

Transitional Justice and Islam

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Table of Contents

- I. Transitional Justice
 - a. Overview: Transitional Justice
 - b. Transitional Justice and Democracy
 - c. Transitional Justice and Development
 - d. Transitional Justice and Islam
 - e. Transitional Justice and Religion
 - f. Special Groups (Gender, children, etc.)
- II. International and National Law
 - a. Amnesty
 - b. International Criminal Court and International Tribunals
 - c. International Humanitarian Law and Human Rights Law
 - d. Islam and Human Rights
 - e. Law of Occupation
 - f. Local and Tribal Laws
 - g. Rule of Law
- III. Transitional Justice Mechanisms
 - a. Judicial and Legislative Reform
 - b. Tribunals
 - c. Truth Commissions
- IV. Post Conflict Reconstruction
 - a. Conflict Resolution
 - b. Statebuilding
- V. Security Sector Reform (SSR)
 - a. Overview: Security Sector Reform (SSR)
 - b. Disarmament, Demobilization, and Reintegration (DDR)
- VI. Conflict Groups
 - a. Counterinsurgency
 - b. Nonstate Actors
 - c. Terrorism
- VII. International Stakeholders/Community
 - a. International Organizations

I. Transitional Justice

a. Overview: Transitional Justice

Arthur, P. (2009). *Identities in Transition: Developing Better Transitional Justice Initiatives in Divided Societies*. International Center for Transitional Justice, New York.

In post-conflict societies, histories of exclusion, racism and nationalist violence often create divisions so deep that finding a way to agree on the atrocities of the past seems near-impossible. This project seeks, first, to ensure that transitional justice measures are sensitive to the ways in which targeting people on the basis of their ethnic or religious identity may cause distinctive harms and, second, to clarify the difficult political challenges that arise in societies where communities are not ready to cooperate, or even agree on a definition of who the victims are. If transitional justice can find ways to act as a means of political learning across communities, foster trust and recognition, and if it can serve to breakdown harmful myths and stereotypes, then this will be at least a small step toward meeting the challenges for transitional justice in divided societies.

Bassiouni, M. C. (2005). "Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal " Cornell International Law Journal 38(2): 327-390

This article provides the goals of post-conflict justice in Iraq and an assessment of the Iraq Special Tribunal.

Bassiouni, M. C. and D. Rothenberg (2007). The Chicago Principles on Post-Conflict Justice, The International Human Rights Law Institute.

The Chicago Principles on Post-Conflict Justice present basic guidelines for designing and implementing policies to address past atrocities. They are the result of a series of meetings and consultations that took place over a seven-year period involving distinguished scholars, jurists, journalists, religious leaders, and others.

Haugbolle, S. and A. Hastrup, Eds. (2008). The Politics of Violence, Truth and Reconciliation in the Arab Middle East, Taylor & Francis.

This book examines the politics of political violence, truth and reconciliation in the contemporary Arab Middle East. It includes studies of state institutions, civil society and international organizations in Algeria, Morocco, Sudan, Iraq, Lebanon and Syria.

Leebaw, B. (2005). *Transitional Justice, Conflict, and Democratic Change: International Interventions and Domestic Reconciliation*, UC Riverside, Department of Political Science.

To what extent have transitional justice institutions succeeded in advancing these goals? What do we know about the social and political implications of transitional justice institutions? This report provides a critical overview of recent scholarship on transitional justice. It begins by placing transitional justice promotion in historical context by charting the shifting goals and enduring dilemmas associated with these institutions. The remaining sections evaluate dominant claims advanced to support the role of transitional justice. In some cases, transitional justice institutions have played a role in deepening democratic change and establishing a basis for political community. However, it is misleading to suggest that these institutions are necessary to achieving such goals and may, at times, undermine them. Scholars do not provide simple answers to explain why transitional justice succeeds, but they do provide important insights in critically assessing common assumptions and practices. The report concludes by discussing the implications of four trends in transitional

justice policy: 1) the reliance on sweeping generalizations regarding the ways in which individuals, communities, and nations “heal” from past conflicts; 2) the conceptual conflation of distinct goals such as democracy and reconciliation, as well as the short term compromises and long term aspirations associated with these goals; 3) the neglect of distributive justice, and 4) the narrow focus on local responsibility for conflicts with significant external intervention.

Leebaw, B. A. (2008). "The Irreconcilable Goals of Transitional Justice." Human Rights Quarterly 30(1): 95-118.

The goals of transitional justice advocacy and institutions are commonly portrayed as mutually reinforcing and complementary. This article argues that in evaluating the political significance of transitional justice, more attention should be given to their irreconcilable goals. This analysis is informed by the work of legal scholars and political theorists that have drawn attention to the dual role of law in relation to violence. While law can be a tool for regulating violence and exposing abuses of power, law is also utilized to obfuscate and legitimate abuses of power. Similarly, transitional justice institutions aim to challenge the legitimacy of prior political practices by confronting denial and transforming the terms of debate on past abuses, yet they also seek to establish their own legitimacy by minimizing the challenge that they pose to dominant frameworks for interpreting the past. This article demonstrates how a better understanding of this tension sheds light on problematic assumptions and unacknowledged trade-offs associated with the claims regarding the role of transitional justice institutions in advancing political reconciliation through measures designed to counter denial, expand dialogue, and address trauma. It concludes by discussing the implications of the analysis for transitional justice policy as well as debates on the general significance of expanding transitional justice advocacy.

Lundy, P. (2009). "Exploring Home-Grown Transitional Justice and its Dilemmas: A Case Study of the Historical Enquiries Team, Northern Ireland." International Journal of Transitional Justice 3(2): 321-340.

There is a growing recognition of the need for home-grown solutions to transitional justice issues rather than a one-size-fits-all approach. In part, this reflects the commonsense view that without local ownership of transitional justice processes, there is unlikely to be domestic buy-in and sustainability. Despite its growing popularity, the concept of local or home-grown transitional justice is ambiguously defined. It is frequently insufficiently spelt out, used interchangeably and applied uncritically. This article uses a case study of the Historical Enquiries Team (HET) to explore the concept of home-grown transitional justice and posit preliminary questions. The HET is a bespoke unit set up by the Police Service of Northern Ireland (PSNI) to re-examine deaths attributable to the conflict in Northern Ireland and answer the unresolved questions of families of conflict victims. The work of the HET is unique and innovative in the world of policing. In transitional justice terms, it breaks new ground as a micro-level information-recovery mechanism. This article argues that the current euphoria for ‘all that is local’ may be in danger of overlooking important considerations, such as who are ‘the locals’ and whose interests are being served. It raises further questions about issues of ownership, trust and legitimacy. The article concludes that there needs to be clarification of concepts, as well as more careful evidence-based analysis of what constitutes home-grown transitional justice and what such a process might conceal.

Mégret, F. (2006). "Jus In Bello as Jus Ad Bellum." American Society of International Law Proceedings 100: 121-123.

An exploration of why the rigid dichotomy between jus in bello and jus ad bellum can be pushed too far in cases where one might normatively want to require more of a participant in armed conflict than to simply abide by the minima set out by the laws of war.

Merwe, H. v. d., V. Baxter, et al., Eds. (2009). Assessing the Impact of Transitional Justice: Challenges for Empirical Research, USIP Press Books, Washington D.C.

As new forms of government replace repressive regimes, the perennial question arises: how to deal with the wrongdoers of the old regime? In the effort to heal and rebuild societies torn by violence, new governments and the international community have tried mechanisms ranging from criminal trials and financial restitution to public denunciation to more symbolic measures such as truth commissions. The results have been mixed. But out of the often failed transitional justice processes of the past, a body of empirical research is emerging that can provide, if not prescriptive answers, at least better questions.

In *Assessing the Impact of Transitional Justice*, fourteen leading researchers study seventy countries that have suffered from autocratic rule, genocide, and protracted internal conflict. The authors gauge the effectiveness of various transitional justice mechanisms in wide-ranging socio-cultural contexts. In a dramatic departure from the typically discursive, anecdotal literature, they use empirical research to make statistical comparisons among the bewildering array of factors that can affect the success or failure of transitional justice. Their findings will prove vitally important for policymakers, legal advocates, and anyone else faced with the daunting task of implementing or monitoring restorative justice processes.

Nadery, A. N. (2007). "Peace or Justice? Transitional Justice in Afghanistan." International Journal of Transitional Justice 1(1): 173-179.

The three decades of conflict in Afghanistan have taken the lives of more than a million people and the country and its people have suffered the gravest violations of human rights. There is a strong desire for justice among the Afghans, but since the fall of the Taliban, the transitional government with its base of international support has intentionally ignored the calls to deal with these past injustices. While Afghanistan has come a long way towards establishing democratic institutions, such as parliament, failure to deal with the crimes of the past threatens the legitimacy and democratic foundation of these institutions. The country has started on a path dealing with these past injustices by conducting a comprehensive national consultation and developing a transitional justice strategy that is coherent, multidimensional and based on the views of the public. The success of this resulting strategy remains precarious, however, due to both the ongoing insecurity in the country as well as its dependence upon the unreliable political will of Afghanistan's leadership.

Nalepa, M. (2010). "Captured Commitments: An Analytic Narrative of Transitions with Transitional Justice." World Politics 62(02): 341-380.

How can outgoing autocrats enforce promises of amnesty once they have left power? Why would incoming opposition parties honor their prior promises of amnesty once they have assumed power and face no independent mechanisms of enforcement? In 1989 autocrats in a number of communist countries offered their respective oppositions free elections in exchange for promises of amnesty. The communists' decision appears irrational given the lack of institutions to enforce these promises of amnesty. What is further puzzling is that the former opposition parties that won elections in many countries actually refrained from implementing transitional justice measures. Their decision to honor their prior agreements to grant amnesty

seems as irrational as the autocrats' decisions to place themselves at the mercy of their opponents. Using an analytic narrative approach, the author explains this paradox by modeling pacted transitions not as simple commitment problems but as games of incomplete information where the uninformed party has "that is, embarrassing information that provides insurance against the commitments being broken. The author identifies the conditions under which autocrats step down even though they can be punished with transitional justice and illustrates the results with case studies from Czechoslovakia, Poland, and Hungary.

Noman, A. B. M. A. (2009). Transitional Justice and Witness Protection: Bangladesh Perspective. Second International Conference on Genocide, Truth and Justice. Liberation War Museum, Dhaka, Bangladesh.

This article provides an overview of the concept of transitional justice through the lens of witness and victim protection. It delineates the basic approaches through which transitional justice can be implemented. The article further takes Bangladesh as case in point to showcase the need for transitional justice in Bangladesh.

O'Connor, V. and C. Rausch, Eds. (2008). Model Codes for Post-Conflict Criminal Justice, USIP Press Books, Washington D.C.

Model Codes for Post-Conflict Criminal Justice is a criminal law reform tool tailored to the needs of countries emerging from conflict. Its three volumes present four complete legal codes that national and international actors can use to create, overhaul, update, or plug gaps in the criminal laws in individual post-conflict states. Each volume offers not only substantive legal provisions but also expert commentary that explains wording choices, elaborates on the content of the provisions, and highlights associated considerations and reforms.

Orentlicher, D. F. (2010). That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia, Open Society Justice Initiative, International Center for Transitional Justice.

When the United Nations Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY) in May 1993, expectations were low. War was still raging in the Balkans, and the creation of the Tribunal was perceived as an attempt by Security Council members to save face after failing to stanch the violence then wracking the region.

Few could have foreseen the deep and lasting effects of the ICTY on Bosnia and Herzegovina, the Balkans, and international law. What began as an ad hoc response to the war's atrocities set a precedent that marked the beginning of the post-Nuremberg era of international justice: since the ICTY's founding, the international community has established courts to address atrocities committed in Rwanda, Sierra Leone, Cambodia, Kosovo, and Timor Leste, as well as a permanent International Criminal Court with more than 100 states parties.

The ICTY has also directly contributed to national war crimes prosecutions, both in Bosnia and Herzegovina, and throughout the region. Moreover, the ICTY has created a rich jurisprudence of international humanitarian law that now informs the work of other national and international courts.

In *That Someone Guilty Be Punished*, Diane F. Orentlicher, professor of law at American University, looks at the effects and effectiveness of the ICTY, including lessons to improve future efforts to provide justice for survivors of atrocious crimes. Perhaps most importantly,

Orentlicher examines the impact of the tribunal through the words and experiences of those in whose name it was established: the victims and survivors. Their expectations, hopes, and disappointments are chronicled alongside the tribunal's achievements and limitations. Based on hundreds of hours of interviews—and featuring the voices and perceptions of dozens of Bosnian interlocutors—That Someone Guilty Be Punished provides a comprehensive and complex portrait of the ICTY and its impact on Bosnia.

Pham, P. and P. Vinck (2007). "Empirical Research and the Development and Assessment of Transitional Justice Mechanisms." International Journal of Transitional Justice 1(2): 231-248.

In this paper, we demonstrate different methods of empirical research available to transitional justice practitioners and scholars. Guidelines on how to conduct research in the field of transitional justice are outlined on the basis of the principles of monitoring and evaluation for decision making, program development and policy development. We argue that such methods offer policy makers a systematic way to consult a population and construct a comprehensive view of what this population has experienced (e.g., violations), what they know (e.g., knowledge of various transitional justice mechanisms), what they believe in (e.g., definition of justice) or what they need (e.g., accountability). Such knowledge is essential for developing effective evidence-based transitional justice programs.

Rausch, C., Ed. (2006). Combating Serious Crimes in Postconflict Societies: A Handbook for Policymakers and Practitioners, USIP Press Books, Washington D.C.

This path-breaking volume fills a major gap in the literature on efforts to rebuild societies emerging from conflict. Drawing on firsthand experience in tackling organized and other destabilizing crime in Kosovo, Bosnia, Afghanistan, Iraq, and elsewhere, it distills that practical, hard-won knowledge into lessons and guidance for policymakers and practitioners who must face similar challenges. No similar work exists anywhere.

"Serious crimes" include any and all criminal acts that threaten post-conflict security, hinder political and economic reconstruction, or undermine public trust in nascent criminal justice institutions. From money laundering to murder, drug trafficking to terrorism, these crimes flourish where governments are impotent or officials are themselves complicit in illegal activities. Their impact on post-conflict societies of all types can be profoundly damaging—but they can be dealt with.

More than forty seasoned practitioners—judges and generals, prosecutors and human rights activists, scholars and government officials from across the world—participated in the discussions that generated the broad guidelines and more specific prescriptions presented in this handbook. Each of its chapters covers a different area of activity—initial assessment, reform of the legal framework, institutional reform, investigation and prosecution of serious crimes, and foreign assistance—providing not only general guidance but also real-life examples to illustrate the importance of adapting to local circumstances.

Roht-Arriaza, N. and J. Mariezcurrena, Eds. (2006). Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice, Cambridge University Press, New York.

Dealing with the aftermath of civil conflict or the fall of a repressive government continues to trouble countries throughout the world. Whereas much of the 1990s was occupied with debates concerning the relative merits of criminal prosecutions and truth commissions, by the end of the decade a consensus emerged that this either/or approach was inappropriate and unnecessary. A

second generation of transitional justice experiences have stressed both truth and justice and recognize that a single method may inadequately serve societies rebuilding after conflict or dictatorship. Based on studies in ten countries, this book analyzes how some combine multiple institutions, others experiment with community-level initiatives that draw on traditional law and culture, whilst others combine internal actions with transnational or international ones. The authors argue that transitional justice efforts must also now consider the challenges to legitimacy and local ownership emerging after external military intervention or occupation.

