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CHAPTER SEVEN

Truth and justice

Introduction

On 26 April 2012, the Special Court for Sierra Leone convicted Charles Taylor, former president of Liberia, on 11 counts across a range of crimes against humanity and other offences. These included murder, rape, sexual slavery, enslavement, terrorism, violence to life, health, physical or mental well-being of persons, outrages upon personal dignity, cruel treatment, pillage, inhumane acts and, most notably, enlisting and conscripting or using children younger than 15 to participate actively in hostilities. This is a long list of offences and is quite particular to a number of laws that comprise the body of what is described as international humanitarian law and the international law of armed conflict (ILAC). The court found that these crimes were committed alongside Mr Taylor's aiding and abetting of the Revolutionary United Front (RUF) and the Armed Forces Revolutionary Council (AFRC). The case is significant since he is the first head of state to be indicted, tried and convicted by an international tribunal since the Nuremburg trials in 1945–46. Between Nuremburg and the Special Court for Sierra Leone, the international community has constructed an ever-increasing and elaborate legal framework that can be used to hold people to account for crimes against humanity. Special tribunals such as those for the Former Yugoslavia (ICTY) and Rwanda (ICTR) have been joined by the International Criminal Court in The Hague, The Netherlands, which was established by the Rome Statute and came into force on 1 July 2002. This development of international law and its culmination in the establishment of the ICC have been described as the international 'institutionalization of criminal liability' (Falk 2000: 4).

Such developments, however, have not only occurred at the international level, as throughout the latter half of the twentieth century, more than 100

countries have embraced legal and quasi-legal processes to address ‘past wrongs’ of some kind, which typically include large-scale human rights violations and crimes against humanity committed during periods of civil war, authoritarian rule and foreign occupation (see Hayner 2002; Olsen et al. 2010, 2012; Sikkink 2011). Popular processes include trials, amnesties, truth commissions, commissions of inquiry, reconciliation forums, human rights commissions and ‘lustration’ processes which seek to provide a public accounting of what has happened, who is responsible, who the main victims of the crimes against humanity are (or were) and what should be done about the truth that is discovered. Between 1970 and 2007, there have been 848 of these different processes, where the most popular have been amnesties (424 or 50% of the total), followed by trials (267 or 32% of the total), truth commissions (68 or 8% of the total), lustration policies (54 or 6% of the total) and reparations (35 or 4% of the total (Olsen et al. 2010: 39). Between 1979 and 2009, there have been more than 425 cumulative years of prosecution for human rights violations (Sikkink 2011: 21). The use of trials has increased dramatically over this period, while the use of truth commissions has declined dramatically since 2000 (Olsen et al. 2010: 100, 2012: 208). Despite the overall decline in the use of truth commissions, however, Brazil, after many years of delay and alternative approaches, launched its own truth commission on 16 May 2012 to investigate the human rights abuses committed during the period of military rule between 1964 and 1985. It is telling that Brazilian President Dilma Rousseff, herself a political prisoner during the military regime, personally launched the truth commission.

This proliferation of international law and development of domestic processes of accountability for the past since World War II – what Sikkink (2011: 96–7) calls the ‘two streams of justice cascade’ – demonstrate a very real and very strong human desire to ‘never forget’ what has happened and to ensure that such atrocities occur ‘never again’ (*nunca mas* in Spanish and *nunca mais* in Portuguese). Embracing the truth in this way, however, is not automatic or an inevitable part of political transition in the ways that have been outlined in this book. Indeed, whether and what kind of process is embraced is a function of possible routes to political accommodation after periods of conflict, authoritarian rule or other periods during which large-scale human rights violations have taken place. For example, both Northern Ireland and Spain are still debating whether and what kind of truth processes to undertake. In Northern Ireland, there has been the Saville Inquiry into the Bloody Sunday incident, but there has not yet been a truth commission of the kind seen in countries such as South Africa (1996–98), Peru (2001–03) or Sierra Leone (2002–04). In Spain, there are continuing debates about having a truth commission for the Spanish Civil War and for the authoritarian period under General Franco.

