

TAKING ACCOUNT OF ACCOUNTABILITY

Transitional Justice: How Emerging Democracies Reckon With Former Regimes

Edited by Neil J. Kritz

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Impunity and Human Rights in International Law and Practice

By Naomi Roht-Arriaza

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Reviewed by Ellen Lutz

The subject of accountability for past gross abuses of human rights has riveted the attention of policymakers and nongovernmental human rights organizations since the early 1980s when political systems in countries such as Argentina, Brazil, Chile, Guatemala, the Philippines, Uganda, and Uruguay were transformed from military dictatorships to democracies. Before then, other than in connection with abuses committed during World War II, there were few trials of those responsible for massive human rights abuses or programs to provide reparations to survivors. To the extent accountability measures did occur, they were inadequately reported or studied.

Yet since Nuremberg, it has been difficult to deny the role of accountability measures in preventing future abuses of human rights. As the Security Council acknowledged when it established the International War Crimes Tribunal for the former Yugoslavia, appropriate responses to past abuses are prerequisites

for ensuring that peace and the protection of human rights are guaranteed in the future.¹

During the 1980s, in addition to closely monitoring the trials of the generals in Argentina and protesting the real or *de facto* amnesties in Uruguay, Chile, Argentina, El Salvador, Suriname, and elsewhere, those concerned with international human rights protection began to examine systematically the subject of accountability and its components. In 1988, the Justice and Society Program of the Aspen Institute hosted a groundbreaking international conference to explore the dimensions of meaningful accountability. There was consensus among those present that meaningful accountability for gross violations of human rights minimally requires that the successor government assume an obligation to investigate and establish the facts so that the truth is known and made part of the nation's history.² The participants emphasized that there must be both "knowledge and acknowledgement." In other words, events must be both officially recognized and publicly revealed. Participants held varying opinions on what other steps states must take in response to past violations of human rights in light of very real political and economic restraints. Yet all agreed that meaningful accountability requires that those individuals who perpetrated the abuses must in some way be held responsible and that victims should be rehabilitated and compensated.

The Aspen Institute conferees also recognized that accountability, by itself, is neither sufficient nor possible, absent other societal transformations. The extent to which justice in a society that has suffered past gross abuses of human rights can be restored or created is intimately linked with that society's capacity to establish functioning, democratic institutions, including an independent judiciary, the removal of impediments to a flourishing civil society, and a commitment to the rule of law.

Within any society that has endured massive violations of human rights, whether in war or peacetime, resistance to achieving accountability and related structural and ideological transformation will not be universally shared. Decisive opposition often comes from former military dictators and their ranks: political, religious, or corporate interests that benefited from or had links with repressive regimes. On the other hand, accountability and related measures become an obsession for certain sectors of society, such as victims, churches, labor unions, human rights groups, other entities that work with or represent victims, and those concerned with the establishment of democratic principles and institutions. These actors are usually recognized as having the moral upper hand even by those who oppose the accountability process out of concern that it will trigger renewed repression, or out of a desire to put the past behind them.

Popularly elected governments bridging the transition, particularly those that must govern under circumstances in which fundamental elements of democracy such as genuine popular representation, free speech and association, or the rule of law are not in place, find themselves caught in the middle and forced to make difficult choices. Consider, for example, what happened in Argentina.³ Following the restoration of democracy in 1983, President Raul

Alfonsín moved quickly to establish accountability for the grave violations of human rights, including the forced disappearance of at least 10,000 people, committed under the prior military regime. He immediately established an independent National Commission on Disappeared Persons (CONADEP) to investigate the fate of the disappeared, passed laws and ratified treaties aimed at preventing any recurrence of abuses, and set in motion the legal steps that would lead to the trials of the nine senior commanders allegedly responsible for these crimes.

The trial, which took place in the summer of 1985, was held in public and was widely regarded as procedurally fair. Thousands of citizens provided evidence. In a lengthy decision issued on December 9, 1985, the civilian federal court found that the dictatorship had discharged a deliberate, concerted policy of covert repression, including the use of murder, forced disappearance, torture, and prolonged arbitrary detention, as its principle weapon in its campaign to defeat subversion. Five of the generals were convicted and sentenced to prison terms. The following year the Supreme Court upheld the lower court's decision.

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The military opposed all trials and, as it became clear that the civilian government intended to try many more than nine generals, initiated an intimidation campaign designed to prevent further accountability. Succumbing to the pressure, President Alfonsín pushed through Congress legislation that effectively barred further prosecutions. His successor, President Menem, went further and pardoned everyone still facing prosecution or convicted for political crimes associated with Argentina's "dirty war."

