GLOBALIZING TRANSITIONAL JUSTICE

CONTEMPORARY ESSAYS

RUTI G. TEITEL

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To Nataša Kandić and Baltasar Garzón, heroes of global transitional justice

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Introduction: Transitional Justice Lived

THE ESSAYS COLLECTED in this volume address more than a decade of practice and study of transitional justice around the world, since my book of that name was published in 2000. Whether one thinks of contemporary conflicts in the Middle East, or earlier ones in South Africa, the Balkans, Latin America, or Cambodia, a remarkable amount of experience and experimentation has by now occurred with transitional justice.

In the recent political awakenings in the Middle East, the call for accountability has been front and center: from the demonstrations in Tahrir Square, to the demands of the international community and its court in the midst of the Libyan conflict. Indeed, in the latest political changes, what has become clear is that transitional justice is no longer a byproduct or afterthought, but rather, appears itself to be the driver of political change. Where transitions are fraught and democratization a distant goal, the call for transitional justice is becoming both means and ends; we can see changing expectations of law and other demands at this time, especially in light of tensions between its demands and politics.

One can see the demand for justice and accountability underway on many levels: beyond war, beyond the transitional state, ranging across the public and private sectors to civil society, with implications for the rethinking of the meaning of transitional justice at this time: where it is accountability—conceived in rule of law terms—that appears to offer a distinctive source of legitimacy. Yet, it is a relative legitimacy, which as we will see is always informed by a transformative politics of often limited and unstable transitions.

To appreciate the road traveled since the time when the modern day notion of "transitional justice" crystallized, at the end of the twentieth century, we must see how transitional justice emerged from, and came to be identified with, a vital debate over how to reckon with the abuses of predecessor regimes, particularly in light of

the aims of democratization and state-building associated with the political transitions of that era. At that time, I was commissioned to write an advisory memorandum for the New York–based Council on Foreign Relations (CFR) aimed at clarifying a debate and making recommendations about justice that had surfaced at the time of the Latin American transitions. In the policy memorandum, I advocated a broader view of transitional rule of law than that originally posed at the CFR debate. Indeed, given the nature of the transitional context, I argued that, wherever the criminal justice response was politically unwise or simply impractical, other ways should be considered to respond to the predecessor regime's wrongdoing and repressive rule, and, moreover, that such alternatives could advance the rule of law. "The extraordinary transitional form of punishment characterized as the 'limited' criminal sanction is directed less at penalizing perpetrators and more at advancing the political transformation's normative shift."[1]

Early on, my interest was the particular character of the challenges of transition in relation to justice: in work leading to my book, *Transitional Justice*, published in 2000 by Oxford University Press, during the late eighties, at the time of the Soviet collapse, I introduced the term "transitional justice"[2] on the heels of the Latin American transitions away from military rule. In proposing this term, my aim was to account for the self-conscious contingent construction of a distinctive conception of justice associated with periods of radical political change after past oppressive rule. As would become clear, the path chosen fell short of ideal conceptions of justice. Rather, transitional justice was an exercise in law and politics where line drawing was endemic, informed by felt necessities, as well as by a country's long-standing traditions relating to the rule of law; "The conception of justice in periods of political change is extraordinary and constructivist: It is alternately constituted by, and constitutive of, the transition. The conception of justice that emerges is contextualized and partial: what is deemed just is contingent and informed by prior injustice."[3]

With the collapse of communism, and the East European transitions, it became evident that this provisional feature constituted the preeminent characteristic of transitional justice: the structure of the legal response was shaped by the circumstances and parameters of the associated political conditions. Further, one could also see that the direction of the transition was itself conditional upon the degree of commitment to normative political change. Several conclusions followed: Transitional justice might not then reflect the ideals of rule of law set out in established political systems. Moreover, in such hyper-politicized moments, one can see that the law operates differently, though of course this is a question of degree; it is near impossible to meet all of the traditional values associated with the rule of law, such as

general applicability and procedural due process, as well as more substantive values of fairness or analogous sources of legitimacy.[4]

After this post–Cold War phase reflecting the proliferation of transitional justice, there has been over two decades of experimentation and change in the nature of conflict as well. I argue here, as this volume's title reflects, that we have now turned to a new global phase, where further to the leading essay in the book, "Transitional Justice Globalized," the volume elaborates a contemporary paradigm of transitional justice associated with the distinctive context of global politics. In analyzing the development of this field against this context of global politics, this book sets out these developments both through a genealogical lens along a proposed three-part framework and substantive analysis of the transitional justice in the context of these periods.