These examples are broadly understood as fitting into the idea of ‘transitional justice’, where some accounting of the past becomes a feature

of political transition from one regime type (typically but not always authoritarian) to another (typically but not always democracy). The international and domestic examples have both temporary and permanent features to them. At the international level, there are specific legal bodies that have been established to deal with specific cases (i.e. Rwanda, the Former Yugoslavia and Sierra Leone) and there are permanent bodies that deal with emerging, ongoing and past cases such as the International Criminal Court (ICC). At the domestic level, there are temporary truth and justice mechanisms (e.g. trials and truth commissions) that deal with specific time periods and there are permanent National Human Rights Institutions (NHRIs) that have oversight for all matters relating to human rights within a domestic jurisdiction. As of August 2011, there are 70 such NHRIs that have been accredited by the ICC across the globe from Afghanistan to Zambia.¹

This chapter focuses on four key questions for the domestic level. First, it considers the choices that countries make at the time of transition (or many years later) about whether and what kind of truth and justice process to undertake. Second, it discusses the legal mandate and scope of any formal body that is established and how that is linked to the type of truth and justice made possible. Third, it outlines the different methods that have been used for discovering the ‘truth’ through these processes and how these methods are important for the kinds of truths that are produced. Fourth, it examines the different kinds of justice that are made possible by them. These four elements – choice, mandate, methods and justice – are both inter-related often highly contested. They also shape the kind of politics that are possible during and after a period of transition.

Choice of truth mechanism

The two previous chapters showed that democratic transformation in any country involves highly contingent processes of challenge, contestation, mobilization, compromise, negotiation and deliberation. One key aspect of this transformation concerns the question as to whether a country should embark on some sort of truth process or truth mechanism. The arguments for having a truth process are numerous: in order for a country to move forward, it must address the problems of the past; give people voice over what has happened; restore the dignity of those who were victimized under the previous regime; provide an opportunity for perpetrators to acknowledge their actions; and to pursue some form of justice against those who committed offences and offer redress to those who suffered. The moment of reckoning made possible by a truth process can provide significant catharsis for society and be a period of public acknowledgement that provides the basis on which to build a new democratic society. The arguments against having a truth process are equally numerous: any uncovering of the truth

will be biased and partial (and may reflect the values of 'victors'); will run the risk of 're-traumatizing' the victims and their families; will raise the political stakes of the game and risk a return of the authoritarian forces to prevent a public process of acknowledgement; will incur huge expenses for very little tangible benefit; and will prevent rather than facilitate a country's process of democratic transformation.

The question **to have or not to have** a truth process is a critical one and is often a function of underlying political power and the nature of the forces that have thus far succeeded in moving a country forward. The dynamics of choice can involve the relative power of the forces that are part of a political settlement at the moment of transition. For example, if the military retain some authority or threaten to disrupt democracy then any truth process will be difficult. Indeed, in Argentina, after the defeat of the military regime in the Falklands/Malvinas conflict and its withdrawal from politics, successive democratic governments struggled to bring accountability to past wrongs and suffered repeated and real threats from the military that sought to disrupt democracy. Even though Argentina had a truth commission (The National Commission on the Disappeared, CONADEP) and trials for the key actors in the military junta that conducted the 'Dirty War' between 1976 and 1983, the years that followed the defeat of the military have been marred by the government enacting and rescinding amnesties for the perpetrators of egregious human rights violations. Only in the last few years has Argentina once again become a major protagonist for truth and justice (see Sikkink 2011: 60–83). In Brazil, the relatively peaceful extraction of the military from power between 1974 and 1985 meant that there was less pressure on (or more resistance within) the country to have a truth commission and only in 2012, more than 25 years after the end of authoritarianism has it been able to establish a truth commission. Spain underwent a relatively rapid period of democratic transition between 1975 and 1977 (Foweraker and Landman 1997) and is still deliberating on the relative merits of having a truth process. In contrast, the rapid and 'least likely' transition in South Africa (see Howarth 1998) brought with it one of the most notable (for good and bad reasons) truth commissions in the post-Cold War period.

