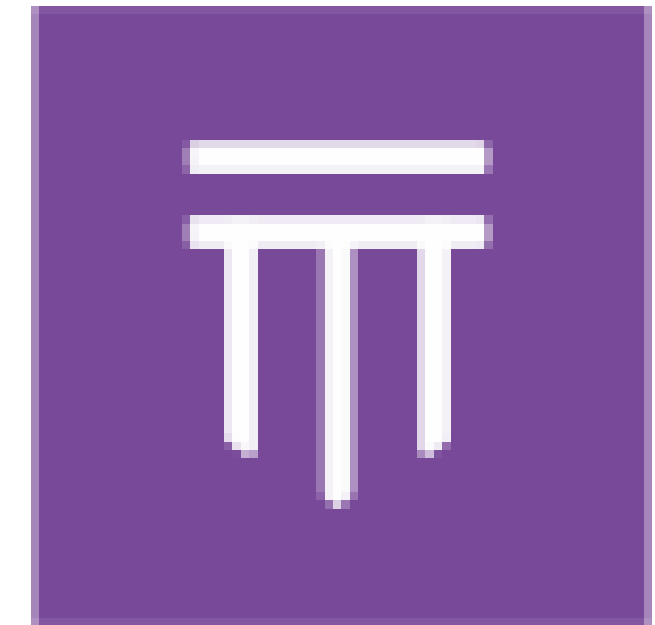


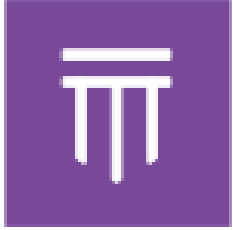
Brno, 22 September 2021

International criminal tribunals I.



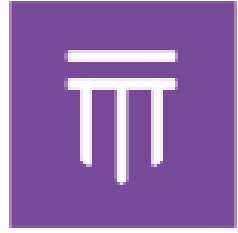
JUSTIN
Judicial Studies Institute
Masaryk University

Katarína Šipulová



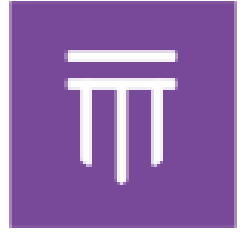
Outline

- Summary: core theoretical concepts of TJ
- Peacekeeping, international law & TJ
- Retributive justice: International Criminal tribunals
 - Generations and aims of international criminal tribunals
 - 1st Generation: pre-TJ legacy
 - 2nd Generation: *ad hoc tribunals*



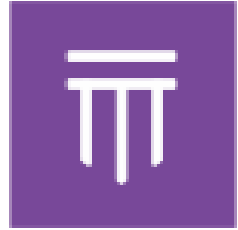
Core concepts and theories of transitional justice

- 1990s, young concept
- Seems to be unique, yet, political sciences:
 - Patterns
 - Reasons
 - Causalities
- Tools: where criminal law is not enough because
 - Too many perpetrators
 - Too political
- Aims:
 - Backwards looking
 - Retribution, victims demand recognition and punishment
 - Hannah Arendt: radical evil
 - Forward looking
 - Reconciliation
- Potential problems
 - Retribution turning into vendetta, witch hunt (Arendt)
 - Can we prosecute for what were not the crimes? (transitional justice = retroactive justice?)



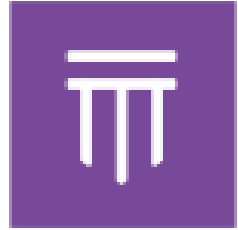
Peace-keeping, international law & transitional justice

- Why do we care about the legality?
- Humanitarian Law x Human Rights Law
 - Hague conventions (how to lead wars)
 - Geneva conventions (how to protect victims)
- Liberalism x Realism
- TJ because traditional criminal law is not able to handle it, TJ is more flexible
 - In RoL state, TJ still needs legitimacy -> **ius cogens + universal jurisdiction**



