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Transitional Justice Moments

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Editorial Note

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Transitional Justice Moments

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Despite their vivid heterogeneity, the articles in this issue of the *Journal* nonetheless share some common threads. Prominent among these is a search for transitional justice moments or, phrased less elegantly, happenings.

Two of the articles unpack situations where transitional justice happened but was not labelled or characterized as such. Four articles examine situations where transitional justice did not happen, or only partly happened, or happened badly. And one article identifies odious violence – child sexual abuse in the Roman Catholic Church – which it argues should be addressed through a transitional justice paradigm.

The articles in this collection accordingly constellate around binaries and continua: hiding, eliding and the hidden; discovery and naming; claiming, disclaiming and reclamation; regretting and ruing; and inclusion for the excluded. The articles unravel Archimedean spirals. Some make a case for greater standardization and best practices, while others gesture towards the pitfalls of proceduralization and the development of those very same best practices. In the end, readers are left with refreshingly competing prescriptions and a kaleidoscope of ideas.

Bits and pieces of each article map onto curatorial concerns that relate to manicuring transitional justice as a discipline, not to mention the rituals of labelling and classing. Perhaps this hunger to categorize stems from the sprawling nature of the discipline's preoccupations. And perhaps this interest is all the more aching because of transitional justice's unresolved epistemology. From where do we know what we know about transitional justice? What to observe? Do we even know where to look to determine whether a moment was transitional? Or whether that moment was at all just, or could have been rendered more just? It is to these questions that the articles provide lively insights.

Human rights are admittedly abstract but remain deeply personal. Often, however, it is easier for transitional justice to grapple with abstracted rights than it is to come to terms with actual human beings with all our indecision, nuance, resilience and unpredictability. A transitional justice brimming with abstractions and guidelines but that condescends flesh-and-blood beings quickly becomes ineffective and dehumanized. The vacillations of the human condition may well exasperate and confound, but they may also surprise and please. They may demonstrate growth and reveal great beauty. Senegalese writer Mariama Bâ, in *So Long a Letter*, recounts how

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Ramatoulaye responds to news of her adolescent daughter's concealed pregnancy. Ramatoulaye learns of the news from Farmata, the *griot* of the cowries. After confronting her anguished and ashamed daughter – holding her at once 'painfully' and 'tightly' – Ramatoulaye writes to Aissatou, her life-long confidante and daughter's namesake:

> And also, one is a mother in order to understand the inexplicable . . . One is a mother so as to face the flood . . . Farmata was astonished. She expected wailing: I smiled. She wanted strong reprisals: I consoled. She wished for threats: I forgave.[1]

HIDDEN HAPPENINGS: PRECURSIVE OR UNSPOKEN TRANSITIONAL JUSTICE

In his chapter, Marcos Zunino revisits the 1967 Russell Vietnam War Crimes Tribunal, which assessed the responsibility of the US for genocide in Vietnam. For Zunino, the Russell Tribunal represents an 'early instance of transitional justice.' He thereby connects the Tribunal to the genealogy of transitional justice. Insofar as the Tribunal operated decades before 'the discourse of transitional justice emerged,' it was a transitional justice practice '*avant la lettre*.' The Tribunal therefore represents precursive transitional justice. Lessons from this ancestor, however, are not to be applied only to contemporary ventures, however categorized, but rather generally towards the discipline of transitional justice, regardless of what is classed as falling within its genus.

The Tribunal was staffed by leading intellectuals, notably Bertrand Russell and Jean-Paul Sartre. It emerged from outside the domain of states or international organizations. Zunino reclaims the value of this Tribunal, which most observers have dismissed or ignored. He views the Tribunal as a historical antecedent for critical approaches to transitional justice and as a 'model of an alternative accountability mechanism.' Although not duly explored in the article, a particularly apposite modern analogue to the Russell Tribunal is the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery. The latter Tribunal met in 2000 and released its final statement in 2001. It considered state and individual responsibility for rape and sexual slavery as crimes against humanity, arising out of Japanese military activity in the Asia Pacific region in the 1930s and 1940s. Its proceedings were conducted formally in front of an audience. Like the Russell Tribunal, it too emerged from civil society. It was proud of its origins – more so than the Russell Tribunal – noting that law is an instrument of civil society and does not belong exclusively to states or governments. Among its principal narrative contributions was a shift in terminology. The Tribunal eschewed 'comfort' – a discomfiting euphemism – and instead, as noted by Rumi Sakamoto, routinely deployed concrete terms such as 'survivors,' 'victims,' 'torture,' 'rape,' 'trafficking' and 'sexual slavery.'[2]

