Book Review

Designing Criminal Tribunals: Sovereignty and International Concerns in the Protection of Human Rights, *by* Steven D. Roper and Lilian A. Barria

Publisher: Ashgate Publishing Ltd. (2006)
Price: $100
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Steven D. Roper and Lilian A. Barria, professors in the Department of Political Science at Eastern Illinois University, are frequent collaborators on scholarly work concerning criminal tribunals. Their co-authored articles and joint conference presentations on assorted aspects of this topic have culminated in *Designing Criminal Tribunals*, a book that examines various *ad hoc* tribunals, primarily those created since the end of the Cold War. These tribunals include the United Nations International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR), both international tribunals; the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), and the Special Crimes Panel for East Timor (SCPET), all mixed tribunals; and the Indonesian Human Rights Court (IHRC), a purely domestic court.

Observing that "[i]nternational law, tribunals and law enforcement mechanisms have developed unevenly in the 20th century as a reflection of political realities,"[1] Roper and Barria argue "that legal concerns are embedded within a political process (either domestic or international) in which rights and obligations are redefined based on political necessity."[2] This point, vocalized by many others in the literature on international criminal law and transitional justice, reflects a realist view of international relations that highlights the epiphenomenal nature, or secondary role, of international law vis-à-vis world politics. And the authors certainly make

1. STEVEN D. ROPER & LILIAN A. BARRIA, DESIGNING CRIMINAL TRIBUNALS: SOVEREIGNTY AND INTERNATIONAL CONCERNS IN THE PROTECTION OF HUMAN RIGHTS 1 (2006).
2. *Id.* at 2.

their case, by convincingly showing that the general evolution in tribunal construction since the early 1990s—from purely international to mixed to purely domestic—reflects states' changing preferences based on matters quite separate from principles of law and justice, such as financial considerations and assertions of state sovereignty.

While *Designing Criminal Tribunals* provides important information and analysis about several critical aspects of its six key case studies, including their financial bases and completion strategies (Chapters Five and Six, respectively, which are the two strongest chapters), it suffers from two major weaknesses. The first is that the book adds little original research to this important topic. By drawing heavily upon secondary sources, Roper and Barria deliver little more than a summary of the existing literature on this topic.

The second major weakness of the book is that it is methodologically unsound. The logic is arbitrary, and readers are left pondering the true focus of the project and its rationale. One methodological problem of this book is its narrow transitional justice *option* selection. Why the authors chose to focus on examining *only ad hoc* tribunals, given the self-described purpose of their project, remains unclear. Roper and Barria rightly argue, "To hold individuals accountable for their crimes under international law in a meaningful way requires the creation and the implementation of mechanisms designed to provide justice."[3] However, the authors proceed to announce that they will exclusively focus on *ad hoc* tribunals. Certainly, there are many other ways to address suspected international criminals, but Roper and Barria make no effort to explain why the essentially contested concepts of "accountability" and "justice"—which the authors do not acknowledge as such until the end of the book[4]—are defined so narrowly, or whether alternative mechanisms are somehow less "meaningful" in providing those objectives.

For example, prosecutorial mechanisms other than *ad hoc* tribunals do exist, such as permanent domestic courts claiming universal jurisdiction over individuals (as in the recent attempt by a Spanish judge to arrest and extradite from the United Kingdom the now late Chilean General Augusto Pinochet). Truth commissions have also been popular and effective means of promoting certain objectives of transitional justice, such as establishing a historical account of heinous crimes. Examples of such institutions include the South African Truth and Reconciliation Commission and its less famous counterparts formed or at least contemplated in Argentina, Bolivia, Chile, Ecuador, El Salvador, Guatemala, Panama, Peru, and three of the regions under consideration in this book (East Timor, the former Yugoslavia, and Sierra Leone). These alternative prosecutorial, civil, and non-legalistic transitional justice mechanisms offer procedural and substantive benefits, as well as drawbacks. A more complete analysis of the political and practical reality a society faces when confronting its past

3. *Id.*
4. *Id.* at 95.

would include an explanation of whether other transitional justice options were considered and why plausible alternatives were rejected.

A second methodological weakness of the book is its narrow transitional justice *case* selection. It is unclear why the authors chose to focus on examining *these ad hoc* tribunals, also given the summary of their enterprise. Why did the authors not also explore the International Military Tribunal (IMT, also known as the Nuremberg Tribunal), the International Military Tribunal for the Far East (IMTFE, also known as the Tokyo Tribunal), and other *ad hoc* tribunals in greater detail? Furthermore, why did the authors choose to analyze only one purely domestic response to human rights violations, the IHRC?

