
Judging the Past: State Practice and the Law of Accountability

Kritz, Neil (ed.). *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*. Washington, D.C.: United States Institute of Peace Press, 1995. 3 vols.

Steven R. Ratner*

As dictatorships of one sort or another around the world give way to nascent democracies, states, international organizations and non-governmental actors are facing head-on the dilemmas inherent in political transitions. For governments, transitions represent both an opportunity and a hazard — an opportunity to judge the evils of the prior regime and the figures behind them, or to decide not to judge them; and a hazard of alienating or angering key constituencies — victims or tormentors — within the polity. The methods used for accounting for past violations of human rights will say much about a new government's commitment to protecting human rights prospectively. At the same time, new regimes will surely be guided by careful political calculations, whether it be for survival against still potent elements of the previous administration, manipulation of the past in order to justify their own prior and current programmes, or advancing a process of national reconciliation among former enemies.¹

For academic observers and advocates, especially legal ones, transitional situations offer their own opportunities and risks. The opportunity for international lawyers is to appraise the actions and attitudes of states and determine (a) if states are complying with existing international legal duties to prosecute certain crimes; and (b) if any new norms have evolved to govern the ways a new government addresses human rights abuses in the prior regime. State practice is obviously important for determining the contemporary meaning of, and state of compliance with, treaties that provide for such duties.² When combined with *opinio juris*, state practice is also critical in gauging the extent of customary law on these questions. The risk, however, which is inherent in all

* Professor of Law, University of Texas at Austin, 727 East 26th Street, Austin, Texas 78705-3299, USA.

¹ See generally T. Rosenberg, *The Haunted Land: Facing Europe's Ghosts after Communism* (1995).

² Vienna Convention on the Law of Treaties, 23 May 1969, Art. 31, 1155 UNTS 331, 340.

of international law though especially so in the area of human rights, is that in studying the obligations of states in transitional situations, the prescriptive and descriptive will merge — so that the observer, perhaps unconsciously, will confuse the 'ought' for the 'is'.³ The tendency to confuse the two is particularly likely when the state practice and *opinio juris* are themselves not clear.

Fortunately, all international lawyers analysing transitions — as well as governments and non-governmental organizations (NGO) facing these problems — now have a priceless resource to help them determine the state of international law on this question. *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, edited by Neil J. Kritz, Senior Scholar on the Rule of Law at the Washington-based United States Institute of Peace, offers a comprehensive set of raw legal materials for lawyers studying transitions — statutes and cases — as well as salient historical and political background in order to understand the context of modern transitions. Just as digests of practice of international law provide the grist for the mill in many other areas of our field, *Transitional Justice* provides it in the area of accountability, boldly going to the source of state practice, a place feared by none too many international legal scholars. European scholars, whose work in this area has tended to focus on transitions resulting from the fall of the Iron Curtain, will benefit in particular from its global reach.

Transitional Justice comes to us in three volumes. Each volume begins with the same useful 12-page essay by Kritz, which crystallizes the main dilemmas confronting governments in transitional situations. Volume I, entitled (somewhat unhelpfully) 'General Considerations', reproduces some of the most important secondary works of the last 10 years on accountability. The topics considered in this volume include the range in forms of transitions and their ramifications for accountability; ethical and moral imperatives; and the major forms of accountability, i.e., commissions of inquiry ('truth commissions'), prosecutions, lustration,⁴ and compensation for victims. Outstanding contributions of particular use to the international lawyer, reprinted in whole or in part, are those by José Zalaquett, a member of Uruguay's truth commission;⁵ Samuel Huntington, with his views on forms of transitions;⁶ Jaime Malamud-Goti on justifications for punishment;⁷ Priscilla Hayner on commissions of inquiry;⁸ Diane Orentlicher and Carlos Nino on the question of an emerging duty to

³ See, e.g., Koskenniemi, 'Lauterpacht: The Victorian Tradition in International Law', 8 *EJIL* (1997) 215, at 216. For a rejection of this dichotomy, see R. Higgins, *Problems and Process: International Law and How We Use It* (1994), at 10.

