

DRAFT FOR BELLAGIO CONFERENCE

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“Beyond the toolkit: rethinking the  
paradigm of transitional justice”

**Stay the Hand of Justice: Whose Priorities Take Priority?**

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“There’s bound to be a sense of tremendous sort of feeling of being cheated by the victims. But even more important, the Serbs who are beginning to realize that they were responsible for this, needed this verdict. They saw the television film of this massacre in Srebrenica involving Serb soldiers, and a guilty verdict would, in my view, have made them face reality.”

David Owen on the death of Slobodan Milosevic, March, 2006<sup>i</sup>

## **The Challenge**

The 2004 report of the Secretary-General of the United Nations on rule of law and transitional justice<sup>ii</sup> strikes to the heart of the major dilemma that confronts advocates of transitional justice, “We must learn as well to eschew one-size-fits-all formulas and the importation of foreign models, and instead, base our support on national assessments, national participation and national needs and aspirations.” Missing from this assessment is recognition of the dynamic interplay of international power and ambitions and in particular, the contribution of the United Nations itself in muddying the waters of accountability. This paper focuses on two critical factors that must be considered in instituting transitional justice interventions. First, the dynamic interrelationship between international and local politics and the impact of domestic politics on the choice and implementation of any particular transitional justice mechanism; and second, the gap that may exist between international norms and expectations for justice and the attitudes, beliefs and goals of the people whose lives were so disrupted by policies of the prior regime or the mass violence that may have erupted.

In his recent report titled “Indifference and Accountability: The United Nations and the Politics of International Justice in East Timor”<sup>iii</sup>, David Cohen strikingly illustrates the vagaries and limitations of international criminal justice. In stark terms, he describes a “lack of political will” to provide resources and support, “failure to establish clear ownership of the process between the UN and East Timor”, failure to meet basic international standards, lack of oversight, management and accountability, failure to

address the needs of victims, witnesses and communities, lack of competence of judges, failure to provide a clear mandate for the prosecution, and tellingly, a country left without an operating judiciary at the end of the process. The details reveal how once again, East Timor was abandoned by the world community<sup>iv</sup> and even more, how international attempts at transitional justice are hampered by the real world of international politics, unrealistic goals and expectations.

In February, 2006, the Sierra Leone Working Group on Truth and Reconciliation released its preliminary study of the performance of Sierra Leone's Truth and Reconciliation Commission<sup>v</sup>. While acknowledging that some progress had been made in following up recommendations from the October, 2004 report, they noted "It has been a deeply flawed and problematic process from its birth in 1999, when the peace agreement was signed." The report raised concerns related to the role of the Office of the High Commissioner for Human Rights, the appointment and role of the Commissioners, the relationship of the TRC and the Special Court, the issue of local ownership, the role of international NGOs and the question of follow through. Once again, local and international politics appeared to influence the processes. UN weaknesses became apparent and the gap between the ideals and practice of international NGO's and local goals became clear. Two areas of great concern loomed large: first, many believed that the arrival of the Special Court ...effectively relegated the TRC to 'second class status' in the hierarchy of accountability mechanisms and that donors increasingly deserted the TRC." Second, the report raised the question of whether the 'official view' at the international level would deem the concurrent processes as a success and that the combined approach would be

recommended as best practice. This was not the view of Sierra Leoneans especially since many reported a lack of a “genuine partnership” with local civil society organizations. The report surfaces a gap in the historical development of transitional justice mechanisms - the lip service attention paid to those whose lives are directly affected by war, repression and human rights violations. They note: “It is particularly important that Sierra Leonean voices are heard at the international level, where criteria for assessing the successes and failures of the ‘experiment’ may be different from those locally and where different agendas may shape the conclusions reached. People have a right to know the truth about the Truth and Reconciliation Commission.”

Critiques of the Sierra Leone process have been echoed from outside as well. Cockayne confronts the vagaries and limitations of international politics and societal dynamics around the “under-resourcing, politicization, complex operational challenges...and...unrealistic challenges” that the Special Court in Sierra Leone faced<sup>vi</sup>. However, the assumption made here is that criminal prosecutions are the essential first element and that they bear a direct relationship to peace and stability. The challenges are more complex – not only with respect to trials and truth commissions, but also to international and local politics, questions about reconciliation, and democracy<sup>vii</sup>. Complicating these concerns is the naiveté that underlies the imposition of specific models of justice in non-Western societies.

Rosalind Shaw’s 2005 report on the Sierra Leone Truth and Reconciliation Commission for the United States Institute of Peace<sup>viii</sup> raised different but related questions whose

foundation lies in cultural practice. Shaw noted “there was little popular support for bringing such a commission to Sierra Leone, since most people preferred a ‘forgive and forget’ approach. Further, she describes how in this country, “social forgetting is a cornerstone of established processes of reintegration and healing for child and adult ex-combatants. Speaking of the war in public often undermines these processes, and many believe it encourages violence.” To many, this startling conclusion flies in the face of the now popular juggernaut of truth telling – a confessional approach to confronting past events that presupposes that “revealing is healing”<sup>ix</sup> No-one has yet demonstrated that this approach other than reinforcing a controversial connection to Westernized approaches to assisting individuals in coping with trauma events is either relevant across cultures or to nations.

And yet, the idea of culturally relevant alternatives to transitional justice is fraught as well with controversy and risk. The Rwandan solution of utilizing a supposedly traditional mechanism of conflict resolution, the gacaca courts, has shown once again, how politics and justice can become inextricably linked. <sup>x</sup> As Oomen has pointed out, the government of Rwanda has masterfully manipulated the international community with dutiful phrases like “transparency” and “good governance” while setting up a judicial process that prevents any examination of human rights violations committed by the regime itself, that has led to scores of accused seeking safety outside the country, and where voluntary attendance at gacaca hearings was made compulsory for all citizens as the empty promises of reconciliation became apparent. Oomen notes “...this particular form of justice has been made subservient to the government’s political mission.”

Meanwhile, human rights organizations have been shuttered and the government works hard to discredit any opposition.

Recently, the Economist, lauded the capture of Charles Taylor and his transfer to The Hague<sup>xi</sup>. As the President of Liberia grappled with the rebuilding of a country that was left in ruins, international pressure mounted on her to demand that Taylor be tried.

