



The Impact of Transitional Justice in Post-Conflict Environments

By Eric Brahm¹

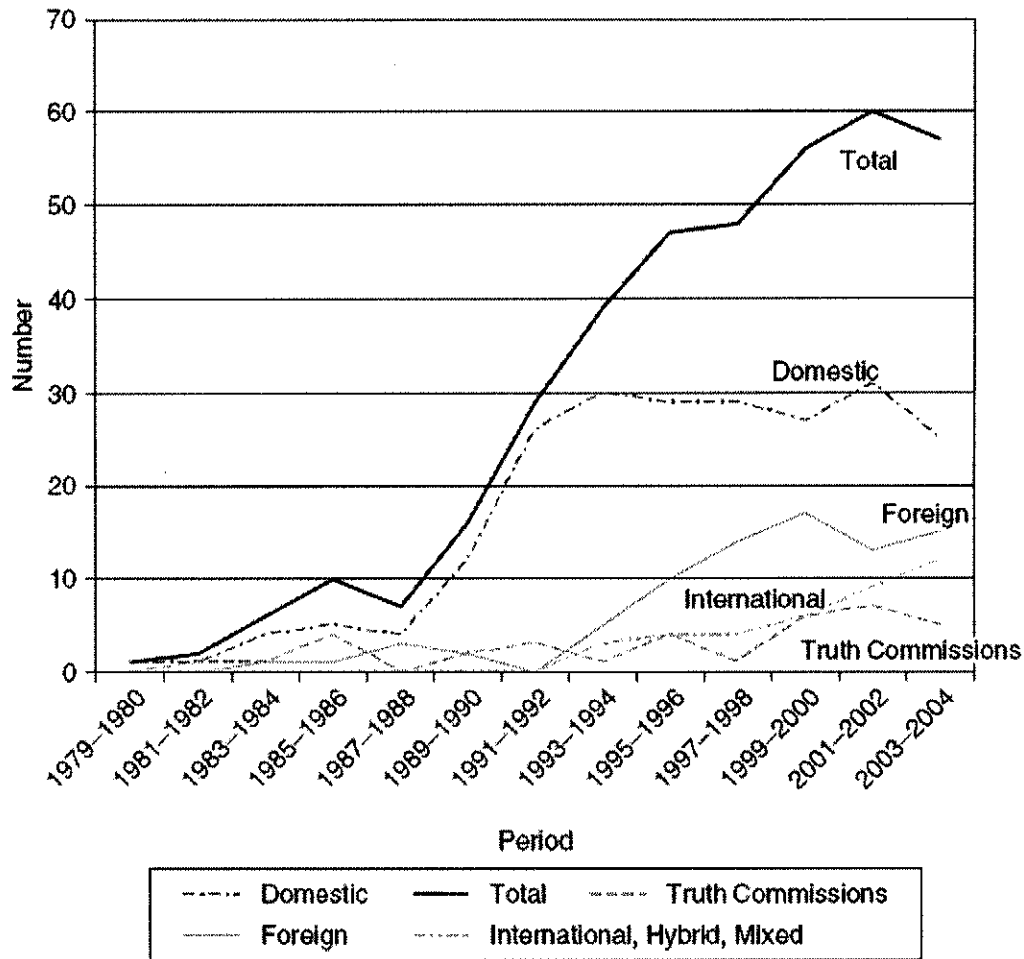
Transitional justice provides a potential contribution to the statebuilding process that is both forward-looking and backward-looking. In post-conflict situations, there are often demands for justice for past human rights abuses. A range of transitional justice measures, such as trials, truth commissions, and reparations programs, have emerged around the globe as tools to meet these demands. Post-conflict governments, however, are often confronted with perpetrators who remain powerful and who may have been promised amnesty as a precondition of laying down their arms. A range of other practical and political considerations also frequently come into play in the construction of transitional justice policies. As such, there is potential tension between transitional justice and statebuilding with respect to how these measures are structured and the motivations of their architects.

Introduction

As attempts are made to bring an end to violent conflict and rebuild a fractured society, there are often demands from victims, domestic civil society, and the international community to address the injustices that occurred during the conflict or that were an underlying source of the conflict in the first place. These efforts to deal with past crimes in the context of dramatic political change have come to be known as transitional justice. A broad range of non-mutually exclusive transitional justice measures have evolved including trials (both international and domestic), truth commissions, vetting processes, reparations, and amnesties. International actors, whether states, international organizations like the United Nations (UN), or transnational human rights groups like the International Center for Transitional Justice have been influential in the promotion of transitional justice as an important statebuilding tool and are beginning to articulate a set of best practices. Although the pursuit of transitional justice has become increasingly common since the late Cold War era (see Figure 1), the most common response to past human rights violations continues to be to do nothing. In some cases, this may be the best option where the prospect of transitional justice keeps fighters from laying down their arms. As such, transitional justice may potentially conflict with the goal of statebuilding (Leebaw 2008).

