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Dialogues of Transitional Justice: Keynote Speech

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KEYNOTE SPEECH

REMARKS OF RUTI G. TEITEL

RUTI G. TEITEL*: Transitional justice appears to have changed in the last couple of decades since I have been following the field. My remarks will address both the practice and study of transitional justice since my book, *Transitional Justice*,¹ was published in 2000.

There is now a significant amount of experience and experimentation in transitional justice, as is seen in contemporary conflicts in the Middle East, as well as postponed transitional justice in Latin America, Cambodia, and elsewhere.

There has been a call for accountability of governments in the recent political awakenings in the Middle East—in the demonstrations in Tahrir Square from the very start, in Tunisia’s demonstrations,² and in the demands by the international community and the International Criminal Court (“ICC”) in the midst of the Libyan conflict³—reflecting a paradigm shift discussed here. These political and legal changes demonstrate that transitional justice is no longer a byproduct or an afterthought, but rather often the driver of political change. Where transitions are fraught and democratization appears to be a distant goal, it is the demand for transitional justice that has become both the means and the end.

We now see changing expectations of law; of course, this also produces tensions between the demands of transitional justice and the relevant political context. One can see the demand for justice and

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¹ RUTI G. TEITEL, *TRANSITIONAL JUSTICE* (Oxford Univ. Press 2000) [hereinafter *TRANSITIONAL JUSTICE*].

² HUMAN RIGHTS WATCH, *COUNTRY SUMMARY: EGYPT* (2012), *available at* http://www.hrw.org/sites/default/files/related_material/egypt_2012.pdf.

³ Press Release, Security Council, In Swift, Decisive Action, Security Council Imposes Tough Measures on Libyan Regime, Adopting Resolution 1970 in Wake of Crackdown on Protesters; Situation Referred to International Criminal Court; Secretary-General Expresses Hope Message ‘Heard and Heeded’ in Libya, U.N. Press Release SC/10187/Rev.1 (Feb. 26, 2011).

accountability underway on many levels beyond war itself, often ex-ante, beyond the transitional state, ranging across public and private sectors, to the galvanizing of civil society. This demand for justice and accountability has implications for the rethinking of the meaning of transitional justice, where it is accountability conceived of in rule-of-law terms that appears to offer a distinctive source of legitimacy. I suggest this is a relative legitimacy, which is always informed by transformative politics of often limited and unstable transitions.

To appreciate the road traveled, let us reflect back to the end of the twentieth century, when the modern day notion of transitional justice emerged and came to be identified with a vital debate over how to reckon with the abuses of predecessor state regimes, particularly in light of the aims of democratization and state-building associated with the political transitions of that era.

In the early nineties, I was commissioned to write an advisory memorandum for the New York-based Council on Foreign Relations (“CFR”), which aimed to clarify a debate and make recommendations about justice at the time of the Latin America transitions, particularly in the Southern Cone. In the policy memorandum, I advocated a broader view of the transitional rule of law than that originally posed at the CFR debate—which had been framed in dichotomous terms of punishment or impunity—and I explored whether it was possible for countries like Argentina, Uruguay, or Chile to have new democracies if they didn’t hold trials.⁴ Given the nature of the transitional context, I argued that wherever the criminal justice response was politically unwise or simply impractical—i.e., where there were holdover judiciaries, or where there had been other irregularities such as retroactive legislation—that punishment should be eschewed and that societies should use alternative ways to respond to the predecessor regime’s wrongdoing and repressive rule, and, moreover, that such alternatives could advance the rule of law.⁵ At the time, the extraordinary transitional form of punishment gave way to the “limited criminal sanction,” which was directed less at penalizing perpetrators and more at advancing the political transformation’s normative shift.⁶

After I wrote the CFR policy memorandum on the problem of

⁴ Ruti G. Teitel, Position Paper Presenter and Discussion Leader: Human Rights Legacies and the New Democracies in the Southern Cone, The Council on Foreign Relations (May 17, 1990).

