Enforcing Accountability for Past Gross Human Rights Violations in Indonesia: Non-Retroactivity, Command Responsibility, and Transitional Justice

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Abstract: The prosecution of past gross human rights violations in Indonesia raises complex legal issues such as non-retroactivity, criminal procedure, command responsibility and transitional justice. This article explores the relationship between the principle of legality and the obligation of the state to ensure accountability for serious violations of human rights . The type of research used is normative legal research with statutory approach, conceptual approach, comparative approach and case approach. The objective of this research is Law No. 26 of 2000 on Human Rights Courts, procedural requirements in historical cases and the standard of establishing individual criminal responsibility. The results indicate that the main obstacles to accountability remain the legal uncertainty of the temporal application of criminal law, procedural difficulties in historical cases and problems in proving command responsibility. The study also finds that criminal proceedings alone cannot address all the consequences of past violations and must be supplemented by truth-seeking, reparations, institutional reform and guaranties of non-recurrence. The article offers an integrated legal framework that links legality, individual responsibility and transitional justice. It is necessary to clarify procedural responsibilities, to improve evidence preservation and investigation, and to better coordinate judicial and non-judicial mechanisms, while protecting legal certainty, fair-trial guaranties and victims' rights.

Keywords: Human Rights, non-retroactivity, command responsibility, transitional justice.

Introduction

One of the most difficult problems in the development of democracy and constitution in Indonesia is the issue of enforcement of law on past gross human rights violations. Serious violations committed in times of political instability and authoritarian rule pose questions

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beyond the prosecution of individual offenders (Isidor et al., 2015; Nevins, 2003). They are about the ability of the state to prove the truth, deliver justice for victims, hold perpetrators accountable and prevent similar violations from happening again. If these objectives are not achieved, the erosion of public confidence in the legal system and the difficulty of quantifying the state's commitment to human rights in practice may be difficult to quantify. Thus, the persistence of unresolved cases constitutes not only a legal problem but a more general challenge to the consolidation of the rule of law in Indonesia (McCarthy et al., 2022; Tranter et al., 2022).

Indonesia has a special legal mechanism for prosecuting serious human rights violations under Law No. 26 of 2000 on Human Rights Courts. The law provides the legal basis for the prosecution of genocide and crimes against humanity and regulates the establishment of ad hoc Human Rights Courts for violations committed before the law entered into force. However, the existence of this statutory framework has not eliminated the difficulties associated with investigating and prosecuting historical cases. The central challenge is to reconcile the pursuit of justice for victims with constitutional and procedural safeguards against arbitrary criminal prosecution. Accordingly, the legal framework must be examined not only in terms of the existence of legal institutions but also in relation to the clarity, consistency, and accountability of the procedures applied in historical cases (Othman, 2003).

One of the most controversial points is the principle of non-retroactivity which does not allow establishing criminal liability on the base of a law under which the behavior in question was not criminalized at the moment of its occurrence. In Indonesian constitutional law, the right not to be prosecuted under the retroactive criminal law is guarantyd by Article 28 I (1) of the 1945 Constitution (Pawennai, 2020; Siahaan et al., 2020). This guaranty corresponds to the principle of legality and protects people against the arbitrary exercise of state power. At the same time, the demand for accountability for past atrocities also poses questions as to the legal consequences of conduct which may already have constituted an international crime under the law in force at the time. This tension cannot be resolved by simple juxtaposition of legal certainty and the rights of victims. It includes the detailed analysis of the relevant legal norms, the legal status of the alleged offenses at the time when they were committed and the limits of the permissible criminal prosecution.

This tension can be understood productively as international law (Howse & Teitel, 2010; Krisch, 2005). The International Covenant on Civil and Political Rights provides that no one may be convicted or punished criminally by virtue of a law adopted after the act was committed. It recognizes that a person can still be prosecuted for conduct which was criminal at the time when it was committed by general principles of law recognized by the community of nations. This provision does not give a free-standing power to apply criminal law

retroactively (Spencer, 2014). Instead, it emphasizes that the critical factor in the analysis is whether the conduct was legal at the time of the conduct. Accordingly, the applicability of international criminal law to the historical events should be examined in the light of the principle of legality, the applicable rules of international law and the legal elements of the alleged crimes. International instruments and judicial practice may be relevant to this analysis, but the relevance of these instruments and practices is distinct from the issue of whether a particular instrument applies to conduct that took place before it entered into force (Kruse, 2015).

