22

Transitional Justice

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Chapter Contents

Reader's Guide

In the months and years after atrocities such as genocide, disappearances, torture, civil conflict, and other gross violations of human rights have taken place, states are left with a puzzling and often difficult question: what to do with the perpetrators of such acts of violence? Such conflict leaves physical scars, evident in the destruction of hospitals and schools, for example. But it also leaves deep and lasting social scars. Transitional justice considers the social implications of this kind of brutal conflict. It is concerned with how to rebuild societies in the period after human rights violations, as well as with how such societies, and individuals within those societies, should be held to account for their actions. It is this past violation of human rights that forms the basis of transitional justice, and is the impetus that pushes the processes of transitional justice forward. How to deal appropriately with these kinds of past human rights violations makes the processes of transitional justice quite controversial.

Introduction

The idea that states can and should deal with the perpetrators of violent crime during a period of civil conflict, or repressive or authoritarian rule, is relatively new. For many years, leaders of rebel groups and states were simply left alone, without consideration of punishment or having to 'pay' for their deeds. Tyrants, such as Idi Amin of Uganda or Jean-Claude 'Baby Doc' Duvalier of Haiti simply left their own countries, moved to countries that were willing to house them, and faded into obscurity. It was only in the 1990s that scholars and practitioners began to sort out how to deal with their violent histories.

At that time, of course, there were many situations of violence and conflict under way, or just ending (see Box 22.1). Private property had been confiscated and secret government files maintained in former Soviet-bloc countries in Eastern Europe. The **genocides** of Rwanda and Bosnia were taking place. Bloody civil conflicts continued in countries such as Somalia, Sierra Leone, Liberia, Haiti, and Guatemala. Yet the perpetrators of even the most egregious human rights violations went free.

It was becoming clear that someone should be made to answer for such horrible crimes. Still, just who should be held to account, and for what, posed a dilemma. Should every single person who had committed a crime be punished and sent to jail? Should only the 'big fish', officials and officers of the former regime, be brought to trial? Or should those lower down the chain of command, the 'small fry', also be tried? Who should carry out such prosecutions? Should governments and their bureaucracies be 'purged' of officials who had helped to carry out such awful acts? How should victims be rehabilitated for the abuses and injuries, both emotional and physical, that they had suffered? Should victims themselves be acknowledged for their suffering? **Transitional justice**, as it has come to be called, deals with all of these questions, and more.

These issues are intrinsically linked with the study of human rights for several reasons. First, the mechanisms of transitional justice deal explicitly with the gross human rights violations that have been committed. Second, transitional justice is an important tool for ending the cycle of **impunity**, and the kind of immunity from prosecution that is prevalent in states where the history of human rights abuses is in the not-so-distant past; justice itself is deeply related to human rights. Third, the mechanisms being utilized in the pursuit of transitional justice are increasingly established, sanctioned, or funded by parts of the United Nations—the main international organ concerned with the protection of human rights.

Transitional justice is also deeply intertwined with the principle of **universality**. In their ideal form, transitional justice mechanisms deal with all individuals equally in giving them an opportunity to participate. In its embrace of the values of universalism, transitional justice works to restore individuals back to their rightful place in society. And insofar as transitional justice also seeks to promote human rights, universality is also a central tenet.

The task, therefore, that confronts societies aiming towards transition from authoritarian or repressive regimes to democracy, or from conflict to peace, is daunting. Where to start? Obviously, changes need to take place in virtually every sector, and at virtually every level. Often, reforms are required in sectors including security, economics, healthcare, education, and infrastructure. Transitional justice focuses specifically on reforms to the justice sector, working towards the re-establishment of the rule of law and assisting in the rebuilding of the system of courts that is required in a functioning, democratic society.

Even so, it can be difficult for transitional societies to come to an agreement about just what this means, or how it will be carried out. One worry, of course, is that decisions about who should be punished will be made by the victorious party, and will not necessarily address the concerns of the population as a whole. In post-apartheid South Africa, for example, white supporters of the defeated National Party worried that they would be attacked by the newly victorious (and mostly black) African National Congress. A second worry is that, in the negotiation of peace settlements, or the handing over of power from one regime to the

BOX 22.1 WHAT ARE SOME SITUATIONS THAT COULD BENEFIT FROM MECHANISMS OF TRANSITIONAL JUSTICE?

- Genocide
- Civil conflict
- Racism
- Forced slavery
- Community violence
- Man-made famine
- Gross violations of human rights

BOX 22.2 THREE DIFFERENT APPROACHES TO TRANSITIONAL JUSTICE

Retributive Justice

Goal: to correct the perpetrator by means of prosecution and punishment.
Usual mechanisms: trials, tribunals.
Sample case: Cambodia: Extraordinary Chambers in the Courts of Cambodia established in 2001 by the Cambodian National Assembly to create a court to try serious crimes committed during the Khmer Rouge regime, 1975–9.

Restorative Justice

Goal: to restore the dignity of the victim; to restore the perpetrator back into society.
Usual mechanisms: truth commissions, healing circles.
Sample case: Guatemala: Commission for Historical Clarification (*Comisión para el Esclarecimiento Histórico*) established in 1994, during negotiations between the Guatemalan Government and leftist rebels under the Oslo Accord process, which ended more than thirty-five years of violence.

Reparative Justice

Goal: to repair the injury suffered by victims.
Usual mechanisms: restitution, apology.
Sample case: United States: $20,000 was awarded by Congress in 1988 to each American of Japanese ancestry who had been forcibly removed and detained in internment camps located throughout the country during the Second World War.

Adapted from Minow (1998).

next, the perpetrators of heinous crimes will be given some kind of **amnesty**, or immunity from prosecution. In Chile, for example, General Pinochet simply granted himself and his accomplices lifetime immunity, insulating himself and them from possible criminal charges. Third, the capacity of the legal system may have been badly compromised during the conflict, and/or may find itself unable to cope with the large numbers of prosecutions that will be required. More than 120,000 people were identified as perpetrators of the Rwandan genocide, for example, which placed an enormous burden on the court system there; it was estimated that it would take nearly 180 years to prosecute all of them. And in Cambodia, the court system was weak to begin with. It has been reported that more than 80 per cent of judges there did not hold law degrees, and many of those had never received formal education at all, let alone legal training.

