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After oppression

After oppression: Transitional justice in Latin America and Eastern Europe

Edited by Vesselin Popovski and Mónica Serrano



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Endorsements

“This book has several strengths. The individual chapters provide a solid overview of transitional justice efforts in a variety of jurisdictions. They are detailed, informative and analytic, and convey a tremendous array of insights.”

Mark A. Drumbl, *Class of 1975 Alumni Professor of Law and Director, Transnational Law Institute, Washington and Lee University*

“Transitional justice has become one of the most important topics studied in comparative politics. There have been many excellent studies, written from various theoretical perspectives, yet there has been no single volume that would summarize the existing knowledge, critically dissect the state-of-the-art theorizing and present up-to-date analysis of important cases (from Latin America and Eastern Europe). This is a volume that splendidly accomplishes all three tasks. A stellar cast of authors provides – finally – a tool awaited by all people interested in transitional justice: a smart, comprehensive and authoritative guide to the field.”

Jan Kubik, *Chair, Department of Political Science, Rutgers University*

“Latin America and Eastern Europe emerged from dictatorship more or less contemporaneously in the 1980s and '90s. The contrast in the ways they reckoned with their respective legacies of human rights violations has been a theme of the emerging field of ‘transitional justice’ ever since. With the benefit of a quarter century of experience, *After Oppression* presents the most comprehensive comparative study of those similarities

and differences. Editors Vesselin Popovski and Mónica Serrano have assembled a most impressive group of scholars and practitioners to conduct this essential study. They combine intellectual rigour with ‘you-are-there’ proximity to the challenges, frustrations and signal successes of the struggle for justice in our time.”

Juan E. Méndez, *UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and Visiting Professor, Washington College of Law*

“Over the past three decades, it has become widely accepted in different parts of the world that transitions from oppression should be accompanied by a reckoning with past abuses of human rights. The purposes include the need to recognize and acknowledge the suffering of the victims; the importance of holding accountable those responsible for their suffering; and the crucial role of justice in promoting democratization. *After Oppression: Transitional Justice in Latin America and Eastern Europe* is the most comprehensive and insightful account of this process in two regions where it has played a crucial role.”

Aryeh Neier, *President Emeritus, Open Society Foundations*

“Democratic consolidation is not merely about institutions and constitutions. It is also about memory, culture and fairness. The latter factors are shaped by complex histories and unique geopolitical contexts and thus there are no legal or political blueprints for handling transitional justice. The contribution of this comprehensive collection of essays is to aid our understanding of the linkage between democratic consolidation and transitional justice in two key regions: Eastern Europe and Latin America. The book is set to become an important source of information and ideas for all those interested in what happens after the fall of authoritarian regimes.”

Jan Zielonka, *Professor of European Politics, St Antony’s College, University of Oxford*

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This book developed out of an ongoing institutional collaboration across continents on the theory and practice of human rights. The publication of *Human Rights Regimes in the Americas* (UNU Press, 2010) enabled us to gain much knowledge about the crusade for human rights and the state of human rights practice on that continent. *After Oppression* is about the efforts of a wider set of people and groups to square up to the grim pasts of human rights violations. Broadly inspired by the lessons learned from Latin American experiences, it goes on to connect with the human rights decisions and actions that accompanied the Helsinki Process and the Velvet Revolutions in Eastern Europe.

The book grew out of a conference that brought together a group of experts from Eastern Europe and Latin America, along with some of the leading theorists on democratization and transitional justice. We had asked them to reflect on the various avenues taken by those who have championed the cause of justice for past human rights violations in their respective societies. There seemed to us to be an inherent value in analysing and contrasting the routes taken by countries in Latin America and Eastern Europe as they transformed themselves from authoritarianism to democracy. But we also aimed higher, moved by our conviction that the questions addressed here are of vital normative importance. Essentially, the focus is on the *interplay* between transitional justice and democratic consolidation. Specialists in both these broad areas now abound, and specialists are notoriously hard to please. Our hope has been that they will at least be persuaded of the innovative value of straddling the study of

transitional justice experiences across continents. Perhaps, too, they will come to fresh understandings of the empirical and theoretical dilemmas of the challenges of transitional justice and democratization as they act upon each other. And, while much of this book is, as it has to be, about the past, we trust readers will come away convinced that the greater story it tells is unfinished. This, indeed, is what turns our exercise into a testament of courage, bitter disappointments and heroic resilience – a record that cannot fail to leave readers unmoved.

Our efforts to bring together a select group of experts from Eastern Europe and Latin America were made possible in large measure by the institutional and financial support offered by three institutions: El Colegio de México, the United Nations University (UNU) and the University of Oxford. In particular we owe special thanks to Laurence Whitehead for his enthusiastic support from the outset. Nuffield College and the Centre for International Studies at Oxford University offered us an ideal setting for the conversations that accompanied the initial phase of this project. We would like to acknowledge all those who generously participated in the gathering at Nuffield with helpful comments and suggestions: Phil Clark, Lily Gardner-Feldman, Eric Gordy, Andrew Hurrell, Rachel Kerr, Timothy Power and Chandra Lekha Sriram.

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Vesselin Popovski and Mónica Serrano

Introduction

1

Transitional justice across continents

Vesselin Popovski and Mónica Serrano

It is now more than four decades since the European Commission of Human Rights, at the request of four of its members, conducted its groundbreaking investigation into human rights violations in Greece in 1968. A newly established democratic government in Greece, as in Portugal, was to conduct unprecedented domestic human rights prosecutions against government officials of the preceding authoritarian regimes.¹

It has been more than three decades since the Inter-American Commission on Human Rights, in its 1974 report on Chile, threw its weight behind the bold idea of domestic trials of state officials for human rights violations.² The 1975 Helsinki Final Act of the Conference on Security and Co-operation in Europe and its periodic review process set off a vibrant trans-Atlantic human rights movement targeting Warsaw Pact countries.

By comparison with many other occurrences in our accelerated cultural times, these events happened long ago. Indeed, for many that is exactly what transitional justice will seem to be all about – events that happened long ago. In some respects, that is right. In some ways, the worlds of oppression that we re-visit in this book are unimaginable today. Yet this did not happen by itself. Indeed, we could say that the making unimaginable of the past worlds of oppression is, unobtrusively, the greatest achievement of the movement to wring amends from those past worlds, which we call transitional justice.

In other ways, though, the stories we will be telling happened only yesterday and are part of tomorrow's story-lines. For the events we have just

commemorated can now be seen, in retrospect, as part of the beginnings of a new normative international era in which we look set to live for a considerable time to come. To go back, then, is also to understand how we are moving forward.

The “oppression” we are concerned with is that suffered by Latin American and East European countries under authoritarianism and Communism. Those countries made a transition to democratic rule. Their experiences of oppression were different, their ensuing trajectory was common. Their different and common experiences mark the parameters of this book. In it, the reader will find an overview of the challenges faced by political transitions and transitional justice efforts in a wide set of countries. The focus is especially on how various transitional justice mechanisms have worked, or not.

Transitional justice developments have become prominent in Africa and other parts of the world, but we have not attempted global inclusiveness. Our comparative space is that of the two continents whose difference and commonality most fully allow us to see transitional justice as both a diverse and a congruent journey.

The story of transitional justice is one of pasts and futures. On the one hand, what do societies that have come through hell do with their pasts? And then how do they attempt to ensure that darkness never again descends at noon? Beneath all the technicalities, these are the fundamental questions that animate this book. Its contributors do not play up the pathos of their cases, but their collective story is unmistakably that of the struggle against evil of many societies.

Transitional justice is an unprecedented enterprise. In the age of oppression, one or two visionaries imagined that the day of reckoning might one day come for omnipotent dictators and tyrants, but millions died without any shred of consolation that justice would one day be done to them. In previous geopolitical cataclysms, millions had also died on what Hegel – thinking of the French Revolution – called the slaughter-bench of history, yet no one had ever suggested that some kind of reparation be made to their memory and to the survivors. Transitional justice is, then, a phenomenon whose historical novelty ought always to impress us. Behind it is a complex interplay among domestic, regional and international processes in which two forces were becoming paramount: human rights and democracy. Latin America and Eastern Europe are the pioneering, still symptomatic cases where we see this.

Looking back, the adoption of the Helsinki Final Act in 1975 is the beginning of our new horizon. It both embodied broad principles of peaceful coexistence and contained important non-binding human rights provisions applicable to the Soviet Union and East European countries among the 35 sovereign signatory countries. From it, dissident and human

rights groups in Russia, Czechoslovakia, Poland and elsewhere were able to invoke legal international human rights instruments as a way of exerting pressure on their respective governments. Soon, the Helsinki Act and its periodic review provided a unique platform for the systematic public exposure, and shaming, of Soviet and East European human rights practices (Chayes and Chayes, 1995; Neier, 2012). And, of course, human rights were taken up as an issue in Western Europe and across the Atlantic.

It was there, in the United States, that the next great shift occurred. The end of the Cold War was to have a major impact in easing the tension between security policy and human rights that had long tainted foreign policy, of the United States in particular. For the United States, throughout the Cold War period the promotion of human rights had been relegated to, or openly subsumed by, anti-Communism. The priorities of containment had provided US policy-makers with the justification to settle for “regimes whose origins and methods would not stand the test of American concepts of democratic procedure” – as a second-best alternative to accommodating “further communist successes” (US diplomat George Kennan, cited in Sikkink, 2004: 41). This line of reasoning had prompted successive US administrations to grant valuable symbolic support and material aid to authoritarian governments. The consequences of this were particularly dramatic in Latin America, where US policies helped prop up authoritarian and military regimes that had interpreted such signals as a green light for outright repression.

The biggest difference between human rights and transitional justice experiences across our two continents had to do precisely with Washington’s role. The rise of human rights and transitional justice initiatives in Latin America had been hindered by the divide that long pitted conservatives against liberals on human rights issues within the US Congress. Conservatives had tended to vote on human rights to punish left-wing regimes; liberals had resorted to the human rights cause to expose right-wing dictatorships. In contrast to Eastern Europe, where support for human rights and efforts at Communism containment proved more or less compatible, anti-Communism and support for human rights did not make good bedfellows in Latin America. True, by the mid-1970s a bipartisan human rights foreign policy had begun to take shape, but it was in no way equally felt across continents. In the Western hemisphere (with the brief exception of the Carter administration), at least until the second Reagan administration, the cause of human rights had remained hostage to anti-Communist policies oriented to military and right-wing governments.³

The 1980s were marked by the overthrow of national security regimes and the rise of democracy in Latin America. And in 1989 the Berlin Wall came down. These events happened in no small measure because of a

rising wave of democratization and changing international attitudes towards authoritarianism and human rights. Yet an ultimately congruent process was driven by different forces in Eastern Europe and Latin America. In the former case, it was the implosion of the Soviet Union that provided the impetus for democratization. In the latter, democratization was more closely linked to endogenous forces, including the disastrous decision of the Argentine military to go to war with the United Kingdom over the Malvinas, or the protracted process of liberalization that underpinned the transition to democracy in Brazil.

So, although the end of the Cold War had profound consequences for the two regions, the wave spreading transitions to democracy in Latin America preceded the fall of the Berlin Wall. On the other hand, and as iconically represented by figures such as Lech Wałęsa in Poland and Václav Havel and his Charter 77 movement in what was then Czechoslovakia, the protest movement against the Soviet system had a long pedigree too. When 1989 came, the forces that had kept the Communist bloc together were ready for their rapid unravelling.

The fall of the Berlin Wall was the fall of the Cold War's ideological barriers. From 1989 to 2001, superpower security policies eased up to a remarkable degree. Human rights norms and standards, supported by a plethora of activist organizations and in accord with Washington's foreign policy objectives, held sway. Further reinforcement would soon come with the application of the European Union's conditionality policies for the 10 Central and East European countries that were to successfully seek membership. The age belonged to democracy and human rights. The magnitude of human rights violations in the recent past made the recent past look like an aberration for which correction could be made. Violations would meet the demand for accountability; a new normative context would make absolute impunity abhorrent.

The twentieth century closed with two key developments that sealed this new international age for human rights. In 1998, the Rome Statute was opened for signature; this was the treaty that created the International Criminal Court (ICC). Also in 1998, General Augusto Pinochet, former President of Chile, was arrested in London on charges of torture and other serious human rights violations. The establishment of the ICC and the arrest of Pinochet signalled the arrival of new international standards. Those alleged to be responsible for serious human rights violations could find no international refuge from accountability. The world had changed, unimaginably.

And so it had. Yet the story was also more uncertain than one of the inevitable triumph over evil. Expectations of that triumph would often be dashed.

To begin with, the effects of the end of the Cold War were not evenly distributed. In some places – most tragically the former Yugoslavia and Central Europe – they were accompanied by the unleashing of brutal inter-state conflict. The savage internal wars of Bosnia and Herzegovina also found some equivalence in Colombia and Guatemala. In these latter two countries, political “transition” occurred, but in tandem with vertiginous disintegration, state weakness and extraordinary levels of violence.

Here were the hardest of all cases for transitional justice and, as such, they loom large in this book. In essence, they presented transitional justice’s tragic *agon*: how could truth and justice be satisfied if the justice sector remained captured by perpetrators of human rights violations? The course of local justice in the small country of Guatemala was to remain blocked despite President Bill Clinton’s apology there in 1999, despite the findings of two groundbreaking Truth Commission reports, despite the evidence made public in 2005 upon the accidental discovery of the archives of the National Police, and despite the bold arrest warrants and extradition requests issued by the Spanish justice system.⁴

Guatemala was an extreme, but not isolated, case. Similar to Romania, it suggested the bleakest of conclusions, namely that where the rule of terror had extended its grasp over a whole society, the chances of an effective pursuit of justice were minimal. As is often the case in small countries, in Guatemala “big” politics and even bigger intelligence apparatuses have persistently obstructed the cause of justice (Goldman, 2007: 140). Now, some 25 years after the transition to democracy, electoral candidacy is still considered by many suspected perpetrators as the best route to secure immunity from prosecution. Although 13 prosecutions in relation to physical integrity rights were registered in Guatemala in the period 1988–2003, systematic intimidation and death threats against victims, judges and prosecutors successfully perverted the course of justice. The majority of the cases of transitional justice closed down.

Yet there was an affront here that could not be allowed to pass either, and again Guatemala was not alone. Where national human rights groups were unable to influence domestic political conditions, international formulas would be applied. In Guatemala’s case, this led to the government’s negotiation with the United Nations for the creation of an International Commission against Impunity in Guatemala (Comisión Internacional contra la Impunidad en Guatemala, CICIG).⁵ In Bosnia and Herzegovina (BiH), where national capacities also remained far from adequate, between 1995 and 2002 the internationalization of justice fell to the International Criminal Tribunal for the former Yugoslavia (ICTY).⁶

These were different forms of international intervention and they served different purposes, yet the internationalization of justice is a clear feature of the transitional justice enterprise. A product of the new

international sway of human rights, the belief that external pressure could have a serious impact on domestic justice systems and help lift the barriers to accountability eventually coalesced around the concept of *complementarity* enshrined by the Rome Statute. The concept spoke for the ambiguities of the new age.⁷ Was the purpose of the ICC to supersede domestic court systems? No, its goal was to reinforce and guide domestic efforts at accountability for past human rights violations. Yes, its role was to trigger the reach-out to regional, foreign and ultimately international courts when national justice systems lacked the capacity or the political will to prosecute serious human rights crimes.

Not all of the ambiguity was disabling, by any means. Where governments proved responsive and domestic courts willing and able to rein in impunity, complementarity would most likely succeed. The “Pinochet effect” and its role as the catalyst of both a chain of human rights prosecutions in domestic courts in Chile and a leap in foreign prosecutions illustrate very vividly what complementarity was meant to achieve.

In other situations, though, internationalized transitional justice was an unsatisfactory default option. The jury remains out on whether international prosecutions helped the cause of justice and social peace in BiH, for example.

Yet ambiguity is not the same as contradiction. The temporary internationalization of justice may well prove highly germane to the eventual success of domestic courts and local institutions. Indeed, the prospects for complementarity in BiH are not necessarily discouraging. The changes associated with the Completion Strategy adopted by the ICTY in 2002 and a number of judicial reform initiatives were very much prompted by the recognition that domestic prosecutions would help bolster the rule of law and make justice less abstract for the population.⁸

Students of international relations will be unsurprised to learn, however, that the internationalization of an issue as sensitive as transitional justice is tricky. As Lavinia Stan highlights in Chapter 15 in this volume, in Eastern Europe international pressures in fact at first privileged the crimes of the Nazi era over the human rights offences committed during the Communist period. It was only in 1996 that the Council of Europe, in Resolution 1096, called on Central and East European countries to dismantle the legacy of the former Communist totalitarian systems.

This has been easier said than done for their transitional justice efforts. Discovering the truth about the oppressive past of nightmarish Big Brother societies in Slovakia, Romania or Poland where party-state structures penetrated so many aspects of political, social, economic and cultural life has involved weighing how much of their populations ought to be liable for the charge of collaboration. Then, too, transitional justice has been manipulated to disqualify political opponents. This was a particu-

larly acute trend in Romania, but also significantly disruptive in Poland. In many instances, the instrumentalization of transitional justice initiatives produced quasi-legalized vengeance and witch hunts. To the extent to which “lustration” policies excluded numerous actors from the political process, it could be argued that they ended up encouraging anti-democratic trends in these societies.

The specific legacy of Communist rule provides, then, a central contrast between East European and Latin American experiences of transitional justice.⁹ Transitional justice gravitated in Eastern Europe around the issue of state and party collaboration; in Latin America, most prominently in Argentina and El Salvador, around the need to exclude from the armed branch of the state and the justice sector those officials and agents who had committed human rights crimes.¹⁰ The criteria that guided such reforms were almost exclusively restricted to grave human rights crimes.

Such divergence brings home the ineluctable relativism within the universality of human rights: “crimes against humanity” are also injustices against societies, and societies are always different. Yet we find a commonality here too. Whether in Eastern Europe or in Latin America, the crucial variables of success or failure have been the public’s appetite for, or apathy towards, transitional justice. In some cases, most notably Argentina and East Germany, bottom-up processes, involving the active engagement of local actors and locally generated pressures, had a direct impact in boosting the domestic demand for truth and justice.

In other experiences, however, top-down processes, driven by the changes in international criminal justice and the shift towards individual criminal accountability, had a clear impact in laying the foundations for the gradual emergence of an incipient domestic accountability structure for human rights. Clearly, international actors and institutions can play a pivotal role but the longer-term prospects for human rights will remain tightly linked to developments and implementation at the national level.

In a variety of experiences examined in this volume, but most clearly in Argentina and East Germany, the boundaries of accountability were effectively widened through a creative and dynamic interaction between efforts deployed at the local level and those pursued in the regional and international arenas. In many instances, victims, relatives and human rights lawyers removed obstacles to the course of justice at home by resorting to judicial systems in other countries. As courts in Spain, France and Italy learned about serious human rights cases – involving citizens with dual nationality or cases in which universal jurisdiction could be established – vigorous “intermestic” processes were set in motion. In a number of cases, not only did such trends spark heated debates about

human rights law and international law and their relation to national laws; they also helped activate national justice systems. This trend has become particularly visible in Latin America, the region that accounts for 55 per cent of all domestic human rights prosecutions, but also in Africa, a region that concentrates 22 per cent of total prosecutions (Sikkink, 2011: 22–23). In turn, Europe as a whole accounts for 14 per cent of human rights trials in domestic courts. This suggests that accountability mechanisms *can* catalyse enabling conditions for the development of a more resilient human rights culture and also for the strengthening of democratic state institutions.

In Chapter 2, Kathryn Sikkink offers a particularly helpful theoretical examination of three models of accountability that are prevalent in the world today. Her analysis depicts a gradual and hard-won evolution from sovereign immunity or “impunity”, to state accountability, to the more recent rise of the individual criminal accountability model. In considering the drawbacks and merits of these models, Sikkink provides an analysis of the effectiveness of accountability mechanisms in terms of their longer-term contribution to reducing human rights violations and/or consolidating democracy. Her findings point to two main conclusions: first, the rise of individual accountability across regions, via an increase in human rights prosecutions; secondly, an apparent correlation between human rights trials, human rights protection and democratic consolidation.

Complementing Sikkink’s analysis, Pilar Domingo delves into the linkages between the rule of law, accountability and transitional justice. The existing literature has focused on transitional justice experiences and rule of law reform as parallel and separate forces, but Domingo argues that the two are highly connected and mutually enforcing processes. In establishing her thesis, she considers how previous and current accountability relates to the evolution of the rule of law in Latin American states over the past two decades. She also provides an interesting insight into how individuals involved in the judicial process, such as judges, are influenced by the interpretation of judicial norms at an international level, and how this has an impact on judicial processes domestically. Although identifying regional trends in transitional justice across Latin America is an important task, Domingo is careful to underline the importance of taking into account specific local contexts and legal cultures.

The justice and reconciliation processes in different countries have been diverse and have been met with different degrees of acceptance: some were successful but others left the victims’ trauma at best half-relieved. No two transitional justice initiatives are identical and each new endeavour yields a fresh set of lessons. The argumentation of Chapters 2

and 3 can be cross-referenced from the seven Latin American case studies. These commence in Chapter 4 with Catalina Smulovitz's examination of accountability and justice in Argentina. In her detailed analysis, Smulovitz highlights the many challenges faced by civilian authorities and human rights activists as they sought to push forward the boundaries of accountability for past human rights violations. In Argentina, a country that has been characterized as a precedent-setter and a "global leader in transitional justice", not only were human rights issues inbuilt in the dynamics of democratization; the many setbacks encountered by the human rights movement were also repeatedly met with creative and innovative action, testifying to the remarkable resilience of human rights activists in this country. Smulovitz draws conclusions by considering how the diverse formal and informal "justice outcomes" that transpired in Argentina interacted with each other and contributed to the ongoing task of establishing a new democracy that respects human rights.

Further demonstrating the diversity of experiences in Latin America, in Chapter 5 James L. Cavallaro and Fernando Delgado assess how Brazil "lagged behind" in redressing the human rights violations of its past. They coincide with other experts in attributing insufficient progress to a variety of factors, including the cultural legacy of slavery, the top-down nature of Brazil's transition to democratic rule and the relatively low numbers of people considered to be victims of state-sponsored violence (at least in comparison with neighbouring countries). What is clear is that the record of transitional justice in Brazil and the relative lack of transnational accountability pressures sharply contrast with the Argentine experience. Although the two countries are now considered fairly consolidated democracies, Cavallaro and Delgado suggest a causal link between failing accountability in previous generations and imperfect support for Brazilian democracy in the current generation. The authors provide an interesting argument in linking transitional justice issues with contemporary Brazilian attitudes to crime. They ask the question of how, paradoxically, the Brazilian public can be so opposed to the military dictatorship yet more tolerant of state-sponsored human rights abuses committed in the name of social order.

Chapter 6 on Chile also attempts to explain the contradictions entailed in another country's experience related to historical human rights violations. Claudio Fuentes finds out why, despite the obstacles to the pursuit of justice thrown up by the amnesty arrangements that characterized the transition from the Pinochet military regime to democracy, Chile was able to institute so many important steps towards truth and justice, including the indictment of close to 500 active and former military and police officers. Fuentes revises the prevailing thesis that General Pinochet's visit to London in 1998 was the catalyst for this transformation. Rather,

he argues, changes in the behaviour of key actors – from governments to conservative forces, social actors and the judiciary – and a shifting balance of political power allowed a more pro-justice environment to develop. Fuentes concludes by highlighting the key lessons to be learned from the Chilean experience.

In stark contrast to the progress being made in Argentina and Chile, Elvira María Restrepo describes the transitional justice experience in Colombia as “one of the tardiest in Latin America”. In Chapter 7, she explores the contested demobilization of right-wing paramilitaries and its tortuous evolution towards a *sui generis* transitional justice process. As Restrepo makes clear, not only were the 2005 Justice and Peace Law and the Constitutional Court rulings from 2006 the first Colombian initiatives to experiment with transitional justice, but these took place in a context dominated by the violence associated with illicit drug-trafficking. Although certainly aware of the imperfections of this enterprise, Restrepo argues that paramilitary demobilization and official exposure of atrocious crimes have produced some benefits, including the ability of victims to seek justice and overall improved chances for sustainable peace. Yet Restrepo closes her chapter by pointing to the main shortcomings of this transitional justice effort and to the clash between the executive branch of power and the judiciary. Indeed, whereas the executive sought to re-establish stability through demobilization and limited criminal liability, the justice system reached out to accountability for serious human rights violations to assert its share of state power.

Chapter 8 focuses on El Salvador’s pending account with its past. Ricardo Córdova Macías and Nayelly Loya Marín chart the country’s transitional experience from war to peace, from militarism to demilitarization, and from authoritarianism to democracy. Based on a broad conceptualization of transitional justice, they explore the interactions between security sector reform and mechanisms of transitional justice, and how these dynamics affect the process of democracy-building. They find that, although the peace process and the Truth Commission of the 1990s have contributed to the institutionalization of electoral democracy and the observance of human rights, much has yet to be achieved, especially in terms of acknowledging the role of the state and bringing state actors of the time to account for their atrocities. The authors highlight the importance of the bold move taken in 2010 by President Mauricio Funes in acknowledging the atrocities committed by state and parastatal security forces in El Salvador.

Like El Salvador, neighbouring Guatemala has made a “double transition”, from authoritarian rule to democracy and from armed conflict to peace, since its long-running internal conflict ended in 1996. In Chapter 9, Carmen Rosa de León Escribano and María Patricia González Chávez

analyse the effectiveness, or lack thereof, of the country's transitional justice mechanisms. In line with Sikkink's argument, the authors identify the links between accountability for past human rights violations and developments in democratic processes and institutions. By focusing on the existence and effectiveness of these mechanisms, they provide a critical assessment of the quality of democracy in Guatemala. As they remind us, the active involvement of international actors, including the United Nations through the International Commission Against Impunity in Guatemala, has not radically altered the balance of power that has long perpetuated impunity for serious human rights violations in this Central American republic.

In Chapter 10, the final Latin American case study, Carlos Basombrío Iglesias investigates the transitional justice and democratic consolidation processes in Peru. His objective is to consider recent Peruvian history in terms of the complete range of transitional justice mechanisms that can be implemented, and the extent to which they recognize victims and promote peace, reconciliation and democracy. Iglesias focuses on what he calls "the backbone" of Peru's transitional justice process: the country's Truth and Reconciliation Commission, the prosecution of human rights violations, the trial of former President Alberto Fujimori, and security sector reform. His central contentions are twofold: first, that, despite the tremendous work that still needs to be done, transitional justice initiatives to date have had a huge positive effect on moulding democracy in Peru; and, secondly, that the chances of future transitional justice mechanisms succeeding will depend heavily on how successful democratic consolidation continues to be.

While the Latin American case studies often combine transition from military rule to democracy with a movement from armed conflict to peace, in Eastern Europe the former transition applies in almost all the cases included in this book. The one exception is in BiH, where, despite being better positioned than most states to make the transition from Communism to democracy according to Ernesto Kiza, the country failed to deal with its complex multi-ethnic legacy and descended into conflict. In Chapter 11, Kiza addresses the unique circumstances in BiH where judicial accountability for war crimes was implemented. Although BiH is lauded internationally for its success in indicting high-ranking individuals for war crimes, Kiza points out how proposals to provide reparations or establish a truth and reconciliation commission were long ignored, and that this contributed to continuing mistrust in the society. Kiza analyses these issues as part of the interactions between judicial concepts and processes at both the regional and international levels. He concludes by identifying the lessons learned from this collective experience, namely that, although international recognition and support for transitional

justice are imperative, ultimately it is up to the society itself to forge a sustainable path to peace.

In Bulgaria, as in most East European countries, transitional justice relates to the transition to democracy since the fall of the Berlin Wall in 1989. In Chapter 12, Hristo Hristov and Alexander Kashumov write about the challenges surrounding responsibility relating to human rights violations committed under the Communist regime. They highlight the importance of knowing what violations took place and for what reasons, with a special focus on disclosure of documentation from the old secret services. They also look at how effective the judicial system has been in assigning accountability for criminal offences committed under the Communist regime. The authors consider these issues in terms of both the country's unique features as well as the broader Central and East European context.

Chapter 13 on transitional justice in East Germany focuses comprehensively on the various instruments used to address East German injustices. These include: rehabilitation and restitution measures for victims of the regime of the Sozialistische Einheitspartei Deutschlands (SED – Socialist Unity Party of Germany); the establishment of an archive for the files of the former secret service (the “Stasi”); “purging” the East German civil service; and the employment of an Enquete Commission. Gerhard Werle and Moritz Vormbaum make the case that transitional justice mechanisms were overwhelmingly just and effective in dealing with East German state criminality. However, they also argue that legal instruments can provide only part of a solution that allows a society to come to terms with its past and that greater efforts could be made to ensure the past is not simply “filed away and forgotten”.

In Chapter 14, Monika Nalepa looks at the extent to which lustration – which she defines as “revealing links to the former [Communist] secret police of persons running for or holding public office” – is an effective trust-building transitional justice mechanism. The problem she addresses is the distrust of state institutions and political elites upon Poland's emergence from Communist rule. Although Nalepa believes that lustration, normatively, is the best response to this lack of trust, she argues that it has been co-opted as a tool by political elites to manipulate the democratic process. Unsurprisingly, in her analysis of lustration and other transitional justice mechanisms implemented in Poland, she is critical of their combined performance.

In her evaluation of transitional justice in Romania, Lavinia Stan focuses on how initiatives including trials and truth commissions, among other proposals, have been “systematically blocked by the political elite”. Chapter 15 suggests that Romania continues to require a belated reckon-

ing with its past. Delays in addressing the past have led to suboptimal outcomes for surviving victims, and information has become less reliable with the passing of time. As part of her analysis, Stan looks at how a range of actors, including the Romanian public, the victims themselves and former perpetrators, have responded to these circumstances.

Chapter 16 examines the approach taken by Slovakia after the 1989 “Velvet Revolution”, which differs from that in most other East European countries. Nadya Nedelsky illustrates how the country’s strategy of forgiveness and forgetting persisted until 2004, after which information about the former secret service was published, stimulating a more vigorous discussion about the past. She analyses why various leaders opted for different strategies at differing stages, and records how effective they were in achieving both their own original aspirations and those of transitional justice advocates. In cataloguing the lessons to be learned from the Slovakian case, focusing on how differing leadership types produce differing outcomes, Nadelsky takes into account the role of national, regional and international political actors.

Chapter 17 presents the final case study, that of the former Yugoslavian state and now independent nation-state of Slovenia. As in other East European countries, the post-Communist era has witnessed attempts to implement restitution measures to address the human rights violations of the Communist era. However, despite efforts to compensate victims in Slovenia, Mitja Steinbacher, Matjaž Steinbacher and Matej Steinbacher find that the restitution process was based on achieving an acceptable truth by consensus, rather than on achieving real truth and justice. After assessing the outcomes of the country’s failure to investigate and assign responsibility for widespread abuses, the authors make the case that, for transitional justice processes to be effective, perpetrators must be brought to justice.

In Chapter 18, Alexandra Barahona de Brito and Laurence Whitehead essay a reframing of the debate on transitional justice by drawing from both empirical and normative knowledge. Reflecting the wide ranges of experiences in Latin America and Eastern Europe, they contend that there is no single model of transitional justice that can be applied universally to countries that have made the transition to democracy in recent decades. They illustrate how contemporary experiences of transitional justice have to be understood in terms of the political motivations behind their implementation, which can have the result of either entrenching or stifling the values of democracy. The authors also shine a light on what they call some of the “overly abstract and excessively normative approaches to the topic”, a tendency that this volume as a whole also aims to correct.

In Chapter 19 Mónica Serrano outlines what this large set of country experiences tells us about the conditions under which democratization and transitional justice, so often taken to be antagonists, can in fact be reconciled. Finally, in Chapter 20, Vesselin Popovski addresses both the complexity and the effectiveness of transitional justice across our two continents.

Notes

1. Following the return to democratic rule, trials in Greece, whether for treason or human rights violations, were initiated by private citizens. Although lawyers relied on private prosecution provisions against abuse of power and bodily harm, the Karamanlis government signalled its support for justice. Moreover, the government's emphasis on due process and its decision to commute the death penalty to life imprisonment created the conditions for the first modern human rights trials. Trials were also conducted in Portugal against officials of the much-hated political police, PIDE, which between 1945 and 1973 had held 12,000 prisoners. The pursuit of justice in Portugal was marred by controversy. Some called for the extermination of PIDE and its members. In other quarters the process was perceived as an exercise in appeasement rather than accountability (Sikkink, 2011).
2. In its 1974 report on Chile, as in its subsequent reports again on Chile in 1977, on El Salvador and Haiti in 1979, and on Argentina in 1980, the Inter-American Commission on Human Rights consistently advocated the prosecution and punishment of perpetrators. There is still a widespread perception that the International Criminal Court was solely born out of the tragic conflict in the former Yugoslavia. This is erroneous. In Latin America, although dictators still represented the norm, a visionary minority was able to predict that the day of reckoning for those dictators would not be far off. The global amnesia about Latin America's role in setting the course for transitional justice and individual criminal accountability is one of the deficiencies that this book aims to correct (Sikkink, 2011: 66–67).
3. One of the two main Congressional groups was led by Henry Jackson, and revolved around the ex-Soviet Union and Eastern bloc countries. The other group included figures such as Edward Kennedy, Frank Church, Donald Fraser and Tom Harkin. By focusing on right-wing authoritarian regimes this group often clashed with those within the US foreign policy establishment who saw these regimes as a bulwark against Communism. With the publication of the report *Human Rights in the World Community: A Call for US Leadership* in 1974 (US Congress, House Committee on Foreign Affairs, 1974) a more general human rights vision within the US Congress began to emerge. See Sikkink (2011: 52–53), Carothers (1991: section on “Democracy by Transition in El Salvador” and Chapter 4, “Democracy by Applause”) and Neier (2012: 14).
4. In that year President Clinton visited Guatemala and explicitly said: “it is important that I state clearly that support for military forces or intelligence units which engaged in violent and widespread repression of the kind described in the [Inter-Diocesan Project for the Recovery of Historical Memory] report was wrong ... and the United States must not repeat that mistake” (cited in Goldman, 2007: 155). Clinton's apology has been perceived in different ways: whereas Goldman describes it as extraordinary, Stephen Schlesinger (2011) found it rather vague.
5. In September 2007, UN Secretary-General Ban Ki-moon appointed Carlos Castresana, a Spanish judge, to lead the CICIG. The resignation of Castresana in 2010 over the al-

leged reluctance of the Guatemalan government to cooperate in support of justice led to the appointment of Francisco Dall'Anese Ruiz, ex-General Prosecutor from Costa Rica. Although human rights were a leading consideration in the process of establishing the CICIG, its agenda has mostly been designed to unveil and dismantle the clandestine networks that are embedded in the state apparatus and that are perceived in some quarters as being protected by agents of the state. It is not a special tribunal, in that it relies on and uses the country's criminal code and established judicial proceedings. See Goldman (2007: 368), *El Financiero* (2010) and Vela (forthcoming).

6. The evaluation system adopted by the ICTY in 1996 established strict rules for national and local prosecutions. Under the terms of this system, no war crime prosecutions were to be conducted without the ICTY's prior authorization.
7. As Ernesto Kiza makes clear in his contribution to this volume (Chapter 11), the adoption of the Completion Strategy by the ICTY in 2002 followed the logic of complementarity. This strategy sought to bolster the development of national justice capacity and thus to balance the internationalization of prosecutions.
8. As Kiza also points out, these changes led in 2005 to the creation of a War Crimes Chamber (exclusively responsible for high-profile cases) and the establishment of the Court of Bosnia and Herzegovina, which is also the highest authority regarding organized crime, economic crime and corruption. The trends that at one point led BiH to dominate the bulk of indictments for serious violations of international humanitarian law (almost 80 per cent of a total of 161 indictments) at the ICTY may gradually change as a result both of these changes and of pacification and stabilization after war.
9. Transitional justice in Eastern Europe differed in at least one other respect from experiences in Latin America. Communist rule in Central and Eastern Europe was accompanied by large-scale property expropriations and nationalization. Not surprisingly, then, demands for property restitution accompanied transitions to democracy in various Central and East European countries, including Bulgaria, East Germany, Poland and Slovenia. Although many of these countries considered property restitution, privatization proved hugely problematic. Thus in Poland, Wałęsa's offer to transfer state enterprises to workers prompted property owners to reactivate pre-1945 claims. Not before long, state authorities in Poland were confronted with mounting national and international property claims. Similar considerations led the German authorities to settle disputes over property claims according to the public interest.
10. At times, the logic of lustration simply clashed with the goal of justice for serious human rights violations. As described by Monika Nalepa in Chapter 14 in this volume, in Poland a number of members of Solidarity who had been shamed as collaborators were the key witnesses who made possible the identification of the commander responsible for the shoot-to-kill order during the 1980 miners' strike in which 15 miners lost their lives.

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2

Models of accountability and the effectiveness of transitional justice

Kathryn Sikkink

The dramatic new trend in world politics towards holding state officials accountable for past human rights violations cannot be properly understood or evaluated by looking primarily at domestic political processes in individual countries. For this reason, broad comparative projects of the kind envisioned by this volume are a useful exercise. The trend towards accountability in world politics is taking place simultaneously in international and regional institutions and courts, in foreign courts, and mainly in the domestic policies and courts of the country where the human rights violation occurred. I argue that international, foreign and domestic human rights trials are all part of an interrelated trend in world politics towards greater accountability – a trend that Ellen Lutz and I have called the Justice Cascade (Lutz and Sikkink, 2001). It is one form of what Cass Sunstein (1997: 36–38) has called a “norm bandwagon”, which occurs when “the lowered cost of expressing new norms encourages an ever increasing number of people to reject previously popular norms, to a ‘tipping point’ where it is adherence to the old norms that produces social disapproval”. The Justice Cascade is a rapid and dramatic shift in the legitimacy of the norms of individual accountability for human rights violations, and an increase in actions (such as trials) on behalf of those norms. It does not mean that true justice is done – far from it – just that there is a new legitimacy of the norm, as evidenced by the frequency of actions on its behalf. We know we are dealing with cascade or diffusion phenomena when government decisions in one country are “systematically conditioned by prior policy choices” made elsewhere in the world (Simmons

et al., 2006: 787).¹ Choices about transitional justice are indeed systematically conditioned by prior policy choices, but “diffusion” is all too passive a word to convey the concerted activity and struggle through which ideas about justice have moved around the globe. The focus of this chapter will be on human rights trials, but some of the arguments, particularly those about effectiveness, are relevant to a wide range of transitional justice issues.

Three models of accountability

The history of the human rights regime has been told at length elsewhere, so I will provide only the briefest sketch to situate the current shift in accountability in the earlier history of human rights regulation. We can think of three “models” of accountability for past human rights violations: the sovereign immunity or “impunity” model; the state accountability model; and the individual criminal accountability model.

The sovereign immunity model

Prior to the Second World War, countries virtually never held state officials accountable for past human rights violations. There were isolated examples of accountability in ancient Greece and in revolutionary France, but no sustained attempts at domestic transitional justice until after the Second World War.² At the international level, various attempts at accountability for war crimes and mass atrocities prior to the Second World War failed to set up the necessary institutions (Bass, 2002). In general, the doctrine of sovereign immunity held firm. The intellectual history of the doctrine traces it to the ancient English principle that the monarch can do no wrong or to the inherent power of the state to prevent such prosecution. Some give functionalist explanations for sovereign immunity: governments need to be protected from frivolous lawsuits so that they can concentrate on governing and not be distracted from the tasks of office. Whatever the explanations for the doctrine of sovereign immunity, prior to the Second World War it was almost unquestioned that state officials should be free from prosecution for human rights violations both in their own domestic courts and in foreign courts or international tribunals.

The state accountability model

The process of regulating human rights began shortly after the Second World War. The Holocaust was the shock or demonstration effect that led

states and non-state actors to identify the problem as a complete lack of international standards and accountability for massive human rights violations and to initiate action through the newly formed United Nations. The drafting and passage of the Universal Declaration of Human Rights in 1948 helped set the agenda for human rights regulation. The solution that states and non-state actors initially negotiated was a state accountability model. In this model, the state as a whole was held to be accountable for human rights violations and was expected to take action to remedy the situation. States negotiated and produced dozens of human rights treaties in the second half of the twentieth century. Most of these human rights treaties reflect the state accountability regulatory model. It continues to be the model used by virtually the entire human rights apparatus in the United Nations, including almost all of the treaty bodies. It is also the model employed by the regional human rights courts – the European Court of Human Rights, the Inter-American Court of Human Rights, and the new African Court of Human Rights. But under this model, if the state refused to take action, there was little the international community could do. Human rights non-governmental organizations, international organizations and other states mainly relied on reputational accountability via moral stigmatization of state violators.³ This was the so-called “name and shame strategy” of the human rights movement. Amnesty International, the United Nations or a foreign government would issue a report documenting human rights violations and call on the country to improve its record. In the few cases where stronger enforcement mechanisms existed, especially the regional human rights courts in Europe and the Americas, these courts could find that a *state* was in violation of its obligations under the Convention and ask it to provide some kind of remedy, usually in the way of changed policy. The actual individuals who carried out human rights violations were not affected.

The individual criminal accountability model

The main changes in regulation between the state accountability model and the individual criminal accountability model involve *who* is being held accountable and *how* these actors are held accountable (Ratner and Abrams, 2001). Both models may involve legal accountability, but the old model involves *state civil* legal accountability, whereas the new regulatory model involves *individual criminal* legal accountability.⁴ Under a state civil accountability model, the state provides remedies and pays damages, whereas under a criminal model the convicted go to prison. Although I focus on individual *criminal* legal accountability, there is also an increase in individual *civil* legal accountability, including in US courts, where cases

are brought mainly under the Alien Claims Tort Act, which permits tort claims for violations of international law.

The new criminal accountability model has emerged over the last 20 years, alongside the state accountability model, and recently it has grown more dramatically than the state accountability model. This new individual criminal accountability model is not for the whole range of civil and political rights, but rather for a small subset of political rights sometimes referred to as the “rights of the person”, especially the prohibitions on torture, summary execution and genocide, as well as for war crimes and crimes against humanity.⁵ Prior to the 1970s, state officials protected themselves from any individual legal accountability either during the repressive regime or after transition to another more democratic regime. By the 1980s, this had started to change and, since that time, an increasing number of trials for individual criminal accountability have been held around the world. I refer to this rise in individual criminal accountability as the Justice Cascade.

The Justice Cascade is “nested” in a larger norms cascade around accountability for past human rights violations. As of the 1980s, states are not just initiating trials but also increasingly using multiple transitional justice mechanisms to address past human rights violations, including: trials, truth commissions, reparations, lustration or vetting, museums and other “memory sites”, archives and oral history projects (Jelin, 2003). The increasing use of these practices attests to a broader accountability norm cascade, of which the Justice Cascade is only one part. Likewise, practices of state accountability for human rights violations have not diminished but continue to exist side by side with the trials for individual criminal accountability, and these two forms of accountability can reinforce one another.

As Pilar Domingo notes in her contribution to this volume (Chapter 3), the Justice Cascade is also nested in a broader process of strengthening of the rule of law through various forms of justice sector reform. Although better-quality rule of law is neither a necessary nor a sufficient condition for transitional justice, Domingo reminds us that there is a “circularity” in these processes, where developments in the rule of law have contributed to transitional justice, and the success of some transitional justice measures may in turn enhance the rule of law.

The scope and dimensions of the Justice Cascade

What makes the Justice Cascade complicated is that it is occurring simultaneously at three different levels: domestic; foreign or transnational; and international.⁶ The domestic level involves trials for individual criminal

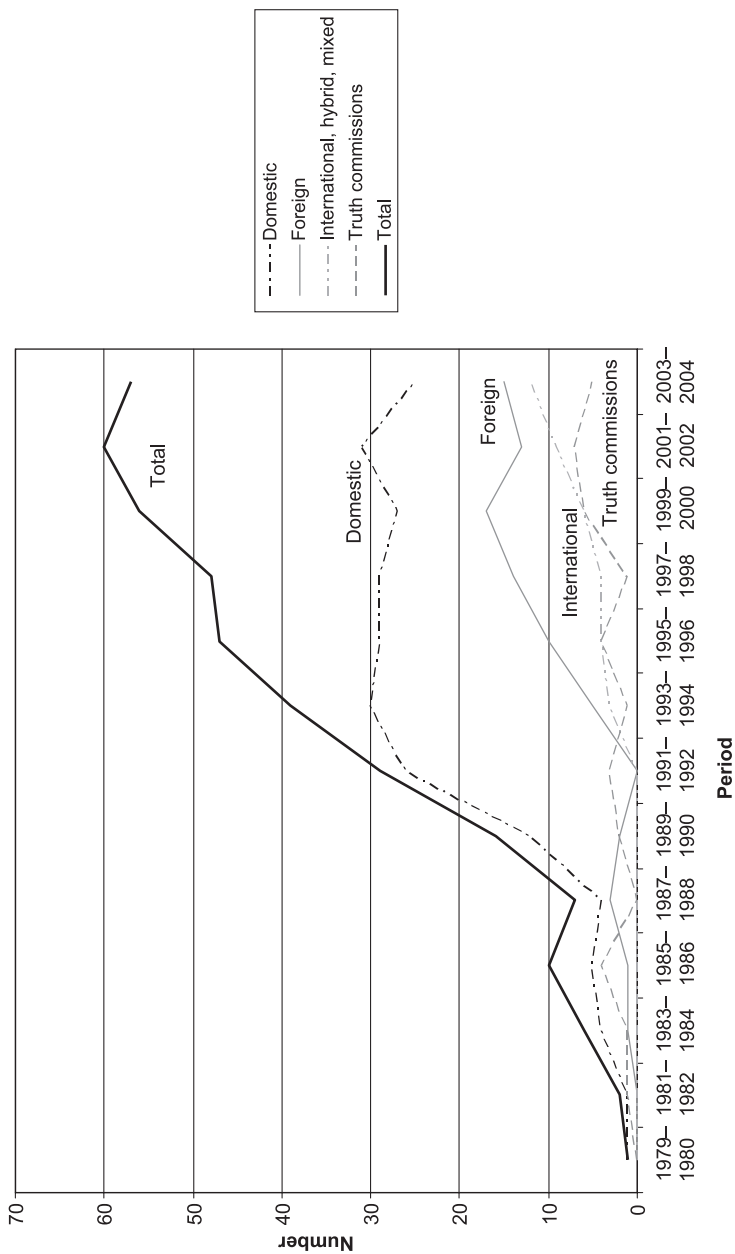
accountability conducted in a single country for human rights abuses committed in *that* country. The foreign or transnational level has included trials conducted in a single country for human rights abuses committed in *another* country – the most famous of which are Spain’s trials for human rights violations that have occurred in Argentina and Chile. Finally, international trials also involve trials for individual criminal responsibility for human rights violations in a particular country or conflict and result from the cooperation of multiple states, typically acting on behalf of the United Nations. Examples include the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The international trials category also includes hybrid criminal bodies defined by their mixed character of containing a combination of international and national features, such as those in Cambodia, Sierra Leone and Timor-Leste (formerly East Timor).

Our data set of trials and truth commissions from countries in transition to democracy from 1979 to 2004 reveals a rapid shift toward new norms and practices providing more accountability for human rights violations. Specifically, our data reveal an unprecedented spike in state efforts to address past human rights abuses that has occurred both domestically and internationally since the mid-1980s (see Figure 2.1). This represents a significant increase in the judicialization of world politics.

The trends in transitional justice follow some distinct patterns. We surveyed data on human rights trials for a 26-year period covering 195 countries and territories. Of the total, 34 countries used truth commissions and 51 countries had at least one transitional human rights trial. Of these 51 countries, many carried out a series of trials, which we capture in our data set as “country-trial years”.⁷ If we look only at the approximately 85 new and/or transitional countries in the period 1979–2004, we see that well over half of these transitional countries attempted some form of judicial proceeding.⁸ If we add to this list the 12 countries that used truth commissions but did not use trials, well over two-thirds of transitional countries used either trials or truth commissions as a transitional justice mechanism.

In sum, the use of a truth commission and/or human rights trials among transitional countries is not an isolated or marginal practice but a very widespread social practice occurring in the bulk of transitional countries. We believe that these four types of transitional justice mechanism (truth commissions, domestic trials, foreign trials and international trials) are all part of a related global phenomenon of increasing accountability for human rights violations.

The Justice Cascade started in domestic courts in the mid- to late 1970s in Greece and Portugal. By 1993, however, with the creation of the ICTY and the ICTR, the model of individual criminal accountability was



embodied in new international tribunals. Finally, as illustrated when Pinochet was arrested in London in 1998, the new development of individual criminal accountability in foreign courts also joined the trend. These ad hoc and decentralized enforcement mechanisms using individual criminal accountability through domestic courts, foreign courts and the ad hoc Tribunals in turn contributed to the expansion and development of new rules, especially in the form of the Statute of the International Criminal Court (ICC), which embodied the new regulatory model of individual criminal accountability. The doctrine of universal jurisdiction and the creation of the ICC are an important part of this new model of regulation, but it is much more than that. Given how new and embattled the ICC has been, it would be unpersuasive if the new model rested primarily on its shoulders. But, because of the importance of domestic courts, the ICC is *not* the main institution through which regulation of the new model is enforced. The doctrine of complementarity in the ICC can be seen as a broader expression of the new model of enforcement. Contrary to the ad hoc Tribunals or to the European Court of Justice, which have primacy or supremacy over domestic courts, under the doctrine of complementarity the ICC can exercise jurisdiction only if domestic courts are “unwilling” or “unable” to prosecute (Schabas, 2001: 13, 67).

The primary institutions for enforcement of the new model thus are domestic criminal courts, and the ICC and foreign courts are the back-up institutions or the last resort when the main model of domestic enforcement fails.⁹ Such back-up institutions, however, are necessary to create a fully functioning international model. If the model depended only on domestic courts, perpetrators could always escape either by blackmail and veto in the domestic constituencies (for example, the sabre-rattling and coup attempts that former military leaders in Argentina and Chile tried on each time they faced the possibility of domestic prosecution), or by retirement abroad in a friendly third country. The back-up provided by foreign and international trials makes such options less possible than before. When trials were only domestic, the process could be “captured” by domestic repressors, whereas the move to create a more transnational system of regulation reduced the opportunity for capture by domestic repressive forces.

Many critics of the ICC or the specialized courts have not understood their role as the back-up institutions in a global system of regulation. For example, Helena Cobban (2006: 22) argues that international tribunals “have squandered billions of dollars” and that domestic solutions would be more cost-effective. It would indeed be costly if international tribunals or the ICC were designed to provide a comprehensive system of individual criminal justice by themselves, but that is not how the model is currently working. The use of international tribunals or foreign courts as a

back-up is the exception, not the rule, in the new model of regulation. For the most part, the new model uses a decentralized system of enforcement that depends primarily on enforcement through domestic courts. Because the system is decentralized, however, the quality of the enforcement varies with the quality of the criminal justice system in the different countries.

Regions and transitional justice

Although transitional justice is a global phenomenon, it has very distinct regional characteristics. As Barahona de Brito and Whitehead point out in Chapter 18 for this volume, transitional justice experiences in different regions have emphasized or brought to light diverse issues. The South American cases certainly provide evidence of problems of impunity and democratic stability, whereas those in Africa have more often brought to light the problems resulting from ethnically divided societies and weak states. Likewise, the experiences in Eastern Europe have highlighted the issues of due process violations and the political abuse of transitional justice.

As Figure 2.2 indicates, the greatest number of transitional country-trial years occurs in the Americas, which account for 54 per cent of transitional trials, followed by Central and Eastern Europe with 21 per cent and sub-Saharan Africa with 17 per cent. Combined, these three regions

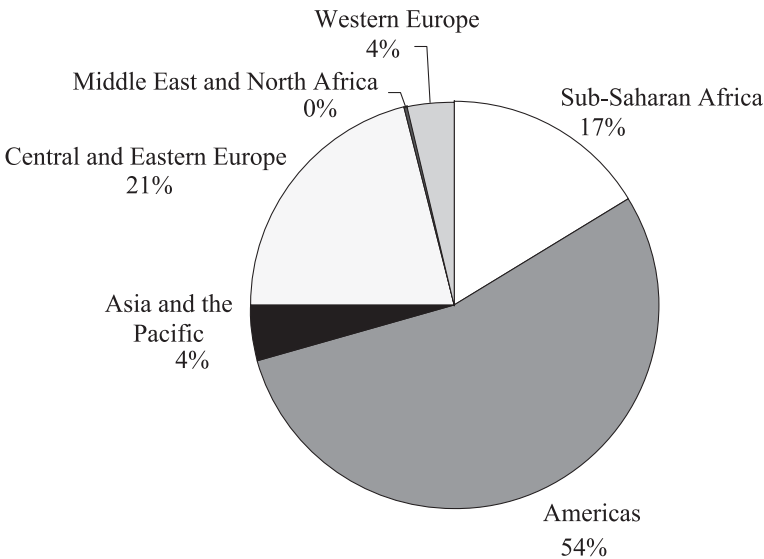


Figure 2.2 Regional distribution of domestic transitional trials.

cover 92 per cent of all country-trial years. In terms of numbers of country-trial years, 17 countries in Latin America accounted for 122, 12 countries in Africa accounted for 39, and 10 countries in Central and Eastern Europe accounted for 48.

Not only do Latin American countries account for the majority of domestic human rights trials, but they are also the subject of the largest number of foreign human rights trials. Most of the 101 foreign trials in our database were held in the domestic courts of European countries for human rights violations committed largely in the Americas. The great bulk of these foreign trials were brought to foreign courts by human rights organizations acting on behalf of human rights victims or their relatives from the country where the human rights violations occurred. But, even in Latin America, there is significant variation among countries in the degree to which they have adopted the new regulatory model, and even variation within a single country as to when it initiates criminal human rights trials. Some Latin American countries such as Argentina and Bolivia were among the very first countries to start making regular use of human rights trials in the mid-1980s. Argentina was both the leader in the region and also a global leader in the number of human rights trials it has held. Argentina's neighbours Brazil and Uruguay, which experienced similar authoritarian regimes and transitions to democracy at roughly the same time as Argentina, made different choices about trials. Brazil has held no human rights trials for violations during the authoritarian government, and Uruguay held no trials for the first 15 years after the transition, and began a handful of prosecutions only in the early 2000s.

Because of these distinct regional patterns, I will argue that we cannot understand the origins or the effectiveness of transitional justice generally or the use of transitional justice mechanisms in any specific country without being attentive to the international and regional context. Hunjoon Kim's (2007) research on the adoption of truth commissions and human rights trials in the world indicates that the single most important factor that helps explain why a country decides to use a transitional justice mechanism is the number of other culturally similar countries in the region that have already adopted the mechanism. We do not yet understand completely why regional neighbours play such an important role, but it is probable that cultural and linguistic similarities permit diffusion to occur with greater ease within regions than between regions.

The effectiveness of accountability mechanisms

I now turn to the topic of the effectiveness of accountability mechanisms in Latin America and Eastern Europe. We can think about effectiveness

in various ways. Some people use the term to refer to whether different countries have been effective in *setting up* various transitional justice or accountability institutions or mechanisms. Others use the term to evaluate whether, once established, these transitional justice institutions or mechanisms actually contribute to meeting certain goals, such as reducing human rights violations or contributing to the consolidation of democracy. I will use effectiveness only in this second way.

There has been a lively debate in the political science and international law literature about the desirability and impact of human rights trials. Many scholars and practitioners believe that such trials are both legally and ethically desirable and practically useful in deterring future human rights violations (Mendeloff, 2004; Roht-Arriaza, 1995). In his review of the transitional justice literature, however, Mendeloff (2004) finds many such claims about the positive effects of human rights trials but relatively little solid evidence to support those claims. As Barahona de Brito and Whitehead point out in Chapter 18 in this volume, much of the literature on transitional justice “remains prescriptive and universalist” and pays scant attention to whether transitional justice policies are always the most appropriate way to deal with the past in diverse settings.

But there is also a literature that is much more sceptical about the effects of human rights trials. Jack Goldsmith and Stephen Krasner (2003: 51) contend that “a universal jurisdiction prosecution may cause more harm than the original crime it purports to address”, and argue that states that reject amnesty and insist on criminal prosecution can prolong conflict, resulting in more deaths. Jack Snyder and Leslie Vinjamuri (2003) also argue that human rights trials themselves can increase the likelihood of future atrocities, exacerbate conflict and undermine efforts to create democracy. They claim that “the prosecution of perpetrators according to universal standards risks causing more atrocities than it would prevent” (Snyder and Vinjamuri, 2003: 5). These arguments suggest that more enforcement or the wrong kind of enforcement can lead to less compliance with international and domestic law. In particular, they suggest that, during civil wars, insurgents will not sign peace agreements if they fear they will be held accountable for past human rights abuses. As a result, these authors claim that the threat of trials can prolong war and exacerbate human rights violations.

A new literature has also emerged that stresses the importance of locally and culturally appropriate measures of transitional justice, including justice rooted in local communal law, such as the *gacaca* courts in Rwanda. Barahona de Brito and Whitehead argue that we must allow the wishes of local citizens to determine what transitional justice mechanisms are best for their locality. But sometimes such local judgements are based on causal assumptions that may or may not be valid. For example, many

local communities choose not to pursue justice because they believe, or they have been told, that you cannot have both peace and justice. In many parts of the world, when ordinary people are given a choice between peace and justice, they will prefer peace. The argument that transitional justice blocks peace, however, is often made by self-interested actors (governments or rebel groups who hope to avoid accountability) and there is simply not adequate evidence yet to support the claim. Thus social science research can produce work such as the current volume that might assist the judgements of such local communities. Indeed, the research from Latin America, discussed below, suggests that the use of trials has coincided with a very significant reduction in conflict in the region. Although we cannot say that trials reduce conflict, there is little evidence from Latin America that you have to choose between justice and peace. This might be a useful and even reassuring finding for communities that have been told that they must choose between the two.

It is difficult to evaluate the impact of transitional justice mechanisms. Our conclusions depend greatly on what we mean by effectiveness and what measures or methods we use to evaluate it. Effectiveness is always evaluated relative to some other benchmark and, thus, a judgement about effectiveness always involves some kind of comparison. I will argue that scholars, policy-makers and activists use three distinct forms of comparison in evaluating the effectiveness of transitional justice mechanisms: comparison with the ideal; counterfactual reasoning; and empirical comparisons. These methods are sometimes used explicitly but more often implicitly, and the type of comparison will often affect the conclusions about effectiveness.

Comparison with the ideal

Evaluations that use comparison with the ideal compare the effects of actually existing transitional justice mechanisms with our ideals of how justice should operate. These evaluations sometimes use the mission statements of actually existing transitional justice institutions as the benchmark against which the institution is measured, so that the institution is being evaluated against its own ideals. Comparison with the ideal can be explicit or implicit. The implicit comparison with the ideal is very common in discussions of human rights trials and other accountability mechanisms.

Human rights activists most often engage in comparison with the ideal. I believe this is what Barahona de Brito and Whitehead mean when they talk about a “moralistic” approach, and point out that transitional justice “highlights the eternal contrast between what we hope for and feel is right and what we are actually able to do”. So, for example, a leading

member of the human rights movement in Argentina described the reaction of Argentine human rights activists to the sentences in the Trial of the Juntas. Instead of being pleased with the life sentences for some of the accused, they were disappointed by the leniency of some of the other sentences. She and some other Argentine human rights activists were at a meeting of human rights groups from the Southern Cone being held in Chile when they got the news. "We got very angry and felt very bad that night. The next day when we entered the conference, various colleagues greeted us with applause. We said, 'Why are you clapping? Are you drunk?' They told us: 'You don't know how to take advantage of what you have. You aren't satisfied with anything; that's how Argentines are.'"¹⁰

Although I will recommend empirical comparison as the superior method, comparison with the ideal is an important form of ethical reasoning. We need to keep the ability to hold our actual practices up to our ideals and constantly measure where they fall short. Such reasoning is a powerful pressure for change in the international system. It is one of the main tools that advocacy groups use in the world. But it is also very important to be careful how we use this form of the ideal comparison and to distinguish it very clearly from empirical comparison and counterfactual reasoning. Most importantly, comparison with the ideal should be explicit rather than implicit. The author should clarify that the practice or institution in question is being compared not with an empirical example in the world but with a set of ideals of what such a practice or institutions should look like, and those ideals should be explicitly stated and defended.

Counterfactual reasoning

In counterfactual evaluations of the effectiveness of transitional justice, we compare what happened with what *would have happened* without transitional justice or with a different combination of transitional justice mechanisms.¹¹

So, for example, some people make the counterfactual argument that the military coup attempts against the government of President Alfonsín of Argentina would not have occurred and democracy would have been more stable if he had not held trials for past human rights abuses. This counterfactual analysis was so common at the time that it was one of the reasons that other countries such as Chile chose to use a truth commission but not to pursue trials, in order to avoid what they believed had been the "mistakes" of the Alfonsín government.

But the problem with counterfactual reasoning is that one can often make plausible alternative counterfactual arguments. For example, one

could argue that, if President Alfonsín had not held trials, the military would have been emboldened and the coup attempts would have succeeded. Or one could make the counterfactual that the coup attempts would have occurred regardless of the particular transitional justice strategy pursued. For example, the transitional government in Spain experienced a serious coup attempt in 1981 despite the fact that it had not used any transitional justice mechanisms such as trials or truth commissions. Counterfactuals are tricky because we cannot determine which of these counterfactuals is more valid.

We cannot eschew counterfactual arguments, because they are ubiquitous in political life. Counterfactual arguments are often contentious, however, because well-intentioned scholars can propose quite different counterfactual scenarios and it is difficult to prove whether one is more plausible than another (Tetlock and Belkin, 1996: 4). In this kind of counterfactual reasoning, it is helpful if the author spells out the counterfactual so that it can be evaluated by other scholars. Tetlock and Belkin (1996: 4) argue that the alternative to an open counterfactual model is often a concealed counterfactual model. In a concealed model, the reader is aware that the author thinks that other outcomes were both possible and desirable but must infer the preferred alternatives from the critique of what did happen, rather than read them stated clearly with both their possibility and desirability defended.

Empirical comparisons

Empirical comparisons involve comparing current transitional justice practices or institutions with other current or historical practices in order to evaluate their effectiveness. In this sense, the effectiveness of the transitional justice mechanisms is judged in relation to other past experiences or to experiences in other countries. So, for example, we can measure the effectiveness of accountability in improving human rights practices and democracy by comparing the human rights situation in individual countries before and after they use trials or other accountability mechanisms such as a truth commission or lustration to see if we can discern the impact of accountability, or by comparing countries that used trials or other accountability mechanisms with other countries that did not.

This is my preferred method of evaluating effectiveness. It is similar to the “comparative historical framework” advocated by Barahona de Brito and Whitehead. To illustrate this method, I will summarize the conclusions from an article I co-wrote with Carrie Booth Walling (Sikkink and Booth Walling, 2007) and discuss the effectiveness of human rights trials in Latin America.

The impact of human rights trials in Latin America

Carrie Booth Walling and I (2007) used the method of empirical comparison to explore the effectiveness of domestic human rights trials in Latin America in terms of the consolidation of democracy and the level of human rights protection. We focus on Latin America because cases in this region account for more of the country-trial years in the data set than any other region. Furthermore, because many Latin American countries were early innovators of human rights trials and truth commissions, more time has passed than in any other region, enabling the evaluation of the impact of these transitional justice mechanisms on future human rights practices, democratic consolidation and conflict. We argue that, if we compare regions that have made extensive use of trials with regions that have not made extensive use of trials, we find that Latin America, which has also made the most extensive use of human rights trials of any region, has made the most complete democratic transition of any transitional region. In the twentieth century, political instability and military coups were endemic in Latin America. Since 1980, however, the region has experienced the most profound transition to democracy in its history and there have been very few reversals of democratic regimes; 91 per cent of the countries in the region are now considered democratic, well above the level for Eastern Europe and the former USSR (67 per cent) or Asia & Pacific (48 per cent) or Africa (40 per cent) (see Diamond, 2003: Table 5).

Since the 1980s when the first trials were initiated in the region, there have been only four examples of coups in Latin America, and none was provoked by human rights trials.¹² The remaining 14 countries that used trials have not had a successful coup attempt since the use of trials and, in many cases, are increasingly considered consolidated democratic regimes. The data from Latin America provide no evidence that human rights trials have contributed to undermining democracy in the region. The argument that trials undermine democracy came largely from observations of a single case: the early coup *attempts* in Argentina against the Alfonsín government after it carried out far-reaching trials of the three juntas for past human rights violations. But almost 20 years have passed since those failed coup attempts, and Argentina has had more transitional human rights trials than any other country in the world and has enjoyed the longest uninterrupted period of democratic rule in its history.

To explore the impact that trials have on human rights in Latin America, we examined the human rights situation in countries before and after trials to see if we could discern any impact of trials on human rights. Using averages of the Political Terror Scale (PTS) as a measure, we examined the human rights conditions prior to trials and after trials in all of

the Latin American countries with two or more trial years.¹³ We excluded from our analysis three countries that had only one country-trial year, including Uruguay. We compared the average PTS score for the 5 years preceding the first trial with the average PTS score for the 10 years after the first trial.¹⁴ Of the 13 countries that held human rights trials for at least two years, 11 improved their human rights situation after trials and in 2 countries (Haiti and Mexico) the human rights situation worsened. The average improvement of the 13 countries was 0.6 on a five-point scale, where 1 is the best human rights score and 5 is the worst human rights score. It is very likely that much of this improvement is due to the transition to democracy rather than to the trials. This is difficult to test because there are only two transitional countries – Brazil and Guyana – that did not hold trials. If we look at Brazil before and after its transition to democracy in 1985, we see that Brazil's average score on the PTS was 3.2 in the 5 years before transition and worsened to an average of 4.1 for the 10 years after transition. Brazil experienced a greater deterioration in its human rights practices than any other transitional country in the region. The Brazil case suggests that transition to democracy, in and of itself, does not guarantee an improvement in basic human rights practices.

We were able to partially isolate the effects of trials from the effects of transition to democracy by looking at the differences between transitional countries that had a greater number of trials and those that had fewer trials. All 13 countries that held trials for two or more years went through processes of democratic transition. And yet the countries that held more trials had a higher average improvement in human rights than the countries that had fewer trials. So, the seven countries in the region that had more trials experienced an average improvement of 0.9 on the five-point PTS, whereas the seven countries that had fewer trials had an average improvement of 0.3 on the PTS.

Countries in Latin America that held more trials were also more likely to have a truth commission than countries that held fewer trials. The countries that had both truth commissions and trials had better scores than countries that just had trials: countries that had both a truth commission and human rights trials had an average improvement of 0.7 on the five-point scale, whereas countries that had only trials had an average improvement of 0.1 on the same scale. These results, together with the evidence from Brazil, suggest that the use of transitional justice mechanisms, in and of themselves, may have some independent effect separate from that of transition to democracy. It could be that there is some other factor doing the work here rather than trials themselves – perhaps the existence of the political will to hold perpetrators accountable for past human rights violations. It is not clear, however, how one

could separate out the political will to hold trials from the existence of trials themselves. Regardless of which part of the human rights improvement comes from transition to democracy, from political will for accountability or from trials, it remains hard to maintain in the face of these data that human rights trials actually lead to more atrocities in the Latin American cases.

Most scholars recognize that, for human rights violations to decrease, countries need to strengthen their rule of law systems. This raises the crucial issue of how to build the rule of law in such countries. Snyder and Vinjamuri (2003, 2004) argue that human rights trials might interfere with the process of building the rule of law: “Amnesty – or simply ignoring past abuses – may be a necessary tool in this bargaining. Once such deals are struck, institutions based on the rule of law become more feasible” (Snyder and Vinjamuri, 2003: 6). Other legal scholars argue that a strong judicial system, including respect for the rule of law, is essential for states to autonomously implement truth commissions and trials. In either case, the rule of law is seen as something that needs to come prior to the effective use of trials or truth commissions.

In Chapter 3 for this volume, Pilar Domingo makes a rather different argument that suggests that transitional justice and the construction of the rule of law are circular and mutually reinforcing processes. Latin America has been undergoing a process of judicial reform and promotion of the rule of law over the past 15 years that parallels the process of human rights trials we describe here. Rather than see the construction of the rule of law as a process separate from, or that must precede, human rights trials, it has been the case that building the rule of law has coincided with human rights trials in much of the region (Domingo and Sieder, 2001). Indeed, the rise of the field of rule of law assistance in the 1990s in large part grew out of the human rights movement of the 1970s and 1980s (Carothers, 2001). The leading promoters of judicial reform recognize this mutual reinforcement of human rights trials and the rule of law.¹⁵

The most crucial ingredient of a rule of law system is the idea that no one is above the law. As such, it is difficult to build a rule of law system while simultaneously ignoring recent gross violations of political and civil rights and failing to hold past and present government officials accountable for those violations. Of course, human rights trials are not the only means of building the rule of law, but the Latin American cases, where the rule of law has been strengthened at the same time that human rights trials have been carried out in most transitional countries, illustrate that human rights trials and the construction of the rule of law can be two simultaneous and mutually reinforcing processes.

Unfortunately, there are not fully reliable data on the rule of law to test these propositions more rigorously. The International Country Risk

Guide (ICRG) has produced a measure of what it calls “Law and Order”, but it is not fully consistent with the notion of rule of law used here.¹⁶ It looks both at the strength and impartiality of the legal system (close to our definition of the rule of law) and at “popular observance of the law”, including high crime rates and widespread illegal strikes (something not included in many definitions of the rule of law).¹⁷ As the harsh authoritarian regimes and civil wars ended throughout the region, unemployed “men with guns” in many cases contributed to an increase in violent common crime. Even given these issues, 10 of the 14 transitional countries in Latin America that have held trials have seen improvements in their Law and Order score between 2006 and the year they held the first trial, suggesting that holding human rights trials is compatible (not in conflict) with the process of building the rule of law. Brazil, the only Latin American country in the Law and Order database without human rights trials, has seen a decrease in its Law and Order score. This kind of data does not allow us to make any causal claim that human rights trials build the rule of law. However, it calls into question the notion that the rule of law is a necessary precondition for human rights trials. Many Latin American countries had quite low Law and Order scores in the years that they initiated human rights trials, and yet they managed to improve the rule of law and hold human rights trials simultaneously.

It is possible that Latin America is the exceptional region and we will not see the same results replicated in other regions of the world. It is equally possible that, because the trials started early in Latin America, we now have a long enough time-frame to realistically assess the effects of trials. Trial sceptics have often based their arguments on a few powerful but as yet unresolved current cases. Just as the frightening but ultimately unsuccessful coup attempts in Argentina drove some of the early pessimism in the transitions literature, the failure of international justice to dampen nationalism in Serbia or to help end conflicts in Uganda or Sudan may fuel current trial scepticism. Just as the transition literature was too hasty in its judgements about the impossibility and undesirability of trials in Latin America, current trial sceptics might be well advised to monitor the situation in the former Yugoslavia and Uganda longer before jumping to conclusions about the pernicious effects of trials.

Conclusion

The benefits of an edited volume of case studies about the effectiveness of transitional justice mechanisms is that it can begin to illuminate the mechanisms through which transitional justice mechanisms have an impact on human rights, democracy, the rule of law or other factors of

interest. Transitional justice more generally, and human rights trials specifically, are only one of the many factors that can contribute to positive human rights change. Although they are not a panacea for human rights problems, they appear to be one form of sanction that can contribute to the institutional and political changes necessary to limit repression.

Notes

1. See also Simmons and Zachary (2004).
2. See the historical narrative in Elster (2004).
3. I use the definition of accountability by Grant and Keohane (2005: 29): it “implies that some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met”. Legal and reputational accountability are two of the seven forms of accountability they discuss.
4. Legal accountability is “the requirement that agents abide by formal rules and be prepared to justify their actions in those terms, in courts or quasi-judicial arenas” (Grant and Keohane, 2005: 36).
5. These include rights from only two or three of the 27 substantive articles of the International Covenant on Civil and Political Rights, those protecting the right to life and prohibiting torture. The new model also provides enforcement of the Genocide Convention, the Convention against Torture, and those parts of the Geneva Conventions prohibiting war crimes.
6. To determine the actual dimensions of the global Justice Cascade, Carrie Booth Walling and I have created a new data set of domestic, foreign and international judicial proceedings for individual criminal responsibility for past human rights violations. I am indebted to Carrie Booth Walling for her permission to use material from our joint data set and for preparing some of the figures based on those data for this book.
7. Our variable measures not the number of trials per se but the persistence of judicial proceedings on past human rights violations in a country over time. The higher the number of “country-trial years”, the greater the persistence of judicial proceedings. We define country-trial years as the number of years during which a state is actively engaged in judicial proceedings for individual criminal responsibility for human rights abuse. This number does not reflect the number of trials under way within that state during those years, which may be far greater.
8. We arrive at the estimate of approximately 85 total transitional countries by subtracting from our list of 192 countries the 41 democracies that existed in the world as the third wave of democratization began in 1974 and the 67 non-democracies that still exist in the world today and did not have even a failed experience with a transition to democracy (based on the coding of Freedom House data by Larry Diamond, 2003: Table 1 and Table 3, pp. 3–6).
9. Orentlicher (1995: 2562) calls this “domestic enforcement with an allowance for ‘fall-back’ international jurisdiction”, and Naomi Roht-Arriaza (2005: 193) refers to foreign trials as a “backstop” for domestic justice.
10. Interview with Graciela Fernández Meijide, Centro de Estudios de Estado y Sociedad (CEDES), 12 December 1989, cited in Jelin et al. (1995: 134).
11. Counterfactuals are subjunctive condition statements (i.e. they take the form, “if x then y would have ...”) in which the first part of the statement is not true.

12. These include the “self-coup” in 1992 in Peru and coups in Ecuador in 2000 and Haiti in 2004. [Editors’ note: and in Honduras in 2009]
13. The PTS is a quantitative scale from 1 to 5 measuring extreme human rights violations, including summary execution, torture, disappearances and political imprisonment (with 1 as the best score and 5 as the worst). The scores are coded from Amnesty International and US State Department annual human rights reports. The PTS tracks the same human rights violations as those captured by our data set. The countries with two or more trial years in Latin America are: Argentina, Bolivia, Chile, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru and Venezuela.
14. Because the PTS begins only in the 1980s we cannot use an average score for 10 years before trials. We use 10 years after the first trial because many countries had multiple trials, and this allows us to look at changes that may occur from multiple trials over time.
15. Interview with Alberto Binder, Instituto de Estudios Comparados en Ciencias Penales y Sociales (INECIP), Buenos Aires, Argentina, 21 November 2006.
16. See “ICRG Methodology”, at http://www.prsgroup.com/ICRG_Methodology.aspx (accessed 8 March 2012).
17. There is also a World Bank data set on the rule of law, but it covers a shorter period and is also more concerned about order than about access to and the impartiality of the judicial system.

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Part I

Latin America

3

Accountability, the rule of law and transitional justice in Latin America

Pilar Domingo

This chapter explores the connections between the different paths of transitional justice in Latin America and the rule of law and judicial reform processes that have taken place in much of the region over the past two decades. For the most part, transitional justice experiences and rule of law reform have been studied as parallel and separate processes, with some recent exceptions (Collins, 2008; Skaar, 2010). However, transitional justice in many ways presupposes minimum rule of law standards, and advances in the rule of law involve precisely a greater commitment to addressing issues of legal accountability for those in positions of political power. The chapter, then, explores the connections between these two processes, looking at how past and present accountability are related to the state's capacity to deliver minimal rule of law standards, and how this has evolved in Latin America in recent times. To the extent that justice sector reform has improved the effectiveness of accountability mechanisms, what is the impact that this has had on transitional justice processes as these have evolved? Where the different actors promoting transitional justice seek to go beyond the establishment of truth commissions and achieve some level of judicial accountability, this requires that courts be minimally receptive to cases dealing with human rights abuses committed in the past and that they be minimally credible and capable of guaranteeing a measure of due process. In turn, developments in transitional justice can have an impact on how members of the judicial system re-position themselves over time with regard to cases of human rights crimes.

The chapter reflects on the ways in which the changing tempos and directions of transitional justice experiences in different Latin American countries are connected to key changes in the judicial branch, through either reform, generational and attitudinal change and developments at the regional and international level in human rights jurisprudence, or jurisdictional change through international or regional treaties and conventions and international institutional innovation in connection to human rights issues. Key to understanding the judicial dimension of dealing with past human rights crimes is the question of how courts are situated historically, politically, institutionally and in terms of the legal culture of the judicial community. There is also the issue of their social standing and public image. These different questions have undergone important changes in the past two decades in much of the region, and the impact of this on transitional justice to date remains generally under-studied.¹

The chapter develops some reflections that perhaps are more intuitive than empirically testable, but they are illustrated through examples from different country experiences in the region. Given the nature of the relationships that are explored and of the subject at hand, I believe it is a matter not of establishing firm causal explanations but rather of advancing our mapping of what, to start with, are two complex context-specific and multi-layered processes and their interaction: namely, the evolution of transitional justice experiences, and regional developments in the politics of rule of law construction and the strengthening of legal oversight and mechanisms of judicial accountability (in the name of *good governance*). The question is the degree to which these two processes are, or are not, mutually reinforcing, and the nature of the interaction between them.

Some preliminary questions

It is worth pointing to some similarities in the bodies of academic enquiry that deal with transitional justice and rule of law construction. First, both have developed in response to similar issues and processes that have acquired unprecedented levels of prominence in the public agenda in the context of the “third wave” of democratization.² Here there are three broad categories of political processes within which the phenomena under discussion have been addressed: the end of authoritarian rule (Latin America, Southern Europe and Africa); democratization in contexts of post-Communism (the Soviet bloc and Eastern Europe, Asia); post-conflict states and states *still* in conflict, through civil war or regional or ethnic conflict (sub-Saharan Africa, Asia, Central America, the Balkans). Second, both literatures are concerned with issues of accountability in the exercise of public office and state power (whether at the in-

dividual or the state level). More recently, however, transitional justice also considers crimes committed by non-state actors. Third, both literatures are interdisciplinary and have attracted a broad range of analytical and normative perspectives across the social sciences, law and the humanities – including social psychology. Fourth, in both cases the analytical input of practitioners and activists has been significant, perhaps especially so by the latter in relation to the transitional justice literature. In this regard there is even some overlap; erstwhile practitioners or human rights activists in the field of transitional justice can in some cases more recently be seen promoting certain aspects of justice sector reform that are deemed to be conducive to furthering the cause of human rights.³

What are the objectives in transitional justice in contrast to the objectives of rule of law construction? If we start with the rule of law, at a basic level this is about making effective the principle of constrained or limited government. This requires, among other things, that those in positions of power accept the *binding spirit* of the law over their actions. On the one hand, this is institutionalized normally through mechanisms of accountability and oversight. Traditionally, this has been presented under the rubric of the separation of powers and the different treatises developed to justify the various constitutional arrangements and dynamics of this. More recent scholarly work has focused on the concept of accountability, be it horizontal, vertical or social.⁴ The focus tends to be on answerability, legal probity and abidance by constitutional principles. On the other hand, the rule of law in liberal democracies is normatively premised around the contract between state and society that is spelled out in the bill of rights (whether written in a constitutional text or not). Citizenship and the corresponding list of rights (however these may be defined – and this is subject to constant revision over time, reflecting changes in values in society and processes of social transformation, sometimes through rights battles yielding shifts in the balance and structure of political, social or economic power) contain the central normative aspirational narrative in contemporary democratic states.⁵ The degree of rule of law to some extent is a measure of the degree to which states live up to the promises of the bill of rights.

Whatever the definition of citizenship or the institutional arrangement around which limited government is structured, a key mechanism of legal oversight and accountability is the judicial branch, and the justice sector more broadly. In some new democracies, increasingly this includes the consideration of non-state mechanisms of justice and conflict resolution. Judiciaries have four main tasks: they are the guardians of the law and constitutional principles through judicial review; they are a central forum for the resolution of disputes in society, between members of society and the state, and between state agencies; they are in charge of the

administration of criminal justice within the bounds of due process; and they play a key role in the protection of citizens' rights. In the legal-rational tradition, the fulfilment of these tasks requires that judges operate with optimum levels of independence, impartiality, equal and predictable application of the law, and so forth. The state's capacity for the rule of law, then, is intimately linked to the legitimacy and effectiveness of the justice sector. The good governance agenda has incorporated the need to improve the rule of law as part of the conditions for responsive, responsible and accountable government – hence the unprecedented level of donor attention and resources to justice sector reform. Over time, the rights component of the rule of law reform effort has acquired varying levels of visibility and prominence as an objective. And in many post-conflict situations in sub-Saharan Africa there is increasing attention to the world of informality and tradition (the two are not interchangeable) in relation to justice mechanisms. I will return to this later in the chapter.

The objectives of transitional justice are different but connected and varied. Lutz (2006) identifies two central goals: to respond to the experience of the suffering of the past; and to prevent similar suffering in the future. This involves the objectives of truth (establishing the facts of the events of the past, giving voice to the victims and their relatives), justice (among other things, the criminal prosecution of human rights crimes), reparation for the victims and their families, and the vetting or purging of security forces (Roht-Arriaza, 2006). A longer-term goal is the difficult endeavour of creating the conditions for reconciliation between the different groups, sectors of society or views whose difference or opposition led to the original conflict or to state-led violence. Although reconciliation is at best a long-term process, transitional justice in the short to medium term is perhaps more immediately also about contributing to recreating the terms of a new political community that can enable the emergence of minimum levels of trust. This involves (re)building trust with regard both to the emerging rules of the political game, which, among other things, has to do with how the political settlement is negotiated, and to the levels of inclusiveness and pacification that it involves. A key aspect of the legitimacy and trustworthiness of the emerging political settlement is the degree to which it is able to build up the principle of "equality before the law" – and that no one is above the law. In this sense, reconciliation is linked to the degree to which the rule of law becomes a credible feature of or prospect for state–society relations in the new political order.

Thus, the (re-)establishment of the rule of law is on the one hand important, or at least desirable, to enable some features of transitional justice with better prospects for effectiveness. On the other hand, in that in

itself it is a measure of rights protection, the construction of the rule of law as defined above is also a long-term goal of transitional justice, because it is the guiding principle around which rights protection is most likely and hence the prevention of crimes against humanity in the future, and also one important basis upon which inter-societal and state–society trust can emerge.

There exists a thriving body of social enquiry on the matter of the how and the why of the process of transitional justice – in its different formulations – and its effect. Some studies have focused on identifying the political factors that facilitate or inhibit the prospects of transitional justice, for instance: the nature, extent and timing of the crimes committed; the balance of social, political and military forces at the time of regime transition or the resolution of armed conflict; the changes in this balance over time; the nature of human rights organization and victims' associations, the nature of their political voice and associational capacity; the timing of the issue in terms of international developments on human rights jurisprudence and attempts at international or foreign prosecution; the matter of the “contagion” effect of experiences in other countries; the nature and legitimacy of state institutions, such as the court system; and the nature and acceptability of the politics of amnesty (and impunity?). The legal literature focuses on the legal dimension of what is likely and what is possible in terms of criminal justice from the perspective of the nature and evolution of formal justice mechanisms at the domestic, regional and international level (I will return to this below). The studies on truth commissions track the structure, mandate, legitimacy, learning process and effectiveness of truth-telling exercises as one of the key components of transitional justice and as an important first step towards criminal prosecution. Some of the earlier works were driven by prescriptive objectives that guided the standards against which transitional justice ought to be measured. Then there are studies that have explored the complexity of the concept of “justice” as encompassing different levels of retribution, restitution, reconciliation and forgiveness, exploring the multiple spaces and dimensions (at the individual and collective psychological, attitudinal, cultural level) in which the politics of memory and justice unfolds, and its impact on political and social processes of reconciliation.

Amidst the broad landscape of analytical perspectives in the literature on the process of transitional justice it is worth pointing to some recurring themes that are relevant for understanding the connection between judicial politics and transitional justice developments. It is clear that in the last 30 years there has been a “thickening” of the normative framework around human rights issues and the question of accountability at the domestic, regional and international levels of practice and discourse

– as described with the notion of the Justice Cascade (Lutz and Sikkink, 2001). This has had an impact on the practice of states, on the options and strategies of the different political, social and legal actors involved, and on the prospects for different aspects of transitional justice to be activated. Key here is the “interconnectedness” of the multiple levels at which transitional justice processes take place – domestic, regional and international – and the various types of interface between the different actors and institutional spaces that are involved and the legal frameworks and rights discourses that are invoked. This has been perceptively analysed elsewhere in the literature.⁶ Here I wish merely to highlight the “circularity” of these processes, because developments at one level have an impact at other levels. The complexity and variability of the different layers that are interacting cause shifts in different ways and with different outcomes. But the trend seems to be one of mutually reinforcing processes that contribute to this thickening of human rights norms and practices that are supportive of transitional justice endeavours. This is reflected in piecemeal and variable shifts in the *opportunity structures* available at different levels of action for human rights and victims’ associations and new levels of *outcomes* in terms of truth-telling, justice through criminal prosecution and reparations (Keck and Sikkink, 1998; Lutz and Sikkink, 2001; Sikkink, 2005).

Moreover, there are trigger events that can serve to activate changes in the tempo and strategic options of transitional justice efforts, such as the impact of the arrest of General Pinochet in London in 1998, or through what have been called “irruptions of memory” that can shift public perceptions and expectations about what is possible and what is desirable (Wilde, 1999). These shifts can in turn trigger other events and developments transnationally. Action by Judge Garzón in Spain served to galvanize activity in other justice systems across Europe in relation to human rights crimes in Latin America and elsewhere. This contagion effect also serves to support the thickening tendency in global norms and discourses around human rights, with concrete effect at the domestic level.

It is important to qualify the “cascading” argument. Although there is much in it that describes some particular transitional justice experiences in Latin America, we should take care not to view it as a linear and inevitable evolution. Moreover, norms are unlikely to trickle (or cascade) down to the national and subnational level in an unimpeded fashion. Rather, there are likely to be hard obstacles in the way of these norms, so that the cascading effect may actually be internalized in ways that look not a lot like liberal “rule of law”. It is likely to be uneven and patchy and its evolution determined by context-specific factors. Here I focus on the particular interface between justice sector reform and the evolution of transitional justice processes.