⁵ *Id.*

⁶ Ruti G. Teitel, *Transitional Rule of Law*, in *RETHINKING THE RULE OF LAW AFTER COMMUNISM* (Adam Czarnota et al. eds., 2005); see *TRANSITIONAL JUSTICE*, *supra* note 1.

impunity, after the Berlin Wall had collapsed, and amongst the many changes going on in Eastern Europe, I realized that the search for alternative ways to respond to repressive rule was hardly a problem only of the Southern Cone of Latin America. Rather, it was an issue in Eastern Europe and it had a historical provenance in South Africa, as well. It led to working on my book and a grant proposal with the U.S. Institute of Peace to do research in Eastern Europe and Latin America. I published my book some years later in 2000.⁷

In putting together these two words, “transition” and “justice,” to create a new term, “transitional justice,” my aim was to account for the self-conscious, contingent construction of a distinctive conception of justice associated with periods of radical political change after past oppressive rule. It would become clear that the path chosen would fall short of ideal conceptions of justice. Rather, transitional justice was an exercise in law and politics, where line-drawing was endemic, informed by felt necessities as well as a country’s longstanding traditions relating to the rule of law. The idea was that transitional justice was both extraordinary and constructivist, and that it would be contextual and partial.

With the collapse of communism, it became evident that the provisional nature of transitional justice constituted its preeminent characteristic. The structure of legal responses and the nature of justice-seeking were shaped by the circumstances, parameters, and often the limits of the relevant transitional political conditions. Furthermore, one could also see that the scope of normative political change itself was often contingent on the degree of political commitment. Several conclusions followed. Transitional justice would not reflect the ideals of the rule of law. Moreover, in such hyper-political moments, the ideals found outside of the normative “rule of law” paradigm could, for example, be seen as teaching tools for lawyers and the legal system. The message was that the law in transition would operate differently; it was often a question of degree. It would be nearly impossible to meet all of the traditional values associated with the rule of law such as general applicability of the law and procedural due process, as well as more substantive ideas of fairness and legitimacy.⁸

After the post-Cold War phase, there was a proliferation of

⁷ TRANSITIONAL JUSTICE, *supra* note 1.

⁸ Judith Shklar makes a related point in her book, where rule of law is characterized in relative terms. *See generally* JUDITH N. SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS (Harvard Univ. Press 1964).

transitional justice. There are now more than two decades of experimentation and change. In a new book, *Globalizing Transitional Justice*,⁹ I argue that we have turned to a new global phase of transitional justice. The book builds on an earlier article I wrote for the *International Journal of Transitional Justice*.¹⁰ This new paradigm associated with the distinctive contemporary context of global politics should be juxtaposed with the early debates on transitional justice such that we can see, in relief, some of the changes associated with this new paradigm of justice.

The early debates on transitional justice involved a somewhat artificial and zero-sum framework that centered on a set of “foundational dilemmas” such as punishment versus impunity, truth versus justice, and justice versus peace. In these debates, the role of the state loomed large. Indeed, this earlier concept of transitional justice could be considered state-centric transitional justice or strong-state transitional justice, often patterned on Nuremberg and the Germany example, with the problem of justice revolving almost exclusively around state actors and related state institutions such as security apparatus and police. In transitional justice’s early days, the central concern was framed in terms of how a successor regime ought to respond to abuses perpetrated by the state and against its own citizens. Based on the writing at the time, Aryeh Neier, who was then the head of Human Rights Watch focused on “what was to be done about the guilty;” the question, as framed, focused on the perpetrators.¹¹

Around that time, I aimed to reframe this question in the CFR debate into how should a society come to terms with its violent, repressive past? At the time, there was an extensive focus on the transitional state. The analogy here seemed to be a constitutional approach following conflict, where the emphasis was on the problem of the strong state and the relevant societal response conceptualized in terms of constraining bad state actors as well as recognizing individual rights and responsibilities. Transitional justice would come to be coincident with changes in Latin America, Eastern Europe, and South Africa’s commitments to new constitutionalism. These were often associated with analogous punitive and administrative responses, and changes in the civil sector.

⁹ See RUTI G. TEITEL, *GLOBALIZING TRANSITIONAL JUSTICE: CONTEMPORARY ESSAYS* (2014).

¹⁰ Ruti G. Teitel, *Transitional Justice Globalized*, 2 INT’L J. OF TRANSITIONAL JUST. 1, 1–4 (2008).

¹¹ See Aryeh Neier, *What Should Be Done about the Guilty?*, THE N.Y. REV. OF BOOKS (Feb. 1, 1990), <http://www.nybooks.com/articles/archives/1990/feb/01/what-should-be-done-about-the-guilty/>.

More than two decades later, how have the central questions changed? I argue that the changes amount to a “global paradigm” of transitional justice, for the very problem of justice is being reconceptualized through a global politics of accountability, often in the context of weak rather than strong states, and, beyond the primary focus on abuses of state power, with evident implications for the transformative challenge.¹² Accountability for past wrongs is being demanded in situations often when there is no clear or consolidated political transition. Indeed, consider the *face volte* in Egypt. It has never been clearer that political change does not constitute a revolution but rather a matter of transition, involving gradual processes.

