## Transitional Justice in Ukraine

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Elements of Transitional Justice

● Transitional Justice and Accountability
  o Transitional justice refers to the set of judicial and non-judicial measures that can be used in society to redress and remedy a legacy of human rights abuses.
  o At its core, transitional justice aims to promote reform and reconciliation, prevent future conflicts, strengthen democracy, and establish the rule of law.
  o Transitional justice mechanisms include 1) prosecutions, 2) truth-seeking mechanism, 3) institutional reform, 4) reparations, and 5) memorialization.
  o Community engagement is a crucial aspect of a successful transitional justice mechanism.

● Accountability Principles
  o Accountability allows people to feel as though they have been able to address wrongs, move forward from the past, and heal.
  o Accountability needs to be legitimate and includes documenting the truth.
  o Society needs to document and find a way to talk about their historical experiences. For instance, by creating memorials and storytelling.

● Transitional Justice Advocacy
  o Advocacy is a process in which people organize around a certain issue in a strategic manner to influence decision-makers for a particular purpose.
  o Advocacy types include 1) community-level advocacy, 2) political level advocacy, 3) vertical advocacy, and 2) horizontal advocacy.
  o Pillars of a successful advocacy campaign include:
    ▪ Identifying the issue
    ▪ Conducting research
    ▪ Raising awareness
    ▪ Carrying out various actions and activities
    ▪ Assessing the process and results
  o Advocacy letters are letters written by individuals or organizations that have the intention of advancing particular advocacy goals.
Shadow reports are reports prepared by civil society organizations to supplement the periodic government reports that are submitted by States Parties to the United Nations, to Treaty Bodies, and to Human Rights Commissions and Committees.

Core International Crimes

- Core International Crimes
  - There are four core international crimes – war crimes, genocide, the crime of aggression, and crimes against humanity.
  - When a crime is a core international crime, it is legitimately within the jurisdiction of an international court or a tribunal.
  - An international crime can be subject to universal jurisdiction.
  - States can adjudicate core crimes even when the crime did not have a connection to that state.
  - States may have an obligation to prosecute or extradite an individual accused of having committed one of the core crimes.
  - Core crimes may be subject to the Responsibility to Protect doctrine.
  - Some of the typical defenses that are characteristic of crimes, would not be applicable to core crimes.

- Crimes Against Humanity
  - Crimes against humanity are a number of enumerated acts committed as part of a widespread or systematic attack against the civilian population.
  - The first time crimes against humanity became a chargeable crime was in Nuremberg Tribunal after World War II.
  - Crimes against humanity do not need to have a war nexus, hence they can occur without an armed conflict.
  - At the core of the definition of crimes against humanity is its gravity – they need to be committed in a widespread or systematic manner.
  - Prosecutors need to prove the elements of the constituent acts and elements of contextual circumstances.
  - Crimes against humanity have to be part of an attack, meaning that they cannot be isolated incidents, and be committed knowingly.
o Crimes against humanity, according to the Rome Statute, need to be committed pursuant to a state or organizational policy. Nevertheless, the requirement is subject to international controversy.

o Article 7 of the Rome Statute holds that a crime against humanity includes acts of murder, extermination, enslavement, forcible transfer of population, imprisonment, torture, rape or sexual violence, persecution on racial, national, political, ethnic, religious, gender-based, or cultural grounds, enforced disappearance of persons, and the crime of apartheid.

● Genocide

o Genocide is one of a number of acts committed with the intent to destroy a particular ethnic group or nation in whole or in part.

o Genocide is often referred to as the crime of crimes.

o Genocide is specifically prohibited and defined by the Convention on the Prevention and Punishment of the Crime of Genocide.

o Genocide is comprised of a contextual element and constituent acts. Constituent acts are killing members of a group, causing serious bodily harm, inflicting conditions on the group that is intended to lead to its destruction, imposing measures that are intended to prevent birth and forcible transfer of children to another group.

o The essence of genocide is the intent to destroy a group in whole or in part.

● War crimes

o For there to be a war crime, there first needs to be a war.

o War crimes are regulated by the Hague Conventions, Geneva Conventions, and customary international law.

o War crimes are violations of international humanitarian law.

o War crimes can be prosecuted in domestic or international courts.

o War crimes are, for instance, the violent killing of civilians, combatants not engaged in hostilities, attacking civilian objects, using children for conducting hostilities, and attacking peacekeepers.

● Crime of aggression

o “Crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of
aggression which, by its character, gravity, and scale, constitutes a manifest violation of the Charter of the United Nations.

