The Role of Courts in Transitional Justice

Voices from Latin America and Spain

Edited by
Jessica Almqvist and Carlos Espósito

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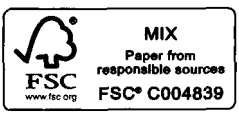

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The Role of Courts in Transitional Justice

Bringing together a group of outstanding judges, scholars and experts with first-hand experience in the field of transitional justice in Latin America and Spain, this book offers an insider's perspective on the enhanced role of courts in prosecuting serious human rights violations and grave crimes, such as genocide and war crimes, committed in the context of a prior repressive regime or current conflict. The book also draws attention to the ways in which regional and international courts have come to contribute to the initiation of national judicial processes. All of the contributions evince that the duty to investigate and prosecute grave crimes can no longer simply be brushed aside in societies undergoing transitions.

The Role of Courts in Transitional Justice is essential reading for practitioners, policy-makers and scholars engaged in the transitional justice processes or interested in judicial and legal perspectives on the role of courts, obstacles faced and how they may be overcome. It is unique in its ambition to offer a comprehensive and systematic account of the Latin American and Spanish experience and in bringing the insights of renowned judges and experts in the field to the forefront of the discussion.

Jessica Almqvist is a Lecturer in Public International Law at the University Autonóma of Madrid, specializing in international law of human rights and criminal justice. She has published *Human Rights, Culture and the Rule of Law* and *Justicia Transicional en Iberoamérica* (co-edited with Carlos Espósito).

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Acknowledgements

This book is the outcome of an international expert roundtable discussion on the role of courts in transitional justice contexts (*El papel de los tribunales en contextos de justicia transicional: Oportunidades y desafíos actuales en la región Iberoamericana*), organized by the Centre for Political and Constitutional Studies in Madrid between 6 and 8 May 2008. The roundtable, which was kindly sponsored by the Spanish Agency of International Co-operation (*Agencia Española de Cooperación Internacional para el Desarrollo*), brought together judges, prosecutors, consultants and scholars who are extensively engaged in transitional justice processes in Latin America and Spain. The objective of the meeting was to reflect upon some of the recent advances made by the courts in these countries and also to engage in a constructive discussion on the challenges facing several of these courts in the process of delivering justice in transitional societies.

The meeting turned out to be extremely productive. Even if there is nowadays much talk about transitional justice in the international setting, including on the role of courts, it still seems relatively rare that judges, prosecutors, lawyers and civil society actors from different countries, albeit with similar legal systems, are brought together to talk about how to achieve justice in the light of the immense difficulties, including legal ones, commonly faced in this process. The discussion also revealed that the question of how to respond to these difficulties remains partly contested and debated. In our view, the reality of disagreement on the limits to criminal justice is not to be brushed aside. Thus, while most of the contributions are permeated by a conviction that criminal justice must have a special or privileged place in transitional justice processes—what we in this book call the canon of criminal law—also included are dissenting opinions on the prevalence of limits that cannot be ignored.

We are most indebted to the judges, consultants and scholars who have contributed to this book and it has been a true pleasure and, above all, a great honour to collaborate with them. We express special gratitude to Judge Antonio Cançado Trindade, who accepted our invitation to write a foreword on his experience with massacres while on the bench of the Inter-American Court of Human Rights. We immediately realized that these recollections of Judge Cançado Trindade were so rich and much more than a foreword and, thus, we finally decided to include his contribution as the opening chapter of this book.

We are thankful to the Centre of Political and Constitutional Studies; without its support, this book and its previous Spanish version (*Justicia transicional en Iberoamérica*, Madrid: CEPC, 2009) would never have become a reality. The majority of the chapters of the present book stem from that publication. This book, however, is not just a translation. Indeed, most of the chapters have been thoroughly revised and updated, and new chapters have been added. Chapters 2, 9, 10, 12 and 13 were originally written in English by their authors; the remaining chapters have been translated into English by the editors. Alejandra Torres Camprubí ably helped us in the editing process and we are grateful for her assistance.

We would like to acknowledge that the chapter of Naomi Roht-Arriaza and Almudena Bernabeu stems from an article published in the *Chicago Journal of International Law* vol. 79 (2008) pp. 79–106.

Furthermore, we want to emphasize and express our gratitude for the constructive comments received from the external reviewers of Routledge and to our editor Katie Carpenter who helped us to refine the focus and the contents of the book.

Most of all, we thank our families—Carlos, Sebastian and Rebecca, and Irene, Federico and Pablo—for their love and patience.

