

Central European University
Political Science Department
MA Program
Winter 2009/2010

Course Description

Transitional Justice

Lecturer: Nenad Dimitrijevic

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Meeting time:
Office Hours:

Number of credits : 4 (8 ECTS credits)
Teaching format : a lecture and a seminar cover each topic

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 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. The basic question is: 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 general goal of the course is to introduce students to the practice and theory of transitional justice: we will examine incentives, conditions and constraints of establishing accountability and achieving truth and 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 accountability'. The analytical focus is on the question why approaches to transitional justice differ from one post-criminal society to another.

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 — 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 legal, political, cultural, and 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. What is Transitional Justice (Is justice in transitions different from our common perceptions of justice? Defining transitional justice. Transitional justice after WW II. 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. A. Barahona de Brito, C. Gonzalez-Enriquez, P. Aguilar, “Introduction”, In *The Politics of Memory. Transitional Justice in Democratizing Societies* (Oxford: Oxford University Press, 2001)

Optional readings

1. J. Elster, *Closing the Books. Transitional Justice in Historical Perspective* (Cambridge: Cambridge University Press, 2004)
2. R. Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000)
3. N. Kritz (ed.), *Transitional Justice. Volume I: General Considerations* (Washington: US Institute of Peace, 1995)
4. J. Amery, *At the Mind’s Limits* (London: Granta Books, 1999)

Topic Two. Dilemmas of Transitional Justice: Truth vs. Justice, and Beyond (Mass crime: constitutive features, agents, and targets. Making sense of the triad: the evil past – the post-regime change condition – a democratic future. Arguments against dealing with the bad past: rationalistic position; conservative position; Arguments in favour of dealing with the past: backward-looking moral position, forward-looking political position. Is compromise necessary? Remembering vs. oblivion. Memory and history. Event and interpretation. Democracy vs. justice? Truth vs. justice: whose truth, whose justice? Focusing on victims)

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. Zalaquett, “Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints”, In N. Kritz (ed.), *Transitional Justice. Volume I: General Considerations* (Washington: US Institute of Peace, 1995)
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. B. A. Leebaw, "The Irreconcilable Goals of Transitional Justice", *Human Rights Quarterly*, Vol. 30, 2008
2. A. Boraine, 2006. "Transitional Justice: A Holistic Interpretation" *Journal of International Affairs*, Vol. 60, 2006
3. C. L. Sriram, *Confronting Past Human Rights Violations. Justice vs Peace in Times of Transition* (London: Frank Cass, 2004)
4. L. Huyse "Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past" *Law & Social Inquiry*, Vol. 20, 1995
5. 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)
6. A. Margalit, *The Ethics of Memory* (Cambridge, Mass.: Harvard University Press, 2002)

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* (Cambridge: Polity Press, 2001)

Optional readings

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

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)
2. E. Piper (ed.), *Forever in the Shadow of Hitler. Original Documents of the Historikerstreit* (New Jersey, Humanities Press, 1993)

Optional readings

1. Ch. Maier, *The Unmasterable Past. History, Holocaust and German National Identity* (Cambridge, Mass.: Harvard University Press, 1988)
2. G. Hartman (ed.), *Bitburg in Moral and Political Perspective* (Bloomington: Indiana University Press, 1986)

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. A. Pelinka, “The Great Austrian Taboo: The Repression of the Civil War”, in K. Harms et al (eds.), *Coping with the Past: Germany and Austria after 1945* (Madison: University of Wisconsin Press, 1990)
2. 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. P. Utgaard, *Remebering and Forgetting Nazism. Education, National Identity, and the Victim Myth in Postwar Austria* (New York: Berghahn Books, 2003)
2. E. Schwarz, “Austria, Quite a Normal Nation”, *New German Critique*, No. 93, 2004

Topic Three, Seminar III. 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)