- The Charters of the International Military Tribunal at Nuremberg and the Tokyo Tribunals first recognized the crime of aggression as an international crime that warranted punishment.
- The crime of aggression in the Rome Statute is a leadership crime; it focuses on the individuals (not States) who are most responsible for planning, preparing, initiating, or executing an act of aggression.
- While the crime of aggression is intended to help prosecutors try those who have contributed to the violation of the prohibition of the use of force, there are few early instances where perpetrators of this crime have been brought before a court.

Judicial Processes

- **International Courts and Tribunals**
  - Some international courts are non-criminal and serve for dispute resolution between states, such as the International Court of Justice.
  - Some international courts are subject area-specific, such as the International Tribunal for the Law of the Sea.
  - Since the early 1990s, there has been a resurgence of international criminal tribunals. For instance:
    - International Criminal Tribunal for the former Yugoslavia (ICTY)
    - International Criminal Tribunal for Rwanda (ICTR)
    - Special Court for Sierra Leone
    - Extraordinary Chambers in the Courts of Cambodia
    - Special Tribunal for Lebanon
  - Some of these courts are international, whereas some are hybrid.
  - The only permanent international criminal tribunal is the International Criminal Court.

- **Domestic Courts**
  - The good aspect about domestic courts is that they are done with the local population in mind. There is a sense that the government is protecting the population.
Domestic courts allow the government to take back ownership over the healing process and leading its people for the future.

When domestic tribunals are done correctly, international experts can bring their knowledge into the country and help train local prosecutors, police, and judges.

Domestic courts allow the process to have more legitimacy and transparency.

It is generally better to have justice felt locally.

Domestic tribunals are also better than ad hoc tribunals, for instance, because they are then in the national language.

Domestic tribunals should be looked at as a first resort.

**Ad Hoc Tribunals**

To establish an ad hoc tribunal, an enormous amount of consent is needed among the United Nations on all the aspects of its establishment.

Ad hoc tribunals are often extremely expensive and lengthy.

The legacy of ad hoc tribunals is the tremendous amount of jurisprudence for prosecuting criminals.

The issue of ad hoc tribunals was that they were not local and hence were disconnected from the local population.

**Hybrid Tribunals**

Hybrid tribunals generally have a lot of visiting lawyers, judges, prosecutors, and police officers that do a lot of training and participate in the cases as equal to domestic actors.

Examples of hybrid tribunals are the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia.

Hybrid tribunals can help facilitate international legitimacy for the tribunal and bring in additional expertise.

A challenge of hybrid tribunals is that they need a lot of support and buy-in from other states, including by attracting funding and international expertise. This means that their establishment may take longer than that of domestic tribunals.

**International Criminal Court**

The International Criminal Court was established in 2002 with the coming into force of the Rome Statute.
The Rome Statute is the foundational document of the ICC.

The Court has four primary organs: 1) The Presidency; 2) The Judicial Divisions; 3) The Office of the Prosecutor; 4) The Registry.

The ICC has jurisdiction over genocide, crimes against humanity, war crimes, and the crime of aggression.

The ICC may obtain jurisdiction: if States ratify the Rome Statute; if States issue a declaration accepting the jurisdiction of the Court; or through the referral from the UN Security Council.

Proceedings at the ICC may be triggered by a State Party referral; by a UN Security Council referral; or proprio motu.

The ICC has to rely entirely on the international community to carry out investigations and arrest suspects.

- **Universal jurisdiction**
  - Jurisdiction can be territorial, extraterritorial (nationality, passive personality, protective principle, universal).
  - Universal jurisdiction is the ability to prosecute crimes, which are of international concern.
  - Crimes that can be prosecuted under universal jurisdiction include piracy, slavery, slave trade, torture, genocide, crimes against humanity, and war crimes.
  - The most famous universal jurisdiction case is the Eichmann case.
  - Universal jurisdiction prosecutions are disfavored due to lack of a link to the crime and due to their costliness and logistical difficulties.

- **Women in International Courts**
  - Women are significantly underrepresented as judges, prosecutors, defense counsel, and other professionals at international criminal tribunals.
  - Lack of female representation undermines the tribunal’s actual as well as its perceived legitimacy.
  - All international tribunals and institutions should have gender parity in their statutes and bi-laws and gender considerations should be present during judicial and non-judicial selection and nomination procedures.