1 Mariama Bâ, *So Long a Letter*, trans. Modupé Bodé-Thomas (Long Grove, IL: Waveland Press, 2012), 87.

2 Rumi Sakamoto, 'The Women's International War Crimes Tribunal on Japan's Military Sexual Slavery: A Legal and Feminist Approach to the "Comfort Women" Issue,' *New Zealand Journal of Asian Studies* 3(1) (2001): 49–58.

Zunino teases out several of the Russell Tribunal's traits as having enlivened its transitional justice journey. Prominent among these is the Tribunal's focus on state responsibility, which arose serendipitously insofar as Sweden, where the Tribunal was based, forbade acts that insulted foreign heads of state. The Tribunal was thus precluded from examining President Lyndon Johnson's individual criminal responsibility. Still, the Tribunal deployed the vernacular of penal process: charges, evidence, rules and verdict (albeit unenforceable). Zunino also deracinates the Russell Tribunal's subversive side. He posits that it desecrated law's sanctity while appropriating its forms. Zunino lauds the Tribunal's rootedness in the initiative of private individuals – civil society, so to speak – interested in commissioning the truth while atrocities were still ongoing. The Tribunal therefore instructs on the value of puncturing state-centrism. Zunino also examines how the Tribunal deployed a broad understanding of the crime of genocide, including cultural genocide, and chastised the transnational economic order. This observation suggests that the push to legal codification in treaties may come with its own set of opportunity costs. In cases of genocide – and, now, the crime of aggression – codification in treaty law may narrow the scope of the impugned conduct. Other accountability mechanisms less tethered to individual criminal responsibility – such as the recently concluded work of the Canadian Truth and Reconciliation Commission – engage broader understandings of genocide, including, in the Canadian case, cultural genocide inflicted upon Aboriginal populations.

Christalla Yakinthou and Sky Croeser look at modernity rather than ancestry, in particular, the modernity of technology. They consider how transitional justice may happen under our eyes though we may not see it as such. We may simply miss it because it takes the form of technology that is too fast, or too novel, for us to notice. Yakinthou and Croeser's subject matter is Internet reform in Tunisia, presented as a form of institutional lustration. While the Internet served as a tool of repression in Tunisia's autocratic periods, it served as a site of resistance and democratic engagement in the country's transitional periods and beyond. In Tunisia, then, the role of the Internet remains a form of unspoken transitional justice: not so much hidden, since it happened in a blur and was known to happen, but never identified or cast as such despite – unlike the case with the Russell Tribunal – the existence of a thick concept of transitional justice and an avid interest in Tunisia as a national case study thereof. For Yakinthou and Croeser, the lack of institutionalization of Internet reform is not necessarily problematic. On the contrary, they emphasize the flexible and responsive ways in which local institutions and stakeholders approach transitions, including memorialization, trust building and promoting social and occupational diversity. Still, the authors chide transitional justice's 'failure to even glancingly address Internet reform,' which they chalk up to the field's 'rigidity' and seek to remedy through an enhancement of the field's attentiveness.

As with Zunino's work, Yakinthou and Croeser invoke the Tunisian example of unspoken transitional justice not just as a lesson in itself, but as pedagogy for the field as a whole. To be sure, their research uncorks only one aspect of the relationship between transitional justice and technology. Other interfaces hungry for sustained attention include the meaning of reconciliation and community in virtual as opposed to territorial spaces; the relationship between privacy rights/informational

dignity and rights to know/information sharing online (i.e., blogging or leaking information about suspected human rights abusers); the circularity among structures that oppress and liberate; and, finally, the extent to which virtuality democratizes transitional justice by carving out spaces for private actors and stakeholders in documenting history while perhaps essentializing narratives of suffering and repentance.