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Figure 1. Trends in Transitional Justice Mechanisms



Source: (Sikkink and Walling 2007: 431)

While many domestic and international actors often want past crimes addressed, in fragile post-conflict environments, transitional governments face a number of political and practical obstacles to developing transitional justice processes. First, perpetrators of past human rights violations may remain influential or useful in the post-conflict context. Second, victims desire justice, but they may or may not have political power and unity on what would constitute justice. Third, there are competing demands that may interfere with transitional justice. In the aftermath of conflict, needs are many and varied, while resources are often scarce. Finally, the international community has demonstrated inconsistent support for transitional justice. Interest is often highest where national security interests are enhanced (or at least not substantially harmed) by the pursuit of transitional justice and where the cost of transitional justice is low in terms of resources and the risk to foreign troops and staff needed to support the effort.

This synthesis will provide a brief overview of the major transitional justice mechanisms. To be sure, this essay cannot adequately address the broad range of processes that have been created to serve a transformative role in post-conflict societies (for an overview, see for example Minow 1998; Teitel 2002). However, in the course of this synthesis, I will highlight the state of knowledge with respect to how best to construct

transitional justice programs and expect what we should expect from such an endeavor. Specifically, I consider the potential contributions transitional justice can make in a successful statebuilding project as well as some of the inherent risks.

Overall, there has been insufficient attention to the potential trade-off between statebuilding and transitional justice. Research has only recently begun to systematically address these issues. International organizations, transnational activists, and many governments have embraced the need for confronting past human rights violations, but there remains limited evidence to support the contention that transitional justice mechanisms have beneficial effects on individuals and societies. In general, the transitional justice literature has been dominated by descriptive, anecdotal accounts and the use of questionable logic and analogy (Mendeloff 2004). There remains a significant need for more empirically sound approaches to the question of what impact transitional justice has on the statebuilding process (Brahm 2007). The example of Nuremberg in Germany suggests that we may also need to wait generations to truly assess the impact of these various measures.

Methods of Transitional Justice

In many instances, the course of transitional justice is shaped by the balance of forces amongst the new and old regime, between perpetrators and victims in the post-conflict setting as well as the degree of international interest in the conflict (Barahona de Brito, Aguilar, and Gonzalez Enriquez 2001). However, transitional justice measures should not be considered mutually exclusive as some post-conflict environments have seen a combination of approaches used either simultaneously or sequenced in a variety of ways. In addition, transitional justice is shaped in powerful ways by a society's political, social, and legal traditions (Teitel 2002). While best practices are only in the process of being formed (Office of the United Nations High Commissioner for Human Rights 2006; Bassiouni Forthcoming), the following sections elaborate on some of the ways in which transitional justice may prove beneficial and detrimental to post-conflict statebuilding.

Trials. The most high profile means of transitional justice is to put perpetrators on trial. Advocates of prosecution point to a number of potential benefits. First, it may deter future would-be human rights abusers. If perpetrators of past abuses are put on trial and punished for their deeds, it may make others think twice. Second, the sanctioning of perpetrators may provide victims with a sense of justice and help them heal. As such, trials may reduce the incentive for victims to engage in vigilante justice which could spiral out of control. Third, by demonstrating a commitment to subjecting everyone to the law, trials may contribute to the (re)establishment of the rule of law. In deciding whether to conduct trials, governments must consider the number of crimes that were committed, how wide a net to cast for perpetrators, and the judiciary's capacity to try these suspects, which is likely limited in the aftermath of conflict.

Where domestic judicial systems lack the ability or the will to try perpetrators, the international community may step in as has occurred with the International Criminal Tribunal for the Former Yugoslavia (ICTY). This is a rarity, however, given the continued power of the sovereignty norm and the international community's general unwillingness to bear the burden of financing tribunals and apprehending suspects.