More on the role of courts in transitional justice

Early debates in transitional justice analyses in Latin America raised the (false) dilemma between truth and justice (Méndez, 1997a, 1997b; Zalaquett, 1992). This dichotomy has since been superseded by the unfolding of events, which have proved truth and justice to be not mutually excluding objectives but two desirable goals that serve different purposes. If and when they do take place, they tend to occur sequentially, with truth-telling preceding criminal investigations. In part this reflects the fact that, contrary to the assumption that truth commissions are less politically destabilizing, where trials have taken place in the region this has not been the cause of democratic breakdown. It is also true, however, that trials have tended to take place at a later stage of the post-transition or post-conflict period in Latin America – with the exception of Argentina in the 1980s, where the initial enthusiasm for criminal prosecution was reined in through decisions based on political expediency (the amnesty laws under President Alfonsín and the pardons under President Menem).

Generally, following the example of the report by the National Commission on the Disappeared (CONADEP) in Argentina in 1983, truth-telling exercises, in various formats and through a variety of mandates, have become almost a staple of transitional justice endeavours. With some exceptions, they have come to be seen as one more – generally early – stage of transitional justice and not as an alternative to criminal justice (Hayner, 2001). Through their particular features, they may provide a better medium than the courts for dealing with certain aspects of the past: they offer a broader forum for victims to tell their story regarding events of the past; they are a more comprehensive opportunity to set the historical record straight on the nature of the violence and its causes and to make public the scale of the atrocities committed; the facts that they marshal can be taken up either for judicial investigations with the aim of prosecuting perpetrators of the crimes, or for the purpose of cleansing public institutions of those employees most complicit with the violence, and as a basis for compensation to victims and their families.

The criminal prosecution dimension of transitional justice has a different logic and justification and is seen as important in coming to terms with the past for a number of reasons. Trials provide victims and relatives with a sense of justice and catharsis with regard to their suffering through the act of punishment and retribution; they represent another form of public and official confirmation of the facts; they advance the objective of deterrence in that they establish the message that perpetrators will be held to account; they have the advantage of separating individual responsibility for the crimes from collective guilt (which is deeply problematic

as regards social processes of reconciliation and healing in the future); the degree of legitimacy of the trials is a measure of the credibility and capacity of the state to honour its commitment to principles of rule of law and human rights (Kritz, 1995; Méndez, 1997b).

The failure to engage with some measure of criminal prosecution can send the message that impunity is possible. It also acts to reinforce the sense of powerlessness and helplessness among victims (Kritz, 1995). When trials do not take place, this can reflect the presence of a combination of factors such as the incapacity or lack of resources of the justice system to shoulder the responsibility of transitional justice, the lack of credibility of the judiciary in terms of its political position, and the degree to which due process is guaranteed. Where the judicial branch is clearly politically partial, it cannot act as a credible forum for criminal prosecutions; this is especially the risk after armed conflict. Poorly conducted trials are worse than no trials at all, and securing the principle of due process is critical in advancing the objectives of transitional justice. Finally, the political context, the balance of power at the time of regime transition or post-conflict settlement and the nature of the strategic choices adopted by the key relevant actors of the moment are likely to condition the prospects of criminal prosecution versus amnesty outcomes (at least for a while).

But it is precisely the experiences of transitional justice in the region that have shown that it is a multi-layered process subject to evolution and change. Of note is that, since the first domestic trials against the military in Argentina in the third wave of democratization in Latin America, Sikkink and Booth Walling (2006: 323) record an escalation in domestic criminal justice cases in the region in relation to human rights crimes even where it had been assumed that it would be impossible to take those responsible for atrocities to court. This evolution of events, however, is uneven throughout the region. Some countries have had no criminal trials (El Salvador). Others, it seemed, had succeeded in sidestepping them to some extent (Chile), but developments at the level of foreign trials and international law had the effect of galvanizing legal action at the domestic level. In Chile prior to Pinochet's arrest in London there had been a number of cases before the courts, but judicial investigations and indictments dramatically escalated thereafter (Collins, 2008).

The matter of criminal prosecution for crimes committed in the past has raised a number of questions in the literature. What determines its credibility and legitimacy for the purposes of transitional justice? What challenges are typically encountered? How should its scope be determined in terms of who should get tried? What determines its effectiveness? Are crimes best tried at the domestic, foreign or international level, and what factors should decide this?

First, there is the issue of the political position of the judiciary in relation to the past regime and the degree to which this is likely to affect judicial rulings on human rights cases. This is important in terms of the legitimacy of trials and the suitability of domestic courts for undertaking the trying of the crimes of the past. From a rational choice perspective, judges may take the strategic option to distance themselves from the past, a tendency that is likely to increase as the risk of a return to the authoritarian past begins to fade. However, strategic calculations are perhaps more constrained than not by the weight of structure and time-tested layers of legal culture and the ideological bent of the judicial community. At the same time, the nature of judicial reasoning and belief systems is subject to transformation prompted by political change, legal change (at the domestic or international level), institutional reform and generational shifts over time, which would help to explain the changing cycles in the likelihood of criminal trials taking place in various countries in the region. I will return to this below.

On the matter of who to prosecute, it is clear that not all culprits can be tried. Kritz (1995) identifies three levels of culpability: the leaders who gave the orders; the individuals who took orders but were in charge of perpetrating the abuses; more diffuse levels of complicity and involvement. In Latin America, it is normally individuals in the first two categories who have been the object of criminal investigation, with an emphasis on the leaders. It is the *symbolic* and *representative* value of the cases that is the guideline for who should be tried in the best interests of the goals of transitional justice. But the boundaries are not always so easy to establish (Osiel, 2005). Despite the risks of trials, Osiel (1997) demonstrates their pedagogic value and sees them as an important cathartic staging or theatre for the public display of the events under consideration, which can contribute to shaping supportive social attitudes towards human rights.

Finally, there is the question of whether there is evidence that the failure to establish criminal culpability has a negative impact on democratic development. It seems that trials are not necessarily detrimental to democratic advancement per se, but it is much harder to demonstrate the negative impact of their absence on the quality of democracy.⁷ Spain is often hailed as an example of an elite pact in support of silence regarding the past in exchange for a peaceful transition in 1977 (despite the coup attempt in 1981). Former Prime Minister Felipe González even supported the same path for Mexico at the height of the debate under the Fox presidency (Acosta and Ennelin, 2006: 100). The passage of time secured an effective amnesty for the crimes committed during the Franco period. In 2007, however, 40 years after the death of General Franco, Socialist Prime Minister Zapatero made the Law of Historical Memory a priority,

breaking with the decision of the Spanish Socialist Workers' Party not to challenge the effective amnesty at the time of the transition. Under the umbrella of the new law, which formally condemned for the first time the 40-year dictatorship of General Franco, the progressive face of the judicial system, through the activism of Judge Garzón, attempted – and failed – to advance the cause of revisiting history (Garzón was subsequently investigated by the more reactionary elements of the Spanish judiciary). Of note is that the whole issue of the Law of Historical Memory unleashed a virulent reaction by the political right, raising in particular some questions about the degree to which reconciliation regarding the past had been achieved through the pact of silence. Paradoxically, Spain has hosted a number of high-profile criminal justice trials for crimes committed in other countries.

The impact of rule of law reform on transitional justice (and vice versa?)

This section examines the different levels at which developments in the political agenda of rule of law construction interact with the processes of transitional justice discussed above. I identify four clusters of reform and transformation processes that have taken place in diverse ways in the region and have had variable impact in terms of improving the rule of law and rights protection. These are: the nature and content of justice sector reform projects; developments in regional and international frameworks of rights; the judicialization of political and social conflict; and discursive, ideational and attitudinal transformations within the justice sector. The intersection and overlap between these different clusters of processes and the world of transitional justice are part of the complex tapestry of the thickening of domestic and international norms around human rights and rule of law construction. Moreover, to some extent developments in transitional justice have permeated the agenda of rule of law construction – in some cases more explicitly than in others – and have also contributed to reshaping discourses about and attitudes towards human rights and their place in democracy within the justice sector community. At the same time, these intersections are fraught with tensions and contradictions. Crucially, however, it is the circularity and interaction between these processes that needs to be highlighted.

Justice sector reform in Latin America

Since the 1980s, and especially into the 1990s, rule of law reforms have featured in the state reform agenda aimed at improving good govern-

ance. The priorities behind rule of law construction have changed over time. Overall, the rule of law agenda has included a wide range of objectives – some in tension to some extent, others more complementary (Angell and Faundez, 2005; Carothers, 2001; Domingo, 1999). These objectives include concerns with improving the protection of human rights through better administration of the justice sector generally, improving legal security for economic transactions to attract foreign investment, and (especially more recently) addressing public security issues. Bearing in mind the variability in how the rule of law reform agenda has unfolded in Latin America, I outline some recurrent themes below.

First, since the 1990s there has been a wide range of constitutional and legal reform. In some cases this has involved the expansion of the bill of rights, as in the case of Brazil in 1988 or Colombia in 1991. More recently (in 2008), the Bolivian constituent assembly produced a greatly expanded bill of rights, amid much tension (Domingo, 2009). The expansion of rights promises through constitutional reform both is a reflection of and contributes to a heightened visibility and awareness of rights narratives in the political discourse of different social and political actors. It responds to changing aspirations and narratives around entitlements and the nature of state–society relations. In turn it contributes to reshaping popular imaginaries and expectations about the distribution of political power and the definition of citizens. An additional feature in some cases of recent constitutional reform has to do with new forms of constitutional subordination (to varying degrees) to international and regional conventions and treaties on rights. This has been especially interesting in the Argentine case, where since 1994 some international instruments have achieved constitutional ranking (Boyle, 1998), and this has had an impact on more recent judicial reasoning behind some of the transitional justice cases (Sikkink and Booth Walling, 2006).

Second, judicial reform has been undertaken on a large scale across much of the region, although the focus and areas of reform have varied enormously. In some cases judicial reform has involved the expansion of judicial review, through either increased review powers for high courts (for instance Mexico in the reforms of 1994 and 1996) or the establishment of new constitutional courts (for instance Colombia in 1991). This has tended to generate greater judicial activism, and in some cases has had an impact on cases of crimes against humanity. For instance, in Colombia, the constitutional tribunal has played a key role in shaping the politics of rights and in setting boundaries around contemporary discussions and decisions about what transitional justice might look like. In Mexico, prior to the constitutional reforms of 1994, the Supreme Court avoided confrontation with the executive branch. Following the expansion of its review powers in 1994 and 1996, there has been a change

in the relationship between the judicial and executive branches. Although the results are mixed, the court has nonetheless in recent times played an important role in shaping the path of transitional justice opportunities as these have emerged (Acosta and Ennelin, 2006). In 2003, the Mexican Supreme Court confirmed a lower judicial ruling on the extradition of naval officer Ricardo Miguel Cavallo (an Argentine torturer) to Spain in 2003 on charges of genocide and torture. It also passed a pro-human rights ruling on the justiciability of forced disappearances by state officials in 2003.

Other judicial reforms have included attempts at enhancing the independence of the judicial branch – for instance through changes in appointment mechanisms and tenure – which have in some cases further contributed to judicial activism in human rights cases. Overall, though, these reforms have not prevented the governing parties from trying to ensure politically loyal appointments, because old habits die hard. The *politicization* of the Supreme Court in Argentina was evident in the 1990s following President Menem's packing of the court. Subsequent reforms under Kirchner made appointments to Supreme Court positions more transparent. This led to an interesting turn in jurisprudence in transitional justice cases, and for now the Supreme Court comprises individuals who are more likely to rule in favour of transitional justice endeavours (Sikkink and Booth Walling, 2006; Smulovitz, 2002).

Other justice sector reforms include the establishment of judicial councils, where the intention has been to advance more merit-based appointments of lower-level judges and improved efficiency in justice administration and the functioning of courts. Generally there has been an expansion throughout the region in the judicial budget, in infrastructural resources and in the numbers of courts and judges. Reforms have also been directed at improving access to justice. Overall the record is mixed, and it certainly falls considerably short of expectations (Pásara, 2004). But growing levels of independence, better-trained judges and the fact of generational change have in some cases led to more activist judges in court and to attitudinal changes within the justice sector body.

Other reforms in the justice sector aimed at strengthening the rule of law include: the establishment of human rights ombudsmen; criminal justice reform and criminal code reforms aimed at securing better due process guarantees and protection of the rights of the accused; police reform, which includes training in human rights.⁸ These reforms have all had mixed results in terms of their objectives and in terms of their impact on strengthening the rule of law and a rights culture. Specifically, their impact on transitional justice outcomes is far from evident. Moreover, the growing trend towards zero-tolerance policies in more hardline public security rhetoric as crime and insecurity increase and the wars on drugs

and terror escalate does not augur well for the development of the principles of due process and rights protection.

Generally, the track record of justice sector reforms has left an uneven patchwork of institutional and legal innovations that have in the main not resolved many of the challenges of rule of law construction. Mostly we are talking about incomplete and partial reform processes and the sense that “unrule” of law prevails in much of the region. The quality of the legal relationship between state and society has probably not improved significantly for the vast majority of the population, and most people in much of the region continue to express deep distrust of justice sector institutions (courts, police, public prosecutors). Nonetheless, there is now a greater density of mechanisms of oversight and legal accountability, which in some cases have had an impact on transitional justice outcomes. In Chile, the reforms, combined with new generations of judges who were not appointed under the old regime, led to the emergence of new attitudes within the justice sector. Pinochet’s arrest in London in 1998 further contributed to emboldening activism in favour of transitional justice in the courts, so that there was a gradual opening up of new (and somewhat unforeseen) windows of opportunity for victims and human rights organizations to take cases to court.

Justice sector reforms have had three important consequences for transitional justice. First, they have opened up new windows of opportunity for human rights and victims’ associations to take cases to court. Second, they have contributed, to varying degrees, to shifting patterns in judicial activism, which in some cases has translated into bolder court decisions on human rights abuses committed in the past. And, third, they have contributed to reshaping the self-perception of judicial actors regarding their role in politics and society – in relation to both the past and the present.

Developments in regional and international frameworks of rights

The second cluster of developments relates to the greater density of international frameworks, obligations and norms regarding rights that have emerged in recent decades. These have involved varying degrees of obligation and acceptance.⁹

First, at the regional legal, the inter-American system of rights protection has really come into its own with the third wave of democratization. There has been a process of reaffirmation of the inter-American system of rights, through both the work of the Inter-American Commission on Human Rights (IACHR) and a rapidly growing body of pro-human rights jurisprudence in the Inter-American Court of Human Rights. In 1992, the IACHR concluded that the pardons and amnesty decisions in Argentina were incompatible with the 1969 American Convention on Human

Rights. This was further advanced by the Inter-American Court decision in connection with the *Barrios Altos* case in 2001 that the amnesty laws in Peru were invalid and incompatible with the American Convention (Sikkink, 2005: 273–275). The successive contagion effect of using these decisions and accumulating jurisprudential precedents for different cases throughout the region has been important in forging domestic judicial reasoning and jurisprudence. Domestic courts are increasingly expected – and inclined – to take note of the inter-American system, contributing to changing patterns of judicial decision-making in some cases.

Secondly, the greater density and discursive prominence of international conventions and treaties, such as the Genocide and Torture conventions and the International Covenant on Civil and Political Rights, mean that they have been increasingly resorted to by human rights organizations. In some cases, for example the Pinochet case, this has involved using third-party courts to build cases around principles such as universal jurisdiction for certain types of crime covered by the Torture Convention. The Law Lords ruling in London in 1999 affirmed the case for the justiciability of certain types of crime in foreign courts under the principle of universal jurisdiction, and it has been the basis for subsequent human rights cases taken up in Spain, Italy, France, Germany and Sweden to secure indictments and international arrest warrants for individuals accused of gross human rights violations (Sikkink, 2005). To this is added the growing number of human rights instruments – culminating in the relatively untested International Criminal Court established with the Rome Treaty of 1999.

Third, and somewhat in the wake of the Pinochet case, there is an emerging region-wide practice of allowing the extradition of indicted individuals. Again, the Pinochet case following the Law Lords decision was important. However, subsequent cases signal a region-specific trend of judicial convergence on human rights crimes: for example, the extradition of the Argentine naval officer Ricardo Miguel Cavallo from Mexico to Spain (following a decision by the Mexican Supreme Court in 2001), where he was accused of torture during the military dictatorship; and, more recently, the decision in 2008 to extradite former President Fujimori from Chile to Peru.

Significantly this growing density of human rights instruments and treaties has been used creatively by victims and human rights associations to keep up the pressure around transitional justice cases at the domestic level. Crucially, however, it has also influenced the evolution of judicial processes and judicial reasoning at the domestic level. Domestic court judges are likely to be affected by regional and international developments in human rights cases.

The judicialization of politics and rights revolutions

A third connected trend is that of the judicialization of politics, which to varying degrees and with different characteristics and consequences can nonetheless be seen as a relatively new phenomenon in much of the region by which judicial rulings are becoming more politically visible and having more impact in determining political and social outcomes.¹⁰ The judicialization of politics to some extent means that the courts have become a new battleground for disputing power relations and the distribution of resources and that the law is being appropriated by different actors as a useful instrument to wage these battles. However, the legitimacy of transitional justice outcomes that are determined in the courts is in large measure also connected to the degree of credibility of the justice sector and to its level of acceptance. What is especially interesting is that, even when the public holds the judiciary in low esteem, this has not deterred human rights organizations from using legal mobilization strategies to bring the cases to court. In part this has to do with the fact that these strategies are not just about courtroom victories but also about using every possible public arena to generate political and public visibility around the cases. In the process, however, the actual experience of judicial investigations into human rights violations contributes to influencing how judges position themselves over time in connection with the general objectives of transitional justice.

The judicialization of politics is thus, especially in human rights cases, the consequence of increased legal mobilization strategies around rights claims at the grassroots level. Over time, this process of appropriation of legal strategies by human rights and victims' associations has occasioned an accumulation of knowledge and expertise that is shared across borders through the consolidation of transnational networks of activist organizations (Keck and Sikkink, 1998). This recourse to legal strategies encased in broader rights narratives by grassroots actors is also deployed in other areas of rights claims (for instance around indigenous rights or social and economic rights), but it speaks of a wider societal process of judicialization of political and social conflict that links up to discourses around the rule of law and legality as the basis for political struggle. An optimistic reading of this sees the emergence of a bottom-up rights revolution of sorts, in part initiated around transitional justice struggles. It is also important to qualify this, in the sense that, for the vast majority of the population, the judicialization of politics has not contributed significantly to improving the quality of citizenship in what are still, in the main, highly deficient democratic political systems (notwithstanding the variability between national contexts).

Discursive, ideational and attitudinal transformations within the justice sector

A final dimension of change, and one that is deeply connected to the above processes, is related to changes in the legal culture of justice sector professionals (judges, prosecutors, litigating lawyers and human rights organizations). This is a highly elusive and multi-layered dimension of change that has to do with judicial actors' attitudes, dominant value system and opinions on the law and the role of legal processes.¹¹ The experience of democratization and its interaction with the changing narratives at the local, national and global levels in connection with human rights and the role of the law through the emerging rule of law agenda discussed above has in many ways affected how judges see themselves and their role in society and how they see the role of the law. There is, then, a new set of factors influencing judges' processes of socialization that are particular to the current global zeitgeist around human rights narratives and also around rule of law agendas. The impact of this has, however, been variable and very uneven and has interacted with local conditions and power structures in very different ways. Nonetheless, in most of the region, judges now occupy a different place in the configuration of public affairs and in public beliefs and perceptions about how political power should be and (in reality) is exercised. The interface between transitional justice and rule of law reform has been relevant in shaping new trends in the legal culture of judicial actors – mostly in how judges, prosecutors and litigating lawyers see their role and the role of the law and judicial structures in connection with political processes.

There are four key influences on the socialization processes of judges and other judicial actors. First, the specific changes ensuing from the reforms in the justice sector and the constitutional reforms discussed above have had an impact on how judges see their role in society. Especially where these have led to expanded review powers, as in Mexico, and in combination with a changing political order resulting from political liberalization, judges are emerging in some cases as emboldened actors, more willing than in the past to take on politically relevant decisions (Domingo, 2005). To the degree that this has prompted a judicialization of politics, this has also translated to (and in some cases been the consequence of) transitional justice experiences.

Second, and in connection with this, the passage of time and generational change within the legal community have meant that, with the retirement of judges who might have been more connected to the authoritarian past, younger judges, socialized in the new spirit of the times, may be more willing to take more progressive positions on human rights cases. This was the situation in Chile in the second half of the 1990s and

into the new millennium when a shift in the normative position of judges vis-à-vis the human rights crimes of the regime became to some extent evident – importantly, pre-dating the arrest of Pinochet in London in 1998.¹² In some cases this may reflect the reputational benefits to be gained from visibly establishing a normative distance from an authoritarian past. To some extent this may have motivated some of the early judicial activism on human rights in the Argentine courts in the 1980s. But it is also the consequence of other factors influencing the processes of socialization of judges in their professional formation and career advancement.

Third, this combines with regional and international processes of socialization of justices. Here, the more consistent presence of human rights narratives at the global and regional levels may increase the reputational costs for judges of disregarding them. Moreover, judges now meet with some regularity, for instance at the regional level, in professional associational activities. This kind of regional contact creates the basis for the more frequent exchange of normative views and experiences, which may in turn be altered precisely as a result of the experience of exchange and regional dialogue (Slaughter, 2002). Over time, it is perhaps proving harder for justice sector actors to remain impervious to the emerging global discourse of human rights and of good governance premised on the rule of law, accountability and legal probity.

Fourth, the high media profile of some human rights cases has possibly influenced the outcome. It has forced judges to take a public position on issues – in this case around human rights cases – that they might have preferred to avoid. For instance, early on in the trial of Fujimori in Peru in 2008–2009 it was believed that the acting judges would decide on the basis of political calculations and probably absolve him from the accusations of human rights violations, pressed by the ruling Alianza Popular Revolucionaria Americana (APRA) in alliance with pro-Fujimori members of congress (Youngers and Burt, 2008). However, the pressure of public opinion and the highly visible character of the trial may have swayed possibly reluctant judges to rule against Fujimori in the end.

Some concluding comments

The experience of transitional justice is very much defined by context-specific historical, political, institutional, cultural, ideational and international factors and the particular patterns and sequence of their interactions. In this sea of complexity, at best we can say that it is likely that, the “better” the quality of the rule of law in terms of both the *spirit* in which it is observed and the *institutional framework* upon which it is

premised, the more likely it is that different aspects of transitional justice may be activated. At the same time, however, it is clear that this is by no means either a sufficient condition or a necessary one. Spain, as we have seen, is an interesting example of contradiction and complexity in the way in which transitional justice has occurred, defying the possibility of establishing clear causal or explicatory relations between the rule of law and transitional justice as discussed above. Its contradictions lie in the fact that an apparently relatively consolidated and reliably legitimate system of rule of law scarcely contributed to its own process of transitional justice. At the same time, some of Spain's judges have taken up the banner of promoting criminal prosecutions with great enthusiasm and to much international acclaim in relation to human rights crimes of other regions. Moreover, their actions have had radical repercussions for the advancement of universal jurisdiction regarding some types of crimes against humanity. There is, indeed, a "before" and an "after" as regards the Pinochet arrest warrant in terms of the freedom with which perpetrators of these crimes move around in the world.

I can suggest, however, that the thickening of norms, rules and institutions at the domestic, regional and international levels is likely to have an impact on the attitudes and legal culture of judges as part of a broader socialization process by which they have in recent decades, perhaps more than at any other time, been immersed in a global discourse around human rights. This has gained strength in the wake of the third wave of democratization and the ending of the Cold War. To the extent that judges are more independent (although this has not been an automatic consequence of rule of law reform), this may become a contributing factor. We have seen this to some extent with Mexico and Chile. Equally important is the presence of an active civil society that is able to organize and activate legal mobilization efforts, forcing engagement and pronouncement on the issue by the judicial branches – whether at the national or international level, and not always in the states that are being held to account. The Law Lords in the United Kingdom were put in the unlikely position of pronouncing on a theoretical principle of universal jurisdiction that had not yet been tested, thanks to the legal mobilization efforts of relatives of victims of human rights crimes in Chile.

The fact is that Latin America has experienced a relative *routinization* of transitional justice processes, in whatever form, in the past two decades. It is no longer surprising to hear that this or that authoritarian leader is a fugitive of justice or has been arrested. Many trials are currently taking place at the domestic and international levels on cases dealing with past human rights crimes. Moreover, the language and the idea of universal norms of human rights are perhaps more pervasive now in the global political discourse than at any other time as a set of values and

aspirations that have acquired fairly widespread global and ideological acceptance.

What this chapter has tried to show is that a part of this diffuse and multi-layered story of a thickening of human rights norms and practices also lies in the deliberate and global effort, whatever its failings and shortcomings, to strengthen the rule of law through various forms of justice sector reforms. At the same time, the increased public prominence of judicial processes (the judicialization of political and social conflict, if you will) in many other areas of litigation and rights claims is also in part related to the evolution of human rights law and discourse in the wake of transitional justice efforts.

Finally, I would like to end on a cautionary note. The sobering global climate since 9/11 of new security discourses and anti-terrorist legislation inspired by the war on terror, and the recurring evidence of extraordinary rendition flights taking place with the complicity of states that have historically championed the cause of civil liberties, do not bode well for the principles of rule of law and rights-based democracy. Progress in human rights instruments at the national and international levels is a welcome trend, but its impact is neither fixed nor necessarily irreversible in terms of effective human rights protection.

Notes

1. The works by Skaar (2010) and Collins (2008) are examples of the very few existing systematic attempts to engage with both the transitional justice literature and the literature on rule of law reform and judicial politics in Latin America.
2. The genealogy of rule of law studies is a long-standing tradition in much legal and political theory. Law and society studies equally have long roots in legal anthropology and legal sociology. The novelty of recent decades has more to do with greater reference to the role of law and the judicial function in political science and empirically based analyses of political development of the judiciary, and, more significantly, with the place it has secured in the study of the challenges of democratization in contexts of underdevelopment and weak state structures. Moreover, this discovery of the rule of law has been taken up by the development donor community and has translated into unprecedented levels of aid resources spent on rule of law reform as part of the remit of state reform and institution-building.
3. This seems to be especially so, for instance, with recent trends in criminal justice reform in Latin America aimed at promoting the adversarial system in replacement for the inquisitorial system, with the intention of improving the prospects for due process and respect for the rights of the accused. See, for example, Duce and Pérez Perdomo (2003).
4. See, especially, Mainwaring and Welna (2003), Maravall and Przeworski (2003), Peruzzotti and Smulovitz (2006) and Schedler et al. (1999).
5. Critics of earlier transition theory pointed, among other things, to the constant attempts to skirt the more normative dilemmas of democratization. This has led to some strands of social science enquiry now more explicitly confronting these issues. This is to some extent taken up in the quality of democracy debates and the human development

- literature, which now more visibly places citizens and their rights at the moral centre of their analyses regarding political and economic development (O'Donnell, 1993, 2004; Sen, 1999).
6. See, especially, Barahona de Brito (2001), Lutz (2006), Lutz and Sikkink (2001), Roht-Arriaza (2006), and Sikkink and Booth Walling (2006).
 7. This must be qualified when applied to conflict situations, where the threat of criminal prosecution may be considered to put pacification processes in jeopardy when the violators of human rights are still in a position of power or have the capacity to derail delicate processes of peace-building.
 8. See chapters in Frühling et al. (2003).
 9. See, especially, Sikkink (2005) and Lutz and Sikkink (2001) for incisive analyses of the circular interaction between the different layers of global, regional and domestic developments in human rights cases, jurisprudence and jurisdictional shifts.
 10. See, among others, the chapters in Sieder et al. (2005) and Gloppen et al. (2004).
 11. Legal culture is a rich field of study in the area of socio-legal analysis. Here legal culture is understood as "the attitudes, values and opinions held in society, with regard to law, the legal system, and its various parts" (Friedman, 1977: 76), but I focus mostly on how this has evolved in some judicial sectors in the region in the recent wave of democratization.
 12. Collins (2008) and Hilbink (2007) document this change well. Interestingly, in the case of the Chilean judges, greater receptiveness to human rights cases does not really signal more progressive judges, because this remains a conservative branch.

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4

“The past is never dead”: Accountability and justice for past human rights violations in Argentina

Catalina Smulovitz

Introduction

In Latin America, rulers of democratic transitions face a disquieting challenge: how to make members of the armed forces accountable for their past human rights violations. Should they punish or pardon them? Whereas punishment could trigger revolts by armed forces against the new democratic regime, pardons could endanger the legitimacy of the new democracy and its ability to do justice and to subordinate the military to civilian rule. The consolidation of democracy implies equality before the law and respect for human rights, but the new regimes also need the collaboration of armed forces that still vindicate the repressive strategies they used, that still command strong resources with which to revolt, and that could threaten the regime's survival. The way this dilemma is solved is not just a problem about the past (how to treat past human rights violations); it also affects the present and future of the new regimes. And it is relevant not only for its ethical implications but also because it could determine the success or failure of the democratic processes.

The way in which Latin American countries initially confronted the question was diverse. In some countries, pre-transition negotiations between the military and civilian actors explicitly precluded judicial treatment of past human rights violations (Chile, Uruguay); in others, judicial treatment could not be prevented (Argentina). In contrast to other countries of the region, the Argentinian case is characterized by two singular

features: the early judicial treatment of human rights violations and the determined pursuit of justice through judicial and non-judicial retribution measures. The first feature involved specific juridical innovations regarding how to carry out this type of trial with domestic legislation and in domestic courts; the second resulted in the creation of an array of alternative measures that includes truth trials, financial compensation, public apologies and the creation of new rights. This chapter shows that the measures implemented in the Argentinian case since 1983 comprise the complete repertoire of procedures on the transitional justice menu.

This chapter analyses the diverse strategies pursued to make human rights violators accountable in the Argentinian case and the different justice outcomes achieved by the victims throughout the process. It will consider the conditions that led to the early judicial treatment of past human rights violations, the succession of strategies and measures implemented to overcome the restrictions that emerged in the process and the political dynamic and consequences of these two developments. It also shows that this highly politicized process resulted in diverse “justice outcomes”, in the subordination of military to civilian rule and in the transformation of human rights issues as a political programme of the new democracy.

In the next section I describe and analyse the early evolution of the legal retribution strategy, how it became predominant, the types of outcome it produced, and the difficulties and restrictions it faced. I then analyse the alternative routes to justice explored and implemented after the legal retribution path was put on hold and the way in which this other strategy also produced justice outcomes. The final section analyses how these different justice outcomes (formal and informal) interacted and led to the consolidation of the human rights question as an ongoing task of the new democracy.

First steps

Between 1930 and 1983 Argentina experienced 12 military coups. The ferocity of the military regimes escalated throughout the period and the repression procedures used to neutralize political opponents varied. Their recurrence established a pattern of civil–military relations characterized by the lack of military subordination to civilian rule, an increase in the political autonomy of the military actor and the internal politicization of the armed forces. The 1976 coup, however, had a particular characteristic: the nature and magnitude of illegal repression set it apart from all previous dictatorships (Acuña and Smulovitz, 1995; Novaro and Palermo, 2003). In September 1975, the Commander-in-Chief of the Army had decided that repression of terrorism was to be clandestine. Repression was

going to be used to neutralize and physically exterminate the militant opposition, whether or not they were involved in armed struggle. The clandestine nature of the repression had several objectives: to delay protests and international pressures of the kind that confronted the Chilean dictatorship, to prevent possible checks and controls on military power, and to paralyse popular reactions through terror. In 1984, the National Commission on the Disappeared (Comisión Nacional sobre la Desaparición de Personas, CONADEP) reported 8,960 disappearances, but made it clear that it estimated that the number of victims was in excess of 9,000. Amnesty International estimated that the number of victims was more than 15,000, and other human rights organizations have maintained that the number of victims reached 30,000. Between 1984 and 1999, the Under Secretariat for Human and Social Rights established the existence of around 3,000 new cases, increasing to nearly 12,000 the number of confirmed disappearances.

When the transition process began in the early 1980s, the treatment of past human rights violations became both a political problem and a political programme for the emerging democracy. Several factors, in addition to the magnitude of the atrocities, explain this development. On the one hand, a few months after the military had seized power in 1976, some groups and organizations – most of them created as a consequence of the withdrawal of other institutions – started to organize and to denounce governmental repression.¹ At first, the military government was able to neutralize their public visibility. However, their work led to early international awareness of the situation, preparing the ground for the validation of their claims in the 1980 award of the Nobel Peace Prize to Adolfo Pérez Esquivel.

In 1982 the military was defeated in the Malvinas war.² Conflicts within the military sharpened (Acuña and Smulovitz, 1995; Fontana, 1987) and the government lost its authority vis-à-vis society. Unable to negotiate a way out of the crisis with civilian forces, the military junta attempted to pre-empt future legal punishment of human rights violations and investigations of all the military operations carried out in the period through a series of unilateral measures.³ Regardless of the military's failure to impose these measures, the retreat strategy of the armed forces helped to make the treatment of past human rights violations the central problem on the transitional agenda. The Peronist candidate (Italo Luder), taking electoral victory for granted, expressed his willingness to accept the armed forces' conditions. The Radical Party candidate (Raúl Alfonsín), in contrast, clearly announced that he was going to ignore them. Alfonsín's strategy had the desired result and in October 1983, to the surprise of many, he won the presidential election.

The strategy designed by the new President to deal with the problem aimed simultaneously to punish members of the armed forces who had violated human rights and to incorporate the military into the democratic arena. The government hoped for a self-cleansing of the military that would allow both the judicial punishment of a limited and symbolically prominent group of human rights violators and the fulfilment of electoral promises, without the government becoming an enemy of the armed forces. The government's initial strategy also included the creation of a Truth Commission (CONADEP), which was to receive accusations and evidence of disappearances and send them to the justice system, and to track down lost children. Although the creation of CONADEP was originally intended to block the bicameral investigation advocated by most of the human rights organizations, it is generally recognized that the Commission's work exceeded the expectations of the government and public (Crenzel, 2007). In addition, the government's initial strategy included the detention of members of the former military juntas and of some other former authorities that had become public symbols of human rights violations; the prosecution of some guerrilla leaders; repeal of the Law of National Pacification (the "self-amnesty" law) in December 1983; and reform of the Military Code of Justice (Law 23049 of February 1984).⁴

In December 1983, Congress repealed the self-amnesty law. However, the government strategy faced its first problem when the Military Code was debated in Congress. As the executive wanted, the new law conferred upon the Supreme Council of the Armed Forces the initial jurisdiction to prosecute military personnel and it established a mechanism of automatic appeal in civilian courts, but parliamentary intervention ensured that indiscriminate use of the concept of "due obedience" in cases of notorious and aberrant crimes (*delitos atroces y aberrantes*) would not be tolerated. This last modification prevented the government from limiting the scope of the trials *ab initio*.

In September 1984, when it became evident that the Supreme Council of the Armed Forces would not carry out the self-cleansing of the military, the Federal Appeals Court of Buenos Aires took the case of the juntas into its own hands. The trial of the members of the military juntas started in June 1985 and for a few months juridical logic held primacy over the political logic that had governed the conflict until then. At the end of the trial, former military President Jorge Rafael Videla and former Commander-in-Chief of the Navy Admiral Emilio Massera were given life sentences; former President Eduardo Viola was sentenced to 17 years in prison; and the junta members for the Navy and Air Force, Admiral Lambruschini and Brigadier Agosti, were given eight years and three years and nine months respectively. (Members of the junta that governed

between 1979 and 1982 were acquitted because the Court considered that the evidence against them was insufficient and inconclusive.)

The trial had an enormous impact on public opinion; it was followed daily on TV and in newspapers, and it led to the publication of a newspaper, *El Diario del Juicio*, devoted to covering its development (Feld, 2002). In addition to its juridical consequences, the trial gave credibility to the narratives of the past. It put the accounts of witnesses beyond suspicion, and it became an effective mechanism for the historical and political judgement of the dictatorial regime. Furthermore, and contrary to what was expected, instead of closing the human rights question, the trial reopened the issue, insofar as the Court recommended following up all the leads gathered about officers and others accused of involvement in human rights violations.

When the trial ended, increasing pressure from the armed forces led the executive to take a series of actions to restrict the scope of the verdict in order to ensure military acquiescence. These moves included three measures: the Instrucciones a los Fiscales Militares (Instructions to Military Prosecutors), the Ley de Punto Final (“Full Stop Law”) and the Ley de Obediencia Debida (“Due Obedience Law”). The Instructions were intended to radically reduce the number of prosecutions by exempting from accountability those accused of torture, kidnapping and/or murder who could prove that they had acted under orders. Yet this initiative to close the question politically did not succeed, given the opposition it aroused among the ranks of the Peronist Party, sectors of the Radical Party, human rights organizations and the Federal Court of the Federal Capital.

The Full Stop Law approached the issue from another angle. Instead of considering whether those who violated human rights were or were not liable, it established a deadline for summoning the presumed violators of human rights. When the law was approved, seven Federal Courts suspended their January holidays to work on the pending cases. By February, when the deadline was reached, more than 300 high-ranking officers had been indicted. Thus, even though the President had managed to pass the Full Stop Law, its practical intentions had been negated.

The Due Obedience Law was approved in April 1987 shortly after a rebellion – the Easter Rebellion of the *carapintadas*, commandos with camouflage-painted faces – against the human rights policies of the Radical Party. The law established that individuals who, at the time of the events, were chief officers, subordinate officers, non-commissioned officers and soldiers of the armed forces or members of the security forces, police and penitentiary police were not punishable for crimes that violated human rights, provided it could be assumed that they had acted within the scope of “due obedience”. For important sectors of the popu-

lation, this law was clear evidence that the government was giving up one of the banners that in 1983 had allowed it to become the main guarantor of democracy and the rule of law. But, despite the setback represented by the passing of the law, it showed too that the armed forces did not achieve the political vindication of their repression strategy.

After the Easter Rebellion, a new front of conflict opened between the government and the armed forces. The discussion over how to penalize those responsible for human rights violations was overshadowed by the debate over how to re-establish the chain of command in the Army. Even though the government was willing to end the trials for those responsible for the violations, neither the government nor important sectors of the Army High Command were willing to reinforce the political power of the *carapintadas* within the military. This second conflict, over the hegemony of the Army among the military sectors, led to three military uprisings: in Monte Caseros and Villa Martelli in 1988 during the Alfonsín government, and the December 1990 rebellion during the Menem government.

Carlos Menem had been elected President in 1989. The *carapintadas* expected that his electoral victory would result in the removal of the sanctions imposed by the Army Chief of Staff on their comrades who had participated in the military rebellions. On 8 October 1989, Menem announced a first presidential pardon. Among its 277 beneficiaries were military personnel convicted for violating human rights, for their intervention in the Malvinas war and for their participation in the military uprisings that took place during the Radical government, as well as civilians who had been convicted of guerrilla activities. Not included in this pardon were former Commanders Videla, Viola, Massera and Lambruschini, Generals Camps, Richieri and Suarez Mason, and the head of the Montoneros guerrillas, Mario Firmenich.

A few days later, it also became evident that the pardon was not going to reverse the sentences handed down to the *carapintadas* by the Army Chief of Staff. Although the presidential pardon allowed the *carapintadas* to avoid being indicted by civilian courts, it did not allow them to obtain impunity in the military arena. Disenchanted with Menem, the *carapintadas* made a last effort to gain control of the Army Chief of Staff. Their last uprising, on 3 December 1990, was the bloodiest and most violent. This time, repression of the uprising was forceful. When the rebellion ended, the *carapintadas* had been defeated in the military field and neutralized in the political arena. In fact, ever since the passing of the Due Obedience Law, the *carapintadas* had faced difficulties in keeping followers among officers. When the recurrence of incidents that broke the chain of command started to be perceived as a mechanism to advance the *carapintadas'* interests and as a danger to the future of the Army, sympathy for their cause among officers began to vanish. This last victory of the

military command sent an unequivocal signal that the repeated challenges to the chain of command had to end.

A few days after this last rebellion, Menem issued a second pardon. This included the first two military juntas as well as Generals Camps, Suarez Mason and Richieri, together with Mario Firmenich and a few other civilians. It reaffirmed the Menemist strategy: past rebellions were going to be forgiven, but present and future disobedience was going to be punished in order to strengthen the Army Chief of Staff and to prevent the *carapintadas* from becoming spokespersons once again for corporatist causes.

In sum, between 1982 and 1990, the treatment of past human rights violations became a central topic of the transition agenda and was characterized by the initial success of the judicial strategy. Given the way in which political conflicts developed at the outset of the transition, accountability for human rights violations during this first period was characterized by the predominance of the judicial strategy and by the search for legal retribution. These developments led, in turn, to political and legal struggles over the definition and reach of the judicial response, and to the eventual achievement of the trial of the military juntas. This first period also involved the reversal, owing to the military reaction, of some judicial and policy outcomes, the politicization of the internal military conflict and the presidential pardon of sentences.

Even though the armed forces succeeded in benefiting from the pardons, the above description shows that the transition confronted them with an extremely risky and costly scenario. They could not avoid the trials and the conviction of their leadership; they faced the emergence of internal political divisions that threatened to divide them across class lines; and they could not reverse the discrediting of their previous actions by civil society. The high costs and threats originated in the investigations and judicial convictions for human rights violations, and the need to prevent their further internal politicization ended up subordinating the military to constitutional power. Although victims and human rights organizations initially thought that presidential pardons closed off the judicial path that had predominated during those first transitional years, they soon found alternative mechanisms to continue their pursuit of justice. In the next section, I analyse those alternative mechanisms and some of their consequences.

The alternative routes

The Full Stop Law, the Due Obedience Law and the two pardons presented the actors who had been seeking justice for past human rights vio-

lations with a new scenario. The measures did not erase the institutional responsibility of the armed forces for the crimes committed or the political and legal costs of the sentences imposed. However, in the wake of these laws and presidential pardons, the judicial route for dealing with human rights violations appeared to be closed.

This closure had several consequences. At first, these measures appeared to sap the morale of the human rights movement and victims. However, and although human rights organizations and victims did not completely abandon the judicial path, they began to search for alternative routes to achieve justice. The persistence of the demand for justice forced the government to advance some measures to appease the discontents. In the following years, a succession of non-judicial actions took place. The measures include: financial reparation for damages to victims of state terrorism; the realization of “right to truth” trials; legal punishment for the kidnapping and abduction of children – where legal retribution measures continued to be pursued; the intervention of foreign courts; individual and institutional public apologies; lustration; the establishment of public commemorative monuments, spaces and dates; social ostracism; and the creation of legal statutes to protect new rights such as the right to historical truth. Some of these initiatives were promoted by human rights organizations, others by governmental actions. In all cases, they show that, although at the time legal retribution for the atrocities committed appeared to be precluded, the pursuit of justice and of some kind of reparation continued to be part of the Argentinian political scenario.

I now describe and analyse some of these measures. Their serial and continuing character produced some unexpected developments and “justice outcomes”. It allowed actors to take the conflict into other arenas and to involve new allies and institutional actors in the process. It forced actors to look for both legal and non-formal innovations that have had lasting consequences. And it led to a fruitful interaction between informal and legal mechanisms of justice that allowed the reopening of some legal demands or that brought to light information that was later used as legal evidence.

Financial reparation

After the pardons, and in order to appease the disgruntlement they aroused, the Menem government – through the Under Secretariat of Human and Social Rights – passed a presidential decree and promoted the approval of several laws that enabled reparation for various types of damage for victims of state terrorism (Acuña, 2006; Gueembe, 2006). The measures appeared as a compliance response to a recommendation of the Inter-American Court of Human Rights that established that it was

the state's responsibility to compensate victims financially for the human rights violations that had taken place under the authoritarian regime.⁵ Although victims had already been seeking reparation in the civil courts, by 1991 their right to file civil cases had expired. Thus, in 1991, Menem issued Decree No. 70/91, which recognized the right to demand compensation for illegitimate detention by those whose right to claim reparation in court had run out. A few months later, Law 24043 extended the benefit to those who had been detained "at the disposition of the executive power" between 6 November 1974 and 10 December 1983; to civilians detained by the decision of war tribunals; to those detained in military facilities without being sentenced by a war tribunal; to conscripts sentenced by war tribunals; to children born during the captivity of their mother; and to all those detained in clandestine centres.⁶ And, in 1994, Law 24.411 granted financial reparation to victims of forced disappearances and to the legal successors of people assassinated by the military, by members of the security forces or by paramilitary groups.

The approval of Law 24.411 aroused several controversies. Some were associated with the difficulties of demonstrating the existence of forced disappearances, which, given their clandestine nature and the lack of information, cannot be easily proved. Others were related to the fears of some human rights organizations that the state was exchanging money for impunity and silence about the past. The implementation problems raised by Law 24.411 led to the approval of Law 24.321, which created a new civil status of "absent by forced disappearance", a juridical figure with no precedent in national legislation or in comparative law.⁷ Compensations were defined as equivalent to 100 times the monthly salary of Category A of the National System of Public Administrators, resulting in a total amount of US\$220,000 per person. By February 2004, the Under Secretariat of Human and Social Rights had received 8,200 claims for reparation in cases of forced disappearance and assassination, and only 200 were rejected (Guembe, 2006). Guembe estimates that US\$1,170,000,000 has been paid for cases of arbitrary detention and US\$1,912,960,000 for forced disappearances and assassinations.

Finally, in 2004, Law 25.914 established reparations for those who were born while their mother was illegally detained; for minors who remained in detention owing to the detention or disappearance of their parents; and for those who had been victims of identity substitution. Lastly, it should be mentioned that, since 1999, there have been demands to consider the situation of those forced into exile. However, given the difficulties of establishing the political motivation for leaving the country, this request has not received legislative backing.

The Menem government had promoted the reparation policy as a way to appease the discontent caused by the pardons. However, once the first

steps of the reparation policy were established, human rights organizations and victims participated in its design and pressed for its extension to cover other damages. Public debates, particularly those relating to the morality of the compensation payments, were difficult and in most cases did not achieve high visibility. Human rights organizations and some of the victims' relatives felt that, in the absence of legal punishment for perpetrators, payments were not only a consolation prize but also a sell-out. Although the numbers of claims filed indicate that most families of victims accepted compensation, the issue introduced not only moral and political dilemmas that have not vanished but also a divisive cleavage between human rights organizations and the victims who accepted or rejected reparations.

Recovery of kidnapped children

After the pardons, the actions of the government and human rights organizations also concentrated on the recovery of children who had been kidnapped together with their parents and of babies born in clandestine detention camps where their pregnant mothers had been taken. The non-governmental organization (NGO) Grandmothers of the Plaza de Mayo (Abuelas de Plaza de Mayo) estimates that at least 500 children were either kidnapped or born in detention camps (Abuelas de Plaza de Mayo, 1999). By the end of July 2007, its records show 242 children kidnapped with their parents or born in detention camps and that 166 of them were born while their mothers were in captivity.⁸ Most of the children born in captivity or kidnapped with their parents were not returned to their original families and were appropriated by members of the military and police or given for adoption to families that, in some cases, were unaware of the children's origin. Since its origin in 1977, the Grandmothers of the Plaza de Mayo has been searching for the missing children and for the punishment of their abductors. By August 2011, 105 children had been recovered and had learned about the fate and identity of their biological parents.⁹ In most cases, they have also re-established a relationship with their biological families.¹⁰

The work of the Grandmothers had some additional unexpected consequences: it led to the reopening of judicial suits, it fostered the development of technologies to determine identities and it promoted the diffusion of human right issues through innovative and popular media such as soap operas. Judicial actions for the kidnapping of children were possible owing to a loophole in the verdict that in 1985 condemned the first three military juntas. Since illegal appropriation of children had not been part of the crimes judged at that time, this crime was not punished and therefore was not included in the presidential pardons. It was for this

reason that the Grandmothers could file cases related to the abduction of children. In 1996 this loophole allowed the Grandmothers to initiate – despite the Due Obedience Law – lawsuits against abductors that have led to the detention of several former high-ranking officials. In addition to these detentions, illegally adopting parents have been convicted on charges related to the forgery and abduction of identities.

Persistence of legal strategies and claims for legal retribution

At the end of 2000, and in the context of a suit advanced by the Grandmothers of the Plaza de Mayo regarding the kidnapping of an 8-month-old baby who had been taken together with her parents, the Centro de Estudios Legales y Sociales (CELS) – a leading human rights NGO – filed a suit concerning the disappearance and torture of the baby’s parents, José and Gertrudis Poblete. CELS took advantage of the opportunity opened by the trials for illegal appropriation of children to show “a fundamental contradiction” in the judicial system. That is, the system allowed the investigation and punishment of the crime committed against the baby but prevented the investigation and punishment of the disappearance of her parents. In March 2001, CELS’ action was favourably considered by Judge Gabriel Cavallo, who nullified the Due Obedience and Full Stop laws, finding them unconstitutional.¹¹ In November 2001, the decision was confirmed by the Federal Court, Room II, and in June 2005 it was reconfirmed by the Supreme Court of Justice. These confirmations enabled the reopening of cases and, in August 2006, Julio Simón was sentenced to 25 years in prison for the kidnapping and torture of José and Gertrudis Poblete.¹²

Beyond the significance of Judge Cavallo’s decision for the reopening of past human rights cases, the role in the reactivation of the legal strategy of the search for and use of legal loopholes by other human rights organizations and victims should also be highlighted.

Public apologies

In 1995, retired Navy Captain Adolfo Scilingo confessed, in a book and in a TV programme, his own participation in the clandestine repressive methods used during the dictatorship.¹³ His confession was also a public acknowledgement that the Navy had participated in the kidnappings, torture, murder and disappearances of the 1970s.

To pacify public reaction, the Chief of Staff of the Army, on TV and in a public document, made the first of a series of public apologies in which various actors admitted their role during those years. The Navy and Air

Force followed with documents in which they owned up to their past roles. The Army's document not only acknowledged the participation of the armed forces in the tortures and murders of those years, but also stated that "he commits a crime whoever acts against the National Constitution ... gives immoral orders ... follows immoral orders ... or who to achieve ends believed to be just employs unjust, immoral means".

Truth trials

At the same time that these public apologies were taking place, relatives of the disappeared started to file requests petitioning for their right to know about the circumstances of the disappearances and the fate of their bodies. At a time when the legal retribution option appeared to be precluded, truth trials appeared as an alternative path to achieve some kind of reparation and informal justice. In 1998, a group of human rights organizations made a presentation at the Inter-American Commission on Human Rights (IACHR) on behalf of Carmen Lapacó, demanding her right to know the truth and her right to mourn her disappeared daughter. In 1999, the Commission affirmed that the state has to guarantee the "right to the truth" to victims and relatives for what happened to their disappeared loved ones (Oliveira and Guembe, 1997). This decision not only acknowledged the legal status of the "right to truth" but also led to what became known as "truth trials".

In 1998, following the IACHR recommendation, the Federal Appeal Courts in La Plata stated that the right to truth and information about victims' whereabouts was not excluded by the pardons, and that investigations should continue to allow relatives to know the circumstances of their disappearance and the location of their remains. Although relatives knew their demands were not going to deliver judicial punishment, the procedure still allowed them to frame their claim in the language of rights and to "judicialize" the conflict over the historical truth. Later, when legal prosecution of human rights violations reopened, the information gathered and disclosed at truth trials became valuable new juridical evidence.

There are no aggregate data regarding the number of truth trials that have and are taking place, but they are known to have occurred in La Plata, Bahía Blanca, Neuquén, Rosario, Córdoba, Mar del Plata, Salta, Jujuy and Mendoza. It should also be mentioned that, in 1998, a centre-left coalition proposed a project to repeal the Full Stop and Due Obedience laws. Although at that time, and because the law was not retroactive, the approved project did not have major legal consequences, its symbolic effects were significant.

Law suits in foreign courts

The resolutions of the IACHR show that on several occasions during these years local actors resorted to the support of international courts. In addition to these international institutions, foreign victims also filed cases in foreign courts. Suits against human rights violators were filed in Italy, France and Germany. In November 1999, Judge Baltasar Garzón in Spain required Interpol to detain 11 members of the Argentinian armed forces accused of human rights violations. The Menem government, and the following de la Rúa and Duhalde administrations, responded to these requests by reaffirming the principle of territoriality and denying collaboration with foreign judges.

The problem of how to deal with the demands of foreign courts was “solved” in 2003 with the nullification of the Due Obedience and Full Stop laws.¹⁴ This occurred irrespective of the juridical controversies, and the nullification enabled new domestic trials to take place (see below). The decision also blocked the legitimacy of requests from foreign courts, allowing the Argentinian government to bypass the territoriality questions they had raised.

Lustration policies and social ostracism

The alternative roads to legal retribution also included lustration initiatives. Argentinian legislation does not yet include specific legal restrictions to exclude from public office individuals involved in the commission of past human rights violations. In spite of that, NGOs have used alternative avenues to de facto enforce lustration policies regarding military personnel, legislators and judges (Barbuto, 2007; Zayat, 2006). Under the Constitution, the promotion of high-ranking military personnel requires the intervention of the executive branch, which proposes the candidates, and a decision by a Senate Agreements Commission, which has to confirm them. Since 1993, before confirmations take place the Agreements Commission requests information from the former CONADEP, from the Under Secretariat of Human and Social Rights, from CELS and from the Asamblea Permanente de Derechos Humanos (Permanent Assembly for Human Rights) about the previous human rights records of candidates. Civil society organizations have taken advantage of this opportunity. They have participated in these public hearings, reviewing records of candidates, producing evidence and impugning candidates. In 2002, these informal mechanisms were institutionalized by an internal parliamentary regulation (Senado de la Nación, 2008).¹⁵

By June 2008, five different legislative projects were being debated in order to enforce by law Article 36 of the 1994 Constitution. This estab-

lishes that “authors of acts of force against the institutional order and the democratic system will be perpetually barred from occupying public posts and excluded from pardons and commutation of sentence benefits”. Even though legal disqualifying mechanisms have not yet been approved, the participation of civil society organizations in confirming procedures has led to debates over the promotion of some well-known repressors.¹⁶ Lustration cases have also reached members of the legislature and of the judiciary. The National House of Representatives, for example, has denied approval of the legislative certification of two elected legislators (Bussi and Patti) owing to their participation in human rights violations.¹⁷ And at least nine members of the federal and provincial judiciary have been accused by the Council of the Magistracy of human rights violations. Although some of the accused judges and prosecutors were able to avoid being sentenced because they resigned before the Council decision was known, their early resignation could not prevent their exclusion from the judiciary.¹⁸

In addition to lustration cases, while legal actions against human rights violators were still barred, victims and human rights organizations organized actions promoting the social ostracism of repressors. Starting in 1995, several human right organizations and in particular HIJOS – an organization formed by the sons and daughters of disappeared individuals – started to organize *escraches*, a new form of political demonstration intended to denounce repressors and to provoke public shaming. Demonstrators meet outside a repressor’s home to inform neighbours that a human rights violator, one who in general has previously been sentenced, is free and is living in the neighbourhood. In addition to social ostracism, this type of action aims to promote social condemnation of the crimes in order to avoid political amnesia. Between 1995 and 2005, at least 50 *escraches* were organized in Buenos Aires city alone. Provincial branches of HIJOS have also organized *escraches* in various provincial cities.¹⁹

Memorials and commemorations

The list of non-legal initiatives that have taken place in Argentina also includes a struggle for memory. The social remembering process has included judicial initiatives and the establishment of public commemorative monuments, spaces and dates. As Elizabeth Jelin (2003) has shown, creating monuments, agreeing on commemoration dates and deciding what to do with particular spaces, such as former detention camps, have resulted in contested struggles. Conflicts over the memories of the dictatorial past resulted, for example, in the creation of different remembrance monuments, in the establishment of 24 March – the day of the coup – as Memorial Day, in the transformation of ESMA (the Higher Naval Mechanics School), an infamous detention camp, into a museum, and in

Table 4.1 Argentina 1983–2008: Stages in the transitional justice process

Period	Predominant strategy	Conditions	Salient measures
1983–1990	Legal retribution	<ul style="list-style-type: none"> • Defeat in war • Existence of organized social movements (in particular human rights organizations) 	<ul style="list-style-type: none"> • Repeal of Law of National Pacification • Truth commission (CONADEP) • Trial and convictions using domestic legislation • Full Stop Law, Due Obedience Law, pardons
1991–2003	Non-retributive actions	<ul style="list-style-type: none"> • Ending of legal retribution owing to military threats • Existence of active and organized human rights organizations 	<ul style="list-style-type: none"> • Reparations • Truth trials • Constitutional review • Informal and formal lustration • Public institutional apologies • Social ostracism • Trials for kidnapping of children
2003–2008	Legal retribution coexisting with non-retributive actions	<ul style="list-style-type: none"> • Extradition demands from foreign courts • Existence of active and organized human rights organizations 	<ul style="list-style-type: none"> • Nullification and unconstitutionality of Due Obedience and Full Stop laws and pardons • Trial and conviction of low- and high-ranking officials using domestic legislation • Continuation of all measures of the previous period

the creation of various archives. The struggle for memory has been an integral and continuous element of the Argentinian process. It has led to the creation of several NGOs that have the preservation of memory as their principal goal.²⁰ Through the slogan “Truth, Memory and Justice”, this has been one of the most distinctive features of human rights demonstrations.

The return of the legal retribution strategy

In recent years, some important developments have allowed the reopening of the legal strategy for dealing with human rights violations in Argentina. As already mentioned, in September 2003 Congress approved a

law promoted by President Néstor Kirchner that declared null the 1986 Full Stop Law and the 1987 Due Obedience Law. Two years later, the Supreme Court ratified the policy when it declared those two laws unconstitutional. Since then, trials for human rights violations have resumed. According to CELS records, by December 2010, 1,403 individuals (civilians and members of the security forces) had been accused in the reopened human rights lawsuits and there were 366 opened cases at different stages of development. CELS statistics also acknowledged that since 2006, when trials reopened, 201 individuals have been sentenced.²¹

The juridical and political significance of the reopening of the legal retribution avenue is undeniable. Although the presidential decision was an important and necessary element in its re-establishment, the historical description above shows that this development was also possible because of changes in the political, institutional and material conditions and the persistent and innovative actions of an array of social actors.²² New political and institutional conditions made it possible to hold new trials, and the persistence and innovations of the human rights movement kept the demand for legal retribution on the political agenda. The next and concluding section analyses how the interaction between legal and non-formal strategies led to the reopening of the legal retribution path and how this interaction contributed to the achievement of different types of justice outcomes.

Conclusion

The various ways of dealing with the human rights violations of the past in Argentina have been subject to different interpretations. The perspective that emphasizes the role of legal retribution in the achievement of accountability recognizes that selective trials took place at the outset of the transition process, but it highlights that, because those initial indictments were reversed by a series of laws and presidential decrees, it was not until those laws were first repealed, then nullified and finally declared unconstitutional that accountability could take place. Thus, from this perspective, because judicial treatment has not been speedy and the process has not been exhaustive or efficient, Argentina is seen as an example of delayed justice or delayed accountability.

In contrast, the interpretation that understands that the achievement of justice involves not only retributive outcomes but also measures to compensate victims through other means considers that the Argentinian case illustrates that different roads can lead to justice and accountability, that these roads can interact, and that these interactions can lead to different “justice outcomes”. From this perspective, justice and accountability

result not from a “unique” and powerful judicial event but from a process involving serial, multiple and nested retributive and non-retributive actions. In the Argentinian case, the unexpected interactions between formal and non-formal outcomes ended up casting doubt on the existing political and institutional restrictions and maintaining the intensity of the human rights claim as a central issue on the political agenda. Although the first interpretation also involves a normative assessment of the process insofar as it highlights the distance between claims for justice and outcomes, the second interpretation emphasizes the descriptive dimension of the analysis in that it draws attention to the difficulties and opportunities that determine the feasibility of the actors’ decisions and goals.

The recent juridical reactivation has been possible because fundamental legislative and jurisprudential changes took place, but also because, after pardons were granted, local actors continued to look for evidence, for new juridical arguments, for the support of international actors and for non-juridical mechanisms for compensating for damage. In their search for both legal and non-formal innovations, actors found “solutions” and measures that have had lasting consequences, such as the right to truth or the state’s acknowledgement of a novel civil status (“absent by forced disappearance”). In the process, they also produced alternative “justice outcomes” such as financial compensation for victims, measures restricting access to public office for individuals accused of human rights violations, public apologies by some perpetrators and the establishment of memorials. These outcomes transformed the problem of how to achieve justice and defend human rights into an ongoing task and programme of the democratic regime and they also led to a fruitful interaction between different mechanisms of justice. In recent years, testimonies obtained in truth trials have been used and accepted as legal evidence in the reopened criminal trials, and claims made in lawsuits regarding the kidnapping of children have led to the revision of the constitutionality of the Due Obedience Law. As this chapter has shown, the measures implemented in Argentina encompass the complete repertoire of procedures on the transitional justice menu: truth commissions; domestic and extra-territorial trials; lawsuits in international courts; indictments; concealed amnesties; presidential pardons; public apologies by individual and institutional actors; monetary compensation for various types of damage; lustration; the establishment of public commemorative monuments, spaces and dates; social ostracism; and the creation of legal statutes to protect new rights. How can this apparently unending succession of measures be explained? Is it the result of an intentional strategy or does serendipity govern the sequence?

Although the above account appears to show that the implemented measures were the product of a chaotic adjustment to a succession of re-

strictions, the process had one permanent trait: the presence of passionate, active and informed actors able to grasp the opportunity of the hour. On the one hand, their sustained actions led to the development of initiatives that bypassed political and bureaucratic obstacles and kept the treatment of the past as a persistent and unresolved claim on the political agenda. And, as the literature has shown, serendipity produces fruitful outcomes only if a prepared actor, a “prepared mind” in Pasteur’s dictum, can grasp an opportunity in an accidental development. Thus, even though this sequence of measures can be analysed as a chaotic succession of accidents, the development of the process can also be seen as resulting from the strategy of a persistent and informed actor that has been able to transform those apparently innocuous and irrelevant developments into latent opportunities. Although they could not totally control the development of their strategy, because many other autonomous actors were involved, the evolution of the process was not accidental: it encompassed an intentional and persistent strategy by human rights organizations to take advantage of opportunities and to keep the human rights claim alive.

The sustainability of these actions had an additional result: it prevented the weakening of the demand for justice and the weakening of the severity of the punishments – two developments that have occurred elsewhere. According to the comparative analysis by Elster (2004), when the worst atrocities lie in the remote past the demand for retribution and the ability to punish weaken and punishments are more lenient. This has not been the case in Argentina. As we have seen, delays have not weakened the demand for retribution.²³ Although there have been few indictments since the nullification of the Due Obedience and Full Stop laws, the punishments do not appear to be more lenient than those imposed in the trials of the 1980s.²⁴ Thus, it could be argued that this complex and interactive process both led to the achievement of different types of “justice outcome” and consolidated the incorporation and oversight of human rights concerns as a continuous political programme of Argentinian democracy. If the pursuit of human rights has indeed helped secure a better future, it is because it also prevented the death of the past. As William Faulkner wrote in *Requiem for a Nun* (Act 1, Scene 3): “The past is never dead. It is not even past.”

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Notes

1. Among the human rights organizations, one should mention: Madres de Plaza de Mayo (Mothers of the Plaza de Mayo), Familiares de Detenidos y Desaparecidos por Razones Políticas (Relatives of Disappeared Persons Detained for Political Reasons), Abuelas de Plaza de Mayo (Grandmothers of the Plaza de Mayo), Servicio de Paz y Justicia (Peace and Justice Service), Movimiento Ecueménico de Derechos Humanos (Ecumenical Movement for Human Rights), Asamblea Permanente por los Derechos Humanos (Permanent Assembly for Human Rights), Centro de Estudios Legales y Sociales (Center for Legal and Social Studies), Liga Argentina por los Derechos del Hombre (Argentine Human Rights League).
2. Several analysts have maintained that the military leadership decided to invade the Malvinas Islands in order to freeze growing internal opposition. However, historical analysis of the conflict shows that the military's decision was only partially related to the internal situation (Freedman and Gamba-Stonehouse, 1992).
3. In 1983, the military government established the Acta Institucional (Institutional Act), which decreed that all military operations undertaken by the armed forces had to be considered as acts of service and thus not subject to punishment. Afterwards it sanctioned the Ley de Pacificación Nacional (Law of National Pacification, or "self-amnesty" law), which granted immunity to those suspected of acts of state terrorism and to all members of the armed forces for crimes committed between 25 May 1973 and 17 June 1982. Finally, in its last days of government, it passed a decree ordering the destruction of documents referring to military repression.
4. Decree 158/83 ordered the arrest and judicial prosecution of the members of the military juntas that governed the country between 1976 and 1983, and Decree 157/83 ordered the criminal prosecution of guerrilla leaders Mario Eduardo Firmenich, Fernando Vaca Narvaja, Enrique Gorriarán Merlo and Roberto Perdía.
5. The recommendations were in turn based on the International Covenant on Civil and Political Rights of 19 December 1966, which states in Article 9(5): "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."
6. "Victims received a sum equivalent, at the time the benefit was claimed, to one-thirtieth of the monthly amount paid to the highest category of the roster of civil servants of the National Public Administration, for each day of the detention" (Guembe, 2006: 32). This meant that victims received U\$74 for each day of their detention.
7. According to Guembe (2006), some of the families of victims of disappearances refused to declare them dead until their bodies were found. They were thus disqualified from the financial reparations of Law 24.411, which required this declaration. The Law of Absence by Forced Disappearance (Ley de Ausencia por Desaparición Forzada) did not presume the death of the disappeared person, but forced the state to accept that the person had been illegally kidnapped by its agents and that he or she had never reappeared, dead or alive.
8. See Abuelas de Plaza de Mayo, "Prensa y Difusión", <http://www.abuelas.org.ar/comunicados.php?comunicados=varios2011.php&der1=der1_varios.php&der2=der2_dif.php> (accessed 12 March 2011).

9. See http://www.abuelas.org.ar/comunicados/prensa2011/pre110809_1432-1.htm (accessed 12 March 2012).
10. When children had been appropriated unlawfully by the military or the police, a judge restituted their original identity. When they had been adopted in good faith, the victim's preferences were taken into consideration.
11. Argentina has a diffuse system of constitutional review.
12. The complete verdict is available at <http://www.derechos.org/nizkor/arg/doc/juliansent.html> (accessed 12 March 2012).
13. For the book, see Verbitsky (1995). The programme was "Hora Clave", broadcast on 9 March 1995.
14. In September 2003, Congress approved a law promoted by President Kirchner declaring null the Full Stop and Due Obedience laws (Law 25.779), and in June 2005 the Supreme Court ruled on the unconstitutionality of the Full Stop and Due Obedience laws. For an analysis of the nullification and of the controversies it aroused, see Varsky and Filippini (2005).
15. In order to allow public debates and observations about the candidates by members of civil society, internal regulations of the Senate established that: "Citizens may exercise this right within seven working days following the reading of the petition for agreement in the Chamber . . . The commission will also receive observations regarding the proposals while the lists are under its consideration." See Articles 22 and 22 bis in the Regulation of the National House of the Senate (Senado de la Nación, 2008).
16. According to Barbuto (2007), the following promotions were debated and in some cases stopped: Navy Captain Roberto Luis Pertussio (1985); Colonel Mohamed Alí Seineldín (1990); Colonel Antonio Fichera (1987 and 1997); Navy officers Carlos Rolón (1995), Antonio Pernías (1995) and Julio César Binotti (2002); Colonel Marino Braga (2002).
17. For an analysis of the controversies aroused by these legislative decisions, see Zayat (2006).
18. The following judges and prosecutors were accused by the Council of Judicature of involvement in human rights violations: Pablo Bruno, Víctor Brusa, Guillermo Madueño, Tomás Inda, María Beatriz Fernandez, Ricardo Lona, Gustavo Demarchi, Carlos Flores Leyes, Roberto Mazzoni and Luis Angel Cordoba.
19. "Historia de los escraches. Largo camino", *Página 12*, 23 March 2006.
20. For example, Memoria Abierta, an NGO that comprises several human rights organizations, works to raise social awareness and knowledge about state terrorism in order to enhance the culture of democracy. Its primary purpose is to make accessible all documentation regarding the last military dictatorship for the purposes of research and the education of future generations.
21. See CELS (2011: 33, 39 and 41).
22. The production of judicial indictments requires enabling legislation and political will but also the solution of practical problems related, among other things, to the availability of evidence and the composition of the judiciary. Before leaving power, the military issued specific orders to destroy files and incriminating evidence. Thus, at the outset of the transition process, conclusive juridical evidence was not available to prosecute the huge numbers of accused military. On the other hand, in 1984 most of the members of the judiciary had also been judges during the military regime and had pledged allegiance to the statutes of the military government. Thus, their ideological position cast doubt on their impartiality in these trials (Smulovitz, 1995: 93–94). The availability of evidence and the renewal of the judiciary are only two of the many policy problems that need to be resolved in order to pursue a retributionist human rights strategy.
23. In an empirical study on the use of transitional justice mechanisms around the world, Sikkink and Booth Walling (2007) show that Argentina is the Latin American country

- where domestic judicial proceedings seeking to determine individual criminal responsibility for human rights violations have taken place over the longest period of time.
24. For example, in recent trials, Nicolaides, Simón, Arias Duval and Hoya were each condemned to 25 years in prison; Etchecolatz and Von Wernich to life; Gualco, Roldán and Simón to 23 years; Fontana to 21; and Guerrieri to 20.

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5

The paradox of accountability in Brazil

James L. Cavallaro and Fernando Delgado

Introduction

In Chapter 2 in this volume, Kathryn Sikkink observes that Latin America, as a region, led a global process of accountability for human rights violations over the quarter century from 1979 to 2004. Further, she notes an apparent correlation between the extent of accountability, on the one hand, and the advance of democracy and respect for human rights, on the other. As she observes, although the region has surpassed others in advancing accountability, within Latin America there has not been uniformity. One vital Latin American state – Brazil – has lagged behind. As of this writing in December 2010, accountability for the gross violations of human rights committed by agents of the military dictatorship in Brazil (1964–1985) has, on the whole, been extremely limited. We attribute this to a combination of the extended effects of the country’s top-down transition; the comparatively lower numbers of victims of mass atrocity, at least by Latin American standards; the surge in crime that accompanied the transition to democratic rule; and the relative isolation of Brazil. We suggest, in consonance with Sikkink’s conclusions, a causal relationship between, on the one hand, this failure of accountability and, on the other, the incomplete support for democracy in Brazil, the continued severe human rights abuses in the country, and the legitimacy gap plaguing human rights defenders in Brazil today.

Our argument emphasizes the centrality of the confluence of factors that have led to weak accountability to our understanding of the legacies

of authoritarian rule in Brazil today. The policies of the period of authoritarian rule (1964–1985), as well as the inability of democratic leaders to respond effectively to crises in the economy and the criminal justice system, helped cause the surge in crime that now undermines public support for human rights and democracy. Impunity, still the norm for the vast majority of abuses committed by state agents, has thus continued to reinforce itself. Today, Brazil has reached a strange new phase. The public generally oppose the military dictatorship. At the same time, large segments of the Brazilian population question democracy and disdain human rights, while supporting the kinds of rights abuses entrenched by the military government. This decoupling – indeed, paradox – is integrally related to the lack of accountability for the crimes of the military era, which has kept the anti-dictatorship national consensus precarious and toothless. This chapter examines the contemporary debates on accountability in Brazil in the context of these legacies of the transition.

Background: Dictatorship, amnesty, transition and limited accountability

On 1 April 1964, the Brazilian military ousted democratically elected President João Goulart. The coup was the dawn of 21 years of military dictatorship. Although always repressive, the military regime under its first dictator, Humberto de Alencar Castelo Branco, did not reach the levels of extreme violence that characterized the first months and years of authoritarian rule in the post-coup period in Chile after 11 September 1973 or in Argentina after 24 March 1976. It was not until 13 December 1968 that the military regime, now under Artur da Costa e Silva, intensified its repressive apparatus with the presidential decree Ato Institucional 5 (Institutional Act 5, or AI-5). AI-5 allowed for the indefinite closure of Congress, suspended habeas corpus for those accused of crimes deemed political, enabled a new strict censorship scheme, curtailed the right to assembly, and established the bases for mass surveillance of the public, among other measures. AI-5, itself a presidential decree, also granted the President the right to legislate by decree.

AI-5, known as the “coup within the coup”, was a victory for the hardliners within the military government that foreshadowed the importance of denial and non-accountability in the transitional period to come many years later. During the first three years of military rule beginning in 1964, when challenged about incidents of torture and killings, Castelo Branco’s administration publicly denied that the military engaged in such practices. At the same time, his administration failed to ensure prosecution in instances of serious violations that came to its attention. Elio Gaspari

(2002: 144) explains how this led the hardliners within the regime to intensify their abuses. The rise of the hardliners corresponded with the most violent period, the six years following the December 1968 decree. As we argue below, the pattern of official denial, permissiveness and impunity with respect to human rights violations would be repeated (albeit with its own specificities) in post-transition Brazil.

AI-5 remained in force for 10 years (Skidmore, 1988: 203), but the first 6 years of the decree's application were the harshest years of military rule. Under Costa e Silva and his eventual successor, General Emílio Garrastazu Médici, Brazilians suffered a severe curtailment of their civil and political rights, as the military government engaged in systematic torture, killing, disappearing, jailing, exiling, censoring and harassing of its citizens, particularly those it perceived to be political opponents. In reference to the bullets employed by the repressive forces, the years between AI-5 in 1968 and the end of Médici's rule in 1974 are popularly known as *anos de chumbo* ("years of lead").

The military government established repressive structures to ensure its capacity to suppress all forms of opposition, whether armed resistance or labour organization, intellectual dissent or student protest. Security agents forcibly disappeared and executed hundreds, most after AI-5 when military leaders increasingly employed enforced disappearance as the preferred means of eliminating opponents. As Elio Gaspari observes (2003: 388–389), whereas security forces killed 58 in 1964–1969, they murdered 249 in 1970–1974. Similarly, whereas only 4 enforced disappearances were recorded between 1964 and 1969, 119 were registered between 1970 and 1974. In 1974, the number of enforced disappearances, 52, matched the number of political killings.

The security forces also tortured political detainees as a matter of routine (see Arquidiocese de São Paulo, 1985b: 89–143). Although police had used torture and other forms of severe mistreatment against suspects of ordinary crime for years, the dictatorship transformed this violence into professional institutional practice. Thus, on the basis of the limited universe of military justice case files, *Brasil: Nunca Mais* (Arquidiocese de São Paulo, 1985a) would report on the torture of 1,843 people in the first 13 years of the 21-year dictatorship – while stating that the source material necessarily excluded an "incalculable" number of other cases. In addition, 356 cases of people murdered and/or disappeared by the military would be officially recognized by the Comissão Especial sobre Mortos e Desaparecidos Políticos (Special Commission on Political Deaths and Disappearances). Furthermore, at least 30,000 people were estimated to have been arbitrarily arrested or tortured during the dictatorship period according to two of the lead federal prosecutors in recent court challenges to impunity (Ofício ao Doutor Juan Méndez, 2008).

Torture methods were both perfected in Brazil and exported to neighbouring countries after democratically elected governments in those countries had been toppled in the course of the Cold War in the southern hemisphere. As Marie-Monique Robin has documented (2005: 49–53), as the first South American Cold War anti-Communist dictatorship, the Brazilian military regime was instrumental in spreading methods learned from the French and the Americans throughout Latin America. As Robin explained, the Brazilian military regime “established a training center in Manaus, ‘a copy of Fort Bragg’”. According to her too, Manuel Contreras, chief of the secret police under Pinochet in Chile, acknowledged that Chilean political police trained at the Manaus school in the 1970s. Brazilian agents also played an active role in Operation Condor, the deadly international assault on dissidents coordinated by the region’s military dictatorships from 1975. Having never been held accountable, Brazil’s security forces, including ordinary police, would continue to torture thousands of detainees after the end of the dictatorship. They would also continue to execute hundreds summarily. As was the case prior to the dictatorship, the victims of torture and summary execution were no longer political dissidents but, instead, ordinary subjects of the criminal justice system, mostly residents in poor, outlying shantytowns.

One dictatorship-era measure also worthy of note was Decree-Law 1.001 of 1969, which expanded the jurisdiction of military courts to cover all offences committed by military police (in Brazil, the vast majority of ordinary police on the streets are military police). The transfer of jurisdiction over incidents of abuse committed by police served, in practice, to guarantee impunity not only for crimes perpetrated during authoritarian rule but also for those committed years after Brazil’s transition to democracy (see Penglase, 1994: 41–47).¹

The slow transition

In 1974, less extreme elements within the military took control of the presidency and the direction of the Brazilian government. Ernesto Geisel assumed the presidency that year and began a gradual process of liberalization, somewhat easing censorship, restrictions on labour organizations and the intensity and frequency of the worst forms of abuse. After banning parties on the left, the military government under Geisel allowed elections in 1974, which were largely won by the authorized opposition, the Movimento Democrático Brasileiro (MDB). The military still controlled the executive and dominated a pliable legislature. But, unlike its Southern Cone neighbours, Brazil engaged in a process of gradual opening of political spaces. This would have important consequences for the effectiveness of measures seeking accountability.

The 1979 Amnesty Law

In March 1979, João Baptista de Oliveira Figueiredo assumed the presidency, having promised to seek reconciliation and re-establish democracy in Brazil. Figueiredo persevered with the liberalization process initiated by Geisel, reducing censorship and removing more limits on political participation. The most important measure adopted in relation to (non-)accountability in this period was the Amnesty Law, approved in August 1979. It ensured immunity from prosecution for security forces and dissidents who had engaged in political violence. The Amnesty Law promulgated by the military government was intended by them to shield state torturers and killers from prosecution without any conditions, such as truth-telling, as was required in certain other states, most notably South Africa.

However, as originally conceived, amnesty was not intended to benefit state security forces. As recounted by Homero de Oliveira Costa (2002), a member of one of the first popular Brazilian Amnesty Committees, the idea for an amnesty emerged in 1978 from popular mass protests against political imprisonment and other forms of legal and quasi-legal repression. The demonstrations united various opponents of the dictatorship, including students, clergy, artists, intellectuals and family members of the disappeared, all seeking amnesty for those who had been prosecuted and persecuted under the dictatorship's laws and policies.

Thus the amnesty sought by Brazilian civil society was of the sort that inspired the creation of Amnesty International: forgiveness for political dissidents who had been or still were being punished for their political views by an oppressive regime. Specifically, civil society was demanding amnesty for the roughly 200 political prisoners; 128 opponents who had been banished; 10,000 exiles; 4,877 government officials fired on account of "excessive acts"; and 263 students expelled from university because of a military decree (Costa, 2002: 14).² State agents accused of practising torture were *not* the intended beneficiaries. Indeed, attorney Eny Raymond Moreira, president of the Brazilian Amnesty Committee, spoke out in 1978 against the application of amnesty to state agents, "because [their] crimes were never punished and a person who was never punished cannot be amnestied" (Veja, 1978).³

Unable to contain the popular movement, the government advanced a proposal for legislation containing an amnesty for its own crimes and those of its agents, while granting amnesty for many, but not all, of the crimes of the military's political opponents. A negotiated document that changed several times following failed votes on versions that more closely resembled the demands of the Brazilian Amnesty Commission, the eventual Amnesty Law of 1979 was immediately controversial. As a

packed audience inside Congress chanted “the fight will continue” and, “united, the people, will never be defeated”, the law passed by the narrow margin of 206 to 201 (Cantanhêde, 2004). Only later, through a ruling by the Supreme Judicial Military Tribunal, was the amnesty interpreted as extending to all government political opponents (Sampaio Ferraz Jr, 2006).

Today, the Brazilian state continues to cite the Amnesty Law as a justification for its failure to prosecute those allegedly responsible for rights abuses during the dictatorship. Thus, for example, when the Inter-American Court of Human Rights ruled that the Brazilian Amnesty Law violated the American Convention on Human Rights in late 2010, Minister of Defence Nelson Jobim asserted that the decision would not produce any legal effect in Brazil. It is true that there have been gradual advances promoting access to information and reparations for certain victims of some of the abuses of the dictatorship. A civil trial court, for instance, ruled in 2008 in favour of a claim based on the right to access information, as we discuss below. However, there has been no change in the lack of criminal prosecutions since 1979.

A policy of non-disclosure and sanctioned forgetting

While foreclosing criminal prosecution, the Brazilian state has also consistently refused to disclose information about violations. In May 2005, a federal law signed by President Lula determined that certain government documents could remain classified virtually in perpetuity. More recently, the Lula administration resisted judicial efforts to force disclosures of military documents from the time of dictatorship, including a public civil suit brought by the Federal Public Ministry seeking the release of files relating to the São Paulo secret police unit created at the beginning of the *anos de chumbo* period.⁴ In April 2008, the suit was suspended until key legal questions could be settled by Brazil’s Supreme Federal Tribunal.⁵

Law 9.140: Compensation without investigation

As noted, the Amnesty Law has effectively barred efforts at state-led accountability. It would not be for some 15 years – with the drafting of Law 9.140 on compensation for the most serious rights abuses – that the government would in 1995 engage seriously with the issue of gross violations committed during the dictatorship. Even then, the engagement would focus on financial payments to victims: limited investigation would occur only to the extent necessary to establish a basis for recovery; the Amnesty Law would not be formally questioned or reopened. No one would

be criminally prosecuted (Comissão Especial sobre Mortos e Desaparecidos Políticos, 2007a).

Although not designed to create a historical record, the Commission established by Law 9.140 (the Special Commission on Political Deaths and Disappearances) did receive significant documentation from the families and representatives of those forcibly disappeared or politically killed by the dictatorship's security forces. In 1999, Nilmário Miranda, who had presided over the Commission, teamed up with journalist Carlos Tibúrcio to publish a book, *Dos filhos deste solo*, based on its findings and clearly assigning responsibility to the Brazilian state for the crimes of the dictatorship. After an 11-year study, the Special Commission itself produced an official report on the use of disappearances by the dictatorship, *Direito à Memória e à Verdade* (Comissão Especial sobre Mortos e Desaparecidos Políticos, 2007a). That Commission, however, was not able to clarify fully most of its cases, because key documents remained undisclosed even to this legislatively created body.

Another consequence of Law 9.140 was the impetus it created for state legislatures to pass legislation authorizing compensation for other abuses committed during the dictatorship. Further official efforts at providing financial compensation for different forms of political persecution followed somewhat similar models.⁶

Civil society efforts at accountability

Remarkably, the most significant organized civil society effort at accountability occurred *during* the military dictatorship. Spearheaded by Cardinal Paulo Evaristo Arns, for a period of several years an anonymous group of religious leaders, lawyers and activists diligently gathered tens of thousands of pages of documents from Brazilian military courts. Systematically, the team secretly photocopied military court records one case at a time, cataloguing violations and detailing the particular abuses committed, the locales, the institutions responsible and the individual participants involved. Their work led to a widely disseminated publication, *Brasil: Nunca Mais* (Arquidiocese de São Paulo, 1985a). Though unofficial, the book relied on official records. For years, this civil society work served as the closest Brazil would come to producing a truth commission report.⁷

The *Brasil: Nunca Mais* project created an authoritative list of 444 state agents who had participated in torture during the period of authoritarian rule. The list has served as a vital resource for civil society groups in the years since the transition to democratic rule. When authorities have sought to appoint someone either on the list or otherwise known to have

been involved in repression to a position of importance, human rights groups have mobilized in opposition.⁸ Another tactic employed by memory groups has been to seek to decertify professionals, primarily doctors, before licensing boards on the basis of unethical conduct in support of severe rights abuse during the dictatorship period (see Amnesty International, 1996).

Rising crime and human rights in the transition period

The military oversaw the process of political transition, allowing elections for state executive positions in 1982. In Brazil's most important states, voters elected reformers: Leonel Brizola (who had returned from exile with the passage of the Amnesty Law) in Rio de Janeiro and André Franco Montoro in São Paulo. Both promised democratic change and respect for fundamental human rights. At the same time, Brazil, like the rest of Latin America, plunged into a decade of economic recession triggered by the 1982 debt crisis.

In both Rio de Janeiro and São Paulo, the new governors took measures to restrict police practices widely viewed as responsible both for grave rights abuses and for violent forms of crime control. Yet the police – and many in society – viewed new policies intended to protect human rights as crippling their efforts to battle crime. Significant resistance developed within the police forces in both Rio de Janeiro and São Paulo, leading many officers to adopt inaction as a response to efforts at oversight and external control.

In this context of recession and police inefficiency, crime spiked in both Rio and São Paulo during these democratic, pro-human rights administrations and for a decade into the broader democratic transition. The homicide rate in Brazil doubled over the 16-year period from 1980 to 1996, from 11.7 per 100,000 residents to 23.7. Over that same period, the rate of killings by firearms rose from 5.1 per 100,000 residents to 14.0. In Rio de Janeiro, a small decrease in crime over the period 1979–1982 was followed by a sharp increase after 1984 (Campos Coelho, 1987).

Popular response to the surge in crime tended to blame the new democratic authorities, as well as the human rights discourse and those who defended it. As in other transitional states facing surging crime, though perhaps in more intense fashion, the civilian authorities faced a “security vacuum”:

One of the first acts of new governments is often to dismantle the old security apparatus, often leading to a security vacuum. This gap leads to wide-spread appeals for more effective order maintenance, especially by people who have

been victimized and who attribute their victimization to this vacuum ... Such collective anger shapes the nature of the request for more effective order maintenance, frequently through increased demands for retributive justice ... [T]hese demands result in the mobilization of repressive responses, that is, measures designed to crack down on crime through police sweeps, raids, and similar tactics. (Cavallaro and Mohamedou, 2005: 146, citing C. Shearing)

In Brazil's major urban centres, this security vacuum led to an unfortunate combination of citizen support for brutal policing methods and rejection of human rights discourse and practice. The following anecdote from a study by the International Council on Human Rights Policy on human rights defence in transitional societies afflicted by crime (Cavallaro, 2002b: 66) is indicative of this popular sentiment:

In August 2002, Wladimir Reale, President of the Rio de Janeiro Police Association appeared on *Fantástico*, a popular Sunday night television programme viewed by a large cross-section of Brazilian society. Reale was interviewed alongside Ignacio Cano, a sociologist from the State University of Rio de Janeiro. The two proposed opposing strategies for dealing with crime. According to Reale, "the police must exercise their legally conferred right to kill", to which Cano retorted, "such a right does not exist". At the end of the interviews, *Fantástico* conducted a telephone poll asking viewers which of the two views on crime they favoured. Approximately seventy-five per cent voted for the police officer.