Early Debates

The established controversy over transitional justice at the beginning of the third-wave transitions toward the end of the twentieth century (a periodization the overview essay following this introduction sets out)[5] involved a somewhat artificial zero sum and dichotomous framework that centered on a set of apparent foundational dilemmas and related binaries: "punishment versus impunity," "truth versus justice," "justice versus peace."[6]

In these debates, the role of the state loomed large, with the problem of justice revolving almost exclusively around state actors and related institutions and purposes. In transitional justice's early days, the central concern was framed in terms of how a successor regime ought to respond to abuses perpetrated by the state and against its own citizens. This primary concern with state behavior often emphasized retribution against official perpetrators. Drawing a line was seen as necessary for the transformation of dictatorial or other repressive regimes, as Aryeh Neier among others framed at the time: "What is to be done about the Guilty?"[7]

I reframed the question in a backgrounder to a Council on Foreign Relations debate on "impunity" in the Southern Cone: How should a society come to terms with a collective violent repressive past?[8] At the time, one can see that often the path of transitional justice followed a constitutional approach, in its emphasis on the problem of strong state transitions, conceptualized in terms of constraining bad state action and actors, as well as recognizing individual rights and responsibilities. Indeed, throughout Latin America, Eastern Europe, and South Africa, commitments to a new constitutionalism were associated with varying forms of transitional justice, punitive or administrative.[9]

Globalizing Transitional Justice

More than two decades on since the early post–Cold War period, how have the central questions changed? At present, I argue the changes amount to a "global" paradigm of transitional justice. The very problem of justice is being reconceptualized through a global politics of accountability, often in the context of *weak* rather than *strong* states, and beyond the primary focus on abuses of state power with evident implications for the transformative challenge. Accountability for past wrongs is being demanded in situations where there is no clear or consolidated political transition. Indeed, there is evidence of its normalization to intra-conflict. Consider some of the claims to transitional justice during the Balkans conflict and now in the Arab awakening, for example, Egypt, Libya or in the Syrian war.

If, before, the centrality of the transitional problem was the predecessor regime and its excesses, and the related aim—constitution-style delimitation of state power—now, the challenge of contemporary transformation is that it engages directly nonstate actors at all levels and their behavior and entails changing social norms building civil society,[10] and a demand for adequate institutions and capacity building.[11] In an increasing number of weak and failed states, from Eastern Europe to the Middle East and Africa, the overriding goal is the assuring of a modicum of security and the rule of law that, even without other political consensus, one might say, has become a route to contemporary legitimacy.

As the introductory essay of this book, "Transitional Justice Globalized," sets out, the global phase or paradigm of transitional justice today is characterized by at least three key dimensions: First, one can see the expansion of the aegis or normalization of transitional justice, that is, the sense of the departure from the original 1980s' transitions associated with justice-seeking for exceptional times. Now, instead, transitional justice is more often than not conceived as disassociated from the *politics* of transition; its globality is comprehended by two models discussed below, which arise as a result of its new normalization: the international law model and the bureaucratic model.

The globality of transitional justice today is also evidenced along a matrix of the passage of time, in that we can see the relevant period for transitional justice extending beyond the immediate times of regime transition. What was initially conceived as *transitional* justice has become normalized as accountability for certain kinds of very serious systemic wrongs, such as crimes against humanity, applied increasingly even while a conflict is underway, and certainly before any definitive political transition, as was seen in the context of the Kenyan elections.[12] One also saw this in the Balkans, with the UN Security Council creation of an intra-conflict adjudicatory

tribunal[13] and, more recently, with Libya and the Security Council referral of the situation and Qaddafi regime to the International Criminal Court.[14] Hence, here we can observe the increase of issues and actors around the transition across war/peace lines in this moment with the recent acceleration in attempts to use the law to impose ex ante settlements via transitional justice mechanisms.