Once a decision has been taken to have some sort of truth and justice process, there is then the choice over what kind of process to have. Again, this choice is influenced by a number of political and economic factors as each option carries with it different costs and benefits with respect to material, moral and long-term cultural concerns. The evidentiary requirement for trials and full-blown legal proceedings can involve significant costs both in terms of time and money, and the choice of the mechanism is very much related to what kind of justice a country desires (see below). Politically, the strict legal outcomes (guilty, not guilty, no case to answer) associated with trials can be threatening to perpetrators from the previous regime and may not be politically possible for that reason. Truth commissions can

have punitive and non-punitive mechanisms attached to them and they may allow ‘amnesty for truth’ as in South Africa or seek some form of retributive justice once the truth is known. As in the case of trials, the prospect of this kind of justice may well alienate the very powers that are required to participate in the truth mechanism. The process of lustration adopted in many former Communist countries of Eastern Europe involves expunging government institutions of perpetrators of past wrongs. Here, the process involves identifying personnel within state institutions that had a significant role to play in repression and social control of society and then deciding what to do with them. The process can involve exclusion from the new system or some form of inclusion based on confession and truth telling (see Olsen et al. 2010; Roman 2011). Each of these options carries with it significant political risk and the possibility of backlash. If personnel from the former regime are excluded, then reconciliation could be undermined even though trust has been achieved. On the other hand, if these personnel are included in the new regime, reconciliation may be achieved at the expense of trust (see Roman 2011). There are these significant trade-offs associated with these choices.

There are many reasons behind the choices that countries make concerning the kind of truth and justice process that they adopt. A broader comparative view shows that there are some common factors that determine whether and what type of process a country adopts. Across the 848 examples of different mechanisms that have been adopted around the world between 1970 and 2007, there are four common political factors that have been identified that help explain the adoption of at least two or more mechanisms: (1) the level of repression in the society (higher repression increases the probability of adoption); (2) the amount of time that has passed since the height of repression (more time increases the chance of adoption); (3) the democratic history of the country (many cases are countries like Chile where democracy was ‘interrupted’ by a period of authoritarianism); and (4) the degree of ethnic fractionalization in the country (higher fractionalization lowers the probability of adoption) (see Olsen et al. 2010: 56–8). In addition to these four political factors, analysis also shows that countries with significant economic growth (i.e. change in GDP) have a much higher probability of adopting one or more of these truth and justice mechanisms. Indeed, as the change in GDP increases, the probability of not having a mechanism drops and the probability of having a trial increases (trials are expensive). At comparatively lower rates of change in GDP (0% to 2.5%), the probability of adopting either amnesties or truth commissions increases, but for rates of growth above 2.5 per cent, the probability for these mechanisms drops in favour of trials (Ibid., 73–6).

Beyond the identification of these key factors that account for adoption of these mechanisms, the analysis of these data show that the process of transition itself can have an impact on what mechanisms a country chooses.

Indeed, countries in which the previous authoritarian regime has collapsed tend to choose the combination of amnesty and trials (some with and some without truth commissions), while those countries that have undergone a negotiated transition tend to issue amnesties first and then have trials (some with and some without truth commissions) (Olsen et al. 2010: 153–9). The recent case of Brazil is illustrative, since it underwent a very long period of negotiated transition between 1974 and 1985, the enactment of its Amnesty Law in 1979 and now the establishment of a truth commission. This makes sense from a political point of view, since regime collapse brings with it a more open ‘political opportunity structure’ (see Chapter 6) for groups in civil society including human rights organizations to mobilize in favour of the adoption of a trial mechanism and/or a truth commission. Negotiated transitions, on the other hand, often involve actors from the previous regime which will reduce the probability that any truth or justice mechanism would be adopted.

Mandate and scope of a truth process

The variation in the adoption of different truth mechanisms identified above is not only a function of the nature of the transition itself but also the legal mandate and scope for each mechanism. The mandate and scope will include what can be investigated, by whom and over which period, as well as the additional powers the mechanism will have in calling witnesses and investigating lines of inquiry to gather evidence. The mandate and scope will also have an impact on the kinds of evidence that are gathered and how they are gathered. For example, the Chilean truth commission was tasked with documenting those cases of human rights abuse that took place under the Pinochet regime **for which a positive identification could be made**. The fact that many individuals ‘disappeared’ during this period means that any such compilation was necessarily and grossly incomplete. In addition, a truth commission may be tasked with investigating only the most ‘egregious’ violations that have taken place, which can lead to an undercounting of particular types of crimes. For example, it is entirely possible for a victim to have been detained, tortured and then killed, where a project documenting the ‘most egregious’ violations will only count the killing. In this case, the detention and torture remain under counted and can lead to biased findings (see Landman 2006; Landman and Carvalho 2009).

