The International Journal of Transitional Justice, Vol. 2, 2008, 1–4,
doi: 10.1093/ijtj/ijm041
Advanced Access publication: 25 March 2008

Editorial Note-Transitional Justice Globalized

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Interest in transitional justice has surged in legal scholarship, in the human rights field generally and most notably in the domain of politics. 'Transitional justice' is an expression I coined in 1991 at the time of the Soviet collapse and on the heels of the late 1980's Latin American transitions to democracy. In proposing this terminology, my aim was to account for the self-conscious construction of a distinctive conception of justice associated with periods of radical political change following past oppressive rule. Today we see that an entire field of inquiry, analysis and practice has ensued that reflects scholarly interest; the launching of this journal, the publication of books in a wide variety of related areas such as rule of law and post-conflict studies, international centers and research institutes dedicated to work in this area, interest groups, conferences, domains, web sites, etc. One cannot help but be struck by the humanist breadth of the field, ranging from concerns in law and jurisprudence, to ethics and economics, psychology, criminology and theology.

Moreover, these scholarly and practice agendas reflect ongoing developments in the phenomena of transitional justice: justice seeking efforts; ongoing debates regarding issues of accountability versus impunity; the dedication of institutions to prosecution; to truth-seeking and the restoration of the rule of law.

To appreciate the road traveled, one might return to the late 1980s and early l990s when the modern day notion of 'transitional justice' crystallized; at that time, transitional justice emerged from and came to be identified with a vital debate over whether to punish predecessor regimes, particularly in light of the aims of democracy and state-building associated with the political transitions of that era. In this context, I was commissioned to write an advisory memorandum for the New York-based Council on Foreign Relations aimed at clarifying a debate over justice which had surfaced at the time of the Latin American transition, and to make recommendations. In the memorandum, I advocated a more expansive view of the question of punishment. I suggested that wherever the criminal justice response was compromised or otherwise limited, there were other ways to respond to the predecessor regime's repressive rule. And such alternatives could develop capacities for advancing the rule of law. Indeed, with the collapse of Communism, and in

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Once a year, the International Journal of Transitional Justice will invite a member of its Editorial or International Advisory Board to contribute an Editorial piece reflecting on a key aspect of the field. Professor Ruti Teitel's contribution is the first in this series.

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the context of the East European transitions, it became evident that this feature constituted the pre-eminent characteristic of transitional justice: the structure of the legal response was inevitably shaped by the circumstances and parameters of the associated political conditions. Justice might not then reflect the ideal. And, moreover, in such hyperpoliticized moments, we learned that the law operates differently, and often is incapable of meeting all of the traditional values associated with the rule of law, such as general applicability, procedural due process, as well as more substantive values of fairness or analogous sources of legitimacy.

This broader historical intellectual context enables us to reflect upon the evolution of transitional justice over the last 15 years. This contextual look can usefully illuminate the paradigmatic framing of the contemporary global scheme associated with the beginnings of the 21st century.

At present, we find ourselves in a global phase of transitional justice. The global phase is defined by three significant dimensions: first, the move from exceptional transitional responses to a 'steady-state' justice, associated with post-conflict-related phenomena that emerge from a fairly pervasive state of conflict, including ethnic and civil wars; second, a shift from a focus on state-centric obligations to the far broader array of interest in non-state actors associated with globalization; and, lastly, we see an expansion of the law's role in advancing democratization and state-building to the more complex role of transitional justice in the broader purposes of promoting and maintaining peace and human security. As will be seen, these changes do not necessarily work in a linear or harmonious direction, but instead may well result in chaotic developments and clashes in the multiple rule of law values involved in the protection of the interests of states, persons and peoples.

The now historical 'punishment-impunity' debate has given way to a marked demand by diplomats and legal scholars for more judicialization and tribunalization at the global level. There is a call for complex forms of accountability associated with the rise of private actors implicated in violent conflict, both as perpetrators – e.g., paramilitaries, warlords and military contractors – and as victims, as we see the ever greater toll borne by civilians in contemporary conflict. In addition to a myriad of local responses, still in operation are the United Nations special tribunals – the so-called ad hocs, set up pursuant to the UN Security Council's 'Chapter 7' peacemaking power in the midst of ethnic cleansing in Bosnia, and in response to the genocide in Rwanda. These experiments have had mixed results: for example, the 'untimely' death of Slobodan Milosevic just days from his trial's close leaves a sense of unfinished business as the aborted proceeding cheated international society of the satisfaction of a final judgment. Moreover, anxiety regarding the limits of the ICTY also derives from the sober recognition that so far, in these waning days of the tribunal, the two persons most responsible – General Radko Mladic and Radovan Karadzic – remain at large.

Yet, there is also a broader lens through which to appreciate the impact of the global justice trend, which goes to the broader aims of the tribunal, beyond any strict retributive or deterrent effect. While ostensibly committed to positivism – to the notion of mere application of pre-existing law according to established criminal justice principles and concepts, as set out in its landmark *Tadic* decision – in

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their jurisprudence the tribunals have also reflected 'teleological goals' including broader, non-criminal justice goals such as peace in the region. As the ICTY appellate chamber has declared, the law applied 'must serve broader normative purposes in light of its social, political and economic role.'

