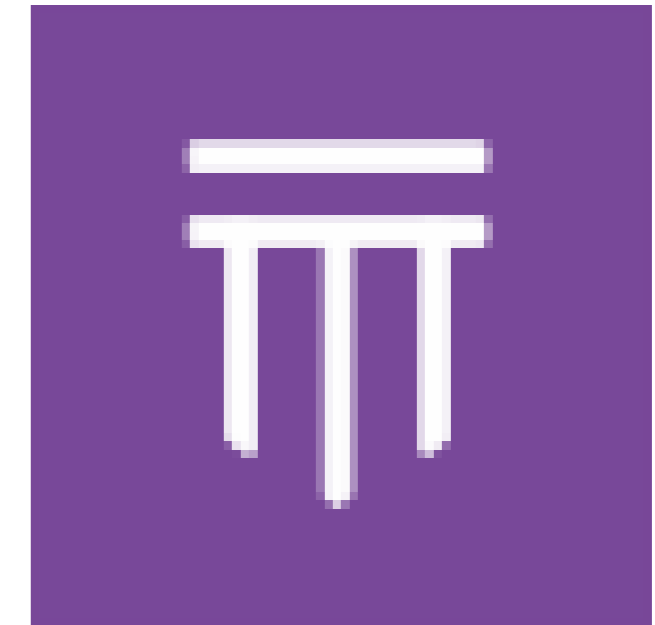


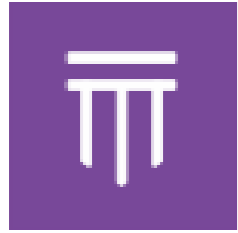
Brno, 26 September 2023

International criminal tribunals I.



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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*



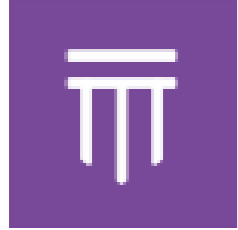
Core concepts and theories of transitional justice

- 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 -> **jus 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?
 - Sovereignty
 - Language
 - 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



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



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



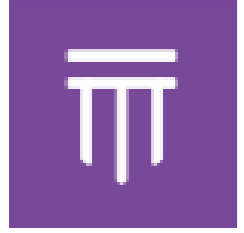
Legitimacy of international courts and tribunals

- 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
- **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