There is evidence of transitional justice’s normalization to intra-conflict, even *ex-ante*. If before the centrality of the transitional problem was the predecessor regime and its excesses, and the constitutional style delimitation of power, now the challenge of contemporary transformation is that it directly engages non-state actors at all levels and many other non-state actors’ behavior; it entails changing social norms, building civil society, and capacity building. In an increasing number of weak and failed states from the Middle East to Africa, the overriding goal is the assurance of a modicum of security and rule of law that, even without other political consensus, is supposed to be a basis for contemporary legitimacy.

One of the dimensions of transitional justice globalized is the expansion of the aegis of transitional justice, or the normalization or standardization of transitional justice—this seems a real departure from the 1980s. In the 1980s, certainly the way I thought about it, and scholars and practitioners at the time, was that this was justice-seeking in periods of exception. Of course in some regard, these were extraordinary periods. Yet, it is also true that this can be misleading, because what we did not see was a gap in the law, as the exceptionalists often claim—i.e., that what we learned was that these did not operate like revolutionary times but rather that these were transitional times and related forms of law. Hence, one can see that these times of political transition highlight a politicization in the law reflected in a distinctive aspect of rule of law.

Now we see transitional justice, more often than not, disassociated from the politics of transition and reflective of a new normalization.

There are several models one might use to depict this new normalization. I will just mention two of them here. One is the evolution

¹² See TEITEL, *supra* note 9.

of a bureaucratic model, which can be seen as a technocratic model that organizes best practices, and the other is a formal international law model. We can see transitional justice entrenched in international law, which has come to be associated with these transformations.¹³

One can also see the dimension of globality that is evidenced in the light of the crucible of the passage of time. Recent phenomena raise the question of what is the relevant period for transitional justice? To what extent does it extend beyond the immediate time of regime transition?

What was initially conceived of as *transitional* justice has become normalized as accountability for certain kinds of very serious systemic wrongs. We can see this in a variety of settings, certainly with the turn-of-the-century creation of the ICC, which applies not just in periods of war but can be seen also to monitor other instances, such as the recent Kenyan elections.¹⁴ One should also consider the earlier creation, by the U.N. Security Council, of the intra-conflict tribunal in response to crimes in the former Yugoslavia. The U.N. international ad hoc court—the tribunal associated with the Balkan atrocities—was established during the Balkan conflict; therefore, it was clearly pre-transition. It was deliberately intended, by being set up before the end of the war, to be the antithesis of victors' justice, but what remained unclear was the kind of justice it actually was. Throughout the proceedings, the idea was to show the impartiality of such judgment during the war.¹⁵

More recently, with Libya and the Security Council referral, there is a normalization of these responses. There is a moving up of the transition across war and peace lines, and an increase in the attempt to use law to impose ex-ante settlements via transitional justice mechanisms. Now, there are many controversies we can see about the ongoing viability of local responses, the potential role of law, justice versus peace, and international versus local justice.

We now talk about a *field* of transitional justice,¹⁶ though, before, it was seen as an exceptional set of practices and theorization. Now there

¹³ See Rep. of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantee of Non-recurrence, Pablo de Greiff, 21 Sess., Aug. 9, 2012, U.N. Doc. A/HRC/21/46, at 5, available at http://www.ohchr.org/documents/hrbodies/hrcouncil/regularsession/session21/a-hrc-21-46_en.pdf [hereinafter Greiff].

¹⁴ See INT'L CRIMINAL COURT, CASE INFORMATION SHEET: *PROSECUTOR V. RUTO*, CASE NO. ICC-01/09-01/11 (2013), available at <http://www.icc-cpi.int/iccdocs/PIDS/publications/RutoKosgeySangEng.pdf>.

¹⁵ See TEITEL, *supra* note 9, at 81–94 (Chapter 5, entitled *Bringing the Messiah Through the Law*).

¹⁶ See Christine Bell, *Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'*, 3 INT'L J. OF TRANSITIONAL JUST. 5, 5–27 (2009).

is talk that “transitional justice” and the use of this term has developed into a field of scholarship that crosses disciplines. With the normalization of the field has come a struggle over control of the field.

