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Learning Handout

# TRANSITIONAL JUSTICE



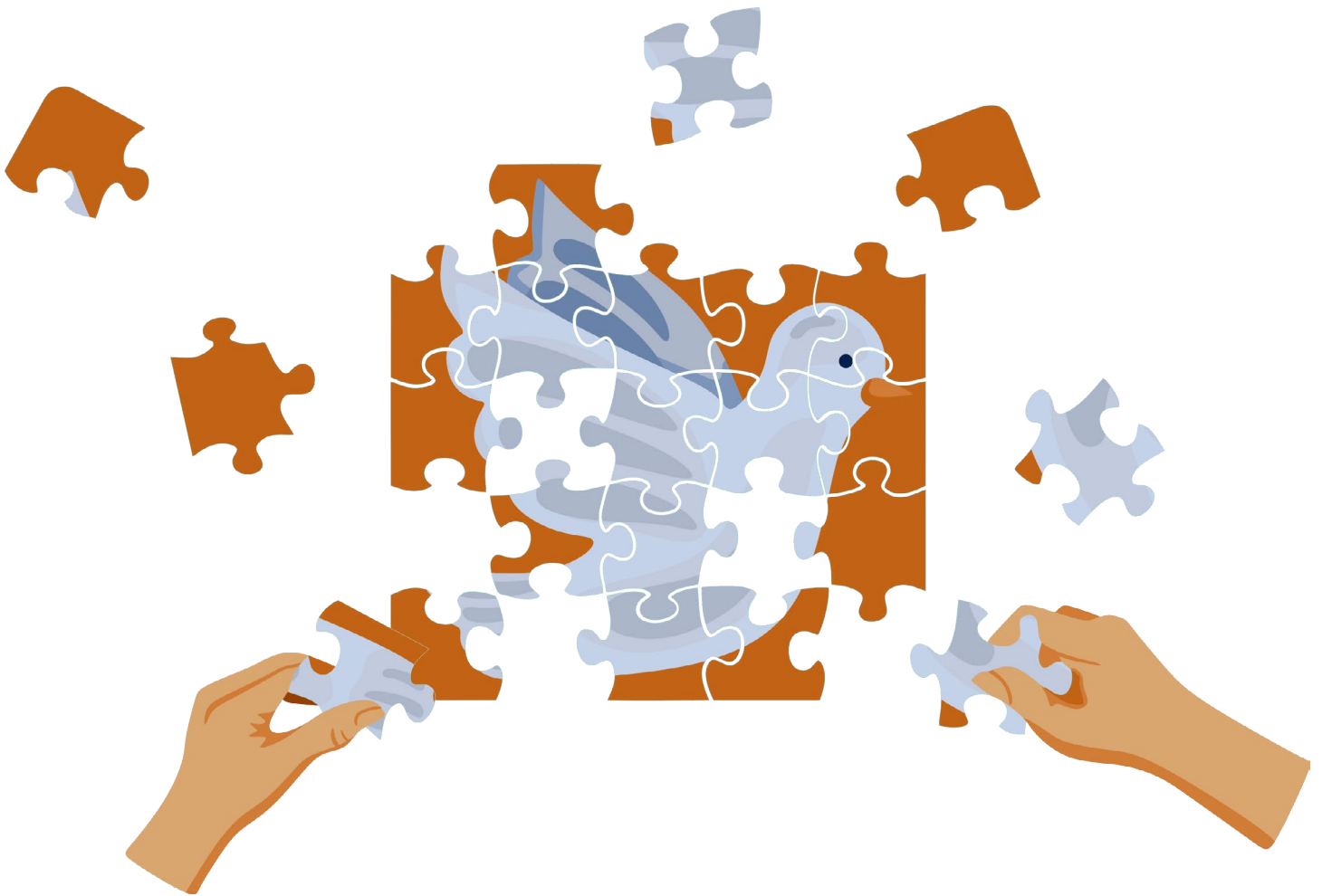


# LEARNING HANDOUT



ASIA JUSTICE AND RIGHTS

# HUMAN RIGHTS AND TRANSITIONAL JUSTICE



Transitional justice is a multi-faceted response to systematic or widespread violations of human rights. It seeks recognition for victims and promotes possibilities for peace, reconciliation, and just governance. Transitional justice is not a distinct form of justice, but rather is justice that is adapted to societies in the process of transformation after a period of pervasive

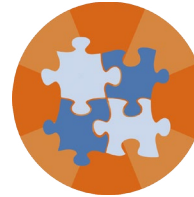
human rights abuse. Transitional justice emerged in the late 1980s and early 1990s, mainly in response to political changes and demands for justice in Latin America and Eastern Europe. Human rights activists and others wanted to address the systematic abuses by former regimes without endangering the political transformations that were underway.

# Common Transitional Justice Strategies Involve:



## Truth-seeking

These initiatives seek to establish an accurate record of what happened during the conflict, clarify uncertain events, and lift the veil of silence and denial from contentious and painful periods of history.



## Reparations

Reparations recognise victims' rights and seek to repair harms they have suffered.



## Prosecution

Prosecutions have the potential to reveal how large-scale crimes were committed, and restore victims' dignity and public confidence in the rule of law.



## Institutional Reform

Reforming abusive or negligent security systems and other structures and institutions can prevent recurrence and provide effective and accountable security to communities.

In 2012, the UN Human Rights Council issued a resolution on Human Rights and Transitional Justice that reaffirms many of the principles that have emerged from the field, including “the importance and urgency of national and international efforts to end human rights violations, [and] restore justice and the rule of law in conflict and post-conflict situations and, where relevant, in the context of transitional processes.”

This resolution underlines the need to develop transitional justice strategies that prevent the recurrence of human rights violations and ensure social cohesion, institution building, ownership, and inclusiveness at the national and local levels. It also calls for a comprehensive approach

that incorporates judicial and non-judicial measures that include prosecutions, reparations, truth seeking, and institutional reform in order to ensure accountability, provide remedies to victims, and promote healing and reconciliation. The resolution reaffirms important elements of transitional justice.

1. Truth-seeking processes that investigate patterns of past human rights violations and their causes and consequences are important tools that can complement judicial processes.
2. National prosecutorial capacities based on a clear commitment to combat impunity, that take into account the perspective of victims and that

- ensure compliance with human rights obligations concerning fair trials, need to be developed.
3. States have an obligation to prosecute those responsible for gross violations of international human rights law and serious violations of international humanitarian law.
  4. States have an obligation to ensure that all victims of gender-based and sexual violence have equal access to justice and an obligation to prosecute persons who are responsible for it.
  5. Peace agreements endorsed by the United Nations can never promise amnesties for genocide, crimes against humanity, war crimes, and gross violations of international human rights law.
  6. Victims' rights include: (a) equal and effective access to justice; (b) adequate, effective, and prompt reparation for harm suffered; and (c) access to relevant information concerning violations and concerning a reparation mechanism.
  7. Institutional reform should incorporate a human rights-based approach into vetting processes.
  8. Disarmament, demobilization, and reintegration (DDR), and transitional justice processes are interrelated. Coordination among these processes is essential to facilitate their coherence and mutual reinforcement.
  9. Justice, peace, democracy, and development are mutually reinforcing imperatives.
  10. A process of national consultation contributes to a holistic transitional justice strategy.
  11. It is important to give vulnerable groups a voice in these processes and to ensure that discrimination and other root causes of conflict and violations of all human rights are addressed.
  12. Victims' associations, human rights defenders, women's organizations, other members of civil society, and a free and independent media play important roles in the realisation of transitional justice goals, the reconstruction of society, and the promotion of the rule of law and accountability.
  13. The term "violence against women" in conflict and post-conflict situations is not limited to sexual violence such as rape, sexual slavery, forced pregnancy, and enforced sterilisation, but includes any act of gender-based violence that results in, or is likely to result in, physical, sexual, or psychological harm or suffering to women.
  14. Sexual and gender-based violence is also committed against men and boys in conflict and post-conflict situations.
  15. It is important that transitional justice processes recognise the particular needs of women and children, and the importance of engaging children as well as fulfill the obligation to enable women's full and equal participation in all transitional justice initiatives.
  16. The rights of both victims and accused persons must be respected in accordance with international human rights law.



## Guidelines on Transitional Justice from the United Nations Secretary General



In March 2010, the UN Secretary-General, Ban Ki Moon, issued a guidance note on the UN's approach to transitional justice that included ten guiding principles "as a critical component of the United Nations framework for strengthening the rule of law". These ten principles that guide the UN's engagement in transitional justice initiatives include:

1. Support and actively encourage compliance with international norms and standards when designing and implementing transitional justice processes and mechanisms;
2. Take account of the political context when designing and implementing transitional justice processes and mechanisms;
3. Base assistance for transitional justice on the unique country context and strengthen national capacity to carry out community-wide transitional justice processes;
4. Strive to ensure women's rights;
5. Support a child-sensitive approach;
6. Ensure the centrality of victims in the design and implementation of transitional justice processes and mechanisms;
7. Coordinate transitional justice programs with the broader rule of law initiatives;
8. Encourage a comprehensive approach integrating an appropriate combination of transitional justice processes and mechanisms;
9. Strive to ensure that transitional justice processes and mechanisms take account of the root causes of conflict and repressive rule, and address violations of all rights;
10. Engage in effective coordination and partnerships.

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2. Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice, Maret 2010; <[www.un.org/ruleoflaw/files/TJ\\_Guidance\\_Note\\_March\\_2010FINAL.pdf](http://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf)>



# RIGHT TO TRUTH



Finding out exactly what happened during a conflict helps to establish an accurate record of a country's past, clarify uncertain events, and lift the veil of silence and denial from a contentious and painful period of history. According to various victim surveys, knowledge of past events helps prevent similar violations from happening again, and is the first step towards justice and accountability. The right to truth has also been codified in various national and international laws. A study on the right to the truth from the Office of the United Nations High Commissioner for Human Rights explains the right to the truth in this way:

The right to the truth implies knowing the full and

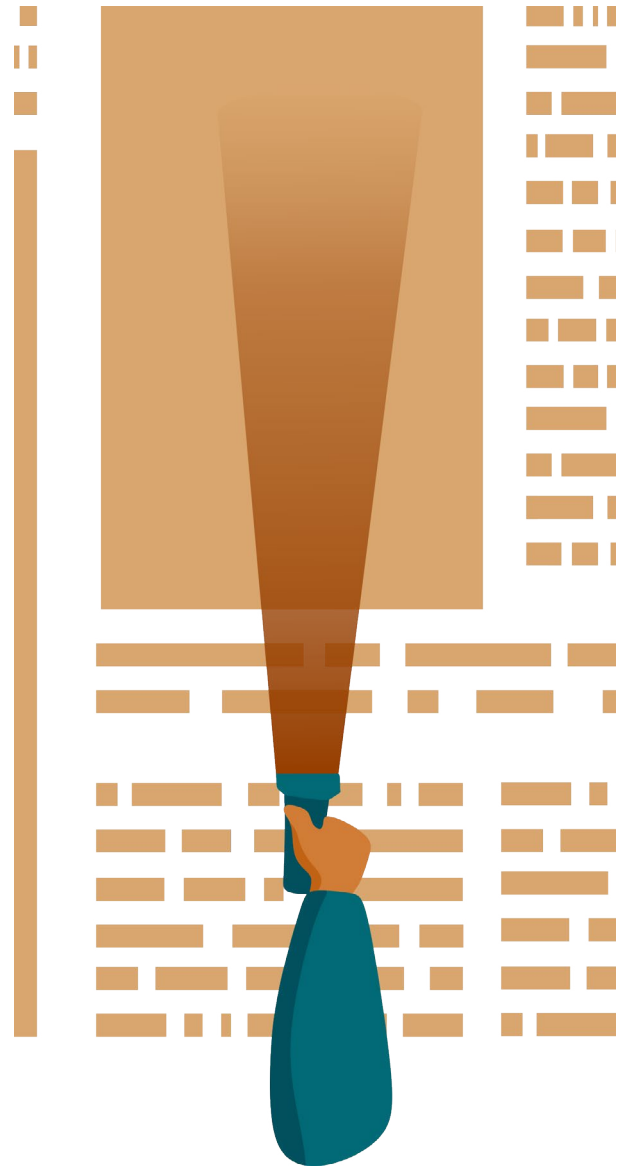
complete truth as to the events that transpired, their specific circumstances, and who participated in them, including knowing the circumstances in which the violations took place, as well as the reasons for them. In cases of enforced disappearance, missing persons, children abducted or during the captivity of a mother subjected to enforced disappearance, secret executions and secret burial place, the right to the truth also has a special dimension: to know the fate and whereabouts of the victim (E/CN.4/2006/91, para. 59).

On 18 December 2013, the UN General Assembly adopted a resolution on the right to the truth. The resolution stresses how important it is for the international

community to recognize the right of victims of human rights violations, the right of their families, and the right of society to know the truth about the violations. In its resolution, the Human Rights Council:

1. Recognizes the importance of respecting and ensuring the right to the truth to contribute to ending impunity, and to promote and protect human rights;
2. Welcomes the establishment of specific judicial mechanisms and non-judicial mechanisms such as truth and reconciliation commissions, that complement the justice system;
3. Encourages the states concerned to disseminate, implement, and monitor the recommendations of non-judicial mechanisms such as truth and reconciliation commissions, and provide information regarding compliance with the decisions of judicial mechanisms;
4. Encourages other states to consider establishing judicial mechanisms, and truth and reconciliation commissions to complement the justice system;
5. Encourages states to provide assistance regarding the right to the truth by means of, among others, technical cooperation and exchange of information;
6. Encourages states and international organizations to acknowledge the important role of civil society in monitoring the implementation of recommendations of truth commissions;
7. Urges all states that have not done so to consider signing, ratifying, or acceding to the International Convention for the Protection of All Persons from Enforced Disappearance; and
8. Calls upon States to work in cooperation with the Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence.

The International Convention for the Protection of All Persons from Enforced Disappearance, which entered into force in December 2010, also provides for the right to truth. In further support of the right to truth, UNGA Resolution 65/196 proclaims 24 March as the International Day for the Right to the Truth Concerning Gross Human Rights Violations and for the Dignity of Victims. This international observance was inaugurated on 24 March 2011.



#### Sources

- Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, New York and London: Routledge, 2011, p. 24.
- ICTJ, "Nepali Voices: Perceptions of Truth, Justice, Reconciliation, Reparations and The Transition in Nepal," available at <<https://www.ictj.org/sites/default/files/ICTJ-Nepal-Voices-Reconciliation-2008-English.pdf>>
- Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity ("Impunity Principles"), U.N. Doc. E/CN.4/2005/102/Add.1, 8 February 2005, adopted by the UN Commission on Human Rights in Resolution E/CN.4/2005/81, 15 April 2005; <<http://www.refworld.org/docid/42d66e780.html>>
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# OFFICIAL (STATE) TRUTH-SEEKING MECHANISMS



## Historical and Human Rights Commissions

Historical commissions are not usually established as part of a political transition, but instead serve to clarify historical events and pay respect to previously unrecognised victims (or their descendants) of incidents that happened years or even decades ago. Historical and human rights commissions generally have not investigated instances of widespread political repression, but have instead focused on practices that affected specific ethnic, racial, or other groups, or specific incidents of human rights violations. Examples include:

- USA: Commission on Wartime Relocation and Internment of Civilians (1980–83)
- Australia: Human Rights and Equal Opportunity Commission (1986); name changed to Australian Human Rights Commission (2008)
- Ukraine: International Commission of Inquiry into the 1932-1933 Famine (1988–89)
- Canadian Royal Commission on Aboriginal Peoples (1991–96)
- Indonesian National Commission to Eliminate VAW (1998); Indonesian National Commission on Human Rights (1999) (these standing commissions were established during the political transition following the fall of the Suharto regime)

## Disappearance Commissions

Disappearance commissions have a specific mandate to investigate disappearances. Examples include:

- Uganda (1974): Commission of Inquiry into the Disappearances of People since 1971
- Argentina (1983-84): National Commission on the Disappearance of Persons
- Nepal (1990-91): Commission of Inquiry to locate persons disappeared during the Panchayat Period
- Sri Lanka (2001-02): Presidential Commission of Inquiry into the Involuntary Removals and Disappearances

## Truth Commissions (TCs)

TCs, often called truth and reconciliation commissions (TRCs), are independent official investigative bodies usually function for less than two years. Created at a point of political transition, the primary purposes of TCs are to investigate and report on key periods of past abuse, and make recommendations to remedy such abuse and to prevent its recurrence. The recommendations may include suggestions for reparations of victims, prosecutions/amnesty of perpetrators, reconciliation, and institutional reforms. These temporary non-judicial bodies have no authority to penalize perpetrators responsible for human rights violations and can only make non-binding recommendations regarding prosecutions, depending on their mandate.