Rubin, B. R. (2003). "Transitional Justice and Human Rights in Afghanistan." International Affairs 79(3): 567-581.

This article addresses a peace-building mission in Afghanistan. The author, maintaining the Afghani people have been suffering abuses since 1978, argues any possibility of peace involves emphasizing the suffering of the victims rather than the guilt of the perpetrators.

Sajjad, T. (2009). "These Spaces in Between: The Afghanistan Independent Human Rights Commission and Its Role in Transitional Justice." International Journal of Transitional Justice 3(3): 424-444.

National human rights institutions (NHRIs) play an instrumental role in defining the human rights culture of their respective countries through their monitoring function, auditing laws, instituting human rights education and making recommendations to governments to improve human rights conditions. In countries that have experienced large-scale human rights atrocities, NHRI mandates sometimes include working to establish processes to seek accountability for war crimes. The involvement in transitional justice matters raises a new set of challenges for these institutions regarding their independence, their role in creating space for local voices and their capacity to serve as a bridge between the government and national and international actors. Using as a case study the experience of the Afghanistan Independent Human Rights Commission (AIHRC), the author identifies several key areas within which this particular NHRI has had to negotiate the tensions between the political and the legal, and the local and the international. A close examination of each of these areas reveals the common challenges NHRIs face in taking on a transitional justice mandate, as well as the particular strengths and limitations of the AIHRC and its creativity and resolve in working in extremely difficult circumstances to seek accountability for the past.

Wardak, A., D. Saba, et al. (2007). Bridging Modernity and Tradition: the Rule of Law and the Search for Justice, Afghanistan National Human Development Report, UNDP/CPHD, Kabul, Afghanistan.

This second Afghanistan HDR explores the importance of the rule of law to human development. Establishing effective rule of law is essential to rebuilding the nation, restoring justice, shaping development and making it effective, and preventing a chaotic relapse into conflict. Bridging Modernity and Tradition argues that the rule of law in Afghanistan must be widely accepted, enforceable, and consistent with internationally accepted norms of human rights. It suggests that in Afghanistan, this can be achieved by combining the best practices of the traditional institutions of justice with the strengths of the modern justice system.

Winterbotham, E. (2010). The State of Transitional Justice in Afghanistan: Actors, Approaches and Challenges, Afghanistan Research and Evaluation Unit, Kabul, Afghanistan.

This discussion paper provides an overview of the current state of transitional justice in Afghanistan. It attempts to establish a picture of transitional justice activities in Afghanistan today, raising the key challenges and debates involved.

Wisner, D. (2008). "Is Time Ripe for Transitional Justice in Afghanistan?" al Nakhlah: The Fletcher School Online Journal for Southwest Asia and Islamic Civilization.

This publication on transitional justice in Afghanistan first touches on local visions for justice and the national strategy for transitional justice. It further discusses the political environment in Afghanistan, including the weak and malfunctioning judicial system, as well as the lack of international political will for justice. The author finally examines whether transitional justice is compatible with on-going war and concludes with policy recommendations.

b. Transitional Justice and Democracy

Bell, C. and C. O'Rourke (2007). "The People's Peace? Civil Society, Peace Agreements and Participatory Democracy." International Political Science Review.

This article, drawing on an extensive collection of peace agreements dating from 1990 until the present day, analyzes peace agreement provisions for civil society involvement and considers the extent to which peace agreements proffer new models of participatory democracy. We begin with some background and a short overview of political theory on participatory democracy, identifying key dilemmas. The body of the article sets out a comprehensive analysis of peace agreement provisions for civil society, indicating how peace agreements negotiate the dilemmas identified in theory. We then evaluate this negotiation in the context of post-agreement implementation difficulties. In conclusion, we discuss the implications for future research.

Leebaw, B. (2005). Transitional Justice, Conflict, and Democratic Change: International Interventions and Domestic Reconciliation, UC Riverside, Department of Political Science.

To what extent have transitional justice institutions succeeded in advancing these goals? What do we know about the social and political implications of transitional justice institutions? This report provides a critical overview of recent scholarship on transitional justice. It begins by placing transitional justice promotion in historical context by charting the shifting goals and enduring dilemmas associated with these institutions. The remaining sections evaluate dominant claims advanced to support the role of transitional justice. In some cases, transitional justice institutions have played a role in deepening democratic change and establishing a basis for political community. However, it is misleading to suggest that these institutions are necessary to achieving such goals and may, at times, undermine them. Scholars do not provide simple answers to explain why transitional justice succeeds, but they do provide important insights in critically assessing common assumptions and practices. The report concludes by discussing the implications of four trends in transitional justice policy: 1) the reliance on sweeping generalizations regarding the ways in which individuals, communities, and nations "heal" from past conflicts; 2) the conceptual conflation of distinct goals such as democracy and reconciliation, as well as the short term compromises and long term aspirations associated with these goals; 3) the neglect of distributive justice, and 4) the narrow focus on local responsibility for conflicts with significant external intervention.

Sandevski, T. (2009). External Democracy Promotion in Post-Conflict Zones: Evidence from Case Studies. Macedonia, Free University Berlin, Berlin.

Can countries emerge from civil wars as democracies? And if they can - to what extent and by what means can external actors support such a transition? While much research effort has been devoted to the question of how warring societies break the conflict trap and return to peace,

much less effort has so far been spent on investigating under what circumstances warring societies not only end violence, but succeed in creating a stable and democratic polity.

c. Transitional Justice and Development

Boon, K. E. (2006). "Open for Business': International Financial Institutions, Post-Conflict Economic Reform and the Rule of Law." NYU Journal of International Law and Politics 39: 513.

What practices should international institutions adopt to promote economic development, peace and stability in post-conflict zones? The United Nations, the World Bank, and the International Monetary Fund amongst other such institutions have a common answer: practices that promote marketization and the Rule of Law. This article examples the relationship between the Security Council and the IFIs in the promotion of the rule of law in post-conflict situations, in order to assess the tension between IFI independence and the supremacy of Chapter VII resolutions. It also examines the development of IFI post-conflict policies generally, and the constitutional doctrines used to justify the expansion into international peace and security.

Duthie, R. (2008). "Toward a Development-sensitive Approach to Transitional Justice." International Journal of Transitional Justice 2(3): 292-309.

This article argues that transitional justice measures should be designed and implemented in ways that are development sensitive.' A development-sensitive approach requires transitional justice practitioners to be aware of the different links that may exist between transitional justice and development, and to consider pursuing synergies with development work and directly addressing development-related issues. The article suggests a number of reasons for considering the relationship between the two fields, and proposes four levels at which this relationship exists: transitional justice and development efforts can complement each other; inadvertently affect each other; be coordinated in order to generate positive synergies; and directly address each other. The purpose of making these distinctions is not only to establish a taxonomy of connections but also to help us think about the arguments for and against deepening the relationship between the two fields. The article considers some of the reasons why it may make sense for transitional justice measures to pursue this relationship at the fourth level, that is, to directly address development issues, as well as some of the risks and challenges involved. Its purpose is not to arrive at a general conclusion that transitional justice should or should not directly address development, but rather to raise some of the questions practitioners need to ask when designing justice measures and determining the extent to which those particular measures should address development issues. Transitional justice is not a development strategy, but it should be, at a minimum, development sensitive.

Greiff, P. d. and R. Duthie, Eds. (2009). Transitional Justice and Development: Making Connections. Advancing Transitional Justice Series, Social Science Research Council.

Developing societies emerging from conflict and authoritarianism are frequently beset by poverty, inequality, weak institutions, broken infrastructure, poor governance, insecurity, and low levels of social capital. The same countries are also often the scene of massive human rights violations which leave in their wake victims who are displaced, marginalized, handicapped, widowed, and orphaned — people who have strong claims to justice. Yet those who work alongside each other to address the interconnected concerns of development and justice do not always work together to provide coherent responses to those concerns. *Transitional Justice and Development: Making Connections* examines the relationship between two fields that, academically and in practice, have proceeded largely isolated from one another.

Waldman, M. (2008). Falling Short: Aid Effectiveness in Afghanistan.

Increasing insecurity and criminality is jeopardising progress in Afghanistan. With low government revenues, international assistance constitutes around 90% of all public expenditure in the country, thus how it is spent has an enormous impact on the lives of almost all Afghans and will determine the success of reconstruction and development. Given the links between development and security, the effectiveness of aid also has a major impact on peace and stability in the country. Yet thus far aid has been insufficient and in many cases wasteful or ineffective. There is therefore no time to lose: donors must take urgent steps to increase and improve their assistance to Afghanistan.

d. Transitional Justice and Islam

Abu-Nimer, M. (1996). "Conflict Resolution in an Islamic Context: Some Conceptual Questions." Peace and Change 21(1): 22-40.

This paper offers a set of conceptual questions for approaching the subject of conflict resolution processes in an Islamic context as well as the implementation of Western models of conflict resolution in such a context. To address these issues, the paper first introduces the basic, preliminary questions which should be raised prior to initiating any study on this subject. Second, there is a brief comparison of the current Western and the traditional Middle Eastern approaches to conflict resolution. Based on this comparison, the third part of the paper discusses the conditions and questions which should be considered when studying Islam and conflict resolution.

An-Na'im, A. A. (1990). Islam, Islamic Law and the Dilemma of Cultural Legitimacy for Universal Human Rights in Asian Perspectives on Human Rights Edited by C. Welch and V. Leary, , Westview Press, Oxford.

Islamic societies, like African ones, generally do not place a high value on the protection of human rights. An-Na'im argues that human rights need to be perceived as culturally legitimate in order for them to be given more than lip service. Since countries are largely left unsupervised in terms of the protection of the human rights of their own citizens, the leaders must be persuaded that the human rights of all citizens are deserving of equal respect. But in Islamic cultures a deep division exists between those who are Muslim and those who are not, as well as between men and women. As long as these divisions exist, appeals to universal human rights will continue to clash with deeply held cultural and religious views.

Baderin, M. A. (2003). International Human Rights and Islamic Law Oxford University Press, New York.

Editor's stance is that lack of cultural legitimacy is one main cause of violations of HR; believes attaining an international consensus via measures establishing the legitimacy of HR in differing cultural traditions is a prerequisite for developing universal and effective standards. To this end, Na'im not only maintains that the West needs to be open to possibly rewriting existing international HR standards to make them more acceptable to other cultures, but proposes in order to overcome ethnocentrism, within a culture people should critically assess how their own traditions and values affect their perspectives on rights and how these perspectives, with their attendant blind spots, may constitute obstacles in the way of achieving fuller protections for rights. Providing a critical perspective on his own culture, Na'im offers an original exposition of the problem of reconciling Islamic criminal penalties, such as amputations, with human rights principles barring cruel, inhuman, or degrading punishment in Sudan, where Islamic

fundamentalists have imposed penalties like amputations with utter disregard for the reactions of the Sudan's large non-Muslim minority.

Carle, R. (2005). "Revealing and Concealing: Islamist Discourse on Human Rights." Human Rights Review 6(3): 122-137.

The two most influential international Islamic statements on Human Rights (the Universal Islamic Declaration On Human Rights and the Cairo Declaration on Human Rights) attempt to reconcile Islamic law and modern norms of human rights. These documents claim that human rights are an inherent part of Islam becoming a cause for concern, as documents proposing regional alternatives to international law always entail the weakening of international standards.

Irani, G. E. (1999). "Islamic Mediation Techniques for Middle East Conflicts." Middle East Review of International Affairs 3(2).

This article reviews traditional, Islamic techniques for resolving disputes and encouraging conciliation as tools applicable to contemporary regional conflicts. It discusses unique aspects of disputes in Middle East societies and why, to some extent, these characteristics contradict assumptions from Western-developed conflict resolution techniques.

Khan, A. (2009). "Jurodynamics of Islamic Law." Rutgers Law Review, Vol. 61, No. 2, 2009.

Abrogation is a classical concept of Islamic law, which allows jurists to organize the normative complexity of divine texts. As a rule of temporality, abrogation invalidates prior rules found incompatible with subsequent rules. By stretching the rule, critics and reformers of Islamic law wish to abrogate substantial portions of the Quran and the Prophet's Sunnah. This methodology of modernizing Islamic law secures no following in the Muslim world, which jealously defends the integrity of divine texts. Jurodynamics of Islamic law offers a sophisticated methodology, which respects the integrity of divine texts, retains the jurisprudential heritage of past centuries, but at the same time modernizes legal systems to absorb modernity and constantly evolving spatiotemporal realities. No dynamic legal tradition cuts loose from the past or dwells exclusively in the past. Jurodynamics is the study of Shariah norms in motion, signifying both stability and change. Jurodynamics recognizes the Shariah as the Basic Code, which empowers Islamic states to construct dynamic bonds with classical jurisprudence (fiqh), positive law (qanun), and international law (siyar). Accusations that the Shariah is a barrier to modernity dissipate under the scrutiny of jurodynamics.

e. Transitional Justice and Religion

Bassiouni, M. C. (2008). "Evolving approaches to jihad: from self-defense to revolutionary and regime-change political violence." Journal of Islamic Law and Culture 10(1): 61 - 83.

Philpott, D. (2007). Religion, Reconciliation, and Transitional Justice: The State of the Field. SSRC Working Papers, Social Science Research Council, New York.

This working paper reviews the religious efforts to shape how countries deal with their past and the literature that surrounds them, asking: What has been accomplished? What questions and controversies sorely need further attention?

Philpott, D. (2007). "What Religion Brings to the Politics of Transitional Justice." Journal of International Affairs 61(1): 93-110.

This article explores the impact of religion on transitional justice. The first half argues that religion supports the distinct approach of reconciliation. The second half argues that religious actors who influence transitional justice are characterized by two features: differentiation from their state and a political theology of reconciliation.

Philpott, D. (2008). "Reconciliation and Iraq: Faith-Based Advice for the Next President." The Review of Faith and International Affairs 6(3): 9-14.

Iraqi factions are divided by ethnicity, religion, ideology, resentments, hatreds, and desires for revenge rooted in history. The U.S. and Iraq need a *jus post bellum*, an ethic for building peace in Iraq. This ethic—reconciliation—is a holistic project of six interlocking practices to restore persons, relationships, and political orders. These include just and inclusive structures, acknowledgement, reparations, apology, forgiveness, and accountability. A religious rationale, especially one that overlaps with Islamic values, can increase the legitimacy of U.S. policy in Iraq, and the next president would do well to heed the resources of religion.

f. Special Groups

Bell, C. and C. O'Rourke (2007). "Does Feminism Need a Theory of Transitional Justice? An Introductory Essay." International Journal of Transitional Justice 1(1).

This essay surveys feminist scholarship and praxis on transitional justice, examining its ongoing contribution to the conceptualization and design of transitional justice mechanisms. We examine some of the gender implications of a specifically 'transitional' theory of justice. The essay concludes by proposing that feminist theory should focus on how transitional justice debates help or hinder broader projects of securing material gains for women through transition, rather than trying to fit a feminist notion of justice within transitional justice frameworks.