In many post-conflict situations, trials are a risky proposition. Where perpetrators are threatened with prosecution, they may resist relinquishing power or be a destabilizing

force in the statebuilding process (Snyder and Vinjamuri 2003). For example, in the mid-1980s, Argentina's democratic transition was nearly reversed due to military anger over the trials of junta leaders. Having seen the instability in Argentina, in the early 1990s the new democratic government in Chile explicitly opted not to pursue the judicial route. Similarly, for many years Slobodan Milosevic was not indicted by the ICTY because he was perceived by the international community to be essential in bringing the Bosnian Serbs to the negotiating table. The debate surrounding whether the recent indictment of Sudanese President Omar Hassan al-Bashir by the International Criminal Court (ICC) will end or fuel violence in Darfur further encapsulates this peace versus justice controversy.

Trials are also risky if they are perceived as a witch hunt or payback. If so, they may provide the basis for future conflict. Many Serbs, for example, believe the ICTY is intended to punish Serbia rather than provide accountability for crimes committed by all sides of the conflict. International tribunals, in particular, are often dismissed as foreign impositions by domestic critics. Domestic intergroup tension may also be exacerbated. When Sunnis in Iraq reacted violently to Saddam Hussein's execution, it reflected a perception that the Shia-dominated government was out for revenge against the Sunni people.

While it may not satisfy everyone, measures that ensure the fairness and transparency of judicial proceedings may help to minimize these risks. Judges and commissioners should be viewed as neutral arbiters who are broadly representative of society. Protecting the rights as well as the physical well-being of the accused is important. The same is true of victims and witnesses. Victims also need security and medical and psychological support for their participation in trials. Studies have found that victims got more comfort from seeing perpetrators diminished before the courts and from finding their loved one's remains than from any sense of justice from the trial itself (see the chapters by Stove and Shigekane and Stover in Stover and Weinstein 2004).

Where the conduct of trials is distant from affected communities, prosecutorial efforts may not be greeted with anger, but with apathy. Recent international tribunals have been particularly prone to this. With the ICTY in the Hague and the International Tribunal for Rwanda (ICTR) in Arusha, few in the affected regions have followed the proceedings (Des Forges and Longman in Stover and Weinstein 2004). What is more, their remoteness also minimizes any impact the trials may have had on strengthening the local judicial system (Fletcher and Weinstein in Stover and Weinstein 2004). A significant risk of international prosecution is that no one will pay attention and the effort will be of little consequence.

There have been two major innovations designed to deal with some of these problems. One strategy has been the development of so-called hybrid tribunals (for an overview, see Romano et al. 2004). Hybrid tribunals employ a mix of domestic and international legal expertise to appear less a foreign imposition and to have a more significant impact on the post-conflict legal system. The tribunals in East Timor and Sierra Leone, for example, took place in-country for greater visibility and to help develop the domestic judicial system. Hybrid courts have also been attractive because they are less costly than international tribunals.

The second response has been the creation of the International Criminal Court. As a standing institution, proponents argue that it can be an effective antidote to the inertia

often facing calls for international tribunals. As such, it can potentially provide a more credible deterrent to would-be human rights abusers. The ICC can initiate an investigation at the request of a state party to the ICC, the UN Security Council, or on the initiative of the ICC Special Prosecutor. A number of provisions in the Rome Statute establishing the ICC are designed to constrain the special prosecutor's authority and ensure the court supports rather than supplants domestic judicial action. The ICC is currently in the midst of its first cases, but it faces the hostility of the United States and some other major powers. It also has the same weaknesses as most other courts, namely that it must rely on others to apprehend suspects.

Truth Commissions. A second transitional justice mechanism that has gained in popularity over the past two decades is the truth commission. South Africa's Truth and Reconciliation Commission (TRC) is by far the most iconic example and has proven highly influential for subsequent cases. Truth commissions are temporary, non-judicial bodies set up by governments to investigate a period of human rights abuses committed by government forces and/or its armed opponents. Historically, truth commissions have been seen as a compromise between trials and doing nothing about the past. Perpetrators may remain powerful and potentially disruptive, yet a transitional government may face counter pressures for accountability. Depending on the capacity of the judicial system to handle the case load and its complicity in past abuses, trials may also not be feasible.

Over some thirty years of experimentation, there is an emerging consensus on best practices in the conduct of truth commissions. To lend the investigation greater credibility, commissioners should be representative of society and untainted by past violations. In principle, the commission should have free rein to investigate abuses. However, even when they have subpoena and search and seizure powers, there is often little to compel cooperation with the commission. It would also be desirable for the commission to have the entire conflict open to investigation, but some examples such as Chile suggest that opportunities for more investigations may emerge in the future if a truth commission's mandate is limited.