Clearly, this posed a dilemma – where should he be tried? Would a trial in Sierra Leone disrupt rebuilding plans? Where did the cost of a trial at this point fit into the magnitude of the economic needs facing Liberia, all of which would be derived from international sources? The Economist notes “...the former Liberian president’s trial may herald the end of impunity for Africa’s ‘big men’, traditionally regarded as too powerful to punish. It also marks a step forward for international justice.” But what does “the end of impunity” mean in practice? And is the “step forward” the most critical step to take for Liberia? And if not, for whom is it the most important step?

After more than a decade of contemporary international responses to criminal justice, the world community is left still with questions about the validity and utility of the mechanisms that we have initiated. Debates about domestic, international and mixed tribunals<sup>xiiixiiiixiv</sup>, the role of punishment and forgiveness<sup>xv</sup>, the value and limitations of amnesties<sup>xvi</sup>, the morality of truth commissions<sup>xvii</sup> and the relationship of these to the social reconstruction of societies are found in the literatures of several disciplines. While we recognize that international criminal law has evolved and created new standards of accountability in the area of war crimes, crimes against humanity and genocide, we raise

questions in this paper about beneficiaries, priorities, the reactionary and perhaps parochial nature of the human rights field, and offer a challenge to those who see transitional justice as the most important step in protecting the security of those whose lives are threatened by violence and terror.

Further, we suggest that part of the problem in assessing the benefits of the approaches now subsumed under the term “transitional justice” lies in an over-reaching expansion of the benefits of these mechanisms. We need to calibrate our expectations. Transitional justice is assumed by many scholars and practitioners to lead to reconciliation, to deter further abuses of human rights and even genocide, to lead to forgiveness, to combat impunity, to support a higher order of morality, to promote social reconstruction, and to alleviate the effects of trauma. In this paper, we suggest that the expectations of the international community for trials be limited to an agreement that retributive punishment is appropriate and sufficient in and of itself; that reconciliation processes may be of another order entirely and that the relationship between justice and reconciliation remains unclear. While truth commissions, trials, vetting, memorials and reparations may all play some as yet undefined role in the social reconstruction of societies, the contributions will vary depending on context and on the priorities assigned to them by those affected. Thus, attention and respect must be paid to the voices and opinions of those whose human rights have been abused.

This poses a challenge to human rights organizations that have fought long and hard for judicial interventions. Yet, given the findings of those who study transitional justice, is it

not time to open the dialogue up and to stop falling back on poorly-crafted rationalizations for traditional (primarily, Western) conceptions of what is moral and right? The involvement of African, Asian and indigenous peoples in dealing with these egregious abuses raises the possibility that we can revisit the “toolkit” and reconsider the established paradigm of transitional justice.

### **Historical Perspective**

Gary Jonathan Bass<sup>xviii</sup> in his 2000 book, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* introduces the text with a quote from Justice Robert Jackson’s opening statement at the Nuremberg Trials: “That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.” However, as Ruti Teitel notes in her 2003 paper on the genealogy of transitional justice<sup>xix</sup>, the mechanisms for responding to violations of international humanitarian law have evolved considerably since the Nuremberg trials, “The genealogical perspective situates transitional justice in a political context, moving away from essentializing approaches and thereby illuminating the dynamic relationship between transitional justice and politics over time.” Snyder and Vinjamuri (2004)<sup>xx</sup> in a pragmatic view of the successes of international justice conclude that while prevention is critical, the international community has achieved minimal success in this regard. They conclude that “legalism, focusing on the universal enforcement of international humanitarian law and persuasion campaigns to spread benign human rights norms” has

been minimally effective. They find “little support for the central empirical assumptions that underpin this approach. Trials do little to deter further violence and are not highly correlated with the consolidation of peaceful democracy.”

Thus, we seem to be at a stalemate on how best to respond to crimes of war, crimes against humanity and genocide. By this, we mean that despite the increased recognition that trials are limited in their effects and may, in fact have untoward consequences, they still remain the primary response of the international community, Iraq being the most recent example. Tension has emerged around the indictment by the International Criminal Court of five leaders of the Lord’s Resistance Army in Uganda while the government of Uganda and many of its people argue for peace negotiations and amnesty. Recently, the former King of Cambodia, Norodom Sihanouk has argued against the new UN-backed tribunal suggesting “it will cost too much money and questioned whether it was worth it since the aging officials could die before a verdict.”<sup>xxi</sup> The stakes are high and disagreement runs the risk of polarization. How do we value the cost of a Tribunal? Do we abandon victims if we argue for a response that addresses the greater good of a community? How do we know what victims want? Is there such a category as “victims” or must we personalize the category?

Transitional justice is a term of art, an academic discipline, a career, a nuisance, or simply jargon. The term has evolved since its debut in the late 1980s, as dictatorships fell in Latin America and the end of the Cold War birthed the reemergence of independent states in Eastern Europe, to refer to the challenges faced by new regimes as they put the

past behind them and transitioned from authoritarian or repressive rule to democracy. World events overtook this original conception of transitional justice – the Cold War thawed but new conflicts flared, fought as civil wars or regional conflicts which unleashed widespread bloodshed and human rights violations on a mass scale. Nevertheless, transitional justice absorbed these new developments and continued to be invoked as a necessary ingredient in any peace process. However developments regarding the length of time that “transitional” justice occurs as well as the particular measures regarded as “justice” indicate that the elasticity of the term may be stretched beyond its usefulness. Addressing the harm of the past is a *process* that may unfold over the course of years, if not decades, and the nature of the response may take multiple forms.

One of the earliest and most influential developments in the field of transitional justice took place in 1988, when the Aspen Institute convened a conference entitled: “State Crimes: Punishment or Pardon” to consider the “moral, political and jurisprudential issues that arise when a government that has engaged in gross violations of human rights is succeeded by a regime more inclined to respect those rights.<sup>xxii</sup>” The conference participants did not use the term “transitional justice,” but they identified the primary fault lines and factors that confronted new regimes brought into power after a period of authoritarian or repressive rule: whether there is moral duty for successor regimes to punish human rights violators under the former regime or whether states should emphasize measures to foster national reconciliation; the nature and extent of international legal obligations of successor states to prosecute wrongdoers; what duties

successor states had to investigate and publicize the truth of the violations that took place under the prior regime; and the extent of political discretion new, often fragile regimes could exercise legitimately in determining how to navigate the need to address the past with the political, social, and economic vulnerabilities that threaten emerging democracies.