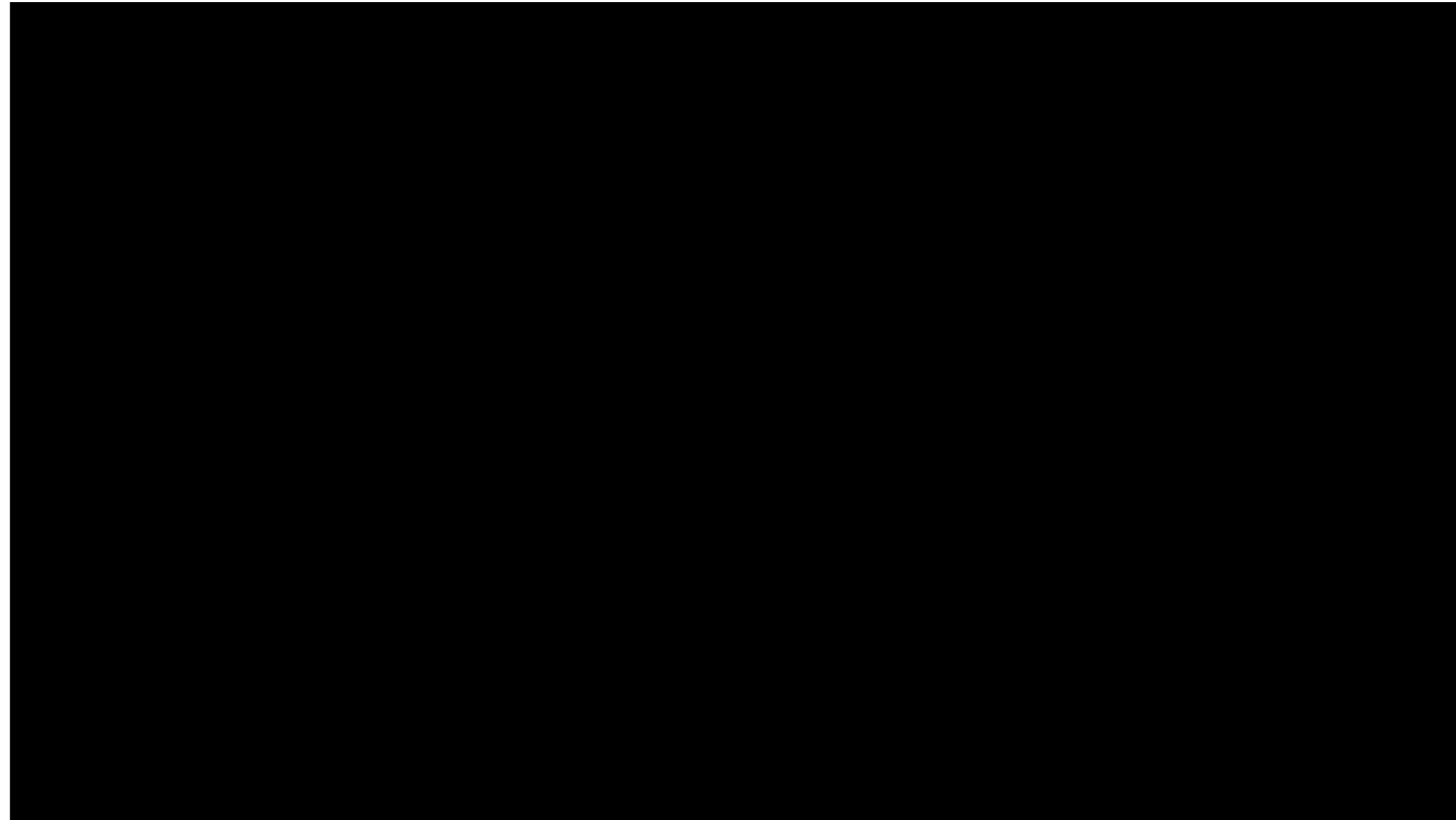


Pre-Nuremberg legacy

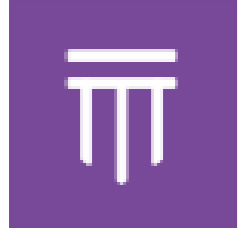
- 3 strategies
 - Normalization of relationship between winners and losers (punitive peace)
 - Individual responsibility
 - Isolation of Nazi leaders from German population, de-nazification of polity and society



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, In Futamura 1999, pp. 1457).



Hannah Arendt: Banality of Evil & Human Condition

- Problem with Radical Evil:
 - Trials pose risk to the stability of the democratic system. Why?
 - 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

