

Episode 2 (March 2020) The evolution of the field

Welcome to *Justice Visions*, the podcast about everything that is new in the domain of Transitional Justice (TJ). *Justice Visions* is hosted at the Human Rights Centre of Ghent University. For more information visit Justicevisions.org.

Tine: Brigitte, what a week this has been, right? I think it's actually even been three weeks since we've seen each other, hasn't it?

Brigitte: Yes, I think it's about three weeks since we last met with the team in the office, and fortunately we have been skyping in the meantime.

Tine: Yes, Skyping and then just working from, in my case, what is my makeshift office in my attic. And we should probably mention this, because we decided to go ahead with the podcast, because there are just so many interesting things we wanted to talk about, but we are actually video conferencing rather than in our studio right now, right?

Brigitte: Fortunately we have the possibility to sit in our attic and make our makeshift studio, and I think we are not the only ones who are doing this because a lot of people are experimenting with audio at home, and I think it's also because we need an outlet for our creative energy, and also there's more people that have time to tune in. And I think a lot of people are doing really interesting stuff. Have you been listening to anything interesting that struck you as novel, anything that you would recommend?

Tine: Podcast-wise, basically the people of *Lawfare* and the people of *Asymmetrical Haircuts* have been keeping me sane, I have been listen to them as I go for my runs in the park, and I'm always so happy that they are there, sharing these insights.

How about yourself? What have you been reading, what have you been listening to?

Brigitte: I've been listening to my favorite podcast of all time: *On Being* and *Asymmetrical Haircuts* as well, because I do think these ladies are doing brilliant work on international law and I am benefitting a lot from their insights.

And then reading of course is always difficult to ask me, so let's just stick to non-fiction. I have been reading a lot about Hannah Arendt lately, and mostly by *Lindsey Stonebridge*, who did a couple of brilliant books about Hannah Arendt and what she can teach us today about poetry, international law and politics. And reading about her of course isn't enough and I just started reading the *Banality of Evil*, because I do think it's important, dealing with the stuff that we're dealing with, international criminal law.

Tine: And it's so nice that you're going back to the, to actually Arendt as well. I was also watching the interview that you recommended to me just yesterday.

Brigitte: The interview was really interesting I thought. So it's an interview from the sixties with Gunter Gaus, and it's really interesting to see the set up in the studio and her smoking and just that going back in time I thought was interesting and then him also just reading his questions. It was quite artificial, and at the same time she was just so brilliant also in her criticism, or rebutting the criticism on how she was ironical and using irony in the Banality of Evil. Seeing how she deals with criticism is just enlightening.

It really brings us neatly to the subject of today and therefore we will also post the link in the enhanced transcript.

So in this episode we wanted to expand on the links international criminal justice and transitional justice, because we felt that the influence of international criminal justice has been so strong in the field of transitional justice, right from its emergence that Hannah Arendt described with the Nuremberg Trial and of course the Eichmann trial. And even if the attention over the last years seemed to shift away from retributive to restorative justice, the importance of criminal accountability in the transitional toolkit cannot be underestimated, and that's why we wanted to take into account the recent evolutions and also how international criminal accountability in ongoing conflict is so important, because of course the field of transitional justice has expanded so much in the last couple of years, covering also ongoing conflict.

Tine: It really makes sense to do this early on in the series now. who better to talk to than Laurel Fletcher; Laurel, who is a Director of the International Human Rights Law Clinic at Berkeley Law.

So I called her earlier this week – from this very attic - and I wanted to talk to her about where we as transitional justice scholars, where we come from, where we are headed of course as well.

But then, of course, Laurel is just one of these people that are and have been involved in so many projects, and that just have so much expertise, that, to be perfectly honest, we ended up talking about much more than just this history of the field and this relation between the field of transitional justice and international criminal justice.

Brigitte: She is also a person who has really seen the field of TJ grow up around her, no?

