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Editorial Note

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Editorial Note

Transitional justice has become a popular bandwagon, driven by the heroic notion that it will somehow carve its way through the wasteland of mass abuse towards a bright horizon. The popular appeal of iconic events such as the Nuremberg Trials, the South African Truth and Reconciliation Commission (TRC) or the *Gacaca* courts in Rwanda (or the Kony2012 debacle) speak to our desire for nicely packaged solutions to our deeply disturbing legacies of abuse and oppression.

Of course, this bandwagon has always been controversial, and *IJTJ* has sought to provide an intellectual space for academics, practitioners and policy makers to reflect critically on what transitional justice can or should contribute to addressing these legacies. Most recently, the deepening inequality and recent incidents of mass violence and police massacre in South Africa have provoked serious questions about what transition in that context has meant and what has happened to the ‘rainbow nation’ envisaged by the TRC. While immediate goals of democracy, human rights guarantees and an end to political violence are clear areas of consensus, the meaning of (and the path to) social equality and more inclusive forms of governance are subjects of more complex debate. Where violence and social mistrust persist despite the basic democratic institutions being secured, we need to ask deeper questions about the causes of violence and oppressive political practices. The question of what a country should transition to, and what should be left behind, thus does not seem to have been adequately answered by policy makers in South Africa, or by transitional justice scholarship more generally.

Similar questions are being asked about the nature of transition and the role of transitional justice processes in North Africa, where the initial excitement of the much touted ‘Arab Spring’ has become mired in conflict over the next phase of transformation.

What can we say, with the benefit of a little bit of hindsight, regarding the trajectories of transition that the transitional justice field overtly, but also covertly or unintentionally, promotes? Should recent events in South Africa make us reconsider the optimism surrounding the archetypal transitional justice model? If so, in what way? In postconflict and postauthoritarian contexts beyond South Africa, as well, questions are being asked about the extent to which transitional justice can provide quick-fix solutions to deep social problems. While articles in this journal aim to provide carefully measured reflection on, as well as serious scepticism regarding, certain transitional justice claims, the field is still painted by the rainbow brush of the South African TRC.

Although the field has come a long way since the South African model was the principal reference point for transitional justice debates, its claims of having effectively promoted reconciliation and justice in South Africa are increasingly undermined as the deeper economic injustices, the failures of institutional transformation and embedded norms of violence¹ persist almost 20 years after the fall of apartheid. Inequality in South Africa remains deplorable, both in terms of the country having one of the highest levels of income inequality in the world (which has in fact increased since 1994)² and in terms of continued racial inequality where the average white household income is six times that of black households.³ The delivery of basic services, while significantly improved since apartheid, is still a distant dream for many citizens, and unemployment remains at a staggering 36.5 percent.⁴ Given South Africa's history of colonial and racial oppression, which spanned more than 300 years, we should perhaps not be too surprised by the persistence of these challenges. Yet, while expecting quick solutions to a legacy of centuries of oppression is unrealistic, the level of violence and political discontent raises serious alarm bells regarding the trajectory of the transition. A few illustrations paint a deeply disturbing picture.

On 16 August 2012, 34 miners were shot and killed by police during a strike at Lonmin platinum mine at Marikana, while 78 were injured.⁵ A commission looking into the massacre has already uncovered evidence of a police cover-up of the events.⁶ Resort to lethal force by the police in responding to strikes and other public protests and in apprehending suspects has been the subject of numerous complaints, investigations and some prosecutions but has remained a persistent problem. Another apartheid legacy, police torture, also seems to have found a new lease of life. While new legislation was passed to regulate police use of force and a bill has been adopted to criminalize torture, these practices seem embedded at a level where legal processes by themselves are insufficient to eliminate them.