A TC generally has a broader mandate than a Col or a judicial inquiry that are tasked to investigate and establish a historical record of a certain period of the past. A TC goes beyond investigating individual abuses to establish the root causes of the conflict, identify patterns of human rights violations that occurred during the conflict, and make recommendations to address such abuses. TCs are not limited by the same procedural or evidentiary rules as judicial prosecutions, and they do not issue judgments. They provide a forum for all victims to be heard and address their abusers, and may also serve as a forum for the abusers to apologize to victims. Since 1974, more than 40 TCs have been established around the world including in Argentina, Chile, El Salvador, South Africa, Sierra Leone, Timor-Leste, and Guatemala. They have many different names and all have been different from each other. Examples include:

- Haiti (1994–96): The National Commission for Truth and Justice
- South Africa (1995-2002): Truth and Reconciliation Commission
- Serbia and Montenegro (2001-03): The Truth and Reconciliation Commission, but no final report was issued
- East Timor (2000-05): Commission for Reception, Truth, and Reconciliation

## Commissions of Inquiry (Cols)

Cols are generally established to investigate and establish the facts regarding specific instances of human rights violations. A Col must also consider appropriate ways to address the findings. Sometimes a Col can exercise select judicial powers similar to those used by courts such as summoning witnesses, issuing subpoenas, and exercising contempt powers. Unlike the courts, however, they do not have the power to prosecute or penalize perpetrators. In certain cases, a Col may operate as a specialized truth commission, e.g. the Commission on the Disappeared of Argentina.

Other examples of Cols include:

- Zimbabwe (1984): The Chihambakwe Col investigated state repression and violence that occurred in Matabeleland and the Midlands during the mid-1980s
- Burundi (1995–1996): International Col
- Northern Ireland (1997): The Northern Ireland Victims' Commission
- East Timor: International Col (two times: 1999 for 1999 violations; 2006 for violence in 2006)
- Indonesia: Col into gross violations of human rights in East Timor (1999) established by the Indonesian National Human Rights Commission
- Kenya (2008): The Waki Commission was established to investigate post-election violence



# UNOFFICIAL TRUTH-SEEKING PROCESSES (CIVIL SOCIETY INITIATIVES)



## REMHI, Guatemala (1995-98)

REMHI (Proyecto Interdiocesano de Recuperación de la Memoria Histórica or Historical Memory Project) was formed in 1995 by the Catholic Church in Guatemala. Coordinated by the Social Ministries' Office for Human Rights, and covering ten dioceses, this process was established in anticipation of the CEH (Comisión para el Esclarecimiento Histórico or Commission for Historical Clarification) that was established in 1994 as part of a UN-facilitated peace agreement between the Guatemalan government and guerrilla groups, but was not instated until three years later. REMHI's work was aimed at setting standards that could later be followed by the

CEH, projecting victims' voices, and integrating truth seeking into the pastoral work of the church. Working for three years with 600 volunteers who took statements in communities, REMHI collected 6500 testimonies and released a 1400-page report, *Nunca Más* [Never Again], in 1998. REMHI reported more than 50,000 cases of human rights violations and concluded that 80% of the violations were perpetrated by the military. Two days after the report was released, Bishop Gerardi, who had led the REMHI process, was murdered. REMHI findings contributed to the work of CEH when it began operations under UN auspices in 1997.

## DC-Cambodia (1994-now)

DC-Cam (Documentation Center-Cambodia) is an NGO that was established after the completion of a research project on genocide conducted in Cambodia by Yale University, USA. The researchers formed a national organization, the DC-Cam, to continue the process of collecting testimonies about massacres and political violence during the Khmer Rouge regime, preparing data to try perpetrators who were still alive, and to educate the public about the prevention of genocide. Its activities have included making films, conducting research, producing publications, and helping to reunite families who had been separated due to the conflict. DC-Cam has collected a large archive of material including testimonies, photographs, and data regarding sites of violence. It has mapped 189 prisons and 19,403 mass graves, and has facilitated the establishment of 80 memorials of the genocide throughout Cambodia. In 1999, a group of UN experts concluded there was some indication that Khmer Rouge leaders were responsible for war crimes, genocide, and crimes against humanity based on an investigation process that used DC-Cam data. After a long negotiation process, the Cambodian government made a treaty with the United Nations to deploy a hybrid court (a mix of Cambodian and international staff and laws) to prosecute Khmer Rouge leaders who were still alive. The court, established in 2006, continues to function.

## Bangladesh War Museum (1996-now)

Civil society in Bangladesh established the Liberation War Museum in 1996 to commemorate martyrs and memories of the 1971 war. The museum seeks to show how popular struggle and human sacrifice contributed to the fundamental principles of democracy, secularism, and nationalism that are embodied in Bangladesh's constitution.

According to its mission statement, the museum is dedicated to all who love freedom and to the victims of mindless atrocities and destruction committed in the name of religion, ethnicity, and national sovereignty. The museum houses rare photographs, documents, and materials used by freedom fighters of the liberation war. It has also excavated two killing fields in the suburbs of Dhaka and preserves one site, including the human remains found there. Through displays and regular programs, the Liberation War Museum is a living museum where visitors can

participate in building national unity and a tolerant society that opposes human rights abuses, and can draw relevance to current social and human rights issues.

## Greensboro Truth & Reconciliation Commission, USA (2004-06)

In 1979 in a small town called Greensboro (North Carolina, USA), five activists of the labor rights movement who were organizing an anti-Ku Klux Klan/KKK demonstration (KKK is a white supremacist organisation) were shot dead by followers of the KKK and Nazis; ten other demonstrators were wounded. At the time, the police stayed at a distance, although they knew the two parties might clash. A police informant also participated with the KKK and Nazis in the attack. Although a local TV station captured the killings, the perpetrators of the murders were acquitted in two criminal courts, both of which had all-white juries. The local Greensboro government eventually paid some compensation to victims following a civil trial.

The Greensboro Truth and Reconciliation Commission (TRC) operated much like an official truth commission. It conducted research, organized community involvement (public hearings and volunteer opportunities for young people and students), and issued a report on the incident and underlying issues. The Commission's mandate called for "the examination of the context, causes, sequence and consequence of the events of November 3, 1979." Seven commissioners, supported by a small executive team (five people) and a corps of volunteers, began work in 2004. The commission held three public hearings, with testimonies from family members of the victims and survivors. Although the Greensboro TRC had no authority to subpoena anyone, it nevertheless managed to obtain testimonies from current or former members of the KKK/Nazi, police, lawyers, journalists, historians, local residents, and a judge.

### Sources

- "Report of the Secretary-General on Khmer Rouge trials," UNGA A/59/432, 12 October 2004; section on Documentation, witnesses and experts, para. 19, p. 5; <<http://www.refworld.org/docid/426917984.htm>> Democratic Kampuchea is the official name of the Khmer Rouge.
- For more on REMHI, see: <<http://www.waccglobal.org/en/19992-key-issues-in-global-communications/833-Guatemala-Never-again-Witnessing-on-behalf-of-the-disappeared-.html>>
- Learn more about the Bangladesh War Museum at <<http://www.liberationwarmuseum.org/the-museum>> and related links.
- Learn more about the Greensboro Truth and Reconciliation Commission at <<http://www.greensborotrc.org>>. For information on the Greensboro TRC's mandate see: <<http://www.greensborotrc.org/mandate.doc>>

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# TRUTH

# COMMISSIONS (TCs)



TCs, also commonly known as truth and reconciliation commissions (TRCs) are independent, official mechanisms that investigate and report on human rights violations that occurred in the past, and make recommendations regarding ways to address them. The basic functions of a TC usually include one or more of the following. TCs:

- Clarify and acknowledge past events and actions;
- Respond to the needs and interests of victims;
- Contribute to justice and accountability;
- Outline institutional responsibility and recommend reforms; and
- Promote reconciliation and reduce tensions resulting from past violence.



TCs can establish an accurate, detailed, and impartial history of past violations that has been previously hidden or denied. This record can counter the denials and fictitious or exaggerated accounts of the past, and bring the true scale and impact of a violent past to public consciousness. TCs can conduct specific inquiries and help establish the location of missing victims who may have been forcibly disappeared or secretly buried. More specifically, truth commissions can achieve:

### **Accountability of perpetrators**

TCs can promote varying levels of criminal and civil accountability for perpetrators of human rights violations. They can gather, organise, and preserve evidence that can be used in prosecutions. They can also build a case for, and recommend alternative forms of, accountability such as civil liability, removal of officials from office, restitution, or community service schemes that may be more appropriate for certain types of perpetrators or violations.

### **Public debate**

TCs can help to stimulate public debate about the wide variety of moral, political, and legal issues that must be addressed during a transition process by encouraging public participation in a truth commission's outreach activities. TCs can also serve as impartial, public arbiters if and when members of the previous regime distort events of the past. TCs can encourage a culture of nonviolent and deliberative engagement on issues that may be deeply contentious.



### **A public platform for victims**

By providing a public platform for victims to speak in their own voices, TCs put victims at the centre of the transition process. This helps victims to heal and gives them a sense of personal vindication. It can also educate the public about the human impact of past crimes and thus build support for further victim-centred transitional justice initiatives such as reparations programmes.

### **Victim reparations.**

TCs can build a case for compensation for past abuses and for ongoing psychological, physical, and economic injuries suffered by victims. They can also establish effective definitions and categories of “victim” for the purpose of financial reparations. Commissions can also make creative and appropriate suggestions regarding symbolic reparations such as memorials, reburials, and commemorative ceremonies. TCs may help restore victims’ dignity by working in a manner that acknowledges and is sensitive to the harm suffered by victims.

### **Legal and institutional reforms**

Through their investigations, TCs can provide evidence of how particular institutions, individually and collectively, failed to protect human rights in the past. They can recommend specific legal and institutional reforms such as strengthened civilian oversight of security institutions; tenure and disciplinary rules for the judiciary; redesign of electoral and political systems; land reform; and new human rights training programmes for security forces.

### **Reconciliation**

TCs promote tolerance and understanding when conflicting parties hear each other’s grievances. As Archbishop Tutu, chairperson of the South African TRC explained, the truth does not necessarily facilitate reconciliation, but reconciliation can only be built on a foundation of truth. TCs may incorporate reconciliation measures or, in their final report, recommend practical measures to reintegrate certain offenders and disaffected groups into society.

### **Democratic transition**

TCs can signal a formal break with a violent past and a transition to a more peaceful and democratic future. If

successful, TCs can contribute to a culture of accountability and weaken anti-democratic forces.

## Statement Taking

Statement taking is the primary means TCs use to gather information. Statements provide data about what happened: the number of people affected by the conflict and in what ways. Statements are a basis for other TC activities like research, investigations, public hearings, recommendations, and the final report. When the identity of a person needs to be confidential, statement taking is done in private. Special attention should also be given to the possibility of victims' re-experiencing trauma and to the verification of statements.

## Public Hearings

Hearings are public events where victims tell their stories. They may provide victims the opportunity to confront their abusers, and allow abusers to make a public apologize. As with statement taking, security and confidentiality are major challenges for public hearings. If the security situation is weak and the safety of victims, witnesses, or perpetrators is at risk, public hearings should not be held or concrete protection measures should be introduced. Public hearings are beneficial because they can:

- provide opportunities for victims to foster empathy from the public;
- provide the public an opportunity to acknowledge past abuses;
- educate the public about events and raise public consciousness of critical issues;
- create a structure of accountability for past abuses; and

- encourage national debate among members of civil society and policymakers.

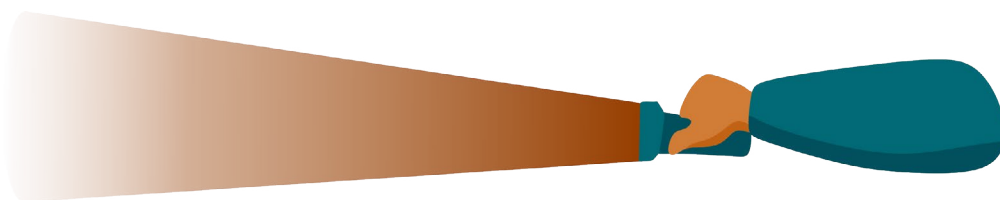
## The Main Lessons from a TC Process

Countries can learn to:

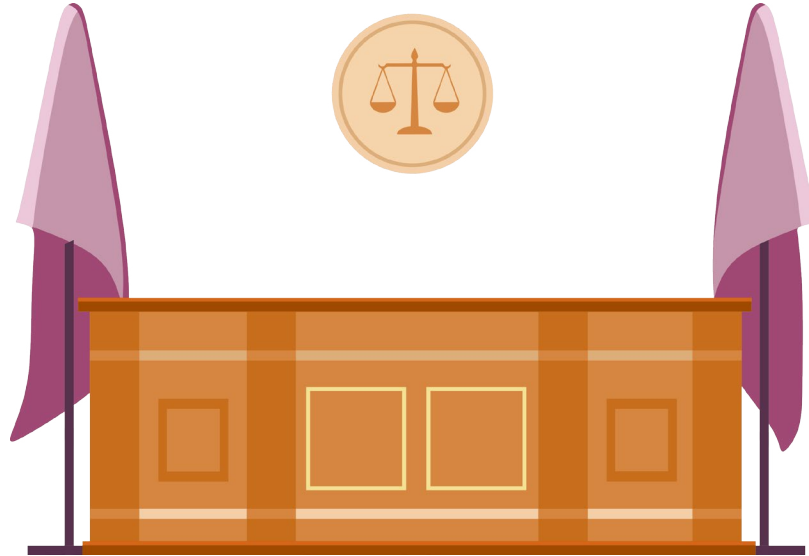
- respond to the needs and interests of victims. Intensive consultation with the victims and other stakeholders is very important before forming a truth commission.
- be transparent and participatory in the selection of commissioners. This is important so that credible and effective persons can be selected, and the victims and other citizens feel that the commission is legitimate. For example, in Timor-Leste, names of candidates to serve as commissioners were collected from all the people.

Future TCs could learn some important lessons from international experiences.

- A TC should have a broad mandate that allows it to investigate individual abuses, establish patterns of human rights violations, name perpetrators, facilitate reconciliation for less serious crimes, and make recommendations to the government regarding reparations, prosecutions, institutional reforms.
- In many international experiences, after the TC submits its final report, governments have been reluctant to implement its recommendations. Therefore, TCs should give specific attention to networks and mechanisms that will support implementation of its recommendations after the TC completes its work.



