

ATROCITIES AND INTERNATIONAL ACCOUNTABILITY

BEYOND TRANSITIONAL JUSTICE



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Atrocities and international accountability: Beyond transitional justice

Edited by Edel Hughes, William A. Schabas and
Ramesh Thakur



**United Nations
University Press**

TOKYO • NEW YORK • PARIS

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1

Introduction

Edel Hughes, William A. Schabas and Ramesh Thakur

The notion that there should be some form of accountability for state-sponsored atrocities is one that is posited within discussions of the broader transitional justice framework. Its function, it is argued, is to reverse the tradition of official impunity so often prevalent in societies emerging from conflict, and perhaps deter future violators of human rights. Although the first *Human Security Report*, published in 2005, points to a decline in the number of violent conflicts,¹ the scale of those witnessed over the past two decades has been brutally evident, due in no small part to improvements in mass media communications.

Rebuilding societies where conflict has occurred is rarely a simple process but where conflict has been accompanied by gross and systematic violations of human rights the procedure becomes a good deal more fraught. Emerging societies may experience the same problems, such as a weakened economy and weakened political institutions, but where there have been widespread abuses of rights there is the additional problem of ensuring that there is some form of accountability, be it prosecutions or otherwise, for the perpetrators. Accountability, and the form it takes, may be affected by a number of issues, including the intensity of the former conflict and abuses, the current status of political institutions and societal desire for some form of acknowledgement of the past.

Inherent in the accountability process is the idea that there are a number of practical concessions that must be made. It is not always possible to punish all those responsible for human rights violations (it would, for example, have been impossible to try everyone responsible for massacres

Atrocities and international accountability: Beyond transitional justice, Hughes, Schabas and Thakur (eds), United Nations University Press, 2007, ISBN 978-92-808-1141-4

in Rwanda as the number may have been as high as 300,000), nor indeed is it always possible to punish even those who bear the greatest responsibility, as society may demand an accountability process that does not involve criminal prosecutions. Indeed the form that the accountability process may take is a much-debated subject among scholars of transitional justice. The traditional argument revolves around the peace versus justice paradigm and whether there can be justice without criminal sanctions, and accordingly peace without this form of “justice”. Whereas retribution and justice are often attributed to trials, reconciliation, the argument goes, may be better achieved in the form of a truth and reconciliation commission.

The trials versus truth commission debate, however, can sometimes be usurped by the official functioning of some sort of independent inquiry. In Argentina, for example, the National Commission on Disappeared Persons was not given prosecutorial powers but had sufficient resources to complete a comprehensive investigation, culminating in a report, *Nunca Más!*, which was later relied on in the trials of some military leaders. The chapters in this collection all look in some way at how the law responds to political change in post-conflict societies and how it holds perpetrators of mass atrocity accountable. Transitional justice issues are no longer solely the preserve of individual countries; the international community through its sponsorship of prosecutions and other accountability processes has become increasingly involved in restoring order and dealing with human rights violators. This is a development that is not welcomed by all; in fact Jeremy Rabkin argues that the idea of global justice is both undesirable and unattainable; to embrace some form of international criminal justice, it is asserted, one must accept both a new understanding of international law and a new understanding of criminal justice.

If this book tells us anything about societies in transition, it is that there can be no blanket solution in terms of the form accountability is to take. As much as each conflict varies, so too do the mechanisms engaged to deal with it – legal and moral concerns must be balanced with political reality in determining the appropriate reaction to atrocities. In Chapter 2, Peter Baehr sets out the various procedures, ranging from vengeance to truth commissions, used by societies in coming to terms with the past. He identifies a major problem in dealing with the past may be that the “guilty” ones may often be those who are needed for the rebuilding of society, without whose knowledge and expertise it may be more difficult to move forward. Baehr concludes the chapter by noting the importance of giving the past some sort of official recognition, although he is sceptical about the extent to which societies can learn from past experience. The collective memory, he notes, is short.