Such anti-human rights sentiment would have important consequences for the shape of accountability efforts in the country.

Contemporary efforts at accountability

Events between December 2007 and late 2010 reignited national discourse in support of truth and justice for the abuses of the dictatorship in Brazil. Yet they also make clear the entrenched and sustained nature of impunity. Major new opportunities and pressure-points have emerged that favour pro-accountability advocates, yet, despite initial breakthroughs, pushes towards truth and justice have in every case been successfully resisted thus far, with the exception of one civil trial, which is being appealed.

A trial victory in civil court

Among the more significant advances in 2008 was a landmark trial court judgment in October in a civil case in São Paulo brought by five torture survivors – Criméia Alice Schmidt de Almeida, César Augusto Teles,

Maria Amélia de Almeida Teles, and César and Maria's children, Janaina de Almeida Teles and Edson Luis de Almeida Teles – against Carlos Alberto Brilhante Ustra. Ustra was one of two former chiefs of the secret police unit that had operated in São Paulo, known as the Information Operations Detachment – Centre for Internal Defence Operations (DOI-Codi).

Judge Gustavo Santini Teodoro found Ustra responsible for torturing three of the plaintiffs – César, Maria and Criméia. In his opinion, the Judge referred to the testimony of several witnesses that corroborated their accounts, witnesses who alleged they themselves were tortured – sometimes personally by Ustra. Both plaintiffs and witnesses told of electric shocks and beatings, including Criméia's account of Ustra beating her unconscious when she was pregnant. Dramatic as this was, the Judge dismissed the case against Ustra brought by the children, because he was unconvinced that they had been directly tortured or had actually seen their parents' injuries at the time.⁹

The Almeida case marked the first time a Brazilian court had ever found any military official liable for dictatorship-era human rights violations. The ruling was also remarkable in its extensive citing of international human rights law and its finding that the Amnesty Law did not protect Ustra from civil liability, giving some hope to victims seeking reparation or, as in the Almeida case, at least recognition of having been wronged. Only a few weeks prior to the Almeida decision, a São Paulo appellate court had dismissed a declaratory judgment suit against Ustra brought on behalf of Luiz Eduardo da Rocha Merlino, a journalist tortured to death inside Ustra's DOI-Codi unit in 1971.¹⁰ To date, the Almeida decision, appealed by Ustra, remains the only court judgment against a dictatorship-era human rights abuser. Yet, important as the Almeida verdict was, its scope was limited, stemming as it did from a private civil case against a torturer in his personal capacity. The state has yet to be held civilly liable in court, and to date there has been no criminal accountability for any abuser.

Italian arrest warrants

Given the Amnesty Law, it is no surprise that the first major recent effort to hold agents of the Brazilian dictatorship criminally liable for abuses came from abroad. On 24 December 2007, Italian judge Luisanna Figliolia issued an extradition request for 140 former agents of dictatorships from throughout Latin America for, among other crimes, the killing of 25 Italian citizens in the course of Operation Condor in the 1970s and 1980s (BBC Brasil, 2007). Among those targeted by the court were 11 Brazilians reportedly implicated in two killings in 1980, the year after the

promulgation of the Amnesty Law (Rey, 2008).¹¹ The day after the request was announced in the press, Minister of Justice Tarso Genro stated that Brazil would oppose the request, given the constitutional prohibition against extraditing (natural-born) citizens. However, he did state that it might be possible to begin investigations domestically (*O Globo*, 2007). Several months later, prosecutors from the Federal Public Ministry in São Paulo formally requested that domestic criminal inquiries be opened in connection with the Italian court's request (Assessoria de Comunicação, 2008).

Then in January 2009 federal prosecutor Ivan Cláudio Marx in southern Rio Grande do Sul was reportedly preparing to file what would be the first ever criminal charges regarding dictatorship abuses, specifically the 1980 disappearances enabled by Operation Condor of Italian-Argentine citizen Lorenzo Ismael Viñas and Argentine priest Jorge Oscar Adur.¹² The Rio Grande do Sul criminal investigation is an important milestone, even if no charges have (as yet) been filed. However, given that the case dates from after the scope of the 1979 Amnesty Law, it remains to be seen what effect, if any, this prosecution might have on impunity for abuses during other portions of the dictatorship, such as the systematic torture during the *anos de chumbo* period.

Outspoken ministers

On 31 July 2008, the Special Commission established by Law 9.140 held a public hearing at the Ministry of Justice at which Special Secretary for Human Rights Paulo Vanucchi and Minister of Justice Tarso Genro spoke, both defending the thesis that the Amnesty Law did not protect torturers since it covered only “political crimes”. As Genro explained:

From the moment in which an agent gets that prisoner and takes him to the basement and tortures him, he goes outside of even the laws of the military regime. Therefore, his crime is not a political crime. It is the crime of torture. He became a torturer just like any other torturer that humanity recognizes. (Scolese, 2008)

Comments by both Vanucchi and Genro made national news on all major outlets. Gilmar Mendes, president of the Supreme Federal Tribunal, declared his opposition to the debate on what he called the “revision” of the Amnesty Law – a surprising declaration given that the Supreme Federal Tribunal was about to hear this challenge. Notably, Mendes shunned other regional examples, stating that “the inspiration of our co-brothers in Latin America is not the best; so much so that they have not produced institutional stability” (Ferreira, 2008). In other words, Mendes asserted

that the Amnesty Law had been vital to the consolidation of democracy in Brazil.

Representatives of the military provided an even stronger negative response. Minister of Defence Nelson Jobim flatly declared that “there will be no change in the Amnesty Law”. Then there was a highly publicized protest in the Military Club of Rio de Janeiro. Despite reports that the High Command informally discouraged members of the military from congregating there, the event was attended by several hundred military personnel. General Gilberto Figueiredo, president of the Club, called the remarks by Vanucchi and Genro a “disservice to the country”. That was restrained by comparison with the response of General Sérgio Augusto de Avellar Coutinho, who read out portions of the intelligence files gathered on the oppositionist guerrilla activities of Vanucchi and Genro during the dictatorship.

In response, the two ministers called for all such files to be released, with Genro adding about his own past, “this is news to nobody . . . it is an open record, and I am proud of it”. Vanucchi also caught the military protestors on a crucial point: if such files existed, then the military – despite repeated denials – must indeed have an unrevealed archive from the dictatorship period (Belchoir, 2008; Brandt, 2008; *Folha Online*, 2008a; Santos, 2008; Zahar, 2008).

As things threatened to get out of control, President Lula insisted that the issue was one for the courts (Giraldi, 2008a). This position rang hollow, though – the President was even then making up his mind about the instructions to give to the Office of the Solicitor General (Advocacia-Geral da União, AGU), due to file a brief on his behalf in the suit brought by the Federal Public Ministry against Ustra and fellow ex-chief of secret police Audir Maciel. The President appeared to be, in reality, eager to avoid the issue, and reportedly instructed Vanucchi and Genro to refrain from engaging any further in the intense public debate (Andrea and Scolese, 2008). Vanucchi accepted Lula’s demand, though with somewhat less deference than Genro.¹³ When eventually President Lula’s official court representative did file briefs in cases related to the Amnesty Law in the months that followed, they asserted that the state torturers from the dictatorship period were immune from prosecution.¹⁴

Challenging the Amnesty Law in the Supreme Court

After much anticipation, the Office of the Solicitor General submitted a brief in October 2008 at the trial court level in the civil public suit brought by another branch of the government against Ustra and Maciel.¹⁵ Contrary to expectations raised in the media (*Folha Online*, 2008b), the brief provided a wholehearted defence of the Amnesty Law, coupled

with a rebuttal of the calls to disclose dictatorship archives. The rejection of the brief by Genro and Vanucchi was quick and complete, with Vanucchi calling it a “brutal error” (*Correio Braziliense*, 30 October 2008). Internal conflicts within the Lula government intensified. The entire Special Commission on Political Deaths and Disappearances created by Law 9.140 threatened to resign en masse, as did the section of the Ministry of Justice entrusted with awarding compensation to individuals persecuted under the dictatorship (*O Popular*, 30 October 2008). And, for good measure, so too did Vanucchi (Rocha, 2008).

Negotiations began on a possible redraft of the brief on the Amnesty Law, with media sources reporting that Lula would request a neutral brief be sent to the Supreme Federal Tribunal (Giraldi, 2008b; Recondo, 2008). Around the same time, the Brazilian Bar Association (Ordem de Advogados Brasileiros, OAB) filed a petition in the Supreme Federal Tribunal challenging the Amnesty Law’s application to dictatorship-era state torturers.¹⁶ The OAB challenge fell to Supreme Federal Tribunal Minister Eros Grau to serve as rapporteur (*JusBrasil*, 22 October 2008). Grau is himself a former political prisoner and had been appointed by President Lula, another former political prisoner.¹⁷ In the end, it was months before the Lula government finally stated its position and, when it did, the result was again heavily criticized by accountability advocates, including the OAB (*O Globo*, 2009). The AGU brief, which formally speaking represents the views of the President, was not neutral. It reiterated its view that the Amnesty Law fully covered government torturers.¹⁸ However, five other government institutions also submitted briefs: the Defence Ministry and the Ministry of Foreign Relations in support of the blanket amnesty interpretation, and the Ministry of Justice, the Human Rights Special Secretariat and the Chief of Staff (a ministerial post in Brazil) in favour of accountability (*Consultor Jurídico*, 2 February 2009). The approach of allowing the filing of six different governmental briefs demonstrated the incoherence of the Lula government on the issue of accountability. In what might have been a legacy-making historical moment, Lula, in effect, opted out, leaving Brazil as the outlier in the continental shift away from impunity.

On 29 April 2010, the Brazilian Supreme Court rejected, by a 7–2 vote, the OAB challenge to the Amnesty Law. Rapporteur Justice Grau, writing for the Court, concluded that the Amnesty Law represented a step towards reconciliation and re-democratization in the country. Grau wrote that the Amnesty Law was a manifestation of a political agreement that resulted in a legal norm that could be reviewed only by the legislature. The Supreme Court thus deemed itself powerless to alter normative texts conceding amnesties.¹⁹ For defenders of the Amnesty Law and the Brazilian approach to transitional justice, the Supreme Court’s decision bur-

ied the issue. By now, however, the challenge to the Amnesty Law had moved well beyond the control of the Brazilian judiciary. A parallel challenge to Brazil's Amnesty Law had been advancing through the inter-American human rights system and was moving quickly to a final decision.

The Guerrilha do Araguaia case

In 1995, several non-governmental organizations (NGOs) filed a petition with the Inter-American Commission challenging the failure of the Brazilian state to provide information and to investigate a series of seizures, forced disappearances and summary executions of a group of guerrilla combatants in the Amazon region in the early 1970s known in Brazil as the *Guerrilha do Araguaia*.²⁰ The case, captioned as *Julia Gomes Lund and Others vs. Brazil*, wound its way through the Commission over the next decade. Eventually, the Commission would find Brazil responsible for failing in its duty to investigate grave violations of human rights by virtue of the application of the 1979 Amnesty Law to the *Araguaia* litigation in Brazil. In May 2009, the Commission filed an application to the Inter-American Court of Human Rights alleging violation of several articles of the American Convention on Human Rights.

While the *Araguaia* case proceeded through the Commission, the Inter-American Court had addressed the legality of amnesty provisions in Peru (*Barrios Altos*), Chile (*Almonacid Arellano and Others*), El Salvador (*Serrano-Cruz Sisters*), Suriname (*Moiwana Village*) and Guatemala (*Dos Erres*). With each successive decision, the Court established and then entrenched its jurisprudence deeming invalid any and all amnesty laws, as well as other measures designed to restrict the investigation and prosecution of human rights violations, such as statutes of limitations.

Not surprisingly, by the time the *Guerrilha do Araguaia* case made its way to the Court, a decision invalidating the Amnesty Law was all but certain. Nonetheless, the Brazilian state vigorously defended the Amnesty Law, relying on the particular nature of its historical context and measures it had taken, such as payment of indemnification to victims, in response to the abuses of the military regime.

On 14 December 2010, the Inter-American Court issued its sentence in the *Gomes Lund (Guerrilha do Araguaia)* matter against Brazil. In the decision, the Court applied its case law on continuing violations and amnesty laws, holding the state of Brazil responsible for the forced disappearance of 62 people between the years 1972 and 1974 in the Araguaia region of northern Brazil. (The doctrine of continuing violation allows the Court to hold states responsible for violations that began prior to the temporal jurisdiction of the Court, to the extent that these continue

beyond the date on which a given state recognizes the Court's jurisdiction.) The Court analysed, among other issues, the compatibility of Brazil's Amnesty Law (Law No. 6.693 of 1979) with the American Convention on Human Rights and the Court's extensive jurisprudence on legislation purporting to restrict the state's duty to investigate grave violations of human rights. The Court concluded that the provisions of the Amnesty Law that prevent the investigation and sanction of grave rights violations are incompatible with the Convention and thus are of no effect. As a result, they cannot present an obstacle to the investigation of the facts of this case, or of the identification and punishment of those responsible for the disappearances. The Court also held Brazil liable for the violation of the right to personal integrity of the relatives of the victims owing to the suffering caused by the lack of effective investigation into the fate of the victims, as well as for violation of the right to freedom of thought and expression.

The sentence of the Inter-American Court provoked a clash of public statements by political authorities, rights advocates and other commentators similar to those triggered by domestic challenges to the Amnesty Law and impunity for abuses of the dictatorship. The response of the Brazilian authorities to the sentence continued along the fault-lines staked out in the lead-up to the Supreme Court decision. As noted above, Minister of Defence Nelson Jobim asserted that the decision would not produce any legal effect in Brazil. The decision of the Brazilian Supreme Court, Jobim asserted, was the final word in the matter. The Ministry of Foreign Relations issued a carefully worded statement to the effect that Brazil had implemented much of what the system had ordered and would take efforts to work towards compliance. Rights activists and progressive commentators, as well as the relatives of those killed and disappeared in the *Guerrilha do Araguaia* campaign, emphasized the state's duty to comply with the decision by the Inter-American Court by releasing information, opening archives and prosecuting rights violators. So too, in somewhat more nuanced language, did the incoming Human Rights Secretary. What remains far less clear than the tension between and among these positions, however, is which position will carry the day with the relevant actors involved in reviewing and applying the Amnesty Law moving forward.

An overall assessment of failed accountability

As these at best mixed developments show, the overall Brazilian record on accountability has been poor in comparative perspective. In Table 5.1, we assess, in approximate terms, the extent of engagement in Brazil with

each of the major accountability mechanisms employed in transitional justice processes. The table does not purport to include all possible mechanisms tried to date, much less all possible measures that might be tried. It does, however, present the most frequently employed transitional justice mechanisms. Note that some of these assessments were not analysed in significant measure in this text. The table is meant to provide a quick, relatively comprehensive assessment of the commitment to accountability mechanisms in Brazil.

Explaining limited accountability

Transitional justice, one commentator has written (Call, 2004: 101), may be defined as the way in which “societies ‘transitioning’ from repressive rule or armed conflict deal with past atrocities, how they overcome social divisions or seek ‘reconciliation,’ and how they create justice systems so as to prevent future human rights atrocities”. Another leading figure in the field, Priscilla Hayner (2002), has noted that the “basic question [of transitional justice is] how to reckon with massive state crimes and abuses”. More recent scholarship (McEvoy and McGregor, 2008) has sought to broaden the perspective to include not only official, primarily legal measures, but also grassroots and civil society efforts to gain a “thicker” understanding of the process of reckoning. This process – both official and civil society efforts – may also be understood through the concept of accountability, as this volume seeks to do across a range of transitional societies. In Brazil, the process of transition and the experience of non-accountability result from a number of factors. We highlight four factors below: the nature of the transition, the number of victims, the role of crime, and the relative isolation of Brazil.

Top-down, gradual and controlled transition

Since the inception of what Samuel Huntington (1991) termed “the third wave” of democratization, scholars have recognized that the nature of the transition constrains post-transition options in important ways. Huntington himself classified the third wave of transitions into three groups, each of which would have consequences for the future democracies established. The three transitional processes he highlighted were: replacement, transformation and transplacement. David Rustow (1992) wrote of overthrow, reform and compromise. The first (replacement or overthrow) involves the clear victory of new forces over the authoritarian regime. The second (transformation or reform) is driven by reformers within the authoritarian regime and is largely controlled by them. The

Table 5.1 Accountability mechanisms in Brazil

Accountability measure	Degree of engagement		
	High	Moderate	Limited or none
Prosecutions ^a			
Domestic			X
Foreign			X
International			X
Other litigation			
Domestic, civil litigation			X
Regional or universal human rights litigation ^b		X	
Lustration ^c			X
Opening of files ^d			X
Truth commission			X
Creation of memory sites ^e			X
Social ostracism ^f			X
Reparations	X		
De-licensing ^g		X	

Notes:

^aSikkink (Chapter 2 in this volume) divides prosecutions into three groups: domestic, foreign and international. The first category comprises those that occur within the territory and performed by the courts of a particular state. Foreign prosecutions are those in which the judiciary of another state or states is involved. The most well-known example of foreign criminal proceedings concerned the arrest and house detention of Chilean dictator Augusto Pinochet in London, based on a Spanish warrant. International prosecutions involve supranational bodies, such as the International Criminal Tribunal for the former Yugoslavia.

^bRegional or universal human rights litigation refers to the use of international human rights regimes that focus on state liability, such as the inter-American system, the European Court system or the African system (regional), or the United Nations system (universal).

^cLustration refers to the process by which particular individuals are barred by law from engaging in government on the basis on their participation in human rights violations during the prior regime. This form of transitional justice mechanism has been most widely employed in East European states in transition from Communist to more open regimes. In Chapter 16 in this volume, Nadya Nedelsky discusses lustration in the context of the Velvet Revolution in the Czech Republic, and in Chapter 14 Monika Nalepa assesses lustration as a means of developing trust in Poland. Lustration, as such, has not been employed in Brazil. However, as noted, civil society groups have sought to press the authorities to deny particular positions to those known to be responsible for human rights abuse. This has been done in a non-systematic, extra-legal fashion.

^dThe paradigmatic case of the opening of files and release of information held by repressive regimes involves the access provided to Stasi files in East Germany. Although there have been some efforts to open some files held by repressive authorities in Brazil, the record of openness has, on the whole, been dismal.

^eCreation of memory sites refers to efforts to transform centres of repression and rights abuse into museums or spaces for public memory recovery and recognition

Table 5.1 (cont.)

of policies of state-sanctioned violence. One clear example, cited in Chapter 4 in this volume, is the transformation of the Higher Naval Mechanics School (Escuela Superior de Mecánica de la Armada, ESMA) into a museum in Buenos Aires, Argentina. Again, although some success has been achieved in this regard in Brazil, the overall record is poor compared with its Latin American neighbours.

^fSocial ostracism refers to civil society efforts to shame human rights perpetrators through targeted public actions, typically in their neighbourhoods. The modality most widely known is the “*escrache*”, an Argentine process in which human rights advocates meet outside the residence of a human rights violator to encourage social condemnation of the particular individual. See Catalina Smulovitz in Chapter 4 in this volume. In Brazil, civil society groups have pushed some limited efforts to embarrass rights violators publicly, mostly through the media.

^gDe-licensing refers to efforts, generally initiated by civil society groups, to de-license medical professionals because of their participation in rights abuses, as mentioned above.

third (transplacement or compromise) involves joint action between the departing regime and democratizing forces.

Scholars of democratization and transitional justice have consistently argued that the relative power of new elites – a function of the nature of the transitional process itself – is a key determinant in the nature of the transitional justice mechanisms employed. When new elites are strong and flush with power, one may expect vigorous transitional justice mechanisms, such as criminal prosecutions, to be the norm. By contrast, when the power of new elites is constrained by other forces (such as the military), one may expect limited accountability measures. The nature of the transition is vital in this regard. To the extent that a transition is uncontrolled and abrupt and involves the loss of legitimacy of the prior regime, new elites will be well situated to promote aggressive transitional justice mechanisms, such as criminal trials. By contrast, where transitions are controlled entirely by authoritarian leaders who maintain power and legitimacy, or when they result from negotiations, one should expect limited capacity to engage in justice mechanisms.

As one scholar (Huyse, 1995: 76) has synthesized the relevance of transition to accountability options:

The widest scope for prosecutions and punishment arises in the case of overthrow. Almost no political limits exist. Full priority can be given to the thirst for justice and retribution. But a totally different situation comes up if the transition is based on reform or compromise. In that situation the forces of the previous order have not lost all power and control. They are to a certain degree able to dictate the terms of the transition. The new elites have only limited options. They may be forced to grant the outgoing authorities a safe passage in

return for their total or partial abdication . . . The successor government and its democracy is too vulnerable to discard clemency.

Unlike in Argentina, for example, the military leaders in Brazil were not driven from office but instead conducted a long, controlled transitional process. Prior to assuming the presidency in 1979, General Figueiredo promised to continue liberalization and lead Brazil to democracy. He would remain in office for six years before ceding power through indirect elections. The role that the military leaders played in the process allowed them to exercise control over the existence (or not) of accountability mechanisms at the time of the transition and beyond. In contrast to Argentina, where an unsuccessful war and an economic downturn led to the collapse of the regime, the Brazilian military leaders left power on their own terms.

The gradual, controlled nature of the transition undermined efforts to develop political momentum around accountability efforts. For example, by the time of the first direct presidential elections after the 1988 Constitution, the Amnesty Law was already a decade old and had become part of the accepted legal landscape in the country. In Brazil, the nature of the regime change and the relative weakness of democratic authorities resulted in significant constraints on transitional justice possibilities in the early years of the transition. In addition, the political strength of the military leaders and of their self-serving discourse has remained remarkably resilient, as we have just seen in the case of the open clashes between pro-accountability ministers and military spokespersons.

What is interesting to observe now – more than two decades after the transitions in the Southern Cone – is the continued power in the national psyche and politics of the initial transition type. In Argentina, military authorities are largely absent from debates about transitional justice and human rights. When their voices are heard, they are almost invariably those of desperate, defrocked defendants rather than respected public figures. In Brazil, as events in 2008 and early 2009 have shown, the military view not only continues to be significant in the public debate; it has been decisive in the decision-making process. More than two decades after their controlled, top-down exit, the members of the Brazilian military have still managed to carry the day on the issue of accountability for their crimes.

The number of victims

Although members of the military engaged in widespread abuse, institutionalizing torture and impunity through specialized courts, the total number of victims in Brazil was significantly lower, in relative terms, than

in other Latin American dictatorships. This, too, may be attributed to the length of time over which the military exercised power, as well as the gradual intensification of repression and the gradual transition to democratic rule. Regardless of the causes, the total number killed or disappeared for political reasons was much lower than in Argentina or Chile, for example, particularly in light of the size of Brazil. Argentina's dirty war – over a period of seven years – killed at least 20 and possibly 60 times as many as were killed in Brazil. Per capita, the Argentine security forces killed between 50 and 200 times as many as their counterparts in Brazil. In Chile, security forces killed 6 times as many in absolute terms and 60 times as many in per capita terms.²¹

One important consequence of this difference concerns the human rights movement that arose during and after the authoritarian periods in these countries. The numbers of victims affected directly or through close family members and friends in Chile and Argentina were far higher than those in Brazil. Though other factors contribute as well, this factor should not be overlooked in assessing the strength of civil society and the capacity of those seeking justice to structure official and extra-official accountability mechanisms. The sheer numbers of those directly affected by the dirty war in Argentina, for example, have helped ensure that the issue of accountability has remained on the agenda of civil society groups, regardless of the legal restraints in effect at any given point over the past quarter century.

The role of crime in stifling accountability

As noted above, the gradual transition to civilian rule occurred in the midst of a severe recession and surging crime. Democratically elected governors in Rio de Janeiro and São Paulo promised a return to the rule of law, including police forces that respected the limits imposed by democracy. This understanding quickly came to be associated – wrongly or not – with surging crime. Thanks as well to political manipulation by reactionary forces, the defence of human rights came to be caricatured as the defence of criminals and, worse still, of criminality. In this context, human rights lost ground in national and local debates. Rather than advocates seeking to protect Brazilians from further abuses, human rights defenders were increasingly seen as part of the new problems that citizens faced on a daily basis.

The role of external actors

Unlike its Southern Cone neighbours, Brazil has remained relatively unaffected by global pressures promoting accountability for past abuses.

Here, a few examples demonstrate the point. First, although it is clear that the arrest of General Augusto Pinochet in London in 1998 sent shock waves through Chilean society, it is important to note that his detention produced a similar result in Argentina as well as in many other Latin American countries that had recently made the transition to civilian rule (Roht-Arriaza, 2005). The Pinochet process intensified ongoing efforts to file suits based on universal jurisdiction against Argentines, Chileans, Uruguayans, Guatemalans and others in Europe. Brazil remained largely on the sidelines (with the exception of cases focusing on Operation Condor that included Brazilians as well). Second, the Inter-American Court's decision in the *Barrios Altos* case against Peru, holding amnesty laws to be in violation of the American Convention on Human Rights, led to the eventual repeal of amnesty laws in Argentina and promoted similar processes in other parts of Latin America. In Brazil, the decision went largely unnoticed.

The relative isolation of Brazil, and in particular of its human rights community, from its Latin American neighbours unfortunately has longer roots. Whereas networks between and among Spanish-speaking Latin American rights and solidarity groups have been strong for decades, it is only in the past decade, with the advance of modern communications, that Brazilian groups have engaged more fully. One sign of Brazil's lag in this regard comes from its involvement in the inter-American system for the defence of human rights. As recently as 1994, whereas activists were filing and litigating scores of cases against almost every other state in Latin America, only two cases were pending against Brazil (Cavallaro, 2002b: 83).

Conclusion

The failure of accountability efforts in Brazil is a significant factor in the creation and maintenance of serious challenges to democracy, the rule of law and human rights. We focus on three aspects in particular. First, many of the abuses characteristic of the military dictatorship have continued (and increased) and still typically result in impunity. Second, support for democracy and the rule of law is low compared with other countries in the region. And, third, broad sectors of the population reject human rights discourse and human rights defence.

Authoritarian-type abuses and impunity continue

Most of the torture methods recounted in *Brasil: Nunca Mais* are deployed by police, prison guards and others throughout the country

(United Nations Committee against Torture, 2008). The same is also true of disappearances, a preferred method of repression employed by the dictatorship that is still used by security forces in post-transition Brazil (Commission on Human Rights, 2004: paras 40, 44).

Figures on killings by state agents demonstrate that the police are as violent as ever: in 2008, police in the state of Rio de Janeiro killed 1,137 people, while 26 officers were killed in alleged confrontations (Instituto de Segurança Pública, 2008). São Paulo police killed 484 people that year in alleged confrontations.²² By contrast, police killed 391 people in alleged confrontations in all of the United States in 2007 (Federal Bureau of Investigation, 2007), a country with a vastly greater population and more overall homicides than Rio de Janeiro and São Paulo combined (Instituto de Segurança Pública; 2008; Secretaria de Segurança Pública do Estado de São Paulo, 2009). War-like attitudes within the police force encourage violence. The main special forces unit of the police in Rio de Janeiro, the Batalhão de Operações Policiais Especiais (BOPE), prominently features a piracy-inspired skull-and-guns logo on its website, uniforms and vehicles; until recently, it displayed a quotation on its official website from a now former commander proclaiming: "To see the eyes of the enemy is important, but we should be prepared to make them close."²³ A significant percentage of police killings in alleged shoot-outs are actually instances of summary execution. A study released in 2003 by the human rights organization Justiça Global detailed 349 cases of summary execution by state security forces throughout Brazil over a six-year period (Carvalho, 2003).

In addition to killings by uniformed police, those committed by "extermination groups", many of which involve off-duty police, constitute a serious problem in the country. Two of the witnesses with whom the United Nations Special Rapporteur on extra-judicial, summary or arbitrary executions, Asma Jahangir, spoke during her visit in 2003 were killed within days of their interviews, the first while Ms Jahangir was still in the country (UN News Centre, 2003). Nilmário Miranda, then Secretary for Human Rights in Brazil, described the killings as "an open challenge [by the death squads] to demonstrate that they are untouchable" (BBC News, 2003). More recently, Philip Alston, the current Special Rapporteur, issued a damning report on police killings in Rio de Janeiro, São Paulo and Pernambuco. As he noted in his summary:

The people of Brazil did not struggle valiantly against 20 years of dictatorship, nor did they adopt a federal Constitution dedicated to restoring respect for human rights, only in order to make Brazil free for police officers to kill with impunity in the name of security. (Human Rights Council, 2008)

Impunity, perhaps the principal enabler of human rights violations, remains prevalent in Brazil. In the first five years after the domestic criminalization of torture in 1997, Brazilian prosecutors brought 524 cases charging torture, a number that suggests a very high incidence of the crime throughout the country given general trends of underreporting and scarce investigatory and prosecutorial resources. Of those 524 cases, just 15 had gone to trial by May 2003 and only 9 had resulted in convictions (Justiça Global, 2004). The reality is similar with respect to other abuses. For instance, in the 349 cases documented by Justiça Global (Carvalho, 2003) of summary executions by state security forces from 1997 to 2003, in 202 of them prosecutors had not even started investigations.

As already noted, this pattern of impunity is not new. The Amnesty Law continues effectively to bar prosecutions of dictatorship crimes. Brazil's failure to break with the repressive ways of its past derives, at least in part, from this lack of accountability regarding the dictatorship. Although *Brasil: Nunca Mais* (Arquidiocese de São Paulo, 1985a) managed to expose fundamental "truths" about the dictatorship, it did not spur successful calls to revisit the Amnesty Law of 1979. As Weschler (1990: 75–76) describes, when the book's producers released a list of 444 torturers in November 1985, "for the most part those whose names appeared on the list retained their positions [in government] and, thanks to the amnesty, had little more to endure than the public's contempt".

Noting that "there has been no full official accounting for the crimes committed by [the military] regime", UN Special Rapporteur on Torture Sir Nigel Rodley recommended that Brazil take effective action to rid its contemporary security forces of torturers, adding that "a start could be made by purging known torturers from the period of the military Government" (Commission on Human Rights, 2001: paras 158, 169(j)). Aside from the numerous military regime holdovers still in government, not even the most elementary steps towards justice have been fully taken. Mechanisms for truth-seeking and reparations have been, at best, incomplete. *Brasil: Nunca Mais* and the work produced by the Special Commission on Political Deaths and Disappearances have been able to establish some record of atrocities. Yet many aspects of the truth remain elusive even after over two decades.

Thin support for democracy

In post-transition Brazil, broad segments of society have grown increasingly disillusioned with democratic rule, in significant part owing to the perceived inability of elected leaders to control ordinary crime. In a 2006 Latinobarómetro poll, only 50 per cent of Brazilians questioned responded affirmatively to the statement that "democracy is preferable to

any other type of government". That placed Brazil next-to-last in terms of support for democracy among 18 Latin American countries surveyed (*The Economist*, 2007).

Distrust of human rights

In addition, Brazilians on the whole demonstrate relatively little support for human rights and their defenders in large part because of the close association in popular consciousness between rights defence and surging crime. Many Brazilians believe that human rights organizations focus excessively on the rights of criminals and criminal defendants. The flash poll run by the TV Globo network on its "Fantástico" show, in which viewers were asked to choose between two views of public security (one that supported the "right" of the police to kill, the other based on the rule of law and human rights), is illustrative of general anti-human rights sentiment in the country. Three-quarters of those polled, in effect, voted against human rights as a paradigm for guiding law enforcement.

For those who support accountability, the Brazilian experience provides a disheartening but vital case study. Despite the consistent absence of official efforts to prosecute crimes of the dictatorship, civil society groups have found limited success in pursuing avenues to press for investigations and non-criminal sanctions. The meta-narrative that we suggest is one of top-down, military control of the transition, exacerbated by the relative isolation of Brazil's civil society and the surge in crime and accompanying loss of prestige of the human rights discourse that occurred in the first years of democratic change. The prospects for meaningful accountability in Brazil are thus limited but extant.

Notes

1. Although, in 1996, Law 9.299 shifted jurisdiction over intentional homicides committed by military police back to ordinary courts, crimes classified as unintentional killings, severe non-lethal physical abuse and other, lesser offences continue to be investigated and prosecuted within the specialized military courts. Cano's 1997 study of the universe of killings from 1993 to 1996 in Rio de Janeiro located 301 investigations in the military justice system, of which 295 had been dismissed without any judicial proceedings; the remaining 6 were dismissed on motions by the prosecutors once the judicial process began. Not a single case led to any criminal punishment of the police officers involved in killing civilians.
2. See also Arquidiocese de São Paulo (1985a), recounting very similar, if slightly different, numbers.
3. *Veja* is the leading newspaper in Brazil.
4. For details, see: (<http://www.prsp.mpf.gov.br/cidadania/Inicial%20ACP%20Mortos%20e%20Desap%20-%20Final.pdf>); and *Contestação à Ação Civil Pública*, Advocacia-

- Geral da União, Procuradoria-Regional da União da 3ª Região-SP/MS, Processo No. 2008.61.00.011414-5, 8ª Vara Federal Cível de São Paulo – 1ª Subseção Judiciária do Estado de São Paulo, 14 October 2008 (Advogada da União Lucila Piato Garbelini, e Procurador-Regional da União da 3ª Região e Advogado da União Gustavo Henrique Pinheiro Amorim); available at http://www.estadao.com.br/ext/especiais/2008/10/cont_agu.pdf (accessed 5 March 2012).
5. See Ação direta de inconstitucionalidade 3987, Conselho Federal da Ordem dos Advogados do Brasil, Supremo Tribunal Federal (Presidente do Conselho Federal da Ordem dos Advogados do Brasil Cezar Britto), 14 November 2007; and see Ação direta de inconstitucionalidade 4077, Procurador-Geral da República, Supremo Tribunal Federal (Procurador-Geral da República Antônio Fernando Souza), 19 May 2008; “Justiça suspende processo do MP”, *Correio Braziliense*, 14 November 2008, p. 6.
 6. See, for instance, the work of the Ministry of Justice’s Amnesty Commission, (<http://www.mj.gov.br/anistia/>) (accessed 14 March 2012).
 7. For an excellent account of the extraordinary efforts that went into the production of the Brazilian shadow truth report, see Weschler (1990).
 8. One such example involved efforts before the UN Committee Against Torture in 2001, at which rights advocates, and the Committee itself, raised the issue of participation by then Rio de Janeiro security chief Josias Quintal in repressive bodies operating during the dictatorship. Although not one of the 444 listed, Quintal’s past role prompted media interest and some public condemnation.
 9. Sentença, Processo No. 583.00.2005.202853-5, 23a Vara Cível do Estado de São Paulo, Poder Judiciário, 7 October 2008.
 10. The suit was reportedly dismissed on standing grounds over a dispute as to whether one of the plaintiffs had proved she had been in a stable relationship with Merlino at the time of the events. The case never reached the merits. One witness who reported seeing Merlino seriously injured after being tortured was Paulo Vanucchi, at the time the Special Secretary for Human Rights leading the campaign for accountability and himself a former political prisoner and torture victim. See *Folha Online* (2008c) and *Portal Imprensa* (2008).
 11. Soon after the Italian warrants were issued, Spanish judge Baltasar Garzón – known primarily for his role in the detention of Chilean dictator Augusto Pinochet in the United Kingdom in 1998 – also requested the extradition of Brazilians involved in Operation Condor. See Rattner (2008).
 12. The prosecutor was reportedly considering supplementing his case with evidence from Italian prosecutors (Flor, 2009).
 13. He stated that, “yes, the judiciary is the place in which to ultimately work, protest about, move along, arbitrate, and decide this”. However, he added, “the secretary for human rights of whatever party of whatever government of whatever country shall cease to be the secretary for human rights if he accepts the notion that the topic of torture is not to be worked on” (Giraldi, 2008a).
 14. Note AGU/SGCT/No. 1-DCC/2009, Arguição de Descumprimento de Preceito Fundamental (ADPF) 153, Supremo Tribunal Federal, 30 January 2009 (Advogada da União Ana Carolina de Almeida Tannuri Laferté e Advogado da União Henrique Augusto Figueiredo Fulgêncio); Contestação à Ação Civil Pública, 14 October 2008 (note 4).
 15. Contestação à Ação Civil Pública, 14 October 2008 (note 4).
 16. Arguição de Descumprimento de Preceito Fundamental (ADPF) 153, Conselho Federal da Ordem dos Advogados do Brasil, Supremo Tribunal Federal, 21 October 2008 (Advogado Fábio Konder Comparato e Advogado Maurício Gentil Monteiro); available at (http://www.oab.org.br/arquivos/pdf/Geral/ADPF_anistia.pdf) (accessed 14 March 2012).

17. "Tortura: Suprema Decisão", Tortura Nunca Mais-RJ, 9 November 2008, (<http://www.torturanuncamais-rj.org.br/artigos.asp?Codartigo=57&ecg=0>) (accessed 5 March 2012).
18. Note AGU/SGCT/No. 1-DCC/2009, 30 January 2009 (note 14).
19. Vote of the Ministro Relator in the Acción de Incumplimiento de Precepto Fundamental No. 153, Supremo Tribunal Federal, 29 April 2010.
20. One of the authors of this chapter, James Cavallaro, was counsel and petitioner on behalf of the victims, acting with the Center for Justice and International Law and Human Rights Watch/Americas in the initial filing with the Inter-American Commission.
21. The figures employed for these comparisons are those of the truth commissions in Argentina (National Commission on the Disappeared) and Chile (National Commission for Truth and Reconciliation). For Brazil, we use the figures from the Special Commission.
22. Secretaria de Segurança Pública do Estado de São Paulo, Mortos por Policiais Militares – 2008 and Mortos por Policiais Civis – 2008.
23. See homepage of the Polícia Militar do Estado do Rio de Janeiro, (http://www.pmerj.rj.gov.br/unidades_pmerj_subcategorias_detalhes.php?id=15) (accessed 5 July 2012).

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6

The unlikely outcome: Transitional justice in Chile, 1990–2008

Claudio Fuentes

Introduction

In 2008, US pop-star Madonna went to Chile for the first time, to perform in Santiago. The local mass media paid great attention to this concert, the most expensive ever put on in Latin America. Interestingly, Madonna performed on 10 December, the International Day of Human Rights, and the concert was staged at the National Stadium, which had been the biggest prison camp after the military coup in 1973, holding about 15,000 prisoners during the first three months after the coup. Official sources have provided compelling evidence of torture and even summary executions inside and outside the stadium then. You might have thought that, on the sixtieth anniversary of the Universal Declaration of Human Rights, a concert at this site might have sparked some comment in the press, some small gesture of remembrance by human rights activists. If you had, you would have been wrong. Instead, the example shows the paradoxes and complexities with which Chile lives with regard to its past and its present. On the one hand, Madonna is a symbol of the modernity that Chile aims to achieve. On the other hand, the National Stadium is a silent testimony to Chile's cruel past. While modernity was celebrated in live music and colours on 10 December, beneath the galleries a grey past was waiting to be remembered.

This chapter attempts to explain why Chile has experienced important advances in the prosecution of those responsible for past human rights violations (HRVs), despite the unfavourable initial conditions during the

transition to democracy. Indeed, initial constraints at transition in Chile made observers very sceptical about the possibilities of justice for HRVs. Legally, the new authorities were constrained by an Amnesty Decree-Law and, politically, the former dictator Augusto Pinochet maintained strong sources of political influence after the transition, keeping as he did the position of Commander-in-Chief of the Army until March 1998. However, despite the absence of a significant shift in the legal environment, things began to change rapidly after 1998. Two governmental commissions (1991 and 2005) made significant steps towards the truth on the HRVs, hundreds of initiatives on symbolic and financial reparation took place, and the judiciary took important steps towards the prosecution and punishment of those responsible for human rights abuses.

By 2008, eight special judges were in charge of close to 400 legal cases dealing exclusively with past HRVs. Nearly 500 active and former military and police officers had been indicted by the courts and, of these, more than 250 officers had been convicted. Of those convicted, 40 are currently in jail; the rest are still in the appeal process. General Manuel Contreras, former head of the National Intelligence Service (DINA) – the repressive apparatus of the military regime – was convicted on more than 100 counts, receiving 25 sentences adding up to 294 years of imprisonment for HRVs. Contreras' close collaborators were convicted in a similar number of cases, establishing, among other facts, that DINA organized and carried out an illegal operation to assassinate a former Commander-in-Chief of the Army, General Carlos Prats, in 1974 in Buenos Aires, Argentina. This case was a tragically emblematic demonstration of Pinochet's ruthlessness, including towards former comrades.

At first glance, it could be argued that such advances towards justice in Chile are accidental by-products of one event: the "mistake" General Pinochet made in travelling to London in October 1998. However, this chapter will argue that, although unforeseen events open spaces for action, it is the combination of actors' choices and the redistribution of power between political forces that really explains the increasing levels of justice in Chile. An unforeseen event no doubt helped, but political and social actors still needed to be able to take concrete actions to reshape reality.

Accordingly, a greater degree of accountability for past HRVs in Chile has required enabling conditions. Four stand out: (1) persistent government policies towards truth, reparation and justice; (2) shifts in coalition patterns within conservative forces; (3) systematic advocacy by social actors; and (4) changes within the judiciary.

The chapter is organized in four sections. The first will address the initial political and institutional/legal conditions in Chile. The second will explore the factors motivating the search for justice in a highly constrained

political and legal environment. The third section will discuss the link between political change and changes in the perception of the Chilean population on the subject. Finally, the conclusion will address some lessons that can be drawn from this case.

Initial political and institutional conditions

Right before the transition to democracy in Chile it was almost impossible to think about the possibility of any significant change in relation to justice for past HRVs committed during the Pinochet regime (1973–1990). The dictator left power after 17 years of a violent regime that transformed the country economically but also institutionally. A new Constitution was crafted (1980), along with special laws establishing several provisions that increased the participation of the military in the political arena and expanded military autonomy from civilian interference. The institutional engineering was impeccable from the military viewpoint but, as we will observe below, politics usually goes beyond formal rules. The dictator failed to envisage that changes in the political context might also affect the interests of the most apparently loyal political actors.

When Pinochet crafted the new institutional setting, he was looking at neighbouring countries such as Argentina and Uruguay, but also at more distant but influential precedents from Spain and Germany (Fuentes, 2006). He did not want to repeat the “mistakes” made by his dictator colleagues, including the lack of legal provisions to protect the former authorities from being held accountable for their past acts. Thus, from the beginning of the transition period – after he lost a plebiscite in 1988 – he explained that he wanted to stay as Commander-in-Chief of the Army, because “I have my fears, as everyone does, that those who today appear as peaceful doves may execute hate and infamy. I know how they destroyed the army in Germany and Spain, and in other parts of the world. There are several ways to do it, and I will work for this not to happen in Chile.”¹

Institutionally, the armed forces gained high levels of political autonomy from civilian interference. For instance, the President could not directly remove the Commander-in-Chief of the armed forces, a power he had had before 1973. Commanders-in-Chief were appointed for a period of four years and the President could remove them only with the approval of the National Security Council, in which the armed forces held half the votes. A special provision allowed Pinochet to stay for a period of eight years as Commander-in-Chief of the Army and, at the end of that period (in March 1998), to be appointed as a senator for life. Moreover, the outgoing regime appointed nine senators – including four

former generals – which allowed right-wing sectors to maintain a majority in the Senate for 15 years after the transition. Thus, as the newly democratic government took power in March 1990, the civil authorities had to rule the country without any legal means to contest Pinochet's power.²

As for legal protection against prosecution for past HRVs, the military regime established a Decree-Law granting amnesty to those who had committed criminal actions between 1973 and 1978, or were accomplices to or covered up such actions, provided they were not already involved in legal proceedings or already sentenced when the law took effect. Those found guilty by military tribunals after 1973 were also granted an amnesty. Most of the HRVs – including thousands of cases of disappearances, exile, political imprisonment and torture – were committed in precisely this period.

The notion of a “protected democracy”, with the strong influence of the military in political affairs through the National Security Council and the appointed senators, made the initial years of the democratic regime a permanent power struggle between the new government and the military – especially the Army, whose chief was Pinochet. Military contestation was to be expected, since the central goal driving the armed forces was to protect the 1980 Constitution and all military prerogatives. Before leaving office, Pinochet was very explicit in his assurances that he would defend two key ideas of the Constitution: military autonomy and institutional involvement of the military in political affairs.

A few months before leaving office, General Raul Iturriaga suggested that “we will continue doing the same; we have a mission to accomplish and this mission is not given by the governments in power but by the Constitution . . . there is no doubt that if we face a similar situation to what happened in 1973, the army would take power again”.

The first democratic government after Pinochet (a coalition of centre-left political parties, *Concertación de Partidos Políticos por la Democracia*, under President Patricio Aylwin) adopted a pragmatic approach in military affairs. It defined some political objectives such as reinforcing the President's leadership over the military and promoting the effective subordination of the military to civilian rule from a professional point of view. However, it also recognized that, with a majority of the right-wing opposition controlling the Senate, there was no space for institutional change. The close relationship between right-wing parties and the military made any reform of the Constitution to reduce military prerogatives very unlikely.

Even though one of the main promises of Aylwin's government had been to eliminate the Decree-Law on Amnesty, soon after the transition civilian authorities realized that it was an empty promise. Edgardo Boeninger, one of the most influential ministers, defined things very clearly:

Table 6.1 Timeline

Year	Event
1973, September	Military coup
1978, December	Amnesty Decree-Law
1980	New Constitution approved by the military junta
1988	Plebiscite – Pinochet loses
1989, December	National presidential and Congress elections
1990, March	First Concertación government (President Patricio Aylwin)
1990	Military unrest
1991	Truth and Reconciliation Commission Report (Rettig Report)
1993	Military unrest
1994, March	Second Concertación government (President Eduardo Frei)
1995	Military unrest
1998, March	Pinochet leaves Army, becoming a senator for life
1998, October	Unforeseen event: Pinochet arrested in London
1999, August	National Roundtable on the detained/disappeared
2000, March	Third Concertación government (President Ricardo Lagos)
2003, August	President's proposal "there is no tomorrow without yesterday"
2004	Unforeseen event: Pinochet's bank accounts discovered in Washington DC
2004, November	Commander-in-Chief of the Army recognizes human rights violations
2005	Valech Report on torture
2006, March	Fourth Concertación government (President Michelle Bachelet)
2006, December	Pinochet dies
2008, June	Sentencing of former Army officers for the killing in 1974 of former Commander-in-Chief Carlos Prats
2010, March	Right-wing Alianza government (President Sebastián Piñera)

[I]n the government's strategy, the first decision was not to attempt the elimination or the annulment of the 1978 Amnesty Decree-Law, even though this initiative was included in the government program. This implied accepting that judicial punishment for human rights violations committed before 1978 was out of the question ... Even though this self-imposed limitation was explainable due to the balance of power in Congress, it also implied a severe hardship for the aspiration to justice within the Concertación coalition and, especially, for human rights organisations that had gained political and cultural legitimacy within the coalition, the country and elsewhere.

In this context, "for the government it was politically and morally incumbent to compensate this decision with other initiatives to achieve justice to the extent possible in order to conciliate the ethical commitment with political responsibility" (Boeninger, 1997: 400).

Because the new government required the support of the opposition to approve some key bills in economic and social matters, the negotiation strategy implied giving up on issues sensitive to the conservative sectors, including military prerogatives and the Amnesty Decree-Law. In Boeninger's words (1997: 396):

[P]romoting initiatives that were close to the heart of the governing coalition audience and making the opposition feel guilty for not approving such reforms was the easy way to go. However, this attitude would have forced the government to introduce more confrontational bills before Congress, such as the abolition of the 1978 amnesty law . . . Obviously, this would produce hostile reactions from the armed forces and make it impossible to reach any agreement with Renovación Nacional [the liberal party within the opposition] on other issues, so bringing down the whole strategy.

Thus, the initial government strategy toward issues related to HRVs involved considering at least three elements: (a) the difficulties of making institutional changes in constitutional provisions, because large majorities were required to introduce them; (b) the need for the government to introduce reforms in other political and social areas in agreement with the opposition, to avoid confrontation with those political sectors close to the military; (c) the perceived need for the government to advance a set of policies in relation to human rights other than judicial punishment.

Although in the early 1990s the political authorities were very sceptical about the possibility of increasing justice for HRVs, a little more than a decade later the probability had risen dramatically. What made this change possible?

Explaining change in Chile

If political actors at the beginning of the transition were so cautious about their chances of bringing about justice, what did it take to produce a significant shift? The arrest of General Pinochet in London in October 1998 has been considered to be a key contextual feature of the shaping of transitional justice in Chile. Indeed, statistical figures show a transformation after 1998 in terms of prosecutions and sentences against military officers.

Contextually, all events related to the domestic prosecution of Pinochet after his return to Chile in early 2000 are central to understanding the dynamics of transitional justice in the country. However, we need to go beyond this particular event in order to explain the specific mechanisms by which advances in justice and reparation have been possible. In

other words, the incident of Pinochet's arrest in London is one that may *or may not* have produced transformation. Such political and social events are, as Alex Wilde suggests, "irruptions of memory", or sudden challenges to the seemingly immovable, in this case the nature of the transition negotiated between the military and the coalition Concertación government. These events are "part of a counterpoint of what might be called the expressive dimension of transitional politics, conditioning its character as they interrupt the flow of normal bargaining over budgets and public policies" (Wilde, 1999: 474).

Therefore, we need to take into consideration such junctures but we also need to explain how such new conditions affect the routines of bargaining among political and social actors. Other elements need to come into effect to produce a substantive change. Political actors may need to advance political reforms, lawyers may take advantage of a new situation in the courts, social actors may need to mobilize to ask for justice, military institutions may need to respond to such events as they are daily questioned by public opinion, and so on.

In explaining change, four factors were central for the advancement of accountability for human rights in Chile: governmental policies concerning justice, truth and reparation; an important political shift within political sectors loyal to Pinochet; the role of human rights activists advancing their agenda locally and internationally; and the role of the justice system, particularly after 1998.

Government policies: Truth, reparation and administrative policies

As already mentioned, early in the transition the newly elected authorities recognized the political difficulties of advancing truth, reparation and justice within a constrained environment. Although the 1989 coalition programme explicitly mentioned the need to promote the derogation or annulment of the Amnesty Decree-Law, soon after Aylwin took office this goal was abandoned. The administration instead designed a strategy oriented to achieve political consensus with the opposition in central areas such as tax reform and an increase in social expenditure.³

In his first speech after taking office, President Aylwin defined the central features of what would be government policy on human rights. He mentioned the need for "full disclosure of the truth, and justice to the extent possible" (quoted in Correa Sutil, 1997: 133). Indeed, from the very beginning of the transition, all Concertación governments explained the engagement of their policies in a constant balancing act between advancing the cause of human rights based on ethical concerns and not endangering the political process of the transition to democracy. As Correa Sutil correctly put it:

For Aylwin and for many, although not all, of his supporters, there was never any doubt about their readiness to use political power in a prudent way to obtain justice to the fullest extent possible. But despite their moral convictions, Aylwin and his supporters were not prepared to break the rules under which they had been elected and were ruling the country. (Correa Sutil, 1997: 133)

The centre-left coalition that ruled the country from 1990 did not promote any initiative to eliminate the Amnesty Decree-Law, instead transferring the debate to the courts. Most government policies have focused on issues of truth, reparation and administrative changes that affected trials only indirectly.

Concerning the issue of “truth”, one of the first initiatives of the Aylwin government was to create a National Commission for Truth and Reconciliation (the Rettig Commission) to come up with a comprehensive overview of the most serious HRVs committed during the military regime. Prestigious academics and former public servants from the whole political spectrum formed this special Commission. After nine months of work, they delivered several volumes considering the historical setting in which these violations occurred, a detailed description of the regime’s repressive apparatus and the methods used, and the documentation of hundreds of cases of persons detained or disappeared (individuals whose detention is not acknowledged but whose whereabouts remain unknown).

Even though this report had no judicial consequences and included only a fraction of all killings and disappearances committed during the military regime, it was considered by political actors at the time as a great achievement because of its broad historical and institutional analysis, which broke through the propaganda of the military regime about the non-existence of HRVs. The report provided detailed documentation that proved concrete examples of massive HRVs. In addition, some members of the Commission were traditionally identified with right-wing sectors of society, and they accepted the conclusions of the report. In this sense, this first report “built an unshakable foundation of established facts about what had occurred as a contribution to Chile’s national history” (Wilde, 1999: 482).

Nonetheless, the report was not at first accepted by all political actors. Some sectors of the opposition and the armed forces challenged the conclusions of the Commission and rejected the historical account of the report. The Army directly rejected the “wrong historical perspective of the report” and noted its “fundamental disagreement” with the report’s concepts and topics (Ejército de Chile, 1991). The Army also declared that there was no reason for any member of the military to seek a pardon because the military action of 1973 was a “patriotic mission” (Ejército de

Chile, 1991). It would take the Army 14 years to acknowledge the violations of human rights committed during the dictatorship.

This first effort, then, revealed the political divisions in Chile and the unwillingness of the armed forces and of the right-wing parties to accept even the existence of HRVs. Moreover, human rights activists felt the Rettig Commission was not enough: many issues were left out of the report, including torture and exile.

A second effort came with the Human Rights Roundtable Dialogue between August 1999 and June 2000.⁴ After the detention of Pinochet in London in October 1998, several human rights organizations and centre-left political actors demanded some explicit gestures by the armed institutions to disclose new information on those still detained or disappeared. By early 2000, according to official statistics from the Ministry of the Interior, the remains of 1,185 victims of political repression by the military regime were still missing; 10 per cent of them would later be identified or located. While the armed forces and some right-wing sectors pushed for the cessation of judicial trials against military officers for HRVs mostly committed between 1973 and 1978, left-wing sectors and human rights organizations demanded justice and more information on the location of the detained/disappeared.

The main objective of the Roundtable Dialogue was to obtain new information on the location of the remaining detained/disappeared, assuming that retired and active military officers would contribute to the truth if the authorities could guarantee certain conditions of privacy and secrecy. Members of the Communist Party and of some human rights organizations did not participate in this initiative because they perceived it as an attempt to close down cases in the courts and clean up the image of the armed forces.

The Roundtable held 22 special sessions around two topics of discussion suggested by the Ministry of Defence: the mechanisms for obtaining information to find the whereabouts of the detained/disappeared, and what was called a “historical revision of the facts”, which basically addressed the need for recognition of institutional responsibilities for HRVs. Even though the members of the Roundtable did not achieve an agreement on the past, at least the armed forces’ representatives agreed to repudiate HRVs committed after 11 September 1973. Concerning institutional responsibilities for such violations, the conclusion of the Roundtable was ambiguous. It mentions the “serious violations of human rights committed by agents of state organizations during the military regime” (Zalaquett, 2000), but without addressing the institutional responsibilities of the armed forces.

As for obtaining useful information on the location of victims, the Roundtable agreed upon establishing a period of six months during

which all information was to be channelled through churches and military institutions under conditions of secrecy. The authorities made assurances that informants would not be subject to any legal action. By early 2001, President Ricardo Lagos (the third democratic President) informed the country that the armed forces had provided information on the location of 180 missing bodies of the detained/disappeared, although in 151 of these cases it would be impossible to obtain physical evidence because the bodies had allegedly been disposed of in the ocean, in rivers and in lakes by military officers. This news had enormous political and social impact, because some sensitive cases had been revealed.⁵

One of the main problems of this initiative, though, was the misleading evidence produced by the armed forces. Because some of the information provided by key informants purported to pin-point the exact location of bodies, experts from the Investigations Police began searching for bodies. After a few weeks they realized that, in many cases, the information was inaccurate. High-ranking Air Force officers purposely hid evidence to protect the names of some agents. Judges also found out that the military authorities had removed the bodies using institutional resources back in the 1980s (Lira and Loveman, 2005: 36). The matter ended with the forced resignation of the Commander-in-Chief of the Air Force and of the representative of the Air Force at the Roundtable Dialogue.

Two years later, in November 2003, the government established a new commission, the National Commission on Political Imprisonment and Torture (the Valech Commission), to address the issues excluded from the first Commission. One of the main complaints by dictatorship victims and their relatives had been that the first Commission included a detailed account only of detained/disappeared individuals. Because right-wing parties were taking some political action to help relatives of the victims to access state benefits – an encouraging sign – President Lagos had decided to take some initiatives on the topic of human rights by establishing a Commission to identify victims of torture and political imprisonment and to define modest but symbolic compensation or retribution.

The Commission gathered 35,000 testimonies of people who had suffered torture and/or had been imprisoned for political reasons after the military coup, providing a comprehensive report that was handed to the President in January 2005.⁶ This initiative expanded public knowledge about HRVs in Chile as dramatic cases of brutal behaviour by the armed forces came to light. As an indirect impact of the Commission, new cases were brought to the courts by the victims and their relatives.

It was in this context that the Commander-in-Chief of the Army, General Juan Emilio Cheyre, declared in November 2004 that no global or national context justified HRVs in Chile:

Human rights violations are not justifiable for anybody or under any circumstances ... The Army has taken the hard but irreversible decision to assume responsibility as an institution in all punishable and morally unacceptable acts of the past. Moreover, it has recognized the faults and crimes committed by its personnel under its direct authority several times; it has censured and criticized the acts and it has cooperated with the tribunals of justice, to the extent possible, to help bring truth and reconciliation. (Cheyre, 2004)

Political initiatives such as truth commissions and roundtables aimed to establish the “facts” on HRVs. Truth commissions in Chile neither defined specific institutional responsibilities for past HRVs nor provided clear sanctions against those institutions and individuals who were involved in these violations. Politically, whereas the Rettig Commission was initially contested by right-wing political actors and by the armed forces, the Valech Commission on torture provoked less political rejection because both public opinion and right-wing parties were more open to accepting the fact of HRVs. The presence of prestigious and uncontested actors from the whole political spectrum and the set of conclusions and recommendations offered by these initiatives are key features in their recognition and acceptance.

Another key issue was providing reliable information. The main problem of the Roundtable Dialogue was the lack of professionalism of some military institutions, which discredited them and raised doubts about the real commitment of the armed forces to the promotion of the truth in a democratic context. The damage has gone further with the recent accusation that between five and seven detained/disappeared cases included in the Rettig Commission were in fact bogus, calling into doubt what good faith seemed to be there early in the transition.⁷

Another government policy has been financial and symbolic “reparation” to the victims and their relatives. The first democratic government focused its attention on the relatives of the detained/disappeared and the executed, on people in exile and on political prisoners. The government established a programme of pensions and extended several other benefits such as health care, training programmes for getting back into employment, housing and scholarships depending on the income level of each family affected. In some of the laws approved by Congress, representatives of human rights organizations played a leading role, although some disagreement between organizations inhibited closer collaboration with the government. Most of the initiatives followed the recommendations of the Rettig Commission (1990–1991). Between 1990 and 1993, the government created all of the following: a national office to deal with the demands of those returning from exile; the National Corpora-

tion for Reparation and Reconciliation to provide benefits to victims and their relatives mentioned in the Rettig Report; a health programme for victims of HRVs; and a programme to provide benefits for those who were fired from the public administration for political reasons in 1973.⁸ New programmes to provide monetary benefits and housing privileges for victims were established after the Roundtable Dialogue (2001), after President Lagos's "there is no tomorrow without yesterday" (August 2003) and after the Valech Commission report on political prisoners and torture, leading to a total of more than 28,000 beneficiaries.

Another form of reparation has been the development of specific actions and symbols to rehabilitate the memory of victims, relatives and society as a whole. After the transition to democracy, several political authorities, presidents Aylwin, Lagos and especially Bachelet, made particular efforts to highlight the issue by including representatives of human rights organizations in events at the presidential palace and by inaugurating memorials with them honouring the victims.

Michelle Bachelet was the first President to visit the office of the Association of Relatives of the Detained-Disappeared since the restoration of democracy and the first to visit Villa Grimaldi, a former torture centre where she was held prisoner and which is now a memorial site. A comprehensive though not definitive count of memorials suggests a marked increase during the 2000s, particularly to commemorate the thirtieth anniversary of the military coup in 2003 (FLACSO-Chile, 2007). Almost half the memorials were public initiatives by central and local government; the rest were private projects (mostly by associations of victims and/or their relatives, universities, professional associations, and so on). Among the most significant memorials and sites are the Memorial of the Detained and Disappeared at the General Cemetery; the Villa Grimaldi Park for Peace; the Pisagua monument; the "Women in the Memory" monument; the "Las Sillas" memorial honouring Santiago Nattino, José Manuel Parada and Manuel Guerrero Ceballos; the establishment of an official day to commemorate the detained/disappeared; and the Museum of Memory and Human Rights.

Looking back, what is interesting in the process of accounting for the HRVs of the past is that all the efforts by the government were accompanied by contradictory trends and moments of political and social tension. The first political initiatives were restricted to certain actions perpetrated by the military regime (mostly disappearances) in an effort not to upset the precarious political equilibrium with the forces of the opposition and the military. As the transition moved forward and key junctures such as the detention of Pinochet in London and the thirtieth anniversary of the coup mobilized key social and political actors to promote a more

comprehensive agenda, the government responded with initiatives such as the Roundtable Dialogue, the Valech Commission and several other schemes to compensate the victims and their relatives.

Concerning the issue of “justice”, Congress rejected, for different reasons, all proposals dealing with HRVs. The issue was characterized by deadlock, as one determined minority rejected all attempts to close cases of human rights while another determined group, the right-wing majority in the Senate, refused to abolish the Amnesty Decree-Law. Given that politicians were unable to reach agreement, interpretation of the law was left to the justice system. However, some indirect and direct *administrative actions* and reforms had an enormous impact in the prosecution of human rights cases.

The first mechanism was the presidential appointment of Supreme Court judges who could bring both a generational change to the Court and some new approaches to the traditional interpretation of the law in Chile. Between 1990 and 2000, presidents Aylwin and Frei directly appointed 7 of the 17 members of the Supreme Court (41 per cent), thus contributing to the overhaul of a Court composed of only members appointed by the military regime (the last judge appointed by Pinochet resigned from the Supreme Court in the summer of 2005).

A second major change that fostered a transformation of the Supreme Court was a 1997 reform increasing the number of judges from 17 to 21 – a 23 per cent increase. The same reform established that five Supreme Court members had to be lawyers with at least 15 years in the profession but outside the established judiciary. In addition, the 1997 reform incorporated a clause establishing the age of 75 for retirement from the Court, with special incentives for judges already appointed who wanted to retire earlier. This also has had an indirect impact on the legal prosecution of military officers.

Another crucial administrative action early in the 2000s on human rights issues was the decision by the Supreme Court to appoint nine (later eight) special judges exclusively dedicated to human rights cases in order to speed up these cases. By April 2011, 25 special magistrates had been assigned to human rights cases spread across 16 jurisdictions investigating 1,446 cases.⁹ Judges send periodic reports to Judge Jaime Rodríguez of the Criminal Bench of the Supreme Court in his role as current national coordinator of human rights investigations. Moreover, by December 2007, the Investigations Police had also established a special division to deal with all cases concerning human rights. All these decisions allowed the concentration of cases and increased the speed of judicial investigations. Indeed, according to official Supreme Court statistics, 49 per cent of all 320 cases for HRVs investigated by the eight special judges had been concluded by September 2008.¹⁰

But the effectiveness of this decision has been called into question. According to FASIC, a human rights organization, the 2005 Supreme Court decision to transfer such cases to appeal court judges has negatively affected the search for justice, because only 50 per cent of the pending cases are currently being investigated. Recent Court decisions on absolution and reduction of sentences in some of their decisions have also been criticized.¹¹

Nonetheless, the administrative initiatives discussed above have indirectly improved the pace of the trials pending in Chilean courts, with a clear trend towards increasing levels of prosecution against former and active military officers who committed HRVs. In some cases, the decisions were not intended to produce an effect on human rights, but they have done so by bringing in new actors, speeding up legal processes and forcing human rights organizations to think about strategies to respond to new events.

Another relevant aspect concerning judicial procedures was the use of international treaties and covenants by judges to support their legal decision to prosecute various state actors involved with cases for past HRVs. This allowed them to surmount the Amnesty Decree-Law.

Weakening the position of the former regime

If government policies in relation to truth, reparation and policy shifts are indispensable in understanding the dynamics of transitional justice, a second major factor influencing a positive trend regarding justice is changes within the political balance of power. The Chilean case cannot be understood without considering the progressive weakening of a once strong alliance between General Pinochet and right-wing parties.¹²

At the time of the transition, General Pinochet enjoyed strong support and loyalty from the two right-wing parties of the opposition – Unión Demócrata Independiente (UDI) and Renovación Nacional (RN). These parties openly supported three demonstrations of military unrest by the Army against the government: in December 1990, in April 1993 and in 1995 (following a court decision to detain former General Manuel Contreras). The position was one of defence of the military's Constitution and economic and social policies, promoting efforts to close judicial human rights cases, and defence of the leadership of Pinochet both as former President and as Commander-in-Chief of the Army.

However, from the very beginning of the transition, certain liberal sectors within RN took a more distant approach towards the Pinochet regime and its legacy, causing a tension in the party.

After the arrest of Pinochet in London in October 1998, major shifts occurred within the right-wing parties. There are two explanations for this change. In the first place, by 1999 opposition parties for the first time faced a real chance of obtaining the presidency of the country under the leadership of Joaquín Lavín. During presidential debates, the candidate distanced himself from Pinochet's legacy in order to capture the centrist vote. After Lavín lost the election, the new Lagos administration (2000–2006) set a proactive human rights agenda and some important politicians from right-wing sectors began to take different approaches on the issue and towards the search for truth, reparation and justice. With Pinochet off the scene by the early 2000s, some prominent opposition political actors became strategically vocal on human rights, taking advantage of the new political, judicial and social environment in Chile.

Secondly, revelations from the United States in July 2004 that Pinochet had 125 illicit bank accounts with over US\$20 million made a strong impact on public opinion and the political system. One of the sources of the loyalty of right-wing parties to Pinochet had been the notion that he was the political and economic “saviour” of the country. His image was built around the ideas of modesty, austerity and public service to the country. Now the “saviour” was involved in a major scandal including use of the institutional resources of the Army for his personal and his family's profit. The Army and the main leaders of right-wing parties significantly distanced themselves from him. Other former collaborators showed disappointment, and the majority reacted with silence. Over recent years, defending Pinochet and his legacy has become politically and morally unacceptable. This has greatly expanded the menu of measures such as financial compensation for HRVs, symbolic gestures and other political measures.

Human rights advocacy: It will never end

At the time of the transition to democracy, the human rights movement consisted of a broad range of voluntary, academic and professional human rights organizations, most of them linked to one another in a dense network of collaboration and reciprocity (Ropp and Sikkink, 1999).¹³ During the military regime, the Catholic Church was particularly important in providing financial, institutional and moral support to the victims of HRVs through its Vicariate of Solidarity, created in 1976. However, during the transition, the Catholic Church closed the Vicariate of Solidarity, on the assumption that the new democratic authorities would deal with the human rights problem in the future. Thus, the human rights movement was largely reduced to two types of group: voluntary organizations of relatives of victims and their friends, and non-governmental

professional organizations such as the Chilean Commission for Human Rights (CCHR), CODEPU (the Corporation for the Promotion and Defense of the Rights of the People), CODEJU (the Commission for the Rights of Young People), and FASIC (the Christian Churches Social Assistance Foundation).

From a strategic point of view, the transition to democracy created new dilemmas for these groups. Many of the organizations were sympathetic to the new centre-left government but, at the same time, wanted their own demands to be addressed. These organizations were, however, aware of the institutional constraints the new government faced, particularly in terms of the high level of military and police autonomy. Thus, the transition to democracy in Chile raised an important strategic question for these organizations: what was the best way to achieve their goals? By the end of 1989, two options were well defined: influencing the government from within, and influencing it from outside.

Leaders of groups closer to the governing Concertación coalition assumed positions in the new administration, with the explicit intention of lobbying from within. Activists from the Vicariate of Solidarity and CCHR were politically connected to the Christian Democracy and socialist parties, and several of them actively participated first in the development of the new government's electoral platform, and then in the implementation of the platform once the transition to democracy took place.¹⁴ The decision by the Catholic Church to dissolve the Vicariate of Solidarity and the CCHR's decision to disband a network of more than 5,000 volunteers nationwide had been clearly consequential here. In turn, as the principal leaders of both organizations took up positions within the state bureaucracy, they lost their ties with the grassroots.

Outside groups such as associations of victims, CODEJU, CODEPU and, to some extent, FASIC adopted a more critical approach, distancing themselves from the government. Politically, CODEPU was closer to the leftist sectors that did not form part of the coalition in power. Most outsiders faced the dilemma of whether to concentrate their scarce human and material resources on addressing the human rights agenda related to the past, or to incorporate a broader definition of human rights and to also focus on current social problems such as police violence, the environment, and social and economic demands. Early in the transition, CODEPU and FASIC decided to concentrate most of their resources on addressing impunity for past HRVs.

The significant reduction in organizations during the 1990s has been counterbalanced by a re-emergence of new social actors in more recent years. As the Supreme Court appointed special judges, relatives, survivors and their lawyers were motivated to coordinate their actions more strategically, organizing new associations of relatives and surviving victims of

the repression, pushing for truth, reparation and justice.¹⁵ Moreover, many of these organizations filed cases in court as soon as the Chilean government promised Pinochet would be tried in Chile, after his London arrest.

The common strategies of these actors have been litigation, public demonstration and advocacy in Congress. The story of *litigation* goes back to early 1974, when some lawyers began a long-term fight for justice in Chile and abroad. Hundreds of lawyers worked under the protection of the Catholic Church, documenting HRVs, filing cases in court and protecting victims. After the transition to democracy, several of them continued this struggle, providing advice to victims and advancing the human rights agenda through legal avenues. Litigation, indeed, has proved to be one of the most effective ways to keep the cause of human rights alive in Chile. In January 1998, before Pinochet left the Army, hundreds of cases against him had been documented and filed in courts. If at the beginning of the transition most cases involved the detained/disappeared, by now a wide range of cases have been investigated including torture, illegal detention, kidnapping, execution and removal of human remains. Human rights advocacy lawyers heavily relied on international norms in order to push for the advancement of cases domestically.

As has been observed, the number of cases submitted to courts by relatives considerably increased after 2000. By February 2010, 782 agents had been charged and/or indicted. As a right-wing government took power in March 2010, the Association of Relatives of Executed Political Prisoners (AFEP) submitted 203 new criminal complaints on behalf of victims with no active investigation open. Moreover, the Human Rights Programme of the Interior Ministry began for the first time to act as a litigant in its own right, “initiating criminal complaints instead of, as previously, only acting in an associate capacity once complaints had been brought by private individuals. This route is now open to the Programme as a consequence of recent legislation creating a National Human Rights Institute, under whose remit the Programme now falls and whose mandate more clearly permits the initiation of legal actions” (Observatorio de Derechos Humanos, 2010: 5).

Campaigning through public demonstrations was a common strategy by human rights actors back in the 1990s. As Wilde suggests, this strategy is closely aligned with the “irruption of memory”. Specific junctures such as the arrest of General Manuel Contreras in 1995, the arrival of Pinochet at the Chilean Congress in 1998, his later arrest in 1998 and return to Chile in 2000, and the commemoration of the thirtieth anniversary of the military coup were particularly conducive to public demonstrations by social actors demanding truth and justice. However, advocacy through

public demonstrations has become less used as the topic has become less relevant for a broader audience. Demonstrations now tend to be sporadic and small.

Another strategy has been *advocacy within Congress and the executive*. The Association of Relatives of the Detained-Disappeared (mostly the mothers or daughters of the victims) has the moral authority and prestige to influence government and Congress policies concerning human rights, usually wielding a veto power over initiatives that might negatively affect the human rights agenda. They have close ties with particular deputies and senators from the centre-left coalition in power, which has made it easier for them to push their own agenda. There are several examples of this strategy. Back in the 1990s, the governments of Aylwin and Frei tried to reach an agreement with the opposition in Congress to re-interpret the Amnesty Decree-Law in order to speed up and close the cases for HRVs. However, the government twice failed to pass the bill because socialists and some Christian Democrats rejected going against the goal of justice and the will of human rights organizations (Fuentes, 2006).

Judicial politics

Another element affecting transitional justice is the role played by the judiciary. This state power became an arena of political battles because, as mentioned before, the political system reached deadlock in this subject. The Amnesty Decree-Law has had an enormous impact, since most crimes were committed before 1978. Moreover, several cases were reviewed by military courts because the military justice legislation provided wide scope for the military to oversee these cases. Most defendants were routinely granted amnesties.

The legal battle had several dimensions. The first was related to the consistency between domestic and international law, since Chile is a signatory to the Geneva Conventions. The second was related to when courts should apply the Amnesty Decree-Law: in the early stages of the trial, when the court may have sufficient evidence of the crime committed, or when those responsible for the crime have been identified (Correa Sutil, 1997)? Things became more complex when some judges ruled that kidnappings were permanent crimes, and so no amnesty law could affect the investigation until the missing person was found. Overall, in a context of such legal uncertainty, judges – particularly at the beginning of the transition – reached decisions mostly on the basis of an acceptance of the Amnesty Decree-Law.

To make matters more complex, the behaviour of lower courts and of the Supreme Court has not followed the same patterns since the return

to democracy. The interpretation of international and national laws and the interpretation of the Amnesty Decree-Law have been constantly debated within the judicial system. Between 1990 and 1998 we can observe a clear pattern by which the Supreme Court adopted quite a conservative approach on the Amnesty Decree-Law but, at the same time, some decisions by lower courts advanced some hope for transitional justice. In December 1991, a lower court for the first time prosecuted a former military officer for the kidnapping and disappearance of two brothers. The disputes, generally, were about the timing of the application of the Amnesty Decree-Law, and whether civil or military courts should be in charge of these cases (Fuentes, 2006).

Without doubt the arrest of Pinochet influenced the way judges in the lower and upper courts interpreted the Amnesty Decree-Law. During the 2000s there was a significant but still not consolidated trend towards an acceptance of international rules and, therefore, towards the inapplicability of the Amnesty Decree-Law in cases where crimes against humanity were seen by the courts. By mid-2004, more than 400 military officers were being indicted by Chilean courts; and 21 military officials had already been sentenced in different cases (see also Table 6.2). The most symbolic case was the indictment of General Manuel Contreras, along with his closest collaborators in the DINA.

Although the Pinochet affair was important, it is worth emphasizing that the replacement of judges within the Supreme Court and the designation of special judges have also had an indirect but significant procedural impact in accelerating indictments and sentences. In 2006, for the first time a Supreme Court judge offered a defence of international law

Table 6.2 Evolution of indictments and convictions by the Chilean court system on human rights cases, 1998–2008

	Closed trial	Indictments	Convictions	Indictments + Convictions
1998	3	2	1	3
1999	2	8	–	8
2000	–	12	1	13
2001	5	11	–	11
2002	2	9	4	13
2003	2	27	4	31
2004	3	17	5	22
2005	4	24	13	37
2006	4	18	9	27
2007	2	9	21	30
2008 ^a	1	14	14	28

Source: Based on FASIC and *La Nación*.

Note:

^aUp to 8 August 2008.

in a verdict in a case of human rights violation. At the end of May 2008, special judge Victor Montiglio indicted 98 former agents from the different branches of the armed forces and the civilian and military police in an investigation into the murder of 42 people in Operation Colombo. This was the first mass indictment since the return to democracy.

Figures on the total number of people on trial vary from source to source. According to the Human Rights Observatory of the Universidad Diego Portales (Observatorio de Derechos Humanos, 2011: 2):

[B]etween 2000 and the end of February 2011, 777 former security service agents had been charged and/or sentenced in Chile for past human rights related crimes . . . Of these 777 individuals, a total of 231 have been found guilty in confirmed final sentences . . . Human Rights Programme and prison service (Gendarmería) records . . . show a total of 68 individuals serving confirmed custodial sentences for human rights-related crimes as of the end of May 2011. However, if press reports of 2 mid-May concessions of early release are confirmed . . . , the total drops to 66.

Both the political context and procedural decisions helped in promoting a new environment for transitional justice. Even though crucial legal barriers remained intact (the Amnesty Decree-Law and the military justice system), the political context opened unexpected windows of opportunities that have been used by political and social actors. In other words, a significant change in the political context such as the Pinochet affair in London helped catalyse *existing* social and political forces, which then promoted new measures to advance the cause of truth, reparation and justice.

From politics to society

Have all these political shifts had a significant impact on society? Or does society continue as a nation of enemies, split between those for and those against the military regime? Does society value justice and truth after 20 or so years of democratic experience? Unfortunately, we do not know much about the subject. There is only fragmentary evidence comparing attitudes in Chilean society at the beginning of the transition and at the current time.

A study comparing social perceptions over time on this subject (Varas et al., 2008) suggests that an overwhelming majority of interviewees supported the armed forces in their professional role in both 1991 and 2007 when the surveys were conducted. A relatively high percentage of the population believed that the commitment of the armed forces to

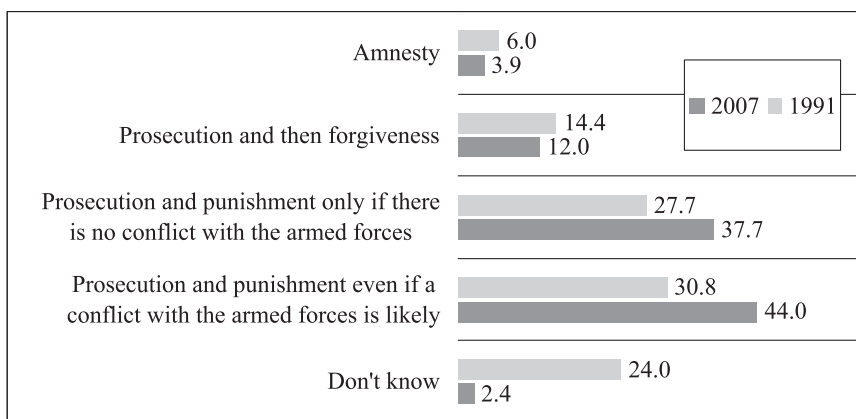


Figure 6.1 Options for human rights cases, 1991 and 2007.

Source: Varas et al. (2008).

democracy is relatively low or very low and that the military should not play a political role (74.5 per cent in 1991, 72.8 per cent in 2007).¹⁶

As regards opinions concerning human rights, one sees a decline in the percentage of interviewees who think that amnesty and forgiveness are possible solutions for the human rights legacy (see Figure 6.1). Moreover, there was a statistically significant shift in the number of people who prefer justice and punishment even if this might cause conflict with the armed forces (from 30.8 per cent in 1991 to 44.0 per cent in 2007). However, a significant percentage of respondents in 2007 (37.7 per cent) preferred the option of justice only if it did not imply a conflict with the armed forces. It seems that, as justice has become a real option, Chileans prefer it while still being concerned about the potential reaction of the military.

As for ways to prevent future human rights abuses, there is an important shift: whereas in 1991 only 7.4 per cent believed that “justice” was an effective way of preventing abuses, in 2007 it was 40.8 per cent. Education and a democratic system were the second and third most mentioned options, respectively, in 2007. In other words, it seems that, again, the actions of the penal system have had a positive impact on public opinion in relation not only to what to do about the problems of the past, but also to what to do to prevent abuses in the future.

The 2007 survey had several interesting questions that had not been asked previously. For instance, most respondents identified the Army (92.5 per cent) and the militarized police, the *carabineros* (61.4 per cent), as the forces most responsible for the abuses committed during the dictatorship. This is totally consistent with the level of institutional

involvement and the number of prosecutions by agencies. Moreover, most respondents (78.7 per cent) believed that those most responsible for abuses are high-ranking officers. Finally, society seems divided over whether responsibility for the abuses is individual or institutional (see Figure 6.2).

Finally, concerning the education of the armed forces on the issue of human rights, an overwhelming majority thought that they are more educated than before (see Figure 6.3).

The overall attitudes of the population seem to cautiously support the option of justice, but a relevant minority still fear intervention by the armed forces if a complex scenario arises. Indeed, after over two decades of democracy, 25.8 per cent of the respondents still thought the armed forces might stage a military coup. Although people are still divided over whether abuses were carried out by the military institutions or by individual actors outside the central command, the majority believe that high-ranking officers were the ones mainly responsible for the abuses.

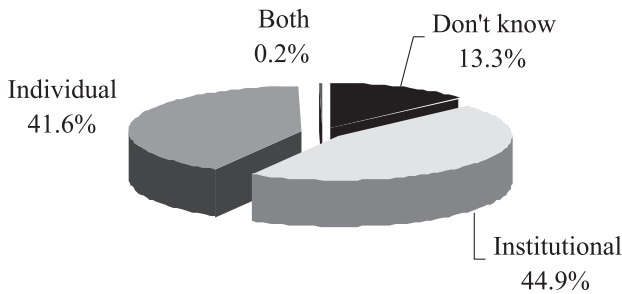


Figure 6.2 Responsibility for human rights violations, 2007.
Source: Varas et al. (2008).

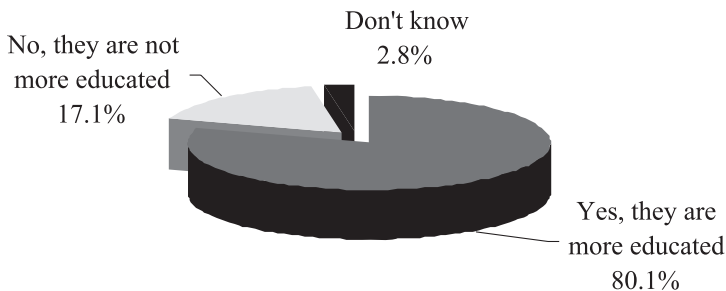


Figure 6.3 Perception of the education of the armed forces in human rights.
Source: Varas et al. (2008).

Conclusion

The new political leaders in Chile have faced a constant struggle between the past and the future. After democratization, several politicians declared that the “transition” was over, assuming that, by thinking about the future, society could forget the atrocities of the past. But, as with the setting for the Madonna concert, the past has been there underneath Chile’s modernity.

One may think that unexpected events in the political process are the best explanation for this refusal of the past to go away. Pinochet’s arrest in London, the irruption of memory on the commemoration of the thirtieth anniversary of the coup, the US Senate investigation into Pinochet’s accounts in the Riggs Bank – these were all unexpected, triggering a completely new state of affairs.

That is the common interpretation of the Chilean political process that this chapter has attempted to revise. Behind the unexpected events, we have seen four main factors explaining the unanticipated outcome of greater levels of transitional justice. These elements are related to governmental commitment towards the subject, shifts in coalition patterns, social advocacy and judiciary politics.

Institutional and political arrangements at the moment of the transition were of vital importance in Chile. The centre-left coalition that took office in March 1990 faced a highly constrained institutional and political environment. Legal provisions protected the military from prosecution, and the armed forces and right-wing political actors enjoyed the use of a set of political tools to preserve the status quo, including control of the majority in the Senate and the threat of force in the case of Pinochet’s Army. In this context, the new government could only promote a highly restricted agenda on human rights.

Before Pinochet left the Army in March 1998, human rights organizations and political activists took the first legal actions against him in the courts for human rights violations committed under his regime. Thus, by the time he decided to travel to London in October 1998, he was already a target of human rights activists (Brett and Collins, 2008). The persistent work by human rights activists has been a key factor in transitional justice. Their most common strategies have been litigation, advocacy in Congress and public demonstrations at key moments. Human rights organizations have also played a role in preserving the memory of past HRVs. More than half of the memorials constructed in memory of the victims of the regime have been on the initiative of these organizations.

A second factor is related to government policies concerning issues of truth, justice and reparation. Initiatives such as truth commissions, the Roundtable Dialogue and several policies concerning symbolic and mate-

rial compensation to the victims and their relatives have been central to the cause of human rights. Not all these initiatives are exempt from political struggle. Most of them are the result of intense negotiations with political actors within and outside the governing coalition, particularly at the beginning of the transition. Because human rights are highly contested in Chile, most government initiatives are measured politically. As political conditions evolved towards greater acceptance of the need for justice, more issues were introduced onto the government's agenda.

A third factor is the shift of the balance of power away from those who were originally loyal to the military regime. As the right-wing coalition came closer to winning presidential elections in 1999, it began a process of disengagement from past loyalties to the military regime. The detention of Pinochet in London and the later disclosure of his personal bank accounts in the United States provoked disenchantment among right-wing sectors with their former military leader.

Finally, a fourth key factor concerns the judiciary. After 1994, the judiciary began a transformation that had an indirect but palpable impact on human rights: more judges were appointed to the Supreme Court and new perspectives were introduced. The lack of agreement among politicians on the interpretation and even annulment of the Amnesty Decree-Law transferred the decision to the courts early on in the transition. There ensued a constant struggle in the lower and upper courts.

Do all these political changes affect society? Fragmentary evidence suggests that Chileans are more willing to accept justice. Moreover, the assignment of responsibility by citizens is closely linked to what the courts are doing at a given time. From the evidence presented here, we may hypothesize that greater efforts towards truth, justice and reparation may have a positive impact on citizens' recognition of the importance of human rights in a democratic society.

Most, if not all, of the Chilean human rights agenda has centred on issues concerning truth, reparation and justice. From the very beginning of the transition, they have appeared not sequentially but in an intertwined way. In comparative perspective, what is striking is the absence of a greater political debate on issues of lustration – formally limiting the participation of former agents in a democratic context, an important aspect of the transition in Eastern Europe. Probably because the repression was conducted mainly by the armed forces and police officers, the issue of identifying the repressors focused almost exclusively on the relationship between the new civilian government and the armed forces. Some informal mechanisms of lustration can be identified, though. On the one hand, because the government could not directly remove officers, civilian authorities paid special attention to not promoting officers involved in HRVs (Fuentes, 2006). On the other hand, civil society actors attempted

to identify and denounce agents of the former regime by actively mobilizing in what were called *funas* – protests against repressors outside their homes and workplaces, thus provoking social penalties. However, no formal political initiative has been proposed to prevent former agents of the regime from participating in government or the civil service in the future.

Overall, this chapter suggests that advancing transitional justice effectively mainly depends on changes in the original balance of power among the social and political actors in charge of the transition. In Chile, we observe a continuous decline in the power of military institutions as a whole, and of General Pinochet in particular. Pinochet lost power when he left the Army, the strong alliance between right-wing sectors and the military weakened, and the prestige of the General quickly decayed after the corruption scandals in which he and his family were involved. This shift in the balance of power opened up opportunities for change, opportunities that were taken by social and political actors. The governing coalition took advantage of such shifts by proposing policies that mostly helped to promote issues of truth and reparation and, more indirectly, justice. Even the Army looked for new ways to gain social legitimacy within society by distancing itself from the Pinochet regime. Advocacy groups also contributed to this process by using several strategies including litigation, social protests and political advocacy. Ultimately, transitional justice is the result of power struggles and, as in any political struggle, the outcome is likely to be uncertain.