Non-Judicial Processes
An Overview of Documentation Tools

- There is no technology tool that is the right tool for all documenters. There is a range of tools and some may suit your workflow and organization’s goals more than others.
- Before selecting a technology tool, it is important to consider what and why you are documenting.
- Witness testimony, images, and videos, open-source information are different types of information that documenters collect.
- Before selecting a tool, it is important to understand and map out fully how the organization conducts or will conduct documentation.
- Similar considerations to have are data cycles, security context, and technological capacity of documenters.
- Common workflow pressure points include:
  - Understanding of evidentiary standards
  - Diversity of skills and backgrounds
  - Different data formats
  - Ensuring the safety of people
  - Technological capacity
  - Unifying workflows of constituent organizations of a network
- Among the documentation tools available for human rights documenters are:
  - EyeWitness to Atrocities
  - Tella
  - ProofMode
  - Save
  - KoBo Toolbox
  - Uwazi

Truth and Reconciliation Commissions

- Two main mechanisms for truth-seeking – truth and reconciliation commissions and commissions of inquiry and fact-finding commissions.
- Truth-seeking is the process of investigating past abuses to determine what happened, why it happened, and how to prevent future abuses.
Truth-seeking mechanisms help create a historical record to prevent denial of past abuses and help victims and communities come to terms with the past by acknowledging that violations occurred.

Truth and reconciliation commissions are non-judicial or quasi-judicial bodies that investigate past abuses to establish the truth.

Truth commissions generally publish a final report with policy recommendations.

Truth and reconciliation commissions are often tasked with examining amnesty applications.

Amnesties for atrocity crimes and international crimes are illegal under international law. Amnesties questions may arise with respect to smaller violations.


Commissions of inquiry and fact-finding missions investigate past abuses to discover the truth and generally focus on a particular event, category of crimes, or time period. Examples of fact-finding missions include those in Libya and Venezuela. Commissions of inquiry include those in Syria and Burundi.

● Documentation as a Tool for Transitional Justice

The central objective of transitional justice is for societies affected by serious abuses of rights to find ways to move forward from past trauma in a manner that is just, peaceful, and healing.

A successful transitional justice process is tailored to the needs of the local population and does not follow a prescribed agenda. To tailor the process appropriately, it is important to consult with victims, civil society, affected communities, and the public as a whole to identify which mechanisms are best suited for the specific context.

Some relevant processes within transitional justice that may involve documentation include:

- (1) Prosecuting human rights abuses for the accountability of perpetrators. Prosecutions involve criminal investigations and judicial proceedings against alleged perpetrators of grave
violations of international human rights law, international humanitarian law, and international criminal law.

- (2) Conducting truth-seeking and reconciliation processes. Truth-seeking is the process of investigating past abuses to determine what happened, why it happened, and the consequences of what happened for the affected community.

- (3) Measuring and delivering reparations. Reparations provide redress for past abuses and attempt to establish a remedy proportional to the gravity of the abuses that a victim or community suffered.

- (4) Facilitating institutional reform. Institutional reform is the process of transforming institutions, such as the police, judiciary, military, and intelligence agencies, into accountable, effective, and fair public service institutions that promote peace and the rule of law.

- (5) Conducting memorialization. Memorialization is a process of honoring the victims of human rights abuses by establishing a permanent record of past violations.

- Lustration
  
  - “Lustration” is a policy whereby post-conflict or post-authoritarian governments can remove personnel implicated in activities, such as human rights violations or abuses, violations of IHL, or related violations, from public institutions as a way to build confidence in the public sector.
  
  - “Vetting” is the process by which a lustration policy is put into effect.
  
  - Legal bases for lustration may be peace agreements, separate legislation on lustration, or a combination of drafting general principles in the peace agreement with additional legislation with more detailed provisions.

  - Before beginning a vetting process, the post-conflict government must establish the goals of the vetting process. The scope of the process then should be highly dependent upon these goals.

  - The lustration process should contain certain vetting criteria. Generally, a sweeping removal of individuals associated with the previous regime is frowned upon.
According to best practice, post-conflict states should focus vetting efforts on the most egregious human rights violations.

Typically states create vetting commissions to carry out the vetting process. These commissions need a clear legal mandate and they should be impartial, independent, respected, and representative of the broader society.

Outcomes of the vetting process should be clearly laid out in the vetting commission’s mandate and conveyed to the public.

The post-conflict state must decide on whether, during the vetting process, it will keep the public institutions functioning or will dissolve them and create new ones.

A reliable pool of resources is needed to ensure that a vetting process is successful.

- **UN Investigative Mechanisms**
  - There have been several new investigative bodies established by the UN bodies. They represent a noteworthy development in the investigation of serious crimes.