⁴ Lustration is the process of screening and purging from certain governmental positions persons associated in some way with the former regime.

⁵ Zalaquett, 'Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints', reprinted in *Transitional Justice*, vol. 1, at 3.

⁶ Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, excerpted and reprinted in *Transitional Justice*, vol. 1, at 65.

⁷ Malamud-Goti, 'Transitional Governments in the Breach: Why Punish State Criminals', reprinted in *Transitional Justice*, vol. 1, at 189.

⁸ Hayner, 'Fifteen Truth Commissions — 1974 to 1994: A Comparative Study', excerpted and reprinted in *Transitional Justice*, vol. 1, at 225.

punish prior officials;⁹ and Theo van Boven, Special Rapporteur for the United Nations Human Rights Commission, on remedies for victims of human rights abuses.¹⁰ Not surprisingly, there is a stronger focus in the articles on changes in South America (Argentina, Chile, Brazil, Uruguay, etc.), largely because of the sufficient elapse of time for analysis, although developments in Eastern Europe are also addressed.

Volume II provides a discussion and analysis of 21 transitions, from the experience of European countries after World War II, through the demise of dictatorships in Greece, Portugal and Spain in the 1970s, to the transitions in Latin America in the 1980s, and ending with Eastern Europe in the 1990s.¹¹ In these chapters, Kritz has skilfully woven together published accounts of these transitions, thereby leaving the reader with both a good sense of the facts of each facet of the transition (trials, purges, compensation, etc.) as well as the ramifications for the country. The scholarly and pedagogical advantages of this approach cannot be underestimated. The reader can learn about both very recent and more distant events, without having to undertake time-consuming research. It was especially welcome to find discussions on Germany, France and Italy after World War II, as well as Greece after the rule of the colonels, as these historical episodes tend to be overshadowed by the more recent attention on Latin America and Eastern Europe. The latter situations are, of course, also represented well here, with lengthy and detailed chapters on Argentina, Chile, Uruguay and Germany.

With the historical and political context set forth, the groundwork is laid for an examination of the raw materials of state practice in Volume III. As the audience for *Transitional Justice* is by no means limited to lawyers, the decision to place the documents after the contextual and historical material, rather than minimizing the latter, makes eminent sense. (Indeed, legal treaties or casebooks that omit this contextual approach are all too common in the academic world.¹²) The materials reproduced include excerpts from the statutes or peace agreements establishing commissions of inquiry as well as their reports; laws and cases on the purging of former officials; key cases on criminal liability and amnesties; treaties, statutes and cases on statutory limitations; and laws and cases on compensation and rehabilitation. The selections are quite representative of the array of options available to and

⁹ Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', excerpted and reprinted in *Transitional Justice*, vol. 1, at 375; Nino, 'Response: The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina', excerpted and reprinted in *Transitional Justice*, vol. 1, at 417.

¹⁰ Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, excerpted and reprinted in *Transitional Justice*, vol. 1, at 505.

¹¹ The 21 are: Germany (after Nazism), France, Denmark, Belgium, Italy, South Korea, Greece, Portugal, Spain, Argentina, Uruguay, Brazil, Chile, Uganda, Czechoslovakia, Germany (after Communism), Hungary, Bulgaria, Albania, Russia, and Lithuania.

¹² For important corrective approaches see W. M. Reisman and A. Willard (eds), *International Incidents: The Law that Counts in World Politics* (1988); R. B. Lillich and H. Hannum, *International Human Rights: Problems of Law, Policy, and Practice* (3rd ed., 1995).

taken up by states.¹³ Again, the advantage of being able to find these laws, rulings and reports in one place, and translated into English (from diverse languages), cannot be overstated.