Acknowledgements

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Notes

1. *La Tercera*, 4 March 1990; quoted in Fuentes (2006).
2. Other privileges included a minimum budget established by constitutional law. In addition, the military receive 10 per cent of the annual earnings from copper exports by the National Copper Corporation and this special budget can be used only for military acquisitions. The armed forces also enjoy special pension and health insurance systems. The military justice system has considerable autonomy in relation to civilian courts and,

after two decades of transition to democracy and deep reform in the penal code system, the justice system inherited from the military regime is still in place. Professional and doctrinal autonomy was also granted. This means that there is no civilian involvement in the armed forces' training programmes. Since 1990, the armed forces have developed their own professional programmes, as well as buying new weapons with minimal civilian influence (Varas and Fuentes, 1994).

3. It should be noted that the government was also internally divided on this matter. For a discussion, see Correa Sutil (1997).
4. Participants included five members of the government, four human rights lawyers, four representatives of the armed forces and the police, five religious authorities and six other intellectuals and lawyers. For an excellent account, written by one of the members, see Zalaquett (2000).
5. For instance, the president of the Association of Relatives of the Detained-Disappeared, Viviana Diaz, was informed that his father – a Communist Party leader – was one of those who had been disposed of in the ocean.
6. Six months later, in June 2005, the President received a second report from the Commission, covering 8,000 cases, of which 1,200 qualified for the benefits considered as compensation for the victims of HRVs and their relatives.
7. The official number of deaths and disappearances in Chile between 1973 and 1990 remains at 3,186. According to the Ministry of the Interior (Human Rights Programme), a total of 1,446 judicial cases were ongoing in Chile at the end of March 2011. Of this figure, only 24 concern torture and political imprisonment; the rest relate to cases of disappearance and/or political execution (Observatorio de Derechos Humanos, 2011: 2).
8. For a detailed analysis of these and other more specific programmes, see Lira and Loveman (2005).
9. According to the Human Rights Observatory of the Universidad Diego Portales, by April 2011 the special magistrates “have all been assigned the category of ‘ministros en visita’, a judicial category used for the resolution of cases of particular social significance or political sensitivity. The new figure represents in some sense a higher status for the cases, as ministros en visita have the same rank and status as appeals court magistrates rather than only first instance judges” (Observatorio de Derechos Humanos, 2011: 7).
10. *La Segunda*, 1 September 2008, p. 11.
11. “Mil crímenes de la dictadura están sin investigar”, *La Nación*, 6 February 2009.
12. This argument is fully developed in Chapters III and IV of Fuentes (2006).
13. This section draws on Fuentes (2005).
14. To mention some of them: Alejandro González, Jorge Domínguez, Roberto Garretón, Carlos López, Felipe Portales, José Zalaquett and several other professionals who used to work in the Vicariate of Solidarity and in the CCHR.
15. I would like to thank Cath Collins for pointing this out to me.
16. The household surveys were conducted among a representative sample of the metropolitan area of Santiago (40 per cent of the nation's population).

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7

Transitional justice without a compass: Paramilitary demobilization in Colombia

Elvira María Restrepo

“Transitional justice is and should be a contested space”

(McEvoy and McGregor, 2008: 8)

Introduction

Colombia's experience with transitional justice is one of the tardiest in Latin America, perhaps with the exception of Brazil. It is also a much-needed one owing to the enormous number of victims and the length of the armed conflict. Yet, for many (Arango, 2008; Díaz, 2008; Hristov, 2010), it is still controversial whether the process of demobilization of approximately 52,000 combatants that started in 2003 really is a case of transitional justice. Human rights activists in particular have strongly denied that there has been any form of transition, contending instead that both war and authoritarianism are still ongoing. An intermediate view acknowledges a partial transition from war to peace, and the more optimistic outlook – based on recent successes of the state and the military over weakened FARC (Fuerzas Armadas Revolucionarias de Colombia) guerrillas – argues that a clear transition has taken place. In fact, some of these optimists assume more extreme positions, claiming that a double transition from war to peace and from authoritarianism to democracy has taken place (Orozco, 2009).

Although this chapter does not embrace any of the extreme views, it will argue that the 2005 Justice and Peace Law, along with the Constitutional Court rulings of 2006 (Decisions C-370, C-127, C-319, C-400, C-426,

C-455, C-476, C-575, C-719 and C-531) and the recently approved Bill on Victims and Land Restitution (2011) are indeed the first Colombian institutional experiments with transitional justice mechanisms to deal with the armed conflict. This chapter also claims that some of the process peculiarities help explain the misunderstandings or lack of agreement on the transition, both in Colombia and abroad: first, the fact that this transitional justice process has occurred in the midst of an ongoing armed conflict; second, that the Justice and Peace Law covers the two illegal actors involved in the conflict (the guerrillas and the paramilitaries), whereas only the paramilitaries (the one actor that never directly fought the state) have demobilized collectively; and, lastly, that the Justice and Peace Law does not involve the state as a wrongdoer.

Moreover, transitional justice experimentation in Colombia stems not from a transition to democracy, as in most South American countries, but from a transition to peace. Colombia, in spite of its democratic constraints, is one of the oldest Latin American democracies and historically had a relatively professional and free press. Sadly, this democratic tradition has not prevented a protracted armed conflict that made Colombia, by any standards, one of the most violent countries in the world between 1980 and 2002 in terms of homicides per 100,000 inhabitants, its huge internally displaced population and its world record in kidnappings. Although a huge drop in both homicides (50 per cent) and kidnappings (80 per cent) started in 2002, the levels of homicide are still high by Western standards; in terms of forced displacements, Colombia scores third in the world after Sudan and Iraq. The extent of this violence has been exacerbated by drug-trafficking, an illegal industry that fuels the armed conflict and has also promoted widespread levels of corruption.

In this context, the initial process of collective demobilization of 31,671 right-wing paramilitaries (and 19,553 guerrillas who demobilized individually) that took place in the period 2003–2009 represents a fundamental change in the search for peace. Not only is this the largest demobilization of combatants in the history of the country, but it also breaks a long-standing Colombian tradition of peace processes characterized by unilateral and unconditional benefits offered by the state to “resolve” violent conflicts through political pacts, amnesties, pardons or impunity. Indeed, until President Alvaro Uribe (2002–2010), no administration had ever succeeded in negotiating with or demobilizing paramilitaries.

This chapter argues that the demobilization of the paramilitaries constitutes a fragmented and incomplete transition (because it does not involve all paramilitaries or all illegal actors) that has, so far, unveiled thousands of unknown atrocious crimes, the locations of more than 1,000 bodies and of mass graves, and links between right-wing paramilitaries and politicians, public officials, sectors of the armed forces and private

entrepreneurs. The paramilitaries not only violated the human rights of a huge number of Colombians¹ but also penetrated most state institutions to levels that were unknown before this transitional justice process took place. The transitional justice process has led to a crisis of political corruption known as the *Parapolítica*, comparable to Italy's 1990s *Tangentopoli*, which reveals the direct involvement of high- and middle-ranking politicians, public officials from many state institutions and even private businesspeople and entrepreneurs in the financing and support of the paramilitaries' bloody war. These revelations, together with another scandal that goes by the name *Falsos Positivos* ("False Positives" – the recent exposure of a significant number of extra-judicial executions of civilians by the state armed forces), would not have occurred without the local criminal prosecutions introduced by the Justice and Peace Law of 2005.

The special characteristics that surround the conflict and the legal framework created for the demobilization of illegal actors make the still ongoing process a fragmented and incomplete case of transitional justice. Nonetheless, a number of factors also make the process a good candidate for being viewed as one of transitional justice. First, the adoption of transitional justice methods has been gradual, as analysed below. Second, as a result of this evolution, the capacity of the victims to mobilize has also been enhanced: victims have become important social protagonists for the first time ever and impunity is unlikely. The latter has become more evident with the Bill on Victims and Land Restitution approved by Congress in June 2011 but not analysed in this chapter.² Third, the demobilization of approximately 52,000 combatants and their reintegration process, although lengthy and hard to gauge at this stage, have clearly reduced violence. Last, the slow but steady progress in truth reconstruction, via both criminal local procedures and also the Historical Memory Group (Grupo Memoria Histórica) of the National Commission for Reparations and Reconciliation (Comisión Nacional de Reparación y Reconciliación, CNRR), is irreversible. In short, the discourse of transitional justice introduced by the Justice and Peace Law in 2005 was reinforced in 2011 with a real possibility of reparations and land restitutions introduced by the Bill on Victims and Land Restitution. These laws have brought to Colombia a process in which important amounts of truth, reparations and criminal justice have started to emerge. Although there is still a gap between the legal framework and its enforcement, the emerging truths, reparations and justice are unalterable in spite of the many obstacles and the incompleteness of the process. Overall, the initial lack of direction of the process has led to improvisations, yet also fortuitously to positive outcomes.

I begin with a brief background of Colombia's conflict and a general overview of the paramilitary phenomenon. Then I analyse whether the

general legal framework of Colombia's paramilitary demobilization, with special emphasis on the type of truth-telling implemented in this proceeding, is indeed a good one for a transition. Finally, I review the application of the Justice and Peace Law in its first years of operation, along with the centrality of the system of justice in the Justice and Peace Law, some of its results, drawbacks and long-term challenges.

The Colombian conflict and the paramilitary phenomenon

Modern Colombia has had an ongoing armed conflict for decades. Most analysts argue that it has gone on for almost five decades; others claim that the modern armed conflict started in the 1980s with the emergence of drug-trafficking (Palacios, 2007). The main illegal actors of the conflict have been the left-wing guerrillas (since the 1960s), the drug-traffickers (since the 1980s) and the right-wing paramilitaries (since the 1980s).

The origins of the modern paramilitaries in Colombia are to be found amongst the self-defence organizations of the large cattle owners in the mid-1960s.³ These organizations were initially legal when the government recognized the impossibility of Colombia's Army controlling and protecting most of its territory (Decree 3398/1965 and Law 48/1968). In the 1980s, the level of extortion (which included death threats to cattle owners who refused to pay protection demands from the guerrillas) and kidnapping escalated considerably, leading to the formation of a new type of (offensive) armed force, usually considered by analysts to be the "first generation" of modern paramilitaries in the country. This first generation of paramilitaries operated initially as counter-insurgent militias and had the support of the state armed forces.

As the conflict evolved, other groups of paramilitary forces were created, most often directly linked with drug-traffickers but also involving relatives of victims of past guerrilla crimes and even a number of guerrilla deserters. The infamous Castaño Gil brothers, led by Fidel Castaño Gil and his brothers Carlos and Vicente, were seeking revenge for the FARC's kidnapping and murder of their father, a cattle rancher. They collaborated with the military before creating their own paramilitary group.

The further escalation of violence and the drug war in the latter half of the 1980s led to a frontal confrontation between drug-traffickers, their paramilitary allies and the government, especially after the 1984 and 1989 assassinations of Justice Minister Rodrigo Lara Bonilla and presidential candidate Luis Carlos Galán, respectively. In 1989, as part of this confrontation and in recognition of the abuses committed under the vague provisions of Law 48/1968, the Supreme Court declared this law invalid and revoked the rights it had granted to self-defence militias. President

Virgilio Barco (1986–1990) instead issued Decree 1194/1989, which prohibited the creation, promotion or organization of paramilitary or self-defence groups, declaring such activities illegal.

The fall of the Medellín cartel and the death of cartel leader Pablo Escobar in 1993 contributed to the further development of the paramilitaries as a more autonomous actor in the Colombian conflict. Their involvement with both drug dealers and drug-trafficking is well documented (Arias and Prieto, 2011). In April 1997, the creation of the United Self-Defence Forces of Colombia (Autodefensas Unidas de Colombia, AUC) was announced, inaugurating what has been termed by some analysts the “second generation” of paramilitaries. It is generally considered to be the result of Carlos Castaño’s efforts to achieve a measure of unity among most of the other paramilitary forces in the country. Several paramilitary groups did not join, but the AUC itself claimed to represent about 90 per cent of forces in existence at the time.

From 1997, the paramilitaries acquired great amounts of land by forcibly displacing large numbers of small landowners. According to Reyes (1997), a third of what became 800,000 internally displaced people “lost their lands at the hands of paramilitary groups, who appropriated [them] as booty in the war . . . Buying cheaply where there were guerrillas, bringing in private security, and appraising property became an enormous business that combined economic power and the private use of force, the two privileged resources available to the mafias and to large landowners.” The evidence now confirms that these tactics of “counteragrarian reform” would become one of their main weapons to control territory and also the main cause of dispute with the guerrillas in the struggle for the control of drug-trafficking operations. In what became one of the most brutal series of assassinations and massacres, all civilians who were or appeared to be in their way were disposed of, often with the passive or active assistance of elements of the Colombian government’s armed forces in some regions of the country. The civilians were the victims, because, in the words of Carlos Castaño, “two-thirds of the effective forces of the guerrillas do not have weapons and are acting as part of the civil population” (Castro Caycedo, 1996: 177). This merciless phrase sums up the level of the paramilitaries’ barbarity.

The recently confirmed but long suspected collusion of sectors of the Colombian armed forces with the paramilitaries is another chapter in the history of the paramilitaries, whose dimension is still being uncovered by criminal depositions and truth reconstruction under the Justice and Peace Law. The state’s responsibility, whether by failing to act to protect civilians from paramilitary attacks, as in the El Salado Massacre in 2000 (in which 40 people were killed), or through the collusion of some Army sectors, as in the *Falsos Positivos* scandal, is clear evidence of the extent of paramilitary penetration of the state security forces.

The current chapter in the history of the paramilitaries is the *Para-política* investigations. These have revealed the direct involvement of high-ranking politicians and public officials in financing and supporting the paramilitaries. They represent the largest ever judicial investigation of ruling elites in the country's history, since most of the accused belonged to parties that supported the Uribe government.

The Justice and Peace Law: A good framework for a transition?

The Justice and Peace Law was preceded by long experience of many peace processes involving former and active guerrillas, going back to the administration of Belisario Betancur (1982–1986). Some could claim success, but others, mainly with FARC guerrillas, proved the opposite. In 1997, 10 million Colombians voted for a negotiated settlement with FARC – a mandate that the new President Andrés Pastrana carried with him into office (1998–2002). Not only did the last peace process with the FARC fail, but the armed conflict also intensified in violence, with homicides increasing and kidnappings reaching their highest ever rate by 2001. By the time of the next presidential election Colombians voted overwhelmingly for Alvaro Uribe (2002–2010), who promised to weaken the empowered guerrillas with the use of military intervention to force them to negotiate (Rangel, 2008a).

Uribe's election manifesto clearly stated that he would talk to the “violent ones” and would even ask for international mediation to make this possible, provided they abandoned “terrorism”, ceased hostilities, disarmed and demobilized. He offered guarantees to those who demobilized and made no reference to any particular armed group, always referring to them as the “violent ones” (Uribe, 2002).

The guerrillas ignored his call, but the paramilitaries saw it as an opportunity to negotiate with the government and cleanse their dirty past. Direct and secret negotiations between the Uribe government and the leaders of the AUC started in December 2002. Transitional justice was not contemplated in these negotiations, which culminated in the Santa Fe de Ralito Agreement of July 2003. Although much of what was discussed then remains obscure, the document that was made public revealed an agreement to demobilize and disarm the paramilitaries and to offer monetary compensation to victims.

The Ralito Agreement informed the draft Ley de Alternatividad Penal (Bill for Penal Alternatives), presented by the Uribe administration to Congress in 2003. This draft was a typical instrument of restorative justice, with no punishment for the demobilized or truth-seeking for the vic-

tims and with a limited reparations scheme. The government's idea was that, in order for the undefeated paramilitaries to demobilize, a form of pardon or a guarantee of no criminal punishment was needed. The draft claimed that any form of punishment would be perceived as revenge and this in turn would impede future reconciliation. In these terms, justice would be accomplished in the form of compensation for the victims.⁴ This was the "framework" under which many of the paramilitaries initially demobilized. This draft bill was a triumph for impunity, as many victims' representatives, the European Union, and national and international non-governmental organizations (NGOs) claimed.⁵

These criticisms, coupled with fear of intervention by the International Criminal Court (ICC), were strong incentives for Congress not to pass the draft bill. Under President Pastrana (1998–2002), Colombia had ratified the Treaty of Rome in August 2002. However, Pastrana's administration included an exception that limited ICC jurisdiction over war crimes for seven years (owing to the ongoing peace process with the FARC during his administration), although crimes against humanity were prosecutable from 2002. The exception for war crimes expired in 2009.

Given all these pressures, the government withdrew the draft Bill for Penal Alternatives and presented a new bill to Congress, known as the Justice and Peace Law. Discussion of the bill in Congress lasted for two years. During this period a great debate also took place, moving far beyond government circles to local political elites, civil society actors and international agencies (Díaz, 2008). In the process, the merits of various transitional justice experiences were compared and presented to Congress. In accordance with the concerns raised, a new draft (Law 975 of 25 July 2005) was designed to demobilize the paramilitaries and other illegally armed actors and to grant limited rights to the victims.

Although the draft law incorporated transitional justice elements such as reparations in an effort to appease its critics, it offered disproportionate benefits to the paramilitaries and incomplete rights to the victims. As a result, NGOs such as the Comisión Colombiana de Juristas (Colombian Commission of Jurists), supported by Human Rights Watch and the Inter-American Commission on Human Rights (IACHR), challenged the law's constitutionality in the Constitutional Court, which upheld the victims' full rights to justice, truth and reparations, and included victims' active participation in the judicial process. The right to justice entailed the state's duty to undertake an efficient investigation leading to the identification, capture and punishment of those responsible for conflict-related crimes, to guarantee victims' access to compensation for the harm inflicted, and to adopt measures preventing the recurrence of such violations (Restrepo, 2012).

A final period began in May 2006 when the draft Justice and Peace Law (Law 975/2005) became law and was turned into a transitional justice instrument through 10 Constitutional Court decisions (Decisions C-370, C-127, C-319, C-400, C-426, C-455, C-476, C-575, C-719 and C-531, all adopted in 2006), which gave “claws to guarantee the victims’ rights” (Uprimny and Saffon, 2006; Uprimny, 2011). Even before the Court’s decisions, the law had ambitious goals: a search for peace; the prosecution of perpetrators of crimes against humanity; reparations for the victims granted through the CNRR; and the reconstruction of historical memory by the Historical Memory Group of the CNRR. But the Court, relying on its past decisions and domestic and international legitimacy, enlarged provisions benefiting the victims and restricting wrongdoers’ privileges.

As a result of the Court’s rulings, the initial framework negotiated between the leaders of the AUC and the Uribe government had become a transitional justice statute with a criminal justice predominance. The Court’s rulings evidently aimed to facilitate the trial, conviction and sentencing of paramilitary leaders and other armed actors for their gross human rights violations, while also giving the victims the right to hear the truth, to participate in the judicial hearings (which was non-existent in the initial version of the law) and to obtain material and symbolic reparations.

The Justice and Peace Law provided for more lenient punishment (up to eight years in jail) for those who fully confessed to their war crimes and crimes against humanity after having been demobilized and disarmed. Failure to fully confess or repetition of the offence warranted the imposition of the harsher sanctions provided by the Penal Code. International experts argue that the law is one of the few transitional justice laws in the world that complies with the general requirements of the German Constitutional Court’s “proportionality test” and the “Rule of Balancing” between the search for peace and justice (Restrepo, 2012). The demobilized paramilitaries felt betrayed once more. Given the new terms of the law, many of the middle-rank paramilitary combatants decided not to demobilize, as some of the emerging depositions (*versiones libres*) later showed.⁶

Prior to the passage of the Justice and Peace Law, paramilitary demobilization had been governed by Law 782/2002 and implemented through Decree 128 of that same year. Law 782 allowed illegal armed groups that had been granted political status by the government to hold peace discussions; it also granted a pardon to those who had committed “politically related” offences. The recognition of political status had been a considerable prize for the paramilitaries – even though, in theory, many paramilitaries (as well as guerrillas) were ineligible to benefit under Law 782 because their crimes went well beyond “political” transgressions. In prac-

tice, criminal investigations had been few and far between. Nonetheless, the risk of facing such investigations and of sentences that could put them away for decades was a significant deterrent to demobilization – one that the political status granted by the initial draft Bill for Penal Alternatives was designed to trump. And then too, the Bill for Penal Alternatives was in line with the assumption in the country's previous processes that the state would recognize its opponents as political combatants not as ordinary criminal actors. For the FARC guerrillas that meant setting aside both their increasing involvement from the 1980s in non-political crimes, such as kidnappings, and their recurrent violation of humanitarian laws.

The topic of what special status if any to grant to both guerrillas and paramilitaries is still controversial. In reconstructing the events, however, it becomes apparent that a shift occurred: the Bill for Penal Alternatives was proposed with the aim of offering a strong inducement for illegal and violent groups to demobilize; that intention was fulfilled in the case of the paramilitaries. Yet the new Justice and Peace Law, with its modifications introduced by the decisions of the Constitutional Court, allowed time for a filtering through of a broad consensus in Colombian society that, owing both to their indiscriminate and massive violations of human rights and humanitarian law and to their completely criminal involvement in drug-trafficking, none of the conflict's perpetrators could any longer be considered political actors. This view was then reflected in the judicial transformation represented by the Justice and Peace Law.

The process, then, was both protracted and transformative, turning initial expectations on their head. Its results have understandably been mixed. Beginning with the paramilitary leaders, a process that began by guaranteeing them impunity has ended with them in jail awaiting trial. The same goes for the paramilitary assassins, estimated on one count at 3,127 (Haugaard, 2008). Taken together, this represents a crippling blow against the hardcore organization of the paramilitary groups, with a loss of much of their political power. Indeed, the transition spearheaded by the Justice and Peace Law has been notable for its punitive severity. The law states that any demobilized person who commits new crimes or carries on with old ones during the demobilization process and detention shall lose the benefits of special consideration under the law – in which jail sentences are limited to 8 years – and be handed over to ordinary criminal jurisdiction, where they can expect the maximum sentence (40 years) and from which they may also be extradited. In fact, in May 2008, 14 demobilized paramilitary leaders were extradited to the United States for continuing to operate their drug-trafficking business while demobilized. This was seen by many paramilitaries as the second government

betrayal of them. Several other extraditions of demobilized paramilitaries have followed. The privileging of US interests (drug-trafficking charges) over those of the victims in Colombia (truth and reparations) has basically brought into question the Uribe government's motives for extradition (Reyes, 2011).

At the same time as these blows have cast doubt on the success of the transition to peace, other developments have been more problematic. At the start of the process, 31,670 paramilitaries demobilized; since then, either many of them have *remobilized* as criminal actors and bands and/or new criminal players have emerged.⁷ A combination of both seems most likely but, whatever the case, some observers point to the continued signs of paramilitary life as a failing of the Justice and Peace Law. It might be more appropriate to see the outcome as an unintended consequence of the law's evolution. That is, after the removal of the leaders of the paramilitary groups, fragmentation – from organizations to bands, from national to local level – became natural. The local pacts with FARC guerrillas also attest to the sea-change: securing their stake in drug-trafficking is now the *raison d'être* for these emergent groups. Certainly, human rights violations persist, albeit on a less horrific scale than in the past. But it seems unfair to blame the Justice and Peace Law for a mutation in the identity of the actors it sought first to demobilize then to punish.

Although the “collective reinsertion of members of illegal armed groups into civil life” (to cite the law's first precept) appears on the whole not to have worked for many paramilitaries, another paradox of the whole process is that important headway has been made with the group that stayed out of it – the guerrillas. True, the scope of the law (Article 3) allowed for any illegal armed actor to join the process, but the guerrillas were consistent in their complete lack of interest in negotiations. That has not though stopped approximately 20,000 of them from individually demobilizing to avail themselves of the benefits of the law.

There is, however, another aspect of the law's framework that complicates a long-term full transition. This is the conspicuous absence of an acknowledgement of the Colombian state's possible responsibility for the conflict. The discourse of the Justice and Peace Law is one in which the state is only a victim, not an accountable body. The untenableness of this stance has been exposed by both the *Parapolítica* crisis and the recent revelations that indicate the use of extra-judicial killings of innocent people by Colombian security agencies out to inflate the body count of their fight against the guerrillas (Evans, 2009). Until Congress revises the framework of the Justice and Peace Law to include the state and its armed forces as possible perpetrators, we cannot speak of the law as a full transitional instrument. The law's exclusion of the armed forces,

aimed at not equating them with illegal actors, has become a greater burden on members of the military, who have had to face ordinary and lengthy sentences.⁸

Yet again, though, it would be unwise to write off the law altogether. From another perspective – that of victims – the enforcement of the law has strengthened victims' capacity to mobilize and demand justice, truth and reparations. It could well be argued that, since the Constitutional Court rulings of 2006, the law encompasses most elements of the transitional justice for victims usually present in the most successful transitions. In fact, comparing the framework of the Colombian law with South Africa's Promotion of National Unity and Reconciliation Act of 1995 from a normative standpoint, the Justice and Peace Law includes some of the most desirable elements of transitional justice and even goes beyond South Africa's Act in some of the victims' rights. This perhaps explains the fact that, in spite of many constraints for the victims (discussed below), 300,000 victims – far more than expected – have attempted to register in the process (Hauggaard, 2008: 2).

The Justice and Peace Law, unlike South Africa's Act, includes both trials and convictions for the wrongdoers as well as participation by victims in the judicial hearings. Thanks to a survey of victims conducted by Angelika Rettberg (2011), we have some idea of how victims have reacted to this. Thus, although most victims do not know the difference between the Justice and Peace Law and ordinary justice, they still register satisfaction with it. Over a quarter of the victims (27.6 per cent) preferred the national judicial system over other options such as international courts (18.7 per cent), mixed systems (17.2 per cent), community justice (15.5 per cent) or military courts (7.4).⁹ Nearly 60 per cent of the victims had benefited from the programmes for attention to the victims of the armed conflict, with 25 per cent expressing trust in them. Victims' preferences also seem to be consistent with some of the law's goals: they prefer reparations (45.5 per cent) and the search for truth (44.0 per cent) over forgiveness.

Truth in the Justice and Peace Law

Knowledge of the truth is declared to be a right in the Justice and Peace Law, yet its pursuit has proved to be an extremely complex issue. It is undeniable that the truth is a basic imperative of any peace process that seeks to respect the human rights of the victims. In fact, the truth is a non-negotiable postulate of transitional justice processes, in contrast to justice – understood as prosecution, trials and criminal convictions. Yet in Colombia, the Justice and Peace Law chose to give preference to a

judicial truth that was different from the search for historical truth common in most transitional processes.

In this, the influence of the zigzag evolution of the law can again be seen. The Bill for Penal Alternatives was very much in line with what could be called the institutionalization of a kind of collective amnesia in the country through the many amnesties and pardons and the absence of trials and prosecutions or truth commissions over the years of the conflict since the mid-1980s. These trademarks of modern Colombian peace processes hindered long-term reconciliation and gave illegal actors additional motives to carry on the conflict for so long. In fact, in the case of the guerrillas the traditional way of “resolving” most conflicts through amnesty removed their incentives to engage in conflict resolution alternatives that might in any way impose a cost on them. This was the same deal that the paramilitaries were originally offered.

More generally, too, the country has been slow to respond to global trends. Only recently has an official Truth Commission, the first ever in Colombia, been put in place. It was set up to investigate the 1985 tragedy of the occupation of the Palace of Justice by the now extinct left-wing guerrilla group M-19, when most magistrates of the Supreme Court of Justice were assassinated in a crossfire confrontation between the Colombian military and the guerrillas who were holding the magistrates hostage, demanding a public trial of incumbent President Betancur (who ironically had extended this group a generous amnesty as part of another peace process). Although the Truth Commission is a step in the right direction, the exercise is scarcely bold: the guerrillas involved have long been reintegrated into society with a certain degree of success, at both a political and a social level, and the military personnel responsible for the uncontrolled use of force have enjoyed two decades of impunity.

Other instances of transitional truth reconstruction have more recently been essayed (Alcaldía de Medellín, 2007; Díaz, 2008), but the overall tendency of the Justice and Peace Law clearly leads in a different direction – for reasons both traditional and having to do with a sense that the continuation of conflict made it hard to create a truth commission to investigate crimes against humanity and war crimes (Uprimny, 2005). The option was not entirely discarded either in the drafting of the law (specifically Article 7) or in practice when the Historical Memory Group of the CNRR was tasked with reconstructing the historical memory of the past and given eight years for the job. Nonetheless, the truth pursued in the first four years of enforcement was the truth of the law.

What consequences can one expect from that decision? Following the most orthodox literature, the quest for historical truth seeks to satisfy the victims’ right to the truth, to prevent the repetition of atrocities and to contribute to the construction of a collective narrative of an unknown,

fragmented reality (Matarrollo, 2002). In contrast, judicial truth is individual and case based, depends on the initiative of victims and offers no guarantees that all of the perpetrators of crimes will in fact be prosecuted (Scharf and Rodley, 2002).

There are, indeed, inherent limitations in the pursuit of judicial truth for collective, societal purposes. Hearings are worthless if the accused refuses to cooperate – as in the case of Edwar Cobo Téllez (alias “Diego Vecino”), who has been recalled 11 times but has attended only 3 sessions, denying all allegations against him. On the other hand, there is a very telling example of the power of judicial truth in the exemplary confession of José Ever Veloza García (alias “HH”), the perpetrator who has cooperated most so far in the workings of the Justice and Peace Law. Veloza was a big catch because, as it turned out, he had been close to both the founders of the AUC and the second-generation paramilitaries. He identified himself as the assassin of dozens of trade union leaders, led authorities to the exact locations of hundreds of bodies in mass graves, and disclosed facts about the aid given to paramilitaries both by sectors of the Colombian military (under the recently detained General Rito Alejo del Río) and by private enterprises (for example, Chiquita Brands International).¹⁰ Many of the crimes Veloza confessed to had not been known about, their authors unidentified until then.

Thus, although the decision to pursue judicial truth rather than historical truth entails significant trade-offs, these are not by any means always to the disadvantage of historical truth – nor is there an immutable trade-off between justice and truth, as some have maintained (Haugaard, 2008). The two truths are different, but judicial truth can have exceptional historical power. Even when based on individual cases, the courts’ archives – if well preserved – can also be a resource as valuable as the testimonies heard by truth commissions.

What emerges, then, is another situation in which the consequences of an initial decision are playing out in a way that is more ambiguous than anticipated. Although the Justice and Peace Law did include precepts that regulate historical reconstruction, the most salient facts confronting its proponents led them to eschew it. These facts essentially related to the paramilitaries. Their role in the conflict was too controversial to be submitted for review to an independent commission. Indeed, with an important number of Colombians having *supported* the role of the paramilitaries in the disastrous last years of the 1990s, the paramilitaries were still the cause of the deepest polarization in the country’s society.¹¹ On the other hand, with their keen interest in demobilizing, the paramilitaries were also prime targets for judicial punishment. What the country missed by way of a larger narrative and reconciliation it could gain in terms of the achievement of justice. Evidently, that *was* the initial trade-off.

And judicial truth had more to commend it for another very pertinent reason: the risk that, unless the justice system reacted, a spiral of extra-judicial killings might start. In a conflict as long-running as Colombia's, revenge has played an important role in the perpetuation of the war. Establishing judicial truth and securing criminal convictions appeared to be the remedy to halt a continuing desire for private justice – for the revenge-taking that, as Jon Elster has persuasively documented (2004, 2006), can be inspired when the names of perpetrators appearing before truth commissions are leaked in the press. Snodgrass-Godoy (2005) has also shown how communities in Guatemala, frustrated by a fragile state incapable of attending to their demands after the signing of peace processes, took justice into their own hands in 1996. Both former actors in the conflict (guerrillas and members of the armed forces) and people unrelated to it (ordinary people, common criminals) produced new cycles of violence fuelled by revenge in a post-conflict context in which, it is claimed, more people have been killed than in the war years.

Colombia's Justice and Peace Law was, then, an assertion of the power of the state in a setting of social polarization over the paramilitaries; so far thus understandable. The trouble is that "the magnitude and characteristics of Law of Justice and Peace procedures are something for which neither the media nor the country were prepared" (Ronderos and Arias, 2008: 32). In other words, in the process of securing convictions, historical truths also came out. That, one might have expected; but not their horror.

The destabilization of the whole enterprise emerges strongly in the predicament that one of the procedures of the law has got into. This is the filming of confessions. The tradition goes back to the Nuremberg trials of 1945, a tradition in which war crimes and crimes against humanity are the issue. Its adoption in Colombia indicates that that was the issue on at least some prosecutors' minds there too. Yet the legal process contemplated by the law is one of an ordinary criminal investigation. Extraordinarily, too, the ambiguity is reflected in the absence of guidelines on media access to the hearings. Sometimes the Office of the Attorney General lets the media in, sometimes not – even though the media's presence violates the requirement of secrecy in the preliminary investigations of ordinary cases.

The upshot is that different versions of the statements of the paramilitary leaders circulated in the press, and that one can visit "confesiones paramilitares Colombia" on YouTube and see dozens of blurred paramilitary heads talking about their murders. You can witness Veloza affirming that all of his victims – in whose assassinations state security forces were accomplices – were innocent. It is safe to infer that the truth was not meant to come out like that.

Some measure of historical memory has found expression in the works of the Historical Memory Group of the CNRR. Thus, since September 2008, a dozen reports have been released aiming at the reconstruction of some of the worst massacres and atrocities perpetrated by the paramilitaries, including the Trujillo massacre. The accounts of the massacres, disappearances, torture and forced displacement inflicted on the population of this small town in the years 1988–1994 reveal both the efforts to establish the historical truth but also the constraints on doing so in the midst of an ongoing conflict that prevents a truth commission's full operation today. Hence the combination of both truths is perhaps the best formula for Colombia in the long run.

The enforcement of the Justice and Peace Law

The first group of criticisms about the application of the Justice and Peace Law stems from the initial process of demobilization of the bulk of the paramilitaries, which, the evidence suggests, was improvised. Members of the IACHR who reviewed the process have claimed that the executive wasted opportunities because, when these paramilitaries were interviewed and registered, the prosecutors who handled the cases had been given no special training and had only a poor questionnaire to work with (IACHR, 2007). These conditions hindered them from obtaining better disclosure about other members of the paramilitary units and about the crimes committed. According to the IACHR, most individuals demobilized did not offer significant information about illegal acts committed by them as paramilitaries and most walked free after their confession.

Some clarifications to this account are needed. Firstly, those who walked free were those who did not confess to any war crimes or human rights violations and for whom there was no evidence of criminal involvement. Consequently, the great bulk of the paramilitaries and those who were not indicted walked free, yet they did so with an unresolved legal situation since there was no amnesty for them. Secondly, and this is of more serious concern, whereas 31,671 people demobilized in order to benefit from the Justice and Peace Law, most calculations at the time put the number of members of paramilitary groups at 10,000. The other 21,671 “newcomers” passed themselves off as paramilitaries in order to clear their criminal past and obtain the benefits of the law.¹² This was a considerable flaw in the process, albeit one explained by the limited capacity of the state to investigate properly given the urgency of dismantling the paramilitary organizations. This imperfect process is justifiable in a

transitional justice context only where some forms of impunity may have to be accepted if they help to facilitate a transition.

Then, too, it might be asked whether it is possible to prosecute 31,671 criminals (paramilitary or not) at once, not just in Colombia, but anywhere in the world. In the words of the head of the CNRR:

The UN and Europe were smart. In Yugoslavia they said: we will judge 90, not the 20,000 criminals we pardoned . . . To bring 150 people to justice in an exemplary manner would be extraordinary. If we tried to judge them all, justice will collapse. We chose the worst path, trying to judge a massive number.¹³

In similar vein there was wide agreement that the 22,000 prosecutions attempted in the case of El Salvador's peace process were far too many. Indeed, most people would accept that, when the magnitude of violence and violations is overwhelming, truth commissions have little choice but to focus on some individual representative cases and drop the others (Matarrollo, 2002: 300).

In most Latin American transitions, the tensions between justice and peace were resolved by obtaining peace first and dealing with justice later. Sometimes, making a deal with the perpetrators is unavoidable and necessary to prevent further conflict and more suffering. As Grono and O'Brien (2008) point out: "Recent agreements backed by the United States and the European Union, for example, have involved deals between serial [human rights] abusers and either implicitly or explicitly provided impunity" – for example, the 2001 Bonn Agreement that established a new government in Afghanistan or the Darfur Peace Agreement of 2006. None of these agreements featured explicit amnesties (except Sierra Leone's), but they are largely silent on accountability for past atrocities despite the fact that some of the most serious rights abusers are parties to these agreements. From any normative standpoint this is highly undesirable, yet in the real world the peace vs. justice dilemma is often one of great urgency: without peace, impunity will also continue, and a line needs to be drawn somewhere.

The initial demobilization in Colombia was one such line. And, as this chapter has argued, once a transitional justice decision has been taken, two things are inevitable – imperfection and unintended consequences. Thus, the failure of the Colombian justice system to properly investigate all those demobilized accidentally played a positive role by not interfering with the successful encouragement of further demobilization by other violent actors.

The second group of criticisms about the application of the Justice and Peace Law relate to a very sensitive issue in transitional justice: the situation of the victims. There are three main related objections: first, in

Colombia there are a huge number of registered victims (200,000–250,000 according to the various sources); secondly, there are problems with victims' access to the hearings; and, thirdly, there is no clarity about what the law's right to the truth really means.

The first concern has to be addressed from different angles. Ideally, one would like to identify all the victims of the conflict, yet this is an impossible task. The Colombian Commission of Jurists, a national NGO, documented 14,677 people killed or disappeared outside combat, allegedly by paramilitaries, between July 1996 and June 2007.¹⁴ The Presidential Office section in charge of human rights has similar numbers for the same period. This concurrence suggests that this is the most accurate information available about what the Justice and Peace Law calls direct victims. The figure is more or less 10 per cent of the currently recorded global number of victims, reflecting the very open definition of victims in the law – without this meaning either that all victims have been recognized or that those registered are all benefiting from the law. As noted above, the emergence of the victims as a social force is another unexpected development within the process.

As for access to the hearings, there are some important sub-issues. On the one hand, many victims are afraid to come out because of intimidation by remaining paramilitaries or their supporters. On the other hand, there are not enough resources, human or economic, to bring all the victims to the hearings. Many victims live in remote areas of Colombia and the hearings take place in only three cities (Bogotá, Medellín and Barranquilla); most victims have no means to pay for their transportation and living expenses during the hearings. As we can infer from Rettberg's survey, only 59 per cent of the victims belong to a victims' association, and only a few of those have become incorporated into the work of the Justice and Peace Law. This perception coincides with the view of Senator Armando Benedetti (a senator of Uribe's party): "in April 2008 only 8,634 victims of more than 125,000 who had registered had actually participated in the Justice and Peace hearings, and only 10,716 received legal counsel from the Ombudsman's office. Only 69,027 were admitted as victims and there are only 68 public defenders – that is, each public defender has 815 victims" (Haugaard, 2008: 9).

There are also many procedural issues that complicate a victim's access to trials. One of these is finding out which hearing to attend, since victims often do not know who was the perpetrator of the crimes of which they are a victim.

The third issue related to the victims deals with their psychological and mental health. In a country such as Colombia, where the conflict has lasted for so long, suffering amongst victims is profound, the more so when many victims of the paramilitaries have been victimized for long

periods or are victims of more than one actor. Uprimny and Saffon (2006) are among those who have questioned whether the rights to truth, justice and reparation of the law are sufficient for the victims without a more psychological dimension too. Acknowledging one would allow victims the right to dissatisfaction, including with the dispensations of the law itself.

A fourth criticism of the law's enforcement may be added, stemming from the perceived incapacity of the local system of justice to handle war criminals and human rights violators. In general, local systems of justice of countries in transition are viewed as unable to prosecute offenders independently and impartially. Cases such as Rwanda or Cambodia show the inherent local limitations. But international tribunals are also often perceived as alien and unfamiliar – geographically, culturally, historically and socially. Although lack of independence does not seem to be the problem with Colombia's criminal system, the system's resources, and hence its inherent capacity, are still insufficient. The Justice and Peace Unit of the Office of the Attorney General, which is the special investigative unit created to apply the Justice and Peace Law, has only 57 prosecutors to investigate and prosecute (so far) the 3,127 demobilized paramilitaries facing serious allegations or accusations of participation in crimes against humanity. This means that each prosecutor, with three to four investigators and two to three legal assistants, will have to prosecute an average of 55 cases. In addition, although the hearings are conducted in just three cities, the investigative staff are responsible for covering the entire national territory, including areas of the country that are still in conflict. Even though steps are being taken to resolve these issues, the number of new investigations is bound to make the existing backlog even bigger.

In terms of general results, by 2009 the Office of the Attorney General presented a report assessing the implementation of the Justice and Peace Law during its first four years. Confirming the findings of the United Nations High Commissioner for Refugees, the report showed that 65 per cent (that is, 1,215) of the 1,867 depositions taken from demobilized paramilitaries by June 2009 were completed. These depositions revealed 27,000 crimes affecting 40,000 victims. Until June 2009, only one indictment had been prepared. Still, depositions have led to the discovery of 2,000 graves and 2,439 bodies, of which 571 have been identified and returned to their families.¹⁵ “Depositions have also uncovered evidence that enabled the initiation of 209 criminal investigations against politicians, mainly mayors, ex-mayors, and over one-third of existing members of Congress (102) who financed or supported the paramilitary” (Restrepo, 2012). The law that trumped a truth commission was, after all, doing more for historical truth than for judicial truth.

Justice and politics

Even with a success rate approximating zero, the justice system has been the centrepiece of the Colombian paramilitary transition. Why did the justice system become the catalyst for this transition? Is this positive or negative for the long-term attainment of peace and eventual post-conflict transition?

In the *longue durée*, the Justice and Peace Law sits squarely within the strong legalistic tradition of Colombia, a product of its Hispanic colonial heritage and republican development after independence. Social and political issues have long been “resolved” through laws. In the shorter run, the centrality of the justice system through the Justice and Peace Law is justifiable because of the incomplete, fragmentary nature of the Colombian transition. Since peace has not been achieved, justice has the virtue of being able to play a dual role that is different from that of finished and complete transitions. On the one hand, justice acts as a safeguard for a final transition, while on the other it represents a constant threat for those who do not demobilize or for those who do but continue their criminal enterprises.

Some have argued that the polarization of the country turned the predominance of the judicial system into a necessity. According to Iván Orozco, the polarization has been such that victims of the guerrillas and their sympathizers, and victims of the paramilitaries and their sympathizers, have developed separate discourses and agendas of peace (Orozco, 2008). In this light, and paraphrasing Orozco, the year 2002 marked the triumph of the victims of the guerrillas, with the arrival to power of a President whose father had been kidnapped and killed by FARC. Moreover, Uribe chose as his vice-president Francisco Santos, another victim of guerrilla kidnapping and former head of one of the NGOs against kidnapping. Having been a victim of guerrilla kidnapping also appeared to be the qualification of Fernando Araújo to become Foreign Minister.

The electoral promise of Uribe was fulfilled to a certain extent. Today, the FARC guerrillas are weaker than ever before, kidnapping is down dramatically and some of the heads of the guerrilla movement’s *secretariado* have been killed (former leader Reyes in Ecuador). Victims have been rescued by the armed forces in operations such as Operation Jaque, which freed former presidential candidate Ingrid Betancourt, 3 American pilots and 11 members of the Colombian armed forces in July 2008 – and which also boosted President Uribe’s popularity to new heights. On the other side of the spectrum, though, are the victims of the paramilitaries, people who belong to more deprived sectors of society. They have become allies with political and human rights activists from the left and want to fight their grievances through the justice system.

The outcome is once again paradoxical. For the dominant group of guerrilla victims it seems pretty clear that the first transitional law – with no trials or prosecutions of paramilitaries and no role for criminal justice – represented their way of seeing the rights and wrongs of the conflict. Yet, since the intervention of the Constitutional Court, the country has a transitional justice framework designed for the section of society that has next to no power. This surely has more than a little to do with its dysfunctionality.

The Justice and Peace Law ought not, however, to be assessed only in terms of performance. To do this is to miss its deeper significance as a key instance of a trend in the whole region – one especially strong in Colombia – towards the judicialization of politics. This process of judicialization, which has been enhanced since the 1991 Constitution, has turned the judges in general, and the Constitutional Court in particular, into crucial actors within the democratic process, with an unprecedented impact in the political system (Cepeda, 2006: 68). The Constitutional Court, but also much of the justice system, has attained notable levels of legitimacy among most sectors of society. This is connected to a lowering of belief in the political system. As Cepeda (2006: 68) astutely comments, “the judicialization of politics is linked to flaws in the political system that does not respond adequately to ordinary social conflicts”.

The absence of other sites of institutional transformation has also left the justice system as the main actor of the transition to peace. Initially led by the Constitutional Court, then by the Supreme Court of Justice and the Office of the Attorney General (which in Colombia is part of the judiciary), the justice system has, for better or worse, become the central player of a transition whose overall direction remains unclear.

For example, no one predicted that the direct involvement of politicians and public officials in the past funding and operation of the paramilitaries would blow up into a scandal in 2008. But the fact that the *Parapolítica* scandal came about because of criminal investigations by the Supreme Court of Justice ought to have surprised no one. The issue ranks as one of the most important revelations of the transitional justice process so far.

And it has particularly de-legitimized Congress. By early 2009, 29 of its members had been detained, 51 were being investigated as former accomplices or perpetrators of paramilitary crimes, and 3 had already been convicted (*El Tiempo*, 12 February 2009). The vast majority of those investigated and prosecuted belong to President Uribe’s political party, and the President has been touched even closer to home through relatives such as his first cousin, Mario Uribe, and former close collaborators, including the brother of his recently appointed Interior Minister (under

investigation and detained). Although no knock-out blows to Uribe occurred, the scandal dented his overwhelming popularity, no small matter for a President who was seeking to override the Constitution and win his second re-election in 2010. In an entirely unanticipated way, then, the Justice and Peace Law enhanced democratic checks and balances at a time when they were needed.

Conclusion

Things have certainly moved on in Colombia, with the judiciary emerging as a powerfully independent force. On the other hand though, how well does an institutional crisis between the executive and the judiciary, along with the discrediting of the political class, bode for the country? Can the justice system see through transitional justice on its own?

Clearly not. As this chapter has argued, the judiciary has been both a pivotal actor and an accidental beneficiary of a process that, although it escaped control, was nonetheless *political*. Without the decision to seize the chance of paramilitary demobilization, the judiciary would not have received its opportunities. Justice, that is, depends on political decisions.

The peculiarities of the Colombian case abound. Its transitional justice experiment was initiated by a government more interested in demobilizing than in punishing paramilitaries. Yet that government acted far more effectively against paramilitary leaders than the criminal justice system did. The government extradited some of the leaders and preventively detained the rest. Most of the “publicly known” paramilitaries who demobilized remained in jail to be investigated; the number of those detained and investigated to date is the non-negligible total of 3,127 (United Nations Human Rights Council, 2008: para. 17). From the howls of paramilitary outrage, it is clear that they thought they had a tacit understanding with the government. But the government decided to bow instead to the outrage of (enough of) the public. With the armed forces too making more headway against FARC, and with the United States unhappy at the paramilitary diversion into drug-trafficking, the paramilitaries were more dispensable. Their impunity came at too high a political cost.

That handed the justice system its opportunity, yet the system was undecided about the grounds of prosecution. It bowed to social realities in opting for ordinary crime as opposed to crimes against humanity (for which, much as they deserved it, the paramilitaries could not be tried without the guerrillas too), and yet it is experiencing enormous difficulties in successfully concluding its trials. It seems harsh but fair to conclude that the Justice and Peace Law created more expectations than

it could hope to fulfil. Limitations of capacity were forgotten, recent international experiences of transition disregarded. Take, for instance, the case of the German Democratic Republic, where justice statistics as of March 1999 showed that, after unification, 22,765 investigations were opened that led to 565 criminal court cases, 211 verdicts and 20 prison sentences.¹⁶ The experiences are of course distinct, but for Colombia to achieve an outcome of 20 successful prosecutions would be a triumph. The trouble is that this is a disastrously low figure for ordinary criminal prosecutions.

The transition is under way, but has the issue of the truth been thought through? The creation of a sub-group for the reconstruction of historical truth and memory, with a fixed expiry date, was not the bravest of initiatives. The decision not to set up a truth commission did not make the question of the truth go away. Instead, the truth began to leak out in fragments that suggest the scale of the past's horrors while making them harder to piece together in future.

As things went haphazardly on, evidence of the role of the state in the conflict began to turn up. The main vehicle of transitional justice had been designed so that this Pandora's box would not be opened. If more secrets come out, where could things lead to? An apology from the state for its former collusions with paramilitaries in mass atrocities? An acknowledgement of the state's enormous moral responsibility? These unthinkable possibilities clearly mark the limits of the Colombian transition. No administration, least of all that of President Uribe, would have accepted a moral and judicial equivalence between its armed forces and the conflict's illegal actors. Nonetheless, the Justice and Peace Law will remain a limited experiment, pointing to but not pushing through the start of institutional change for a full transition.

And what, finally, of the country's guerrillas? As individuals, some have proven susceptible to the enticements of the Justice and Peace Law; as collective actors, their voluntary submission is inconceivable. They have, over decades, been accustomed to seeing themselves and being treated as political actors. The experience of their former deadly enemies has been a memorable demonstration, if one were needed, of the costs of demobilizing without the guarantees that status brings. And, as the conflict continues to degenerate into a struggle for the control of drug-trafficking, the framework of transitional justice also loses applicability.

In sum, then, an experiment in transitional justice was undertaken in the midst of an ongoing conflict in Colombia. It dismantled the original structures of one of the parties to a very long conflict, saw a diminution of the most appalling human rights violations against the most defenceless part of the population, and so far has brought a degree of compensation for some of the victims of past atrocities. The 2011 Bill on Victims

and Land Restitution opens a new and promising chapter in this process without a compass. But will the state be capable of enforcing it?

Notes

1. So far the government has recognized 3.5 million victims of the armed conflict.
2. The Bill on Victims and Land Restitution (Law 1448) was passed by Congress on 10 June 2011.
3. For a detailed analysis of the origins of the paramilitary, please see Restrepo et al. (forthcoming).
4. *Gaceta del Congreso*, No. 436, 2003.
5. In order to understand the context of the draft Bill for Penal Alternatives, see Uprimny (2011).
6. See <http://www.verdadabierta.com/> for real-time information on the process and depositions.
7. The Colombian government calls them Bacrim, short for bandas criminales (criminal bands).
8. The Office of the Attorney General of Colombia is investigating more than 1,400 cases involving thousands of victims. In the summer of 2011, eight soldiers were sentenced to 60 years each for killing four farmers in 2006 in the province of Antioquia and then pretending they were guerrillas (BBC News, 2011).
9. Rettberg (2011). Although the sample is nationally representative, victims who are not part of victims' associations (be these local, regional or national) are excluded from it.
10. A digital archive of these confessions can be found at <http://www.verdadabierta.com/victimarios/los-jefes/658-perfil-jose-ever-veloza-alias-hh/> (accessed 19 March 2012). See also the various reports published in *Semana* in August 2008.
11. In 1999, polls showed that 60 per cent of Colombians opposed the dismantling of the paramilitaries.
12. E. M. Restrepo and C. Riveros, unpublished data from a project to create a website to monitor the application of the Justice and Peace Law.
13. "Está Fracasando la Ley de Justicia y Paz?", *Semana*, 28 June 2007; available at http://www.semana.com/wf_ImprimirArticulo.aspx?IdArt=105238 (accessed 19 March 2012).
14. Comisión Colombiana de Juristas at <http://www.coljuristas.org> (accessed 19 March 2012). These numbers may in fact be lower than the actual figures because many killings are not included when the perpetrators remain unknown.
15. See the most recent results of the enforcement of the law from the Unidad Nacional de Fiscalías para la Justicia y la Paz at <http://www.fiscalia.gov.co/justiciapaz/Index.htm> (accessed 19 March 2012) and at Verdad Abierta's portal (<http://www.verdadabierta.com/component/content/article/175-estadisticas/1856-estadisticas>) (accessed 19 March 2012).
16. Taking an extreme example in terms of numbers of convictions, one could look at Nazi Germany, where the rate of convictions was impressive: the United States tried 169,283 and convicted 144,139; France tried 17,353 and convicted 17,033; and the Soviets tried 18,328 and convicted 18,061 (Cohen, 2006: 72). Even then, the US efforts, which were the most dramatic of all, saw the great limitations of punishing almost everybody. "The more systematic the procedure, the more irresistible became the conclusion that the original idea of removing anyone who had in some way been associated with the Nazi party or another Nazi organization was incapable of execution" (Friedmann, 1947: 114). In fact, after an Advisory Board for War Criminals studied petitions by high-ranking Nazis, of the war criminals imprisoned by Americans in Landsberg only a few remained: in 1950, 663 Nazis were imprisoned in Landsberg; by 1955 there were only 50 (Buscher, 1989: 174).

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8

El Salvador: The peace process and transitional justice

Ricardo Córdova Macías and Nayelly Loya Marín

Introduction

This chapter explores the process of transition to democracy in El Salvador. After 12 years of civil war, the signing of the Peace Accords of 1992 allowed for the simultaneous development of three transitions: from war to peace, from militarism to demilitarization, and from authoritarianism to democracy (Córdova Macías, 1996). Both the nature and the challenges of the transitions of countries that are emerging from internal armed conflict are different and could be characterized as “war transitions” (Torres-Rivas, 2004; Zamora, 2001).

Our broad understanding of transitional justice starts out from the same source – the International Center for Transitional Justice – that Carlos Basombrío Iglesias cites in Chapter 10 in this volume. From this angle, Basombrío argues that transitional justice “includes many approaches, such as prosecuting human rights violators, truth commissions, reparation programmes, security sector reform and memorialization efforts”.

This perspective may prove useful in analysing a particular kind of experience linked to internal armed conflicts and peace processes, where transitional justice mechanisms have operated in a context of deeper security sector reform. In our context, the focus is specifically on the interconnections between security sector reform and mechanisms of transitional justice, with a view to analysing their combined impact on democracy-building.

This chapter consists of three sections. The first presents the historical context of the Salvadorean conflict and of the peace process. The second deals with the mechanisms for security sector reform, as well as the mechanisms for transitional justice that were defined and implemented in the context of the peace process. The third takes stock of the process and the outcomes achieved in its contribution to the efforts toward the construction of democracy.

The historical context of the Salvadorean conflict and the peace process

The rise of militarism in the political life of El Salvador began with the coup d'état of December 1931 that brought General Maximiliano Hernández Martínez to power (Guidos Véjar, 1980). From then on, military governments used a mix of elections, fraud and coups to maintain themselves in power. The Official Party was created to be the political instrument of the armed forces (Castro Morán, 1984). The political regime of 1931–1979 could be described as authoritarian and military.

The military regime was incapable of responding to the growing demands for, and expectations of, democratization and socioeconomic reforms. This in turn led to a cultivation of attitudes that legitimized the use of extra-legal means as valid forms of political action. Several factors placed the country on the brink of civil war. In the political sphere, the following stand out: (i) the regime hardened its inflexibility and exclusionary character, manifesting intolerance of the political opposition rather than any willingness to allow it to participate; at the same time, the regime had been weakened by both (ii) the successive electoral frauds and (iii) the high doses of repression that came with military predominance; and (iv) the inoperative and unreliable justice system. Meanwhile, citizen awareness of injustice and exclusion in the country had grown. In the socioeconomic sphere, the following factors can be identified: (i) the state of poverty in which the majority of the population lived; (ii) growing inequality in the distribution of income and wealth; (iii) a concentration of land ownership and a sharp rise in the number of landless families; and (iv) a fall in the real minimum wage (Córdova Macías et al., 1998: 1–12). Another factor accounting for the civil war was a new international context: on the one hand, the defeat of the Somoza regime and the triumph of the Sandinista revolution in Nicaragua in July 1979, and, on the other, the location of the Central American conflict in the logic of the Cold War (LeoGrande, 1998).

The country experienced its last coup d'état of the twentieth century on 15 October 1979. A coup with a difference, it was led by reformists

and represented the last chance for the democratization process and socioeconomic reforms to avert the armed conflict. However, this reformist attempt eroded very quickly, and starting in early 1980 the transition to civil war began. The principal political and social forces in the country spent the year realigning themselves around the two belligerent forces that were being put together. On the one hand, in January 1980, a pact was signed by the armed forces and the Christian Democrat Party (PDC). Other right-wing parties joined, as well as the private sector. It also received support from the United States government. On the other hand, that same year, various guerrilla organizations were brought together in the Frente Farabundo Martí para la Liberación Nacional (FMLN); simultaneously, non-armed organizations formed the Frente Democrático Revolucionario (FDR); further along, an FDR-FMLN alliance came about during the civil war.

This was, in early 1980, the transition to the 12-year Salvadorean civil war, which has been considered one of the most intense internal conflicts in Latin American history by virtue of the number of victims during that period. Although there is no general agreement regarding the human costs, the number that is most cited is 75,000 victims. Some authors have estimated that 1 in 66 Salvadoreans died in the war (Seligson and McElhinny, 1996: 213).

Despite the death toll and the length of the civil war, during this period there were moments that were more intense and violent than others, moments where positions hardened, and moments of relative calm. The report of the Commission on the Truth for El Salvador (United Nations Security Council, 1993) was able to distinguish four phases indicative of political changes, the evolution of the war and the systematic nature of the practices that violated human rights (see Table 8.1).

The peace negotiations

Two phases may be distinguished in the process of dialogue and negotiation. The first phase lasted from the first meeting between President Napoleón Duarte and the FDR-FMLN in the city of La Palma in October 1984 up until the November 1989 military offensive. It was characterized as a phase of dialogue without negotiation. The second period developed from 4 April 1990 in Geneva – when agreement was reached to start negotiations with mediation by the United Nations – until 16 January 1992, when the Peace Accords were signed at Chapultepec castle in Mexico City. This phase was characterized as taking place in compressed time and having an intense discussion agenda, as well as generating agreement between the two parties (Córdova Macías, 1993).

Table 8.1 Periods of violence during the civil war in El Salvador, 1980–1992

1980–1983	<p>This was the period when violence was systematically established. Opposition movements were dismantled and repression in the city targeted political organizations, unions and organized sectors of Salvadorean society.</p> <p>Seligson and McElhinny (quoted in Córdova Macias et al., 2007) give the minimum number of deaths and disappeared persons as 40,395, and the maximum as 65,327 (including civilian and combatant deaths) for this period.</p>
1983–1987	<p>There was a decrease in human rights violations and deaths, in terms of increased selectivity. The FMLN, in turn, strengthened its military structure, laid land mines among the population and continued a campaign of economic sabotage. The armed forces carried out bombings indiscriminately. Both situations created large displaced and refugee populations. In this regard, Córdova et al. (2007: 63) cite a figure of over 1 million refugees. As for deaths and disappeared persons, Seligson and McElhinny (quoted in Córdova Macias et al., 2007) set the range between 8,582 and 13,886 victims.</p>
1987–1989	<p>During this period, Central American pacification efforts were under way, but the internal dialogue process reached a stalemate. There were advances in terms of “humanizing the conflict”. However, the FMLN carried on a campaign of abductions, summary executions and murders against civilians and government sympathizers. It is estimated that there were 3,423 deaths and 10,079 disappeared persons.</p>
1989–1991	<p>The 11 November 1989 offensive by the FMLN and its aftermath exposed the impossibility of a military solution to the conflict and created the conditions that enabled negotiations to proceed. It is estimated that the number of deaths and disappeared persons reached 3,531 during this stage.</p>

Source: Based on United Nations Security Council (1993).

The logic of deepening the conflict on the one hand and continuing dialogue on the other developed from the outset and went through several stages. Initially, negotiation efforts and proposals were a ploy, used to improve the combatants’ positions, and what actually continued was the search for a military solution to the conflict.

The break in the focus of the negotiations came about when it was accepted that winning the war on military terms was not possible. This situation began to change with the regional pacification process of Esquipulas II (1987), which set up a context that was favourable for the conclusion of military conflicts. By that time, each of the three Central American countries with internal armed conflicts was able to carry out its own search for a political solution. Each responded to conditions that were unique to its own country, and this trend benefited from the new international context following the fall of the Berlin Wall in 1989.

The Salvadorean peace negotiations responded to a classic case of military stalemate, where neither the guerrillas nor the Army could be defeated but neither could beat their adversary. This is how the logic of a negotiated political solution to the conflict gradually imposed itself. A major event was the guerrilla offensive of November 1989, which for the first time drove the fighting into the capital city. This offensive had, “as a major political effect, demonstrated to all stakeholders in the conflict, the impossibility of a military solution, thus definitively reinforcing the path to a political settlement” (Montobbio, 1999: 117).

Two dynamics – one at the international level and the other at the national level – came together to make possible the final phase of the peace negotiations. In the international arena, it was the end of the Cold War. At the national level, the November 1989 offensive made it clear that a military victory was impossible, which resulted in both sides redefining their positions and discourse and taking steps that favoured peace and negotiation. This is how, on 16 January 1992, after 22 months of intense negotiations, the peace was signed.

The Peace Accords and the institutional reforms

The Peace Accords of Chapultepec (named after the castle where they were signed) were the detailed and systematized outcome of several political agreements: the Geneva Agreement to initiate UN-mediated negotiations, April 1990; the General Agenda and Timetable for the Comprehensive Negotiation Process, Caracas, May 1990; the Agreement on Human Rights, San Jose, July 1990; the Agreement on Constitutional Reform or the Mexico Agreement, April 1990; the New York Agreement, September 1991; the New York Act I, December 1991; the New York Act II, January 1992; and the Final Peace Accords, Mexico, 16 January 1992 (United Nations, 1992).

The overall objective of the peace process was stipulated in the Geneva Agreement (Article 1): “The purpose of the process shall be to end the armed conflict by political means as speedily as possible, promote the democratization of the country, guarantee unrestricted respect for human rights and reunify Salvadorian society.” That is, the four pillars of the Peace Accords were as follows:

- *End the armed conflict*: in order to comply with this objective, the agreements called for cessation of the armed conflict through the laying down of arms and a gradual process of breaking up forces and demobilizing troops.
- *Promote the democratization of the country*: an agreement was made by which the FMLN was to be legalized as a political party; the electoral system was to be reformed, with the former Central Electoral

Council becoming the Supreme Electoral Tribunal; the function and institutions responsible for public security were separated from those of national defence, and the National Civil Police was created; and the Ad Hoc Commission was created to purge the armed forces.

- *Guarantee unrestricted respect for human rights*: the mechanism for electing magistrates to the Supreme Court of Justice was redefined; 6 per cent of the general budget of the nation was assigned to the judicial branch; and the Office of the Ombudsman for Human Rights was created.
- *Reunify Salvadorean society*: an economic and social forum was created; measures were established to reduce the social cost of the structural adjustment programmes; and the Truth Commission was created.

The Peace Accords were fundamentally political in nature. The items that referred to the political system and their level of detail contrast starkly with those that had to do, for example, with the economic and social order.

Four elements characterized the process by which the Peace Accords were implemented. First, it involved “continuity of the ‘parties’ of the negotiation as central ‘parties’ for its implementation” (Córdova Macías et al., 2007: 127). Secondly, it concentrated on issues linked to demilitarization and the political electoral system. A study by Córdova Macías et al. (2007) has analysed the number of deadlines set for compliance with the commitments of each issue (see Table 8.2), and it identified that, of the 118 actions with an established time-frame, 68.6 per cent had to do with the demilitarization of the state, whereas 18.6 per cent had to do with the judicial system, the political electoral system and the political participation of the FMLN, and 12.7 per cent with economic and social items. Thirdly, the time-concentration was also notable: for the majority of the tasks to be undertaken, a period of one year was set, from February

Table 8.2 Number of time-frames for the fulfilment of commitments by item

Item	Number
COPAZ (Commission for the Consolidation of Peace)	2
Armed forces	40 ^a
National Civil Police	25
Judicial system	9
Electoral system	5
Economic and social issues	15
Political participation of the FMLN	6
Cessation of the armed conflict	16
Total	118

^aAdditional time-frame of the reduction not stated in the agreements.

Source: Córdova Macías et al. (2007: 125).

1992 to February 1993. And, fourthly, it required simultaneous and conditional execution of the commitments.

The mechanisms for security sector reform and transitional justice defined and implemented in the context of the peace process

This section tackles two aspects. First, it analyses the mechanisms for security sector reform that were implemented in the context of the peace process; and, second, it examines the mechanisms of transitional justice that were applied in the Salvadorean case.

Security sector reform

The implementation of the Peace Accords led to a profound demilitarization of the state and of the political process. They entailed an institutional transformation of the armed forces, because members of the military were removed from political control of the state. The foundation was laid for the subordination of military power to a constitutionally elected civilian authority. Six key measures were taken in this regard:

1. An important doctrinal reform separated the function and institutions in charge of defence from those of public security. The armed forces mission is currently defined as “the defence of the territory’s sovereignty and integrity” and they come under the Ministry of Defence. Meanwhile, the new National Civil Police has the public security mission and is answerable to what was then the Ministry of Justice and Security. In the past, “the Armed Forces was a ‘supra-institution’ that was above the other institutions, deciding on a great variety of aspects and having a high level of autonomy regarding the powers of the state. Now its function has been circumscribed to the defence of the sovereignty of the state and the integrity of the national territory” (Córdova Macías, 2001: 335).
2. The armed forces educational system was reformed.
3. The number of those serving in the armed forces was cut significantly, from 63,175 troops in 1991 to 31,000 in February 1993. By 2003 the number was down to 15,500. Meanwhile, the budget allocated to national defence went down, from 13.71 per cent of the general budget of the nation in 1992 to 7.37 per cent in 1995. By 2004 it stood at 3.8 per cent (Córdova Macías et al., 2007). In addition, there was both a meaningful purging of the armed forces and investigation of the violent actions of the past through two mechanisms: the Ad Hoc Commission and a Truth Commission. Not without difficulties, officers

whose names appeared in the reports by both Commissions were removed from their posts.

4. The National Bureau of Intelligence was dissolved and a legislative decree created the State Intelligence Agency, under civilian administration and answerable to the President of the Republic.
5. Military service reform.

Although there has been important progress in the process of security sector reform, some authors point out the high level of institutional autonomy that the armed forces enjoy. Córdova Macías (2001) identifies some of the challenges to deepening this process: the responsibility of civilian leadership in the executive branch and in Congress when dealing with specific missions of the armed forces, and the strengthening of Congress's capacities to exercise effective legislative control over the military budget.

6. In the realm of public security,

the former security corps was dissolved and a new National Civil Police was created, based on a new doctrine, a new organization, and new mechanisms for selection, training and preparation. Additionally, a legal framework has been developed for its operation. However, this process has run into a series of problems, which may schematically be summed up as follows: (1) constraints on financial resources and necessary equipment; (2) conflicts generated by varying visions regarding the model of public security; (3) weaknesses in internal control mechanisms; (4) pressure generated by the context of increased crime and insecurity, which first affected the formation of the new police corps – favouring quantity over quality in order to deploy the new police corps at the national level in the shortest time possible – and then influenced decisions on how to deal with criminal activity and violence. (Córdova Macías et al., 2007: 239)

At the start of the new millennium, four important problems have been identified regarding the National Civil Police (PNC): reports of human rights violations; problems in the system of promotions (FESPAD, 2001); diminishment of the National Public Security Academy's independence and its loss of identity in relation to the PNC (in the 2001 restructuring the General Inspector was placed under the command of the General Director of the PNC) (FESPAD, 2002); and weak internal control.

The reform of the defence and security sectors that has developed during the post-conflict period has been influenced by a context in which violence has increased, as have crime and the perception of insecurity in the country. These have posed important challenges to the state. A study by Córdova Macías and Cruz (2007) revealed that 44.5 per cent of Salvadoreans interviewed consider the principal problem in the country to be violence, crime and insecurity, and 45.2 per cent are concerned about

economic aspects; 47.1 per cent of those interviewed feel insecure (between a lot and somewhat) because of crime. A report by the United Nations Development Programme (UNDP) estimated the cost of violence at US\$1,717 million in 2003, equivalent to 11.5 per cent of the gross national product (UNDP, 2005).

Participation by the Army, under the control of the PNC, to support operations to fight crime in recent years is troublesome (FESPAD, 2001: 32). This concern focuses on the possible consequences for the advances seen in the separation of the doctrine and institutions that are responsible for defence and public security.

The mechanisms of transitional justice

The Peace Accords set out measures aimed at strengthening the democratic process – through the demilitarization – but also geared towards reunifying Salvadorean society. The Truth and Ad Hoc Commissions were, in this light, mechanisms of transitional justice.

According to Teitel (2003: 70), transitional justice in El Salvador is framed in the context of what he calls “the second, or post–Cold War, phase”, which “juxtaposed and even sacrificed the aim of justice for the more modest goal of peace” (2003: 81). In Teitel’s words:

In fledgling democracies, where the administration of punishment can pose acute rule-of-law dilemmas, the contradictions to the uses of the law may become too great. These profound dilemmas were recognized in the deliberations preceding the decisions in many countries to forego [*sic*] prosecutions in favor of alternative methods for truth-seeking and accountability. (2003: 77)

From this perspective:

The leading model in this phase is known as the restorative model. In this phase, the main purpose of transitional justice was to construct an alternative history of past abuses. A dichotomy between truth and justice therefore emerged. Thus, the Phase II paradigm largely eschewed trials to focus instead upon a new institutional mechanism: the truth commission. A truth commission is an official body, often created by a national government, to investigate, document, and report upon human rights abuses within a country over a specific period of time. (Teitel, 2003: 78)

In El Salvador, this is the approach that prevailed in the implementation of transitional justice. Consequently, the negotiating parties considered that “the courts would have been unable to implement justice, and, in any case, attempting to do so would have destabilized the efforts to consolidate peace, and would have carried the former war of opponents onto the arena of the political process” (Popkin, 2004: 109).

Forced to choose between truth or justice, the process focused on truth, as the Truth Commission itself recognized:

We must ask ourselves, therefore, whether the judiciary is capable, all things being equal, of fulfilling the requirements of justice. If we take a detached view of the situation, this question cannot be answered in the affirmative. The structure of the judiciary is still substantially the same as it was when the acts described in this report took place.... The question is not whether the guilty should be punished, but whether justice can be done. Public morality demands that those responsible for the crimes described here be punished. However, El Salvador has no system for the administration of justice which meets the minimum requirements of objectivity and impartiality so that justice can be rendered reliably. This is a part of the country's current reality and overcoming it urgently should be a primary objective for Salvadorian society. (United Nations Security Council, 1993: 178)

What the Truth Commission could offer was an advance towards reconciliation based on knowledge of the truth of the past, even though truth alone “does not bring reconciliation; it is only *one of its ingredients*” (IDEA/IIDH, 2005: 18).

The Truth Commission

- *The mandate*

The Truth Commission's mandate was outlined in the Mexico Agreements of 27 April 1991. The Commission was created as a consequence of the vision shared by both the government and the FMLN “to contribute to the reconciliation of Salvadorian society” and “to clear up without delay those exceptionally important acts of violence whose characteristics and impact, and the social unrest to which they gave rise, urgently require that the complete truth be made known ... through a procedure which is both reliable and expeditious and may yield results in the short-term, without prejudice to the obligations incumbent on the Salvadorian courts to solve such cases and impose the appropriate penalties on the culprits”. It was also stipulated that the Commission “shall not function in the manner of a judicial body”.

The Truth Commission was given two specific functions: (a) “investigating serious acts of violence that have occurred since 1980 and whose impact on society urgently demands that the public should know the truth”; and (b) “recommending the legal, political or administrative measures which can be inferred from the results of the investigation. Such recommendations may include measures to prevent the repetition of such acts, and initiatives to promote national reconciliation.”

- *The composition*

The Commission was to consist of “three individuals appointed by the Secretary-General of the United Nations after consultation with the Parties”. The Secretary-General designated Belisario Betancur (former President of Colombia), Reinaldo Figueredo (former Foreign Minister of Venezuela) and Thomas Buergenthal (former president of the Inter-American Court of Human Rights). The Commissioners chose Belisario Betancur to serve as chairman of the Commission.

The establishment of the Truth Commission marks the first time that the parties to an internal armed conflict, in negotiating a peace agreement, conferred on a commission composed of foreign nationals designated by the United Nations the power to investigate human rights violations committed during the conflict and to make binding recommendations. (Buergenthal, 1994: 501)

- *The work of the Commission*

An initial decision was that “its staff should also be international in composition. Consequently, no Salvadorans were hired to work for the Commission. Instead, its staff consisted largely of lawyers, sociologists, forensic anthropologists, and social workers drawn from other Latin American countries, the United States, and Europe. The total number ranged between twenty to thirty persons, including support personnel” (Buergenthal, 1994: 504).

In search of information, the Commission began with extensive research on events during the conflict, which allowed it to make a selection of cases that would appear in the report. Once the cases were listed, the Commission conducted interviews of witnesses. This process suffered many obstacles, which directly influenced the outcome of the investigation.

- (a) Extensive research

The Commission began its work with a broad investigation of events during the civil war, interviewing victims and witnesses, receiving evidence from both individuals and government agencies and non-governmental organizations. In order to do the research, the Commission set up offices in different parts of the country.

- (b) Selection of cases that would appear in the report

Once the Commissioners had the whole picture, they conducted interviews and meetings with all sectors of society, including residents of rural

areas, in order to determine the cases that would provide the focus of the report. “While the list was longer at the beginning of the process, it shrunk as time went on because of insufficient credible evidence or because we lacked adequate investigative resources to pursue certain leads. The short, six-month deadline established in the mandate also affected the number of cases with which the Commission could deal” (Buergethal, 1994: 506).

(c) Interviews with victims and alleged perpetrators

Having identified a number of cases, the Commissioners began to interview victims, alleged perpetrators and those who might have information.

On the whole, the Commission encountered few difficulties in interviewing any individual it wished to have appear before it. Most civilians, former FMLN combatants, and military personnel presented themselves at the Commission after being summoned by it. There were exceptions and delays in appearances, but they were not significant and did not affect the Commission’s work to any significant extent. Of course, it is one thing for individuals to appear for questioning; it is quite another for them to tell the truth or, for that matter, to provide information. (Buergethal, 1994: 506–507)

However, the Commission “encountered greater difficulty in obtaining relevant documents” and was not always permitted access to the archives of the security forces and the FMLN.

(d) The problem of confidential information

The Commissioners decided “to rely on confidential information despite the due process implications inherent in this approach”.

In reaching this conclusion, we took two considerations into account. First, the Commission’s mandate authorized this procedure, and it did so precisely because the Parties of the Peace Accords knew full well that any other approach would be doomed to failure. . . . Second, it did not take very long for the Commissioners to recognize that these fears were well-founded and that the Commission had no other way to protect those who provided information other than to keep their identities secret. (Buergethal, 1994: 511)

• *Trust in the process and the outcome*

Also daunting was the amount of trust the Commission needed to generate. Without trust in its procedures, its findings would lack the legitimacy required to be accepted not just by the actors directly involved but also

by diverse sectors of society. Therefore, the generation of trust can be considered on two levels:

(a) The generation of trust in the process

The procedures centred on the use of primary sources, that is, on testimonies. These were provided by people who in many cases were fearful of reprisals – so another level of confidence had to be built into the process. This was achieved by withholding the identity of witnesses during the procedures and, in the final report, assuring its sources of confidentiality. Even after its mandate had ended, and with the aim of further guaranteeing the confidentiality of the testimonies, all documents (reports, testimonies and publications) were transferred to George Washington University in 1992.

(b) The generation of trust in the outcomes

Given its non-judicial nature, the Commission had to take into account several considerations to ensure that the outcomes of its investigation were as reliable and objective as possible:

- It set down degrees of certainty in each of the cases presented in the report, using them as the foundation for the final conclusions. This came from the Commission's recognition that both accusations and evidence received in confidence could be less reliable than those subject to judicial proof. The established degrees of certainty were (United Nations Security Council, 1993: 24):
 1. Overwhelming evidence – conclusive or highly convincing evidence to support the Commission's finding;
 2. Substantial evidence – very solid evidence to support the Commission's finding;
 3. Sufficient evidence – more evidence to support the Commission's finding than to contradict it.
- The Commission determined there was a need to verify, confirm and re-examine the accusations it received.
- It based the cases on several information sources. It did not reach conclusions when there was only one source or witness, or when it obtained only secondary sources.

Another element that contributed to generating trust in the process was the composition of the Commission, which was made up of people who were entirely unassociated with the dynamics of the confrontation that had occurred. The Commission comprised foreign personnel, experienced in the field of human rights. Neither the leadership nor the mid-level personnel were Salvadorean.

- *A swift process*

The Peace Accords granted the Commission six months to do its work. This period started on 13 July 1992 and ended on 15 March 1993, when the report was delivered to the Secretary-General.

- *Elucidating the truth*

- (a) What or which violent acts?

The Commission mandate was to investigate serious acts of violence committed by both parties that had generated social distress, not to elucidate all acts of violence. The time-frame that was set down would not allow it. In this regard, the mandate did not single out any specific case, nor did it make a distinction between violent acts on a large scale and those committed by a few people. That is why one of the Commission's principal tasks was to determine which facts it should focus on. To this end, it took the following into account:

- (a) Individual cases or acts which, by their nature, outraged Salvadorian society and/or international opinion;
 - (b) A series of individual cases with similar characteristics revealing a systematic pattern of violence or ill-treatment which, taken together, equally outraged Salvadorian society, especially since their aim was to intimidate certain sectors of that society. (United Nations Security Council, 1993: 19)

- (b) Perpetrators: Institutions or people?

The Truth Commission's decision to make public the names of the people mentioned as being responsible for human rights violations was very controversial, "both in El Salvador and for experts in the field" (Popkin, 2004: 111). The Commission based its decision on two fundamental issues: "it is individuals that commit crimes, not the institutions they have created" (United Nations Security Council, 1993: 13), and "the whole truth cannot be told without naming names" (1993: 25), which led it to identify those people who had ordered the crimes to be committed or who, having been in a position to prevent these acts, acted with leniency and permissiveness. The Commission's decision has given rise to questions from some actors.

- *The non-judicial character of the Commission's actions*

The Commission was not granted judicial authority. This condition restricted it from going beyond the investigation of the acts of violence. However, the Mexico Agreements stipulated two aspects that could help in the administration of justice. First, the preamble states that the parties

agree to conduct a reliable and expeditious procedure “that may yield results in the short-term, without prejudice to the obligations incumbent on the Salvadorian courts to solve such cases and impose the appropriate penalties on the culprits”. Second, “[t]he Parties undertake to carry out the Commission’s recommendations”. In other words, “by signing the Peace Accords, the FMLN and the government of El Salvador agreed that the recommendations be binding for both parties” (Buergethal, 1996: 14).

- *Outcome and results of the Truth Commission report*

- (a) The outcome

Complying with the mandate and the scope stipulated in the Peace Accords, it can be concluded that the Truth Commission fulfilled its mission, although the report “has turned out to be highly controversial, and has elicited dissatisfaction along a good deal of the political spectrum, due largely to the expectations each had on its contents” (Córdova Macías, 1999: 13). This is tied to a poor understanding of the Commission’s mandate and the methodology used in its work.

As for the investigation itself, the Commission recorded 22,000 complaints, which enabled it to complete the documents and evidence for the 32 cases it focused on in its report, addressing different patterns of violence. Regarding the complaints that were filed, in terms of the perpetrators, almost 95 per cent referred to agents of the state, paramilitary groups and death squads; 5 per cent were attributed to the FMLN. In this sense, according to Hernández Pico (1993: 378), the report revealed, “a systematic structure of human rights violations by the Armed Forces . . . a systematic structure of concealment by State institutions involved in the crimes”, or “the case of judges, and particularly the Supreme Court of Justice, who were supposed to investigate them and submit them to the courts; . . . It also states that the FMLN, in its attempt to change the country, fell several times into the same logic that disregards human life, transforming people into enemies.”

The violence “obeyed a political preconception that equated political opposition with subversives and enemies. Anyone who held views contrary to the official line ran the risk of being eliminated like an armed foe on the battlefield” (Cardenal, 1993: 350).

A series of recommendations in the Truth Commission report can be summed up under four headings:

1. Recommendations directly associated with the investigation

In terms of the armed forces and public administration, the Commission recommended that officers on active duty, civilian public officials and those in the justice system, as well as the members of the FMLN High Command named in the report, be removed from their positions, dis-

charged from the armed forces and banned “from holding any public post or office for a period of not less than 10 years, and should be disqualified permanently from any activity related to public security or national defence” (United Nations Security Council, 1993: 176).

As for judicial reform, the Commission recommended that all aspects of the agreed judicial reform be put in place. The immediate resignation of all members of the Supreme Court was also recommended, as a measure necessary for its renovation.

2. Recommendations to eradicate the structural sources linked to acts of violence

In terms of armed forces reform, the Commission recommended that the transition to the new armed forces model ought to be completed quickly and transparently, with close supervision by the civilian authorities. It also recommended a comprehensive review of military legislation in order to bring it into line with the new Constitution and the requirements of respect for human rights.

As for public security reform, the Commission recommended that the old public security forces be disbanded, and citizen security handed over to the National Civil Police. Finally, it recommended that all necessary measures be adopted to ensure the disbandment of illegal groups.

3. Recommendations to prevent the recurrence of similar events

With regard to the administration of justice, the Commission recommended dealing with the high concentration of functions in the Supreme Court of Justice, which undermines the independence of judges in the lower courts.

On the issue of protection of human rights, it recommended strict compliance with agreements reached during the peace negotiations and implementation of the recommendations of the United Nations Observer Mission in El Salvador (ONUSAL). In addition, the Office of the National Counsel for the Defence of Human Rights needed to be strengthened.

As for the National Civil Police, the Commission recommended setting up the mechanism to investigate crime that was agreed to in the Peace Accords, which presupposes joint action by the PNC and the Office of the Attorney General of the Republic.

4. Recommendations for national reconciliation

In terms of material compensation, it was recommended that a special fund be created to award appropriate compensation to the victims of violence. As for moral compensation, it was recommended that a national monument be built bearing the names of all victims of the conflict, that the integrity of the victims and the serious crimes of which they were victims be recognized, and that a commemorative holiday be established.

There was also a recommendation to create a forum where the results of the report could be analysed.

(b) Obstacles to implementing the Truth Commission's recommendations

Commenting on the role the Truth Commission played, Margaret Popkin noted the following:

A truth commission should provide a unique opportunity to develop consciousness about the violence that took place, to change the understanding and create a new discourse about what is possible and what still needs to be done. Doing so, however, is particularly challenging in a context such as El Salvador's where the regime responsible for many human rights violations remained in power and where state institutions remained weak and those primarily responsible for the violations retained significant power. (2004: 106)

On 15 March 1993, the Commission presented its report. Three days later, President Cristiani addressed the nation and pointed out that the government was "committed to implementing the recommendations that issue from the Truth Commission Report, in this sense, the Government of El Salvador will fulfill its commitment. . . . Certainly, we will do so within the context of what the Executive Branch has to do as part of its attributes, always in keeping with the constitutional framework." Despite the positive tone of the message, the recommendations would not be implemented in their entirety. The following three factors contributed to this: opposition to the report from different sectors and actors in society; the implementation of the Amnesty Law; and the lack of demand for it by civil society.

1. Opposition to the report from different sectors and actors in society

A few days after President Cristiani's address regarding the presentation of the Truth Commission Report, various conservative groups rejected it. For instance, the armed forces decried it as "an attempt to discredit the military institution", declared that the report's conclusions misrepresented historical fact, and concluded by attacking the whole report as "unfair, incomplete, illegal, antiethical, partial and impudent".

The Supreme Court of Justice "rejected the Report emphatically", as well as the Truth Commission's recommendations. In the opinion of the Court magistrates, the Truth Commission was created by political agreement in order to "investigate serious acts of violence occurring since 1980". It had to do with "a political agreement between two expressly defined parties, and with a particularly determined purpose, which in no way could give rise to anything that would subvert the order established by the Constitution, International Treaties, and the secondary laws that are in force in El Salvador." Another complaint was against the methods

used to carry out the investigation, which “absolutely disregard the principles of due process, under the pretext of avoiding delay in finding out the truth, incurring arbitrariness, so that with such methodology, it eliminates any possibility of defense or hearing for the people who, in its judgement, must be mentioned as responsible for the acts under investigation.”

2. The implementation of the Amnesty Law

A few days after the signing of the Peace Accords, a Law of National Reconciliation – essentially an amnesty law – was decreed. Following the presentation of the Truth Commission Report, on 20 March 1993 the parties on the right approved a Law of General Amnesty for the Consolidation of Peace, which provided for the lapsing of civil and criminal responsibility, eliminating by this means the possibility that the courts of justice would investigate the acts described in the report.

President Cristiani noted:

[W]e consider that the Truth Commission’s report does not respond to the majority of Salvadoreans’ wish for forgiveness and forgetting everything that is part of that painful past ... Further, it is necessary to analyse ... that the truth report has extracted ... a sample of these violent acts and analysed ... only a part thereof ... Therefore, we are again calling upon all sectors in the country to support a general and absolute amnesty, so that we can turn this painful page in our history and seek a better future for our country. (1993: 484)

In Popkin’s opinion, “the broad amnesty law passed in the wake of the Truth Commission’s report has effectively precluded any prosecution, and a range of political actors consider the policy of ‘forgiving and forgetting’ to be the cornerstone of the transition from war to peace” (2004: 118).

Following the approval of the Amnesty Law, civil society organizations and international organizations attempted unsuccessfully to get it repealed. In fact, several human rights organizations requested that the law be declared unconstitutional, but the Supreme Court of Justice granted it constitutional validity in its 2000 resolution. As Popkin (1998) argued, for the Court the approval of the Amnesty Law was tacitly a political matter outside its jurisdiction. It was not interested in exploring any of the dissonances between the law’s provisions and both constitutional and international norms. Instead, the Court pointed to the article in Protocol II added to the Geneva Conventions calling for broad amnesty at the conclusion of the internal armed conflict.

