

Central European University
Political Science Department
MA Program
Fall 2008/2009

Course Description

Transitional Justice

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Meeting time: Mondays and Thursdays, 13:30–15:10

Office Hours: Tuesdays, 15:30–17:30, and by appointment

Course Overview

This course is organized around controversies over the issue of the proper dealing with the grave violations of human rights committed by a recently ousted regime and its supporters. We will depart from the assumption that the complex task of a democratic transition acquires yet another dimension in societies whose immediate past has been marked not only by the authoritarian nature of the previous regime, but also by mass regime-sponsored crimes. Most often at issue are the crimes perpetrated in the name of a whole political community, or in the name of a group constitutive of that community. The basic question is simple: does the new political community, legitimized by its democratic intentions, need to reckon with such crimes? Dilemmas brought up by this question span legal, practical-political and moral considerations.

The overall goal of the course is to introduce students to the theory and history of transitional justice: we will examine incentives, conditions and constraints of establishing truth and achieving justice in post-criminal societies. The normative focus is on the question of whether such societies should promote ‘politics and culture of forgetting’ or ‘politics and culture of memory’.

The course is divided in two parts. The first part (*Concepts and Controversies*) introduces basic categories and addresses focal questions in the debate; case studies will be used to elucidate moral, legal and political controversies that surround the key concepts, and to illustrate diverging answers. The second part (*Institutions of Transitional Justice*) concentrates on the question of responsibility: we will be exploring different (regular and extraordinary) organizational forms that are used to tackle multiple forms of responsibility of different agents of mass crime. Special attention will be devoted to identification of agency (perpetrators, collaborators, by-standers), and victimhood; it will be argued that the nature of the relationship between these groups requires some

adjustments of the concept and practice of responsibility. Again, we will explore several case-studies.

Expected outcomes

Students will learn that the issue of the proper attitude to the past is of direct relevance for sustainability of a new democracy. They will be expected to master different – legal, political, cultural - approaches to dealing with the evil past. By the end of the course they should be able to figure out the practical-political importance of moral issues that are raised after the fall of a criminal regime.

Course requirements and evaluation

This is a four-credit course. A lecture and a seminar will cover each topic.

One of you will be asked to prepare a short presentation for each seminar class, as the basis for a more concentrated discussion. Your presentation will take approx. 20 minutes, and it will be based on a short position paper (2-3 pages), that you will distribute electronically to all class participants and to me before 4 PM, on the day preceding the seminar class. Your presentation should contain short critical evaluation of the topic and of the way it is presented in the assigned readings, as well as questions that you think need to be raised in the seminar discussion. A general class discussion will follow.

Questions and comments during lectures are welcome. Active participation in seminars is required. You should write an approx. 15-20 pages long (Times New Roman 12, double-spaced) final essay. The topic should be chosen - upon my approval - by December 1, 2008. Final papers are due December 25, 2008.

Classes are mandatory for all of you who take the course for grade. I will take attendance. You are allowed no more than two unexcused absences for the semester. Beyond those two 'free' absences you will need to provide written documentation of legitimate circumstances that prevented you from attending class. Legitimate circumstances include illness, serious family emergencies and participation in group activities sponsored by CEU. Should you not meet these conditions, you will not receive credits for the course.

Grading will depend on the above-presented features, in the following way:

- class participation: 40%
- final essay: 60%

Topics

Part One: Concepts and Controversies

First meeting. Introducing the Course (Identification of the main questions that will be addressed during the course.)

Topic One. Remembering the Evil Past, Undoing Injustice, Building Democracy: Where is the Problem? (Mass crime: constitutive features, agents, and targets. Making sense of the triad: the evil past – the post-regime change condition – a democratic future.

Remembering vs. oblivion. Memory and history. Event and interpretation. Democracy vs. justice? Moral predicament of the past and political constraints of the present. Truth vs. justice: whose truth, whose justice? Focusing on victims. Introducing transitional justice.)