Achieving accountability is never easy, nor are all the conundrums faced by policymakers forced upon them by threat. Ethical, legal, practical, and even psychological problems also abound. For example, while meaningful accountability for past human rights abuses requires discovery of and reckoning with the truth, most gross abuses of human rights are shrouded in secrecy and shame. Thus, proving their occurrence requires a level of cooperation from both perpetrators and traumatized victims that is rarely forthcoming.

Tradeoffs, thus, become inevitable. To get a complete record of the truth, it may be necessary to grant perpetrators immunity from prosecution, thereby

compromising the prosecution and punishment of offenders. Similarly, to encourage traumatized victims to testify, it may be necessary to relax evidentiary requirements, but doing so can compromise a defendant's right to a fair trial.

There are also broader questions: Does the accountability process defuse societal tensions by individualizing responsibility for human rights violations or does it augment those tensions by disclosing the complicity, through participation or silence, of entire institutions, national groups, or sectors of society at large? Are trials adequate vehicles for condemning the political forces, institutions, and other components of collective momentum that made the abuses possible, or must other steps such as dismantling the security apparatus or purging the armed forces also be taken? To what extent do human rights trials contribute to the process of restoring confidence in the judiciary and the rule of law?

Given that accountability concerns generally arise under circumstances involving transition from repressive or wartime regimes to democratic governments, other balancing questions also arise. For example, what other conditions must simultaneously be in place to reinforce confidence in the rule of law? Must the functioning of the repressive regime be fully revealed and any documentation about abuses in their possession be made public? Going even further, must the responsible sub-units of that regime—for example, the military, paramilitary, or police apparatus—be purged or dismantled? What other conditions are a prerequisite to or must occur concurrently with the accountability process to prevent future abuses? For example, must a society simultaneously embrace full, participatory democracy?

These are all questions that are more easily asked than answered. But two new works on accountability provide an indispensable, comparative framework for wrestling with these issues. Naomi Roht-Arriaza's *Impunity and Human Rights in International Law and Practice* is perhaps misnamed, since it focuses not on what states can and do get away with but on their international law obligations and on the often heroic efforts of official and nongovernmental actors to achieve accountability. Roht-Arriaza's introductory chapters provide the clearest and most comprehensive legal overview of accountability, in all its facets, yet in print. Adopting the view that widespread violations of human rights have a profound effect not only on those directly involved—policy-makers, perpetrators, and victims—but on everyone living in the impacted society, she compels the reader to focus on accountability concerns not only from the perspective of the government in transition, but from that of the victim and the wider society.

The remainder of the book consists of case studies from Europe, Latin America, Africa, and Asia, written by 11 country experts. This part of the book suffers from an unevenness that is common to edited volumes, but is redeemed by Roht-Arriaza's concise regional overviews and her concluding chapter in which she summarizes, in her words, "the lessons learned." These range from practical considerations, such as the importance of adopting accountability measures before the new government loses the widespread le-

gitimacy it enjoys, apathy sets in, or the old guard reorganizes, to broad policy recommendations, such as the need for far greater norm articulation and application at the international level.

The United States Institute of Peace's three volume work, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* is a complementary, albeit more ambitious, contribution to the accountability literature. Volume I, entitled "General Considerations," includes well-chosen excerpts and reprints from myriad sources of the core literature on accountability. Topics are organized around many of the complex questions transitional governments face: Does the duty to prosecute include taking the risk of being overthrown? How should the delicate balance between truth and justice be struck? If trials are held, who should be tried? If non-senior officers are tried, should the defense of superior orders be permitted? Are noncriminal sanctions, such as the lustration laws enacted in some Eastern European countries, appropriate components of meaningful accountability? To what forms of reparation, including monetary compensation, are victims entitled?

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Volume II examines how 21 countries have approached the question of accountability during the last 50 years. Instead of drawing from one source, editor Neil J. Kritz culled excerpts from a rich array of country-focused material to craft each chapter. What unevenness there is here is not so much from the quality of the excerpted material as from the availability of material and from the extent to which the selected countries have addressed accountability issues. Thus the chapters on countries such as post-Nazi Germany, Greece, Argentina, Uruguay, Chile, and Czechoslovakia expose the extent to which policymakers, nongovernmental organizations, victims, and academics have grappled with accountability questions, while the chapters on countries such as Spain, Albania, Lithuania, and Brazil reveal how those countries have evaded accountability for past abuses.

