

Syllabus for Course

COURSE TITLE: Transitional Justice in the 21st Century

Instructor: David Tolbert

Title Department: SPP

Spring term

AY year 2019-20

Course level (MA)

No. of Credits 2 (No. of **ECTS Credits**): 4

Office hours: upon agreement

Course Description:

This course provides an introduction to the concept and development of transitional justice ('TJ'), including the principal justice mechanisms developed and implemented by some countries following massive human rights abuses and/or armed conflict. These processes include a number of special measures, notably truth commissions, specialized criminal courts (often with the deployment of international judges, prosecutors and staff), reparations processes and reforms (e.g. vetting out human rights violators from law enforcement and the military, the adoption of constitutional protections). Broadly speaking, these processes are based on principles of accountability and redress and ultimately aim to assist rebuilding trust in institutions and between citizens and the state. TJ is grounded in modern human rights law.

This course offers an overview of the actors, organizations, countries and institutions involved in the field of transitional justice, particularly focusing on policy developments in the United Nations and

other intergovernmental (e.g., EU) institutions. It will look at some of the most recent trends in the TJ field and the criticisms that are made of transitional justice processes, both in practice and on a theoretical basis. The course is intended to provide a platform on which further, more specialized, studies can be carried out, particularly in the area of policy.

Learning Outcomes:

After the successful completion of the course, the students should be able to:

- Recognize the main actors and policy challenges in the TJ field;
- Analyze and explain the dynamics shaping TJ both on the ground in countries and in policy circles and related contexts;
- Understand and critically assess TJ policies and implementation of TJ processes;
- Develop, or participate in, work aiming at developing alternative solutions to specific justice issues and problems;
- Critically assess arguments/material that put forward various propositions relating to TJ and its development;
- Assess the role TJ might or might not play in the current global political climate.

Assessment:

The students will be assessed according to the combination of the following criteria:

- *Class participation and pre-session assignments: 40%*

Students will be expected to fulfil pre-session assignments as listed in the course schedule. The pre-session assignments can include the requirement to read the mandatory readings and be ready to discuss them during the sessions, identify specific materials or develop short

presentations on a topic relevant for the session, and also review, comment, or participate in online discussion posted to the course's e-learning site.

- *Policy brief and literature review: 20%*

Each student will need to prepare and present a short policy brief, including a related literature review. This could be about an organization/institution, a specific policy area or situation, an emerging trend. The brief should include a review of relevant scholarly literature based on 5-7 research articles or studies. Students can propose their own topics in discussion with the instructor. The policy briefs are expected to be about 2000 words long and need to be handed in before session 6. Each student will have about 20 minutes during classes 6 and 7 to present their work to the class.

- *Final project: 40%*

Students, either individually or in a group, will choose a policy topic which will be presented orally during classes 10 and 11 and as a final written report (3500-4000 words) that is to be handed in after the course ends (specific date will be defined during class). It will involve approaching a past or present situation regarding a country going through a transition and must include elements of a policy proposal. That is, it should contain a clear problem(s) definition, based on secondary (i.e. literature) and/or primary data drawn from sources or interviews for example. Based on the problem(s) definition several policy solutions formulated and assessed according to different criteria. After identifying the best policy solution, the paper should elaborate on the mechanisms/instruments by which it could be implemented.

COURSE SCHEDULE

6 April, Monday Class 1-2

14 April, Tuesday Class 3-4

20 April, Monday Class 5-6

27 April, Monday Class 7-8

4 May, Monday Class 9-10

11 May, Monday Class 11-12

Classes and Readings

6 April 2020, Class 1 (9:00 – 10:40)

Topic: What is Transitional Justice?

This session will focus on what is meant by ‘transitional justice’ both from a normative perspective as defined by the United Nations (UN) and other policy makers but also how transitional justice became a ‘field’ and how it is seen by victims, experts and other groups.

Readings (required):

‘Transitional Justice in the 21st Century’, in the Oxford Handbook on Atrocity Crimes (OUP, forthcoming, 2020) (to be provided), pp. 1 – 20 (of manuscript).

‘Report of the UN Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies’, available at <https://www.un.org/ruleoflaw/files/2004%20report.pdf>

UN Secretary-General's Guidance Note on United Nations Approach to Transitional Justice, available at https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf

'What is Transitional Justice' (ICTJ)?
<https://www.ictj.org/about/transitional-justice>

Readings (optional):

Christine Bell, 'Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'', 3 *International Journal of Transitional Justice*, 5 – 27 (2009), available at <https://academic.oup.com/ijtj/article/3/1/5/2356979>

6 April 2020, Class 2 (15:30 – 17:10)

Topic: The role of victims and affected communities/participation in Transitional Justice processes

This session will address the role of victims in transitional justice processes, in terms of how they engage in these processes, how their voices are heard or not and how/whether these processes meet the needs of victims. What role should victims and affected communities play? Why do so many activists and commentators talk about a 'victim centered approach'? Victims and civil society are not co-extensive, what are the differences and how do these differences play out in practice? In a number of cases, courts and other TJ measures have created Outreach programs that try to provide information, dispel propaganda and engage with victims and the population as a whole. To what end/to what effect?

