

5-19-2015

## Editorial Note

Laurel E. Fletcher  
*Berkeley Law*

Follow this and additional works at: <http://scholarship.law.berkeley.edu/facpubs>



Part of the [Law Commons](#)

---

### Recommended Citation

Laurel E Fletcher, Editorial Note, 9 Int'l J. Trans. Just. 193 (2015)

This Article is brought to you for free and open access by Berkeley Law Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact [jcera@law.berkeley.edu](mailto:jcera@law.berkeley.edu).

## Editorial Note

Laurel E. Fletcher\*

Is transitional justice suffering an identity crisis? The field, which began as a human rights project leveraging the state duty to prosecute, has expanded as an international criminal law project focused exclusively on individual accountability. It now seems to be turning back to human rights, not to impose criminal accountability but to seek state accountability to provide reparations to victims and to address structural drivers of violence. In the attempt to be ‘holistic,’ transitional justice glosses over the ways in which human rights and international criminal law prioritize different goals. In part this is due to the fact that, while ‘accountability’ is central to the field, it has multiple meanings. As a result, transitional justice scholars and practitioners may be talking past each other when they debate the extent to which the field is or should be ‘norm driven,’ ‘legal’ and aim to ‘end impunity’ or focus on victims, economic injustice or root causes of mass violence. To make progress in these discussions, transitional justice needs to attend more carefully to what accountability means and entails.

### CRIMINAL ACCOUNTABILITY AS THE FOUNDATION OF TRANSITIONAL JUSTICE

The origins of transitional justice began with legal accountability, broadly defined. From the ruins of the Second World War, nation states built a new, international system designed to maintain international peace and security based on human rights and the rule of law. These commitments require that legal accountability serve as the lynchpin of modern global governance. There must be consequences for breaches of international law obligations. The regular reference to the origins of transitional justice as emerging from the Nuremberg trials has elevated the latter to a symbol of this norm of accountability. Individual criminal accountability for orchestrated mass violence that offends our collective humanity has become the guiding principle for the global community to respond to such events.

However, individual criminal accountability for violations of international law, while novel at the time, was only one form of accountability imposed on Germany at the end of the Second World War. The Nazi’s surrender and Allied and Soviet occupation enabled the victors to implement multiple forms of legal accountability. In addition to the Nuremberg trials, the victors exacted war reparations, reasonably understood as a form of state accountability, designed not just to compensate them

\* Co-Editor-in-Chief, Berkeley, California, USA. Email: lfletcher@law.berkeley.edu

for their costs of defeating the Nazi regime, but also to dismantle Germany's war machinery and prevent another world conflagration. The demands of Holocaust survivors led to the German state paying reparations to individual survivors. Such monetary compensation needs to be seen as part of the development of international human rights law and its challenge to international law as the exclusive province of states. And their occupation of Germany enabled the Allies and Soviets to impose political accountability on the German state by implementing far-reaching constitutional and institutional reform.

Fast forward to the fall of the Berlin Wall and the emergence of transitional justice as a post-Cold War response to periods of mass violence or repression and we see that individual criminal accountability for international crimes is the rallying cry to respond to the bloodshed in the Balkans and Rwanda. Yet, there is no similar momentum to pursue legal accountability against the state for its role in the violations. Part of the difference is due to the fact that the flowering of transitional justice in the early 1990s occurred in a different geopolitical context to that of the Nuremberg trials. To the extent that Nuremberg is thought to have contributed to establishing (West) Germany as a democratic state, the trials were only one piece of a broader effort to rebuild Europe.