Furthermore, the institutional design of the national legal framework generates accountability problems. Article 43 of Law No. 26 of 2000 provides for the establishment of ad hoc Human Rights Courts to try gross violations of human rights committed prior to the promulgation of the law. Their establishment shall be affected upon a proposal of the House of Representatives and a decision of the President. Article 43 (2) states: This begs questions about the relationship between political institutions and the administration of criminal justice, especially when we consider historical instances in which powerful state institutions or former officeholders are involved. The constitutional examination of the legal framework in question has also affected the discussion on the creation of ad hoc courts and the handling of historical violations. The more serious problem is whether the existing institutional arrangements provide a sufficiently clear, independent and accountable path from investigation to adjudication. This question calls for an examination of the applicable legal provisions and judicial decisions and not an assumption that all delay or unsuccessful prosecution is necessarily attributable to political interference.

Another challenge relates to evidentiary standards to prove crimes against humanity and individual criminal liability. They need an attack against a civilian population which is widespread or systematic. This is in addition to the other elements of crimes against humanity as defined by the applicable law. Unlike ordinary criminal offenses, crimes against humanity: Such contextual elements may include an assessment of patterns of conduct, organizational structures, documentary evidence, witness testimony and links between particular acts and broader operations. The prosecution of persons in positions of authority presents further difficulties, since responsibility cannot be presumed merely based on rank or institutional position. The doctrine of command responsibility does not require a legally adequate basis for the establishment of the relevant superior-subordinate relationship, the applicable standard of knowledge and the omission of the necessary and reasonable measures within the limits of the applicable law. The quality of investigation, collection of evidence, protection of witnesses and judicial reasoning are the preconditions for the effective prosecution of historical violations (Griffin, 2000; Oldfather, 2004).

Judicial processes are, of course, imperfect, and this makes it even more important to locate accountability for past violations within a broader framework of transitional justice. Criminal trials are a means of determining individual criminal responsibility, according to the relevant standards of law. Truth-seeking, reparations, institutional reform and guaranties of non-repetition address other aspects of the harm caused by serious violations. They are related mechanisms, but not interchangeable. Where prosecution is a matter of law, a criminal trial cannot be replaced by a non-judicial process. And a criminal judgment may not meet the larger needs of victims and impacted communities. The cancelation of the previous Truth and Reconciliation Commission Law complicates the institutional development of non-judicial transitional justice in Indonesia (Setiawan, 2019). The intersection of judicial accountability and remedies for victims demands a legal framework that appreciates their different goals while enabling proper coordination (Butt & Lindsey, 2020; Manan, 2015).

The above issues call for an integrated normative analysis of three inter-related issues: the constraints imposed by constitutional and international law on non-retroactivity; the procedural and evidentiary challenges of prosecuting gross human rights violations including command responsibility; and the institutional relationship between criminal proceedings and non-judicial mechanisms of transitional justice. This set of dimensions provides a basis for assessing whether the existing legal framework offers coherent standards of historical accountability without undermining the guaranties of legality and due process. The analytical focus is not on the automatic priority of international law over domestic constitutional provisions, but on how the relevant legal norms can be interpreted and applied consistently within their respective scopes.

Based on this, the study is formulated to answer three research questions. Firstly, what is the meaning of the principle of non-retroactivity in considering past gross human rights violation under Indonesian Constitution, Law No. 26 of 2000 and the relevant international legal instruments. Second, what are the procedural and evidentiary barriers that influence the prosecution of crimes against humanity and the application of command responsibility in Human Rights Courts in Indonesia. Third, what legal reconstruction could promote the coherence and effectiveness of criminal procedure and reinforce the connection between judicial accountability and transitional justice. The answers to the questions were conducted by normative legal research through statutory, conceptual, comparative and case study approaches. The analysis is based on legislation, international legal instruments, judicial practice and scientific literature to assess the current state and to define the necessity of its clarification and reform.