Readings (required):

Transitional Justice in the 21st Century, pp. 29 – 32.

Statement by UN High Commissioner for Human Rights:
Consultations with Victims/Affected Communities required by
international law, available at:

https://www.un.org/ruleoflaw/files/Tool_National_Consultations_final_web.pdf

Refik Hodzic, 'Changing the Narrative: The Role of
Communications in Transitional Justice' (Institute for Integrated
Transitions) available at: <https://www.ifit-transitions.org/resources/publications/major-publications-briefings/changing-the-narrative-the-role-of-communications-in-transitional-justice>

'Making an Impact: Guidelines on Designing and Implementing
Outreach Programs for Transitional Justice', available at:
<https://www.ictj.org/sites/default/files/ICTJ-Global-Making-Impact-2011-English.pdf>

14 April 2020 (**Tuesday**), Class 3 (9:00 – 10:40)

Topic: Gender, marginalized groups; participation

This session will examine how transitional justice processes address violations against, and marginalization of, women and others based on gender. In addition, we will look at other marginalized groups and how transitional justice processes have or have not addressed the violations and marginalization that they suffer.

Readings (required):

Transitional Justice in the 21st Century, pp. 37 – 40;

The Disappeared and Invisible: Revealing the Enduring Impact of Enforced Disappearance on Women:

<https://www.ictj.org/publication/disappeared-and-invisible-women-disappearances>

Elise Ketelaars, Gendering Tunisia's Transition: Transformative Gender Justice Outcomes in Times of Transitional Justice Turmoil?, *International Journal of Transitional Justice*, Volume 12, Issue 3, November 2018, Pages 407–426.

Fanneron E., Sahle E.N., Dahlgren K. (2019) 'Transitional Justice, Gender-Based Violence, and Women's Rights', in Sahle E. (eds.) *Human Rights in Africa* (Palgrave Macmillan, New York (2019).

ICTJ, 'When No One Calls it Rape',

<https://www.ictj.org/publication/sexual-violence-men-boys>

Readings (optional):

Fanneron E., Sahle E.N., Dahlgren K. (2019) 'Transitional Justice, Gender-Based Violence, and Women's Rights', in Sahle E. (eds.) *Human Rights in Africa* (Palgrave Macmillan, New York (2019).

14 April 2020 (**Tuesday**), Class 4 (15:30 – 17:10)

Topic: Criminal Justice and Transitional Justice; amnesties

While criminal justice is widely viewed as an essential component of transitional justice by most practitioners and victims alike, it is clear that criminal justice processes have limits in contexts where there are widespread violations of humanitarian and human rights law. We will

examine the role of the International Criminal Court ('ICC'), the principle of 'complementarity' and other international and 'hybrid' courts.

Others argue that criminal justice processes can undermine peace efforts, as leaders with 'blood on their hands' are unwilling to engage in peace talks due to concerns about being prosecuted. Thus, they argue for amnesty in some situations. There have also been a variety of amnesty provisions in peace agreements, most notably in the peace agreement reached with the FARC guerrillas in Colombia (which complied with international law) as well as much broader amnesties, e.g., Uganda, Northern Ireland that arguably would not pass muster under current international law. We will look at the interplay of amnesties and accountability in the context of serious crimes.

Readings (required):

Transitional Justice in the 21st Century, pp. 20 – 29;

Overview of the ICC: available at, <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf>

T. Piccone, 'Peace with Justice' (Brookings Institute), https://www.brookings.edu/wp-content/uploads/2019/06/FP_20190708_colombia.pdf

P. Seils/ICTJ, The Handbook on Complementarity, available at https://www.ictj.org/sites/default/files/ICTJ_Handbook_ICC_Complementarity_2016.pdf

ICTJ Criminal Justice, available at: <https://www.ictj.org/our-work/transitional-justice-issues/criminal-justice>

‘Rethinking Peace and Justice’: <https://www.ifit-transitions.org/resources/publications/major-publications-briefings/rethinking-peace-and-justice> (Institute for Integrated Transitions).

The Belfast Guidelines on Amnesty and Accountability:
[https://peacemaker.un.org/sites/peacemaker.un.org/files/Belfast Guidelines TJI2014.pdf](https://peacemaker.un.org/sites/peacemaker.un.org/files/Belfast%20Guidelines%20TJI2014.pdf)

20 April 2020, Class 5

Topic: What is ‘Truth’ in Transitional Justice?’