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Contents

1 Introduction

Jessica Almqvist and Carlos Espósito

This book examines the role of courts in transitional justice. It brings into focus and analyzes the extent to which national courts in Latin America and Spain have come to investigate, prosecute and sanction serious human rights violations or grave crime perpetrated on a massive or considerable scale in the context of transitions and post-transitional settings. The book discusses what are in the view of the judges, lawyers and consultants in the field the key factors that have contributed to this development. Special attention will be afforded to the architectural design of the emerging system of international criminal justice, the progress made in terms of international legal codification and classification of the crimes in focus as well as the contributions by regional and international tribunals in terms of progressive interpretations of international human rights and criminal law with a view to govern judicial action in relation to "radical evil".[1]

In our view, the body of international and transnational law that is emerging and which is now meant to govern the role of courts in times of transitions and their aftermaths is driven by a desire to give full recognition in international law to what is present throughout the book as a *canon of criminal law*. This canon refers to a set of principles or rules of conduct for judges and prosecutors, mandating or dictating the investigation and prosecution of all crime, including grave crime, without any exception. The canon, as we understand it, really changes the axis of the discussion of how we should deal with grave crime in transitional justice. Several obstacles have been encountered in the process of implementing this canon. The challenges that are especially recurrent for the courts in transitional justice include amnesty laws, the principle of legality, statutory limitations and the prohibition against the retroactive application of criminal law to the detriment of the accused, as well as the absence of effective schemes of transnational judicial co-operation. How the courts have dealt with these matters and the extent to which they may be overcome are questions that lie at the heart of this book. Also considered are non-legal obstacles, such as the lack of judicial independence and the presence of strong political and military

1 Nino, C S, *Radical Evil on Trial*, New Haven: Yale University Press, 1998.

opposition, which tend to postpone the arrival of the courts and judges into the framework of transitional justice.

1.1 Transitions judicialized

A book dedicated to these themes takes on renewed importance in the light of the universe of international criminal justice initiatives that have developed since the end of the Cold War and which seek to ensure the investigation and prosecution of grave crime. The UN Security Council has been, and continues to be, a critical actor in this process. Especially significant is its repeated recourse to its mandatory powers under Chapter VII of the UN Charter declaring situations of grave crime as amounting to international security threats and as requiring the introduction of international judges and prosecutors to investigate, prosecute and punish the perpetrators of such crime. To this end, it has created two ad hoc international criminal tribunals for the former Yugoslavia (ICTY—1993)[2] and Rwanda (ICTR—1994),[3] and has requested the UN Secretary-General to ensure that internationalized or hybrid tribunals be established or authorized by the Special Representatives of UN transitional administrations to act in its place on this matter through the establishment of panels composed of international judges.[4] Even more significant is the parallel development in the post-Cold War period towards the establishment of an International Criminal Court (ICC) that is institutionally independent, at least formally speaking, from the organs of the United Nations and with competences to try crimes against humanity, war crimes and genocide. In spite of the misgivings about the efficacy or legitimacy of a court of this kind, its advocates and supporters have already managed to attract 115 states to ratify its Statute and join its Assembly. And, several cases are by this time at the pre-trial and trial stages.[5] The creation of the ICC means that for the first time in history there is a permanent international judicial institution with competences to investigate, prosecute and sanction the crimes in focus.

The international institutional advances over the last 20 years bear witness to a growing international conviction that grave crime cannot go unpunished and that courts have a crucial role to play in times of transition, including in conflict situations, and to the establishment of the basic conditions for lasting peace in a given country or region. At the same time, although this development has placed the question about the role of international judges and prosecutors

2 UN Security Council Resolution 827 of 25 May 1993.

3 UN Security Council Resolution 955 of 8 November 1994.

4 See, e.g. Romano, C, Nollkaemper, A and Kleffner, J (eds), *Internationalized Criminal Courts. Sierra Leone, East Timor, Kosovo, and Cambodia*, Oxford: Oxford University Press, 2004.

