Transitional Justice and a State's Response to Mass Atrocity

Roberti di Sarsina J (2018), the author with Mr. Franco Leoni Lautizi, Victim and Survivor of the Nazi Massacre of Marzabotto (September–October 1944), Rimini, 9 February 2018

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Reassessing the Obligations to Investigate and Prosecute

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To my Mother and to Luise

Foreword by William Schabas

For more than a quarter of a century, "accountability" has been a preoccupation of international law. The concern that perpetrators of mass violence, persecution, and war crimes may go unpunished only emerged in the 1990s. This was marked by the emergence of new institutions, such as the ad hoc tribunals for the former Yugoslavia and Rwanda, and the International Criminal Court, and new legal norms and standards. Arguably, an obligation to try or prosecute those suspected of responsibility in "unimaginable atrocities" has emerged as a rule of customary international law, binding even upon States that have accepted no such treaty obligations.

International law first manifested its interest in accountability following the First World War. The Treaty of Versailles proposed a trial of Kaiser Wilhelm II for what was defined as an "offense against international morality and the sanctity of treaties." Wilhelm was given sanctuary in the Netherlands, which refused to extradite him for trial, and he lived out his final decades in comfort, in a Dutch castle. Several of the post-War treaties adopted at the Paris Peace Conference provided mechanisms for prosecuting those who had violated the laws and customs of war but only a handful of suspects were actually put on trial. The Treaty of Sèvres took a step further, promising that those responsible for "massacres" within the Ottoman Empire would be judged. But that Treaty never entered into force.

These unsatisfactory results were nevertheless the start of an idea, one that might stall for years at a time but that could never be reversed. For two decades, efforts at accountability were relatively stagnant, but they quickly revived during the Second World War. For several years following the defeat of Germany and Japan, starting with the great trials in Nuremberg and Tokyo, international justice seemed to have regained the momentum that it had first acquired in 1919. This time there were more permanent results, at least in terms of universally applicable treaties intended to apply prospectively. The four Geneva Conventions contemplated criminal justice of those responsible for "grave breaches," which were particularly serious violations of the laws and customs of war. The labels given to these crimes seemed close to the new discipline of international human rights law. Indeed, the influence was reflected in the emergence of a new term, international humanitarian law, to replace the

somewhat archaic notion of the laws of armed conflict. Perhaps even more important was the adoption by the United Nations General Assembly, in December 1948, of the Convention on the Prevention and Punishment of the Crime of Genocide. It required Contracting States to cooperate in prosecution, through extradition, and it also envisaged the establishment of an International Criminal Court.

But this dynamic period that followed the Second World War soon stalled, just as it had done thirty years earlier after the First World War. For the next four decades, there was little development. Then, quite suddenly, the imperative of accountability emerged once again as a serious concern. Indeed, soon it seemed to dominate discussions of conflict prevention and peacemaking. Very quickly, it became almost unthinkable for wars to end or regimes to collapse without individuals being not only blamed and stigmatized, as had been the fate in the past, but also brought to justice.

The forces that drove these changes in international law are complex and multifaceted. Democratic governance became increasingly widespread, as one tyrannical regime after another seemed to go the way of all flesh. Perhaps, a desire for justice was merely an inevitable accompaniment of such positive political changes. Undoubtedly, the human rights movement played its part. At some point in the 1980s, international human rights law began to address seriously the responsibility of States for so-called horizontal violations. A new understanding emerged whereby States had the responsibility to protect individuals within their jurisdictions from threats to their life, liberty, and security, even when the acts themselves could not be blamed on the State. It was seen as an obligation of means rather than one of the results. When serious violations occurred, States were required to investigate and, where possible, ensure that perpetrators were tried and punished appropriately.

By the 1990s, landmark judgments and decisions describing these principles had been issued by such bodies as the Inter-American Court of Human Rights, the European Court of Human Rights, and the United Nations Human Rights Committee. From modest and rather hesitant beginnings, characterized by an early fear that States would never tolerate robust and dynamic pronouncements from international human rights courts and tribunals, the institutions began to innovate. The treaties might be silent about such matters as the authority to issue provisional measures, or extraterritorial effects, or obligations to prosecute. That did not discourage the judicial creativity of these innovative institutions. The spirit proved infectious. The growth of international criminal justice was one of the very desirable results.

It is to the legal consequences of these developments that Jacopo Roberti di Sarsina turns his attention in this remarkable study. He asks whether international law, as it now stands, constitutes a building block or a stumbling block when States respond to legacies of mass atrocity. This involves an assessment of the obligations imposed upon States to investigate or prosecute international atrocity crimes. Dr. Roberti di Sarsina is intrigued by the obligation, which is clearly expressed in several international treaties, both old and new. His inquiry addresses the customary nature of the obligation. His conclusion may not be popular in all circles, perhaps because international law discourse is sometimes imbued with an element of wishful

thinking. But the examination is rigorous and the argument well-formulated. It represents an important contribution to an ongoing debate.

