

INSTITUTIONS FROM ABOVE AND VOICES FROM BELOW: A COMMENT ON CHALLENGES TO GROUP-CONFLICT RESOLUTION AND RECONCILIATION

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I

INTRODUCTION

Several articles in this symposium, including Thomas Brudholm's and Valérie Rosoux's *The Unforgiving: Reflections on the Resistance to Forgiveness After Atrocities*,¹ explore challenges to the ability of communities to reconcile in the aftermath of mass violence. One theme that emerges from this collection is the importance of scrutinizing assumptions that drive political and legal responses to large-scale violence. Drawing on prior work regarding transitional justice, this comment explores how assumptions about justice have succeeded in establishing a new international consensus on necessary processes of rebuilding societies, some pitfalls of this approach, and recommendations for new directions for the field of transitional justice.

II

ASSUMPTIONS

A central assumption animating the moral, political, and legal cases for transitional justice is that those responsible for unleashing and conducting mass violence that devastates countries and the lives of civilian residents should not “get away with” their criminal acts.² And further, supporters of justice assume that a legal response is necessary in order to promote reconciliation.³ However,

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1. Thomas Brudholm & Valérie Rosoux, *The Unforgiving: Reflections on the Resistance to Forgiveness After Atrocity*, 72 *LAW & CONTEMP. PROBS.* 33 (Spring 2009).

2. See Eric Stover & Harvey M. Weinstein, *Introduction: Conflict, Justice, and Reclamation*, in *MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY* 4–5 (Eric Stover & Harvey M. Weinstein eds., 2004) [hereinafter *MY NEIGHBOR, MY ENEMY*].

3. Laurel E. Fletcher, *From Indifference to Engagement: Bystanders and International Criminal Justice*, 27 *MICH. J. INT'L L.* 1013, 1018–21 (2005).

until quite recently, legal impunity and social amnesia were more the rule than the exception. New governments that assumed power after cataclysmic violence operated under political and legal restraints in which amnesty for past crimes helped to purchase peace agreements.⁴ The end of the Cold War, public outrage over the wars in the Balkans, and genocide in Rwanda spurred the United Nations to act and helped turn the tide against wrongdoers. This momentum culminated in the establishment of the International Criminal Court.⁵

This era also witnessed the birth of the South Africa Truth and Reconciliation Commission (SATRC). The innovative framework of the SATRC, which conditioned amnesty on full disclosure of criminal acts, quieted critics of truth commissions and ushered in new international acceptance among international-justice advocates that truth-seeking mechanisms were valid alternatives to criminal trials.⁶ Transitional-justice advocates for criminal trials and truth commissions justify these mechanisms as capable and necessary to escort a country from a violent past to a peaceful future.⁷ The success of their efforts has paid off. The landscape of acceptable options for addressing past episodes of mass violence or authoritarian regimes has been indelibly altered. The international presumption prevails that *something* must be done by states (alone or through the international community) to address the past. Debate centers on the contours of the appropriate mechanisms.⁸

III

PITFALLS

The assumption that justice for past periods of violence and repression promotes reconciliation has been the midwife of two ad hoc criminal tribunals, for the former Yugoslavia and Rwanda, and of initiating transitional-justice mechanisms in Liberia, Sierra Leone, East Timor, Cambodia, and Morocco—all since 1993.⁹ Yet there are warning signs that these institutions may not be able to achieve the lofty goals of supporters. In fact, the design and implementation of transitional-justice programs may have unintended consequences that

4. See TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES, at xxi–xxii (Neil Kritz ed., 1995) (a three-volume collection of works that explores the philosophical, moral, political, and legal debates regarding transitional justice, including a volume of twenty-one case studies; questions raised by criminal prosecutions, including the use of amnesties are addressed in multiple selections).

5. Fletcher, *supra* note 3, at 1015.

6. Laurel E. Fletcher & Harvey M. Weinstein et al., *Stay the Hand of Justice: Whose Priorities Take Priority?*, in LOCALIZING TRANSITIONAL JUSTICE: JUSTICE INTERVENTIONS AND LOCAL PRIORITIES AFTER MASS VIOLENCE (Rosalind Shaw et al. eds., forthcoming 2009).

7. See Stover & Weinstein, *supra* note 2, at 3–5 (publication of empirical research conducted in the Balkans and Rwanda examining the relationship between international criminal justice and communities affected by mass violence).

8. Fletcher & Weinstein et al., *supra* note 6.

9. See generally Laurel E. Fletcher & Harvey M. Weinstein, *Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective*, 31 HUM. RTS. Q. 163 (2009).

frustrate or even exacerbate the struggles of communities emerging from mass violence or from a period of repression.

Advocates for trials or truth commissions invoke “reconciliation” as the destination to which these initiatives will lead. However, it is not clear how the term applies or whether it is even usefully employed in the context of group violence or repression.¹⁰ Transitional justice appears to share the phenomenon that Susan Bandes describes in this symposium: an untested, unreflective application of concepts appropriate to a therapeutic context for legal and policy prescriptions.¹¹ One individual may forgive another for a transgression, but what does it mean for communities to reconcile? Rather, the term social reconstruction better frames the structural, institutional, and policy reforms needed to generate the conditions under which individual-to-individual reckoning may occur.¹² In other words, it may make sense to understand trials and truth commissions as helping to generate official histories about the past, acknowledge the loss of victims, remonstrate perpetrators, and instantiate a state commitment to rule of law and to nonviolent conflict resolution that will help lay the groundwork for former enemies to leave aside past grievances and work together to rebuild.