5 The Rome Statute establishing the International Criminal Court, signed on 17 July 1998 and in force since 1 July 2002. As of 12 October 2010, there are 114 States Parties to the Rome Statute.

at the forefront of contemporary international debates, a study of the architectural design of the emerging system of international criminal justice indicates that national courts and judges are expected to assume the main burdens of bringing this contemporary aspiration and ambition into effect. Especially telling is the introduction of the complementarity principle into the ICC framework. According to this principle, the ICC can only investigate or prosecute a case if the national courts with territorial or universal jurisdiction competences over the same case are unwilling or unable to do so.[6] The first Prosecutorial Strategy that was adopted by the ICC Chief Prosecutor in September 2006 stressed the exceptional character of the ICC-led investigations and prosecutions and ICC action considered as a last resort. As it noted, from the standpoint of the ICC Office of the Prosecutor, emphasis will be placed on the need for the *national* courts of States Parties, rather than the ICC itself, to shoulder the task of investigating and prosecuting the perpetrators of these crimes.[7] The second Prosecutorial Strategy (2009 to 2012) states that the ICC Office of the Prosecutor is committed to a positive approach to complementarity, which is defined as a "proactive policy of cooperation aimed at promoting national proceedings" and which means that the office "will encourage genuine national proceedings where possible, including in situation countries, relying on its various networks of cooperation, but without involving the Office directly in capacity building or financial or technical assistance".[8] The trend to assist and empower national judiciaries and thus seek to embed UN criminal justice-initiatives in the national judiciaries of affected societies is also reinforced by the policies emanating from the Rule of Law section of the UN Office of the High Commissioner for Human Rights as well as the policies of the UN Security Council in collaboration with the Secretary-General.[9]

6 Note the distinction between negative and positive complementarity. With regard to the notion of positive complementarity, see Burke-White, W W, "Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice", *Harvard International Law Journal*, vol 49, no 1, 2008, pp 53–108.

7 The International Criminal Court, Office of the Prosecutor, *Report on Prosecutorial Strategy* (Ref-RP20060914-OTP), 14 September 2006. Indeed, the promotion of a primary role for national courts is not confined to the ICC framework, but is also a key element in the completion strategies of the two ad hoc international criminal tribunals. See completion strategies of each tribunal as presented in UN Security Council resolutions S/RES/1503 of 28 August 2003; S/RES/1534 of 26 March 2004; and S/2007/323 of 31 May 2007. In addition, attention should be given to the seminal report of the UN Secretary-General on *The rule of law and transitional justice in conflict and post-conflict societies*, UN Doc S/2004/616, 23 August 2004, according to which international institutions that seek to assist in peace-building efforts must focus on the building of national court capacities in order to ensure respect for the rule of law, which includes the investigation and the prosecution of the crimes in question.

8 See Prosecutorial Strategy 2009–2012, ICC Office of the Prosecutor, 1 February 2010, p 5.

9 For further information, see resources of the Rule of Law section, UN Office of the High Commissioner for Human Rights, available online at www2.ohchr.org/english/issues/rule_of_law/democracy.htm.

The recent international criminal justice initiatives are no doubt critical sources of inspiration and provide an important impetus for judicial action in national settings. However, from the standpoint of the national courts, of equal significance are the outcomes of international law-making processes towards the international legal codification of grave crime, including the duty of states and their courts to investigate and prosecute such crime, as well as the progressive development of the bulk of international law that is meant to govern and inform their conduct in times of transition more generally. To be sure, the ambition to draft something like an international penal code has been present ever since the end of the Second World War and the organization of the Nuremberg and Tokyo Trials. Even so, it took until 1998 and the adoption of the Rome Statute of the International Criminal Court before it could be said that the international community has a multilateral treaty in force the contents of which are akin to such a code. During the Cold War period, the principal successful law-making initiatives in the field were case-based and consisted of the adoption of treaties that recognized especially horrendous abuses as amounting to crimes under international law and also reinforced the obligation of states and their courts to prevent and punish such crime. Thus, prior to the adoption of the Rome Statute in 1998, the international criminalization of the crime of genocide, war crimes and crimes against humanity was partial and scattered and some crimes had been only partially defined. The first significant achievement in the field was the adoption of the UN Convention on the Prevention and Punishment of the Crime of Genocide (1948).[10] A year later, war crimes were thereafter defined in the four Geneva Conventions (1949). The two Additional Protocols to these Conventions define attacks against civilian populations as war crimes, but were not adopted until 1977. Before the adoption of the Rome Statute, the crimes against humanity had only been defined in the London Charter of the International Military Tribunal (1945), the application of which was limited to times of war and to prosecution of perpetrators belonging to the Axis Powers, as well as the ICTY and ICTR Statutes, the application and enforcement of which were limited to a given conflict situation. The crime of torture was recognized in the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), but is limited to public officials as perpetrators.[11] Finally, the crime of enforced disappearance was defined as late as 2006 in the UN Convention on the Protection of Persons from Enforced Disappearance and has so far achieved 25 ratifications.[12]

To this must be added the significant contributions made by international and regional courts and tribunals to the progressive development of inter-

10 UN Convention on the Prevention and Punishment of the Crime of Genocide, UNGA Res 260 (III)A of 9 December 1948.

11 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA Res 39/46 of 10 December 1984.