Tine: Yeah, before we started talking she actually told me about how she started out as this self-identified human rights practitioner, activist. I mean she has always been working on gross human rights violation and mass repression, from working on human rights responses to apartheid in South Africa, to being involved, as a young attorney, in accountability efforts for rape as a weapon of war in the Yugoslavia War.

And then she told me this thing that I've actually heard a couple of people mention before her as well, which is that you are doing the work you are doing, and all of a

sudden, now it's called transitional justice, and she describes how she found herself to now be a TJ person.

Brigitte: That's really interesting and striking. And of course there is this continuity, from the quest for accountability in the former Yugoslavia war, where she was involved so heavily, to the demands in other Central European countries and of course Latin-America. That lineage has often been coined as the emergence of the field of transitional justice.

But it must also be interesting for you because it is something familiar what she is describing, of all of a sudden finding yourself to be a TJ person?

Tine: Absolutely, it's actually something that I also talked about with her over dinner last December. How strange it feels to all of a sudden, in my case, be a professor of transitional justice, without ever having taken a course in transitional justice. But the truth is that that just wasn't really a thing back then when I was doing my MA for example. Now I sound really old, but I think that curricular attention for transitional justice is something, I don't know, maybe of the last 10-15 years probably?

Brigitte: That's really interesting you mention that, and it does say something about how new in a way this field is.

Tine: Yes, and that was actually the first thing I discussed with Laurel.

Laurel: To pinpoint the moment in time when this was crystallized as a field is somewhat of a moving target, but certainly most people credit the three volume Neil Kritz as one of those touchstone moments, right? So, okay, this is transitional justice. This idea that after mass repression, there needs to be some measure of accountability. And then the question is what measures of accountability, what's appropriate, etcetera, etcetera.

And certainly the rise of international criminal tribunals accelerated that because you had institutions, international institutions that were all operating under a similar set of assumptions and proclaimed themselves to be doing this thing we call transitional justice in a particular way.

Brigitte: It is really interesting how she describes that the link with international criminal justice is so encompassing and interesting, because in a way, people have argued that there are so many disciplines that come together in transitional justice. But I think at the same time, it is also quite clear that for a long period of time, legal scholars, legal practitioners have been the ones that have had the most influence, no?

But there is also the element of institutionalization, where you see that institutions were all operating under a similar set of assumptions and they were all doing this thing that they call transitional justice in a particular way.

Tine: Yes, and this is also something I asked Laurel about, what she thought the impact was of that very close relationship between international criminal justice on the one hand and then the broader field of transitional justice, and how it evolved, on the other hand.

Laurel: Well, I mean, the way that I've understood this is the core claim of transitional justice was always about accountability. This question of then these new regimes and their values of rule of law, need to confront the problem of what to do about the past and the past is then understood to be the past criminal conduct committed at this date. And once you have the label of criminality, of mass criminality, the question is raised, if there has been a crime, then there needs to be justice. And so what form should justice take? And the gold standard was trials and where trials weren't possible, then truth commissions.

And so South Africa became the example of truth commissions and Latin America to varying degrees was this example of trials. And, so I think that we see there, this intersection of criminal law, international criminal law and transitional justice. We're deeply integrated from the start. Now that's not to say that criminal law was seen as the only response, or increasingly as the best response. Right? I think what we see happen is, once you actually have international criminal tribunals, there was a record, to assess their efficacy and lots and lots of critiques emerged as well: "Maybe trials aren't so great, and maybe victims aren't treated so well, and maybe not all victims want this form of justice." Those questions got raised in the wake of a record. So you start seeing other ways of looking at truth commissions, not as second best, but actually truth commissions might be doing certain aspects of accountability like creating an authoritative record better than trials.

Brigitte: Hearing this brought a smile to my face, because these are the issues we are discussing within the Justice Visions team on a daily basis. It is so beautiful how she draws out these questions we are trying to get our heads around. What kind of justice do different groups of victims aspire to? And then another one that really struck me is the danger of focusing too heavily on criminal prosecutions and when we're doing that, aren't we then drawing attention away attention from other efforts such as truth-telling?