Public protests in South Africa have become increasingly violent. The protests in Marikana and during other strikes have often been marked by violence, and

¹ Violence and injuries are the second leading cause of death and lost disability-adjusted life years in South Africa. The overall injury death rate of 157.8 per 100,000 people is nearly twice the global average. Mohamed Seedat, Ashley van Niekerk, Rachel Jewkes, Shahnaaz Suffla and Kopano Ratele, 'Violence and Injuries in South Africa: Prioritising an Agenda for Prevention,' *Lancet* 374(9694) (2009): 1011–1022.

² South Africa's Gini coefficient increased from 0.66 to 0.70 between 1993 and 2008. Murray Leibbrandt, Ingrid Woolard, Arden Finn and Jonathan Argent, 'Trends in South African Income Distribution and Poverty since the Fall of Apartheid,' OECD Social, Employment and Migration Working Papers No. 101 (2010).

³ Philip de Wet, 'Census 2011: 50 Years for Blacks to Catch Up,' *Mail and Guardian*, 30 October 2012.

⁴ The official figure of 25.5% unemployed includes only those actively looking for work.

⁵ This was the most serious incident of police violence not just since the democratic transition but since the Sharpeville Massacre of 1960 that marked the beginning of the armed struggle in South Africa.

⁶ Evidence was presented showing that police placed weapons by the bodies of deceased protestors. See, Greg Marinovich, 'Marikana: A Cover-Up for All to See,' *Daily Maverick*, 6 November 2012.

numerous nonstriking workers have been killed during strike action.⁷ Protests over poor government delivery of basic services, such as sanitation and promised housing, have also often turned violent. Much of the blame for this, however, rests with the police because of their confrontational strategies in engaging public protests, with peaceful demonstrations spiralling out of control once police engage protesters.⁸

Public violence has also been witnessed in community action against criminal suspects and nonnationals. Where the state has failed to take effective action against high levels of crime, many communities have resorted to vigilante methods, and this often in the form of brutal killings, sometimes drawing on the apartheid-era political struggle repertoire of 'necklacing' the victim. Xenophobic attitudes towards 'foreigners,' who are suspected of competing unfairly for jobs, housing and social services, have also often resulted in violent deaths, the worst of which were the riots in 2008 that killed 62 people.

Gender violence, particularly rape, remains at a horrific level. More than 25 percent of South African men questioned in a 2009 survey admitted to raping someone, and nearly half of those men said they had raped more than one person.⁹ The rate of homicide of women by intimate partners is six times the global average.¹⁰

South Africa was a transition, but a transition to what? Formal democracy has been effectively consolidated, but a safe and secure livelihood has not been achieved and the legitimacy of the state's ways of addressing labour disputes, crime and social welfare is showing signs of disintegration. The benefits of democracy have been very unevenly distributed. While democracy has to carry a heavy burden of past inequality and repression, the investment in transitional justice processes in South Africa would, many believe, have provided a better prognosis. We should clearly now ask: What are the changes to which transitional justice is supposed to contribute? And how exactly are transitional justice processes supposed to contribute to these changes?

Transitional justice is not about finding a shortcut to a utopian society or at least a stable democracy. Each country dealing with the legacy of mass political violence and human rights abuses confronts its own unique challenges and holds a different vision of a reconciled and just society, or at least its own unique set of competing claims to such a vision. While there are some strong general themes (such as human rights) that appear to unite transitional justice, these are not

⁷ The most violent of these was the national strike by security guards during which 50 people were killed over a three-month period. The main umbrella union in South Africa admits that half of its members believe that violence during strike action is necessary in order to achieve results. Crystal Orderson, 'Violence Necessary, Say COSATU Members,' *Cape Times*, 7 September 2012.

⁸ Centre for the Study of Violence and Reconciliation and Society, Work and Development Institute, *The Smoke that Calls: Insurgent Citizenship, Collective Violence and the Struggle for a Place in the New South Africa* (July 2011).

⁹ Rachel Jewkes, Yandisa Sikweyiya, Robert Morrell and Kristin Dunkle, *Understanding Men's Health and Use of Violence: Interface of Rape and HIV in South Africa* (Cape Town: South African Medical Research Council, 2009).