Ni Aolain, F. D. and C. O'Rourke (2010). "Gendered Transitional Justice and the Non-State Actor. Contested Transitions: Dilemmas of Transitional Justice in Comparative Experience, M. Reed & A. Lyons, eds., Forthcoming." Transitional Justice Institute Research Paper No. 10-02; Minnesota Legal Studies Research Paper No. 10-23

This essay starts from the premise that feminist contributions to shaping the field and scope of transitional justice have had a significant effect on broadening and redefining the field. Intervention designed to activate international accountability and to deepen domestic criminalization of sexual violence have been a priority and have had some success. In addition, exploration of the relationship between truth-telling and gender, amnesty and gender, as well as the relationship between gender and peacemaking, were also high on the feminist agenda. More recently, efforts to engender reparations programmes have brought light and heat to a range of harms experienced by women. There is increasing feminist attention to the category of socioeconomic harms, and their disproportionate impact on women. However, we argue that by contrast to feminist efforts to broaden transitional justice's frame, feminist interventions have assumed a remarkably narrow set of actors and institutions of responsibility. The legal devices common to transitional justice landscape – amnesty, truth recovery, international criminal justice, reconstruction, rule of law reform, security sector reform, and reparations – posit the state as the site and conduit of transition. In this typology, transitional justice is a process by which the state is rendered coherent and legitimate. Throughout, feminist interventions in the field of transitional justice tend to assume the state. By this we mean that the state is seen as the locus for reform, and the entity that is most capable of and necessary to delivering

transformation for women. As a result, advocacy for tougher measures of individual criminal accountability for sexual violence, gender analysis in truth commissions, policy prescriptions for reparations programmes, and advocacy for prioritizing an end to gender harms in security sector reform, are all interventions that assume the necessity of a state and its related institutional components. We argue that this singular focus on the state can obscure a range of other important actors relevant to securing transition and may overestimate the extent to which the state is capable of delivering on feminist expectations. To advance our analysis we focus on the Colombian context, assessing in particular the extent to which gendered violence committed by non-state actors can be satisfactorily be accommodated within current state oriented framework. We offer some alternatives to the state-only focus with a particular focus on the contribution of international humanitarian law for the accountability of violations committed by non-state actors.

Parmar, S., M. J. Roseman, et al., Eds. (2009). Children and Transitional Justice: Truth-Telling, Accountability and Reconciliation, Human Rights Program at Harvard Law School, United Nations Children's Fund (UNICEF).

This book is a contribution toward documenting and encouraging emerging efforts in protecting child rights through transitional justice mechanisms. It explores the questions raised when children's issues are prioritized in transitional justice processes. It analyzes practical experiences to determine how the range of transitional justice mechanisms can be applied, both to improve accountability for crimes perpetrated against children and to protect the rights of children involved, primarily as victims and witnesses, but also at times as members of armed forces and groups that perpetrate violations.

Ayub, F., S. Kouvo, et al. (2009). Addressing Gender-specific Violations in Afghanistan, International Center for Transitional Justice, New York.

This briefing paper analyzes the relationship between transitional justice and gender in Afghanistan. The paper provides an overview of the past three decades of conflict and the complex gender relations in Afghan society. It also discusses transitional justice and gender in the post-2001 state-building process and concludes with recommendations on how to address gender-based violence.

The paper calls for further comparative research into women's experiences of conflict. It underscores the need for better documentation of domestic violence and war crimes targeting women, and emphasizes the role of civil society in providing support for victims, fostering accountability and promoting reconciliation.

II. International and National Law

a. Amnesty

Mallinder, L. (2007). "Can Amnesties and International Justice Be Reconciled?" International Journal of Transitional Justice 1.

When states are attempting to recover from periods of serious human rights abuse, they often must try to reconcile the competing demands of different stakeholders. These demands may range from claims that complete impunity is a necessary sacrifice to achieve peace, to the belief that without justice no meaningful peace can be reached. This paper will attempt to highlight

the ways in which international courts and quasi-judicial bodies address the dilemma of peace versus justice, in relation to amnesty laws. The discussion will consider the main international standards on impunity, the international jurisprudence relating to amnesties and whether international courts should recognize amnesties that are accompanied by alternative forms of justice. This paper will argue that international courts should recognize amnesties that are introduced with democratic approval to promote peace and reconciliation, provided that they are accompanied by mechanisms to fulfil the victims' rights.

Mallinder, L. (2009). "Indemnity, Amnesty, Pardon and Prosecution Guidelines in South Africa." Transitional Justice Institute, United Kingdom.

In charting the history of the amnesty and amnesty-like measures in South Africa, this paper will begin in Part 2 by providing a brief overview of the apartheid system and the violations committed by the parties to the conflict that resulted. Then in Part 3 it will explore the triggers that forced the apartheid regime to move towards a negotiated transition. Part 4 will discuss the origins of the amnesty question in the transition through the struggle to define political crimes. Part 5 will consider the evolving positions of the government and the ANC towards amnesty and truth recovery in a context of high levels of violence and greater public knowledge of the crimes committed by both sides. Part 6 will explore the amnesty provisions in the preamble to the Interim Constitution 1993. Part 7 will briefly discuss the implementation of the 1990 and 1992 indemnity laws following the transfer of power. The provisions of the Interim Constitution relating to amnesty were given more detail in the subsequent Promotion of National Unity and Reconciliation Act 1995, which created the Truth and Reconciliation Commission (TRC), with its Amnesty Committee. This work of this commission will be explored in Part 8 and Part 9 will analyse the mandate and operations of the Amnesty Committee. Part 10 will evaluate how far the South African amnesty process achieved the goals outlined in the Promotion of National Unity and Reconciliation Act. Then, Part 11 will explore the relationship between the amnesty and trials, and in particular, it will discuss how the new National Prosecution Policy and the possibility of presidential pardons for political prisoners affect the legacy of the TRC.

Mallinder, L. (2010). "Amnesty Law, Trials and the Promise of Complementarity?" Transitional Justice Institute Research Paper No. 10-10.

Developments in international criminal law in recent years have eroded the impunity enjoyed by political and military leaders who are responsible for mass atrocities. The extent of this transformation has been labeled a "justice cascade" by Sikkink et al. Furthermore, since the end of the Cold War, amnesties have increasingly become a site of controversy and contestation within political transitions. However, amnesty laws continue to be enacted around the world and in many cases, they co-exist in different ways with trials and other accountability mechanisms. The paper will explore the ways in which trials, both domestic and international, have coexisted and interacted with amnesties in Argentina, Bosnia-Herzegovina, Cambodia, Uganda, Uruguay, Sierra Leone, South Africa, and Timor-Leste. This analysis will explore the diverse forms these relationships have taken ranging from efforts to enact "blanket" amnesty legislation to prevent all trials, to amnesties that are intrinsically designed to complement prosecutions.

b. International Criminal Court and International Tribunals

Bassiouni, M. C. (1997). "From Versailles to Rwanda in seventy-five years : the need to establish a permanent international criminal court." Harvard Human Rights Journal 10(11-62).

The history and record of international criminal investigation and adjudication bodies, from the Treaty of Versailles to the International Court for Rwanda, clearly demonstrates the need to establish a permanent international criminal court. In the absence of such a court, not only many atrocities gone unpunished, but every one of the ad hoc tribunals and investigations that has been created has suffered from the competing interests of politics or the influence of a changed geopolitical situation. The lessons from past dictate the fundamental importance to establish the international criminal court as means to settle international criminal issues.

Bassiouni, M. C. (2006). "The Perennial Conflict Between International Criminal Justice and Realpolitik." Georgia State University Law Review 22(3): 541-560

Bassiouni, M. C., Ed. (2010). The pursuit of international criminal justice : a world study on conflicts, victimization, and post-conflict justice., Intersentia.

This publication surveys world conflicts that occurred between 1945 and 2008, the level of victimization they produced, and the subsequent post-conflict justice mechanisms which were applied. It is intended to show the scope of the problem faced by international criminal justice and how the International Criminal Court needs to shape its mission and approach to address international criminal justice needs and expectations.

Baylis, E. A. (2009). "Reassessing the Role of International Criminal Law: Rebuilding National Courts through Transnational Networks." Boston College Law Review 50(1).

The international community has long debated its role in redressing grave atrocities like war crimes and crimes against humanity. This Article suggests that this debate has focused too much on trials in international and hybrid courts as the primary conduit for international contributions to justice in post-conflict states. It proposes that the international community should look instead to national courts as the primary venue for such trials and to transnational networks as an effective mechanism for international involvement. Key characteristics of this model include: (1) reliance on transnational networks to convey international criminal law and international resources into national settings; (2) hybrid international-national processes in which international actors play a supporting, rather than a controlling, role; and (3) integration of international support for atrocity trials into broader efforts to rebuild national judicial systems.

Lamont, C. (2010). "International Criminal Justice and the Politics of Compliance." Transitional Justice Institute Research Paper No. 10-12.

International Criminal Justice integrates theoretical debates on compliance into international justice scholarship. Through the use of three models of compliance, based on coercion, self-interest and norms, International Criminal Justice explores the domestic and international politics of compliance with ICTY orders on the part of states and international organizations in the former Yugoslavia and efforts by external actors such as the European Union, the United States and the Tribunal itself to induce compliance outcomes. Through a comprehensive exploration of the politics of compliance in Croatia, Serbia (formerly the Federal Republic of Yugoslavia), Macedonia, Bosnia-Herzegovina and Kosovo, International Criminal Justice demonstrates that that compliance with ICTY orders can only be understood through both

material and ideational incentives. Moreover, International Criminal Justice imparts that compliance outcomes often do not translate into a changed normative understanding of international criminal justice on the part of target states.

Orentlicher, D. F. (2010). *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia*, Open Society Justice Initiative, International Center for Transitional Justice.

When the United Nations Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY) in May 1993, expectations were low. War was still raging in the Balkans, and the creation of the Tribunal was perceived as an attempt by Security Council members to save face after failing to stanch the violence then wracking the region.

Few could have foreseen the deep and lasting effects of the ICTY on Bosnia and Herzegovina, the Balkans, and international law. What began as an ad hoc response to the war's atrocities set a precedent that marked the beginning of the post-Nuremberg era of international justice: since the ICTY's founding, the international community has established courts to address atrocities committed in Rwanda, Sierra Leone, Cambodia, Kosovo, and Timor Leste, as well as a permanent International Criminal Court with more than 100 states parties.

The ICTY has also directly contributed to national war crimes prosecutions, both in Bosnia and Herzegovina, and throughout the region. Moreover, the ICTY has created a rich jurisprudence of international humanitarian law that now informs the work of other national and international courts.

In *That Someone Guilty Be Punished*, Diane F. Orentlicher, professor of law at American University, looks at the effects and effectiveness of the ICTY, including lessons to improve future efforts to provide justice for survivors of atrocious crimes. Perhaps most importantly, Orentlicher examines the impact of the tribunal through the words and experiences of those in whose name it was established: the victims and survivors. Their expectations, hopes, and disappointments are chronicled alongside the tribunal's achievements and limitations. Based on hundreds of hours of interviews—and featuring the voices and perceptions of dozens of Bosnian interlocutors—*That Someone Guilty Be Punished* provides a comprehensive and complex portrait of the ICTY and its impact on Bosnia.

c. International Humanitarian Law

(2004). *A Call for Justice: A National Consultation on past Human Rights Violations in Afghanistan*, Afghanistan Independent Human Rights Commission, Kabul, Afghanistan.

This report is based on a widespread consultation with various survey respondents and participants. It seeks to explore the extent to which human rights is valued in the past conflict scenario of Afghanistan and proposes recommendations to restore the protection of human rights and bring justice to those who have suffered in the past.

(2005). *Peace, Reconciliation and Justice in Afghanistan: Action Plan of the Government of the Islamic Republic of Afghanistan*, Afghan Independent Human Rights Commission. June 2005.

This Action Plan draws from the findings and recommendations in the *A Call for Justice* report and provides a national strategy for peace, reconciliation and justice in collaboration with

Afghan Independent Human Rights Commission (AIHRC) and the United Nations Assistance Mission in Afghanistan (UNAMA). The Action Plan focuses on four key areas-symbolic measures, institutional reform, truth-seeking and documentation and reconciliation to maintain stability and security relying on the religious values considering the reality of the situation.

An-Na'im, A. A. (1990). Islam, Islamic Law and the Dilemma of Cultural Legitimacy for Universal Human Rights in Asian Perspectives on Human Rights Edited by C. Welch and V. Leary, Westview Press, Oxford.

Islamic societies, like African ones, generally do not place a high value on the protection of human rights. An-Na'im argues that human rights need to be perceived as culturally legitimate in order for them to be given more than lip service. Since countries are largely left unsupervised in terms of the protection of the human rights of their own citizens, the leaders must be persuaded that the human rights of all citizens are deserving of equal respect. But in Islamic cultures a deep division exists between those who are Muslim and those who are not, as well as between men and women. As long as these divisions exist, appeals to universal human rights will continue to clash with deeply held cultural and religious views.

Baderin, M. A. (2003). International Human Rights and Islamic Law Oxford University Press, New York.

Editor's stance is that lack of cultural legitimacy is one main cause of violations of HR; believes attaining an international consensus via measures establishing the legitimacy of HR in differing cultural traditions is a prerequisite for developing universal and effective standards. To this end, Na'im not only maintains that the West needs to be open to possibly rewriting existing international HR standards to make them more acceptable to other cultures, but proposes in order to overcome ethnocentrism, within a culture people should critically assess how their own traditions and values affect their perspectives on rights and how these perspectives, with their attendant blind spots, may constitute obstacles in the way of achieving fuller protections for rights. Providing a critical perspective on his own culture, Na'im offers an original exposition of the problem of reconciling Islamic criminal penalties, such as amputations, with human rights principles barring cruel, inhuman, or degrading punishment in Sudan, where Islamic fundamentalists have imposed penalties like amputations with utter disregard for the reactions of the Sudan's large non-Muslim minority.

Bell, C. (2009). "Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'." The International Journal of Transitional Justice 3: 5-27.

Transitional justice appears to be an established field of scholarship connected to a field of practice on how to deal with past human rights abuses in societies in transition. The original focus of transitional justice discourse was that human rights law requires accountability in transitions, rooted in the discipline of law. Over time, this focus has been expanded to include a much broader range of mechanisms, goals and inquiries across a range of disciplines. In order to probe the current state of the field, this article argues against the current conception of transitional justice as a praxis-based interdisciplinary field. It suggests that there is a hidden politics to how transitional justice has been constructed as an interdisciplinary field that obscures tensions between the range of practices and goals that it now incorporates.

Beres, L. R. (1991). "After The Gulf War: Iraq, Genocide and International Law." University of Detroit Mercy Law Review 69(1): 13-31.

Bibas, S. and W. W. Burke-White (2009). "International Idealism Meets Domestic-Criminal-Procedure Realism." Duke Law Journal 59(4).

Though international criminal justice has developed into a flourishing judicial system over the last two decades, scholars have neglected institutional design and procedure questions. International criminal-procedure scholarship has developed in isolation from its domestic counterpart but could learn much realism from it. Given its current focus on atrocities like genocide, international criminal law's main purpose should be not only to inflict retribution, but also to restore wounded communities by bringing the truth to light. The international justice system needs more ideological balance, more stable career paths, and civil-service expertise. It also needs to draw on the domestic experience of federalism to cultivate cooperation with national authorities and to select fewer cases for international prosecution. Revised plea bargaining and sentencing rules could learn from domestic lessons and pitfalls, husbanding scarce resources and minimizing haggling while still buying needed cooperation. Finally, in blending adversarial and inquisitorial systems, international criminal justice has jettisoned too many safeguards of either one. It needs to reform discovery, speedy-trial rules, witness preparation, cross-examination, and victims' rights in light of domestic experience. Just as international criminal law can benefit from domestic realism, domestic law could incorporate more international idealism and accountability, creating healthy political pressures to discipline and publicize enforcement decisions.

Mégret, F. (2005). *From 'Savages' to 'Unlawful Combatants': A Postcolonial Look at International Humanitarian Law's 'Other'*, Cambridge University Press.

