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The Characteristics of Transitional Justice

The concept of transitional justice arose to address the administration of justice in the special context of regime change. In most understandings of the justice system, courts try people who are accused of acts that were publicly crimes at the time they were committed. The Latin adage *Nullum crimen sine lege* ('there is no crime unless there is law') is widely regarded a foundational to the rule of law.[1)] Since the middle of the 20th century, however, the sanctity of this principle has been challenged by cases in which individuals have been prosecuted for actions which were formally legal under the authority of the recognized government of a sovereign state. War crimes and crimes against humanity were extensively prosecuted in international military tribunals after the Second World War[2)], and prosecutions for crimes against humanity have continued thereafter, albeit at irregular intervals and in a variety of different tribunals, international, domestic and hybrid.

The actions for which defendants were prosecuted were deemed to be crimes either by virtue of international customary law or by virtue of international treaty. The perpetrators, however, had carried out these actions either at a time they were formally legal or in circumstances where they were following the orders or expectations of legitimate authorities. Allowing international rules to prevail over domestic law in this fashion was a major step in eroding what had once been the absolute sovereignty of the state.[3)] Neil Kritz coined the term 'transitional justice' in 1995 to address the question he posed as 'how emerging democracies reckon with former regimes', but the legal and moral questions underlying transitional justice relate primarily to regime change, rather than specifically to the transition to democracy.[4)]

Transitional justice, however, raised three issues that required further departure from the norms of domestic legal systems. All three encouraged proponents of transitional justice to develop new ways of imagining justice processes and outcomes First, most of the actions prosecuted in the name of transitional justice had been carried out in the name of the state or under orders of state officials. The legality of these acts at the time they were committed meant that the scope of legal culpability was much greater than for most crimes, which have to be planned and carried out clandestinely and

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1）Aly Mokhtar, 'Nullum crimen, nulla poena sine lege : aspects and prospects', *Statute Law Review* 26 no.1 (2005), pp.41-55.

2）There were no prosecutions for crimes against humanity in the Asia-Pacific region following the Second World War but there were substantially more prosecutions for war crimes. See Sandra Wilson, Robert Cribb, Beatrice Trefalt and Dean Aszkielowicz, *Japanese War Criminals : The Politics of Justice After the Second World War* (New York : Columbia University Press, in press) ; on the post-war trials in Europe, see Gary Jonathan Bass, *Stay the hand of vengeance : the politics of war crimes tribunals* (Princeton, N.J. : Princeton University Press, 2000).

3）See Geoffrey Robertson, *Crimes against humanity : the search for global justice* (New York : New Press, 2000) p. xviii.

4）Neil J. Kritz, ed., *Transitional Justice : How Emerging Democracies Reckon with Former Regimes,* 3 volumes (Washington : United States Institute of Peace, 1995).

which therefore tend to involve only a small number of people. In transitional justice, by contrast, guilt could encompass those who actually carried out a crime such as massacre or torture, those who issued the immediate commands, and those who had created the broad circumstances in which the crimes took place. To encompass this different aspects of criminal liability, the authorities who prosecuted war crimes immediately after the Second World War developed a doctrine known as command responsibility, which enabled them to reach far up the chain of command to people who had not been physically present at the time that a crime was committed and who may not even have known of the specific event. The post-war authorities also rejected the defence known as superior orders (sometimes called the Nuremberg defence), under which the actual perpetrators claimed innocence by virtue of following the commands of their superiors. This rejection was later made concrete in the doctrine of 'joint criminal enterprise', under which anyone who played a role in the process leading to an atrocity could be considered culpable.[5)]

Second, transitional justice generally dealt with extraordinarily terrible crimes, generally categorized as atrocities, because only such crimes were worth pursuing after the fall of an offending regime. But atrocity generally defied easy punishment because of the scale of the crimes. Societies in which a single murder might lead to life imprisonment struggled to determine what punishment might be appropriate.

The third characteristic of transitional justice was that it was subject to what might be called 'justice decay', that is a diminished ability to achieve conventional justice. This decay arose partly because both regime transition and the passage of time diminished the possibility of marshalling evidence against the accused and achieving a verdict. Witnesses and accused were subject to human mortality and senility ; documents went astray. Moreover, the standard motives for punishment—vengeance, deterrence, prevention and rehabilitation—always diminish in force with the passage of time. Aging criminals cannot be kept in prison as long as young ones ; even execution robs them of a smaller proportion of their lives. Delayed prosecution is a weaker deterrent than prompt conviction. Old men do not need to be prevented from committing crimes, and are unlikely to have become more amenable to rehabilitation.