¹⁰ Seedat et al., supra n 1.

universally shared or understood in how they should be applied. There is no one vision of what transitional justice means or requires that unites the field into a collective movement.

Transitional justice, therefore, is a contested field. This struggle is visible in terms of the diversity of goals pursued in transitional contexts. Transitions are more easily defined in terms of what they are departing from – dictatorship, war, mass violations, genocide, authoritarianism, communal mistrust and division. What they deliver, how and to whom, however, is subject to local and international political contention as well as normative debate in the transitional justice field. Both a vision for an ideal society and the path to that horizon can be highly controversial and subject to intense and violent conflict. Too often, transitional justice proponents assume consensus on key goals, viewing one transition as analogous to another and simply requiring some form of cultural calibration. In a context of the global strengthening of the rule of international law, of human rights as a normative framework, of global capital as an unquestioned economic logic, the transitional justice model that emerges to fit this ‘consensus’ is one that is deeply alien to some communities. Not only does it not provide a good fit but it also may present solutions that pose a threat to the specific priorities or vision of a just and reconciled society of a particular country, community or victim. The international template too often appears to prioritize the interests of certain stakeholders (generally the wealthy and educated elite) and to present a cultural model that can be deeply threatening to local conceptions of community, including indigenous ideas of a moral order drawn from values of tradition and social connectedness. Rather than an impartial regulatory framework, the new recipe for peace may appear like a new form of colonialism.

There is no solution to this contestation. We have not arrived at the end of politics. The trajectories of transitions need to be negotiated among relevant stakeholders. The transitional justice field can assist in clarifying such contestation and mapping out competing claims but ultimately is itself subject to this normative debate.

Therefore, even where there is some consensus on goals, transitional justice is also contested in terms of the strategies and policies employed in achieving them. The past 20 years have seen intense and acrimonious debates as the transitional justice field has entered mainstream politics and its interventions have been introduced largely through popular myths about their impact (among both local policy makers and international actors).

Transitional justice has been presented as the ingenious quick remedy for addressing a range of social ills. But has the field been undone by its own public relations campaigns, whereby the expectations of truth, justice and reconciliation seem to precede disappointment with such regularity? The painful irony that now confronts many transitional justice interventions is the fear expressed by policy makers of educating victims about their rights in a context where this will cause a backlash against transitional justice mechanisms that fail to deliver on their overblown promises.

When putting Nazis on trial and restoring dignity to apartheid-era victims, transitional justice seemed like it had a nice unifying call that could build consensus locally and globally. The hard work of engaging with communal and intergenerational trauma, of addressing deeply rooted social inequalities, of shifting social norms shaped by centuries of violence and dehumanization is less likely to lead to consensus and is not resolvable through short-term interventions. The Kony2012 video and other such attempts to hype new transitional justice bandwagons still find popular appeal in certain circles and highlight the need for the field to engage in more sophisticated public education that seeks not simply to gain support for a predetermined outcome but also to encourage debate and critical engagement.

The South African situation presents a good opportunity to reflect more critically on the challenges of building sustainable change. Some obvious concerns emerge. Transitional justice practices are intimately linked to particular transitions. The legitimacy of a transitional justice process is ultimately tied to the legitimacy of the transition and whether it delivers on its promises of a better life. Such processes seek to establish new norms of how society engages with conflict and violence, but these norms endure only if they facilitate a process of fulfilling citizens' ideals. Root causes of conflict are seldom addressed even during radical political shifts. Gains made by transitional justice processes that ignore structural and economic causes of conflict are likely to be undone as these factors give rise to new conflict.

Transitional justice should not be viewed as an exceptionalist intervention that seeks to provide a one-off solution to the challenges of violence and conflict. Instead, transitional justice interventions need to be foundational in setting precedents for how future conflicts and mass abuses are handled. In particular, expectations for state responsibility for future cases of torture, police killings and intercommunal violence can be (to some extent) reshaped by transitional justice practices. Creating habits of transparency, accountability and participation is an essential part of transforming behaviour and institutional culture.

