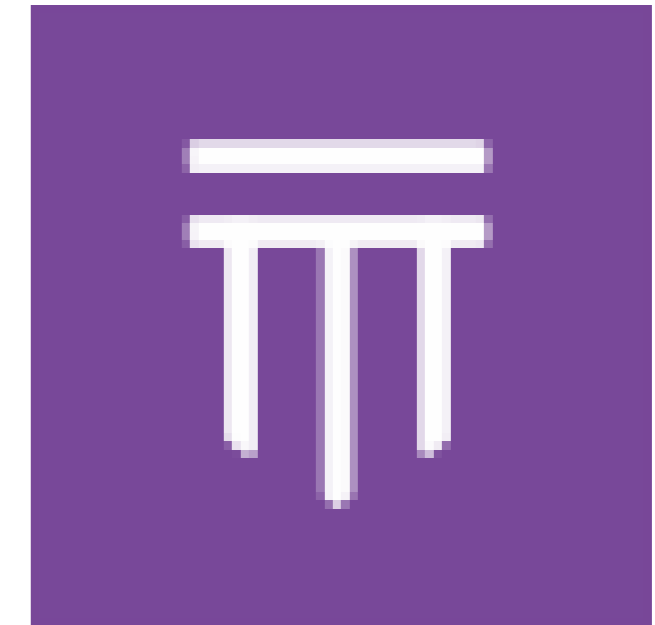


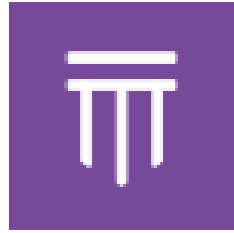
Brno, 1 October 2024

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 of 1899 and 1907 (how to lead wars, warfare)
 - Geneva conventions 1949 (how to protect victims)
 - Henri Dunant and Red Cross
 - How to ameliorate the effects of war on soldiers and civilians
 - 1. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
 - 2. the Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea,
 - 3. Convention Relative to the Treatment of Prisoners of War
 - 4. Convention Relative to the Protection of Civilian Persons in Time of War
- 2 Protocols 1977



Peace-keeping, international law & transitional justice

- Why do we care about the legality?
- 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



How TJ uses humanitarian law

- 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
- Article 33
 - 1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.
 - 2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.
- Article 37
 - 1. Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council.
 - 2. If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate



How TJ uses humanitarian law

- Exception: self-defense, A 51
 - *Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security”*
- UN Charter Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression



How TJ uses humanitarian law

- 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

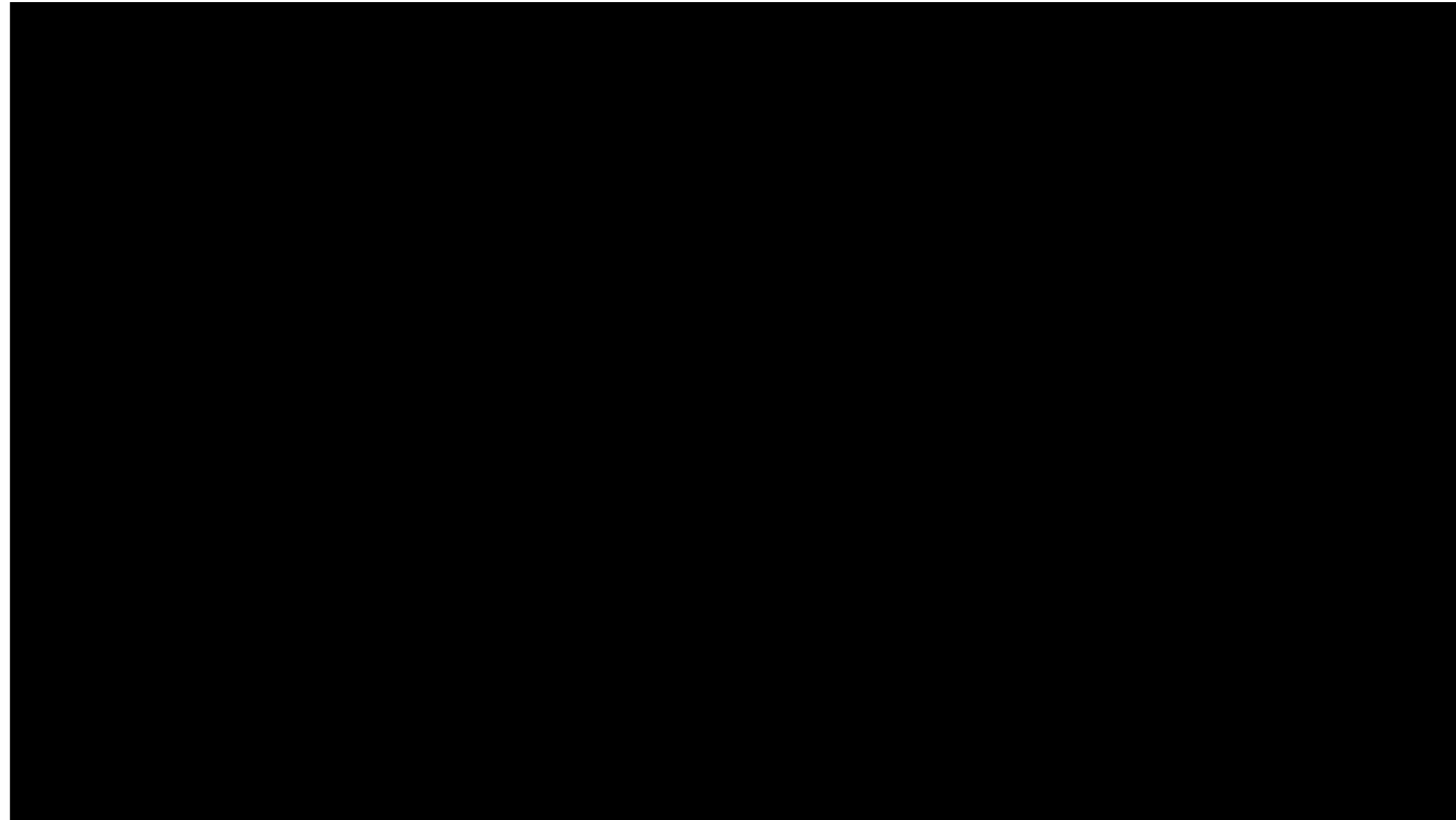


Pre-Nuremberg legacy

- 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

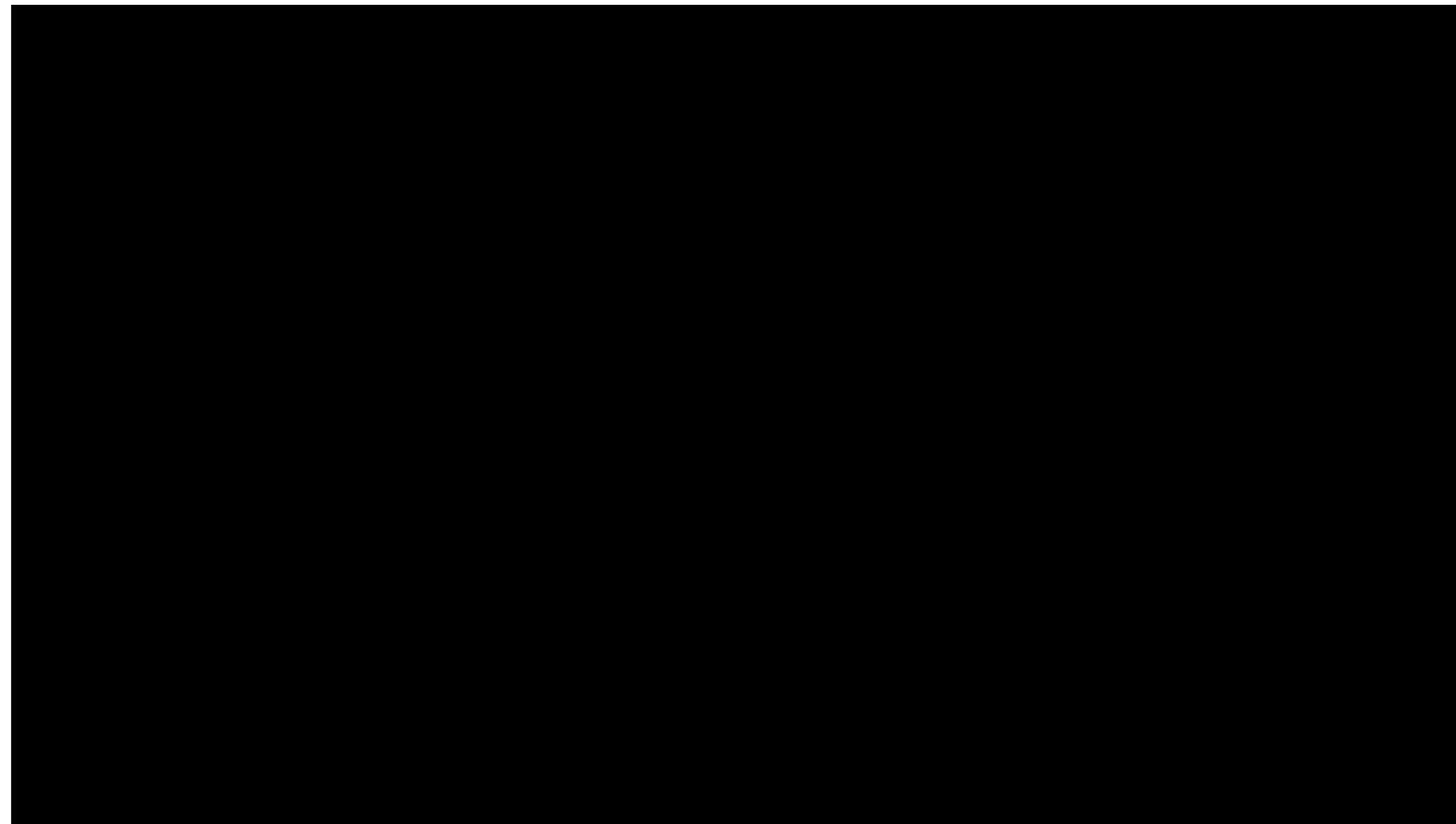


Judith Shklar on Nuremberg

- 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