Even with this reframing of the goal, it is far from clear that trials and truth commissions are capable of delivering on this promise. James L. Gibson’s empirical work on the SATRC in this symposium¹³ adds to the small but growing body of scholarship studying the impact of transitional-justice mechanisms. The empirical evidence gives us a far richer understanding of the contextual complexities in which transitional justice plays out. Support for state-sanctioned reckoning among communities varies in unexpected ways. Communities may be split regarding their readiness to live with former enemies, their support for trials, or even whether they believe that accountability of any sort is acceptable.¹⁴

Similarly, reports in countries like East Timor and Sierra Leone have documented civil society’s discontent with those countries’ truth commissions

10. See Stover & Weinstein, *supra* note 2, at 13–14.

11. See Susan A. Bandes, *Victims, “Closure,” and the Sociology of Emotion*, 72 LAW & CONTEMP. PROBS. 1 (Spring 2009); see also Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573, 592–95 (2002) (critiquing the argument that criminal trials for mass violence promote therapeutic healing for individual victims).

12. Fletcher & Weinstein, *supra* note 11, at 623–35.

13. James L. Gibson, *On Legitimacy Theory and the Effectiveness of Truth Commissions*, 72 LAW & CONTEMP. PROBS. 123 (Spring 2009).

14. Eric Stover & Harvey Weinstein, *Conclusion: A Common Objective, A Universe of Alternatives*, in MY NEIGHBOR, MY ENEMY, *supra* note 2, at 332–36; INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE & HUMAN RIGHTS CENTER, UNIVERSITY OF CALIFORNIA, BERKELEY, FORGOTTEN VOICES: A POPULATION-BASED SURVEY ON ATTITUDES ABOUT PEACE AND JUSTICE IN NORTHERN UGANDA 28–29 (2005).

and courts.¹⁵ Justice mechanisms are perceived by some as disconnected from the local institutions and community priorities.¹⁶

Part of this gap between assumptions underlying transitional-justice mechanisms and their effects on the intended beneficiaries of these institutions can be traced to the fact that communities do not speak with a single voice. “Justice” means many things to many survivors: for some it may be criminal trials of political leaders, for others punishment of their neighbor who killed a family member is most important, and some may find justice in being able to return to one’s home and live in peace.¹⁷ Complicating matters further is the observation that individual and community priorities change over time.¹⁸

IV

RECOMMENDATIONS

How are transitional-justice mechanisms to promote social reconstruction if the priorities for what measures are needed vary within communities and change over time? There are no easy answers, but the available record suggests the need for a new approach. First, transitional-justice adherents need to reexamine the assumption that communities emerging from mass violence or repression are assisted by criminal trials or truth commissions. Empirical data should be gathered regarding community desires as to the relative importance of trials, commissions of inquiry, or other means of reckoning with the past.¹⁹ And data collection should be conceived of as an ongoing part of planning and implementing transitional-justice programs. There are hard trade-offs involved—how should we resolve conflicts when some affected groups want criminal punishment for perpetrators in order to move forward and others feel that only through forgiving perpetrators will the community recover?²⁰ Meir Dan-Cohen’s article in this symposium offers the possibility of shifting “temporal boundaries” around past events as part of moving beyond a collective injury.²¹ However, the means for redrawing these boundaries are contested and require a dynamic analysis informed by the voices of community members.

Second, in those instances in which the international community becomes involved in establishing and implementing transitional-justice institutions, more attention should be given to the interface between the international and national. Repeated instances of well-intentioned international efforts to promote transitional justice have alienated critical segments of the national

15. See Fletcher & Weinstein et al., *supra* note 6.

16. *Id.*

17. See Stover & Weinstein, *supra* note 2, at 10–13.

18. See Fletcher & Weinstein et al., *supra* note 6.

19. *Id.*

20. *Id.*

21. Meir Dan-Cohen, *Skirmishes on the Temporal Boundaries of States*, 72 LAW & CONTEMP. PROBS. 95 (Spring 2009).

population: judges, lawyers, and civil society. Perceptions within countries of top-down approaches by the international community generate frustrations and distort institutional relationships and power dynamics, which undermines the legitimacy of international efforts.²²

Finally, it is time to consider timing and sequencing of transitional-justice initiatives. The trend toward earlier and earlier establishment of trials or truth commissions may mean that in the rush to justice, we have missed the mark. The conditions under which trials or truth commissions will promote social reconstruction will be influenced by a number of factors, including culture, legal structure, strength of rule of law, and economic development.²³ More work needs to be done to understand how efforts to prosecute wrongdoers, to promote public disclosure, and to acknowledge crimes and misdeeds might unfold within the historical context, and how that particular context might influence transitional-justice measures.²⁴ In other words, there may be a time when redrawing the temporal boundaries of the state will successfully shift an incident from collective memory to history. Currently, however, no empirical or theoretical data indicate when that moment arises or how intervention might hasten its arrival. Nevertheless, we must begin to grapple with this indeterminacy by refraining from unalloyed promotion of transitional justice and by reexamining some of the foundational assumptions of the field.²⁵

22. Laurel E. Fletcher & Harvey M. Weinstein, *A World unto Itself? The Application of International Justice in the Former Yugoslavia*, in MY NEIGHBOR, MY ENEMY, *supra* note 2, at 29–48.

23. See Fletcher & Weinstein, *supra* note 9.

24. *Id.*

25. *Id.*