Tine: Exactly, and this is why I wanted to also hear Laurel's thoughts about accountability beyond criminal procedures, to understand whether she sees this as a complimentary kind of accountability or an alternative to criminal or legal accountability. This is what she had to say about that.

Laurel: I think that practitioners and scholars have, and the whole restorative justice movement as it has been interpreted by transitional justice and even international criminal justice practitioners, has started to contest what we mean by accountability, right? So I think you could have what I'll maybe refer to as like strict accountability advocates would say accountability is first and foremost criminal accountability. I don't think that that is the majority view right now. I'm going to go out on a limb. I think that

people in the field are approaching this question with a much broader sense of accountability and nuance about what accountability means. I think that's part of what you've also seen emerge over the last 15 years: this understanding of a holistic response to transitional justice. And that criminal accountability is only one aspect of that, because accountability to victims means more than just retribution for particular perpetrators.

Accountability also means providing reparations, restoring victims to their former status. And then others push beyond that and say, well, actually, if the former status wasn't so great because of endemic corruption, because of social marginalization, because of systemic discrimination, then actually what transitional justice presents is the opportunity for a more revocatory justice. Let's really go deeper and provide those who have been victimized, not just in this most recent period of repression or mass violence, but who have been on the losing end of structural constraints or rather structural discrimination. Let's get at root causes and let transitional justice be the banner under which we try and finally address these systemic drivers of marginalization. And that I think has been a real push in transitional justice. What you see there is this term transitional justice being used to apply to situations where there hasn't been a transition. Right? So I was just at a conference that was talking about innovations in transitional justice in the MENA region. Well, if you look at the MENA region, where has there been, let's say you're talking about Syria... There is no regime change in Syria. So what do we mean by calling for transitional justice in Syria?

Brigitte: I was thrilled to hear Laurel raise Syria, because this case illustrates the conceptual and practical difficulties of expanding TJ to ongoing conflicts. Because here there is no prospect of a transition and very limited scope for justice processes. She rightly raises the concrete and important question what we mean by calling for TJ in Syria?

Tine: So, I assumed that you would get really excited about this topic, so I actually took one for the team and asked her about this discussion that we have also been having: the discussion about whether thick accountability - the way in which people like McEvoy describe it - whether this notion of thick accountability that also looks at root causes of conflict, at deeply embedded structures of oppression, at accountability for economic and social rights, whether that notion might actually entail a risk of diverting attention away from actually trying to pursue criminal accountability, through, for example, universal jurisdiction, especially in these cases where the regime is still in place, like Syria, this would be a legitimate concern, right?

Laurel: I think that's an interesting question. I think that his critical intervention was to say, look at what the effects are of emphasizing criminal accountability to the exclusion of other forms. And so when we look at a case like Syria, there are efforts that are being made to use universal jurisdiction to provide some measure of accountability for those perpetrators who can be found outside of Syria. And I think that strategy has always been understood as one way to put pressure on regimes and on the international community to do more. I think the problem is that the legal

accountability, the criminal accountability tends to suck a lot of the money and the energy out of other forms of transitional justice.

Those who are doing legal accountability don't claim that this is the magic bullet that's gonna change the systemic injustices let's say in Syria or bring about regime change. But the question is, well then who's working on those other aspects? And that's I think where you get to the sidelining of local groups who are working in communities that find it difficult to get resources and attention to other forms of perhaps more curated transitional justice measures, that experimentation with what that looks like by local communities.

Tine: So this was a matter that intrigued me: to what extent the focus on legal accountability leaves enough room for other initiatives, often developed by people from the ground up.

Brigitte: So I assume that you are referring to non-judicial mechanisms?