Two controversial powers given to some truth commissions have been to grant amnesty and to name names. To date, only South Africa has had the power to grant amnesty to perpetrators. Applicants had to come before the TRC and give a full confession and demonstrate a political motive for their actions. While this criteria was criticized as unverifiable, defenders pointed to the low percentage of applicants who were granted amnesty. It is important for clear criteria to be established for eligibility and the reasoning behind the decisions should be clearly articulated. Some more recent cases have permitted commissioners to recommend amnesty. While critics decry the injustice of the amnesty, defenders argue it encourages uncovering more information.

Some commissions have also named names of those they have concluded are responsible for human rights abuses. Advocates of the practice argue that it provides a form of accountability and, after all, the accused had the opportunity to come before the truth commission to tell their story. Opponents do not see naming names as appropriate because truth commissions do not have the same standards of proof as a court and the accused do not have sufficient opportunity to defend themselves.

An important function of truth commissions is to engage the public. Increasingly, commissions are conducting public hearings. Where the infrastructure exists and

security is sufficient, this can be an effective way to begin a national dialogue about the past. Whether or not hearings are public, the truth commission's key connection to society is its final report. The report summarizes the commission's findings with respect to the causes and consequences of past human rights abuses. In addition, it outlines recommendations that are designed to prevent the repetition of human rights violations and to provide further redress for the past. To ensure a broader impact, truth commissions should follow recent practice in Sierra Leone of producing popular versions of final reports as well as versions aimed at children and school children.

Overall, a truth commission needs adequate resources with which to conduct its investigation. Much can be accomplished with a few million dollars. What is most crucial for the commission is that it have funds in hand up front. In a number of instances, governments and international donors have pledged money only to not follow through. This causes needless delay in the investigation as plans are retooled. Sufficient planning before getting started is important for the truth commission's ability to successfully fulfill its mandate.

Although they often employ some of the trappings of trials, truth commissions are rooted in ideas of restorative justice. Rather than seeking to provide punishment or even necessarily allocate individual blame, truth commissions typically seek to establish an authoritative narrative of the political and socio-economic circumstances that enabled gross human rights violations to occur. Truth commissions have been described as more victim-centered in that they provide an opportunity for survivors' suffering to be acknowledged and some closure to be achieved through commission revelations. While some victims are comforted by this, others see truth without punishment as an injustice. Despite the fact that truth commissions are frequently constructed ostensibly on behalf of victims, their input in the process has been lacking. Witness protection as well as medical and psychological support for truth commission participation has also been meager.

In constructing a narrative of the conflict, truth commissions attempt to produce an authoritative history upon which society can rebuild. Conflict was often instigated through biased, inaccurate depictions of history. If the details of the past uncovered by truth commissions are perceived as neutral and authoritative, they may provide the basis for society to construct a common history. Still, the Chilean truth commission, for example, did not diminish the claims of military leaders that they were acting to defend the country. Surveys taken after a number of commissions indicate that many were not persuaded. However, the effect may be longer term.

Increasingly, truth commissions are not an alternative to trials. In East Timor and Sierra Leone, truth commissions operated alongside internationally-sponsored courts. In these instances, the key leaders were tried and lower level offenders were encouraged to use the truth commission as a means to reintegrate into society. These early experiments point to the importance of clearly delineating the relationship between the two bodies to ensure they work in harmony. What is more, it is important that a public education campaign be conducted to clarify the powers and purpose of each body.

Most studies of truth commission impact have focused on South Africa. Overall, the TRC appears to have had mixed results (Gibson 2004). Most South Africans were ambivalent about the process. A majority of all races thought it would reopen old wounds. Black South Africans were the only group in which sizeable numbers thought uncovering the

past was very important. The TRC also appears to have not lent legitimacy to political institutions of post-1994 South Africa. More positively, the TRC seems to have moderated the views of different racial groups. Overall, Gibson concludes that, while South Africa has some way to go to achieve reconciliation, the TRC has significantly helped the process.

Vetting. Vetting processes, sometimes also called lustration or purges, is a third form of transitional justice. Popular in Eastern Europe after the end of communism, lustration laws provide a means of screening individuals for past behavior as a precursor to holding public office or other positions of power. The United States pursued such a strategy early in its occupation of Iraq when it dismissed all Ba'ath Party members from the civil service and the military. Countries have varied in what positions have been subject to vetting. In addition, some countries have used vetting more punitively, while others have used the process to allow individuals to voluntarily demonstrate they are untainted. Finally, while some have enacted lifetime bans, other countries have specified a number of years.