Mandatory readings:

1. T. Forsberg, "The Philosophy and Practice of Dealing with the Past: Some Conceptual and Normative Issues"; in: N. Biggar (ed.), *Burying the Past. Making Peace and Doing Justice after Civil Conflict* (Washington: Georgetown University Press, 2003)
2. J.W.Müller, "The Power of Memory, the Memory of Power and the Power over Memory"; in: J.W.Müller (ed.), *Memory and Power in Post-War Europe* (Cambridge: Cambridge University Press, 2002)
3. Y. Elkana, "The Need to Forget", *Ha'aretz*, March 2, 1988

Optional readings:

1. D. Levy, "The Future of the Past: Historiographical Disputes and Competing Memories in Germany and Israel", *History and Theory*, Vol. 38. No. 1, 1999
2. Tz. Todorov, *Hope and Memory. Reflections on the Twentieth Century* (London: Atlantic Books, 2003)
3. P. Nora, "Between Memory and History: Les Lieux de Memoire", *Representations. Special Issue: Memory and Counter-Memory*, Vol. 26, Spring, 1989.
4. A. Margalit, *The Ethics of Memory*, (Cambridge, Mass.: Harvard University Press, 2002)
5. J. Amery, *At the Mind's Limits* (London: Granta Books, 1999)

Topic Two. What is Transitional Justice (Is justice appropriate for transitions different from our common perceptions of justice? Arguments against dealing with the bad past: rationalistic position; conservative position; post-modern position. Arguments in favour of dealing with the past: backward-looking moral position, forward-looking political position The subject of transitional justice: normative background, political incentives and constraints, agents, features, and institutions. Knowledge, acknowledgement and recognition.)

Mandatory readings

1. R. Teitel, "Transitional Justice Genealogy", *Harvard Human Rights Journal*, Vol. 16, 2004
2. J. Elster, *Closing the Books. Transitional Justice in Historical Perspective* (Cambridge: Cambridge University Press, 2004)
3. J. Mendez, "In Defense of Transitional Justice", in: A. J. McAdams (ed.), *Transitional Justice and the Rule of Law in New Democracies* (Notre Dame: University of Notre Dame Press, 1997)

Optional readings:

1. N. Kritz (ed.), *Transitional Justice. Volume I: General Considerations* (Washington: US Institute of Peace, 1995)

2. A. Barahona de Brito, C. Gonzalez-Enriquez, P. Aguilar, *The Politics of Memory. Transitional Justice in Democratizing Societies* (Oxford: Oxford University Press, 2001)
3. R. Teitel, *Transitional justice* (Oxford: Oxford University Press, 2000)

Topic Three. Silence and Denial as Cultural and Political Attitudes to Crime. (Whose silence, whose denial: individuals, groups, society, polity. Silence: healing or destructive? What does silence mean for victims? Three types of denial: literal, interpretative, implicatory)

Mandatory readings:

1. S. Cohen, *States of Denial. Knowing About Atrocities and Suffering*, Chs. 1, 4, 5 (Cambridge: Polity Press, 2001)

Optional readings

1. M. and A. Mitscherlich, *Inability to Mourn: Principles of Collective Behavior* (New York: Grove Press, 1975)
2. R. Hilberg, *Perpetrators Victims Bystanders. The Jewish Catastrophe 1933-1945* (New York: Aaron Asher, 1992)
3. E. Johnson and K-H. Reuband, *What We Knew. Terror, Mass Murder and Everyday Life in Nazi Germany* (Cambridge, Mass.: Basic Books, 2006)
4. G. Schwan, "Political Consequences of Silenced Guilt", *Constellations*, Vol. 5, No. 4, 1998
5. G. Calder, "Relationality and Evil: Judging Bystanders", in M. S. Breen (ed.), *Minding Evil: Explorations of Human Iniquity* (Amsterdam: Rodopi, 2005)

Topic Three, Seminar I: Case Study: German Historians' Dispute (The factual and normative background of *Historikerstreit*. Habermas vs. Nolte. What should present generations do: between relativist normality and universalist moral duty of reflection)