Significant controversy remains about the ongoing viability of local responses and processes and the relationship to international interventions[15] as well as regarding the potential role of the law in peacemaking, and reconciliation.[16] Indeed, these two recurring debates—justice versus peace and international versus local—continue and overlap in interesting ways, as is discussed here in some of the essays, for example, Chapter 5, "Bringing the Messiah through the Law." Last, in terms of the manifest expansion of the ambit of the discourse and practice of transitional justice, one also can see efforts to address past wrongdoing by state and even nonstate actors long after regime change has occurred, in some cases as in Latin America's Southern Cone, decades later, reflecting various political failures and social pathologies in the states concerned, despite regime change.

With the normalization of the field, some of the essays in this book address not only the practice of transitional justice over the past decade or so, but also its development as a field of scholarship that "crosses" disciplines. The struggle over the nature, parameters, and control of the field is sometimes intense: with much at stake within academia and in the broader society.[17] Christine Bell has argued against the current conception of transitional justice as a "praxis-based interdisciplinary field,"[18] characterizing it as a departure from "the original focus of transitional justice discourse [which] was that human rights requires accountability in transitions rooted in the discipline of law." Although we might differ upon the "original focus," there is no question that, over time, the focus has been expanded to include a much broader range of mechanisms, goals, and inquiries across a range of discipline/approaches—taken up in this book.

But what to make of these interdisciplinary developments? Insofar as its basis is in praxis, there is a dimension that has developed that is bureaucratic in nature. Yet, the inquiry into the character of the field may well be the tail wagging the dog. It is part of a bigger debate about what to make of essentially the birth of an industry that has developed over recent years of research and assistance training, etc., on the topic of transitional justice (e.g., U.N. versus the ICC). What is its relationship to other sectors such as of peace, security, and development?[19] For example, what is its relation to the UN and its Security Council? Of late, the UN has endorsed justice practices as part of its approach to new states.[20] Might controversies about international versus local responses be best understood as part of this broader policy question of what discourses, what institutions, and what actors will be engaged in the transitional

project? Some practitioners in the field advocate a holistic or ecological approach,[21] while others invoke "best practices." But what does this mean? "Best" according to what measure? To what extent can such practice-based approaches aiming at a general rule, that is, of best practices, be sensitive to politics, to context?

Of course, on the ground, the issues do not neatly fall into just one discipline or another, perhaps not surprisingly, given that we are talking about massive instances of systemic abuses, in multiple and very diverse social, political, and cultural contexts.[22] Even more crucially, to what extent do such practices match those of one discipline, such as law or politics? This goes to the question of how to conceptualize the field. From the vantage point of the normalizing models, for example the praxis-bureaucracy model, "justice" becomes just one piece in the "tool box" of practices. Yet from the formal-legalist side, seen as a priori obligatory, this hardly makes sense considering that, from its very beginnings, transitional justice was conceptualized as a distinctive conception of justice, which was tightly connected to a state's political transformation, and to substantive commitments—of a political and constitutional character.

Emergent Models: Bureaucracy and Law

As the first essay in this volume elaborates, the landscape today reflects a global politics of transitional justice, often engaging stakeholders who are not direct participants in the transition itself, such as international actors and institutions, as well as global civil society.[23] In a world that is increasingly interdependent but remains not politically integrated there is a strong tendency to superimpose international law as the governing normativity in resolving these issues. This is closely connected to the ascendance of international criminal law and tribunals, and even more so to the discourse of legal punishment that this generates.[24]

What might the direction in the proliferation of transitional justice tell us about the new circumstances of political transition? One can see the turn to this discourse even ex ante and intra-conflict, where societies face a threat of the use of violence, particularly where ethnic and civil strife exists, with a shifting adaptation in our sense of the relationship law bears to violence.[25]

In this light, given changing borders of international conflict and accordingly of political transition, the contemporary management of transitional justice resonates as an issue of global governance. The parameters of jurisdiction are changing, and there is greater transnational engagement on these issues (as taken up in the first essay here), and where conflict is often cross-border, then how to manage is a matter

of global governance where the central question is: When and where should there be supranational intervention?[26] What principle might guide the choice between international and the local responses to issues of wrongdoing? Here some of the hardest dilemmas are faced in places such as Cambodia, Sierra Leone, Iraq, and Libya. One kind of solution is to adopt hybrid local/international mechanisms, for example, as in East Timor and Sierra Leone.[27]

Overall, the global paradigm has given rise to two preeminent models or approaches operating in contestation with one another, with varying weight given as to what justification exists for such global engagement on these issues, for example, between practice-oriented efficiency and legal obligation.