Protracted conflict reshapes identity, norms and values that cannot be reshaped overnight. Social change of this nature needs to be conceptualized as intergenerational. How individual and collective identities are shaped, and how one conceives of one's connectedness to a neighbour or a colleague, is often determined by decades of conflict. It will take decades (at least) to reshape these building blocks of identity.

The articles in this issue of *IJTJ* engage with many of the issues mentioned above. The authors challenge conventional approaches to transitional justice, questioning the role of international agencies, the effectiveness of international courts, the links between memorials and reconciliation and the effectiveness of existing transitional justice models in fulfilling the field's goal of preventing future abuses. While challenging conventional thinking, the authors offer constructive inputs regarding lessons learnt about strategies to ensure more effective interventions and analytical frames that allow a more nuanced engagement with

the deeper transformative needs of these contexts. These articles provide ample demonstration of how practically engaged the transitional justice field is (or can be) and how sophisticated conceptual engagement can help guide policy and intervention.

In 'Mapping Perpetrator Prosecutions in Latin America,' Cath Collins, Lorena Balardini and Jo-Marie Burt demonstrate how civil society has engaged state actors to promote accountability in Argentina, Chile and Peru and explore the comparative lessons for promoting an access to information and transparency agenda.

The need to take stock of transitional justice claims regarding the field's impact on preventing abuses is highlighted by Lorna McGregor's article 'Transitional Justice and the Prevention of Torture.' McGregor argues that even in relation to torture, an issue that is generally prioritized by transitional justice, these interventions have generally failed to identify and analyse the full extent of the practice and its supporting structures.

Rosemary Nagy argues for more expansive notions of injustice and transition. Her article 'The Scope and Bounds of Transitional Justice and the Canadian Truth and Reconciliation Commission' challenges the field's focus on the individualized violence of the past and argues for an approach that engages more directly with structural violence and structural transformation.

The international community's contribution to justice is interrogated by two of the articles. Elizabeth Drexler analyses the complicity of international agencies in perpetuating impunity in Timor Leste in 'Fatal Knowledges: The Social and Political Legacies of Collaboration and Betrayal in Timor-Leste.' The claims of international(ized) justice are also brought into question by Maria Elander in 'The Victim's Address: Expressivism and the Victim at the Extraordinary Chambers in the Courts of Cambodia.' Elander finds that the expressivist rationale for international criminal law provides simplified representations of victims that do not adequately address their needs.

The role of memorials is explored by two articles, which both present case studies that challenge conventional thinking about the topic. Janine Clark in 'Reconciliation through Remembrance? War Memorials and the Victims of Vukovar' argues that memorials can undermine reconciliation by encouraging selective memory or too much memory, thus preventing society from moving forward. In 'Remembering Complexity? Memorials for Nazi Victims in Berlin,' Christiane Wilke examines how memorials shape who we think we are. Her article examines the complexity of the identity of those who are memorialized and of those who visit memorials to show that memorial practices can be crucial in contemporary identity politics and social movements.

In 'Denial, Silence and the Politics of the Past: Unpicking Opposition to Truth Recovery in Northern Ireland,' Cheryl Lawther examines the resistance to truth recovery in that country and discusses the 'myth of blamelessness' and the interlocking manifestations of silence that inform unionist elite discourse on the past.

These writings prompt reconsideration of the conceptual, practical and temporal boundaries of transitional justice. The field simultaneously defines itself in relation to an ultimate destination as well as the nature and quality of the journey to arrive there.

Especially as adherents to transitional justice continue to rise in numbers, the transitional justice bandwagon will benefit from sympathetic but critical engagement by scholars and practitioners. We welcome continued debate that renews our commitment to the success of the field.