Of particular relevance to the scholar or practitioner attempting to determine the role and extent of international norms is that some of the domestic decision-makers addressing transitional issues rely on international law in their rulings and reports, while others focus only upon domestic law. Thus, for instance, the Czech and Slovak Republic Constitutional Court's 1993 decision upholding most of the controversial 1992 law on lustration found no violation of international human rights instruments, and indeed found some support for the law in them;¹⁴ Uruguayan President Julio Maria Sanguinetti justified his country's '*Ley de Caducidad*' law to Amnesty International as being based on human rights principles;¹⁵ and the dissenting opinion, but not the majority, of the Argentine Supreme Court in a judgment upholding the 1987 due obedience law (which created an irrefutable presumption of impunity for many officers) relied extensively on international law.¹⁶ In contrast, other domestic decision-makers scrutinizing accountability laws do not seem to regard international law as particularly relevant to their inquiry, and rest their conclusions solely on national constitutional law.¹⁷

The only shortcoming of this volume is its insufficient number of sources of an international nature. While the El Salvador peace accords, a few UN documents,¹⁸ and several key decisions in the Inter-American human rights system¹⁹ are reproduced, it lacks some of the core documents of the UN Human Rights

¹³ The documents concern the following states: Albania, Argentina, Bangladesh, Brazil, Bulgaria, Cambodia, Chad, Chile, Czech and Slovak Federal Republic, Denmark, El Salvador, Ethiopia, Germany, Guatemala, Haiti, Honduras, Hungary, India, Italy, Lithuania, Nicaragua, Netherlands, Russia, Sierra Leone, South Africa, Uganda, Uruguay.

¹⁴ Czech and Slovak Federal Republic: Constitutional Court Decision on the Screening Law, reprinted in *Transitional Justice*, vol. 3, at 346, 353–355.

¹⁵ Uruguay: Letter from President Sanguinetti to Amnesty International Regarding the *Ley de Caducidad*, reprinted in *Transitional Justice*, vol. 3, at 600.

¹⁶ Argentina: Supreme Court Decision on the Due Obedience Law, reprinted in *Transitional Justice*, vol. 3, at 509, 511–522 (Opinion of Justice Petracchi).

¹⁷ See, e.g., Russia: Constitutional Court Decision on the Banning of the Communist Party, reprinted in *Transitional Justice*, vol. 3, at 436; El Salvador: Supreme Court of Justice Decision on the Amnesty Law, reprinted in *Transitional Justice*, vol. 3, at 549. For a critique of a court decision arguing its insufficient discussion of international law, see Dugard, 'Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question', 13 *South African Journal of Human Rights* (1997) 258, at 266–268. See also Roht-Arriaza, 'Conclusion: Combatting Impunity', in N. Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice* (1995) 281, at 294–295.

¹⁸ United Nations Commission on Human Rights, Report of the Working Group on Enforced or Involuntary Disappearances, reprinted in *Transitional Justice*, vol. 3, at 473; United Nations, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res. 40/34, reprinted in *Transitional Justice*, vol. 3, at 645.

¹⁹ E.g., Uruguay: Organization of American States, Inter-American Commission on Human Rights — Decision on the *Ley de Caducidad*, reprinted in *Transitional Justice*, vol. 3, at 605; Honduras: Organization of American States, Inter-American Court of Human Rights: *Velasquez-Rodriguez Case*, reprinted in *Transitional Justice*, vol. 3, at 586.

Committee,²⁰ the European Court of Human Rights,²¹ and even the Statute of the International Criminal Tribunal for the Former Yugoslavia,²² all of which directly concern accountability. One can only hope that future supplements to *Transitional Justice* will incorporate these sources. Such supplements — which could perhaps be published every five years — would serve to keep the collection up-to-date with current developments in the field.

The situations considered in *Transitional Justice* challenge any simple notion that international law now places a broad duty on states to bring former officials of a regime to justice for prior abuses. Instead, it reveals at least four phenomena that lawyers must take into account. First, states have made use of a variety of accountability options. It may not be an exceptionable observation to note that each form of accountability has been tailored to the unique situation of the country. But what is more significant is the range of both the formal mechanisms — from truth commissions (which themselves may take many forms, including in terms of the extent to which they report the names of the victims and victimizers), to lustration and trials — and the extent to which each of those options provided real accountability and justice. Argentina, one of the classic cases explored here, used several methods, and over time attempted different degrees of accountability, beginning with a military self-amnesty, through large-scale plans for trials, and ending with the Full Stop Law.²³ At each stage, specific groups within civil and military society protested the government's policy or court rulings, and even today the wounds remain open.²⁴