By comparison, postconflict reconstruction in the post-Cold War era is a more modest affair. Nevertheless, the Nuremberg trials are used by transitional justice advocates to justify individual criminal accountability as uniquely capable of promoting truth recovery, rule of law, reconciliation and democracy. These are outcomes that in Germany were supported by a broader range of initiatives that were not associated with the trials. In contrast, the *ad hoc* criminal tribunals, grounded in humanitarian and human rights law obligating states to prosecute egregious crimes, were thought to provide an authoritative truth about who was responsible for the bloodshed in the Balkans and Rwanda to dispel collective guilt and enable ordinary citizens to live again as neighbors.<sup>1</sup> Or, as advanced by proponents of the South African Truth and Reconciliation Commission, truth commissions were no longer a second best alternative to criminal trials but were uniquely capable of promoting reconciliation across racial divides.<sup>2</sup> The instrumental justifications for transitional justice mechanisms came under the banner of truth, justice and reconciliation – the salutary troika of promised outcomes. These goals served to elevate the moral plane upon which the international community's commitment to justice for mass atrocities would play out and galvanized support for criminal accountability as a preferred approach to dealing with such episodes.

In other words, transitional justice was necessary not only because widespread violence or repression demands some form of criminal accountability, but also because transitional justice would help produce societies that had 'overcome' their violent and fractured pasts and were committed to rule of law and human rights. Once

1 See, Naomi Roht-Arriaza, 'The New Landscape of Transitional Justice' in *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice*, ed. Naomi Roht-Arriaza and Javier Mariezcurrena (Cambridge, NY: Cambridge University Press, 2006).

2 Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston, MA: Beacon Press, 1999); Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (New York: Routledge, 2001).

pursuit of criminal accountability became tied to the achievement of broader social goals, transitional justice could no longer justify itself as simply a normative project of pursuing wrongdoers, if indeed it ever could. It had to show results. This meant that interventions undertaken as part of transitional justice – trials, truth commissions, lustration, etc. – were now fair game for empirical scrutiny.

### THE TURN AWAY FROM CRIMINAL ACCOUNTABILITY AND LEGALISM

As scholars began to evaluate how effective transitional justice interventions were at achieving their goals, the record that emerged was decidedly mixed. It was not clear that trials or truth commissions helped strengthen rule of law or promoted reconciliation. Furthermore, critiques of transitional justice came not only from researchers testing the record of mechanisms, but also from scholars and practitioners who questioned the foundational normative claims of the field. What does justice mean and look like in any particular postconflict country? What does reconciliation look like after the fall of a repressive regime? In particular, skepticism emerged about criminal accountability and legalism itself as able to deliver on the aims of transitional justice. Trials may punish a few, but do not deliver justice to the many victims. The truth as determined in a courtroom or a commission is reductive and partial. Taking up transitional justice from the vantage point of its purported beneficiaries, the question became not so much whether criminal accountability was necessary but rather whether it was missing the point entirely.

Instead of starting from the proposition that mass violence and repression are synonymous with international crimes and therefore criminal accountability is required, scholars and practitioners examined transitional justice from a new vantage point. They began by asking what practices and processes are needed to ensure change so that neighbor need not fear neighbor, inequality and marginalization are not a birthright and citizens are able to live with confidence that social and political conflicts will be resolved peaceably. Taking up this line of inquiry, a strand of thinking in transitional justice developed that looked to social and cultural practices rather than law as the framework around which transitional justice should be organized.<sup>3</sup> This brought a focus on bottom-up initiatives and processes, and challenged international criminal justice and legalism more generally as the *sine qua non* of transitional justice. The role of law was challenged but not entirely displaced. The empirical or end goals of transitional justice – to achieve a peaceful and just society – could be leveraged by state duties under human rights law to guarantee basic human freedoms. In other words, ‘accountability’ could be understood primarily as the duty of states to secure social justice and thus deprioritize or subordinate the state duty to prosecute individuals to a broader agenda of social transformation.

