

TRANSITIONAL JUSTICE

Philip Alston and Michael Reed-Hurtado

Tuesdays, 4.00 p.m. – 5.50 p.m.

SYLLABUS, FALL 2017

Transitional justice as a body of law and practice is firmly rooted in international criminal law, international humanitarian law and human rights law, but it has also taken on a life of its own over the past thirty years. Today, many of the deepest challenges confronted in the context of post-conflict and post-authoritarian settings are being debated and negotiated within frameworks shaped by the notion of transitional justice. The seminar will explore the implications of the principal elements of the notion – justice, truth, reparations, and guarantees of non-recurrence – both in theory and in practice. Particular attention will be given to case studies of Colombia and Sri Lanka which are very timely and serve to highlight many of the major challenges. In addition to considering the role of courts and prosecutions in transitional contexts, the seminar will consider alternative mechanisms for promoting reconciliation and accountability, such as truth commissions, reparations, restorative justice and vetting programs. Consideration will also be given to key questions that arise, such as the relationship between truth and justice, the relationship between ‘ordinary’ and ‘transitional’ justice, and the compatibility of full respect for human rights with the adoption of transitional measures.

The course will be co-taught by Philip Alston and Michael Reed-Hurtado. Reed-Hurtado is an experienced transitional justice practitioner who is currently advising the Office of the UN High Commissioner for Human Rights in relation to the peace process in Colombia and previously taught for several years at Yale University.

Course materials

The principal sources are the materials that will be distributed for each class. The ‘other relevant texts’ suggested in the syllabus are mainly for those who might write a paper on the relevant issue.

Office hours:

for Philip Alston: 9.00 – 11.00 on Thursdays, sign-up with Brianne Cuffe, VH 310 (cuffeb@mercury.law.nyu.edu).

for Michael Reed-Hurtado, 2.30 p.m. to 3.30 p.m. on Tuesdays, and by appointment (mjr15@nyu.edu)

Assessment

For this course you are required to write a paper for 2 credits (or 3 if an additional writing credit is approved). The regular 2 credit paper should be at least 6,500 words in length; a 3 credit paper must be at least 10,000 words. Both figures include footnotes.

Central to the development of the seminar is the production of a research paper on a topic relevant to the course (and approved by the instructors). We are available to guide your research and writing process. The deadlines for the research paper are as follows:

Friday, Sept. 29 – abstract due. It should identify a specific research question, describe the methodology, and outline the proposed structure of the paper

Tuesday, Oct. 31 – revised abstract and outline due

Friday, Dec. 22 – final paper due

The footnotes should follow any one of the standard style formats, but it need not be Blue Book. The paper should be sent to philip.alston@nyu.edu You do not need to submit a hard copy. You will receive an email acknowledgement in return.

Final grades for the course will also take account of class participation.

Course Outline and Readings

Session 1, 2017.09.05

Transitional justice: origins and concepts

Materials:

- UN Secretary-General, ‘The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies’, UN Doc S/2004/616 (23 August 2004).
- Thomas Obel Hansen, ‘The Time and Space of Transitional Justice,’ in Cheryl Lawther, Luke Moffett and Dov Jacobs (eds.), *Research Handbook on Transitional Justice* (Edward Elgar Publishing Limited: 2017), hereinafter “Lawther, Handbook”, p. 34.
- Lars Waldorf, ‘Institutional Gardening in Unsettled Times: Transitional Justice and Institutional Contexts,’ in Roger Duthie and Paul Seils (eds.), *Justice Mosaics. How Context Shapes Transitional Justice in Fractured Societies* (International Center for Transitional Justice, ICTJ: 2017), hereinafter “ICTJ”, Ch. 1, p. 40.

Other relevant texts:

- Paige Arthur, ‘How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice’, (2009) 31 *Human Rights Quarterly* 321-367.
- Christine Bell, “Transitional Justice, Interdisciplinarity and the State of the ‘Field’ or ‘Non-Field’”, *International Journal of Transitional Justice*, Vol. 3, 2007, 5-27.