Second, the cases in *Transitional Justice* allow the reader some scepticism about the extent to which states are complying with existing treaties on accountability. There can be no doubt that various specialized conventions obligate states parties to prosecute individuals for certain gross violations of human dignity, such as genocide, war crimes, torture and disappearances.²⁵ Moreover, certain treaty supervisory bodies such as the Inter-American Court and Commission on Human Rights and the UN Human Rights Committee have found fairly broad duties emanating from the American Convention on Human Rights and the International Covenant on Civil and

²⁰ E.g., General Comment 20(44) (Article 7), 3 April 1992, UN GAOR, 47th Session, Supp. No. 40, Annex VI, at 193, 195, UN Doc. A/47/40 (1992); Preliminary Observations on Peru, 25 July 1996, UN Doc. CCPR/C/79/Add. 67.

²¹ E.g., *X and Y v. the Netherlands*, 1985 European Court of Human Rights, Ser. A, No. 91 (March 26).

²² Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, UN Doc. S/25704.

²³ See Argentina, *Transitional Justice*, vol. 2, at 323.

²⁴ See Sims, 'Argentines Clash Over a Place of Horrors', *New York Times*, 18 January 1998, at 10.

²⁵ See, e.g., Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, Art. VI, 78 UNTS 277, at 280; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Art. 146, 75 UNTS 287, at 386; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, Arts. 5, 6(1), 7(1), 1465 UNTS 85, 114–115; Inter-American Convention on the Forced Disappearance of Persons, 9 June 1994, Arts. 4, 6, 7, 33 ILM (1994) 1529, at 1530–1531. While the conventions on torture, war crimes and disappearances adopt an 'extradite or prosecute' regime for alleged offenders found on a party's territory, the Genocide Convention obligates only the party where genocide took place to prosecute an alleged offender.

Political Rights.²⁶ But the failure of states to prosecute — most notably the failure of parties to the Torture Convention to prosecute their own violators²⁷ — suggests a willingness by governments to ignore treaty duties in the name of national reconciliation or simply for fear of upsetting the remnants of the prior government. State-to-state pressure is one of several means available to promote compliance with these treaties, but even this form of pressure appears to be scantily used.

Third, a review of the cases offered in this series reveals that any notion of a customary-law based duty of a state to bring to justice — in even the broadest sense of the term — leaders of a prior regime for violations of human rights is clearly in an evolutionary state, rather than a consolidated one. On the one hand, it seems generally accepted that customary law provides for universal jurisdiction by states to prosecute crimes against humanity, war crimes, genocide, torture and slavery.²⁸ But universal jurisdiction is generally only permissive, and it would take additional evidence to demonstrate (though it might well be the case) that customary law *obligates* all or some states to prosecute even these specific crimes. *A fortiori*, there seems to be quite a heavy burden to show a more generalized duty to prosecute all serious human rights abuses. It would presumably be easier to show that states accept a less onerous obligation to convene a commission of inquiry or remove offenders from office.

But the indicia of custom for either a strict or loose duty of accountability are just not there. This seems to be the case whether one relies upon state practice — for *Transitional Justice* shows the absence of such consistent acts by states in transition — or *opinio juris* — if one adopts the traditional meaning that states regard accountability as required by international law.²⁹ In this regard, the materials in *Transitional Justice* would need to be supplemented by some additional sources regarding state-to-state communications on accountability strategies (e.g., protests).³⁰ Of course, it is possible to adopt less orthodox views of what constitutes state practice and *opinio juris*, or to discount one for the other (depending upon the norm at issue) to

²⁶ See, e.g., *Velasquez-Rodriguez Case*, *supra* note 19, para. 174, at 588 (duty to investigate seriously, identify, and punish); Human Rights Committee General Comment 20(44), *supra* note 20, para. 15 (duty not to promulgate blanket amnesties); Decision on the *Ley de Caducidad*, *supra* note 19.