# PROSECUTION



Prosecutions are another element (or pillar) of transitional justice. The term “Prosecutions” typically refers to criminal trials of those alleged to be responsible for human rights violations or other crimes. Prosecutions focus on individual criminal responsibility – that is, they focus on holding individual people accountable for crimes that they commit. In the context of mass human rights violations, prosecutors frequently emphasize the investigation and trial of those considered most responsible for the violations (e.g. commanders, more senior political or military officials, those who issued orders or devised plans that included human rights violations, etc.). Prosecutions may help restore victims’ dignity and public confidence in the rule of law by combating impunity.

In recent years, the Prosecution’s element of transitional justice has been understood to include other types of proceedings or initiatives that contribute to perpetrator accountability. Some now also include cases seeking to hold States accountable for violating human rights obligations set forth in treaties to which they committed (such as the Convention on the Prevention and Punishment of the Crime of Genocide and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) as Prosecutions.

In addition, because it is not always possible to bring cases against those who committed human rights violations

immediately after the violations occur, mechanisms have been created to investigate alleged human rights violations, preserve evidence, and prepare case files for use against individual perpetrators. When it does become possible to try one of the perpetrators for whom a file has been prepared, the expectation is that the file will be shared with the prosecutor. The International, Impartial and Independent Mechanism (IIIM) for Syria and the Independent Investigative Mechanism for Myanmar (IIMM) are two examples of such investigative mechanisms, and they are generally also considered to be part of the Prosecution’s pillar.

## What Are the Purposes of Prosecutions?

Prosecutions have several purposes. They:

- Respond to victims’ demands for justice by punishing those responsible for violations and acknowledging the victims’ suffering;
- Uphold the rule of law by fulfilling the legal obligation to provide remedy for victims;
- Condemn violations and impunity, assure a fair objective process, and serve as a deterrent;
- Determine individual responsibility as opposed to collective guilt;
- Establish an accurate historical record, revealing what happened and why; and

- Symbolize the beginning of a new chapter in a nation's life marked by social justice and the rule of law.

## What Are the Different Mechanisms of Prosecutions?

Prosecutions may be conducted by international courts, national courts, or mixed/hybrid courts.

### 1 International Courts

International courts take one of two forms—ad hoc or permanent. As a response to reports of mass human rights violations, the UN Security Council established two ad hoc international criminal tribunals. In 1993, it established the International Criminal Tribunal for the former Yugoslavia (ICTY) to address violations accompanying the breakup of Yugoslavia. In 1994, the UN Security Council established the International Criminal Tribunal for Rwanda (ICTR) to prosecute those most responsible for Rwanda's 1994 genocide. The successes and challenges of the temporary ad hoc tribunals laid the groundwork for the development of a more permanent solution: the International Criminal Court (ICC). In 1998, 120 countries signed the Rome Statute, the Court's founding treaty. By 2002, the Rome Statute took effect upon ratification by 60 states, officially establishing the ICC. The Rome Statute identifies the most serious violations of international human rights and humanitarian law for the purposes of exercising jurisdiction. These violations are grouped within the categories of genocide, crimes against humanity, war crimes, and the crime of aggression.

### 2 National Courts

National courts make up a state's domestic judicial system. Many view national courts as the preferred forum for the prosecution of past human rights violations because they demonstrate a country's effectiveness in applying the law within its own judicial and cultural context. Holding a trial in the country where violations occurred may prove easier and more efficient than holding it in international or hybrid courts.

### 3 Mixed/Hybrid Courts

Prosecutions for international crimes have more potential for impact when they are conducted in the society where the crimes occurred. However, societies emerging from conflict or in transition may lack the political will or resources needed to prosecute these crimes, and legal systems may be in disarray. Even sophisticated legal systems that deal mainly with ordinary crimes

may lack the capacity to effectively address international crimes. These problems may require international assistance that draws on best practices from elsewhere; for instance, assistance through “hy-brid” courts or tribunals composed of both international and domestic justice actors. Examples of hybrid courts include the Special Court for Sierra Leone, the Special Panels for Serious Crimes in East Timor, and the Extraordinary Chambers in the Courts of Cambodia.

### 4 Universal Jurisdiction

Universal jurisdiction is a legal principle that permits a state to conduct criminal proceedings for certain crimes regardless of where the crimes took place or whether those involved are citizens or nationals of that state. The principle of universal jurisdiction acknowledges that some offences are so egregious that they are considered crimes against the whole international community and, thus, are of universal concern. In some situations, these prosecutions may provide the only opportunity to promote accountability. Several European countries have opened universal jurisdiction cases against foreign nationals alleged to be responsible for international crimes committed in the nationals' home countries. In most instances, prosecutors or investigative magistrates have brought these cases forward with the assistance and/or pressure of human rights NGOs and victims' groups from the countries where the alleged violations took place. Countries such as Belgium, Germany, the United Kingdom, Spain, Argentina, and Australia have pursued prosecutions through universal jurisdiction.

## What Is the Relationship Between Truth Commissions and Prosecutions?

Information collected by a truth commission may be useful to those investigating cases for prosecution while the commission is still operating, immediately after its conclusion, or many years later. Generally, a truth commission should be viewed as complementary to judicial action. Even where prosecutions are not immediately expected, it is important that truth commissions conduct their work keeping in mind the possibility of future prosecutions. When prosecutions eventually do take place, a truth commission's report and its other records might be relied upon as background materials and/or to provide leads to witnesses. Even if a truth commission's report does not point to specific perpetrators, the commission's information can reveal patterns of violations, show institutional involvement and/or illuminate command structures and the responsibility of those at the top of political or military institutions.

# THE INTERNATIONAL CRIMINAL COURT (ICC) AND CORE CRIMES DEFINED IN THE ROME STATUTE

As of July 2018, 26 cases have been brought before the International Criminal Court (ICC), with some cases having more than one suspect. Fourteen of the 123 state parties to the Rome Statute (states that have ratified it) are located in Asia—Afghanistan, Bangladesh, Cambodia, Cyprus, Timor-Leste, Georgia, Japan, Jordan, South Korea, Maldives, Mongolia, Palestine, Philippines, and Tajikistan. In recent years, some state parties have withdrawn from the ICC (i.e., Burundi), begun the withdrawal process (i.e., the Philippines), or threatened to withdraw (i.e., South Africa, Gambia).



## Jurisdiction of the ICC

The ICC can obtain jurisdiction over a situation in three ways:

- A state party may refer a situation to the court;
- The UN Security Council may refer a situation to the court, including a situation involving a state that is a member of the UN, but not party to the Rome Statute; or
- The ICC Prosecutor may initiate an investigation of crimes alleged to have occurred in the territory of a state party or to have been committed by nationals of a state party. The ICC may exercise jurisdiction where genocide, crimes against humanity, or war crimes were committed on or after 1 July 2002. As of 17 July 2018, the Security Council could refer to the ICC cases in which an act of aggression seemed to have occurred whether or not it involved a state party.

## Definition of Crimes under the ICC's Jurisdiction

**1**

### Genocide

The crime of genocide is any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group:

1. Killing members of the group;
2. Causing serious bodily or mental harm to members of the group;
3. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
4. Imposing measures intended to prevent births within the group;
5. Forcibly transferring children of the group to another group.

**2**

### Crimes Against Humanity

Crimes against humanity are any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

1. Murder;
2. Extermination;
3. Enslavement;
4. Deportation or forcible transfer of population;
5. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
6. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
7. Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law;
8. enforced disappearance of persons;
9. the crime of apartheid;
10. other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

### 3 War Crimes

War crimes are any of the following breaches of the four Geneva Conventions of 12 August 1949, perpetrated against any persons or property:

1. Willful killing;
2. Torture or inhuman treatment, including biological experiments;
3. Willfully causing great suffering or serious injury to body or health;
4. Extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly;
5. Compelling a prisoner of war or other protected person to serve in the forces of a hostile power;
6. Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
7. Unlawful deportation or transfer, or unlawful confinement
8. Taking of hostages.

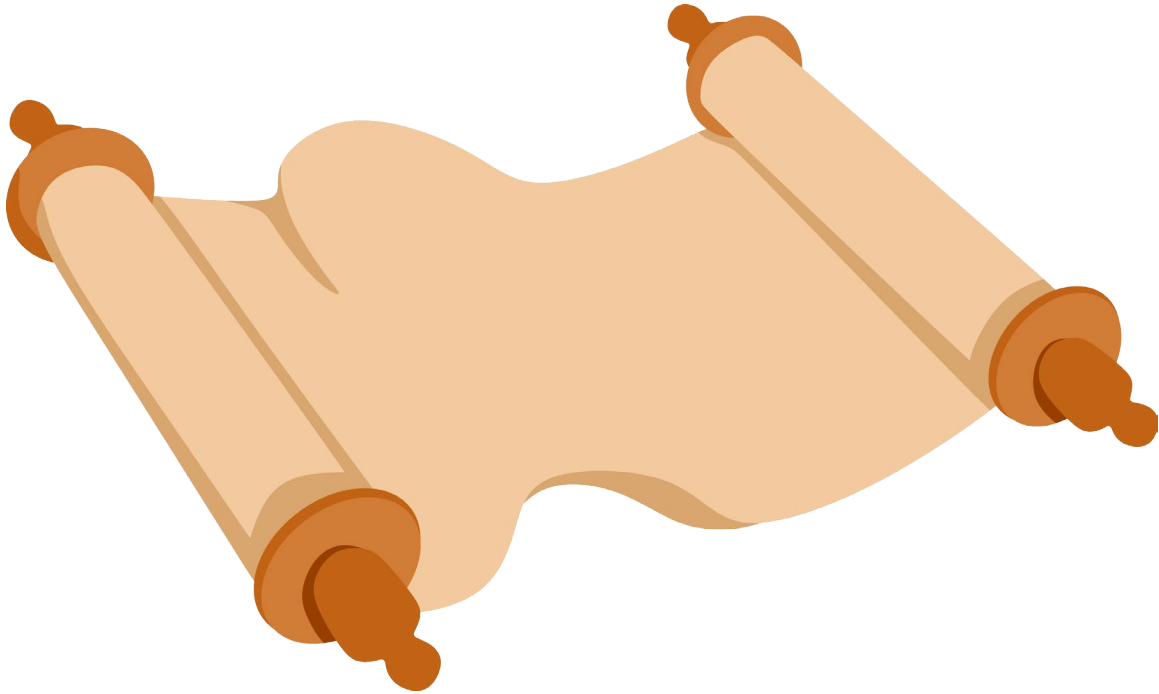
Under the definition of war crimes, the ICC will also have jurisdiction over the most serious violations of the laws and customs applicable in international armed conflict within the established framework of international law. These violations are defined extensively in Article 8(b) of the Rome Statute. In the case of armed conflict that is not of an international character, the Court's jurisdiction will cover breaches of Article 3 common to the Geneva Conventions of 12 August 1949.

### Amendments to extend the elements of crimes

Under Article 9 of the Rome Statute, amendments to the elements of crimes that assist the ICC in the interpretation and application of crimes under its jurisdiction may be proposed by any state party, by the judges acting by an absolute majority, or by the prosecutor for the Court. All proposed amendments are subject to the approval of two-thirds majority of the members of the Assembly of States Parties.

While not a United Nations organization, the ICC has a cooperation agreement with the United Nations. When a situation is not otherwise within the Court's jurisdiction, the UN Security Council can refer the situation to the ICC granting it jurisdiction.

# THE LEGAL PROCESS OF THE INTERNATIONAL CRIMINAL COURT (ICC)



## After Crimes Occur

### Preliminary examinations

The Office of the Prosecutor must determine whether there is sufficient evidence of crimes that fall within the ICC's jurisdiction, whether there are genuine national proceedings, and whether opening an investigation would serve the interests of justice and of the victims.

*If the requirements to initiate an investigation are not met, or if the situation or crimes are not under the ICC's jurisdiction, the ICC's prosecution cannot investigate. The prosecution may again seek confirmation of charges by presenting new evidence.*

### Investigations

After gathering evidence and identifying a suspect, the prosecution requests ICC judges to issue an arrest warrant. The ICC relies on countries to make arrests and transfer suspects to the ICC, or to issue a summons to appear (suspects appear voluntarily; if not, an arrest warrant may be issued).

### Pre-trial stage

**Initial appearance:** Three pre-trial judges confirm the suspect's identity and ensure the suspect understands the charges. **Confirmation of charges hearings:** After hearing the prosecution, the defence, and the legal representative of the victims, the judges decide (usually within 60 days) if there is enough evidence for the case to go to trial.

*If the suspect is not arrested or does not appear, legal submissions can be made, but hearings cannot begin.*

### Trial stage

Before three trial judges, the prosecution must prove beyond reasonable doubt the guilt of the accused. Judges consider all evidence, then issue a verdict and, when there is a verdict of guilt, issue a sentence. Judges can also order reparations for the victims.

*If there is not enough evidence, the case is closed and the accused is released.*

### Appeals stage

Both the prosecutor and the defence have the right to appeal a Trial Chamber's verdict and the sentence. The victims and the convicted person may appeal an order for reparations. An appeal is decided by five judges of the Appeals Chamber who are never the same judges as those who gave the original verdict. The Appeals Chamber decides whether to uphold the original decision, amend it, or reverse it. This is the final judgment unless the Appeals Chamber orders a retrial before the Trial Chamber.

### Enforcement of sentence

Sentences are served in countries that have agreed to enforce ICC sentences.

*If a verdict of guilt is not upheld the person may be released. The Trial Chamber may order a convicted person to pay reparations to the victims of the crimes she or he committed. The Court may order such reparations to be paid through the Trust Fund for Victims.*

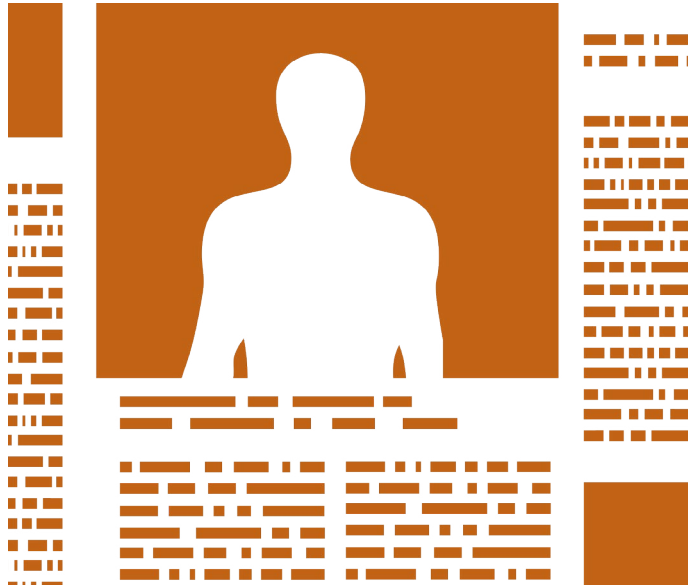


## Principle of Complementarity

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- The ICC seeks to complement, not replace, national courts. It prosecutes cases only when states are unable or unwilling to carry out proceedings. This provides an incentive for states to provide justice at the domestic level.
- All states parties should bring their laws into conformity with the Rome Statute and build capacity to investigate and prosecute war crimes, crimes against humanity, and genocide at the domestic level.
- Even if the motivation of domestic courts is to avoid the ICC, the pursuit of domestic criminal justice conducted to an international standard and the development of new domestic capacities should be seen as overall gains.
- More effective pursuit of international crimes at the domestic level will alleviate some concerns that the ICC targets only crimes in certain locations, such as the African continent. Domestic justice, if enforced to certain standards, can carry a high degree of legitimacy, can escape some limitations to the ICC's jurisdiction, and can be better suited to the local context. The expansion of domestic legislation may also result in extraterritorial options that serve to "tighten the net" in respect to perpetrators.
- International prosecutions are expensive and limited by constraints on resources. The focus has increasingly been on those bearing the greatest responsibility. More cases on the domestic level may make it possible to encompass mid-level perpetrators. On the other hand, domestic courts tend to have even fewer resources. Other transitional justice mechanisms are needed to ensure that redress is available for a large number of victims.
- Building better connections, or complementarity, between international and domestic justice actors entails refocusing international justice efforts away from international tribunals and toward rebuilding domestic justice systems.