No one solution will ever be acceptable to everyone. For victims of heinous crimes, no remedy can ever be enough. No court sentence can restore a missing limb. No amount of money will bring back a dead child. Similarly, for perpetrators—such as Nazi officers—whose actions were taken in an environment that condoned, rather than condemned, them, it may be difficult for society to try them. Still, common morality dictates that something must be done.

As the idea of coming to terms with past abuses has unfolded into practical application, different ways of dealing with both victims and perpetrators have developed (see Box 22.2). The types of mechanisms that states adopt tend to reflect the circumstances that arise from the particular crimes committed, and the social and political conditions that follow. They also correspond to particular ideas about how and why justice must be done, and must be seen to be done. Martha Minow (1998) has characterized these approaches as three distinct *paradigms* (philosophical or theoretical frameworks): retributive, restorative, and reparative justice. This typology is useful as a means of both explaining and understanding the different ways of approaching transitional justice.

Retributive Justice

Retributive justice is the kind of 'justice' that those in the 'West' are used to thinking about. In this paradigm, justice equates with legal prosecutions and the rule of law. This includes the kinds of court proceedings and sentencing that are common throughout much of the world today, all of which are based on the notion of retribution or punishment for crimes committed. Typically, a trial involves a person charged with the commission of a crime being brought before an arbitrator, if not a panel of his peers, whereupon his guilt and subsequent penalty are determined.

The rationale behind retributive justice is at least fourfold. First, if a person has done something wrong, those actions need to be publicly acknowledged. During the process of a trial, details about specific crimes committed are openly discussed, often being revealed for the first time. Second, a perpetrator needs to be punished for his actions. The objective of punishment is both to remove the perpetrator from the circumstances in which he committed the crime and to rehabilitate him before his release into the community. Third, by disciplining someone for his actions, there is a wider, educative effect for the public. That is, if others see that someone is being punished for committing particular crimes, they will be deterred from committing the same crimes. And fourth, the ability to conduct a trial demonstrates and reinforces that the justice system is both capable of carrying out retributive actions and is viable as an institution. If a trial takes place, it must be the case that the justice system is fully functioning, and able to transmit the full authority of the law of the land.

National Trials

And so, a number of societies in transition have opted to utilize mechanisms of retributive justice, mostly in the form of trials, to deal with the perpetrators of past crimes. In most parts of the world, this is the remedy that would be expected. Under normal circumstances, in fact, it is the main forum for such resolution.

Such was the case in Greece, which experienced a *coup d'état* (violent overthrow) by a military *junta* (pronounced HOON-ta) in April 1967. The constitution was suspended and martial law was declared. In 1973, thousands of students were arrested, injured, or killed in a

BOX 22.3 TIMELINE OF MODERN INTERNATIONAL MECHANISMS OF TRANSITIONAL JUSTICE

1945 *Nuremberg Trials* established by victorious Allies in post-War Germany

- Tribunal located in Nuremberg, Germany.
- Four justices and four alternates from the four Allied countries adjudicated cases.
- Charges of crimes against peace, crimes against humanity—crimes that did not exist at the time of commission.
- More than 200 Nazi officials tried, excluding most senior decision makers.

1946 *Tokyo Trial* established by victorious Allies in post-War Japan

- Tribunal located in Tokyo, Japan.
- Eleven justices from ten countries adjudicated cases.
- Charges of crimes against peace, crimes against humanity, and conventional war crimes.
- Twenty-eight top Japanese officials tried.

1993 *International Criminal Tribunal for the Former Yugoslavia* (ICTY) established by the UN Security Council to try top officials from the conflict in the Balkans

- Tribunal located in The Hague, Netherlands.
- Sixteen justices elected to four-year terms by the UN General Assembly, and twelve *ad litem* justices (appointed only for specific cases) adjudicated cases.
- Charges included grave breaches of Geneva Conventions and Protocols, violations of laws of war, genocide, and crimes against humanity.
- Most 'big fish' eluded capture and escaped prosecution.
- Tribunal intended as ad hoc or temporary, to be disbanded when mandate met.

2002 *Special Court for Sierra Leone* (SCSL) established between the United Nations and Sierra Leone as the first hybrid national/international tribunal to try criminals from Sierra Leone's brutal civil war

- Tribunal located in Freetown, Sierra Leone (except Charles Taylor, who was tried in The Hague under SCSL auspices).
- Eleven judges appointed from ten countries, from across Africa and the West.
- Charges included war crimes and crimes against humanity committed in Sierra Leone.
- 'Big fish' including Charles Taylor charged, detained, and tried.

2002 *International Criminal Court* (ICC) established by states parties to the Rome Statute

- Tribunal located in The Hague, Netherlands.
- Eighteen justices elected from Assembly of States Parties adjudicated cases.
- Charges included crimes of aggression, genocide, and war crimes.[1]
- ICC intended as permanent tribunal.

violent protest at the Athens Polytechnic. And in 1974, the military dictatorship invaded the island of Cyprus, launching a bloody coup against its population. In a series of trials held throughout 1975, dealing with the dictatorship in its entirety, more than 150 top officials were tried and punished for crimes including torture, assassinations, and the unlawful suspension of the constitution. Many thousands of others were stripped of governmental and administrative positions—an attempt to 'dejuntify' the country in the aftermath of the coup.

International Justice

Sometimes, however, the national court system is unwilling to carry out these kinds of prosecutions. Furthermore, it may be unable to do so. In these cases, the international community has stepped in to assist with these prosecutions. Such trials began with the post-War **Nuremberg Trials** and Tokyo Tribunal, which were appointed to deal with Nazi war crimes and the crimes of Japanese officials. Thus began the development of the system of international criminal law (see Box 22.3). Previously, any and all laws had existed only at the national/state level (see Chapter 4).