Many of the most glaring problems with lustration are shared with prosecution. One major problem is obtaining credible information about individual involvement in past crimes as a basis for determining whether someone should be purged or not. In Eastern Europe, for example, secret police contacts were often fabricated or individuals were unaware they were providing information to security services.

Second, stronger sanctions against perpetrators and those complicit in past human rights violations have a potential practical drawback. Many of these individuals possess technical expertise that is sorely needed as part of the statebuilding process. For example, the American purge of Ba'athist elements from the Iraqi government robbed the security services of many of those best trained to deal with looting and the ensuing insurgency. Given the difficulty in obtaining credible evidence of individual wrongdoing, lustration is particularly prone to casting an overly wide net by screening individuals based on group membership rather than on proof of actual deeds.

Reparations. In the course of pursuing transitional justice governments might grant material and/or symbolic reparations to victims of past human rights abuses. Based on truth commission recommendations, for example, the Chilean government provides a monthly pension and other benefits like school tuition and medical coverage to thousands of victims of the Pinochet era. Most countries, however, do not provide material benefits for victims of past human rights abuses. Aside from the cost to states that are often desperately poor, there are other issues of identifying victims and quantifying suffering. Constructing memorials, preserving sites associated with past brutality as museums, and national days of remembrance are examples of symbolic measures that governments can take to provide some measure of transitional justice.

Reparations are often of paramount importance to victims and their loved ones. Although unable to undo the harm, reparations may help alleviate some of the material and psychological effects of past crimes and represent a societal commitment to address the harm done. Unfortunately, there are a number of ways in which a reparations policy can fail to achieve these ends. For example, reparations programs targeted at one segment of the population will likely generate feelings of jealousy amongst others. In addition, reparations often sit uncomfortably with other forms of transitional justice. They may be seen by victims as blood money for acquiescing to an amnesty, for instance. Many

victims also come before truth commissions believing that doing so will make them eligible for reparations. Victims often feel angry when they have to wait many years after a conflict, if ever, before receiving reparations. Meanwhile, perpetrators benefit immediately from DDR programs. Reparations programs are most effective when they meet victims' needs. To ensure this, victims should be consulted in their construction.

Amnesties and Pardons. Another form of transitional justice would be characterized by many as no justice at all, namely amnesties. Amnesties represent a commitment to forgo punishment. They may be created by perpetrators to protect themselves, as was true in Pinochet's Chile. They may also be enacted by transitional governments in hopes that it will placate perpetrators who might otherwise disrupt the statebuilding process. This was true of Argentina where a series of military uprisings in the late 1980s led President Menem to pardon those convicted of human rights violations under the prior military junta. Some argue that amnesties are largely responsible for the post-conflict peace and stability for which other transitional justice mechanisms are often given credit (Snyder and Vinjamuri 2003).

Blanket amnesties are seen by human rights activists as illegitimate, though they are often important in persuading fighters to lay down their arms. As mentioned above, South Africa represented a unique case of conditional individual amnesty. The process was far from perfect as limited action and success in prosecuting alleged perpetrators reduced the incentive others had to come forward. What is more, amnesties may not be durable over time. Victims' groups and activists in a number of countries have eroded the amnesties with innovative legal maneuvers years after the fact when conditions were much more stable. As this becomes more frequent, it is debatable whether amnesties may increasingly lose credibility in the eyes of fighters and, as a result, they may become more cautious about laying down their arms.

Forgetting. Finally, flatly doing nothing about past human rights violations can sometimes be a powerful and flexible tool to bring conflict to an end. The reluctance of Uganda's Lord's Resistance Army to reach a peace accord is a direct result of the LRA leadership's fear of prosecution before the ICC, for example. Rehashing the past, as other forms of transitional justice do, may reignite old anger and hatred and obstruct the statebuilding process. Forgetting may also have broad cultural resonance in society. In the interest of reconstruction, the parties may find it best to let bygones be bygones. This was the strategy pursued in Mozambique and in Spain after their respective transitions. However, the persistent discussion of Franco-era abuses in Spain suggests that agreements to do nothing about the past may not be durable.