What Is to Be Done? The Rise of the Bureaucratic Model

Here, one can see a significant interest in framing transitional justice as a global question and likewise in delivering a global answer, such as "best practices." The "bureaucratic" approach tends to theorize across regions and transitions, aiming at a general rule. It appears to be guided by a scientific analogy, and the notion of delivering a formula or prescription to states. This approach is epitomized by the leading nongovernmental organization (NGO) in this field—the International Center for Transitional Justice,[28] which conceives of transitional justice as a set of responses to a problem that demands a solution, where lessons can be learned worldwide. Hence, it consults with states and proposes an array of transitional justice practices.[29] Other institutions involved in the bureaucratization of transitional justice such as the UN and other NGO institutions, both domestic and international, have helped develop a series of transitional justice practices that are framed as required in human rights terms.[30]

But, there are issues with the model, insofar as it departs from the pragmatic politics of the 1980s, as bureaucratic decisionmaking regarding transitional justice is being formulated by technocratic elites and not sufficiently informed by local politics. Some of the issues involved in the intervention by international bureaucracy have been articulated in the work of David Kennedy, in his critical writing about humanitarian aid[31] and international intervention. Although other scholars, such as Harvey Weinstein and Laurel Fletcher, conclude that there may well be times for international intervention,[32] that determination depends on a number of factors, which often involve granular, careful assessment of relative institutional legitimacy indeed, as taken up toward the end of the book, and, therefore, interventions that may well be at their most justified when local institutions of justice are at their weakest.

International Law Model

In *Transitional Justice*, I identified a turn to the alternative normativity of international law, an early trend in the late 1980s' wave of transitions, as a way to mediate the core dilemma of transition between the adherence to established positive law and the demand for potential transformation and discontinuity. This is seen, for example, in the statute of limitations debates, occurring over punishment in post-communist East Europe,[33] where international law appeared to offer an alternative normativity that addressed and indeed could solve the problem of retroactivity, for example, in debates about the application of punishment in the post-communist transitions. Beyond offering an alternative process, international law also seemed to solve the problem of normative change associated with transition, of the value switch between regimes, for example, by proposing a highly circumscribed set of offenses: as in the words of the Rome Statute, proscribing those "most serious crimes."[34]

A major change in transitional justice today is its increasing application via legal processes and institutions, particularly through human rights law and international criminal law. Today, the global paradigm and the demand for its enforcement has given rise to two other features primarily associated with international criminal justice—weak state, therefore, limited sovereignty and likewise, limited immunities for political leadership. In the characterization of the offense against "humanity," all are potentially aggrieved. Enforcement is disaggregated, a development that goes hand in hand with weak state justice.

Beginning with the so-called exceptional or "ad hoc" tribunals established to deal with specific transitional situations, such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), and then evolving into a permanent regime with a standing tribunal, the International Criminal Court (ICC), and together with the jurisprudence of the regional human rights courts, there are now a host of enforcing institutions that appear to greater or lesser degree to generate new legal obligations in this area.

The surge in developments in transitional criminal law and related jurisprudence are explored in various essays in this volume, as well as in other responses that inform transitional justice. Essays such as "The Alien Tort and Global Rule of Law" take up other forms of legalization, such as civil litigation and the demand for reparatory rule of law, as well as others devoted to transitional constitutionalism, as set out below.

What these essays all share is a preoccupation with the global paradigm, the ascendance of international law and related institutions and the tensions raised, which is

how to reconcile these normative commitments and obligations with other transitional values and context on the ground. In the international criminal context, the Rome Statute of the International Criminal Court gives us a norm, in the commitment to the jurisdictional principle of "complementarity"[35]: where there is willingness and capacity, the domestic jurisdiction should prevail. Conversely, it is in instances of political failure that international intervention is at its most justified.