Mandatory readings:

1. P. Baldwin, "The *Historikerstreit* in Context", in: P. Baldwin (ed.), *Reworking the Past. Hitler, the Holocaust, and the Historians' Debate* (Boston: Beacon Press, 1990)

Optional readings

1. E. Piper (ed.), *Forever in the Shadow of Hitler. Original Documents of the Historikerstreit* (New Jersey, Humanities Press, 1993)
2. Ch. Maier, *The Unmasterable Past. History, Holocaust and German National Identity* (Cambridge, Mass.: Harvard University Press, 1988)

Topic Three, Seminar II. Case Study: Post-WW II Austria (silence about crime as officially upheld communicative pattern; denial as official lie; denial through self-victimization)

Mandatory readings

1. H. Uhl, "From Victim Myth to Co-Responsibility: Nazi Rule, World War II, and the Holocaust in Austrian Memory", in R. Ned Lebow et al (eds.), *The*

Politics of Memory in Postwar Europe (Durham: Duke University Press, 2006)

Optional readings

1. A. Pelinka, "Austria: Out of the Shadow of the Past", in R. Smith and R. Remington (eds.), *Nations of the Modern World: Europe* (Boulder: Westview Press, 1998)
2. P. Utgaard, *Remembering and Forgetting Nazism. Education, National Identity, and the Victim Myth in Postwar Austria* (New York: Berghahn Books, 2003)
3. E. Schwarz, "Austria, Quite a Normal Nation", *New German Critique*, No. 93, 2004

Topic Four. Closing the Books. Case-study: Spain

Mandatory readings

1. P. Aguilar, "Justice, Politics, and Memory in the Spanish Transition", in A. Barahona de Brito, C. Gonzalez-Enriquez, P. Aguilar, *The Politics of Memory. Transitional Justice in Democratizing Societies* (Oxford: Oxford University Press, 2001)
2. A. Rigby, *Justice and Reconciliation after the Violence* (Boulder: Rienner, 2001), Ch. 3.

Optional readings

1. R. Carr and J. P. Fusi, *Spain: Dictatorship to Democracy* (London: Routledge, 1993)
2. G. Blakeley, "Digging up Spain's Past: Consequences of Truth and Reconciliation" *Democratization*, Vol. 12, No. 1, 2005.
3. H. Graham (ed.), *Spanish Cultural Studies: An Introduction. Struggle for Modernity* (Oxford: Oxford University Press, 1995)

Part Two: Institutions of Transitional Justice

Topic Five. Responsibility for Mass Crimes: Its Meaning, Agents and Types (Whose responsibility: perpetrators, collaborators, by-standers; political leaders and military commanders; 'ordinary people'. What kind of responsibility for whom: criminal and political responsibility; vicarious and personalized responsibility; individual and collective responsibility; moral responsibility. Challenge of cultural relativism.)

Mandatory readings

1. K. Baier, "Guilt and Responsibility"
2. R. Downie, "Responsibility and Social Roles"
3. D. Cooper, "Responsibility and the 'System'"

These three texts are in P. French (ed.), *Individual and Collective Responsibility. Massacre at My Lai* (Cambridge, Mass.: Schenkman, 1972)

Optional readings

1. H. Arendt, "Personal Responsibility Under Dictatorship"; in: H. Arendt, *Responsibility and Judgment* (New York: Schocken Books, 2003)

2. H. Arendt, "Organized Guilt and Collective Responsibility", in: H. Arendt, *Essays in Understanding, 1930-1954* (New York: Harcourt Brace, 1994)
3. L. May, *Sharing Responsibility* (Chicago: University of Chicago Press, 1992)
4. M. Moody-Adams, "Culture, Responsibility, and Affected Ignorance", *Ethics*, 104/1994
5. A. Schaap, "Guilty Subjects and Political Responsibility: Jaspers, Arendt and the Resonance of the 'German Question' in Politics of Reconciliation", *Political Studies*, Vol. 49, No. 4, 2001

Topic Six. Criminal Trials (Importance and limitations of criminal trials. Extraordinary tasks of criminal justice after mass crime. Law and memory. Between the rule of law and victor's justice. What victims expect.)