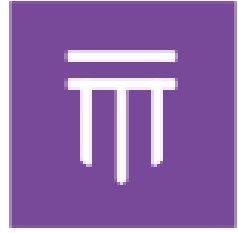
Universal jurisdiction

- Jurisdiction
 - *Territorial* (where)
 - *Personal*
 - *Passive* (committed against a Czech citizen)
 - *Active* (committed by a Czech citizen)
- Universal: no relation to a state
 - Some countries are not interested in punishing certain crimes on HR
 - Pragmatism: we have to use all resources to punish HR violations
 - Theoretical school: crimes attacking the very essence of human beings – moral obligation to punish them
- Issues
 - Language
 - State sovereignty
 - What law?
 - National interests
 - Evidence
 - Risk of politicization



How TJ uses humanitarian law

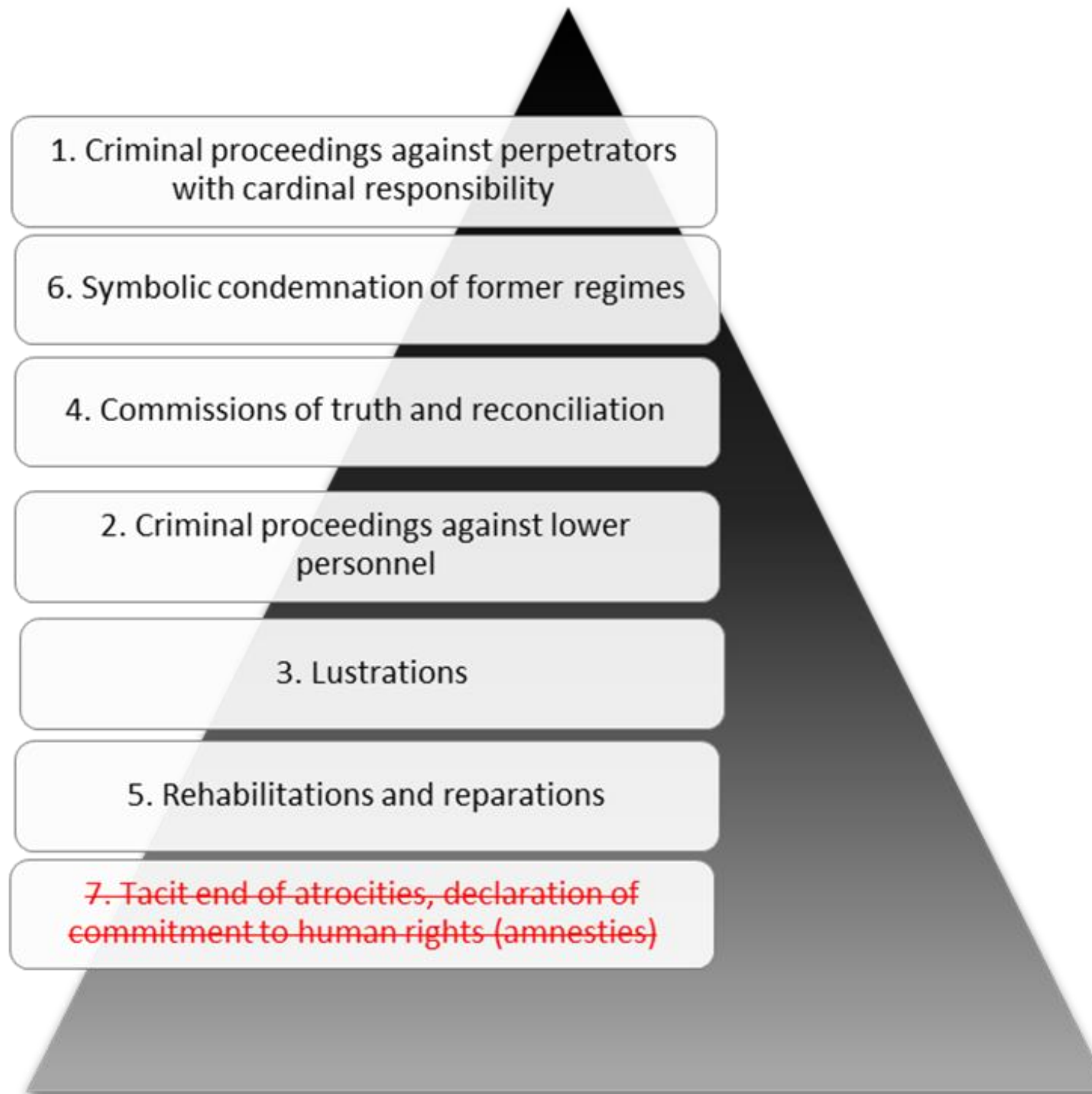
- Hugo Grotius:
 - Ius ad bellum (UN Charter)
 - Ius in bello (Geneva Conventions)
 - -> liberal tradition justifying the intervention
- UN Charter, Article 2.4
All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state
 - A 37: if peace resolution of a dispute is not possible -> SC
 - Exception: self-defense, A 51
 - preventive self-defense
 - Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression
- From HL to post-conflict assistance to transitional justice
- From peace-keeping to peace-building where TJ coexists with
 - safe transition
 - democratic transition
 - Socio-economic transition