One of the key developments in the transitional justice field is the role of ‘truth’ as a TJ measure, which is, e.g., knowing what happened with respect to the violations, who is responsible, what are the root causes and structures that lead to the abuses whether in repression or conflict. This has led to the emergence of truth commissions, which are non-judicial mechanisms that hear testimony, examine human rights violations and issue reports on the violations as well as the root causes of those violations. In some cases, these truth commissions also make referrals to criminal courts (e.g., Tunisia) and/or (more often) award reparations, order reforms and take others steps to address the violations. We will discuss the emergence of truth-telling processes, the strengths and weaknesses of those processes and the impact that these processes have had on addressing the root causes of the violations/prevention of future conflict and related issues.

Readings (required):

P. Haynor, Unspeakable Truths, pp. 1 – 25; 75 – 209; available at: https://www.mcgill.ca/isid/files/isid/priscilla_b._hayner_unspeakable_truths_transitibookzz.org_.pdf (2nd ed.).

Eduardo Gonzales/ICTJ, Drafting a Truth Commission Mandate, available at: https://www.ictj.org/sites/default/files/ICTJ-Report-DraftingMandate-Truth-Commission-2013_0.pdf

Susan Kemp, 'The Inter-relationship between the Guatemalan Commission for Historical Clarification and the Search for Justice in the National Courts', in: Schabas W., Darcy S. (eds.) Truth Commissions And Courts. (Springer, Dordrecht).

20 April 2020, Class 6

First Round: Presentations of Policy Briefs (no more than 20 minutes per person, see p. 3 above)

Topic: 'Reparations' (and Memorialization)

The right to reparations and a remedy for violations of human rights is the TJ measure that, arguably, has the most direct impact of victims, as reparations provide direct recompense for the injuries that they have suffered. Thus, the UN has adopted principles that establish a right to a remedy and reparations. Some TJ measures, such as the Extraordinary Chambers in the Courts of Cambodia ('ECCC'), have ordered memorials for victims as a reparations measure. While memorialization is, conceptually, a distinct aspect of TJ and a form of acknowledgment, we will take up memorialization in this class as well.

Reading (required):

UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law assert, available at: <https://www.ictj.org/sites/default/files/ICTJ-Global-Reparations-Practice-2007-English.pdf>

Lisa Magarrell/ ICTJ, 'Reparations in Theory and Practice', available at <https://www.ictj.org/sites/default/files/ICTJ-Global-Reparations-Practice-2007-English.pdf>

Ruben Carranza, 'The Right to Remedy in Situations of Poverty', available at <https://www.ictj.org/sites/default/files/ICTJ-Global-Right-Reparation-2009-English.pdf>

Pablo De Greiff (ed.), The Handbook on Reparations, (OUP, 2006), Introduction, chapters 1 and 12 (OUP, 2006).

Brett, Bickford, Sevenko and Rios, Memorialization and State Action: State Policy and Civic Action, https://www.ictj.org/sites/default/files/ICTJ-Global-Memorialization-Democracy-2007-English_0.pdf

Readings (optional):

Other chapters in De Greiff above, e.g., chapters 12, 14, 18, 19.

27 April 2020, Class 7

Second Round: Presentations of Policy Briefs (no more than 20 minutes per person, see p. 3 above)

Topic: Guarantees of non-recurrence

In addition to the other principal measures of transitional justice, another category of TJ covers several important processes, often referred to as guarantees of non-recurrence. These processes are measures or steps taken to ensure the protection of human rights for the future, i.e., to prevent reoccurrence of violations of human rights norms. These measures will depend on the context of the country but often

involve the removal of perpetrators of human rights abuses from the security forces through vetting processes, reforms or restructuring of the military and police and constitutional change. Reforms are also directed at the judiciary to increase independence and effectiveness. Constitutional reforms also form part of the 'tool kit'. However, the current approach seems a very narrow view of these guarantees and arguably there is much more that might be done to buttress prevention in a more coherent and substantive way (see Roht-Arriaza below).

One avenue that we will explore is the way other truth commissions make recommendations for reform/guarantees of non-recurrence.