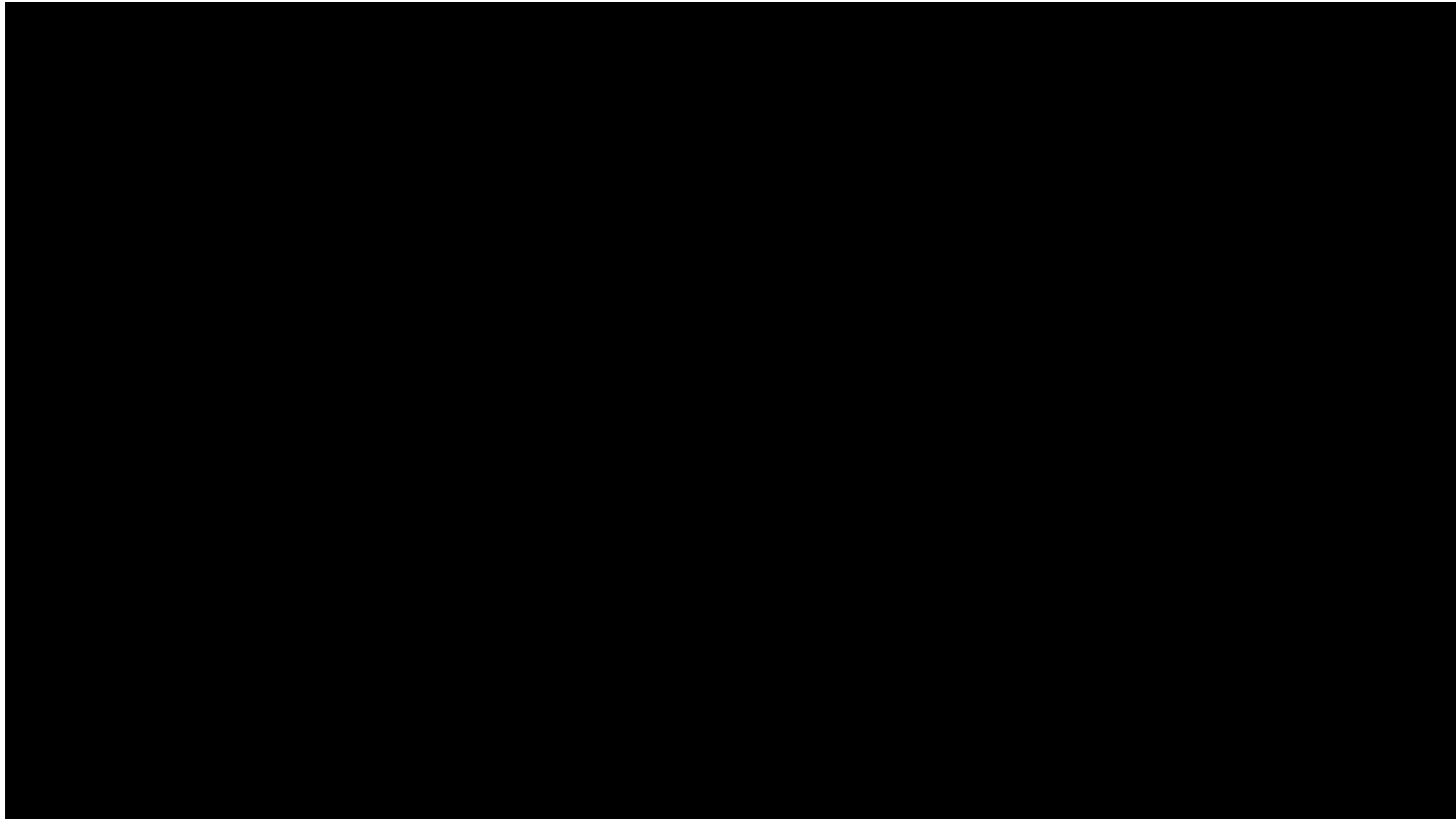
Eichmann case

- 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 and 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 suggests international tribunal (x domestic courts)
 - Bosnia and Croatia want 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?)

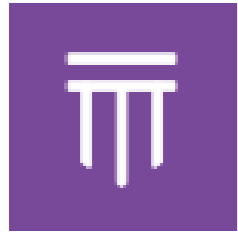
- Legal achievements
 - Shift from impunity to accountability (low activity of domestic prosecutors in Serbia);
 - Establishing the facts – truth seeking and truth telling
 - Restorative justice: voice to victims
 - New concepts in international law