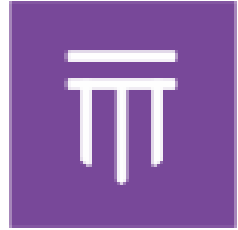


Transitional Justice Mechanism

Transitional Justice

Brian Grodsky (2009)





International courts and tribunals

• **Legitimacy to intervene:**

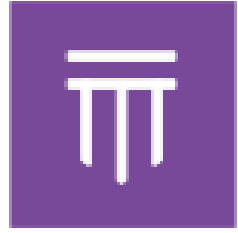
- Responsibility (war or former colonies);
- Reputation of the international community
- Responsibility to protect (R2P)
- The lack of legitimacy and willingness of national governments to act.
 - Eichmann case

• **Conditions to intervene**

- Extraordinary situation
- Will of international community
- Finances

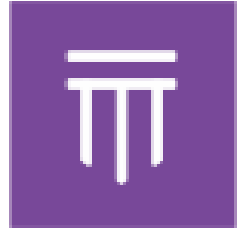
• **Aims**

- Peace-keeping
- Deterrence
- Reconciliation



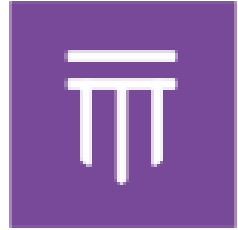
Do we need international tribunals?

- Authority problem
 - *It is primarily the role of domestic courts to prosecute*
 - *Exceptions*
 - Postconflict environment: destruction of domestic institutional network
 - Strongly repressive regime: institutionalised violence, dependent courts or courts part-taking on the HR abuses



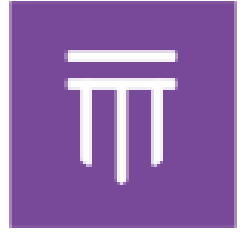
Legitimacy of international courts and tribunals

- Form of mandate
- Seat
- Independence
- Cooperation of domestic government and third countries
- Trust and reception on the part of citizens



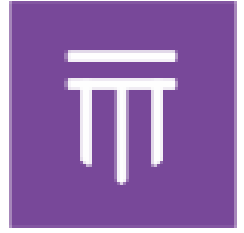
International courts and tribunals

- Three generations
 - I. War tribunals of Nuremberg and Tokyo
 - Stay the hand of vengeance
 - Individual responsibility
 - Isolation of Nazi leaders from the rest of the society
 - II. Ad hoc tribunals of Rwanda (ICTR) and former Yugoslavia (ICTY)
 - Created by UN resolutions
 - International institutions
 - Seated outside
 - III. Hybrid courts (Sierra Leone, East Timor, Cambodia)
 - Created by contract
 - Hybrid
 - Seated in the country
- permanent International Criminal Court
 - Crimes against peace
 - Grave violations of humanitarian law (Geneva conventions)
 - Genocide and CAH
 - War crimes



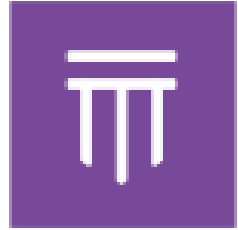
Pre-Nuremberg legacy

- 1872 Gustav Moynier: International court on the basis of Geneva conventions
- Versailles Treaty System 1919: crimes against peace, morals and sanctity of treaties
- Law v sovereignty
- 1929 Briand-Kellog pact: renouncing the use of war, crimes against peace
- 1941 Churchill: accountability for starting the war with NO TRIAL (summary execution)
- 1944 Morgenthau: execution of war criminals
- 1945 – Roosevelt: initial support, until the plan leaks out