Optional readings

1. G. Blakeley, “Digging up Spain’s Past: Consequences of Truth and Reconciliation” *Democratization*, Vol. 12, No. 1, 2005.
2. R. Carr and J. P. Fusi, *Spain: Dictatorship to Democracy* (London: Routledge, 1993)
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: Meaning, Agents, Controversies (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, "Organized Guilt and Collective Responsibility", in: H. Arendt, *Essays in Understanding, 1930-1954* (New York: Harcourt Brace, 1994)
2. L. May, *Sharing Responsibility* (Chicago: University of Chicago Press, 1992)
3. M. Moody-Adams, "Culture, Responsibility, and Affected Ignorance", *Ethics*, 104/1994
4. 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 Justice (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. D. Orentlicher, "'Settling Accounts' Revisited: Reconciling Global Norms with Local Agency", *The International Journal of Transitional Justice*, Vol. 1, No. 1, 2007
2. R. Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000), Ch. 2

Optional readings

1. Madoka Futamura, *War Crimes Tribunals and Transitional Justice. The Tokyo Trial and the Nuremberg Legacy* (London: Routledge, 2008)
2. R. Teitel, "Transitional Justice: Post-War Legacies", *Cardozo Law Review*, Vol. 27, No. 4, 2006
3. L. May, *Crimes Against Humanity. A Normative Account* (Cambridge: Cambridge University Press: 2005), Chs. 9, 12.
4. D. Majzub, "Peace or Justice? Amnesties and the International Criminal Court", *Melbourne Journal of International Law*, Vol. 3, 2002
5. M. Osiel, *Mass Atrocity, Collective Memory and the Law* (New Brunswick: Transaction Publishers, 1999)
6. M. Minow, *Breaking the Cycles of Hatred: Memory, Law, and Repair* (Princeton: Princeton University Press, 2002)
7. 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, "From Prague to Baghdad: Lustration Systems and Their Political Effects", *Government and Opposition*, Vol. 41, No. 3, 2006

Optional Readings

1. L. Stan (ed.), *Transitional Justice in Eastern Europe and the Former Soviet Union. Reckoning with the Communist Past* (London: Routledge, 2009)
2. 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
3. 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)
2. R. Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000)

Optional Readings

1. Jon Elster (ed.): *Retribution and Restitution in the Transition to Democracy*. Cambridge University Press 2001
2. N. Kritz (ed.), *Transitional Justice. Volume I: General Considerations* Ch. 9, (Washington: US Institute of Peace, 1995)
3. P. Hayner, *Unspeakable Truths. Confronting State Terror and Atrocity* (New York: Routledge, 2001)
4. 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)

Optional Readings

1. P. Hayner, *Unspeakable Truths. Confronting State Terror and Atrocity*, (New York: Routledge, 2001)
2. N. Dimitrijevic, "Justice Beyond Blame: Moral Justification of the (Idea of) a Truth Commission", *Journal of Conflict Resolution*, 54/2006
3. D. Dyzenhaus, "Justifying the Truth and Reconciliation Commission", *The Journal of Political Philosophy*, Vol. 8, No. 4, 2000
4. 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
5. *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)

Optional Readings

1. *Final Report* of the South African TRC, at: www.doj.gov.za/trc/report
2. J. Gibson, *Overcoming Apartheid. Can Truth Reconcile a Divided Nation?* (New York: Russel Sage, 2004)

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. D. Orentlicher, *Shrinking the Space for Denial: The Impact of the ICTY in Serbia* (Belgrade: Center for Transitional Processes, 2008)
2. M. Spoerri, “From Prosecution to Persecution. Perceptions of the International Criminal Tribunal for the former Yugoslavia in Serbian Domestic Politics”, *ASSR Working Paper*, 2/2008
3. L. Martindale, “Lessons from the Former Yugoslavia”, at <http://www.sipa.columbia.edu/REGIONAL/ECE/vol6no2/martindale2.pdf>
4. “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>