TRANSITIONAL JUSTICE AND HUMAN RIGHTS

Learning objectives

By the end of the course, participants will be able to:
- demonstrate a theoretical and practical knowledge of transitional justice;
- demonstrate an understanding of the role of the judiciary and how the formal justice system fits within the broader transitional justice framework;
- apply this demonstrated knowledge in your continuing professional practice.

Course outline

1) Introduction

2) Basics of Transitional Justice
   a) Understanding Transitional Justice
   b) Transitional Justice – A definition
   c) Transitional Justice – Goals
      i) Truth
      ii) Confidence and Reconciliation
      iii) Justice
      iv) Rule of Law
      v) Peace
   d) Transitional Justice – Mechanisms
      i) Individual Prosecutions
      ii) Reparations
      iii) Truth Seeking
      iv) Institutional Reform
      v) Vetting and Dismissals
   e) Transitional Justice – Role of the Judiciary
      i) Main Roles
      ii) Secondary Roles
      iii) Challenges
      iv) Duties
   f) Transitional Justice – Challenges
      i) Peace vs. Justice
      ii) Number of Victims and Perpetrators
iii) Weak Justice Institutions
iv) Flawed Domestic Legal Frameworks
g) Transitional Justice – Regional Perspective
   i) Types of Transition
      (1) Pre-transition
      (2) Post-transition
   ii) Forms of transition
      (1) Economic
      (2) Conflict
      (3) Cyclical
h) Transitional Justice – Sources of Transitional Justice
   i) International Human Rights Law
      (1) Right to a Remedy
      (2) Right to Liberty and Security
      (3) Right to a Fair Trial
      (4) Principle of Legality
   ii) International Humanitarian Law
      (1) Prevention of Further Violations
      (2) Accountability
      (3) Reconciliation
   iii) International Criminal Law
i) Transitional Justice – Vulnerable groups in the process
   i) Gender
   ii) Children
   iii) LGBT communities
j) Transitional Justice – European Perspective
k) Transitional Justice – Latin America
l) Transitional Justice – Eastern Europe
m) Transitional Justice - Africa

3) Basics of International Crime
   a) Introduction
   b) Transitional Justice – International Criminal Law Characteristics
      i) Jus in bello
      ii) Jus ad bellum
   c) Transitional Justice - Overview of some challenges
      i) The Tadic case
      ii) Binding Treaties
      iii) Custom
      iv) General Principles
      v) Judicial Decisions
      vi) Distinction and Interplay between International Crimes
   d) Transitional Justice – Modes of Liability
i) War Crimes

ii) Crimes Against Humanity
   (1) The existence of a widespread or systematic attack against any civilian population
   (2) The existence of a nexus between the attack and the act that is to be charged as a crime against humanity
   (3) The perpetrator’s knowledge of the attack and awareness that his or her acts comprises part of that attack

iii) Genocide

e) Acts Punishable as War Crimes
f) Acts Punishable as Crime Against Humanity
g) Acts Punishable as Genocide

h) Liability for leadership figures and masterminds
   i) Responsibility of the Commander or Superior
      (1) Superior/Subordinate Relationship
      (2) Knowledge
      (3) Failure to take preventive or punitive measures
   ii) Joint Criminal Enterprise

i) Defences
   i) Article 31
   ii) Article 32
   iii) Article 33

j) Overview of common Defences or related concepts
   i) Jurisdictional challenged and immunity
   ii) Exceptions
   iii) Self defence
   iv) Duress