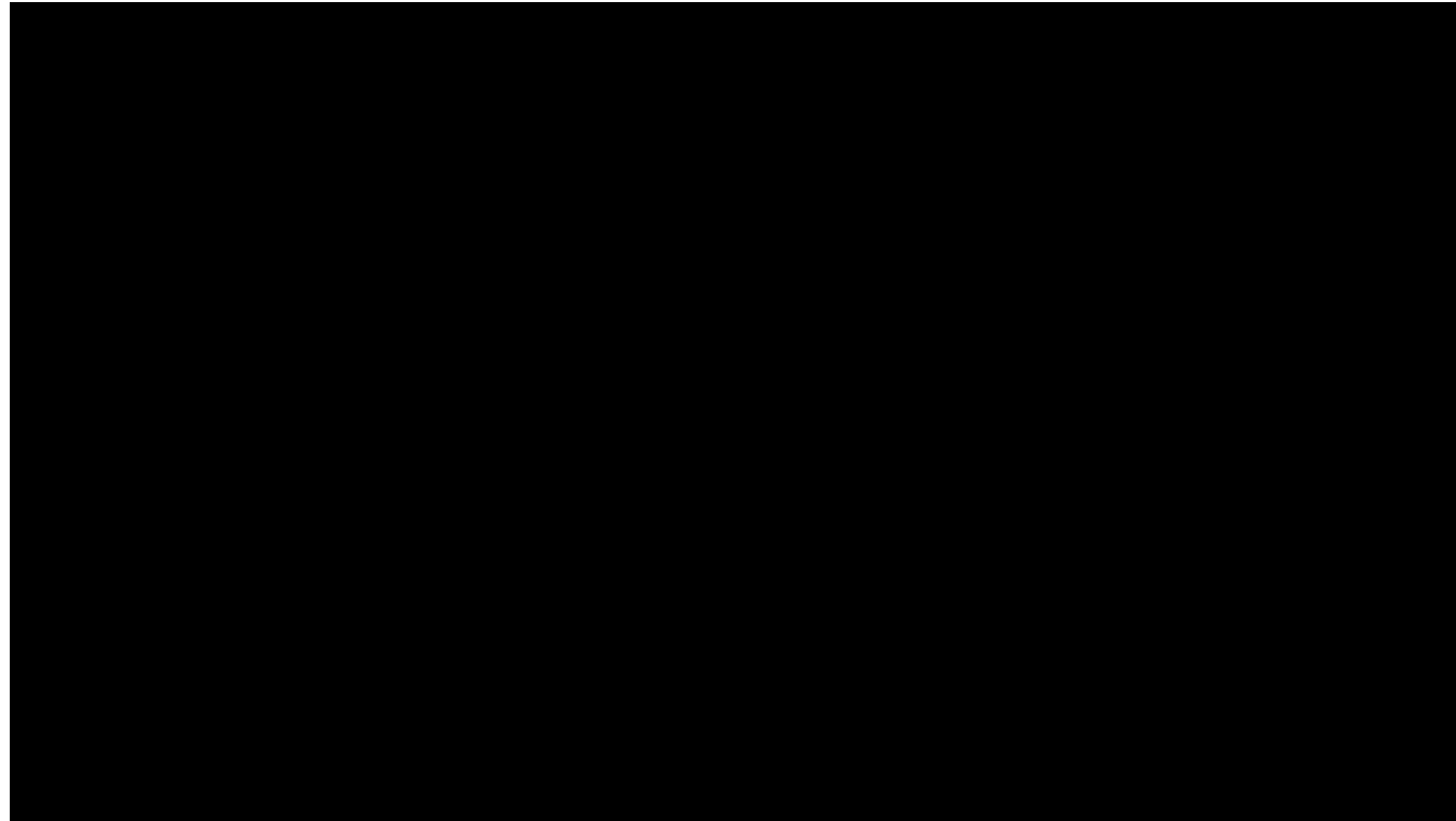


Pre-Nuremberg legacy

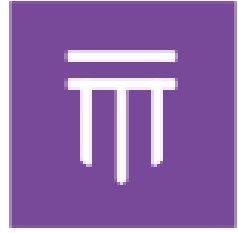
- 3 strategies
 - Normalization of relationship between winners and losers (punitive peace)
 - X Morgenthau and economic plan
- Individual responsibility
- Isolation of Nazi leaders from German population, de-nazification of polity and society



First generation: Tokyo and Nuremberg

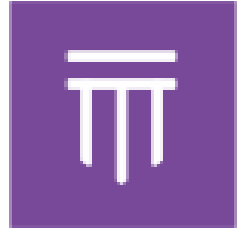


"That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason."