There are those who would maintain that the new focus on practice and the interdisciplinary nature of this new *field* is a move away from legal control of these issues as well as any original focus on punishment or impunity. While there is a difference of opinion over this question—one might differ upon what the nature of the “original” focus was—there is no question that there is now an inclusion to a much broader range of mechanisms, goals, and inquiries, and these modalities and responses are what makes up this “field.”

What should we make of these interdisciplinary developments? What is its relationship to the original aims of transition that have been alluded to—whether domestic political transformation or advancing security and development? We can certainly see that major non-state actors, such as the United Nations, have made increasing reference to “transitional justice” both in the General Assembly and Security Council, linking up transitional justice to rule of law and peace-making, and to a variety of other broader goals.¹⁷

There are practitioners who advocate a holistic or ecological approach. Others invoke “best practices,” as I’ve mentioned already, but the difficult question here is: “best” according to what measure? In the new paradigm, to what extent can such general-practice-based approaches that aim for standardization be sensitive to domestic context and political concerns? They certainly fall out of one discipline, law or politics, but then the question becomes: how to conceptualize the field? From the vantage point of the bureaucratic model, it appears that justice becomes just one piece in a toolbox of practices. From the other side, the formalist legal side, we can see transitional justice as very tightly connected to a set of formal obligations which are increasingly spelled out in a variety of resolutions and case law.

The landscape today includes far more than the state and its decision-making concerning the transition. Such policy is not only normalized in terms of the relationship to the transition, but rather the landscape includes a great variety of stakeholders, not just the direct political actors involved in the transition, and that is very different.

One can think back to Argentina and its major human rights trial.¹⁸

¹⁷ Greiff, *supra* note 13, at 5.

¹⁸ Jorge Rafael Videla, TRIAL, <http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profiles/profile/151/action/show/controller/Profile/tab/legal-procedure.html> (last visited

The trials project processes that were stopped but three decades later have been revived. Three decades after the fact, there are trials of the leading human rights abusers during that time. One of the important central claims made by the chief prosecutor at that first trial was “this is no Nuremberg, we are trying ourselves, this is something where we are the prosecutors of ourselves.”¹⁹

By contrast, today, there are many stakeholders. This proliferation is one dimension of the globalization of transitional justice. There are local actors, regional actors, international actors and institutions, as well as this amorphous global civil society. For example, consider diasporic victims movements: victims groups in Argentina that have gone to Spain, and Spanish victims that have now raised claims in Argentina. We see a world that is increasingly connected and interdependent, but that remains politically unintegrated. There is a tendency to superimpose international law as a potentially shareable normativity. In this regard, we also see the ascendancy of more judiciary—the ICC—but also the use of domestic jurisdiction, the normativity that goes beyond just the Hague, where the use of language in those terms, crimes against humanity, etc., appears and shapes the discourse locally.

What might this direction tell us about where this is going? We can certainly see a greater sense of management of transitional justice as an issue of global governance. There is cross-border transnational engagement. We certainly saw this with respect to Libya, but also in places like Cambodia, Sierra Leon and Iraq. There were debates about how much international intervention there should be. How much international intervention versus how much local intervention? One “solution” has been to adopt hybrid mechanisms such as East Timor in Sierra Leone, but then the question often becomes in the hybridity between the international and the local: where is there accountability? Overall, there are two sides of this global paradigm: one is the emphasis on the bureaucratic and the other draws from international law.

On the bureaucratic side—I see this certainly at the U.N.—there are regular reports about what the pillars of transitional justice are and the reflection that there are four pillars, including a right to truth. This is a bureaucratic approach that tends to theorize across transitions and across regions, and seems to be guided by a scientific analogy. One can

Nov. 16, 2014).

¹⁹ See generally Argentina: National Appeals Court (Criminal Division), Judgment on Human Rights Violations By Former Military Leaders of December 9, 1985, 26 I.L.M. 317 (1987).

understand it as a prescription to leading states undergoing transition. An illustration today would be Tunisia, where the U.N. is running a program on transitional justice. Another actor, the International Center for Transitional Justice, which is a leading non-governmental organization in the field,²⁰ also conceives of transitional justice according to a very different definition than the one I proposed. In its understanding, the definition of transitional justice is seen as the set of responses, or the array of practices. This is why I said it has become a technocratic model—it has become a set of answers. Then, we could ask ourselves: what is the problem? It is a set of responses where there are lessons that can be learned worldwide—truth commission over here to another truth commission over there. That is one side of this picture.

One concern raised by this bureaucratic development, for example in Tunisia, is the exacerbation and reproduction of divisions from the past—divisions between those in the political process, and between perpetrator and victim. These divisions have become a central defining line in this process; they have delayed constitution building there.