The aim of this paper is to contribute to the debate on historical accountability, by outlining a normative reconstruction of the relation between constitutional legality, effective criminal

procedure and victim-oriented transitional justice. The proposed way forward is study of the institutional arrangements governing ad hoc Human Rights Courts; clarification of the application of international criminal law standards within the limits of the applicable domestic law; strengthening of investigation and evidentiary assessment of command responsibility; and consideration of complementary mechanisms for truth-seeking and reparation. The proposals are not put forth as statements of the law as it now stands, but as subjects for legal analysis and reform. The ultimate goal of the study is to provide a legally defensible way to accountability for past gross human rights violations. This route addresses impunity and respects fair-trial guaranties and the core values of a constitutional state.

Research Method

This research employs normative legal research to analyze the legal system that governs the prosecution of gross human rights violations of the past in Indonesia (Hadiprayitno, 2010; Setiawan, 2018). This research discusses the relationship of the principle of non-retroactivity with criminal procedure, command responsibility and transitional justice. The aim is to examine whether the current legal framework offers a consistent foundation for the pursuit of accountability, while maintaining legal certainty and safeguarding fundamental legal principles. The research is based on analysis and interpretation of legal texts and not on collection of empirical data (Langbroek et al., 2017; Salehijam, 2018).

The analysis is performed in four ways. The statutory approach is the first approach that considers relevant national laws and international legal instruments, in particular the 1945 Constitution of the Republic of Indonesia, Law No. 26 of 2000 concerning Human Rights Courts and the applicable international human rights and criminal law instruments (Adjami, 2002). Secondly, the conceptual approach examines the principles of legality, non-retroactivity, individual criminal responsibility, command responsibility and transitional justice. Thirdly, the comparative approach examines the relevant international legal structures and the practice of the international criminal tribunals to identify the legal standards that may inform the interpretation of Indonesia's legal framework (McCrudden, 2000). Fourth, the case approach looks at the relevant judicial decisions, including Constitutional Court Decisions No. 018/PUU-IV/2006 and No. 65/PUU-VIII/2010, to understand how constitutional principles and legal requirements have been interpreted in terms of human rights accountability (Sitompul, 2018).

Legal information sources are considered to be primary, secondary and tertiary sources. The main legal sources are constitutional provisions, laws, international instruments and relevant judicial decisions. The secondary materials include books, articles in academic journals and legal research publications related to international criminal law, human rights enforcement,

criminal procedure and transitional justice. Where necessary to explain legal terms and concepts reference is made to legal dictionaries and encyclopedias. The choice of materials is determined by their relevance to the research questions and by the extent to which they contribute to the understanding of the legal questions investigated.

The materials are compiled by means of the documentary research, i.e. identification, examination and organization of relevant legal provisions, judicial decisions and scholarly literature. The analysis is based on a qualitative legal interpretation, taking into account the meaning, scope and interplay of the relevant legal rules and principles. This analysis also considers the consistency of the constitutional guaranties, statutory provisions and international legal standards. The focus is on the legal basis for the prosecution of past wrongs, the procedural and evidentiary challenges in establishing individual and command responsibility, and the relationship between judicial accountability and non-judicial mechanisms of transitional justice.

The last part of the analysis is dedicated to the identification of the areas of legal uncertainty, the procedural shortcomings and the possible inconsistencies of the current system. On this basis, the study develops normative recommendations for the improvement of legal coherence, the enhancement of the effectiveness of accountability mechanisms and the support of transitional justice. Any proposed legal reconstruction is evaluated in the light of the principles of legality, legal certainty, guaranties of a fair trial and the need to promote the rights of victims. Figure 1 shows the research framework.

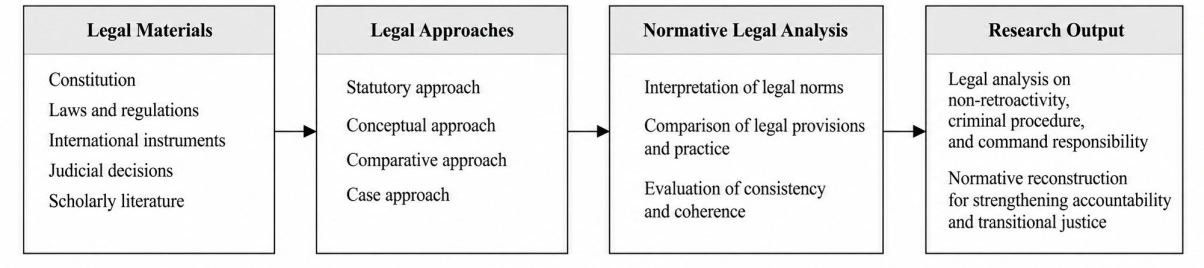


Figure 1 Research framework

Figure 1 shows the research framework used in this study. The analysis begins with the review of the relevant legal materials and then the statutory, conceptual, comparative and case approaches are applied. These approaches form the basis for the interpretation of legal norms, for the comparison of relevant legal provisions and practices, and for the evaluation of the coherence of the existing legal framework. Then the findings are used to develop a normative legal reconstruction that seeks to improve the accountability of past gross human rights violations in Indonesia while preserving legal certainty and supporting transitional justice.