It was several decades, however, until further international criminal legal avenues were pursued. The international community showed little interest in the prosecution of perpetrators of mass atrocities, genocide, and **war crimes**. In the 1990s, several international courts and tribunals were established, in conjunction with the United Nations Security Council. These included the **International Criminal Tribunal for the Former Yugoslavia** (ICTY) and the **International Criminal Tribunal for Rwanda** (ICTR), both established on an ad hoc (single-purpose) basis to try cases pertaining to the genocides, war crimes, and other atrocities that took place in those countries. Most recently, the **International Criminal Court** (ICC), a permanent court with more or less international jurisdiction, was established to try individuals for war crimes, crimes against humanity, and genocide (see Box 22.4).

One other option in the international arena is that various states can step in and conduct trials of people who have committed criminal acts in another country. Such cases are tried under the international legal principle of **universal jurisdiction**, which, until the late 1990s, had rarely been used. Universal jurisdiction is claimed on the grounds that the crime committed is considered to be a crime against all, and therefore any state may claim criminal jurisdiction. The idea, then, is that people who have committed crimes may be tried in a country other than their own, regardless of nationality, country of residence, or any other relation with the prosecuting country, even though their crimes have been committed outside the boundaries of the prosecuting state.

The case of Rwanda illustrates how retributive justice can be applied by the international community when a state itself is unwilling or unable to prosecute those responsible for criminal violations. Between early April and mid-July 1994, a genocide was carried out in Rwanda in which more than 800,000 mostly Tutsi Rwandan citizens were brutally murdered by mostly Hutu citizens (see Chapter 20). When the genocide came to an end, more than 120,000 Rwandans stood accused of the commission of these crimes. The justice system, as it then existed, was simply unable to deal with such an

BOX 22.4 CHALLENGING ASSUMPTIONS: THE INTERNATIONAL CRIMINAL COURT

To date, the International Criminal Court has only taken up the prosecution of cases from the continent of Africa—although the Court has carried out preliminary examinations of situations in a number of other states outside Africa, including Afghanistan, Colombia, Georgia, Honduras, Iraq, Ukraine, and Palestine. This has led to charges of bias against the Court, as well as a deep distrust of the Court by a number of African states, who accuse it of being a court for policing Africa.

However, the very reason for the existence of the Court holds an important clue as to the reason for this: the Court is intended for the prosecution of the most serious cases of human rights abuses where the state that has jurisdiction over it is 'unwilling or unable genuinely to carry out the investigation or prosecution' (Rome Statute Art.17.a) of those crimes. In the case of states like Uganda, Democratic Republic of Congo, and Darfur, Sudan, the states themselves have indicated that they are either unwilling or unable to prosecute those who have committed serious crimes.

One other reason must also be considered: courts can only successfully prosecute situations in which clear evidence exists of the crimes that have been committed. Without this evidence, it is much harder to secure convictions. And like any court, the International Criminal Court must have clear evidence. The crimes that have been committed in various African situations, such as in the case of Jean-Pierre Bemba, who was ultimately convicted of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities in the context of an armed conflict, reflect the availability of clear evidence that is used in successful prosecutions.

extreme number of cases. Two separate international mechanisms, along with an intricate national system of ***gacaca* courts** (pronounced ga-CHA-cha), were established to try those accused. We will describe the international mechanisms in the following sections.

International Trials: Tribunals

The International Criminal Tribunal for Rwanda was established by the United Nations Security Council in 1994, to prosecute those responsible for genocide and other serious breaches of international humanitarian law committed in the territory of Rwanda in 1994. The international community recognized the need to strengthen the rule of law, and to demonstrate that it had held at least the 'big fish' responsible, in an attempt to show other leaders around the world that they could not get away with such crimes. The idea behind the court was that it would try a finite number of cases and then be disbanded, which happened in late 2015. A similar court was appointed for the Former Yugoslavia in 1993.

International Trials: Universal Jurisdiction

The second international mechanism being used in pursuit of retributive justice for crimes committed during the Rwandan genocide is the trial of *génocidaires* by courts of, and located in, other countries, using the principle of universal jurisdiction. Belgium was the first country to try Rwandan *génocidaires* in its civilian courts, based on a law of universal jurisdiction passed in 1993. In 2001, four Rwandans were charged, convicted, and sentenced under the Belgian criminal justice system for crimes that they had committed in Rwanda. Canada, France, and Switzerland have also tried Rwandan genocide cases. Many other states are reluctant to do so.

Restorative Justice

Restorative justice may be a foreign concept to those who have grown up with the idea of retributive justice described above. In this paradigm, justice is about restoring both the victim and perpetrator of crimes back into harmony with the community. Restorative processes always seek to dignify and empower victims. And so, unlike retributive mechanisms such as court cases, which tend to focus only on the perpetrator, victims often play a central role in restorative processes. Ideally, the victim is also empowered through restorative processes. The wider community, too, is often a participant in restorative processes.

Restorative justice can take many forms. A number of these are, and have been, actively used in the West and elsewhere, either instead of, or alongside, retributive mechanisms. In New Zealand, Family Group Conferences, based on traditional Maori principles, including teaching, settlement, and community restoration, are used in conjunction with the court system. In many parts of Canada, aboriginal communities use healing circles instead of the courts to deal with community members who have committed crimes against the community. Ceremonies to 'cool the heart[s]' of former child soldiers on their return to their home communities in Sierra Leone are commonplace.

Truth Commissions

In pursuit of justice in transitional communities, one of the most commonly used restorative mechanisms has been the **truth commission**. Truth commissions are bodies established to look at widespread human rights violations that took place during a specified period of time, on a temporary basis, by the state, often in conjunction with opposition forces and/

KEY POINTS

Retributive justice generally involves the indictment, trial, and punishment of the perpetrators of crimes.

Trials for the perpetrators of crimes may be carried out by national courts.

Retributive justice may also be carried out by international tribunals.

Courts around the world have begun to try the perpetrators of crimes in other countries under the principle of international law known as *universal jurisdiction*.

Critical Thinking Questions:

Who should be held accountable for gross violations of human rights—only the masterminds of the crimes, or also the low-ranking soldiers who carried them out?