Session 2, 2017.09.12

Original and ongoing debates: Peace versus Justice; and Transitional Justice and the Rule of Law

Materials:

- Anonymous, “Human Rights in Peace Negotiations,” *Human Rights Quarterly*, Vol. 18, No. 2 (May, 1996), pp. 249-258.
- Christine Bell, ‘Contending with the Past: Transitional Justice and Political Settlement Processes,’ in *ICTJ*, ch. 2.
- Megret & Vagliano, ‘Transitional Justice and Human Rights,’ in *Lawther Handbook* p. 95
- Pdraig McAuliffe, ‘Transitional Justice’s Impact on Rule of Law: Symbol or Substance,’ in *Lawther Handbook*, p. 74

Other relevant texts:

- Aryeh Neier, “Peace vs. Justice: Is there a Conflict? If so, What is to be Done?” Emilio Mignone Lecture, NYU, October 15, 2008.
- Carlos Nino, ‘The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina’ (1991) 100 *Yale Law Journal* 2619.
- Diane Orentlicher, ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime’ (1991) 100 *Yale Law Journal* 2537.
- Michael P. Scharf and Paul R. Williams, “The Functions of Justice and Anti-Justice in the Peacebuilding Process,” *Case W. Res. J’ Int’l L.* 35 (2003): 161-190.
- Forsythe, David P. ‘Human Rights and Mass Atrocities: Revisiting Transitional Justice’ (2011) 13 *International Studies Review* 85-95.

Session 3, 2017.09.19

A strange mix of justice and peace: paramilitary demobilization and the appearance of TJ in Colombia

Materials:

- View: Juan Lozano and Hollman Morris, *Impunity* (2010).
- Rodrigo Uprimny and Ma. Paula Saffon, “Uses and Abuses of Transitional Justice Discourse in Colombia” in Morten Bergsmo and Pablo Kalmanovitz (eds.), *Law in Peace Negotiations* (Oslo: FIHCL and Prio 2009), p. 217-243.
- Jamie Rebecca Rowen, “‘We Don’t Believe in Transitional Justice:’ Peace and the Politics of Legal Ideas in Colombia,” 42 *Law and Social Inquiry* (2017) 622.
- Kimberly Theidon, “Reconstructing Masculinities: The Disarmament, Demobilization, and Reintegration of Former Combatants in Colombia” (2009) 31 *Human Rights Quarterly*.

Other relevant texts:

- Catherine C. LeGrand, “The Colombian Crisis in Historical Perspective,” *Canadian Journal of Latin American and Caribbean Studies*, Vol. 28, No. 55/56 (2003), p. 165-209.

- Law No. 975, 25 July 2005, Issuing provisions for the reincorporation of members of illegal armed groups who effectively contribute to the attainment of national peace, and other provisions for humanitarian accords are issued.
- Pablo de Greiff, “Theorizing Transitional Justice” in *Transitional Justice, Nomos Vol. LI* Melissa S. Williams, Rosemary Nagy, and Jon Elster, eds., (NY: NYU Press, 2012), pp. 31-77.
- M. Reed Hurtado, “Transitional Justice Under Fire: Five Reflections on the Colombian Case,” in Amanda Lyons and M. Reed Hurtado (Coord.), *Contested Transitions: Dilemmas of Transitional Justice in Colombia and Comparative Experience* (Bogotá: ICTJ 2010), p. 87-114.

Session 4, 2017.09.26

Truth Commissions

Materials:

- View: Pamela Yates, *State of Fear* (Skylight Pictures, 2005).
- José Zalaquett, “Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations,” *Hastings Law Journal* (1992): 1425-1438.
- Pablo de Greiff, UN Special Rapporteur on Truth, Justice, Reparations Guarantees of Non-Recurrence, report to the Human Rights Council, 2013, A/HRC/24/42 (on truth commissions).
- Alison Bisset, “Truth Commissions and Trials within the Transitional Justice Frame,” ch. 1 of *her Truth Commissions and Criminal Courts*, (New York: Cambridge University Press, 2015), pp. 9-43.
- Cheryl Lawther, ‘Transitional Justice and Truth Commissions,’ in *Lawther, Handbook*, Ch. 17, p. 342.

Other relevant texts:

- Marcos Ancelovici & Jane Jenson, ‘Standardization for Transnational Diffusion: The Case of Truth Commissions and Conditional Cash Transfers,’ *7 International Political Sociology* (2013) 294.
- Jennifer Llewellyn, ‘Truth Commissions and Restorative Justice’ in Gerry Johnstone and Daniel W. Van Ness (eds), *Handbook of Restorative Justice* (Willan Publishing, Cullompton 2007) 351-372.
- Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2nd Ed., Routledge, London 2010), ch. 2 and 3.

