criminal records through the Criminal Alien Program.



This week, the **Executive Office of Immigration Review** of the **Department of Justice** released an immigration judge ruling, which ordered that former **Salvadoran Defense Minister** José Guillermo García is **subject to removal** from the United States due to his assistance and participation...

...in the **torture** of civilians, his assistance and participation in the 1980 **extrajudicial killing** of the four American churchwomen, the 1981 Sheraton Hotel **killings** of two Americans and a Salvadoran land reform leader, the 1981 **massacre at El Mozote**, the 1980 massacre at the Sumpul River, the **assassination of the leaders** of FDR, the political opposition, among many other killings and massacres.



Right to justice - different mechanisms

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- After the Genocide, more than 100,000 people accused of genocide, war crimes, and related crimes against humanity
- By 2000, approximately 120,000 in Rwanda's prisons.
- 12/1996 - 12/2006, the courts managed to try about 10,000 suspects: at that rate it would take another 110 years to prosecute all the prisoners.
- Originally, the Gacaca settled village or familial disputes. They were constituted as village assemblies, presided by the ancients, where each member of the community could request to speak. The trials were meant to promote reconciliation and justice of the perpetrator in front of family and neighbors.
- The system emphasizes the importance of accord, condemns the guilty, and promotes collaboration between those deciding as well as among the spectators. In keeping with tradition, villagers elect nine representatives for each Gacaca court to be the judges known as "people of integrity."

Traditional mechanisms: Gacaca Courts

- Gacaca = “justice on the grass”
- Part of a system of community justice inspired by tradition and established in 2001 in Rwanda.
- Method of transitional justice, designed to promote healing and moving on from the crisis.
- Power to sentence criminals up to life imprisonment, but not the death penalty.





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Group work:

- Split in two equal groups
- Imagine you have to argue before the parliament of Colombia whether to request the ICC to investigate the crimes committed in Colombia or not (and handle the prosecution of those responsible of international crimes domestically).
- 5 minutes to prepare in the two groups:
 - prepare 5 arguments for / against such a request
- 10 minutes debate

Domestic tribunals

- Advantages?
 - Enables justice?
 - Encourages reconciliation and healing of the society where it happened
- Criticism?
 - Revenge? Winner's justice?
 - Who judges over who's crimes?
 - Failed state?
 - High costs for post conflict society?
 - Justice system? Judicial reform needed?

International tribunals

- **Advantages?**
 - Enables justice where state institutions are unable or unwilling
 - Neutrality? Independence? etc.
 - Same justice for all?
- **Criticism:**
 - Long proceedings / very expensive
 - residual issues after closing
 - too abstract for the common people
 - legacy: what is left after the Tribunal closes
 - Reconciliation? Conflict sensitivity?

Gacaca Courts

- Advantages?
 - Enables justice?
 - Encourages reconciliation and healing of the society where it happened
- Criticisms?
 - Revenge?
 - Fair trial guarantees?
 - Lack of legal representation?
 - Protection of witnesses?

Universal Jurisdiction

- Advantages?
 - Enables justice when there is no justice “at home”?
 - Creates a “shares value” of justice
- Criticisms?
 - Difficulty to prosecute and try cases which took place on foreign territory (access to witnesses, etc.)
 - Different due process standards
 - Lack of political will of the States
 - Political / economical pressure from other states against proceedings

Right to justice - interaction between the mechanisms

- Principle of complementarity
- Interaction
 - Political pressure by other states
 - Pinochet, El Salvador, etc.
 - Pressure of the ICC – good or bad?
 - Colombia
- “judicial dialogue”
 - Inter-American HR Court -> domestic tribunals
 - Barrios Altos and others -> Amnesty laws
 - La Cantuta -> indirect responsibility



Prosecuting heads of state: challenges

- Amnesty laws
- Political power
- Immunity of political actors
 - Immunity for certain acts (before, during, after)
 - Not for acts “outside the scope of the political mandate”
- No direct actions - “indirect author”
- No direct evidence implicating them
 - Theory of command responsibility

Questions and dilemma

- Peace versus Justice dilemma?
- Justice: the most urgent need?
- What kind of justice mechanisms?
National - international? Traditional – formal?
- What about the other rights: right to truth, right to reparation, guarantee of non recurrence / institutional reforms?
- Who pays for justice? Who sets the rules?
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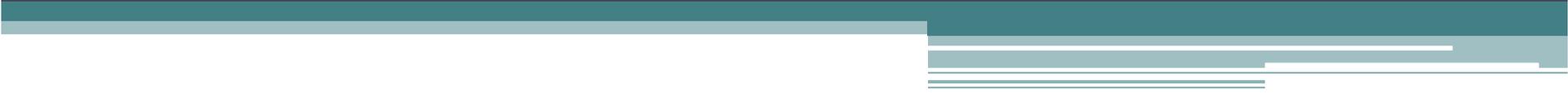


Not the “whether” but the “how” is important

- Timing and sequencing
- Cooperation with other mechanisms
 - e.g. with the TRC
- Balancing of expenses – one mechanism gets a lot more finances than the others
- Sustainability – e.g. justice sector reform?
- Bring justice closer to the people
- When is a “transition” over?