Result and Discussion

Non-Retroactivity and the Prosecution of Past Gross Human Rights Violations

The analysis shows that the prosecution of past gross violations of human rights in Indonesia is characterized by a basic tension between the principle of non-retroactivity and the obligation to ensure legal accountability for serious human rights abuses. The principle of legality protects people from arbitrary prosecution for a criminal offense and demands that criminal liability be founded on an adequately established legal basis. At the same time, the application of this principle has to be seen in the light of the legal regime on crimes against humanity and the development of international criminal law. The constitutional guaranty of no retroactive criminal law in Indonesia should be read together with the statutory setting of Law No. 26 of 2000 on the Human Rights Courts. The law establishes a legal framework to address gross human rights violations, including the establishment of ad hoc Human Rights Courts for specific events that occurred prior to the law's entry into force. The existence of such a framework, however, does not mean that the legal questions involved in the prosecution of historical cases have been settled. The relevant law, period of criminal liability and legal basis for prosecution should be given special attention in each case. The relevant provision of the International Covenant on Civil and Political Rights distinguishes between retroactive criminalization of conduct by law and the recognition of conduct that was criminal under the relevant international law at the time of commission. This distinction is important, as the principle of non-retroactivity cannot be considered as a mere procedural obstacle, nor can the seriousness of an alleged violation justify the disregard of the principle of legality alone. The legal assessment is to determine whether the conduct was criminal under the law in effect at the time in question and whether the proposed prosecution is consistent with the applicable law. The analysis therefore suggests that one need not choose between legal certainty and accountability. A coherent approach demands clear standards to determine which law applies, the time jurisdiction of the court and the elements of the alleged offense. Such standards are necessary because they protect the rights of the accused and ensure that the principle of non-retroactivity is not applied without due regard to the relevant constitutional, statutory and international legal framework.

Procedural Obstacles and the Role of Institutional Arrangements

The second issue concerns the relationship between the statutory framework and the institutional procedures for bringing historical cases to trial. Conversely, Law No. 26 of 2000 offers a special procedure for the establishment of ad hoc Human Rights Courts to deal with

serious human rights violations committed before the law was enacted. The institutional arrangement is based on the provision under article 43 (2) which involves proposal from the House of Representatives and decision by the president. This mechanism raises questions on the relation between legal responsibility and political decision-making. If there are any institutional steps to be taken before the judicial proceedings can be initiated, the process may be delayed or uncertain. But the fact that there is a procedural requirement does not mean that every delay is due to political interference. The former requires a good legal appreciation of the formal requirements imposed by the legislator and their practical consequences.

The key issue is whether the current institutional framework offers an adequate and effective route from the investigation of alleged violations to judicial review. Uncertainty at the procedural stage may affect case management, the preservation of evidence and the capacity of victims and witnesses to participate effectively in the process. These concerns are particularly important in historical cases, where the passage of time may make it more difficult to obtain documentary evidence, to locate witnesses and to reconstruct the circumstances of the alleged violations. The findings suggest the importance of considering the distribution of responsibilities of the institutions involved in the investigation and prosecution of gross human rights violations. Any reform should set out the procedural steps, the institutional responsibilities and the legal consequences of delays without undermining the constitutional authority of the relevant institutions. The objective should be to reduce unnecessary uncertainty while preserving judicial independence, due process and the rights of all parties.