Beyond these concerns over enumeration of atrocities (see below), the mandate and scope of a truth and justice processes produce five major types of mechanism: (1) trials, (2) truth commissions, (3) amnesties, (4) reparations and (5) lustration. These different mechanisms are not necessarily mutually exclusive as many truth commissions have also had the use of amnesties (e.g. South Africa) and reparations (e.g. Peru), and it is entirely possible for

a country to have a truth commission and trial, as in the case of Argentina (see Sikkink 2011).

Trials typically include those domestic or international legal bodies that try individuals for crimes against humanity and where the country in which the crimes were committed is involved in the trial (see Olsen et al. 2010: 32). Thus, trials can include the tribunals for Rwanda and the former Yugoslavia, as well as the Special Court for Sierra Leone. In addition to these legal bodies, there are some trials conducted under the auspices of ‘universal jurisdiction’ in which a state uses its own domestic court system to try someone from another state. For example, former Chilean President Augusto Pinochet was detained in the United Kingdom in 1998 as a result of a request from a judge in Spain who sought Pinochet’s extradition to stand trial in Spain for crimes against humanity that were committed against Spanish citizens while he was head of state. Even though Spain and the United Kingdom have an extradition treaty which would have allowed for the transfer of Pinochet, there was a long drawn out set of proceedings in the House of Lords in the United Kingdom, which resulted in (a) the Lords agreeing that he should be tried and (b) that he was of ill health and should be allowed to return to Chile. He was then indicted in Chile, but died before any conviction was secured. The principle of universal jurisdiction, however, was bolstered by the case (Sands 2006; Sikkink 2011).

Underlying the use of trials are three simple ideas, neatly summarized by Sikkink (2011: 13):

- 1 [T]he most basic violations of human rights—summary execution, torture, and disappearance—cannot be legitimate acts of state and thus must be seen as crimes committed by individuals.
- 2 [I]ndividuals who commit these crimes can be, and should be, prosecuted.
- 3 [T]he accused are also bearers of rights, and deserve to have those rights protected at a fair trial.

It has taken until the passage of the Rome Statute in 1998, which established the International Criminal Court to realize these three ideas in practice and in ways that can apply to all states. Moreover, the commitment to the idea that perpetrators themselves have rights means that evidentiary standards need to be met and that conditions of a fair trial need to be upheld at all times. These conditions mean that such trials tend to be **prolonged**, **expensive** and most important for any conception of justice, **highly selective**. The International Criminal Tribunal for the Former Yugoslavia (ICTY) has been in operation since 1993 and the International Criminal Tribunal for Rwanda (ICTR) since 1994. The ICTY has an annual budget of \$300 million, while the 2002–03 budget for the ICTR was \$208.4 million (Olsen et al. 2010: 66). Both bodies have successfully convicted perpetrators of crimes against humanity, but the convictions are for a selective number

of perpetrators. Trials such as the ones conducted by these bodies tend to focus on the main perpetrators and thus do not achieve widespread justice in convicting a large number of individuals involved. In Rwanda, domestic courts became overwhelmed with cases and a community-based process of justice known as the **gacaca** system has been used to provide reconciliation between opposing groups through alternative means that in many ways complement those of the international tribunal and the domestic court system (see Clark 2011).

In contrast to trials, truth commissions are less prolonged, are less selective in their attention to perpetrators and are less expensive. Typically, truth commissions last between 2 and 3 years and their cost can be as high as \$20 million as in the case of South Africa, but such costs are nothing near the costs associated with trials. Depending on how one counts them, there have been between 40 (Hayner 2010) and 68 (Olsen et al. 2010: 39; see also Landman 2006) truth commissions so far, where Uganda had the first in 1974 and Brazil is the latest country to establish one in 2012. Their main aims and objectives as well as their composition have varied over these many years and countries, but they share the following common features: (1) they focus on the past, (2) they do not focus on specific events, but seek to discover a broader picture, (3) they are temporary, (4) they have the authority to access all areas to obtain information (see Hayner 1994: 604, 2002: 14) and (5) they have a legal mandate to 'clarify', 'establish the complete picture', 'investigate serious acts of violence', 'establish the truth' and 'create an impartial historical record'. Despite these common features, there has been a lot of controversy over their findings, their funding, the methods they adopt to investigate the truth (see below) and the degree to which they have achieved justice (see below).