Mandatory readings

1. R. Teitel, *Transitional Justice*, (Oxford: Oxford University Press, 2000), Ch. 2
2. L. May, *Crimes Against Humanity. A Normative Account* (Cambridge: Cambridge University Press: 2005), Chs. 9, 12.

Optional readings

1. M. Osiel, *Mass Atrocity, Collective Memory and the Law* (New Brunswick: Transaction Publishers, 1999)
2. D. Orentlicher, "'Settling Accounts' Revisited: Reconciling Global Norms with Local Agency", *International Journal of Transitional Justice*, Vol. 1, No. 1, 2007
3. M. Minow, *Breaking the Cycles of Hatred: Memory, Law, and Repair* (Princeton: Princeton University Press, 2002)
4. H. Arendt, *Eichmann in Jerusalem. A Report on the Banality of Evil* (Harmondsworth: Penguin, 1994)

Topic Seven. Lustration. Case-Study: Post-Communism

Mandatory Readings

1. K. Williams et al, "Explaining Lustration in Central Europe: A 'Post-Communist Politics' Approach", *Democratization*, Vol. 12, No. 1, 2005
2. R. David, "Lustration Laws in Action: The Motives and Evaluation of Lustration Policy in the Czech Republic and Poland (1989-2001)", *Law & Social Inquiry*, Vol. 17, No. 1, 2003

Optional Readings

1. E. Jaskovska and E. Moran, "Justice or Politics? Criminal, Civil and Political Adjudication in the Newly Independent Baltic States", *Journal of Communist Studies and Transition Politics*, Vol. 22, No. 4, 2006
2. N. Letki, "Lustration and Democratization in East Central Europe", *Europe-Asia Studies*, Vol. 54, No. 4, 2002

Topic Eight. Reparation and Compensation for Victims (An element of justice for victims, families and society. Legal, political and moral aspects. Different cases)

Mandatory Readings

1. J. Elster, *Closing the Books. Transitional Justice in Historical Perspective* (Cambridge: Cambridge University Press, 2004), Ch. 6.
2. P. Hayner, *Unspeakable Truths. Confronting State Terror and Atrocity*, (New York: Routledge, 2001), Ch. 11.

Optional Readings

1. N. Kritz (ed.), *Transitional Justice. Volume I: General Considerations*, Ch. 9, (Washington: US Institute of Peace, 1995)
2. R. Teitel, *Transitional Justice*, (Oxford: Oxford University Press, 2000), Ch. 4
3. J. Junk and J. Miner, *Compensating Historical Injustice: More than Just Money* http://humanityinaction.org/docs/Junk_Minier.pdf

Topic Nine. Collective moral responsibility (How to understand CMR? Can CMR be justified, especially in a liberal perspective? Who is the agent: group or its members? Types of CMR. Defending the need for CMR after the mass crime.)

Mandatory Readings

1. L. Radzik, "Collective Responsibility and Duties to Respond", *Social Theory and Practice*, Vol. 27, No. 3, 2001
2. L. May, "Metaphysical Guilt and Moral Taint", in L. May and S. Hoffman (eds.), *Collective Responsibility. Five Decades of Debate in Theoretical and Applied Ethics* (Lanham: Rowman and Littlefield, 1991)

Optional Readings

1. L. May, *Sharing Responsibility* (Chicago: University of Chicago Press, 1992)
2. C. Kukathas, "Responsibility for Past Injustice: How to Shift the Burden", *Politics, Philosophy & Economics*, Vol. 2, No. 2, 2003
3. P. French (ed.), *Individual and Collective Responsibility. Massacre at My Lai* (Cambridge, Mass.: Schenkman, 1972)
4. C. Kutz, *Complicity. Ethics and Law for a Collective Age* (Cambridge: Cambridge University Press, 2000)
5. A. Rosenberg and G. Myers (eds.), *Echoes from the Holocaust. Philosophical Reflections on a Dark Time* (Philadelphia: Temple University Press, 1988)

