2004

Book Review of Post-Conflict Justice (C. Bassiouni, ed.)

Ruti G. Teitel
New York Law School, ruti.teitel@nyls.edu

Recommended Citation
98 American Journal of International Law 872–875 (2004)

whole "statist/secessionist norm"[12] and have suggested some creative solutions to resolving violent territorial struggles. Castellino and Allen's book assists in pointing out the injustices of current international territorial doctrines and begins to outline the possible path to an alternate view.

VALERIE EPPS
Suffolk University Law School

Post-conflict Justice. Edited by M. Cherif Bassiouni. Ardsley NY: Transnational Publishers, 2002. Pp. xx, 1,041. Index. $145.

In the midst of the persistent political conflict occasioned by post–Cold War political fragmentation and globalization, as well as by the ongoing antiterrorism campaign, comes M. Cherif Bassiouni's edited volume, *Post-conflict Justice*, an ambitious collection of essays addressing all manner of justice-seeking that arises in the wake of conflict. In this book, the term "post-conflict justice" is used broadly: in his introductory essay, Bassiouni defines it to include the responses following armed conflict and also those following political regime change (commonly known as "transitional justice").[1]

We must be grateful for this compendium, which, while an edited volume, clearly bears the stamp of Bassiouni, the distinguished international law scholar from DePaul College of Law, both as editor and as a contributor of several essays. The book also draws on the talent of many other top scholars and practitioners in the fields of international law, human rights, and humanitarian law. Its massive size (over one thousand pages) and scope capture the extent to which the field of postconflict justice—with its focus on periods of political transition (typically, though not necessarily, in relation to authoritarian regimes)—has evolved and expanded to include a broad range of issues and situations. *Post-conflict Justice* also reveals the greatly expanded regime of international humanitarian law and shows that it is no longer confined to extraordinary periods. That regime now has greater breadth, for it has been normalized and thereby merged into ordinary human rights jurisprudence. As is apparent from the book under review, this expansion reflects the contemporary moment's greater expectations of justice. Indeed, at present, the "humanitarian law" associated with postconflict justice has come to represent the normative threshold associated with global rule of law.

The contemporary period is, at once, a time of apparently greater international legal consensus as well as of heightened political fragmentation and civil conflict. How should these paradoxical developments be reconciled? How might one explain the gap between law and political realities in the area of human rights? This book goes a long way toward helping us understand these ambivalent realities. And to the extent that there is evolution toward legal integration—toward closing that gap—it is seen in the recent proliferation of judicial machinery dedicated to the enforcement of humanitarian law. Much of the book is dedicated to discussion of these juridical and institutional transformations, and of the dilemmas that they raise, especially given today's political realities.

More than a half century after Nuremberg, three world leaders—Saddam Hussein, Slobodan Milošević, and Augusto Pinochet—have been indicted for their roles in atrocities. There are the same number of international criminal tribunals in operation—the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, and the International Criminal Court (ICC)—as well as all manner of domestic and hybrid courts involved in diverse adjudications of postconflict justice. Other official investigatory mechanisms provide a modicum of historical justice. *Post-conflict Justice* addresses these matters, which could be considered forms of "transitional justice," but also goes further to define its subject more broadly. The book transcends the backward-looking questions concerning justice-seeking responses that follow various forms of peaceful or conflictive political change, and extends its reach to cover forward-looking issues concerning the restoration of law and order, the rebuilding of national legal systems, and the reestablishment of the rule of law.

The book is divided into five sections, or what are referred to as "chapters," with essays by various authors within each section. The book's first section, entitled "Accountability: Policy Issues," presents eight essays surveying the aims and values of postconflict justice. Bassiouni's extensive introductory essay lays out the full range of questions that need to be addressed, while the other

[12] *See, e.g.*, Paul Williams & Karen Heymann, *Earned Sovereignty: An Emerging Conflict Resolution Approach*, 10 ILSA J. INT'L & COMP. L. 422 (2004).