²⁷ The applicability of human rights conventions to events prior to their entry into force has received contrasting answers from the UN Committee against Torture and the Inter-American Commission on Human Rights. Compare Report of the Committee against Torture, UN GAOR, 45th Sess., Supp. No. 44, Annex VI, paras. 549–550, at 99, UN Doc. A/45/44 (1990), with Report No. 28/92, 2 October 1992, paras. 18–19, reprinted in *Annual Report of the Inter-American Commission on Human Rights 1992–1993*, OEA.ser.L/V.II.83 (1993), at 41, 44–45.

²⁸ See generally S. R. Ratner and J. S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (1997), at 141–146. This book and the one edited by Roht-Arriaza, *supra* note 17, serve as useful international law companions to *Transitional Justice*.

²⁹ *North Sea Continental Shelf* (FRG/Den.; FRG/Neth.), 1969 ICJ 3 (Feb. 20), at 45.

³⁰ Some examples appear in Roht-Arriaza, 'Nontreaty Sources of the Obligation to Investigate and Prosecute', in Roht-Arriaza, *supra* note 17, at 39, 42–43. See also Hedges, 'Zagreb Sends Croat to Trial in the Hague', *N. Y. Times*, 29 April 1997, at A11; Hedges, '10 Bosnian Croats Surrender to War Crimes Tribunal', *N. Y. Times*, 7 October 1997, at A3 (on the US refusal to provide loans to Croatia until it handed over indicted war criminals).

prove custom.³¹ Thus, one might examine the incorporation of accountability principles in constitutions, court rulings, UN resolutions and other documents to search for some universal sense that states believe there is such a duty. This would help us determine, as McDougal and Reisman put it, whether the supposed duty ‘is viewed as authoritative by those to whom it is addressed and . . . its audience concludes that the prescriber . . . intends to and, indeed, can make it controlling’.³² But even under a more contemporary view of customary law, a duty of general criminal accountability is not yet apparent. Among the most notable divergences from such a norm is the readiness of states to issue broad amnesty laws.³³

None of this is to say, of course, that customary law is opposed to a broad vision of accountability. Various UN resolutions, for instance, have spoken of the importance of accountability.³⁴ Clearly, human rights activists and academics are forceful in advocating a duty that includes prosecution.³⁵ Most of these sources, however, seem to be ahead of the willingness of states in transition to actually undertake comprehensive accountability. Thus, commentators studying the existing practice of states tend to be more circumspect in their conclusions on the existence of any general customary-law duty to prosecute, either referring to it as an ‘emerging’ duty or simply noting that it is not present.³⁶

Finally, *Transitional Justice* forces us to reckon with the relationships between potentially competing emerging norms — those of accountability and democracy. As a matter of *causation*, some of the excerpts suggest that the former necessarily promotes the latter, while others contain arguments by state actors that accountability can undermine democracy. The latter thus tend to seek to justify partial or negligible accountability as a means of furthering democratic governance.³⁷

Apart from the question of a causal link between accountability and democracy, there is also the question of a *priority* of these apparently emerging norms. It is quite respectable to argue, as should advocates of accountability, that the existence in international law of various obligations of accountability law means that democracy

³¹ For a useful review of these views, see Simma and Alston, ‘The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles’, 12 *Australian Yearbook of International Law* (1992) 82, at 84–102.

³² ‘The Prescribing Function in the World Constitutive Process: How International Law is Made’, in M. S. McDougal and W. M. Reisman (eds), *International Law Essays* (1981) 355, at 377; see also Nino, *supra* note 9, at 419 (‘a necessary criterion for the validity of any norm of . . . positive international law is the willingness of . . . states and international bodies to enforce it’).

³³ See Roht-Arriaza, *supra* note 17, at 293–294.

³⁴ See, e.g., Vienna Declaration and Programme of Action, 25 June 1993, para. 60, in *World Conference on Human Rights: The Vienna Declaration and Programme of Action June 1993*, UN, Sales No. DPI/1394–39399–August 1993–20M (1993), at 61; Principles on Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, paras 18–19, ESC Res. 1989/65, Annex, UN ESCOR, 1989, Supp. No. 1, at 52–53.