Tine: Mostly, yes: questions like how things like immersive theater or artistic practices could nourish or interact with the quest for accountability. That's definitely one thing. But I was also thinking about things like the famous Gacaca trials that took place in Rwanda.

Brigitte: We have also been discussing this question in the context of our own work: how do you deal with these initiatives: Do you call them instances of transitional justice, or not?

Because if you don't, then in a way they risk becoming invisible because, the whole transitional justice architecture and discourse carry so much normative power. If you're not calling it transitional justice, in a way, you risk being deemed irrelevant.

But then at the same time, if we do cast them as instances of TJ, isn't there a risk of being sucked into this one size fits all kind of managerial understanding of how change comes about and can be managed.

Tine: This is an ongoing discussion, right? And I also asked Laurel about how she treats or sees these initiatives that in a way are happening in the orbit of more formal transitional justice efforts. And it is actually quite interesting what she had to say about that.

Laurel: I mean, I think this is a real dilemma, certainly conceptually. I guess I have a bit of an ambivalent answer to this. On the one hand, I see that, as just an empirical reflection groups on the ground who are doing good work - by that I mean they are accountable to local communities and constituents who are articulating their needs, congruent with human rights values to address systemic inequality and mass government, repression or right. And they are quite rightly, given the choices for funding, putting that under the rubric of transitional justice.

I think it's important to ask those who are articulating an action agenda under the banner of transitional justice: what is it that you are doing that you think falls within transitional justice and why?

Brigitte: What is really appealing is this idea of an action agenda under the banner of transitional justice, because in the end, it is about advancing justice efforts in creative ways, and this can make a tangible difference for victims.

Tine: True, and I think that brings with it a lot of complexities. So I was quite interested when, in preparation for this episode, I noticed that Laurel recently gave an opening address during a conference which was called “confronting complexity, valuing elegance”, where, I think, the idea was, that as we confront complex societal problems, that law, international law, can give us this sense of stability, predictability, elegance if you will.

And I thought that was actually quite interesting, because it also seems to apply to transitional justice, no? This appeal of a legal solution, this aura that legal solutions have of manageability, maybe even malleability, in what is otherwise an incredibly complex process and an incredibly complex context to be working in. So I also asked Laurel about that.

Laurel: I know what you're talking about. Those are remarks that I gave for a memorial conference for David Caron, who was a beloved colleague at Berkeley. That was actually his theory about the elegance of international law. I hadn't reflected on that in the context of transitional justice. I think that transitional justice does offer that kind of conceptual elegance that includes many struggles for justice within an overarching framework. What I would say it masks, is the politics of transitional justice. And that I think is one of the reasons why transitional justice has become a hegemonic in this space. And I also think it's one of its limitations.

So let me explain what I mean by that. When those who are talking about root causes for mass violence are talking ultimately about distributional justice or distributional injustice, whether that's in many countries the need for land reform, the need for redressing systemic social and economic marginalization beyond land reform. And those are inherently political decisions that need to be made. And when we use the language of international criminal law, it's a poor fit. And even when we use the language of rights, often times it's a poor fit. And I think what transitional justice claims with this elegant theory of rights, masks this political claims about citizenship, about belonging and about social justice. And I think that's the danger that we in a sense take away falsely what ultimately are political battles that need to be waged. And from the perspective of victims and the marginalized need to be won in order to really achieve social justice. It's not going to happen in the courts.

Tine: So, that was really interesting. And we'll actually be talking about this topic, with Simon Robins and Evelyn Schmid in one of the next episodes.

Brigitte: But what I also find interesting about how Laurel frames the argument, and I think this is in the [violence and social repair paper](#), is that she writes about the unforeseen and unwanted consequences of these legal interventions, by also pointing out how people become swept up in the violence.

Tine: Yes, true, she talks about these people who either actively or through passive acquiescence, because of the nature of these legal interventions in a way they are in a way relieved of their moral responsibility, that they are not necessarily challenged. That is also something we talked about.