Nuremberg trials (International Military Tribunal)

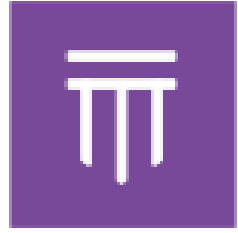
- A set of trials 1945-1946 (9)
- War character
- IMT Established by a GA UN Resolution of 11 December 1946, No. 95 (I) **Affirmation of the Principles of International Law recognized by the Charter of the Nurember Tribunal**
- Personal jurisdiction: 24 war German criminals bearing the core responsibility
- Material jurisdiction:
 - Act of aggression
 - War crimes
 - Crimes against humanity
- **Principles -> 4 Geneva Conventions of 1949 and 2 Protocols of 1977**
- **Establishment of individual criminal accountability**
- Issues: winners' justice?



Nuremberg

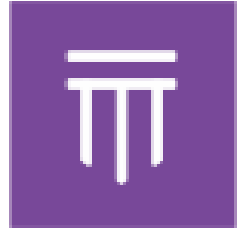
The trial turned out to be many things: a court of justice an historical inquest; a forum in which Nazi leaders could state their motivations and their rationalizations; a condemnation of tyranny and of racial prejudice; and a precedent in moving toward international means for bringing to justice modern day perpetrators of gross evils wherever they may be found.

(prosecutor Sprecher 1999, pp. 1457).



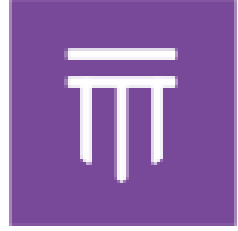
Hannah Arendt: Banality of Evil & Human Condition

- Problem with Radical Evil:
 - trials pose risk to the stability of the democratic system
 - Circle of HR violations
 - Huntington and Linz: they may provoke and foster social hostility and acrimony
 - They also offend some of the RoL principles
 - Harm the defendants
 - x Kant: against using human beings as means
- Problem of Legality
 - discrepancy between the law existing at the time of the violations and the laws deemed as necessary basis for punishment
 - too many or too few laws
 - Nuremberg tried to solve the legal vacuum by resorting to international law

