15 On the futures of reckoning with the past

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Transitional justice stands, today, as the paradigmatic framework for justice after the atrocities of wars, genocides and human rights abuses of autocratic regimes. Reflecting on what it has so far achieved in a relatively short time span of three decades or so, Pablo de Greiff (2020) noted that it has “helped to give richer content to the notion of justice” by giving visibility to victims, shaping key elements in criminal justice, facilitating reparations, establishing forums for truth telling and mandates for institutional reform (p. 252). It has also bolstered, notes de Greiff, the entrenchment of rights to justice both in doctrine and practice, and has taught the criminal justice system how to cope with the consequences of amnesties and statutes of limitation, develop prosecutorial prioritization and provide plural formats for the delivery of justice (p. 252).

Ambitious projects, however, often court clay feet. It is possible to see, with the hindsight of three decades, that many of the “settlements” brokered by transitional justice’s mechanisms have been partial, ambiguous and even contradictory. Their instability emerges from what de Greiff notes as challenges pertaining to all justice projects: “selectivity in the implementation of human rights norms, the tendency to ‘securitize’ all sorts of topics, and ... the ‘closing of civic space’” (p. 253). In addition, transitional justice has been specifically vulnerable to an instrumental use of its mechanisms for political “turn-taking” and to paying insufficient attention to specific contexts, resulting in an “isomorphic mimicry”, or belief that success in one place automatically translates as the same in another (pp. 254–55). This is a problem which de Greiff sees as also arising from donor agendas and the work of an elite global and mobile group of professionals within the field. What follows is that technicalities take over, in “an institutional engineering” that shapes questions such as how to set up a special court or truth commission, rather than what may be the best way of satisfying victims’ rights to justice (p. 255).

The chapters in this volume uphold de Greiff’s assessment of where transitional justice is at today, foregrounding in particular where it has failed its promise. In doing so they contribute to questioning, on a scholarly register, its framings and legacies, taking both a long, historical view and highlighting its current tendencies – be these mandates, implementation, intransigent

contexts, racialized geographies, shifting goalposts, or sidelined local resources, groups and experiences. Briony Jones argued in Chapter 11 for working with resistance as a way of pointing to both the incomplete nature of “knowing” and revitalizing the field. The impulse of this book has been precisely this: taking seriously sources of disappointment and opposition, but also engaging with transitional justice towards repair, conceptual gain and course correction, rather than dismissing its legacy altogether.

A central tension within transitional justice, as pointed out in the different contributions in this book but particularly foregrounded in Tim Murithi’s opening chapter, is of the emphasis on accountability and restoration of order based on a unifying master narrative versus a reckoning with the past that is more inclusive of different points of view, ethical choices and ways of remembering. While the first demands *certitude*, the latter acknowledges the need for an open-ended process, prone to contestation as varied memories and narratives of the past find their voice. In societies that have gone through the atrocities of apartheid, genocide or civil warfare, the notion of transition – to a new regime or to post-war reconstruction – carries the comforting certitude that the tragedy belongs to the past, and that a moral and social victory draws a firm line between a divisive past and a consensual present. Celebrating victory over a past that is “over” too quickly can come at a cost however, especially when forms of injustice bigger than what can be undone during an “extraordinary” transitional justice process, with a short-term mandate, are part of the problem. As Rothberg (2019, p. 15) noted, citing Robert Meister (2011, p. 26), rapid reconciliation based on a common understanding that “the evil is past” can be a questionable priority when it implies foregoing the necessary quest for social justice between the groups that structurally benefited from criminal regimes and those that were harmed.

The three contributions to the first section of this book provided vivid accounts of how official consensus that “the evil is past” has been achieved after apartheid in South Africa (Chapter 2), after the genocide in Rwanda (Chapter 3) and after civil war in Sri Lanka (Chapter 4), resulted in social fallout. Interestingly, while political will to create consensus is clearly discernible through each of these three cases, the relationship with human rights discourse appears more complex. While the South African Truth and Reconciliation Commission (TRC) clearly foregrounded a language of human rights, Rwanda’s multi-modal transitional justice experiment unfolded through a complex mixture of running with the “global norm” and denouncing its limitations, whereas the war-winning Sri Lankan government took a path of open opposition to transitional justice delivered in the name of international human rights norms (and to international institutions, such as the United Nations Human Rights Council). One thing we can learn from these three cases placed side-by-side is that the declaration of “moral victory”, and the simultaneous postponement of “material redistribution”, can come in different guises. Human rights is only one of the languages mobilized to

prioritize reunification (on the terms of the victorious regime or coalition of forces) over social and economic transformation. Depending on particular political configurations and histories of struggle, appealing to collectively cherished ideals of national emancipation and sovereignty, for example, can serve similar functions of rallying a broad spectrum of actors around chosen priorities.