Similar issues are being confronted in Latin America in the context of challenges with its regional human rights tribunal. Kathryn Sikkink emphasizes human rights trials as essential to contributing to the rule of law.[36] A variant of this thesis can be seen for example in the work of political scientist Leigh Payne, whose approach is characterized by ecumenicism, and a "holistic" view of transitional justice. She exhorts an overall "justice balance" approach, that is, arguing against too much punishment, but also against amnesties where there is no investigatory process.[37] Others taking a pragmatist position are Jack Snyder and Leslie Vinjamuri, who argue for "sequencing", i.e., putting peace before justice, particularly in situations where prosecutions could endanger fragile peace negotiations, such as in the UN referral of Bashir/Sudan.[38]

Yet, even in instances of political failure, international law itself is neither one universal norm nor an absolute; instead, international law contemplates interpretation. Indeed, the rise in institutions of judicialization allows for case-by-case consideration, where ultimately these responses ought to be measured by the aim of change in a more liberalizing direction together with relevant goals such as a measure of human security.

Perhaps, the best way to understand these competing conceptions is in terms of a contestation over what space transitional justice ought to occupy, but, as will be seen, both models are inadequate because they are conceptualized as disconnected from the transitions' substantive political commitments and values.

Road Map

What follows is a mapping of the book. I begin with a short overarching chapter grounded in an editorial written at the beginning of the century, entitled "Transitional Justice Globalized," which also doubles as the title of the volume because it offers both a way of identifying and understanding the global paradigm of transitional justice and a good summary of many of the themes explored in the individual essays. It also serves as a basis for an introduction for this volume, providing a road map through various pieces, situating them in context, and providing a narrative of how the theory and the practice of transitional justice have evolved in

response to political events, but also, to broader social, political, and legal tendencies associated with the post–Cold War period, ranging from globalization to the judicialization of international conflict to the new humanitarian intervention.

The remaining essays in the book fall into three Parts, which pick up on these strands characterizing the global paradigm: *Roots,* relating to the origins of contemporary developments, *Narratives* addressing transitional justice as a site for contestation about the past and future, and *Conflict, Transition, and Rule of Law* analyzing the situatedness of transitional justice today along a continuum of violence and international law. A word about each of these.

Roots returns to the early twentieth-century instances of transitional justice that have great salience today, in particular to post–World War II, with chapters on what distinguished those moments and their response, characterized by exceptional international trials. "Transitional Justice: Post-War Legacies" analyzes the legacies of the post-war transitional justice, identifying ways these trials have shaped current understandings. "The Universal and the Particular in International Criminal Justice" explores the move to individual accountability in transitional justice, and raises the question of what is sought via this form of judgment in the courts.

The next Part, *Narratives*, addresses the appeal of the transitional justice discourse to offer an account of the complexity of interactions of goals, actors, processes, and institutions in such periods. It begins with an essay entitled "Transitional Justice Genealogy," which offers an account of the evolution of the field. "Transitional Justice Genealogy" traces an intellectual history of the central ideas in a tripartite framework starting with the development of international criminal justice processes and institutions from the exceptional (as experienced in the Balkans and post-genocide Rwanda) as they have developed a permanent feature of contemporary international affairs, and ending with the globalization of transitional justice and its "normalization," a central theme in this volume.

Building on "Transitional Justice Genealogy," *Narratives* continues with the next essay, "Bringing in the Messiah through the Law," which takes up the heady expectations for international criminal justice and explores their relationship to peacemaking. The essay follows a story being told in the Balkan trials of how the end or aims of justice is peace. It takes up the first international tribunal convened during a conflict, the International Criminal Tribunal for the former Yugoslavia, which was established by the U.N. Security Council under Chapter VII of the U.N. Charter, explicitly to deter and to reconcile warring factions in the Balkans. The broader account here informs the next chapter, "Transitional Justice as Liberal Narrative," which aims to reframe our understanding of the present uses of criminal justice in terms of the liberal aims shared across transitional justice modalities.