Several shibboleths are confronted by the author in this book. One of the more popular claims to circulate in recent years is the suggestion that amnesty at the end of conflicts is now prohibited by international law. Dr. Roberti di Sarsina challenges such an extravagant contention. It is one that seems to find constant confirmation in the echo chamber of academic commentary and the writings of activists yet precious little endorsement in the practice of States. The latter continue to regard amnesty as a useful component of the toolbox of peacemaking, showing little regard for those who contend this is not allowed. Even the United Nations Secretariat purports to hold the position that peace agreements with amnesty clauses are impermissible. And yet time and again, it welcomes decisions by combatants to lay down their arms and stop the bloodshed, as it should, and despite the fact that there has been an agreement not to punish perpetrators of war crimes.

The proponents of the anti-amnesty thesis are reduced to claims of a rule that is "crystallizing" rather than one that has crystallized. But often, those with the nuanced approach of Jacopo Roberti di Sarsina—one that is highly commendable—find themselves trying to formulate another rule. They feel it is necessary to identify situations when amnesty is prohibited. The tired mantra about the exclusion of amnesty received a serious blow in the 2017 submission to the International Law Commission by the rapporteur on the draft articles on crimes against humanity, Sean Murphy. Now the president of the prestigious American Society of International Law, Prof. Murphy pointed to a genuine debate among international lawyers about the approach to be taken to amnesty. He discussed at length what are known as the Belfast Principles. These represent a serious attempt to attempt to frame and regulate the practice of amnesty rather than to deny it outright.

Besides being informative and comprehensive, this book is a "reality check." It constitutes a sober and realistic assessment of issues about which there is often significant exaggeration. For that reason alone, it deserves our attention.

London, UK
September 2018

William Schabas

Foreword by Augusto Antonio Barbera

The current trend of international law is to broaden as much as possible the protection of human rights and, by the same token, to make those responsible for heinous breaches of such rights criminally accountable. We have seen the growing weight of international human rights instruments and the birth of international tribunals, notably and most recently the International Criminal Court. These last reflect a change of heart by the international community as a whole.

As is known, the first foundations of this process lie in the manifesto of the four liberties (freedom of speech, freedom of worship, freedom from want, freedom from fear) proclaimed by Franklin D. Roosevelt in 1941, and in the USA's determination after the Second World War to override the formalism of continental law and impose statutes establishing what history would come to know as the Nuremberg Tribunal and the Tokyo Tribunal. By contrast, the end of the First World War had seen an unfortunate attempt to arraign the German Kaiser Wilhelm II "for a supreme offense against international morality and the sanctity of treaties."

Once the door was open, there followed (to cite the most important) the Convention on the Prevention and Punishment of the Crime of Genocide and the Universal Declaration of Human Rights, both in 1948; the 1949 Geneva Conventions; the European Convention on Human Rights in 1950; the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, both in 1966; the 1969 American Convention on Human Rights; the African Charter on Human and Peoples' Rights in 1981; the Convention against Torture in 1984; the signing of the International Criminal Court Statute at Rome on the memorable night of July 17, 1998; the Arab Charter on Human Rights in 2004; and the International Convention for the Protection of All Persons from Enforced Disappearance in 2006.

The trend has brought a welcome change in the basis of international law. Firstly, it outmodes the traditional view of the latter as a law regulating relations among States and increasingly focuses on individuals and peoples as a subject of international law. Secondly, it challenges the principle of nonintervention in the internal affairs of another State. Thirdly—and this is the topic of the present

splendid volume—it queries the conduct and limits even of peace processes within individual States.

All too often purely political reasons and the desire to patch up an ostensible national reconciliation have ended by perpetuating systematic impunity at the expense of any punishing of the guilty, establishing of the truth or adoption of reparation policies on behalf of the victims. Impunity for wholesale violation of human rights was long considered the lesser evil, or the price to be paid for ensuring an end to armed conflict and a peaceful transition toward democracy.

Gradually, however, the international community has come to realize that impunity forms an insuperable obstacle to the establishment of the rule of law and full enjoyment of basic rights and freedoms. International law and international criminal justice have therefore made States assume ever-clearer obligations to criminalize certain conduct, and prosecute and punish appropriately the authors of dire crimes. Due in particular to regional courts and UN committees on human rights, amnesty and other acts of clemency have been ruled incompatible with international law. But State practice often goes in the opposite direction, as recently emerged in Colombia, where the vexed November 2016 peace agreement with FARC-EP still resorted to measures of clemency to put an end to decades of devastating internal conflict and facilitate transition.

Within this debate, the present monograph addresses in a clear and rigorous manner the complex and practical question of the role of international law in the face of massive atrocities perpetrated in the past and the daunting dilemmas of countries undergoing transition when it comes to striking the proper balance between achieving peace and searching for justice.