Chapters 3 and 4 look at the timing, nature and form that transitional justice must take. Rama Mani examines some of the core questions that concern the search for justice, reconciliation and the rule of law in post-conflict societies. These include issues that must be resolved before the decision to pursue transitional justice is taken and the processes and measures of reconciliation and transitional justice embarked upon after conflict. Mani concludes that peace and justice are irrevocably interconnected, interdependent and mutually reinforcing and can and must be pursued in tandem. Reparative justice, she asserts, underscores the requirement of a broader, more realistic framework to respond to the diverse needs in post-conflict societies. Helena Cobban looks in particular at transitional justice and conflict termination in Mozambique, Rwanda and South Africa in Chapter 4. Although the three countries underwent markedly different experiences, Cobban stresses that this does not mean that one cannot extract general lessons from them, rather it points to which kind of conflict termination and post-violence policies can make the most constructive approach to building a sustainable peace.

In Chapter 5, Jorge Heine examines some of the dilemmas of dealing with the past in new democracies and gives an insightful account of the trials of Augusto Pinochet. Heine looks at the idea of truth and reconciliation commissions as a compromise between blanket amnesties and special prosecutions, using the examples of Argentina, Chile and South Africa, and concludes that they are the product of the need of statesmen and politicians more generally to come to terms with the past. The theme of justice and reconciliation is explored further in the context of East Timor in Chapter 6. Jeff Kingston outlines the process of dealing with human rights abuses in East Timor and attempts at pursuing justice and holding perpetrators accountable. Kingston explains that justice in East Timor remains elusive and signs of progress toward achieving it are negligible, mainly due to Indonesia and an apathetic international community. Discovery of the truth alone does not bring reconciliation in the East Timorese context and the postponement of publication of the report of the Commission of Reception, Truth and Reconciliation in December 2005 generated dismay. Kingston also considers the establishment of the Commission for Truth and Friendship in 2005 and whether this will ultimately provide any solace given that its establishment has been criticized as providing impunity to perpetrators and denying victims future access to justice.

If the idea that criminal punishments are necessary still dominates the transitional justice landscape, then the case of Sierra Leone presents an interesting example of the peace versus justice dichotomy, having experienced both a truth commission and a special court, which were held simultaneously for a time. Whilst the truth commission concluded with the

dissemination of its final report in October 2004, in Chapter 8 we are given an interesting insight into the workings of the Special Court by Prosecutor David Crane, who outlines succinctly the practical challenges of investigating and indicting those allegedly responsible for massive human rights violations. The Special Court for Sierra Leone is vested with trying those who bear the greatest responsibility for war crimes, crimes against humanity and other violations of international humanitarian law committed during the conflict in that country. The fact that not everyone responsible can be tried is central to the idea of prosecutorial discretion, which has existed in international criminal justice since the Nuremberg trials. Matthew Brubacher explores this concept in Chapter 9 and evaluates what it means in practice at the international tribunals and the International Criminal Court. Brubacher argues that whilst the International Criminal Court must maintain its independence in pursuing accountability, the jurisdictional and admissibility criteria of the Court as well as the need to obtain effective cooperation requires it to pursue a process of international consensus building.

Where prosecutions are neither possible nor desirable, alternatives may be sought. These are investigated by Gerald Gahima in Chapter 10, who looks in particular at the *gacaca* court system utilized in Rwanda following the 1994 genocide. An exploration of this alternative court system is an especially useful one, given the fact that there is also a United Nations-sponsored international criminal tribunal dealing with issues arising from the horrific events of 1994. Gahima examines the structure and jurisdiction of the *gacaca* system as well as the relevant procedures and penalties, and provides a critical evaluation of the system. The Rwanda tribunal and its counterpart, established to prosecute those responsible for atrocities committed in the former Yugoslavia, have naturally come under close scrutiny from the international legal community. The following two chapters deal with the vexed issue of the impartiality, or lack thereof, of international criminal judges. Diane Amann uses the term “impartiality deficit” to describe how demands for fairness and justice centre almost exclusively on victims, with scant regard to the corollary rights of alleged perpetrators. In order to achieve a justice system free of impartiality deficit, therefore, its founding charter must allude to the defence function, equal in status, resources and respect to the judicial, administrative and prosecutorial functions. Amann concludes by advocating that international criminal justice proceed alongside efforts to confront and correct errors inherent in it. In Chapter 12, William Schabas addresses the question of independence and impartiality of the judiciary in the ad hoc tribunals for the former Yugoslavia, Rwanda and Sierra Leone as well as in the International Criminal Court. The chapter analyses the independence and impartiality of judges by examining issues related

to their qualifications, selection, training and conditions of service. Schabas concludes that there are structural weaknesses in the system, albeit that judicial independence and impartiality has been better protected by the International Criminal Court than by the ad hoc tribunals.