The broader normative impact can be seen in the substantial developments in local justice and the evolution of the work of the domestic judiciary in the Balkan region, where since the launching of the ICTY, remarkably, there are now scores of war crimes cases in the region including hundreds indicted by the special court in Serbia, as well as national courts in Croatia and Kosovo's internationalized courts. Further, the normativity more broadly affects the political discourse and civil society in the region, both regarding domestic politics, and in regional issues such as accession to Europe, where compliance with the UN tribunal has in and of itself become a benchmark of greater European cooperation. Here, transitional justice appears to represent a way to legitimacy. Similar instances in other previously conflict-ridden areas such as Latin America reflect this broader impact. This may well help to explain the last decades' proliferation of transitional justice phenomenology.

Transitional justice has become a critical element of the post-conflict security framework; its normative effects are now seen as having the potential of fostering the rule of law and security on the ground. At a time of a growing number of weak and failed states, from Eastern Europe, to the Middle East, to Africa, it is the particular mix of assuring a modicum of security and the rule of law that, with or without other political consensus, has become a route to contemporary legitimacy.

Understanding the transformation of the categories associated with the legal regimes of war and peace illuminates the new century trend of a growing entrenchment and institutionalization of the norms and mechanisms of transitional justice. The most significant symbol of this trend is the establishment of the first freestanding, permanent International Criminal Court, mandated to apply a prevailing international consensus on the obligation to prosecute the 'most serious' crimes, namely, war crimes, crimes against humanity and genocide. Further, we have seen a host of new tribunals, such as the Extraordinary Chambers in the Courts of Cambodia to deal with the Pol Pot regime leaders responsible for the atrocities in the Khmer Rouge's killing fields, the special United Nations tribunals convened for Sierra Leone and Lebanon and the return of a prosecutions policy in Argentina. Meanwhile, other non-criminal processes and institutions such as truth commissions have proliferated in the pursuit of ways and means to deal with long-standing conflict, from Timor-Leste to Liberia.

These processes serve multiple values in the name of justice, such as nation-building, truth, reconciliation and the rule of law. By now, it is expected that this is part of the necessary response to repressive prior rule. Indeed, given the many conflict-ridden areas in the world, transitional justice is no longer primarily considered to be about the normative questions regarding a state's dealing with its troubled past, but, instead, the relevant questions are now considered part of a broader international commitment to human security. From the ICTY on, where according to its founders, establishing the truth about the conflict was seen as 'essential' to reconciliation, similar goals have been set out in the International Criminal Court

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statute. Beyond, in the United Nations tool box for dealing with post-conflict security issues, transitional justice is now viewed as an important component, so that the UN Department of Peacekeeping has reconstituted a Security Sector Reform and Transitional Justice Unit. Justice is no longer primarily about retribution nor even deterrence. Rather, these aspirations may actually give way to the demand for a kind of accountability suited to fostering peace and security on the ground.

Steady-state transitional justice is not always aligned in a straightforward way with transitional chronology. By now, there has been a significant normalization and entrenchment of transitional justice *within* existing legal regimes such as the human rights and humanitarian law systems. Many transitional justice responses have become ratified in standing human rights conventions where they have given rise to enduring and universally invoked human rights, such as the so-called right to truth that includes investigations, and often related prosecutions, adjudication and reparation. These rights depend for their vindication on the responses of civil society, such as NGOs devoted to the representation of human rights and its abuses. Likewise, these actors' legitimacy also draws from the emerging normativity of global transitional justice.

Indeed, wherever the issue has been kept alive, it has been as a result of the significant impetus of non-governmental actors. This has been the case, for example, in Argentina where 30 years after junta rule, there has been a revival of human rights-related prosecutions. Much of the impetus for this is an outgrowth of the interaction between the state and non-state actors in the evolution of the normativity as well as the significance of civil society in the form of the organization of the mothers of the disappeared, the 'Mothers of the Plaza de Mayo,' as well as other interest groups and the media. This underscores the ongoing repercussions of the passage of time that relates to the involvement of the state in these wrongdoings, and the often long time before the effectuation of transitional justice. At present, we can see that the dynamic interaction of state and non-state actors has created a context where transitional justice can promote a culture of the rule of law.

Further, the involvement of transnational NGOs and global civil society more broadly illustrates the wider politics of transitional justice. Reflecting on the current global politics of transitional justice may well illuminate areas of foreign affairs controversy where claims to transitional justice change the structure of the terms of the discourse. So, for example, one might see this in the struggle over General Mladic between Serbia and the EU, where transitional justice may well end up as a chip in the bargain around the status of Kosovo. It may explain the puzzling revival of the Turkish Armenian genocide question where the elision of transitional justice remains critically important to the implicated peoples with extraterritorial dimensions, but where the timing of the demand indubitably shapes the structure of other questions of interstate relations, such as European accession. Japanese accountability for past war crimes may well affect the extent to which that country can be seen as an Asian great power with a human rights alternative to China. Today, transitional justice has a global normative reach, with effects far and wide on the discourse and structure of international affairs.

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