Topic Ten. Truth Commissions (Defining features. Composition. Tasks. Timing of establishment and timeframe of existence. Final report. The relationship to 'ordinary' state institutions, especially to judiciary. Legitimation: from authoritative truth to transformative justice)

Mandatory Readings

1. P. Hayner, "Fifteen Truth Commissions 1974 to 1994: A Comparative Study", in: N. Kritz (ed.), *Transitional Justice. Volume I: General Considerations*, (Washington: US Institute of Peace, 1995)

2. Ch. Maier, "Doing History, Doing Justice. The Narrative of the Historian and of the Truth Commission", in: R. Rotberg and D. Thompson (eds.), *Truth v. Justice. The Morality of Truth Commissions* (Princeton: Princeton University Press, 2000)
3. N. Dimitrijevic, "Justice Beyond Blame: Moral Justification of the (Idea of) a Truth Commission", *Journal of Conflict Resolution*, 54/2006

Optional Readings

1. P. Hayner, *Unspeakable Truths. Confronting State Terror and Atrocity*, (New York: Routledge, 2001)
2. D. Dyzenhaus, "Justifying the Truth and Reconciliation Commission", *The Journal of Political Philosophy*, Vol. 8, No. 4, 2000
3. J. Allen, "Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission", *University of Toronto Law Journal*, Vol. 49, 1999
4. *Truth Commissions: A Comparative Assessment. An Interdisciplinary Discussion Held at Harvard Law School*, 1996
<http://www.law.harvard.edu/programs/hrp/Publications/truth1.html>

Topic Eleven. South African Truth and Reconciliation Commission (Historical context of establishment. Leading values. Goals. Achievements. Possible lessons for other countries.)

Mandatory Readings

1. J. de Lange, "The Historical Context, Legal Origins and Philosophical Foundations of the South African TRC", in: C. Villa-Vicencio and W. Verwoerd, *Looking Back, Reaching Forward. Reflections on the Truth and Reconciliation Commission of South Africa* (London: Zen Books, 2000)
2. A. Boraine, "Truth and Reconciliation in South Africa: The Third Way", in: R. Rotberg and D. Thompson (eds.), *Truth v. Justice. The Morality of Truth Commissions* (Princeton: Princeton University Press, 2000)
3. J. Gibson, *Overcoming Apartheid. Can Truth Reconcile a Divided Nation?* (New York: Russel Sage, 2004), Ch. 1.

Optional Readings

1. J. Gibson and A. Gouws, "Attributions of Blame and Struggle Over Apartheid", *The American Political Science Review*, Vol. 93, No. 3, 1999
2. *Final Report of the South African TRC*, at: www.doj.gov.za/trc/report

Topic Twelve. Failure to Confront the Criminal Past and its Consequences: The Case of Serbia (Historical context. The regime change and conflicts over the path of transition. Normative confusion over the attitude to the past crimes and practical-political consequences: the past that has not passed.)

Mandatory Readings

1. N. Dimitrijevic, "Serbia after the Criminal Past: What Went Wrong and What Should be Done", *International Journal of Transitional Justice*, Vol. 2, No. 1, 2008.

2. D. Ilic, "The Yugoslav Truth and Reconciliation Commission" *Eurozine* (<http://eurozine.com/pdf/2004-04-23-ilic-en.pdf>)

Optional Readings

1. L. Martindale, "Lessons from the Former Yugoslavia", at <http://www.sipa.columbia.edu/REGIONAL/ECE/vol6no2/martindale2.pdf>
2. "Serbia and Montenegro: Selected Developments in Transitional Justice", *International Center for Transitional Justice, Case Study Series*, at <http://www.ictj.org/images/content/1/1/117.pdf>