OMISSIONS, PARTIAL HAPPENINGS AND BAD MOMENTS

Lauren Dempster examines how and why disappearances carried out by Republican armed groups in Northern Ireland elude transitional justice scrutiny. She notes how the Republican insistence that the disappeared were legitimate targets left the movement open to criticism that it was insufficiently abandoning or denouncing violence. In a sense, then, we are left with a transitional justice omission, which Dempster exposes and then – invoking Erving Goffman – places within the broader nexus of frame analysis. She also links this omission to another neglected interaction – that between armed movements and transitional justice. This neglect may be particularly glaring when armed movements subsequently become engaged in postconflict politics, such as the Revolutionary Armed Forces of Colombia's involvement in peace processes and legislative composition.[3] Dempster notes how actors may have 'specific, complex and perhaps contradictory motivations' in how they frame issues. In the case of Republican disappearances, this triggers a 'dissonance between actions and rhetoric.' That said, these framing choices do not necessarily impede transitional processes. Rather, they may well mediate the 'difficulties in keeping former combatants on side while transitioning away from violence.' Curiously, perhaps, the absence of transitional expectations, notably best practices of who should be involved on which specific terms, might accord invested parties greater latitude in generating framing narratives in which contradictions are not seen as pejorative, but might instead be appreciated as complements.

Victor Peskin and Mieczyslaw Boduszynski unfurl the vacillating role of the international community in terms of supporting the International Criminal Court's (ICC's) judicial intervention in Libya. Initially, the international community's pro-ICC enthusiasm and support were high. The gusto soon faded, however, as did the support. Peskin and Boduszynski link these oscillations to the undermining of the effectiveness and legitimacy of the ICC as a transitional justice institution in Libya. For these authors, external actors become surrogate enforcers. Attitudinal volatility among these enforcers leads the authors to eschew language such as justice 'cascades' and instead to prefer the metaphor of justice 'tides' that capture the waxing and waning of global justice norms. The fickle nature of the external commitment may generate the transitional justice institution but then subject it to caprice. The fickleness then turns what would otherwise be a virtue into a foible. In the specific case of the ICC in Libya, Peskin and Boduszynski are clear: external instrumentalization can

3 Similar questions arise with regard to the political involvement of persons convicted by international criminal tribunals following their sentence or release. For example, Moinina Fofana's early release was deemed violated in March 2016. Fofana was a Civil Defence Forces leader in Sierra Leone. In revoking his early release and rearresting him, the president of the Residual Special Court for Sierra Leone noted that Fofana was not free to participate in any political activity until May 2018 (the point at which his total sentence of 15 years would expire).

both boost and wither institutional effectiveness and thereby 'plant the seeds for tribunal delegitimation.' Peskin and Boduszynski fear the acceleration of

> an already established diplomatic precedent in which individual state parties and the international community at large mobilize ICC intervention only to sideline the Court when the pursuit of criminal accountability is perceived to interfere with a range of foreign policy goals.

The growing strength of this precedent, according to these authors, places the norm of international criminal accountability under 'increasing strain.' These dependencies and variabilities, therefore, become undesirable.