The parallel (or sequential) tracks of special courts seeking accountability for extraordinary violence, and truth commissions for reckoning, dialogue and the admission of “smaller” crimes as windows into larger patterns, might be seen as transitional justice’s current best answer to tackle the potentially contradictory imperatives of settling certainties and opening up diverse perspectives. The two routes are, however, interlinked. Even though they abide by distinct evidentiary processes, their respective focuses draw upon each other to create a bigger picture. This is because the extraordinary violence adjudicated in transitional justice courts is scripted on the “slow violence” which Rob Nixon (2011) writes of in another context (of ecological destruction), but which has a bearing on what we discuss here. Here, “slow” stands for the structural violence audible, for instance, at TRCs, which provides a context and template for the proliferating and acute forms of violence (pp. 2–3).

Attentiveness to the *longue durée* of violence inevitably raises questions about responsibility. Michael Rothberg’s (2019) recent discussion of the “implicated subject” is particularly instructive here. The implicated subject is both real people in situated, material contexts who bear responsibility, for example as descendants and/or beneficiaries of systems of political violence, economic privilege, social discrimination, ecological plunder and so on, as well as “a trope for describing a contingent, shifting, and socially constituted position in that world”. The implicated subject stands, therefore, for a broader reckoning of both slow, attritional forms of violence – the historical harms of racism, casteism, slavery and colonialism – and of the violence of war economies, corruption, ecological destruction, indebtedness and distributive distortion (Arbor 2007; Mani 2008; Duthie 2008; Gready and Robbins 2014; Urban-Walker 2016). Accountability and reparation for both of these sets of harms have yet to take place, however, on a meaningful scale. The contributions to the second section of this book vividly illustrated what can be the price for such oversights in the delivery of transitional justice. This ranges from societies that remain segregated along the same lines along which the economic crimes have been committed historically (which are racial lines in the case of South Africa, as discussed by Durrheim and Murray in Chapter 5), to post-generations which are made, in the best of cases, to claim rights responding to the trauma of their parents rather than to the inherited challenges of their own living circumstances (Chapter 6), or victim-survivors left with a potentially inflammatory combination of a language of virtuous struggle and an unfulfilled promise of justice (Chapter 7).

According to Rothberg (2019, p. 10), traditional forms of accountability for past misdeeds struggle to repair the harms of structural violence (such as

economic crimes) because the spectrum of actors involved is discomfoting, and responsibility is elusive as long as the spotlight is on individual victims and perpetrators. The figure of the implicated subject represents, therefore, “not a solution but a problem” (p. 200), a nettle transitional justice has yet to fully grasp. The challenges range from denial to scope: the “breadth of implication in a globally connected world” (p. 200), and the elusiveness of its “‘agents’ ... [who] appear on the surface amorphous – more faceless and nameless – than the perpetrators of legally defined and proscribed violations” (Mani 2008, p. 255). To ignore these interlinked structural harms, to highlight civil and political rights over socio-economic and cultural rights, is, however, to risk losing credibility in the very societies that transitional justice aims to benefit (Arbor 2007; Mani 2008). As Gready and Robbins (2014) noted in their call for a shift from transitional to a more transformative justice, a “new agenda of practice” has become necessary. This demand also implies a call for research as a critical practice on, and for, transitional justice that would find new and persuasive ways of analysing implication and responsibility.

Working with complex forms of implication in past injustice is also a condition for the inclusion of groups whose trajectories belie the victim-perpetrator binary, such as the former combatants discussed by Usoof-Thowfeek and Gunasekera in Chapter 10, whose pathways in and out of combat have been marked by manifold forms of coercion and violence. Relatedly, it provides a context to the experiences of actors kept “at a distance” in current ways of delivering justice, either literally, as a consequence of conflict-generated exile (Chapter 8), or when the gap between the legal procedures of justice and cultural expectations of justice seems insurmountable (Chapter 9). It thereby opens up hitherto under-explored possibilities for building more inclusive processes for addressing past injustice, which are not only premised on the establishment of proof for individual guilt, adversariality or individual entitlement for reparation, but also collective patterns of historic violence whose consequences span into the present. To be of pragmatic and ethical value, these processes have to foreground the ethical, social and political alliances capable of undoing, here and now, the consequences of past injustice and facilitate what Rothberg (2019, p. 12) dubs *long-distance solidarity* between diverse groups of beneficiaries and victims who move towards each other in a joint commitment to create fairer structures.

This volume coalesced around the scholars, themes and issues that both framed and emerged from the Lausanne Summer School on Transitional Justice and Conflict Transformation, and the Pluralistic Memories Project from which the summer school emanated, and the chapters reflect this orientation. They offer insights on how group psychology, commemoration, justice beyond the law, combatant reintegration, victim solidarities, diasporas and postgenerations can add to the reconceptualization of transitional justice. They pay less attention, therefore, from a disciplinary lens of, say, developmental or political science, or legal or security studies, to questions

on post-war development, institutional reform (including constitutional, legal and security sector restructuring), or the consolidation of democracy and good governance. They stay *interested* in these topics, however, given their intersections with the case studies at hand. Nor do they discuss at length cultural work for peacebuilding and long-term change which de Greiff (2020) rightly notes as “the least developed in terms of doctrine and practice” within transitional justice (p. 257); an observation endorsed in Chapter 3 on how individual commemorations on the Rwandan genocide through music and art were overshadowed by official top-down imperatives of remembering. Nor do they analyse the anatomy of the state – or more precisely, how we may move beyond what Ruti Teitel (2014) once called “steady-state justice” (p. 4) to theorize the state not as an abstraction (which thereafter permits its stability to be constructed), but as an “archipelago”, or chain of logics incorporating the cultural/ethno-nationalistic, juridical, neo-liberal and militarized, which combine and reconfigure contingently (Amar 2013).