The back cover informs readers: "This book traces the development of international humanitarian law especially since World War II and focuses on the role of the international community in crafting international and mixed war crimes tribunals." This description suggests an examination of the establishment of the IMT and the IMTFE with as much rigor and space as it does the ICTR, the ICTY, the SCSL, the ECCC, and the SCPET. Yet Roper and Barria fall victim to the trend of much secondary literature on this topic by not committing more of their efforts to exploring and reflecting upon the significance of the twin post-World War II tribunals. Indeed, the authors devote less than two pages to documenting the establishment of the IMT and only one page to the creation of the IMTFE.[5] Both efforts offer disappointingly—and, in terms of the book's purported goal, detrimentally—brief summaries of the chronology of events; neither provides any new information or analysis of the circumstances that led to the creation and operation of these tribunals. Especially because the IMT and the IMTFE were the first *ad hoc* international criminal tribunals—and since they served as such important precedents for the later tribunals which are more of the focus of the book—a lengthier analysis of their etiology and legacy would have strengthened the book's argument. After all, the path dependency formed by these two models provides a compelling explanation for the design of the later tribunals and also serves as a starting point for analyzing the differing forms those later tribunals took.

The book's preface opens with the claim that by spring 2002 "no volume explored the origins, the structure and the influence of all the newly created international and hybrid criminal tribunals."[6] This description of the genesis of *Designing Criminal Tribunals* implies that the book would be concerned with more than just *ad hoc* tribunals and that the world's first permanent international war crimes tribunal, the International Criminal Court (ICC), therefore should have been a major case study. But even though the ICC was not a case study of *Designing Criminal Tribunals*, this permanent tribunal with potentially worldwide jurisdiction undermines the authors' attempt to generalize the recent evolution of

5. *Id.* at 6-8.
6. *Id.* at vii.

tribunal construction as tilting towards domestic courts. Where the ICC *is* briefly mentioned, the authors make an erroneous assertion, claiming "Once the ICTY and the ICTR fulfill their mandates, all future international prosecutions involving the criminality of individuals will be adjudicated by the ICC."[7] In fact, we have many reasons to believe that alternative transitional justice mechanisms will continue to be used, including that the ICC will be limited by its own jurisdiction, capacity, and discretion in the number and type of cases it will try.[8]

Other recently created tribunals also receive little or no mention in the book. Roper and Barria claim that their book "examines all the *ad hoc* tribunals created since the early 1990s"[9] and then proceed to focus on just six. The reader is left wondering why other significant *ad hoc* tribunals, particularly the Iraqi Special Tribunal (IST), are not discussed. The IST, which recently completed a controversial trial of Saddam Hussein by sentencing him to death by hanging, is a particularly curious omission since the book's very first paragraph mentions Saddam twice. The authors argue that his trial, along with that of Slobodan Milošević, "represent[s] flawed justice in which either the defendant has been able to prolong and subvert the process or is a victim of 'victor's justice'."[10] For a book that dedicates an entire chapter to understanding the effectiveness of international, hybrid, and domestic tribunals, this comment misleadingly implies that the IST would figure prominently in the narrative.

Moreover, neither of the descriptions included in the back cover or preface mentions domestic tribunals, and yet the IHRC is one of the book's six case studies. Either these descriptions should have explicitly included domestic tribunals or the book should have limited the discussion of the IHRC. If the former route were taken, more domestic courts that have and have not operated alongside international and hybrid tribunals should have been explored. As is, the highly controversial *ad hoc* U.S. military commissions are not mentioned and the War Crimes Chamber in the Court of Bosnia and Herzegovina and Rwanda's *gacaca* courts are discussed only briefly.

The book's preface may help explain the narrow selection of case studies in this volume. The authors note that they conducted fieldwork in The Hague, Cambodia, and Indonesia. These experiences would naturally direct their work towards the ICTY, based in The Hague; the ECCC, the SCPET, and the IHRC; and, perhaps also the ICTR, which shares the ICTY's appeals chamber. But there is no indication that the authors even attempted to conduct fieldwork in Africa, where two of their case studies are located. To promote the intellectual integrity of this project, and to better explain their case selection, the authors should have admitted they chose case studies with which they were most familiar.

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7. *Id.* at 96.

8. *See* Zachary D. Kaufman, *The Future of Transitional Justice*, 1 ST. ANTONY'S INT'L REV. 58, 71-72 (2005).

9. ROPER & BARRIA, *supra* note 1, at 2.

10. *Id.* at 1.

All of this arbitrariness could have been resolved by expanding the book. The current edition, excluding the appendices, is not even 100 pages. Readers could certainly benefit from a revised edition that considers additional cases or at least offers a more compelling explanation for why this work is so narrowly focused.

