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Introduction

New Horizons: Transitional Justice in the Asia-Pacific

Renée Jeffery and Hun Joon Kim

THE QUESTION OF HOW THE HUMAN RIGHTS VIOLATIONS OF previous regimes and past periods of conflict ought to be addressed is one of the most pressing concerns facing governments and policy makers today. New democracies and states in the fragile post-conflict peace-settlement phase are confronted by the need to make crucial decisions about whether to hold perpetrators of human rights violations accountable for their actions and, if so, the mechanisms they ought to employ to best achieve that end. Since the 1980s, post-transitional states have increasingly opted in favour of accountability for human rights violations and have used a wide range of measures from prosecutions and punishment to truth telling, lustration of police and security forces, reparations, and judicial reforms, to reconciliation processes, apologies, forgiveness ceremonies, exhumations and reburials, memorialization projects, traditional and indigenous justice practices, and other guarantees of non-repetition.¹ In doing so, they have contributed to the emergence of what has variously been termed ‘the justice cascade’ or as a ‘revolution in accountability.’²

1 Naomi Roht-Arriaza, ‘Civil Society Processes of Accountability’ in M. Cherif Bassiouni (ed.), *Post-Conflict Justice*, Ardsley, NY: Transnational Publishers, 2002, p. 97.

2 Ellen Lutz and Kathryn Sikkink, ‘The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America,’ *Chicago Journal of International Law*, Vol. 2, No. 1 (2001), pp. 1–34; Chandra Lekha Sriram, ‘Revolutions in Accountability: New Approaches to Past Abuses,’ *American University International Law Review*,

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The purpose of this book is to provide an in-depth analysis of the practices, processes, and problems of transitional justice in the Asia-Pacific region. Although the practice of transitional justice is global in its reach, scholarship concerned with theorizing and analyzing the practice has focused on cases in Latin America, Africa, and Eastern Europe. The reasons for this are largely historical. During the 1980s and 1990s large numbers of states in Latin America, Africa, and Eastern Europe experienced transitions to democracy and, in doing so, pioneered efforts to hold state officials accountable for past human rights violations. For example, exemplary truth commissions were established in the 1980s and 1990s in Argentina and South Africa, and foreign and international criminal prosecutions were carried out in response to human rights violations that occurred in Chile, the former Yugoslavia, and Rwanda throughout the 1990s. Although the use of transitional justice mechanisms to address past human rights violations has been similarly prevalent in the Asia-Pacific, however, this region has attracted decidedly less scholarly attention than Latin America, Africa, and Eastern Europe.

A simple comparison of the number of publications reveals this unbalance. As the Transitional Justice Database Project reveals, of the 1,520 country-specific studies of transitional justice published in recent years, only seventy-eight (5 percent) are on countries of the Asia-Pacific region. By contrast, 629 studies (41 percent) have appeared on transitional justice in Africa, 474 (31 percent) on Europe, and 336 (23 percent) on Latin American cases.³ The imbalance is not caused by the number of new democracies in the region because the Asia-Pacific region, with twenty-four new democracies since 1980, ranks second, following Africa (twenty-nine countries), and followed by Europe (twenty-one countries) and Latin America (seventeen countries). More strikingly, studies of

Vol. 19, No. 2 (2003), pp. 310–429; Hunjoon Kim, *Expansion of Transitional Justice Measures: A Comparative Analysis of its Causes*, PhD Thesis (2009), University of Minnesota.

³ Transitional Justice Database Project, at <http://sites.google.com/sites/transitionaljustice/database/home> (accessed 20 May 2011).

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Japan, Cambodia, and East Timor make up almost 90 percent of all regional research. This suggests a lack of interest in those cases which do not get much attention from the international media. This is a significant oversight. The Asia-Pacific, as the region that has most recently embraced the practice of transitional justice, following, developing, and modifying practices employed in the rest of the world, has shaped many of the most innovative, dynamic and, at times problematic, processes. Examining the practices and processes of transitional justice in the Asia-Pacific will thus provide not only sorely lacking regional analysis but also broader insights into the theory and practice of transitional justice.

The remainder of this introductory chapter thus explains our understanding of transitional justice in the twenty-first century. By expanding the conceptual horizons of what constitutes a ‘transition’ and what the term ‘justice’ means, we provide a broad understanding of transitional justice that encompasses the range of contexts within which states and other actors pursue accountability for past human rights violations as well as the various means by which they seek that end. In order to situate our work within the development of transitional justice scholarship over the past three decades, we then provide an overview of the three key debates that have shaped the sub-field: prosecution versus pardon, retributive versus restorative justice, and bottom-up versus top-down approaches. In doing so, we suggest that a new trend in transitional justice is emerging and consolidating in the Asia-Pacific, where previous dichotomous divides are no longer relevant and synthetic and holistic approaches that combine different transitional justice mechanisms and notions of justice have taken hold. This provides the basis on which we explain the selection of cases included in this book before outlining its structure and content.