Reading (required):

DCAF, Alexander Mayer-Rieckh/Howard Varney, Truth Commission Recommendations on Institutional Reforms: An Overview: available at

<https://www.dcaf.ch/sites/default/files/publications/documents/International%20study%20%28ENG%29%20-%20Mapping%20of%20TRC%20recommendations%20-%20publication%20version.pdf>,

Naomi Roht-Arriaza, 'Measures of Non-Repetition in Transitional Justice: The Missing Link?', available at

<https://poseidon01.ssrn.com/delivery.php?ID=681105073027020001018087100123098029122047004088035085027090096031068127102118121077126045101012021097047093071102120127120100114008094039021095077020001100124088031060078024020124007101113000075123106074031086115079066095102029065096089095109080099115&EXT=pdf>

Payne et al., Conflict Prevention and Guarantees of Non-Recurrence, available at: <https://www.legal-tools.org/doc/53cb7e/pdf>

27 April 2010, Class 8

Corruption and Economic Crimes

Economic crimes and corruption have been on the margins of transitional justice processes despite the fact that corruption and economic grievances have played a significant role in fueling conflict. This is in part due to the difficulties in addressing economic crimes, e.g., pillage, and the entrenched interests that push back against the prosecution of those crimes or seek to hide the gains made through corruption and economic plunder. The question to be explored is how these efforts might be strengthened and what are the forces that are preventing pursuit of the actors committing those crimes?

Reading (required):

K Andrieu, 'Should Anticorruption Be Part of the Transitional Justice Agenda?' 11 Journal of Human Rights 537 – 557 (2012).

James Stewart, 'Corporate War Crimes', available at:

<https://www.justiceinitiative.org/uploads/9a7c2390-4d10-4f0b-9f0c-f62d578c7d9b/pillage-manual-2nd-edition-2011.pdf> (pp. 1 – 39).

Ruben Carranza, 'Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?', available at, <https://www.ictj.org/sites/default/files/IJTJ-Global-Justice-Corruption-2008-English.pdf>

Agatha Ndonga and Ruben Carranza, Can Building Bridges Break the Cycles of Corruption and Political Violence in Kenya? Available at, https://www.ictj.org/sites/default/files/ICTJ_Briefing_Kenya_Cycle%20of%20Corruption%20Brief-Web.pdf

4 May 2020, Class 9

Topic: Peace and Justice

One of the major points of dispute in the transitional justice field as well more generally in the negotiating of peace agreements is the question of whether peace and justice can coexist in these negotiations. With the advent of the ICC and other international war crimes tribunals, there is tension between accountability and making a peace agreement work, as the leadership of the warring parties are not likely to agree to a peace agreement that leaves them open for prosecution. There are various strategies to deal with this conflict, but the rise of the ICC and international criminal justice has caused a number of issues. However, in some situations like Colombia innovative approaches have succeeded to 'square the circle'.

Readings (required):

P. Hayner, *The Peacemaker's Paradox*, pp. 1 – 85

Challenging the Conventional: Can Truth Commission Strengthen Peace Processes? Available at:

https://www.ictj.org/sites/default/files/ICTJ_TruthCommPeace_English_2016.pdf

Tolbert and Wierda, 'Stocktaking: Peace and Justice, available at <https://www.ictj.org/sites/default/files/ICTJ-RSRC-Global-Peace-Briefing-2010-English.pdf>

Readings (optional):

P. Hayner, *The Peacemaker's Paradox*, pp. 85 - 216

D. Tolbert/Kofi Annan Foundation, *Challenging the Conventional: Can Criminal Justice Strengthen Peace Processes?* (if available)

4 May 2019, Class 10

Presentation of Final Projects

11 May 2019, Class 11

Presentation of Final Projects

11 May 2019, Class 12

Whither Transitional Justice?

What role will the 'field' of transitional justice play in the future, particularly with rising reaction and populism? Has TJ proven to be effective? If so, where and why? While the Arab Spring countries initially embraced TJ, ultimately it played a very limited role except in the case of Tunisia, which some might argue is related more to cultural factors in the country than to TJ processes. Colombia has embraced TJ as perhaps no other country, and there does seem to have taken root. However, political backlash threatens the process/progress. South Africa was seen a breakthrough at one time but much less so now.

Moreover, interestingly, there are increasing call for TJ measures to be used in other settings, such as racial injustice in the United States or in other developed countries.

How do we judge 'progress', what does TJ look in the future? What are the measure sticks or modes of analysis to judge whether TJ is effective and when and how? Where does TJ fit into dealing with the past and is it relevant to the future? And if so, how will it be relevant.

Readings (required):

Transitional Justice in the 21st Century, pp. 29 – 45

Paige Arthur, 'Notes from the Field: Global Indicators for Transitional Justice and Challenges in Measurement for Policy Actors', <https://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1080&context=tjreview>

Ta-Nehisi Coates, 'The Case for Reparations', The Atlantic (June, 2014) available at:

<https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>

Pablo De Greiff, 'The Future of the Past: Reflections on the Current State and Prospects of Transitional Justice',

https://www.youtube.com/watch?v=JOccBWg_plc