Whereas Peskin and Boduszynski, and also Dempster, focus on omissions that lead to partial happenings, Jasna Dragovic-Soso examines the omission *in toto* of a truth and reconciliation commission in Bosnia and Herzegovina (BiH). While a truth and reconciliation commission was supposed to happen in BiH, it flatly did not – just like it never happened in Rwanda either. Yet truth and reconciliation commissions emerged in many other places, at times iconically, and the contrast between these many spaces and the two places that generated the ad hoc international tribunals remains evident. As to BiH specifically, Dragovic-Soso begins by mapping out several initiatives between 1997 and 2006 to create a national truth and reconciliation commission. She notes that external actors pushed for these initiatives. Ultimately, Dragovic-Soso links the foundering of these proposals to three dynamics: political resistance; institutional rivalry with the International Criminal Tribunal for the former Yugoslavia (ICTY); and the lack of legitimacy that BiH victim associations accorded to the initiatives. Bosniaks in particular feared 'compromise' truths that may have generated symmetry between their vast suffering (83% of missing and killed civilians in conflict) and the suffering of others. Dragovic-Soso locates pedagogic value in this transitional justice omission. She counsels that exogenous pressures to promote transitional justice may become fulsome. If so, then these pressures will not bear fruit in places with limited domestic political will and high levels of social mistrust in truth-seeking ventures. The role of the ICTY as a competing externally driven rival is particularly galling. In addition to compromising the prospects for a truth and reconciliation commission, the ICTY's push to convict some defendants led it to welcome redacted evidence. That, in turn, undermined the International Court of Justice's ability to deliver transitional justice for the region from proceeding to a truly transparent evidentiary record when it made its own assessment of Serbia's state responsibility for genocide in BiH. The ICTY did not welcome other modalities of justice. Rather, it stifled them. Transitional justice, then, may be distorted by petty institutional politics.

Sarah Williams and Emma Palmer bring us to a bad moment or, more precisely, to the avoidance of an even worse moment. The moment involves the Extraordinary Chambers in the Courts of Cambodia's (ECCC's) opportunity to address gender equity through reparations. The paradox of reparative theory is that it assumes a return to what was before. But what if the prior position – the 'before' – was marred by inequity and disadvantage for women and girls? The opportunity to repair then achieves nothing more than the reassembly of the unfair: to regress, in other words. Williams

and Palmer assess the ability of the reparations mandate of the ECCC to transform gender relations instead of reinforcing preexisting patriarchy. They conclude that placing this expectation on the ECCC leads to disappointment, perhaps inexorably, because of the ECCC's structure, in particular its temporal jurisdiction, remedial limitations, hunger for causality, jurisprudential caution and dependence on voluntary funding and governmental cooperation. The authors broadly conclude that it may be 'unrealistic or inappropriate' for the ICC to attempt to provide transformative justice. Their goal, then, is to avoid bad moments. One way to avoid these is to manage expectations, temper hopes and deflate altitudinous aspirations. Yet another way, ostensibly, would be to do less in the way of transitional justice institution building and perhaps consider how goals of gender equality can be realized outside of transitional justice frames. On the one hand, perhaps transitional justice can become transformative justice. On the other hand, perhaps transformative justice should simply remain something else – separate and self-contained. The solution might not always be to cram additional tasks onto the shoulders of an extant postconflict legal institution. The solution might not be to say that transitional justice can do more, and then even more, in an endless conjunctive and additive carnival. The solution may instead be to say that transitional justice has its limits. And that the value of a transformative policy does not depend on its underlying, or purported, transitionality.

TRANSITIONAL JUSTICE STILL NEEDS TO HAPPEN HERE

James Gallen argues that transitional justice should operate as an 'analytical framework' for responding to the legacy of child sexual abuse within the Roman Catholic Church. Unlike many of the other contributors to this issue, Gallen sees potential in applying transitional justice methods and mechanisms. He propounds an expansion of the field into what may be a 'novel' context – one that is unrelated to armed conflict or authoritarianism. He argues by analogy, demonstrating how the violence of child sexual abuse bears important parallels with subject matter traditionally accepted as falling within transitional justice's docket. Gallen points to the patterns of abuse, the depth of superior responsibility and the subterfuge of transferring alleged perpetrators from one jurisdiction (parish, diocese) to another. In some instances, however, the case he makes could be made even easier. For example, the institutionalization, bureaucratization and normalization of violence that distinguish mass atrocity from other forms of violence are all factors that arise within the church, itself a tightly controlled hierarchical and authoritarian entity.