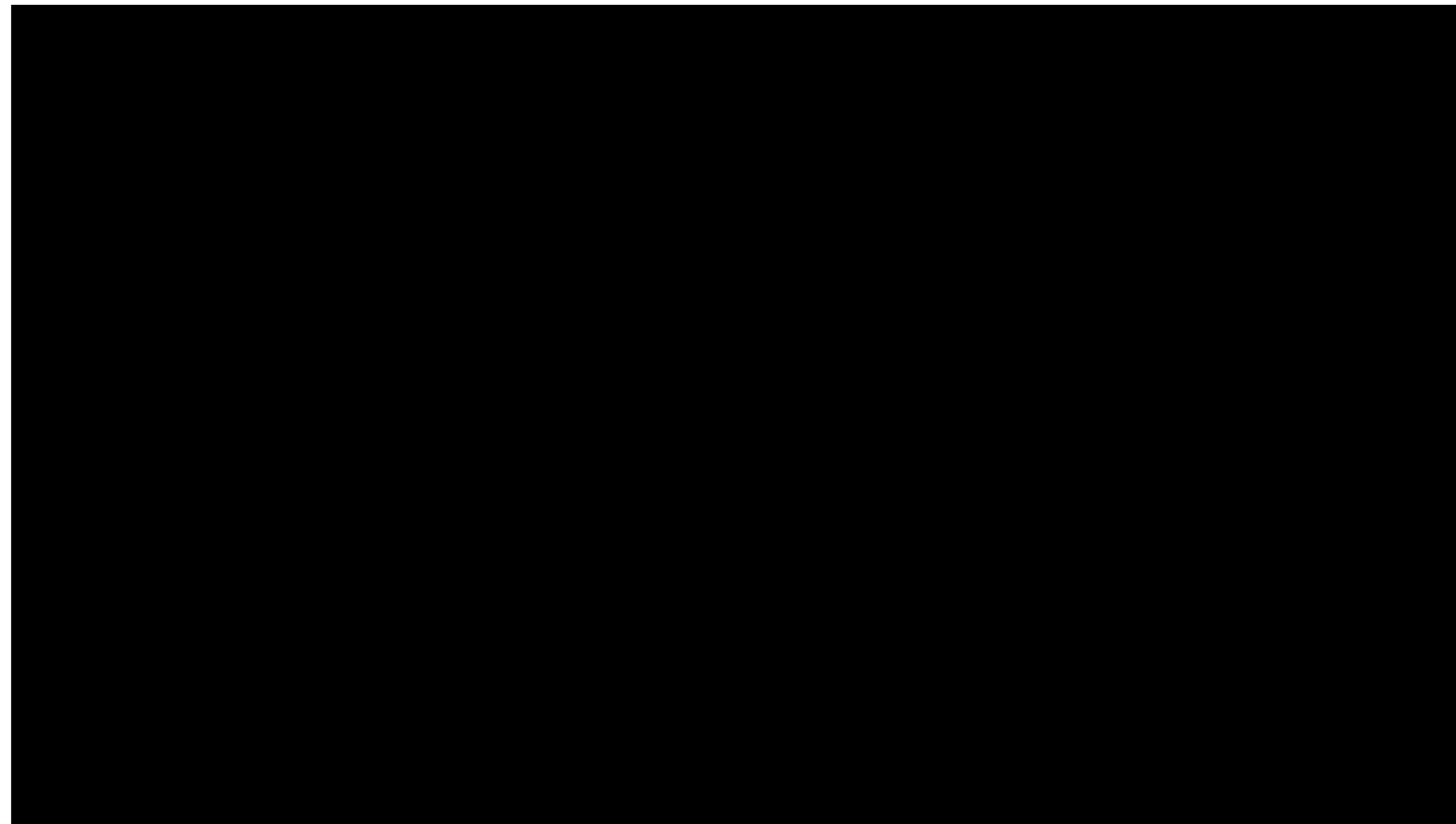


Judith Shklar on Nuremberg

- 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





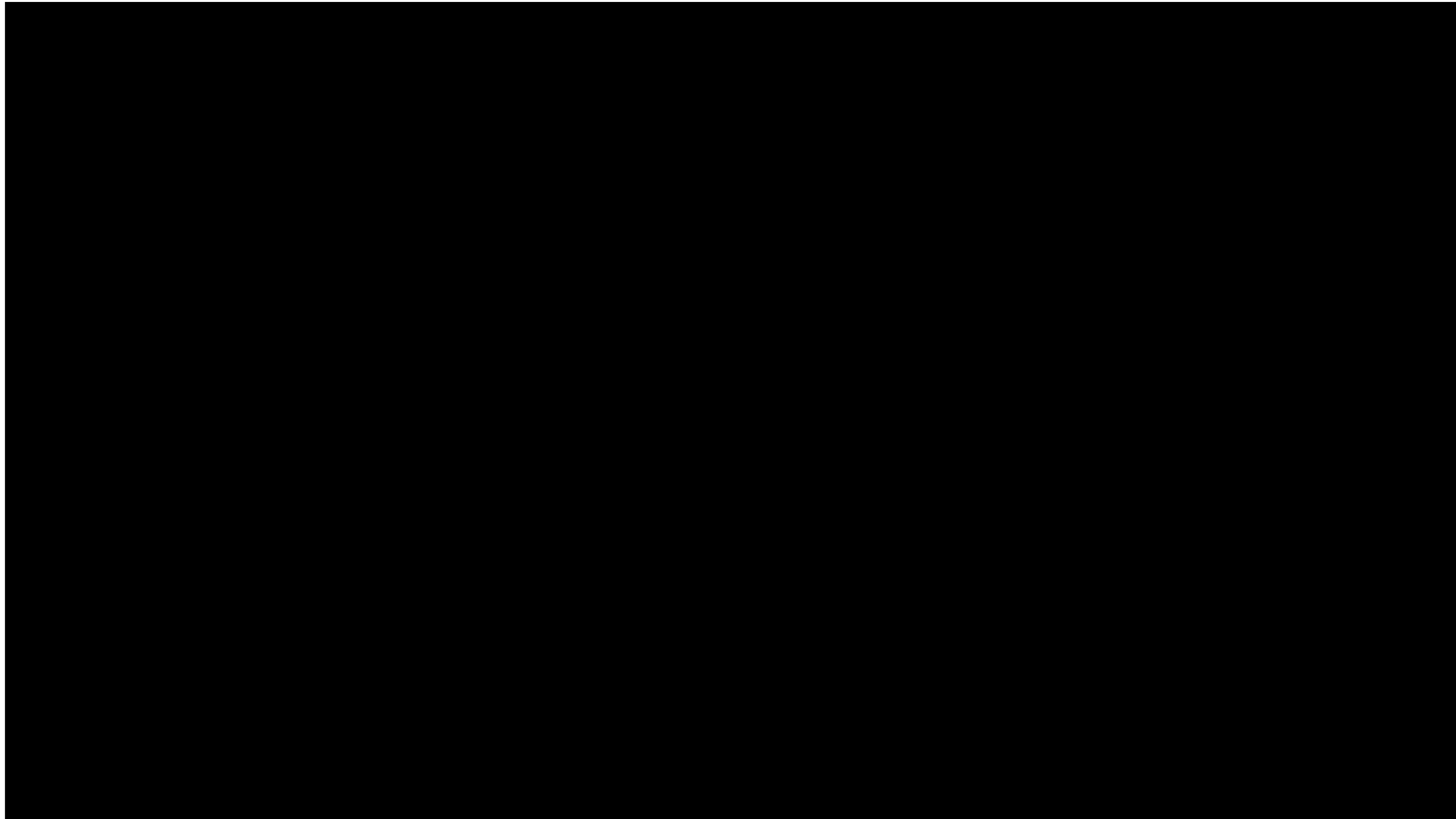
Eichmann case

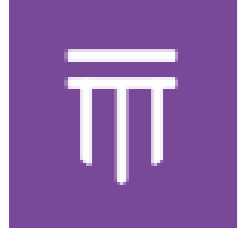
- Implementation of the Final Solution
- Bureaucrat, SS-Obersturmbannführer
- Escapes to Argentina after WW2
- 1960: captured by Mossad who seized Eichmann and transported him to Jerusalem
 - Argentina unhappy, but does not request extradition
 - Same goes for Germany, Eichmann could not have been prosecuted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





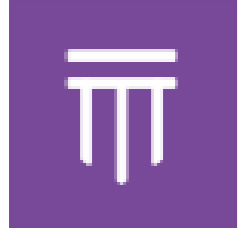
Hannah Arendt: Banality of Evil & Human Condition





II. Generation: Ad hoc Tribunals

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



ICTY

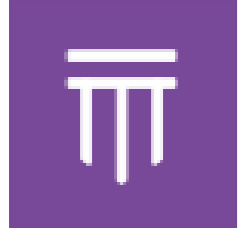
- Resolution UN SC 827
- Legitimacy: UN Charter, Head VII
- Aim: to prosecute persons bearing the core responsibilities for grave violations of international humanitarian law on the territory of former Yugoslavia FROM 1 January 1991
 - i.e. open mandate
- Reasonings
 - international community unsure how to tackle the Balkan conflict
 - created *during the conflict* -> The Hague
- Prosecution will lead to peace and stability