For its part, the Inter-American Commission on Human Rights (IACHR) declared in its report on the status of human rights in El Salvador that the publication of the Commission’s report and the simultaneous approval of the Amnesty Law could lead to a subsequent infringement of

the Truth Commission's recommendations. Additionally, it noted that the political agreements between the parties "do not in any way relieve the State of the obligations and responsibilities it undertook with ratification of the American Convention on Human Rights and other international instruments on the subject" (IACHR, 1993).

3. Civil society's failure to demand implementation

Some authors consider that the deficit in implementing the recommendations is also attributable, in part, to civil society's failure to demand it. As Popkin noted:

Salvadoran civil society was not involved in the process of designing the Truth Commission, its mandate or its methodology. The United Nations and the parties to the negotiations consulted with a few key individuals in El Salvador and many more in the international human rights community. Salvadoran human rights groups provided important information to the Commission, but were not otherwise involved in the Commission's work. (2004: 108)

That being the case, the Human Rights Institute at the "José Simeón Cañas" Central American University notes that, "despite the execution of these commitments and respective recommendations – whose fulfilment was binding on the parties – there needed to be widespread awareness of them in civil and political society as a general achievement of the nation. The population never appropriated what definitely constituted the key that could open the door to full respect for human rights in the country" (IDHUCA, 1997: 1146).

Popkin, for her part, attributed the slow and selective implementation of reforms to the fact that civil society's demands were insufficient: "At the end of the war, human rights groups demanded justice but failed to design a strategy that would enable them to keep up the fight against the amnesty law" (2000: 161).

(c) The outcome of implementation

In this context, it is no surprise that there were difficulties and gaps at the time of implementing the Truth Commission's recommendations. In Popkin's view:

[I]mplementation of the Truth Commission recommendations ... was slow and selective, and it was plagued with difficulties ... 5 years after the Truth Commission Report many of its recommendations have not been implemented. Unquestionably, more effort has been made to implement the structural and institutional reforms proposed than to implement the measures that intended to impose administrative sanctions or ban individuals named in the report, or measures intended to contribute to national reconciliation. (2000: 161)

We have previously described the four groups of recommendations by the Truth Commission. As regards the first group, not all officials and officers were removed, owing to the fact that, in some cases, they retired only when their term of service expired. Moreover, as Popkin (1998) noted, the recommendation to ban guilty parties from holding public office was rejected by the political parties and remained a dead letter. Regarding the second set of recommendations, the government of El Salvador and the United Nations established a “Joint Group” to investigate illegal groups, but only after United Nations Secretary-General Boutros Ghali called for it to be complied with (IDHUCA, 1997: 1147). Recommendations that have to do with overcoming impunity and strengthening the justice system were only partially fulfilled (FESPAD, 2002). As for the fourth group, these were not complied with either. “The integrity of the victims was not publicly acknowledged, nor was a monument erected in their honour bearing the names of those who appeared in the Commission’s report, nor was a holiday declared to remember them, nor was the ‘truth and reconciliation forum’ organized; not to mention material compensation for the individuals affected directly or indirectly by the violence” (IDHUCA, 1997: 1147). Nevertheless, a civil society initiative created the Commission for the Historical Memory of El Salvador, which took on the task of constructing a monument dedicated to memory and truth, to honour the memory of the disappeared persons and victims of human rights violations. A total of 28,139 names have been engraved on the monument.

The Ad Hoc Commission

In the New York Agreement (United Nations, 1992) it was accepted that an Ad Hoc Commission would be created to purge the armed forces, based on an evaluation of all its members. As for implementing this objective, it was set down that the Commission would be made up of three Salvadoreans “of recognized independence of judgement and unimpeachable democratic credentials. It shall also include two officers of the armed forces with impeccable professional records, who shall have access only to the deliberations of the Commission; they shall not have access to the investigation phase to be carried out by the ad hoc Commission, nor be involved in the final phase of the investigation, but they may have access to its conclusions.”

• *Outcome and results of the Ad Hoc Commission*

Work began in May 1992 and lasted four months. During the investigation, it ran into three obstacles: a lack of time to execute the assigned task; limited information provided by the armed forces; a lack of records

of acts against life, liberty, security and physical integrity in the civilian population (IDHUCA, 2002: 280).

The report, which was delivered to President Cristiani, comprised recommendations applicable to 103 officers, only one of whom had ceased to be an active member of the armed forces.

As for the remaining 102 officers, it recommended 26 others be assigned other functions, and 76 be dismissed from service. In the UN Secretary-General's letter dated January 7, 1993 addressed to the President of the Security Council, it says that, after careful study of the measures adopted by president Cristiani: "I am willing to consider as satisfactory the measures adopted and applied by the government of El Salvador regarding 87 of the 102 officers mentioned in the Ad Hoc Commission's recommendations, although some are not entirely consistent with the recommendations. Notwithstanding, the measures adopted in relation to the other 15 officers fail to comply with the recommendations." It was not until mid 1993 that the recommendations regarding the remaining officers were finally completed. (Córdova Macías, 1999: 12)

It was noted that some of these officers did not retire until they came to the end of their period of service (IDHUCA, 1997: 1147).

A general assessment of the process

Now that we have reached the landmark of two decades after the signing of the Peace Accords, important advances in the democratization process in El Salvador can be seen, although democracy remains to be consolidated. The peace process made three key contributions to this. First, it oversaw a significant demilitarization of the state and the political process, one that entailed an institutional transformation of the role of the armed forces, with a laying of the foundation for civilian control over them by constitutionally elected authorities. Second, political reform allowed for the institutionalization of electoral democracy. Lastly, the peace process created the conditions for the observance of human rights (Córdova Macías et al., 2007).

Although the Peace Accords have reshaped the institutions of the new post-conflict political system, it must be noted that "there are significant deficits in the democratic process that signal failings in the way institutions function and the political behaviour of the actors in the post-war period. These deficits can hardly be understood in the light of the Peace Accords any more, and their analysis has to be associated with the way the new institutions function and the requirements for deepening democracy" (Córdova Macías et al., 2007: 262).

An issue that was not addressed with due importance was reconciliation in society during the post-conflict period. Only a handful of measures were contemplated that were indirectly aimed in that direction. In fact, the political actors “did not give the issue the importance it deserved, as no programmes were formulated, nor were any policies developed to deal with it effectively. In hindsight, this is an important deficit, particularly when taking into account its importance for the development of a democratic political culture” (Córdova Macías et al., 2007: 258).

Despite the Truth Commission’s specific recommendations, measures for the moral or material compensation of the victims of the conflict have not been implemented. It is also important to note that it took the Salvadorean state 18 years to ask society for forgiveness for what occurred. On 16 January 2010, President Funes declared:

As the head of the Executive Branch of the nation and in name of the Salvadorean state, regarding the context of the internal armed conflict that concluded in 1992, I recognize that agents that at that time belonged to institutions of the state, among them the armed forces and the forces of law and order, as well as other state-related organizations, committed serious violations of human rights and abused power, made illegitimate use of violence . . . I publicly recognize the state’s responsibility in these acts, both by commission and by omission, given that it was and is the obligation of the state to protect its citizens and guarantee their human rights. In light of this, in the name of the Salvadorean state, I ask for forgiveness.

In this same speech, mention is made of creating a commission that would propose to the President “the adoption of measures for moral, symbolic and material compensation”, and likewise announces the creation of a National Search Commission for Disappeared Children.

Additionally, as some analysts have noted, truth commissions, aside from having been created by the national government to “investigate human rights violations committed by the military, the Government or other armed forces under the previous regime during the civil war” (IDEA, 2001: 288), are a mechanism by which truth and justice can be addressed in post-conflict societies. In the Salvadorean case, the chosen mechanism favoured the search for truth; and knowledge of the truth, as noted before, was not accompanied by other concrete elements to consolidate the process and progress towards reconciliation.

The issue of justice did not remain definitively closed, and in recent years, in a different internal and international political context, the issue has re-emerged, expressed in terms of two aspects: reopening the discussion on the Amnesty Law, and opening trials against some military officers.

Reopening the discussion on the Amnesty Law

In the course of the 2009 electoral campaign, the issue of the Amnesty Law came up on the discussion agenda owing to two factors: the FMLN's programme for government proposed a human rights policy, and the FMLN had made prior attempts to repeal the Amnesty Law in the Legislative Assembly. These factors led some sectors to consider that, with the possibility of an FMLN victory, it would seek to abolish the Amnesty Law. This situation led to an unusual debate among various sectors in society, particularly between the political parties and involving the armed forces.

The political parties and the armed forces categorically rejected any repeal. They claimed that such an action would have serious consequences for the country's governance and would re-open wounds that, in their judgement, were closed (see *El Diario de Hoy*, 9 September and 22 November 2008). This was also the sense of the rhetoric of the FMLN candidate at the time (see *El Diario de Hoy*, 10 September 2008). However, this caused human rights activists to criticize the left-wing party (see *El Diario de Hoy*, 10 September 2008).

Following the March 2009 elections, some voices were heard proposing the abolition of the Amnesty Law. On 17 August 2009 (see *El Diario de Hoy*), the Archbishop of San Salvador declared: "It must be said that, upon repealing the Amnesty Law, all the war cases would have to be taken to trial; it has to be seen whether it is suitable to do so at this time. This would bring about a difficult situation, there will be an increasing number of cases, and very complicated ones."

Opening trials against some military officers

Starting in 2004, trials got under way against several Salvadorean military officers. Complaints have been filed in courts in Spain and the United States.

The first lawsuit was filed in the State of Florida in 2002, where former generals Guillermo Garcia and Eugenio Vides Casanova were found guilty of torture and kidnapping based on their responsibility as officers in charge (Dada, 2006). A second request for a trial was filed in the State of California, where in 2004 Captain Alvaro Rafael Saravia was found guilty of the assassination of Monsignor Romero, although the trial was held in absentia (Dada, 2005a). A third trial took place in the State of Tennessee against Colonel Nicolas Carranza, who was found guilty of crimes against humanity, extra-judicial assassination and torture (Dada, 2005b).

Attention in Spain had focused on the assassination on 16 November 1989 of six Jesuit priests of the "José Simeón Cañas" Central American University – the Rector, the Vice-Rector, the Director of the Institute of Human Rights, and three teachers – along with a cook and her 16-year-

old daughter. The charge was brought up in 2008 under the principle of universal jurisdiction.

The Truth Commission Report and its recommendations have fulfilled a twofold function in the history of El Salvador: on the one hand, they serve historical memory, in the sense that they have contributed to making known to the public the truth of the acts of violence that occurred in the country; on the other hand, they serve the future, with the purpose of preventing such acts from recurring. However, as noted in this chapter, the issue of justice has not been definitively closed, and it seems that the search for justice and truth persist in the collective imaginary. Therefore, the issue will continue to be present on the agenda in coming years. To this should be added the issue of compensation for the victims, given that it is a pending issue in the peace process.

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9

Transitional justice in Guatemala

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Introduction

This chapter presents an analytical review of the application and/or absence of transitional justice mechanisms in reparations for human rights violations committed during the 36 years of Guatemala's internal armed conflict (1960–1996). Like Guatemala, other countries have made the change from authoritarianism to democracy, and during this process there has been a close link between accountability for past human rights violations and the success or weakness of the development of a democratic system. The objectives of this work focus, therefore, on identifying the existence, quality and effectiveness of these accountability mechanisms so that they are able to provide resources for analysing the strengths and weaknesses of the country's democratic consolidation. We start with a contextual vision of Guatemala – with what has been called a “double transition” from authoritarianism to democracy and from the internal armed conflict to peace. We follow with an analysis of the transitional justice approach experienced during the post-conflict period in Guatemala, leading us to an overall assessment of the situation and lessons learned.

Context

To analyse recent history, the complexity of political transformations in Guatemala needs to be explained with reference to two different

processes in the transition: from authoritarianism to democracy and from the internal armed conflict to peace. The former focuses on the advent of civil constitutional governments through free elections from 1986 onwards after a long history of military and repressive regimes; the latter represents the end of the internal armed conflict, which lasted from 1960 to 1996, through a negotiation process that concluded with the signing of the Peace Accords. Although both respond to a systemic dynamic, it is worthwhile examining them separately to understand the rationale of each process because of their different effects on accountability and the consolidation of democratic rule of law. There has been considerable debate over explaining these processes, and experts have had difficulty agreeing on a single interpretation. There are two main reasons for this. The first is conceptual and reflects different understandings of terminology such as “democracy”, “authoritarianism” and “peace”. The second is related to a political discussion on whether the actual processes in Guatemala correspond with these ideas. Despite these debates, we can safely say that both transitions have occurred and that there are formal reference points to be analysed in both cases.

The chronological reference point for the political transition from authoritarianism to democracy was the process that started in 1984 when the National Constituent Assembly was set up to draft the current Constitution (1985). This established elections based on a new political framework. National elections were held in November and December of 1985 to elect the first government under the new Constitution. Up to that time, the political history of the country had been marked by a sequence of authoritarian, repressive regimes that had taken power through non-democratic means.

The Christian Democrats of Guatemala won these elections, representing an important change in the conservative history of the political system up to that time. In January 1986, Vinicio Cerezo Arévalo took office as President of the Republic, the event that marked the political transition to democracy. This new government developed a relationship with the Army in the context of a vast state strategic plan to channel efforts to help the country find a way out of the internal armed conflict and to return the leadership of the state apparatus to civilians with a gradual restoration of a state model based on democracy. What is now called the internal armed conflict was the period between 1962 and 1996, ending with the signing of the Peace Accords between the government and the guerrillas represented by the Guatemalan National Revolutionary Unity (Unidad Revolucionaria Nacional Guatemalteca, URNG), which had a leftist political tendency. The origins of this conflict were multidimensional, based mainly on historical exclusion, as explained in the following

text from the document *Guatemala: Memory of Silence, Report of the Commission for Historical Clarification*.¹

The Commission for Historical Clarification (CEH) concludes that the structure and nature of economic, cultural and social relations in Guatemala are marked by profound exclusion, antagonism and conflict – a reflection of its colonial history. The proclamation of independence in 1821, an event prompted by the country's élite, saw the creation of an authoritarian State which excluded the majority of the population, was racist in its precepts and practices, and served to protect the economic interests of the privileged minority. The evidence for this, throughout Guatemala's history, but particularly so during the armed confrontation, lies in the fact that the violence was fundamentally directed by the State against the excluded, the poor and above all, the Mayan people, as well as against those who fought for justice and greater social equality.

The anti-democratic nature of the Guatemalan political tradition has its roots in an economic structure, which is marked by the concentration of productive wealth in the hands of a minority. This established the foundations of a system of multiple exclusions, including elements of racism, which is, in turn, the most profound manifestation of a violent and dehumanizing social system. The State gradually evolved as an instrument for the protection of this structure, guaranteeing the continuation of exclusion and injustice. (CEH, 1999: paras 3 and 4)

The Guatemalan insurgent movement emerged as a response to structural, historic and systemic injustice, exclusion, poverty and discrimination in the country, its members proclaiming the need to take power into their own hands to build a new social, political and economic order. Its perspective was based on Marxist doctrine in its different international interpretations (CEH, 1999). At the same time, the social movement, structured on the basis of socioeconomic demands, was growing. Both the revolutionary and the social movements were strategically and systematically repressed. By the end of 1986, the levels of repression had reached unimaginable levels with regard to human rights violations.

It was the appearance of the guerrillas in the dominant geopolitical context of the Cold War and the increase in social protest that created the conditions for the country's economic and political powers to react and establish the National Security Doctrine. This identified the insurgent movement as an internal enemy that needed to be annihilated at any cost. This in turn resulted in the consolidation of a state strategy based on the political use of the security forces to implement extensive repressive campaigns that became state policies.

The results of this process included: the repression of all opponents of the government; the elimination of all political participation; the perpetu-

ating of government structures through military coups and electoral fraud; and over 200,000 victims between 1962 and 1996. The human rights violations suffered by the Guatemalan people included crimes such as genocide against the Mayan population, arbitrary execution, imprisonment, forced disappearances, torture, rape and 626 massacres.

According to the CEH:

With the outbreak of the internal armed confrontation in 1962, Guatemala entered a tragic and devastating stage of its history, with enormous human, material and moral cost. In the documentation of human rights violations and acts of violence connected with the armed confrontation, the Commission for Historical Clarification ... registered a total of 42,275 victims, including men, women and children. Of these, 23,671 were victims of arbitrary execution and 6,159 were victims of forced disappearance. Eighty-three per cent of fully identified victims were Mayan and seventeen per cent were Ladino.

Combining this data with the results of other studies of political violence in Guatemala, the CEH estimates that the number of persons killed or disappeared as a result of the fratricidal confrontation reached a total of over 200,000. (1999: paras 1 and 2)

The most significant aspect of this information, which will have a direct impact on transitional justice, is that the CEH reported that over 90 per cent of the responsibility for human rights violations during the internal armed conflict lay with the Army.

The long process of peace negotiations included a large number of different efforts with actors from different regions of the world. It culminated, in 1996, with the signing of the Peace Accords in Mexico. Since 1996, the economic, political and social situation in Guatemala has been complex, with internal and external factors creating unstable conditions for democratic consolidation. Specifically:

- The socioeconomic situation that prevailed before the internal armed conflict continues to be profoundly unequal, with extreme polarization in access to resources and between 40 per cent and 60 per cent of the population living either in poverty or in extreme poverty.
- The political situation has not been consolidated owing to the absence of a social pact to mobilize actions and demands and place the main concerns of the majority of the population on the agenda. Political parties have also failed to consolidate, and the social movement, which continues to be disorganized, has not been able to recover from the repression suffered during the conflict.
- The social framework is extremely divided, because of both the legacy of the conflict and the political and socioeconomic instability that has become worse during the post-conflict period. Psychosocial elements related to the crimes against humanity still survive and impunity

prevails, which means that crimes fail to be investigated and victims have not been given adequate compensation.

- The state apparatus is weak and unstable. This is symptomatic of institutions that have not managed to consolidate and that are part of a long state tradition in Guatemala of evading accountability, a situation that also responds to the influence of neo-liberal policies.
- These elements have resulted in an unstoppable and profound systemic violence that is among the worst in the region and in the history of the country, with an average of 48 murders per 100,000 inhabitants.
- The inefficiency of the justice system, which solves an average of 2 per cent of cases in a context of profound impunity, has resulted in the establishment of the CICIG (a UN-backed International Commission Against Impunity in Guatemala).

Thus, the growth of insecurity and of organized crime, the high rate of poverty, the militarization of citizen security forces and the incapacity of the state to control violence were all challenges for the government of Álvaro Colom, who took office as President in January 2008.

Mechanisms of transitional justice in Guatemala

A description of transitional justice in Guatemala involves thinking about a somewhat vague process, mainly because most of the human rights violations in the recent past have not been punished. There have been no profound or integrated processes related to justice, reparations and guarantees of non-repetition. These processes are still pending for society and the state as a whole. The many factors that intervene in difficulties related to transitional justice processes in Guatemala have been described in several documents and by various organizations, but can be summarized as follows:

1. From a political viewpoint, the fact that society fails to demand accountability is an effect of the long years of repression and counter-insurgency and of the nature of the mass crimes and cruelty committed during the conflict. This is related to the continuation of the same economic and political power structures that have dominated the country throughout its history. A balance of power has not been achieved, and there are no real counterweights despite the huge and valuable efforts of individuals and civil society organizations. This is reflected in the politicization and control of hegemonic structures in the justice system in the past and present, as well as the implementation of delaying tactics to obstruct accountability.
2. From an economic standpoint, accountability consists of extremely complex processes and costs because of the magnitude of the viola-

tions and the facts that victims are mainly rural, poor and indigenous and that they suffer systemic and structural historic discrimination, making access to the justice system almost impossible. Lawsuits are expensive and long, in addition to the fact that many victims have to travel from remote communities. But the fundamental reason for frustration is that the state has failed to implement a policy to support the development of mechanisms to make reparations effective.

3. From a social standpoint, it is clear that the absence of coordination in society, as a result of the conflict, creates huge additional difficulties for accountability. Community structures and victims' organizations face a large number of difficulties in organizing themselves. There is distrust, fear, even terror. Permanently oppressive and threatening policies by those responsible for crimes remain unpunished, acting as deterrents to demands for justice and reparations.
4. From a cultural perspective, Guatemala continues to have a collective legacy that falls between memory and forgetting, between reconciliation and hate, between fear and the need for reparations, in addition to the profound consequences of a traditional authoritarian culture created by the hegemonic power system. This is immersed in a context of violence, insecurity and weak democratic governance, which is a result of past and present conditions, of economic crises and transnational crime, a situation in which discrimination and intolerance are rampant in many sectors and oppressive systems strengthen the culture of authoritarianism and intolerance.

An initial approach to transitional justice in Guatemala is based on the formal instruments produced in the context of the peace negotiations, which are related to transitional justice because of their content. We have identified four main ones:

- *Comprehensive Agreement on Human Rights*. This was one of the first accords, signed in 1994 in Mexico, which established a general framework for commitments related to protection, guarantees and compensation and against impunity.
- *Agreement on the Establishment of the Commission for the Historical Clarification of Human Rights Violations and Acts of Violence That Have Caused Suffering to the Guatemalan Population*. Signed in Oslo in 1994, this was one of the main commitments relating to transitional justice, because its mandate was to clarify violations committed during the armed confrontation, draft a report of its findings, and formulate specific recommendations for peace and national harmony, in addition to measures to preserve the memory of victims and achieve democratic strengthening. A significant aspect is that an agreement was reached not to name the individuals responsible for violations.

- *Agreement on the Strengthening of Civilian Power and the Role of the Armed Forces in a Democratic Society*. Signed in Mexico in 1996, this is one of the most significant achievements of the negotiation process because it focuses on central elements that would serve as a basis for a general transition of the political regime by establishing a foundation for democratic consolidation. Furthermore, it thoroughly develops the main components of reform of the security and justice systems along three main lines: the reformulation of doctrine with subordination to the civil power and a shift from a state-centric model to an anthropocentric one; institutional restructuring to separate internal and external security, to delimit the functions of the Army and to reduce its size, budget and deployment; and new relations between the state and society.
- *Law of National Reconciliation*. This law, signed two days before the signing of the Peace Accords, was significant because it was a form of amnesty for crimes committed during the conflict. Although its provisions exclude the crimes of genocide, torture and forced disappearance, it establishes full exemption from all responsibility for political crimes committed against state security forces and by state authorities.

Although this legal framework was considered by many analysts to be advanced, in practice it has meant that transitional justice processes have failed to develop in the country. The serious violations committed, despite their qualitative and quantitative nature, remain unpunished. These considerations support the argument that perspectives of transitional justice in Guatemala should be understood in the context of both legal constraints and the absence of institutional mechanisms. This has mainly been a result of the absence both of political will since the end of the conflict and of a social base to push for an integrated and thorough investigation of the truth, prosecute the perpetrators and provide thoroughgoing reparations for victims of the tragedy experienced by the Guatemalan people. Only in this way will it be possible to achieve the sought-after guarantees of non-repetition of the terrible violations that caused and continue to cause such terrible pain and suffering among the people, as well as recognizing the cost this has represented for democratic consolidation.

Power and time-frames

Accountability for crimes against humanity committed during the conflict in Guatemala has drawn considerable attention from various international agencies which are concerned about the lack of legal proceedings. This issue is extremely complex because the balance of political and

economic power, considered to be one of the main causes of the conflict, remains unchanged. Those responsible for human rights violations form part of the power structures, which have maintained the profound inequity that was one of the causes of the uprising of the popular revolutionary movement. It was to repress and destroy this movement that extensive annihilation strategies were designed and executed against civilians, far beyond the remit of a confrontation between the Army and the guerrillas.

For the majority of observers, the main explanations of these shortfalls are that the hegemonic forces that have held economic and political power in the country remain intact, as do those that used the state apparatus to repress the opponents of the historically exclusive, unequal and discriminatory system. Any objective overall assessment of transitional justice processes in Guatemala, in terms of processes established for accountability, will have to conclude that these lack the clear and sustained impetus of legitimate processes. The prevailing impunity, the continued participation of known perpetrators in political and public spheres, the dominant powers and an authoritarian culture have blocked substantive progress towards a change of political forces. A clear indication is the fact that a member of the Army who was responsible for intelligence structures during the confrontation, Otto Pérez Molina, won the 2011 presidential elections.

So, from a global perspective, although there are legal instruments available for accountability for crimes against humanity committed in Guatemala, these are not used by the justice system for a broad range of political, economic and social reasons. This is why recourse has been sought from inter-American and international human rights bodies to punish the state and achieve recognition of victims' rights. In other words, even though the legal, legitimate framework exists, it is simply not being used. For example, the Guatemalan state has not yet fully recognized the historical truth of the CEH report, nor has it committed itself to comply with its recommendations.

Applying mechanisms to achieve transitional justice in Guatemala is something that has to occur in the context of the process of achieving and complying with the commitments of the Peace Accords. The aims of the Accords were first of all to put an end to the structural causes of the conflict and then to mitigate its effects. Although the causes of the conflict are related to a state that excludes certain sectors of the population, the role played by the Army in repressing groups, political parties and analysts who advocated a fairer system became a consequence of the conflict that then exacerbated it.

Impunity has existed for a long time, before, during and after the conflict, owing to a weak democracy and inefficient and corrupt governments.

The political context, which is certainly unfavourable to a reconciliation of interests conducive to accountability for past events, is unstable and huge efforts will be required from all sectors of society. However, efforts do continue. Several forums on transitional justice have concluded that, the more time that passes after the end of the conflict, the better the conditions for the treatment and prosecution of perpetrators of human rights violations. In Guatemala, this has also been one of the arguments used with regard to the process. However, for many sectors, relatives of victims and international actors, despite the fact that the conflict ended well over a decade ago, there are still no real processes for achieving accountability.

Criminal justice

The investigation and prosecution of perpetrators of human rights violations in the context of the internal armed conflict have come up against all kinds of resistance and opposition, and access to justice has been obstructed for victims. Although there are different reasons for this situation, the state has neither formulated nor implemented policies to apply justice because the perpetrators are in positions of political and economic power. From this viewpoint, the overall political context has not been conducive to the fight for justice, a situation that can be observed in the different delaying and obstruction tactics used and the complexity of prosecuting the perpetrators. Furthermore, there are other factors that make it difficult to find out who all of the perpetrators are. So far there has been no exhaustive effort to gain access to and integrate existing information about past events through the recovery and opening of files or other official sources in order to collect data on the structures, operation and responsibilities of institutional actors who committed the crimes. Significant efforts have been made, but these have been uncoordinated and disorganized. The main difficulty lies in the large number of counter-insurgent operations and the fact that they were deployed over large areas of the country, making it more difficult to retrieve the information. Although lack of access to the truth is a profound limitation, justice is even more unattainable. Guatemala has the national and international legal framework for prosecuting all the crimes committed during the internal armed conflict. Yet there has been absolutely no justice for victims. Several documents and testimonies have denounced the absence of action and the obstruction of justice by the state in relation to prosecuting the perpetrators of crimes committed during the conflict.

The Office of the Public Prosecutor has played a central role in this context.

According to the Law of Reconciliation, the path to the courts is open for torture victims and for the relatives of victims of massacres or forced disappearances. MINUGUA [the United Nations Verification Mission in Guatemala] has again criticized the obstruction of this path to justice by the state. The last Attorney General in De León Carpio's administration denounced the pressure applied on him by the executive branch not to investigate or prosecute any member of the army. A recent analysis by MINUGUA describes in detail the obstructive attitudes of state agents. The Office of the Public Prosecutor never starts investigations on its own, nor does it investigate accusations, and frequently it even resists receiving accusations. (Bornschein, 2005: 5)

Despite being largely funded by other departments, the justice system is not only inefficient but also works only on the cases it chooses at its own discretion. It intentionally conceals any prosecution related to the past. Furthermore, there are general limitations throughout the justice system, including technical, operational and investigative deficiencies, both for prosecutors and for judges. Another factor contributing to this unstable situation is that justice operators are often vulnerable and threatened by powers whose interests might be affected. Furthermore, the appointment of public officials is highly politicized and there are no procedures in place to check their past. In theory, the creation in 2005 of a Historical Clarification Unit in the Office of the Public Prosecutor specifically to investigate crimes committed in the past (as well as to regulate exhumations) ought to have made headway here. Yet this unit has only eight members of staff and, by the end of 2008, it had not prosecuted a single case, despite having received 164 accusations.

The system of impunity that serves to support the existing powers in Guatemala received another boost with the nullification by the Constitutional Court in December 2007 of the decision of the Fifth Sentencing Court to arrest retired General Ángel Aníbal Guevara and the former chief of police Pedro García Arredondo. The Court also demanded that they be released.

These arrests were based on judicial extraditions requested by Spain on the basis of international law on investigating genocide committed by former members of the military. The Guatemalan Court annulled all the requests for extradition issued by Spain. Experts concur that the decision was legally and juridically arbitrary, violating international conventions signed by Guatemala, such as the Convention on the Prevention and Punishment of Genocide and the Convention against Torture, as well as ignoring the principle of universal jurisdiction, which does not recognize boundaries for genocide and crimes against humanity. Furthermore, the ruling stated that the crimes committed by former Army members are related to political common law crimes, a definition contained in the Law of Reconciliation that grants amnesty and can be used to acquit people

of crimes. Baltasar Garzón, the judge from the Spanish National Court responsible for this process, described the decision as shameful, and it has been rejected by the national and international human rights community because it so clearly contributes to increasing and exacerbating impunity. In addition, there has been the controversial role played by the Office of the Human Rights Ombudsman in Guatemala, an institution that fails to work consistently to investigate violations committed during the conflict and that has neither urged nor endeavoured to secure state compliance with the recommendations contained in the CEH report.

In all, the situation represents an extremely unfavourable context for seeking justice through legal proceedings. Impunity, inefficacy and the precariousness of the victims' conditions have led to distrust and fear. Very few legal proceedings have taken place or are still ongoing, although they are emblematic. As a result of this situation, justice for the victims through the prosecution of perpetrators is still pending. Indeed, it has even been difficult to make an inventory of the number of legal proceedings because there are no records that include and systematize all the different cases in the justice system. There is information available about some cases in the Office of the Public Prosecutor; other cases have been referred to the inter-American human rights system, and still others to Spain. Furthermore, the specialists working on these cases have expertise in different areas (for example, forced disappearances, exhumations and torture), which does not help the compilation of data either.

Since the beginning of transitional justice, the nature of the crimes has made them difficult to individualize, so work has focused on emblematic cases. An effort has been made to record the proceedings at different stages – accusation, filing of cases, investigation, indictment and resolution – but there is an almost complete absence of information. Despite this, there are some cases that represent an unexpected triumph over the conditions prevailing in the country. The following paradigmatic cases resulted in convictions:

- the murder of Bishop Gerardi, two days after presenting the report *Guatemala Never Again* (ODHAG, 1998) from the Inter-Diocesan Project for the Recovery of Historical Memory (REMHI)² – this and the CEH report are considered to be the two truth reports for Guatemala, with thousands of testimonies related to the internal armed conflict;
- the murder of the anthropologist Myrna Mack, who worked with displaced persons and whose sister now runs a human rights organization;
- the Río Negro massacre in March 1982, one of five mass murders that occurred in the Río Grande community between 1980 and 1982 and in

which 444 of the 791 inhabitants were murdered, all of whom were indigenous Mayan people;

- the Xamán massacre (which according to the CEH report was the last of 626 mass killings committed as part of the genocide perpetrated in Guatemala), in which 11 people died and 28 were wounded, captured and imprisoned by the Army members responsible.

It is important to underline that people who have presented accusations have exhausted all possibilities for redress with the national bodies responsible for legal proceedings and have resorted instead to the inter-American or the international human rights system.

In the Playa Grande massacres, for example, one public official stated that it was possible to investigate only “as long as [the complainant] personally identified the perpetrators”. In another case, the official asked for the complainants to identify the remains of the victims of the massacre, an impossible task because the 400 victims had been burnt. The proceedings were shelved.

It has been possible to start proceedings in only a few cases. These have generally been accompanied by intimidation and threats, including against the judges or prosecutors. In some cases, sentences have been passed, but this has occurred only when the accused are former members of PAC [paramilitary groups organized by the Army during the armed conflict]. This is why complainants sometimes resort to the Inter-American system, which does not identify individual responsibility. The attitude of governments to this international entity has been varied. In several cases, the responsibility of the state has been recognized and indemnification paid. The policy for overcoming the past appears to have two faces, a domestic one and an international one. (Bornschein, 2005: 5)

Guatemala is one of the countries with the largest number of cases in the Inter-American Court of Human Rights, which has already passed sentence in 11 contentious cases against the Guatemalan state, only 3 of which are related to the internal armed conflict. The Inter-American Commission on Human Rights has found that the state violated several provisions of the American Convention on Human Rights in over 40 cases between 1993 and 2004, and it has passed over 80 agreements for “friendly solutions” between the state and petitioners. However, the inter-American procedure is far too lengthy and expensive for the majority of victims.

That said, there is an ongoing proceeding that is particularly significant for Guatemala. In July 2006, Santiago Pedraz, another judge from the Spanish National Court, issued an international search and arrest warrant for Efraín Ríos Montt and seven more people accused of genocide, terrorism, torture and illegal arrests (see Box 9.1). The background to Judge

Pedraz's decision was the 2005 Spanish Constitutional Court ruling that the Spanish justice system *does* have the authority to judge genocide and crimes against humanity, even when there are no Spanish victims. More immediately, Judge Pedraz was acting on a request for the arrests from the Spanish Attorney General's Office, frustrated at the lack of cooperation by the accused in the investigation against them, and after the failure of the visit of the Inter-American Commission to Guatemala, armed with writs, to obtain statements from them. Pedraz was thus in a strong position to allege an obstructionist attitude by the accused. The arrest warrant included the former head of state Romeo Lucas García, who was to die in 2008. He and the rest were charged with being responsible for approximately 100 massacres in which over 6,000 people died, as shown in Box 9.1.

The Spanish justice system had moved rapidly through the early 2000s to get to the landmark of the 2006 warrants, but in Guatemala the political context was both unstable and weighed down by the past. In particular, Ríos Montt is a well-known leader of the fourth-strongest political force in Guatemala, he has been a presidential candidate in elections since the signing of the Peace Accords, and he has been a member and president of Congress. All of which has more than a little to do with the

Box 9.1 Search and arrest warrants issued by Judge Santiago Pedraz in 2006

- Efraín Ríos Montt, head of state from 23 March 1982 to 8 August 1983. Accused of being responsible for over 47 massacres.
- Óscar Mejía Víctores, a general who governed the country from 8 August 1983 to 14 January 1986. Accused of over 47 massacres.
- Romeo Lucas García, President from 1978 to 1982. Accused of over 43 massacres.
- Ángel Guevara, Minister of Defence during the administration of Romeo Lucas García. Accused of over 43 massacres.
- Benedicto Lucas García, Army Chief of Staff during his brother's administration. Accused of over 43 massacres.
- Germán Chupina, director of the National Police during the Lucas administration. Accused of burning down the Spanish embassy in 1980.
- Donaldo Álvarez Ruiz, Minister of the Interior during the Lucas administration. Accused of burning down the Spanish embassy in 1980. A fugitive from justice since 2004.
- Pedro García Arredondo, former head of the 6th Command of the National Police during the Lucas administration. Accused of burning down the Spanish embassy in 1980.

Table 9.1 Legal cases related to the conflict

Legal proceeding	Situation
Xaman massacre	Conviction for felonious homicide. Civil proceedings against the state for damages were dismissed.
Myrna Mack case	One conviction for the actual murder and one for planning it, against Coronel Valencia Osorio, a fugitive from justice. In the inter-American system the state was found guilty of violating the right to justice.
Cándido Noriega case	Several people were convicted of extra-judicial execution.
Murder of Bishop Gerardi	Army members and a priest were convicted.
Río Negro massacre	Verdict of guilty. The accused are fugitives.
Spanish embassy massacre	Crimes of genocide, torture and terrorism. The accused have been identified. Investigation ongoing.
Genocide against 9 communities by Lucas García's General Army Staff	Crime of genocide. Investigation ongoing.
Genocide against 14 communities by Riós Montt's General Army Staff	Writ of habeas corpus presented by the defence to obstruct access to military premises.
Colotenango case	Against former members of Civil Patrols (paramilitary groups organized by the Army during the armed conflict) accused of extra-judicial execution and acquitted.
Las Dos Erres massacre	Trial discontinued because of 32 unresolved writs of habeas corpus since 1998.
1,400 accusations by the National Procurator's Office	No information available about whether proceedings were initiated.
1,500 exhumations	No proceedings.
164 cases presented to the Office of the Public Prosecutor	No proceedings.

decision of the Guatemalan Constitutional Court in December 2007 to deny Spanish jurisdiction over the accused. Faced with this flagrant defence of impunity, even the Office of the Human Rights Ombudsman has been moved to protest, along with other human rights organizations. Table 9.1 provides an outline of legal cases related to the conflict.

Exhumations deserve a special section of their own because, although they have been performed, it has been with difficulties and obstructions similar to those faced by other proceedings. Forensic work has mainly been the responsibility of civil society organizations because the state has failed to establish any policy to deal with the issue. Over two decades or so there have been about 1,500 exhumations for which, by law, the Office

of the Public Prosecutor is supposed to receive a formal accusation so that the investigation can proceed. There is some hope in the current context. During his 2007 election campaign, former President Álvaro Colom offered to open the archives related to the internal armed conflict. In March 2008 a presidential order created a commission presided over by the Inspector General of the Army, Colonel Aníbal Flores España, to declassify the military archives from 1954 to 1996. One of the most internationally important archives, the Historical Archive of the National Police, was also accidentally discovered in 2005. Considered to be the largest of its kind in Latin America, with an estimated 4.5 linear kilometres of documents and files, the archive contains an estimated 50–75 million documents. The contents are reports of police activities between 1902 and mid-1997, when the National Police was replaced by the current National Civil Police, in accordance with the Peace Accords. The result of the valuable work of a multidisciplinary team that has organized, cleaned and digitized at least 7 million pages of documents is that they are ready to be used in legal proceedings. By early 2009, the fruits were beginning to show with the prosecution of several members of the police for the disappearance and murder of trade union leader Fernando García in 1984.

March 2009 was also when a judge of the Criminal Court in Guatemala, investigating a case brought by relatives of victims, received two military files on operations against civilians during the internal armed conflict. To lay hands on the “Victoria 82” and “Firmeza 83” military plans was itself significant, but so too was the fact that another two files that the judge also requested – “Ixil” and “Sofía” – were withheld. This confirmed that the “Sofía” plan in particular might be extremely compromising. One version of it was even mysteriously sent to President Colom (who sent it to check for authenticity). Subsequently, the media were leaked information that General Otto Pérez Molina, then a politician from the opposition party and Colom’s main rival during the 2007 presidential elections, appears to have been the person who implemented the “Sofía” plan. Such events are encouraging, but also show how much work is still to be done for transitional justice in the country. Taking into account the extreme nature and number of crimes committed during the conflict, legal proceedings have been shockingly minimal. The difficulties in making headway against unaccountability and impunity remain overwhelming. In the words of the World Organisation Against Torture (OMCT): “the persistence of impunity in relation to crime in general and particularly to human rights violations is exacerbated by the repeated non-compliance of the state with its obligation to prevent, investigate and punish violations. Impunity exists for the majority of violations that occurred during the internal armed conflict as well as those committed after the peace accords were signed” (OMCT, 2006: 110).

Truth

There are many elements that make the path to justice difficult in relation to crimes committed during the conflict. One of these is the limitation of the right to the truth. This can be seen in the difficulties in resolving the tension between truth and forgetting, memory and reconciliation. Two extraordinary reports have been written about this subject: the CEH report, coordinated by the United Nations, and the REMHI report, conducted by the Catholic Church of Guatemala. The recording and categorization of violations, as well as the rigorous methodology and procedures used, have made these reports invaluable for understanding the past. Nonetheless, the CEH conceded that it had not been able to collect all the testimonies it had wanted to, and that some massacres had not been included in the analysis. It is worth reiterating that the CEH's mandate expressly forbade using the information and testimonies collected as evidence for the purposes of mounting prosecution cases. The CEH experience, then, also demonstrates how gaining and granting access to the truth has not become a state policy. The CEH worked as an international commission whose recommendations have not been implemented. In fact, the findings of the report have not been made public; copies have not been distributed and the population is largely unaware of it. There were no institutional dissemination strategies developed for this information to alter society's values and attitudes – a key condition for non-repetition.

The pattern set with the CEH has been repeated. For example, in March 2008, the group that has been working on the project with the Historical Archive of the National Police publicly presented its first report, *The Right to Know*, based on the findings from the period of worst repression, 1975–1985. No such right to know has been promulgated by the state, which, instead, has conspicuously failed to develop a consistent policy on institutional archives that could contribute to knowledge of the truth. Self-evidently, the impunity of the powerful groups responsible for the crimes of the conflict is best served by amnesia.

And yet on several occasions in recent years various presidents have publicly requested forgiveness on behalf of the state from relatives of disappeared or murdered persons and survivors in the communities that suffered genocide and the cruellest forms of repression. The most recent occasion was in the Courtyard of Peace at the National Palace of Culture during a tribute in honour of people murdered during the conflict. Special mention was made of the university leader Alejandro Cotí, who was kidnapped, tortured and murdered in 1980. President Colom drew attention to the fact that, during the civil war, 496 students from the national university had been murdered. In other words, at some deep level there

is recognition by the state of its own responsibility. It could hardly be otherwise.

People

The general living conditions of victims and survivors of the conflict are extremely poor, with severe cultural and economic limitations. Access to justice requires resources, time and a mastery of the Spanish language. And, given that the majority of victims live in rural indigenous areas, this structural inequality also limits their access to justice. In the few ongoing legal proceedings, the victims, relatives and organizations that support these causes are co-prosecutors; they present witnesses and documentary evidence, at the same time as advising and monitoring the procedures of justice operators. This difficult and complex situation is of central importance for understanding the restrictions on access to justice. Moreover, threats received and the risks these people must take are serious problems.

It is also significant that Guatemala has not experimented with any alternatives to the formal judicial system, which presents formidable barriers. As has been noted by Samset and colleagues, this contrasts with the use of the *gacaca* courts in Rwanda, an institution between the formal and traditional justice systems, and one that received about 20 per cent of the international aid given to transitional justice in that country (Samset et al., 2007). Instead, in Guatemala, the aim has been to bring the customary law of indigenous people into line with formal law. These circumstances have contributed to inconsistency in the articulation of victims' claims; valuable efforts have been made, but usually individual ones. Access to full transitional justice is based on the attainment of a collective set of rights (restitution and reparation), as well as access to justice from a multicultural perspective. Without progress on these fronts, social justice remains as elusive as ever.

Supposedly, the mission of the National Reparations Programme is to respond to the demands of victims of the conflict with full compensation. Yet institutional difficulties have meant that the effort has not been consolidated. No clear and strong policy has been forthcoming for the restoration of the victims' dignity, for economic and cultural reparation or for a real contribution to reconciliation among the people. On the contrary, confrontation still exists in society for the same reasons as in the past, as well as for new reasons, as evident in the polarization, distrust and intolerance fostered by impunity for human rights violations. Because the instruments and mechanisms that could be used for accountability are not so used, their legitimacy also wanes.

National and international civil society is striving to achieve recognition of the crimes against humanity in Guatemala. The state has accepted responsibility on several occasions, but this has not led to the coordination of a specific, integrated policy. On the contrary, the negligent attitude of the state to the past has had a negative effect on accountability: truth, justice and reparations have been postponed, and attempts to integrate these goals have failed. In this context, it is necessary to start deep-seated processes of awareness and advocacy because accountability is about more than merely legal proceedings. The recovery of historical memory, the democratic rule of law, the effective protection of human rights and the elimination of the predominant culture of impunity should all be sought simultaneously. Only then will the way be clear for overcoming authoritarianism and its political, social and cultural manifestations.

Non-repetition guarantees and the reform of the security sector

With all of the above-mentioned limitations related to justice, access to the truth and the real political ability to change, non-repetition guarantees have been seriously compromised. Furthermore, the purging of the security forces has failed to be clearly based on a mandate, meaning that human rights violators during the conflict have remained unpunished and continue to participate in the political, business and everyday life of the country.

According to the CEH, the perpetrators acted under a counter-insurgency policy designed to defend the system. Beyond any political or ideological discussion, thousands of testimonies, documents, investigations and other initiatives have demonstrated that the state – via its National Security Doctrine – was responsible for crimes against humanity during the conflict, responding to the logic of hegemonic political power, but implemented by specific agencies and perpetrators, the majority of whom remain unpunished. As cannot be emphasized enough, the CEH's conclusion was that state forces and associated paramilitary groups committed 93 per cent of the violations documented by the Commission, including 92 per cent of arbitrary executions and 91 per cent of forced disappearances (CEH, 1999: 25). Amongst its other tasks, the CEH was asked to make recommendations for the transformation of the security and defence forces as a mechanism to guarantee non-repetition. The provisions for reorganizing the security forces were designed with a security model in mind that would guarantee individual rights and provide access to justice.

There have been significant developments in security sector reform in Guatemala – the legislative framework resulting from the Peace Accords, institutional changes, the creation of new structures such as the National Civil Police and the dismantling of some repressive structures, all with some input from civil society. But changes in the security systems have not led to the development of efficient or strong security structures. This is linked to fundamental aspects of transitional justice, including the absence of a systematic process to investigate and prosecute the security forces responsible for political and ordinary crimes during the internal armed conflict. Although there is a Law of Reconciliation, some analysts view it as a factor that has facilitated the continuity and consolidation of impunity, as well as being arbitrary – because the more serious crimes of genocide, torture and forced disappearance are exempt from this law.

Although the Peace Accords, in accordance with an anthropocentric view of security, provided the foundation for a democratic vision of security and justice based on the rule of law and human rights, in practice no structures have been established that are consistent with that approach. In particular, the absence of non-repetition guarantees leads to the possibility of violations of fundamental rights. Army members are involved in citizen security (in the current combined forces) and there are still two distinct doctrines (the military doctrine of annihilating the enemy and the civilian doctrine of prevention and rehabilitation). One aspect that is reinforced by all this is the persistence of factors involving power management and social control with systemic violence based on the deeply rooted structures of domination in the country. This occurs because of the continued military presence in the security forces at a time when their past responsibilities have not yet been resolved. The signal communicated by not prosecuting perpetrators of crimes against humanity, such as the ongoing case in Spain presented by the Spanish National Courts, leads to a psycho-social state of fear and distrust that is scarcely conducive to democratic progress and consolidation with full observance of human rights.

Indeed, hopes have again been dashed. At the ending of the conflict many were looking for a transformation of the state, with the expectation that a reorganization of the security apparatus would make it capable of providing genuine security and peace for Guatemalan society. Inadequate reform has instead increased the feeling of insecurity and hindered trust in justice. No doubt, part of the explanation lies in the vicious circular logic of weakened institutions: the change of personnel they require to become strong is impossible to effect because they are weak. Yet the absence of real political will is part of the equation too. So it is important to take into account that post-conflict transition processes are permeated by

practices acquired by the state apparatus during the war, not least those of treating citizens as possible opponents who potentially need to be controlled and repressed. This form of action and logic in the institutions is manifested in a multitude of daily practices that tread a fine line between the obligation to guarantee security and the violation of basic individual rights. This ambiguous, interwoven mix of old and new behaviours makes it difficult to trust in the country's security and justice institutions, much less believe that they will respond to people's demands. And if that is the case, it becomes far harder to see how the investigation, prosecution and punishment of those who were guilty of human rights violations can be possible.

At the same time, the weakness of civilian security institutions has re-empowered the Army in relation to citizen security. This, of course, also delays any possibility of a clean-up of the Army, as well as making it unlikely that it will confess to its role during the conflict and request forgiveness from Guatemalan society. In effect, the only possibility of such an eventuality would have to come from inside the Army itself, rather than being imposed by political decision. The *esprit de corps* shown by the military throughout and just after the conflict suggests that it is extremely unlikely that mechanisms of confession and acceptance will be adopted.

There is another link between the past and the present here that has been insufficiently investigated – between the perpetrators of political crimes and the perpetrators of ordinary crimes. In the search to identify the former, the latter have been overlooked, in turn allowing another area of impunity to open up. In other words, in order to mobilize the justice system to act properly, the overlaps between past and present structures should ideally be investigated from the perspective not only of political crimes but also of all the different criminal variables. The principles of security sector reform have to do with establishing systemic security and justice transformation processes for citizens; the aim of justice system reform, as indicated by transitional justice, is to defend fundamental guarantees. In Guatemala, the power structures that unleashed so much terror in the past remain entrenched. Their power is now to ensure impunity; their culture is still authoritarian, as announced even by the persistence of images from the past.

Cultural inertia should not be underestimated. Neither should the laxity of an unfair and ineffective justice system that, however institutionally weak, has also shown itself reluctant to change in the direction of a democratic security and justice system. But the main reason for the overall lack of progress is the nature of the power of the state. This continues to be held by the traditional sectors of the economic and political élite, which failed to change with the transition and which will continue to

exercise governmental control based on the same perspective that sustained repression and provided grounds for the annihilation and eradication of the “enemy” that sought to change the status quo. The country’s political system has yet to accommodate any counterweights to the power of that élite.

External influence

During the negotiation of the Peace Accords, ongoing support was given by the international community to the whole process. In the 1994 Framework Agreement for the Resumption of the Negotiating Process between the Government of Guatemala and the URNG, the parties asked the governments of Colombia, Spain, the United States, Mexico, Norway and Venezuela to form the Group of Friends of the Guatemalan Peace Process. The functions of this group were to support the UN Secretary-General’s Representative and to speed up the negotiation process, as well as to act as honourable witnesses providing greater security and strength to the commitments.

After the approval of the Comprehensive Agreement on Human Rights in 1994, the presence of the United Nations Verification Mission in Guatemala (MINUGUA) was requested. This entity was responsible for verifying the process of implementing the Peace Accords, and its functions were to provide technical advice and to act as a coordinator of assistance with resources for the process through the United Nations and its various agencies.

The role and resources of the international community were especially significant in the area of security sector reform. Indeed, along with the justice system, security sector reform received the bulk of the money donated to the country to implement the Accords. In the final report on the actions of MINUGUA in Guatemala, the Secretary-General of the United Nations stated that donations to the Trust Fund had amounted to US\$19.8 million (United Nations General Assembly, 2005). This fund comprised voluntary contributions from nine member states: Germany, Belgium, Canada, Denmark, the United States, Norway, the Netherlands, the United Kingdom and Sweden. Almost half of the Fund, 45 per cent, was used for projects to strengthen the justice sector and the defence of human rights. Approximately 21 per cent was used for improving public security through various projects to strengthen the recently created National Civil Police. A large part of the Fund went to the Police Academy and human rights training, along with the creation of administrative controls inside the police force and increasing the number of indigenous recruits.

The international community continues to be involved in finding a way to end impunity in the country. The concern to achieve better levels of justice application has led donors to keep investing heavily in the justice system, yet without achieving satisfactory results against impunity. A sign of this concern was the creation by the United Nations of the CICIG. In the Agreement that the CICIG signed with the Guatemalan government, impunity was defined as

the de facto or de jure absence of criminal, administrative, disciplinary or civil responsibility and the ability to avoid investigation or punishment, all of which weaken the rule of law, impeding the ability of the State to fulfil its obligation to guarantee the protection of the life and physical integrity of its citizens and provide full access to justice, with the resulting loss of confidence of citizens in the democratic institutions of the country. (CICIG, 2006: preamble)

In effect, the Guatemalan state was admitting to the existence of illegal security groups and clandestine security organizations.

The establishment of the CICIG was indeed proposed to the government to assist it with its commitment, assumed in the Comprehensive Agreement on Human Rights on 22 March 1994, to combat and end those groups and organizations. As the terms of the CICIG's mandate are so indicative of the dystopian realities of the country, they are worth pausing over (CICIG, 2006, Article 2(1)):

[T]he Commission shall have the following functions:

- (a) Determine the existence of illegal security groups and clandestine security organizations, their structure, forms of operation, sources of financing and possible relation to State entities or agents and other sectors that threaten civil and political rights in Guatemala . . . ;
- (b) Collaborate with the State in the dismantling of illegal security groups and clandestine security organizations and promote the investigation, criminal prosecution and punishment of those crimes committed by their members;
- (c) Recommend to the State the adoption of public policies for eradicating clandestine security organizations and illegal security groups and preventing their re-emergence, including the legal and institutional reforms necessary to achieve this goal.

Conclusion

The lessons that transitional justice can offer for any social process are far-reaching, with many different levels and dimensions, although they are all part of the same reality. The lessons learned by Guatemala from its past relate, above all, to the experience of crimes against humanity.

This has affected all levels of the state and society, and will require enormous and ongoing efforts from all citizens to overcome. But some lessons are more immediate. Although both civil society and the international community have made efforts towards transitional justice and the creation of the corresponding regulatory frameworks, practice has indicated that formal systems are not sufficient. It is necessary to focus on both the real and the symbolic power systems that perpetuate impunity for human rights violations. The absence of political agreements and of a well-articulated social base have weakened the fight against impunity, leaving virtually no counterweight to the hegemonic powers responsible for the violations. It is important to work to coordinate sectors of society and to create community awareness, not only to compensate for the past but also to create minimum conditions for non-repetition guarantees, a fundamental principle of transitional justice.

Although the Peace Accords provided the foundation for a democratic vision of security and justice based on the rule of law and human rights, in practice and beyond the legal framework no structures have been established that are consistent with that approach. This leads to the real possibility of violations of fundamental rights. In this respect, the past is still an open book. In other respects, though, the past has been closed. One of the main objectives of transitional justice is the recovery of the truth through mechanisms and processes of historical memory. This has been absent in the post-conflict transition process in Guatemala. There is no official policy or will to investigate or teach recent history at the different levels of learning of the formal and informal education systems. Rather, the policy that has been followed has been more like a strategy for forgetting. What makes the case of Guatemala so distinctive is that this oblivion has been embraced not for the sake of reconciliation but for that of gross impunity. There is still, then, an urgent need to mobilize efforts to record the history of the conflict. One could go even further and say that a critical history of the whole country needs to be written and taught. As for retributive justice, there has been no progress. The trials that have started have done so because of the initiative of individual prosecutors; there is no overarching prosecution policy for crimes committed during the conflict. In general, this type of justice has two barriers to contend with: the resistance of the perpetrators and of the individuals who were politically responsible for the violations, and the ineffectiveness of the justice system as a whole. The latter is clearly a determining factor. The general reckoning is that the justice system in Guatemala successfully prosecutes less than 5 per cent of murders. Prosecuting the crimes of the past becomes a dim prospect in that light. What we see instead is the expansion of impunity to the new actors from the world of organized crime.

The principle of compensation for the victims continues to be a deeply felt issue, one that is still pending because meaningful policies have not advanced beyond political vicissitudes. The existence of the National Reparations Programme represents institutional progress in the provision of attention to victims, but it has experienced difficulties of design and implementation. And it, too, has run up against formal and informal resistance to examining the past.

The current status of human rights in the country is controversial. Although freedom of expression and movement are accepted, the existence of high levels of violence is an expression of the failure of the state in its obligation to protect. Human rights workers face selective, but constant, threats. As for the social rights that revolve around the attainment of a minimally secure life for the majority of the country's inhabitants, they remain as far off as ever. In this regard, too, the account with the past is not closed.

Notes

1. The Commission for Historical Clarification was created during the peace negotiations in 1994 and had the mandate to investigate and report on human rights violations. It operated for one year after the signing of the Peace Accords.
2. The REMHI report was prepared by the Human Rights Office of the Archbishop of Guatemala (ODHAG).

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10

Transitional justice and democratic consolidation: The Peruvian experience

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The International Center for Transitional Justice defines transitional justice as “a response to systematic or widespread violations of human rights. It seeks recognition for victims and promotion of possibilities for peace, reconciliation and democracy. Transitional justice is not a special form of justice but justice adapted to societies transforming themselves after a period of pervasive human rights abuse” (ICTJ, 2009: 1). From this perspective, transitional justice includes many approaches, such as prosecuting human rights violators, truth commissions, reparations programmes, security sector reform and memorialization efforts. The Peruvian case perfectly fits within this definition, both in the need for transitional justice, and in being a place where most of the strategies have already been implemented. The Peruvian process is very complex and unfinished, with many successes and failures.¹

The purpose of this chapter is to look at the recent Peruvian history through the lens of this approach. Even though there have been meaningful exercises in victim compensation and some interesting initiatives related to the memory issue, I will focus on the experience of the Truth and Reconciliation Commission, the prosecution of human rights violations, particularly the paradigmatic trial of former President Alberto Fujimori, and the efforts to reform the security sector. These, in my view, constitute the backbone of the process in Peru. The central thesis is that transitional justice has had a tremendous impact in shaping the country’s renewed democracy; and that, at the same time, the possibilities of suc-

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cess for transitional justice are closely related to the legitimacy and success of democratic governance.

An internal war that led to authoritarianism

From the late 1970s to the late 1980s, Latin American countries underwent a historic process of transition from authoritarianism to democracy. After decades of military governments and massive human rights abuses, the entire region is today ruled by democratically elected governments, with the notorious exception of Cuba. It is true that democracies have not been able to solve most of these countries' problems; that democratic politics are widely discredited among the population; and that in the twenty-first century new threats to democratic life are emerging. Yet, at the same time, almost all countries have managed to keep their democracies working. In the 1990s, Peru was the sole exception; in 1992, the transition to democracy was brutally interrupted by an authoritarian government that ruled for eight years.

Why this exceptional situation? On 18 May 1980 Peru held free and fair elections for a return to democracy after 12 years of military rule. Yet, the very same day, the *Sendero Luminoso* (Shining Path) insurgency began. To understand what happened later, it is important not to forget the nature of Shining Path, which was by no means a typical Latin American insurgency movement. To begin with, it was clearly indifferent to and aloof from the democratization process taking place, one that included the unrestricted participation of all political movements, even the most radical leftists. At the same time, Shining Path had an extremely radical dogmatic and archaic ideology that totally disregarded human rights, as well as the norms and principles of international humanitarian law. This movement provided an ideological reading of reality, totally independent of the political process under way, and turned this interpretation into the guide and fundamental motivation to initiate and sustain armed action (see Basombrío, 1998).

Peru's emerging democracy was not prepared for this problem; what is more, all sorts of mistakes were made. Successive governments failed to understand the kind of threat they were facing and, instead of isolating a basically small and marginal group, they directed their attacks against the populations of poor rural areas, where Shining Path was trying to make inroads. In the process, awful human rights abuses took place, strengthening the insurgents' cause. Democracy was under siege. On one side, it was targeted by Shining Path, which wanted to prove its point that "aside from war, everything is an illusion" and that "bourgeois democracy" is a

farce; and, paradoxically, a renewed democracy was also being questioned by state authorities that increasingly saw its rules and institutions as constraints on effectively dealing with the insurgency.

The situation rapidly deteriorated. And at the end of the 1980s, during President Alan García Pérez's first term, Peru was on the brink of collapse, entering a state that would be called "catastrophic equilibrium". Insurgent groups had widely expanded and were able to threaten most of the country.² This was coupled with the worst economic crisis ever in the country and a generalized feeling of chaos and demoralization in the face of an ungovernable situation. All this was behind Fujimori's coup d'état on 5 April 1992. He and the military high command closed down Congress, dismissed judges, suspended the Constitutional Court and significantly expanded the powers of the armed forces and the intelligence services, while simultaneously eliminating virtually all forms of genuine institutional accountability. The coup was welcomed. Most people strongly doubted the ability of the "traditional" political class to solve the country's problems. Shielded by a veneer of democracy, that class had proved to be incompetent and frivolous when facing the drama unfolding in the country. Popular support for Fujimori increased as his government managed to solve the economic crisis and, most importantly, to defeat Shining Path. The latter was owing to a combination of effective police investigations that led to the capture of most of the Shining Path leaders – including Abimael Guzman – and a new strategy in rural areas where the military finally allied with the peasants. In spite of the attempt by some to continue their struggle, Shining Path was strategically defeated. Since 1994, its ability to carry out violent acts has statistically decreased to the point of nullity, and its political relevance even more so. But it had been defeated by a dictatorship. This would create problems. This chain of events explains Peru's exceptionality – why, while Latin America was following another path, Peru was living under an authoritarian regime that corrupted institutions, perpetrated heinous human rights abuses and sacked resources, with the tolerance of most of the population.³

The collapse of the authoritarian regime and the transition to democracy

In spite of the existence and increased legitimacy of a pro-democracy movement, this situation lasted for eight years, that is until the end of 2000, when, brutally and unexpectedly, the country became aware of the overwhelming levels of corruption of the authoritarian regime, leading to its inevitable collapse. People also only now learned that the real power during Fujimori's 10 years in office had been a ruthless and corrupt

former Army Captain, Vladimiro Montesinos Torres. In July 2000, the Fujimori–Montesinos duo won a third term of office, in total disregard of laws and constitutional precepts. Indeed, in spite of the fraudulent mechanisms put in place by the government, opposition candidate Alejandro Toledo received the support of around 50 per cent of the national vote. Much evidence points to him actually having won the election, but the government manipulated the figures and, using its control over the media, Fujimori was declared the winner of the first round. He later had to run alone in the run-off election to win his illegitimate and precarious third term.

The international community now played a role in the Peruvian situation. Back in 1998, the Fujimori government – unilaterally and in violation of international treaties – had withdrawn from the jurisdiction of the Inter-American Human Rights Commission and Court, looking to avoid the consequences of pending decisions on many issues. That did not stop international criticism of fraudulent elections; and the regime started to become isolated. The Organization of American States (OAS) sent an Observer Mission to supervise elections in Peru. The mission went far beyond the traditional remit in Latin America, analysing the whole political situation and widely disseminating information about the gross violations they uncovered. The illegitimacy of Fujimori's government was already the central issue of the thirtieth session of the General Assembly of the OAS in June 2000. The Peruvian government was obliged to talk to the opposition under the OAS umbrella.

The farce of the last Fujimori election abruptly ended when he fled the country. All in all, the third Fujimorismo fell within 50 days. The final crisis was unleashed when Fujimori and Montesinos were discovered trafficking arms with the FARC (Fuerzas Armadas Revolucionarias de Colombia) of Colombia. This was an event of monumental political proportions and international implications. Members of the highest echelons of the Peruvian armed forces had provided arms to Marxist guerrillas, wreaking havoc in a neighbouring country, in return receiving drug money.⁴ It appears that the episode was the last straw for the United States. It also triggered conflicts within the armed forces that culminated in the release of an infamous video in which Vladimiro Montesinos is seen offering a Congressman a bribe of US\$15,000 a month to support the ruling party. When the scandal erupted, Fujimori found himself with no way out. He could not govern with Montesinos, who would have to go if Fujimori was to survive. But he also knew that Montesinos would not go alone, since the two had been inseparable partners for years. Montesinos knew too much, and dragged the regime down with him.

The Fujimori regime collapsed in the midst of the worst corruption scandal in Peruvian history. Almost all of the Commanders-in-Chief,

Ministers of Defence and Army generals, as well as dozens of other prominent generals, were imprisoned or on the run. They were involved in major corruption cases linked to arms acquisitions, bad management of retirement funds or the misuse of intelligence resources. The same can be said about many other ministers, Congressmen and high-ranking officials of the Fujimori administration, along with businesspeople and broadcasters. When Fujimori fled to Japan and resigned by fax, suddenly a brilliant opportunity for democracy emerged in Peru. Congress appointed a transition government presided over by Valentín Paniagua Corazao, a respected leader of the democratic opposition. He had a two-pronged mandate: to dismantle the authoritarian regime and to preside over free and fair elections.

As has happened in other transition countries, a window of opportunity emerged and Peru experienced a new and perhaps unique moment of its history. Most people were so stunned and even traumatized by the magnitude of the corruption and abuses of the authoritarian regime, which they had supported or at least tolerated, that a substantive change in appreciation for democracy and human rights took place in the country. Suddenly the majority of the population questioned authoritarianism, the *autogolpe* (constitutional crisis) and human rights violations. People wanted from the state, as never before, democracy, transparency, truthfulness, honesty and respect for human rights.

This, in turn, allowed the transitional government to make profound changes: the Constitutional Tribunal was restored; the control and political manipulation of institutions ended; freedom of the press returned; and free elections were guaranteed. Peru returned to the jurisdiction of the Inter-American Court of Human Rights and amicable settlements were reached with the Inter-American Commission on Human Rights. Hundreds of people were arrested and charges were filed against thousands of individuals involved in acts of corruption. For the first time in Peru's history, the powerful were brought to justice for their crimes within the framework of the law. Prominent businesspeople, broadcasters, police and military leaders, cabinet ministers, high-level court officials, directors of public agencies and others were arrested and charged.

At the international level, the new Peruvian government changed its role and image in the region, becoming an active promoter of democratic values and human rights. Its authorities proposed a new instrument for the OAS to isolate governments violating democratic principles. For this purpose, a new Inter-American Democratic Charter was approved in Lima on 11 September 2001.⁵ The Charter established that any unconstitutional alteration or interruption of the democratic order in a state of the hemisphere would not be tolerated by state members; it also detailed the measures to be adopted if such a circumstance emerged.

At the domestic level, society's criticism was also deeply felt among the armed forces, which had been drastically purged of the commanders most involved in the scandalous events. The fact that so many military commanders – who had all those years claimed to be the “saviours of the country” in the war against terrorism – were either accused of very serious acts of corruption or actually in jail made possible a national debate on what had taken place. In April 2001, the military were forced to apologize to the country, and accepted the need for a truth commission in a document signed by the Commanders-in-Chief of the three branches of the military and by the Director of the Peruvian National Police. The 1992 coup was condemned and the subordination of all these chiefs to the President was reaffirmed.

All these facts provided the opportunity for discussing and confronting what had happened during the years of violence, as well as to start a process of transitional justice.

The Truth and Reconciliation Commission

The first component of a transitional justice experience – looking for the truth and identifying responsibility for past abuses – took, in Peru, the form of the Truth and Reconciliation Commission (Comisión de la Verdad y Reconciliación Nacional, CVR). Initially enacted by the interim government of Valentín Paniagua and then with some additional goals set and extra members appointed by President Alejandro Toledo, the Truth and Reconciliation Commission was established in 2001 to look into the atrocities committed in the 1980s and 1990s.⁶ The Commission was chaired by Salomón Lerner Febres, a philosopher and the Rector of the prestigious Pontificia Universidad Católica del Perú. The other members came from diverse sectors of Peruvian society.⁷

The Commission focused on massacres, forced disappearances, human rights violations, terrorist attacks and violence against women, all committed by both the rebel groups – Shining Path and the Túpac Amaru Revolutionary Movement (MRTA) – as well as the military. It was also asked to determine the whereabouts, identity and circumstances of the internal conflict's victims and, when possible, who was responsible for the abuses and violations, as well as to analyse the conditions and the political, social and cultural context that had contributed to the violence. At the same time, it had to develop proposals for the provision of compensation to the victims and put forward measures and reforms to be implemented aiming at ensuring that such events would never happen again.⁸

In this context, almost 17,000 testimonies were received by the Commission's central office in Lima and by the four regional offices in

Huancayo, Ayacucho, Huánuco and Sicuani. Those testimonies resulted in the documentation of over 11,500 cases of serious human rights violations.⁹ During its 16 months of groundwork, the CVR also identified over 4,600 clandestine burial sites across Peru and was able to carry out inspections of over 2,200 of them.¹⁰

During 2002, the CVR also held public hearings in the cities of Huanta, Huamanga, Huancayo, Huancavelica, Lima, Tingo María, Abancay, Trujillo, Chumbivilcas, Cusco, Cajatambo, Pucallpa, Taratopo, Huánuco and Chungui. There, the victims or their family members were able to testify to the Commissioners and proceedings were followed by large audiences, either present in person or via radio or TV.

The CVR's work formally concluded in August 2003, when its Final Report was presented to the representatives of the three branches of government: the President of the Republic, the president of Congress and the president of the Supreme Court, as well as to the Ombudsman (CVR, 2003). The next day the report was presented to Peruvian society in a ceremony held in Ayacucho, where the internal armed conflict had begun and from where most of the victims came. In the report, the CVR concluded that the internal armed conflict that Peru had undergone between 1980 and 2000 constituted "the most intense, extensive and prolonged episode of violence in the entire history of the Republic". The conflict affected a large proportion of national territory, larger than any other violent period in the country's history. The number of people who died or "disappeared" during the internal armed conflict surpassed the number of lives lost in Peru in all the foreign or civil wars in the almost two centuries since its independence. Based on the 23,969 cases reported to it, the CVR estimated a total of 69,280 fatalities during that period.

The CVR concluded that, during the two decades of internal armed conflict, thousands of serious abuses of fundamental rights had been committed by armed opposition groups, mainly Shining Path and, to a lesser extent, the MRTA. Shining Path "was the principal perpetrator of crimes and violations of human rights".¹¹ It was responsible for "systematic and generalized" criminal actions, including torture and murder, as well as devastating entire communities, perpetrating sexual violence against women and using explosives to carry out indiscriminate attacks in cities.

But the CVR also assigned responsibility for gross human rights violations – which, at certain times and in certain places, were systematic and widespread, amounting, even, to crimes against humanity – to state officials, especially the armed forces. Of the latter, the CVR confirmed that "at some places and moments in the conflict, [their] behavior . . . not only involved some individual excesses by officers or soldiers, but also entailed generalized and/or systematic practices of human rights violations that constitute crimes against humanity as well as transgressions of

the norms of International Humanitarian Law".¹² In the case of the police: "Torture during interrogations and undue detentions ... acquired a massive character during the counter-subversive action".¹³ In addition, thousands of other cases of human rights abuses and violations were documented by the CVR, including torture and cruel, inhuman or degrading treatment; sexual violence against women; violations of due process; kidnapping and hostage-taking; and violations of the human and fundamental rights of children and indigenous populations.

According to the CVR's analysis, the violence perpetrated by the armed opposition groups and state officials focused on the most defenceless sections of the Peruvian population, namely those living in indigenous or peasant communities, mainly Quechua-speaking, as well as those with scarce economic resources and educational levels below the national average. The Commission assumed the position that the existing chronic racial, social and gender discrimination in the country contributed to the fact that the suffering of these thousands of Peruvian men and women went unacknowledged for years by the groups that held economic and political power.

The Final Report states that 61 per cent of those who died at the hands of state officials during the internal armed conflict were victims of forced disappearance – almost 4,500 cases of forced disappearance in at least 18 departments of the country. In 65 per cent of those cases, the whereabouts of the victims were still unknown.

The CVR assigned "grave responsibility" to the political authorities governing the country during those years, stating that "the police and armed forces took charge of combating the subversion through legal instruments approved by civilian governments", which "incurred the most serious responsibility by failing to attend to reports of human rights violations or, as in many cases, by ensuring impunity for those responsible for the violations".¹⁴ It concluded that the judicial system had failed to adequately fulfil its mission, whether with regard to punishing the actions of subversive groups under the law, protecting the rights of detainees or putting an end to the impunity of state agents who committed severe human rights violations.

The CVR interpreted reconciliation as being "a new foundational pact between the Peruvian State and society, and among the members of society ... [in order to build] a country that is positively recognized as multiethnic, pluri-cultural, and multilingual".¹⁵ It saw such reconciliation as being a necessity that can be made possible by uncovering the truth and using the justice system to provide compensation and to punish the guilty. It also had to include social justice, that is to say, the redistribution of access to power and wealth within Peruvian society.

The Commission believed that a first step towards reconciliation was only possible in the measure that the perpetrators assume their

responsibilities before the courts and pay their dues to society. If the principle of reconciliation is based on justice, then “not only must the members of ... [Shining Path and the MRTA] pay for their crimes but also anyone else who has committed a crime”. The CVR proposed a Comprehensive Plan for Reparations, to help the victims of the internal armed conflict regain personal dignity, security and tranquillity, as well as self-respect and mental and physical well-being. The Plan also sought to ensure that the victims were given back their rights as citizens and, when possible, that compensation would be provided for the social and material damage caused to their local area or community as a result of a specific loss, “disappearance” or suffering. Reparations had, therefore, to be both individual and collective.

A series of recommendations for institutional reforms was also formulated. First, there were reforms to ensure the state’s presence:

- (1) the rights of indigenous people and their communities should be recognized in national legislation in order to give them fair legal protection, reaffirm the diversity and plurality of Peru, and set up a state policy body to deal with indigenous and ethnic matters;
- (2) policies and standards should be developed to facilitate collaboration between the National Police, the municipal authorities and citizens for the police to work effectively and to a high standard, with mechanisms to prevent and handle abuses;
- (3) incentives should be given to those working in state education and health to go and work in the areas that were most affected by the conflict, as well as those further away from urban areas.

Second, there were reforms related to the security forces, such as developing a national security policy and establishing civilian control over military intelligence services, as well as determining the respective spheres of competence of the armed forces and the police.

Third, there were reforms related to the administration of justice with the aims of:

- (1) strengthening the independence of the justice system and confining military jurisdiction to service-related offences;
- (2) incorporating into domestic legislation developments in international human rights law and international humanitarian law;
- (3) reforming the prison system by introducing guaranteed rights for detainees, including access to basic services (food and healthcare), as well as retraining, rehabilitation and a social reintegration programme;
- (4) setting up the necessary procedures and institutions to examine and rule on requests for clemency from those convicted on terrorism charges but claiming their innocence (the so-called “innocent prisoners”).

Fourth, the CVR proposed reforms related to the education system:

- (1) to promote respect for ethnic and cultural differences and favouring a policy of bilingual and cross-cultural education that, by prioritizing children from the poorest areas that were most affected by violence, could bring about greater integration, as well as overcome racism and discrimination;
- (2) to draw up a plan to teach basic literacy above all to teenage and adult women in rural areas where illiteracy rates are highest;
- (3) to improve rural schools, at both the infrastructural and staffing levels.

In November 2003, President Alejandro Toledo devoted a speech to the CVR's report. The President apologized on behalf of the state "to those who have suffered" and announced that some US\$800 million would be put into a Plan de Paz y Desarrollo (Peace and Development Plan) to improve public works in the areas most affected, as well as to strengthen public institutions and civil society. As for the work of the Commission, he gave it his backing and stressed that its recommendations would be addressed by the government and that a working group would be set up to follow them up. Yet the fact of the matter was that it had taken Toledo three months to give this speech. It was a sign that the general climate was deteriorating and that the work of the CVR had lost the momentum and support it had three years earlier.

In retrospect, it is safe to say that the CVR report is the most important document ever written in Peru with the aims of understanding its national identity and of proposing paths for a better shared future for all. It squarely addressed the magnitude of the problems and established responsibility for the most terrible period of the country's history. Yet, in so doing, the Final Report became – as it still is – highly controversial. From the start it was fiercely attacked by important sectors of society, especially by members of the armed forces, politicians from parties that ruled Peru during those years and conservative members of the Church. The main accusation has always been that the report is biased and does not take into account the sacrifices and efforts made by the armed forces to bring peace to the country and that, because of it, many of them are now in prison. Even though many of the accusations are completely unfounded (and indeed betray an ignorance of what is actually in the report), over the years the campaign has won many converts.

Prosecuting human rights violators

The second component of transitional justice, the prosecution of human rights violators, has also been extremely important for Peru. It is an

intense, complex and difficult process that is still not finished. After Fujimori fled to Japan and the amnesty laws he approved were nullified by the Constitutional Tribunal, hundreds of human rights trials began. The CVR, specifically, presented a group of cases of crimes committed by state agents, recommending their investigation.

A decade or so on and only a handful of cases had been successfully prosecuted. In general, progress was painfully slow, with many cases being thrown out on technicalities. Of those that have resulted in convictions, only one has been upheld at the appeal stage. According to Human Rights Watch (2008):

[O]nly 17 former military officers and civilians had been convicted for abuses attributed to state actors by the truth commission. Lack of cooperation by the armed forces has hampered the investigation of these cases. The military has often failed to provide information needed to identify potentially key witnesses who served in rural counterinsurgency bases during the conflict. It has also declined to identify military officials known to witnesses only by their aliases.

According to the Washington Office on Latin America (WOLA), “problems that have long dogged Peru’s judiciary are partly to blame, including a poor resource base, an overloaded court system, and insufficient training for judges involved in trying human rights cases” (Burt, 2008; see also Burt, 2007–2008).

The upshot has been unfairness to the victims, but the creation too of a cause of unrest among the armed forces. Long judicial delays have been used by authoritarian segments to question the CVR and, in general, those who promote human rights.

In parallel, if on the other side, the restored democracy in the country was obliged to re-try almost all the convicted members of Shining Path. The reason was that, during Fujimori’s government, the standards of due process were not respected, leading to the Constitutional Tribunal’s annulment of all its prosecutions. This was a daunting prospect, and Peruvian society panicked at the idea of mass releases of the people mainly responsible for the years of violence, as the CVR described them. Nevertheless, the re-trials were a big success. In four years and without any major incident to report, a specially appointed Anti-terrorist Court ruled on 1,400 cases, including those involving the Shining Path leadership, always in full respect of due process.

All these cases are important and deserve attention yet, without any doubt, the most important element of the transitional justice process in Peru, and one that has had important repercussions in Latin America and the world, has been the detention in Chile, the extradition to Peru and the trial in Peruvian courts of former President Alberto Fujimori. Sur-

prisingly abandoning the safe haven he had in Japan, on 6 November 2005 Alberto Fujimori arrived at Santiago de Chile in a private plane. He had made a technical stopover in Mexico, mocking Interpol's international "red notice" ordering his capture, which was in force in 189 countries, including Chile and Mexico. Fujimori was, though, detained by the Chilean authorities and subjected to an extradition process. Almost two years later, the Chilean Supreme Court decided to allow his extradition to Peru to stand trial on several charges of corruption and human rights violations.

Fujimori was convicted of abuse of authority and sentenced to six years in prison for authorizing and participating in an illegal raid on the home of Montesinos's wife in 2000, presumably to secure and remove compromising evidence. The sentence was upheld on appeal. However, the most important trial against Fujimori started on 10 December 2007. It focused on some very select cases of human rights violations: the Barrios Altos massacre of 1991, in which 15 people were killed; the disappearance and later killing of 9 students and a professor from La Cantuta University in 1992; and the kidnappings of journalist Gustavo Gorriti and businessman Samuel Dyer in the aftermath of the 5 April 1992 *autogolpe*. In the cases of Barrios Altos and La Cantuta, the killings were carried out by the Colina Group, a clandestine death squad that operated out of the Army Intelligence Service and whose purpose was to eliminate suspected guerrilla sympathizers. Arguing that Fujimori had direct command responsibility for these crimes, the prosecutor asked that he be sentenced to up to 35 years in prison. The trial, which had an important effect on Peruvian public opinion, was conducted with all the guarantees of due process. In 2009 Fujimori was sentenced to 25 years.

This was an historic event. Never before had a former President been judged in Peru in democracy, under the rule of law and before pre-established tribunals for any crime, much less for human rights abuses. It was also the first time that a civilian Latin American President had been extradited to his home country to stand trial on human rights charges.

Security sector reforms

A third major component of a process of transitional justice that took place in Peru was the attempt to reform the institutions of the security sector. As mentioned before, the collapse of the authoritarian regime allowed a profound purging of military and police officers involved with the previous regime, weakening their political standing and creating extraordinary conditions for reforms. Many reforms were indeed devised and implemented between 2001 and 2004.

In the case of the police, a unified Peruvian National Police (PNP) had existed since 1988. Conflicts between the old police institutions had intensified during the 1980s, often resulting in violent confrontations in the streets. This situation, along with the need to improve police efficiency and prevent duplication of administrative and operational duties, led to police unification. The following years coincided with an extremely difficult national environment that affected the institution in various ways. Until the mid-1990s, Peru's internal conflict was the main problem that the PNP had to face. Even if under the command of the armed forces, the PNP confronted this challenge at a high cost, suffering many more casualties than the military. The fight against terrorism reinforced a militaristic vision of the police's doctrine, training, regulations and conduct. It also led to significant isolation from society. The police had to withdraw from many of their stations (*Comisarías*) and from the streets and close down installations in order to prevent terrorist attacks. Police departments turned into fortresses and the police's preventive focus was transformed into a defensive one. The traditional closeness between the police and society was also lost, which in turn was a factor in another negative development of those years: the tolerance of police corruption. Several high-ranking officers were involved in a chain of corruption uncoiling from the highest echelons of the government of the time. Later, during the Fujimori dictatorship, the PNP was both further militarized and politicized as a vehicle for maintaining the administration in power. The institution became completely subordinated to the armed forces. Indeed, only Army generals were appointed as Interior Ministers during the entire Fujimori regime.

A few weeks after the inauguration of Alejandro Toledo's government, a Special Commission for the Restructuring of the National Police was established to provide specific recommendations for reform. Headed by the Minister of the Interior, the Commission had real teeth: initial diagnosis of problems was accompanied by a timeline for restructuring solutions. Later, a Modernization Commission also set about implementing the whole set of reforms. These, clearly, were ambitious and involved every aspect of police work, regulations and welfare. The underlying vision of the whole process was to strengthen the police's role as the institution that has to confront internal challenges to security.

There is in Peru – and, for that matter, in many other Latin American countries – a strong tradition of the armed forces intervening in the protection of internal order. From the inception of the Republic, the nation's many constitutions have not sufficiently underlined the differences between the police and the armed forces. This helps to explain why many in Peru (including political leaders) see the two institutions as interdepend-

ent. It is widely acknowledged that this expanded role of the armed forces is in turn one of the explanations for the weakness of Latin American democracies.

So one of the aims of the police reform was to make clear that the PNP is not a minor branch of the Army but a civilian body with its own remit, distinct mission and institutional culture, that keeping internal order and defending the country from potential external threats are completely different endeavours, in the charge of different bodies. This new way of conceiving of the police and its distinctive role needs a constitutional modification to establish that the PNP has a basic and final authority to guarantee, maintain and re-establish internal order; to help the public; and to prevent, investigate and fight crime. It is also true that the Constitution of 1993 gives similar constitutional authority to the armed forces, and even places these responsibilities in the same chapter. The Restructuring Commission proposed splitting this chapter of the Constitution: one to be devoted to national defence and the role of the armed forces, a second to internal order and the role of the PNP.

The project of the PNP's demilitarization implies other important legal changes, among them affirming the police officers' civilian condition, which grants them the right to vote and withdraws them from military jurisdiction. The Restructuring Commission also proposed that members of the police who commit crimes should be tried under the legal norms and jurisdiction of the common law. In parallel, the disciplinary regimen should be strengthened and some activities that were currently considered crimes under the Code of Military Justice should be decriminalized, turning them into administrative infractions.

Among the changes that actually took place, the efforts for greater professionalism via changes in educational policies and professional career opportunities, and the creation of the Office of Internal Affairs to aggressively fight corruption stand out. Also, a Police Human Rights Ombudswoman was appointed to protect members of the institution from the abuses they endured in the workplace. The rights of women in the police force were promoted, and the first rule against harassment in the workplace was approved. On all counts, a zero tolerance policy towards human rights violations was adopted. In addition, a democratic counter-insurgency strategy defining the need for comprehensive action from the state was designed.

Civilian authority, specifically the Ministry of the Interior, was designated as being responsible for the development and execution of these policies. "Commissioners for Peace" were created as representatives of the state in the areas of ongoing conflict, aimed at coordinating public policies in related areas. Many other changes were designed and began to be implemented but they did not succeed owing to a lack of continuity

and political support from the President. By mid-2004, the willingness to make changes ceased, and the police reform effort came to an end.

Regarding the armed forces, over the past decade they have been deeply affected by the turmoil of the political situation. In the 1980s, almost immediately after they relinquished political power to an elected civilian government, they had to face a complex phenomenon of internal violence for which neither they nor the political elite were prepared. The civilian authorities soon abdicated their responsibility of conducting the internal war and, through the Comandos Político-Militares, positioned the Army as an almost *de facto* government in several areas of the country. By the end of the 1980s, while the conflict intensified and civilian authorities proved to be clearly incompetent, leading the country to economic bankruptcy, many among the armed forces reached the conclusion that a new political scheme was needed to deal with subversion. They wrote the “Green Plan”, a long-term military project for ruling the country without democratic institutions, a condition that in their view was critical to defeat insurgency.

The “Green Plan” was never put into practice as such; however, it basically coincided with what happened during the 1990s. The armed forces were the backbone of the regime put in place on April 1992 and they played an important role in the defeat of Shining Path. Yet, in the years that followed, their institutional association with a mafia-style government finally led them to their worst institutional crisis.

The Toledo administration created a Commission for the Comprehensive Restructuring of the Armed Forces (Comisión de Reestructuración Integral de las Fuerzas Armadas), composed of public figures, civilian experts and prominent retired soldiers, which delivered a final report on 4 January 2002 (Comisión de Reestructuración Integral de las Fuerzas Armadas, 2002). It stated that the objective of the reform was not just of a technical nature but, above all, a political process that should lead to strengthening democracy. This meant establishing a new type of military–civilian relationship based on civilian control and military abstention from participation in political decisions. Another crucial point of the proposed reform, coinciding with the parallel Commission for the Restructuring of the National Police, was to establish a clear distinction between security and defence at a constitutional level. The need to reform military justice was also emphasized. The Restructuring Commission gave crucial importance to the process of reform and modernization, as described above, as well as to having a true Ministry of Defence “responsible for the formulation, direction, coordination and administration of the general strategies of the state insofar as these refer to defence policies”.

The reform process proved to be extremely difficult to implement in the years that followed the report’s publication. Significant progress was

made during the administration of Aurelio Loret de Mola, a former member of the Restructuring Commission and the second civilian Minister of Defence in Peruvian history. Perhaps the most significant aspect of his work was to obtain Congressional approval of a new law for the Ministry of Defence, a qualitative advance over the previous law, which stated that the Ministry of Defence was the “representative body of the armed forces”. Unfortunately, Loret de Mola lasted only one year, although important changes also took place with President Alan García’s first Minister of Defence, Ambassador Allan Wagner, who not only proposed many modernization and transparency initiatives but also incorporated the conclusions of the CVR into his approach. As in the case of the police, the reformist spirit quickly faded and, if not to the same degree as in the past, the armed forces have succeeded in recovering autonomy and some traditional powers, especially in such sensitive areas as budget management and military justice.¹⁶

Conclusion

In spite of the problems and ominous clouds on the horizon, significant achievements have been attained with transitional justice in Peru. Many victims of Shining Path and the state’s terror have received recognition for their suffering and losses. Some have received individual compensation and others are receiving collective reparations. The “official truth” was effectively contested and there is, now, a new, more balanced and sophisticated interpretation of what happened during the 20 years of violence. True, it is contested by some, but this in itself is not necessarily a bad thing: public discussion also keeps the past alive. Certainly, too, the authoritarian regime responsible for brutal human rights violations is no longer much admired by the overwhelming majority of the population. Many of those responsible for Peru’s tragic events have either been sentenced or are undergoing trial. Voices arguing for amnesty are fairly marginal. In addition, the trial of former President Alberto Fujimori has had a profound impact on Peruvian society, setting a unique precedent for future rulers. Violations of civil and political human rights are scarce and, when discovered, strongly condemned by society. The armed forces have lost some of the political power they held in the past, and some improvements have been achieved regarding democratic civilian control.