# Forms of Criminal Responsibility



## Individual criminal responsibility

International criminal law allows for individuals to be held criminally responsible not only for committing genocide, crimes against humanity, and war crimes, but also for attempting, facilitating, or aiding and abetting the commission of such crimes. Individuals may also be held criminally responsible for planning and instigating the commission of such crimes.

## Command responsibility

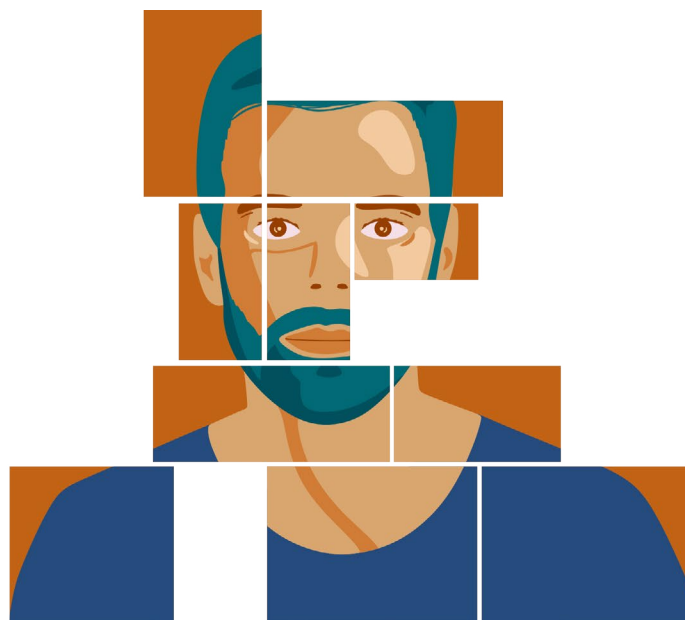
Violations of international criminal law can also result from a failure to act. Armed forces or groups are generally under a command that is responsible for the conduct of its subordinates. In order to make the system effective, superiors in the chain of command should be held to account when they fail to take proper measures to prevent their subordinates from committing serious international crimes. Therefore, they may be held criminally responsible for criminal activities they did not directly do or order, but that they did not prevent or stop.



### Sources

- Rome Statute of the International Criminal Court, 1998, <[https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/o/rome\\_statute\\_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/o/rome_statute_english.pdf)>
- "About ICC", International Criminal Court, <<https://www.icc-cpi.int/about>>

# UNDERSTANDING REPARATIONS



Reparations provide official state recognition of victims' rights by repairing the damage and suffering of individuals and communities caused by one or more serious human rights violations. The objectives of a reparations programme include:

1. Fulfilment of rights to restitution, compensation, and rehabilitation;
2. Building trust in the state and its ability to guarantee human rights; and
3. Contributing to a sustainable peace.

## The importance of reparations

Reparations are important because they fulfil victims' rights that have been violated and so begin to repair the social fabric that was torn by conflict. After a conflict has ended many people continue to suffer negative consequences of past human rights violations. They wait for official recognition of their suffering and of the contributions they made during the conflict. Many victims require material assistance and symbolic recognition to heal their physical and emotional wounds, and restore their dignity.

International law and, often, domestic law recognize that victims of human rights violations have a right to a remedy. When the state gives priority to addressing the needs of victims, it demonstrates its commitment to providing this remedy to victims, strengthening human rights, and condemning violence, which builds victims' trust toward the state. Reparations also strengthen social solidarity by promoting an understanding of the situation of victims' and of the contributions they made to the nation. All this contributes to long-term stability.

Reparations programs are usually implemented in countries that have suffered a long conflict or repressive regime marked by widespread human rights violations and many victims. Often the local court system is unable to deal with this high number of violations so that the state must find other ways to care for or recognize victims. Reparations must be implemented alongside other approaches used to address the negative impact of past conflict. For example, if there is no institutional reform to ensure that the state respects citizens' human rights it will be easy for violations to recur, making any reparations an empty measure. If there are reparations but no initiatives to bring suspects to account, victims may feel as though reparations are intended to

replace their right to criminal justice. Reparations are not an alternative to criminal justice, but part of a broader strategy to acknowledge and address the impact of abuses.

Social assistance programs and veterans' programs are not the same as reparations. Social assistance programs are a right of all citizens, provided they fulfil certain criteria such as being disabled or elderly. Veterans' benefits are a way to thank veterans for their service to the nation and aim to reintegrate ex-combatants into civilian life. Reparations, on the other hand, usually address the harm caused by the violations that victims suffered.

Implementation of a reparations program may use a number of mechanisms. A special institution may be created to implement a reparations program that would establish beneficiary criteria, collect necessary data, and provide reparations to the beneficiaries.

Having a single institution dedicated to the provision of reparations has several benefits. It:

- Demonstrates the state's commitment to victims,
- Makes it easier for victims to access information about reparations as there is only one institution to contact, and
- Is easier to measure the resources dedicated to reparations.

A negative aspect of establishing a new institution to provide reparations is that it requires a lot of resources.

Although reparations are not the same as social assistance, some countries may integrate reparations into a social assistance strategy. For example, in Chile the reparations programme included a victim-sensitive health care system and the provision of university scholarships for victims or their children. When this approach is used it is important to distinguish benefits given for vulnerability caused by political violence from benefits given for vulnerability caused by other factors. This will allow the state to demonstrate its effort to provide reparations to victims and will help victims to feel they have been recognized.

## Different forms of reparations

### Material reparations

are concrete forms of assistance to victims that may include:

- Compensation, usually monetary: payment for damages
- Rehabilitation: provision of services to help addresses

victims' needs such as special services for education, and mental and physical health including special counselling; legal aid; and economic assistance, such as access to micro-credit schemes, one-off payments, or monthly pensions

- Restitution: returning victims to their original situations as much as possible; e.g., re-employment, full citizenship, the return of stolen property, or the repair of damaged property
- Proper burial of victims (families are able to have appropriate ceremonies).

### Symbolic reparations

are measures that can provide victims with satisfaction and are often seen as efforts to keep the violations from being repeated in the future. They include:

- Apologies to victims from those responsible for the violations;
- Monuments or other forms of recognition dedicated to victims;
- Memorialization such as national days of remembrance, renaming public places and streets after past events, or marking former massacre and detention sites;
- Locating missing persons and recovering the remains of deceased victims.

Collective reparations are material and/or symbolic reparations designed for a community or specific group of victims. Material reparations for the community may take the form of new or improved infrastructure or some other project, such as a community centre, that will help the community as a whole to recover.



#### Sources

- Lisa Margarrell, "Reparations in Theory and Practice", 2007, available at <<https://www.ictj.org/sites/default/files/ICTJ-Global-Reparations-Practice-2007-English.pdf>>
- Pablo de Grief (ed.), The Handbook of Reparations, New York: Oxford University Press, 2006.

## BASIC PRINCIPLES AND GUIDELINES ON THE RIGHT TO A REMEDY AND REPARATION FOR VICTIMS OF GROSS VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW SUMMARY



The right to a remedy for victims of gross violations of international human rights law is found in numerous instruments of international human rights law:

- The Universal Declaration of Human Rights (article 8),
- The International Covenant on Civil and Political Rights (article 2),
- The International Convention on the Elimination of All Forms of Racial Discrimination (article 6),
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (article 14), and
- The Convention on the Rights of the Child (article 39).

Provisions for this right are also found in international humanitarian law:

- The Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV, article 3),
- The Protocol Additional to the Geneva Conventions of 12

August 1949 (article 91),

- The Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, and
- The Rome Statute (articles 68 and 75).

In honouring the right of victims to remedies and reparations, the international community reaffirms accountability, justice, and the rule of law. In adopting a victim-oriented perspective, the international community affirms its solidarity with victims of violations of international law, as well as with humanity at large, in accordance with the following Basic Principles and Guidelines.

### Basic Principles and Guidelines

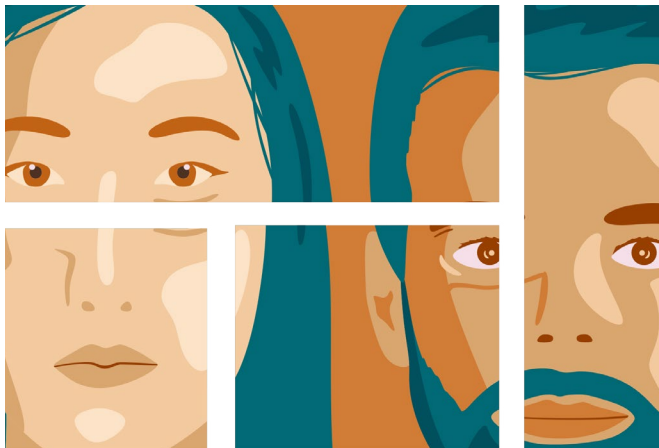
*Obligation to respect, ensure respect for, and implement international human rights law and international humanitarian law.*

This obligation is provided for in international treaties, customary international law, and in domestic laws. This obligation includes, inter alia, the duty to:

1. Take legislative, administrative, and other measures to prevent violations;
2. Investigate violations effectively, promptly, thoroughly, and impartially and, where appropriate, take action against those allegedly responsible;
3. Provide victims with equal and effective access to justice, irrespective of who bears responsibility for the violation; and
4. Provide effective remedies to victims, including reparations.

## Victims of Gross violations of International Human Rights Law and Serious Violations of International Humanitarian Law

*Victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted, and regardless of whether or not there is a family relationship between the perpetrator and the victim.*



## Treatment of Victims

Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their physical safety, psychological well-being, and privacy, as well as that of their families. A State's domestic laws should ensure that a victim who has suffered violence or trauma benefit from special consideration and care to avoid her or his retraumatization in the course of legal and administrative procedures designed to provide justice and reparation.

## Victims' Right to Remedies

Remedies for gross violations of international human rights law and serious violations of international humanitarian law include a victim's right to the following as provided for under international law:

1. Equal and effective access to justice;
2. Adequate, effective, and prompt reparations for harm suffered; and
3. Access to relevant information concerning violations and reparations mechanisms.

## Remedy as Access to Justice

A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as to mechanisms and proceedings conducted in line with domestic law. Obligations arising under international law to secure access to justice, and to fair and impartial proceedings shall be reflected in domestic laws. To that end, States should:

1. Disseminate information about all available remedies for violations of international human rights law and international humanitarian law;
2. Minimize the inconvenience to victims, protect against unlawful interference with victims' privacy, and ensure their safety from intimidation and retaliation, as well as that of their representatives, families, and witnesses, before, during, and after judicial, administrative, or other proceedings;
3. Provide proper assistance to victims seeking access to

justice; and

4. Make available all appropriate legal and diplomatic means to ensure that victims can exercise their rights to remedy.

An adequate, effective, and prompt remedy for violations of international human rights law and of international humanitarian law should allow victims to access all available and appropriate international processes. Moreover, access to international remedies should not prevent the possibility of any domestic remedies. In addition to individual access to justice, States should endeavour to develop procedures that allow groups of victims to receive reparations as appropriate.



## Reparations for harm suffered

Adequate and prompt reparations promote justice by redressing violations of international human rights or humanitarian law. Reparations should be proportional to the gravity of the violations and harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparations to victims for acts or omissions by the State.

A person who is found liable for reparations should provide them to the victim or compensate the State if the State has already provided reparations to the victim. States should establish national programmes for reparations and other assistance to victims in case those liable for the harm suffered are unable or unwilling to meet their obligations. States shall provide effective mechanisms for reparations and enforce judgements for reparations against parties liable for the harm suffered in accordance with domestic law and international legal obligations. In accordance with domestic law and international law, victims should be provided with full and effective

reparations that include: **restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.**

### Restitution

seeks to restore the victim to the original situation before violations occurred. Restitution may include: restoration of liberty; enjoyment of human rights (identity, family life, citizenship); return to one's place of residence; restoration of employment; and return of property.

### Compensation

should be provided for any economically assessable damage, such as:

- Physical or mental harm;
- Lost opportunities, including employment, education, and social benefits;
- Material damages and loss of earnings, including loss of earning potential;
- Moral damage;
- Costs for legal assistance, and medical, psychological, and social services.

### Rehabilitation

includes medical and psychological care, legal and social services.

### Satisfaction

includes any or all of the following:

- Effective measures aimed at the cessation of continuing violations;
- Verification of the facts, and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;
- The search for the disappeared, for the identities of children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;
- An official declaration or a judicial decision restoring the dignity, reputation, and rights of the victim and of persons closely connected with the victim;

- Public apology, including acknowledgement of the facts and acceptance of responsibility;
- Judicial and administrative sanctions against persons liable for the violations;
- Commemorations and tributes to the victims; and
- Inclusion of an accurate account of the violations that occurred in trainings and in educational material at all levels.

### **Guarantees of non-repetition**

should include the following measures that may also contribute to prevention:

- Ensuring effective civilian control of military and security forces;
- Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
- Strengthening the independence of the judiciary;
- Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;
- Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;
- Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service, and military personnel, as well as by economic enterprises;
- Promoting mechanisms to prevent social conflicts and monitor their resolution;
- Reforming laws that contribute to or allow gross violations of international human rights law and serious violations of international humanitarian law.



## **Access to Relevant Information Concerning Violations and Reparation Mechanisms**

States should inform the general public and, in particular, victims of gross violations of international human rights law and serious violations of international humanitarian law of the rights and remedies addressed by these Basic Principles and Guidelines and of all available legal, medical, psychological, social, administrative, and all other services victims may have a right to access. Moreover, victims and their representatives are entitled to information about the causes and conditions of the gross violations of international human rights law, of serious violations of international humanitarian law, of their victimization, and a right to learn the truth in regard to these violations.

### **Non-Discrimination**

These Basic Principles and Guidelines must be consistent with international human rights law and international humanitarian law and be interpreted and applied with no discrimination of any kind or on any grounds.

### **Non-Derogation**

Nothing in these Basic Principles and Guidelines shall restrict or derogate (detract) from any rights or obligations determined by domestic and international law. The present Basic Principles and Guidelines do not prejudice (do not interfere with or deny) the right to a remedy and reparation for victims of all violations of international human rights law and international humanitarian law. It is further understood that these Basic Principles and Guidelines do not prejudice the special rules of international law.