These dilemmas endured and proliferated with the fall of the Berlin Wall in 1989, and commanded attention of increasing numbers of diplomats, scholars, and advocates. By the time Neil Kritz published his important three-volume work on transitional justice in 1995<sup>xxiii</sup>, the term had unquestionably entered the lexicon of international law and relations. There was considerable debate regarding how successor regimes should address the past, but consensus existed that the past could not be ignored. Rather, it must be addressed in an intentional manner, lest stability be purchased on the cheap, grievances left festering, and violence simmering just below the surface – arguments that are hypothetical in nature since there is no evidence to support these views. Kritz’s book documents the rich debates and proliferation of policy choices regarding transitional justice measures. In the book, the decision to seek criminal sanctions continues to occupy center-stage – becoming the fulcrum leveraging subsequent considerations. Whether to prosecute, who to prosecute, what legal barriers might prevent prosecutions, the political feasibility of prosecutions, and alternatives to criminal sanctions, and how to respond to victims presented a thicket of questions with no clear answers, but there was a recognition that universal claims of human rights and the rule of law are often in tension with the exigencies demanded by the specific context of a particular transition.

The conflicts in the Balkans and Rwanda in the early 1990s introduced a new dimension to transitional justice. Rather than emerging from a repressive or authoritarian era, these countries experienced mass violence as a result of civil wars and communal violence. Pursuit of accountability for the atrocities committed during these wars linked the cases of former Yugoslavia and Rwanda conceptually to those of emerging democracies, a development that has changed the field. In 2000, the Ford Foundation spearheaded an effort to establish the first international organization devoted exclusively to supporting transitional justice. The mission statement of that group, the International Center for Transitional Justice, announces the organization “works in societies emerging from *repressive rule or armed conflict*, as well as in established democracies where historical injustices or systemic abuse remain unresolved<sup>xxiv</sup>.” (emphasis added) Broadening the conceptual framework of transitional justice strengthened the momentum of the field but also served to obscure distinctions between types of transitions.

Accountability for past abuses has remained the galvanizing principle behind transitional justice for many in the international community, and criminal sanctions continue to be the privileged option. Human rights advocates pressed the case for prosecutions of political leaders and military architects of repression and mass violence, arguing that international law permitted – if not demanded – an end to impunity and that a legalized response strengthened the rule of law in societies emerging from repression. Debates within academic circles raged regarding the nature and extent of any legal obligation by a successor regime to prosecute abuses of the past and are not yet fully resolved. Yet a

moral and political consensus emerged within the international community to prosecute serious violations of international criminal law. The institutional expression of this commitment began with the ad hoc criminal tribunals for the former Yugoslavia and Rwanda in 1993 and 1994, continued with support for internationalized courts for Sierra Leone and East Timor, and culminated with the establishment of the International Criminal Court in [2001]. Since the discussions within the international community tended to be led by lawyers, it is perhaps, not surprising that the focus has remained on retributive justice with underlying rationales that are based upon the moral rationales for the primacy of law. While this view relies upon principles of morality, legal theory, conceptions of democracy, and theology, there has been little room for consideration of broader or alternative approaches especially those that might emerge out of different or non-Western conceptions of justice.

Surprisingly, given the normative shift toward prosecutions, the simultaneous acknowledgment within the field of transitional justice that truth commissions are an acceptable, if not in some instances preferred, alternative to criminal sanctions has been particularly striking. South Africa's choice in 1995 to address the abuses of the Apartheid regime through a truth commission became a watershed event in transitional justice. The South Africa Truth and Reconciliation Commission, with the authority to grant amnesty for political crimes if the perpetrator made a full disclosure of the events and to compensate victims, disrupted several paradigms of transitional justice. First, the South Africa case challenged conventional wisdom that amnesties necessarily buried the truth about the past. Second, subordinating prosecutions to a truth commission in which

perpetrators had to testify publicly about their crimes and victims had the opportunity to confront wrongdoers tested the notion that truth commissions necessarily trade justice for truth. Finally, South African supporters of the TRC defended the commission a preferred mechanism for transitional justice as consistent with *cultural values (ubuntu)* that prioritize social harmony and reconciliation over retribution. Thus the TRC constituted a natural extension of the restorative justice principles that framed the political agreement enabling a peaceful transition to majority rule.

The influence of these two trends in transitional justice – international promotion of prosecutions and integration of local priorities and conditions – continues. The next wave of initiatives after the ad hoc tribunals and the South African TRC has been marked by hybrid, or internationalized tribunals that integrate international law and judges into domestic adjudication of war crimes committed in the conflicts in Cambodia, East Timor and Sierra Leone. Similarly, as we have noted, Rwanda’s decision to adapt a “customary” dispute resolution process - gacaca -- to address the national challenge of holding accountable the thousands of those involved in the genocide expanded the transitional justice lexicon. East Timor also incorporated a customary dispute resolution mechanism into its efforts to respond to the wave of violence that accompanied the vote for independence. And in Sierra Leone, while controversial, the country witnessed the simultaneous operation of a truth commission and internationalized court. Currently, transitional justice might be characterized as a buffet of options for mechanisms -- driven by principles of accountability -- from which countries may pick and choose to craft a considered response to a period of widespread violence or repression. However, an

important question is whether we remain too fixed in our perspective, that the dishes on the buffet are selected by the theme of the menu that we adhere to, and that a different theme e.g. Chinese or Indian might surface an array of options that would be dramatically different. Further, current status does not allow for individuals (or countries in this case) to reframe and reinterpret the menu.

A full consideration of developments in transitional justice would not be complete simply by reviewing an abbreviated chronology of how societies and the international community have responded to the question of how to reckon with a violent or repressive past period. Indeed, a historical review of the transitional period points to the messy, incomplete, or continually contested nature of transitional justice. In some countries, implementation of transitional justice measures does not resolve the demands by some for accountability. Decisions to amnesty perpetrators, even with a truth commission, as in Guatemala or Argentina, do not staunch efforts to find justice in other venues. Or in the case of Cambodia, efforts to hold accountable the Khmer Rouge leadership for the genocide spanned decades after the group was forced from power. The extended periods of activity to implement justice raises questions about whether there are outer limits to what might reasonably be termed a period of transition and when such a transition ends.