The judicial branch, in spite of its many limitations, continues working on many human rights cases, in a basically independent manner. The human rights cause has also transcended its traditional constituencies, namely non-governmental organizations and the democratic left. Important newspapers, TV stations and universities, as well as intellectuals,

journalists and politicians from the democratic right, are now strong supporters of human rights. Yet, within a decade of the fall of the authoritarian regime, the political climate had changed dramatically and was seriously jeopardizing these achievements.

The problem started with the weakening of the Toledo government, but soon evolved into an overall deterioration in political democracy. For several years now, the legitimacy of democracy's institutions has again been questioned; distrust of Congress, of the executive branch, of the judiciary and of political parties is almost universal. Old authoritarian reflexes, deeply entrenched in society, have re-emerged in many sectors, calling the transitional justice process into doubt. The armed forces lead the discontent and a significant portion of the press often publishes articles and statements claiming that the CVR's sole purpose was to take revenge against the armed forces, and that it favoured Shining Path.

This weakening of pro-democracy and pro-human rights positions became evident during the 2006 presidential campaign. In addition to the comeback of Fujimori's followers, who obtained 8 per cent of the national vote and won a dozen seats in Congress, the two contenders in the run-off election had highly questionable credentials in those fields. On one side, retired Army commander Ollanta Humala called for a central role for the armed forces as part of an ultra-nationalist political project with xenophobic and even warmongering positions. In addition, Humala faced several serious and highly plausible accusations of human rights abuses. He was accused of being directly responsible for serious crimes – including forced disappearances, extra-judicial executions, rape and torture – while he was military commander of the Madre Mía base in the Alto Huallaga in 1992, one of the conflict's bloodiest years and one during which most abuses in the area against the civilian population were reported. The complaints were documented by the prestigious National Human Rights Coordinating Committee (Coordinadora Nacional de Derechos Humanos).

The other contender (and winner) was Alan García, whose first administration (1985–1990) had been responsible for dozens of human rights atrocities.¹⁷ García nominated as his vice-presidential running mate retired Admiral Luis Giampietri, who has been publicly linked to Fujimori and who has maintained a position belligerently opposed to human rights. García has been very much against the spirit and contents of the CVR. He also advocated the re-establishment of the death penalty, despite the fact that the American Convention on Human Rights does not allow it.

In general, the discourse, attitudes and measures of the García administration have constituted a severe setback to the consolidation of human rights in Peru. The government has not been politically interested in

fighting impunity for human rights violations and is closely allied with Fujimori's representatives in Congress. In addition, Peruvian human rights activists and organizations as important as the Instituto de Defensa Legal are increasingly – and constantly – being harassed over their investigations and financing. High-ranking government officials and García himself have accused human rights defenders of acting as “apologists for terrorism”. So, in Peru, transitional justice is still an open and unfinished process having to negotiate an uncertain future. Its achievements face a high risk of reversal, yet it is also true that strong voices and influential sectors of society are fighting very hard to protect what has already been achieved for democracy and human rights. It would accordingly be remiss to slight their efforts with too pessimistic a prognosis.

Notes

1. Vetting, lustration and restrictions have taken place in only an informal and sporadic manner, because no ruling exists for their purposes.
2. In addition to Shining Path, the Movimiento Revolucionario Túpac Amaru (MRTA), a less important but very active insurgent group, added to the problem.
3. There is a wide bibliography on the Fujimori regime, including Iván Degregori (2000), Cotler and Grompone (2000) and Conaghan (2005).
4. Details of this dramatic period can be found in Basombrío (2001).
5. This is why US Secretary of State Colin Powell was in Lima on the infamous 11 September 2001.
6. The period covered by the CVR comprises the later stages of the government of General Francisco Morales Bermúdez (17 May – 28 July 1980) and the governments of Fernando Belaúnde Terry (28 July 1980 – 28 July 1985), Alan García Pérez (28 July 1985 – 28 July 1990) and Alberto Fujimori (28 July 1990 – 20 November 2000).
7. Beatriz Alva, lawyer and former member of Congress; Rolando Ames, political researcher and analyst; Monsignor José Antúnez de Mayolo, La Salle priest, ex-apostolic administrator of the Ayacucho Archdiocese; retired Air Force Lieutenant General Luis Arias Grazziani, expert in national security issues; Enrique Bernal, lawyer and sociologist, executive director of the Andean Jurists Commission; Carlos Iván Degregori, anthropologist, professor at the Universidad Nacional Mayor de San Marcos and member of the Instituto de Estudios Peruanos; Father Gastón Garatea Yori, Sacred Hearts priest and president of the Consensus Building Table for Poverty Fighting; Minister Humberto Lay Sun, architect, leader of the Assemblies of God, an evangelical denomination of the Evangelical National Concilium, CONEP; Sofía Macher, sociologist, former executive secretary of the National Human Rights Coordinating Committee; engineer Alberto Morote, former president of the Universidad San Cristóbal de Huamanga; and engineer Carlos Tapia, political researcher and analyst. Monsignor Luis Bambarén of Chimbote was an observer.
8. For a very good description and analysis in English of the work of the CVR, see Amnesty International (2004).
9. See CVR (2003), Vol. IX, Appendix 4: “Cases and Victims Recorded by the CVR”, p. 2.
10. See CVR (2003), Vol. IX, Chapter 2.3: “National Plan for Forensic Anthropological Interventions”, p. 209.

11. CVR (2003), Vol. VIII, Part Three: “General Conclusions”, para. 13; for an English version see <http://www.cverdad.org.pe/ingles/ifinal/conclusiones.php> (accessed 23 March 2012).
12. Ibid., para. 55.
13. Ibid., para. 46.
14. Ibid., paras 72–73.
15. Ibid., paras 170–171.
16. For additional information, see Basombrío and Rospigliosi (2006).
17. Among the most notorious were the massacre of almost 200 prisoners, most of whom had already surrendered, during prison riots in Lima in 1986, and the Accomarca and Cayara massacres of peasants in 1985 and 1988, respectively.

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Part II

Eastern Europe

11

On the effectiveness of judicial accountability mechanisms in Bosnia and Herzegovina

Ernesto Kiza

Introduction

In order to understand the context of transitional justice mechanisms in Bosnia and Herzegovina (henceforth referred to as BiH or simply Bosnia), first one needs to understand the preconditions of the genesis of today's state and get at least a glimpse of the events that were taking place in the wider region.

BiH is probably the most extreme example of the failure of a multi-ethnic Communist state in Europe since the Second World War, although, as has been pointed out by several writers, as a part of the Socialist Federal Republic of Yugoslavia (SFRY), the country was better poised than many other socialist countries to make a successful transition to a pluralist society with a market-based economy on the eve of the so-called “third wave of democratization” in 1989 (Woodward, 1995: 1). Located on the south-eastern fringes of the European continent, BiH emerged as late as 1992 from the already conflict-ridden and economically depleted SFRY. And its existence was cemented only in November 1995 through the Dayton Peace Agreement, which officially ended war in the country.¹

The SFRY consisted of six republics (BiH, Croatia, Slovenia, Montenegro, Macedonia and Serbia). Shortly after Slovenia and Croatia declared their independence from the SFRY (in 1991 and 1992, respectively), a referendum held in BiH paved the way for the independence

After oppression: Transitional justice in Latin America and Eastern Europe, Popovski and Serrano (eds), United Nations University Press, 2012, ISBN 978-92-808-1200-8

of the country in 1992, and for war. In the same year, violence between the three ethnicities (Bosniaks, Croats and Serbs) evolved to become the first reoccurrence of genocide in Europe after the Second World War.

The inevitable political transition of the SFRY from a centralized and authoritarian Communist state to a liberal democracy was turned into a bloodbath by leading politicians whose own ambitions for power became transformed into nationalist catalysts of hatred (Kiza, 2003). All of this happened in a very short period of time. As Susanne Woodward (1995: 1) notes:

Between the Fall of the Berlin Wall in 1989 and the start of the war in Bosnia-Herzegovina in March 1992, the path of disintegration moved at astonishing speed: from a shock-therapy program of economic reform . . . , the beginnings of democratization with multiparty elections . . . , and declarations of independence.

Dealing with the issue of transitional justice in BiH therefore means being fully aware of the fact that there is a legacy of ethnic division, internal armed conflict and extraordinary violence, which is of more concern than systematic state crime against the country's own populations and groups (democide, politicide), as occurred in many South American, African or East European countries. It is therefore a very specific condition that, in its extension, led to an unprecedented push towards arousing international awareness for the creation of a universal judicial system designed to cope with impunity for individual state leaders and key actors who have committed the cruellest crimes – representing “radical evil”, as Hannah Ahrendt called it (Drumbl, 2005).

It is on this basis that all further analysis of the efficiency and effectiveness of transitional justice mechanisms has to take place. This chapter will first address the very specific circumstances in which judicial accountability for war crimes was implemented and established in BiH. Then the transitional justice process will be outlined, before the shortcomings and progress of transitional justice processes, and judicial accountability in particular, in BiH are addressed. Following an assessment of the impact of specific transitional justice measures, the interdependency between international and regional judicial concepts and processes will be analysed. This in turn leads to a final elucidation of lessons learned and *not* learned in the process and of opportunities taken and missed.

Bosnia and Herzegovina: The painful birth of an international protectorate

From dissolution to a new beginning – with uncertain outcome

BiH was one of six republics of the SFRY. The state that emerged from the Second World War as the Democratic Federal Republic of Yugoslavia was renamed the Federal People's Republic of Yugoslavia in 1946 and received its final name, SFRY, in 1963. The formal dissolution of the SFRY took place in 1992 (de facto in 1991). Under the leadership of Josip Broz Tito – who through the constitutional reform of 1974 was President of the SFRY until it dissolved (although he died in 1980) – the multi-ethnic, single-party state was expertly guided through the currents of the Cold War. However, the internal fabric of the multi-ethnic state was always in jeopardy owing to the nationalist goals of political leaders in the republics of the SFRY, especially Serbia, Slovenia and Croatia. Quarrels over mutually perceived exploitation divided the republics of Yugoslavia, particularly owing to differences in development that led to a developed north and an “underdeveloped south” (BiH, Montenegro, Macedonia and Kosovo) (Deacon and Stubbs, 1998: 101). After Tito's death in 1980, the economic situation further deteriorated and led to even more conflict and ultimately to the break-up of the SFRY. The disintegration of Federal Yugoslavia, although clearly not just economic, does begin to be understandable in terms other than the rhetoric of centuries-old ethnic hatreds (Deacon and Stubbs, 1998: 101; Kiza, 2003). And, although ethnicity was certainly utilized by power-hungry elites in the republics to incite hatred, economic and political power was the actual driving force of the violent dissolution of the SFRY.

With regard to Bosnia, the impact of these strategies of dissent and conflict that were ultimately designed to create new sovereign states in the territory of the SFRY was particularly devastating. Whereas Slovenia and Croatia found early support for their struggle for independence from the European Community, BiH was marginalized owing to its strategic insignificance and its complicated ethnographic composition (Woodward, 1995). In fact, the European Community was not prepared to accept the creation of a Bosnian state for quite a time and the opposing factions of Serbs and Croats in Croatia had enough time to politicize “their” respective people in the Serbian and Croatian parts of Bosnia in order to dismantle the republic and annex the regions that were populated by the majority of the respective ethnicity. Only international moral pressure – particularly created through the media – and strategic considerations by West European countries, especially Germany, ultimately led to an intervention in the conflict in BiH, which by then had already spread from

Croatia and was encompassing large parts of the republic. After the European Community had demonstrated its inability to prevent or moderate the war and the United Nations had failed with half-hearted peace-keeping efforts – in a country already at war (Chesterton, 2003: 373) – the United States entered the crisis, first with its support for a sovereign Bosnian state and, later, after countless crimes had been committed, helping to end the war by activating NATO to intervene in a robust military way and thereby turn the military balance in favour of the Croatian–Bosnian alliance (Cigar, 2003).

After the new reality created through international military intervention, the Dayton Peace Agreement was signed in 1995 by the Bosnian President (Alija Izetbegović), the Croatian President (Franjo Tuđman) and the President of the Republic of Serbia (Slobodan Milošević). The Agreement ended the war but also cemented the ethnicization of the country and created a pseudo-sovereign state with two autonomous entities (Republika Srpska and the Federation of Bosnia and Herzegovina) together with Brčko District, setting the preconditions for a protracted conflict area in the Balkans. Overall, four contradictory strategies were embedded in Dayton: neutral peace-keeping, peace through military balance, just peace and peace through economic development (Faber, 1997). Accompanied by a multi-layered governmental system, including a state government incorporating all three entities, largely independent governments in each of the entities – with their own constitutions – and another 10 cantons in the Federation, “micro-etatism” was established and increasing fragmentation was introduced (Deacon and Stubbs, 1998: 103).²

With only 4.5 million citizens and very low productivity owing to the large modernization gap, today’s Bosnia is largely sustained through international donations (Herz et al., 2004) and stabilized through a massive presence of supranational organizations, international non-governmental organizations (INGOs) and local non-governmental organizations (NGOs). In fact, shortly after the Dayton Peace Agreement, the actual government of the state was transferred to the Office of the High Representative (OHR), thereby creating an international protectorate. By mandate, “the High Representative is the final authority in theater regarding interpretation of this Agreement on the civilian implementation of peace settlement” (OHR, 1995: Article IV). He has such extensive powers as being able to remove the President (which he has done).³ The High Representative in turn is elected by the international Peace Implementation Council, which consists of 55 countries.

The international community has further wide-ranging involvement in BiH. In addition to the numerous NGOs, INGOs and UN agencies still operating in the country (the United Nations Mission in Bosnia and Herzegovina ended in December 2002), the European Union took over

the NATO-led peacekeeping mission in December 2004 to continue to provide a safe and secure environment.⁴ In the transitional justice arena, further key players are the Organization for Security and Co-operation in Europe (OSCE) and the United Nations High Commissioner for Refugees. Furthermore, the International Criminal Tribunal for the former Yugoslavia (ICTY), established in 1993 in The Hague, the Netherlands, as a temporary institution during the war by the UN Security Council, plays a key role in the prosecution of war crimes offenders.

Some immediate effects of the war in BiH

The outcome of the violent dissolution of the SFRY and the birth of BiH was devastating for the whole region, and particularly for the people of Bosnia. Although space does not permit analysis in detail of the outcomes of the conflict here, some of the worst effects were a very high number of victims, the destruction of an already weak and underdeveloped economy and infrastructure, and a fissure in the social fabric of the state that is still far from mended. Although a final account of the war crimes and severe breaches of international humanitarian law is still pending, according to currently available data, between 1991 and 1995:

- over 150,000 BiH citizens were recorded as killed,
- at least 170,000 were recorded as injured,
- more than 1 million people became refugees and even more were internally displaced (some studies indicate that as many as 40 per cent of all citizens experienced forced displacement),
- systematic rape, torture, killing, expulsion and other serious forms of human rights violations – including acts of genocide – took place,
- 50–60 per cent of industrial capacity was destroyed or damaged,
- 60–70 per cent of homes were looted and burned,
- a large part of the communications and transportation infrastructure was damaged or destroyed,
- about 55 per cent of healthcare facilities and the majority of ambulances were destroyed and 350 healthcare personnel killed,
- more than 1,600 religious buildings were damaged, most of them Islamic mosques,
- numerous educational, scientific, cultural and sports facilities were destroyed.⁵

Owing to the after-effects of war, BiH remains one of the poorest countries in Europe and is plagued by high unemployment (over 50 per cent). In addition, a massive brain drain of skilled workers has deprived the country of economic potential. Because of the peculiar construction of the country, economic regeneration remains difficult. Social stratification was deepened and regional disparities have increased, as

have the inequalities between war-profiteers and the vast majority who have been impoverished and “are experiencing a kind of retrograde revolution, with a decline in human capital and increasing agricultural production for subsistence” (Deacon and Stubbs, 1998; Herz et al., 2004: 635).

The most recent representative study (ORI, 2007) indicates that Bosnians are particularly apprehensive about the lack of medical care, local government services and unemployment. The overall situation in BiH is perceived as extremely unfavourable, with almost 90 per cent of all participants in this study indicating that the situation is very or quite bad. On the bright side, “BiH respondents feel happier, wealthier and less worried than one might predict”. In comparison with other transition countries, Bosnia often finds itself among the top performers in terms of the overall situation (ORI, 2007: 3–13).

Furthermore, the consolidation of party politics along ethnic lines has strengthened the position of the main nationalist parties. As a consequence, political power is still held by the local party machinery. As regards the rebuilding of the judicial system and the judiciary, the international community had to start from scratch because many skilled judges, attorneys and prosecutors had been displaced, had left the country or were killed during the war.⁶

War and transitional justice: The approach in Bosnia

Providing adequate transitional justice in post-conflict situations is always a very challenging and complex issue. In the case of BiH this challenge is further exacerbated by very complex political circumstances due to the peace that was negotiated in 1995, to the fact that the formerly opposing parties are expected to live peacefully side by side in one country, and to the massive involvement of the international community.

There are many facets to the implementation of transitional justice programme and empirical research demonstrates that – although there are some universal aspects – these programmes have to be designed very carefully (Kiza et al., 2006). Not all of these aspects can be addressed at this point. However, a short overview of the main instruments implemented in BiH is given in the following, at the same time outlining the major trajectory of the strategy applied in post-war Bosnia.

Criminal justice at the international level

Simply put, the transitional justice approach favoured in the case of Bosnia was a retributive one, mainly based on criminal prosecution of key offenders at the ICTY in the early stages and prosecution of “minor” of-

fenders at the national or cantonal level of BiH at a later stage (actually as of 2003, when national bodies were created in light of UN Security Council Resolution 1503 on the completion of the work of the ICTY). As Natasa Zupan rightly notes: “The ICTY is one of the key – if not *the* key – transitional justice mechanism set up by the international community” (Zupan, 2006: 328).

As presented in the ICTY annual report of 1999, the goals of the Tribunal were the following:

The Tribunal was created by the Security Council to establish the legal accountability of those who committed crimes during the conflict in the former Yugoslavia. In so doing, the Tribunal is intended to contribute to the restoration of international peace and security. In the region, therefore, the Tribunal is a means to assist in reconciliation and to prevent a recurrence of conflict. The achievement of these objectives is dependent on the victims being aware of and understanding the war and its causes. (ICTY, 1999: para. 146)

However, although conventional wisdom holds that criminal trials promote several goals, including uncovering the truth, avoiding collective accountability by individualizing guilt, breaking cycles of impunity, deterring future war crimes, providing closure for the victims and fostering democratic institutions, little is known about the role that judicial interventions play in rebuilding societies.

In fact, the wars in Yugoslavia acted as a catalyst for the promotion of the international impunity movement. In 1993, the ICTY was founded by UN Security Council Resolutions 808 and 827 in order to deal with the gross violations of human rights and humanitarian law in the region. It is probably the single most important and positive outcome of the terrifyingly brutal wars in the region of the former Yugoslavia since the end of the Second World War and the Nuremberg and Tokyo war crimes trials. The establishment of the ICTY was the precursor to the establishment of a number of criminal tribunals for the prosecution of war crimes and genocide.

Since the creation of the ICTY, international intervention in armed conflict has increasingly been accompanied by international prosecution of violations of humanitarian law committed during armed conflicts. For instance, the International Criminal Tribunal for Rwanda (ICTR) was created in the wake of the ICTY, but so were many other mixed or hybrid institutions. As Diane Orentlicher (2010: 11) noted:

what began as an ad hoc measure became a global paradigm: Since the ICTY’s creation, international or internationalized courts have been established to respond to sweeping atrocities in Rwanda, Sierra Leone, Cambodia, Kosovo, Bosnia, and Timor Leste, and a permanent International Criminal Court is now operating in The Hague.

Interdependently with these developments, the opinion of world leaders, diplomats and law experts has coalesced around the idea that international criminal prosecutions are integral to the process of reconciliation in a country that has been torn apart by violence (HRC, 2000: 6; Bassiouni and Morris, 1996; Joyner and Bassiouni, 1998; Mani, 2000). Accordingly, expectations of the effectiveness of these institutions were very high. And, although the perceived success of these tribunals was the precursor to the implementation of a universal system for the prosecution of perpetrators of particularly serious international crimes, victims, their dependants and critical experts were not fully convinced and satisfied (Drumbl, 2005; Kiza et al., 2006).

In the wake of the establishment of the two ad hoc tribunals, a lively academic debate erupted around the macro-phenomena of an evolving international criminal law. A plethora of questions emerged: “Should perpetrators be prosecuted? Is amnesty acceptable? To what extent is transitional justice shaped by political conditions? Do truth commissions offer an alternative to tribunals or are they rather complementary mechanisms? What are the advantages and disadvantages of truth commissions on the one hand and tribunals on the other? Should dealing with past conflicts be left to national or international bodies?” (Rombouts, 2002: 217).

While these more universal questions were debated, the ICTY – against impossible odds and great resistance – has so far contributed significantly to the development of substantial international criminal law. And, through this international body, so too has the past of BiH. Because the ICTY had paid particular attention to war crimes committed in BiH – in fact almost 80 per cent of the 161 indictments of people who seriously violated international humanitarian law were related to acts committed in BiH – the criminal prosecution of crimes committed in BiH has strongly influenced the development of international criminal justice norms. At the same time, the creation of an international criminal justice system has had an impact on judicial and state reform in the former Yugoslavia and particularly in BiH – first through the activities of the ICTY and later on through accession to the Rome Statute (ICC, 2011) and the judicial reform following from that and other international commitments (Sieber, 2004).

The ICTY has so far had mixed results. Although it has certainly contributed to the uncovering of grave crimes and to the punishment of major war criminals, it has at the same time attracted much criticism. Some of the most serious accusations relate to the long and complicated procedures, the delivery of partial justice (most of the indicted persons were Serbs) and the disappointment among virtually all ethnicities in the former Yugoslavia because the sentences were perceived as too low or too high. It has experienced a number of problems regarding applicable

law but at the same time has – precisely because of this problem – made a vast range of decisions that were groundbreaking with regard to the development of international criminal law. Among the “highlights” were certainly the indictment of the former President of the Federal Republic of Yugoslavia, Slobodan Milošević, the prosecution and sentencing of Biljana Plavšić, former President of Republika Srpska (1996–1998), and the opening in 2008 of proceedings against Radovan Karadžić, the first President of Republika Srpska (1992–1996). However, as will be discussed subsequently, the self-proclaimed goals of the ICTY are far from being achieved.

Criminal justice at the national level

Almost 13 years after the Dayton Peace Agreement, the national capacity to deal with the many crimes committed during the war in BiH was still far from adequate (OSCE, 2005; UNDP, 2008a, 2008b). After many years of “muddling through”, in 2009 a Bosnian national strategy for dealing with war crimes was finally adopted. In September 2007, the High Representative had called for the adoption of such a strategy, “noting that the families of victims cannot wait forever for justice in the courts; and that without justice the future is in question” (UNDP, 2008a: 9). The problem was particularly complex and urgent because the ICTY was nearing its end (probably 2013) and its Completion Strategy relies on the transfer of cases into the region – not only to BiH but to all successor countries of the SFRY. In addition to the continuing lack of criminal justice for victims and their dependants, the whole historical project of the ICTY will be measured by its success or failure in bringing to justice the hundreds, if not thousands, of culprits.

It was mainly the Completion Strategy of the ICTY, adopted in 2002, that bolstered the development of national war crimes capacities, spearheaded for quite a time by the Office of the High Representative in Bosnia (Orentlicher, 2010: 20). Up until 1999 the ICTY had hardly pressed ahead in the direction of national recognition of the work done in The Hague or the development of sufficient national capacities to deal with war crimes, preferring to externalize and monopolize the justice process (Burke-White, 2007: 1).

In fact, from today’s point of view, the ICTY froze the development of national capacities to deal with war crimes for almost a decade. The approach was to secure evidence, investigate and make sure that case selection took place at the ICTY and that most proceedings were held only there. In the case of BiH, this made sense because the divided country demonstrated that no impartial trials could take place. Lacking adequate equipment, premises and personnel, as well as a judicial system prepared

for impartial justice in the two entities of BiH, political and arbitrary arrests and proceedings took place. For instance, some 47 verdicts by the Orašje military court (between 1993 and 1995) were transferred to The Hague in 2001 and 41 were overturned owing to lack of sufficient evidence (UNDP, 2005: 8). In February 1996, the so-called “Rules of the Road” were established under the Rome Agreement (ICTY, 2011), an evaluation system that prohibited the prosecution of war crimes cases without prior evaluation by the ICTY’s Office of the Prosecutor. Under this system, the ICTY has decided on 1,410 files involving 4,985 suspects brought to its attention, of which up until 2004 only 846 were rated “A” – sufficient evidence to prosecute. Very few of these cases were referred back to national courts. Before 2004, only 54 war crimes prosecutions were recorded as having reached trial stage in BiH courts.

However, beginning in 2002, judicial law reforms in Bosnia became an important factor in the prosecution strategy of the international community. The OHR started judicial streamlining within the entities. The number of courts, their location and their ethnic balance was addressed. A High Judicial and Prosecutorial Service Council was established in order to evaluate judges: it replaced many of them and raised wages in an effort to curb bias and corruption. Court administration, management, and services were also improved (Burke-White, 2007: 7). In the same sweep of judicial transformation, the rule of law in Bosnia was brought to a whole new level with the establishment of the hybrid Court of Bosnia and Herzegovina (BiH Court) in July 2002, with no limitations in place concerning the duration of its mandate. It is the highest authority as regards organized crime, economic crime and corruption in Bosnia (Tolbert and Kontić, 2008).

The whole process was accompanied by a rather slow and ongoing reform of the normative system in Bosnia.⁷ Eventually, a major breakthrough was made in 2005 when a new set of laws was finally passed, allowing for the creation of a hybrid War Crimes Chamber (WCC) within the BiH Court. The idea of establishing such a reliable institution had already been suggested in 2001 by the ICTY’s Office of the Prosecutor. Initially there was tentative support from the Bosnian government, but without effect. Only when the ICTY approached the OHR with a complete framework for such an institution did the whole idea gain impetus. Together, the two international institutions convinced the Bosnian government to implement the WCC, offering international funds and expertise (Hodžić 2007: 5–7). With the new legislation and a high authority in place, the ICTY has begun to refer a large number of cases to BiH.⁸

However, there is also a flipside to these generally positive developments and the record is mixed so far. Whereas many cases have been and are prosecuted in the Federation (at the BiH Court level as well as in

cantonal courts), the authorities are still very slow to react in Republika Srpska (UNDP, 2005, 2008a). Furthermore, most recent empirical research on the issue suggests that the judiciary at the entity level, in particular, is far from prepared to deal adequately with war crimes cases.⁹ Thorough research by the United Nations Development Programme (UNDP) summarizes the major lacunae of the Bosnian criminal justice system. The major factors identified were (UNDP, 2008a: 7):

- lack of the ability of all courts to apply uniform law,
- lack of adequate witness protection,
- lack of resources to train prosecutors and judges specialized in war crimes proceedings,
- lack of specially trained investigative staff at the cantonal level,
- lack of court houses, court rooms and interview facilities,
- lack of well-trained defence counsel,
- a massive backlog of cases.

In addition to these issues one must certainly add the bad situation in the penitentiary sector and the virtual absence of interregional cooperation in war crimes prosecutions.¹⁰ All of these issues were identified and addressed in December 2008 when the National Strategy for Processing of War Crimes Cases (NSPWCC) was adopted by the BiH Council of Ministers. The new strategy includes the bolstering of the capacities of the cantonal courts as well as a dual system for war crimes processing, whereby the WCC is exclusively responsible for high-profile cases – which are determined through a sophisticated evaluation system – and the cantonal courts process less serious cases that will be referred to them by the WCC if prosecutions began after 2003. All cases prosecuted prior to 2003 will be re-evaluated and probably most of them will be concluded in the cantonal courts.

Furthermore, very ambitious goals have been formulated in the NSPWCC, bringing the national prosecution of war criminals to a whole new level. These are (UNDP, 2008b: 5):

- a. Prosecute the most complex and top priority war crimes cases within 7 years and other war crimes cases within 15 years from the time of adoption of the Strategy;
- b. Centralize and update at the level of the Court and Prosecutor's Office of BiH the record of all war crimes cases pending before the BiH judiciary;
- c. Ensure a functional mechanism of the management of war crimes cases, that is, their distribution between the state-level judiciary and judiciaries of the entities and of Brčko District that will facilitate efficient prosecution within the set timeframe;
- d. Prosecute as a priority the most responsible perpetrators before the Court of BiH, with the help of the agreed upon case selection and prioritization criteria;

- e. Harmonize the court practice in war crimes cases in order to ensure legal certainty and equality of citizens before the law;
- f. Strengthen the capacity of the judiciary and police in the whole of BiH to work on war crimes cases;
- g. Establish a more efficient co-operation with countries in the region concerning war crimes cases for the sake of prosperity in the whole region;
- h. Provide protection, support and same treatment to all victims and witnesses in the proceedings before all courts in BiH;
- i. Establish an appropriate legal framework for the implementation of measures adopted in the Strategy and the accomplishment of its objectives.

The actual adoption of the NSPWCC speaks volumes about the determination of the Bosnian government to deal systematically with war crimes and demonstrate full commitment to rule of law principles.

However, there is a large gap between an initial resolve and its actual implementation. According to reports by the Balkan Investigative Reporting Network, a national NGO (Mackic, 2010), the International Center for Transitional Justice (ICTJ, 2009) and the OSCE Mission to Bosnia and Herzegovina (OSCE, 2011), not much has been achieved so far. Even the most basic milestones of the agreed-upon roadmap have not been reached. For instance, the creation of a centralized database of all war crimes cases in BiH was scheduled to be completed in January 2009. In January 2010, no such database was in place (Mackic, 2010).

The OSCE Mission notes considerable problems with regard to witness protection in national war crimes proceedings at the entity level: “Although the National Strategy recognises many of the obstacles in the system of witness protection and support in BiH, little has been done in the past year to improve the situation of witnesses, including the particularly sensitive category of victim-witnesses” (OSCE, 2010: 22). Obviously, many cases of victim intimidation and threats were recorded while authorities did not allocate sufficient funds and means to the protection of victim-witnesses. No NGOs were identified that could be trustworthy interlocutors in the process, nor was there a serious attempt to set up a witness support network.

The ICTJ further notes in its submission to the seventh session of the Universal Periodic Review of the UN Human Rights Council in February 2010 a number of adverse effects of the NSPWCC in terms of some global concerns regarding the peace process in BiH (ICTJ, 2009). The most significant of these are certainly the fact that the efforts of the Bosnian authorities have concentrated on a retributive approach at the State Court while paying less attention to other transitional justice initiatives, including the fact that there have been no efforts to implement a truth commission at the national level. In addition, the construction of the

State Court as a hybrid organ creates tension in relations between the state and the entities. Actors in Republika Srpska, in particular, still lack clarity about the prioritization of cases at the WCC and therefore continue to dispute the neutrality of this institution. The implementation of the National Strategy is still hampered by the fact that issues of dual citizenship and the prohibition on the extradition of nationals, which is still in place in the successor countries of the SFRY, have not been addressed in an appropriate way. Finally, there is no movement with regard to a national reparations programme.

Truth-seeking mechanisms and the reluctance to implement a truth commission

Although the establishment of truth commissions has largely been recognized as an important factor in providing some kind of restorative post-war justice since 1974 (Graybill and Lanegran 2004: 1), the question has arisen of whether this kind of “soft” justice is appropriate to meet the needs of post-war Bosnia. The answer so far has been a clear “no” by the Bosnian authorities:

There is no national strategy in BiH for documenting war crimes. Documentation is mainly carried out by civil society organizations. The incomplete information available to the public, the still unresolved issue of about 13,000 missing persons, and the lack of official records of people who were killed during the armed conflict in BiH open room, as the participants say, to various kinds of manipulation, primarily with the number of victims. (UNDP, 2008c: 19)

International and national war crimes prosecutions have undoubtedly shed some light on the conflict in BiH, but the accounts are far from complete. The modus operandi of the ICTY does not per se allow for the production of a common narrative regarding the violent past of the country. There is simply not enough time for comprehensive story-telling owing to limited resources. Obviously, the national courts too are overburdened with a high caseload and certainly most will never accomplish the prosecution of all war criminals, so there is no place for truth-telling there either. The only place for such a comprehensive approach towards a common narrative, or “truth”, about the atrocities of the past would obviously be a truth commission.¹¹ However, the still divided and conflicting members of the BiH government were never able to show the political will to establish such a commission.

In fact, shortly after the Dayton Peace Agreement, a bottom-up initiative to establish a truth and reconciliation commission (TRC) was

launched by BiH NGOs and the United States Institute for Peace. In 2000, a conference on the topic was held in Sarajevo attended by over 100 NGOs from across the country, and it was concluded that a TRC at state level should be formed in order to further societal peace (UNDP, 2005: 12). In 2001, even Claude Jorda, the then president of the ICTY, supported the idea – after the ICTY had resisted this approach, fearing that a TRC would compromise criminal justice efforts. Some preparations were actually made and laws were drafted, but the implementation process got stuck again because of a lack of interest by Bosnian governments and also a lack of serious public debate on the matter (Freeman, 2004: 7). In 2005, another unsuccessful attempt was made. Currently UNDP is working on a more promising programme to actually implement a truth and reconciliation process.¹²

In 2008, for the first time since the signing of the Dayton Peace Agreement in 1995, consultations between civil society organizations and government institutions were organized with a view to openly discussing problems related to transitional justice: “the very lack of consultations and, generally, communication between institutions and civil society representatives ... is the main cause of failure of many initiatives, such as, the initiative to establish a body to investigate facts about crimes committed in the past and lack of confidence of BiH citizens towards these kinds of activities” (UNDP, 2008c: 4).

The need to include alternatives to the strictly retributive approach was finally recognized in December 2008 and explicitly mentioned in the draft of the National War Crimes Strategy (UNDP, 2008c). This initiative tackles the problems and lacunae in the sectors of justice and responsibility, truth-telling, reparations and institutional reform (vetting, etc.). However, owing to the Bosnian public’s generally distrustful attitude with regard to “truth”, the establishment of a truth commission will be a major challenge for its advocates.¹³

Missing persons initiatives

In contrast to this as yet unsuccessful attempt to create a common basis for reconciliation, some truth-seeking mechanisms were more successful. For instance, the National Assembly of Republika Srpska, of course acting under pressure from the OHR, established the Commission for Investigation of the Events in and around Srebrenica between the 10th and 19th July 1995 (the Srebrenica Commission). The purpose was to disclose the full truth about the infamous massacre at Srebrenica in 1995 where several thousand Bosniaks were liquidated and the perpetrators attempted to cover up the crime. After initially failing to produce signifi-

cant results, the Commission finally contributed a great deal to uncovering the facts of the gruesome crimes that happened at Srebrenica (Freeman, 2004: 9–10; UNDP, 2005: 10–12).

Another important transitional justice path concerns the tracking of missing persons in Bosnia. Providing closure for the families of persons disappeared during the war and adding to the very complex puzzle of what actually happened in the country, a number of initiatives have been started to gather information on the whereabouts of approximately 30,000 unaccounted-for people, of whom 13,500 remain unknown (ICMP, 2008). In addition to the Missing Persons Institute, set up in 2005, many victim associations pressed for the creation of a Missing Persons Law for Bosnia, which came into force in 2004 (ICMP, 2008).¹⁴

Reparations

Reparations are another very important field of transitional justice processes (Kiza et al., 2006; Kiza and Rettberg, 2010; Rettberg, 2008). Basically one has to distinguish between individual reparation programmes – and of course the whole universe of options for such programmes – and reparations at the inter-state level. In Bosnia both paths were followed.

Aside from Annex VII of the Dayton Peace Agreement, which stipulates the return and reconstruction of property, compensation for damage to displaced persons and their return, at the individual level reparations are provided only through the national court system. Because of the complex political situation, there has never been a broad, state-sponsored compensation programme.¹⁵ Partly owing to the fact that the issue of individual compensation has not been addressed by the ICTY, and consequently has not been transferred to the national judicial system in a timely manner (the right to individual compensation was enacted much later), but mostly owing to the inefficient and weak national justice system, victims and their dependants are having a hard time being awarded any form of compensation at all (OSCE, 2005). In fact, the largest number of individual claims has been filed with the Human Rights Chamber for Bosnia and Herzegovina. However, a massive backlog of cases prevents effective processing (Freeman, 2004). In addition, victim-witnesses in war crimes proceedings in BiH often were not informed about their right to claim compensation and, even if they were, civil courts dealing with these cases are also overstretched and insufficient legal assistance was provided (OSCE, 2005). The situation is further aggravated by the fact that military reparations for veterans are more efficiently and effectively distributed than reparations for the victims of war – especially as regards eligibility criteria (UNDP, 2008c).

Furthermore, the whole complex issue of reparations – including the universe of eligible persons, comprehensiveness, munificence, finality and coherence – has so far been neglected. As a result of more recent developments, awareness is being built with regard to this particularly important issue (UNDP, 2008c).

As regards the state level, Bosnia lodged a case in 1993 before the International Court of Justice (ICJ) against the Federal Republic of Yugoslavia (FRY). In April 1993, the ICJ provisionally ruled that the FRY should desist from genocide. In 2004, the ICJ's jurisdiction in this case was confirmed and in February 2007 the ICJ ruled that Serbia, as the formal successor of the FRY, was not guilty of genocide but had failed to prevent and punish the mass killing occurring in Srebrenica, which was classified as genocide in the verdict.¹⁶ Accordingly, no reparations were awarded to Bosnia.

Lustration

In transitional societies, lustration and access to secret police or army files often play an important role in the transition process. In Bosnia, however, no national legislation on lustration has been passed so far. Some screening processes took place in the wake of broader institutional reform. The Dayton Peace Agreement stipulates that no person indicted by the ICTY can hold an appointive, elective or other public office. Also, according to election regulations, individuals running for election in BiH must undergo a screening process by the OSCE (Zupan, 2006: 333). Screening of the judiciary was supplemented by a screening of the police and high-ranking officers of the Bosnian Army. However, once again this process was very slow, took place outside public discourse and was not transparent, yielding mixed results (Freeman, 2004; UNDP, 2008c).

Insights into the successes and failures of applied transitional justice approaches

Although the overall strategy of transitional justice in BiH is still far from adequate, the paths taken have nevertheless had great effect. In particular, institutional reform in Bosnia was fuelled after the strategic turn of the ICTY in 2002, when it decided that national war crimes prosecutions would benefit the development of the rule of law and make justice less abstract to the people in BiH, and of course owing to the Court's limited mandate.

Considering that, in a first move, accountability mechanisms were externalized and thereby systematically “taken away” from the people in

BiH, the initially low levels of acceptance of the foreign court meant a general shift in the idea of universal international criminal justice.¹⁷ Consequently, important lessons were learned and the idea of purely externalized justice in the area of war crimes has been – at least in part – abandoned by the international community. Accordingly, the Rome Statute introduced a system of complementarity. Large caseloads and complex investigative procedures, a lack of power to arrest indicted persons, and logistical as well as resource problems have helped in the understanding that international courts are mostly needed in the gravest of cases, that is, if there is no willingness by the state to prosecute high-level offenders, and as a general deterrent for state leaders and key architects of international crimes through the introduction of individual accountability.

However, in the former SFRY, and particularly in Bosnia, this learning process has, as mentioned above, produced many undesired and counter-productive effects. In particular, the introduction of the ICTY slowed down the judicial reform process in Bosnia through its initially protective and exclusive strategy. The costs of remedying this initial mistake in strategy are still immense, especially when taking into account the effects on the creation of societal peace in Bosnia. For instance, careful and intelligent research by Meernik (2005) has shown that the ICTY in fact did not have a positive impact on societal peace in Bosnia. On the contrary, Meernik concluded: “More often than not, ethnic groups responded with increased hostility toward one another after an arrest or judgment” (2005: 287). According to his findings, the actions of the European Union, NATO, the United States and neighbouring countries (especially Croatia) had a much greater impact on the behaviour of Bosniaks, Croats and Serbs in BiH. His conclusions are therefore very sceptical.

However, other research demonstrates in a very convincing way that the work of the ICTY actually has had a number of very positive effects – although not necessarily at the level of reconstructing societal peace, which doubtless is the ultimate goal of transitional justice exercises. A study on the impact of the ICTY in Bosnia conducted by Diane Orentlicher (2008) identifies many a positive contribution to the transitional justice process in Bosnia. She makes it clear “that the ICTY has mattered greatly to many Bosniaks – who endured the largest number of crimes charged by the ICTY Prosecutor – even as the Tribunal has disappointed their expectations” (2008: 14). Certainly, many of the Tribunal’s sentences have seemed short to Bosniaks. But some judgments have managed to provide a sense of justice not commonly reflected in assessments of the ICTY. Orentlicher (2008: 14) notes: “For example, many Sarajevans were gratified by a November 2006 Appeals Chamber judgment imposing a sentence of life imprisonment on a defendant, Stanislav Galić, for his role

in the siege of Sarajevo; in their view, the judgment honored their suffering and helped restore a moral balance that had been frightfully put awry.”

In addition, the recognition that the massacre at Srebrenica was in fact genocide is probably the most important achievement and would not have been possible without the ICTY. Moreover, ICTY judgments helped to empower diverse victim groups and reshape civil society. The judgments have created a new kind of awareness that, for instance, women had been abused as a means of war. This made them visible as victims and encouraged them to become more active (Orentlicher, 2008: 15), not only within the context of the war but also as regards issues of domestic violence.

Furthermore, “a particular moral and legal dimension has been established through the Court’s rulings” (UNDP, 2005: 15). This particularly concerns the fact that new sets of rule of law have been further imprinted in the once anomie-ridden society of Bosnia. It has been made clear that fighting against injustice and unjustified aggression does not confer the right to commit acts of injustice or war crimes in return. The information gathered so far by the ICTY has also led to the dismissal of senior officials by the international community, which has contributed to the removal of war criminals from public life and has laid the basis for the reconciliation process in the future. Nonetheless, lesser criminals remain at large and allegedly occupy government posts. Finally, the work of the ICTY has contributed to changing overall public perceptions of how war crimes cases are handled, “encouraging the public to view the domestic courts, such as the war crimes registry [of the BiH Court], in a more favourable light” (UNDP, 2005: 15).

In terms of trust in institutions, the problems of wider state integrity and the general strategy of transitional justice become evident (ORI, 2007: 14–17). The most trusted institutions are either at the local level or the media. In particular, the municipal authorities, the police and public service TV are the most trusted institutions in BiH. At the other end of the scale are those institutions that are basically entrusted with the creation of a common state, namely the state government, political parties and – most of all, with about 68 per cent of respondents expressing mistrust – the United Nations. The only exception to this trend is the almost 50–50 division of trust and mistrust towards the European Union.

Furthermore, people do not trust each other. In international comparison, BiH turns out to be in last place as regards social trust (ORI, 2007: 14).¹⁸ People in BiH do not expect much fairness from their fellow citizens. Paradoxically, at the same time several studies (Kiza et al., 2006; ORI, 2007; Petrovic, 2005) indicate that there actually is a serious need

and willingness for reconciliation, the creation of societal peace and, finally, coping with the past. Although such paradoxes might be perceived as methodological research artefacts, their recurrence in different empirical studies suggests that there is more to the problem than meets the eye. Petrovic suggests that the cause of this paradox is that all three ethnicities in BiH are in fact ready to forgive and reconcile but each group expects the others to take the first step and apologize, that is, take the blame (Petrovic, 2005).

With respect to war crimes prosecutions, one of the more recent opinion polls (ORI, 2007) indicates that, when presented with a battery of policy goals, BiH citizens are least concerned about dealing with war criminals (only 1 per cent). This finding is in blatant opposition to earlier studies, such as a large population-based study by the International Committee of the Red Cross (Greenberg Research, 1999), our own study (Kiza et al., 2006) on war victimization and a study by UNDP (2005: 14), all of which suggest that, within the context of war crimes, people still feel the need for further prosecution and especially for alternative means of transitional justice, such as a truth commission. Oxford Research International (ORI), however, suggests that this means that “these policy options were never important to begin with or, the implementation of those policies has been so successful that they no longer matter. In any case, from the perspective of popular reproductions, it now appears that there will be diminishing returns from investment” (ORI, 2007: 28).

In my view, this explanation is questionable. It is probable that such results were produced because of the research methodology – note that participants were allowed to choose 1 out of 11 categories offered by the research team. However, since the ORI study is the most recent and the most general as regards the scope of topics, there is a chance that people are actually “fed up” with the topic of accountability and prosecution and just want to move on. Nevertheless, further enquiry in this area is obviously needed.

In summary, the strategies of transitional justice applied so far provide a heterogeneous picture in terms of the achievements of the initially postulated goals. Certainly, many high-ranking architects of war crimes have been prosecuted and punished by the ICTY. However, the task ahead is still overwhelming because the retributive legacy of the ICTY leaves only limited space to deal with the past in a more general way, to, for instance, introduce amnesties for lesser offenders in exchange for their public appearance before a TRC. This path still seems blocked, whereas the majority of the population is obviously in favour of such an institution (Kiza et al., 2006; Petrovic, 2005; UNDP, 2005).

With regard to national and local justice mechanisms, the retributive approach has certainly supported the creation of a more just and

impartial judicial system. However, according to available poll data, these institutions have yet to gain the population's trust.

Non-transparent models of deterrence, the difficulty of measuring deterrence and what has (not) been achieved so far

As in the sphere of “ordinary” criminal law, it is hard to evaluate the deterrent effect of international criminal justice or even national special war crimes justice. Theoretically, models of special and general deterrence stipulate that, by punishing an offender, he or she will not in future commit crimes. In addition, the punishment of offenders who are caught, prosecuted and found guilty yields the potential to generally deter other people from committing similar crimes.

Well, so much for theory. In reality, it is much harder to determine the effects of deterrence, especially in the sphere of international crimes. In the case of Bosnia, one might argue that the prosecutions by the ICTY and the domestic authorities have of course had significant effects in both realms of deterrence. Those found guilty of committing genocide are locked away and will not commit genocide ever again; those found guilty of inhuman treatment of prisoners in detention camps will not commit the same crime again – because there is no opportunity in Bosnia any more. The same is true for all those “minor” offenders who have not been caught yet. They are not going to commit breaches of humanitarian law in Bosnia. Perhaps they will even keep a very low profile in everyday life for fear of being caught in other deviant acts and subsequently exposed as war criminals. So deterrence probably works on these very logical or less abstract levels.

This general feeling that there is indeed a deterrent effect at work when serious crimes are prosecuted is further supported by experts from the region at a more abstract level. In her report on the impact of the ICTY in Bosnia, Orentlicher (2010) cites a number of very interesting statements by notable scientists and NGO activists. For instance, Mirsad Tokača, president of the Research and Documentation Center in Sarajevo, noted on the work of the ICTY: “Simply, it’s a message for people that crime will never be accepted . . . There is a strong message to society that there is not anybody who committed a crime who can stay untouched, unpunished” (Orentlicher, 2010: 36).

On the other hand, the ICTY was already in place in 1993. Yet the war crimes in BiH happened after that, even after 1994 when the ICTY experienced considerable international support. The ICTY did not prevent Srebrenica, and thereby genocide, from happening. Nor did the work of the ICTY in a wider perspective prevent the terrible episodes in Kosovo, a re-emergence of Bosnian conditions. The commitment to prosecute war criminals did not prevent Sudan, or Georgia, or indeed Guantanamo.

However, these arguments are too pessimistic and it is a probability that the punishment of offenders who committed war crimes in BiH has prevented much worse crimes from happening in the wars in Kosovo, Macedonia and elsewhere. Nevertheless, we still lack the proper instruments and experience with international criminal law to measure these effects.

Interdependent effects of transitional justice between the national and international spheres

Turning to the interdependence of transitional justice effects between the international and national spheres, the major causes and effects of the establishment of the ad hoc ICTY have already been presented. One could say that, without the shocking wars in close proximity to the “civilized” Western states, it is probable that the international movement against impunity would not have experienced such an impetus. The creation of the ICTY was the precursor to the creation of the ICTR and many other, mostly hybrid, institutions dealing with the prosecution of international crimes. The culmination of this movement was the creation of the International Criminal Court – with some setbacks, such as the creation of the Iraqi High Tribunal by the United States. In this line of reasoning, the wars in the former Yugoslavia greatly contributed to the development of a universal consciousness and norm that there are certain crimes that cannot go unpunished – with all the limitations in the real world (for example, political opportunism regarding state leaders or simply the lack of resources or opportunities to arrest alleged perpetrators).

From the narrower perspective of interdependence between the ICTY and the national judicial institutions in BiH, the latter have certainly greatly benefited from the strategy applied by the ICTY after 2002. Burke-White (2007: 49) identifies three important points. First, the ICTY has had significant influence on BiH, far beyond deterring international crimes. The ICTY has deeply influenced the structure and operation of domestic judicial institutions, both directly and indirectly. Secondly, incentives were created by the jurisdictional relationship between international and domestic institutions through the pursuit of self-interest by domestic and international actors and the norm leadership of international institutions. Thirdly, the design of international criminal tribunals and their jurisdictional relationship with national courts are of significant importance.

In particular, it is the complementarity of norms created through hierarchically defined structures that has a high impact on the creation of corresponding national legal capabilities. Only after Rule 11bis of the ad hoc tribunals was established, and it became clear that cases would be

referred to domestic institutions, did the process of creating a system complementary to the sophisticated and complex system of the Tribunal gain impetus. At the end of this process the BiH Court was created, largely reflecting the normative and operative structure of the ICTY and thereby attempting to create a just judicial system with respect for fair trial norms. However, this was only the beginning of a very complicated and long-term transitional justice process and, as argued elsewhere in this chapter, the ultimate success of the whole process of bringing to justice those who have committed unimaginable crimes will be measured in the future, when Bosnian citizens decide that the time has come to close the books.

In conclusion: Lessons learned? Pleas unheard!

The transitional justice process Bosnia is far from perfect, and yet it holds great potential for the future and yields much information about positive and negative examples of justice transition in post-conflict societies.

On the positive side of the balance sheet we find the commitment of international society to prosecute even high-ranking individuals for committing war crimes, crimes against humanity and genocide. During the Cold War, such a move would have been nigh on impossible. Furthermore, the overall strategy of the international community and especially the ICTY seems reasonable in hindsight. The initial phase of monopolizing the prosecution of alleged war criminals made sense because of the arbitrary behaviour of Bosnian institutions. It was important to protect the population from a vengeful judiciary and to pave the way for fair trials and rule of law. In a second phase, the subsidiary strategy was able to further the development of the judiciary in Bosnia. Huge reforms were initiated by the international community and strongly benefited from the experience accumulated by the ICTY. However, this strategy had its downsides. It contributed to the mistrust of the population towards international institutions and particularly towards the ICTY. Remedying these effects was and still is – especially in Republika Srpska – an arduous task. Moreover, the perception of injustice has reflected on the domestic institutions at the federal level. It will take time to convince the population that the national judicial system will be able to continue the long process of bringing many more war criminals to justice.

However, the strategy of international prosecution through a Tribunal outside the country and the subsequent transformation of the national judicial system, and in fact the institutional system as a whole, was possible only because Bosnia was conceptualized as an international protectorate. In other countries, these transitional processes are much slower

and harder to achieve. In Serbia, for instance, the prosecution of war criminals is yet to begin in earnest – the international community simply did not have the same leverage as it did in Bosnia.

Another downside of the overall strategy is that it was only in December 2008 that a national strategy for the prosecution of war criminals was adopted, and it is still lacking impetus. The current situation is further aggravated by the fact that no strategy was devised to provide reparations or to establish a truth and reconciliation commission that would ultimately help to create a common narrative in order to deal with the past, memorialize events, recognize the victims and pave the way for a common future. Instead, bottom-up processes of civil society, NGOs, victim associations and so forth were ignored. Although it is clear from contemporary research that there is a demand for a TRC, the process is still stuck and no serious broad public discussion of the events between 1992 and 1995 has yet taken place. Because of this and, of course, the unusual construction of the micro-state, the country is still divided. Open questions about the future of BiH remain and people still mistrust each other.

Bosnia has a long way to go until societal peace is achieved and, as some research findings suggest, this ultimate goal can be achieved only by the Bosnian people. International intervention and support can help up to a point, but the rest of the difficult path to peace is ultimately in the hands of those who are expected to live together after the end of violence.

Unfortunately, I have not had space in this chapter to discuss the many civil society and grassroots initiatives that were designed to further the peace in BiH. These have certainly had a significant impact, especially with regard to documenting the past in BiH. As the UNDP (2008c: 21) remarks:

It is primarily the NGOs that work on crime documentation in BiH, applying different methods of research. In general, the majority of these NGOs work on documenting violations of the rights of a particular group of the population in terms of their status, gender and ethnic background. A number of organizations also collect data on committed crimes applying the method of verbal history, trying to create in this way a culture of memory.

Notes

1. Officially called the General Framework Agreement for Peace (GFAP).
2. For instance, the federal government was not even able to decide on what road signs should be used in BiH.
3. High Representative Paddy Ashdown removed Croat presidency member Dragan Čović on 29 March 2005; other High Representatives have also made removals.

4. The original NATO-led peacekeeping force (IFOR) consisted of 60,000 troops; this later became a smaller Stabilization Force (SFOR).
5. These statistics are based on data taken from reports by the Helsinki Committee for Human Rights in Republika Srpska, "Narrative Report: On the Activities within the Framework of the NED Grant Project 'Protection, Promotion and Monitoring of Human Rights in Republika Srpska'", 1996–2005; available at <http://freedownload.is/doc/protection-promotion-and-monitoring-of-human-rights-in-republika-srpska> (accessed 26 April 2012).
6. For a good account of this issue, see OSCE (2005).
7. A major law reform was completed in 2003. However, the norms in place are under constant review.
8. Since its creation, the BiH Court has tried 20 accused and is working on 25 cases at various stages (UNDP, 2008a: 9).
9. I have been involved in the preparation of a comprehensive OSCE research project evaluating the capacity of national judicial institutions in the territory of the former Yugoslavia to deal with war crimes cases.
10. Note that all successor countries of the SFRY have legislation in place that prohibits the extradition of citizens.
11. Moreover, the overwhelming demand for a truth commission by people affected by the wars in the region of the SFRY has been empirically proven (Kiza et al., 2006).
12. I have spoken about this process with the UNDP project manager in charge, John Furnari. The progress regarding the institutional setting so far seems very promising.
13. In fact, one of the latest assessments of the National War Crimes Strategy is entirely focused on the key aspect of the strategy, namely prosecution, while other aspects are largely ignored (OSCE, 2011).
14. For further details on missing persons initiatives, see UNDP (2005: 9–12) and Freeman (2004: 10).
15. Note that, under international law, states have obligations to compensate victims of grave human rights violations (Freeman, 2004: 11).
16. For a summary of the judgment, see <http://www.icj-cij.org/docket/index.php?sum=667&code=bhy&p1=3&p2=2&case=91&k=f4&p3=5> (accessed 27 March 2012). As an interesting aside, the ICJ verdict has still not been officially translated in Bosnia, because no agreement could be reached on which institution should have the task of undertaking the translation – speaking volumes about the state of the Bosnian system.
17. Supported by the experience of the ICTR and other more nationalized mixed tribunals.
18. BiH was compared with 24 countries, including China, Belarus, Viet Nam, Montenegro and Moldova.

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12

Justice and accountability mechanisms in Bulgaria in the transition period (1989–2008)

Hristo Hristov and Alexander Kashumov

Introduction

Transitional justice has become an issue in Bulgaria in the course of its “change” from Communism to democracy since 1989. The Communist regime had been established in the country in the mid-1940s and lasted for more than four decades.¹ During that period there were a number of human rights violations and, after the change, society faced the question of recognizing responsibility and making amends. Logically these issues raised the need to know more about what was actually done, why and for what reason. Therefore the disclosure of secret service dossiers and the screening of public figures and candidates for public positions became important topics. The question of lustration was part of that discussion as well.

In this chapter we touch on these issues with the aim of presenting some specifics of the situation in Bulgaria both in the context of Central and East European societies and as a unique case. Some of the questions concern expectations of justice from the judicial system for criminal offences committed by and connected with the regime before 1989. We categorize the human rights violations and tell the story of the investigations, charges and eventual punishments. We briefly describe property restitution as an option in Bulgaria. We use case histories to present the issues of accountability and the disclosure of documents revealing what has been done in the past, how and why. We also explain the constraints on access to documents imposed by the current regime. Despite that obstacle, two

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books have been published about the killing of the dissident writer and BBC journalist Georgi Markov in London in 1978, disclosing a lot of previously unknown facts. The 2006 law on disclosure and access to documents of the former State Security Service and its implementation also contributed to satisfying public demand for information about the past.

The context: Brief overview of the Communist period in Bulgaria

The Communist regime was established in Bulgaria on 9 September 1944 when a new government came to power after a coup d'état. The government was composed of left-wing parties and dominated by the Communist Party, which soon became the sole party. In the 1940s it eliminated all political opposition via political trials and other forms of repression and ruled the country for more than 40 years together with the satellite organization Bulgarian Agrarian People's Union. The Communist Party nationalized all industries and large urban properties in the 1940s and forcibly unified individuals' agricultural land into so-called "cooperatives" in the 1950s. Repression was undertaken in the 1940s and 1950s against political opponents, industrialists, intellectuals, priests, etc. Any expression of different political, philosophical or even aesthetic views was restricted and subject to persecution. People were often under surveillance by the Secret Service of the regime.

The 1971 Constitution prescribed a monopoly role for the Communist Party in ruling the state.² It also, on paper, guaranteed fundamental human rights more or less in line with those provided under the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ratified by Bulgaria in 1970). However, they were not respected at all and no measures were taken at either a legislative or a practical level to give effect to the constitutional provisions. On the contrary, a number of laws and secondary legislation contained restrictions on rights that were incompatible with the international standards. For example, the right to peaceful enjoyment of possessions was limited to a certain number of square metres of living space per individual and unearned income was subject to confiscation.

The context: Transition in Bulgaria

The "change" started on 10 November 1989 when the long-standing head of state and Secretary General of the Communist Party Central Commit-

tee Todor Zhivkov resigned. After that, the first opposition parties and free press (not controlled by the Communist Party) were created. As in other countries in transition, roundtable agreement was compromised as regards the main issues related to the change. It did embrace questions of restitution of nationalized property and of the forcible change in Turkish people's names in 1984–1985, but it did not extend to matters of justice and responsibility for human rights violations. The idea that the Communist Party would recognize or confess its own responsibility for the past failed. In 1990, the party simply changed its name from “Communist” to “Socialist”.

The first parliament elected after the change in 1990 adopted a new Constitution (1991). This provided for the principle of the separation of powers, and political pluralism replaced the previous unification of power and one-party monopoly. Chapter two of the Constitution guaranteed fundamental human rights, including the right to ownership (Article 17), the right to a fair trial, the right to privacy (Article 32), the right to free expression (Articles 39–40), the right to seek, receive and impart information (Article 41) and the right to free assembly (Article 43). In 1991, the parliament also adopted the main laws regulating the restitution of property.

Ratification of international human rights instruments after 1989

At the time of the first government of the Union of Democratic Forces (UDF) – the main Socialist Party opponent – which ruled Bulgaria for a year (November 1991 to December 1992), Bulgaria became a member of the Council of Europe (1992). In that period it ratified the European Convention on Human Rights (ECHR)³ as well as the First Optional Protocol to the ICCPR, thus accepting the jurisdiction of the European Commission of Human Rights.⁴

Unfortunately, the first case before the European Court of Human Rights (ECtHR) against Bulgaria was brought and won by Andrey Luukanov, a former high-level Communist Party activist and Prime Minister of the socialist government in 1990.⁵ At that time this did not encourage a feeling that the ECtHR might play an important role in transitional justice. Today, however, the ECtHR is highly respected by Bulgarian citizens, who view it as a last resort for a number of disputes,⁶ including problems with property rights created before 1989 (for example, cases of not giving compensation after the appropriation of private property).⁷ However, in a number of cases involving human rights violations in the past the ECHR is just not applicable. For example, it cannot be

retroactively applied and itself prohibits retroactive application of criminal law or sanctions (Article 7), and the right to a fair trial (Article 6) does not include the right of victims in criminal cases.

The Bulgarian judiciary in the transition

After the fall of the Communist regime in Bulgaria in 1989, necessary changes within the judiciary as part of the transition were put on the agenda. The judicial branch was found to be deeply dependent on the Communist Party – judges, public prosecutors and investigators were appointed after approval by party organs at various levels. So the issue of the depoliticization of that system was raised at the beginning of 1990 by the new political opposition. The new Constitution of 1991 enshrined the principle of separation of powers and provided that the independent judicial branch embraced the courts, the Public Prosecutor's Office and investigating authorities. A new body was established, the Supreme Judicial Council, to deal with judicial appointments and budgeting for the judiciary. The Constitution also guaranteed that magistrates could not be removed from office.

After these first steps of the reform, for the first time in 45 years Bulgaria appointed a Prosecutor General (Attorney General) and president of the Supreme Court who were not linked to the former Communist Party. One of the main tasks of the judiciary for the next few years became to investigate and apply justice to the serious crimes and violations of the Communist regime. This was not possible before 1989 owing to the lack of independence and impartiality of the public prosecutors and the courts, especially in cases involving high-level party officials.

Justice and accountability for what?

We may distinguish four categories of offence committed by the Communist regime in Bulgaria:

- crimes against the person, such as execution without a trial, illegal deprivation of liberty and forced confession;
- judicial or administrative repression: trials, forced settlement, deprivation of the freedom to move about the country and abroad, violation of religious freedom, violation of national and racial equality;
- financial and ecological crimes;⁸
- betrayal of national interests.⁹

A separate category of criminal offences committed between the change in 1989 and the beginning of 1990 concerns the destruction of documents with the purpose of covering up previous crimes of the regime, one of

which relates to the dossiers of the State Security Service. The latter seriously affected developments and political processes after the change.

As regards the first category of crimes, execution without trial was typical of the period after 9 September 1944 when the Communist Party took power with the help of the Soviet Army. Various sources show tens of thousands were killed. According to some, the number was between 20,000 and 40,000.¹⁰ In addition, nearly 2,000 people were declared missing.¹¹ These cases were not investigated by the Public Prosecutor's Office after the change owing to a lack of documents and evidence.

It was different with the death sentences of the so-called People's Court in 1945–1947. This “court” convicted 10,897 individuals on 21,024 charges in 131 trials. A total of 2,730 individuals were sentenced to death, including the regent (the king's brother Prince Kiril¹²) and most of the ministers and members of parliament after 1941; 1,305 people were sentenced to life imprisonment; 4,348 people were sentenced to imprisonment terms of 1–20 years. More than 200 factories were confiscated, as well as huge amounts of property. Between 1992 and 1999 the Supreme Court reconsidered most of these sentences and repealed them.

In addition, in the period 1946–1953 the Communist regime suppressed political opposition and elite members of the Army, the Church and the intellectual establishment through a number of political trials. This was done in a “soviet manner”, which means that people were tortured to confess their “guilt”. These convictions were not reconsidered.

The administrative repression in Bulgaria moved tens of thousands out of their homes. In just the period 1949–1956 more than 22,000 people were arrested. After 9 September 1944, 7,025 families with approximately 25,000 members were settled in the countryside away from their homes. The rights of more than 10,000 families of political émigrés were restricted by bans on leaving the country, censoring of correspondence and systematic ill-treatment.

Justice for crimes committed in the Communist era

In general, criminal convictions were pronounced and subsequent sanctions imposed only in exceptional cases. At the beginning of the 1990s some of the above-listed crimes were investigated, but others were not. Among the very few convictions were those for not informing the public about the Chernobyl accident. In other cases, the trial was terminated owing to the statute of limitations. In Bulgarian criminal law, there are fixed time periods for investigation and trial, which even in the case of serious crimes are not very long. Bearing in mind that no steps for prosecution and trial were taken during the regime prior to 1989, it is easy to understand that crimes committed, say, in the 1950s could not be

punished. A third category of cases is still ongoing (for example, the case of the murder of Georgi Markov in London in 1978).

Investigations and justice for human rights abuses

The new independent judiciary started investigations into the killings in the secret Communist camps in the period 1945–1962. Because documents are missing in many of the cases, the Public Prosecutor's Office started detailed investigation only in the case of the last Communist camp, situated near the city of Lovech. In the period 1959–1962, 151 people were killed there and more than 1,500 people were subject to appalling conditions and systematic abuse.

After the change, charges were brought against five former State Security officials: a deputy minister in the Ministry of Interior (responsible for camps), two of the camp's officers and two jailers. The case was taken to the Supreme Court. The Public Prosecutor's Office found that there had been no decision by the Politburo (the highest committee) of the Central Committee of the Bulgarian Communist Party to set up the camp. Nevertheless, it was established that the Politburo members, including Todor Zhivkov, knew about the crimes committed in that camp. After many long procedures, in 2002 the Supreme Court of Cassation dropped the proceedings without delivering judgment because the time limits for criminal prosecutions had expired.¹³

The judiciary also investigated several crimes against the person organized by the regime. The most famous were the assassination of the dissident writer and BBC journalist Georgi Markov in 1978 in London, the kidnapping of the émigré Boris Arsov in 1974 (forcibly brought back to Bulgaria from Denmark) and the unsuccessful attempt to assassinate another journalist – Vladimir Kostov – in August 1978 in Paris (see Hristov, 2000). In 1993, the Prosecutor General refused to provide the international investigation with documents from the dossier on the suspect in the Markov assassination, Francesco Gullino, an Italian citizen with a Danish passport. The withholding of the information blocked the investigation, which is still ongoing without success.¹⁴

One of the biggest investigations of the judiciary after the political change in Bulgaria was conducted into the forced change of the names of Bulgarian citizens of Turkish origin in 1984–1985. Despite the charges brought against the former state and party leader Todor Zhivkov, the former Prime Minister Georgi Atanasov, the former Interior Minister Dimitar Stoyanov and the former Foreign Minister Petar Mladenov, there was no trial. Separate criminal cases were brought at regional level against former State Security officers who participated in the murder of Bulgarian citizens of Turkish origin, but there were no convictions.

Judicial prosecution of felonies in the Communist camps

After the fall of the Communist system in November 1989 in Bulgaria, the murders in the Communist camps were among the first felonies of the regime that attracted society's attention. The killings began immediately after the beginning of the Soviet occupation in November 1944. The last known camp, near the city of Lovech, existed in the period 1959–1962. It was organized by the Ministry of Interior by order of the Central Committee Politburo – whose director was Todor Zhivkov. The main purpose was to move 166 criminals from the camp near Belene, which closed in 1959. The new camp consisted of male and female sections, the latter near the village of Skravena in Sofia district. It was a labour camp and was organized near a stone-pit where the camp inmates worked in appalling conditions. More than 1,500 people were kept there and among those killed were ex-deputies from the Agricultural Party, ex-landowners and musicians accused of telling jokes against the authorities. In 1962, the camp was closed by the Politburo without publicity after finding out that brutal murders had been perpetrated.

In January 1990, the Military Prosecutor's Office, which is part of the Public Prosecutor's Office, started an inquiry concerning the Lovech camp against the ex-military officials: the former Deputy Interior Minister, General Mirtcho Spasov, an important member of Todor Zhivkov's entourage; the chief of the Lovetch camp, Peter Gogov; his deputy, Cviatko Goranov; the State Security official in the camp, Nikolai Gazdov; and the supervisor, Juliana Rujgeva. At first they were taken into custody as a preliminary detention measure. Gazdov and Rujgeva were detained for three years and then freed.

The inquiry identified the perpetrators of 14 of the murders in the camp, but then the trial proceedings were terminated because of the expiry of the 20-year statute of limitations, provided for by the Penal Code for murder. In April 1990, the National Assembly passed an amendment to the Penal Code that referred particularly to the crimes in the Lovech and Skravena camps. It extended the statute of limitations in cases of the murder of two or more persons from 20 to 35 years.¹⁵ However, the last parliament of the Communist era (acting by the spring of 1990) "missed" giving the provision retroactive effect. Thus the amendment had no consequences for the Communist camps case. The Military Prosecutor's Office, which did the investigation, arrived at the conclusion that, under Zhivkov's rule, the statute of limitations stipulated in the Penal Code did not lapse for crimes against humanity but it distinguished such crimes from *crimes against humaneness*. This tiny juridical line leads to a lack of consistency with the United Nations' Universal Declaration of Human Rights, which was ratified by Bulgaria in 1976. According to the 1991–

1992 Military Prosecutor General, Lilko Yotsov, a solution could be found if the legislature passed a new law with retroactive effect. It would deal with and punish people who had organized or directed a camp involving illegal arrest, torture and murders. The jurist assumed that such a legislative amendment would not be inconsistent with the Universal Declaration of Human Rights. However, this step was not taken by Prosecutor General Evtim Stoimenov in 1990 when the state's Attorney General had the right of legislative initiative and when the investigation was at its beginning.¹⁶

The next Prosecutor General, Martin Gunev, who restarted the investigation into crimes in Communist camps, asked the Grand National Assembly for a solution to the problem with the statute of limitations. He insisted that the seventh Grand National Assembly provide an explanation of how the amendment of Article 80, paragraph 1, of the Penal Code on the extended statute of limitations should be put into practice. The Attorney General formulated three possible hypotheses. The first was that the amendment was valid for future crimes. The second was that the amendment covered all crimes committed since 1955. The third was that the statute of limitations on the camp crimes could not have been valid until 10 November 1989. The parliament did not come up with a solution to the problem.

The Supreme Court also "kept its distance" and in 1990 declined the Prosecutor General's request for an interpretative decision on the case. The refusal of the Supreme Court to deliver such a decision was justified by "the lack of contradictory practice". The next Prosecutor General, Ivan Tatarchev, accepted that under totalitarianism the statute of limitations was not applicable. As a result, the case was brought to court in 1993. Tatarchev read the indictment himself and demanded the harshest punishment for the four defendants.

A few months later, the main defendant, Mirtcho Spasov, died at over 80 years of age. The trial, which was in the hands of the Military Division of the Supreme Court, was halted and sent to the military court in Pleven, where the crimes had been committed. However, it was not considered there and was brought back to the Supreme Court. However, a jury was needed to consider the case, and it had to be chosen by the parliament. The National Assembly made this choice in December 2000.

Once the jury was chosen, the trial was again set for consideration by a commission of the Supreme Court of Appeal. The case ended in July 2002 when the court terminated it with the reasoning that the statute of limitations for criminal responsibility had expired. The president of the panel and vice-president of the Supreme Court, Rumen Nenkov, declared: "The ignorance of the legislators left the court no legal alternative."

Investigation and justice for crimes connected with the “export of revolution”, the economy and the environment

The Public Prosecutor’s Office investigated the former highest party officers for a series of secret decisions regarding the “export of revolution”. This related to support given in the 1960s and 1980s by supplying various left-wing terrorist regimes with arms and armaments. More than 20 members of the Central Committee of the Bulgarian Communist Party were charged but there were no convictions. After the change, there were several investigations of economic crimes committed during the Communist era.

The Moskwa (Moscow) Fund. This case was started against Todor Zhivkov, charged with embezzlement of 22.5 million lev. Over a period of 30 years (1957–1987) this considerable amount of money had been given on his orders to the Soviet ambassador in Bulgaria, who sent it to a separate account in a special fund in Moscow designed to support the international Communist movement. The indictment was brought to court in March 1993 but the trial did not proceed.

Case No 1. The Prosecutor General’s Office investigated Zhivkov over Case No. 1 in 1990. He was charged together with Milko Balev, the head of his cabinet and member of the Central Committee of the Communist Party, for abuse of power for private benefit. The indictment reveals data on the money spent on food and representation expenses given yearly to the high-level party nomenklatura, illegally purchased Western cars and 125 apartments given to various people by Zhivkov. Zhivkov was sentenced to seven years in prison and Balev was sentenced to two years. In 1995, the General Assembly of the Supreme Court overturned the conviction, accepting that Zhivkov could not be judged in his capacity as head of state.

Chernobyl case. One of the few effective sentences for the crimes of the regime after 10 November 1989 was passed in 1993 when the court convicted the former Deputy Prime Minister Grigor Stoichkov and the former Chief Sanitary Inspector Chavdar Shindarov for breaching the norms of radiation protection, and thus endangering the population of Bulgaria, through the accident at the Soviet Chernobyl nuclear power plant in 1986. Both were sentenced to two years of imprisonment.

Investigation and justice for crimes connected with concealing information and destroying documents

An investigation into the destruction of the secret dossiers of the former State Security Service in 1990 led to charges and trial (see Hristov, 2005: 493–523 [Bulgarian edition]). Those prosecuted were the former Interior

Minister, General Atanas Semerdjiev and the chief of the Ministry of Interior archive, General Nanka Serkedjieva. They were charged with the criminal offence of organizing and ordering the destruction of approximately 40 per cent of the former State Security Service dossiers.

In 2002 the defendants were found guilty. General Semerdjiev was sentenced to four-and-a-half years in prison and General Serkedjieva was sentenced to two years. It was established by the court that, following their orders, approximately 100,000 files were destroyed. By a decision on 13 August 2003, a five-member panel of the Supreme Court of Cassation overturned the conviction and sent the case back for further investigation, which is still ongoing.

A separate court case was started on charges of destroying State Security Service dossiers on the dissident writer and journalist Georgi Markov. The trial ended with a judgment in 1992. The Supreme Court found General Vladimir Todorov – the last head of the foreign intelligence department of the State Security Service in Zhivkov's time – guilty and sent him to prison for 11 months. The other defendant in the trial, General Savov, committed suicide while proceedings were pending.¹⁷

The efficiency of the judiciary in the period after 1989

One of the main failures of the judiciary after the change, which illustrates its inefficiency in relation to cases that would now be considered criminal, is connected with malicious bankruptcies in the period 1993–1996. In that period, a number of banks lost about 3 billion lev, which led the whole system to crash. Despite the fact that charges were brought against at least 10 high bank officials, no conviction was made and the defendants were acquitted.

A little more successful were the trials of the bosses of the financial “pyramid” schemes, who took the money saved by hundreds of thousands of people. In these cases there were several convictions by courts.

Another field of clear failure by the judicial system is related to the prosecution and punishment of organized crime. In the period 1993–1997, forced protection and racketeering remained unpunished. A remarkable example of the failure of the judiciary concerns contract killings. Bulgaria is constantly criticized by the European Commission for that, and for various reasons the judicial system failed to investigate and bring to trial more than 150 planned murders after 1992 affecting people from the “underworld”.¹⁸

Corruption and financial fraud are the biggest problems for the judiciary today. The scandals of 2007–2008 involved the failure of the investigating and prosecutor's offices to conduct fact-finding and collect appropriate evidence for these crimes. In recent times, even the informa-

tion on corruption and financial fraud in some cases comes from outside the country. A typical example is the reports by the European Anti-Fraud Office (OLAF) in 2007–2008 on the misuse of money from various European Union funds.¹⁹

Restitution of property and compensation

In the 1990s the parliament adopted a number of laws regulating the return of nationalized property or compensation. In 1991 it passed a law that gave people the right to claim back agricultural land that had been forcibly appropriated for the agricultural cooperatives in the 1950s.²⁰ The return of property was enforced by special commissions. Restitution was implemented either by giving back the land as it had existed before the agricultural cooperatives or by assigning new land to the applicants. The law was amended nearly 50 times and was slowly enforced. Most of the commissions' decisions for restitution were made in 2000 or later and a lot of court disputes started as well, so in a number of cases the process is not finished. In any case, this was the biggest restitution operation involving thousands of families.

In 1992 there was also restitution of the property of Bulgarian citizens of Turkish origin whose assets were seized in the period May–November 1989. This episode involves one of the biggest crimes of the Communist regime, with potentially long-lasting effects. In 1984–1985, as part of their assimilation policies, the authorities forcibly changed the names of many people of Turkish origin in Bulgaria and killed some of those who protested. The consequent discontent of the people affected led to a mass migration in 1989 (some sources say 360,000 people) known as “the Big Excursion”. Property purchased by the state from the people who left as a result of these events was returned in 1992 by a special law enacted by the parliament.²¹

Several other laws provided for the restitution of large urban property, of real estate expropriated for public purposes that were not fulfilled, of forests, etc.²² These properties had been taken in the past on various grounds: some were nationalized just because they were big plots in urban areas; others were confiscated following the criminal conviction of the owners. In some cases, the property was returned, whereas in others compensation was given in various forms such as shares in companies or compensatory financial instruments.

In 1991 the parliament declared the political and civil rehabilitation of individuals who had been wrongfully repressed for their origin, political views or religious beliefs in the period 12 September – 10 November 1944. The list of categories under the law includes people sentenced by

criminal courts or the People's Court in the case of rehabilitation, people illegally detained by the police, interned, missing, escaped across the border, and repressed in connection with the forced change of names. The victims of these activities are entitled to some compensation, which has not yet been determined in most cases.

Lustration

The Bulgarian transition is notorious for its lack of clear political will to apply lustration to past events connected with totalitarianism or the repressive system of the State Security.²³ The UDF, which declared itself against totalitarianism after its decline, also lacked such will. Moreover, the right-wing UDF was more active in advocating lustration mechanisms when it was in opposition. It was never consistent and united behind this idea when it was in power. In the period 1991–1992, during the administration of Philip Dimitrov and the UDF (with the support of the Movement for Rights and Freedoms), a few lustration items were included in several laws. For example, paragraph 9 of the miscellaneous provisions of the Banks and Credit Act prohibited anyone who had held a key Communist Party position or been an officer or agent of the State Security Service during the previous 15 years from being appointed to the management of a bank for a five-year period.²⁴ In 1992, the parliament adopted the Law on the Temporary Introduction of Additional Requirements for Members of the Executive Bodies of the Scientific Organizations and the Higher Certifying Commission, known as “the Panev Law” after Georgi Panev, the member of parliament (MP) who proposed it.²⁵ It restricted the access of nomenklatura personnel of the former Communist Party as well as of collaborators with the secret services to positions on academic, faculty or scientific councils and to the directorates of universities and the Higher Certifying Commission.

Resistance to these small legal provisions was strong. On the initiative of 49 MPs, the Constitutional Court dealt with the question of the constitutionality of paragraph 9 of the miscellaneous provisions of the Banks and Credit Act. It declared it unconstitutional in its Judgment No. 8 of 27 July 1992 on constitutional case No. 7.²⁶ Later, in 1995, under Zhan Videnov's administration, the parliamentary majority of the Bulgarian Socialist Party abolished the Panev Law.²⁷ A comprehensive draft law on anti-communization was proposed by the UDF in the last months of Dimitrov's government in 1992, but President Zhelyo Zhelev opposed it. The project provided for restricting occupation of management positions in the executive and in enterprises with over 30 per cent state participation, in the state media and in organizations financed by the state budget with regard to the following categories:

- personnel and collaborators with the Security Service;
- secretaries of primary party organizations of the former Communist Party;
- nomenklatura personnel from the Central Committee of the former Communist Party and other related satellite structures, including youth groups;
- participants in the repression of people of Turkish origin in 1984–1989;
- professors and teachers in the former Communist Party academy, in the schools of the Central Committee of the former Communist Party and the Communist Party of Soviet Union, and in the KGB school.

The draft law was not adopted and the historical moment for passing legislation of that type was missed. Head of state Zhelev explained his opinion with the words: “National peace and success in economic reforms are for me the real anti-communization.”

Anti-communization in the countries of the former socialist bloc, including Bulgaria, was encouraged by Europe. In 1996, the Parliamentary Assembly of the Council of Europe (PACE) accepted Resolution 1096 (1996) on measures to dismantle the heritage of former Communist totalitarian systems (Council of Europe, 1996). The Resolution clearly stated (paras 13–14) that lustration laws are in principle compatible with a democratic state if various criteria are met. The Resolution also welcomed “the opening of secret service files for public examination in some former communist totalitarian countries” (para. 9). After the coming to power of the UDF in 1997, its coalition partner the People’s Alliance introduced a draft law in the parliament for restricting access to key public positions in Bulgaria. The MPs who introduced it were motivated by the recommendations of PACE’s Resolution 1096. President Petar Stoyanov and Prime Minister Ivan Kostov did not support the idea. “I do not think that the law will have a strengthening effect on Bulgarian society. It is now seven years since 10 November 1989. We cannot constantly look back and we cannot move rapidly forward if we carry the shadows of our past” was President Stoyanov’s opinion. Prime Minister Kostov indicated that the bill was too late: “Such a law will affect only a few people.”

In 1998, the Radio and Television Act introduced lustration provisions that forbade people who cooperated with the former Security Service from being members of the Council for Electronic Media or of the managing committees of Bulgarian National Radio and Bulgarian National Television. This prohibition was appealed before the Constitutional Court, but the Court found it consistent with the Constitution and the provision still applies.²⁸ On the basis of this lustration text, some members of the Council for Electronic Media were forced to leave their positions.

In 1998 a similar legal provision was included in the Public Administration Act.²⁹ It stated that, for five years after the law came into force, anyone who held a managerial or equivalent position in the political or

administrative apparatus of the Communist Party or cooperated with the former State Security Service in any category was prohibited from occupying a managerial position in the civil service. Individuals occupying such positions were required to declare that they did not fall into one of the incompatible categories. Control over the veracity of declarations was left to be determined by the Council of Ministers. By its decision of 21 January 1999, the Constitutional Court declared the provision unconstitutional. It found that it contradicted the constitutional right to equality and Article 14 of the ECHR.³⁰

Lustration provisions in relation to people who cooperated with the former State Security Service in Bulgaria were not included in any of the laws on disclosure and access to the former State Security Service's files adopted in 1997 (as amended 2001) and 2006. The philosophy of these laws was focused on the public identification of collaborators in the former repressive system taking legislative, judicial or executive positions, or positions in the media, the banking sphere, the universities and other bodies. Both the 2001 and the 2006 laws provided for a special mandate and an independent body (committee) to conduct the disclosures. The disclosure of agents through these laws has a mere moral effect and is not accompanied by other sanctions on those whose cooperation with the former Security Service was officially known to the committee. They were not banned from occupying any positions. The only lustration provision after the 2006 law on dossiers is related to the Dossier Committee, itself established under that law (consisting of nine members). The legislature took the view that members of the Dossier Committee cannot be former or current personnel or non-regular collaborators with the former secret service. This approach was taken with the aim of protecting the body from social distrust and ensuring its independence.

Despite the fact that Bulgarian legislation on agents of the Communist repressive system does not itself have a lustration character, there is a mechanism in it that in fact functions as a kind of voluntary lustration. The mechanism is in both the 1997 (as amended in 2001) and the 2006 laws on disclosure and access to former State Security Service documents. It provides the opportunity for political parties and coalitions to ask the Dossier Committee to perform preliminary checks for affiliation with the former State Security Service of candidates for public positions. The opportunity for a preliminary check began to play an important role from the 2001 parliamentary elections, also having the effect of publicly exposing the real views of the various political parties on the issue and their attitude towards and dependence on the past. If the Dossier Committee found a candidate to be affiliated to the former State Security Service, it informed the relevant political party, which was free to withdraw or recall such candidates.

This mechanism was used for the first time by some parties during the 2001 election campaign for the 39th National Assembly. The main initiator of these checks was the UDF coalition, but it was joined by the newly formed National Movement for Stability and Progress, also known as National Movement Simeon II after its leader Simeon Saksoburg-gotski. The candidate-deputies identified as former secret agents or officers were struck off the electoral lists before being registered with the Central Electoral Commission. In subsequent years, these preliminary checks were developed as a practice in relation to candidates for local elections. In 2007, the mechanism was used in the first elections for members of the European Parliament (MEPs). Because candidate MEPs were subject to mandatory screening and public disclosure by the Dossier Committee, some parties withdrew identified candidates even if they did not demand a preliminary check. For example, in the European Parliamentary elections in 2007, the Union of the Free Democrats withdrew a candidate who had been disclosed as a former secret agent. On the other hand, parties such as the Bulgarian Socialist Party (BSP) and the Movement for Rights and Freedoms did not take advantage of the preliminary checks and did not support the concept of a voluntary lustration mechanism (MEP Evgeni Kirilov of the BSP was named by the Dossier Committee as a regular collaborator with the former Security Service).

This political approach provoked a strong reaction in civil society. In order to avoid similar examples, at the beginning of 2008 several civil society organizations – including the Hannah Arendt Center, the “Justice” Civil Initiative, the Coalition for Fair Management, the Anna Politkovskaya Association for Free Speech, the Republican Conservative Institute and ASET (a centre for people who have suffered torture) – announced the “Citizens for a Pure Parliament” initiative. The aim of the campaign was to prevent the election to the National Assembly or to the European Parliament of candidates who had cooperated with the former Security Service. Appeals were made to Bulgarian society, to the European Parliament and to the European Commission to restrict such candidates during elections. In this way, public pressure on political parties continues to be part of the public debate about the past.

Proclaiming the Communist regime as criminal

A more outspoken approach was taken in a law passed in 2000, which proclaimed the Communist regime in Bulgaria to have been criminal. The law was designed to provide some evaluation of the regime and to determine the responsibility of the Communist Party (non-existent at the

time of the adoption of the law). The law states that the Communist Party was responsible for the government of 9 September 1944 to 10 November 1989 that led the country to national catastrophe. Furthermore, the law states that the management and the people who led the party were responsible for the deliberate destruction in Bulgaria of traditional values of European civilization, for the conscious violation of rights and freedoms, for repression against MPs in the 25th parliament and against all those convicted by the People's Court, for the breach of traditional principles of ownership rights, for moral and economic destruction, and so on.