12 UN Convention on the Protection of Persons from Enforced Disappearances, UNGA Res 61/177 of 20 December 2006.

national law meant to govern the role of courts in transitions.[13] To begin with, regional human rights courts have derived rather specific obligations and duties of states related to investigation and prosecution from rather generally held provisions of the human rights treaties that they have been given the authority to interpret. Thus, the Inter-American Court of Human Rights (IACtHR) has interpreted the international legal obligation of the States Parties to the Inter-American Convention of Human Rights to "ensure the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction" as implying the duty of these states to prevent human rights violations, including serious ones, to investigate them, to identify the victims and the perpetrators, to impose sanctions and to afford reparations.[14] Additionally, it has ruled that amnesty laws, such as the Peruvian or Uruguayan laws, are contrary to international law even if democratically adopted and confirmed by referenda.[15] In a similar manner, the European Court of Human Rights (ECtHR) has contributed to an interpretation of the European Convention on Human Rights that fosters a role for criminal justice in response to grave crime, a role that in its view does not vanish even when more than 50 years have passed since the time of its commission.[16]

Finally, attention must be paid to recent international litigations before the International Court of Justice. The court has come to adjudicate controversies related to matters of criminal justice with the effect of advancing the body of international law in this field, including the meaning and scope of the duty of states to investigate or prosecute (the principle of *aut dedere aut punire*);[17]

13 For a consideration of international judicial law-making, see Ginsburg, T, "Bounded Discretion in International Judicial Law-making", *Virginia Journal of International Law*, vol 45, 2005, 631 ff.

14 IACtHR, case of *Velásquez Rodríguez v Honduras*, Series C No 4, Judgment of 29 July 1988, para 166.

15 IACtHR, case of *Barrios Altos v Peru*, Series C No 75, Judgment of 14 March 2001; IACtHR, case of *Gelman v Uruguay*, Series C No 221, Judgment of 24 February 2011. See also IACtHR, case of *Almonacid Arellano v Chile*, Series C No 154, Judgment of 26 September 2006. But compare with the decision of the Supreme Court of Brazil rejecting the challenge to *Lei da Anistia*, no 6683/79, which gave amnesty to political crimes in Brazil between 2 September 1961 and 15 August 1979. See Supremo Tribunal Federal, case CBFP 153, reporting judge Eros Grau, decided in plenary session on 10 April 2010 and published on 6 August 2010, available online at www.stf.jus.br/portal/jurisprudencia/listarJurisprudencia.asp?s1=%28ADPF%24.SCLA.+E+153.NUME.%29+OU+%28ADPF.ACMS.+ADJ2+153.ACMS.%29&base=baseAcordaos. For an analysis of transitional justice in Uruguay, see Errandonea, J. "Justicia transicional en Uruguay", *Revista Instituto Interamericano de Derechos Humanos*, vol. 47, 2008, pp. 13–70.

16 ECtHR, case of *Kononov v Latvia*, Application 36376/04, Judgment of 24 July 2008.

17 On 19 February 2009, the Belgian application to the International Court of Justice to institute proceedings against Senegal was made public. It originates as a result of Senegal's lack of compliance with the principle of *aut dedere aut punire* in relation to the former President of Chad, Hissène Habré. See *Proceedings instituted by the Kingdom of Belgium against the Republic of Senegal (Belgium v Senegal)*. Furthermore, the principle is also studied by the International Law Commission. See the report prepared by Zdizlaw Galic, *Second Report on the Obligation to Extradite or Prosecute (aut dedere aut judicare)*, 14 UN Doc A/CN.4/585 (11

questions concerning the terms and conditions of immunity from jurisdiction for government officials;[18] and the international obligation to co-operate on matters pertaining to criminal justice.[19] The judges of international criminal tribunals must also be seen as critical judicial actors in the furthering of the substantial contents of the canon of international criminal law. The recognition of gender-specific crimes of the two ad hoc criminal tribunals is especially telling as this achievement led to their inclusion in the Rome Statute.[20]

1.2 The basic elements of transitional justice

One may have a broad or narrow definition of transitional justice.[21] This book adopts a relatively narrow view of transitional justice as it is concerned with the propriety of judicial responses to the question of how society should deal with an evil past or conflictive present. Thus, we reject the contention that the answer to this question is subject to national political judgment based exclusively on strategic calculations on how to maximize the prospects for peace and stability in the light of the specific circumstances prevailing in each case. In its place, it sets forth an alternative and competing claim about the prevalence of a substantive notion of transitional justice enforceable by the judicial branch, which purports to constrain and inform the political options available for national governments in transitions and their aftermaths.