Through an exploration of the colonial genesis of the laws of war, specifically their exclusion of non-European people, this paper seeks to understand how contemporary exclusions are part of a continuity within international humanitarian law, rather than a break with it.

Mégret, F. (2009). "The Diversification of Actors Involved in Armed Conflicts: Beyond 'Direct Participation to Hostilities'? (La Diversification Des Acteurs Impliqués Dans Les Conflits Armés: Vers Un Dépassement De La 'Participation Directe Aux Hostilités'?)."

This paper (in French) was originally presented at a conference at the Collège de France organized by the University of Paris I on "The role of third parties to the implementation of international humanitarian law". As discussant, I was asked to provide a general presentation of the challenges of distinguishing between "parties" and "non-parties" in today's conflicts. The paper seeks to give an overview of current debates, whilst questioning how long this distinction can remain the summa divisio of the laws of war in a context where it radically challenged both by non-state actors and states. I suggest that the distinction is in practice more a continuum than a clear binary opposition in that, although some actors may more naturally be seen as "parties" or "non-parties", there is no status that cannot change over the course of a conflict depending on what one does (as opposed to what one is). I suggest that this essential and inevitable fluidity is also what makes it very difficult to keep these distinctions stable over time. I then turn to what I see as the two hardest cases of maintaining the division, namely private security companies on the one hand, and terror groups on the other (arguably both instances - albeit very different - of a larger trend towards privatization of violence). The great difficulties that these actors create in terms of the implementation of international humanitarian law suggest that the distinction is under threat. In the conclusion, I outline some ways in which the distinction might be reinvigorated or transcended. I suggest, for example, that one should critically assess international humanitarian law's continued statist biases (state forces are always combatants, even if they violate the laws of war, whereas this is not true of non-state or

irregular forces) on humanitarian grounds. Moreover, I suggest that the normative asymmetry of conflicts creates conditions where states must be willing to abide by high standards even confronted with an adversary that does not - so much so, in fact, that international human rights law may in the end turn out to be the most cogent way to regulate contemporary modes of even armed violence.

Milanovic, M. (2008). "From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties." Human Rights Law Review 8(3): 411-448.

This article analyses the notion of state jurisdiction in international human rights treaties, which is central for determining their territorial scope of application. In that regard, the article provides an overview of jurisdiction clauses in the relevant treaties and examines their historical origins. It then attempts to distinguish this notion from state responsibility and from the concept of state jurisdiction in general international law.

Milanovic, M. (2009). "Norm Conflict in International Law: Whither Human Rights?" Duke Journal of Comparative & International Law 20(1).

The article examines norm conflicts, defined as situations where one norm constitutes, has led to, or may lead to a breach of another, and particularly those norm conflicts in which one of the conflicting norms is a rule of human rights law. Such instances occur more and more every day, are increasingly litigated, and can be of great political importance. For example, a human rights treaty might prohibit the preventative detention or internment of persons under any circumstances, while the UN Security Council might pass a resolution actually authorizing such detention, say in relation to suspected terrorists. What does then happen when a state's obligations under a human rights treaty conflict with its obligations under the UN Charter?

In that regard, one possible solution is that pursuant to Article 103 of the UN Charter, obligations under the Charter - including binding Security Council resolutions - prevail over conflicting treaty obligations of the UN member states. The article will explore whether the Council can displace international human rights treaties, and if so, how can such a development be curtailed or avoided. It will elaborate on various forms of norm conflict resolution and avoidance, and will discuss the recent jurisprudence of the House of Lords (Al-Jedda), the European Court of Human Rights (Behrami and Bosphorus) and the courts of the European Union (Kadi). The article thus provides a systematic overview of the impact of norm conflicts on the protection of human rights in a fragmented international legal order.

Milanovic, M. (2010). "Norm Conflicts, International Humanitarian Law and Human Rights Law." Human Rights and International Humanitarian Law, Collected Courses of the Academy of European Law, Orna Ben-Naftali ed., Oxford University Press XIX(1).

One of the most powerful methods of inducing changes in outcomes governed by international humanitarian law is to add human rights rules and arguments into the equation. This, indeed, is precisely the point of the whole project of linking these two branches of international law. This article explores the relationship between the two bodies of law, and makes several broad propositions. First, that there is a need for a change in perspective, from examining the relationship of the two regimes as such, to the interaction of particular norms that regulate specific situations. Second, that this interaction will frequently result in a norm conflict, and that we have numerous tools at our disposal for either avoiding or resolving these conflicts. Third, that *lex specialis* is at best a fairly limited tool of norm conflict avoidance, and that it most certainly cannot be used to describe the relationship between human rights and humanitarian

law as a whole. Finally, that there are situations where all of our tools will fail us, where a norm conflict will be both unavoidable and unresolvable due to a fundamental incompatibility in the text, object and purpose, and values protected by the interacting norms, and where the only possible solution to the conflict will be a political one. The article identifies three such possible situations of unresolvable antinomy - targeted killings, preventive security detention, and positive obligations during occupation, and addresses recent cases with a norm conflict component, such as Al-Jedda, Behrami, and Al-Saadoon. Though in most cases harmony between human rights and humanitarian law is possible, and indeed desirable, we should not underestimate the practical and political relevance of situations of true norm conflict, which no amount of academic exposition will be able to fix.

Milanovic, M. and T. Papic (2009). "As Bad as it Gets: The European Court of Human Rights' Behrami and Saramati Decision and General International Law " International & Comparative Law Quarterly 58(2): 267-296.

This article examines the European Court of Human Rights' encounter with general international law in its Behrami and Saramati admissibility decision, where it held that the actions of the armed forces of states acting pursuant to UN Security Council authorizations are attributable not to the states themselves, but to the United Nations. The article will try to demonstrate that the Court's analysis is entirely at odds with the established rules of responsibility in international law, and is equally dubious as a matter of policy. Indeed, the article will show that the Court's decision can be only be explained by the Court's reluctance to decide on the questions of state jurisdiction and norm conflict, the latter issue becoming the clearest when Behrami is compared to the Al-Jedda judgment of the House of Lords.

Rubin, B. R. (2003). "Transitional Justice and Human Rights in Afghanistan." International Affairs 79(3): 567-581.

This article addresses a peace-building mission in Afghanistan. The author, maintaining the Afghani people have been suffering abuses since 1978, argues any possibility of peace involves emphasizing the suffering of the victims rather than the guilt of the perpetrators.

Sajjad, T. (2009). "These Spaces in Between: The Afghanistan Independent Human Rights Commission and Its Role in Transitional Justice." International Journal of Transitional Justice 3(3): 424-444.

National human rights institutions (NHRIs) play an instrumental role in defining the human rights culture of their respective countries through their monitoring function, auditing laws, instituting human rights education and making recommendations to governments to improve human rights conditions. In countries that have experienced large-scale human rights atrocities, NHRI mandates sometimes include working to establish processes to seek accountability for war crimes. The involvement in transitional justice matters raises a new set of challenges for these institutions regarding their independence, their role in creating space for local voices and their capacity to serve as a bridge between the government and national and international actors. Using as a case study the experience of the Afghanistan Independent Human Rights Commission (AIHRC), the author identifies several key areas within which this particular NHRI has had to negotiate the tensions between the political and the legal, and the local and the international. A close examination of each of these areas reveals the common challenges NHRIs face in taking on a transitional justice mandate, as well as the particular strengths and limitations of the AIHRC and its creativity and resolve in working in extremely difficult circumstances to seek accountability for the past.

d. Islam and Human Rights

An-Na'im, A. A., Ed. (1992). Human Rights in Cross-Cultural Perspectives: A Quest for Consensus University of Pennsylvania Press, Philadelphia.

Editor's stance is that lack of cultural legitimacy is one main cause of violations of HR; believes attaining an international consensus via measures establishing the legitimacy of HR in differing cultural traditions is a prerequisite for developing universal and effective standards. To this end, Na'im not only maintains that the West needs to be open to possibly rewriting existing international HR standards to make them more acceptable to other cultures, but proposes in order to overcome ethnocentrism, within a culture people should critically assess how their own traditions and values affect their perspectives on rights and how these perspectives, with their attendant blind spots, may constitute obstacles in the way of achieving fuller protections for rights. Providing a critical perspective on his own culture, Na'im offers an original exposition of the problem of reconciling Islamic criminal penalties, such as amputations, with human rights principles barring cruel, inhuman, or degrading punishment in Sudan, where Islamic fundamentalists have imposed penalties like amputations with utter disregard for the reactions of the Sudan's large non-Muslim minority.

An-Na'im, A. A. (2006). "Why should Muslims abandon Jihad? Human rights and the future of international law." Third World Quarterly 27(5): 785-797.

Basis and reality of international legality and universality of HR from Islamic perspective; author calls for principled commitment and systematic respect for institutional framework of international legality and rule of law to encourage Muslims to abandon traditional notions of jihad. Similarly, since the institutional framework of legality and the rule of law in international relations is necessary for protection of human rights as well, the absence of this framework would undermine the credibility and viability of human rights norms.

Baderin, M. A. (2003). International Human Rights and Islamic Law Oxford University Press, New York.

Editor's stance is that lack of cultural legitimacy is one main cause of violations of HR; believes attaining an international consensus via measures establishing the legitimacy of HR in differing cultural traditions is a prerequisite for developing universal and effective standards. To this end, Na'im not only maintains that the West needs to be open to possibly rewriting existing international HR standards to make them more acceptable to other cultures, but proposes in order to overcome ethnocentrism, within a culture people should critically assess how their own traditions and values affect their perspectives on rights and how these perspectives, with their attendant blind spots, may constitute obstacles in the way of achieving fuller protections for rights. Providing a critical perspective on his own culture, Na'im offers an original exposition of the problem of reconciling Islamic criminal penalties, such as amputations, with human rights principles barring cruel, inhuman, or degrading punishment in Sudan, where Islamic fundamentalists have imposed penalties like amputations with utter disregard for the reactions of the Sudan's large non-Muslim minority.

Bielefeldt, H. (1995). "Muslim Voices in the Human Rights Debate " Human Rights Quarterly 17: 587-617.

The main purpose of this article is to display a plurality of Muslim positions in the area of human rights. Like other religions or cultures, Islam is a complex reality harboring various, and frequently conflicting, interpretations about its inherent normative demands. Such diverse

interpretations also emerge in the field of human rights. As the title of this article suggests, there is not one binding Islamic position but rather a great variety of "Muslim voices" offering different views about whether and how the idea of human rights and Islamic normative requirements fit together.

This article can, at the same time, be read as an exploration of the relationship between the universal claims of human rights on the one hand and the traditional values rooted in a particular culture on the other. It seems beyond question that many tensions between traditional Islamic norms and international human rights standards exist. No one can predict whether and how they will be settled in the future. However, because all cultures and religions are open to various interpretations and evolutions, the frequently perceived antagonism between universal human rights and cultural identity appears at least questionable.

In order to overcome this perceived antagonism, one must clarify the concept of human rights. Therefore, I begin my analysis by suggesting an understanding of human rights that refers primarily to the Universal Declaration of Human Rights and, at the same time, is potentially open to a variety of different cultural interpretations. I then move on to an identification of the main areas of conflict between the Islamic normative tradition and human rights. The third section focuses on the different positions Muslims take today to deal with these conflicts. I conclude with a short retrospective on my main arguments followed by some remarks about the complexity of the human rights debate.

Bielefeldt, H. (2000). "Western" versus "Islamic" Human Rights Conceptions?: A Critique of Cultural Essentialism in the Discussion on Human Rights " Political Theory 28(1): 90-121.

Brems, E. (1997). "Enemies or Allies: Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse." Human Rights Quarterly 19(136-164).

In recent years, feminism and cultural relativism have been among the most vigorous and the most visible critiques of dominant human rights discourse. On many issues feminists and cultural relativists have found themselves taking diametrically opposed sides. The manifest successes of feminist views inside the human rights system have sometimes been at the expense of cultural relativist views. This paper argues against such an antagonism. An analysis of both the feminist and the cultural relativist positions will uncover parallels and similarities in their respective claims. There seems to be enough common ground to allow for building a bridge between the two strands of thought. Instead of wasting part of their creative potential in opposing each other, feminists and cultural relativists could join forces and combine their insights into a constructive critique.

Carle, R. (2005). "Revealing and Concealing: Islamist Discourse on Human Rights." Human Rights Review 6(3): 122-137.

The two most influential international Islamic statements on Human Rights (the Universal Islamic Declaration On Human Rights and the Cairo Declaration on Human Rights) attempt to reconcile Islamic law and modern norms of human rights. These documents claim that human rights are an inherent part of Islam becoming a cause for concern, as documents proposing regional alternatives to international law always entail the weakening of international standards.

Fadel, M. (2008). "Public Reason as a Strategy for Principled Reconciliation: The Case of Islamic Law and International Human Rights." Chicago Journal of International Law 8(1).

The salient question of the twenty-first century may turn out to be religion, and its relationship to secular norms such as international human rights law. In this paper, I explore a Rawlsian strategy for effecting a principled reconciliation of Islamic law and international human rights law. The need for effecting such reconciliation is pressing, as is evidenced by first, the large number of Muslim-majority states that adopt Islamic law-based reservations to international human rights conventions, and second, the distrust that non-Muslim majorities often exhibit to their Muslim minorities which is in part fueled by suggestions that Muslims are insufficiently committed to human rights norms. Rawls' framework for analyzing how incompatible theories of the good may nevertheless co-exist within one constitutional regime under conditions that give rise to an overlapping consensus suggests that advocates of Islamic law and international human rights law should seek to articulate both the norms of international human rights law and their justifications in a manner that could reasonably result in the good faith acceptance by Muslims of such norms, and the good-faith acceptance of Islamic law by international human rights law as a legitimate interlocutor. I propose a framework for effecting this reconciliation through various strategies: first, revision of non-conforming substantive rules of Islamic law wherever possible to do so without engaging in controversial moral or theological interpretation so as to render them in conformity with norms of international human rights law; second, where there is a genuine contradiction between Islamic religious doctrine and the norms of international human rights law, by the more robust recognition within international human rights law of the right of Muslims (as well as other religiously-motivated citizens) to continue to observe voluntarily Islamic law (or other religiously-motivated norms) - even where adherence to such norms results in discrimination - as a matter of their human right to religious freedom, while Muslim states would agree not to impose such religiously-motivated rules as part of its positive legislation; and third, requiring Muslim states to disavow restrictions on freedom of conscience, including laws penalizing apostasy, even in civil law.

Mawdudi, A. I. A. I. (1976). Human Rights in Islam, Islamic Publications Pvt. Limited, Lahore, Pakistan.

Human Rights in Islam is an English translation of a talk given by Mawlana Mawdudi at the invitation of Civic Rights and Liberties Forum in Lahore, Pakistan on November 16th, 1975. It also includes an earlier talk by Mawlana Mawdudi on the political system of Islam. The two talks together provide an idea of the Islamic political framework and the nature and concept of human rights in Islam.

Mayer, A. E. (1994). "Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?" Michigan Journal of International Law 15(307).

Mayer, A. E. (2006). Islam and Human Rights: Tradition and Politics, Westview Press, Fourth Edition.

Mernissi, F. (2002). Islam and Democracy, Perseus Books.

Is Islam compatible with democracy? Must fundamentalism win out in the Middle East, or will democracy ever be possible? In this now-classic book, Islamic sociologist Fatima Mernissi explores the ways in which progressive Muslims--defenders of democracy, feminists, and others trying to resist fundamentalism--must use the same sacred texts as Muslims who use them for violent ends, to prove different views.