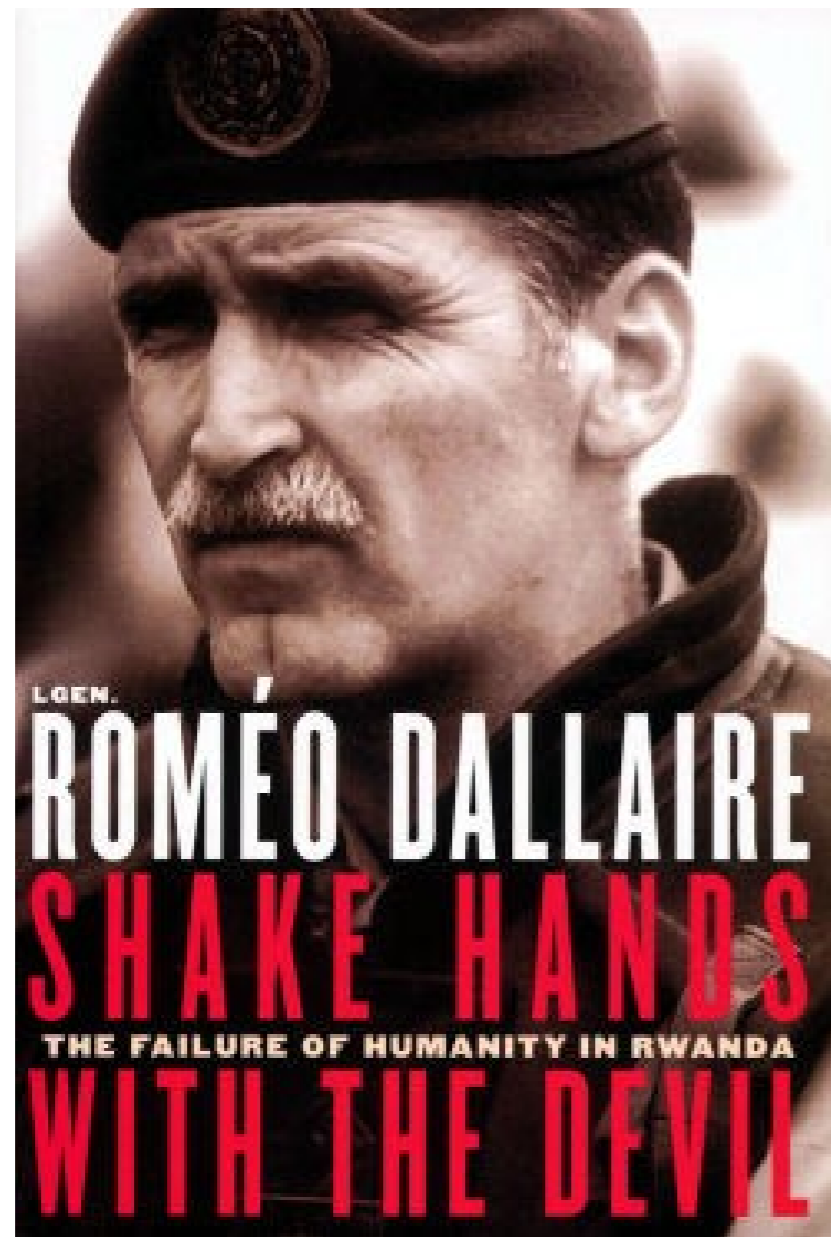
ICTY - criticism

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)

- Background
 - Problematic engagement of international community
 - X genocide
 - Hutu v Tutsi conflict
 - Fear of commitments v public pressure
 - Expert committee investigation of the genocide – confirms the planned genocide and recommends establishment of ICTR
 - Position of Rwanda's government
 - turn after UN expert committee suggesting to extend the ICTY jurisdiction
 - *Ubuntu?*
 - *Role of priests in the genocide*
 - *Low legitimacy of domestic courts*
 - *lack of capacity*



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

- The first ad hoc international tribunal to adjudicate on an internal conflict
- Rwanda's government issues
 - proposal to extend the ICTY jurisdiction
 - temporary jurisdiction: 1994
 - joint office of Prosecutor and Appeal Court
 - Seat in Arusha
 - death penalty
 - Carla del Ponte's role: members of RLF (radical Tutsies)