It is time to reconsider whether the term “transitional justice” accurately captures the dynamic processes unfolding on the ground. There may be a discrete, political episode during which the regime change takes place, yet the term “transition” denotes a temporary state in which movement occurs and transports a country from the past

(violence or repression) to the future (peace/democracy). However, the reality is that progress toward social reconstruction may be halting and marking the end of a “transition” by the first free elections is a poor metric to determine a lasting peace. Broadening the aims of transitional justice to support social reconstruction reveals some noteworthy limits of current approaches of its advocates. Looking beyond the initial outburst of hope, if not euphoria that often accompanies the end of a violence or repressive period, review of how transitional justice interventions unfold over time, in different political contexts and cultures raises a number of questions. For all the talk of the importance of trials, what evidence is there that justice is more than a rhetorical talisman for social transformation; that the transitional justice paradigm that has been evolved is a magical process that may be invoked to usher in a new era? In fact, the focus on trials leads us to question whether the emergence of criminal accountability for mass atrocities has dislodged or obscured the importance of other processes and interventions needed to create an enduring platform for social stability in countries that have experienced protracted, state-sponsored violence. How should we conceptualize the relationship between prosecutions and these other interventions? And what consideration should we give to timing, or sequencing, of these events? Have we become so blinded by the popular approaches that we cannot see that our rhetoric has outstripped the evidence?

Finally, we remain wedded to the idea that justice will alleviate the pain of traumatic experience. Kirsten Campbell describes “this conception of international law ... [that presupposes] ... an intimate relationship between law, justice and trauma<sup>xxv</sup>.” Yet, as she so eloquently reveals, “the trauma of law is that it cannot represent justice. The trauma of

justice is its juridical impossibility... [Justice] requires a fundamental change to the social order which made possible the originary trauma of crimes against humanity. In this sense, justice remains the event yet to come.” While we would prefer the easy answer that trials and punishment will assuage the grief of trauma, the ideal of closure remains that – just an ideal.

Over the past decade then as the world community has seen the eruption of identity-based conflicts, several critical dimensions of post-conflict reconstruction have become apparent with important application to the concept of transitional justice. First, conceptions of justice vary both among individuals but especially among various communities and cultures; second, how communities respond to these violations may reflect mechanisms that differ considerably from Western models of justice; third, timing is a critical factor. When is the appropriate time for which kind of intervention, recognizing that priorities change over the months and years after overt conflict has ended? Fourth, responses are context-bound and heavily influenced by the relevant political dimensions; and finally, while community consultation is a key component of determining the appropriate response, we are faced with the question of how best to make that determination. We must ask whether and when local desires should trump international law or should we assume that the universal application of international humanitarian law must not be transgressed?

**What do we know about attitudes towards justice? Evidence from the field.**

In this paper, we review data from several countries that have confronted these questions – Bosnia-Herzegovina, Croatia, Serbia-Montenegro, Rwanda, Uganda, and Iraq with a specific focus on how those affected think about justice and what it means for their futures. Over the last decade we have gathered these data using a variety of research methods and the findings raise questions about the goals of trials, the beneficiaries of trials, motivations for justice, and the on-going tension between rich and poor countries, the North and the South. Our specific focus in this section is the range of attitudes towards justice, the types of judicial mechanisms and what we can learn about how these attitudes may relate to the social reconstruction of countries after mass violence.

### **Bosnia-Herzegovina, Croatia and Serbia**

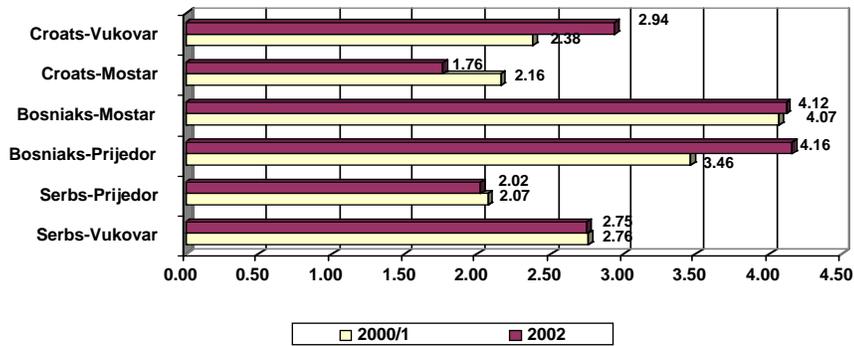
While we will not review the results of these studies in detail, we will highlight some of the findings to illustrate the need to pay attention to local attitudes.<sup>1</sup> Using random sample survey techniques administered at two time periods in three different sites, we were able to gauge how samples of the local populations of these countries viewed legal justice. The results illustrated that attitudes are influenced by the identity group to which one belongs and its position within the country after peace has been established; that these attitudes are not fixed – they change over time; that they are heavily influenced by prior personal relationships with “the enemy” and beliefs in retributive punishment.

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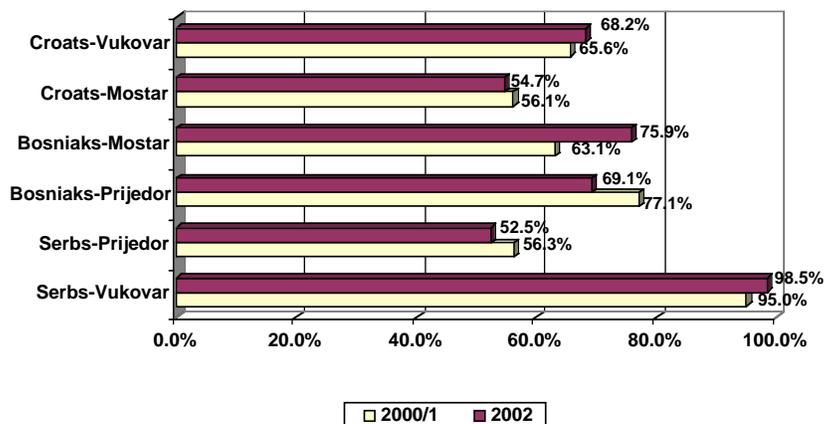
<sup>1</sup> For a complete description of these studies and associated tables, see Stover, E and Weinstein, HM (eds.), 2004, *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*. Cambridge: Cambridge University Press, pp. 183-205.