Evidentiary Challenges and Command Responsibility

The discussion on procedural and evidentiary issues further emphasizes the importance of the finding of individual criminal responsibility in the case of widespread or systematic attacks against civilian populations. Such cases can involve several actors, different levels of authority and conduct through organizational structures. So, the question of criminal responsibility is far more than just establishing that a serious breach has taken place. The evidence must also prove the elements of the offense involved and that of the accused person. Command responsibility is a very hard doctrine for the reason that the fact of authority does not in itself create criminal liability. The analysis must separate formal rank, actual authority or control, knowledge of relevant crimes, and the failure to take legally required measures within the applicable standard of responsibility. Such factors should be assessed within the framework of an applicable legal regime and not simply based on an individual's institutional position. Evidence relevant to command responsibility might include orders, official communications, operational records, testimony, reporting structures and other materials that might be relevant to the relationship between commanders and those who committed the alleged acts. The absence of one kind of evidence should not determine the result of a case.

However, in conducting the evidentiary assessment, regard must be had to the admissibility, reliability, relevance and cumulative significance of the material available, in accordance with the relevant rules of criminal procedure.

The historical cases also present special problems, because evidence may have weakened, records may be incomplete, and witnesses may no longer be available. The conditions stated above point to the necessity of systematic evidence preservation and efficient investigative procedure. But evidentiary difficulties should not be allowed to lower the standard of proof which applies or to shift the burden of proof. The defendant shall have the procedural safeguards provided by law. The prosecution must prove the elements of criminal responsibility required by the law. In this regard, efforts to strengthen the legal framework for command responsibility should be directed toward clarifying the applicable elements of liability, improving investigative capacity and consistent application of evidentiary assessment. Such measures would help to deal with the complexity of organizational crimes without replacing the proof of command position by the proof of individual responsibility.

Transitional Justice and the Limits of Judicial Accountability

The analysis also highlights that judicial processes are important for establishing criminal responsibility, but they are not, on their own, sufficient to address all the consequences of past gross human rights violations. The criminal trial is only about the guilt of the person under the law. They might not tell the whole story of what happened in the past, meet the needs of all victims or address the institutional conditions that allowed the abuses to take place. Transitional justice, then, provides another suite of tools for addressing the wider impact of past violations. It includes the relevant aspects such as truth-seeking, reparations, institutional reform, guaranties of non-recurrence. The purposes of these mechanisms are similar but not identical to criminal prosecution. The search for truth can help set the historical record straight and reparations can help make amends for particular harms done to victims. The institutional reforms and guaranties of non-repetition are aimed at reducing the probability of the occurrence of similar violations.

Linkages between judicial accountability and non-judicial mechanisms need to be carefully designed in law. Initiatives to seek the truth should not be considered automatic substitutes for criminal proceedings where prosecution is required by law. The provision of reparations as such does not establish that an individual criminal responsibility has been established. Each mechanism should function based on a clear mandate and in a manner consistent with the rights of victims and the guaranties given to the accused. For Indonesia, the integration of judicial and non-judicial measures needs to focus on institutional coordination, access to relevant information, victim participation, and the implementation of appropriate remedies. Any proposal for a truth and reconciliation mechanism must explain its relationship with

existing institutions and judicial processes. If this is not clarified, another mechanism could create overlapping mandates or uncertainty over how to deal with historical cases. The findings suggest that transitional justice should be viewed as a component of accountability and not as a replacement for the need for legal measures. Criminal responsibility must be closely associated with the recognition of victims' rights, the clarification of historical facts and measures to prevent future violations.

Normative Reconstruction of the Legal Framework

The above analysis highlights three interrelated areas in which the law must be sensitive: interpretation of non-retroactivity, institutional procedures for the management of historical cases, and evidentiary requisites to establish individual and command responsibility. These cannot be effectively addressed in isolation. Increased uncertainty in one area can impact the functioning of the other areas. The first step is to clarify the temporal reach of criminal law in the light of the gross human rights violations of the past. Any clarification must respect the principle of legality and make the distinction between retroactive creation of criminal liability and prosecution of conduct which was a crime under the law in force at the time. The seriousness of the conduct alleged is in the legal sphere, but it cannot replace the need to show a valid legal basis for prosecution.

Secondly, procedural rules and institutional responsibilities should be examined to see whether there are unnecessary delays or ambiguities in the processing of historical cases. In particular, the mechanism under Article 43 of Law No. 26 of 2000 deserves a close look. The reform proposals must define the legal basis for any change, the duties of the institutions involved and retain the safeguards required by the constitutional system. The aim is not only to speed up the process but also to make it transparent, legally predictable and subject to independent judicial review. Third, develop legal and institutional capacity to investigate complex crimes. This includes gathering documentary evidence, a strict analysis of the chain of command, witness protection and the uniform application of the legal elements of individual criminal responsibility. Better and more guidance on command responsibility would improve the quality of legal analysis but should not lead to presumptions of guilt based on rank or institutional affiliation.