Updated with a new introduction by the author written in the wake of the September 11 terrorist attacks on the United States, *Islam and Democracy* serves as a guide to the players

moving the pieces on the rather grim Muslim chessboard. It shines new light on the people behind today's terrorist acts and raises provocative questions about the possibilities for democracy and human rights in the Islamic world. Essential reading for anyone interested in the politics of the Middle East today, Islam and Democracy is as timely now as it was upon its initial, celebrated publication.

Pollis, A. and P. Schwab, Eds. (1979). Human rights: A Western construct with limited applicability in Human Rights: Cultural and Ideological Perspectives, Praeger, New York. .

The authors argue that the debate has been dominated by Western conceptions of human rights that do not translate over to other cultures where, they maintain, economic rights are more important than political rights, and collectivism rather than individualism is the cultural mode. The authors make the claim that the UN Declaration is "predicated on the assumption that Western values are paramount and ought to be extended to the non-Western world." I must take issue with the authors' assumptive language that these values should be classified as "Western." Throughout this essay, I shall argue that the Law of Nature and of Nature's God⁵ are the wellspring of human rights and responsibilities and as such are universally, easily, and equally applicable to all and that because of this evidence of them may be found in all cultures.

Tabandeh, S. (1970). A Muslim commentary on the Universal Declaration of Human Rights, F. J. Goulding and Company.

e. Law of Occupation

Boon, K. E. (2009). "The Future of the Law of Occupation." Canadian Yearbook of International Law.

The law of occupation has become the subject of great contemporary interest because of two prominent, although sui generis situations: The long term Israeli occupation of the Gaza Strip, the West Bank, and the Golan Heights, and the "transformative" occupation of Iraq. In both situations, the occupying powers resisted the label of belligerent occupier, and selectively applied the Hague Regulations of 1907 and the Geneva Conventions of 1949 to the territories in question. In Iraq, a further level of complexity arose when the Security Council used its Chapter VII powers to finesse certain aspects of the law of occupation to address circumstances particular to that intervention, prompting a volley of inquiries into the future role of the Security Council in updating, amending, and administering the law of occupation. The unique circumstances of these occupations have sparked vigorous debate over the future of the law of occupation. To wit: Is the widely accepted but largely unenforced law of occupation capable of regulating transitions between armed conflict and peace in the Twenty First Century. Although judicial decisions interpreting the Hague Regulations and the Fourth Geneva Convention are rare, some recent cases have advanced doctrinal issues behind the scenes of this larger debate about the relevance of occupation law. This essay examines recent developments in the notoriously open-textured law of occupation that have arisen as the law of occupation has been variously ignored, invoked, challenged, examined, and ultimately reformed through practice. In particular, I discuss the triggers for beginning and ending an occupation, including recent jurisprudence on the "effective control" test. I examine who can be an occupier, the question of "multiple occupiers" under unified command, and the obligations of occupiers in the areas of legislation and institutional reform. I also consider the challenges of UN involvement in transitional situations, including the applicability of the law of occupation to UN forces, and the role of the Security Council in adapting the law of occupation. I conclude with a discussion of the

principle of "conservationism", and the relationship between the law of occupation and jus post bellum, in order to provide an assessment of possible "futures" of the law of occupation.

Boon, K. E. (2009). "Obligations of the New Occupier: The Contours of a Jus Post Bellum." Loyola of Los Angeles International and Comparative Law Review 31(2).

Jus post bellum derives its name from two existing bodies of law: jus ad bellum and jus in bello, which are applicable, respectively, to the initiation of war and to conduct in war. In this article I assess whether the law of occupation is a workable point of departure for a jus post bellum. I then comment on what theory of peace informs jus post bellum, and I conclude with some suggestions on the scope and content of a jus post bellum, emphasizing the role of human rights, multilateralism, and economic reconstruction. In particular, I argue that jus post bellum should be based on the emerging norms of accountability, stewardship, good economic governance, and proportionality. Jus post bellum triggers principles in play in periods after armed conflict, moving away from war (ab bello) towards justice (ad justitiam) and peace (ad pacem). Jus post bellum expands the traditional binary rules of international law into a tripartite system, which will bring the law into closer conformity with the challenges presented by the peace-making, peacebuilding, and post-conflict practices of today.

Mégret, F. (2009). "On the Legitimacy of 'Insurgency': Rise and Fall of the Idea of Resistance to Occupation (Grandeur Et Declin De L'Idée De Résistance à L'Occupation: Reflexions à Propos de la Légitimité des 'Insurgés')." Revue Belge de Droit International.

This article seeks to chart the evolution of the idea of a legitimate resistance to occupation under international law to see how it can be applied to the Iraqi context. Its starting point is the proposed amnesty for insurgents and Iraq, and the reaction to it in the US. If it is indeed the case that the invasion of Iraq was illegal under international law, then what is the status of the resulting resistance to an illegal occupation, and why do international lawyers seem to have so little relevant to say on the matter? The article assumes that we are dealing with a "virtuous" insurgent movement in that no terrorist methods are used (this is arguably the case of at least some insurgent movements in Iraq). Different historical phases of recognition of a right to resistance are identified, from late nineteenth century crafting of the laws of war to recognition of national liberation movements during decolonization. Whatever foothold a "right to resist foreign occupation" achieved then, the article identifies a number of factors that compromise a more secure role for legitimate resistance, including the fact that "transformative" jus post bellum reform is increasingly seen as a legitimate goal of occupation, with the result that insurgency is seen as increasingly problematic. The article then attempts to throw the theoretical and legal foundations of what might be a more just recognition of the role of insurgents in some circumstances as part of a radically decentralized model of the enforcement of international law. It finds that a growing recognition of the role of non state groups in conflicts and a more general conception of the right of self defense can allow us to rethink the conditions of legitimacy of insurgency. The article concludes with a few thoughts borrowed from theories of "militant democracy" about how international law could become more sanguine about its own enforcement, and see non state actors, including occasionally ones using violence, as part of the total process by which the international order comes into being.

f. Local and Tribal Laws

Wardak, A. (2004). "Building a Post-War justice System in Afghanistan." Journal of Crime, Law and Social Change 41.

This paper examines key dimensions of justice in post-war Afghanistan. These are shari'a (Islamic law), traditional institutions of informal justice (jirga), the Afghan interim legal framework, and human rights principles. It is argued that despite their apparent incompatibility, these various dimensions of justice could be integrated within a coherent framework of a new justice system in post-war Afghanistan - a framework that would promote interaction between local institutions of informal justice and a district level court of justice, on the one hand, and between these two and a proposed Human Rights unit, on the other. On the basis of this analysis, an experimental model of a system of justice is proposed, which integrates local jirga and Human Rights units into the existing formal justice (based on shari'a and positive law) and law-enforcement institutions. This experimental model provides a multi-dimensional framework that both reflects the cultural and religious values of Afghan society, and at the same time, has the capacity to draw on human rights principles. It is maintained that the model has the capacity to deliver justice expeditiously and in cost-effective ways; it also has a strong potential to act as a channel of communication between ordinary people and a modern participatory state in post-war Afghanistan. However, in order to test the applicability of this model in the real world, it needs first to be thoroughly discussed among Afghan and international legal experts as well as among ordinary Afghan people, and then piloted in selected districts in Afghanistan.

Wardak, A., D. Saba, et al. (2007). Bridging Modernity and Tradition: the Rule of Law and the Search for Justice, Afghanistan National Human Development Report, UNDP/CPHD, Kabul, Afghanistan.

This second Afghanistan HDR explores the importance of the rule of law to human development. Establishing effective rule of law is essential to rebuilding the nation, restoring justice, shaping development and making it effective, and preventing a chaotic relapse into conflict. Bridging Modernity and Tradition argues that the rule of law in Afghanistan must be widely accepted, enforceable, and consistent with internationally accepted norms of human rights. It suggests that in Afghanistan, this can be achieved by combining the best practices of the traditional institutions of justice with the strengths of the modern justice system.

g. Rule of Law

Bassiouni, M. C. and D. Rothenberg (2007). An assessment of justice sector and rule of law reform in Afghanistan and the need for a comprehensive plan. Conference on the Rule of Law in Afghanistan. Rome, Italy.

This paper presents an assessment of justice sector and rule of law reform in Afghanistan and gives special consideration to the Afghanistan National Development Strategy (ANDS) documents prepared by the Supreme Court (SC), the Ministry of Justice (MOJ) and the Attorney General's Office (AGO). The ANDS strategies are linked to a broader process of international support for nationwide reform outlined in the Afghanistan Compact and other key documents. Above all, the paper encourages donors and the Islamic Republic of Afghanistan to use the Rome Conference as an opportunity to build on previous experiences and agreements by making a series of commitments backed by immediate and long-term financial pledges. Each element of the executive summary is discussed in greater detail in the body of the report.

Beaulac, S. (2010). "What Rule of Law Model for Domestic Courts Using International Law in States in Transition: Thin, Thick or 'A La Carte'." Transitional Justice Institute Research Paper No. 10-13

The immense performative power of the rule of law has been at work for some time at the international level, notably in UN promotion efforts, in both development and transition fields. This is a conceptual paper which explores the possible heuristic models for the rule of law to

help discuss the hypothesis of the empowerment of domestic courts, at an “international constitutional moment,” through recourse to international law, in post-conflict and post-dictatorial states. Groundwork issues of international rule of law, developments about interlegality and characteristics of states in transition are examined first. For the present purposes, there needs to be a relocating of the supremacy legal character of normativity, in a separate space, beside the international-national axis. This parallel space allows for the reflexive complementarity of rule of law values, from both phenomena of the rule of law internationalized and the internationalization of the rule of law. This epistemological process, in view of the nature of transition jurisdictions, requires to conduct macro-adjustments (relevant to all transitions) and micro-adjustments (relevant to a particular transition) to one’s rule of law model. Hence the argument in favour of an à la carte approach to the concept, which is meant to provide an organising structure for the relevant rule of law values, actual and aspirational, within a new or true stable constitutional arrangement. In the end, no exhaustive laundry list is proposed, merely tentative non-negotiable elements likely appropriate to all transition societies. Although imperfect, this à la carte model constitutes a real heuristic tool to guide our reflections on the role domestic courts in states in transition can and should play by means of international law.

Boon, K. E. (2006). "Open for Business': International Financial Institutions, Post-Conflict Economic Reform and the Rule of Law." NYU Journal of International Law and Politics 39: 513.

What practices should international institutions adopt to promote economic development, peace and stability in post-conflict zones? The United Nations, the World Bank, and the International Monetary Fund amongst other such institutions have a common answer: practices that promote marketization and the Rule of Law. This article examples the relationship between the Security Council and the IFIs in the promotion of the rule of law in post-conflict situations, in order to assess the tension between IFI independence and the supremacy of Chapter VII resolutions. It also examines the development of IFI post-conflict policies generally, and the constitutional doctrines used to justify the expansion into international peace and security.

Chesterman, S. "'I'll Take Manhattan': The International Rule of Law and the United Nations Security Council." The Hague Journal on the Rule of Law, Forthcoming.

Frequent agreement on the rule of law in theory is possible in large part because of divergent views on what it means in practice. This essay briefly addresses the content of the rule of law at the international level before discussing the challenge to this idea presently posed by the United Nations Security Council - the one international body with the power to enforce the law, but which is nevertheless loath to submit to it.

Chesterman, S. (2008). "An International Rule of Law?" American Journal of Comparative Law 56(2): 331-361.

The rule of law is almost universally supported at the national and international level. The extraordinary support for the rule of law in theory, however, is possible only because of widely divergent views of what it means in practice. Disparate national traditions posed few problems while operating in parallel, but efforts to promote the rule of law through international organizations have necessitated a reassessment of this pluralism. This article proposes a core definition of the rule of law as a political ideal and argues that its applicability to the international level will depend on that ideal being seen as a means rather than an end, as serving a function rather than defining a status. Such a vision of the rule of law more accurately

reflects the development of the rule of law in national jurisdictions and appropriately highlights the political work that must be done if power is to be channeled through law.

Hayden, P. R. (2008). Setting the Conditions for the Rule of Law During Military Interventions. Newport, RI, Naval War College.

Establishing the rule of law is a critical component of the national strategic endstate for any U.S. military intervention in a foreign nation. Although U.S. policy recognizes that civilian organizations, and the State Department in particular, are best suited to develop the rule of law in post-conflict societies, the military Joint Force Commander wields the most influence over the eventual direction and pacing of post-conflict rule of law development by virtue of his position, authority and capability at the moment of intervention and the instability immediately thereafter. Lacking the sophisticated capabilities and insights of the civilian organizations, the Joint Force Commander must nevertheless plan and conduct his initial intervention to dominate the operational environment with due regard for the requirements of the follow-on civilian rule of law development program to set the conditions for that program's success. He can best accomplish this by incorporating interagency counterparts, host-nation experts and relevant NGO and private legal actors within his planning process, ensuring the maintenance of civil order immediately upon arrival in the operational area, and preparing his forces to act in a supporting role for the rule of law force by assessing and securing key infrastructure and personnel.

Miller, L. and R. Perito (2004). Establishing the Rule of Law in Afghanistan, United States Institute of Peace, Washington D.C.

Two years into the process of re-building Afghanistan, and in the wake of the adoption of a new Constitution in January 2004, this report evaluates the progress that has—and has not—been made in establishing the rule of law in Afghanistan. The report assesses efforts by Afghan institutions and international donors to develop the apparatus of law enforcement and administration of justice necessary to ensure that the rights and protections guaranteed to Afghans in their new Constitution can be meaningfully implemented. Both the reform process and priorities are analyzed with respect to police, courts, judges and lawyers, law reform, legal education, and corrections. Key cross-cutting challenges to rule of law development, such as narcotics and organized crime, are also addressed. The report is based principally on approximately 70 interviews conducted by the authors in Kabul and Washington during October and November 2003. Interviewees included officials of the Afghan government, judiciary, and commissions created under the Bonn Agreement, the United Nations, the United States and other donor governments, and nongovernmental organizations, as well as independent observers.

Wardak, A., D. Saba, et al. (2007). Bridging Modernity and Tradition: the Rule of Law and the Search for Justice, Afghanistan National Human Development Report, UNDP/CPHD, Kabul, Afghanistan.

This second Afghanistan HDR explores the importance of the rule of law to human development. Establishing effective rule of law is essential to rebuilding the nation, restoring justice, shaping development and making it effective, and preventing a chaotic relapse into conflict. Bridging Modernity and Tradition argues that the rule of law in Afghanistan must be widely accepted, enforceable, and consistent with internationally accepted norms of human rights. It suggests that in Afghanistan, this can be achieved by combining the best practices of the traditional institutions of justice with the strengths of the modern justice system.

III. Transitional Justice Mechanisms

a. Judicial and Legislative Reforms

(2003). Afghanistan: Judicial Reform and Transitional Justice, International Crisis Group, Kabul/Brussels, January 28, 2003.

This document by the International Crisis Group provides recommendations to rebuild the justice system on priority and moving it higher up the political agenda. The process requires conspicuous support from the United Nations and full implementation of the Bonn Agreement, which offers a mechanism to build a new justice system. Donors need to provide technical and financial support in a timely manner to ensure that Afghanistan develops a legal system that serves and protects all its people and reduces the risks of a return to conflict.

Bassiouni, M. C. and D. Rothenberg (2007). An assessment of justice sector and rule of law reform in Afghanistan and the need for a comprehensive plan. Conference on the Rule of Law in Afghanistan. Rome, Italy.