Those who argued that the ends of securing a just and peaceful society required structural reforms to cure the underlying drivers of conflict found help in human

3 Kieran McEvoy and Lorna McGregor, eds., *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Oxford: Hart Publishing, 2008); Rosalind Shaw and Lars Waldorf, with Pierre Hazan, eds., *Localizing Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford, CA: Stanford University Press, 2010).

rights norms and principles of state responsibility.<sup>4</sup> A human rights-based approach to diagnosing the causes and offering solutions to economic violence and marginalization offers moral and legal justification that greater attention should be paid to structural ‘root and branch’ problems as part of transitional justice policy.<sup>5</sup>

### STATE ACCOUNTABILITY REVISITED

Human rights law provided new succor particularly for advocates of victims of international crimes. As long as victims’ rallying cry was trials of perpetrators, criminal accountability sufficed to satisfy their demands. But transitional justice promised victims reconciliation and peace in addition to justice, and that meant more than punishing wrongdoers. It meant things like rehabilitation, land reform and fair and effective government. Victims, their advocates and scholars advancing this approach profited from a rights-based approach that foregrounded prospective, restorative justice and human rights guarantees.<sup>6</sup> States owe victims of serious human rights violations (which are also international crimes) a right to a remedy, which includes the right to reparations. Reparations, in turn, may take many forms, including ‘guarantees of non-repetition,’ that is, measures of reform that will guarantee the violations do not recur. Thus, state land reform as a transitional justice measure could be the result of the legal obligation of a state as a human rights remedy for atrocity crimes – something that international criminal law does not require. A key challenge becomes how to turn these substantive human rights norms into change on the ground. Although law is brought back to advance transitional justice, there is no comparable enforcement mechanism to the International Criminal Court (ICC).

Shifting from individual criminal accountability to attending to prospective structural change fixes our gaze on the state rather than the individual as the legally accountable actor. Yet, states jealously guard their sovereignty and have been stingy in permitting international oversight. Human rights arguably have flourished despite the state-centric international system. But existing human rights mechanisms are ill suited to serve as the state analog to the ICC. There is no international human rights court with comparable jurisdiction to the ICC. And while human rights bodies have developed norms and creative approaches to reparations that arguably could achieve some of the structural reform desired by root and branch transitional justice, the record of implementation and enforcement of these types of recommendations and judgments is poor. These shortcomings point to the incomplete nature of the

4 See, Dustin N. Sharp, ‘Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice,’ *Harvard Human Rights Journal* 26(1) (2013): 149–178; Pablo de Greiff and Roger Duthie, eds., *Transitional Justice and Development: Making Connections* (New York: Social Science Research Council, 2009); ‘Transitional Justice and Development,’ special issue of *International Journal of Transitional Justice* 2(3) (2008).

5 See, e.g., Paul Greedy and Simon Robins, ‘From Transitional to Transformative Justice: A New Agenda for Practice,’ *International Journal of Transitional Justice* 8(3) (2014): 339–361.

6 See, e.g., Pablo de Greiff, ‘Articulating the Links between Transitional Justice and Development: Justice and Social Integration,’ in *Transitional Justice and Development: Making Connections*, ed. Pablo de Greiff and Roger Duthie (New York: Social Science Research Council, 2009); Naomi Roht-Arriaza and Katharine Orlovsky, ‘A Complementary Relationship: Reparations and Development,’ in *Transitional Justice and Development: Making Connections*, ed. Pablo de Greiff and Roger Duthie (New York: Social Science Research Council, 2009).

international rule of law system. Legal accountability remains at the center of transitional justice, but states have created institutions that treat accountability principally as applying to individual criminal accountability while eschewing state accountability. In other words, states favor accepting demands for reparations and reform as policy options subject to political and economic constraints, rather than as legal obligations.

#### IN THIS ISSUE

The articles in this issue speak to these themes. Transitional justice continues to be an expansive site to theorize the ways that democracies should respond to injustice. Nicola Henry, in 'From Reconciliation to Transitional Justice: The Contours of Redress Politics in Established Democracies,' proposes an expansive conception of transitional justice, one that encompasses redress for historical injustices in Australia and uses transitional justice as a powerful analytic frame to understand contemporary politics and the ongoing legacies of past injustice. Yeliz Budak also extends the application of transitional justice beyond postconflict situations. In 'Dealing with the Past: Transitional Justice, Ongoing Conflict and the Kurdish Issue in Turkey,' Budak makes the case to analyze Turkey as an example of a 'proto-transition,' in which transitional justice mechanisms are constitutive of a potential transition with respect to the Kurdish conflict. Thus, Turkish state practices of transitional justice such as criminal accountability for past violence against the Kurdish population serve as a framework for understanding how transitional justice praxis in the midst of conflict may contribute to political transition.