Importantly, the relationship of legal justice to reconciliation is not straightforward but influenced as well by multiple factors. Attitudes towards the ICTY (measured on a 1-5 scale where 5 is absolute acceptance) were related not surprisingly to identity group, war experience and postwar geography but also to the ability of a group to acknowledge its own war criminals. These as well have an associated time dimension. Finally, our data indicate that there was no correlation between the level of traumatic experience and the desire for war crimes trials, nor with positive attitudes towards the ICTY.

**Attitudes toward the ICTY and War Crimes**



*Figure 7: Attitudes toward the ICTY*



*Figure 8: Admission of war crimes committed by own nationality*

As we explored these surprising findings, our ethnographic studies revealed that justice is not always defined as “trials” or legal interventions. For some, “The greatest justice for me would be to let me live and die in peace there where I was born”; for others, “Punishing criminals would bring satisfaction.” We conclude that it is important to recognize that we cannot make sweeping statements about what “victims” want; that view in itself re-victimizes those who have lost so much.

## **Rwanda**

In Rwanda, we sampled more than 2000 people. Here we examined more closely the attitudes of the Rwandans towards specific legal interventions – the ICTR, domestic

genocide trials and gacaca.<sup>2</sup> As in the Balkans, our findings suggest that attitudes towards legal interventions are not straightforward but are influenced by many social, demographic, and economic factors as well as security. The experience of trauma appears to influence attitudes towards but not in any clear-cut manner. Some of the interesting findings were that 92% of respondents supported the use of trials to punish the guilty but often espoused different goals e.g. rebuilding trust, or recognizing the suffering of survivors. However, ethnic differences emerged e.g. Hutu had more positive views of the ICTR than Tutsi, the principal victims. Importantly, some 87% of respondents had very little knowledge if at all about the ICTR and of those who did, only 32% were positive. At the time of the study, there was significantly greater support for gacaca than the other two forms of legal intervention. Another important dynamic was that the more educated were significantly less supportive of any of the approaches. The association of traumatic experience with attitude to trials was also unclear – the more the respondents had been exposed to traumatic events, the more negative they were to domestic trials, especially gacaca and the more positive they were towards the ICTR. If respondents reported symptoms of post-traumatic stress disorder (a proxy for emotional effects in our study), the more negative they were towards classical domestic trials. Finally, while statements suggested support for the idea that trials could contribute to reconciliation (as we defined it), statistical analysis found little relationship between attitudes towards these trials and openness to reconciliation.

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<sup>2</sup> See Stover and Weinstein, *supra*, pp. 206-225. Also see Pham, P, Weinstein, HM, and Longman, T. Trauma and PTSD Symptoms in Rwanda: Implications for Attitudes Toward Justice and Reconciliation. *JAMA* 292(5):602-612, August 4, 2004.

TABLE 5: ODDS RATIOS (95% CONFIDENCE INTERVAL) ATTITUDES TOWARD JUDICIAL PROCESSES AND RECONCILIATION ACCORDING TO TRAUMATIC EXPOSURE LEVEL			
Outcome	Mean Traumatic Exposure Level (Standard Error)	Unadjusted Odds Ratio (95% C.I.)	Adjusted Odds Ratio* (95% C.I.)
<b>ATTITUDES TOWARD JUDICIAL RESPONSES</b>			
ICTR		NS	1.10 (1.04, 1.17)
Positive	3.35 (0.06)		
Negative	3.24 (0.05)		
Rwandan Trial		NS	0.90 (0.84, 0.96)
Positive	3.16 (0.04)		
Negative	3.56 (0.06)		
Gacaca		0.81 (0.73, 0.89)	0.80 (0.72, 0.89)
Positive	3.24 (0.04)		
Negative	3.79 (0.13)		
<b>OPENNESS TO RECONCILIATION</b>			
Social Justice		NS	NS
Support	3.35 (0.05)		
Oppose	3.18 (0.06)		
Non-violence		NS	0.92 (0.87, 0.98)
Support	3.19 (0.05)		
Oppose	3.19 (0.05)		
Support Community		0.86 (0.81, 0.90)	0.92 (0.87, 0.98)
Support	3.08 (0.05)		
Oppose	3.49 (0.05)		
Interdependent		0.87 (0.82, 0.93)	0.86 (0.81, 0.92)
Yes	3.18 (0.05)		
No	3.54 (0.06)		

TABLE 9: CONTRIBUTION OF ICTR AND RWANDAN TRIALS TO RECONCILIATION		
	ICTR (%)	Rwandan Trials (%)
No Contribution	481(32.0%)	78 (4.0%)
Limited Contribution	208(13.8%)	110(5.6%)
Moderate Contribution	370(24.6%)	317(16.2%)
Significant Contribution	324(21.6%)	787 (40.3%)
Very Significant Contribution	119(7.9%)	660(33.8%)
Total with Opinion	1502 (71.9%)	1952(93.4%)
Not informed	588(28.1%)	138(6.6%)
Total Responses	2090	2090
Chi-Square= 467.59, df=25, p-value<0.001		

In Rwanda, we are left with the conclusion that while support existed to hold trials within the country and even outside, this support was influenced by politics, war experience, the type of legal intervention that was contemplated, lack of information, ethnicity, education and traumatic exposure. However, the relationships are far from clear and when looked at in relation to their contribution to reconciliation, the association becomes murky indeed.

## **Iraq**

In Iraq, we examined attitudes towards transitional justice mechanisms three months after the US-led invasion of the country. Primarily because of security issues and the difficulty in finding local partners, our study employed a qualitative methodology. In July and August, 2003, we conducted extensive interviews and focus groups with representatives from a broad spectrum of the Iraqi population. During the study, 395 people were polled through 38 individual interviews and 49 focus groups in north, central and southern Iraq.<sup>3</sup> Respondents included members of all ethnic, religious and political groups, victim groups and members of civil society organizations and leaders of religious and political organizations.