This paper presents an assessment of justice sector and rule of law reform in Afghanistan and gives special consideration to the Afghanistan National Development Strategy (ANDS) documents prepared by the Supreme Court (SC), the Ministry of Justice (MOJ) and the Attorney General's Office (AGO). The ANDS strategies are linked to a broader process of international support for nationwide reform outlined in the Afghanistan Compact and other key documents. Above all, the paper encourages donors and the Islamic Republic of Afghanistan to use the Rome Conference as an opportunity to build on previous experiences and agreements by making a series of commitments backed by immediate and long-term financial pledges. Each element of the executive summary is discussed in greater detail in the body of the report.

Boon, K. E. (2005). "Legislative Reform in Post-Conflict Zones: Jus Post Bellum and the Contemporary Occupant's Law-Making Powers." McGill Law Journal 50.

This article distinguishes the traditional concepts of jus ad bellum and jus in bello (law of war and law in war) from the new doctrine of jus post bellum (law of post-war reconstruction). The author examines the recent legal reforms in Iraq, Kosovo and East Timor in order to demonstrate how international bodies and coalitions are increasingly assuming legislative functions, legitimately and otherwise, in the context of their duties as interim administrators. The large degree of discretion left to these administrators does not always ensure adequate levels of trusteeship, accountability, and proportionality to guarantee the stability of post-conflict zones. The author contends that a distinct jus post bellum framework that incorporates these factors would allow for a more systematic approach to legal reform in occupied territories, which would in turn ease the transition to legitimate self-government.

Mani, R. (2003). Ending Impunity and Building Justice in Afghanistan, Afghanistan Research and Evaluation Unit.

Tondini, M. (2008). "From Neo-Colonialism to a 'Light-Footprint Approach': Restoring Justice Systems " International Peacekeeping 15(2): 237 - 251.

The article analyses peacebuilding theories and methods, as applied to justice system reform in post-conflict scenarios. In this respect, the international authorities involved in the reconstruction process may traditionally choose between either a dirigiste or a consent-based approach, representing the essential terms of reference of past interventions. However,

features common to most reconstruction missions, and relatively poor results, confirm the need for a change in the overall strategy. This requires international donors to focus more on the 'demand for justice' at local levels than on the traditional supply of financial and technical aid for reforms. The article stresses the need for effectively promoting the 'local ownership' of the reform process, without this expression being merely used by international actors as a political umbrella under which to protect themselves from potential failures.

Tondini, M. (2009). "Justice Sector Reform in Afghanistan: From a 'Lead Nation' Approach to a 'Mixed Ownership' Regime?" Transition Studies Review 15(4): 660-673.

The article describes the policy-making structure which governs the reform of justice in Afghanistan. It is characterized by an evolution from a bilateral to a multilateral approach, aimed at increasing the Afghan ownership. However, observing the system 'from within', it seems currently ruled by a mixed regime, being still deeply influenced by external inputs. As a consequence, the final outcome of the process remains uncertain.

Wardak, A. (2004). "Building a Post-War justice System in Afghanistan." Journal of Crime, Law and Social Change 41.

This paper examines key dimensions of justice in post-war Afghanistan. These are shari'a (Islamic law), traditional institutions of informal justice (jirga), the Afghan interim legal framework, and human rights principles. It is argued that despite their apparent incompatibility, these various dimensions of justice could be integrated within a coherent framework of a new justice system in post-war Afghanistan - a framework that would promote interaction between local institutions of informal justice and a district level court of justice, on the one hand, and between these two and a proposed Human Rights unit, on the other. On the basis of this analysis, an experimental model of a system of justice is proposed, which integrates local jirga and Human Rights units into the existing formal justice (based on shari'a and positive law) and law-enforcement institutions. This experimental model provides a multi-dimensional framework that both reflects the cultural and religious values of Afghan society, and at the same time, has the capacity to draw on human rights principles. It is maintained that the model has the capacity to deliver justice expeditiously and in cost-effective ways; it also has a strong potential to act as a channel of communication between ordinary people and a modern participatory state in post-war Afghanistan. However, in order to test the applicability of this model in the real world, it needs first to be thoroughly discussed among Afghan and international legal experts as well as among ordinary Afghan people, and then piloted in selected districts in Afghanistan.

b. Tribunals

Baylis, E. A. (2009). "Tribunal-Hopping with the Post-Conflict Justice Junkies." Oregon Review of International Law, Symposium Issue 10: 361.

The field of post-conflict justice is characterized in no small part by international interventions into post-conflict settings. International interveners invest substantial resources toward the goals of post-conflict justice, including creating legal accountability for atrocities and rebuilding local and national justice systems that respect human rights and rule of law. The aims of post-conflict justice and the mechanisms by which the international community can contribute to post-conflict legal institutions and processes have been and continue to be studied intensively.

But while the institutions, processes, and goals of post-conflict justice have been carefully scrutinized, another aspect of international interventions into post-conflict justice has been

evaluated less thoroughly: the people who carry out the interventions. Who are the international lawyers, human rights officers, and others who do this crucial work on behalf of interveners, and what is their role in shaping post-conflict accountability and legal reform?

Looking behind processes and institutions to the people involved is particularly critical in the post-conflict justice context, because there exists a tight-knit network of repeat players (the "post-conflict justice junkies") who move quickly and repeatedly from one international criminal tribunal or other post-conflict justice institution to the next ("tribunal-hopping"). In this symposium article, I explore the implications of the existence of this network and its practice of tribunal-hopping for the effectiveness of international involvement in post-conflict justice. This article sets out my initial observations and analysis in preparation for an empirical study.

Bell, C. (2010). "Of Law and Lawyers." Transitional Justice Institute Research Paper No. 10-11.

This short essay contains a reflection on the Chilcott Inquiry into Iraq. The comments critically critique the relationship of the inquiry to the requirements of legal rules and principles - both national and international.

Dickinson, L. A. (2002). "Transitional Justice in Afghanistan: The Promise of Mixed Tribunals. ." Denver Journal of International Law and Policy 31(1): 23-42.

In the wake of the September 11th attacks on the World Trade Center and the Pentagon, how to apprehend, question, and punish the perpetrators remains a difficult question to answer. Moreover, the question of where, and how, to try suspects raises a series of deeper questions about the role of criminal accountability in times of conflict and war.

Scholars in the emerging field of transitional justice do not focus on the question of terrorism specifically, however, they study the ways in which societies that are attempting to confront past and lingering mass atrocities do so through a variety of means: criminal trials, truth commissions, civil compensation schemes, lustration programs, and so on. An exploration of how the insights derived from this body of work might be applied to the problem of terrorism in the wake of September 11th would be a fruitful source of further research.

This Essay is an effort to initiate that process by examining an emerging transitional justice mechanism - the mixed domestic-international tribunal - and considering the role such tribunals might play in the fight against terrorism. This brief Essay delineates the recent history of this emerging accountability mechanism, compares hybrid tribunals to international tribunals, on the one hand, and domestic tribunals, on the other, and suggests their possible use in the current climate, in a setting such as post-Taliban Afghanistan.

Mégret, F. (2008). "In Search of the 'Vertical': An Exploration of What Makes International Criminal Tribunals Different (and Why)."

International criminal tribunals have often claimed that they are in a 'vertical' relationship vis-a-vis states that is fundamentally different from 'horizontal' international criminal law, as exists between states. Although there are many studies of specific aspects of that claim to verticality (for example, the power to order subpoena), there have few attempts to systematically study all the possible ways in which international criminal tribunals could be described as being distinctly 'vertical'. More importantly, international criminal justice still lacks a comprehensive theory of what it is that allows international criminal tribunals to claim 'verticality'.

This chapter seeks to remedy these shortcomings. It argues that 'verticality' is truly the defining feature of the tribunals as institutions of international criminal justice, not only for the purposes of analyzing cooperation, but also to understand complex issues of jurisdiction. The chapter also develops a theory of the foundations of verticality, by arguing that it is only tenuously anchored in the law, and should be understood more broadly as an affirmation of international criminal tribunals' separate identity. That identity is indissociable from international criminal justice's claim to emancipate itself from the inter-state world.

Mégret, F. (2008). "A Special Tribunal for Lebanon: The UN Security Council and the Emancipation of International Criminal Justice." Leiden Journal of International Law 21: 485.

Discussions on the creation of the Special Tribunal for Lebanon have focused on its impact on Lebanese sovereignty and, specifically, the fact that a Chapter VII resolution seems to bypass Lebanese democracy. Simply relying on the idea of a 'breach of international peace and security' to overcome these arguments is not helpful. It is more useful to locate the creation of the Tribunal within evolving international criminal justice practices. These practices are increasingly constraining the Security Council's own work rather than the contrary, as international criminal justice gradually emancipates itself from the confines of 'international peace and security' and becomes a logic unto itself.

Newton, M. A. (2005). "The Iraqi Special Tribunal: A Human Rights Perspective." Cornell International Law Journal 38(3): 863-898.

The creation of the Iraqi Special Tribunal in December 2003 by Iraqi authorities who were at the time under the legal occupation of the Coalition Provisional Authority marked the emergence of a new form of internationalized domestic tribunals. The Iraqis succeeded in incorporating the full range of modern crimes into their domestic codes alongside some carefully selected domestic offenses, while amending domestic procedural law in some key ways to align the process with established international law related to the provision of full and fair trials. The subsequent investigations and the beginning of trial proceedings generated major debates about the legitimacy of such a domestic forum within the context of human rights norms and the law of occupation. In particular, there was a major strand of thought from outside Iraq that the most legitimate and appropriate forum would have been an international process under the authority of the United Nations. This article examines the arguments made by the Iraqis who demanded a domestic process based on their inquisitorial model, setting them in the broader context of the emerging trends in international criminal law. Through a detailed and unique analysis of the provisions of human rights law and underlying Iraqi procedural law, it criticizes the arguments made by some that assume the illegitimacy of the tribunal under established international norms. The article provides the most detailed explanation of the law of occupation as it emerged following World War II to conclude that the establishment of the Tribunal as an independent court, and its subsequent validation by sovereign Iraqi domestic authorities, was completely valid and proper. The overarching theme of the article is that the imposition of artificial standards and the complete revocation of the preexisting Iraqi judicial structures would have created a process deemed wholly illegitimate by the Iraqi people and judiciary that would have undermined the establishment of the rule of law in Iraq. The author's personal interactions with the judges serve to support the conclusion that the Tribunal is capable of serving as the doorway through which the detailed body of international criminal law is introduced to the broader Arabic speaking world

Orentlicher, D. F. (2010). *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia*, Open Society Justice Initiative, International Center for Transitional Justice.

When the United Nations Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY) in May 1993, expectations were low. War was still raging in the Balkans, and the creation of the Tribunal was perceived as an attempt by Security Council members to save face after failing to stanch the violence then wracking the region.

Few could have foreseen the deep and lasting effects of the ICTY on Bosnia and Herzegovina, the Balkans, and international law. What began as an ad hoc response to the war's atrocities set a precedent that marked the beginning of the post-Nuremberg era of international justice: since the ICTY's founding, the international community has established courts to address atrocities committed in Rwanda, Sierra Leone, Cambodia, Kosovo, and Timor Leste, as well as a permanent International Criminal Court with more than 100 states parties.

The ICTY has also directly contributed to national war crimes prosecutions, both in Bosnia and Herzegovina, and throughout the region. Moreover, the ICTY has created a rich jurisprudence of international humanitarian law that now informs the work of other national and international courts.

In *That Someone Guilty Be Punished*, Diane F. Orentlicher, professor of law at American University, looks at the effects and effectiveness of the ICTY, including lessons to improve future efforts to provide justice for survivors of atrocious crimes. Perhaps most importantly, Orentlicher examines the impact of the tribunal through the words and experiences of those in whose name it was established: the victims and survivors. Their expectations, hopes, and disappointments are chronicled alongside the tribunal's achievements and limitations. Based on hundreds of hours of interviews—and featuring the voices and perceptions of dozens of Bosnian interlocutors—*That Someone Guilty Be Punished* provides a comprehensive and complex portrait of the ICTY and its impact on Bosnia.

c. Truth Commissions

Hayner, P. B. (2000). Unspeakable Truths: Facing the Challenges of Truth Commissions. Routledge, Oxford.

Unspeakable Truths explores the complex mechanisms and conditions that influence truth commissions—their establishment, mandate, operation and outcomes—as they investigate past human rights abuses. Hayner reviews the experiences of the twenty-one truth commissions established between 1974 and 2000 and examines the correlations between the truth-seeking process, transitional justice and the establishment of a working peace system after a period of domestic conflict.

Hayner illustrates the complex problems faced by policymakers in their quest to reinstate order and maintain peace within civil society and the limitations encountered by human rights advocates in their pursuit of punishment for past abuses. The author provides rigorous theoretical analysis, numerous testimonials and well-documented references, through which she successfully draws the reader's attention not only to the array of interests and stakes specific to each society, but also to the recurrence of fundamental issues across societies.

James-Allen, P., A. Weah, et al. (2010). Beyond the Truth and Reconciliation Commission: Transitional Justice Options in Liberia.

This report reviews the Truth and Reconciliation Commission (TRC) process, examines its final report, and suggests a number of steps to be taken by the government, Liberia's civil society, and external partners. These suggestions are designed to respond to the opportunities presented by the TRC report and to address the shortcomings of its transitional justice recommendations. ICTJ offers these proposals as a general roadmap on what actors can do in the short-term to begin the process of moving forward with further transitional justice efforts.

Nwogu, N. V. (2010). "When and Why It Started: Deconstructing Victim-Centered Truth Commissions in the Context of Ethnicity-Based Conflict." International Journal of Transitional Justice 4(2): 275-289.

This article argues that truth commissions as a transitional justice mechanism have fallen short of what is achievable within the context of their own aspirations, particularly with respect to cases involving ethnicity-based violence. This failure is primarily due to the structural application of the narrative process, where (1) the commissions shy away from exploring the motivations behind violent actions; (2) victims' and perpetrators' voices are restrained to fit into collective accounts; and (3) victims' voices are elevated over perpetrators' in the memory-making aspect of the commissions' work. This article asserts that truth commissions must focus on personal narratives over grand narratives, de-essentialize the 'victim' and the 'perpetrator' and place victims' and perpetrators' narratives on equal footing with respect to the collective memory project. Governments must allow more time and resources for truth commissions to delve into the nuances of conflict in order to create a more feasible platform for realistic reconciliation and the possibility of enduring peace.

IV. Post-conflict Reconstruction

a. Conflict Resolution

Abu-Nimer, M. (1996). "Conflict Resolution in an Islamic Context: Some Conceptual Questions." Peace and Change 21(1): 22-40.

This paper offers a set of conceptual questions for approaching the subject of conflict resolution processes in an Islamic context as well as the implementation of Western models of conflict resolution in such a context. To address these issues, the paper first introduces the basic, preliminary questions which should be raised prior to initiating any study on this subject. Second, there is a brief comparison of the current Western and the traditional Middle Eastern approaches to conflict resolution. Based on this comparison, the third part of the paper discusses the conditions and questions which should be considered when studying Islam and conflict resolution.

Albrecht, H.-J., J.-M. Simon, et al., Eds. (2006). Conflicts and Conflict Resolution in Middle Eastern Societies - Between Tradition and Modernity, Duncker and Humblot, Berlin.

The historical and cultural richness of the Middle Eastern societies and the role of the state in the countries of the region provide a unique basis to understand the variety of means to address violent conflicts in different societies with a common basis. Against this backdrop, the leading question addressed in the contributions to this book concerns what is the best-suited response to violent conflicts? The question implies that there exist alternative ways of dealing with violent

conflicts. And posing this question, there follow immediately other questions: best in terms of what and best for whom: the offender, the victim, the public or all of them?