Is there moral value in imprisoning people found guilty of these crimes?

or the involvement of the international community. While no two truth commissions ever look or function in exactly the same way, their aim, generally, is to inquire into past events (see Box 22.5). Often, the inquiry includes the collection of details from victims by means of questionnaires, and sometimes by public testimony. For the most part, each truth commission also produces a report that contains detailed or summary accounts of exactly what has taken place. In most cases, these reports are widely publicized. In Argentina, for example, the report published by the National Commission on the Disappeared, entitled *Nunca Más* (*Never Again*), became one of the best-selling books of all time in that country. There have been more than thirty truth commissions established around the world since 1974. The majority of these have been held in Africa and Latin America, although commissions have also been established in Asia and Europe.

The benefits of truth commissions over retributive mechanisms have been hotly debated. First, truth commissions have a much broader focus than trials. While the scope of a trial is often limited to the actions of one perpetrator, truth commissions focus on widespread abuses perpetrated by any number of individuals and on the suffering endured by hundreds, or more likely thousands, of victims. Second, truth commissions can have an educative effect through the broadcasting of public hearings and testimony or through the publication and dissemination of the final report. Such measures might be the first opportunity that people have to hear about what happened in their own country. Third, truth commissions are not a 'one-size-fits-all' approach. Truth commissions may choose to focus on truth or they may choose to focus on reconciliation, as identified by the people of a particular country. They are also able to tailor their activities to suit the circumstances of the particular country in which they operate. Fourth, truth commissions are often seen as a less costly alternative to retributive approaches. For example, because truth commissions

BOX 22.5 WHERE HAVE TRUTH COMMISSIONS BEEN ESTABLISHED?

Uganda	Commission of Inquiry into the Disappearance of People in Uganda since 25 January 1971 (1974)
Argentina	*Comisión Nacional para ka Desaparición de Personas* (1983–4)
	(National Commission on the Disappearance of Persons)
Chile	*Comisión Nacional para la Verdad y Reconciliación* (1990–1)
	(National Commission on Truth and Reconciliation)
South Africa	Truth and Reconciliation Commission (1995–2000)
Guatemala	*Comisión para el Esclarecimiento Histórico* (1997–9)
	(Commission for Historical Clarification)
Sierra Leone	Truth and Reconciliation Commission (2000–4)
Peru	*Comisión de la Verdad y Reconciliación* (2003)
	(Truth and Reconciliation Commission)
Morocco	*Instance Équité et Réconciliation* (2004–5)
	(Fairness and Reconciliation Commission)
Ghana	National Reconciliation Commission (2004–5)
Kenya	Truth, Justice and Reconciliation Commission (2008–13)
Canada	Indian Residential Schools Truth and Reconciliation Commission (2007–)
Tunisia	Truth and Dignity Commission (2014–)

This is not an exhaustive list, but shows selected truth commissions.

require far less in terms of infrastructure, personnel, and other expenses generally associated with a trial, their expenses are considerably lower. The South African Truth and Reconciliation Commission, for instance, had a total budget, for all five years of its operation, of 196 million Rand (approximately US$25 million)—a substantially smaller sum than the ICTR, as we have discussed.

National Implementation

Truth commissions are generally established and run by the *national government*, as happened in Chile. In 1973, the Government of democratically elected President Allende was overthrown by General Augusto Pinochet in a brutal and repressive military coup. More than 3,000 people were killed, and many more were injured. When the subsequent Government came to power in 1990, a truth commission was established. The *Comisión Nacional para la Verdad y Reconciliación* (National Commission on Truth and Reconciliation) worked for a period of nine months. During that time, the Commission received evidence from victims and their families in 3,400 cases, considered this evidence, and finally prepared a report. Testimony was heard, evidence gathered, and decisions made; in the end, all of the evidence was referred to the courts, except for the testimony of those who had been granted a blanket amnesty.

International Involvement

In other cases, however, truth commissions are implemented and/or run by the *international community*. The involvement of the international community may come as a result of one factor or a combination of several factors. First, the national government may be too fragile to carry out such investigations on its own. The involvement of the international community gives legitimacy to the national regime, and the support that the international community can provide often strengthens the process immeasurably. Second, the financial resources of the national government may be too depleted for it to be able to carry out a truth commission on its own. Third, other resources in society, including members of the judicial community, or basic infrastructure needs, may be similarly depleted. The international community can provide for these needs. Fourth, there is enormous expertise in matters concerning truth commissions in the international community that may be lacking at the national level. The inclusion of personnel from the international community can provide such expertise. Finally, the conditions to bring about the truth commission may have been negotiated between opposing parties under international supervision. The presence of members of the international community can keep disagreements between rival parties that are meant to be working together on the truth commission from flaring up and derailing the process.

The international community was very much integrated in the Haitian truth commission. President Jean-Bertrand Aristide was elected President of Haiti in 1990, but he was forced into exile in 1991 when a coup led by Raoul Cédras erupted. From 1991 to 1994, the military regime waged a campaign of torture against Aristide's supporters. In October 1994, after the US brokered an agreement between Aristide and Cédras, Aristide was returned to power, and appointed the *Commission nationale de vérité et de justice* (National Commission of Truth and Justice) in 1995. The idea for a Haitian truth commission and much of the work towards it was initiated and influenced by the Haitian diaspora community abroad. The Haitian commission was carried out by the Organization of American States (OAS) and the United Nations Permanent Mission to Haiti (*International Civilian Mission in Haiti*). In the end, four of the appointed commissioners were Haitian nationals, all of whom had been living in exile at the time of the violence. The three others were representatives of the international community, from Bahamas, Barbados, and Senegal. The Commission presented its final report in December 1995, as Aristide was again forced out of power—this time because of the terms of the Constitution.

KEY POINTS

Truth commissions are implemented and run by the international community in conjunction with, or in support of, the national government.

Critical Thinking Questions:

If no one is ever punished, can victims really feel like justice has been done?

Is it possible to restore communities back into harmony? How might the mechanisms discussed here help, or hinder, this effort?

Reparative Justice

Reparative justice is a different kind of justice again from either retributive or restorative justice. The reparative paradigm is concerned with making right the things that went wrong. At its root is the idea of repair. The goal, therefore, is to provide a remedy for the suffering and loss that have occurred.