According to the law, the regime was held accountable for the deprivation of free expression, for forcing citizens to hide their opinions and to agree publicly with what they did not believe in, for systematic human rights violations and oppression of whole groups of the population on the basis of their political, social, religious or ethnic identification, and for breaching the principles of democratic governance and the rule of law. The law further lists forms of repression such as executions, inhuman prison conditions, camps, torture and humiliation, placement in psychiatric clinics as a means of repression, deprivation of property, a ban on education or the exercise of a profession, and deprivation of free movement and citizenship.

Freedom of expression and access to former State Security Service documents (1990–1996)

As in other countries after the revolutions in the 1990s, one way to seek accountability in Bulgaria for what had been done by the Communist regime was public debate about cases of criminal and other serious offences committed during the regime. However, publications that were not supported by enough evidence were prosecuted for defamation. The application in such a case in which the author of a newspaper article was convicted by the criminal court for stating untrue facts was found manifestly ill founded by the European Commission on Human Rights acting at that time under the ECHR.³¹

At the beginning of the 1990s, a parliamentary committee was created to check for MPs who were former State Security Service officers or agents. In April 1990, the National Assembly adopted and published a List of facts, information and matters that constitute state secrets of Bulgaria.³² This was the first time such a list had been published – before 1989 these lists were themselves classified as secret.³³ Item 20 of the List described the category pertaining to “data of the organization, methods and instruments for the performance of specific tasks of counter-

intelligence and intelligence services of the Ministry of Interior". There were two questions here:

1. To what extent did this information coincide with the archives of the former State Security Service?
2. Did this category apply retroactively, that is, to documents created before the List?

The second issue was not reflected in the List itself. At the beginning of 1995, the government adopted a Regulation on the activities of the State Security Service for protecting state secrets that for the first time introduced unified classification markings (corresponding to the level of protection). These were: secret, top secret and top secret of particular importance. The time period of classification and declassification as such were not regulated at all.

Meanwhile, in 1994 the National Assembly adopted a decision stating that information related to the organization, methods and instruments for the performance of the specific tasks of the organs of the former State Security Service as well as agents' information on these organs related to or connected with the period prior to 13 October 1991 should not be regarded as secret. The parliamentary decision was quoted in 2003 by the Supreme Administrative Court in a judgment. Despite this decision by parliament, the legislation did not provide a legal right to access former State Security Service dossiers before 1997.

Access to former State Security Service documents (1997–2002)

In the period 1997–2001, laws related to access to government-held information and to transparency were passed: the 2000 Access to Public Information Act (APIA), the 1997 Access to Documents of the Former State Security Service Act (ADFSSA), and the 2000 Law on the Publicity of the Assets of High-Ranking Officials. The ADFSSA established a legal right for everyone who was a victim, or his/her heirs, to view State Security files related to them.

In 2001, the ADFSSA was amended and two commissions were created. The first had the task of screening public figures and candidates for certain public positions for belonging to the former secret services. Individuals thus identified had the right to refer their case to the second commission for review before they were publicly named. The first commission was composed of seven people, five elected by the parliament after nomination by various parliamentary groups and two appointed by the President. Certain categories of high-ranking officials were checked by the first commission and, as a result, several candidate MPs were named as

officers or agents of the former State Security Service. Soon after the elections in summer 2001, the new government (dominated by the National Movement Simeon II) drafted a bill to completely repeal the ADFSSSA. This was a surprise, because the government was led by the former Bulgarian king Simeon II, who had been sent into exile in the 1940s by the Communist regime.

The legal provision by which the ADFSSSA was repealed was challenged before the Constitutional Court in 2002 by a group of MPs. The Access to Information Programme (AIP), a Bulgarian non-governmental organization (NGO) active in the field of freedom of information,³⁴ submitted an *amicus curiae* brief. In its Judgment No. 3 in September 2002, the Constitutional Court did not declare the provision unconstitutional by 6 votes to 6.

The new law on state secrets (2002)

In spite of this backwards step, a new concise law was adopted for the protection of classified information – the Protection of Classified Information Act (PCIA). For the first time in Bulgaria, the PCIA provided for a time limit for classification, corresponding to the level of the classification, that is, protection for 5, 15 or 30 years. Clear procedures were provided for the classification, declassification and destruction of documents. Once documents were declassified they became subject to the APIA. A separate provision in APIA enables the courts to conduct a judicial review of the lawfulness of the classification, once it has been invoked as grounds for refusing information.³⁵ The procedure has been used several times in litigation cases backed by the AIP.³⁶

The PCIA also provided for a one-year period in which all public authorities had to review all the old secret documents they had and bring them in line with the new requirements, which meant either declassifying them or reclassifying them on the basis of the new classification levels and protection rules. However, the government was not keen on a speedy reconsideration of old secrets.

A couple of court cases under APIA supported by AIP played a role in speeding up the process of reviewing secret documents. In the first case, the NGO requested the government to reconsider, declassify and provide access to a 1980 document that regulated the state secrets of Communist Bulgaria. The refusal by the Government Information Office was appealed against in 2002, and in 2003 the Supreme Administrative Court declared it unlawful. The Council of Ministers appealed the decision, but in 2004 declassified 1,484 documents from the past, including the disputed regulation on secrecy.³⁷ Another court case aimed at declassification of

and access to a 2001 contract between the Ministry of Finance and the UK company Crown Agents. During the proceedings, the ministry reviewed all the secret documents before 2002.³⁸ A response by the Prime Minister to a parliamentary question in 2006 revealed that almost all public authorities within the executive had already implemented the review. Nevertheless, the status of the process in the Ministry of Interior, which inherited most of the former State Security Service files, remained unclear.

Access to former State Security Service documents (2002–2006)

Once the special law on access to security files was repealed in 2002, the Interior Minister adopted guidelines for access to such documents. The guidelines applied only to the Ministry of Interior's archives. In the period 2002–2006, the guidelines were the only applicable regulation for applicants requesting access to documents, that is, people affected by the activities of the former State Security Service or their heirs, researchers and journalists. The courts also found the general principles and provisions of the Access to Public Information Act (2000) applicable where there were gaps in the guidelines. The minister of that period, Georgi Petkanov, appeared reluctant to apply even his own guidelines, so his refusals to grant access to the documents were appealed against in the courts.

One of the cases was brought by a Bulgarian who was jailed for nearly 10 years and then exiled to France in the Communist era. He wished to see the files of the agents who reported on him, but his request was refused. The courts upheld the denial on the basis of exemption from the principle of personal data protection (handwritten documents) and classification as a state secret.

Another case was brought by Hristo Hristov, a journalist on *Dnevnik* daily newspaper who worked for several years on the case of the writer and BBC journalist Georgi Markov, murdered in London in 1978. During his research, Hristov inspected a number of archives in Bulgaria and abroad. In 2003, he filed an information request to the Interior Minister based on the APIA and the guidelines for access to documents kept by the State Security Service on the radio stations Free Europe, BBC and Deutsche Welle. Minister Petkanov's refusal was appealed against with the help of AIP in the Supreme Administrative Court, which ordered the release of the documents in its final decision.³⁹

Litigation on access to information also proved to be effective in the case of refusals by the foreign intelligence service established right after

the change – the National Intelligence Service (NIS). For years after its creation in 1991 the NIS was not publicly visible and did not even have a register of non-secret documents. In the past decade, journalists have made information requests to the NIS in the course of their investigations. After a few refusals, three journalists (Hristo Hristov, Bogdana Lazarova and Alexenia Dimitrova) separately filed court cases. In 2007, Hristov won his case against the NIS whereby the Service was ordered to release documents related to Markov's probable murderer, an Italian named Francesco Gullino who was a Bulgarian State Security Service agent.⁴⁰ The court's decision was carried out and the journalist received hundreds of pages of documents. As a result he published a second book on the Markov case, based on the documents received, and identified Gullino as the most probable perpetrator of the Markov assassination (Hristov, 2008).⁴¹

The AIP played an important role in the cases described above. It assisted the case of Hristov, who had legal representation in the courts from AIP lawyers Alexander Kashumov and Kiril Terziiski.⁴² Later, in 2006, AIP participated actively in the campaign for a new law on access to former Security Service documents, basing its arguments in the debate on its experience in these cases.

Access to former State Security Service documents (2006–2008)

The above events and cases and growing pressure by EU institutions and officials at the time of Bulgaria's approaching accession to the European Union, aiming to change the situation in Bulgaria, led to a big public debate in the spring and summer of 2006 over access to security files. For the first time, representatives of several parties, journalists and intellectual groups all spoke out in favour of changes in the existing situation. Three different political parties represented in the parliament, including the Socialist Party (the leader of the ruling coalition), which had always been against the regulation of access, prepared draft laws. With consensus on a large proportion of the provisions, the parliament passed a new law at the end of the year.⁴³

The law provided for a special commission (the Dossier Committee) for disclosing documents and announcing the affiliation of Bulgarian citizens to the State Security Service and the intelligence services of the Bulgarian National Army, which was established at the beginning of 2007.⁴⁴ Its function is to screen various categories of public figures and disclose their affiliation to the former State Security Service. A number of catego-

ries have already been checked and published. By August 2011 the Dossier Committee had made 254 decisions to identify individuals who cooperated with the former Security Service. It published nine reports on its activities to the parliament.⁴⁵ The reports demonstrate that the Committee has already checked many thousands of individuals occupying or applying for a public position. The Committee's work is ongoing.⁴⁶

Under the law, the Committee *ex officio* checks and identifies individuals following strict categories. Another possibility is for it to act on a request by political parties or state authorities in relation to candidates for public office.⁴⁷ The total number of individuals checked in the period 2007–2011 was in excess of 36,000. In the first seven months of 2011 the Committee checked 10,914 individuals. The checking of 3,088 of that number was done at the request of political parties or state authorities. The Committee commented in 2011 that there was growing interest in identification on request.⁴⁸ This can be explained by the forthcoming local and presidential elections in that year. In addition, the consistent and effective work of that body in recent years has led to sustained public interest in the issue and a stronger public desire for information about candidates for public office.

People thus identified have the right to challenge the decision for disclosure before the administrative courts. So far, the activities of the Committee have been found to be legal in all the cases.

Alongside checking and disclosure, the Committee has organized a reading room for citizens and researchers. According to the law, the affected people and their heirs have a right to read and obtain copies of related documents. Researchers and investigative journalists also have a right to read documents for their work. Access to documents may be restricted in very limited cases. When the disclosure of documents could substantially impair the rights or legal interests of third parties and they have not given consent, copies of documents are given only after crossing out the relevant names. Disclosure of documents identifying officers or agents prior to a decision by the Committee is forbidden and represents a criminal offence. In the first seven months of 2011 the Committee recorded 1,277 requests for reading and/or copying documents, of which 37 were for the purposes of journalistic investigation and 72 were for research. Those making requests in this period received 7,155 pages on paper and 4,779 pages electronically.⁴⁹

The Committee also undertook to publish documents of public interest. It has already published four volumes of documents and is preparing another five. Under the law, it is supposed to store all documents of the former State Security Service, which in 2006 were in the custody of various ministries and services. After years of document collection, the

Committee had possession of most of the documents, which formed a unique archive. To ensure the preservation and availability of the documents, the public body asked the government to supply it with additional premises. These premises were arranged in early 2011.

Concluding remarks

The events of the last 20 years in Bulgaria show that there is not sufficient political will to achieve an acceptable degree of justice and accountability for the past. Moreover, the judiciary is not strong enough, and in some cases it is subject to political influence in spite of its guaranteed independence. The investigating authorities and the public prosecutors are part not of the executive but of the judiciary, which means that they do not have much incentive to act in a speedy and effective way. Some investigative powers were assigned to the police, but the system under the Ministry of Interior designed to fight organized and high-level crime turned out to have huge problems involving external influence and corruption. As a result of scandals and public exposure of problems, Interior Minister Rumen Petkov was compelled to resign in 2008. The government formed in 2009 showed the political will to reform the system of investigation and to fight against crime, but there are still not enough visible results.

The process of compensating for the oppressions of the past started in the early 1990s through the passing of a number of laws. At the same time, opening up the former State Security files turned out to be a much slower and more difficult process, and it was based on clear and consistent rules only from 2006. The 1997 law on access to dossiers was repealed in 2002 by a parliamentary majority without a clear explanation. Just before its accession to the European Union, Bulgaria passed a relatively strong law on dossiers. Lustration was not politically supported in Bulgaria, but the screening of candidates for public positions plays a similar role.

In contrast, journalists and NGOs have been the real drivers of reforms in the field of access to information and disclosure of documents revealing the past. Pressure on public authorities to become more transparent and open has been successful, as have media campaigns and legal action. The 2007 Dossier Committee, as an independent body dealing with the issues of disclosure, provision of access, the openness of dossiers and the publication of important information, appears to be efficient and effective, which guarantees some progress in accountability. However, justice in the legal sense remains unrealized and unlikely to happen in the case of many Communist era violations.

Notes

1. It is worth mentioning that the regime ideologists used the terms *socialism* and *socialist* to explain the kind of system established. This was based on the belief that society was still progressing towards Communism. In this chapter, we term the regime “Communist” in order to avoid a dual meaning and misunderstanding.
2. Article 1 of the Constitution published in State Gazette No. 39, 18 May 1991. The Article was repealed after massive protests in January 1990 (amendment published in State Gazette No. 6, 19 January 1990).
3. Ratified and published in State Gazette No. 80, 2 October 1992.
4. Ratified and published in State Gazette No. 60, 24 July 1992.
5. Case of *Lukanov v. Bulgaria*, application No. 21915/93, in which the ECtHR found a violation of Article 5, para.1 of the Convention.
6. A considerable number of cases have been brought against Bulgaria before the ECtHR. The figure of pending cases for 2009 was 2,728, compared with 2,279 against Germany, 2,464 against France, 1,620 against the United Kingdom and 1,406 against Hungary, all of which have larger populations than Bulgaria. See European Court of Human Rights (2010: 154).
7. In 2009, the ECtHR delivered 63 judgments against Bulgaria and 18 of them referred to protection of property (European Court of Human Rights, 2010: 158).
8. Financial crimes include the creation of “black” party cashiers, the export of national capital through overseas companies, and favouring a certain class of people (nomenklatura) by privileges and fees. Also in this category is state contraband of arms, bombs, drugs and precious metals, which started in the 1960s as official but secret state policy and was described by the party with the euphemism “transit trade”. Ecological crimes include suppressing information about environmental pollution leading to harm to the health of the population.
9. For example, the covert proposal by Todor Zhivkov, head of state and Secretary General of the Central Committee of the Bulgarian Communist Party, that Bulgaria become the sixteenth republic of the USSR in 1962, which was approved by the Central Committee.
10. According to a report from the Interior Minister dated 16 November 1944, 28,630 people had been arrested since 9 September of that year. In his research published on 6 March 1991 in the newspaper *Vek 21*, Professor Mito Isusov reported 18,000 killed. This number is confirmed by Professor Georgi Markov (1992). In February 1991, Interior Minister Hristo Danov reported to parliament that 25,000 people disappeared in that period.
11. The Chief Prosecutor in the so-called People’s Court reported to the Communist Party Central Committee that about 5,000 people had disappeared by 6 October 1944.
12. King Boris III died in 1943.
13. See more in Hristov (1999).
14. See more in Hristov (2005: 683–723 [Bulgarian edition]) and Hristov (2008).
15. Art. 80, para. 1, subpara. 1 of the Penal Code was amended to that end, published in State Gazette No. 31, 1990.
16. The Prosecutor General had the legislative initiative under Art. 80, para. 1 of the 1971 Constitution.
17. See more in Hristov (2005: 560–682 [Bulgarian edition]).
18. See European Commission progress reports on Bulgaria (and Romania) for recent years, available at http://ec.europa.eu/dgs/secretariat_general/cvm/progress_reports_en.htm (accessed 28 March 2012).

19. See, for example, publications at http://afcos.mvr.bg/Activity/report_2007.htm, http://news.ibox.bg/news/id_1192140381, and a link to the 2008 OLAF report in English at http://www.dnevnik.bg/evropa/evrofinansirane/2008/07/16/526845_dokladut_na_olaf/ (accessed 28 March 2012).
20. Published in State Gazette No. 17, 1 March 1991; last amendment published in State Gazette No. 39, 20 May 2011.
21. Act No. 205/1992 on the Restitution of the Ownership of Real Estate to Bulgarian Citizens of Turkish Origin Who Applied to Leave for the Republic of Turkey and Other Countries in the May–September 1989 Period, published in State Gazette No. 66, 14 August 1992, last amendment published in State Gazette No. 30, 11 April 2006.
22. The most important laws on restitution are: the 1991 Law on Amnesty and Restoration of Confiscated Property; the 1992 Law on Restitution of Expropriated Real Estate; the 1992 Law on Restitution of Some Property Deprived under the Territorial and Urban Planning Act; the Law on Spatial and Urban Planning; the Law on Urban Development; the Law on State Property; the Law on Possessions; the 1997 Law on Restitution of Forests and Land within the Forest Fund.
23. In Latin, “lustration” means religious purification in the form of sacrifice.
24. The law was published in State Gazette No. 25, 25 March 1992, and abolished with the new Banks Act promulgated in State Gazette No. 52, 1 July 1997.
25. Published in State Gazette No. 104, 24 December 1992.
26. In its reasoning the Constitutional Court referred to the principle of equality for all before the law as enshrined in Art. 6, para. 2 of the 1991 Constitution.
27. The law was repealed in 1995 (published in State Gazette No. 30, 31 March 1995).
28. In its Judgment No. 10 of 25 June 1999 on constitutional case No. 36 of 1998 the Constitutional Court rejected the argument that the challenged provision impaired the principle of equality before the law. It held that, although Art. 6, para. 2 of the Constitution prohibits any discrimination based on personal or public position (among other features), cooperation and collaboration with the former State Security Service do not represent either form of discrimination.
29. Para. 1 of the miscellaneous provision of the law.
30. Decision No. 2 of 21 January 1999 on constitutional case No. 33 of 1998. According to the Constitutional Court, the challenged provision represented discrimination on the basis of political affiliation.
31. Decision in 1997.
32. Published in State Gazette No. 31, 17 April 1990.
33. See more on the website of the Access to Information Programme at <http://www.aip-bg.org/library/dela/case33.htm> (accessed 29 March 2012).
34. See <http://www.aip-bg.org/en/> (accessed 29 March 2012).
35. Art. 34, para. 3 of PCIA. The text of the law is available in English at <http://www.aip-bg.org/library/laws/pcia.pdf> (accessed 29 March 2012).
36. See more at <http://www.aip-bg.org/court.htm> (accessed 29 March 2012).
37. A description of the case is available at <http://www.aip-bg.org/library/dela/case33.htm> (accessed 29 March 2012).
38. Information on the first Crown Agents case is available at <http://www.aip-bg.org/library/dela/case31.htm> (accessed 29 March 2012). Information on the second Crown Agents case, during which the document review was carried out, is available at <http://www.aip-bg.org/library/dela/case42.htm> (accessed 29 March 2012).
39. See details on the case at <http://www.aip-bg.org/library/dela/case32.htm> (accessed 29 March 2012).
40. See details on the case at <http://www.aip-bg.org/library/dela/case69.htm> (accessed 29 March 2012).

41. The impact of Hristov's book was huge. See reactions in *The Economist*, *The Independent*, *The Times*, *The New York Times*, *Der Tagesspiegel*, etc. at <http://hristo-hristov.com/content/view/37/42/lang,english/> (accessed 29 March 2012).
42. For a detailed description of the first Hristov case and the documents related to the court case, see the book by Kashumov and Terziiski (2005: 85–126); for the second case, see Kashumov and Terziiski (2008: 263–269).
43. Published in State Gazette No. 102, 19 December 2006. The full name of the law is Law on Access and Disclosure of Documents and Announcing Affiliation of Bulgarian Citizens to the State Security and the Intelligence Services of the Bulgarian National Army.
44. See more about the Dossier Committee on its website at <http://www.comdos.bg/p/language/en/> (accessed 29 March 2012).
45. All of them are available online (in Bulgarian) at http://www.comdos.bg/Доклади_пред_Народното_събрание (accessed 29 March 2012).
46. All the Committee's decisions are available online at <http://www.comdos.bg> (accessed 29 March 2012).
47. Under Art. 27 of the law.
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13

After the fall of the Berlin Wall: Transitional justice in Germany

Gerhard Werle and Moritz Vormbaum

Historical and political background

After the end of the Second World War, Germany was divided by the Allies into four zones of occupation, each of which was administered by one of the victorious powers.¹ The eastern occupied zone was administered by the Soviet Union, which soon moved towards creating a Communist system. The establishment of a socialist state on eastern German territory had at this point, shortly after the end of the war, not yet been planned by the Soviets, at least not for the near future (Weber, 1993: 4; Zimmermann, 2000: 3). However, key positions in the government and judiciary were immediately filled by loyal members of the German Communist Party (Kommunistische Partei Deutschlands – KPD), and the KPD itself merged with the Social Democratic Party of Germany (Sozialdemokratische Partei Deutschlands – SPD) to form the Socialist Unity Party of Germany (Sozialistische Einheitspartei Deutschlands – SED). Private industries were nationalized and a planned economy introduced. As the Cold War worsened, the interest of the western Allies in unifying their “trizone” into a West German state grew. Not the least important function of such a state was seen to be the creation of a “bulwark against communism”, that is, against the Soviet Union’s claims to power. The road to the establishment of the Federal Republic of Germany (FRG) in 1949 was taken with the merging of the western zones of occupation; a few months later, the German Democratic Republic (GDR) was established in response.

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Further important stages on this road were, among other things, the currency reform in East and West Germany, the Berlin blockade by the Soviet Union in 1948–1949 and the drafting of a constitution for West Germany (Grundgesetz, or Basic Law) at the Herrenchiemsee Conference in 1948.

Following the establishment of the GDR in 1949, and more so after 1952,² the construction of a socialist state was pursued in East Germany under the leadership of the First Secretary of the Central Committee of the SED, Walter Ulbricht. Political opposition was ruthlessly suppressed – this repression showed its most brutal face in the bloody suppression of the uprising on 17 June 1953 – and the everyday life of East German citizens was systematically kept under surveillance by the Ministry for State Security (Ministerium für Staatssicherheit),³ created for this purpose. A result of this measure was a wave of emigration to West Germany by East German citizens. In this situation, the SED leadership decided, in 1961, to seal off the border with West Germany and build the Wall in Berlin.

In the following 28 years, the regime clung to its bureaucratic, dictatorial system, which did not tolerate political opposition and treated dissidents and those trying to escape harshly. Even when, in the 1970s, the politics of détente, brought into being above all by West German Chancellor Willy Brandt, led to a rapprochement between the two German states, this had no significant influence on the persecution of critics of the East German regime. The emigration permits that were now more frequently issued were granted only to loyal citizens; critics continued to face persecution and arrest.

Not until the collapse of the Soviet Union, the peaceful revolution in East Germany and the fall of the Berlin Wall in 1989 did the situation change. SED General Secretary Erich Honecker resigned first, and shortly thereafter the entire GDR government followed suit. On 18 March 1990, the first free elections were held in East Germany, and in the same year, on 3 October, the GDR officially joined the Federal Republic on the basis of the Unification Treaty.⁴

Fields and instruments of transitional justice in Germany

In confronting GDR injustices, essentially all the tools of “transitional justice” were used to a greater or lesser extent. Criminal law played a central role, especially in public perceptions;⁵ therefore a whole section of this chapter will be devoted to the prosecution of GDR state criminality. Before this, the chapter will deal with other measures that were implemented or at least discussed in public debate.

Rehabilitation

A main instrument used by the SED regime to combat and intimidate political enemies within the country was the employment of coercive measures such as imprisonment, forced resettlement and professional bans (Ludwig, 2000: 434 et seq.; Wimmer, 1996: 56). These measures were based on East German law and therefore had the character of legal procedures. The victims thus suffered not only from the concrete consequences of the measures, such as deprivation of freedom or loss of property, but also often found themselves marked as criminals. Finding an arrangement that would suitably compensate the victims of these measures for the disadvantages they suffered was a major challenge in dealing with East German crimes.

The earliest rehabilitation measures were undertaken following the fall of the Wall by the East German government democratically elected in 1990. The Rehabilitation Law adopted on 6 September 1990, immediately before the Unification Treaty went into force, is particularly noteworthy (*Bundesgesetzblatt* [German Federal Law Journal] I 1990, p. 1459). In the Unification Treaty, too, rehabilitation was defined as a main method of dealing with the past. In Article 17, the treaty parties underscore their intention to immediately create the legal basis for rehabilitating any persons “who were victims of politically motivated criminal prosecutions or other legal decisions that violated rule of law and the constitution”. In addition, rehabilitation was to be linked to appropriate restitution measures. In contrast, Article 18 provided that criminal convictions continued to be valid, but also allowed for the opportunity to move to reverse criminal convictions (cassation). The decisive factor was the East German criminal law on reversal of criminal convictions, under which a conviction could be reversed if it was based on a “serious violation of law” (Ludwig, 2000: 435 et seq.). Parallel to this, Article 19 made it clear that East German administrative acts also retained their validity unless they were incompatible with fundamental rule of law principles or with the provisions of the Unification Treaty.

The Rehabilitation Law took effect if a conviction had followed East German law but served to intimidate political opponents or take them out of action. In such cases, the law provided for reparations (reversal of the conviction, crediting the period of imprisonment to employment and insurance status, etc.) (Ludwig, 2000: 435 et seq.).⁶ In this way, a functional distinction was made between reversal of convictions that contradicted East German law (in accordance with Article 18 of the Unification Treaty) and rehabilitation in the narrower sense (in accordance with the Rehabilitation Law) (Ludwig, 2000: 451).

Two laws soon followed regarding rectification of East German injustices. The first law revised the rules on rehabilitation under criminal law and took effect on 4 November 1992 (*Bundesgesetzblatt* I 1992, p. 1814). The second law, on 23 June 1994, concerned administrative and professional rehabilitation (*Bundesgesetzblatt* I 1994, p. 1311). The criminal justice Rehabilitation Law abandoned the distinction between rehabilitation and revision of convictions that were illegal under East German law. The new law looked at whether the decision was “compatible with the fundamental principles of a free system based on the rule of law” (§1(1)). This would be assumed, *inter alia*, if the principle of proportionality had been “grossly ignored” or those involved were victims of political persecution; political persecution was indicated by specific political crimes. The new law no longer made recourse to the East German legal situation and included decisions, arrest warrants and extra-judicial measures. The process in general was simplified, although the scope of Article 17 of the Unification Treaty was narrowed overall (Ludwig, 2000: 453).

The provisions of the second Rehabilitation Law on administrative and professional rehabilitation were also narrower than the Unification Treaty. In regard to administrative rehabilitation, only cases of serious injustice (“plainly incompatible with the fundamental principles of rule of law”) were included, the “consequences of which continue to have a direct, serious and unacceptable effect” (§1(1)). Full compensation would not generally be awarded.⁷ The rules for professional rehabilitation were based on similar guidelines (Ludwig, 2000: 461). The Rehabilitation Law was criticized, in part, for its strict requirements (Lüderssen, 1992: 154; Ludwig, 2000: 497).

It must be considered, however, that nearly every East German citizen was in some way disadvantaged by measures taken by the SED government, especially in regard to education and professional freedoms. Rehabilitating everyone, or even those who were “victims of politically motivated criminal prosecutions or other legal decisions that violated rule of law and the constitution”, as provided for in Article 17 of the Unification Treaty, was difficult to achieve from the start. Thus it makes more sense to criticize the wording of the Unification Treaty, which probably went too far, rather than the provisions of the Rehabilitation Law.

However, the criticism that the reparations provisions inseparably linked rehabilitation and compensation, so that no exclusively moral reparations were possible, is justified (Ludwig, 2000: 463; Wimmer, 1996: 61). In fact, in many cases, an official declaration that a decision was wrong would have been of greater value than financial compensation to victims who had lived for years with the stigma of a professional ban or a criminal conviction.

The requirements to be met under the law for compensation are formulated quite vaguely (when was the principle of proportionality “grossly” ignored, and when only moderately?). The case law of various courts on the Rehabilitation Law was correspondingly varied.⁸ However, the fact that the judges had a great deal of discretion in their decisions allowed them to decide on a case-by-case basis and consider sufficiently the particular social position of the applicant in deciding on financial compensation. Overall, too, the impression never arose that the government was trying to use these rather restrictive legal arrangements to escape the responsibility placed upon it by Article 17 of the Unification Treaty. Indeed, it went to significant expense to ensure compensation to East German citizens.⁹ Overall, rehabilitation of victims was not optimally regulated, but its consequences were acceptable.

Restitution of property

Even before the East German state was established, the Soviet occupiers had begun to expropriate and nationalize private real estate and means of production.¹⁰ In this way, they hoped to advance construction of a Communist system and settle Second World War reparations claims. Later, the East German leadership targeted confiscation at East Germans who had escaped to the West or emigrated legally and left property behind.¹¹ Also targeted were members of the middle class who, in the government’s view, stood in the way of society’s transformation to Communism. They were often compensated, though only minimally, whereas those who fled as a rule received nothing. Additional expropriations were undertaken under the guise of criminal sanctions or administrative coercion.

After reunification, in accordance with the Unification Treaty (especially Article 25) and a federal law of 17 June 1990, a Trusteeship Agency set up the same year was responsible for administering and privatizing East German state industries. It was also supposed to restructure them and make them competitive. If a business “could not be saved”, it was shut down¹² – an alternative not infrequently employed owing to the often ailing state and outdated technology of businesses. In part for this reason, the East German unemployment rate skyrocketed after reunification, whereas previously a “right to work” had existed under Article 24 of the East German Constitution. The Trusteeship Agency thus had a correspondingly bad reputation among the East German public. Its reputation was further worsened by cases of misuse of public funds and other economic crimes committed in the course of privatization. However, the Trusteeship Agency was also able to turn some businesses, such as the East German technology producer Jenoptik and East German dockyards,

into successful private companies.¹³ The Trusteeship Agency ceased operations in 1994.

The Trusteeship Agency only indirectly encountered claims by citizens who had lost property through expropriation. These so-called open property questions were settled once and for all by the Property Law;¹⁴ in other cases, as already mentioned, East German administrative acts remained in effect. Cases for which the Property Law provides for resumption of possession are listed in §1. They include, *inter alia*, uncompensated expropriation, expropriation with discriminatory compensation,¹⁵ state sale, loss of property based on abuse of power (such as corruption, coercion and fraud), removal of property by government administrators, and loss of property as a result of illegal criminal conviction or other illegal official decisions.¹⁶

As with rehabilitation, however, the scope of the rule on restitution was limited to various types of resumption of possession. The Property Law was fundamentally limited by a restrictive interpretation, especially by the courts, of the crime of “uncompensated expropriation” (§1(1)(a)).¹⁷ According to this provision, the law would be applied only for “division crimes”, that is, expropriations directly connected with the division of Germany. In this view, the main focus of “uncompensated expropriation” would be cases in which people had escaped “illegally” to the West, from the East German perspective, and left their property behind.¹⁸ In contrast, expropriations for which East German law did not provide discriminatory compensation would not be included (Rodenbach, 1995: 295). In addition, the Property Law even ruled out restitution in a range of cases. Thus §1(8) did not apply to expropriations on the basis of Soviet occupation law (that is, primarily expropriations between 1945 and 1949). The law also lists various additional grounds in §4 in which restitution was ruled out, for example if the business had already been sold by the Trusteeship Agency or investment had begun in the property or business,¹⁹ if the nationalized property had been acquired in good faith,²⁰ or if concrete reasons stood in the way of restitution, such as complete restructuring or legal impossibility. In these cases, compensation could be claimed under special laws, but the amount often was significantly below the actual value of the property.

Given what has been said, the rules on restitution seem quite narrow and could lead in individual cases to unjust results. However, in assessing the restitution laws, it must be kept in mind that complete resumption of property ownership on the basis of long-past, systematic expropriation was not possible. For this reason, a total revision of property relationships was not intended and could not be undertaken. In addition, after the transition from Communism, other difficult matters had to be dealt with, particularly unemployment in the East and the creation of a

competitive infrastructure for East German businesses. These conditions stood in the way of a return of property. Conflicts were resolved to the benefit of the public interest; that is, in specific cases the interests of property owners had to take a back seat. The broad network of individual laws shows, however, that lawmakers made a great effort, in this area as well as others, to find suitable, fair solutions, even if this may not have succeeded in each case.

Access to Stasi files

A further major challenge in dealing with East German criminality was the legacy of the Ministry for State Security (Stasi), which was considered the “shield and sword of the party”.²¹ The main issue here was what to do with the files that the Ministry had collected from its spies in the 40 years of its existence. The sheer number of files found in the Ministry’s archives was overwhelming. During the final days of East Germany’s existence, Stasi members had begun to destroy files in order to prevent compromising material from coming to light. But in December 1989 they were stopped by demonstrators in East Germany, who stormed and occupied various Stasi headquarters (the last one was the main headquarters in Berlin on 15 January 1990). If the files saved from destruction and secured after the dissolution of the Ministry had been placed end to end, they would have stretched 180 kilometres (Geiger, 1993: 43).²²

It was not only the number of files, however, but the enormous significance of their content that made considered action necessary. For the East German citizens directly affected by the spying, the information in the files played a crucial role in working through the East German past in their personal lives. Not only did the files provide information about whether particular citizens were classified by the Stasi as a danger to the state and what specific surveillance measures were carried out; they often also revealed who carried out the surveillance. In addition to the approximately 90,000 “official employees”, who were often known to the public, approximately 170,000 so-called “unofficial informers” (Inoffizielle Mitarbeiter – IMs) worked for the Stasi (Geiger, 1993: 43). Not infrequently, these IMs were assigned to inform upon close friends and even family members.²³

Even in other areas, however, the files could provide valuable services. For example, they were used as evidence in the trials of SED functionaries and border guards after the change in systems (Marxen and Werle, 1999: 163) and provided historians with information about the hierarchy and functioning of the SED apparatus. East German civil servants were also investigated for Stasi connections on the basis of their files before being employed in united Germany.²⁴ Although some in West and East

Germany advised keeping the files locked up,²⁵ at reunification on 3 October 1990 a federal agency was established to archive and administer the numerous files. It had its headquarters in Berlin and, with its 14 branch offices, it is one of the largest archives in Germany today.²⁶

In order to make it possible for East Germans, in particular, to access “their” files, the Stasi Files Law was adopted on 29 December 1991 to create a legal framework for access. The challenge was to find a balanced arrangement that would satisfy the individual, as well as the public and historic, interest in the files, but would at the same time take into account the data-protection interests of people mentioned in the files (“informational self-determination”). Thus §1 of the law formulated four separate purposes: granting individuals access to their files; taking account of the justified data-protection interests of third parties; promoting historical, political and legal research; and providing information to government and non-governmental organizations for particular purposes. Under the law, every citizen has the right to learn whether a Stasi file existed about him or her and, if it did, to see the file. In addition, he or she can demand to have the informers’ real names revealed by the agency. Names of third persons appearing in the files, however, are redacted in order to protect their privacy. Journalists and historians may also apply for access, as can public officials, in order to investigate candidates’ possible Stasi activities before appointing them to the civil service or to judgeships (see §§19 et seq.).

The German method of dealing with the Stasi files is particularly noteworthy for two reasons. First, the idea that citizens can be guaranteed comprehensive access to the files of a secret service is a new one. Second, the strategy applied is persuasive: the former head of the Stasi files agency, and now President of the Federal Republic of Germany, Joachim Gauck, was right when he said that, with the help of the Stasi files, the instrument used to obtain information was being used, now that things had changed, against the former oppressors (Gauck, 2004: 279). It must be emphasized, however, that this instrument is being used cautiously, and not to satisfy a desire for revenge. The agency essentially responds only to applications. Thus former Stasi members are not publicly pilloried on a large scale; instead, dealing with the past is left to historians, journalists and citizens. It is noteworthy that the possibility of seeing one’s files has been taken advantage of to a very great extent. According to the agency, since 1991 a total of 6,680,934 applications to see files have been made.²⁷

“Purging” the civil service

In March 1990, the newly elected East German parliament decided that all its deputies would be screened for possible activity as informers, using

the now available Stasi files. This would mark a symbolic break with the old system and ensure confidence in the new representatives on the part of East German citizens (Gauck, 2004: 278). The possibility of screening based on Stasi files had existed for applicants to public office since the adoption of the Stasi Files Law (§§19 et seq.). In addition to parliamentary deputies, it was possible to screen civil servants, judges, soldiers and other members of the civil service.

The question of continuing to employ East German civil servants arose not only in the case of Stasi activities, but more generally as well. Continued employment was often impossible because the former jobs were no longer needed. A more difficult question was whether former party-line SED members were even qualified to join the civil service in united Germany. One problem was that East Germans had had a completely different concept of the role of civil servants than West Germans. In West Germany, the Basic Law provided that access to civil servant status was available to anyone and that becoming a civil servant could not be dependent on worldview (Article 33(4)), but in East Germany, the decisive criteria for holding a civil service position were a firm belief in the Party's policies, uncompromising willingness to carry out Party decisions and ideological consistency (Loschelder, 1995: 192). Under Article 3 of the Unification Treaty, which declared the Basic Law applicable to the new eastern German states, the principles that were in control in West Germany also applied in the East after reunification. Thus the Federal Civil Service Law, which regulated details of civil service law, applied to eastern Germany. According to this law, civil servants must accept the "free democratic order, as contained in the Basic Law, through their overall behaviour and advocate for it" (§52(2)). It was unclear to what extent East German civil servants met this criterion. This required individual determinations, based on the new civil service laws adopted in the five new states following the transition. The results could be different in the different states. In Saxony, for example, it was assumed that all those who had held a higher position in an East German mass organization lacked the necessary suitability for a civil service position (Saxon Civil Service Law, §6(3)). Brandenburg, in contrast, largely refrained from setting explicit rules and simply imposed a general attitudinal requirement – that is, a guarantee of espousal of the free democratic system. Otherwise, the attempt was generally made to determine those with "ties to the system" by way of questionnaires or requests to the Stasi files agency (Loschelder, 1995: 200). In addition, under the Unification Treaty, in conjunction with the new East German Judges Law (which entered into force on 5 July 1990), committees made up of local and state parliamentary deputies and four judges or prosecutors decided on the continued careers of judges and prosecutors.²⁸

The legal consequences of a lack of suitability for the civil service, as well as the lack of demand for continued employment, were already regulated by the Unification Treaty. It provided that proper notice of termination – that is, termination in accordance with specific notice periods – could be given for lack of professional or personal suitability (primarily meaning overly close ties to the SED regime), lack of need or elimination of the place of employment. Extraordinary termination was possible for violations of the principles of humanity and rule of law or in the case of Stasi connections.²⁹

Since removing civil servants from the public service was a serious intervention in the lives of many eastern Germans, these purges walked a very fine line and the restructuring of jobs was a very delicate subject. The governments of East and West Germany were quite aware of this. Therefore, following negotiations with unions and professional associations, government assistance programmes and rules on support payments during job-seeking were established in order to make the transition more socially tolerable. Nevertheless, the decisions could be painful for those affected, and some details of the procedure gave cause for criticism. Thus, for example, it was argued that, in assessing judges, the committees had no conclusive list of criteria for evaluation and that only behaviour under the East German regime, but not in the transition period, was taken into account.³⁰

Overall, the “purge” of the civil service was imperative for a comprehensive accounting for government crimes and establishment of a credible democratic system based on rule of law in eastern Germany. The point was not to punish former party-line civil servants or to exclude former SED functionaries completely from the professions (no comprehensive professional bans were imposed). Rather, the goal of the “purge” was to gradually strengthen eastern Germans’ trust in the public administrative apparatus. After all, they had lived through nearly 45 years of unbroken dictatorship, in which public offices were occupied primarily by supporters of the regime. A clear signal was necessary for citizens to gain renewed confidence in the system.

Enquete Commission

A special instrument for examining and processing the SED dictatorship was the Enquete Commission (Yoder, 1999). This type of commission can be established under §56 of the Bundestag’s rules of procedure to “prepare decisions on comprehensive and significant issues”.³¹ The Enquete Commission established in May 1992, which dealt with East German crimes, was officially titled “Enquete Commission ‘Overcoming the

Consequences of the SED Dictatorship in the Process of German Unity'". The findings of the Enquete Commission can be found in an anthology published by the German Bundestag following completion of the Commission's activities in 1998 (Deutscher Bundestag, 1999). At the start of its activities, the Commission defined its task in the following points:

- precise analysis of the structure of SED rule to avoid a renewed strengthening of the same forces;
- historical justice for victims who could not benefit from legal and material rehabilitation, through consideration of the unjust nature of the SED regime;
- making a contribution to "internal unity" by enhancing consciousness of the ways in which the SED dictatorship influenced the lives of both East and West Germans;
- ensuring a basic democratic consensus among the population by processing the history and consequences of the SED dictatorship;
- recommendations for lawmakers on how to proceed with eliminating the consequences of the SED dictatorship.³²

The Enquete Commission consisted of 16 members of parliament and 11 outside experts.³³ The chairman of the Commission was Rainer Eppelmann, a pastor and former East German dissident who now represented the Christian Democratic Union (Christlich Demokratische Union – CDU) in the Bundestag. In the course of the Commission's activities, numerous scholars and historians presented reports to the Commission (a total of 750 reports were submitted) (Yoder, 1999: 72). In addition to regular meetings, public hearings were held across East Germany. The Enquete Commission has been criticized for choosing an overly "didactic" approach (Yoder, 1999: 71).³⁴ In particular, it has been claimed that the work of the Commission, unlike that of, for example, the Truth and Reconciliation Commission in South Africa, was too far removed from the public. The public hearings took place at inconvenient times (on weekday mornings) and the results of the Commission's activities (a multi-volume work of over 15,000 pages) are said to be difficult to access for non-scholars (Yoder, 1999: 72 et seq.).

The criticism can be countered by pointing out that an enquete commission has different goals than a truth commission, and thus operates differently. Whereas a truth commission is primarily interested in promoting dialogue between perpetrators and victims, under §56(1) of the Bundestag rules of procedure the task of an enquete commission is to lay the groundwork for Bundestag decisions. The commission report is intended to form the basis of Bundestag debates³⁵ and decisions. Although the Enquete Commission may hope that its work will have a positive effect on coexistence, and although everyone can profit from its results, its official mandate was to aid the Bundestag. The critics' accusations must

therefore be addressed to the Bundestag and its creation of an enquete commission rather than a truth commission.³⁶ The work of the Enquete Commission itself, however, cannot be criticized. On the contrary, the wealth of information contained in the report is of great historical and political value.

Alternatives and adjuncts to prosecutions

General amnesty

As a concrete alternative to criminal prosecution of East German crimes, some demanded a general amnesty. This suggestion was contributed to the public debate, for example, as early as 1990 by some members of the East German civil rights movement (Rossig and Rost, 2000: 525).³⁷ However, the proposal died away without consequence. As the fall of the Wall receded further into the past, the suggestion of an amnesty was occasionally brought up again (Sandler, 1997). In 1998, on the occasion of the fiftieth anniversary of the Basic Law, the SED successor party, the Party of Democratic Socialism (Partei des Demokratischen Sozialismus, PDS), again submitted to the Bundestag a proposal for a general amnesty for East German crimes.

Advocates of such an amnesty believed that, instead of concentrating on prosecuting crimes, it was necessary to look to the future and attempt to solve the many difficult tasks accompanying reunification together, without criminal trials. They felt prosecution would make the reconciliation process more difficult and create new tensions among East Germans. In addition, it was feared that criminal prosecutions would be too time and cost intensive and would thus impose long-term burdens on the unification process.³⁸

Opponents of this view believed that an amnesty would send the wrong signal to the victims. It would be wrong to end the discussion without investigating crimes that had been committed.³⁹ The victims would feel scorned by such behaviour.⁴⁰ The mistakes made after 1945 in dealing with the Nazi past in West Germany, when prosecution of the perpetrators was neglected, had to be avoided in dealing with East German crimes. As a result, a general amnesty was rejected by the plenum by a large majority (Schaefer, 2006: 16).

It is fortunate that no general amnesty ultimately came about. Such a procedure would have represented governmental neglect of its duty to prosecute serious violations of important civil and human rights. In addition, it is extremely doubtful that an amnesty would actually have promoted reconciliation, as claimed by proponents of a general amnesty.⁴¹ A cloak of silence would likely have only inadequately concealed the

serious crimes committed during the 40 years of the SED regime. The history of dealing with Nazi crimes has shown that suppressed injustice does not rest in peace (Marxen and Werle, 1999: 255).

In retrospect, the fears of amnesty advocates have not been borne out in practice. As shown in the next section of this chapter, criminal prosecution of the perpetrators was carried out cautiously, taking into consideration the wishes of East Germans and with prosecution limited in large part to cases of serious crimes against humanity.⁴² In this way, criminal prosecutions were able to make a significant contribution to elucidating the past, while taking care not to open old wounds or create new gulfs between citizens.

Furthermore, a general amnesty could only have been justified by prevailing necessity (Marxen and Werle, 1999: 259). But such a necessity did not exist in the case of East Germany, which had ended following a peaceful revolution and voluntary accession to the Federal Republic. There was no reason to refrain from prosecutions, as was the case in other transitional processes in which this was the price of a peaceful transfer of power.

Truth commissions, alternative tribunals and other forums

In addition to the option of a general amnesty, the use of alternative tribunals or other forms of investigation that could replace or accompany criminal prosecution was discussed. The suggestions covered a broad spectrum and often differed a great deal from one another. It is therefore not always easy to categorize them as a specific model (Lüderssen, 1992: 129; Rossig and Rost, 2000: 525 et seq.).

A much-noted suggestion advocated a public discussion in the form of a tribunal, at which, however, no sanctions could be imposed. They would be replaced by public determinations of moral and political responsibility.⁴³ Another approach envisaged the creation of a commission for scholarly investigation of contexts and structures (see Lüderssen, 1992: 130).⁴⁴ A further proposal would have considerably expanded the rehabilitation regulations as an alternative to prosecutions. In particular, the standards for review would arise not only from East German law but from constitutional and international law. The limits imposed on criminal prosecution by procedural guarantees such as the prohibition on retroactivity would not apply in this area, so that the instrument could be used more broadly than prosecution (Lüderssen, 1992: 154).

Most of these proposals, however, remained theoretical exercises. The only suggestion that was actually put into practice to some extent was the Forum for Investigation and Renewal established on 23 May 1992 in Leipzig. The forum was headed by well-known figures in politics and society and was reported on widely by the media. The forum's goal was to encourage East Germans to tell their various stories and thus find ways

of achieving reconciliation and a new beginning in a common Germany.⁴⁵ In the course of the forum in Leipzig, perpetrators and victims regularly met and spoke at public events. But interest in the forum soon ebbed, and the results it achieved were ultimately rather meagre (Wassermann, 1992: 132).

It has been pointed out that, if the alternative tribunals had been consistently implemented, a host of theoretical and practical problems would have arisen that would have called their legitimacy into question. Thus it has been noted that the Unification Treaty made clear that, with East Germany's accession to the Federal Republic, West German criminal law also applied to the territory of East Germany. From a legal perspective, therefore, there was no place for a second prosecutorial apparatus. It is also unclear whether this alternative model, even if it could not have imposed sanctions, would have been able to respect fundamental legal principles for the protection of defendants. These include, in particular, application of the presumption of innocence and other fundamentals of a fair trial (Lüderssen, 1992: 131).

Finally, the same applies to alternative tribunals as to general amnesties: the situation in which Germany found itself following reunification made the creation of such forums less urgent. Existing laws provided a sufficient legal framework for prosecution, and there were functioning prosecutorial authorities to carry them out. For this reason, too, none of the models discussed was ultimately implemented over the long term.

Prosecutions

Confronting the crimes committed by the SED dictatorship using criminal law had already begun in the final days of the GDR.⁴⁶ Under pressure from the public and media, even before the first free elections, investigations were begun under the successor government of members of the East German political leadership (Politburo members) and high-level officials of the old regime. These investigations were continued and expanded after the free elections on 18 March 1990. Substantively, these investigations mainly dealt with electoral fraud, abuse of power and corruption. In united Germany, systematic criminal prosecution of government crimes committed under the SED dictatorship began in October 1990 and continued into 2005.⁴⁷

Forms of state criminality

In the years of the SED dictatorship, numerous forms of state criminality could be observed in various sectors. At the centre of public, and later

legal, interest were crimes at the internal German border,⁴⁸ especially the shootings by border guards of East German citizens attempting to flee to West Germany. At least 264 people were killed at the internal German border by firearms, mines and self-firing machine guns (Rummler, 2000: 1). The instructions given to the border guards who implemented the policy were aimed at preventing flight at all costs, even, if necessary as a last resort, killing the fleeing person. The East German political leadership took numerous measures to keep border incidents secret. Even when those fleeing were badly hurt, these measures took precedence over saving lives. For this reason, medical assistance was often delayed, which at times resulted in deaths (Marxen and Werle, 1999: 8 et seq., 224 et seq.).

A further set of crimes involved perversion of justice by party-line judges, prosecutors and members of the Ministry of Justice. This included, especially, criminal trials of internal opponents and critics of the regime, but also decisions in the fields of labour law and other civil law.⁴⁹ There were also cases of systematic non-prosecution of crimes – for example, of prosecutors who, in the interests of the political leadership, did not carry out investigations of electoral fraud. Overall, the application of law in the GDR, within the framework of socialist justice, was geared towards the government goal of creating a socialist state led by the working class and its Marxist-Leninist party. The decisions of the justice system were often subject to external influence that could always be traced back to the SED. There was no separation of powers in East Germany, as conceived of by the concept of rule of law.⁵⁰ Jurisprudence was instead integrated into a unified power structure.

Another important field of state crimes was electoral fraud. In East Germany, no competing political parties stood for election, as in Western-style parliamentary democracies.⁵¹ Voters could only strike individual candidates from those recommended on the lists, or announce their rejection of the entire set of recommendations through an opposing vote. Even before the actual voting, citizens were subjected to various types of practical interference with the freedom and confidentiality of voting, although these were in fact guaranteed even by East German law.⁵² After correct counting of the votes, the records of the results were falsified by the responsible local electoral commissions. These actions were centrally initiated, through purposely camouflaged instructions from Berlin. In addition, state functionaries were influenced by the parallel hierarchy of the SED at the local level. Implementation ultimately took place uniformly, using as small as possible a group of subordinate officials from the local government.⁵³

Other state crimes were those committed by official and unofficial informers for the Stasi, such as phone tapping, entering homes, removing money from letters and directing it to the state budget, revealing infor-

mation from confidential job-related relationships, taking reprisals against people who had applied to emigrate, and kidnapping.⁵⁴ Although many of these acts could not be criminally prosecuted later on,⁵⁵ they helped to intimidate possible opponents of the regime and suppress criticism of the state. Prosecutions also dealt with other forms of state criminality, such as doping methods that were systematically and broadly employed in East German athletics, often without the athletes' knowledge (Marxen and Werle, 1999: 102 et seq.), illegal enrichment and other economic crimes committed by Politburo members,⁵⁶ and espionage against the Federal Republic by the Stasi's intelligence service and the National People's Army (see Marxen and Werle, 1999: 124 et seq.; Thiemrodt, 2000).

The legal framework

Prosecutions before unification were based on the criminal law of the GDR alone; this process started in November 1989. From 3 October 1990, the legal framework for the punishment of crimes committed under the SED regime changed. The new framework was established in Article 315(1) of the Unification Treaty.⁵⁷ This clause refers to §2 of the West German Criminal Code, which regulates the temporal applicability of West German criminal law. It provides that, in principle, the law in force at the time of the commission of the crime is applicable unless it was changed before the decision; in that case, according to §2(3) of the Criminal Code: "If the law in force upon the completion of the act is amended before judgment, then the most lenient law shall be applicable." The extensive substitution of the West German Criminal Code for East German criminal law after East Germany joined the Federal Republic was therefore equated with a national change in laws between the time of the crime and the conviction. The question of criminal liability for East German crimes thus became subject to the so-called "most favourable" principle.⁵⁸ This meant that courts had first to establish that a crime was punishable under East German law. If this were not the case, there would be no criminal liability, since that was the more lenient option, even if liability could be shown under Federal Republic law. Only if criminal liability was found under East German law would a second step be necessary, which would consider criminal liability under the law of the Federal Republic and determine the more lenient law on this basis.

With this so-called two key approach, the provisions of the Unification Treaty provided only a broad framework for applying criminal law. They did not provide more precise guidelines, for example regarding a prohibition on retroactivity. Particularly at the "border guard trials" – trials of border guards who shot East Germans trying to cross the border to the West – the question was raised of the criminal liability of those border

guards under East German law. The crucial question was whether convicting East German soldiers violated the prohibition on retroactivity – a highly controversial issue in the German legal debate.⁵⁹

Under West German law, intentional homicide would be easily found. According to the law of the Federal Republic, justificatory grounds for the killing of escaping East German citizens obviously could be ruled out. However, criminal liability under East German law was doubtful. Of course, East Germany also criminalized intentional homicide. But the killing of people trying to escape was always seen as justified if the killing was committed as a last resort to prevent “fleeing the Republic [*Republikflucht*]”. Under §27(2) of the State Borders Law,⁶⁰ the use of firearms was justified “to prevent the imminent commission or continuation of an offense [*Straftat*] which appears in the circumstances to constitute a serious crime [*Verbrechen*]”. §27(5) of the State Borders Law provided that, “when firearms are used, human life should be preserved *where possible*”. As a result, this provision had a clear meaning in East German practice: “No one may get through!” – that was the first commandment (Werle, 2001: 3001, 3004).⁶¹ This goal of preventing border crossings at all costs was assumed in every examination of proportionality within the framework of East German law. If a warning was unsuccessful, those fleeing were to be rendered incapable of flight through shooting. If that did not work, killing was permissible as a last resort. Thus the killings were followed in East Germany not by criminal prosecution but by recognition by government authorities: certificates, medals, monetary bonuses, special vacations and promotion for the soldiers who had fired the fatal shots (Werle, 2001). Accordingly, at first glance the situation was completely clear: domestic law in East Germany allowed killing as a last resort to prevent border crossings. Within this framework, East German law granted a licence to kill. If one understands East German law in its historical sense, here, as in other areas, state-organized violence was domestically legal.

Case law

Therefore, it was not surprising that the indicted border guards referred to the domestic legality of their conduct. They admitted to intentionally shooting at the fleeing people and thus wilfully risking their death. But they pointed out that this was allowed under East German law, and in fact was praised as particularly dutiful behaviour. The defence lawyers asserted that convicting the border guards for the killings would violate the prohibition on retroactivity, because the act was not forbidden under East German law at the time it was committed. This would also represent a violation of the Unification Treaty and rule of law principles (Geiger, 1998: 540, 543; Herdegen, 1995: 591, 596; Werle, 1995: 79 et seq.). In their

decisions, the German courts did not adopt this argument, but instead employed a two-track approach that on the one hand undertook a human rights-friendly interpretation of East German law, and on the other had recourse to the “Radbruch formula”, applied in accordance with international law. As a result, the Federal Supreme Court (Bundesgerichtshof – BGH) was of the opinion that the border guards had violated not only West German but also East German law, which then left no obstacles to conviction.

Human rights-friendly interpretation of East German law

The Federal Supreme Court decision that the border guards had violated East German law surprised many. No wonder; law in East Germany was not understood by the Federal Republic’s judiciary as it in fact existed. Instead, the Supreme Court asked: Was it possible or even necessary to interpret East German law in such a way that it favoured human rights? In other words, what would a judge influenced by the spirit of human rights have derived from the East German legal texts? Would such a human rights-friendly judge have been able to find the killings at the border illegal, and to declare them criminal, even in East Germany?

The Federal Supreme Court held that such a human rights-friendly interpretation of the East German border law was indeed called for. The East German Constitution, it pointed out, also recognized the protection of life and the principle of proportionality; that is the light in which one could and should have limited the interpretation of the border law. In this interpretation, shooting to kill unarmed people could not have been allowed (BGHSt [Decisions of the Federal Court of Justice in Criminal Matters] 41, 101 (110); Geiger, 1998; Herdegen, 1995). This means that even under East German law, if interpreted in a human rights-friendly way, the shootings at the border were illegal. This seems to be a slick legal solution: criminality existed even under *correctly interpreted* East German law. Both keys, West German and East German law, fit and opened the gates to criminal liability. The prohibition on retroactivity was not involved, because East German law itself provided for criminal liability for the killings at the border.⁶² One cannot deny this solution’s legal elegance and subtle irony. The Federal Supreme Court turned repressive East German laws against those who had enacted and implemented them. It must also be granted that the interpretation of written East German law developed by the Federal Supreme Court was possible from a purely textual perspective. In addition, East Germany, quite unlike the Third Reich, had professed regard for human rights to the outside world. Had democratic East Germany lasted longer, East German courts would likely also have found a way to reach such a human rights-friendly interpretation (Werle, 2001: 3001, 3004); after all, they had attempted to use the crime of treason

in the East German Criminal Code against former Council of State chairman Erich Honecker.

In general, however, the human rights-friendly interpretation of laws that violate human rights is still subject to some reservations. The essence of the dictatorship, a legality that *violated* human rights, was interpreted out of existence. East German law as it existed in reality was conceived of not as instituting limitations that protected human rights, but as a tool of politics. Basic rights did not serve to fend off intrusions by the state, but were understood as freedom to have a state;⁶³ the primacy of the socialist order prevailed over the rights of the individual. The Party's leading role was a central constitutional principle in East Germany, and the party also led in implementing socialist law. Every interpretation was therefore bound to the will of the Party and state leadership. The human rights-friendly interpretation by the Federal Supreme Court masks this context, to a certain extent rehabilitating written East German law, and thus abets legal and historical misunderstanding (Geiger, 1998: 540, 546). In addition, the method of human rights-friendly interpretation fails if a law formulated with brutal clarity is not amenable to a human rights-friendly interpretation.⁶⁴ Should such a law be a bar to prosecution? Should the later accountability of rulers and their henchmen depend on how dictatorial laws are formulated? Are verbal niceties ultimately decisive, rather than the societal reality of serious abuses of human rights?

Despite these reservations, the European Court of Human Rights (ECtHR) endorsed the Federal Supreme Court's approach without reservation, and thereby denied that it violated the European Human Rights Convention's ban on retroactive punishment (Article 7(1)).⁶⁵ The Court emphasized the right of democratic successor states to change the interpretation of old laws to comport with the rule of law, saying that one could not reproach the courts of a successor state for applying and interpreting the laws in force at the time of the crime in the light of rule of law principles. The Court considered it legitimate, in particular, to take the superficial appearance of rule of law created by repressive states seriously and to reinterpret domestic laws.⁶⁶ The "human rights-friendly interpretation" elaborated by the Federal Supreme Court was thus explicitly recognized as a permissible – and most effective – tool of post-dictatorship justification of criminal liability.

Limitation on the prohibition of retroactive punishment for violations of the right to life

The Federal Supreme Court's second line of argument was oriented around the "Radbruch formula" (Herdegen, 1995: 599 et seq.). The German legal philosopher and Justice Minister during the Weimar Republic

Gustav Radbruch elaborated this formula in 1946. Its core element was Radbruch's idea that a judge facing a conflict between positive law and substantive justice must decide in such a way that "the positive law ... has primacy even when its content is unjust and improper. It is only when the contradiction between positive law and justice reaches an intolerable level that the law is supposed to give way as a 'false law' to justice" (Radbruch, 1946: 105, 107). West German courts had already had recourse to the "Radbruch formula" in dealing with the crimes of the Nazi dictatorship. There the issue was the extent to which certain Nazi rules and laws could be binding on the jurisprudence of the Federal Republic in prosecuting crimes committed during the Nazi dictatorship. The question arose, for example, whether the far-reaching shoot to kill orders by the Nazi leadership justified the killing of deserters by soldiers.⁶⁷ The Federal Supreme Court and the Federal Constitutional Court consistently advocated the view, within the meaning of the "Radbruch formula", that Nazi legislation that was evidently unjust, at least, did not have to be taken account of in Federal Republic jurisprudence.⁶⁸

In dealing with East German crimes, the Federal Supreme Court again applied the "Radbruch formula", but this time alongside international law. It advocated the view, affirmed by the Federal Constitutional Court,⁶⁹ that the development of human rights since 1946 had led to the need to refuse recognition of human rights-violating justificatory grounds for government-instigated killings (Geiger, 1998: 540, 547 et seq.; Vest, 2006: 71).

This further development of the Nuremberg principles should meet with approval. The right to life is recognized under international law. In addition, the fundamental criminality of intentional killing is provided for in all legal systems. The only thing that can be questioned, therefore, is whether and under what conditions state intrusion on the right to life can be justified. In principle, such intrusions are possible. Thus killings in the course of military conflicts are permitted by international law. Further, international law considers the imposition of the death penalty for serious crimes a permissible limitation of the right to life. The question is whether killings to prevent one leaving one's own country can be justified. According to the accepted view, the proportionality of means and ends is not present here; the killing of defenceless individuals for the purpose of preventing them from leaving the country is an absolutely impermissible means. Such a limitation on the right to life is arbitrary. And arbitrary government killings are always incompatible with human rights and basic rights. It was therefore correct that the German courts refused to recognize attempts to legalize arbitrary state killings. The prohibition on retroactivity does not stand in the way of accountability in such cases.

Basic principles of criminal prosecution

If we analyse the procedures of German courts in dealing with East German crimes through criminal law, it becomes clear that arguments similar to those used in regard to the border guard trials can be found for other sets of offences. Criminal behaviour that violated human rights under international law in obvious and serious fashion was penalized across the board. The requirement of a serious human rights infringement acted both to legitimize and to limit punishment. This was true not only of the already discussed cases of violence at the internal German border (Marxen and Werle, 1999: 239 et seq.); the requirement of a serious human rights violation was also applied to perversion of justice.⁷⁰ The lack of a serious violation of human rights in this area led to numerous acquittals or case dismissals. The result was that prosecution concentrated on convictions by East German courts in which, in a grave violation of human rights, the death penalty or a longer prison sentence had been imposed. The same is true for criminal prosecution of denunciations. Here, too, the result was that the only denunciations that were prosecuted as political suspicions (*politische Verdächtigung*) were those that created the risk of a public, grave violation of human rights through the threat of a criminal trial. The Supreme Court further extended this requirement to the penalization of deprivation of liberty committed in connection with political suspicions. The treatment of other types of cases fits within the pattern of focusing criminal prosecution on serious violations of human rights. Thus, in prosecuting abuse of prisoners and doping carried out without the subject's permission, serious human rights violations were assumed to exist owing to the massive intrusion upon the victims' physical health. The criminal liability of Stasi staff (for example in tapping telephones or secretly entering homes) was often negated because it lay below the threshold of a *serious* violation of human rights.⁷¹

Another basic principle of criminal prosecution lies in the continuity of the prosecutions (*Verfolgungskontinuität*). If we consider the statistics on criminal trials involving East German crime, it is apparent that a large number of trials that ended with convictions dealt with abuse of power, corruption⁷² and electoral fraud (see Marxen and Werle, 1999: 240 et seq.). These offences were not characterized by serious human rights violations. Rather, criminal proceedings in this area were oriented according to the guiding principle of continuity of prosecution, which represents the second basic pillar of transitional criminal justice in Germany: almost all trials for abuse of power and corruption, as well as numerous trials for electoral fraud, had already been initiated in East Germany

under the government that succeeded Honecker. The transformed East German judiciary achieved a not-insignificant number of convictions. The Federal Republic's criminal justice system continued these criminal prosecution activities. This was in accordance with the will of the East German people, which they expressed unmistakably in the final days of the GDR.

Assessment of the process of prosecutions

The process of legal reckoning with GDR state criminality lasted around 15 years, from 1990 to 2005, when the last known relevant trial ended. It could already be predicted at the beginning of the process that many trials, however they might end, would remain legally and politically controversial. Given the difficulties of the subject, it was not surprising that there would be contradictions in the case law and that legal justifications in some areas would be vulnerable to attack.

Strengths

Accountability for serious violations of human rights

The deciding factor in a positive overall assessment comes above all from the central result of the use of criminal law: concentrating criminal prosecution on serious violations of human rights. Impunity for serious human rights violations is one of the most important causes of their repetition. This is true not only of the worst human rights violations, such as genocide, but of all serious human rights violations, such as arbitrary and serious assaults, deprivation of liberty and killings. The situation in numerous countries provides unfortunate confirmation. Thus, in the international debate on how to deal with serious violations of human rights, the view has prevailed that a "culture of impunity" favours the repetition of these violations. The German trials sent the right message. The trials contributed to establishing respect for basic human rights.

Further, the effects of individual accountability can be considered positive. Individual accountability illuminates the ways in which state-sponsored crime arises from the actions of particular individuals. Individualization gives perpetrators reason to comprehend their contribution to a system's crimes. It makes clear to a society that it was not an anonymous collective, but a specific group of people, who planned, organized and carried out serious violations of human rights. This process in no way aims to obscure, let alone deny, societal responsibility. In the calculation of sentences, at the latest, the perpetrators' integration into the

context of government action must be considered. Consequently, relatively lenient sentences have often been imposed. In particular, one might mention the numerous suspended sentences imposed on border guards. The unusual circumstance that an intentional killing would be penalized with a suspended sentence in fact shows quite clearly that the judiciary has carefully individualized guilt. This is clearly expressed by the fact that the case law views the border guards, who were quite low in the hierarchy, as in a sense also victims. Thus it cannot be claimed that individuals were sacrificed as “scapegoats”.

Taking account of the will of the East German population

Significant arguments can be made against the prosecution of abuse of power, corruption and electoral fraud, in which the above-described “continuity of prosecution” was the guiding principle. Serious human rights violations, in the sense of attacks on life, health and freedom of movement, were not present in these cases, and it is also doubtful that criminal prosecution under the “two key approach” was permissible here. The German judiciary could, in these areas, have rejected criminalization for understandable reasons. Still, the efforts to continue the trials begun in East Germany deserve approbation.

In 1989–1990, the transformed East German judicial system was serious about applying East German criminal law, and thus ended the privileging of government power holders under criminal law. The judiciary of the Federal Republic was acting with legal consistency when it took up the legal practice that had already changed in East Germany and continued already initiated investigations. The judicial system at the same time ensured that the clear political will of the East German people, which had manifested itself in the final phase of the GDR in prosecutions, among other things, survived the transformations of unification. Thus the prosecutorial continuity in the area of electoral fraud and certain economic offences should also be commended. Admittedly, it cannot be overlooked that this development had its origins in the distinctive characteristics of the German unification process. Unlike the demand for prosecution of serious human rights violations, prosecutorial continuity in the areas of abuse of power and electoral fraud cannot be adopted by other countries.

Acknowledgement of past wrongs

Establishing the truth of and acknowledging past East German crimes is a further central achievement of the trials. Even if some of the courts’ legal assessments will remain controversial, their decisions will influence German society’s recollections of East Germany (Wingenfeld, 2006). The

facts determined in trials can claim a high degree of reliability. In addition to the punitive functions of criminal convictions, they fulfil truth-establishing and acknowledgement functions. In some trials, the emphasis can be more on the truth-establishing function, when for example the courts actually bring new facts to light. In other areas, the contours of the crimes were known; here, the acknowledgement function of court decisions is more central.⁷³

In the trials based on the guiding principle of prosecutorial continuity (abuse of power, corruption and electoral fraud), the truth-establishing function was most important. The suspicion of abuse of power and corruption, as well as electoral fraud, was an important motivation for the civil rights movement in East Germany's final months. The clarification and prosecution of crimes in this area thus had corresponding importance in East Germany in 1989 and 1990. If we consider the results, the electoral fraud trials revealed the structures and processes of electoral fraud in East Germany in exemplary fashion. The trials proved what had thus far only been suspected. Thus, for example, the "negotiating" for percentage points in the election results that was confirmed by many witness statements provided impressive proof of cynical and systematic disregard of the voters' wishes. The meaning of the electoral fraud trials was not reduced either by the relatively low sentences or by certain legal doubts about the applicability of the crime of electoral fraud in Federal Republic law. Like electoral fraud, behaviour that had heretofore only been the subject of speculation was proven in the areas of abuse of power and corruption. It should not be forgotten how much of an influence these trials had on public consciousness during the period immediately following the fall of the Wall.

The acknowledgement function was most important for the killings at the internal German border, which were especially important for public perceptions. The fact that killings were carried out at this border on government orders was known throughout the world. Nevertheless, the use of criminal law in dealing with these incidents had its own special value. In order to classify the acts of individual defendants, such as the border guards, the trials revealed the entire system of border security in minute detail. They reconstructed the chain of command, reaching from the top of the political leadership to the simple border guard. The court decisions further made clear how the individual border guard was integrated into this system through instruction and indoctrination and how this led to the individual contribution to the crime. Overall, the trials revealed without doubt that killings were consciously used by the government as the ultimate means of preventing border crossings, and they showed how this was done. This determination counters any attempt to

play down the crimes at the border. The trials for perversion of justice demonstrated how the judiciary itself had become an instrument of serious violations of human rights. The prosecutorial investigations provided important insights into the organization and process of politically controlled justice.

Weaknesses

The following weaknesses of dealing with East German crimes through criminal law can be observed. The requirements set by the German legislature provided only a rough framework for transitional criminal justice. On substantive questions regarding the criminal law to be applied, the legislature was silent. It also left the organizational structure of criminal prosecution essentially unchanged. Promises that the staff of prosecutorial organs would be increased were not kept in their entirety. No central prosecutorial office was established, for example, that could have coordinated investigations and ensured uniform trial practice. In the political discussion, the serious general problems with the integration of East and West overshadowed the debate about transitional criminal justice. Sharp differences of opinion developed, in which demands for harsher prosecution collided with demands for amnesty.⁷⁴ Thus, transitional criminal justice became a major legal experiment under difficult conditions. Its course was necessarily marked by the characteristics of justice that was mainly executed by the German states (*Länder*) and that offered a complicated, multi-level system of legal tools overseen by the Constitutional Court. Divergences inevitably emerged in the practice of prosecution, and only in a lengthy clarification process did guidelines emerge for judicial decision-making. Added to this was an insufficient revision of the statute of limitations, which caused more harm than good.⁷⁵

The courts, meanwhile, can be accused of not always sufficiently clarifying the two above-mentioned guiding principles (protection of human rights and continuity of prosecutions), sometimes offering a variety of arguments and making only tentative links with the bases of human rights protection in international criminal law. In addition, as shown, the human rights-friendly interpretation of East German law, as undertaken by the Federal Supreme Court, can be accused of distorting historical facts.

Mistaken criticisms

In the public debate in Germany, the accusation of “victor’s justice” has sometimes been levelled against the criminal prosecution undertaken by the judicial system of the Federal Republic. This meant that the “victors” – the Federal Republic of Germany – sat in judgment over the “losers” –

former representatives and functionaries of the former GDR. This criticism is mistaken. The prosecution of serious violations of internationally recognized human rights cannot be qualified as “victor’s justice”. The accusation of victor’s justice is also refuted by the fact that sentences, even for convictions for killings, to a large extent remained extremely low. The courts took account of the fact that, for example, the border guards who fired the deadly shots were ultimately only “small cogs in the machine” of state injustice.⁷⁶ In the areas of abuse of power and corruption, as well as electoral fraud, prosecution was, as shown, backed by the will of East German citizens, so that this accusation of (West German) victor’s justice is also unjustified.

Others, especially members of the civil rights movements in the former East Germany, have criticized the judiciary for imposing penalties that were too lenient. Accusations of a “camouflaged amnesty” have sometimes been made (Hillenkamp, 1996: 179 et seq.). This criticism, too, should be rejected. The more lenient penalties were an expression of carefully balanced sentencing that took account of the individual situation of perpetrators, in their favour. This should be seen as a strength (and not a weakness) of the process.

Conclusion

In assessing the process of dealing with East German history, it is significant that a comprehensive approach was taken. In addition to criminal law, essentially all the instruments of “transitional justice” came into play. Despite unavoidable shortcomings, the victims’ perspective was taken sufficiently into account. Criminal prosecution of East German crimes was a distinctive focus of the process. Here, in retrospect, it can be said that the judicial system developed a generally just and logical concept for dealing with the most important types of cases. Therefore, in Germany the process of dealing with East German state criminality can be considered, by and large, to have succeeded – quite in contrast to the process of dealing with the Nazi past.

Although the process of “transitional justice” in Germany has been completed, this is not the case for society’s reckoning with the past. The use of legal instruments is only a partial element of the process by which a society comes to terms with its history. Here, care must be taken that the efforts to acknowledge and illuminate past wrongs are not filed away and forgotten. The conclusions reached by the criminal justice system, in particular, are enormously useful to society’s historical memory. They are important tools to prevent forgetting, denial or trivialization of historical injustices.

Appendix: Facts and figures⁷⁷

Table 13.1 East German justice: Indictments/applications for penal order (*Strafbefehl*), decisions/penal orders and sentences, by type of offence

Type of offence:	Electoral fraud	Abuse of power and corruption	Other offences	Total
Indictments/applications for penal order	19/11	21/0	1/0	41/11
Number of defendants in indictments/applications for penal order	65/11	28/0	2/0	95/11
Final decisions/penal orders	6/11	1/0	0/0	7/11
Total convictions in final decisions/penal orders	14/11	1/0	0/0	15/11
<i>Sentenced to:</i>				
Public censure	1			1
Fine	18			18
Suspended sentence	4			4
Suspended sentence and fine	2			2
Imprisonment		1		1

Table 13.2 Investigations, investigations concluded and proportion of investigations leading to indictment

No. of investigations	Total no. of conclusions	No. of indictments	Percentage of indictments
74,894 ^a	74,793 ^a	1,037	1.4 ^a

Notes: These figures are based on figures provided by justice departments in the various states, which were compiled as part of the project “Criminal Justice and the East German Past”. Reliable information on the total number of investigations is impaired by, among other things, differences in the investigative period and the recording of procedures in general registries.

^aThese are approximate figures.

Table 13.3 Number of cases, by type of offence

Type of offence	Number of cases ^a	Percentage of all cases
Perversion of justice	374	36.6
Killings at the border	244	23.9
Stasi crimes	142	13.9
Prisoner abuse	79	7.7
Electoral fraud	66	6.5
Abuse of power/corruption	38	3.7
Doping	38	3.7
Economic crimes	16	1.6
Denunciations	11	1.1
Other	13	1.3
Total	1,021	100.0

Notes: The cases are those in which indictments were filed or an application was made for a penal order.

^aWhere there are discrepancies in the number of indictments compared with Table 13.2, it is because the figures in Table 13.2 are based on official justice department statistics. The figures in Table 13.3 are derived from our own investigations in the course of the research project “Criminal Justice and the East German Past”. In the latter, however, a closer specific relationship of the crime to the SED leadership was called for, which, in contrast to the official figures (especially for economic crimes), was denied in some cases.

Table 13.4 Conclusion at main trial and through penal orders, by type of conclusion

Type of conclusion	Number	Percentage of defendants
Conviction	753	53.9
Acquittal	336	24.1
Dismissal	280	20.0
Warning with suspended sentence	28	2.0
Total	1,397	100.0

Table 13.5 Acquittals and convictions, by type of offence

Type of offence	No. of judgments	Acquittals		Convictions	
		No.	Per cent	No.	Per cent
Killings at the border	385	110	28.6	275	71.4
Perversion of justice	301	120	39.9	181	60.1
Electoral fraud	103	4	3.9	99	96.1
Stasi crimes	131	62	47.3	69	52.7
Prisoner abuse	57	15	26.3	42	73.7
Doping	47	0	0.0	47	100.0
Abuse of power/corruption	32	10	31.3	22	68.8
Economic crimes	18	5	27.8	13	72.2
Denunciations	9	4	44.4	5	55.6
Other	6	6	100.0	0	0.0
Total	1,089	336	30.9	753	69.1

Table 13.6 Sentences by type of offence and type of sanction

Type of offence	Total no.	Fine		Total imprisonment		With probation	
		No.	Per cent	No.	Per cent	No.	Per cent
Killings at the border	267 ^a	1	0.4	266	99.6	236	88.7
Perversion of justice	181	5	2.8	176	97.2	169	96.0
Electoral fraud	99	57	57.6	42	42.4	42	100.0
Stasi crimes	69	31	44.9	38	55.1	36	94.7
Denunciation	5	0	0.0	5	100.0	5	100.0
Prisoner abuse	42	26	61.9	16	38.1	14	87.5
Abuse of power/ corruption	22	5	22.7	17	77.3	12	70.6
Economic crimes	13	10	76.9	3	23.1	3	100.0
Doping	47	30	63.8	17	36.2	17	100.0
Total	745	165	22.1	580	77.9	534	92.1

^aIn eight cases the defendants were discharged from sentence under §60 of the West German Criminal Code.

Notes

1. On the historical context, see Schaeffen (2006), Weber (1993), Wehler (2008), Winkler (1994) and Zimmermann (2000: 3 et seq.).
2. On 9 July 1952, the “construction of socialism” on the Soviet model in East Germany was formally decided upon at the Second Party Congress (Zimmermann, 2000: 7).
3. In the roughly 40 years that the Ministry for State Security existed, it created an extensive and highly hierarchical structure, with almost 90,000 full-time staff by the end; see Marxen and Werle (1999: 75 et seq., 228) and Engel (1994: 43 et seq.).

4. The possibility of merger was established by Article 23 of the Basic Law. After the Basic Law came into effect in 1949, the article “for now” established its scope of applicability over the western federal states but provided that it “would go into force after the merger . . . in other parts of Germany” (Jain, 1999: 253 et seq.; Kocka, 1994).
5. The research project “Criminal Law and the East German Past” in the law department of Humboldt-Universität zu Berlin has evaluated all the criminal trials that involved acts related to the East German regime. In addition to many dissertations, the project published a seven-volume series of publications that was supplemented with an overview volume (Marxen and Werle, 1999) as well as a brochure of data (Marxen et al., 2007).
6. The Rehabilitation Law, adopted by East Germany, was subsequently applied only in regard to rehabilitation under criminal law, on the basis of a supplementary agreement in the Unification Treaty between the two German states.
7. This was the legislature’s intention; see *Bundesratsdrucksache* [Official Records of the Bundesrat] 92/93, p. 36.
8. Documented in Ludwig (2000: 463 et seq.).
9. For compensation for victims of illegal deprivation of freedom alone, the federal government calculated nearly DM 2 billion, or approximately €1 billion. Documented in Ludwig (2000: 456) with reference to former Justice Minister Sabine Leutheusser-Schnarrenberger, the compensation amounts were raised in retrospect (from around €150 at first to €250 per month in prison). In 2007, the Bundestag decided on an additional special pension for East German victims, for which an additional €90–100 million per year would be required.
10. An overview of the history of expropriations in East Germany can be found in Fieberg (1995: 80 et seq.), Rodenbach (1995: 290) and von Bismarck (1999: 203 et seq.).
11. Between 1945 and 1990, a total of approximately 3.5 million East Germans fled to the West. The great majority of them left before the building of the Wall in 1961. See Fieberg (1995: 80).
12. On the mandate of the Trusteeship Agency, see §8 Gesetz zur Privatisierung und Reorganisation des volkseigenen Vermögens (Treuhandgesetz) of 17 June 1990.
13. On the Trusteeship Agency, see Rodenbach (1995: 288 et seq.).
14. Entered into force on 3 August 1992, *Bundesgesetzblatt* I (1992: 1446).
15. This includes cases in which property held by West Germans received lower compensation than the property of East Germans; see Rodenbach (1995: 297).
16. In the latter case, §3 of the SED Injustice Revision Law discussed above referred to the Property Law. For details of individual cases, see Rodenbach (1995: 295 et seq.).
17. Judgment of the Federal Administrative Court, 24 March 1994.
18. A case that was quite common before the erection of the Berlin Wall.
19. A law created especially for these cases, the Law on Precedence of Investments, regulated the details.
20. Under §4(3) of the Property Law, this meant above all when, under the East German regulations, the property or business had been acquired in good faith before reunification (Fieberg, 1995: 86).
21. This was a common description of the Stasi. According to Geiger (1995: 42), the Stasi was the “heart of repression in East Germany”.
22. Hans-Jörg Geiger was director of the Office of the Federal Commissioner for the Files of the State Security Service from 1990 to 1995.
23. A subject dealt with in the Oscar-winning film *The Lives of Others* (2006).
24. See below.
25. Some feared that this could lead to aggression and acts of revenge by former East Germans. However, when these fears came from the East, the real concern related to the discoveries that their own Stasi files might reveal. See Geiger (1993: 46).

26. Additional information on the agency can be found on its official home page at (<http://www.bstu.bund.de>).
27. According to the agency's official home page (as of 31 December 2011).
28. On screening of judges, see von Roenne (1997).
29. The exact location is Unification Treaty, Chapter XX, Subject Area A, Section III, No. 1 paras 4 and 5 of annex 1.
30. On the examination process, see von Roenne (1997: 266 et seq.).
31. Enquete commissions have been regularly established by the Bundestag since the early 1970s. The subjects of their investigations have included nuclear energy, gene technology, the fight against AIDS, climate change and educational policy.
32. See p. 5 of the interim Enquete Commission report in Bundestag Drucksache 12/7820, 31 May 1994, available at (http://www.bundestag.de/dokumente/datenhandbuch/08/08_10/08_10_01.html) (accessed 17 April 2012).
33. See pp. 12 et seq. of the report.
34. With reference to Sa'adah (1998: 185).
35. Thus, for example, the Bundestag group of the Party of Democratic Socialism (the SED successor party) submitted a special vote on the Enquete Commission report in which it portrayed the central results as wrong; see Rossig and Rost (2000: 525).
36. See below on alternative forms of dealing with the past.
37. However, others rejected these alternatives.
38. Documented in Rossig and Rost (2000: 525 et seq.).
39. In contrast, Sendler (1997: 3148) asks whether one might not see amnesty as the "culmination" of the peaceful revolution.
40. This was the response of the legal spokesperson of the SPD parliamentary party to this proposal by the PDS in 1998.
41. According to Sendler (1997: 3148), a broad social consensus would have been necessary for a general amnesty, which was not present.
42. This procedure has been wrongly criticized for amounting to a "hidden amnesty". For details, see the evaluation of prosecutions in the next section of this chapter; see also Marxen and Werle (1999: 254). Criminal prosecutions for espionage are exceptional for the amnesty issue. Amnesties were demanded early on specifically for East German espionage, but this was ultimately rejected by the Bundestag. However, the Federal Constitutional Court decided that a preponderance of reasons spoke against further criminal prosecution of East German spies and they represented an obstacle to prosecution. This can be considered, with some reason, to be a "de facto amnesty". In an important group of cases, the Constitutional Court's jurisprudence resulted in non-prosecution; see Marxen and Werle (1999: 232, 238).
43. Documented in Rossig and Rost (2000: 530).
44. This idea was essentially realized with the Enquete Commission.
45. This is how it is expressed on the home page of the forum, which still exists today; see (<http://www.ddr-diktatur.de>) (accessed 30 March 2012).
46. On confronting the past during the final year of the East German state, see Bock (2000).
47. On the trials, see McAdams (1997).
48. For more details on this, see Rummler (2000) and Vest (2006: 7 et seq.).
49. Detailed descriptions of some cases can be found in Marxen and Werle (1999: 39 et seq.).
50. The Federal Supreme Court came to this conclusion in the process of accounting for perversion of justice using criminal law. Evidence can be found in Marxen and Werle (1999: 54).
51. On the entire issue, see Müller (2000).
52. Thus those eligible to vote were approached personally by so-called agitators on election days and told to vote. Voting was also sometimes permitted outside polling sites.

- Those who might be unwilling to vote would therefore have difficulty escaping the pressures. See Marxen and Werle (1999: 26).
53. Evidence of these procedures, uncovered in the process of judicial accounting, is found in Marxen and Werle (1999: 24 et seq.).
 54. On the activities of secret police informers, see Engel (1994: 79 et seq.) and Gauck (2004: 277–284).
 55. The reason for this was either the lack of a legal norm under East German law or the assumption that there had been an unavoidable error of law by the Stasi member. It was different for acts of coercion to withdraw an application to emigrate or for deprivation of liberty through kidnapping. See Marxen and Werle (1999: 228 et seq.).
 56. On the entire issue, see Fahnenschmidt (2000).
 57. For details, see Marxen and Werle (1999: 3 et seq.).
 58. The “Meistbegünstigungsprinzip”, or the principle of the application of the most lenient law.
 59. An overview of writings on this, which are now almost too numerous to list, can be found in Lackner and Kühl (2007: §2, marginal no. 16a).
 60. The official title of the law was Law on the Borders of the German Democratic Republic of 25 March 1982. Previously, the use of firearms against fleeing citizens was governed by a network of regulations, instructions and orders. But even after the adoption of the State Borders Law, unofficial instructions on the use of firearms remained; see Marxen and Werle (1999: 224) and Rummler (2000: 157 et seq.).
 61. In its decision BGHSt [Decisions of the Federal Court of Justice in Criminal Matters] 39, 1 (11), the Federal Supreme Court came to the conclusion that the motto was “Better the escapee is dead than the flight succeeds”.
 62. A summary of this jurisprudential line of argument is found in Rummler (2006: 330 et seq.), with cites mainly to sceptical sources. For details, see also Vest (2006: 71, 87 et seq.).
 63. See, for example, Mampel (1997: Article 19, marginal nos. 12 et seq.).
 64. See BGHSt 41, 101 (112).
 65. Those who brought suit included, among others, the last head of the East German Council of State, Egon Krenz, against whom, as well as against other members of the political and military leadership, a sentence of several years’ imprisonment had been imposed for homicide committed as a “perpetrator by means”. On the judgments of the ECtHR, see Kreicker (2002), Vest (2006: 78 et seq.) and Miller (2001).
 66. ECtHR, judgment on 22 March 2001 – 34044/96, 35532/97 and 44801/98 (*Streletz, Kessler and Krenz v. Germany*), published in *International Legal Materials* (ILM) (2001) 40.
 67. BGHZ [Decisions of the Federal Court of Justice in Civil Matters] 3, 94 (107).
 68. However, criticism of the “Radbruch formula” is often expressed in legal doctrine. Among other things, it is criticized because it is not possible to clearly determine when an “unjust law” in the sense of the formula is present, and because it ultimately acts as a covert circumvention of the prohibition on retroactivity. On the “Radbruch formula”, see Amelung (1996: 51), Dreier (1997: 421), Kaufmann (1998: 81), Ott (1998) and Saliger (1998).
 69. For detailed information, see Vest (2006: 75 et seq.).
 70. On the criminal prosecution of East German jurists, see Hohoff (2001).
 71. The guiding principle of the prosecution of serious violations of human rights also governs trial practice from the quantitative perspective. Thus two types of cases, killings at the border and perversion of justice, which are areas most influenced by the idea of human rights protection, made up the overwhelming majority of investigations.
 72. On prosecutions for abuse of office and corruption in East Germany’s final year and after reunification, see Fahnenschmidt (2000).