The responses are related to basic concepts of punishment, retaliation and mediation that have evidently been developed everywhere although content and meaning differ. Within this context, the book provides an overview on structural factors, settings and the phenomenology of violent conflicts in fourteen countries of the Middle East and an insight into the variety of types of traditional and modern conflict resolution applied largely in parallel in the region from different perspectives of social, legal and political sciences.

Irani, G. E. (1999). "Islamic Mediation Techniques for Middle East Conflicts." Middle East Review of International Affairs 3(2).

This article reviews traditional, Islamic techniques for resolving disputes and encouraging conciliation as tools applicable to contemporary regional conflicts. It discusses unique aspects of disputes in Middle East societies and why, to some extent, these characteristics contradict assumptions from Western-developed conflict resolution techniques.

b. Statebuilding

(2010). Stabilizing Afghanistan: Legitimacy and Accountability in Governance, International Center for Transitional Justice, New York.

President Obama's long-awaited plan to increase the number of US troops in Afghanistan is meant to include a number of benchmarks aimed at stabilizing Afghanistan as part of an overall strategy to defeat or contain Taliban/al-Qaeda extremists. Bringing an end to the insurgency and addressing its regional roots are crucial parts of a successful peace process, but cannot prevail unless coupled with a strategy to address the governance deficit in Afghanistan.

Gossman, P. (2006). Truth, Justice, and Stability in Afghanistan. In Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice, edited by N. Roht-Arriaza and J. Mariezcurrena. New York, NY: Cambridge University Press.

McNerney, M. J. (2006). "Stabilization and reconstruction in Afghanistan: are PRTs a model or a muddle?" Parameters: 32-46.

During the summer of 2002, U.S. officials developed the concept of Provincial Reconstruction Teams (PRTs) to spread the International Security Assistance Force (ISAF) effect, without expanding ISAF itself. First established in early 2003, PRTs consisted of 60-100 soldiers plus, eventually, Afghan advisors and representatives from civilian agencies like the U.S. State Department, the U.S. Agency for International Development, and the U.S. Department of Agriculture. PRTs have the potential to become a model for future stabilization and reconstruction operations (SRO). Representatives from more than a dozen countries are now participating in 22 PRTs to enhance security, reconstruction, and the reach of the Afghan central government. PRTs have achieved great success in building support for the U.S.-led coalition and respect for the Afghan government. They have played important roles in everything from election support to school-building to disarmament to mediating factional conflicts. Despite their potential and record of success, however, PRTs always have been a bit of a muddle. Inconsistent mission statements, unclear roles and responsibilities, ad hoc preparation, and, most important, limited resources have confused potential partners and prevented PRTs from

having a greater effect on Afghanistan's future. This article will first review the strategic context in which PRTs operate, namely, SROs. Second, it will describe the PRT concept and its history. Third, the article will assess the success of the PRTs against three criteria: coordination, relationship-building, and capacity-building. Enhancing local security is also a key measure of success, but as this article will discuss, PRTs achieve this goal primarily through their relationships and capacity-building efforts. Finally, the article will conclude with some recommendations for how PRTs should evolve in Afghanistan and how they can be a model for future operations.

Suhrke, A. (2010). Upside-down state-building: The contradictions of the international project in Afghanistan Cambridge University Press

In the contemporary writing on state-building in post-conflict situations, remarkably little attention is paid to what it takes to build a state. There is much advice on policy priorities and sequencing – security, rule of law, humanitarian assistance, fast pay-out of a peace dividend, demobilisation, elections, and so on – but much less attention to the basic ingredients that are required for the enterprise.

Historical experience and the political science literature suggest four necessary components: coercion, capital, legitimacy and leadership. In Europe, as Charles Tilly [1990] tells us, the modern state developed as local rulers marshalled revenues to pay for armies to fight other rulers; protection and increasingly other services were provided to their subjects to ensure continued flows of resources, and the state became a going concern.

Time is commonly also added in recognition of the fact that most contemporary states are the product of a long historical process of state-formation. Yet even these cases typically have some periods of more active state-building, when leaders mobilise arms, capital and legitimacy in ways that decisively strengthen the state. Given the internationalised nature of current state-building, arguably the most central, but also the least addressed, question is therefore to what extent the four components of state-building can be effectively provided by international actors, as opposed to being mobilised through an endogenous process. The present chapter explores this question with reference to post-2001 Afghanistan, first by reviewing the features of successful non-European state-building processes, and then by contrasting these with the tension-filled experience in Afghanistan.

V. Security Sector Reform (SSR)

a. Overview: Security Sector Reform

Davis, L. (2009). Transitional Justice and Social Security Reform, Initiative for Peacebuilding.

The relationship between transitional justice and security system – or sector – reform (SSR) is understudied, yet both contribute to state-building, democratisation and peacebuilding in countries with a legacy of massive human rights abuse. The security system is fundamental in any democracy for protecting the citizens' rights. Yet in postconflict environments it usually comprises members of the police, military, secret police, intelligence agencies, armed rebel groups and militia – the groups which are often the most responsible for serious and systemic human rights violations during conflict. Reforming the system to ensure security agents become protectors of the population and the rule of law is therefore of the utmost urgency, but the political and security context may pose serious challenges to reform. This paper draws on

research in four very different environments: Afghanistan, Burundi, the Democratic Republic of Congo (DRC) and Timor-Leste. Although effective SSR is highly context-specific, this paper argues that the EU could improve the substance of its SSR programming and implementation by drawing on lessons from these four case studies.

Piotukh, V. and P. Wilson (2009). Security Sector Evolution: Understanding and Influencing How Security Institutions Change. , Libra Advisory Group, London, United Kingdom.

What implications do different theoretical approaches to institutional change have for security sector reform (SSR)? How can evolutionary approaches be applied to SSR in practice? This paper from the Libra Advisory Group examines theoretical approaches to institutional change and their implications for SSR. It argues that an evolutionary approach to SSR can make the reform process more democratic and lead to transformations that are locally-owned and sustainable.

b. Disarmament, Demobilization, and Reintegration (DDR)

Gossman, P. (2009). Transitional Justice and DDR: The Case of Afghanistan., International Center for Transitional Justice, New York. June 2009.

In Afghanistan's nation-building process, security has been prioritized over justice. This strategy has shaped the way programs for disarmament, demobilization and reintegration (DDR) of former combatants and transitional justice are perceived and accepted by the Afghan population and the international community. Ongoing insecurity and the reliance of the international community on former militia commanders undermine DDR and obstruct transitional justice initiatives. Slow progress on crucial institutional reforms continues to impede efforts to create a competent and professional police force, a functioning civil service, and an accountable judiciary; all three of which are vital to successful disarmament, transitional justice and, ultimately, security.

Patel, A. C., P. d. Dreiff, et al., Eds. (2010). Disarming the Past: Transitional Justice and ex-combatants. Advancing Transitional Justice Series. New York, Social Science Research Council, International Center for Transitional Justice.

Over the past twenty years, international donors have invested in large-scale disarmament, demobilization, and reintegration (DDR) programs. In the same period, there has been a proliferation of transitional justice measures to help render truth, justice, and reparations in the aftermath of state violence and civil war. Yet DDR programs are seldom analyzed to consider justice-related aims; and transitional justice mechanisms rarely articulate strategies for coordinating with DDR. Disarming the Past: Transitional Justice and Ex-combatants examines how these two types of initiatives have connected — or failed to connect — in peacebuilding contexts, and begins to articulate how future DDR programs ought to link with transitional justice aims.

VI. Conflict Groups

a. Counterinsurgency

Gompert, D. C., J. G. IV, et al. (2008). War by Other Means. Building Complete and Balanced Capabilities for Counterinsurgency, RAND National Defense Research Institute.

The difficulties encountered by the United States in securing Iraq and Afghanistan despite years of effort and staggering costs raises the central question of the RAND Counterinsurgency Study:

How should the United States improve its capabilities to counter insurgencies, particularly those that are heavily influenced by transnational terrorist movements and thus linked into a global jihadist network? This capstone volume to the study draws on other reports in the series as well as an examination of 89 insurgencies since World War II, an analysis of the new challenges posed by what is becoming known as global insurgency, and many of the lessons learned in Iraq and Afghanistan. The report's recommendations are based on the premise that counterinsurgency (COIN) is a contest for the allegiance of a nation's population; victory over jihadist insurgency consists not of merely winning a war against terrorists but of persuading Islamic populations to choose legitimate government and reject violent religious tyranny. The authors evaluate three types of COIN capabilities: civil capabilities to help weak states improve their political and economic performance; informational and cognitive capabilities to enable better governance and improve COIN decisionmaking; and security capabilities to protect people and infrastructure and to weaken insurgent forces. Gompert and Gordon warn that U.S. capabilities are deficient in several critical areas but also emphasize that U.S. allies and international organizations can provide capabilities that the United States currently cannot. The authors conclude by outlining the investments, organizational changes within the federal government and the military, and international arrangements that the United States should pursue to improve its COIN capabilities.

Rathmell, A. (2009). "Adapting Government For Stabilisation And Counter-Insurgency Operations " The RUSI Journal 154(6): 8-13.

The demands of counter-insurgency have sparked much discussion about the need for army reform. But it is also the case that government, as a whole, must adapt to the present campaign. Britain has lagged behind the US in this regard, and it is not clear that sufficient political will exists in the UK for real change. However, British capacity is only ever the first step: ultimately, what matters for successful stabilisation is the capability and legitimacy of the host government.

b. Nonstate Actors

Bassiouni, M. C. (2008). "The new wars and the crisis of compliance with the law of armed conflict by non-state actors." Journal of Criminal Law and Criminology 98(3).

Mégret, F. (2009). "Beyond 'Freedom Fighters' and 'Terrorists': When, if Ever, is Non-State Violence Legitimate in International Law?"

This paper seeks to elucidate the conditions under which non-state violence might be considered legitimate under international law. Contra a tendency to dismiss all non-state violence as "terroristic" it makes an argument that the conditions of legitimate non-state violence, at the intersection of international law and moral theory, require us to assess the ends and means of such violence, and the conditions in which it is used. This leads one to depart from international law on the use of force as it applies to states in some cases, but also to draw on it in others. The paper concludes with a moderate stance in favor of exceptionally lending strong normative support to certain forms of non-state violence.

Mégret, F. (2009). "The Diversification of Actors Involved in Armed Conflicts: Beyond 'Direct Participation to Hostilities'? (La Diversification Des Acteurs Impliqués Dans Les Conflits Armés: Vers Un Dépassement De La 'Participation Directe Aux Hostilités'?)."

This paper (in French) was originally presented at a conference at the Collège de France organized by the University of Paris I on "The role of third parties to the implementation of international humanitarian law". As discussant, I was asked to provide a general presentation of the challenges of distinguishing between "parties" and "non-parties" in today's conflicts. The paper seeks to give an overview of current debates, whilst questioning how long this distinction can remain the *summa divisio* of the laws of war in a context where it radically challenged both by non-state actors and states. I suggest that the distinction is in practice more a continuum than a clear binary opposition in that, although some actors may more naturally be seen as "parties" or "non-parties", there is no status that cannot change over the course of a conflict depending on what one does (as opposed to what one is). I suggest that this essential and inevitable fluidity is also what makes it very difficult to keep these distinctions stable over time. I then turn to what I see as the two hardest cases of maintaining the division, namely private security companies on the one hand, and terror groups on the other (arguably both instances - albeit very different - of a larger trend towards privatization of violence). The great difficulties that these actors create in terms of the implementation of international humanitarian law suggest that the distinction is under threat. In the conclusion, I outline some ways in which the distinction might be reinvigorated or transcended. I suggest, for example, that one should critically assess international humanitarian law's continued statist biases (state forces are always combatants, even if they violate the laws of war, whereas this is not true of non-state or irregular forces) on humanitarian grounds. Moreover, I suggest that the normative asymmetry of conflicts creates conditions where states must be willing to abide by high standards even confronted with an adversary that does not - so much so, in fact, that international human rights law may in the end turn out to be the most cogent way to regulate contemporary modes of even armed violence.

Steinbock, D. (2009). "Talking to the Enemy: State Legitimacy Concerns with Engaging Non-State Armed Groups." Texas International Law Journal 45: 297-322.

Most armed conflicts today are not between states, but are internal in nature. Since internal conflicts often involve non-state armed groups fighting for national liberation, religious beliefs, or political ideological goals, the conflicts are particularly violent. However, the traditional laws of armed conflict, called international humanitarian law (IHL), provide few regulations for internal conflicts. As a result, parties often evade humanitarian regulation of their conduct.

This paper first discusses the importance of engaging non-state armed groups in IHL processes. Through negotiations, states and armed groups can agree to apply IHL to a conflict, in whole or in part, providing greater protections to vulnerable groups and captured combatants.

Second, it is argued that states are reluctant to talk with armed groups due to a fear that non-violent engagement would legitimize the armed group. States have manifested their worries through less regulation of internal conflicts under IHL. States have traditionally argued that the bases of their worries are the legal consequences of bestowing legitimacy non-state actors.

Most important, this paper examines alternative motivations behind states' refusal to engage non-state armed groups. Although many states claim their worries are based on the legal consequences of recognition, this paper examines possible alternative bases for their fears.

Sveinbjörnsson, D. Ö. (2009). "The Non-State Actor Threat. An Examination into the Legitimate Actions Available to a 'Victim State' Threatened by a Non-State Actor Operating From a Foreign Territory."

Terrorism at the beginning of the 21st century has prompted the international legal community to revise its position on non-state actors and the use of force in international law. The state-centric nature of the international community has in recent years been faced with non-state actors on such a scale as to demand a response from states and forcing them to take defensive measures against the non-state actors which otherwise ought to be dealt with under the domestic legal system of the state from which they operate. Non-state actors are a new threat to international peace and security which can take various forms such as rebel groups, terrorist groups and even pirates. Although the actors are not new per se their threat level is of a new proportion.

As recent events are examined and in order to comprehensively address the issues of non-state actors as threats and the available legitimate actions a 'victim state' has, it seems that international law needs to clarify these issues through co-operative measures and reach a consensus on the legal issues of non-state actors. In the absence of clear information, international law is left with rules which essentially were created for inter-state relations but need to be applied to non-state and state interactions because of pure necessity, since the threat of non-state actors in the 21st century has reached a level which the domestic legal system mostly cannot deal with.

c. Terrorism

Bassiouni, M. C. (2004). "Terrorism: the persistent dilemma of justice." Case Western Reserve Journal of International Law, 36(2/3): 299-306

Hassanien, M. R. (2008). "International law fights terrorism in the Muslim world: a Middle Eastern perspective." Denver Journal of International Law and Policy 36(2): 221-253.

The September 11 terrorist attacks ignited global interest in the Muslim world; (1) hence the region has become a primary concern for the international community, with national security bolted to the forefront of the American foreign policy and that of the rest of the world as well. (2) Six years after the attacks on New York, Pennsylvania and Washington DC, the American perspective has been the prevailing one in most of the writings about International law and terrorism. However, the Middle Eastern approach toward international terrorism needs to be explored carefully in light of the globalization that is taking place everywhere.