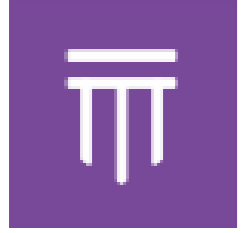
ICTY

- Will to repair the damage done by UN inactivity and weak reaction
 - 80s and 90s spirit, fear of intervention commitments
 - 1991 cease fire btw Croatia and Serbia – unsuccessful
 - UN informed about HL violations by at least 20 countries – SC places embargo on arm trade
 - Economic sanctions
 - UNPROFOR in Bosnia nad Croatia
 - Resolution 764: obligation of countries to comply with requirements of international humanitarian law and Geneva conventions
 - Resolution 780: Committee of experts
- Preliminary report of 1993 demonstrates risk of ethnic cleansing and suggest in international tribunal (x domestic courts)
 - Bosnia and Croatia wants to use OSCE
 - Federal YUG against
- Resolution 827 (of 1993) - unanimous



ICTY

- Material jurisdiction
 - Grave violations of Geneva conventions
 - Customs and rules of war
 - Genocide
 - Crimes against humanity (without relation to war)
- But what law??
- Primacy before domestic courts
- Numbers
 - 161 indictments
 - Last arrest 2011
 - Last judgment 2017
 - Residual Mechanism



ICTY – criticism (the voice of the victims?)

- Legitimacy
 - UN Charter: presumes establishment by GA, not SC
 - Reply: *Tadić* case (1995)
- Fairness
 - Majority of accused: Serbs
- Seat: Hague
 - Language barrier
 - Lack of cooperation with states on capturing the accused
 - No police apparatus
 - Too lengthy trials
 - Majority of accused: Serbs
 - Overall low effectiveness
- 1999: jurisdiction broadened to cover also conflict in Kosovo
- Did it fail the role of deterrence?



ICTY – criticism (the voice of the victims?)

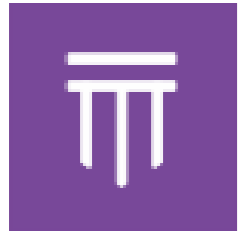
- Legal achievements
 - Shift from impunity to accountability (low activity of domestic prosecutors in Serbia);
 - Establishing the facts – truth seeking and truth telling
 - Restorative justice: voice to victims
 - New concepts in international law



