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Introduction

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The requirements of international criminal law in the aftermath of human rights violations and conflict are clear. The perpetrators of such crimes must be held responsible for what they have done. Complications arise, however, when putting this kind of law into practice in fractured and conflict-ridden societies because the effective prosecution of such criminals can sometimes sound the death knell for the signing of a negotiated settlement as the basis for the resolution of conflict and the cessation of hostilities.

The idea that states can and should attempt to reckon with past atrocity is relatively new. Its antecedents date to the Nuremberg and Tokyo trials in the years following the Second World War. The idea, first embraced by the victorious allies in the post-war years, is relatively simple: that the perpetrators of past crimes ought to be held to account for the crimes they have committed. In recent years, this kind of "accounting" has taken the form of international criminal proceedings, including the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, and now the International Criminal Court, all established by the United Nations system to, in many ways, replicate the trials held at Nuremberg and Tokyo. Apart from this kind of retributive accounting, restorative processes have been established to aid in the social healing process, while at the same time uncovering details of past crimes; the most famous of these is the South African Truth and Reconciliation Commission, although restorative mechanisms have been developed and utilized in a number of contexts. Or, states have endeavored to repair the social fabric after mass violations of human rights by means of apology and compensation, as utilized by the Government of Australia in implementing the recommendations of the Council for Aboriginal Reconciliation. This typology of responses (retributive,

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restorative, reparative), as suggested by Martha Minow, Minow (1998) is the basis for the orthodoxy of a rapidly emerging field of study and practice that has become known as Transitional Justice, (Kritz 1995, pp. xxi–xxxii. See also Elster 2006 and United Nations Secretary General 2004, S/2004/616) and which is concerned with the social rebuilding of states after conflict.

Yet, negotiating the resolution of conflict is rarely so straightforward. No fighting faction ever gives up willingly. The stakes of peace-building are increasingly high, as the lives and livelihoods of persons living both within and adjacent to situations of conflict are impacted in a real way. Frequently, and usually with help from an outside agent, fighting gives way to some form of dialogue between opposing groups which, then, leads to an agreement about how the perpetrators of past crimes should be dealt with by the new regime. At the same time, however, the architects of these often-fragile peace settlements are hesitant to take actions that will endanger the agreement. Political settlements have tended to do whatever seems necessary to ensure the continued cessation of hostilities, leaving aside the complicated array of legal requirements in favor of restoring peace. It is thought that these kinds of arrangements can help facilitate the kinds of social rebuilding that need to take place after conflict. As such, it is often the case that those who ought, from the perspective of international criminal law, to be held to account for their past actions are simply excused from the process of accountability.

And so, rather than a cut-and-dried legal solution, as would seem from the outside to be beneficial for all, it has become an accepted fact that sometimes, states will opt instead for a negotiated settlement that can temper hostilities. It is precisely at this nexus between international criminal justice and negotiated settlements that moral and legal questions, therefore, collide. Political settlements often seem, at best, contradictory. The importance of following the letter of the law, particularly in criminal matters, is evident. Yet, it is often difficult to know whether it is better to stick doggedly to legal doctrine, or to pursue a political settlement to end an ongoing conflict. In many instances, it is seen as better to flout the rule of law where that is deemed necessary to procuring peace.

Whether these ideologies are contradictory is the subject of great debate amongst scholars and practitioners of transitional justice. Legal and political scholars hotly dispute whether this conflict is simply evident in the short term, but can be overcome in the longer term, once peace has been proven durable, for example. The requirements of international criminal law, too, are often substantively different from those needs that emerge from within the local community, along with approaches to and standards of justice—and knowing when and how to utilize global standards and/or local systems has been cause for consideration. Scholars and practitioners alike have also attempted to sort out whether a "peace first, justice later" approach might be more feasible. It is precisely these questions which are addressed by the collection of essays in this volume: are international law and political settlements at "cross-purposes"?

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