
Professor Teitel led a discussion with OTJR members on 02 March 2009. The following is a summary of the key points that Professor Teitel and OTJR members discussed.

Topic 1: Transitional Justice in the US Post-Bush Administration: Truth Commissions and Ethics Investigations

The debate over whether there should be a transitional justice process in the US and how to handle issues of accountability with regard to the Bush administration is very quiet and has been overshadowed by the financial crisis. The terrorist attacks of September 11th also overshadowed the rule of law and accountability issues that emerged with Bush v. Gore in 2001. We are now experiencing a sense of déjà vu; the pressing questions have been diverted.

Putting the financial crisis aside, President Obama ran on the politics of unity and change and never articulated an agenda for transitional justice. Rather, his agenda is for reconciliation. He is an almost unassailable figure because he voted against the Iraq war and has the purity and legitimacy of someone who can stand on his own integrity. In this way, he is a Vaclav Havel type character. The appeal of reconciliation is that we are currently in a financial emergency and need to move beyond politics; there is no time to look back, only to look forward.

Yet there are developments underway within the Department of Justice. Under investigation are John Yoo, a former Office of Legal Counsel official and Berkeley law professor, now on leave from Chapman University, who was the principal author of national security opinions between 2001 and 2003; Jay Bybee, who oversaw the OLC during the same period and is now a federal appeals court judge; and Steven Bradbury, who oversaw the OLC during Mr. Bush’s second term. They are responsible for the memoranda that advocated for harsh methods of interrogation and misstated the law and justified torture. In evaluating the memos, one should ask whether what was written in them was reasonable; would a reasonable person have written them? The answer is no. Adequate citations were missing; moreover, misstatements of critical terms, i.e. the definition of torture given was significant harm to an organ. Coming up with any kind of clear answer about whether the memos are problematic and by what standard may draw
on precedent from the Nixon administration. Responsibility, of course, is not just with those who wrote the memos; it may also be with those who took the advice.

The current investigation will likely produce information not widely known to the public and may bring to light a second round of memos written during the second term of the Bush presidency that have not yet been released, including the Bradbury memo. It is not clear yet whether the DOJ will keep these confidential, or if Attorney General Holder will release them. Should they be made public, there may well be enough troubling information that there will be more interest in the public and a broader group than exists at present may push for action to be taken.

Certain human rights groups, Senators and Congresspersons, and members of the broader global community are interested in calling for truth commissions and prosecutors. Senator Pat Leahy (D-VT) has called for a truth and reconciliation commission, and Congressman John Conyers, Jr. (D-MI) has called for legislation that would establish a national commission on presidential war powers and civil liberties. The proposed Conyers Commission would have subpoena powers and other coercive tools to call witnesses; it is less conciliatory in name.

There is a debate as to whether the ‘truth finding’ process should be open ended. That is, should we learn the truth and then decide what to do, or should there be a finite process established from the beginning? The human rights community has been absolute on this: where there is evidence of crime, there should be a trial. There is very little support for a truth commission or trials from the Obama administration. The DOJ ethics investigation is the only step in this direction made thus far.

There is also, however, the powerful symbolism of closing down Guantanamo and leaving Iraq. Mr. Obama has moved towards these substantive changes quickly, though implementation may take much longer and there are practical implications such as where to send the detainees that are stateless or could face torture upon return to their country of origin. Mr. Obama has not yet stepped away from the military tribunal set-up. Domestic courts pose a challenge because of the standard of evidence required and because of how some of this evidence was obtained. It may be easier to try the detainees in military tribunals, which offer somewhat truncated proceedings.

There is a question as to whether “transitional justice” is the right term to use in this context. Certainly the term itself is rather vague, and we must consider what we mean by justice and by a transition. The move from Bush to Obama is not a regime change, but definitely a transition in that we have a new administration and a different party in power. It is clear that the transition from a Democratic to Republican administration, from Clinton to Bush, affected Bin Laden’s calculations. We suffered from a lack of continuity at that time. President Obama may think it is better to have continuity for the country’s stability (which is also vulnerable at this time given the financial crisis) and to limit the potential for terrorism.

There are statutes of limitation on torture and there will soon come a point in time after which criminal investigation is not possible. But there has always been a role for the passage of time. Societies are not always organized for quick trials. Consider that in Argentina, trials began almost three decades later.
In response to the question of the possibility of ICC involvement in the US transition, it is important to consider the perception of the ICC in American politics more broadly. President Obama will certainly have a different relationship with the ICC than his predecessor, although there hasn’t been any serious discussion just yet about exactly how Mr. Obama will approach the Court. There has been no new congressional discussion concerning the ICC either. Ultimately, the fact that the US is not a signatory to the Rome Statute makes it unlikely the ICC will play a serious role in U.S. transitional justice debates. There was some discussion earlier about the possibility of a joint US-UK commission, but nothing has manifested on this front either. Moreover, it bears noting that Chief Prosecutor Ocampo has a great deal on his plate already with the Sudan case and ongoing investigations in Afghanistan, Colombia, and other countries without attempting any controversial investigations concerning the US.

In terms of the ICC’s other investigations, however, it seems likely that the US will be more willing to play ball. The US does have a record of providing expertise and funding to international tribunals in the past, from Nuremberg to the ICTY and ICTR. Moreover, the Obama administration will not have such a strong opposition to the ICC, and it is unlikely, especially given Mr. Obama’s current advisory team, which includes Susan Rice and Samantha Power, that the US will pursue additional bilateral Article 98 agreements.

In a broader sense there is still great concern about the lack of a definition of the crime of aggression in the Rome Statute. The US is obviously apprehensive about this issue, as are China and Russia, especially given debates about the degree of independence given to the prosecutor. In regards to the crime of aggression, which the Statute technically has authority over even though the member states have yet to agree upon a definition of the crime, there is controversy about whether the prosecutor should be independent or if his or her actions will require UN Security Council approval. The crime of aggression is of particular interest because of its history; while it was not a part of the ICTY mandate, aggression was the primary issue of concern at Nuremberg. It will be important to see if and how the crime of aggression is received in contemporary discussions of international criminal law. Additionally, given the ongoing nature of the US “war on terror,” the definition of aggression will continue to complicate the US perspective on the ICC.

Moreover, it is important to consider the ICC in the context of larger debates about accountability and transition. In issues of transitional justice we tend to find pockets of accountability all over: in international courts, but also in domestic contexts and even through the activities of civil society.

When we think about the purpose of the ICC we should consider larger questions about the overall objectives of truth processes. We need to ask exactly what it is the ICC supposed to achieve. Many critiques of the Court do not distinguish between issues of peacemaking and the role of justice, but we should ask ourselves if and how different institutions can achieve these goals. Courts are often seen as having an explicitly
nonpolitical role, and while it would be a mistake to think of a court like the ICC as completely independent from political processes, we should consider the specific nature of the ICC and other mechanisms for achieving justice in light of current political contexts and situations.

We can think of at least three potential objectives for transitional justice mechanisms: punishment, truth-telling, and reconciliation. In this sense, reconciliation can mean something as broad as “reconciling to reality,” or providing common acceptance and acknowledgment of past atrocities. While the role of law needs to be distinct from politics in the sense that political power can’t control legal reality, one needs to consider how different mechanisms for justice best achieve these different ends and what types of institutions are best suited to attain particular objectives, particularly when some of these thought to serve political purposes, such as attaining or maintaining the peace.

Discussion summary compiled by Zachary Manfredi and Julie Veroff.