At the time of the study, Iraqis were united in their hatred of the Saddam Hussein regime, “The whole of Iraq was a jail”. While the different ethnic groups in the country emphasized the human rights abuses that were specific to their identity group, they pled common cause with their countrymen in their rage against the arbitrary nature of the

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<sup>3</sup> Human Rights Center and International Center for Transitional Justice (2004). *Iraqi Voices: Attitudes Toward Transitional Justice and Social Reconstruction*. Occasional Paper Series, New York: International Center for Transitional Justice.

violent regime, “Our life was full of lies and fear.” Our research showed that for Iraqis, concepts of justice focused on what constituted a just society and this was expressed primarily as everything the old order was not. There was common agreement that perpetrators should be held accountable through legal trials but this was associated with a strong sense that a trial process must be fair and legitimate, in accordance with the law, transparent, and Iraqi-based with international support. There was a profound distrust of United Nations involvement and great support for the United States to distance itself in favor of international input. While many believed strongly in retributive justice and even vengeance, Iraqis expressed a hierarchy of who should be tried and supported the death penalty for those found guilty. While many recognized and encouraged a process of memorialization, education and other forms of recording historical memory, there was little knowledge of truth commissions or more formal mechanisms of remembering the past.

In Iraq, shortly after the release of the country from the iron grip of a ruthless dictatorship, rage and pain suffused the populace. Yet, most had an understanding that revenge would only recapitulate the violence of the past. In this country, support for legal interventions was clear with the important caveat that it be according to international standards, that the Iraqi system of justice be supported, and that international input be minimized.

## **Uganda**

In December 2003, President Museveni of Uganda asked the International Criminal Court (ICC) to take up the problem of the twenty-year old war by the Lord's Resistance Army against the people of Northern Uganda. Marked by two decades of endemic violence and displacement of 1.6 million people, the abduction of children and adults, and mass mutilations, the war has recently garnered world attention because of the horrific nature of violence. At the same time, the Government of Uganda has pursued a peace process that would involve amnesties in the search for a way to end the conflict<sup>4</sup>. The intervention of the International Criminal Court sparked controversy among civil society organizations in Northern Uganda. There were conflicting reports about what the Acholi (the major population group) and others in the North wanted as an outcome and what process would best meet their priorities and contribute to peace. Some argued that traditional reintegration and reconciliation mechanisms involving ceremonies such as the *mato oput* and "bending of the spears" were best adapted to deal with those who committed atrocities. Further, it was argued that the involvement of the ICC and the threat of prosecution and trials would jeopardize peace talks between the government of Uganda and the LRA.

An initial assessment conducted in March 2005 found that population attitudes toward forgiveness, amnesty, trials, and reconciliation were more complex and not properly represented in this debate. A systematic population-based survey was subsequently

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<sup>4</sup> On August 27, 2006, the government of Uganda and the LRA signed an agreement to cease hostilities. As part of an overall peace settlement, President Museveni has indicated that he will offer a total amnesty to the LRA leadership.

implemented to assess the population priorities and their attitudes toward peace and justice<sup>5</sup>. The preliminary results from that assessment confirmed the initial findings.

When we asked 2, 550 Northern Ugandans, “Is it important for you that persons responsible for abuses in Northern Uganda are held accountable for their actions?” more than three-quarters of those surveyed responded “yes”. Further, when we asked what they would like to see happen to the LRA leaders who were responsible for the mass atrocities, more than one-half (66%) wanted punishment in the form of trials, imprisonment, and execution. To add to the complexity, 71% stated that they would accept amnesty if it were the only road to peace but if there were peace, 54% would prefer peace with trials over peace with amnesty (46%). Surprisingly, however, Acholi respondents were more willing to accept amnesty than the Lango and Teso (the response pattern between districts also confirmed this finding). In addition, the more education the respondents had, the more likely they were to accept amnesty rather than trials. More education was also associated with the belief that former enemies can live together. The greater the exposure to trauma, the more the respondents wanted to have accountability and trials. The only exception to this relationship was that exposure to more trauma was associated with the belief that former enemies could live together

*Table 4 – What would you like to see happen to those LRA leaders who are responsible for human rights violations?*

<b>Districts</b>				
<b>Gulu</b> (n= 618)	<b>Kitgum</b> (n = 638)	<b>Lira</b> (n = 652)	<b>Soroti</b> (n= 642)	<b>Total</b> (N= 2550)

<sup>5</sup> International Center for Transitional Justice and Human Rights Center, *Forgotten Voices: A Population-Based Survey on Attitudes About Peace and Justice in Northern Uganda* (2005), ICTJ:New York.

Forgive (reconcile and reintegrate)	229 (37%)	160 (25%)	50 (8%)	114 (18%)	553 (22%)
Confront and confess to community	21 (3%)	19 (3%)	6 (1%)	13 (2%)	59 (2%)
Compensate Victims	3 (1%)	8 (1%)	2 (0.3%)	13 (2%)	26 (1%)
Punishment (Trial and Imprison or Kill)	271 (44%)	392 (61%)	575 (88%)	439 (68%)	1677 (66%)
Other	94 (15%)	59 (9%)	19 (3%)	63 (10%)	235 (9%)

Average Sampling Error is +/-3 Percentage Points

Question	Is it important for you that person responsible for abuses in Northern Uganda are held accountable for their actions?			If there are two choices – peace with amnesty or peace with trials, which one would you choose?		If the only road to peace were amnesty, would you accept that?	
	Yes	No	Don't Know	Peace with Amnesty	Peace with Trials	Yes	No
<b>All</b>	<b>77.4</b>	<b>17.9</b>	<b>5.7</b>	<b>45.9</b>	<b>54.1</b>	<b>70.6</b>	<b>29.4</b>
<b>Gender</b>							
Male (%)	80.6	17.2	2.2	48.0	52.0	73.1	26.9
Female (%)	74.3	18.6	7.1	43.9	56.1	68.4	31.6
<b>Ethnicity</b>							
Acholi (%)	75.8	19.0	5.2	58.4	41.6	81.0	19.0
Lango (%)	86.1	11.9	2.1	34.5	65.5	63.6	36.4
Teso (%)	65.7	26.2	8.2	44.5	55.5	64.4	35.6
<b>District</b>							
Gulu (%)	71.6	22.7	5.7	65.2	34.8	86.1	13.9
Kitgum (%)	82.3	13.4	4.4	46.9	53.1	73.0	27.0
Lira (%)	85.9	11.9	2.2	34.3	65.7	63.4	36.6
Soroti (%)	64.1	27.4	8.5	43.7	56.3	63.6	36.4
<b>Traumatic Exposure</b>							
Exposure (Mean # Events)	5.09	4.62	4.73	4.75	5.20	4.93	5.15
<b>Education</b>							
No School (%)	75.2	16.1	8.7	39.3	60.7	66.5	33.5
Some Primary (not completed) (%)	78.3	17.4	4.4	44.7	55.3	70.8	29.2
Primary and/or some Secondary (%)	79.6	18.1	2.3	51.6	48.4	73.2	26.8
Completed Secondary and above (%)	74.9	22.7	2.4	52.3	47.7	73.4	26.6