Can one build a new society and a new citizenry based on these categories of perpetrator and victim? There are others who have also commented on bureaucratic decision-making. We can see it in the work of David Kennedy and his critical work on humanitarian aid and international intervention.²¹ But then there are scholars such as Weinstein and Fletcher who look to a number of factors to see where international intervention might be most appropriate.²²

The international law side has been in the picture since the late 1980s; back then, international law was an alternative normativity in Eastern Europe in dealing with issues of legislation retroactivity. For example, it was used in Hungary, where the international community wanted to prosecute those who had been involved in the violent repression of the 1950s; it was used in Czechoslovakia before the crimes that were committed at the time of the Prague demonstrations. For solving these problems, international law almost seemed to be a gimmick because it gave some kind of normative continuity in a period

²⁰ See INT'L CTR. FOR TRANSITIONAL JUSTICE, <http://www.ictj.org/> (last visited Nov. 10, 2014).

²¹ DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* (2005).

²² See Laurel E. Fletcher & Harvey M. Weinstein, *A World Unto Itself? The Application of International Justice in the Former Yugoslavia*, in *MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY* (Eric Stover & Harvey M. Weinstein eds., 2004).

of transition, which is characterized by value switches between regimes. International law, therefore, has been in the picture from the beginning. But what we see now is its entrenchment, through the various charters for the ad hoc tribunals and the Rome Statute,²³ and these have given rise to certain conceptualizations of what are the most serious offenses for the international community.

These conceptualizations may also give us a principle for figuring out how to deal with the dilemmas posed by the global paradigm of justice. The ICC is a permanent court, at least for its signatories, and it has to figure out its relationship with other standing bodies that worry about crime and security. There is a norm for the ICC, and a principle of jurisdiction—the principle of complementarity—which attempts to guide the relationship of the domestic and international on a continuous basis. Within the principle of complementarity, we might see some glimmerings of light for how to think about the problems for a field that has expanded in the ways I have described—the global context of the domestic, regional, and the international. The principle of complementarity looks to the context in the domestic jurisdiction to see whether there should be international intervention, and, where there is political will and capacity, the international should step back. Conversely, I would argue—and put it more strongly than it is put in the Rome Statute—that it should be in instances of political failure that international intervention is at its most justified.

That is a position, a way to think about the globalization of transitional justice. Nevertheless, there is a whole school now of international formalism—legal formalism—with a variety of different scholars from both political science and law who are emphasizing that the cascade of human rights trials is contributing to the rule of law,²⁴ and other scholars who essentially argue in the human rights community that there is an obligation to punish.

There are recent confrontations that bring together the international and bureaucratic models, and raise questions for us about the direction of the field. One can see, international law is not just one value, nor is it an absolute; rather, it needs to be interpreted. We see a number of different instances of conflict which reflect the fact that both of these models—the bureaucratic standardized practices model and the formalist

²³ INT'L CRIMINAL COURT, ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (1998), available at <http://www.refworld.org/docid/3ae6b3a84.html>.

²⁴ See KATHRYN SIKKINK, THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS (2011).

international law approach—are inadequate to really lead the field because both are conceptualized as disconnected from the transition’s substantive political commitments and values.

Taking up the recent confrontation between the bureaucratic standardized practices model and the formalist international law model makes us think about what some potential guiding factors might be. Let us consider some recent instances of this confrontation reflecting the global paradigm and, in particular, the failures of these two dimensions that I mentioned: this disconnect from politics. One that has been glaring and is the most contemporary is the relation of the ICC to the current administration in Kenya. We have seen over the last year: an indictment, an election, a granting of postponement, then a reversal, and now it appears a postponement again with the African Union (“AU”) threatening to pull out of the court as a bloc.²⁵ The AU was the leading region—along with Europe—supporting the ICC, and arguably the ICC would have been eviscerated if the AU had pulled out. It is a critical moment in the life of this institution.

Another instance of this confrontation has surfaced in the ongoing debates in New York and elsewhere; the International Peace Institute sponsored a debate on this issue on October 12, 2013.²⁶ Of late, this is an instance where the ICC had to reflect on its context, and on what principles might guide its prosecutions. The ICC says that it is mandated and under an international legal duty. Until recently, the prosecutor has maintained there is very little discretion in the prosecution. You can see this kind of international formalism appearing there. Another example of this confrontation is Libya, where we see a number of exchanges about whether trials should be occurring in Libya, or in the Hague, yet no agreement on the relevant standards guiding admissibility.