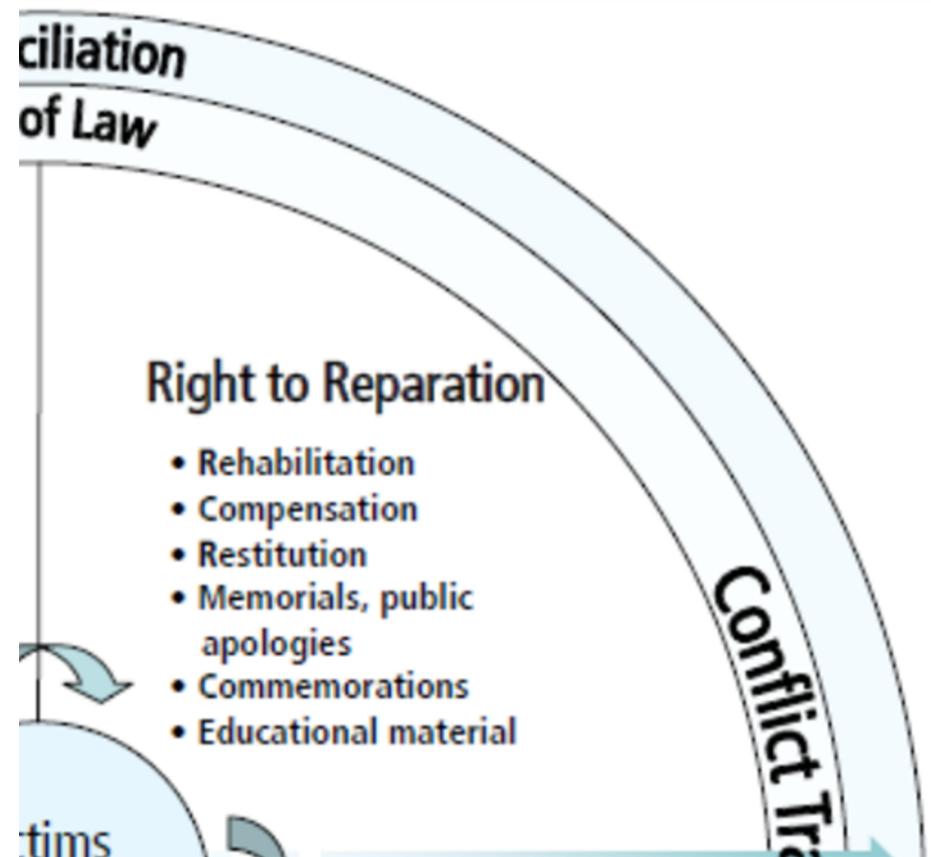


The right to reparations



The right to reparation

- Compensation of monetary damages.
- Rehabilitation of dignity of the victims.
- Public apologies.
- Monetary as well as symbolic reparations, e.g. jurisprudence of the IACtHR (naming streets, public places, create scholarships, etc.).



The right to reparations - International standards

In recent years the international community has promoted the reformulation of the scope of the reparations, moving towards an **approach of comprehensive reparation** of damages, which constitute a broader redress for the harm caused to the victims.

- *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.* Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005
<http://www2.ohchr.org/english/law/remedy.htm>

Redress for human rights violations

- International HR Law recognizes the existence of two types of generic damages: Pecuniary and Non-pecuniary
- Pecuniary Damage is divided into:
 - Actual loss suffered/costs incurred
 - Loss of earnings
 - Financial loss to family
- Non-pecuniary Damages:
 - Moral damage
 - Psychological damage
 - Physical damage
 - Damages to the life plan
 - Collective damages



Redress for human rights violations

- Obligation to Investigate
- Restitution
- Compensation
- Rehabilitation
- Satisfaction
 - Guarantees of non-repetition
 - Duty to adjust domestic law
 - Symbolic measures
- Costs and expenses