Session 5, 2017.10.03

Denial of atrocities and transitional justice

Materials:

- Stanley Cohen, *States of Denial* (Cambridge: Polity 2001), Ch. 1 and 4, p. 1-20 and 76-116.

- M. Reed Hurtado, 'Killing Through the State in the Colombian War and Getting Away With Murder: An Exploration of Organizational Crime and Its Denial' in Roland Moerland, Hans Nelen, Jan C.M. Willems (eds.), *Denialism and Human Rights* (Netherlands: Intersentia 2016), p. 285-314.
- Sidney Leclercq, 'Injustice through Transitional Justice? Subversion Strategies in Burundi's Peace Process and Postconflict Developments,' *International Journal of Transitional Justice*, (advance, 2017).

Other relevant texts:

- Stanley Cohen, *States of Denial* (Cambridge: Polity 2001), Ch. 3, 51-75.

Session 6, 2017.10.10

Criminal Accountability and TJ (1): amnesties and the ongoing quest for justice

Materials:

- Tom Hadden, 'Transitional Justice and Amnesties,' in Lawther, *Handbook*, Ch. 18, p. 358.
- Rachel Kerr, 'Transitional Justice in Post-Conflict Contexts: Opportunities and Challenges,' in ICTJ, ch. 3, p.
- Inter-American Court of Human Rights, *Case of the Massacres of El Mozote and Nearby Places v. El Salvador*, Judgment, October 25, 2012 (excerpt); and Concurrent vote by Judge Diego García-Sayán.

Other relevant texts:

- OHCHR, *Rule-of-Law Tools for Post-Conflict States, "Amnesties"* (2009).
- Transitional Justice Institute, University of Ulster, *The Belfast Guidelines on Amnesties and Accountability* (2013).
- República de Colombia, *Ley 1820 del 30 de diciembre de 2016 "por medio de la cual se dictan disposiciones sobre amnistía, indulto y tratamientos penales especiales, y otras disposiciones"*.

Session 7, 2017.10.17

Criminal Accountability and TJ (2): effective prosecutions

Materials:

- Pablo de Greiff, UN Special Rapporteur on Truth, Justice, Reparations Guarantees of Non-Recurrence, report to the Human Rights Council, 2014 A/HRC/27/56 (on prosecutorial strategies).
- Mark A. Drumbl, *Atrocity, Punishment and International Criminal Law* (New York: Cambridge University Press 2007), p. 123-148.
- Aaron Fichtelberg, 'Transitional Justice and the End of Impunity: Hybrid Tribunals,' in Lawther, *Handbook*, Ch. 16, p. 328.

Other relevant texts:

- Mark A. Drumbl, *Atrocity, Punishment and International Criminal Law* (New York: Cambridge University Press 2007), p. 23-45.
- Ellen L. Lutz and Caitlin Reiger (eds.), *Prosecuting Heads of State* (New York: Cambridge University Press 2009), Introduction, p. 1-24.
- Naomi Roht-Arriaza, "Prosecutions of Heads of State in Latin America" in Ellen L. Lutz and Caitlin Reiger (eds.), *Prosecuting Heads of State* (New York: Cambridge University Press 2009), p. 46-76.
- Kai Ambos, "The Fujimori Judgment, A President's Responsibility for Crimes Against Humanity as Indirect Perpetrator by Virtue of an Organized Power Apparatus," *Journal of International Criminal Justice* 9 (2011), p. 137-158.

Session 8, 2017.10.24

Reparations

Materials:

- Luke Moffett, 'Transitional Justice and Reparations: Remediating the Past,' in Lawther, *Handbook*
- Heidi Rombouts, Pietro Sardaro and Stef Vandeginste, "Appraisal of the Victims' Right to reparation under International Law" in *Out of the Ashes. Reparation for Victims of Gross and Systematic Human Rights Violations*, Koen de Feyter, S. Parmentier, M. Bossuyt and P. Lemmens, eds., (Antwerp: Intersentia, 2005), pp. 451-486.
- Pamina Firchow, 'Do Reparations Repair Relationships? Setting the Stage for Reconciliation in Colombia,' *11 International Journal of Transitional Justice* (2017) 315

Other relevant texts:

- UN General Assembly. Resolution. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (A/RES/60/147 21 March 2006).
- OHCHR, *Rule of Law Tools for Post-Conflict States: Reparations Programmes*, HR/PUB/08/1 (2008), 5-37.