Apology

Reparative justice can take place in one of two ways, or it can contain a mixture of both. The first method of repairing the past is by issuing an *apology*. That is, the perpetrator himself can simply say sorry for what has taken place. Or, if sufficient time has passed that the perpetrator is no longer able to apologize—for instance, if generations have passed since the abuses were carried out and the perpetrator has died—then a representative of the perpetrator may apologize on his behalf. The Government of Canada, for example, apologized in 1992 for the hanging of Métis leader Louis Riel in 1885 for his role in the Northwest Rebellion. None of the elected officials who had been responsible for the decision to hang Riel in 1885 were still alive. Yet the modern-day Government took the initiative, as representatives of that regime, to issue a formal apology for the previous Government's actions.

The benefits of an apology are many. First, the wrong that the victim has suffered is acknowledged by the perpetrator. This kind of acknowledgement—publicly admitting to and accepting a knowledge of the events that have taken place—can allow the victim to move forward, and to begin to 'let go' of the wrong she has suffered. Second, and closely related to the first, is that an apology can lessen the bitterness that the victim feels. This is not to say that she will necessarily become suddenly freed of the loss, or will forget it entirely. Rather, an apology can reduce feelings of anger and hurt. Third, the victim may feel a sense of vindication at being recognized, finally, as being right. Fourth, the trauma of the incident may also be diminished.

Obviously, the hurts that a victim feels will not magically disappear simply because an apology is made. This is particularly the case if the victim feels that the apology is in any way insincere, or if she feels that the apology giver does not have the authority to issue a meaningful apology. An apology is not a panacea. But it does go some way towards repairing the damage that has been inflicted.

For example, the Government of Australia offered an apology for past wrongs to the Aboriginal people who live there. Between 1915 and 1969, thousands of Aboriginal children were forcibly removed from their parents and given to white families or institutions to raise. As a lasting outcome, Aboriginal people in Australia remain the country's poorest and most disadvantaged group. An inquiry into these policies was held in 1997, and a report was released. The following year, a National Sorry Day was instituted, to acknowledge the wrong that had been done. In 2008, the new Prime Minister, Kevin Rudd, issued a formal apology. The apology was issued instead of the billion-dollar nationwide compensation package that Aboriginal campaigners had been calling for.

Restitution

The second method of repair is **restitution**. Restitution can be defined as a token paid in compensation for loss or injury. The idea behind this kind of compensation is similar to the awards offered by civil courts when, for example, a child is killed through an act of negligence. No one can be sure what that child's life might have been worth, yet a sum of money is awarded as payment or repair for the harm that was caused. This is the kind of repair that the Aboriginal community in Australia had been calling for.

To be sure, the idea of compensation is not completely adequate. No amount of money can ever fully compensate someone for loss or damage suffered, and no 'wrong' can be righted with the payment of money. Yet restitution has been utilized by a number of countries in an attempt to right the wrongs that were perpetrated. In Canada, for example, after the attack on Pearl Harbor in 1941, more than 20,000 Canadian citizens of Japanese ancestry, many of whom had lived in Canada for several generations and had Canadian citizenship, were suspected of aiding Japanese authorities in military espionage activities. These Canadian citizens were placed in internment camps, and many of the men were taken to work camps; and homes, fishing boats, and other property were seized by the Government and sold without the permission of their rightful owners. At the end of the war, in 1945, these Canadians of Japanese ancestry were released from the camps, but were banned for the next five years from living near the coast. They were unable to reclaim much of their property. In 1950, the Bird Commission awarded $1.3 million in claims to 1,434 Japanese Canadians, based solely on claims for lost property. More than half a century later, in 1988, the Government awarded CAD$21,000 to each Canadian of Japanese ancestry who had been interned, under the *Japanese Canadian Redress Agreement*.

KEY POINTS

Reparative justice focuses on repairing suffering and loss.

One key method of bringing about reparation is by issuing an apology.

Another way of effecting reparation is by awarding compensation or restitution.

Critical Thinking Questions:

If restitution is purely symbolic, can any amount of money ever be sufficient?

Can an apology serve 'justice' needs?

Putting Transitional Justice into Practice

These three paradigms of transitional justice represent three different visions of how a society can and should be rebuilt in a period of transition. Retributive justice focuses on holding perpetrators of crimes accountable for their actions. Restorative justice focuses on uncovering the truth about past crimes, focusing not only on the perpetrators but also on the victims of criminal activities. Reparative justice focuses on making things right, whether by means of an apology, or by giving a token amount of money, or by replacing what was lost. It is clear that there are both benefits and shortcomings to each of these approaches.

The number of mechanisms employed in the pursuit of transitional justice has grown considerably since the mid-1980s. And with every new attempt, knowledge about how best to carry out such efforts has grown too. Lessons can be learned from past attempts that can inform how new mechanisms will be set up.

In 2004, then-United Nations Secretary General Kofi Annan addressed the subject of transitional justice. One of the things that he stressed the most was the need for these mechanisms to work together:

> The international community must see transitional justice in a way that extends well beyond courts and tribunals. The challenges of post-conflict environments necessitate an approach that balances a variety of goals, including the pursuit of accountability, truth and reparation, the preservation of peace and the building of democracy and the rule of law … Where transitional justice is required, strategies must be holistic, incorporating integrated attention to individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or an appropriately conceived combination thereof. The United Nations must consider through advance planning and consultation how different transitional justice mechanisms will interact to ensure that they do not conflict with one another. It is now generally recognized, for example, that truth commissions can positively complement criminal tribunals.
>
> (UN Secretary General, 2004, p. 9)

Indeed, a number of transitional justice mechanisms have been established with just this in mind. One of the biggest needs is for some combination of all the objectives of the three different paradigms (retributive, restorative, reparative) to be fulfilled. In some cases, one mechanism can fulfil more than one of these objectives on its own. The South African Truth and Reconciliation Commission, for example, was established with three distinct objectives, reflected in the three different committees into which it was divided: gross violations of human rights, amnesty, and reparations.