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

- 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



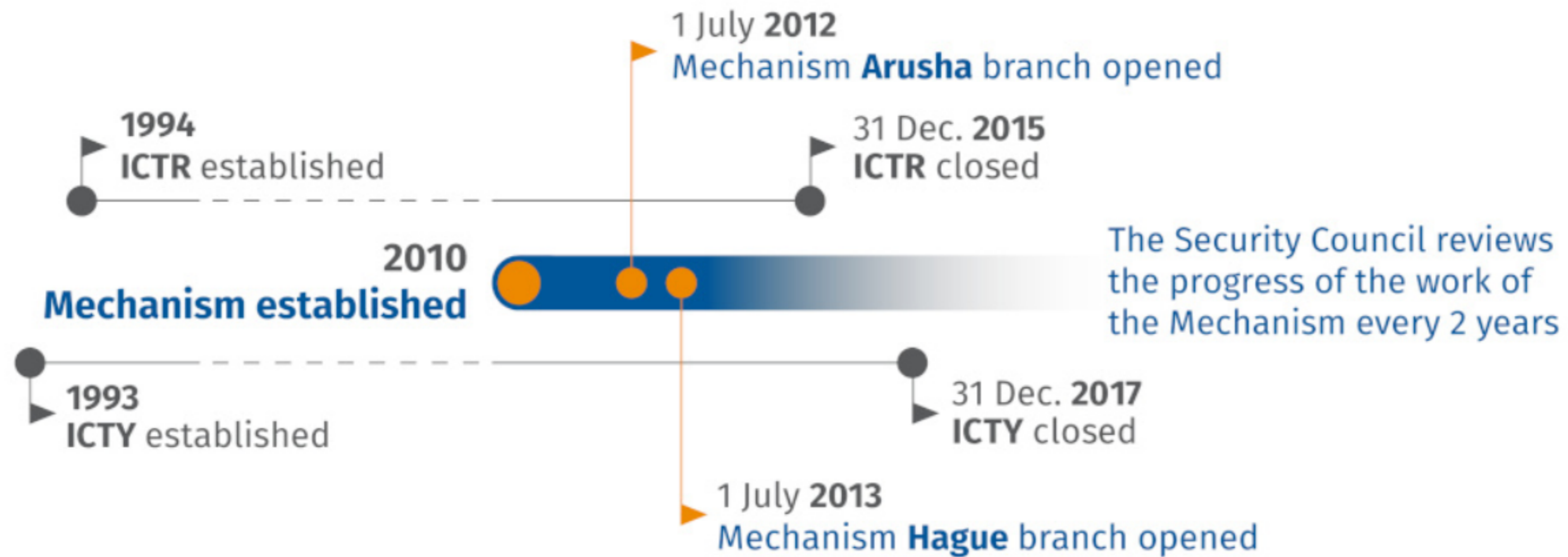
Legitimacy

Why?

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



International Residual Mechanism



<https://www.irmct.org/en/about>



III. Generation: Negatives

- Cooperation between domestic and international elements far from smooth
 - Cambodia: 3 domestic and 2 international judges
 - decision-making by 4 votes majority – unrealistic
 - Independent budgets = little money
 - Established by international treaty
 - Weaker mandate
 - Weaker enforcement



III. Generation: Sierra Leone, East Timor, Cambodia

- HYBRID COURTS, mix courts, specialized courts, internalized courts
- Draw on negative experience of ICTY and ICTR
 - costs, mistakes in management, negative feedback of domestic governments and population
- Attempt to connect international institutions with domestic context
- ***In situ*** courts
- They integrate domestic judges and domestic law
 - not always possible: existing and functioning domestic judicial structure
 - Pragmatic step of UN unwilling to spend too much money?
- Easier access of witnesses, etc.
- Faster reconciliation



Extraordinary Chambers for Cambodia

- Parallel negotiations for ECCC and Special Court for Sierra L
- Material jurisdiction
 - prosecution of the leaders of Khmer Rouge regime
 - Violations of international law
 - Serious crimes perpetrated during the Cambodian genocide
 - Communist party GP Pol Pot
 - Agrarian socialist society
 - Emptied cities
 - Relocation to labor camps in countryside
 - Mass executions, forced labour, abuse, malnutrition, etc.
 - Killing fields (pickaxes)
- Deaths of 1.5 to 2 mil people from 1975 to 1979 (approx. 1/4 of the population)
- Strong economic support of Chinese Communist Party
- End: invasion of Vietnamese military





Extraordinary Chambers for Cambodia

- Government asked the UN for assistance with prosecution in 2001
- Domestic volatile situation
- Negotiations abandoned in 2002
- Finances, composition, amnesties
- 2001, domestic Act on ECCC
 - GA UN issues resolution 57/228 asking to renew the negotiation while preserving the ECCC,
 - another resolution issued the very same day, addressing worries of politicised justice
- Treaty between UN and Cambodia of 13 May 2003
 - Formally independent on both national government and UN
- Biggest point of controversy: crimes of genocide v autogenocide (x 1948 convention)
 - ICTR *Akayesu* case: genocide must target stable groups, membership in which is given by law





Special Court for Sierra Leone

- Posterchild of hybrid courts
 - Seated in Free Town
 - Mixed composition
 - Based on international treaty
- Biggest controversy: Lomé agreements of 1999 (signed under UN auspices)
- Material jurisdiction
 - Accountability of members of RUF
 - HR violations of SL people, detention of peacekeepers
- AND crimes against implementation of peace process, crimes committed by peacekeepers UNAMSIL
- Crimes against humanity, grave violations of A3 of Geneva conventions, other grave violations of humanitarian law
- Resolution 1315 of 14 August 2000
- Crimes on Sierra Leone territory committed from 30 November 1996



Special Court for Sierra Leone – sui generis court

- Both international and domestic law (two domestic criminal acts: particularly targeting cruelty against children – reflected in A5 of the Statute)
 - Rape of children
- Temporal jurisdiction: 3 years – extended (no final date)
- In situ, Process with Charles Taylor – Hague



East Timor: Special chambers

- 1999 conflict (mass murders, persecutions)
- Civil war – legacy of decolonization process started in the first half of 1970s
- Indonesia – mass violations of HR (since 1976)
- 1990s: East Timor starts negotiations on independence and democratization
- Indonesia promises referendum – after 80% votes for independence – armed forces initiate HR repressions