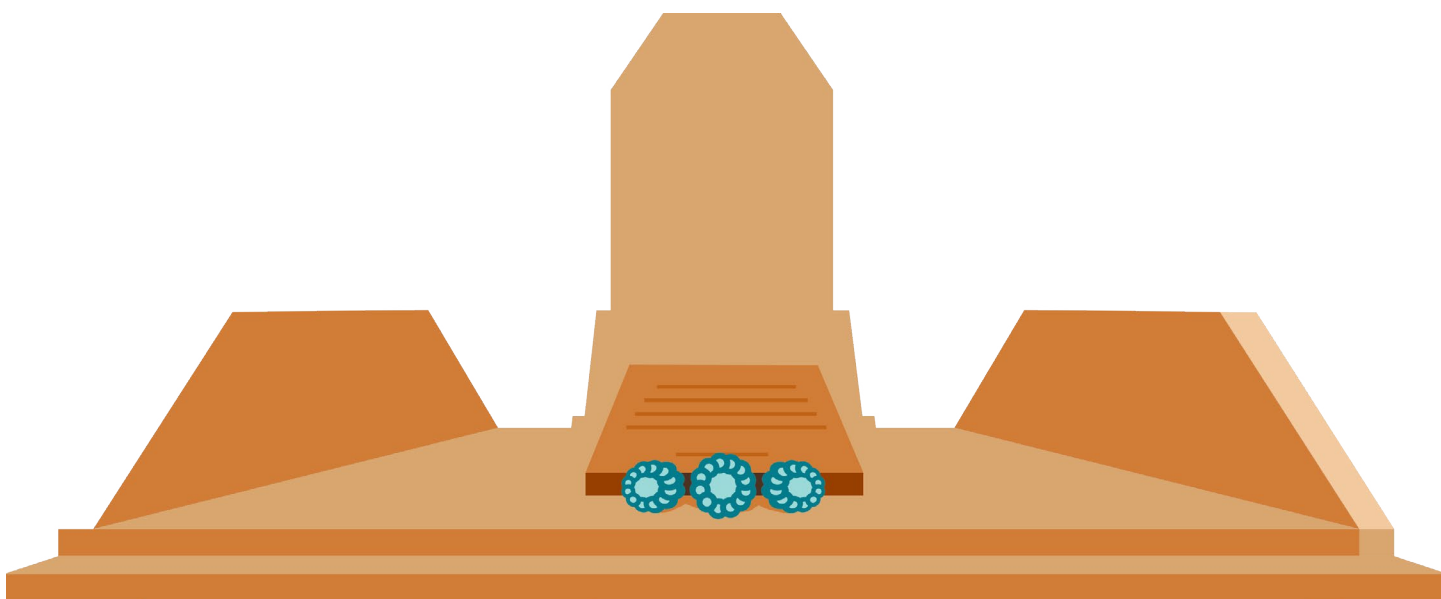
### **Rights of Others**

Nothing in this document is to be construed as denying the rights of others as protected by international or national laws, in particular the right of an accused person to benefit from applicable standards of due process.



# MEMORIALISATION

Memorialisation is the act of collectively recognising and remembering past human rights abuses in order to honour victims and contribute to building a more democratic, peaceful, and just future in post-conflict societies. A memorial is any process, event, or structure that provides a mechanism for remembering. In addition to acting as a form of reparation for victims, memorialisation can contribute to wider transitional justice efforts by promoting truth-telling, documenting specific human rights violations, and harnessing collective memory to avoid repetition of past atrocities.



## Functions of Memorials

In essence, a memorial provides a physical place for families and communities to remember victims. More broadly, memorials represent a society's acknowledgement of past violations that can serve as a commitment to non-repetition, fulfillment of human rights, and reconciliation. Memorials not only reflect social change, but serve as catalysts for it.

In societies where past human rights abuses remain veiled by political or social forces, memorials, or even the proposal of them by civil society, can shed light on a past abuse and obtain official recognition of it. In some instances, memorials, can serve as the first step on the road to accountability. They can promote

an active citizenry by inspiring individuals to participate directly in the creation of a human rights culture that seeks to ensure such atrocities never happen again.

Memorials also create a powerful platform for survivors to tell their stories, whether or not these are linked to, or result in, social reforms. New museums and heritage sites built today almost always incorporate oral history testimonies to tell the story of the site or an event. This allows the experiences of ordinary people to be heard and ensures that a site expresses the intense emotions of people who once suffered extreme forms of abuse.

On the other hand, memorials can be misused to promote a victor's account of an event or a period of history that denies

the experiences of victims. They can be used to promote propaganda and hate, and instill a distortion of the truth in the next generation. They may also reinforce harmful gender stereotypes either by memorialising only men's roles in a conflict and ignoring the role of women, or by representing men primarily as combatants and women primarily as victims or caregivers.

Memorials can bring people together by creating spaces for peace and the validation of people's experiences, but they can also divide, by breeding contestation, hostility, and exclusion. In transitional justice, memorialisation cannot expect to be successful without a commitment by society to uncovering the truth, ensuring just reparations, and promoting reform to guarantee that such violence and violations do not reoccur.

The process that is followed when developing a memorial project is essential to ensuring its success as part of a transitional justice process, perhaps even more important ultimately than the physical memorial itself. The process itself can bolster or undermine the credibility and legitimacy of the memorial, and therefore determine the success or failure of the project. In essence, memorials should never speak on behalf of victims and survivors without a thorough consultation and collaboration process with important stakeholders. The process should be deliberate and tailored to a specific context. It should take into account local needs, priorities, and interests.



## Forms of Memorials

Memorials can take a variety of forms and vary in scale from small local initiatives to grander projects that seek to transform sites of mass atrocity, and invite contemplation and interpretation. They can provoke a range of responses from public acknowledgement and national recognition to personal reflection or mourning, pride, anger, sadness, or curiosity about what has happened in the past. As all objects and acts have symbolic meaning, they can also be controversial and divisive, especially if they promote partisan and selective truths that by design or default silence other voices.

### Constructed Memorials

Constructed memorials are structures or institutions purposely

built to memorialise individuals or an event. They may be organised at the international, regional, national, or local level, and include the following:

- Museums and commemorative libraries
- Monuments, including walls listing the names of victims
- Virtual memorials on the internet

### Sites of Conscience

Sites of conscience, also referred to as found memorials, are spaces or structures not originally designed as memorials but that hold commemorative meaning. Many of these sites, which include graves, former torture centres, concentration camps, buildings used by a previous regime, and locations of mass killings or genocide, have been transformed into museums or memorials.

### Anniversary Dates and Commemorations

Certain days, such as anniversaries of coups, battles, or other activities relevant to conflict or peacemaking, serve as important opportunities to memorialise events from the past. Governments often observe these days as national holidays, encouraging citizens to pay homage to the past.

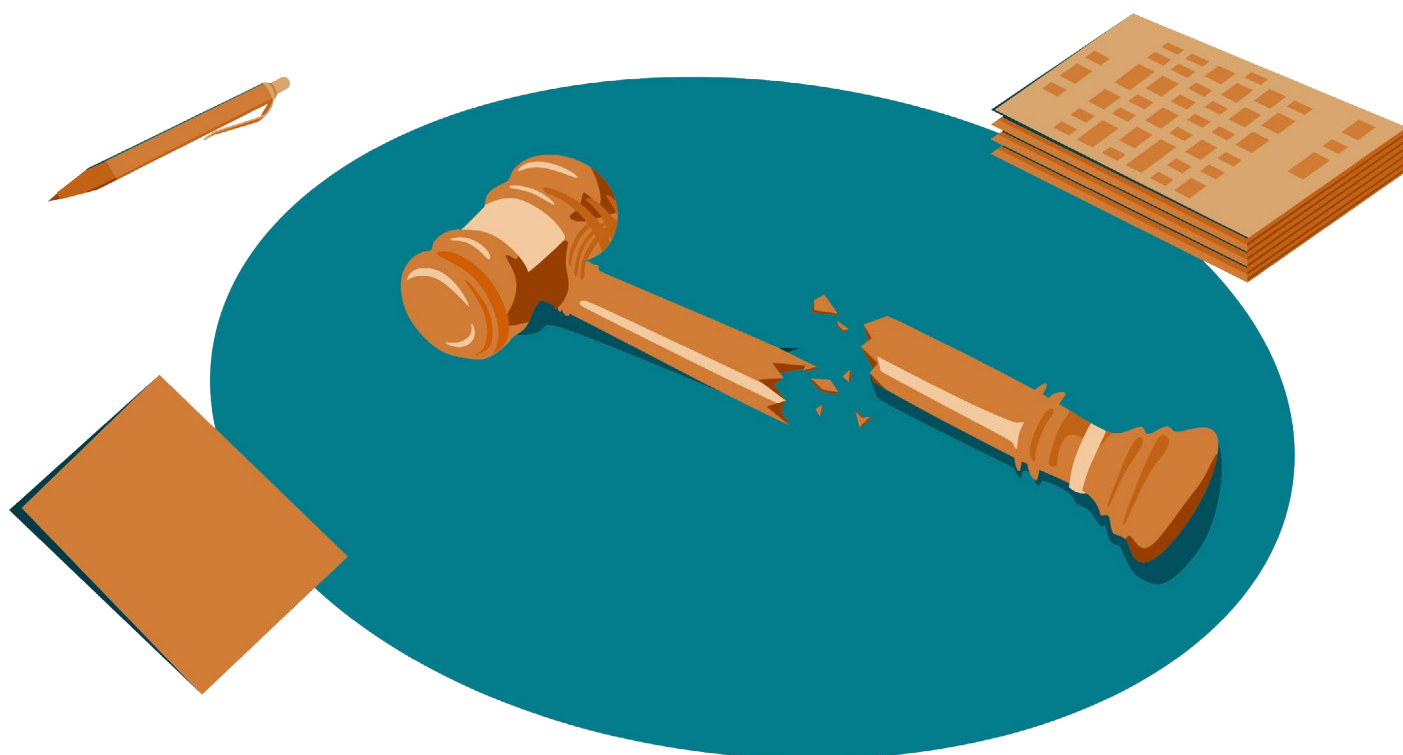
### Other Types of Remembering

Activities focused on framing or reframing memories are an imaginative form of memorialisation. In some instances they can serve as a powerful means to encourage empathy with the experiences of others. Memorialisation activities include:

- heritage trails and marches;
- demonstrations and vigils;
- walking tours and parades;
- public apologies; and
- performance art.

Memorials are complex and engaged processes that keep memories alive. While monuments traditionally proclaimed an historical event or person that often privileged male figures, memorials that are linked to the pursuit of accountability should invite introspection and engagement, and seek to recognise the suffering of victims as citizens inclusive of their gender, class, sexuality, and ethnicity. They prompt reflection about the past, the present, and the future. A practitioner of transitional justice needs to see memorials as a means of inspiring citizens to support dialogue, ask questions, and participate in their society.

# INSTITUTIONAL REFORM



## Institutional Reform and Its Functions

Institutional reform is the process of examining and reshaping state and social structures that seeks to provide a post-conflict society with functioning, non-partisan institutions. Its mandate is broad and may include changes to, among others, the constitution, the military, the police, the judiciary, the parliament, the educational system, and the media. Those institutions might have been abusive, unaccountable, and corrupt. Reform is needed to ensure that such institutions are:

- Accountable for their actions;
- Democratically controlled;
- Grounded in rule of law and respect for human rights;
- Legitimate in the eyes of the public;
- Responsive to the needs of all groups within society, not only the political or economic elite, but also the needs of victims, the poor, and those marginalized.

## The “Guarantee of Non-Repitition”

The “guarantee of non-repetition” is enshrined in several international human rights instruments and decisions. It means that following a period of conflict in which mass human rights violations occurred, states are required to ensure that such atrocities never happen again. In practice, this guarantee is satisfied by institutional reform, particularly the reform of those institutions that committed violations or allowed them to take place.

Legal sources of the guarantee of non-repetition are:

- Article 2 of the International Covenant on Civil and Political Rights (ICCPR) requires state parties to take legislative and constitutional steps, and other measures, to give effect to the rights recognised in the Covenant and to ensure that any person whose rights are violated has an effective remedy.

- The International Convention for the Protection of All Persons from Enforced Disappearance contains an explicit provision regarding “guarantees of non-repetition”.
- The Inter-American Court of Human Rights in the case of Velásquez Rodríguez held that States are obliged “to organise the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights” (para. 166).
- The legal mandates of truth commissions often require such commissions to make recommendations to ensure the non-repetition of violations.

## The Preconditions for Effective Institutional Reform

In 2015, the UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence issued a report that set out basic preconditions for effective institutional interventions. These include:

- Provision of effective security for the population;
- Issuance of legal identity materials (e.g., birth certificates, ID cards) so that citizens can exercise their rights and gain access to state services;
- Ratification of human rights treaties and their incorporation into domestic law to signify intent, and to allow for enforcement and monitoring.

## A Justice-Sensitive Approach to Institutional Reform

Justice-sensitive reform seeks to reshape institutions by addressing past operational practices that contributed to human rights violations (e.g., cultures of torture in police investigations) and holding individual perpetrators to account. A justice-oriented paradigm is needed to ensure that institutions are responsive to the needs of all citizens (including women, children, and other vulnerable groups), and not just responsive to select or partisan interests. This responsiveness is a critical component for rebuilding trust, and lies at the heart of the social contract between the state and its citizens. Just and well-functioning institutions contribute to the transformation of victims and survivors into rights-bearing citizens who are able

to participate in society rather than suffer as victims of state oppression.

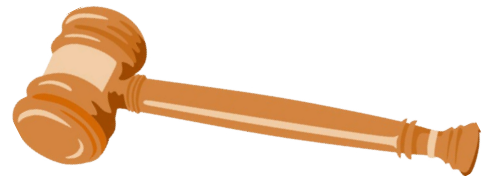
A justice-sensitive approach to reform focuses on the following four mutually-reinforcing objectives that also often serve as principles to guide how reforms are pursued. Institutional reform seeks to:

- Build the institutional integrity of a society’s institutions to discourage abuses, and increase responsiveness and accountability to citizens;
- Promote the legitimacy of a society’s institutions to overcome the population’s fear and lack of trust arising from a legacy of serious abuse;
- Represent and empower all citizens, especially victims of oppression and violence, and other marginalised groups; and
- Enhance coherence with the other transitional justice pillars (i.e., truthseeking, prosecutions, and reparations) to enhance the effectiveness of each component.

## Some challenges to institutional reform

Decisions about institutional reform, including decisions about security sector reform (SSR) and vetting processes, take place within a country’s broader context of political transition and/or peacebuilding. The most serious challenges, therefore, appear to be:

- A scarcity of financial and human resources,
- Competing political or economic interests,
- A fragile political and socio-economic context, and
- A lack of political will.