What these studies show in Uganda is the complexity of the relationship between justice, peace, and reconciliation. Attitudes were modified by ethnicity, geography, education and exposure to traumatic events. The data offer further evidence for the importance of

considering a range of solutions and for understanding not only the nature of the conflict but also the characteristics of the populations affected by the violence.

## **Discussion**

Each of these countries was examined at a particular point in time and the events that led up to the “transitional period” were quite different. In the Balkan countries, an internationally supported peace agreement (the 1995 Dayton Accord) had set out a political mechanism to assure peace and stability; in Rwanda, a victorious army, the Rwandan Patriotic Army assumed power in 1994; in Iraq, we interviewed our respondents three months after an international invasion and occupation had ended decades of human rights abuses, and in Uganda, the survey was carried out in the midst of on-going atrocities. There are distinct similarities and differences among the countries that we studied. In all, one’s identity group strongly influences attitudes towards trials, as does local politics. Lack of information about legal structures and alternatives influence attitudes in Rwanda, Iraq, and Uganda. In these countries, the legal institutions suffer from a profound lack of confidence in their fairness and capability to administer justice. Time is an important dimension – as we saw in the Balkans, attitudes towards trials, the ICTY and toward the former enemy changed over time. In Iraq, at the time of the survey, there appeared to be a commitment to a unified country – a belief that clearly has changed in the intervening months. In Rwanda, the initial and overwhelming enthusiasm for gacaca has been tempered by its one-sided approach to justice, compulsory attendance and threats against those accused. In all of these settings, the involvement of the international community is viewed with ambivalence at best to outright rejection.

Definitions of justice vary with country although retributive justice appears to be very important to some groups in all. How, when and by whom it is meted out remains an open question. While there was no clear relationship between trauma experience and desire for trials in the Balkans, there were some associations in Rwanda particularly to type of trial. In Uganda, there is a relationship between exposure to trauma and desire for trials but once again, this is not clearcut e.g. the Acholi (the most victimized) most supported amnesty.

Finally, local politics -- the legacy of the Dayton Accord, the RPF victory and government in Rwanda, the US-led invasion in Iraq, the relationship between President Museveni's government and the people of northern Uganda—profoundly shape the responses of identity groups to whatever form of transitional justice is proposed. And these attitudes are influenced, in turn, by culture and tradition. These data illustrate the futility of simplistic responses to mass violence. Each country and culture must be considered separately and interventions be developed that make sense for the populations of concern. This raises the question of research methodologies.

How do we find out what people think? How do we know what people want? The most accurate response to those questions would be that all methods have limitations. At best, we can obtain an approximation of the beliefs or attitudes of a population. In our studies, we have incorporated both quantitative (survey) methods as well as qualitative methods. Each has its strengths and each has its critics<sup>xxvi</sup>. We have routinely chosen a combination of methods with the recognition that while all are imperfect, we can minimize the

weaknesses by building on their strengths. In a contested arena like transitional justice, our goal must be to move beyond parochial viewpoints and untested assumptions to examine data with an open mind and the goal of responding to the needs of those who have suffered.

### **Closing the Gap: Transformative Justice for Survivors of Human Rights Violations**

“ The thing is, peace first. Justice will come later. He has violated so many people’s rights, but people have weighed a lot and found that peace should be paramount. And if he hears that he is wanted, he will not come out and that is no peace. I think that what happens to Kony after he has come out and peace achieved will be another thing.”

Acholi woman<sup>xxvii</sup>

In this paper, we have mounted several challenges to established rhetoric about transitional justice. First, we cannot assume that legal justice is desired or the highest priority in all countries after periods of repression or violence. Culture and tradition may lead to different definitions of justice and to different paths for achieving it; second, there is no unitary concept of victimhood - there are many types of victims and they do not think the same about the topic of justice; three, justice can be defined broadly and retributive justice is only one part of that definition. Attitudes towards legal justice are influenced by trust in the pre-existing legal institutions and the political dynamics that operate in the country; fourth, many involved with international justice have lost sight of its goals in favor of developing and maintaining an international system of criminal law

over and above what might be the needs and desires of the victims of abuse. Positive effects that might emerge are sabotaged by UN policymakers – seen by many as incompetent - and bureaucratic procedures, insensitive and inexperienced lawyers, and systems that are out of touch with events in the field. Fifth, the primacy of Western legal systems and thinking over that of other forms of legal intervention (be they civil law or indigenous mechanisms) must be examined. Sixth, the equation of justice with some ethereal conception of psychological catharsis must be challenged. In this respect, Stover’s recent book about witnesses<sup>xxviii</sup> importantly narrows the expectations for what trials may offer. Seven, international justice that is isolated from the development of a competent domestic judicial system sabotages an important dimension of building a democratic society.<sup>xxix</sup> Finally, we must stop the equation of justice with reconciliation and acknowledge that many steps may be taken to rebuild societies. At this point, we do not know which are most critical or even if there is any universal program to implement. Our studies in the Balkans, Rwanda, Iraq and Uganda reveal that priorities for post-conflict justice vary with identity group, type of violence and human rights abuses, country, culture and time. If transitional justice is indeed to become transformative, then the “toolkit” must be expanded and transformed into interventions that reflect a broadened view of responses to human rights violations. Dilemmas abound – what do we do with perpetrators for whom trials may be put off to another time? What about those for whom trials are the most important next step? How do we judge the moral choice – trials for individual victims versus the greater good of a peaceful society? Is there “no peace without justice or “no justice without peace”? However, we suggest that the lessons of the last twenty years put us in a better position to reframe the questions and to explore

new options. The ultimate challenge will be our ability to question assumptions and to hear what the beneficiaries of justice believe to be important.

