

The “Democratization Exception” to the Norm of Criminal Accountability for Atrocities

Summary of Post-Doctoral Research Proposal by Sigall Horovitz*

Goals: My research will examine whether, in times of post-authoritarian or post-conflict transitions, international law recognizes an exception to the rule of criminal accountability, and if so, what norms apply to this exception.

Outline: States often fail to fulfil their obligation under international law to prosecute perpetrators of gross human rights violations.¹ However, some states respond to such violations through non-retributive “transitional justice” (TJ) mechanisms.² For example, Chile and South Africa, as they emerged from periods of repression in the 1990s, addressed past atrocities through “truth and reconciliation commissions” instead of criminal trials. Truth commissions and similar non-retributive approaches to justice have since been adopted by other societies, in an attempt to establish the rule of law and promote national reconciliation following periods of authoritarianism or conflict. These TJ approaches allow states to address past human rights abuses without frustrating their transition to peace and democracy, a transition which often demands the support of powerful actors who backed or were implicated in the abuses (and who would not lend such support if threatened by prosecution). While some critics consider them a cover up for impunity, non-retributive TJ approaches are becoming increasingly popular and defended as culturally relevant and more effective forms of justice than conventional trials.

A recent UN report stressed that truth commissions “have become a habitual response to the challenges posed by transitional situations and the legacies of atrocities”,³ and notes that “they have proven to be capable of making significant contributions to transitional processes in the over 40 countries that have implemented them since the 1980s”.⁴ The popularity of truth commissions can partly be explained by the same consideration that prevented South Africa and other post-authoritarian states from holding transitional trials, namely, that trials may undermine the transition. But it also reflects a rejection of retributive models of justice, which have been regarded as incompatible with or even harmful to societies’ attempts to reconcile. Increasingly, national non-retributive TJ mechanisms are supported and encouraged by international actors.⁵

Does this mean that international law is moving in the direction of allowing states to “derogate” from their obligation to prosecute violations, and instead apply non-retributive TJ mechanism, for the sake of democratic transition? And if such a “democratization exception” to the rule of prosecution is emerging as an international norm, under what circumstances does this exception apply? And, more importantly, what are the standards for the operation of alternative TJ mechanisms? How can we ensure that TJ mechanisms meet these standards and indeed promote their stated goals while upholding human rights? These are some of the questions my research will consider.

Methodology and Outputs: My research will be theoretical and conceptual in nature. In order to prove that a norm of customary international law has emerged, one must prove two elements: widespread state practice and *opinio juris* (i.e. states’ conviction that such practice is the result of a compulsory rule). Accordingly, in considering whether a “democratization exception” to the duty to prosecute gross human rights violations has emerged or is emerging as a norm of international law, and what international legal norms may be applied to regulate this exception as to prevent its abuse, I will refer to a variety of sources. First, I will examine international legal sources such as treaties, international court decisions and UN resolutions.

Secondly, I will examine national laws and jurisprudence that can teach us about the approach of states towards the existence of the above exception and its regulation. Public statements made by state leaders will also be helpful in this regard. Finally, I will draw on various empirical studies of national TJ practices, including the work of scholars such as Oretlichter as well as some of my own research.⁶ Such an examination of national and international sources and practices will help us ascertain whether international law recognizes, or is moving in the direction of recognizing, an exception to the rule of criminal accountability in times of democratic and post-conflict transitions, and what are the requirements this exception must meet. The research is expected to last one academic year, and end with a publication.

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¹ This obligation is sometimes framed as an obligation to “prosecute or extradite” to another state that will prosecute the crimes. It stems from customary international law as well as from treaties such as the 1948 Genocide Convention, the 1949 Geneva Conventions, the 1984 Torture Convention, and the 1998 Rome Statute of the International Criminal Court.

² Transitional justice refers to the range of approaches through which states and societies address legacies of gross human rights violation in the context of transitions to peace and democracy. See UNGA, Report of the Secretary General on Rule of Law and Transitional Justice (2004), para. 8. Transitional justice literature includes seminal books such as Ruti G. Teitel, *Transitional Justice* (Oxford University Press, 2000); Martha Minow, *Between Justice and Forgiveness: Facing History after Genocide and Mass Violence* (Beacon Press, 1998); Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Polity Press, 2002).

³ UN Human Rights Council, 24th session, Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence’ (28 Aug. 2013), UN Doc A/HRC/24/42 <http://ap.ohchr.org/documents/dpage_e.aspx?m=193> accessed on 28 February 2014, para 27.

⁴ *Ibid.*, para. 23.

⁵ Foreign advisors and panel members are frequently involved in national truth commissions. Moreover, international organizations, including the UN, assist states in setting up and supporting the operation of truth commissions. For example, in late 2011, the UN Human Rights Council has appointed a Special Rapporteur to support states in “the promotion of truth, justice, reparation and guarantees of non-recurrence”. See UN Human Rights Council, Resolution 18/7, ‘Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence’, Human Rights Council, Eighteenth session, Agenda item 3, UN Doc. A/HRC/RES/18/7 (13 October 2011) <http://ap.ohchr.org/documents/dpage_e.aspx?m=193> accessed on 28 January 2013.

⁶ In connection with the EU-funded “DOMAC Project” (see www.domac.is) , I conducted extensive fieldwork addressing TJ processes in four different African countries (Uganda, Sierra Leone, Rwanda and the Democratic Republic of Congo). In addition, my PhD dissertation included an in depth analysis of Rwanda’s TJ approaches. Finally, my previous work at the UN International Criminal Tribunal for Rwanda and the UN-backed Special Court for Sierra Leone sensitized me to the needs of societies in transition.