Redefining Transitional Justice in the Twenty-First Century

Transitional justice has traditionally been defined as ‘the conception of justice associated with periods of political change, characterized by

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legal responses to confront the wrongdoings of repressive predecessor regimes.⁴ In this book, however, we adopt a broader understanding of transitional justice that extends both the constitutive elements of transition and justice beyond their original conceptualizations. By redefining its parameters, we hope to reflect developments in both the practice and study of transitional justice that have seen its contours significantly expanded over the past three decades.

Although transitional justice has been practiced since at least the time of the ancient Greeks and found form in the aftermath of World War II with the Nuremberg and Tokyo Trials, the origins of the contemporary study and practice of transitional justice are most commonly associated with the ‘third wave’ of democratic transitions from authoritarian rule in the 1980s in Latin America.⁵ Democratization in this context commonly referred to the movement from a repressive and closed regime, such as military, authoritarian, and one-party dictatorships, or communist regimes, to more open and decentralized government marked by free, fair, secret, and direct national elections for major government offices including head of state.⁶ Reflecting this, transitional justice was primarily focused on ‘justice associated with periods of political change’, specifically the ‘movement from repressive regimes to democratic societies.’⁷ Justice, in this context, was generally conceived in terms of the establishment of trials and truth commissions to address past human rights violations.

4 Ruti G. Teitel, ‘Transitional Justice Genealogy,’ *Harvard Human Rights Journal*, Vol. 16 (2003), p. 69.

5 Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective*, Cambridge: Cambridge University Press, 2004, p. 1; Neil J. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Washington D.C.: United States Institute of Peace, 1995; Paige Arthur, ‘How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice,’ *Human Rights Quarterly*, Vol. 31, No. 2 (2009), pp. 329–331.

6 Samuel Huntington, *The Third Wave: Democratization in the Late-Twentieth Century*, Norman: University of Oklahoma Press, 1991, p. 7.

7 Richard H. Solomon, ‘Preface’ to Neil J. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Vol. 3, Washington D.C.: United States Institute for Peace, 1995, p. xxiii.

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Starting from the mid-1990s, however, the parameters of the ‘transitions’ included within the scope of transitional justice began to expand into areas that had traditionally been demarcated in scholarly terms as the concerns of conflict resolution and peace building. With this, movements from conflict to peace (or some other sort of post-conflict state) associated with the end of civil wars and periods of violent instability came to also be viewed as transitions. In these types of contexts, political transitions were primarily brought about by one party to a conflict inflicting a decisive victory over their adversaries or by the signing of a peace accord, often mediated by international actors. Significantly, these types of transition have not always accompanied movements from authoritarian rule to democracy, but also occurred within established democracies like Northern Ireland. In large part, this spillover of the study of transitional justice into conflict resolution and peace building reflected changing practices in world politics. In particular, in the face of new ethnic and civil conflicts in Yugoslavia and Rwanda, diplomats, peace negotiators and international organizations considered and actually adopted trials and truth commissions before, during, and after conflict resolution. In scholarly terms, what followed was not simply the encroachment of transitional justice into conflict resolution and peace building, but the simultaneous redefinition of peace building to include the pursuit of justice as a key priority.⁸ The result was the establishment of this second type of transition from conflict to peace as a key concern of transitional justice along with justice associated with transitions from authoritarian rule.

At the same time, the concept of justice embedded in traditional understandings of transitional justice has also been expanded beyond its original focus on ‘legal responses . . . to the wrongdoings of repressive predecessor regimes’ to reflect broader notions of justice.⁹ Although some

8 John Paul Lederach, *Building Peace: Sustainable Reconciliation in Divided Societies*, Tokyo: UNU Press, 1994, p. 14; Michael Barnett, Hunjoon Kim, Madalene O’Donnell, and Laura Sitea, ‘Peacebuilding: What Is in a Name?’, *Global Governance*, Vol. 13, No. 1 (2007), p. 44.