k) Punishment

l) International Armed Conflict
   i) Intensity
   ii) Organisation

m) NEXUS

n) Victims Protected Status

4) Investigation and Prosecution

a) Introduction

b) Key Features of an Investigation
   i) Strategy
   ii) Joint Teams and Investigative Plans
   iii) Multi Discipline
      (1) Expert Analysts
      (2) Analytical Support Fields
         (a) Political/Historical analysts
         (b) Criminal analysts
(c) Military analysts
(d) Other/Forensic analysts
(3) Evidence management
(4) Strategic Considerations
   (a) Prosecutorial Strategy
   (b) Focus and Defining Responsibility
   (c) Discretion and Scope
(5) Media and Public Perception
(6) Obligation to Prosecute and to Investigate
   (a) Obligation to Prosecute
      (i) Criminal Jurisdiction of a State
      (ii) Types of Jurisdiction
      (iii) Law of Extradition
      (iv) “Aut dedere aut judicare (or punire)”
      (v) Amnesties
      (vi) Amnesties and the ICC
   (b) Obligation to Investigate
(7) International Cooperation
   (a) Overlapping Jurisdictions
   (b) Informal Cooperation
   (c) Challenges in obtaining information
   (d) Types and Stages of Informal Cooperation
   (e) Cooperation with International Tribunals
   (f) Strategic Cooperation
(8) Joint Investigation
(9) Joint Investigation Roles
(10) Investigative Plans and Strategy
(11) Investigative Plans Preparation
(12) Strategy
(13) Theory of Investigations

5) Legality
   a) The Principle of Legality
   b) International Legal Framework
   c) Other Sources
   d) Legality and Transitional Justice
   e) Legality and the ECHR
      i) Article 7
         (1) Offence
         (2) Law
         (3) Penalty
   f) Components of the Principle of Legality
      i) *Nullum Crimen Sine Lege*
ii) Principle of Specificity
iii) *Nullum Poena Sine Lege*
iv) *Lex Mitior*

**g)** Source of International Law and Legality

**h)** Convictions based on the general principles recognised by civilized nations (Art. 7 (2) ECHR)

**i)** *Ne Bis in Idem*

**j)** *Ne Bis in Idem* in International Criminal Law
   i) *Bis* (twice after final decision)
   ii) *Idem* (same offence)
   iii) New facts

6) **Fair Trail Guarantees**

   **a)** Fairness in Transitional Justice
   **b)** Fairness Under International Law
      i) 1948 Universal Declaration of Human Rights
      ii) 1966 International Covenant on Civil and Political Rights
      iii) Common Article 3 para (1) of the 1949 Geneva Convention
   **c)** ECHR
   **d)** Equality of Arms
   **e)** Pre-Trial Detention
   **f)** Disclosure of Evidence

   **c)** Disclosure in the Jurisdiction of International Criminal Court
      i) ICTY
      ii) ICC

   **d)** Decision Making on Disclosure
   **e)** Obligation of the defence to disclose materials
   **f)** Meeting of the Obligations of Disclosure
   **g)** Principle of Legality
   **h)** Prolongation of Pre-Trial Detention
   **i)** Pre-Trial Detention of Juvenile Offenders
   **j)** Individualised Decision Making
   **k)** Alternative Measures
   **l)** Case specific Assessment
   **m)** Due Diligence of the Defence
   **n)** Material Equality
   **o)** Procedural Deficiency
   **p)** Reasonable Opportunity to Present the Case

7) **Witnesses and Victims**

   **a)** Witness Protection in Transitional Justice
   **b)** Witness in need of protection
      i) Perpetrators
ii) Other victims

c) The Duty to Testify

d) The Obligation of the State to Protect Life and Physical Integrity of the Witness

e) Witness Protection at International Criminal Courts
   i) ICTY
   ii) ICC
   iii) Special Units

f) Risk Assessment – When is Witness Protection Needed?

g) Tools of Witness Protection
   i) During the Investigation
   ii) Pre-Trial of the Proceeding
   iii) Trial Stage

h) Witness Protection in a Fair Trial

8) Victims Rights
   a) Introduction
   b) Definition of Victims
   c) Overview of Victims’ Rights
      i) Right to the Truth
      ii) Right to Reparation
         (1) Characteristics
         (2) Forms of Reparation
            (a) Restitution
            (b) Compensation
            (c) Rehabilitation
            (d) Satisfaction
            (e) Guarantees of Non-Repetition
         (3) Court ordered reparations and the role of courts in delivering reparations