In light of the Truth and Dignity Commission established in Tunisia in December 2013 after the demise of the Ben Ali regime, the peace agreement in Colombia and the processes that may be expected in other countries like Syria, Libya, the Democratic Republic of the Congo, the Central African Republic, Yemen and Myanmar—all torn apart by internecine conflicts and grave violation of human rights calling for a reckoning with their past after some sort of peace agreement and democratic transition—this book makes a most timely appearance and a constructive contribution to the debate, casting light on the current status of customary international law.

Following a classic international law methodology, this book specifically examines the contention that there is an absolute obligation upon States, and allegedly a customary obligation, to prosecute or extradite in case of gross humanitarian and human rights violations often committed by State agents or with their complicity, and in light of this weighs the compatibility of amnesties, pardons, and similar arrangements to facilitate transition with the applicable international legal framework.

To this end, in the first parts of his study the author looks into the *aut dedere aut judicare* clauses enshrined in the 1949 Geneva Conventions and in three principal human rights treaties, before examining the procedural obligations derived from general human rights treaties; he moves on to examine the realpolitik considerations and practical difficulties faced by countries in transition in investigating and

prosecuting thousands of culprits responsible for "extraordinary" crimes—which have too often led them to pass amnesty laws as bargaining chips in negotiating the peaceful exit of dictators, along with the relationship between international law and transitional justice, and the role played by the International Criminal Court; he then goes on to examine instruments under international law that States may utilize amid a transition in order not to engage their international responsibility.

In the last three decades, the global fight against impunity has gained momentum with (international) criminal prosecution at the forefront of this campaign but the international community has increasingly become aware of the fact that ending the culture of impunity and bringing about the rule of law is no easy task and can not be limited to a retributive notion of justice. For this reason, there is a need for transitional justice that embraces a restorative and reparative understanding of justice, resting on a pluralistic notion of accountability and on institutional restructuring, after scenarios of mass atrocities with which ordinary justice would be incapable of coping. As Pope Francis said during his visit to Colombia—a country which has made great strides toward ending violence and seeking reconciliation—"The more demanding the path that leads to peace and understanding, the greater must be our efforts to acknowledge each another, to heal wounds, to build bridges, to strengthen relationships and support one another."[1]

Dr. Roberti di Sarsina's study draws attention to the importance of a multidisciplinary approach to these issues and endorses *bona fide* national reconciliation programs with community-rooted alternatives in which criminal prosecution is only one of the various measures employed as part of an integrated approach to peacemaking. I am sure it will help the scholars and experts in the field to reach greater understanding of the role of international law, the nature of the obligations to investigate and prosecute serious international humanitarian and human rights law violations, and to appreciate the value of transitional justice—an unavoidable component of the complex backward- and forward-looking process of confronting a past of human rights abuse and building a brighter future grounded in the pursuit of the common good and respect for the inviolable dignity of the human person.

Rome, Italy
September 2018

Judge Augusto Antonio Barbera
Constitutional Court of Italy

[1] Address of His Holiness Pope Francis, 7 September 2017, Apostolic Journey of His Holiness Pope Francis to Colombia, 6–11 September 2017, Meeting with Authorities, the Diplomatic Corps and Representative of the Civil Society, https://w2.vatican.va/content/francesco/en/speeches/2017/september/documents/papa-francesco_20170907_viaggioapostolico-colombia-autorita.html [Accessed 18 September 2018].

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I have co-dedicated this book to my mother, Patrizia, passionate and optimistic as always, who encouraged and counseled me, and to my girlfriend, Luise, who has always been inspirational and supportive.

I am deeply grateful to all.

Bologna, Italy Jacopo Roberti di Sarsina
September 2018

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Dr. Jacopo Roberti di Sarsina is an International Law Expert at the Alma Mater Studiorum - University of Bologna School of Law and a dual-qualified lawyer (Italy and New York). He completed a PhD in public international law, label Doctor Europaeus, at the School of International Studies, University of Trento, holds an LLM from NYU School of Law, and read law at the University of Bologna.

Abbreviations

ACHR	American Convention on Human Rights
AP I-III	Additional Protocol I-III
CITCNR	Commission for the Identification of the Truth, Coexistence and Non-Repetition
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECommHR	European Commission on Human Rights
ECtHR	European Court of Human Rights
FARC-EP	*Fuerzas Armadas Revolucionarias de Colombia-Ejército del Pueblo*
GC I-IV	Geneva Convention I-IV
HRC	Human Rights Committee
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICC Statute	Statute of the International Criminal Court or Rome Statute
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICSID	International Centre for Settlement of Investment Disputes
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
LRA	Lord's Resistance Army
OAS	Organization of American States
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
SCSL	Special Court for Sierra Leone
TRC	Truth and Reconciliation Commission

UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
VLCT	Vienna Convention on the Law of Treaties

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