Finally, judicial accountability must be necessarily paired with adequate transitional justice mechanisms. The legal framework should provide for the complementary role of truth-seeking, reparations, institutional reform and guaranties of non-recurrence in conjunction with judicial processes. This requires clear mandates and institutional responsibility and genuine concern for the rights of victims in this coordination. Together, these proposals provide a normative reconstruction for better consistency in Indonesia's framework for

dealing with past gross human rights violations. The main objective is to strike a balance between legal certainty and effective accountability, ensuring that the prosecution of past cases is grounded in a legitimate legal basis, fair procedures and sufficient evidence, while complementary measures would address the broader consequences of past abuses.

Discussion of the Research Findings

The key contribution of the study is the combined analysis of non-retroactivity, procedural and evidentiary challenges and transitional justice. These dimensions are often asked as separate legal questions, but they are closely related in their practical and normative implications. This is the interpretation of the law which is applicable. That's as far as the prosecution can go. That's how the institution works. This is whether a case can go anywhere. This is what the standards of evidence are. Whether individual responsibility can be proved in a fair trial. It also shows why accountability cannot be pursued by exclusive resort to the gravity of the alleged violations. A process is legally sustainable if it meets the requirements of legality and due process. The principle of non-retroactivity should be viewed in the light of a close reading of the relevant provisions of the constitution, legislation and international legal standards, not in the light of a general presumption that past cases are automatically exempt from prosecution.

Institutional barriers are also differentiated. Procedural arrangements might cause problems in dealing effectively with historical cases, but reform proposals should be well informed about relevant legal provisions and institutional responsibilities. The normative reconstruction is therefore aimed at the determination of specific legal uncertainties and the elaboration of solutions even in conformity with constitutional guaranties. The debate over command responsibility stresses the importance of connecting the organizational setting with the evidence of individual culpability. The existence of a hierarchy may be relevant to the inquiry but cannot, of itself, establish criminal responsibility. The sound framework should allow the investigators and the courts to look at the relevant evidence, while preserving the presumption of innocence and the appropriate standard of proof. Ultimately, the study proposes a constructive approach that conceives judicial accountability and transitional justice as complementary features of a coherent legal framework. The success of such approach depends on clear legal standards, adequate institutional arrangements, reliable evidence and meaningful recognition of victims' rights. Considering these findings, the study developed legal recommendations. The question of criminal responsibility is a matter for determination in each case by the proper judicial process.

Conclusions

This study concludes that the prosecution of past gross human rights violations in Indonesia requires a coherent legal framework that considers the principle of non-retroactivity and the need for accountability. The principle of legality remains an important safeguard against arbitrary criminal prosecution. However, the applicability of the law should be examined in the light of the law in force at the time of the alleged conduct, the constitutional framework and relevant international legal standards. The historical case does not preclude prosecution any more than the gravity of an alleged violation justifies a retroactive imposition of criminal liability. Procedural and evidentiary matters are also pertinent to the achievement of accountability. It is necessary to study the institutional mechanism under Law No. 26 of 2000, especially Article 43 in an effort to find out whether the procedures used are descriptive enough and are supportive of a good judicial proceeding. The establishment of command responsibility also requires proof of the relevant elements of individual criminal responsibility. The rank or position of an individual does not establish his guilt, and the evidence must be evaluated according to due process and the applicable standard of proof.

The findings further show that judicial proceedings must be complemented by suitable transitional justice measures. Seeking the truth, making reparations, reforming institutions and guaranties of non-repetition can address some aspects of past violations that criminal trials can never fully redress. They must be carried out under clear mandates and should not replace criminal proceedings where the law requires prosecution. Legal reform should therefore focus on clarity of the temporal application of criminal law, the review of procedural and institutional arrangements, improved investigative and evidentiary capacity, and coordination between judicial accountability and transitional justice mechanisms. Any such reform must respect the rule of law, the independence of the judiciary, guaranties of a fair trial and rights of victims. This work offers a normative perspective from which to explore these related issues. Further evaluation of the implementation of the proposed reforms can be carried out by detailed analysis of judicial decisions, institutional practices and processing of historical cases.

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