³⁵ See, e.g., Orentlicher, *supra* note 9; but see Reisman, ‘Institutions and Practices for Restoring and Maintaining Public Order’, 6 *Duke Journal of Comparative and International Law* (1995) 175, at 186.

³⁶ See, e.g., Mendez, ‘Accountability for Past Abuses’, 19 *Human Rights Quarterly* (1997) 255, at 261; Roht-Arriaza, *supra* note 30, at 40; Dugard, *supra* note 17, at 267.

³⁷ Compare, e.g., El Salvador: Report of the Commission on Truth, reprinted in *Transitional Justice*, vol. 3, at 177, 203; with Uruguay: Letter from President Sanguinetti, *supra* note 15.

or democratic preferences do not matter.³⁸ Thus, an amnesty, such as occurred in Uruguay, is no less suspect under international law simply because it is approved by referendum, as opposed to the legislature (or, worse still, the outgoing regime). This certainly seems correct with respect to clearly established legal duties (such as the treaty-based obligations to prosecute or extradite),³⁹ where popular preferences cannot be held as an excuse for violation of international law. Yet many of the actors who argue causally that prosecutions (or even truth commissions) undermine democracy clearly view democracy as more important than accountability — or, perhaps, argue that democracy will best lead to the rule of law, thus preventing, or perhaps providing a system of accountability for, *future* abuses.⁴⁰ If forced to provide a legal justification for this position, these actors might deny the existence of any accountability obligations (a palpably unacceptable argument as some treaties do obligate states to punish certain crimes), deny the existence of the broad duty to prosecute, or in some way argue the derogability of broad accountability duties to further democracy or reconciliation.

The gap between a position which stresses the duty of accountability and one which emphasizes the importance of democracy could be bridged somewhat if a duty of accountability (assuming that one is emerging) were to afford some discretion to the state regarding specific forms of action against former abusers. State practice could be reconciled more easily with a duty of accountability that includes non-prosecutorial options than with one requiring prosecutions in all cases (although as noted above, proving even a lesser duty is not easy, if only due to the lack of *opinio juris*). New governments, such as South Africa's, seem to view non-prosecutorial options as a promising alternative to suicide by prosecution, but this is unlikely to sit well with victims and human rights groups.

Yet another twist in the knot created by these two strings of international law is that new governments can undertake accountability in an undemocratic way, thus trampling on the rights of innocent people, as shown in the Czech lustration practices.⁴¹ In such situations, those who oppose accountability — because they see it as undermining the transition to democracy or simply because they do not wish to be held accountable — find unlikely allies in human rights groups that condemn such procedures as lacking in due process. This type of situation is not dissimilar to that found in domestic systems where the neo-Nazis and the American Civil Liberties Union share the same side of a case. *Transitional Justice* offers no answers to these questions (assuming they may exist), but it provides a unique resource for assessing

³⁸ See, e.g., Human Rights Watch, Policy Statement on Accountability for Past Abuses, reprinted in *Transitional Justice*, vol. 1, at 217, 218 ('it is not the prerogative of the many to forgive the commission of crimes against the few'). Cf. Vienna Convention on the Law of Treaties, *supra* note 2, Art. 27.

³⁹ See *supra* note 25.

⁴⁰ See, e.g., Nino, *supra* note 9, at 435–36.

⁴¹ See Czech and Slovak Federal Republic: Memorandum on the Applicability of International Agreements to the Screening Law, reprinted in *Transitional Justice*, vol. 3, at 335. For a dynamic account of the process, see Rosenberg, *supra* note 1, at 3–121.

how different actors can reach completely contrary perspectives on the link between these two important developments of the post-Cold War world.

In inviting us to take up these issues and others, *Transitional Justice* is a significant contribution to a major debate in international human rights law, constitutional law and criminal justice. The norms behind the stories it recounts may yet be uncrystallized, but knowing how far we have come is the first step in learning how far we have to go.