In other cases, more than one mechanism must be employed in order to satisfy the objectives of the three paradigms. For example, in Sierra Leone, the Truth and Reconciliation Commission and the Special Court for Sierra Leone were established, and ran, concurrently. While this caused practical problems, such as the sharing of evidence and sheer amount of resources and capital required to carry out both projects simultaneously, the various needs of the population could be more adequately addressed in this way.

However it works, in the aftermath of violent conflict and human rights abuses, societies in transition have a real need to overcome the social implications of past conflict. Obviously, not every situation will require the same kind of solution. Moreover, not every society will have the same ideas about what must be done. But it is the case that reforms in the justice sector can go a long way towards helping societies to move forwards. And these reforms help, overall, to strengthen a country's chances at a successful

BOX 22.6 ALTERNATIVE POINTS OF VIEW: SOCIO-ECONOMIC JUSTICE

Transitional justice mainly deals with civil and political rights. Claims have emerged that economic, social, and cultural rights should also be considered, whether as a means of providing development or as a means of redress. Scholars like Rama Mani argue that the liberal goals of promoting democracy and legal justice exclude broader 'social injustices and patterns of structural violence that may have been the underlying causes of conflict … [including] practices of discrimination, exclusion and marginalization targeting certain groups or communities' (Mani, 2008, p. 254). The mainstream literature has thus far resisted their inclusion, arguing that courts and other mechanisms are ill-equipped to deal with these types of crimes. Some truth commissions, though, have included some socio-economic crimes in their mandates.

transition towards peace and democracy. (See Box 22.6 for a discussion of claims that economic, social, and cultural rights should also be considered in transitional justice.)

KEY POINTS

The number of mechanisms of transitional justice at work has grown.

Mechanisms can work alone or in tandem.

Where more than one mechanism is in use, they must work together.

Critical Thinking Question:

Is the proliferation of transitional justice mechanisms a sign of progress?

Case Study: Uganda

The country of Uganda has experienced a high level of human rights abuses at the hands of the state since its independence from Britain in 1962. From 1971 onwards, the country experienced a series of coups, which culminated in a concentration of power in the head of state. Under Milton Obote, the country's first post-colonial prime minister, a number of groups carried out riots and armed attacks in protest against his accession to power (Berg-Schlosser and Siegler, 1990, p. 196).

In 1971, Obote was overthrown by his top general, Idi Amin, who carried out a systematic reign of terror, murdering anyone he considered to stand in his way (Wright, 1996, p. 306). The military and paramilitary mechanisms of the state conducted brutal campaigns of torture (Khiddu-Makubuya, 1989, pp. 141–57). It is conservatively estimated that between 300,000 and 500,000 people were killed during this period (Briggs, 1998, p. 23). In 1979, Amin's forces were defeated by forces including those of Obote, of future president Yoweri Museveni, and of neighbouring Tanzania. Amin fled to exile in Libya (Ofcansky, 1996, p. 47). Interim Governments were appointed in 1979 and 1980.

As the result of rigged elections in 1980, Obote returned to power. He remained until 1985, when he was again overthrown by a faction of the Ugandan military. During this period, human rights abuses skyrocketed as the paramilitary forces of the state carried out campaigns of torture, rape, and rampant looting (Khiddu-Makubuya, 1989, p. 153). It is estimated that approximately 300,000 (*Uganda*, 1998, p. 53) to 500,000[2] people were killed, many of them within a small geographic area known as the Luweero Triangle. Obote fled into exile in Zambia (Museveni, 1997, p. 166). A military council ruled for six months, until it, too, was overthrown.

The current President, Yoweri Museveni, and the National Resistance Army (NRA; now National Resistance Movement (NRM)) seized power by means of military force in January 1986. He, too, has ruled with an iron fist. As with his predecessors, Museveni has faced considerable opposition from many of the fifty-six different ethnic groups throughout the country. Between 1986 and 2008, Museveni faced more than twenty-seven armed insurgencies.[3]

One of the most violent was carried out by the Lord's Resistance Army (LRA), a rebel group led by Joseph Kony. The LRA perpetrated thousands of human rights abuses against the population of northern Uganda in its bid to defeat Museveni and take control of the country. Their fighting spilled over to areas including the greater north and east of the country. An estimated 30,000 children were abducted for use as child soldiers and sex slaves. Many thousands of women were raped and gang-raped. And thousands of others were tortured, many with lips, noses, and ears sliced off. Over the years, at least 1.8 million people, representing 80 per cent of the population of northern Uganda, were forced to flee to camps for **internally displaced persons** (IDPs)—and many were in the camps for twenty years or more. The fighting and rebel raids tapered off during periods when peace talks were taking place, and at other times were increasingly violent. One study reported that 79 per cent of community members said they had witnessed torture, 40 per cent had witnessed killing, and 5 per cent had been forced to physically harm another (T. Allen, 2005b, p. 25).

This conflict, although distinct from many of the other conflicts that have taken place, is in many ways representative of the manner in which discord has manifested itself in the country. The scope of abuse, and the devastation of communities, is similar to many of the other conflicts that have seized Uganda. And so Uganda finds itself beleaguered by conflict, with many of the resulting problems untreated and questions unanswered—even though it has attempted, at different times and in different ways, to deal with the perpetrators of such conflicts.

Truth Commission

When Museveni and the NRM came to power in 1986, one of their programmes involved the creation of a truth commission. The role of the 1986 Commission was to inquire into 'the causes and circumstances' surrounding mass murders, arbitrary arrests, the role of law enforcement agents and the state security agencies, and discrimination that occurred between 1962 and January 1986, when Museveni and the NRM assumed power. It was also meant to suggest ways of preventing such abuses from reoccurring (Republic of Uganda, 1994, pp. 3–4). The Commission was expected to determine the role of various state institutions in both perpetrating and hiding gross human rights violations. It collected testimony from thousands of victims and witnesses, and in the end 608 witnesses appeared before the Commissioners at public hearings. Its final report is 720 pages in length.