[1] *See* RUTI TEITEL, TRANSITIONAL JUSTICE (2000).

essays discuss central policy issues concerning punishment and impunity in postconflict situations. The six essays in the book's second section, entitled "Assessing Accountability Mechanisms," deal with the modalities of postconflict response. In the section's opening essay, Bassiouni proposes a set of "guiding principles" of accountability. While conceding (like many of his colleagues in this volume) that postconflict justice almost invariably involves difficult normative choices, Bassiouni nevertheless remains committed to the project of developing prescriptive principles in this area.[2]

In its third section, entitled "Case Studies in Post-conflict Justice," the book explores diverse examples of postconflict justice, largely organized along two dimensions: judicialization and internationalization. The central questions posited concern the extent to which the relevant postconflict processes ought be judicialized or internationalized. This section includes discussion of a wide range of prosecutorial responses, domestic and international, as well as other, so-called mixed models that involve a hybrid of domestic and international regimes. Various other forms of "nonjudicial" responses are covered—such as investigatory mechanisms and "lustration," both of which offer a modicum of historical justice. Given the range of the case studies and the associated modalities, this section—comprising fifteen separate essays and nearly four hundred pages of text—could have been a book unto itself.

In the contemporary moment, postconflict justice is sometimes associated with apparently permanent conditions of civil conflict, as well as with the substantial extension of international peacekeeping. *Post-conflict Justice*'s fourth section, entitled "Post-conflict Justice and Peacekeeping," hints at these latter developments and includes an informative array of recent case studies. One of the book's innovations is the inclusion of material relating to the various legal measures associated with the aftermath of military conflict. This section thus addresses issues that arise at the juncture of two areas—civilian and military law—as well as potential problems relating to law enforcement and to the military's involvement in nation building. Operations in Bosnia, Kosovo, and Somalia are discussed, as are issues arising in civil-military relations, such as in the definition of the "mission"—a critical problem in reestablishing the rule of law in pretransition phases, such as in the Kosovo intervention.

The book's final section addresses the problem of how to enforce the new legal schemes, focusing largely on the policy questions occasioned by the growing reach of transnational jurisdiction for postconflict justice.

The greatest contribution of *Post-conflict Justice* derives not from its evaluation of policy issues in the abstract (which are addressed in the first, introductory section), but from its case studies. Perhaps it would have been more illuminating had the book's theoretical, evaluative proposals followed the case studies—the discussions of particular instances of postconflict justice on the ground. That is, no matter what accountability principles might be proposed in the abstract, it is obvious from the case studies that their normative potential always depends on political realities. Indeed, this book's central contribution is that it does not elide these dilemmas.

Thus, for example, in the long section of case studies, several contributions address the efforts at international justice for Rwanda and the former Yugoslavia. These accounts are sobering—especially in light of what are coming to be recognized as the limits of the two international tribunals. Not only will their work be ending over the course of this decade,[3] but they have arguably been ineffective in achieving their stated aims of deterrence, reconciliation, and restoration of the rule of law. The essay on Rwanda paints an especially bleak picture. In his essay "The Rwanda Case: Sometimes It's Impossible," William Schabas[4] delves into the particularities of the Rwanda case, which is intriguing in that it presents such different problems from those typically encountered in efforts to achieve postconflict justice. Instead of being paralyzed due to a lack of political will, there was, in Rwanda, almost a surfeit of will—though without the judicial capacity to give it effect. Just this sort of case has given rise to the recent demand for international criminal justice.

Even so, the book holds no brief for international justice, as is apparent from the very first section. In addition to a pair of helpful essays by

[2] Elsewhere, Bassiouni has proposed a list of accountability principles in this area. *See* Draft, The Chicago Principles of Post-conflict Justice (Nov. 11, 2003) [hereinafter Chicago Principles].

[3] SC Res. 1503 (Aug. 28, 2003).

[4] Schabas is known for his pioneering work canvassing the legal developments concerning genocide—of which Rwanda appears to be a contemporary example. *See* WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW (2000).