- Very wide jurisdiction
- Unlimited temporal jurisdiction
- Personal jurisdiction not limited to persons carrying grave accountability

- *Too much ,too messy*



Limitations of 3rd Generation

- No mandate to address immunities of heads of states, or to require cooperation of third countries
- *x problematic extraditions*
 - *SCSL and Charles Taylor – years long negotiation with Nigeria and Ghana*
 - *Only thanks to the agreement of SC with conclusion of the international treaty (= Charter UN, as the treaty was concluded by SC, not GA)*
- *East Timor:*
 - *Only semi-hybrid*
 - *No legitimate government with sovereign authority*
 - *Indonesia does not cooperate*
 - *Weak legal culture*
 - *Budgetary issues*



How effective were individual tribunals?

- *ICTR and ICTY*
- Jurisprudence
 - Development of important doctrines: genocide, crimes against humanity, individual criminal accountability, fair trial conditions
- Inspired SCSL and all 3rd generation
- Residual mechanism in Hague: concluded (2011)
- Reiteration of history (lot of evidence, recollection, partial reconciliation)
- ICTR
 - USA and UK against investigation of crimes committed by RPF militia (nowadays Rwanda's government and army)
 - Prosecuted over 60 actors of genocide, including Bagosora or Bikindi
 - New crime of rape as a war crime
 - Torture as CAH



How effective were individual tribunals?

- *ICTR and ICTY*
- Deterrence
 - Peace?
 - Balkan: failure of ICTY
 - 1999 – expansion of jurisdiction to cover conflict in Kosovo (low deterrence potential?)
 - Very lengthy processes
 - Difficult to get the accused
- Legitimacy
 - Budget – dependent on UN member states
 - Low compliance and cooperation of domestic judiciary
 - Low reconciliation
 - Only symbolic role?



Legitimacy

	Second generation	Third generation
A. Mandate	Resolution	Treaty
B. Seat	3 rd country	In situ
C. Perceived Independence	No	Yes
D. Cooperation	No	Yes



Legitimacy

	Second generation		Third generation		
	ICTY	ICTR	SCSL	ECCC	SPSC
A. Mandate	Resolution	Resolution	Treaty	Treaty	Resolution
B. Seat	3 rd country	3 rd country	In situ	In situ	In situ
C. Perceived Independence	No	No	Yes	Partly	Partly
D. Cooperation	No	No	Yes	Yes	No



Effectivity and promises of mandates:

1. Prosecution of crimes
2. Deterrence
3. National reconciliation



Effectivity and promises of mandates:

1. Prosecution of crimes

- Focus of majority of legal scholarship
- How to evaluate this?



Effectivity and promises of mandates:

1. Prosecution of crimes

- Focus of majority of legal scholarship
- How to evaluate this?
 - *Number of convicted*
 - *Number of accused*
 - *Number of cases issued per year*
 - *Execution/compliance with the rulings (cooperation of domestic courts and governments)*
 - *Development of the international criminal law doctrine (II v III Gen)*
 - *Individual accountability*
 - *X politicization (personal jurisdiction and its limits)*
 - *X length of proceedings (II. GEN; SCSL concluded in 2014 – but, only 21 accused)*



Effectivity and promises of mandates:

3. National reconciliation

- Domestic reception, legitimacy of courts
- Seat
- Language
- Transparency
 - How understandable is the work
 - How visible is the work



Effectivity and promises of mandates:

3. National reconciliation

- ICTY

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 %



Effectivity and promises of mandates:

3. National reconciliation

- SCSL

	% of respondents (82% were war refugees)
I do follow the cases	73 %
SCSL is beneficial for Sierra Leone	61 %
Willing to stand as a witness if needed	57%



Effectivity and promises of mandates:

3. National reconciliation

- ECCC

Perceptions of ECCC by public

ECCC should partake on prosecution of Khmer Rouge regime	86.9%
Judges of ECCC are fair	66.7 %
ECCC will be neutral	67.1%
If the answers above were negative, these are the reasons	
Weak results of prosecution	29.7 %
ECCC is corrupted	22.9%
ECCC is politicized (ties to government)	28.2%
Too lengthy proceedings	15.1%



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Thank you for your
attention