Final Thoughts

From the vantage point of the early 21st century, it seems that past abuses are rarely forgotten. With the increased attention to transitional justice paid by transnational activists, states, and international organizations, the expectations of victims and citizens alike have risen and it is becoming harder for governments to resist calls to examine the past. As a result, transitional justice can provide post-conflict governments with a modicum of domestic and international legitimacy. For victims, transitional justice may provide a sense of healing, but they have diverse needs. Some gain satisfaction from their tormentor being punished, while others seek reparations. Some gain comfort from having their suffering acknowledged by a truth commission, while others are retraumatized by telling their story. For society in general, while much depends on

political will, a number of truth commissions have contributed to institutional change and legal reform by recommendations produced as a result of their investigations.

On the question of timing, it is often assumed that transitional justice should be pursued immediately after the transition to take advantage of the window of opportunity. However, it need not be if such a step risks destabilizing the country. While there are ethical and practical reasons to provide victims with immediate relief, taking modest steps or abstaining from some measures initially does not preclude additional steps in the future.

Because transitional justice is about repairing society, outsiders must play a delicate, supporting role. International tribunals and truth commissions run by foreigners are all too easily dismissed as foreign impositions by domestic critics. As much as possible, measures should be in the hands of locals to encourage ownership and to facilitate positive externalities. Foreign governments and private foundations may provide helpful financial support, but there is a potential conflict between donors' desire for accountability and perceptions of undue influence. International organizations and transnational activists are important conduits of information from other countries' transitional justice experiences, but they must be careful that the lessons are appropriate for local circumstances. This extends to being sensitive to local preferences and traditions with respect to justice and conflict resolution.

Suggested Reading

- Barahona de Brito, Alexandra, Paloma Aguilar, and Carmen Gonzalez Enriquez. 2001. "Introduction." In *The Politics of Memory: Transitional Justice in Democratizing Societies*, ed. A. Barahona de Brito, C. Gonzalez Enriquez and P. Aguilar. Oxford: Oxford University Press.
- Barkan, Elazar. 2000. *The Guilt of Nations: Restitution and Negotiating Historical Injustices*. New York: Norton.
- Bassiouni, M. Cherif. Forthcoming. *The Chicago Principles on Post-Conflict Justice*. Chicago: International Human Rights Law Institute, DePaul University.
- Bloomfield, David, ed. 2003. *Reconciliation After Violent Conflict*. Stockholm: International Institute for Democracy and Electoral Assistance.
- Brahm, Eric. 2007. "Uncovering the Truth: Examining Truth Commission Success and Impact." *International Studies Perspectives* 8 no. 1.
- De Greiff, Pablo, ed. 2006. *Handbook of Reparations*. New York: Oxford University Press.
- Gibson, James L. 2004. *Overcoming Apartheid: Can Truth Reconcile a Divided Nation?* New York: Russell Sage Foundation.
- Hayner, Priscilla B. 2001. *Unspeakable Truths: Confronting State Terror and Atrocity*. New York: Routledge.
- Kritz, Neil J., ed. 1995. *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*. 3 vols. Washington DC: United States Institute of Peace Press.
- Leebaw, Bronwyn. 2008. "The Irreconcilable Goals of Transitional Justice." *Human Rights Quarterly* (February).
- Mendeloff, David. 2004. "Truth-Seeking, Truth-Telling and Post-Conflict Peacebuilding: Curb the Enthusiasm?" *International Studies Review* 6, no. 3: 355-380.
- Minow, Martha. 1998. *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence*. Boston: Beacon Press.
- Office of the High Commissioner for Human Rights. 2006. "Rule of Law Tools for Post Conflict States." New York: United Nations. <<http://www.ohchr.org/english/about/publications/>> (31 May 2007).

- Romano, Cesare P. R., Andre Nollkaemper, and Jann K. Kleffner, eds. 2004. *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia*. New York: Oxford University Press.
- Schabas, William. 2001. *An Introduction to the International Criminal Court*. New York: Cambridge University Press.
- Sikkink, Kathryn and Carrie Booth Walling. 2007. "The Impact of Human Rights Trials in Latin America." *Journal of Peace Research* 44 no. 4: 427-445.
- Snyder, Jack L., and Leslie Vinjamuri. 2003. "Trials and Errors: Principle and Pragmatism in Strategies of International Justice." *International Security* 28 no. 3: 5-44.
- Stover, Eric, and Harvey M. Weinstein, eds. 2004. *My Neighbor, My Enemy: Justice and Community in the Aftermath of Ethnic Cleansing*. New York: Cambridge University Press.
- Teitel, Ruti G. 2002. *Transitional Justice*. Oxford: Oxford University Press.