Michael Scharf and Nigel Rodley—in which they explore the question of whether there exists an obligation to prosecute—Neil Kritz's essay, "Progress and Humility: The Ongoing Search for Post-conflict Justice," advocates adjusting downward the expectations of international criminal justice. Likewise, in the book's long section of case studies, which opens with a group of essays on the "international judicial model," Bassiouni argues in support of domestic trials, maintaining that international justice, whatever its potential, is best understood at the level of "complementarity," as a means of filling in for national justice.[5] Where prosecution is unlikely or impossible—whether, for reasons of political will, as in the Balkans, or for reasons of inadequate judicial capacity, as in Rwanda—a "cooperative" approach between the national and the international judicial systems, he contends, would assist in building the rule of law in the state involved. By the same token, Bassiouni argues that the relation between the domestic and the international/global should be governed by a "principle of cooperation."[6] Although this approach is now embodied in the International Criminal Court's principle of complementarity, a fully cooperative judicial process remains in the realm of the aspirational. Moreover, even if put into practice, a cooperative scheme might well present drawbacks, for it could obscure the question of where the ultimate responsibility for establishing accountability lies, particularly in a globalizing international system.

Alternatives to international justice are also discussed in the section of case studies—for example, the "mixed model" used in Sierra Leone and East Timor, as well as in various lesser-known national trials in Ethiopia and Chechnya. Fairly comprehensive in terms of contemporary practice, these case studies include several discussions of the leading contemporary alternative to criminal justice—the "truth commissions." Jason Abrams and Priscilla Hayner usefully juxtapose the pros and cons of trials to investigatory alternatives, suggesting that the latter are more flexible and, especially when predecessor regimes have denied wrongdoing, can make a significant contribution to the historical record.

Notwithstanding its many contributions, the section of case studies does not include studies of historical examples—such as the post–World War II prosecutions, many of which continue in Europe to this day. Addressing these instances of long-delayed justice would clearly demonstrate the difficult dilemmas endemic in the internationalization of postconflict justice, particularly the tension between the rule of law and efforts to obtain retributive justice. The debate over this process of internationalization surfaced of late with respect to postwar Iraq and, in particular, the trial of Saddam Hussein. While the great weight of scholarly and human rights practitioner opinion comes down on the side of international justice, Bassiouni favors a domestic, Iraqi-led tribunal, albeit with international advice.[7] One wonders about this suggestion, however; despite a well-established legal system, Iraq's standing judiciary is heavily compromised by its prior association with the reigning Ba'ath party. Further, the "internationalization" debate potentially takes on another meaning in the context of postconflict situations involving postwar occupation, such as Iraq. To frame the question as a choice between a national and international tribunal may, in such cases, be misleading. As a political matter, the actual choice may be between an occupation and non-occupation tribunal—each with their own implications concerning retributive justice, a recurring theme in the book.

Post-conflict Justice raises important and topical questions. The book seeks to transcend mere description of the current justice-seeking phenomenon, and to cast a normative eye on the array of prevailing postconflict responses. After several decades and a host of civil conflicts, there is now a good opportunity to evaluate these efforts. Such normative evaluation requires, however, an understanding of the ultimate purposes of post-conflict justice. This question is raised in the book's introductory essay. Although it is commonly assumed that postconflict justice advances the international rule of law, there is, at present, little empirical support for this proposition. For example, the assumption that successful international criminal prosecutions will strengthen the international rule of law is typically based on an extrapolation from the domestic criminal justice system—even though its different conditions, coupled with its political and legal predicates,

[5] The full title of this essay is "The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) to Investigate Violations of International Humanitarian Law in the Former Yugoslavia."

[6] *See* Chicago Principles, *supra* note 2, at 15 (Princ. 26, "International Cooperation").