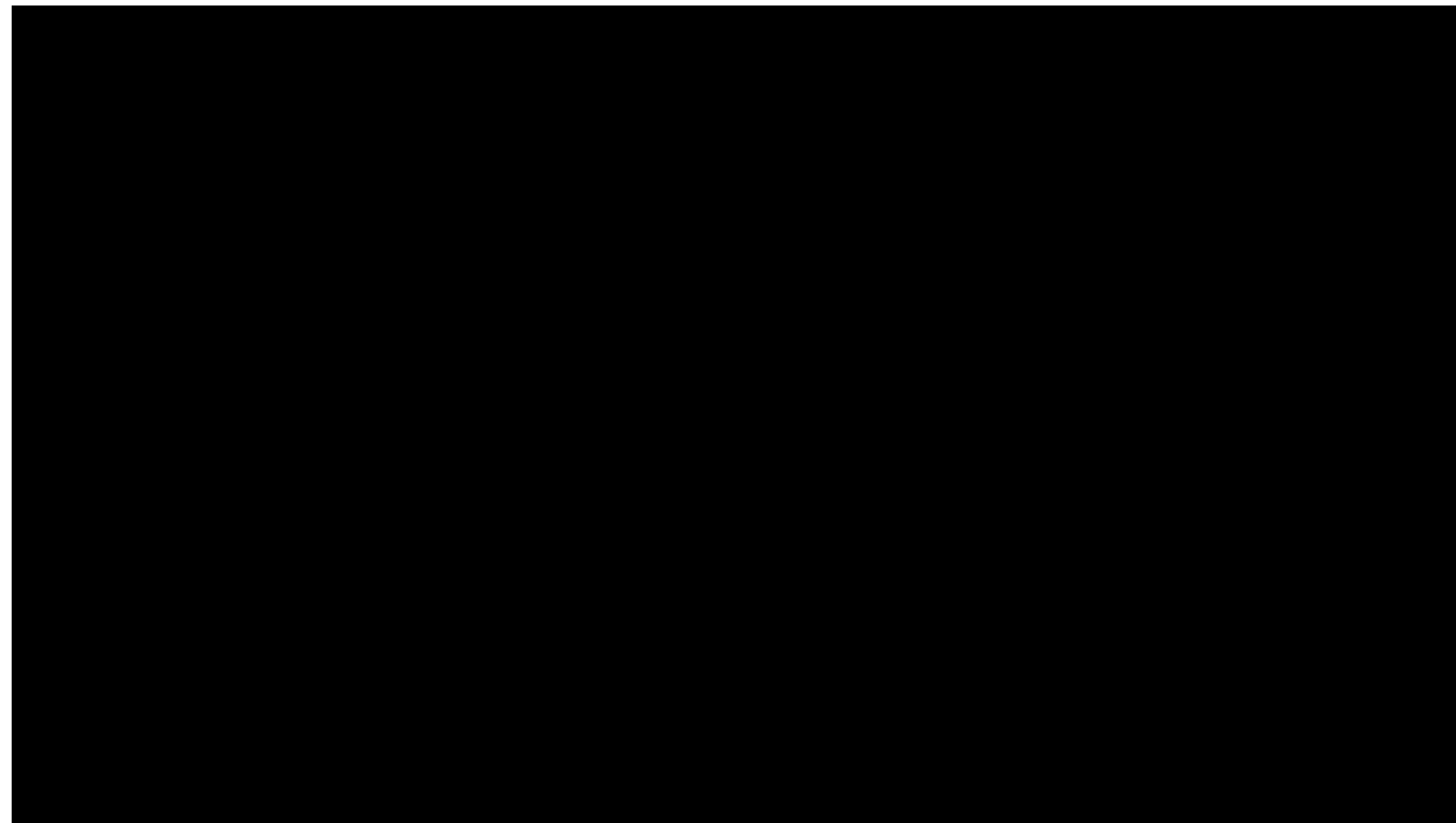


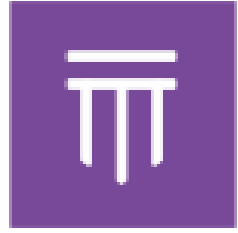
Hannah Arendt: Banality of Evil & Human Condition

- Problem with Radical Evil:
 - x retributive justice
 - Judith Shklar:
 - legalism (ideology) Nuremberg trial is not justified
 - legalism (social policy): law is a political phenomenon, Nuremberg is a triumph of legalism, it awakens dormant legal consciousness
 - function of trials:
 1. highlight the scope of atrocities
 - Overcoming the radical evil by grasping its reality
 - Can also be done by truth, but: second best solution (less dramatic), lower quality of narration)
 2. Further the rule of law
 3. Lessen impulse towards private vengeance
 4. Recovery of self-respect for victims
 5. Promote public deliberation