Amnesties are seen as a 'practical mechanism to secure democratic transition and rule of law by appeasing potential spoilers' (Olsen et al. 2010: 36). They are an official declaration of the state that protects individuals who have been accused or convicted of human rights violations from prosecution or pardon them and then release them from custody. For example, the 1979 Amnesty law in Brazil and the 1987 Law of Due Obedience in Argentina protected members of the armed forces from prosecution for such crimes as murder, disappearance and torture. In South Africa, amnesties were issued on an individual basis in exchange for evidence from perpetrators. Those that had committed human rights abuses during the period of Apartheid (from either side) were granted immunity from prosecution if they gave statements to the Truth and Reconciliation Commission. It seems odd at first blush to refer to amnesties as part of a truth and justice mechanism, and there are spirited arguments on both sides, but the reality of politics shows that amnesties are used frequently and have constituted 50 per cent of all mechanisms adopted between 1970 and 2007 (see above). The **acceptance** of amnesties whatever their

frequency as a viable component for any truth and justice process rests very much on the conception of justice one has, a subject that is discussed further below.

Methods for uncovering the truth

The idea of ‘truth’ is contested. Even if ‘facts’ about a case are known and there is detailed forensic evidence of the victim, his or her cause of death, etc. the circumstances around the death, the context of the death and the interpretation of the death can vary greatly across different accounts (see, e.g. Wilson 2001). But truth processes seek to account for many deaths and associated crimes against humanity over many years of the kind detailed in the 2012 conviction of Charles Taylor. To provide some idea of the scale of these crimes, the civil war in El Salvador between 1980 and 1991 claimed more than 70,000 lives; the conflict in Guatemala between 1962 and 1996 claimed between 119,300 and 145,000 lives; the period of the Dirty War in Argentina between 1976 and 1982 is estimated to have taken 30,000 people; while the 100 days of inter-ethnic violence in Rwanda claimed as many as 900,000 people (Landman 2006: 107–25). As we shall see, however, it is crucially important to understand that each of these figures is an **estimate** and not a definitive total. For any period under investigation there are a **circumscribed** but **unknown** number of crimes against humanity that have been committed and there are different methods for counting this unknown population of violations. In other words, the total number of violations is finite, but what that number actually is remains unknown when a truth process begins. Counting large-scale human rights violations and crimes against humanity is thus a huge challenge (see Ball et al. 2000; Landman and Carvalho 2009; Taylor et al. 2012).

Moreover, counting is only one of many methods a truth process will use, as typically, many truth mechanisms include both quantitative and qualitative elements. For example, both the South African Truth and Reconciliation Commission (TRC) and the Peruvian Truth and Reconciliation Commission (CVR) had quantitative and qualitative features. In South Africa, the TRC took 21,296 statements from deponents about the various human rights violations that took place under Apartheid between 1960 and 1994 and from these statements reported 46,696 violations (36,935 were deemed gross violations) that had affected a reported 28,750 victims. In addition to the data project that collected and coded all the statements, the TRC also conducted public hearings around South Africa to hear people’s stories and to give voice to the many different communities affected by Apartheid. In Peru, the CVR took 16,917 statements and then through comparison and careful statistical estimation determined that between 61,007 and 77,500 people had died or disappeared, where the most likely estimate was 69,280 (see Ball et al. 2003). In addition to the data team, the CVR also conducted

30 **estudios en profundidad** (in-depth studies) and conducted public hearings to provide a greater understanding of what it meant to live in conflict and to learn first-hand about the kinds of atrocities that had been committed by state and non-state agents during the 20 years of conflict between the government and the **Sendero Luminoso** ('Shining Path') rebel insurgency (see Landman 2006, 2012b; Landman and Carvalho 2009).