By focusing only on a subset of cases within a subset of options, Roper and Barria restrict the universe of data they collect and the observations they share. Of course, perhaps no single volume could address the myriad transitional justice institutions and experiences. But even considering the book's actual content, it is still problematic. For example, the case study of the ICTR is poorly developed. Although, as the authors describe, Rwanda's Organic Law initially divided suspects into four categories,[11] those classifications have now been consolidated into three.[12] The custody battle between the ICTR and the Rwandan government over defendants arises not only because of the absence of a death penalty option in the UN tribunal, as Roper and Barria speculate,[13] but also because the Rwandan government has had concerns over the ICTR's operation. For example, the ICTR has previously hired genocide suspects as staff members,[14] and judges have failed to treat witnesses with the respect they deserve, on one occasion laughing at a witness testifying about the rape she suffered.[15] The Rwandan government's initial objections to the ICTR were not merely based on the tribunal's temporal and subject-matter jurisdictions and the absence of the death penalty, as the authors claim.[16] From the Rwandan government's perspective, the ICTR did not include enough trial chamber judges and problematically shared an appeals chamber and chief prosecutor with the ICTY; the UN Security Council member states that participated in the Rwandan conflict would wrongly have power to propose and vote on judicial candidates; suspects and convicts would inappropriately be held in states outside of Rwanda; and the ICTR should have been located in Rwanda instead of in neighboring Tanzania.[17]

Beyond the flawed methodology and analysis, the book is marked by general sloppiness. The editing is poor, as evidenced by several arithmetic, spelling, and nomenclature mistakes.[18] *Designing Criminal Tribunals*, published in 2006, also refers to past events as occurring in the future.[19]

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11. *Id.* at 25, 78.

12. *See* Phil Clark, *Hybridity, Holism and "Traditional" Justice: The Case of the Gacaca Courts in Post-Genocide Rwanda*, 39 GEO. WASH. INT'L L. REV. (forthcoming 2007).

13. ROPER & BARRIA, *supra* note 1, at 25.

14. *See* Victor Peskin, *Rwandan Ghosts*, LEGAL AFFAIRS, Sept.-Oct. 2002, at 21.

15. *See* Valerie Oosterveld, *Gender-Sensitive Justice and the International Criminal Tribunal for Rwanda: Lessons Learned for the International Criminal Court*, 12 NEW ENG. J. INT'L & COMP. L. 119, 130 n.55 (2005).

16. ROPER & BARRIA, *supra* note 1, at 23-24.

17. U.N. SCOR, 49th Sess., 3453d mtg. at 13-16, U.N. Doc. S/PV.3453 (Nov. 8, 1994).

18. For example, the authors refer to four international tribunals, whereas the book analyzes five. Roper & Barria, *supra* note 1, at 3. Furthermore, throughout the book, the authors mistakenly refer to the ECCC (the proper name of this tribunal, as indicated in the primary documents in Appendix F) as the Extraordinary Chambers for Cambodia (ECC).

19. For example, the authors claim the ECCC is "the only tribunal that will be established

This latter problem can be explained by the fact that much of the book is directly reproduced from the authors' previous work. Roper and Barria co-authored related articles in *Human Rights Review*, the *International Journal of Human Rights*, and the *Journal of Human Rights*,[20] journals they thank "for allowing us to use ideas from these publications."[21] More than merely *reusing* their ideas, however, much of the book is a verbatim *reprint* of these recently published articles. While scholars often draw upon their previous work in later anthologies, they usually do so with updated material and new insight, or only as part of a greater work. The minimal changes the authors made from earlier iterations of their work, added to the fact that the book is relatively short, raise the question: why did the authors not add more value to their previous publications?

The authors should be commended for raising awareness about the phenomenon and challenges of *ad hoc* tribunals. As Roper and Barria rightly point out in their final chapter, the effectiveness of these tribunals is difficult to assess because there are myriad rationales for and expectations of them, which may sometimes conflict or be unrealistic. The authors are also appropriately sensitive to contextual circumstances, arguing that their case studies "demonstrate that there is no one model that fits all situations."[22]

However, *Designing Criminal Tribunals* adds little value to the literature on international criminal law and transitional justice because Roper and Barria rehash and regurgitate so much of others'—and their own—work. Furthermore, the book is confused about its exact purpose. In not clearly providing a rationale for its chosen case studies, the book reads as a disjointed set of reflections on a topic that is too important not to treat more rigorously. Roper and Barria's next book together is entitled *The Development of Institutions of Human Rights*. Such a similarly broad and ambitious subject will require an amount of documentation and a depth of analysis lacking in their first co-authored volume.

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after the entry into force of the ICC in 2002." *Id.* at 30. Furthermore, this statement has been proven false, as evidenced by the fact that the IST was created in 2003.

20. Lilian A. Barria & Steven D. Roper, *Assessing the Record of Justice: A Comparison of Mixed International Tribunals versus Domestic Mechanisms for Human Rights Enforcement* 4 J. HUM. RTS. 521 (2005); Lilian A. Barria & Steven D. Roper, *How Effective are International Criminal Tribunals? An Analysis of the ICTY and the ICTR*, 9 INT'L J. HUM. RTS. 349 (2005); Lilian A. Barria & Steven D. Roper, *Providing Justice and Reconciliation: The Criminal Tribunals for Sierra Leone and Cambodia*, 7 HUM. RTS. REV. 5 (2005).

21. ROPER & BARRIA, *supra* note 1, at viii.

22. *Id.* at 94.