These three distinctive characteristics of transitional justice have given the phenomenon special features that separate it from conventional justice.

First, transitional justice often relaxes standards of proof. Conventional criminal law requires that guilt be proven beyond reasonable doubt, but the recent experience of international tribunals has shown that the financial cost of achieving a conviction is enormous. In around a quarter of a century, the International Criminal Tribunals for the Former Yugoslavia (ICTY) indicted 161 persons and achieved eighty sentences at a total budget cost of around US$2 billion. During its first decade of operation, the International Criminal Court delivered one verdict for a budget cost of US$900 million.[6)] These conviction figures are not so much a drop in the bucket as a tiny fleck of spray from a Niagara Falls of human rights abuses. In consequence, transitional justice can achieve nu-

5）Allison Marston Danner and Jenny S. Martinez, 'Guilty Associations : Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law', *California Law Review.* 93, No.1 (2005), pp.75-169.

6）David Wippman, 'The Costs of International Justice', *American Journal of International Law,* 100, 4 (Oct., 2006), 861-881 ; David Akerson, 'The Comparative Cost of Justice at the ICC', *Denver Journal of International Law and Policy,* 26 March 2012, http : //djilp.org/1877/the-comparative-cost-of-justice-at-the-icc/. See also the ICTY's own presentation : "The Cost of Justice", http : //www.icty.org/en/about/tribunal/the-cost-of-justice.

merically significant results only by relaxing its standards of proof, moving from 'beyond reasonable doubt' to the balance of probabilities and often to mere plausibility. The expedited procedures of war crimes trials after the Second World War pioneered this approach, which has been taken to greater lengths in other transitional justice for a such as Truth and reconciliation Commissions, the gagaca courts of Rwanda[7] and the various forms of international people's tribunals.[8]

Second, transitional justice affirms victims' rights to a significantly greater extent than does conventional criminal law. Whereas the emergence of criminal law has been interpreted as removing the determination of guilt and the punishment of the guilty from the hands of victims (who might be assumed to be biased and not to consider the overall interests of society), transitional justice typically shifts the balance back towards victims and their representatives. In particular, transitional justice tends to allow victims to determine whether justice has been done and permits the monetization of victimhood by means of financial compensation.[9]

Third, transitional justice responds to the problem of justice decay by positing what might be called 'extended historical responsibility', in which guilt and victimhood persist beyond the deaths of perpetrators and victims to influence the moral and legal standing of their heirs. The consequences of past victimization can live on in the psychological and economic condition of descendants,[10] while today's generations can be the undeserving beneficiaries of past atrocities.

Transitional justice emerged as a technique for dealing with the atrocities committed by oppressive regimes which provided perpetrators with formal or practical legal protection. In dealing with such crimes, the protagonists of transitional justice have ventured into legal and moral terrains that had formerly been avoided by criminal law. The implications of this venture have yet to be fully explored.

7）Phil Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda : Justice without lawyers* (Cambridge : Cambridge University Press, 2010).

8）See for example, Arthur W. Blaser, 'How to Advance Human Rights without Really Trying : An Analysis of Nongovernmental Tribunals', *Human Rights Quarterly* 14, no.3 (1992), pp.339-370 ; Christine M. Chinkin, 'Women's International Tribunal on Japanese Military Sexual Slavery', *American Journal of International Law* 95, no.2 (2001), pp.335-341.

9）Determining the appropriate financial compensation for suffering is an aspect of (civil) tort law, but even there determining figures is problematic. As Chase notes, 'an inescapable reality of the pain and suffering conundrum is that tort law requires the monetization of a "product" for which there is no market and therefore no market price.' See Oscar G. Chase, 'Helping Jurors Determine Pain and Suffering Awards', *Hofstra Law Review* 23 Iss. 4 (1995), p.765 [763-790].

10）See Gabriele Schwab, *Haunting Legacies : Violent Histories and Transgenerational Trauma* (New York : Columbia University Press, 2010).