Demands for criminal accountability and the fight against impunity for past crimes continue to animate contemporary politics in countries in which amnesty laws block prosecutions decades after the major conflict has ended. In 'Amnesty Law, Political Struggles for Legitimacy and Violence in Mozambique,' Victor Igreja looks at state and elite politics in Mozambique at critical junctures in the peace negotiations to argue that the amnesty law does not reflect a societal consensus so much as it does the political maneuvering of the Frelimo government and Renamo rebels. As a result, accountability for past crimes remains an unresolved issue and one that continues to undermine political stability in the country. Similarly, in 'International Justice through Domestic Courts: Challenges in Brazil's Judicial Review of the Amnesty Law,' Yi Shin Tang studies the status of the amnesty law in that country and the possibilities for its reversal. Brazil's Supreme Federal Court upheld the amnesty law under the constitution, whereas the Inter-American Court of Human Rights found it to violate Brazil's human rights obligations. The conflict over the priority and meaning of the accountability norm between international and domestic law raises important questions for the relationship of law to transitional justice processes.

Authors also examine transitional justice from perspectives that decenter criminal accountability as the fulcrum for social change in postconflict countries. Lucas Lixinski sheds light on cultural heritage law in South Africa as a component of transitional justice in 'Cultural Heritage Law and Transitional Justice: Lessons from South Africa.' Which objects are entitled to legal protection as cultural heritage can be understood as one of the ways that postconflict states authorize the heritage of some

groups and exclude or elide the experiences of others. Here law operates to regulate public memory, but in Siona O'Connell's 'Injury, Illumination and Freedom: Thinking about the Afterlives of Apartheid through the Family Albums of District Six, Cape Town,' law is in the background and provides the frame through which the author mines an archive of family photographs to explore what it means to live in postapartheid South Africa. Both articles underscore that the work of transitional justice as a practice that produces social meaning may take place far away from criminal courtrooms.

Two articles take up the construction of victims and their relationship to transitional justice. In 'Recovering Historical Memory: A Struggle against Silence and Forgetting? The Politics of Victimhood in Spain,' Vincent Druliolle unpacks the production of 'victims' in Spain to analyze the politics of victimhood in that country, how it has generated a hierarchy of victims and what this portends for how scholars and practitioners should understand transitional justice dynamics. Enzo Nussio, Angelika Rettberg and Juan E. Ugarriza, in 'Victims, Nonvictims and Their Opinions on Transitional Justice: Findings from the Colombian Case,' offer an empirical examination of another presumed truism of victims: that those who are victims of armed conflict will have different views of transitional justice measures than those who were not victimized. The authors find, to the contrary, that in the case of Colombia there were no significant differences in attitudes between these two groups, raising provocative questions about the impact of violence on reconciliation.

Where does this leave us? Legal accountability remains central to the transitional justice project. In fact, the extension of transitional justice to achieve broader aims makes state accountability more important and more expansive. It also leads us to ask whether transitional justice has become so enamored of accountability that it has lost sight of its limits. It is time to reconsider a series of conceptual relationships in transitional justice. First, the relationship between law and transitional justice: as an instrument, law has been more developed with regard to the enforcement of international criminal law, but can it deliver the same impact with regard to the broader social justice goals of transitional justice? Second, the relationship of accountability to transitional justice: can transitional justice's understanding of accountability be broadened to include state accountability in the same way as the field has conceived of criminal accountability, that is, as the lynchpin of prevention and justice? Finally, the relationship of transitions to justice: transitional justice's aims to address systemic drivers of violence arguably have shoehorned human rights claims into the field, but to what effect? Transitional justice may become even more firmly a human rights-oriented project reliant on law as a tool for social justice, with the challenges or shortcomings that legalism brings with it. These varying uses of law and legal accountability challenge the ability of transitional justice to maintain itself as a coherent field, even as these debates vitalize its theorization and practice.