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<sup>i</sup> Quoted in Margaret Besheer, “Milosevic Death a Blow to Victims and Tribunal,” *Voice of America News* (March 11, 2006). Available at <http://www.voanews.com/english/2006-03-11-voa24.cfm>.

<sup>ii</sup> UN Security Council, U.N. Doc.S/2004/616 (2004). Report of the Secretary-General, “The rule of law and transitional justice in conflict and post-conflict societies.”

<sup>iii</sup> David Cohen, *Indifference and Accountability: The United Nations and the Politics of International Justice in East Timor* (Honolulu: East-West Center Special Report #9, 2006).

<sup>iv</sup> Joseph Nevins, *A Not-So-Distant Horror: Mass Violence in East Timor* (Ithaca: Cornell University Press, 2005).

<sup>v</sup> “Searching for Truth and Reconciliation in Sierra Leone: An Initial Study of the Performance and Impact of the Truth and Reconciliation Commission,” The Sierra Leone Working Group on Truth and Reconciliation, February, 2006.

<sup>vi</sup> James Cockayne, “The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals.” *Fordham International Law Journal* 28 (2005):616.

<sup>vii</sup> For a trenchant critique of international courts, see Cobban Helena, “International Courts.” *Foreign Policy* (March-April, 2006): 22-28.

<sup>viii</sup> Rosalind Shaw, *Rethinking Truth and Reconciliation Commissions: Lessons From Sierra Leone* (Washington, D.C.: United States Institute of Peace Special Report 130, 2005).

<sup>ix</sup> The banners of the South African Truth and Reconciliation Commission proclaimed that “Revealing is Healing”. See Brandon Hamber, “Does the Truth Heal? A Psychological Perspective on Political Strategies for Dealing with the Legacy of Political Violence.” In Nigel Biggar (ed). *Burying the Past: Making Peace and Doing Justice After Civil Conflict* (Washington, D.C.: Georgetown University Press, 2001) pp 131-148.

<sup>x</sup> See Barbara Oomen, “Donor-Driven Justice and Its Discontents: The Case of Rwanda,” *Development and Change* 36(5) (2005): 887-910, Timothy Longman and Allison Des

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- <sup>xi</sup> "Out of Africa, into The Hague," *The Economist* (6/24/06): 53
- <sup>xii</sup> Stephen Roper and Lillian A. Barria, "Assessing the Record of Justice: A Comparison of Mixed International Tribunals versus Domestic Mechanisms for Human Rights Enforcement," *Journal of Human Rights* 4 (2005): 521-536.
- <sup>xiii</sup> Eric A. Posner and Adrien Vermeule, "Transitional Justice As Ordinary Justice," *Harvard Law Review* 117 (2004): 761.
- <sup>xiv</sup> Simon Chesterman, *Justice Under International Administration: Kosovo, East Timor, and Afghanistan* (New York: International Peace Academy Special Report, 2002).
- <sup>xv</sup> Raquel Aldana, "A Victim-Centered Reflection on Truth Commissions and Prosecutions as a Response to Mass Atrocities", *Journal of Human Rights* 5 (2006): 107-126.
- <sup>xvi</sup> Jeremy Sarkin and Erin Daly, "Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies," *Columbia Human Rights Law Review* 35(2004): 661.
- <sup>xvii</sup> Rajeev Bhargava, "Restoring Decency to Barbaric Societies." I R.I. Rotberg and D. Thompson, eds. *Truth v. Justice: The Morality of Truth Commissions* (Princeton: Princeton University Press, 2000), 45-67.
- <sup>xviii</sup> Gary J. Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton, N.J.: Princeton University Press, 2001).
- <sup>xix</sup> Ruti G. Teitel, "Transitional Justice Genealogy," *Harvard Human Rights Journal* 16 (2003): 69-94.
- <sup>xx</sup> Jack Snyder and Leslie Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice," *International Security* 28(3) (2003/4): 5-44.
- <sup>xxi</sup> "Cambodia's former king questions necessity of Khmer Rouge tribunal." *Associated Press* available at [http://english.ohmynews.com/ArticleView/article\\_view.asp?no=306230&rel\\_no=1](http://english.ohmynews.com/ArticleView/article_view.asp?no=306230&rel_no=1) Http
- <sup>xxii</sup> Aspen Institute, "State Crimes: Punishment or Pardon," Papers and Reports of the Conference, Wye Center, Maryland, November 4-6, 1988.
- <sup>xxiii</sup> Neil Kritz, ed. *Transitional Justice: How Emerging Democracies Reckon With Former Regimes*, vols I-III (Washington, D.C.: United States Institute of Peace Press, 1995).
- <sup>xxiv</sup> International Center for Transitional Justice, Mission Statement available at <http://www.ictj.org/en/about/mission/index.html>.
- <sup>xxv</sup> Kirsten Campbell, "The Trauma of Justice," Paper presented at *Human Frailty: Rights, Ethics and the Search for Global Justice*, University of west England, 2001.
- <sup>xxvi</sup> See Shaw supra. See also Helena Cobban, *Just World News* at <http://justworldnews.org/archives/001115.html>.
- <sup>xxvii</sup> Lucy Hovil and Joanna R. Quinn, "Peace First, Justice Later: Traditional Justice in Northern Uganda" (Kampala: Refugee Law Project Working Paper No.17, 2005).
- <sup>xxviii</sup> Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (Philadelphia: University of Pennsylvania Press, 2005).

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<sup>xxix</sup> The Human Rights Center & the International Human Rights Law Clinic, University of California, Berkeley & The Centre for Human Rights, University of Sarajevo, *Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors*, 18 Berkeley Journal of International Law 102, 133 (1999) and Laurel E. Fletcher and Harvey M. Weinstein, “A world unto itself? The Application of international justice in the former Yugoslavia” In E. Stover and H. Weinstein, eds. *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge: Cambridge University Press, 2004), 29-48.

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