### Human Rights Law

- **Introduction to Human Rights Law**
  - Human rights are a set of norms that states and non-state actors have to uphold towards individuals and groups.
  - They are incorporated into national and international legal systems.
  - Human rights are generally divided into civil and political rights and economic, social, and cultural rights. Civil and political rights are negative obligations, whereas economic, social, and cultural rights are positive obligations.
  - Human rights can also be divided into individual and collective rights and absolute and limited rights.
  - International human rights law only imposes obligations on governments. The states bear the duty of upholding and enforcing human rights.
  - Primary sources of law are treaties and customary international law.
A treaty is a written international agreement between States governed by international law. A treaty becomes law through the expression of “consent to be bound”.

The time when treaties become enforceable depends on the domestic legal procedures of each state party. They can be either self-executing or non-self-executing.

In legal disputes, states must consent to a jurisdiction of a court or a tribunal to make the decision binding.

Customary international law arises out of a general and consistent practice of states from a sense of legal obligation - opinio juris. Jus cogens norms absolutely prohibit certain state action.

Secondary sources on law include general principles of law, judicial decisions that are not binding upon the states, and teachings of the most highly qualified publicists. Secondary sources are usually not binding and only provide interpretative guidance to courts.

The Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly in 1948, is a milestone document in the history of human rights in that it was the first legal document to set out the fundamental human rights to be universally protected.

There are 9 core international human rights treaties, including optional protocols. They all also have respective monitoring bodies.

The International Bill of Rights comprises of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and its two Optional Protocols (on the complaints procedure and on the death penalty), and the International Covenant on Economic, Social and Cultural Rights and its Optional Protocol.

In addition to international treaties that states can choose to ratify, states can also enter into a number of regional treaties. Among these is, for instance, the European Convention on Human Rights.

Three important bodies dealing with international human rights law are the Human Rights Council, the United Nations High Commissioner for Human Rights, and the International Court of Justice.

- Fair Trial Rights
Every person accused of a crime has a right to a fair and effective legal process, including the right to a lawyer, the right to know the charges, the right to be tried without undue delay, and more.

Each of the international criminal tribunals sets out in their statutes the rights that must be afforded to the accused being tried.

These rights are based on Article 14 of the International Covenant on Civil and Political Rights.

At the ICC, the trial not only has to be fair but also public. There are a number of other rights afforded to the accused by the Statute of the International Criminal Court.

The most difficult right to live up to for international criminal tribunals is the right to undue delay. The trials are often over a decade long.

If fair trial rights are violated, the violations must be effectively remedied.

**Presumption of Innocence**

Presumption of innocence means that the judge adjudicating an international criminal case cannot hear the evidence with any kind of preconceived notions about the responsibility of the accused. It regulates who is required to prove what and to what standard, and how the accused and the defense must be treated throughout the proceedings.

Presumption of innocence appears in many international human rights treaties and statutes of tribunals.

In international criminal cases, the challenge for this principle is that the fact that the crimes occurred is not being challenged. Rather the responsibility of the particular accused is being challenged.

Without the presumption of innocence, the entire criminal process is undermined. Practically, it means that the prosecution always bears the burden to prove the case beyond a reasonable doubt. The burden cannot shift. That also means that the accused has the right to silence.

At the ICC, the right to be presumed innocent is guaranteed also to those with respect to whom a warrant to arrest or summon to appear has been issued, even before their surrender to the court.

**Representing the Victim**
In past international criminal trials, victims were not parties to the proceedings and could not claim reparations or compensation. An exception was the Extraordinary Chambers in the Courts of Cambodia where the victims were given fairly broad participatory rights and there was a provision for symbolic or collective reparations.

ICC proceedings now have victim participation and the convictions of the accused give rise to reparations. Victims can apply to be participants in the trial, which means they may be represented by a lawyer at the trial. The Court assigns a Counsel (or Counsels) to represent the interests of the victims. The legal representatives are in regular contact with the victims and inform them of the progress, as well as obtain instructions for significant next steps. They also help the victims stay engaged.

- **Representing the Accused**
  - A defense counsel is an essential defender of the fairness of the trial. The task of the defense counsel is to act in the interests of the accused and help the trial chamber by testing the prosecutors’ case.
  - The accused may choose his or her own lawyer.
  - The defense counsel reviews the charges, reviews the prosecution’s case and the underlying evidence, makes a request for a provisional release of the accused if that’s appropriate, brings any preliminary legal challenges, and investigates the prosecution’s case. During the trial, the defense will cross-examine the witnesses and present its defense arguments.
  - The defense counsel will be in regular contact with the accused and seek instructions on the next steps. The defense counsel remains subject to the ethical and procedural rules of the domestic laws and the rules of the court in question.
  - Defense counsel always remains independent of the court. They act on the instructions of the accused within the limits of ethical standards.