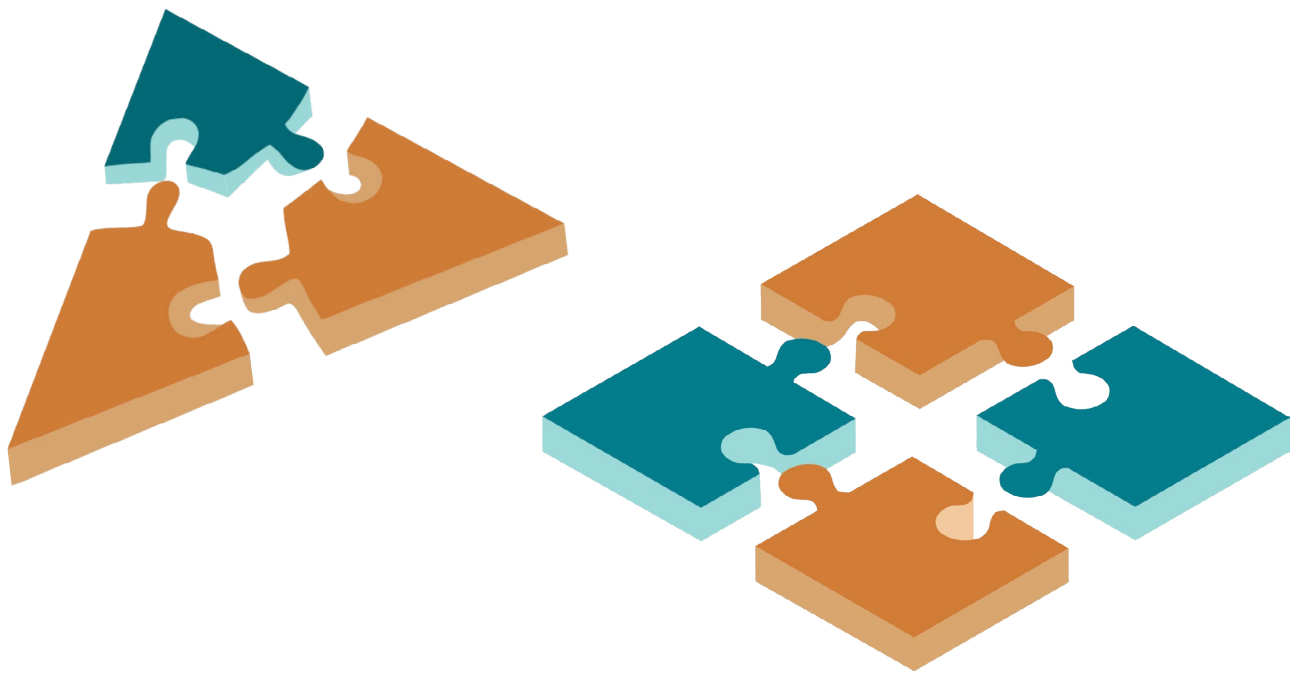


### Sources

- United Nations Human Rights Council, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, AHRC/30/42, 7 September 2015, <<https://undocs.org/en/A/HRC/30/42>>

# DIFFERENT TYPES OF INSTITUTIONAL REFORM

Institutional reform is the process of examining and reshaping state and social structures. Following a period of conflict involving mass human rights violations, states are required by several international human rights instruments to ensure that such atrocities do not happen again. This requirement is known as the “guarantee of non-repetition,” and it is specifically through reform of institutions that contributed to or permitted the violations to occur to become functioning, non-partisan institutions, that this requirement may be satisfied. Different types of institutional reform include reform of the constitution, criminal law, judicial system, security sector, education system, and media.



## Constitutional Reform

Constitutional reform revises laws that govern the basic structures of a society in transition to ensure stability, democracy, accountability, and adherence to the rule of law. Constitutional reforms may include the following:

- removing discriminatory provisions;
- inserting mechanisms to support inclusion;
- creating a bill of rights;
- reforming provisions that govern the security sector;
- securing the separation of powers;
- limiting the scope of military courts; and/or
- adopting a brand-new constitution.

## Criminal Law Reform

Serious international crimes committed in conflicts and contexts of repression need to be prosecuted to secure the rule of law and ensure a foundation for peace in post-conflict societies. Domestic criminal laws may need to be revised to allow for the prosecution of serious international crimes and to ensure such crimes are not subject to a statute of limitations. These crimes constitute an “affront to humanity” and a lapse in time should not provide perpetrators an escape from responsibility. In addition, emergency, anti-terrorism, or other security-related laws must be made fully compatible with human

rights standards to prevent rights violations by state and non-state actors. This can be achieved by:

- Prohibiting arbitrary detention;
- Eliminating amnesty provisions;
- Guaranteeing access by detainees to lawyers and private doctors;
- Prohibiting evidence or confessions obtained through coercion or torture; and
- Providing legal aid to indigents accused of serious crimes.

## Judicial Reform

Post-conflict societies are characterized by an absence of the rule of law, past and present gross human rights violations, impunity, and economic devastation and decay. Often, the judicial system has become so compromised that the system and its supporting services need to be reformed or even rebuilt in order to support prosecutions, truth-seeking, and reparations. Judicial reform may include vetting judicial personnel, strengthening judicial independence, building judicial capacity, and establishing ongoing judicial training. Reforms that focus on the role and treatment of judicial personnel may include:

- Recruiting on the basis of merit and objective criteria;
- Providing the security of tenure;
- Offering adequate remuneration and predictable conditions of retirement;
- Subjecting personnel to transparent, fair procedures and proportionate sanctions, promotions, dismissals, and transfers; and
- Providing guarantees of physical safety.

Other reforms that may be needed to strengthen the judiciary as an independent organ of the government may include:

- Enshrining the separation of powers in the constitution;
- Appointing judges and magistrates on the basis of competence and independence, not political affiliation;
- Providing the judiciary with sufficient resources, and budgetary and administrative autonomy;
- Ensuring that cases are assigned on the basis of objective criteria; and
- Respecting and enforcing the decisions of courts, even when they are contrary to the interests of the government.

## Security Sector Reform

Under authoritarian rule or during conflict, the police, military, and intelligence agencies, as well as non-state security actors

(i.e., armed rebel groups), are often responsible for serious and systemic human rights violations. Reform of the security sector is often essential in transitional contexts to prevent recurrence of abuse, and to provide effective and accountable security to communities. In post-authoritarian societies, it may be possible to reform abusive institutions, whereas in societies that have sustained intense conflict it may be necessary to entirely rebuild institutions. The following are often key elements of effective security sector reform:

- Removal (lustration) of personnel who supported a prior oppressive or authoritarian regime;
- Thorough vetting of future personnel;
- Disarmament, demobilisation, and reintegration (DDR) of former combatants;
- Revision of policies (e.g. codes of conduct, policies regarding the treatment of detained individuals) that allowed security agents to engage in abusive practices; and
- Inclusion of marginalised groups within the security sector.

## Educational Reform

Though often overlooked, education can play a key role in guaranteeing non-repetition of past abuses. Educational curriculum can promote truth about the past and contribute to lasting peace. Education has the formative potential to help shape new norms, mediate between contending narratives of the past, and nurture a culture of respect for human rights across generations.

## Media Reform

A hallmark of many authoritarian regimes is the control or suppression of the media. For that reason, it is imperative that a transitioning society reflects on the character of its media and introduces reforms to ensure that it is open and free, and that journalists are adequately protected.

### Sources

- Clara Ramírez-Barat and Roger Duthie, Education and Transitional Justice Opportunities and Challenges for Peacebuilding, ICTJ and UNICEF, November 2015, <<https://www.ictj.org/sites/default/files/ICTJ-UNICEF-Report-EducationTJ-2015.pdf>>
- United Nations, Human Rights Council, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, A/HRC/30/42, 7 September 2015, <<https://undocs.org/en/A/HRC/30/42>>

# GENDER AND TRANSITIONAL JUSTICE



It is important to understand how human rights violations affect men and women differently in order to develop transitional justice mechanisms and initiatives that can adequately address their different experiences, and the gendered and long-term impact of armed conflict. Although the scale of violations often increases significantly in a conflict situation, massive human rights violations that have a particular impact on women may occur before or after a conflict.

In situations of conflict or widespread repression, identities are used to exaggerate differences. Those who spread conflict or order attacks make use of gender stereotypes to further incite violence. Because of gender norms and stereotypes, men and women experience conflict in different ways. Men and boys become targets of forced recruitment into armies. Often, there are more male victims of killings, torture and disappearances. Women and girls may experience the same violations as men, but are also more vulnerable to sexual abuse. In many conflicts, men who bear arms enslave women and girls to carry out domestic chores and take them as “wives” whom they rape.

Early transitional justice processes that had a narrow focus on human rights violations, such as torture and arbitrary detention, prioritised the experiences of men. Many violations committed against women were overlooked, and their experiences of human rights violations were not well documented or understood. Because this bias often continues today, it is important to give particular attention to the experiences of women to ensure a holistic understanding of mass violations. Similarly, transitional justice mechanisms need to be sensitive to the gendered impact of armed conflict and ensure both men's and women's access to and participation in transitional justice processes so that solutions for peace and democracy not only embody principles of gender justice, but themselves become examples of it.





## How Can Truth Commissions Promote Gender Justice?

Truth commissions can provide women a way to share about the human rights abuses they experienced and reclaim their voices in the public sphere. The experience of past truth commissions indicates that truth seeking can be gendered. If there is no information regarding gender-based violations, the truth about the conflict and the outcome of the truth-seeking process will remain incomplete. Only by documenting and analysing gender-based human rights violations can a fuller historical record be achieved.

## How Have Criminal Justice Mechanisms Addressed Gender-Based Human Rights Violations?

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Different criminal justice mechanisms have been used to prosecute massive human rights abuses, including gender-based violations: international courts, including the International Criminal Court; hybrid courts, such as the Special Court for Sierra Leone; and national courts instead of, or in addition to, international courts.

After the Second World War, neither the Nuremberg nor Tokyo tribunals specifically prosecuted the crime of rape, despite well-recorded violations against women, such as the rape of 20,000 women by Japanese soldiers at Nanking and sexual violence in the Nazi concentration camps. Evidence of systematic rape was included in some of the trials, but no judgment stated the crime of rape. However, the Batavia Trials conducted in 1946 in Indonesia by the colonial Dutch East Indies government at a domestic level, did prosecute enforced prostitution as a war crime. The 1949 Geneva Conventions



and the two additional protocols contain provisions relating to women, yet prosecutions at the international level for rape did not take place until the mid-1990s. The first prosecutions took place when the ad hoc tribunals for Rwanda and the former Yugoslavia recognised sexual violence against women as a violation of the various rules of international criminal and humanitarian law. As a result, sexual and gender-based violations are now recognised as among the most serious offences during conflict, and are often charged and prosecuted as such.

## How Can Reparations be Gender-Sensitive?

Historically, few reparations programmes have paid adequate attention to gender, either with regard to women's access to reparations, or the ways in which reparations packages need to be tailored to the harms women suffered, and to their distinct needs and priorities. In 2007, a number of women's rights organisations mobilised to examine how to better incorporate gender into reparations policies. These civil society groups adopted the Nairobi Declaration that highlights the importance of addressing gender-based violations by way of reparations



and urges policymakers to devise programmes that transform socio-cultural injustices and structural inequalities that predate conflicts. Since women's rights are often not protected during peacetime, reparations, therefore, can be used not only to restore victims' rights, but also transform the fulfillment and protections of rights so that both women and men victims become holders of equal rights. Thus it is important that reparations programmes seek to address conditions that enable gendered patterns of human rights violations. Supplementing individual reparations with collective measures is important for recognising the systemic, collective patterns of abuse against women. There is also an increasing call for reparations initiatives to address the harm women experience as a result of the men in their lives being targeted, especially men who are killed or disappeared. Although some initiatives reflect gender sensitivity, reparations programmes still need to improve in order to address the specific trauma caused by sexual and gender-based violence.

### How Can Institutional Reform Promote Gender Justice?

During a period of transition after years of mass human rights violations, the root causes of violations are still present, but may be hidden. Unless the root causes are understood and dealt with there is a high likelihood of a recurrence of violence. Discrimination and inequality can provoke violence that escalates out of control. Discrimination and inequality reflect both a manipulation and a weakening of state institutions whose job it is to protect the rights of citizens. The military and police become agents of the elite who are often directly involved in violations committed with total impunity. Unfair laws are passed, and corrupted courts lose independence. The media, religious bodies, and educational institutions all become tools not for spreading the truth, but rather distort and manipulate it.

Understanding how women experience discrimination and human rights violations, before and during armed conflict, must inform the institutional reform agenda and process. Civilian oversight and mechanisms for check and balance must be established to ensure that state institutions are transparent and accountable. Ensuring that women are involved in designing and implementing reforms is key to a long-term evolutionary process to strengthen democracy and freedom.

# CHILDREN AND TRANSITIONAL JUSTICE

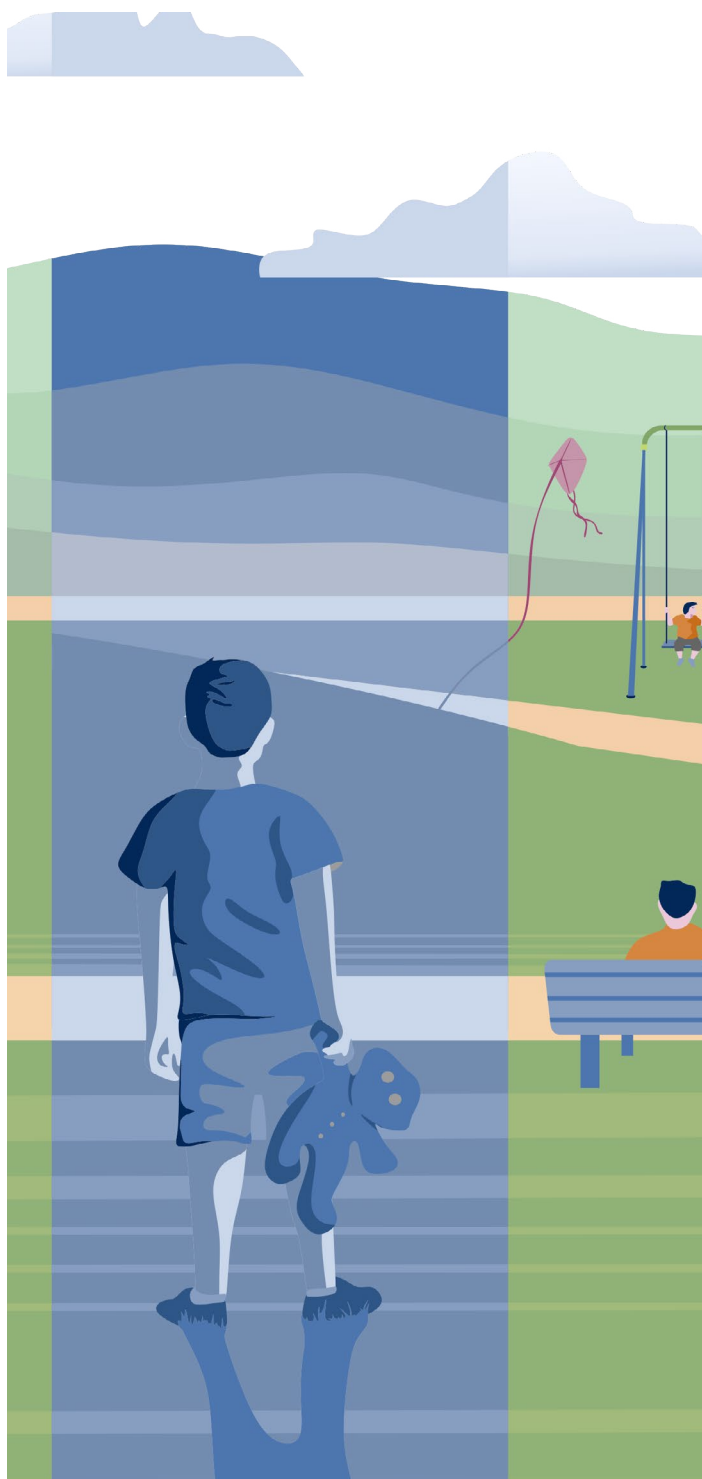
In 1996, a groundbreaking report was presented to the UN General Assembly that highlighted the disproportionate social, economic, political, and psychological impact of armed conflict on children. Based on two years of research in several war-affected countries, the report's recommendations guided principles for the protection of children affected by conflict, ensuring due consideration be given to their distinct roles and needs in conflict and post-conflict contexts. Child-sensitive approaches to transitional justice help to ensure that the rights of children are protected and promoted, as well as guarantee more inclusive reconciliation processes.

