
Foreword

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There is a famous story of a meeting between United States President Richard Nixon and Chinese Premier Zhou En-lai, in Beijing in 1972. Nixon asked Zhou whether he thought the French revolution had been a success. 'It's too early to tell', was the inscrutable answer. Zhou might well have been talking about transitional justice.

Transitional justice is a term of art that emerged during the early 1990s, variously attributed to Neil Kritz and Ruti Teitel. They never made any claim to having invented the phenomenon. For example, Neil Kritz's book drew upon examples from post-war Europe. But they gave it a label.

As the Cold War came to an end, several factors seemed to converge. Central and Eastern Europe embraced the European Convention on Human Rights while coming to terms with its past. Mandela and de Klerk attempted to forge a pluralist South Africa. South American states grappled with the amnesties that had been accorded to dictators like Augusto Pinochet. There were great challenges in the aftermath of genocide in Rwanda and the fragile, uncertain peace of the Balkan wars.

Within human rights law there was a growing emphasis on accountability and impunity, including an understanding that the protection of the right to life and other fundamental entitlements required the State to take criminal investigation and punitive action against perpetrators. At the United Nations, a long-postponed idea to establish an International Criminal Court was suddenly revived.

A quarter of a century later, we are still at it. The practice of transitional justice has become immensely more sophisticated. When the South Africans launched their truth and reconciliation commission, in the mid-1990s, there had by then been about a dozen similar institutions. Today, there are reports of many scores of them. Some countries, like Chile, have had more than one truth commission.

Whereas international criminal tribunals were very much the exception in the early days, given the absence of a permanent court and the apparent need for Security Council action in order to establish a temporary institution, today the reach of the International Criminal Court extends to about two-thirds of the countries in the world. In South Africa, in the early 1990s, decisions about prosecution or alternative forms of accountability were essentially domestic. Today in most countries the issue is no longer whether to contemplate prosecution within the post-conflict justice package but rather how to do it. The Rome Statute does not provide a real option. In 2016, the Prosecutor of the International Criminal Court was, by necessity, a participant in negotiations to finalize the transitional justice component of the Colombian peace process.

Instead of viewing the problem as a series of binary choices between alternative approaches, transitional justice today increasingly involves mixed formulae, drawing upon a palette of options that have been enriched by many years of practice and that are

guided by experienced professionals. This comprehensive volume is a manifestation of the diverse issues and alternatives that are now associated with transitional justice.

Some of the early challenges have now found well-accepted solutions. Others remain controversial, and after 25 years of debate there is still no consensus. The permissibility of amnesty, once an important element in the toolbox of the peace negotiator, is an example of an unresolved issue. For several years, some international judges spoke of a 'crystallizing' or 'emerging' rule of international law that would prohibit recourse to amnesty. However, recently, they seem to have stepped back from the brink. Increasingly, the conversation is about how to frame an amnesty, and the nature of the quid pro quo that is provided in return for this form of impunity.

It may still be too early to judge whether transitional justice initiatives have been a success. This may take centuries, as Zhou En-lai intimated. Yet what would the measures be to enable such a judgment? Here, the question is what transitional justice actually seeks to achieve. Like classic criminal justice, there are a variety of relevant elements.

The first is accountability for the victims. This derives from principles of human rights law. Ultimately, it has strong notes of retribution or one of its milder offshoots, such as 'just desserts'. To the extent that this component prevails, success might be measured by assessing the degree of satisfaction that victims attribute to the process. Yet no matter how harsh the punishment, many victims feel that their concerns have not been met.

Yet justice is also meant to deter. This is a utilitarian rather than a retributive function. Success is then assessed by the non-repetition of violations or, perhaps, the fact that a society is at relative peace. However, many things may account for the absence of conflict. It is pretty hard to disaggregate the contribution of transitional justice.

Truth and reconciliation are two of the main deliverables. Sometimes this is explicit, in the name of the eponymous commissions, but other mechanisms, such as criminal prosecution in its various forms, may also contribute to the search for peace as well as the reconciliation of victim and perpetrator.

Zhou En-lai does not seem to have indicated how he would have measured 'success'. Perhaps the distinction, when one speaks of transitional justice rather than social revolution, is that our expectations may not be as high. Eleanor Roosevelt once said that human rights begins in small places, close to home. Perhaps that is also the way to view the measures that are undertaken as part of transitional justice. They consist of a series of often small and seemingly insignificant steps. They do not remove the pain and suffering of the victims, but they may ease and alleviate it. They do not guarantee a future of peace and prosperity, but they may make it more likely. They do not ensure the triumph of truth but, as Michael Ignatieff has said, they may put some lies out of commission.