June 2007). For a comprehensive account of the principle, see also Cherif Bassiouni, M and Wise, E M (eds), *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, Dordrecht: Martinus Nijhoff, 1995.

18 See International Court of Justice, case of *Certain Criminal Proceedings in France (Republic of the Congo v France)*, which was initiated on 9 December 2002, although it was removed from the docket of this court on 16 November 2010 as a result of a letter dated 5 November 2010 and received in the court's registry the same day on which the Agent of the Republic of the Congo informed the court that his government "withdraws its Application instituting proceedings".

19 See International Court of Justice, case of *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, Judgment of 4 June 2008.

20 See the contribution of Judge Elizabeth Odio Benito included in this book.

21 For legally informed accounts of transitional justice, see Teitel, R G, *Transitional Justice*, Oxford: Oxford University Press, 2000, p 1; and Teitel, R G, "Transitional Justice Genealogy", *Harvard Human Rights Journal*, vol 16, 2003, p 69. In the latter article, Teitel defines the notion of transitional justice as a "conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoing of repressive predecessor regimes". See also Roht-Arriaza, N, "The New Landscape of Transitional Justice", in Roht-Arriaza, N and Mariezcurrena, J (eds), *Transitional Justice in the Twenty-first Century*, Cambridge: Cambridge University Press, 2006, p 2, who, when defining the purpose of this book, adopts an understanding of transitional justice as including "that set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting past violations of human rights and humanitarian law".

The elaboration of a substantive notion of justice breaks with the idea of transitions and transitional politics, largely inspired by the experiences in the Southern European hemisphere in the 1970s. In the field of political science, these experiences, and the Spanish one in particular, were converted into models to be followed by other countries when seeking to tackle similar situations. The Spanish transition is still seen as particularly successful, as it managed to secure a relatively peaceful move from a dictatorship to a democratic form of government. On the other hand, hardly any attention was paid to the fate of those who had suffered from serious human rights violations or grave crime committed during these dictatorships. Instead, in the Spanish case, an Amnesty Law was adopted in 1977, a law that has gained public support until this very day; and, until recently, there were no reparations given to the victims. As the Spanish Constitutional Court had pronounced, the measures were adopted as a matter of grace and not as reflecting any legal obligation to do so.[22] Although this stance has changed somewhat as a result of the adoption of the so-called Historic Memory Law in December 2007, at least in terms of reparation, as manifested by the fervent judicial reactions from the Supreme Court to the opening by Judge Baltasar Garzón of criminal investigations into the violations and crimes of the past in 2008, the Spanish model remains rather intact and consistent. However, in the light of the developments in Argentina, Chile, Peru and Colombia, the Spanish experience is slowly converting itself into an exception or an anomaly that does not necessarily meet the general expectations of international law in the field.[23]

In the initial stages of elaborating on a competing account of how transitions are to be realized in order to meet substantive standards of justice, most attention was paid to the fate of victims and their interests in accessing the truth of what had happened during the repressive regime, not only to their loved ones, who had disappeared, been illegally detained, tortured and murdered, but also what sorts of policies and actions of the repressive government had authorized or legitimized the commission of these crimes, and who had actually executed them. The idea of truth commissions emerged as a response to such concerns and the South African Truth and Reconciliation Commission, while not actually the first one to be organized, came to be promoted as a model and source of inspiration for other societies finding themselves in the process of tackling an evil past. However, since that time, remarkable developments have taken place in the international setting in terms of articulating a much more comprehensive notion of justice applicable to transitions, including a range of measures meant to give effect to its basic requirements. Though counting as soft law, strictly speaking, the Basic Principles and Guidelines on

22 See Tribunal Constitucional de España (Spanish Constitutional Court), STC 361/1993, Judgment of 3 December 1993.

23 For a more detailed analysis of the Spanish transition, see the contributions of Alicia Gil Gil and Javier Chinchón Álvarez included in this book.