There is very little scholarship or studied reflections that are transparent on the issue of what is complementarity, i.e., reflections on when the court should be involved. You might think, for example, that complementarity should mean some understanding of what a fair trial is,

²⁵ AFRICAN NETWORK ON INT’L CRIMINAL JUSTICE, REFLECTIONS ON THE AFRICAN UNION ICC RELATIONSHIP (2014), available at <http://www.iccnw.org/documents/CivSocdoCreAUsummit.pdf>.

²⁶ *Complexities Abound in Kenya’s Withdrawal From Rome Statute*, INT’L PEACE INSTITUTE (Sept. 19, 2013), <http://www.ipinst.org/events/panel-discussions/details/479-complexities-abound-in-kenyas-withdrawal-from-rome-statute.html>; see Ruti Teitel, *Judging and Judgment in the 21st Century: The ICC’s Confrontation with Africa’s Leaders*, SECURITY IN TRANSITION (June 7, 2014), <http://www.securityintransition.org/commentaries/judging-and-judgment-in-the-21st-century-the-iccs-confrontation-with-africas-leaders/>.

but up to now this has not been articulated as one of the dimensions of complementarity. The Quaddafi regime was referred to the ICC at nearly the same time as the Libya intervention, and now there are two different rulings by that court about whether a trial can occur in Libya, one for al-Senussi who was one of the henchmen there and one for the son, Saif Quaddafi.²⁷ What is interesting is that the ICC maintains that politics is not part of its mandate and wants to think of itself as some kind of neutral actor that lies outside of political time and space. Might this view of international justice threaten rather than advance the goals of democratization?²⁸ Even from an international lawyer's perspective, all treaties need to be interpreted and there is room in the Vienna Convention to reflect upon the object and purpose of the statute; there is a certain set of moves that any international lawyer or judge would make in order to think about how to apply a particular treaty to a case.

Another example of this confrontation is in Latin America, where the Inter-American Court of Human Rights has been involved with a series of confrontations with respect to opening up determinations that had been made by various countries after their military rule. This has become a kind of transitional justice revival. The latest struggle is between the democratically elected leader in Brazil and its regime,²⁹ and the Inter-American Court of Human Rights where the court is saying that Brazil needs to reopen and overturn its amnesty law. The amnesty law in Brazil has been upheld by its own court as part of the political transition in that country. This does not mean that it must stand, though there is a serious lack of reflexivity by the regional judiciary about its role, what are its likely effects, and what other factors one might think of as relevant to guiding the intervention. The principle of complementarity, which of course relates to the principles of subsidiarity important of region, could be of useful guidance.

²⁷ See INT'L CRIMINAL COURT, PRE-TRIAL CHAMBER I: SITUATION IN LIBYA IN THE CASE OF *PROSECUTOR V. GADDAFI* (2013), available at <http://www.icc-cpi.int/iccdocs/doc/doc1663102.pdf>.

²⁸ See Anthony Dworkin, *International Justice and the Prevention of Atrocities*, EUROPEAN COUNCIL ON FOREIGN RELATIONS (Oct. 10, 2014), http://www.ecfr.eu/publications/summary/international_justice_and_the_prevention_of_atrocities.

²⁹ Brazil's leader was herself a victim of military torture and detention. See *It Isn't Even Past: Better Late than Never, Brazil is Re-examining the Legacy of Dictatorship*, THE ECONOMIST (Nov. 19, 2011), <http://www.economist.com/node/21538786>.

CONCLUSION

Clearly there is no going back to the pre-global time. While it would be nice to put the global justice genie back in the bottle, but there are too many conferences, too many civil society actors, and too many non-state interests; that is not a way forward. But the question today, given the two prevailing dimensions that have become increasingly disconnected and disembodied approaches to transitional justice, is: what ought to guide the relationship of these supra-national interventions to local self determination? Obviously one important factor should be the robustness of democracy and the political process below. But we might think of others.

There is definitely a continuum one might think of for a threshold or colorable basis for international or transnational judicial intervention. But the question today, often in international law and in non-governmental organizations that see themselves as non-political or functioning in neutral space, is: how should we problematize and theorize about these various changes in the field and the various relationships of these actors, and then confront what are going to be clearly competing goals, purposes and competing values? Judicialization can, in many ways, be a salutary development, because it is case by case and it could allow and facilitate the processes of interpretation, bringing to bear the relevant considerations to advance transformation.