Gallen might more greatly emphasize the state-like nature of the church. Certainly, the Holy See – the seat of the bishops of Rome, headed by the pope and representing well over one billion Catholics worldwide – is not formally a state. That said, as Cedric Ryngaert concludes, it is 'a *sui generis* non-State international legal person.'[4] It has enjoyed this personality for centuries. The Holy See is a party to many international treaties. It sends and receives diplomatic representatives to

4 Cedric Ryngaert, 'The Legal Status of the Holy See,' *Goettingen Journal of International Law* 3(3) (2011): 830 (noting also that the Holy See derives its personality from its spiritual sovereignty as the centre of the Catholic Church).

and from many states. It has been granted sovereign immunity.[5] It has permanent observer status at the UN, and influenced the adoption of a UN declaration banning all forms of human cloning. In the Rome Statute negotiations, it challenged the inclusion of forced pregnancy as a crime against humanity. The Holy See, moreover, links to the Vatican, which unequivocally is a formal state. Sited on a 110-acre enclave in Rome, the Vatican attaches to the Holy See through the 1929 Lateran Treaties with the Kingdom of Italy (represented at the time by Benito Mussolini). According to Ryngaert, the Vatican 'has a *status aparte* in international law,' existing as a 'territorial basis guaranteeing the independence of . . . the Holy See.'[6] The Vatican also is party to certain international agreements, which tend to be more technical in nature and connected to its operational needs.

Gallen's call is for more transitional justice, a better transitional justice, and for the development of transitional justice best practices to facilitate both quality and quantity. To be sure, the emergence of organizations, journals like this one, reports and a UN special rapporteurship each contribute to the *habitus*. In contrast, Yakinthou and Croeser, writing from the Tunisian vantage point, are less sanguine about the benefits of officialization and more concerned with the limitations of institutionalized cultural capital and competence. They emphasize instead the potential of the unplanned, organic and unprocessed.

Gallen notes how a victims' group unsuccessfully petitioned the ICC's Office of the Prosecutor (OTP) to investigate Vatican officials on the basis of superior responsibility for having consciously disregarded information that subordinates were committing or were about to commit sexual violence. The OTP declined the petition for reasons related to lack of jurisdiction and temporality. That said, the petition indicates the thirst among victims for justice, and the channelling of that impulse in the case of some victims towards the ICC. For Gallen, transitional justice offers the chance to 'enable a comprehensive and coherent assessment of the issues involved in responding to a past legacy of violence.' The sum, therefore, becomes larger than the parts. The collectivization of the victims relates a more powerful story than fragmented cross-border accretion of a range of micro- or meso-level settlements, admissions, reparations or sanctions under canon law. Gallen emphasizes the best practice that reparations for gross human rights violations need to come with an acknowledgement of responsibility. Such acknowledgements have often been lacking thus far in church settlements for child sexual abuse. Gallen appears comfortable with the 'expansionary trend' in which transitional justice becomes applied to 'non-paradigmatic issues.' Gallen is mindful yet also minded to see the potential not in a borderless transitional justice, but in one whose borders are fluid and elastic.

CONCLUSION

The diversity among the articles reveals the vivacity of transitional justice studies and the breadth of the subject matter that now falls under the aegis of transitional justice.

5 For discussion related to the US Foreign Sovereign Immunities Act, including exceptions thereto, see, ibid. The persistence of the sovereign immunity question in lawsuits related to sexual abuse provides a further justification for application of a much broader transitional justice paradigm.

6 Ibid., 858.

This diversity at the same time belies the fuzziness about what exactly transitional justice should concern itself with and unmasks the field's catch-all nature. We may study anything and everything, which may lead to learning nothing. The catch-all nature of what constitutes transitional justice is all the more exposed insofar as it is advanced by influential actors, including the UN, as an integral part of postconflict and peacebuilding strategies. Relatedly, we may see transitional justice in unexpected places and lament its omission from expected places. That or this should have been done as part of a transition – leading to a push towards professionalized homogeneity and the triumph of the checklist, manual and boilerplate. Once something novel is identified as transitionally just, then it too enters the lexicon and morphs from innovative to precedential. More perplexing still is that best practices may shift transitional justice into the exigent realm of only being capable of being done by those with the available expertise. This shift may in turn prompt a drift to graft transitional justice onto the very governmentality that abandons the vulnerable and engorges the privileged.