

## 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 Trial 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
  - iv) ECHR
  - v) Equality of Arms
  - vi) Pre-Trial Detention
  - vii) 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