Laurel: That article was written really to talk about mass state violence and the ways in which the state authorizes and promotes and makes acceptable and justifies genocides and crimes against humanity. And I think that there is little, that law, a legal response is not adequate to reverse, well, to both understand state responsibility in those instances. And that is one of the fallacies of pursuing individual criminal accountability for mass violence, is that it ignores state responsibility. And the legal doctrine on state responsibility is, compared to international criminal responsibility, is virtually nonexistent when it comes to what I'll call state crimes. We don't have a theory of the jurisprudence of state criminality, let alone a mechanism for accountability, and further still, an understanding of what state responsibility for promoting conditions of mass criminality, in those episodes. We talk about complicity, let's say complicity to commit genocide, complicity for torture, but that doesn't really get at the entire web of authorization that is created in those circumstances.

Tine: So when Laurel started talking about all these avenues, I had to of course also ask her if, indeed, she has the impression that this is indeed where the field is moving, if the field is moving in that direction. And more generally, what she thinks is the most important evolution that we will observe in the next decade or so when it comes to transitional justice and where it is headed, and especially with regards to victim participation.

Brigitte: That rings a bell, that is the one million dollar question as Stephan Parmentier called it in the [previous episode](#), right?

Laurel: I think transitional justice is approaching, if not *at a crossroads*, where I think there is a widespread agreement about the limitations of the predominant approach and transitional justice policy at the international level, which emphasizes state down, sort of top-down approaches either within international institutions or national institutions. And I think a more popular bottom-up approach to building what a transformative justice theory and practice would look like. And whether or not a popular approach is going to win out. I think that's the challenge. I see the energy, the intellectual energy, and transitional justice is moving towards a more grounded theory and looking at structural factors that need to be redressed in transitional justice processes. But I think in part because that tends to decentralization, it also makes it more difficult to galvanize the kind of global support for this other approach. So I see

that as being both the future and also the challenge for the field. So I don't know how this is ultimately going to play out.

Brigitte: I am curious to actually hear more about the other approach, because it does seem hard to imagine how these popular approaches can gain more traction in an era where mass state violence seems to spiral.

Tine: Well so was I, and we then always ask people we talk to where they are looking for inspiration, to start answering those questions because that we are also posting in our transcripts. This is where Laurel is looking.

Laurel: I'll tell you the literature that I'm trying to look at, and they're not transitional justice literatures. I'm looking at social movement literatures and I'm looking at the literatures on authoritarianism and popular nationalism. Because I think that transitional justice came of age in a moment of time when there was mass democratization, globally, that's not our particular moment. We're in a moment of regression. And so what does transitional justice look like in an age of rising authoritarianism? I'm not sure what that looks like. And I am not sure if transitional justice is going to be the banner under which human rights is going to be promoted. So my own ear is bending toward rethinking where the human rights movement is in this age.

And I think that the Corona-virus, we're going to see a new iteration of how are authoritarian regimes going to respond to the pandemic? And what are the implications of those responses for human rights and within that transitional justice claims?

Brigitte: That was so rich. She really touched upon a lot of the problems that we are dealing with in our team. But more broadly I also thought it was fascinating to hear her speak so clearly about the fallacies of pursuing individual criminal accountability for mass violence, because it might risk to draw attention away from state responsibility, which is really one of the main challenges the international justice system is faced with.

Tine: Yes, and what I also really found interesting is the question of what this all means for victims, but also how to adopt a more victim-centered perspective on these issues, no?

Brigitte: Exactly, and that's precisely what we will be doing next month: a deep dive on this victim notion that seems to escape us.

Tine: Exactly, let's see where we are one month from now, but I do feel that this is an interesting time to be podcasting, because there are so many interesting things happening in the field of international law, also in response to this crisis, so that I feel that it's really interesting to ensure that we keep the conversation going. So thank you Brigitte for being part of that conversation, and also thanks very much to Laurel for sharing her insights in these very peculiar and somewhat challenging circumstances.