In the transitional justice arena it is perhaps fair to say that no issue provokes more division and controversy than that of amnesties. Whilst the major international non-governmental organizations and numerous legal scholars argue that amnesties are illegal under international law, if not for all crimes then at least for the most heinous, they have been used to great effect in some transitional societies, South Africa being a case in point. Because of the controversial nature of amnesties, it is often forgotten that they can allow for some measure of accountability and do not have to be mechanisms behind which perpetrators of human rights abuses can shelter with impunity. The final two contributions address the vexed issues arising from amnesty, exile and the duty to prosecute. Leila Sadat argues that the legal effect of any particular grant of amnesty or exile will be determined, in part, by the forum before which the amnesty is invoked. Michael Scharf concludes the collection of essays with a look at the contemporary debates surrounding the idea of relinquishing criminal prosecutions in the attempt to guarantee sustainable peace.

The long-held view that there should be a permanent forum where international justice would be “seen to be done” received a huge boost with the establishment of the International Criminal Court. The complex issues arising from international criminal justice and accountability for atrocity remain, however. This collection brings together contributions from some of the leading scholars in the transitional and international justice legal field. It is hoped that the theoretical analysis and pertinent case examples will be of assistance to both practitioners and scholars alike.

Note

1. A. Mack, ed. (2005) *Human Security Report* (Vancouver: The Human Security Centre: 17) states “. . . in terms of battle-deaths, the 1990s was the least violent decade since the end of World War II. By the beginning of the 21st century, the probability of any country being embroiled in an armed conflict was lower than at any time since the early 1950s.”

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United Nations University Press
United Nations University, 53-70, Jingumae 5-chome,
Shibuya-ku, Tokyo 150-8925, Japan
Tel: +81-3-3499-2811 Fax: +81-3-3406-7345
E-mail: sales@hq.unu.edu general enquiries: press@hq.unu.edu
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United Nations University Office at the United Nations, New York
2 United Nations Plaza, Room DC2-2062, New York, NY 10017, USA
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United Nations University Press is the publishing division of the United Nations University.

Cover design by Sese-Paul Design

Cover photograph: UN Photo by Mathew Elavalthoduka
UN peacekeepers effect the arrest of former Liberian President Charles Taylor at Monrovia's Roberts International Airport on his arrival from Nigeria. (29 March 2006)

Printed in India

ISBN 978-92-808-1141-4

Library of Congress Cataloging-in-Publication Data

Atrocities and international accountability : beyond transitional justice / edited by Edel Hughes, William A. Schabas and Ramesh Thakur.

p. cm.

Includes bibliographical references and index.

ISBN 978-9280811414 (pbk.)

1. Crimes against humanity. 2. Criminal liability. 3. Atrocities. 4. Truth commissions. 5. Reconciliation—Political aspects. I. Hughes, Edel. II. Schabas, William, 1950– III. Thakur, Ramesh Chandra, 1948–
K5301.A978 2007

345'.0235—dc22

2007025786

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Rebuilding societies where conflict has occurred is rarely a simple process; but where conflict has been accompanied by gross and systematic violations of human rights the procedure becomes fraught with controversy.

The traditional debate on 'transitional justice' sought to balance justice, truth, accountability, and peace and stability. The appearance of impunity for past crimes undermines confidence in new democratic structures and casts doubt upon commitments to human rights. Yet the need to consolidate peace sometimes resulted in reluctance on the part of authorities—both local and international—to confront suspected perpetrators of human rights violations, especially when they were a part of the peace process. Experience in many regions of the world therefore suggested a trade-off between peace and justice.

However there is a growing consensus that some forms of justice and accountability are integral to—rather than in tension with—peace and stability. This volume considers whether we are truly going beyond the 'transitional justice' debate. It brings together eminent scholars and practitioners with direct experience of some of the most challenging contemporary cases of international justice, and illustrates that justice and accountability remain complex ideals.

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ISBN 978-92-808-1141-4
300pp US\$32.00



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University Press**

53-70, Jingumae 5-chome, Shibuya-ku, Tokyo 150-8925, Japan
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