9 Teitel, ‘Transitional Justice Genealogy,’ p. 69.

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scholars and practitioners hold firm to the view that criminal prosecutions remain the ‘unrivaled’ means of addressing past human rights violations, a dramatic increase in other formal and official responses such as truth commissions, reparations, vetting procedures, and amnesties, as well as in informal and customary practices, has taken place.¹⁰ What unites these different approaches to transitional justice, however, is that each seeks to achieve accountability for serious crimes, including human rights violations, committed in the past. Accountability, in this sense, denotes being held responsible or blameworthy for an action or set of actions. In minimal terms, accountability requires ‘actors to accept’ whether forcibly or through their own volition, ‘responsibility for the impact of their action or inaction on human rights.’¹¹ Accountability thus means that ‘some actors have the right to hold other actors to a set of standards, then judge whether they have fulfilled their responsibility and to impose sanctions if they determine these responsibilities have not been met.’¹² Accountability may be pursued through trials and punishments or through the provision of compensation or restitution, the issuing of apologies, truth telling, expressions of guilt and repentance, and requests for forgiveness.¹³

However, these different approaches to transitional justice are not only united in their common pursuit of accountability but in their attempts to right the wrongs of the past. They do this in different ways by pursuing retribution, restoration, reinterpretation, rectification or reparation. Retribution, which is often understood as the most traditional notion of justice – ‘an eye for an eye’ – seeks to establish blame for wrongs committed and administer punishment.¹⁴ It is primarily, although not exclusively,

10 Mark Freeman, *Truth Commissions and Procedural Fairness*, Cambridge: Cambridge University Press, 2006, p. 10.

11 United Nations Human Development Report, 2000, p. 89, at http://hdr.undp.org/en/media/hdr_2000_ch5.pdf (accessed 3 March 2011).

12 Robert Keohane and Ruth Grant, ‘Accountability and Abuses of Power in World Politics,’ *American Political Science Review*, Vol. 99, No. 1 (2005), p. 29.

13 Rachel Kerr and Erin Mobekk, *Peace and Justice: Seeking Accountability After War*, Cambridge: Polity, 2007, p. 4.

14 Howard Zehr, ‘Restorative Justice: The Concept,’ *Corrections Today*, Vol. 59, No. 7 (1997), p. 68.

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manifested in judicial activities such as criminal and civil proceedings and the punishments, which exact certain costs on the perpetrator that followed them.¹⁵ Transitional justice may also attempt to right the wrongs of the past by reinterpreting that past, re-establishing suppressed facts, reconceiving distorted ideas, and rewriting official narratives in sanctioned documents and history textbooks. At its most basic, reparative justice seeks to repair damage or harm that has been unjustly inflicted on an individual, group, or state. In its ideal extreme it is ‘designed to re-establish the situation prior to . . . [a] wrongful act or omission’ and, in doing so, ‘wipe out all consequences of the illegal’ or, indeed, immoral act.¹⁶ Reparative justice may be administered through a formal legal system with current efforts concentrated on recovering stolen assets from former dictators for redistribution to victims, or through informal community or grass-roots processes.¹⁷ Similarly, restorative justice aims to ‘create peace in communities by reconciling the parties and repairing the injuries caused by the dispute.’¹⁸ It commonly does so through truth telling, reconciliation processes, apologies, forgiveness ceremonies, the payment of compensation, and participation in traditional dispute reconciliation practices. Finally, rectification is the restoration of the prior social and political status of the victims of human rights violations and their family members. It seeks to specifically address the injustice of ‘direct physical violence suffered by people during conflict’ by providing

15 Many traditional, customary, and indigenous justice practices also incorporate retributive elements alongside those commonly deemed ‘restorative’.

16 Louis B. Sohn and R.R. Baxter, ‘Responsibility of States for Injuries to the Economic Interests of Aliens,’ *American Journal of International Law*, Vol. 55 (1961), pp. 545–546; Jo M. Pasqualucci, ‘Victim Reparations in the Inter-American System: A Critical Assessment of Current Practice and Procedure,’ *Michigan Journal of International Law*, Vol. 18, No. 1 (1996–1997), p. 25.

17 Ruben Carranza, ‘Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?,’ *International Journal of Transitional Justice*, Vol. 2, No. 3 (2008), pp. 310–330.

18 Burt Galaway and Joe Hudson, ‘Introduction’ to Burt Galaway and Joe Hudson (eds.), *Restorative Justice: International Perspectives*, Monsey: Kugler, 1996, p. 2; Allison Morris, ‘Critiquing the Critics: A Brief Response to Critics of Restorative Justice,’ *British Journal of Criminology*, Vol. 42, No. 3 (2002), pp. 596–615.

restitution or rehabilitation.¹⁹ Of course, these represent ideal types of justice that, in reality, are often pursued in combination with one another. Nonetheless, all, in their different ways, seek to address the wrongs of the past and attempt, as far as is possible, to put those wrongs right.

With this we arrive at our broad understanding of transitional justice as the pursuit of accountability for, and attempts to make right, the wrongs of human rights violations committed in the past associated with major political shifts, including movements from authoritarian rule to democracy, or ruptures, such as those that mark the end of violent conflicts. This understanding, as we will see, not only reflects the changing nature of transitional justice over the past thirty years or so, but provides a starting point for examining the actual dynamics of transitional justice as it is practiced in the Asia-Pacific region.