## How Conflict Affects Children

Children are often threatened and exploited in times of conflict and political destabilisation. In conflicts throughout history and around the world, victims of killings, torture, abductions, disappearances, arbitrary detention, and sexual abuse have included children. Since the 1996 report, major progress has been made in the protection of children in war, especially in the fight against the recruitment of children to become soldiers. However, according to the UN Secretary General's 2018 report on children and armed conflict, a significant increase in violations against children during armed conflict from 2016 to 2017 was reported with at least 6,000 violations by government forces and more than 15,000 violations by non state actors. Beyond the most visible and immediate wounds affecting children, conflict has far-reaching, long-term impacts on their wellbeing and livelihoods. Those who survive violence often end up trapped in poverty, deprived of their homes, food, health care, and education, and must face stigma and psychosocial pressures. For transitional justice processes to be effective they need to address such impacts holistically.

## Child-Sensitive Approach to Transitional Justice

A child-sensitive approach to transitional justice supports children's participation in transitional justice processes and



advocates for outcomes in the best interests of the child. Only by adopting a child-sensitive approach can transitional justice practitioners create real change. Such approaches must:

- include abuses against children in historical narratives;
- allow children to participate in truth-seeking mechanisms;
- address issues surrounding children victims and perpetrators in the framework of criminal justice;
- implement reparations programmes considerate of children's specific needs;
- consider the role of gender in the abuses committed against children; and
- promote child-sensitive institutional reforms.

## Children's Participation in Transitional Justice

Children's meaningful participation in transitional justice processes can contribute to peacebuilding and the promotion of tolerance and democratic principles. It can also build skills and capacity for active citizenship and encourage social responsibility during post-conflict recovery. Efforts to encourage children's participation in transitional justice mechanisms must be respectful of their distinct needs and capacities. In the Guidance Note on the UN Approach to Transitional Justice, the UN Secretary General highlights the importance for transitional justice processes to be guided by the best interests of the child, a principle enshrined in the Convention on the Rights of the Child (1989). The Guidance Note also highlights the need to recognise that, in accordance with their evolving capacities, children have the right to express their views in matters and proceedings affecting them. Factors to consider when assessing the best interests of the child, and to weigh how transitional justice processes affect their wellbeing include:

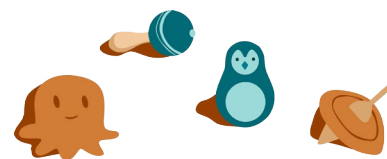
- the impact of the conflict on the child's life;
- the nature of the transition process;
- the likelihood of risk to a child's wellbeing should he/she participate in a transitional justice mechanism; and
- the extent to which protection measures are in place.

## Key Principles for Children's Engagement with Transitional Justice

These principles, developed at the Children and Transitional Justice Conference convened in 2009 by UNICEF Innocenti Research Centre and the Human Rights Program at Harvard Law School, provide a framework for children's engagement with a

range of transitional justice processes, and promote coherence and consistency with international standards. These principles include:

- The best interests of the child should guide transitional justice processes.
- Children must be treated with dignity and respect.
- Children have the right to participate in decisions affecting their lives. The participation of children should be voluntary, with the informed consent of the child and parent or guardian. The decision not to participate can also be a form of participation.
- Transitional justice mechanisms should ensure the protection of children against violence and promote their physical and psychological well-being.
- Protection of the identity of the child and the child's privacy must be guaranteed at all times.
- Policies and procedures to protect the rights of children involved in transitional justice processes should include a specific focus on adolescents and should be consistent with the evolving capacities of the child.
- Participation should be non-discriminatory and should include, as appropriate, diverse ethnic, racial, religious and other groups, and take into consideration the specific needs of children with disabilities.
- A gender-sensitive approach to participation in transitional justice processes should include a focus on the protection of the rights of girls and should address their specific needs and experiences
- Transitional justice processes should facilitate the realisation of children's civil, political, economic, social and cultural rights. Transitional justice processes should be holistic and sustainable, address the root causes of armed conflict and political violence, and strengthen the protective environment for children in their families and communities.



### Source

- Report of impact of armed conflict on children, A/51/306, 26 August 1996, <[https://www.unicef.org/graca/a51-306\\_en.pdf](https://www.unicef.org/graca/a51-306_en.pdf)>
- Children and Transitional Justice Key Principles, 2009, <<https://www.unicef-irc.org/files/documents/d-3727-Key-principles-document-f.pdf>>
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- UN Report of the Secretary-General on Children and armed conflict, 16 May 2018, <<https://reliefweb.int/sites/reliefweb.int/files/resources/N1815109.pdf>>

# DISPLACEMENT AND TRANSITIONAL JUSTICE



## Internally Displaced Person (IDP)

- **Definition:** A person who has been forced or obliged to leave her or his home or place of habitual residence, in particular due to violations of human rights and/or to avoid the effects of armed conflict, situations of generalised violence, or natural or human-made disasters, and who has not crossed a recognised international border.
- **Protection:** As a citizen of the country in which he or she is displaced, an IDP is legally under the protection of the state and the rights of an IDP are guaranteed under International Human Rights Law (IHRL) and International Humanitarian Law (IHL).

## Refugee

- **Definition:** A person who is outside of his or her country and who is unable or unwilling to return to it owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.
- **Protection:** A refugee has international protection under another country providing refuge or asylum. The rights of a refugee are also guaranteed under IHRL, IHL, and the 1951 Refugee Convention.

A crucial requirement for a person to be considered a refugee rather than an IDP is that she or he crosses an international border. Persons displaced from their homes due to conflict who cannot or choose not to cross a border, therefore, are not considered refugees, even if they share many of the same circumstances and face the same challenges as refugees. Unlike refugees, international law does not acknowledge or provide protection for internally displaced persons.

IDPs and refugees need to be able to resume a normal life by achieving durable solutions that include voluntary return, local integration, or resettlement in a third country or community. The UN Inter-Agency Standing Committee (IASC) Framework on Durable Solutions for IDPs recognises:

- The “right to reparation, justice, truth and closure for past injustices through transitional justice or other appropriate measures”; and
- That IDPs “who have been victims of violations of international human rights or humanitarian law, including arbitrary displacement, must have full and non-discriminatory access to effective remedies and access to justice, including, where appropriate, access to existing transitional justice mechanisms, reparations and information on causes of violations.”

### Displacement is Often Linked to Massive Human Rights Violations in the Following Ways:

- Widespread human rights violations, such as the destruction of homes and property, often cause displacement and hinder the possibility of IDPs or refugees to return home;
- Forced displacement can itself constitute a war crime or a crime against humanity;
- Victims of displacement are often particularly vulnerable to human rights violations.

### Some Transitional Justice Measures Relevant to Displacement Include

- Restitution of housing, land, and property;

- Reparations programs that may provide benefits to victims of abuses that led to displacement, to those who suffered while displaced, or for the crime of displacement itself;
- Truth commissions that have begun to recognize and investigate displacement due to conflict as a serious human rights violation;
- Criminal prosecution of perpetrators of human rights violations that led to displacement (e.g. persecutions, mass murders) or perpetrators of displacement (as an act) itself.

### Challenges in Responding to Displacement Transitional Justice Measures Include:

- Transitional justice mechanisms, so often essential to achieve redress for IDPs and other affected populations in post-conflict situations, may be absent.
- Even where such mechanisms exist, responding fully to displacement issues is often perceived as complex and costly.
- Transitional justice processes have traditionally addressed a narrow range of serious violations of civil and political rights while neglecting violations that result in displacement.
- Provision of reparations for victims of displacement due to conflict is difficult because there is no formal registry to identify who qualifies as victims.
- Transitional governments often cannot afford to provide financial compensation for lost property and the suffering of displaced persons.
- The massive human rights violations that may have occurred prior to and precipitated displacement may continue while persons remain displaced and even after they have returned to their homes, been locally integrated, or resettled someplace else.
- IDPs are often excluded from community reconciliation and social cohesion projects that play an important role in peace-building initiatives.
- Governments often do not guarantee the right of IDPs to participate fully in transitional justice mechanisms and peace-building processes.

#### Source

- Guiding Principles on Internal Displacement, OCHA/IDP/2004/01, 2004, available at <<http://www.unhcr.org/43ce1cff2t>>
- IASC Framework on Durable Solutions for Internally Displaced Persons, April 2010, <<http://www.unhcr.org/50f94cd49.pdf>>

LEARNING  
HANDOUT

9

# NATURAL RESOURCE CONFLICTS AND TRANSITIONAL JUSTICE: SOME LESSONS FROM AFRICA



## What Constitutes an Economic Violation?

An economic violation includes one or more of the following elements: an act that violates the rights of others, including the rights to property, life, freedom and security of the person, and freedom of occupation. Violations of these rights include unlawfulness and taking property from the owner.

## Investigation and research challenges related to economic violations:

- Such violations often take place where there is little transparency or accountability.
- Investigations rely on paper trails and official records that are often the first to be destroyed by perpetrators.
- It is difficult to document money that has been moved offshore due to geographic distance and because bank transfers are hidden through money laundering schemes.
- Individuals with knowledge of corrupt behaviour are usually silenced through intimidation, violence, or by being co-opted.
- Another challenge is the courage required for meticulous investigations, media reports, or whistle-blowers to speak the truth despite the prevailing odds.

## Sierra Leone Truth and Reconciliation Commission (TRC): A Case Study

Following a decade of civil war that included high rates of civilian casualties and sexual violence, recruitment of child soldiers, and struggles for control of diamond mines, the Sierra Leone TRC operated for two years, from November 2002 to October 2004. This TRC recorded human rights violations from the beginning of the conflict in 1991 until January 2002 that includes the signing of the Lome Peace Agreement in May 1997. It seeks to address impunity and victims' needs, promote healing and reconciliation, and prevent a repetition of the violations. The following findings are not comprehensive, but rather a selection that covers several different areas.

## Causes of the Conflict

1. By the early 1990s, greed, corruption, and bad governance

had led to institutional collapse through the weakening of the army, police, judiciary, and the civil service. The entire economy was undermined by grave mismanagement.

2. Selfish leadership bred resentment, poverty, and no access to key services. Despite Sierra Leone's diamonds and other rich mineral resources, most of the population remained impoverished or became poorer.
3. These social ills began with a collective failure to work for the common good. Often, the rich perceived the poor as worthless, while the poor felt the rich to be unworthy of their respect and trust.
4. Intolerance for the rights of others became entrenched in Sierra Leone. People were systematically deprived of their dignity.
5. Government and civil society leaders failed the people of Sierra Leone. The period between independence and the start of the conflict represents a failure of leadership at all levels of public life. No enlightened and visionary leaders emerged to steer the country away from the slide into chaos and bloody civil war.

## Findings on Mineral Resources

1. Contrary to popular belief, the exploitation of diamonds did not cause the conflict in Sierra Leone, but different fighting factions did exploit diamond areas to support their war efforts.
2. Countries in the Mano River Union permitted their territories to be used as conduits for smuggling diamonds extracted from Sierra Leone. Members of the political elite in these countries benefited enormously from the diamonds smuggled out of Sierra Leone.
3. The Revolutionary United Front (RUF), the Armed Forces Revolutionary Council (AFRC), and the paramilitary Civil Defense Forces (CDF) were primarily responsible for exploiting diamond areas. The RUF and AFRC abducted individuals, including children, and forced them to mine diamonds.
4. Successive governments of Sierra Leone have never had effective control over the diamond industry. While the present government has made significant progress in regulating the industry, much still needs to be done.
5. During the conflict, the global diamond industry deliberately chose not to determine the origin of diamonds, thereby promoting trade in "conflict diamonds" that, in turn, prolonged local wars.





## Truth and Reconciliation Commission (TRC) of Liberia: Economic violations

The TRC of Liberia, working from February 2006 to June 2009, was mandated to investigate human rights violations that included massacres, sexual violations, and economic crimes committed from January 1979 to October 2003. The Commission was to determine the context of the violations, if they were part of a systematic pattern, and those responsible for them. The Commission's findings related to economic violations included the following points:

- Government leaders, motivated by the desire to reap **great profits**, plundered the country's natural resources—diamonds, rubber, timber, iron ore—on a grand scale.
- **Numerous economic violations** included
  - Systematic looting of private and public assets and property, as well as systematic extortion;
  - Large-scale corruption, known as grand corruption. This comprised monies that may have been illegally placed in foreign banks or invested in real estate, including investment in fixed assets of the state. Another form of grand corruption was the extraction and sale of mineral resources for private and/or organisational gain.
  - Large-scale fraud and violations of government regulations regarding the movement of currency between countries;
  - The sale of diamonds, timber, and other mineral resources, along with the trafficking of drugs to sponsor war
- **Areas of investigation related to economic violations** included:
  - The role of local/international business and finance
  - The role of external governments and organisations
  - Areas prone to grand corruption such as large cash flows that have little or no scrutiny
  - Arms and ammunition purchases
  - Oil, transport, equipment, and other purchases by state and organisations
- **Long-standing relationship between Charles Taylor and Firestone**
  - To ensure rubber production for its tires, Firestone financed Taylor in his war efforts (and war crimes).
  - As such, Firestone was involved in the exploitation

of labour and natural resources.

- To date Firestone has not been held accountable for complicity in these violations.

## Kenya Truth, Justice, and Reconciliation Commission (TJRC): Findings about Land

Established by an Act of Parliament in 2008, the Kenya TJRC was tasked to investigate gross human rights violations from December 1963 to February 2008, a period of about 45 years. Regarding land, the Commission found that land-related injustices took many forms, such as:

- The illegal takeover of individual and community land by public and private institution
- Giving preference to certain ethnic groups over more deserving groups in settlement schemes
- Forceful eviction
- Land grabbing by government officials
- Illegal allocation of public land by officials that increased landlessness and land scarcity
- A get-rich scheme in which public lands were transferred to individuals and then quickly bought off at exorbitant prices by state corporations.

## South Africa's Reconstruction and Development Programme (RDP): An Effort at Institutional Reform

This policy framework, established in 1994, sought to address huge socioeconomic problems created by the apartheid regime. Although it was addressed only after transition, land reform was a top priority for the post-apartheid government. RDP was launched with broad goals, including land redistribution, to be met within five years. However, the stated objective of radical land redistribution never materialised. The RDP has had very limited success and faced much criticism. Land reform remains a crucial issue in South Africa.

## Land reform difficulties in Zimbabwe: An attempt at land reform

Land reform attempts in Zimbabwe have been ineffective, violent, and economically harmful. Formerly the British colony of Southern

Rhodesia, Zimbabwe became independent in 1980. That same year, with no transitional justice mechanisms in place, land reform efforts were begun in an effort to realise more equitable land distribution between black Zimbabweans and those of European descent. Effective land tenure reform requires sufficient funding to ensure both peace and justice. Therefore, it is important to establish accountability before reforms are introduced: Who should be held responsible for theft of land during the colonial period? Britain financed land reform policy in Zimbabwe until 1997 when Clare Short, a Labour MP, wrote to Zimbabwe's Minister of Agriculture stating: "we [Britain's new labour government] do not accept that Britain has a special responsibility to meet the cost of land purchase in Zimbabwe." ineffective, violent, and economically harmful land reform attempts followed in Zimbabwe.

### Sources:

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LEARNING  
HANDOUT

11

# WHAT IS IMPUNITY?



The absence or collapse of the rule of law can result in violent conflict or repression, leading to gross violations of human rights. Impunity is often the primary obstacle to upholding the rule of law. Human rights become a mockery when killings, disappearances, torture, rape and other forms of sexual violence go unpunished; when amnesty laws exempt perpetrators from responsibility; when inquiries into excessive use of force fail to produce results; and when economic, social and cultural rights cannot be attained through a judicial process.