Missing altogether are chapters on countries such as El Salvador, Ethiopia, and South Africa, that have faced the accountability challenge most recently. While a comment in the introduction suggests that they were omitted because events have not yet played themselves out, their omission leaves the reader wistfully hopeful that the U.S. Institute of Peace will publish an addendum volume. The unique problems and solutions adopted or under consideration in these countries would have enriched this already extensive study.

In El Salvador, for example, the United Nations assumed responsibility for

ferreting out and publicizing the truth for the first time. El Salvador's solution was criticized by some human rights activists on the ground that "international truth" is much easier to ignore than truth that emerges from a genuine internal disclosure effort designed to be the first step of a process that includes official acknowledgement of truth, prosecution of those responsible for abuses, and reparations to victims. Indeed, seemingly in repudiation of the truth commission's report, El Salvador adopted a sweeping amnesty law just days after it was released.⁴

In Ethiopia, the transitional government has taken steps since May 1991 to bring former officials of the Mengistu regime to justice for abuses. But, in order to do so, the financially strapped country had to create a legal system out of whole cloth. While young lawyers and judges were being readied for the task, the alleged perpetrators languished for years under deplorable prison conditions, in some cases without knowing the charges against them.⁵

South Africa faces the immense task of achieving accountability, given the enormous number of those who engaged in apartheid-related abuses. One unique solution adopted was to offer amnesty to members of political organizations, liberation movements, law enforcement agencies, and security forces who fully disclose their involvement in human rights violations.⁶

Volume III contains a compilation of primary source documents from 28 countries, including El Salvador, Ethiopia, and South Africa. They range from truth commission reports, to judicial decisions, to amnesty and purge laws and their evaluation by the judiciary, to reparations statutes. Also included are key intergovernmental documents such as excerpts from the charter of the International Military Tribunal held in Nuremberg in 1945 and the Inter-American Court of Human Rights opinion in the first ever contested case involving state-sponsored disappearances in Honduras.⁷ Given the great difficulty of obtaining much of this primary source material, its collection, albeit in abridged form, in one volume is most welcome.

In his introduction to the three volume work, Kritz describes an encounter he had with Raul Alfonsín in March 1992 in which the two discussed the parallels between the dictatorships in Greece and Argentina and the similar problems both countries faced in making the transition to democracy. Alfonsín confessed to Kritz that even though Greece's transition from dictatorship to democracy had occurred nearly a decade earlier and had parallel features to events in Argentina, his administration did not draw on Greece's experience as they wrestled with the issues of accountability for human rights abuses under Argentina's military dictators. Had ready material about Greece's transition been available, he assured Kritz, it most certainly would have been examined in depth.

Today the problem is no longer one of lack of material. Indeed, states making the transition from repressive to democratic regimes eagerly look to one another's experiences for guidance. The problem they now face is one of sifting through and drawing appropriate lessons from a voluminous amount of material on accountability. These two works make that task a little easier.

Notes

1. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, May 3, 1993, para. 10, reprinted in 32 *International Legal Materials* 1166 (July 1993).
2. The Justice and Society Program of The Aspen Institute, "State Crimes: Punishment of Pardon," 1989.
3. For an account of developments in Argentina, see Americas Watch, *Truth and Partial Justice in Argentina: An Update*, April 1991; Amnesty International, *Argentina: The Military Junta and Human Rights: Report of the Trial of the Former Junta Members*, 1987; Alejandro M. Garro and Henry Dahl, "Legal accountability for human rights violations in Argentina: One step forward and two steps backward," *Human Rights Law Journal* 8 (1987): 283; Alejandro M. Garro, "Nine Years of Transition to Democracy in Argentina: Partial Failure or Qualified Success?" *Columbia Journal of Transnational Law* 31 (1993): 1; Jaime Malamud Goti, "Punishing Human Rights Abuses in Fledgling Democracies: The Case of Argentina," in Naomi Roht-Arriaza, *Impunity and Human Rights in International Law and Practice* (Oxford: Oxford University Press, 1995), 160.
4. Legislative Decree 486, March 20, 1993, published in *Diario Oficial* vol. 318, no. 56, March 22, 1993.
5. Human Rights Watch/Africa, *Ethiopia: Reckoning Under the Law*, December 1994.
6. Promotion of National Unity and Reconciliation Act (Act no. 34, assented to July 19, 1995), published in South African Government Gazette no. 16579, July 26, 1995.
7. *Velásquez Rodríguez Case*, Judgment of July 29, 1988, series C no. 4.



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