Session 9, 2017.10.31

Non-state actors and conflict situations: an exploration of issues in the Sri Lankan situation

Materials:

- International Crisis Group, *Sri Lanka's Conflict-Affected Women: Dealing with the Legacy of War*, Asia Report No. 289, 28 July 2017
- Catherine Harwood, 'Contributions of International Commissions of Inquiry to - Transitional Justice,' in Lawther, *Handbook* p. 401
- Annyssa Bellal, 'Non-State Armed Groups in Transitional Justice Processes: Adapting to New Realities of Conflict,' in ICTJ, ch. 7

Session 10, 2017.11.07

TJ and Guarantees of Non-Recurrence (1): Overview

Materials:

- Pablo de Greiff, UN Special Rapporteur on Truth, Justice, Reparations Guarantees of Non-Recurrence, report to the Human Rights Council, 2015 (on guarantees of non-recurrence).
- Cynthia Horne, 'Transitional Justice: Vetting and Lustration,' in Lawther, Handbook, p. 424
- Fionnuala Ní Aoláin, Women, Security and the Patriarchy of Internationalized Transitional Justice, (2009) 31 Human Rights Quarterly 1055.
- Christine Bell, 'Introduction: Bargaining on constitutions – Political settlements and constitutional state-building,' 6 Global Constitutionalism (2017) 13

Other relevant texts:

- Charmaine Rodrigues, 'Letting off Steam: Interim Constitutions as a Safety Valve to the Pressure-cooker of Transitions in Conflict-affected States?,' 6 Global Constitutionalism (2017) 33
- Silvia Suteu, 'Eternity Clauses in Post-conflict and Post-authoritarian Constitution-making: Promise and Limits,' 6 Global Constitutionalism (2017) 63
- Tom Gerald Daly, 'The Alchemists: Courts as Democracy-builders in Contemporary Thought,' 6 Global Constitutionalism (2017) 101.
- Federico Andreu-Guzmán, 'Due Process and Vetting' in Alexander Meyer-Rieckh and Pablo de Greiff (eds), Justice as Prevention: Vetting Public Employees in Transitional Societies (Advancing Transitional Justice, Social Science Research Council, New York 2007).

Session 11, 2017.11.14

TJ and Non-Recurrence (2): Radical Transformations?

Materials:

- Paul Gready and Simon Robins, "From Transitional to Transformative Justice: A New Agenda for Practice," *The International Journal of Transitional Justice* (2014) 8 (3): 339-361.
- Clara Sandoval, 'Reflections on the Transformative Potential of Transitional Justice and the Nature of Social Change in Times of Transition,' in ICTJ, ch. 5.
- Evelyne Schmid and Aoife Nolan, "'Do No Harm'? Exploring the Scope of Economic and Social Rights in Transitional Justice," *International Journal of Transitional Justice*, (2014) 8, 362–382.
- Pádraig McAuliffe, 'Dividing the Spoils: The Impact of Power Sharing on Possibilities for Socioeconomic Transformation in Postconflict States,' 11 *International Journal of Transitional Justice* (2017) 197

Other relevant texts:

- Elena Baylis, 'Transitional Justice and Development Aid to Fragile and Conflict-Affected States: Risks and Reforms,' in ICTJ, ch. 12.
- Eva Ottendörfer, Mariam Salehi, Irene Weipert-Fenner, and Jonas Wolff, 'Labor Unions and Transitional Justice: An Exploratory Study on a Neglected Actor,' in ICTJ, ch. 11.
- Dustin N. Sharp, "Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice," *Harvard Human Rights Journal* (2013) 26: 149-178.

Session 12, 2017.11.21

Local Justice and the role of non-governmental actors: the Sri Lankan experience

Materials:

- Sara Dezalay, 'The Role of International NGOs in the Emergence of Transitional Justice: A Case Study of the International Center for Transitional Justice,' in Lawther, Handbook, pp. 202-220.
- Dustin Sharp, 'Transitional Justice and "local" justice,' in Lawther, Handbook p. 142
- Ioana Cismas, 'Reflections on the Presence and Absence of Religious Actors in Transitional Justice Processes: On Legitimacy and Accountability,' in ICTJ, ch. 10.
- Pablo de Greiff, "On Making the Invisible Visible: The Role of Cultural Interventions in Transitional Justice Processes," in *Transitional Justice, Culture, and Society* Clara Ramírez-Barat, ed., (New York: Social Sciences Research Council, 2014), pp. 10-24.