Nuremberg: The Guilt of the World

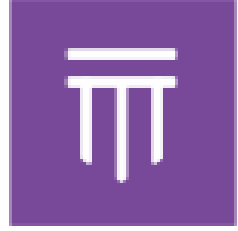




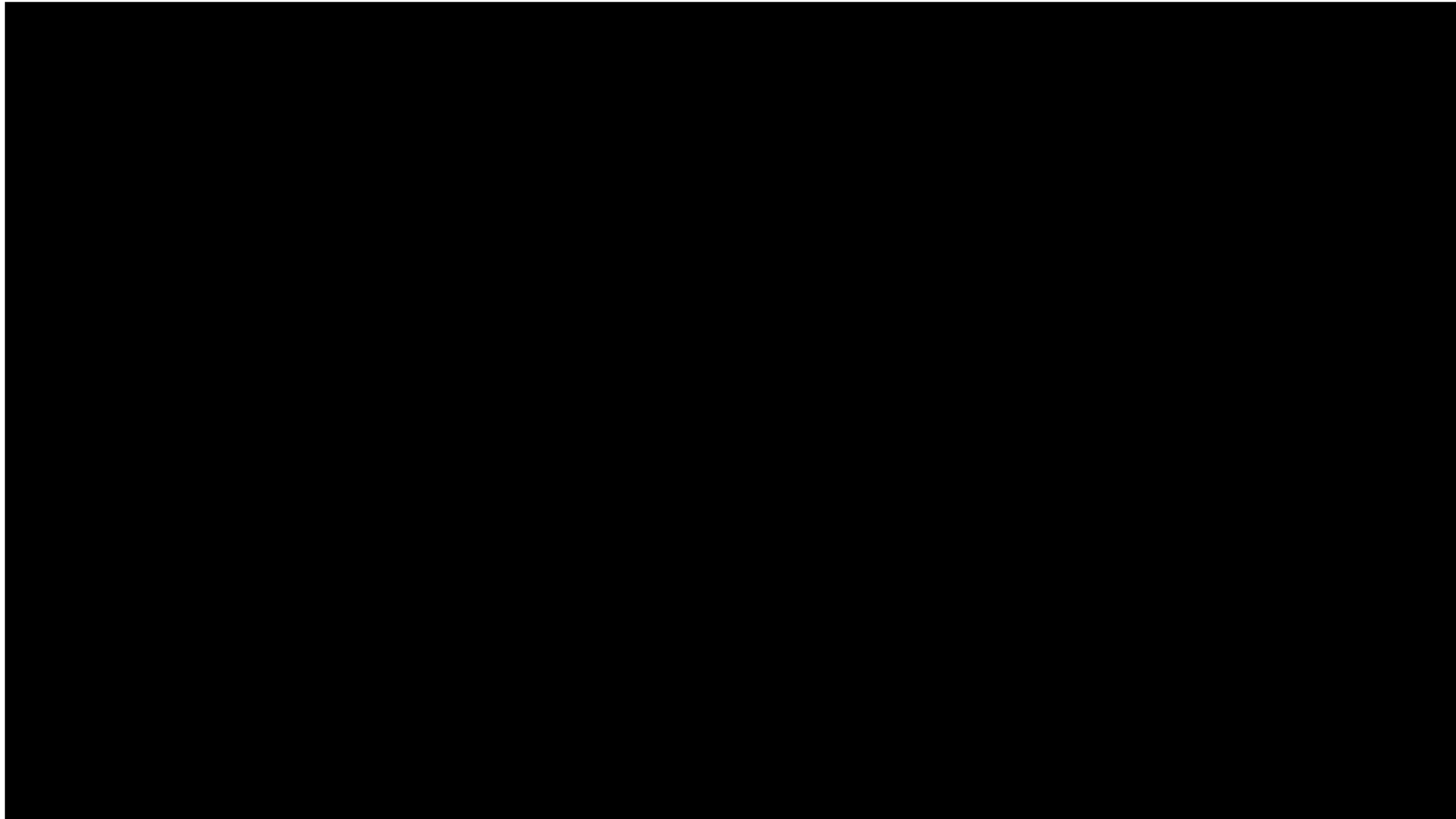
Eichmann case

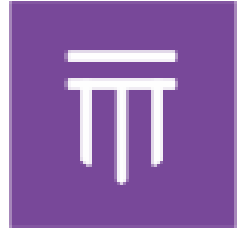
- Implementation of the Final Solution
- Bureaucrat, SS-Obersturmbannführer
- Escapes to Argentina after WW2
- 1960: captured by Mossad seizes Eichmann and transports him to Jerusalem
 - Argentina unhappy, but does not request extradition
 - Same goes for Germany, Eichmann could not have been prosecuted in Germany
- A show trial
- Trial: 15 crimes: crimes against humanity, war crimes
- Executed in 1962 (the only execution in the history of Germany)





Hannah Arendt: Banality of Evil & Human Condition





II. Generation: Ad hoc Tribunals

- Nuremberg legacy?
 - partly
 - Unique experience of post-war Germany
 - War tribunal, not judicial tribunal