Common across both the quantitative and qualitative methods used during truth mechanisms is the importance of the **narrative** (Landman 2012b). Narratives are at a base level 'stories' that people tell about things that they have experienced directly or indirectly, as well as the evaluative impressions that those experiences carry with them (e.g. the subjective experience and registering of emotions, feelings and insights connected to such experiences). Such stories are often complemented with other items that can form the universe of data and evidence a truth mechanism will use to develop its account, including journals, field notes, letters, conversations, interviews, photos, other artefacts and videos and films (see Clandinin and Connelly 2000: 98–115; Riessman 2008; Sandercock et al. 2012). These stories can be taken in and of themselves, or they can be used to develop a large picture of what has happened to a society during a period of conflict, authoritarianism or occupation. The quantitative projects that form part of truth commissions will collect thousands of narrative statements, deconstruct the 'grammar' of human rights events into databases according to a 'who did what to whom' model, and then analyse the patterns of abuse that occurred according to the legal categories made explicit by the truth commission (see Ball et al. 2000; Landman 2006; Landman and Carvalho 2009). These narratives, however, also contain additional qualitative information about how people were feeling when the events took place; the social, political and cultural context under which they occurred; and the long-term impact that the events had on the victim (if they survived), their families and friends. The narratives provide the **human** element to the tales of atrocity that capture the meaning of inter-personal violence, state-repression and fear of non-state actors such as death squads, paramilitaries, guerrillas and other militants.

In my own view, the quantitative and qualitative approaches are a necessary part of any truth-telling process. Not only can the quantitative approach provide a macro-picture of the pattern of violations that have taken place, but can also, if done using particularly advanced forms of statistical analysis, reveal which groups were more responsible for the violations and which groups were more likely to be victims. For example, analysis conducted across three different samples of narratives in Guatemala showed that indigenous people were six times more likely to have been targeted by government forces (Ball 2000) and in Peru, indigenous people living in the mountainous region of Ayacucho made up nearly half of all the documented deaths (Ball et al. 2003; Landman 2006). Analytical statements such as these could not be made in the absence of quantitative analysis of narrative reports.

Equally, however, the true human element of periods documented by truth commissions also needs to be captured through other means. Qualitative methods of ethnography and in-depth interviewing provide unique insights into the mindset of perpetrators and victims alike and provide the kinds of rich understandings that complement the statistical estimations.

Types of justice and the impact of truth processes

Just as there are ‘varieties’ of truth that emerge from different methodological approaches, there is much variation in the understanding of justice and the impact that truth processes have on the politics and psyche of a country. The United Nations defines transitional justice as ‘the full set of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuse, in order to secure accountability, serve justice and achieve reconciliation’ (United Nations 2004: 4). Here, there is a direct link, and in my view, tension between the goals of accountability, justice and reconciliation. A truth process can identify perpetrators, victims and survivors of large-scale violations of human rights, but then a series of question remain. What to do with the perpetrators? If the perpetrators are not tried, convicted and sentenced does that mean that there has not been justice? Does conviction and imprisonment hinder or help the process of reconciliation? Does justice include material redress for survivors and families of victims? What is a fair settlement figure for material redress?

There are many arguments for and against a conception of justice that includes conviction and imprisonment for perpetrators, or what is known as retributive justice. Three strong arguments for this kind of justice have been outlined by Sandoval Villaba (2011: 4)

- 1 international law obliges states to investigate, prosecute and punish such crimes;
- 2 reparation under international law includes bringing perpetrators to account
- 3 accountability for past crimes is crucial to prevent such atrocities in the future

We have seen so far in this chapter that the two streams of the justice cascade have indeed fortified the legal basis for the first two of these arguments. The development of international law between the passage of the UN Charter and the establishment of the Rome Statute and the increasing use of tribunals and trials show that this notion of retributive justice is becoming entrenched and in many ways is an **expected** and **appropriate** response to mass atrocity. Human rights groups such as Human Rights Watch are strongly behind the

idea of retributive justice and have been critical of the use of amnesties, for example, since they undermine the basic principle of accountability for past crimes, which here is defined as a perpetrator receiving his or her 'just deserts'. For example, in its report *Adding Insult to Injury* on the accountability for human rights violations committed in Nepal during its civil war, Human Rights Watch (2011: 3) says,

The Nepal authorities have argued that transitional justice mechanisms (a truth and reconciliation commission and a commission to investigate enforced disappearances, which are provided for in the CPA but not yet established) trump the normal criminal justice system in relation to widespread human rights abuses committed during the conflict period. This is in contradiction to findings by Nepal's courts and provisions in international law.