Addressing such a state requires new vocabularies and schemas from transitional justice research including how we may avoid the ever-present *nation-state* which influences, also in this book, the identification of the particular case studies. Our intuitive understanding of what defines a “case” is typically bounded by the notion of a sovereign territory, even when some case studies are comparative, or include diasporas and groups that claim a right to return, or an anticipated state. For example, Parmentier, Rauschenbach and Hein’s contribution (Chapter 8) showed not only how the taken for granted boundaries of national territories become visible (and problematic) once we take into account justice stakeholders located beyond these boundaries, but also why the analysis necessarily has to work with national frames as established social and political realities. We may not, therefore, want to dismiss the nation-state as a unit of analysis altogether given its primacy in international and humanitarian law) but, rather, we should be aware of the paradox of keeping to its borders when the nationalisms that underwrite its imaginaries have been turned into intractable grounds for violence.

To shed light on the unsettled nature of transitional justice, including research in the field, then, is to acknowledge that transforming injustice is, inherently, about work in progress. This refusal to settle often courts impatience. Noting that, because transitional justice can never fully redress all violations, de Greiff calls for a *principled pragmatism* invested in problem-solving and prevention of violence, rather than the utopianism he sees behind the endless rounds of critique that the human rights community has fallen prey to (2020, p. 257). The binary, however, between continuous critical reflection – which is also the habitus of research – and a pragmatic, ready-to-go practice on the basis of the gravities at stake, requires reframing. Qadri Ismail (2013), addressing a conference on “Ethical Futures”, noted that if “one understands ethics, very crudely, as making a claim upon the good, and politics upon the possible, the statement challenges us to imagine

the should, without being constrained by the could” (p. 2). Ethics is frequently aligned with justice; the “could” signals political conditions and judgements, and the “should” an anticipatory idealist promise. “Settlements” after systemic violence teach us, however, that neither the “could” nor the “should” is without politics.

Collective interpretations of what is desirable *and* feasible do not emerge in a vacuum, but are actively shaped and mobilized by those who have a stake in the outcome. Claims that peace is illusive (e.g. because the enemy is too hateful) or that a fairer distribution of privilege is out of reach (e.g. because people are intrinsically resistant to change) are typically easier to uphold than the claim that peace and equity are intrinsically unwanted. In democracy, everyone’s view of what “should be” is meant to be given the same weight, but by orienting the collective perception of what “could be”, influential elites can effectively bypass democratic aspirations. If one thinks (as we do) that scholars have a responsibility to facilitate transitional justice processes that are more democratic and inclusive, this aim certainly cannot be achieved through (technocratically) prescribing “the good”, but rather by amending unduly narrow understandings of “the possible”. In transitional justice, neglecting existing collective resources can sometimes lead to ignoring the potentially most desirable options prematurely, i.e. a failure even to consider them as serious options in the deliberative process.

The ethical and pragmatic implications highlighted in the four contributions presented in the final section of this book can, therefore, be far-reaching. They brought into consideration options traditionally viewed as impractical, such as working with spoilers (Chapter 11) or with people’s capacity to connect with the suffering of communities different from their own (Chapter 12). They also revealed that what communities can become is not overdetermined, once and for all, by what they have been during the darkest (or brightest) hours of their collective trajectory. Communities can see their boundaries, values or capabilities shift in unpredictable ways by the experiences they go through collectively, be it by gathering at the same time and place as a crowd (Chapter 13) or by developing a sense of common fate throughout a wider pattern of events (Chapter 14).

Critically, therefore, these contributions have reminded us that the concept of transition applies equally to how we think about justice following violence, as well as to the needs of justice stakeholders and to the pathways available to meet these needs. Survivor expectations of, and settlements with, justice change over time. What someone feels is just when beginning a post-war life, for instance, may not be adequate justice later on in life. How justice is experienced, defined, promised and understood by different constituencies is shaped and measured along shifting individual and social relations. Therefore, creating justice in the aftermath of violence, whether we understand it as implication and responsibility (Rothberg 2019) or as ethical futures (Ismail 2013), is best thought of as a *heuristic*, rather than a point of resolution. It should be something that allows us to see further, and to open new

pathways in the next act, rather than to celebrate victory or the final stroke of a pen on a peace agreement. What applies to the political holy grails that conflict actors strive for also applies to the intellectual ideal of conceptual definitiveness. The chapters in this book, therefore, in dialogue with each other as well as with other voices from within and without the transitional justice community, might offer the transitional justice field something more precious than new certainties: a nurturing of its continuous becoming.

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