Three Debates in Transitional Justice

Developments in the theory and practice of transitional justice have also been reflected in three main debates that have preoccupied scholars and practitioners since the 1980s. The historical development of these debates is important for our purposes for it serves to further underpin our broad understanding of transitional justice and helps to further establish the context in which new developments in transitional justice have taken place in the Asia-Pacific. The three key debates in question emerged around three sets of dichotomous extremes:

- (1) prosecution versus pardon, also referred to as trial versus amnesty, or justice versus peace;
- (2) retributive versus restorative justice, variants of which included 'justice versus truth, perpetrator-focused versus victim-centered approaches, and backward-looking versus forward-looking approaches; and,

¹⁹ Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War*, Cambridge: Polity, 2002, p. 7.

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- (3) top-down versus bottom-up, or state-led versus civil society-initiated approaches, or international versus local approaches.

Prosecution versus Pardon

In the early years of scholarship concerned with transitional justice, a fault line emerged between international lawyers and social scientists over questions of the morality, legality, and efficacy of pursuing criminal proceedings against former state officials. At their core, these ‘major debates’ concerned whether or not new democracies should ‘prosecute or punish . . . [or] forgive and forget’ crimes committed by members and supporters of past authoritarian regimes.²⁰ In the main, the lawyers who engaged this question endorsed the criminal prosecution of the perpetrators of human rights violations on both deontological and utilitarian grounds.²¹ They argued that criminal prosecutions were either necessary moral and legal responses to criminal offenses or were useful means of endorsing the criminal justice system, upholding the rule of law, and preventing future abuses through the effects of deterrence, or both. These scholars explicitly opposed the main alternative to prosecutions – amnesties – and questioned their ability to serve the instrumental function of bringing peace and stability to transitional countries with which they had been readily associated.²²

By contrast, scholars of democratization viewed the rising demand for accountability that had accompanied the Latin American transitions as a fad that would pass with the passage of time. For example, in

20 Huntington, *The Third Wave*, pp. 211, 213.

21 Aryeh Neier, ‘What Should be Done About the Guilty?’, *New York Review of Books*, Vol. 37, No. 1 (1990), pp. 32–35; Diane F. Orentlicher, ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,’ *Yale Law Journal*, Vol. 100, No. 8 (1991), pp. 2537–2615; Naomi Roht-Arriaza, ‘State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law,’ *California Law Review*, Vol. 78, No. 2 (1990), pp. 449–514.

22 Gary J. Bass, ‘War Crimes Tribunals’ in Keith E. Whittington, R. Daniel Keleman, and Gregory A. Calderia (eds.), *The Oxford Handbook of Law and Politics*, Oxford: Oxford University Press, 2008, p. 237.

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accordance with his view that transitional justice is ‘shaped exclusively by politics’, Huntington observed that no effective criminal prosecution and punishment occurred in most transitional countries before concluding that ‘[i]n new democratic regimes, justice comes quickly or it does not come at all.’²³ His guidelines for democratizers thus advised that only when it is both ‘morally *and* politically desirable’ should the leaders of past authoritarian regimes be prosecuted.²⁴ Similarly, O’Donnell and Schmitter predicted that such prosecutions would become less likely as ‘the bitterness of memories attenuated with the passage of time’ in transitional societies.²⁵ These scholars openly supported the positive function of amnesties in bringing democratization and raised concerns that pushing new democracies to prosecute still-powerful members of former regimes might derail transitions and precipitate renewed violence.

The punishment versus pardon debate came to a head in 1993 with the creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY). In this instance, the ‘Security Council voted to create’ an ad hoc international tribunal ‘while the fighting and atrocities still raged.’²⁶ Skeptics of criminal prosecutions vehemently criticized the tribunal for obstructing the ongoing peace process and thus prolonging a war that brought great human suffering.²⁷ As one anonymous analyst famously wrote, one of the lessons of the former Yugoslavia was that the ‘quest for justice for yesterday’s victims should not be pursued in such a manner that it makes today’s living the dead of tomorrow.’²⁸ Lawyers and human rights activists responded to these criticisms and supported the

23 Huntington, *The Third Wave*, pp. 215, 231.

24 Huntington, *The Third Wave*, p. 228.

25 Guillermo A. O’Donnell and Philippe C. Schmitter, *Transitions from Authoritarian Rule: Conclusions about Uncertain Democracies*, Baltimore: Johns Hopkins University Press, 1986, p. 29.

26 David Forsythe, *Human Rights in International Relations*, Cambridge: Cambridge University Press, 2006, p. 97.

27 Anthony D’Amato, ‘Peace vs. Accountability in Bosnia,’ *American Journal of International Law*, Vol. 88, No. 3 (1994), p. 500.

28 Anonymous, ‘Human Rights in Peace Negotiations,’ *Human Rights Quarterly*, Vol. 18, No. 2 (1996), p. 258.