Under its international obligations, Nepal is obliged to initiate investigations and criminally prosecute those responsible.²

There are strong arguments against the strict application of retributive justice. First, achieving the goals of peace and reconciliation can be seen as coming before justice in its strict sense, where peace brings an end to all out confrontation or repression, and reconciliation involves all sides on a conflict or regime transition to reach some sort of political accommodation that allows a country to move forward. Second, tribunals and trials take time, while countries often want to move forward with a new system quickly. Third, retributive justice, to be effective, must be impartial and not seen as vengeance wrought by those who are now in power. Engaging in vengeance can undermine the credibility of the new power holders as well as the foundations being laid for the new society.

An alternative and in some ways complementary form of justice is **distributive** justice, where some determination of economic costs of violations has been made and a material or financial contribution to the survivors and families of the victims can be offered. It is entirely possible to have conviction and sentencing of perpetrators alongside the payment of reparations. The legal obligation for reparations lies with both the state and the individual (see Sandoval Villalba 2011: 6). Reparations are not only directly financial in nature and can include health programmes, rehabilitation and restitution. It is also possible for external actors, such as wealthy countries to set up programmes for reparations to be carried in third countries. The issue of reparations is highly complex as it is difficult to put a financial figure next to egregious crimes that have been committed. There are also the issues of identifying the victims and the perpetrators with a degree of verification that could yield a payment of reparation. More importantly, working out policies for reparation can exacerbate political tensions and may threaten a political settlement; re-traumatize victims and/or exacerbate harm; lead to the social marginalization or exclusion of victims; and create tensions for

development or nation-building processes following a period of conflict or authoritarianism (Llif et al. 2011: 2).

A relatively new form of justice (for transitional countries anyway) is **restorative** justice. Unlike an adversarial or tribunal approach as in retributive justice, processes of restorative justice involve perpetrators and victims coming together and seeking reconciliation and mutual understanding. It is typically practised on a community level and is founded on a different understanding of crime as not only an act against another person, but also the community from which that person comes. It also recognizes the large 'social dimension' of crime and the collective as well as the individual responsibility for crime. The process itself involves dialogue and negotiation, where the outcome is about problem-solving and healing rather than punishment per se. This is a radically different way of addressing the question of truth and justice. Outcomes under such a process may well include some form of punishment for the perpetrator, but it is one that agrees through a process of dialogue and negotiation of all parties affected, rather than a 'case' being made to a tribunal that then reaches a judgement and passes a sentence.

As mentioned above, owing to an overwhelming number of cases in the Rwandan court system, community **gaccaca** courts have engaged in this form of restorative justice to heal the wounds of the large-scale inter-ethnic violence that took place in 1994. In the United Kingdom, Jo Berry, daughter of Conservative MP Sir Anthony Berry, who was killed in an IRA bombing that took place in Brighton in 1984, has worked with IRA bomber Pat Magee. Magee was responsible for the bomb that killed her father and their work together promotes a process of conflict resolution that is very much like the restorative justice model outlined here. At a micro-level, Jo Berry has transcended individual emotions and difference to reach out to Pat Magee as a way of dealing with her own past. She also sees that they are both a product of larger systemic forces and that individual-level blame and discussions of culpability are not particularly helpful for making long-term progress. Such processes of restorative justice are becoming more prevalent in the areas of community crime, schools, care homes, etc. but it is clear that this model of reconciliation is equally applicable for large-scale atrocities committed during times of conflict or authoritarian rule.

Beyond these different notions of justice, what has been the impact of the different truth and justice mechanisms? Since as we have shown already in this volume, transitional processes are highly complex and contingent, where is it difficult to establish direct links between particular mechanism and particular outcomes (see, e.g. Cesarini 2009), but it is possible to explore changes within and across different countries that have variously engaged with truth and justice processes. Large-scale comparative analysis has shown statistically significant and positive benefits for the presence of particular truth and justice mechanisms. For example, for Latin America between 1976 and 2004, Sikkink (2011: 150–3) shows that the average level of human rights violations was much lower for countries that engaged in a

long-term process of prosecutions for past crimes. For a global sample, she finds that while the average level of human rights violations has decreased slightly between the 1980s and 2005, the levels of violations were higher than the global average for countries that did not have prosecutions and lower than the global average for countries that did have prosecutions (Sikkink 2011: 183–8, 273–7). These results were obtained for a measure of truth commission experience and the cumulative total of prosecution years over the period of her analysis. In similar fashion, Olsen et al. (2010: 131–51) find that the adoption and implementation of truth and justice mechanisms in general have positive and statistically significant effects on both democracy and human rights, where levels of each are higher for countries that have undergone various combinations of truth and justice mechanisms.

