

TRANSITIONAL JUSTICE

During periods of authoritarian rule and conflict, mass human rights violations are often committed in darkness, with the truth hidden and manipulated. After a transition to democracy, many perpetrators are often protected by entrenched impunity. In many cases, they still hold great power and tightly control a false narrative about what has taken place. Institutions that were designed to protect and uphold the rights of the people are weak or broken. In order to build a free and accountable democracy, the truth about what has happened needs to be investigated and shared, perpetrators brought to justice, victims assisted and honored, and laws and institutions reformed to ensure that the mass violations will not recur.

The transitional justice framework is a tool that can assist in developing and implementing effective strategies to deal with a history of mass violations. **It is often divided into four major elements: seeking the truth, prosecuting those responsible, helping to repair the lives and dignity of victims (reparations), and providing guarantees of non-repetition (or institutional reform).** These elements are interdependent, so an effective approach must be holistic, and the different initiatives should be sequenced in an order that is appropriate to the context. An approach that is sensitive to gender is also needed to understand how violations impacted men and women differently and to ensure participation of the most vulnerable and marginalized.

[T]ransitional justice is the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. Transitional justice processes and mechanisms are a critical component ... for strengthening the rule of law.¹



Diagram adapted from the Transitional Justice Research Clinic's infographic, "Components of Transitional Justice."

TRUTH

Experiences of mass violations are rarely isolated. They recur over and over again in the same places, in cycles of violence. A major contributor to this repetition is a refusal to courageously and honestly confront the truth about what has taken place. A transition to democratic rule does not by itself remove the root causes and enabling factors of mass crimes, nor bring to account the powerful perpetrators who are often involved directly or indirectly when cycles of violence reignite. It is impossible for a society to break these deeply destructive cycles without confronting and learning from the truth of what happened, who was responsible, the effect on victims, and the root causes of the violence.

Governments and civil society can use different ways to establish a truthful account of mass human rights violations. Truth-seeking initiatives may be **official** or **unofficial**. Official truth-seeking efforts may include truth and reconciliation commissions (TRCs), commissions of inquiry, investigations conducted by national human rights commissions, fact-finding missions, criminal investigations, and other government-initiated inquiries.

Each truth commission is a unique institution, but their core activities usually include collecting statements from victims and witnesses, conducting thematic research, including gender and children analysis of violations including their causes and consequences, organizing public hearings and other awareness programs, and publishing a final report outlining findings and recommendations.²

PROSECUTIONS

Throughout human history, decisions to commit mass atrocities have been made by leaders who are confident they will never be held to account for the crimes they commit. This impunity has been a major contributing factor to the recurrence of mass crimes in many parts of the world. Prosecution of those responsible for “gross human rights violations,” that include the major crimes against international criminal law, is essential for deterrence and to re-establish the rule of law. It provides the important message that elites, security forces, and ordinary people will be equally held to account for their actions.

Major crimes amounting to “gross human rights violations” that are recognized under international criminal law include:³

1. **Genocide:** Certain acts **intended to destroy, in whole or in part, a national, ethnic, racial, or religious group**. These acts include, but are not limited to, killing, causing serious bodily or mental harm, forcibly transferring children, and imposing measures intended to prevent birth among a national, ethnic, racial, or religious group.
2. **Crimes Against Humanity:** Acts that are committed **as part of a widespread or systematic attack against a civilian population**. These acts include, but are not limited to, murder, imprisonment, torture, rape, sexual slavery, and enforced disappearance.
3. **War Crimes:** Acts that are committed **during an armed conflict** that violate the laws and customs of war. These acts include, but are not limited to, murder, mutilation, inhuman treatment, torture, rape, and slavery.
4. **Aggression:** Planning, preparing, initiating, or executing the use of armed force by one state against the sovereignty, territorial integrity, or political independence of another state or in a way inconsistent with the United Nations Charter. An individual who commits this crime, which can include heads of state, must have had effective control over the political or military action of the state.

These crimes can be prosecuted in international, hybrid (international-national), or national courts.

The International Criminal Court (ICC) is a permanent, international court that sits in The Hague in the Netherlands. It was established in 2002, after 120 countries signed the statute, known as the Rome Statute, providing for its creation. Prior to the establishment of the ICC, two ad hoc tribunals—the International Criminal Tribunal for Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)—were established by the UN Security Council. The ICC has jurisdiction over crimes committed within the territory of a member state of the Court, and under certain circumstances, crimes committed within the territory of a non-member state.