*“Impunity” means the impossibility, de jure or de facto, of bringing the perpetrators of violations to account—whether in criminal, civil, administrative or disciplinary proceedings—since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.*

Impunity arises from a failure by states to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations.

## Stages of Campaign Against Impunity

1

### First stage:

During the 1970s, non-governmental organizations, human rights advocates, legal experts, and, in some countries, the democratic opposition when able to state its views, mobilized to obtain amnesty for political prisoners. This was typical in Latin American countries then under dictatorial regimes.

2

### Second stage:

In the 1980s, amnesty, as a symbol of freedom, was increasingly used as a kind of insurance to ensure impunity as with the proliferation of “self-amnesty” laws proclaimed by declining military dictatorships anxious to arrange for their own impunity while there was still time. This provoked a strong reaction from victims who strengthened their organizational capacity to ensure justice was done. This was demonstrated in Latin America by the increasing prominence of the Mothers of the Plaza de Mayo, followed by the Latin American Federation of Associations of Relatives of Disappeared Detainees (FEDEFAM) that later spread to other continents.

3

### Third stage:

The end of the cold war, symbolized by the fall of the Berlin Wall in 1990, was marked by many processes of democratization along with peace agreements that ended many internal armed conflicts. Whether in national dialogues or peace negotiations, the constant question of impunity faced parties seeking to strike an unattainable balance between the former oppressors’ desire for everything to be forgotten and the victims’ quest for justice.

4

### Fourth stage:

There is an increasing realisation in the international community of the importance of combating impunity. The Inter-American

Court of Human Rights, for example, in a groundbreaking ruling, found that amnesty for the perpetrators of serious human rights violations was incompatible with the right of every individual to a fair hearing before an impartial and independent court. The World Conference on Human Rights (June 1993) supported that line of thinking in its final document, “Vienna Declaration and Programme of Action” (A/CONF.157/24, Part II, para. 91).

## Transitional Justice Mechanisms to Combat Impunity

Establishing effective mechanisms to ensure that perpetrators of human rights violations do not go unpunished is an important step in restoring the rule of law following conflicts or authoritarian regimes. National accountability mechanisms are vital to ensuring that victims obtain appropriate remedies and redress. Transitional justice is recognized as essential for countries recovering from conflict or repressive rule. Rooted in the rights to justice, truth, reparations, and guarantees of non-recurrence, transitional justice mechanisms constitute a comprehensive approach to combating impunity, ensuring accountability for past human rights violations, redress for victims of violations of human rights, and advancing broader institutional reform necessary to address the root causes of strife and conflict.

At the International level, through its contribution to the Secretary-General’s report on the rule of law and transitional justice in conflict and post-conflict societies (S/2011/634), OHCHR drew the attention of the Security Council to the need to make explicit reference to accountability, combating impunity and the provision of remedies for victims. OHCHR emphasized the need to: foster accountability for gross violations of human rights and serious violations of international humanitarian law, including by supporting the implementation of recommendations of international commissions of inquiry; reject any endorsement of amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights and support for the implementation of transitional justice and rule of law provisions in peace agreements; encourage further attention to the rights of victims to a remedy and reparations,

in particular the victims of conflict-related sexual and gender-based violence; and to provide for transitional justice measures when establishing new mandates.

## AJAR on “Unlearning Impunity”

Impunity perpetuates silence about violence; ignores past and present trauma and poverty; and refuses to demand accountability from institutional and individual perpetrators. Consequently, perpetrators continue to have social, economic, and political power. In this way, impunity maintains cycles of violence, particularly against women, through cultural and religious norms. AJAR believes that “unlearning” these norms is a first step to combating the many ways used to buttress impunity. Combating entrenched impunity cannot be achieved by policies and laws alone, but requires the engagement of a broad range of citizens, including victims, to foment the political will necessary to a sustained struggle.

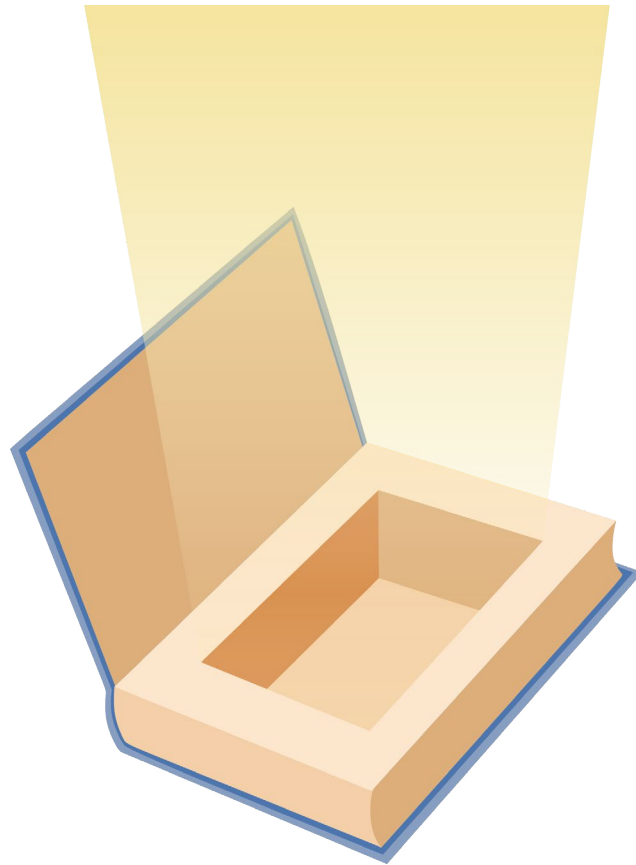
AJAR seeks to encourage stakeholders—from policymakers to academics to victims of mass human rights violations—to “unlearn impunity” through its trainings, research, publications, and advocacy efforts. “Lessons learned” about transitional justice mechanisms in countries across Asia is a key component to unlearning impunity. By developing multiple “learning circles”, AJAR supports exchange across differences of gender, ethnicity, culture and language, social-economic status, and capacity. AJAR facilitates dialogue and reflection among individuals and groups that have experienced mass human rights violations in the past as well as in the present to enhance learning and insights valuable for advocacy. AJAR also seeks greater balance between attention to civil-political and economic-social-cultural rights, between victims’ experiences before as well as after conflict, and among efforts for healing, empowerment, and advocacy at both individual and community levels. By strengthening victims to find and raise their voices, facilitating educators and academics to integrate the lessons of transitional justice into formal and non-formal learning contexts, and engaging with officials and policymakers to strengthen the rule of law and protection of human rights, AJAR combats impunity and contributes to demands for accountability across Asia.



### Source

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- UN Commission on Human Rights, Report of the independent expert to update the set of Principles to Combat Impunity, E/CN.4/2005/102, 18 February 2005, <<http://www.refworld.org/docid/42d66e7a0.html>>

# PRINCIPLES OF ADULT LEARNING



Informal learning communities are a key component to unlearning impunity (see AJAR Learning Handout #11) whether they develop at a community or an organizational level. Vibrant learning communities on behalf of social change and transformation can be nurtured through curriculum development, monitoring and evaluation tools and processes, and seminars and trainings. In all settings, learning agendas are strengthened when guided by principles for adult learning.

- Most adults come to learning situations with a well-defined perception of themselves. However, some adults have a poor self-concept and self-esteem due to their past experiences of marginalization. Because a poor self-concept and self-esteem block new learning, taking time to build adults' self-concept and self-esteem can facilitate their learning.
- Adult learning is an emotional experience. The act of learning, especially when working with victims of past conflict or others traumatized by it, may create anxiety, stress, fear, frustration, or feelings of helplessness. Understanding this can help educators and trainers to tailor learning opportunities with needed sensitivity.
- Adults usually come to a workshop or training with an intention to learn. If this motivation is not supported they will withdraw. Learning improves when self-directedness is encouraged, and when adults have an opportunity to identify what they need or want to learn and do. Therefore, the learning content needs to be based on their needs and interests.
- Adults are voluntary learners. They participate in programs and attend trainings or workshops to discover ways to improve and have better control of their lives. What adults bring with them into a learning situation along with their aspirations and expectations must be recognized and

respected to sustain adults' motivation to learn. Solutions to their problems must come from their own understanding and analysis, and must be congruent with their lifestyle.

- Adults learn best in an atmosphere of active involvement and participation. Therefore, facilitators of adult learning should ensure that learning is an active process conducted in an atmosphere of openness and encouragement. It is not just being present for a preset program, but rather the learners participate at every stage from planning the agenda to choosing methods to self-evaluation.
- Regular feedback to adult learners can help to sustain motivation and involvement in a learning process. Creating a learning environment that encourages regular and balanced feedback among all participants that is always respectful can enhance adult learning. Not all feedback needs to be positive, but the concept of “plussing” in which anyone who comments about weaknesses or limitations always “adds to” or “plusses” any critical insights with constructive inputs.
- Adult education can help groups to organize, stay together, and grow. People develop their creativity and insights when working with others to identify and solve problems. Collectively, adults recognize their knowledge, skills, interests, and ability to act, and can also help to hold each other accountable for their learning.
- Success reinforces learning. When adults succeed in an activity, their satisfaction motivates them to get more involved. To achieve this, it is often best to begin with a small and immediate problem. Successful solutions of problems will empower them to face other problems and at the same time to expand their vision of the future.
- Participation is difficult when there are financial, physical, or social-political constraints. Learning takes place when learners are not under stress and when a learning environment is safe and supportive. Therefore, facilitators of learning experiences for victims of past or present human rights violations should incorporate healing and trust building exercises into a curriculum to enhance adults' full potential for learning.
- Different adults learn differently. Some learn best by reading on their own; others learn best through

group discussion and debate, by watching a video, or through creating a role play. In general, lessons are better retained when more than just one sense is involved. The use of diverse learning methods that can accommodate different learning styles will enable all learners to get the most out of the learning process.

## Learning Spiral

The spiral model of learning ensures that adults have the opportunity to practice their skills in the learning context. In the spiral model, education leads to action for social change rather than the maintenance and reproduction of the status quo. This model allows for an open and democratic learning environment that reflects and reinforces the human rights values and principles that we strive towards in our work.

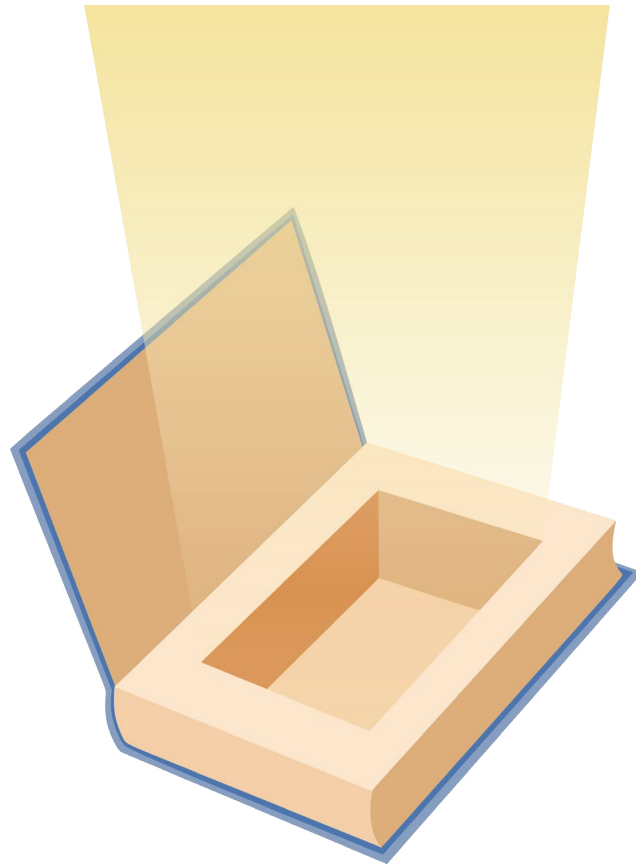


Source:

- Equitas, International Human Rights Training Program, 2009.



# PARTICIPATORY LEARNING AND RESEARCH



Adult learning is complimented by participatory approaches to learning and research. Participatory learning includes a range of approaches and methods that invite group reflection on attitudes, behaviours, and relationships, including relationships of power, that facilitate people to share, analyse, and enhance knowledge of their lives and conditions, and enable them to make plans and take action for personal and social transformation. Facilitators of participatory learning tend to use an inductive approach where learning draws on a person's own experiences and interactions with others (experiential learning) rather than a deductive approach in which structured presentations and lessons introduce concepts and ideas to be learned.

Participatory learning is inspired, in part, by the work of Paolo

Freire, a Brazilian philosopher and popular educator whose approach to learning was critical of what he called a banking model of education in which students' minds are like an empty bank account to be filled with a wealth of knowledge taught by the teacher who holds power and authority. Inherent in this process are lessons about domination and submission. Influenced by his work teaching unschooled peasants how to read and write, Freire's *Pedagogy of the Oppressed* (1968) makes a case for how education should help those dominated to regain a sense of dignity and participate in their own liberation from domination. In contexts of entrenched impunity and widening social and economic gaps, it is this spirit of political and critical pedagogy that informs participatory learning and research. Participatory approaches to research have evolved since

Freire's approach to popular education and have been applied to different contexts. These approaches are known by different names, such as: Activist Participatory Research, Rapid Rural Appraisal, Applied Anthropology, Participatory Rural Appraisal, and Participatory Action Research or PAR.

PAR is an approach to research in communities that focuses on the poor and powerless to examine and analyse their own condition. It understands the world through the process of seeking to transform it, collaboratively and through a process of dialogue and reflection.

In both participatory learning and participatory research, the word “participatory” points to the shared principle of interaction—that learning and research for transformation cannot be topdown processes, but indeed require interaction among individuals willing to accept each other as peers. Participation also allows for insights, knowledge, and innovations that are largely absent with deductive approaches to education or from reading textbooks.

## Participatory Learning and Research Principles

Principles are the basic assumptions, attitudes, and elements that make a participatory learning or research process work well. In keeping with the value of participation, the following list of participatory learning and research principles was compiled through a group process. These principles include:

- The right to participate,
- Hearing unheard voices; encouraging multiple perspectives,
- Seeking local knowledge and diversity rather than simplifying complexities,
- Reverse the learning (not “top-down”),
- Uses diverse methods, e.g., “handing over the stick” (or pen, or marker) to ensure that the power to speak is shared with everyone,
- A shared commitment to transform existing conditions to improve people's situation,
- The process leads to change: collective analysis and dialogue identify actions needed to bring about improvements.

## Participatory Training and Facilitation

The role of a trainer and facilitator is crucial to meaningful participatory learning. Participatory training centers on participants so that they have the opportunity to articulate their specific needs. The role of a trainer or facilitator is not to take on the burden of meeting others' expectations or fulfilling their learning needs, but rather to create a space and process that enables learners to take responsibility for their own learning. Participatory learning requires an environment where learners feels valued and psychologically safe to try out new ideas and share experiences. The role of a trainer or facilitator is also to ensure this type of environment is maintained.

## Ethical guidelines

An explicit discussion of ethical guidelines is an important component of participatory approaches to learning and research as they form part of a mutual learning contract. Although the starting point is to facilitate a process for learners and researchers to identify their own ethical guidelines, the following may serve as a useful reference relevant for PAR:

- Do no harm,
- Informed consent,
- Confidentiality,
- Mutual benefit,
- Non-discrimination,
- Consensus regarding use of data.

### Sources

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