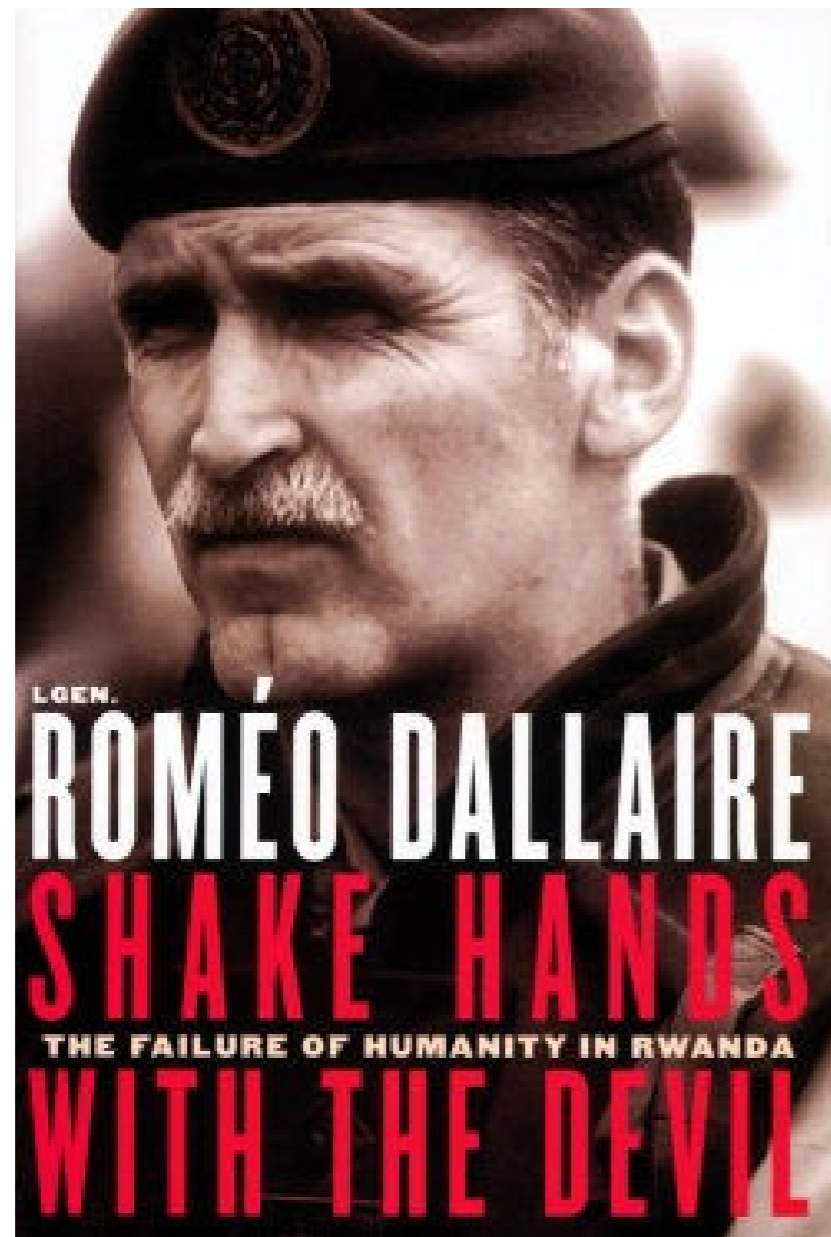
ICTY - criticism

Positive perception of the role and potential of ICTY in respective countries (2001)

Serbia	8 %
Kosovo	83 %
Bosnia	51 % (but, the most trust-worthy among international institutions)
Montenegro	24 %
Croatia	21 %



II. Generation: International criminal tribunal for Rwanda (ICTR)





II. Generation: International criminal tribunal for Rwanda (ICTR)

- The first ad hoc international tribunal to adjudicate on an internal conflict
- *Ubuntu?*
- Adopted by UN Resolution 955 (1994)
 - Rwanda is the only country against
 - Joined office of prosecutor
 - Arusha
 - Time jurisdiction: 1994
 - Aim to prosecute members of Rwanda freedom front



II. Generation: International criminal tribunal for Rwanda (ICTR)

- ESTABLISHMENT: alternative options
 - International treaty
 - X ongoing Conflict
 - GA Resolution
 - SC Resolution
 - The widest set of competences
 - Primacy over domestic courts (and their obligation to delegate cases upon ICTR)
 - Possibility to issue binding ordinances for third countries
 - Prosecution of top political leaders irrespective of their immunity



Legitimacy

Why?

- Access to evidence, witnesses, security
- Problem: postconflict environment
- Colaps of domestic judiciary? NO

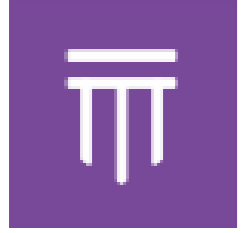


Effectivity of international criminal tribunals

- Helfer – Slaughter
 - Independence
 - High standards on who is the judge
 - Presenting the evidence
 - Binding effect of decisions

Posner – Yoo

Characteristic	Dependent	Independent
Time	During the conflict	Unlimited
Jurisdiction	Statute	International law
Initiation	Victim only	Independent party
Membership	Bilateral	Multilateral
Commitment	After conflict	A priori
Judges	Selection by a state	Independent selection



Role of courts in transitions

Why are elites willing to constrain their power?

Why are constitutional courts different in terms of independence, jurisdiction, competences and effectiveness?

Symbolic role (Hirschl, Schwartz)

- Separation of powers
- Rechtstaat
- Written catalogues of HR
- Agents of change

- Ramseyer
 - A mean to conclude longterm contracts of political parties and their voters
 - If a high probability of future independent parliamentary elections
 - If a low probability that current government easily wins next independent parliamentary elections

Ginsburg – insurance theory (democratization might lead to a loss of power + CC is a guaranty for minorities' rights)

Veto player theories

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Thank you for your
attention