The Muslim world--in the post-September 11 era--has been the scene for major American operations whether in Afghanistan or Iraq. (3) Consequently, Muslims consider the U.S. to be the major threat to them. (4) The populace in the Middle East contemplates the invasion of Iraq, Afghanistan and the current tension between Iran and U.S. as major reasons to root in rather than uproot terrorism in the Middle East. After almost four years of the war on Iraq, international terrorism has proven to be a pervasive and unconventional enemy, making it evident that the use of force is no longer the most effective tool in combating it. Free trade, economic development, strengthening international law and engaging the Muslim world could equally solve the problem. These tools have to be considered in the American portfolio of combating international terrorism.

America, as a global power, has to realize that engaging other parts of the world, including the Muslim world, in the war on terror is a must. International terrorism has two sides; (5) Shibley Telhami described the terrorism phenomena as having two sides, the first is the demand side, where international trade law could be relevant. (6) As free trade agreements are more than liberalizing certain markets, they have a lot of economic and political ramifications that may defuse the causes of terrorism in the Middle East. However, this paper does not propose that free trade is the ultimate solution for terrorism in the Middle East, but rather suggests that free trade is one of the tools that may provide a way out of the problems that besiege the region. But it would be meaningless or even harmful if it is not accompanied with political reform in the region. (7) The strengthening of international treaty law, the law of armed conflict, and engaging the Muslim world in the fight against terrorism can also help combat the supply side of terrorism.

Mégret, F. (2009). "Beyond 'Freedom Fighters' and 'Terrorists': When, if Ever, is Non-State Violence Legitimate in International Law?".

This paper seeks to elucidate the conditions under which non-state violence might be considered legitimate under international law. Contra a tendency to dismiss all non-state violence as "terroristic" it makes an argument that the conditions of legitimate non-state violence, at the intersection of international law and moral theory, require us to assess the ends and means of such violence, and the conditions in which it is used. This leads one to depart from international law on the use of force as it applies to states in some cases, but also to draw on it in others. The paper concludes with a moderate stance in favor of exceptionally lending strong normative support to certain forms of non-state violence.

Mégret, F. (2009). "The Diversification of Actors Involved in Armed Conflicts: Beyond 'Direct Participation to Hostilities'? (La Diversification Des Acteurs Impliqués Dans Les Conflits Armés: Vers Un Dépassement De La 'Participation Directe Aux Hostilités'?)."

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of conflicts creates conditions where states must be willing to abide by high standards even confronted with an adversary that does not - so much so, in fact, that international human rights law may in the end turn out to be the most cogent way to regulate contemporary modes of even armed violence.

Ni Aolain, F. D. (2007). "The No-Gaps Approach to Parallel Application in the Context of the War on Terror." Israel Law Review 40(2): 563-591.

This article asserts that a challenge exists in deflecting the prevailing view that a general gap of legal applicability exists in respect of legal regulation of the war on terror. This "gap" is articulated by a focus on a new phenomena—namely the emergence of Al Qaeda as a nonnationally motivated, transnational terrorist organization whose actions and actors do not "fit" existing legal norms and sanctions. In addressing that challenge, this article will rebut the argument that suggests a legal lacuna exists, and that no appropriate legal tools are available to states and international organizations as they confront the post September 11th context. In particular, the argument asserts that existing legal norms provide sufficient coverage to respond to the conflicts experienced in the contemporary moment, as well as to the state and non-state entities participating in them. The article suggests that clarity about the boundaries between the legal regime of international human rights law and international humanitarian law would assist closing off perceived regulatory gaps. It contends that the usual rationale given in favor of parallel application, namely higher protection for the victims of conflict, substantially underestimates its other valuable policy and instrumental benefits. Specifically, the traditionally vaunted victim centered rationale does not sufficiently weigh the value of affirming consistent rule of law coverage to situations of conflict. The article asserts that while further regulatory measures may be possible and even desirable to confront the contemporary challenges of conflict forms (including terrorism), a combined or dynamic approach to the law of war and international human rights law provides sufficient traction and norm content to address and be relevant to present needs.

VII. International Stakeholders/Community

a. International Organizations

Boon, K. E. (2006). "'Open for Business': International Financial Institutions, Post-Conflict Economic Reform and the Rule of Law." NYU Journal of International Law and Politics 39: 513.

What practices should international institutions adopt to promote economic development, peace and stability in post-conflict zones? The United Nations, the World Bank, and the International Monetary Fund amongst other such institutions have a common answer: practices that promote marketization and the Rule of Law. This article examines the relationship between the Security Council and the IFIs in the promotion of the rule of law in post-conflict situations, in order to assess the tension between IFI independence and the supremacy of Chapter VII resolutions. It also examines the development of IFI post-conflict policies generally, and the constitutional doctrines used to justify the expansion into international peace and security.

Boon, K. E. (2008). "Coining a New Jurisdiction: The Security Council as Economic Peacekeeper." Vanderbilt Journal of Transnational Law 41(4).

Economic conditions are linked to international peace and security. Financial crises, mismanagement of natural resources, food shortages, and climate change can create transnational effects, including conflict. The Security Council is the executive organ of the United

Nations, with primary jurisdiction over the maintenance of international peace and security. This Article explores the extent to which the Security Council can and should assert jurisdiction over economic and financial issues.

Chesterman, S. "'I'll Take Manhattan': The International Rule of Law and the United Nations Security Council." The Hague Journal on the Rule of Law, Forthcoming.

Frequent agreement on the rule of law in theory is possible in large part because of divergent views on what it means in practice. This essay briefly addresses the content of the rule of law at the international level before discussing the challenge to this idea presently posed by the United Nations Security Council - the one international body with the power to enforce the law, but which is nevertheless loath to submit to it.

Danchin, P. G. (2008). "Beyond Rationalism and Instrumentalism: The Case for Rethinking U.S. Engagement with International Law and Organization." The SAIS Review of International Affairs 28(2): 79-100.

Today it's become fashionable to disparage the United Nations . . . and other international organizations. In fact, reform of these bodies is urgently needed if they are to keep pace with the fast-moving threats we face. Such real reform will not come, however, by dismissing the value of these institutions, or by bullying other countries to ratify changes we have drafted in isolation. Real reform will come because we convince others that they too have a stake in change—that such reforms will make their world, and not just ours, more secure.

Davis, L. (2010). The European Union and Transitional Justice. New York, Initiative for Peace Building; International Center for Transitional Justice.

This paper argues that rather than remain simply a supporter of transitional justice endeavours undertaken by others, the EU should also draw on its experience at home and abroad, and on lessons learnt from other actors such as the UN, to develop a strategic approach to transitional justice as a way of achieving its foreign policy objectives. This could help close the credibility gap between declared commitments to peace, human rights and international law and their realisation. The institutional reforms underway at the time of this writing provide the opportunity to make this happen. This paper briefly reviews transitional justice and its relationship to peacebuilding and crisis management, institution-building (including security sector reform and disarmament, demobilisation and reintegration) and development, given the importance of these areas to the EU. It then offers an overview of EU policy provisions relevant to transitional justice. Finally, it draws conclusions and gives recommendations as a basis for future elaboration of an EU approach to transitional justice.

Deledda, A. (2006). "Afghanistan – The End of the Bonn Process " Transition Studies Review 13(1): 155–171.

The Afghanistan of the new millennium represents a significant test of the latest attempts to allow the coexistence of Western law principles and Islamic law – an issue that has been accompanying the East–West relations since the first colonial relations. The meaning of the path followed by Afghanistan is fully and clearly outlined when we consider that from 1996 to 2001 the Talibans turned this country into an emblem of the strict enforcement of the shari'a and of a radical contrast to Western countries. The presence of Osama bin Laden turned Afghanistan into the base of a global network of Islamic extremism, which interpreted religion as a motive and a justification for the most heinous actions, aiming at countering global powers. After 11 September 2001, and the subsequent rapid repulse of the Talibans, the international community

undertook to support the reconstruction of a country devastated by 23 years of war, immediately giving back the country sovereignty to the representatives of the Afghan people. The still ongoing process of reconstruction of democratic state structures was not therefore entirely "imposed" from outside of Afghanistan; it was rather mediated by a national political class that is acquiring increasing legitimacy through the carrying out of democratic elections. A reconstruction process of Afghanistan on a sound basis cannot but take into consideration the history of a population that always and successfully opposed foreign rules, and that twice in the 20th century, in 1929 and in 1973, rejected the state visions inspired to the experiences of other countries. The history of Afghanistan is strewn with moments of confrontation and fight against "modernity", in which ethnic and tribal dynamics always prevailed. These dynamics, although fragmented, were marked by a strong national identity, also based on the religious bond. However, it must be recalled that the constitution passed on January 2004, in compliance with the guidelines provided for in the Bonn Agreement of December 2001, represents the seventh constitutional charter Afghanistan has adopted over the last 80 years (1923, 1931, 1964, 1977, 1987 and 1990). The country therefore owns a remarkable judicial inheritance that also includes a significant tradition of protection of rights.

Mégret, F. (2007). "The Vicarious Responsibility of the United Nations for 'Unintended Consequences of Peace Operations'." United Nations University Press: 250-267.

This chapter examines the degree to which the United Nations, as an international organization, will incur responsibility for harm caused during peace operations. It offers a synthetic overview of the key legal issues, examining both the substantive and procedural dimensions of UN accountability.

Mégret, F. (2008). "A Special Tribunal for Lebanon: The UN Security Council and the Emancipation of International Criminal Justice." Leiden Journal of International Law 21: 485.

Discussions on the creation of the Special Tribunal for Lebanon have focused on its impact on Lebanese sovereignty and, specifically, the fact that a Chapter VII resolution seems to bypass Lebanese democracy. Simply relying on the idea of a 'breach of international peace and security' to overcome these arguments is not helpful. It is more useful to locate the creation of the Tribunal within evolving international criminal justice practices. These practices are increasingly constraining the Security Council's own work rather than the contrary, as international criminal justice gradually emancipates itself from the confines of 'international peace and security' and becomes a logic unto itself.

Milanovic, M. (2009). "Norm Conflict in International Law: Whither Human Rights?" Duke Journal of Comparative & International Law 20(1).

The article examines norm conflicts, defined as situations where one norm constitutes, has led to, or may lead to a breach of another, and particularly those norm conflicts in which one of the conflicting norms is a rule of human rights law. Such instances occur more and more every day, are increasingly litigated, and can be of great political importance. For example, a human rights treaty might prohibit the preventative detention or internment of persons under any circumstances, while the UN Security Council might pass a resolution actually authorizing such detention, say in relation to suspected terrorists. What does then happen when a state's obligations under a human rights treaty conflict with its obligations under the UN Charter?

In that regard, one possible solution is that pursuant to Article 103 of the UN Charter, obligations under the Charter - including binding Security Council resolutions - prevail over

conflicting treaty obligations of the UN member states. The article will explore whether the Council can displace international human rights treaties, and if so, how can such a development be curtailed or avoided. It will elaborate on various forms of norm conflict resolution and avoidance, and will discuss the recent jurisprudence of the House of Lords (Al-Jedda), the European Court of Human Rights (Behrami and Bosphorus) and the courts of the European Union (Kadi). The article thus provides a systematic overview of the impact of norm conflicts on the protection of human rights in a fragmented international legal order.

Milanovic, M. (2010). "Norm Conflicts, International Humanitarian Law and Human Rights Law." Human Rights and International Humanitarian Law, Collected Courses of the Academy of European Law, Orna Ben-Naftali ed., Oxford University Press XIX(1).

One of the most powerful methods of inducing changes in outcomes governed by international humanitarian law is to add human rights rules and arguments into the equation. This, indeed, is precisely the point of the whole project of linking these two branches of international law. This article explores the relationship between the two bodies of law, and makes several broad propositions. First, that there is a need for a change in perspective, from examining the relationship of the two regimes as such, to the interaction of particular norms that regulate specific situations. Second, that this interaction will frequently result in a norm conflict, and that we have numerous tools at our disposal for either avoiding or resolving these conflicts. Third, that *lex specialis* is at best a fairly limited tool of norm conflict avoidance, and that it most certainly cannot be used to describe the relationship between human rights and humanitarian law as a whole. Finally, that there are situations where all of our tools will fail us, where a norm conflict will be both unavoidable and unresolvable due to a fundamental incompatibility in the text, object and purpose, and values protected by the interacting norms, and where the only possible solution to the conflict will be a political one. The article identifies three such possible situations of unresolvable antinomy - targeted killings, preventive security detention, and positive obligations during occupation, and addresses recent cases with a norm conflict component, such as Al-Jedda, Behrami, and Al-Saadoon. Though in most cases harmony between human rights and humanitarian law is possible, and indeed desirable, we should not underestimate the practical and political relevance of situations of true norm conflict, which no amount of academic exposition will be able to fix.

Milanovic, M. and T. Papic (2009). "As Bad as it Gets: The European Court of Human Rights' Behrami and Saramati Decision and General International Law " International & Comparative Law Quarterly 58(2): 267-296.

This article examines the European Court of Human Rights' encounter with general international law in its Behrami and Saramati admissibility decision, where it held that the actions of the armed forces of states acting pursuant to UN Security Council authorizations are attributable not to the states themselves, but to the United Nations. The article will try to demonstrate that the Court's analysis is entirely at odds with the established rules of responsibility in international law, and is equally dubious as a matter of policy. Indeed, the article will show that the Court's decision can be only be explained by the Court's reluctance to decide on the questions of state jurisdiction and norm conflict, the latter issue becoming the clearest when Behrami is compared to the Al-Jedda judgment of the House of Lords.

Orentlicher, D. F. (2010). That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia, Open Society Justice Initiative, International Center for Transitional Justice.

When the United Nations Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY) in May 1993, expectations were low. War was still raging in the Balkans, and the creation of the Tribunal was perceived as an attempt by Security Council members to save face after failing to stanch the violence then wracking the region.

Few could have foreseen the deep and lasting effects of the ICTY on Bosnia and Herzegovina, the Balkans, and international law. What began as an ad hoc response to the war's atrocities set a precedent that marked the beginning of the post-Nuremberg era of international justice: since the ICTY's founding, the international community has established courts to address atrocities committed in Rwanda, Sierra Leone, Cambodia, Kosovo, and Timor Leste, as well as a permanent International Criminal Court with more than 100 states parties.

The ICTY has also directly contributed to national war crimes prosecutions, both in Bosnia and Herzegovina, and throughout the region. Moreover, the ICTY has created a rich jurisprudence of international humanitarian law that now informs the work of other national and international courts.

In *That Someone Guilty Be Punished*, Diane F. Orentlicher, professor of law at American University, looks at the effects and effectiveness of the ICTY, including lessons to improve future efforts to provide justice for survivors of atrocious crimes. Perhaps most importantly, Orentlicher examines the impact of the tribunal through the words and experiences of those in whose name it was established: the victims and survivors. Their expectations, hopes, and disappointments are chronicled alongside the tribunal's achievements and limitations. Based on hundreds of hours of interviews—and featuring the voices and perceptions of dozens of Bosnian interlocutors—*That Someone Guilty Be Punished* provides a comprehensive and complex portrait of the ICTY and its impact on Bosnia.

Thallinger, G. (2007). "The UN Peacebuilding Commission and Transitional Justice." German Law Journal 8(7): 681-710.

This contribution examines the possible contribution the UN Peacebuilding Commission (PBC) can make towards the achievement of transitional justice in countries or regions recovering from (civil) war or other serious conflict. It will first briefly epitomize the recent process culminating in the set-up of the PBC and then address the functions and tools of the Commission with particular focus on its transitional justice capabilities. Thereby, I will examine conceivable operative approaches the PBC might take in the first cases submitted to it, i.e., Burundi and Sierra Leone, and assess the Commission's potential and added value both in general terms but in particular with regard to transitional justice activities.