In actuality, however, the Commission was able to accomplish very little. It faced a considerable number of constraints that ultimately proved its undoing. The Commission was beset by a number of institutional failures. These included a lack of capacity to carry out the kinds of investigations and referrals to prosecution that it was meant to have undertaken. Its mandate, for example, was simply too vast: to investigate *all* human rights abuses committed between 1962 and 1986 would have required many times more than that with which the Commission was invested. And there was a dearth of hard evidence, either because that evidence was never preserved, or because it went missing (whether innocently or nefariously) in the intervening years. The passing of time also affected the ability of witnesses to testify, as those who might have provided important information had either forgotten crucial details or died before the opportunity arose. Funding, too, was a problem for the Commission, since it was never adequately funded or resourced by the Government. This affected everything from the Commission's ability to pay the commissioners and other staff, to their need for basic items such as file folders, pens, and petrol. In the end, funding came from international non-governmental organizations (NGOs) to enable the Commission to complete its work and publish the final report. Similarly, the Commission suffered from a general lack of political will to galvanize the process. Most citizens were too sceptical of the process to become involved; these people, who had been abused at the hands of their Governments for the better part of forty years, were not in a position to trust that this government-initiated process might be beneficial for them. Likewise, the Government itself backed away from the work of the Commission almost before it started, and its officials, such as the Criminal Investigations Division and the Director of Public Prosecutions, which were supposed to have collected evidence and used it to prepare for prosecutions of perpetrators, failed to fulfil these responsibilities.

In the end, the work of the Commission was negligible. It touched only a marginal segment of the population in any real way. As a testament to the ineffectual performance of the Commission, all of its documents now reside in a locked, bug-infested closet, forgotten by everyone.

Amnesty Act

With the number of armed conflicts and the amount of bush warfare that has paralysed the country since 1962, it is not surprising that there are thousands of former rebel soldiers who could rightly face prosecution. This is especially relevant to the ongoing conflict in northern Uganda, in which thousands of people, including children, have been abducted into the rebel forces and made to commit heinous crimes. The people of Uganda, therefore, 'conceived [of an amnesty] as a tool for ending conflict … a significant step towards ending the conflict in the north and working towards a process of national reconciliation' (Hovil and Lomo, 2005, p. 6).

After a significant amount of persuasion of Government officials, particularly those in northern Uganda, in November 1999 the Government of Uganda passed an Amnesty Act, which was enacted in January 2000. The Act offers amnesty to anyone who has 'engaged in or is engaging in war or armed rebellion against the government of the Republic of Uganda' (Republic of Uganda, 2000, II.3.i). By 2006, the Amnesty Commission had received more than 20,000 applications for amnesty.

The people of Uganda are deeply divided as to whether those who have committed serious crimes should be punished for them. On the one hand, there is substantial support for the prosecution of those such as Joseph Kony, the leader of the LRA. There is little question among the population, particularly in the north, that Kony should simply go free. On the other hand, however, there is widespread concern that those who have been forced to commit such atrocities might also be held responsible—including those children and adults who were forcibly abducted by the LRA. For these, there is substantially less clarity about the issue of amnesty. Only one point garnered consensus: the conflict must be stopped.

> The Government of Uganda has waffled on the issue. Within the Parliament and the Presidential Palace, there is at best 'ambiguous support for the amnesty process: numerous informants questioned whether or not the government was really serious about the Amnesty. Indeed, since its enactment, the government has never presented a consistent position on the Amnesty … One elderly man in Kitgum articulated a commonly held view: "Parliament said [the Amnesty Act] was OK, but the president himself didn't want it. This is no secret." '
>
> (Hovil and Lomo, 2005, p. 18)

In April 2006, the Government passed the Amnesty Amendment Bill (2003) to enable the Minister of Internal Affairs, with Parliamentary approval, to prevent specific people, most notably the LRA, from being granted amnesty. In January 2012, the Amnesty Amendment Bill was challenged when ex-LRA commander Col. Thomas Kwoyelo was granted amnesty by the International Criminal Division of the High Court.

International Criminal Court

Another piece of the 'justice' puzzle in Uganda has come in the form of the International Criminal Court (ICC). In what has been seen as a further indication of Museveni's dissatisfaction with the Amnesty Act, he formally requested an investigation by the ICC into the actions of the Lord's Resistance Army in northern Uganda in December 2003. This cast a more ominous shadow over the existing amnesty process. The Chief Prosecutor issued warrants for the arrest of Joseph Kony and four other senior members of the LRA, making Uganda the first situation to be examined by the Court. Individually, each of the five warrants details the atrocities attributed to the LRA, and to each of the five men, including more than 2,200 killings and 3,200 abductions in over 820 attacks. Kony, for example, is charged with twelve counts of **crimes against humanity** and twenty-one counts of war crimes.

Yet here, too, opinion is divided. The same justice versus peace debate rages on regarding the role of the ICC. International agencies have, for the most part, been very supportive of the role played by the ICC. On the ground, however, sentiments are mixed. Many Ugandans see the ICC as a troublesome intruder that threatens to take away any chance that they have for peace and a resolution of the conflict through negotiation with the rebels, for Kony and his men are unlikely to surrender in the face of such daunting warrants. Others seem relieved for the international community, finally, to have become involved, when it has been clear that the Government of Uganda had no will to prosecute.

In early 2016, the situation of Uganda at the ICC was still active. None of the warrants had been executed. But in January 2015, one of the five, Dominic Ongwen, surrendered himself to US forces, whereupon he was surrendered to the ICC; at the time of writing, he was awaiting trial.

KEY POINTS

- Protracted civil conflict has plagued Uganda since 1962.
- Uganda's truth commission (1986–94) failed to acknowledge past events adequately.
- The Amnesty Act (2000) has been divisive, as people debate who should be punished, and how.
- The warrants issued by the International Criminal Court have been equally divisive.

Critical Thinking Questions:

Many argue that Uganda is still not in transition. Is it too soon for transitional justice?

Can there be too many mechanisms of transitional justice?