Session 13, 2017.11.28

Gender and TJ

Materials:

- Catherine O'Rourke, "Transitional justice and gender" in Lawther, Handbook, p. 117-141.
- Brandon Hamber, "Masculinity and Transitional Justice: An Exploratory Essay," *International Journal of Transitional Justice*, Vol. 1, 2007, 375–390.
- Fionnuala Ní Aoláin, 'Advancing Feminist Positioning in the Field of Transitional Justice,' *International Journal of Transitional Justice* 6(2) (2012): 205–228.

Other relevant texts:

- Nahla Valji, *A Window of Opportunity? Making Transitional Justice Work for Women* (UN Women, 2010).

Session 14, 2017.12.05

Colombia's current approach to TJ: technically sound, but practicable?

Materials:

- Rodrigo Uprimny Yepes and Nelson Camilo Sánchez, 'Transitional Justice in Conflict: Reflections on the Colombian Experience,' in ICTJ, ch. 8.

- Government of Colombia and FARC-EP, Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace, 24 November 2016, “Agreement regarding the victims of the Conflict”, p. 132-203.
- Padraig McAuliffe, “Transitional Justice and the Rule of Law: The Perfect Couple or Awkward Bedfellows?”, *Hague Journal on the Rule of Law*, Vol. 2, 2010, 127-154.^[11]_[SEP]
- Lisa Denney and Pilar Domingo, ‘Local Transitional Justice: How Changes in Conflict, Political Settlements, and Institutional Development Are Reshaping the Field,’ in ICTJ, ch. 6.
- Ken Opalo, ‘The Contingent Role of Political Parties in Transitional Justice Processes,’ in ICTJ, ch. 9.

Other relevant texts:

- All documents relative to the peace negotiation in Colombia are available in Spanish at: <http://www.altocomisionadoparalapaz.gov.co/mesadeconversaciones/index.html>
- Eric Wiebelhaus-Brahm, ‘After Shocks: Exploring the Relationships between Transitional Justice and Resilience in Post-Conflict Societies,’ in ICTJ, ch. 4.

ADDITIONAL BIBLIOGRAPHY

On reserve in the library:

Olivera Simić, *An Introduction to Transitional Justice* (Routledge 2017)

Colleen Murphy, *The Conceptual Foundations of Transitional Justice* (Cambridge UP, 2017)

Jamie Rowen, *Searching for Truth in the Transitional Justice Movement* (Cambridge UP, 2017)

Available online:

Cheryl Lawther, Luke Moffett and Dov Jacobs (eds.), *Research Handbook on Transitional Justice* (Routledge, 2017) available electronically at <http://julius.nyu.edu/record=b2472772~S0>

Roger Duthie and Paul Seils, *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies* (International Center for Transitional Justice, 2017) available electronically at https://www.ictj.org/sites/default/files/ICTJ_Book_JusticeMosaics_2017.pdf

Others:

Onur Bakiner, *Truth Commissions: Memory, Power, and Legitimacy* (Pennsylvania Studies in Human Rights) (2015).

Susanne Buckley-Zistel et al, *Transitional Justice Theories* (Routledge, 2014).

Pascha Bueno-Hansen, *Feminist and Human Rights Struggles in Peru: Decolonizing Transitional Justice* (U of Illinois Press, 2015).

Lyn S. Graybill, *Religion, Tradition, and Restorative Justice in Sierra Leone* (U of Notre Dame Press, 2017).

Bert Ingelaere, *Inside Rwanda's Gacaca Courts: Seeking Justice after Genocide* (U of Wisconsin Press, 2016).

Fionnuala Ní Aoláin, Dina Francesca Haynes & Naomi Cahn, *On the Frontlines: Gender, War, and the Post-Conflict Process* (OUP, 2011).

Chandra Sriram (ed.), *Transitional Justice in the Middle East and North Africa* (OUP, 2017).

Ruti G. Teitel, *Globalizing Transitional Justice* (OUP, 2014).