The ICC's mandate includes the following important principles:

- **Complementarity:** The Court may only pursue crimes under its mandate if a state is unwilling or unable to carry out the investigation or prosecution of those crimes.
- **Non-retroactivity:** The mandate only covers crimes committed after the Court's establishment in 2002, or for a state that joined the Court after its establishment, the date when that state ratified the Rome Statute.
- **Voluntary Membership:** The ICC's mandate applies to states that have voluntarily ratified the Rome Statute. An exception to this rule is that under certain circumstances **the United Nations Security Council (UNSC) may refer a situation to the ICC** for investigation even when it involves a state that has not ratified the Rome Statute. However, any permanent member of the Security Council—the USA, Russia, China, the UK, or France—can veto a UNSC referral. In recent years, one or more of the permanent members has exercised the veto on a range of important cases of mass crimes.

Hybrid or mixed courts are tribunals that include international and national judges, prosecutors, and investigators. Examples include the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for Lebanon, and the Special Panels and Serious Crimes Unit in Timor-Leste.

National courts may also try those responsible for international crimes if those crimes are recognized by national law. For example in Asia, Indonesia and Bangladesh have passed national laws and established courts to try mass crimes. Some benefits of international courts are their high level of legal expertise and objectivity. However, they are extremely expensive and conducted far away from

those who have suffered the violations and need to learn what happened. Hybrid and national courts conducted in contexts where the crimes were committed provide far greater levels of engagement and are less expensive. However, they often struggle with political influence and low levels of capacity of national systems to try complex international crimes.

Universal jurisdiction is the ability of states to prosecute perpetrators regardless of where or against whom mass crimes were perpetrated. States that have passed national laws implementing universal jurisdiction can arrest and prosecute suspected perpetrators even though the crimes may have been committed outside of their national borders.

REPARATIONS

Years of mass violations and authoritarian rule seriously damage the relationship between citizens and the state. Rebuilding this relationship requires the government to offer a message of care and accept responsibility for failing in its primary duty to protect its citizens against serious human rights violations. This is even more important when state agents have been involved as perpetrators of those violations. A key way to fulfill this duty is to take effective steps that help repair the lives of victims and their families (reparations).

Programs that provide reparations may include the following elements:⁴

- **compensation** for the damage to victims lives;
- **restitution**, which are efforts to restore victims to their original situation before gross violations occurred;
- **rehabilitation**, which may include the provision of medical, psychological, legal, and social services;
- **satisfaction**, which may include acknowledgement of suffering and memorials; and
- **effective reforms** that provide victims with a guarantee that violations will not recur.

Reparations may be **material** or **symbolic**; **individual** or **collective**.

- **Material reparations** include payments, pensions, free healthcare, scholarships, skills training, and micro-finance loans.
- **Symbolic reparations** demonstrate public acknowledgment of the experiences of victims. They may include memorials, the renaming of public places, apologies by the state and perpetrators, and the creation of days of remembrance.
- **Individual reparations** acknowledge the harm done to individual victims, and provide concrete social and economic benefits to them.
- **Collective reparations** are benefits provided to a group of people that suffered human rights violations as a group or those who experienced the same form of violation.

Reparations programs must involve and empower victims and not simply provide some benefit without acknowledging the truth of what they experienced. The state has an international legal obligation to provide reparations. However, when states fail in fulfilling this obligation, civil society organizations have initiated a range of community-based reparations programs, seeking to provide some recognition and assistance to victims.

GUARANTEES OF NON-REPETITION (INSTITUTIONAL REFORM)

Three of the four general elements of the TJ framework—truth, prosecutions, and reparations—deal with what has taken place in the past. The fourth element focuses on reforms that relate to the future. The revealed truth about the past must be used as the basis to develop the legal and institutional reforms needed to guarantee that the mass violation of the rights of all individuals and communities will never recur.

The changes necessary to provide guarantees of non-repetition are highly dependent on the context. Institutions or systems that may need reform include the following:

- constitution and laws
- educational institutions
- judiciary
- media
- security forces (military, police, intelligence)
- political systems

Efforts need to be put in place to vet individuals, ensuring that those who were complicit in committing violations can no longer hold public positions. Steps to eradicate discrimination and prejudice against those who have been oppressed create the foundation for building a new society where everyone is free and equal.

Notes

1. Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice ("Guidance Note"), 2010, p. 2, https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf.
2. Guidance Note, p. 8.
3. These are the crimes over which the International Criminal Court has jurisdiction. See Rome Statute of the International Criminal Court, 1998, http://legal.un.org/icc/statute/99_corr/cstatute.htm.
4. Guidance Note, pp.9-8.