Conclusion

The case of Uganda aptly illustrates the difficulty that exists in putting into practice any form of 'justice' through the paradigms of retributive, restorative, and reparative justice, and resolving the social implications of prolonged violent conflict, as we have discussed. What seems, on paper, a reasonable solution to a difficult problem is often no match for the complexity of situations on the ground, or the complicated effects of human rights abuses. Scholars and practitioners of transitional justice are only now beginning to comprehend the manner in which such mechanisms can and should promote greater goals such as peace and democracy, and how these relate to and interact with other concurrent processes of transition, such as economic development, or the demobilization and disarmament of combatants, that are also likely to be under way.

The field of transitional justice is rife with debate about how these different paradigms fit together, and about how we can be sure they have succeeded or failed. Indeed, some have argued that without the rule of law, as demonstrated by a rigorous use of retributive mechanisms, there simply is no justice, and that the restorative and reparative paradigms are neither fully right nor adequate. Others claim that the latter two approaches are merely a second best option, sufficient for use only when all else fails. Yet many contend that each of these approaches is sufficient, in and of itself, to bring about the desired outcome: the rebuilding of a society after human rights violations.

What is clear is that the three paradigms, and the institutions that operate within them, aim towards the same goals. Their methods and rationale, of course, differ greatly. But, in the end, it is entirely possible that the paradigms are themselves concordant pieces of a holistic process of justice. In the years to come, as transitional justice is applied through all three of its paradigms, in different cases and at different times, it will become more apparent whether this is, in fact, the case.

QUESTIONS

Individual Study Questions

1. What is transitional justice?
2. What good does transitional justice serve?
3. How is universal jurisdiction useful?
4. How does restorative justice differ from retributive justice?
5. What is the value of a truth commission?

Group Discussion Questions

1. Should these three different types of justice always work alone?
2. Is there any benefit to a society as a whole in avoiding retributive punishment?
3. Is there a role for amnesty in encouraging societal participation in restorative processes?
4. What should the responsibility of government be in apology or restitution? Should there be a statute of limitations on this responsibility?
5. What kinds of developments in transitional societies would reflect some measure of 'success' of transitional justice mechanisms?
6. What issues in your own country warrant examination by the kinds of mechanisms outlined in this chapter?

FURTHER READING

Elster, J. (ed.) (2006). *Retribution and Reparation in the Transition to Democracy*. New York: Cambridge University Press.

Elster provides an in-depth treatment of a number of cases from the early stages of retroactive accountability for crimes of war that took place in the twentieth century. Elster also offers overviews of the history of the practice of transitional justice that neatly conceptualize the mechanisms and processes that are used.

Hayner, P. (2001). *Unspeakable Truths*. New York: Routledge.

Hayner deals with the need for and utility of truth commissions as a means of reckoning with past crimes. She provides a number of case studies, and a deep look at restorative justice.

Kritz, N. J. (ed.) (1995). *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*. Washington, DC: United States Institute of Peace Press.

Kritz's three volumes look at the nuts and bolts of transitional justice, from theory (Vol. 1) to country studies (Vol. 2) to legal documentation (Vol. 3).

Mani, R. (2008). Editorial: Dilemmas of Expanding Transitional Justice, or Forging the Nexus between Transitional Justice and Development. *International Journal of Transitional Justice*, **2**/3, 253–65.

Mani provides an alternative viewpoint, exploring the possibility for transitional justice to address socio-economic abuses, rather than just civil and political abuses.

Minow, M. (1998). *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*. Boston, MA: Beacon Press.

Minow unpacks the three paradigms of transitional justice, and presents a thoughtful discussion of the positive and negative impacts of each.

Parliament of Australia (2008). Apology to Australia's Indigenous peoples. *House Hansard*. 13 February. http://australia.gov.au/about-australia/our-country/our-people/apology-to-australias-indigenous-peoples

The full text of MP Kevin Rudd's apology to Australia's Indigenous population can be found here.

Quinn, J. and **Freeman, M.** (2003). Lessons learned: Practical lessons gleaned from inside the truth commissions of Guatemala and South Africa. *Human Rights Quarterly*, **25**/4, 1117-49.

Using primary documents and information obtained by staff from the truth commissions in South Africa and Guatemala, Quinn and Freeman discuss the practical difficulties encountered by truth commissions.

Rotberg, R. I. and **Thompson, D.** (eds) (2000). *Truth v. Justice*. Princeton, NJ: Princeton University Press.

Rotberg and Thompson provide a collection of essays that deal with the essential paradox that paralysed transitional justice in its early years: is truth more important than justice?

Stover, E. and **Weinstein, H. M.** (eds) (2004). *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*. Cambridge: Cambridge University Press.

The essays provided in this book edited by Stover and Weinstein examine various responses to atrocity in Rwanda and the former Yugoslavia.

WEB LINKS

http://www.icc-cpi.int The website of the International Criminal Court contains details of each of the cases presently before the Court, as well as documents including the Rome Statute.

http://www.ictj.org The International Center for Transitional Justice is an NGO that works in countries around the world, helping to develop transitional justice solutions in post-conflict societies.

http://ijtj.oxfordjournals.org/ *The International Journal of Transitional Justice* publishes academic articles dealing with the topic of transitional justice.

http://www.usip.org/ The website of the United States Institute of Peace has a collection of primary documents from a number of truth commissions.

NOTES

1. The Rome Statute of the International Criminal Court also specifies that the Court will try crimes of aggression. At the time of writing, however, such crimes remain undefined.
2. Confidential interview with Abdul Nadduli, District Commissioner, Luweero District, by the author on 17 November 2004, Luweero Town, Uganda.
3. These include rebellions by Action Restore Peace, Allied Democratic Forces, Apac Rebellion, Citizen Army for Multiparty Politics, Force Obote Back, Former Uganda National Army, Holy Spirit Movement, Lord's Army, Lord's Resistance Army, National Federal Army, National Union for the Liberation of Uganda, Ninth October Movement, People's Redemption Army, Uganda Christian Democratic Army, Uganda Federal Democratic Front, Uganda Freedom Movement, Ugandan National Democratic Army, Uganda National Federal Army, Ugandan National Liberation Front, Ugandan National Rescue Fronts I and II, Ugandan People's Army, Ugandan People's Democratic Army, Uganda Salvation Army, and West Nile Bank Front (Hovil and Lomo, 2004, p. 4; 2005, p. 6).

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