[7] M. Cherif Bassiouni, *Ace in the Hole; Saddam Hussein Is Ours, but What Are We Going to Do with Him?* CHI. TRIB., Dec. 21, 2003, at 1.

undercut any facile extension to the international realm. Indeed, the expectations for the law often surpass its actual contribution, especially when the law operates independently of other political institutions or sources of support, as is often in the case with postconflict justice. Consider, for example, the gap between the expectations for the international criminal tribunal established in the midst of the Balkans conflict, on the one hand, and the dubious deterrent effect of that institution, on the other. Witness the Srebrenica massacre, in which thousands were murdered in cold blood even after the Tribunal was in operation. Moreover, taking into account Serbia's current political direction (together with the Djindjić assassination), the Tribunal cannot be presumed to be having a significant impact on current democracy building in the region.[8] Although postconflict justice may ultimately make a real contribution to security and the rule of law, the book under review suggests that at least so far, the gains are modest.

As this volume also suggests, there is rarely just one purpose of postconflict justice. Much more common is a mix of symbolic and operative roles, of backward- and forward-looking purposes, within distinct political circumstances.[9] Postconflict justice performs varying roles, at distinct political periods.[10] This mix of purposes—and of the degree to which certain purposes are achieved or not—is well explored in Paul Van Zyl's essay, "Unfinished Business: The Truth and Reconciliation Commission's Contribution to Justice in Post-apartheid South Africa."

Among the recurring normative questions raised in the book is the relationship between postconflict justice and the rule of law: to what extent is postconflict justice forward looking in its aims and directed at developing judicial and rule-of-law capacity on the ground? When these forward-looking concerns are made explicit, how should they affect the relevant policy choices? The book's opening section raises these questions as the ones animating the debate over postconflict justice. But the book—as might be expected, given its scope—supplies no single, unequivocal answer. In his introductory essay, Bassiouni calls for a guiding principle based on "sustainable justice," which is defined as a level of domestic justice compatible with the building and maintenance of a viable state legal system.

The question of whether justice seeking—after conflict—is normatively desirable is ultimately contingent on its aims. But those aims may vary widely from country to country, and may even vary over time within a single state, depending on the political purposes and realities. Blanket prescriptions in this area therefore are difficult and risk oversimplifying complex, necessarily evolving situations. What is clear in any case, however, is that questions concerning the aims of postconflict justice—and, more generally, of the political transition—continue to engage public attention and are being actively, even contentiously debated in a number of post-conflict situations, such as postwar Iraq.

The case studies discussed in this volume bear witness to the ever growing menu of the possible modalities of postconflict justice. With globalization, and as the field of postconflict justice has gained major prominence as a dimension of legal development, transregional transfer of know-how and experience has significantly increased. In this context, the book's case studies have the potential to illuminate the successes and failures, the value and potential problems, of using different modalities of postconflict justice in diverse political, legal, and factual circumstances.

Finally, what role is postconflict justice playing in reestablishing and redefining the meaning of security in present global politics? Bassiouni's ambitious volume makes apparent that this area of law has become normalized, as is reflected in the linguistic move from "transitional" to "post-conflict" justice—implying the concomitant expansion and merging of the law of conflict and humanitarian law into a more broadly defined human rights doctrine. Further, this compendium of perceptive and sober essays suggests that the contemporary extension of humanitarian law does not necessarily represent normative progress. Instead, it may reflect an overall diminishment in political objectives for the global rule of law—from the lofty goals of state building and democratization, to the mere preservation of political stability. As *Post-conflict Justice* illustrates, however, the recently expanded regime of post-conflict humanitarian law lays the basis for the transnational protection of core human rights of persons and peoples. Therefore, as now conceived, critical human rights protections depend upon a measure of postconflict justice.

RUTI TEITEL
New York Law School

[8] *See* Human Rights Watch, *Open Letter to Serbian Prime Minister Zoran Zivkovic*, Mar. 25, 2003, *at* <http://www.hrw.org/press>; Nicholas Wood, *Serb Rightists Are Big Winners, but Not Big Enough to Rule*, N.Y. TIMES, Dec. 29, 2003, at A3.

[9] TEITEL, *supra* note 1.

[10] Ruti Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69 (2003).