Some of the Challenges faced by reparation programs

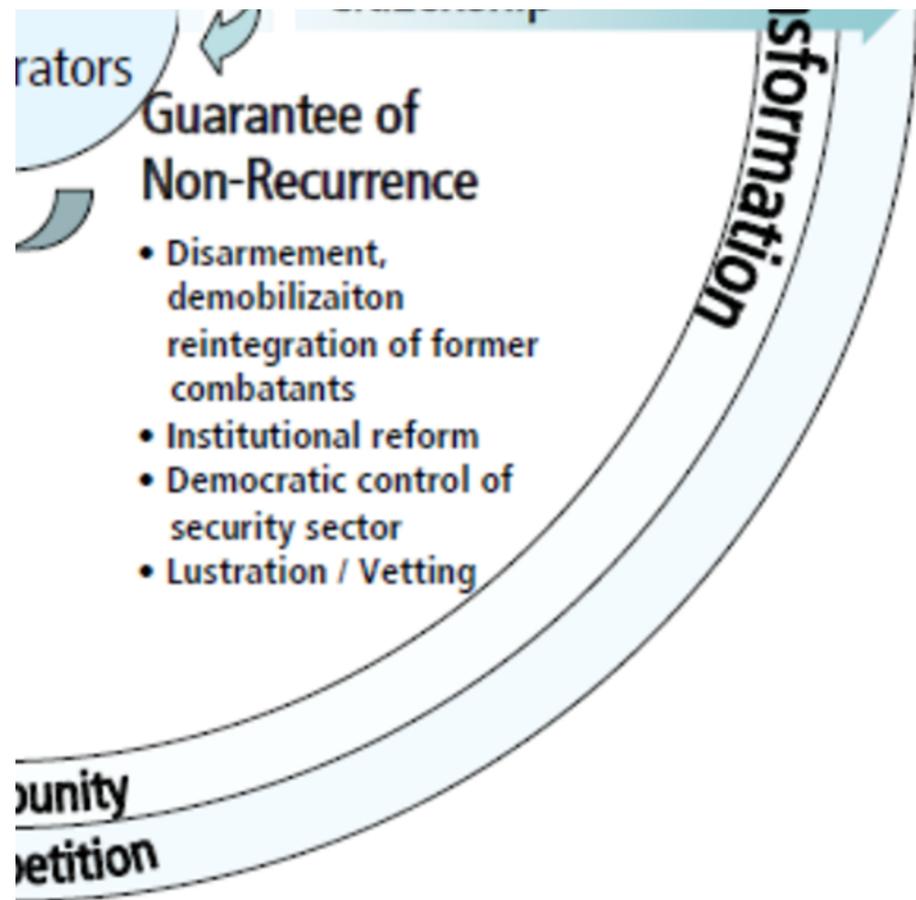
- Achieving “completeness” – who are the victims?
- Which violations should be subject to reparations?
- What kinds of benefits should reparations programs distribute? Development vs. Reparation?
- Defining the goals of reparations, and how this affects the level and the modalities of compensation
- Financing reparations
- Interpreting reparations benefits. Linking reparations and other justice measures
- Making a reparations program gender-sensitive

Guarantees of non-repetition: Institutional reforms



Guarantees of Non-Recurrence

- Duty of the state to prevent repetition
- Disarmament, demobilization, reintegration (DDR)
- Institutional reforms, strengthening of democratic institutions, education etc.
- “Nunca más!”



Disarmament, Demobilization, Reintegration - DDR

- **Disarmament** is the collection, documentation, control and disposal of small arms, ammunition, explosives and light and heavy weapons from combatants and often from the civilian population.
- **Demobilization** is the formal and controlled discharge of active combatants from armed forces and groups, including a phase of “reinsertion” which provides short-term assistance to ex-combatants.
- **Reintegration** is the process by which ex-combatants acquire civilian status and gain sustainable employment and income. It is a political, social and economic process with an open time-frame, primarily taking place in communities at the local level.

Security sector reform(s) - SSR

- Civilian control of military and security forces, as well as of intelligence agencies must be ensured and, where necessary, established or restored.
- Vetting processes aiming to exclude individuals from public service whose previous conduct is incompatible with their holding a public position, with a view to re-establishing civic trust and re-legitimize public institutions. Their removal should comply with requirements of due process of law and principles of non-discrimination.
- Experiences: Argentina, Bosnia and Herzegovina, The Czech Republic, East Germany, El Salvador, Greece, Hungary, Poland, South Africa, Iraq...



DDR and SSR - selected challenges

- Institutional Context
- Due process
- Reinstatement
- Exemptions
- Patterns of Membership and Dismissals
- Information management
- Focus on Senior Bureaucrats Vs. Impact on Capacity



Other institutional reforms

- Democratic institutions, executive, legislative and judicial powers
 - rule of law
 - independent judiciary
- The aim is that citizens (re-) gain civic trust in (democratic) state institutions, make use of them, strengthen them and abstain from arbitrary vengeance and undemocratic means to seek justice.





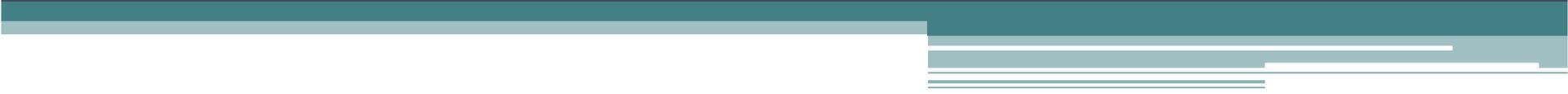
Other institutional reforms

- Constitutional reform
- Electoral reform
- Media reform
- Educational reform

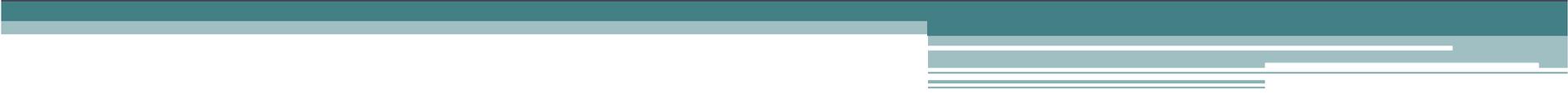
- Economical reform
- Power sharing
- Land reform

Exercise

Negotiating peace in Colombia

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Final thoughts



Questions and dilemma

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