These findings are for aggregate measures of democracy and human rights are of the kind we have already seen in Chapter 3 of this volume, but are their attitudinal and cultural impacts of the truth and justice processes? It is difficult to assess such an impact in the same broadly comparative way since individual level data across such a wide sample of countries have not yet been collected. There has been some systematic research using survey data after the experience of the Truth and Reconciliation Commission in South Africa (see Gibson 2004). This research conceptualizes and measures what is meant by ‘truth’ and ‘reconciliation’ for a sample of 3,700 South Africans. The analysis reveals three distinct sets of findings. First, there is a high level of consensus across the sample on the truth that was discovered by the TRC. Second, there was some degree of reconciliation achieved. Third, the truth process itself contributed to that understanding and acceptance of reconciliation (Gibson 2004). The Institute for Justice and Reconciliation in South Africa has carried out a regular ‘Reconciliation Barometer’ since 2003, which gauges the progress of reconciliation across different issues areas, including human security, political culture and democratic consolidation, national unity and the legacy of Apartheid. Despite mixed results for the degree of progress on many of these issues (e.g. increases in physical security but decreases in economic security; growing confidence in some aspects of governance, but distrust of local government), the barometer, like the study by Gibson (2004), shows that South Africans want to have a unified country and that they agree that Apartheid committed crimes against humanity. But with respect to justice, the barometer shows that South Africans want more to be done to prosecute the perpetrators of those crimes (see IRJ 2010).

Other country studies that do not utilize attitudinal data also find complex feelings and understandings of truth and justice processes alongside other features of transition. Historical analyses of Spain, Germany, Austria, Costa Rica and Nicaragua show remarkably different national experiences with confronting the past. In some cases (Spain), a policy of selective amnesia has prevailed, in others (Germany) direct and ‘top-down’ confrontation with the past has been fruitful in promoting reconciliation, while in others (Austria) absence of confrontation with the past means that authoritarian tendencies can haunt the present (see

Aguilar 1996; Sa'adah 1998; Cruz 2005; Art 2005 as discussed in Cesarini 2009). Such variation in outcome and impact of transitional justice processes is not surprising given the many different experiences with atrocity that countries have had and the many paths that they have pursued in dealing with the past.

Summary

Truth and justice remain contested and partial concepts. They are partial since the whole truth of what has happened can never be known and every last perpetrator can never be prosecuted. They are contested since that which is uncovered will be differently understood and 'owned' by different segments of society, while the actual judicial outcomes (if they take place) will not satisfy everyone. As we have seen, the decision to adopt a truth and justice mechanism (or mechanisms), the defining mandate and scope for the process and its eventual impact are subject to great variation across the world. Despite this variation, however, the record shows that countries continue to embrace truth and justice mechanisms of some kind as they seek to redress past wrongs. As countries such as those that comprise the Arab Spring (or the notable case of Burma) undergo remarkable and dramatic political change, the ensuing years will involve these societies coming to terms with their past, building a new future that recognizes that past and finding some way to prevent atrocities from ever happening again.

SUGGESTIONS FOR FURTHER READING

- Cesarini, Paola (2009) 'Transitional Justice', in Todd Landman and Neil Robinson (eds), *Sage Handbook of Comparative Politics*, pp. 497–521.
- Hayner, P. B. (2002) *Unspeakable Truths: Facing the Challenge of Truth Commissions*, London: Routledge.
- Olsen, Tricia D., Payne, Leigh A. and Reiter, Andrew G. (2010) *Transitional Justice in the Balance: Comparing Processes, Weighing Efficacy*. Washington, DC: United States Institute for Peace.
- Sikkink, Kathrin (2011) *Justice Cascade: How Human Rights Prosecutions are Changing World Politics*. New York: Norton.

Notes

- 1 See http://www.ohchr.org/Documents/Countries/NHRI/Chart_Status_NIs.pdf, accessed on 25 May 2012.
- 2 Full report available here: <http://www.hrw.org/reports/2011/12/01/adding-insult-injury-0>, accessed 28 May 2012.