73. On the educational function, see Bock (2000).
74. An overview of the discussion is found in Rossig and Rost (2000: 525 et seq.).
75. For more details, see Marxen and Werle (1999: 248 et seq.).
76. On hierarchies among the border guards and the legal assessment of the crimes by the judicial system of the Federal Republic, see Marxen and Werle (1999: 8 et seq.).
77. The tables are based on figures from Marxen et al. (2007).

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14

Lustration as a trust-building mechanism? Transitional justice in Poland

Monika Nalepa

Introduction

Lustration, that is, revealing public officials' links to the former Communist secret, is Poland's dominant transitional justice mechanism. It is more prevalent than truth commissions, trials or compensation of victims of Communist rule. This chapter uses survey data from the period preceding the democratic transition, as well as public opinion data from surveys taken throughout the post-transition period. It first demonstrates that Polish citizens emerging from decades of Communist rule trusted neither state institutions nor political elites. From a normative point of view, lustration is the best response to such a deficit of trust. I argue, however, that political elites did not implement lustration for its normative qualities. This transitional justice mechanism has been politically misused more than any other to skew the results of elections and other democratic processes. I support this claim with public opinion data from the more recent period showing that the passage of lustration laws has failed to improve trust in political elites and state institutions. Other public opinion data show the Polish public to be deeply dissatisfied with existing lustration laws. This finding is particularly disturbing in light of the absence of other transitional justice mechanisms, such as trials, victim compensation and property restitution, which have been very difficult to implement. Despite the normative advantages of lustration, relative to other transitional justice mechanisms, the overall performance of lustration in Poland has been far from satisfactory.

A deficit of trust in political elites

It is hardly surprising that Polish citizens would mistrust political elites from the Polish United Workers' Party (Polska Zjednoczona Partia Robotnicza, PZPR) – the official Communist Party organization discredited by more than 50 years of illegitimate rule, which was plagued by human rights abuses. One would expect dissidents from the revived “Solidarity” movement, however, to be considerably more popular.

Solidarity was the first independent trade union in the Soviet bloc. It was legalized in August 1980, after its leaders signed the first accords with the Communist government in Gdańsk. Many believed at the time that Poland was about to become the first state in the bloc independent of the Soviet Union. For 18 months, Solidarity functioned as a legal organization. At the height of its popularity, the trade union had almost four times as many members as the PZPR. Furthermore, during the 18 months in which Solidarity was a legal trade union, other civic associations proliferated. These included independent professional unions, Rural Solidarity (a farmers' union), student unions and even independent trade unions of the police and armed forces – adding a few more million members to the body of non-Communist organizations.

Figure 14.1 presents results from a survey among a representative national sample conducted in 1988, on the eve of the roundtable talks that eventually led to the democratic transition in Poland.¹ It shows the average levels of trust and mistrust and overall name recognition in relation to members of three groups engaged in preparatory talks for the roundtable negotiations: the Communist government, the Solidarity opposition and the Catholic Church.

The two puzzling inferences to be drawn from these data are, first, that dissidents from Solidarity were more recognizable than leaders from the Party apparatus and the Catholic Church and that dissidents were trusted less than members of the Communist establishment. The first fact is surprising because, whereas leaders of the Communist Party had exclusive access to the media, Solidarity, following its de-legalization in 1981, had been running its activities as an underground organization.² Solidarity was also the only group for which average mistrust exceeded the average level of trust. Although close to 10 per cent of respondents mistrusted the Communist candidates, close to 15 per cent trusted them. Only the representatives of the Catholic Church – the so-called *guarantor* of deals struck at the roundtable – could boast trust levels (10 per cent) twice the size of levels of mistrust (5 per cent).

Readers sceptical about surveys conducted in authoritarian regimes might react to the figures reported here with suspicion. These doubts can

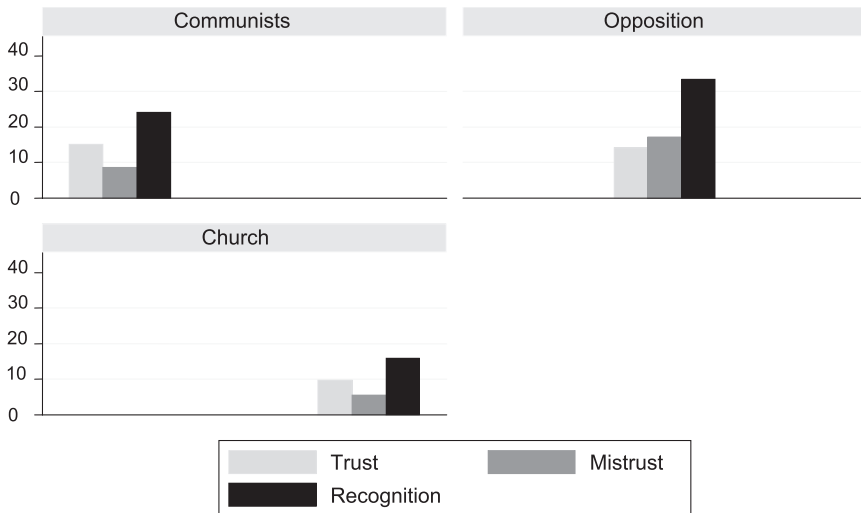


Figure 14.1 Attitudes of trust and mistrust and overall name recognition in relation to roundtable participants in 1988.

Source: CBOS, Communication: “Wokół Okrągłego Stolu” [Surrounding the Roundtable Negotiations], 1989.

be easily dissipated. First, note that, if respondents had been concerned that recognizing opposition members could result in persecution by the secret police, they would not have admitted to recognizing their names. Second, these data reflect mistrust not towards the Communists in general but towards those Communists who the regime was considering as its representatives in the roundtable negotiations. It is not unreasonable to assume that, according to the Communist regime, these were the *most* trustworthy elites available. Finally, note that the data come from the Public Opinion Research Center (Centrum Badania Opinii Społecznej, CBOS) – a survey institute created by the Communist authorities in 1983 for monitoring attitudes of the general public so that a martial law scenario could be avoided in the future.³ Because the objective of CBOS was to provide the authorities with reliable data, the survey institute worked hard at instilling confidence among the people it interviewed, assuring them of the confidentiality of their responses. Pollsters were encouraged to report on actual attitudes in society and were rewarded for delivering results that presented the Communist authorities in a favourable light. Therefore, the usual criticisms aimed at surveys conducted in authoritarian states – that respondents are too intimidated to provide reliable responses – are less of a concern for CBOS data.⁴

Trust in state institutions and perceptions of corruption

In a state permeated with members of the old *nomenklatura*,⁵ members of the ruling elites were not the only ones lacking trust. The bureaucrats of the state administration, 65 per cent of whom were members of the Communist Party or its satellites, were perceived as extremely corrupt. In a survey conducted in 1988, just a few months before the fall of Communism, three-quarters of respondents indicated that “bureaucrats did not treat all clients equally” (CBOS BDF/20/2/88).⁶ Public servants extended preferential treatment to Communist apparatchiks and to clients offering bribes – 36.3 per cent of respondents indicated that bribing an official had worked for them in the past and 34.3 per cent admitted that they would bribe an official if prompted to do so. According to the CBOS results, some respondents would offer bribes even when they were sceptical that the bribe would be effective at bringing about the intended result. For instance, although 57 per cent of small business owners⁷ indicated that they would offer a bribe if prompted to do so by a civil servant, only 41 per cent had experienced a bribe to no effective.

In 1991, just two years after the transition, a CBOS poll asked respondents to identify public servants most likely to engage in corruption. Respondents believed public officials appointed in the Communist era to be twice as likely to engage in corruption as the new administrators employed after the transition (CBOS, BS/247/82/91).

Based on surveys conducted towards the end of the Communist era and in the early aftermath of the transition, the only two institutions that voters were confident in were the Catholic Church and the military. But these two organizations could hardly serve as the foundation of a constitutional democracy, a regime that needs to be secular and whose military should be placed under civilian control.

The police apparatus was controlled by the Ministry of Internal Affairs, the same department in which secret police officers played a leading role. The secret police, tasked with collecting intelligence against former dissidents, was ill equipped to combat corruption. Transcripts from parliamentary debates offer ample evidence of its deficiencies. In September 1989, Solidarity deputy Zbigniew Janas asked Stanisław Pudysz, the Undersecretary in the Ministry of Internal Affairs responsible for the secret police, what the secret police had been doing following the roundtable negotiations. In an incredible response, Pudysz outlined the function the secret police could serve in protecting historical prints and museum artefacts. Janas’s justification for posing the question in the first place was considerably more revealing. At one of the electoral rallies after the conclusion of roundtable negotiations, he recognized in his audience one of the secret police officers who had searched and arrested him during his dissi-

dent past. When Janas asked the secret police officer if he had come as a participant, the officer explained that he was attending the rally in “his official capacity”. Following Janas’s demand for an explanation, other dissidents reported similar experiences with secret police officers attending their rallies, including one extreme case where a secret police officer, after introducing himself *as* a secret police officer, actually took the floor (Stenogram Sejm Rzeczypospolitej Polskiej, 1989)!⁸

In light of this evidence of a crisis of trust in post-Communist Poland, the following section develops a normative argument in support of lustration. I next discuss to what extent lustration legislation and the debates surrounding it have allowed citizens to renew their trust in political elites and state institutions. I use summary statistics from a range of public opinion surveys conducted by CBOS to argue that the lustration laws that were implemented in Poland failed to improve the Polish public’s trust in the state administration. The surveys I use span the period 1991–2004 and fall into two categories. The first category looks at attitudes to corruption, understood as officials abusing their office for personal or party gain. The second looks at attitudes to lustration and satisfaction with its implementation.

A normative argument for lustration

Scholars argue that citizens’ trust is critical for the consolidation of democratic norms that make democratic processes work as their designers intended them to (Davis, 2007). Because lustration is a transitional justice mechanism that promises to uncover, shame and – at times – legally punish individuals who in the past had collaborated with the *ancien régime*, it seems to be very well suited to Poland. By revealing links to the secret political police of individuals running for or holding public office, lustration can be viewed as particularly appropriate for alleviating mistrust of political elites and perceptions of corruption in the top echelons of power. Note that, by focusing on links to the secret police of the *ancien régime*, lustration is different from de-Communization, de-Nazification and de-Ba’athification. The latter punish open collaborators, such as former authoritarian Party members, whereas lustration reveals, but does not necessarily also formally penalize, covert collaboration. Thus, whereas de-Communization and de-Nazification exclusively target former members of Communist or Nazi parties, lustration can also affect the opposition, particularly dissident groups that had been a recruiting ground of the secret police.⁹

Thus, lustration can restore trust in public officials by revealing which political elites had been true to their dissident ideals and denying

legitimacy to those who had not. Indirectly, lustration and de-Communization should increase trust in political institutions as well as in the state administration. Poland's deficit of trust in political elites, state officials and their bureaucracies points to lustration as the normatively appropriate transitional justice mechanism. In the remainder of this chapter, I ask whether lustration has resolved the country's crisis of trust in governmental institutions.

Public satisfaction with existing lustration laws

For lustration to revive trust in governmental institutions, it must be valued by voters. To gauge how citizens have responded to lustration processes, I compare public opinion data from periods preceding the passage of the lustration law (in April 1997) with periods following the passage of that law.

In May and October 1999, CBOS asked respondents a series of questions aimed at evaluating the lustration process thus far. In particular, they were asked to evaluate the current *effects* of the lustration law. In October, as many as 40 per cent of respondents (up 17 percentage points from May 1999) evaluated the process "rather negatively" and only 3 per cent expressed a "definitely positive" attitude (half as many as had evaluated it positively in May 1999). According to the same survey, nearly 60 per cent of respondents claimed that, instead of "making the political climate better", lustration was "making it worse";¹⁰ on the other hand, 47 per cent of respondents believed that lustration was taking place too slowly.

We find more evidence supporting the public's negative evaluation of the lustration process by tracing the dissonance between two similar questions. The first asked respondents if lustration should be carried out, explaining that it referred to verifying whether a person holding an important public position had in the past collaborated with the secret political police. CBOS asked respondents for the first time in June 1994 whether lustration should be conducted. The same question was asked again in December 1996 – only four months before the first lustration law was passed by the legislature – and then on two subsequent occasions: in December 1997 (three months after national elections had been held) and in September 1999.

Figure 14.2 graphs the responses provided in all four surveys. We see that the percentage of respondents eagerly awaiting lustration steadily increased from June 1994, and peaked in 1997 when lustration was finally implemented. At the same time, we observe a reverse trend for respondents sceptical about lustration. However, following the adoption of lustration in 1997, the number of respondents believing that lustration

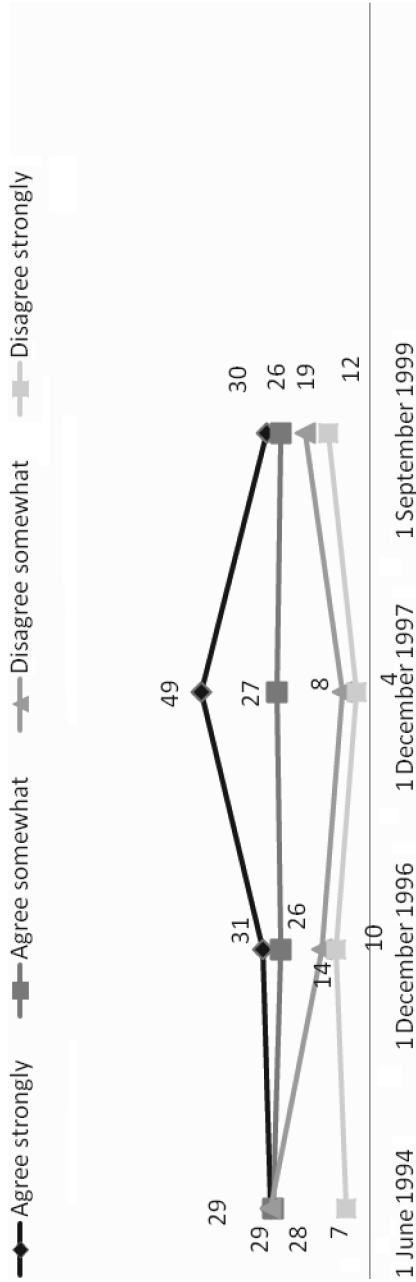


Figure 14.2 Respondents answers to “Do you agree that, at this point in time, lustration should be carried out?”

Table 14.1 Respondents' attitudes towards purging state institutions of collaborators, 1994–1999

What should happen to persons holding a position of responsibility in state institutions, if it is revealed that they had collaborated with the secret police?	Responses according to timing of study (per cent)				
	June 1994	February 1996	December 1996	December 1997	September 1999
They should be forced to give up their position	72	67	59	62	53
They should continue to hold their position	15	17	23	21	28
Difficult to tell	13	16	18	17	18

Source: CBOS, Communication: “Ocena Procesu Lustracyjnego” [Evaluation of the Lustration Process], 1994, 1996, 1997, 1999.

should be carried out dropped (from 76 to 56 per cent) and the number of lustration sceptics increased (from 12 to 31 per cent).

Is this because citizens' trust in political elites had been restored by the lustration process? This is highly unlikely. Instead, it is quite possible they had become disenchanted with the lustration process. Along with the question about whether lustration should be carried out, in the same set of surveys CBOS also asked respondents if they believe that former collaborators should be purged from the state administration. Data on responses to this question are presented in Table 14.1.

Here we observe almost the opposite pattern: initial support for purges steadily declined, with a short rebound in December 1997, right after the lustration law was passed. This is consistent with the trend in responses affirming that former collaborators should continue to hold their positions. Note also that the number of respondents confused about purges (the “Difficult to tell” category) is growing. This could be interpreted as an indication that, as the implementation of the lustration process continues, it is becoming harder for respondents to decide which side of the lustration debate to support (Nalepa, 2012).

However, this evidence is suggestive, at best, because it analyses the two variables simultaneously. In order to show the increasing trend in individuals who are simultaneously (1) supportive of purges and (2) sceptical about lustration, I cross-tabulated frequencies for responses to these questions. The top panel of Table 14.2 shows data from 1994, that is, *before* any lustration law had been adopted. The bottom panel shows data from 1997, that is, *after* the lustration law came into effect. The rows indicate the percentage of respondents supporting the current lustration pro-

Table 14.2 Cross-tabulations of respondents supporting the current lustration process and believing in purges (per cent)

Do you believe that, at this point in time, lustration should be carried out?	If it is revealed that persons holding a position of responsibility in state institutions had collaborated with the secret police:			
	Agree strongly they should be forced to give up their position	Agree somewhat they should be forced to give up their position	Agree somewhat they should continue to hold their position	Agree strongly they should continue to hold their position
In June 1994:				
Agree strongly	29.48	17.27	5.39	0.00
Agree somewhat	8.40	26.47	9.03	0.32
Disagree somewhat	<i>0.00</i>	<i>0.16</i>	0.16	0.95
Disagree strongly	<i>0.00</i>	<i>0.00</i>	2.38	0.00
Total	37.88	43.90	16.96	1.27
Kendall's tau-b = 0.3467.				
In December 1997 (3 months after the passage of the lustration law):				
Agree strongly	30.30	17.60	7.19	0.60
Agree somewhat	7.07	15.57	7.78	0.96
Disagree somewhat	<i>0.96</i>	<i>1.68</i>	5.27	0.48
Disagree strongly	<i>0.12</i>	<i>0.60</i>	1.80	2.04
Total	38.44	35.45	22.04	4.07
Kendall's tau-b = 0.4158.				
Difference 1997–1994 (per cent):				
Agree strongly	0.82	0.33	1.80	0.60
Agree somewhat	–1.33	–10.90	–1.25	0.64
Disagree somewhat	0.96	1.52	5.11	–0.47
Disagree strongly	0.12	0.60	–0.58	2.04

cess, while the columns show the percentage of respondents who believe that purges of the state administration should be carried out.

The first noteworthy fact is that, in both the 1994 and the 1997 surveys, the correlation between support for purges and scepticism towards lustration in its current form is less than 0.5 (Kendall's tau-b measure of association in 1994 is only 0.3467). Second, note that, if the two questions asked by CBOS measured the same attitude, we would not see any respondents in the off-diagonal cells. The percentages in italics in the first two panels of the table signify those respondents who want former collaborators to give up their positions but do not approve of lustration.

If the lustration law had addressed the citizens' demand for lustration, those cells would contain just zeros. However, as the difference table located below Table 14.2 indicates, not only are these cells populated, but the percentage of respondents who wanted former collaborators to give up their positions but did not approve of lustration *increased* between 1994 and 1997. The percentages in bold in the middle panel of the table represent respondents who believe lustration should be carried out but want former collaborators to hold on to their positions. Because the Polish lustration law passed in 1997 allows former collaborators who admitted to their past wrongdoings to stay in office, these respondents could be interpreted as understanding and supporting the existing lustration law. These numbers, totalling a little over 15 per cent of the population, suggest that support for lustration remained low, even after the policy was implemented.

To further corroborate these findings, I present some findings from my own survey on lustration, where I made use of many of the questions from the original CBOS polls. In 2005, I found the percentage of respondents negatively evaluating the lustration process to be 61 per cent. Figure 14.3 summarizes respondents' answers to the question "What is

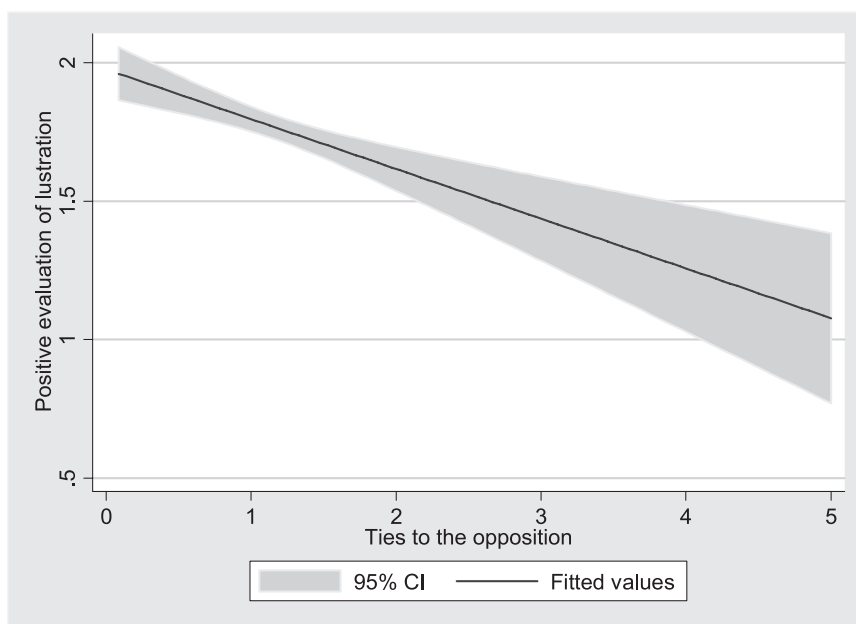


Figure 14.3 Attitudes to lustration by knowledge of individuals persecuted by the secret police.

your evaluation of the lustration law thus far?” as a function of answers to the question “How many individuals do you know who, prior to the transition, were under investigation by the Communist secret police?” In answering the question about attitudes to lustration, respondents could express “dissatisfaction” (1), “indifference” (3) or “satisfaction” (5). When answering the question about ties to the opposition, respondents could indicate that they knew (1) “no member of the former opposition”, (2) “no more than two such individuals”, (3) “between three and five such individuals”, (4) “between five and ten such individuals” and (5) “more than ten such individuals”. The graph shows a fitted line with 95 per cent confidence intervals around it. Few Poles are satisfied with lustration, but dissatisfaction with the effects of lustration is noticeably higher for those who have more to gain from an effectively implemented lustration law.

In light of these data, one is tempted to ask how it is possible that lustration has become the main transitional justice mechanism in Poland. This is the topic of the following section.

Lustration – the preferred transitional justice mechanism

After presenting a brief history of lustration in Poland, I argue that, even though lustration was the most appropriate transitional justice mechanism to remedy Poland’s lack of trust in political elites, it was not implemented for its normative appeal. Instead, the political elites attempted to mould lustration policies to maximize their representation in legislative and executive bodies.

Poland did not implement a fully functioning lustration law until June 1998. Long before that, however, the secret police files were put to political use. The early 1990s were a very unstable period in Polish politics. The first term of the Polish democratic legislature (the Sejm) began in November 1991 but ended prematurely in September 1993 with the fall of the fourth cabinet in a two-year period. The four cabinets were composed of ministers from a total of 15 parties. Since all the cabinets were centred around fragile coalitions fighting for dominance among themselves as well as over the parliamentary opposition, secret police files were frequently used to extract rewards from coalition partners and to pressure members of the opposition into submission. Yet parties left out of ruling coalitions, such as Janusz Korwin Mikke’s Union for Real Politics (Unia Polityki Realnej, UPR), could never take advantage of the files in this way. It is hardly surprising that Mikke, dissatisfied with his losing position in the “files game”, proposed the first lustration act. This was a vaguely worded resolution requiring the Interior Minister to “disclose full information about who among the civil servants – including senators,

members of the Sejm, governors,¹¹ judges and prosecutors – had collaborated with the Communist secret police”. Mikke’s proposal had already been signed by 105 members of the parliament (MPs), more than were present in the legislature at that time. No members of the Democratic Union (Unia Demokratyczna, UD) and the Labour Union (Unia Pracy, UP), the two parties uniting prominent opposition roundtable negotiators, were present when the resolution was being discussed or voted on. It passed by 186 votes to 15, with 32 MPs abstaining. The Interior Minister, Antoni Macierewicz, was given 21 days to disclose the information, but there were no guidelines attached to the resolution.

All Macierewicz managed to do in this limited time-frame was to compile a list of MPs whose names were mentioned in the files of the former secret police that he had access to. The list contained 61 names. Among them were many parliamentarians who had voted for the resolution only a week earlier. The following day the Sejm brought down the entire cabinet (including Macierewicz) through a vote of no confidence. A month later, the Constitutional Court declared the resolution illegal, and, finally, a special investigative committee was launched to scrutinize all the procedural mistakes that had been committed by the Interior Ministry while executing the resolution. The special committee that was appointed to investigate the execution of the resolution revealed that Macierewicz had been “organizing” the files with a team of researchers called the Department of Analysis (“Wydział Studiów”) for three months before the resolution was proposed in the Sejm.

While the MPs regretted their hasty decision and were trying to undo its consequences, the list leaked to the press and took on a life of its own, alerting the public to the urgency of lustration. However, now the opposition parties had discovered that the outgoing Communists were not bluffing when they claimed that the opposition, rather than they, would be implicated by lustration. When Macierewicz’s famous list was circulated in the Sejm, the post-Communists could be heard sneering, because very few of the 61 MPs listed as secret police agents were members of their party (interviews: PC5, PC6 and PC2, 2004).¹² In part, this was because the resolution upon which Macierewicz was acting did not include working for the Communist intelligence and counter-intelligence, which recruited predominantly PZPR members.

In the aftermath of the Macierewicz scandal, even though the liberal opposition’s electorate supported lustration, the liberal politicians became aware of the fact that there were too many collaborators amongst their ranks. Nothing would convert them into supporters of lustration now.

Within weeks of the May resolution, before the Constitutional Court ruled it unconstitutional, six independent lustration proposals were submitted.¹³ All except for one proposal placed the burden of verification on

the Interior Ministry. Only one proposal insisted on lustration being carried out by institutions independent of the executive, in effect requiring the executive to surrender its monopoly on access to information.¹⁴ Politicians who were determined to hold executive power wanted to restrict the usage of files to themselves. For this reason they resisted granting lustration power to an independent organization. The dissolution of the Sejm in 1993 prevented these lustration proposals from being developed into legislation. The new elections brought to power a coalition of post-Communist parties: the Polish Peasants' Party (Polskie Stronnictwo Ludowe, PSL) and the Democratic Left Alliance (Sojusz Lewicy Demokratycznej, SLD).

Poland's Communist Party reinvented itself as Social Democracy of Poland (Socjaldemokracja Rzeczypospolitej, SdPR) (Grzymała-Busse, 2002). What helped them win the 1993 elections, however, was an electoral reform favouring large and medium-sized parties at the expense of the extremely fragmented ex-dissident right.¹⁵ Few of the ex-dissident right's lustration sponsors secured parliamentary seats and the lustration proposals were not resubmitted. The first lustration bill was not submitted until February 1997, just before the next elections, expected to be won by Solidarity Electoral Action (Akcja Wyborcza Solidarność, AWS), a coalition of former dissident and rightist parties.

After the elections, in June 1998, a harsher version of the bill was passed, requiring approximately 20,000 people running for public office to fill out a declaration in which they would admit or deny having collaborated with the secret police. If a candidate admitted collaboration, he or she would not be banned from office, but the declaration would be published so that voters or the appropriate nominating agency could withdraw their support for the candidate if they believed his or her past presented an impediment to holding the office in question. Statements denying collaboration were transferred to a state prosecutor, who would use the archives of the former secret police to assess the accuracy of the declaration. If the prosecutor found evidence that the declaration was inaccurate, the politician would be accused of a "lustration lie" and tried before the Lustration Court. Depending on the outcome of the trial, the politician could be banned from running for public office for 10 years.

The next amendment was attempted in 2001, following elections that brought the post-Communist coalition back into power. The proposal, submitted by President Aleksander Kwaśniewski, called for "limiting the range of lustrable offences and restricting the powers of the lustration agency". After procedural difficulties involving both legislative chambers and the Constitutional Court, the lustration law finally passed in September 2002.¹⁶ It was again amended in 2006, after the elections brought

to power a staunch anti-Communist party, Law and Justice (Prawo i Sprawiedliwość, PiS), and its coalition partner, the League of Polish Families (Liga Polskich Rodzin, LPR). This time the law was extended to cover managerial positions in ministerial departments, the regional administration, foreign service employees and peripheral governmental agencies.

A process that developed parallel to lustration was dealing with the archives of the former secret political police. The first motion to open the archive to the public was put forward by President Aleksander Kwaśniewski in 1997 (*Dziennik Ustaw Rzeczypospolitej Polskiej*, 1998). He proposed the establishment of a Citizens' Archive – an institution for collecting, organizing and distributing copies of the *ancien régime's* documentation. However, in contrast to the famous Stasi Archives in Germany, the archive would merely preserve the secret files. Victims would not be able to conduct further enquiries or to initiate investigations against those who had spied on them. Furthermore, the President would nominate one-third of the archive's authorities.

The Institute of National Remembrance (Instytut Pamięci Narodowej, IPN), which was created by a statute in 1998 and began operations in 2000, had far greater competences. Its main task was collecting and organizing files that had been created by the secret political police and enabling researchers, prosecutors and victims to read files that the secret police had created on them. But the IPN, in addition to taking care of the files, also conducted research and assumed the role of an investigative body (Prezes Rady Ministrów 1998, Article 23). The proposal lifted statutes of limitation on "Communist crimes" committed between 1944 and 1990. The new limitation period established for those crimes would start running in 1990 and last for 20 years (Prezes Rady Ministrów 1998, Article 4). Victims could supply further information to the archives and could also initiate additional investigations. The names of perpetrators would be made available for them. The choice of authorities leading the institute would be entirely controlled by the legislature. The President had no nomination authority.

The IPN has its central headquarters in Warsaw and regional offices in capitals of 17 regions. The Institute has digitized many of its documents, providing easier access to the files than the Citizens' Archive would have. Candidates for public office are prevented from accessing the archives to find out what information has been stored in their files. Every person applying to see his/her files is required to declare whether he/she has worked as an informer for the secret political police or whether he/she considers himself/herself a victim of secret police infiltration. Only people who are victims and whose files have been located by the IPN are allowed to access their files. People whose files have not been found,

or who have files testifying to their collaboration with the secret police, receive letters informing them that “according to materials currently in possession of the IPN [they] are not a victim of Communist persecution”. Between 7 February 2001 and 31 January 2004, the IPN responded to 6,290 applications for reviewing files. Of these applications, 2,978 were submitted by victims whose files were in IPN’s possession, 3,408 applications were from individuals for whom no files were found, and 480 were from people who had files that indicated they had been informers (interviews: PN1, 2004).

One of the most striking aspects of Poland’s lustration history is how significantly it was delayed. One former Polish samizdat publisher, asked to assess the size of the secret informer network in Poland, exclaimed: “The opposition in Poland was so numerous that it must have had more secret police agents in its ranks than there were oppositionists in the remaining countries of the Communist bloc all taken together!” (interviews: PA3, 2004). One would think that, given such widespread and acknowledged infiltration of the opposition, Polish lawmakers would have been eager to pass transitional justice legislation, especially lustration laws.

In order to understand the delay, it is helpful to consult the CBOS survey data quoted at the beginning of this chapter in some more detail. In Figure 14.4, I look solely at members of the opposition who were considered as candidates for participating in the roundtable talks. I present their levels of trust, mistrust and name recognition as a function of their position on “dealing with former Communist Party officials”, measured with the Party Policy in Modern Democracies (PPMD) expert survey carried out by Ken Benoit and Michael Laver (Benoit and Laver, 2007). The PPMD survey asked experts about politicians’ preferences in terms of ways of dealing with the nomenklatura. Policy preferences were measured on a 20-point thermometer scale, with 1 representing “Former Communist Party officials should have the same rights and opportunities as other citizens to participate in public life” and 20 representing “Former Communist Party officials should be kept out of public life as far as possible”. A party’s position was measured as the average score over all experts. The only problem with this otherwise valid measure of attitudes to lustration is that it was carried out in 2002. Hence I had to rely on anticipated party memberships. The data show a clear relationship between popularity and attitude to lustration. With the exception of one outlier (Ryszard Bugaj), members of the opposition who were more easily recognized by respondents were also more opposed to lustration than those who were harder to recognize.

Lustration has distributive political effects (Nalepa, 2010). Lustration affects parties unequally, because infiltration by secret police collaborators

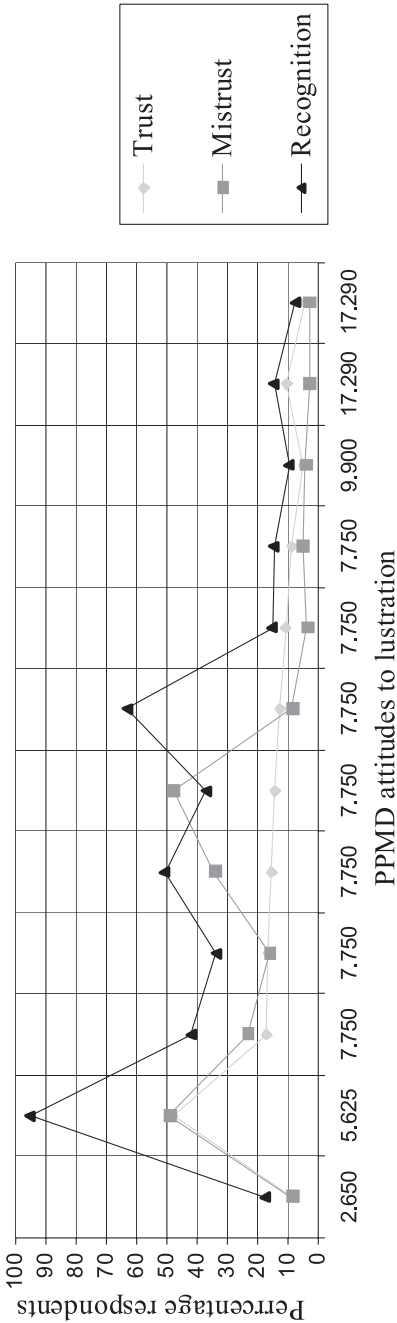


Figure 14.4 Trust, mistrust and name recognition, by attitudes to lustration.

across political parties is unequal. Heavily infiltrated parties suffer losses, whereas mildly infiltrated parties gain from lustration. The public visibility of Wałęsa, Geremek or Michnik came at a price. Members of the opposition who worked in more open dissident groups gained greater public visibility but also exposed themselves to more infiltration by secret police collaborators. For them, lustration was associated with risks. On the other hand, members of the opposition who operated underground were harder to track down and their organizations were more difficult to infiltrate with agents. However, in the transition aftermath they were not as popular as Wałęsa, Geremek or Michnik, although they stood to gain more from a lustration policy.

Whereas the lack of lustration in the early 1990s in Poland can be associated with the popularity of elites who were anxious about the effects of lustration (perhaps because they were concerned that their parties might have more collaborators in their ranks than the public was willing to accept), the late 1990s saw a rise to power of political elites who had much to gain from transitional justice. They knew they had not been infiltrated by the secret police and, as a result, had fewer collaborators. In 2005, the Polish parliamentary and presidential elections were won by the PiS party, led by the twins Lech and Jarosław Kaczyński. Even though PiS did not win an absolute majority, it emerged as sufficiently strong to lead a cabinet coalition. Lech Kaczyński served as President; his brother, Jarosław, became Prime Minister. PiS made its name by promising to end the vestiges of Communist rule in Poland once and for all. It would purge former police collaborators from public office, deprive former Communist military and police forces of their excessive pensions and benefits, and hold Stalinist prosecutors and judges responsible for judicial murder. Eventually, it would make public all of the documentation collected by the dreaded secret political police. In March 2007, a lustration law was passed requiring each of approximately 700,000 persons – including journalists and academics in private institutions – to declare whether he or she had collaborated with the Communist secret political police. When the Constitutional Court struck down key provisions of the law, PiS started organizing a coalition to amend the Constitution to allow the extensive lustration law to be implemented.

What is most striking about this wave of reckoning with the past is that it happened more than 17 years after the transition to democracy, a transition that occurred through peaceful negotiations between the outgoing Communist government and its former opposition. To casual observers of politics in East Central Europe, PiS's actions seem like overzealous "witch-hunting" (Osiatynski, 2007; *The Economist*, 2007). Although seeking revenge is not a rare motivation for political action (Petersen, 2002), it fails to explain why such retributive activity came so late in the

democratic process. Why did PiS engage in lustration with such determination after so much time had passed?

As I argue elsewhere (Nalepa, 2010), PiS had all the prerequisites of a party that would benefit from lustration. The Kaczyński twins had participated in the pre-transition opposition and were even part of the dissidents' team in the roundtable negotiations. Yet they remained on the fringes of the negotiations (Dubinski et al., 1990; Garlicki, 2003; Glowinski, 2001; Raina, 1997, 1999). They were quick to distance themselves from any dissident tainted with secret service collaboration or even from people who had been involved in "close to the surface" underground organizations.¹⁷ These included the Solidarity trade union hero, Lech Wałęsa. After Wałęsa was elected President in the first democratic elections for the highest executive office, the Kaczyński brothers acted as heads of his chancellery. When rumours emerged in the early 1990s that Lech Wałęsa had been recruited as an agent of the secret political police during the Gdańsk strike activities in the 1970s (before Solidarity was established), the Kaczyński twins quickly dissociated themselves from Wałęsa's circle (Cenckiewicz and Gontarczyk, 2008). The first political party they established – the Centre Agreement (*Porozumienie Centrum*, PC) – was the only parliamentary group free of collaborators on the Macierewicz list.¹⁸ This suggests that, very early in their political career, the Kaczyński twins knew that their party was free of secret police collaborators – at least in its top echelons. During the period when the post-Communist coalition of SLD and PSL was in power, Lech Kaczyński maintained a position as head of the Supreme Audit Office. Kaczyński was awarded the post of Minister of Justice for his contributions to AWS, the coalition that united all former right-wing dissidents under the aegis of Solidarity. According to political commentators, while holding those two positions, Lech Kaczyński was able to survey the files of fellow party members and locate hidden skeletons (Nalepa, 2010).

Today, PiS is composed of very young MPs who are extremely unlikely to include former agents of the Communist secret police. This is either because of the MP's age or because of his or her background in student unions and underground groups that maintained a very low profile before the transition. PiS's composition and political position help explain why the party is not afraid that lustration will uncover skeletons in its own closet: it hardly has any. On the other hand, it probably knows exactly who would be affected by lustration.

As further insurance against potential "weak links" in the ranks of their party, Lech and Jarosław Kaczyński changed their party organization four times. First, they joined Wałęsa's Non-Party Bloc for Supporting Reforms (*Bezpartyjny Blok Wspierania Reform*, BBWR), which won parliamentary elections and helped Wałęsa broaden the powers of

the Presidency. But, after Wałęsa was rumoured to be a secret police informer himself, the Kaczyński brothers abandoned BBWR and joined Centre Alliance, a party led by Jan Olszewski. Olszewski was a lawyer with a long history of defending dissidents prosecuted under Communist rule. After his government was ousted from power in 1992, and all parties descending from dissident groups – with the exception of the left-leaning UD and UP – lost in the subsequent parliamentary elections (in 1993), the Kaczyński twins joined the AWS, which won the 1997 elections. In 2001, as crises plagued AWS and support levels of cabinet ministers were plummeting, Lech Kaczyński maintained a very high level of popularity as Justice Minister. At that time, Lech and Jarosław Kaczyński abandoned AWS to create PiS. Of former dissidents, the Kaczyński brothers were probably among those who most frequently terminated one party and created another. Although it is likely that these party transformations were induced by changes in the electoral laws (Kaminski, 1999; Kaminski et al., 1998; Kaminski and Nalepa, 2004), each new party organization presented an opportunity to purge party ranks of known collaborators. The Kaczyński twins took liberal advantage of these opportunities.

To summarize, by belonging to low-profile underground groups prior to the transition, by enjoying access to secret information about which parties were infiltrated with former secret police agents and by purging known collaborators from party ranks when reinventing party labels, the Kaczyński brothers reached a point where they were certain that they would benefit from lustration. The advancement of parties like PiS in other countries of East Central Europe in the late 1990s explains the adoption of lustration laws much better than attributing those laws to the fact that these countries' electorates suddenly developed a preference for dealing with their past, making lustration a central voting issue. In a nutshell, eventually non-collaborating parties came to power.

In this section, I have demonstrated why elites sponsoring lustration laws, despite claims to the contrary, were not guided by the normative virtues of lustration but, instead, used this policy as a tool of political manipulation.

Alternatives to lustration

In this section I briefly discuss three other transitional justice mechanisms that were implemented at various stages of the transition process in Poland (trials and prosecutions, reparation and compensation, and property restitution). None of them can be compared to lustration in its scope, efficacy or time devoted to public debates.

Trials and prosecutions

In contrast to the German Democratic Republic, Czechoslovakia and Hungary, Poland did not share a border with Western Europe. Thus, there were no trials of border guards charged with shooting escapees. Indeed, trials of former Communist perpetrators have been few and far between. Normally, these trials fall into one of two categories: trials of order givers and trials of order followers. However, one of the cases, which lasted for over 10 years because of its spectacular complexity, can serve as an example of prosecuting both foot soldiers (or those following orders) and those issuing orders. This is the story of bringing to justice those responsible for opening fire on striking miners at the Wujek coal mine during martial law. The history of the human rights tragedy and the unsuccessful attempts to prosecute its perpetrators unfolds as follows.

On the night of 12 December 1981, on the eve of the implementation of martial law (which banned strike activity), the secret police arrested the leader of the Solidarity chapter at the Wujek coal mine, Jan Ludwiczak. Upon learning about this, Wujek's miners ignored the ban on strike activity and began protesting against the dismissal of their leader, demanding an end to the martial law regime and that previously negotiated concessions be respected. The following day, riot police entered another coal mine in the region (Manifest Lipcowy) and shot four protesting workers. On 16 December, riot police tanks stormed the Wujek coal mine and a division of the riot police militia (ZOMO) entered the facility. The militiamen opened fire, shooting dead 9 miners and injuring another 21.

Between 19 and 22 December, the secret police arrested seven miners, accusing them of instigating and leading the Wujek strike. On 20 January 1982, a Military Court acquitted the riot policemen responsible for the death of the miners on the grounds that they were acting in self-defence and had used weapons pursuant to regulations; 19 days later, a Military Court sentenced four of the strike leaders to prison sentences of between 3.5 and 4 years.

After the transition, in October 1991, the district attorney's office in Katowice reopened the Wujek case as one of the first cases of Communist crimes. In December, it indicted 24 people, including General Czesław Kiszczak, Minister of Internal Affairs in 1981, and accused them of authorizing the use of firearms against protesting workers. On the first day the court was in session, in March 1993, Czesław Kiszczak submitted a note from his doctor stating he was too ill to stand trial that day. In April 1993, owing to Kiszczak's illness, the court separated his case from the other defendants so that their trial could proceed in a timely manner. In December, it did the same with the case of the riot police commander from Katowice. Kiszczak's case was eventually sent to trial in Warsaw, so

that the ill Kiszczak could attend court. At that point, only the order followers remained to stand trial in Katowice. A month after the prosecutor gave his final speech, Kiszczak's legal counsel petitioned to have the panel of judges replaced. The petition was rejected.

In October 1997, one of the justices on the panel resigned. The prosecution was asked to repeat its final accusatory speech to the new bench, and in November 1997 the verdict was passed – 11 members of the riot police unit were acquitted; the cases of the remaining 11 were dismissed for lack of evidence. Specifically, the judges claimed that it was impossible to determine who exactly had fired the fatal shots and who had just been firing shots into the air to keep the protesting miners at bay. The case was appealed and, a year later, the Appellate Court in Katowice overruled the decision of the lower-level court on procedural grounds and sent the case back for reconsideration. However, the original panel of judges recused itself from deciding the case. Five months later, in July 1999, the public defenders of the riot police soldiers resigned from the case, citing their anti-Communist dissident past as an excuse.

October 1999 marked the initiation of the second Wujek trial, which lasted through 2001. The court heard close to 300 witnesses. A turning point of the trial was the surfacing of the legendary "Tatra Mountaineers' report". To explain the importance of this piece of evidence, one has to go back in time to the events directly following the Wujek tragedy.

In the aftermath of the shooting, and for the physical protection of the anti-riot policemen, the martial law authorities felt compelled to "hide" the riot police unit from the public eye. They sent the riot police to a boot camp in the Tatra mountains for "anti-terrorist training". However, among the four instructors appointed to "train" them were three Solidarity agents. The agents spent night after night discussing with the exhausted riot police the events that had taken place in the coal mine. Aided by vodka and the thin mountain air, they discovered that the order "shoot to kill" had been issued by the riot police's chief commander, Romuald Cieslik, who also fired the first shot. The three agents wrote up what they heard in a report, made copies of it and sent it to key members of the Solidarity underground. For years, all copies were thought to be lost, until in 2002 one of them surfaced.

On 31 October 2002, after 82 sessions, the court announced a verdict of not guilty for all defendants in the Katowice trial. The verdict was a direct result of the presiding judge's refusal to admit the mountaineers' report as evidence. Moreover, the panel of judges argued that, because it was impossible to attribute individual responsibility for the miners' deaths to specific members of the riot police unit (all of them fired live ammunition, but it was not clear whose bullets were fatal), the court was forced to acquit all defendants.

Another example of how hard it is to bring to justice the most serious human rights violators – because they are too sick and old to stand trial – is the case against the masterminds of martial law in Poland. In the most recent (2008) case brought against nine members of the Military Council of National Salvation by the Institute of National Remembrance, the three main defendants – Wojciech Jaruzelski, Czesław Kiszczak and Stanisław Kania – were accused of “participating in a criminal military organization, appointed with the aim of committing crimes”. Jaruzelski is facing additional charges of pressuring the Sejm to retroactively approve martial law decrees (after he had used them to arrest thousands of Solidarity leaders). Kania and Kiszczak were additionally facing accusations of conspiring to implement martial law as early as March 1989. The average age of the three main defendants was 82. Kiszczak immediately submitted a note from his cardiologist testifying to his poor health. The trials of Kania and Kiszczak had to be coordinated with other cases against them. Kiszczak, even after being acquitted of issuing the order legitimizing the use of firearms, is still facing trial for persecuting policemen under his command for participation in religious activities. According to his doctor’s note he cannot sit in court for more than two hours a day. Jaruzelski’s physician bars him from sitting for longer than three to four hours a day.

The paradoxical outcome of these trials is that the order givers, to whom it was possible to attribute individual responsibility, were too old and sick to stand trial. At the same time, as illustrated in the Wujek case, it was frequently impossible to attribute individual responsibility to those who had been on the order-receiving side of the crime. Polish courts applied strict rule of law standards, particularly in regard to evidence quality. In the Wujek case, the court decided to reject the mountaineers’ report from admissible evidence. In the martial law case, the court initially sent the case back to the prosecution, requiring it to take depositions from Mikhail Gorbachev and Margaret Thatcher!

Reparations and compensation

In post-Communist Europe, an important addition to the generic mechanisms of reparation and compensation is rehabilitation. Rehabilitation refers to reversing verdicts passed by the Communist authorities and compensating the surviving victims and their families. A statute compensating for and invalidating verdicts passed on people repressed for their activism in restoring Poland’s democracy and independence was passed by the Sejm as early as 1991. It was amended a number of times and even sent to the Constitutional Tribunal. The dispute centred on the interpretation of “Polish territories”. Eventually, in 1998, the lower house passed

a bill explicitly interpreting the territories of Poland as specified in the 1921 Treaty of Riga. This meant that the Polish authorities claimed responsibility for people sentenced by the Soviet NKWD (People's Commissariat for Internal Affairs) if, after serving their sentence, they became Polish citizens. Between May 1991 and 1996 a total of 50,000 claims were filed for compensation for unfair sentences by courts of the Stalinist era. About 50 million zloty were paid in reparations to former political prisoners and their heirs.

Property restitution

As in the case of rehabilitation, a major challenge to property restitution was whether to extend Poland's responsibility for expropriations that took place outside its post-Second World War borders. The very first restitution law was proposed in 1991 by Janusz Lewandowski, the head of the Ministry of Ownership Transformation (that is, privatization). Lewandowski outlined a plan for limited re-privatization, which would substitute restitution in kind with a form of partial monetary compensation. This, he believed, would be least likely to conflict with an ambitious privatization programme. For Lewandowski and his Gdańsk-based party of neo-liberals, privatization rather than re-privatization was the main tool for reversing the effects of more than 40 years of Communist nationalization. Unfortunately, his proposal came on the heels of one of the first splits within Solidarity (the splits were known as the "war at the top between President Lech Wałęsa and the cabinet of Mazowiecki – and subsequently Bielecki). The day after Lewandowski's proposal, President Lech Wałęsa proposed a draft law pushing for in-kind restitution. The President's plan included a populist provision reserving 20 per cent of the shares of privatized companies for their employees.

This sparked a campaign among former Warsaw property owners, who began to demand the restitution of 4,500 buildings nationalized in 1945 via a special decree concerning land in Warsaw. Whereas, in 1990, claims for the restitution of property across Poland totalled 70,000, by 1991 that number had doubled. The Ministry of Ownership Transformation estimated the value of property under dispute at 12.5–15.0 billion zlotys.

Meanwhile, work on a privatization bill in the Sejm came to a halt with the premature termination of the legislative term (the termination was due to the lustration measure described above). Following the elections, the Sejm was dominated by post-Communist parties. A new proposal offered bonds to some 80,000 former owners for purchasing shares in privatized companies instead of the original property they had lost. This was criticized by former owners, who now organized in the Polish Union of Property Owners and demonstrated in Warsaw, demanding immediate

restitution of property in kind. The government's response was that restitution at a level demanded by the former owners would bankrupt the state. Instead, it proposed to set aside 5 per cent of the profits from selling stocks of privatized companies in order to compensate former owners for the loss of their property directly. Unconvinced, the ex-owners continued to demand restitution in kind and threatened to take their grievances abroad. They were joined over the course of the following year by international Jewish organizations and lobby groups.

In April 1995, eight influential US Congressmen wrote to US Secretary of State Warren Christopher accusing 13 East European countries of deliberately obstructing the process of property restitution and making it difficult for Jews to recover properties they lost during the Second World War. The signatories included both Republicans and Democrats. They threatened these East European countries that relations with the United States would be severed unless they passed laws guaranteeing restitution and compensation for real estate seized by the Nazis and nationalized by the Communists. The Polish government's swift response was that the terms of awarding compensation to former Jewish owners would be no more favourable than those used with regard to other nationalities (*Gazeta Wyborcza*, 15–17 April 1995). Under pressure from international and domestic organizations, the government withdrew its proposal from consideration by the Sejm and continued to fine-tune its details to ensure passage.

When eventually, in June 1995, the Sejm approved a scheme to use re-privatization bonds to compensate former owners of properties illegally seized by the Communists, the leader of the Polish Union of Property Owners – Janusz Szczypkowski – lodged a protest with the European Council over delays in compensating the ex-owners and threatened to ask the Brussels-based International Union of Property Owners to file another protest with the United Nations, because a “a basic human right of property ownership is violated in Poland” (United Press International, 3 April 1996).¹⁹ The bill did allow for returning property to nine Jewish communities, albeit in a very restricted form. In June 1997, the World Jewish Restitution Organization threatened to contest the admission of Poland, Romania and the Czech Republic to NATO. The proposal passed in the Sejm required a statute specifying the categories of restitution, in terms of both citizens and property to be returned. These specifics were not settled until September 1999, when the cabinet, led by the Solidarity coalition, as well as two post-Communist parliamentary parties submitted their proposals.

The cabinet bill included Poles who lost property in what was Polish territory that was taken over by the Soviet Union after the war (about

90,000 claims). Those seeking compensation for property lost between 1944 and 1962 could get 50 per cent of the value of their claim, either the property itself or in re-privatization bonds. The bill stipulated that Poland could face up to 170,000 claims from 2.5 million people, totalling US\$27–32 billion (110–130 billion zlotys), about the same amount as Poland's annual government budget. The State Treasury committed to earmark 15 per cent of revenues from privatization to satisfy restitution claims. The draft was rejected by the Polish Union of Property Owners, which demanded that it also include confiscations carried out in the years 1939–1962. Yet, compared with the proposals from the post-Communist parties, the cabinet's proposal was quite generous to former owners.

A special parliamentary committee was appointed to resolve differences between the three proposals. The committee passed a special amendment restricting the cabinet proposal by excluding anyone who was not currently both a Polish citizen and a resident of the country from receiving compensation for property seized by the Communist authorities after the Second World War. Predictably, this further cut relations with the World Jewish Restitution Organization. Most notably, Elan Steinberg, director of the World Jewish Congress, pointed out that “any restitution bill that fails to extend back to 1939 rewards property to someone who was given Jewish property by the Nazis and subsequently lost it to the Communists, giving this person a stronger legal claim than the prewar owner” (Finn's News Agency, 8 January 2000).

The committee then passed another amendment to the cabinet bill committing the descendants of former property owners in Poland to paying an inheritance tax upon being compensated for land and buildings confiscated under the Communist regime. Descendants of former property owners were believed to make up about 80 per cent of all property restitution claimants in Poland (PAP News Agency, 29 February 2000). Although, by June 2000, the initial expectation of 170,000 restitution claims was downgraded to 110,000 (about 34 per cent of those who lost their property under the Communist regime were not able to document it), in March 2001 President Aleksander Kwaśniewski decided to veto the bill. Kwaśniewski justified his decision by pointing out that, according to the associations of former owners, the number of applications might reach 250,000 and the total cost of the dues almost 69 billion zlotys, but it is highly likely that he did not want to further antagonize the international community by openly excluding Jewish organizations from the re-privatization scheme. The principle of compensating everyone whose property was expropriated or no one was easier to defend than arbitrarily restricting compensation to Polish citizens living within Poland's borders at the time.

Thus, no restitution law was implemented in Poland. A law that would placate the demands of international organizations would bankrupt the state. At the same time, a law that Poland could afford was too exclusionary of influential international groups.

Conclusion

Lustration, even though normatively desirable as a mechanism of transitional justice, was not adopted or used because of its virtues of restoring trust. On the contrary, it has been a fixture on the political agenda of transitional policies because of its distributive effects. Because politicians use and abuse lustration policies to their own advantage it has not led to reconciliation or coming to terms with the past.

Sadly, the fact that an institution serves a desirable purpose cannot explain its adoption and implementation. Any institution, lustration included, is established by political actors who pursue their own interests and face a multitude of incentives and constraints. The normatively desirable functions of transitional justice, such as promoting democratic consolidation, are not sufficient to explain institutional choice. Lustration, in particular, stands out as resulting from strategic interaction among political elites in a new democracy.

Notes

1. The roundtable negotiations took place between February and April 1989 and concluded in an agreement to hold the first election in which non-Communist candidates could run for 35 per cent of seats in the lower house and all seats in the Senate. This gave Solidarity a theoretical chance to win enough seats to form a blocking coalition that would prevent the formation of another PZPR-led cabinet. Solidarity seized this opportunity and won the blocking number of seats. Eventually, this allowed it to form the first non-Communist cabinet behind the Iron Curtain.
2. The Catholic Church, although legal, was not allowed to engage politically. However, Catholic leaders, by virtue of performing religious functions (which they were allowed to do fairly openly; Dudek and Gryz, 2003), had considerable public visibility.
3. The martial law enacted by General Wojciech Jaruzelski, the Communist leader, dramatically ended the expansion of civil society associated with the emergence of Solidarity. On 13 December 1981, Jaruzelski appointed the interim executive Military Council of National Salvation (Wojskowa Rada Ocalenia Narodowego, WRON), which carried out the military crackdown on Solidarity as a fully internally administered operation without any aid from the Warsaw Pact or Soviet armies. The government had arrested a total of 4,790 by the time it was forced to announce an amnesty in order to free up prison space in July 1983.

4. For research on the reliability of surveys conducted in social environments where respondents have biased perceptions of surveyors, see Anderson et al. (1994), Anderson (1987) and Silver et al. (1986).
5. "Nomenklatura" is a term used throughout post-Communist Europe to signify either (1) a set of positions filled by appointments made by officials of the Communist Party, or (2) the activity of filling state positions through decisions made by Communist Party officials (Karpinski, 1988).
6. CBOS publications are available at <http://www.cbos.pl/EN/publications/publications.php> (accessed 5 April 2012). In this chapter, I used "Komunikaty: Aktualne Problemy i Wydarzenia, Wokół Okrągłego Stołu, oraz Oceny Procesu Lustracyjnego" [Current Problems and Events, Surrounding the Roundtable Negotiations, and Evaluations of the Lustration Process] Surveys 1988/T186, 1994/23, 1995/07, 1995/34, 1996/05, 1996/58, 1997/47, 1997/15, 1997/52, 1999/25, 2000/25, 2001/20, 2002/20.
7. In the aftermath of the martial law, the Communist authorities allowed small private enterprises to function.
8. Note that the 1989 elections, which were the first in which non-Communist candidates were permitted to run, allowed only 35 per cent of seats in the lower house to be open for contestation by non-Communist candidates. Given the secret police's omnipresence, Solidarity's crushing defeat of the Communists at the polls appears even more remarkable.
9. In the aftermath of transition to democracy, former dissident groups struggle to establish themselves as political parties. Lustration, by revealing which of those groups harboured secret police collaborators under the Communist regime, offers legitimacy to those dissident groups that had escaped infiltration by agents of the secret police (Nalepa, 2009, 2010).
10. Answers of the form "don't know" are also included in calculating the percentages of the reported results.
11. In Polish, the term describing the chief executive of one of the 49 administrative units is *Wojewoda*.
12. All interviews were conducted by me in 2004 and are coded according to the following rules: the first letter of the code represents the country of the interviewed politician (P = Poland, C = Czech Republic, H = Hungary); the second letter represents their affiliation (N = neutral, L = liberal, A = anti-Communist, C = post-Communist).
13. The proposals came from the Liberal Democratic Congress (Kongres Liberalno-Demokratyczny, KLD), the Confederation for an Independent Poland (Konfederacja Polski Niepodległej, KPN), the Christian National Union (Zjednoczenie Chrześcijańsko-Narodowe, ZChN), the Independent Self-Governing Trade Union Solidarity (NSZZ), the Polish Peasants' Party (PSL), and the Senate Committee for Human Rights. The KLD proposal called for covering the smallest number of past and present positions; the ZChN the largest, requiring even people who were applying for a licence to start a private business to undergo lustration. The KPN and KLD proposals did not ban proven collaborators from holding the position in question, and required only that the information be made public.
14. This was a proposal from Solidarity. Solidarity's proposal was also exceptional in the sense that it included a sunset provision of eight years and postulated opening a public archive to house the files of the secret police apparatus.
15. Even though the algorithm for allocating votes to seats was proportional (Sainte Laguë), the newly implemented thresholds prevented the fragmented post-Solidarity parties from winning seats (Kaminski et al., 1998; Kaminski and Nalepa, 2004).
16. According to the proposal, those who worked for military intelligence and counter-intelligence as well as for the secret service protecting Polish borders would be exempt

from lustration. Only conscious collaboration with the aim of providing information damaging to the underground opposition would count. Finally, the screening agency had to inform the target of lustration about any doubts its members had about the target's declaration. When the proposal reached the Sejm, amendments were passed to preserve the original definition of collaboration. However, in the Senate (controlled by post-Communists), the bill was reverted to the original presidential version with the restricted definition of collaboration. This "amended version" of the lustration law was then sent back to the Sejm, where the opponents of the presidential proposal could not muster a two-thirds supermajority to overturn the Senate's decision. The presidential proposal was thus accepted. Upon the petition of a group of MPs, the Constitutional Court stepped in and declared that the Senate had unlawfully extended its jurisdiction. This decision was the fourth the Constitutional Court had made about lustration laws in Poland. However, it was the first time that the substance of lustration was not addressed directly. Instead, a procedural flaw in the legislative process was found. Shortly afterwards, a group of moderates (Civic Platform) and anti-Communist MPs from Law and Justice and the League of Polish Families tried to extend the scope of lustration targets to local legislatures and governments. Their proposal failed. Also following the Court's decision a group of post-Communist senators put forward a new proposal, identical to the presidential one. This time it passed.

17. In Chapter 5 of Nalepa (2010), I analyse in detail the relationship between the structure of the underground movement and the likelihood of infiltration. Briefly, it is related to how the group valued expansion and getting the work done relative to certainty that there were no collaborators in its ranks. The trade-off would be that the group would be deep underground and would need to keep a very low profile.
18. This could be related to the fact that the cabinet in which Macierewicz was Interior Minister was led by the PC leader, Jan Olszewski, and that the PC had 20 per cent of the portfolios in that cabinet. However, a list created prior to the 1992 lustration resolution but not circulated until later – the so-called "Milczanowski list" – did not have the names of PC members on it either.
19. For brief accounts of restitution drafts prior to 1997, see Poganyi (1997).

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15

Neither forgiving nor punishing? Evaluating transitional justice in Romania

Lavinia Stan

Romanian transitional justice – encompassing a handful of trials against Communist leaders, the opening of the secret archives, reforms of the security sector, a Truth Commission, mild lustration, two official apologies, financial compensation, and the restitution of confiscated property in kind – has been reluctantly moved forward by initiatives from anti-Communist social segments and systematically blocked by the political elite. The advocates of a radical break with the Communist regime have been drawn primarily from among the victims and their surviving relatives. Among them were members of pre-Communist political parties, collaborators of the royal family, individuals involved in anti-Communist resistance during the 1940s and the 1950s, Orthodox, Greek and Roman Catholic and Protestant faithful persecuted for their religious beliefs, intellectuals who spoke out against the Communist regime, people who unsuccessfully tried to cross the border illegally in order to escape to Western Europe, and workers and miners who revolted in Valea Jiului in 1977 and Braşov in 1987. Some of them were imprisoned and tortured, others lost their jobs, were relocated to different regions of the country or forced to emigrate, still others were spied upon and placed under constant surveillance, and another group lost their property to Communist authorities (Oprea, 2002, 2005 and 2007; Oprea and Olaru, 2003).

The repeated calls for truth, justice and reparations have been blocked by political elites drawn primarily from among the Romanian Communist Party. Until now, the centre-left has remained strong and united around the Social Democratic Party (Partidul Social Democrat, PSD) –

the conservative faction of the National Salvation Front (Frontul Salvării Naționale, FSN) – whereas the centre-right was weak and divided among a multitude of political formations. The PSD inherited the organizational skills, the financial resources and, most importantly, the territorial organization of the Communist Party, which penetrated every town, every workplace and every apartment block. Together, these advantages have turned the PSD into a formidable political actor, allowing it to win the largest number of parliamentary seats in every post-Communist election organized to date (1990, 1992, 1996, 2000, 2004 and 2008). Consequently the PSD remained an important voice even when unable to form the government (in 1996–2000 or 2004–2008). Providing a safe haven for former Communist officials and full-time agents and part-time spies of the secret political police, the PSD has constantly opposed each and every transitional justice attempt. Lacking leadership, financial resources, a clear vision for the future and managerial experience to lead the country, the centre-right failed to deliver accountable and transparent governments in 1996–2000 and 2004–2011. Despite electoral promises to come to terms with the recent past, under their rule transitional justice was the result of the personal initiative of individual politicians (such as senator Constantin Ticu Dumitrescu, President Traian Băsescu or Prime Minister Călin Popescu-Tăriceanu) more than the expression of a coherent governmental strategy.

In a country where Communist Party membership extended to one-third of the adult population, 50 per cent of citizens depended on the party-state for their livelihood (Lovenduski and Woodall, 1987) and hundreds of thousands of individuals (including children) spied on their relatives, neighbours and friends for the benefit of the feared Communist political police, the Securitate (Stan, 2002a, 2005), the PSD's position has not significantly departed from the wishes of the majority of the population. But the PSD has not been the most formidable obstacle to Romanian post-Communist transitional justice. The chauvinistic Greater Romania Party (Partidul România Mare, PRM) made it its mission to rehabilitate Communist officials and secret collaborators and to recast the Communist period as the epitome of Romanian civilization, a time when the country gained unprecedented international status, albeit not for its commitment to freedom and democracy but for its apparent independence from Moscow in matters of foreign policy. By blending virulent nationalism and irredentism with a discourse emphasizing Romanian cultural superiority, the PRM and its leader – Ceaușescu's sycophantic court poet Corneliu Vadim Tudor – systematically attacked transitional justice proponents, mocking them, laughing at them, smearing them and, whenever possible, destroying their lives, careers and reputations. In this war of words, bottom-up calls for reckoning with Communist-era human

rights abuses were promptly dismissed as witch-hunting and a desire to take revenge on hard-working individuals who collaborated with an oppressive regime not for personal gain but out of a genuinely altruistic and disinterested impulse of trying to help their country and nation.

Although Romania's record of coming to terms with the Communist past remains mixed, it has had more reasons than other East European countries to pursue resolute transitional justice. First, the Communist regime was not instituted by free and fair elections, but was imposed by Soviet troops on an ethnically diverse and politically fragmented country at the end of the Second World War. Secondly, up to the very last moment the rule of unrepentant dictator Nicolae Ceaușescu remained one of the strictest in the region, permitting neither opposition ("voice") nor emigration ("exit") for individuals discontented with his policies (Moran, 1994). Thirdly, regime change was achieved through the region's only bloody revolution, which resulted in over 1,100 dead and some 3,350 wounded (Siani-Davies, 2006). Lack of a dynamic civil society meant that, in the aftermath of the revolution, political power shifted from Ceaușescu's family and their clients to second-echelon Communist Party officials organized as FSN. Rather disingenuously, the FSN claimed to represent the expression of popular desires to build liberal democracy and a free market economy. Instead of engineering the transformation needed to move away from Communist repression and control, the FSN made every effort to slow down political and economic change and, whenever possible, to turn it to its own advantage (Gallagher, 2005; Roper, 2000; Stan, 1997).

Mechanisms for dealing with the Communist past

In terms of reassessing its recent past, Romania has trailed behind Central Europe, while retaining a small comparative advantage over its Balkan neighbours and all former Soviet republics except for Estonia, Latvia and Lithuania. The population has generally been indifferent to the need to reckon with the past, when not outwardly hostile to uncovering the most gruesome Communist atrocities and, by doing so, further spoiling the country's blemished international image (Stan et al., 2007). Except for a handful of historians and intellectuals, for whom the process was meant primarily to set the historical record straight, civil society and the political elites have tended to politicize the (re)construction of memory. On the one hand, politicians of all ideological persuasions have supported transitional justice when it hurt their political rivals but bitterly opposed it when it damaged the reputation of their political allies. On the other hand, victims and intellectual groups have reignited their anti-

Communist crusade in the wake of every presidential and general election, pointing the finger at PSD and the PRM members as unrepentant Communists who sought to undermine democracy from within, but keeping silent whenever the media unveiled former Securitate agents from their midst or the ranks of their favoured political parties. Such political instrumentalization has de-legitimized transitional justice, making it vulnerable to the whims of intellectual and political elites disconnected from the public and concerned more with their own interests than with those of the country.

As a result, since 1989 the country has lacked a coherent strategy to effect transitional justice, both because de-Communization was seen not as key to democratization but as a factor that could further divide an already polarized society, and because the country's transition has been painful, commanding resources that could have served to advance the process of coming to terms with the past. A lack of political will, political commitment and political capacity has meant that the process has been patchy, uneven, unfocused and reversible. In this sense, Romania followed neither the example of Germany, where Communist crimes were addressed at the onset of transition through a host of different mechanisms and institutions (Bruce, 2009; McAdams, 2001; Sa'addah, 1998; Welsh, 2006), nor that of Poland, where the pro-democracy political elites initially drew a "thick line" between the Communist past and the democratic present to honour the Roundtable Agreements (Stan, 2006a, 2006b; Walicki, 1997), nor that of Hungary, where the public believed that "living well is the best revenge" (Halmai and Scheppele, 1997; Stan, 2007) for the suffering they experienced at the hands of an *ancien régime* with which, in fact, they had collaborated closely. Politicization has meant that transitional justice in Romania proceeded in fits and starts, by omission and commission, advancing when least expected or stagnating when windows of opportunity were opened.

Whereas the international community was instrumental in advancing the process in Africa and Latin America by creating the institutional framework required to revisit the past and/or by financing and staffing truth commissions, its impact on Romania and other East European countries was rather different. There have been repeated calls for these countries to repent for collaboration with the Nazi regime and to admit to involvement in the Holocaust, confiscating Jewish property and persecuting religious and ethnic minorities, but calls to prosecute and punish Communist human rights offenders have been feeble. It was not until 1996 that the Council of Europe formulated its position on post-Communist transitional justice in its well-known Resolution No. 1096 on measures to dismantle the heritage of former Communist totalitarian systems. In a carefully worded statement, the Resolution reminded East Europeans not to "cater to the desire for revenge instead of justice"

(Council of Europe, 1996: para. 4). It stressed that “a democratic state based on the rule of law must, in dismantling the heritage of former communist totalitarian systems, apply the procedural means of such a state. It cannot apply any other means, since it would then be no better than the totalitarian regime which is to be dismantled. A democratic state based on the rule of law has sufficient means at its disposal to ensure that the cause of justice is served and the guilty are punished” (Council of Europe, 1996: para. 4). Its recommendation for de-bureaucratization as a method to “reduce communist totalitarian over-regulation and transfer the power from the bureaucrats back to the people” (Council of Europe, 1996: para. 5(iv)) was frequently cited by Romanian critics of lustration as an anti-lustration gesture accompanied by job losses. Resolution No. 1481 of 2006 “strongly condemned” the “massive violations of human rights” committed by totalitarian Communist regimes (Council of Europe, 2006: para. 2), but at the same time European officials condemned the radical Polish lustration drive for curtailing the political rights of former Communist officials and secret collaborators (although similar purges were conducted in the aftermath of the Second World War against Nazi officials and collaborators, and the vetted Communist officials could exercise all political rights except that of representing the new democracy as public officials).

By mid-2008, Romania had adopted several judicial and non-judicial mechanisms for accountability for Communist crimes, including: (a) public identification of former Securitate agents; (b) court trials against Communist officials and militias; (c) access to secret files for both victims and victimizers; and (d) a presidential Truth Commission. These methods were complemented by changes to names of localities and streets; the creation of museums, exhibitions and commemoration sites; the restitution of property illegally confiscated by the Communist authorities; official apologies delivered by the head of state; the rehabilitation of Communist-era political prisoners; and the rewriting of history books to reflect Communist human rights abuses – methods that were focused less on accountability and more on reparation, reconciliation, memory and truth. The following discussion touches on the reasons for the selection of the four main mechanisms for accountability, the political negotiations that inspired the creation of the mechanisms identified above, the institutions established to enact them, their outcomes and their overall efficacy.

From public identification of Securitate agents to lustration without effects

Although demanded in March 1990 by civil society groups from Timișoara, the city where the December 1989 revolution began, lustration was given the cold shoulder by the then ruling FSN. The Timișoara

Declaration asked for former Communist officials and Securitate agents to be banned from post-Communist politics for a 10-year period, but the FSN rejected the proposal, which would have cut short the political aspirations of many of its members (Stan, 2006c). In view of the 1996 elections, the Romanian Democratic Convention (Convenția Democrată Română), a coalition of coalitions including the centre-right Christian Democratic National Peasants' Party (Partidul Național Țărănesc Creștin Democrat, PNT-CD) and the National Liberal Party (Partidul Național Liberal, PNL), asked its members to sign confidential statements detailing their involvement in the Communist repression organs. The statements were never verified, were kept under lock and key by party leaders, and led to no sanctions for involvement. After bitter negotiations, in 1999 a slim parliamentary majority adopted a modified version of the legislative proposal submitted by PNT-CD senator Dumitrescu, a former political prisoner. The law entrusted the newly created National Council for the Study of Securitate Archives (Consiliul Național Pentru Studiarea Arhivelor Securității, CNSAS) with the task of investigating the ties to the Communist political police of all individuals appointed or nominated to public office, and allowed ordinary citizens, political parties and public and private organizations to call for such investigations. The CNSAS had to establish whether public office holders and electoral candidates had worked as full-time officers or part-time informers for Securitate "as a political police", that is, an organization that infringed fundamental human rights. The names of former Securitate agents were to be published in *Monitorul Oficial* (the Official Gazette) if those individuals did not contest the verdict or if the verdict was upheld by the Romanian courts.

Compared with the Timișoara Declaration, Law No. 187/1999 severely reduced the number of Communist perpetrators whose names were made public from all Communist Party leaders and all Securitate personnel to only those who engaged in "political police" actions leading to political persecution. As in Poland in 1997, ordinary Communist Party members and nomenklatura members with responsibility in the economic or cultural spheres were excluded from verification, together with members of the Securitate support staff (including accountants, cleaning personnel and archivists). Whereas the Declaration called for the former collaborators' marginalization from politics, the law prescribed no loss of job, providing instead for public disclosure of the identity of tainted individuals. Tainted public holders did not have to resign their positions, and tainted electoral candidates could still seek positions in the presidency, the parliament, the government, county and city councils, prefectures, mayor's offices, the judiciary, the diplomatic corps, public institutions and organizations (universities, national television and radio, utilities and state-owned enterprises). In contrast to the 1994 Hungarian lustration law, the

Romanian law provided for no loss of job for politicians who lied about their past. It was up to the public to know about the politicians' human rights record, to evaluate that information critically and to refuse to vote for politicians who had engaged in political police actions.

The law was first applied in the elections of 2000, when the CNSAS failed to unveil the identity of all former spies from among the ranks of the public local administration, the state bureaucracy and the political elite. The PSD pledged to back its members, even if irrefutable evidence exposed them as long-time Securitate agents. The PRM threatened to dissolve territorial organizations that gave the CNSAS the personal information needed to investigate electoral candidates. In 1999, PNT-CD President Emil Constantinescu permitted thousands of files detailing the Communist-era activities of post-Communist politicians to be classified as unavailable to the public and to the CNSAS for reasons touching on "national security". However, the Council's failure was not the result only of factors outside its control. Instead of admitting that it lacked the tools to conduct thorough investigations, the CNSAS declared that it had examined the files of all 300,000 candidates for mayoral and county council positions and found no trace of collaboration. The announcement came as a surprise, because one-fifth of the candidates for the Bucharest mayor's office turned out to be former secret agents, and there were reasons to suspect that the national average was not significantly different (Stan, 2002a). Instead of diversifying its information sources to compensate for limited access to secret archives, the CNSAS based its verdicts exclusively on the secret files, in some cases failing to interview electoral candidates before pronouncing a verdict, as required by law (Andreescu, 2001, 2003; Stan, 2002b; Stănescu, 2007). Instead of maintaining neutrality, CNSAS leaders publicly sided with political parties and carelessly disclosed private information to the media, thus compromising the impartiality of the verdicts and de-legitimizing the Council's public image (Stan, 2004).

Verifications performed for the 2004 elections fared no better, as the CNSAS lacked the institutional capacity to handle the large number of candidacies (over 400,000 at the local level). By then it was clear that the public identification of former political police agents was proceeding at such a slow pace that it was rendered politically insignificant; the public were indifferent to the politicians' human rights record; CNSAS leaders were profoundly divided and unable to agree on the institution's general mission and the way to accomplish it; and the procedure for arriving at verdicts on collaboration was politically driven. In 2002, the CNSAS was deadlocked after its leaders, nominated by the PRM and the PSD, refused to brand Corneliu Vadim Tudor a Securitate collaborator in spite of archival evidence. That year, the CNSAS leadership lacked the

necessary quorum to discuss any cases.¹ More importantly, the drive to publicly expose secret informers first among all possible categories of Communist torturers implicitly suggested that this category was guiltier than the Securitate officers who coerced them into spying or the Communist Party officials who masterminded repression, when in fact the opposite was true. Public scandals in which important pro-lustration intellectuals and politicians were unmasked as former Securitate agents further de-legitimized the identification process when it became clear that the CNSAS had protected these individuals. Because respected intellectuals, church leaders and pro-democracy politicians went to great lengths to hide their past, refused to apologize for it and nonchalantly pointed the finger at their rivals, the difference between them and the tainted PSD or PRM members became a matter of semantics.

In 2006, the parliament extended the CNSAS's mandate for another term and nominated a new 11-member leadership. At the government's request, the parliament accepted amendments to Law No. 187/1999 that granted access to files to former Romanian citizens and citizens of NATO countries. Following the Hungarian precedent, the legislation permitted lustration only of public office holders who had covered up their tainted past. According to Government Emergency Ordinance No. 16/2006, the CNSAS verified the accuracy of personal statements signed by public office holders. Verification was halted if the person gave up the public post within 15 days or if presidential hopefuls withdrew their candidacy within 24 hours after the CNSAS interviewed them. The final verdicts regarding the collaboration of public office holders and electoral candidates – including their real and code names, period of secret collaboration and political police activities – were to be published in *Monitorul Oficial*. If the verdict differed from the personal statement (presumably because the statement denied collaboration whereas *Monitorul Oficial* certified it), the CNSAS notified the Supreme Court of Justice, because “the final verdict of having offered a false declaration leads to loss of public office” (Romanian Government, 2006: Article 8). Involvement in political police activities was established with the help of the secret file or of other written documents if the file was incomplete or had been destroyed or altered (Article 10). Only politicians who held public office when the Ordinance was passed and those who sought future appointments were affected by the Ordinance, not those who had discontinued their political careers by 2006.

Romanian lustration depended on a largely corrupt, politically tainted and inefficient judiciary both to have the Council's collaboration verdicts upheld (in order to have them printed in *Monitorul Oficial*) and to launch criminal investigations against politicians who lied about their past. In fact, those identified as former Securitate agents represented only a small

fraction of all secret agents active in post-Communist politics. As a result of President Constantinescu's decision in 1999, the CNSAS was unable to access the files of the most important post-Communist luminaries who had acted as former spies. Because of political divisions between CNSAS leaders, some former spies were declared innocent. Because of procedural issues, the availability of new evidence or the corruption of judges, many of the Council's guilty verdicts were overturned by the courts. More importantly, in order to lose public office, a politician had to have provided a false statement, but the incentive to lie was often cancelled out by the fact that statements were not made public. Taken together, these factors ensured that lustration affected nobody during 2006–2007. During that period, the CNSAS identified 600 informers and 395 full-time secret officers (Table 15.1), but none of the 2,958 secret agents whose names had been published in *Monitorul Oficial* by late 2009 were removed or barred from public posts.

The transformation of Law 187/1999 into a lustration tool – albeit one closer to the mild Hungarian and Polish lustration than to the radical German or Czech lustration – was denounced by the leftist political parties, which suffered most as a result. In 2007, PSD senator Șerban Nicolae introduced a proposal that robbed the CNSAS of its prerogatives related to the lustration and public identification of former secret agents. Opposition to the CNSAS grew stronger after it announced that 9 of the 19 members of the Supreme Council of Magistrates had worked for the Securitate (Burla, 2007). Legally, the death sentence for lustration was signed by Dan Voiculescu, the wealthy leader of the Conservative Party, which in 2004 renounced the electoral alliance with the PSD that had

Table 15.1 Securitate agents officially unveiled by the CNSAS, 2000–2009

Year	Full-time agents (officers)	Part-time informers (collaborators)
2000	0	17
2001	0	12
2002	0	0
2003	46	0
2004	20	10
2005	47	15
2006	111	270
2007	284	330
2008	149	610
2009	298	739
Total uncovered	955	2,003
Total estimated Securitate personnel	13,275 ^a	486,000–700,000

Source: CNSAS annual reports; data as of 1 January 2010.

^aExcludes agents operating abroad and civilian personnel.

allowed it to enter parliament, helped President Bănescu form a Justice and Truth Alliance cabinet, and joined the opposition in 2006. After the CNSAS found Voiculescu guilty of spying under the code name “Felix”, his lawyers petitioned the Constitutional Court. The Court found both Law 187/1999 and Emergency Ordinance 16/2006 unconstitutional (Constitutional Court, 2008), although the same Court had recognized the constitutionality of Law 187/1999 before on seven different occasions. The decision invalidated all CNSAS verdicts handed down up to that point, blocked lustration and threatened to shut down the Council completely. To avert this possibility, the PNL cabinet of Călin Popescu-Tăriceanu extended the Council’s life by limiting its mandate to granting citizens access to their own files only, and by permitting the courts to decide who was a former Securitate secret agent (Romanian Government, 2008).

In adopting Emergency Ordinance 16/2006, the government justified lustration as being key to democratization, and pledged “to correctly inform the public about the nature of political police activities” and “to introduce the obligation to tell the judiciary when the signed personal statements did not reflect the result of the Council’s verifications into one’s past” (Macovei, 2006). It accomplished both objectives, but without aiding Romanian democracy. Lustration arrived 17 years after the regime change, when most Communist officials had already renounced post-Communist politics, and it was discontinued before forcing anyone out of public office. The 2008 ordinance that extended the Council’s life provided for collaboration verdicts to be based on signed secret notes, which infringed human rights (Popescu and Gârleanu, 2008), although many such notes have been destroyed since 1989 and it was difficult to establish a link between notes and human rights violations.

Of all East European lustration programmes, Romania’s was the least effective in uncovering the truth about Communist repression and in replacing the Communist political elite. Because victims have seen it as a half measure rather than a vindication of their sufferings, they have called for the adoption of radical lustration, that is, the removal of all Communist officials and secret agents from public posts, whether they admit to their past or not.² Although the programme did little to help the country to reckon with its recent past, it did allow the PNL government to distance itself from the PSD and the Democratic Liberal Party (Partidul Democrat-Liberal, PDL), to outbid President Bănescu in the quest to use transitional justice as a tool for political legitimization, and to retain popularity with the anti-Communist electoral segments representing the PNL’s electoral base.

Thus, the public identification of Romania’s tainted public figures has failed to accomplish the main purposes of de-Communization. Because it

was only partially implemented and because it included no sanctions on public figures involved in Communist-era human rights abuses, it brought no justice to former victims. Because identifications were politically driven and the political and intellectual elites embraced the view that “your tainted ones are guiltier than mine”, identification led to no reconciliation between the former torturers and the tortured. Because verdicts were based on fragmentary evidence and were influenced by the politics of the day, identification did not provide a balanced impartial historical record of the Communist dictatorship.

Court trials of Communist officials and secret agents

After 1989, Romanian courts heard more cases than courts in any other country in the region. The number of cases heard by courts in Romania rose to 96 in 1991–1992, and the number of cases under investigation reached 3,500 by mid-2007 (Ursachi, 2007). Post-Communist trials of Communist decision-makers, secret agents and militias can be divided into three categories: (1) trials connected with the 1989 revolution, (2) trials connected with Communist-era human rights abuses, and (3) the “mixed” show trial of Nicolae and Elena Ceaușescu, connected to both the revolution and the Communist regime.

The trials related to the revolution indicted Party officials, Securitate officers and Army officers for quelling the popular revolt in Timișoara, Bucharest and other cities – including General Iulian Vlad (head of the Securitate), former Interior Minister Tudor Postelnicu, Filip Teodorescu (head of the Securitate’s Counter-espionage Directorate), Radu Bălan (Communist Party secretary for Timiș county), Gheorghe Roset (head of the Caransebeș militia), and Generals Victor Atanasie Stănculescu and Mihai Chițac (Supreme Court of Justice, 2004). In 1990, in the so-called “CPEx Trial”, 21 Politburo members were sentenced to jail for endorsing Ceaușescu’s order of 17 December 1989 to shoot to kill into the revolting, but peaceful, masses. That year, Ceaușescu’s closest collaborators (Deputy Premier Ion Dincă, Communist Party Secretary Emil Bobu, former Deputy President Manea Mănescu and Interior Minister Postelnicu) were convicted in the “Trial of the Four”, which, despite expectations, failed to represent the Romanian equivalent of the Nuremberg Trials (Bohlen, 1990). The four stood accused of “genocide”, as the FSN described the 1989 revolution, but they were not convicted of belonging to the inner circle that helped Ceaușescu effectively run the country. Explaining his refusal to bring to trial the top Communist leaders, Petre Roman, post-Communist Romania’s first Prime Minister and the son of high-ranking Communist officials, said that “we cannot judge people for what they were, but only for what they did. [Otherwise] we

can create the risky precedent of allowing each regime to bring its predecessor before the courts, [a move] that would lead to a never ending process detrimental to our democracy” (Roman, 2002: 42). All four accused were released for health reasons after serving less than five years in jail.

Only the trial of the Ceaușescu and the four cases connected to Communist-era crimes (the trial of Gheorghe Ursu’s killers, the “Bus Trial”, and the trials of the torturers of the 1950s Alexandru Drăghici and Gheorghe Crăciun) have transitional justice dimensions, and only they are discussed in detail below. The trials of Drăghici and Crăciun were never concluded because the accused died before the cases were heard.

Like other trials organized in post-Communist countries, the Romanian trials were affected by a host of problems: for some crimes the statute of limitations lapsed before the sentence was handed down, some of the accused were old people in poor health, and others managed to flee the country and thus avoid prosecution. Observers have detected a qualitative difference between trials initiated in the early stages of post-Communism and those launched later. Whereas earlier trials were marked by serious procedural flaws that turned them into mock show trials (as was the case with the trial of the Ceaușescu and to a lesser extent the “Trial of the Four”), later trials were less a spectacle for the benefit of a population hungry for revenge and rather drier legal exercises that endeavoured to observe the letter and the spirit of the law (Grosescu and Ursachi, 2009; Ursachi, 2007).

The best-known is the trial of Nicolae Ceaușescu, Romania’s supreme leader from 1965 to 1989, and of his wife and political partner, Elena. After unwisely fleeing Bucharest aboard a helicopter, the presidential couple was apprehended and brought to the military garrison of Târgoviște, a small town not far from the capital. There, on the morning of 25 December 1989, the Ceaușescu appeared before an ad hoc military “people’s tribunal” put together by revolutionary forces, which handed down the death sentence after less than two hours of deliberation. After the two were executed commando-style, their corpses were taken to Bucharest and put in unmarked graves in the Ghencea cemetery. The trial was denounced internationally on several grounds. The panel of judges knew in the morning that Ceaușescu had to be executed by the afternoon (Săraru and Stănculescu, 2005); no hard evidence was produced to substantiate the claim that Ceaușescu was the only, or even the most important, political figure responsible for the loss of human lives before or during the revolution; the number of casualties cited as proof of Ceaușescu’s repressive stance was grossly inflated; Elena’s guilt of intellectual fraud did not warrant a sentence as harsh as the one reserved for her husband (the death penalty); and the defendants were granted nei-

ther a strong defence (even their counsel accused them of crimes) nor the right to appeal.

Security concerns were the trial's main driving force,³ but some accusations referred to Ceaușescu's 25-year rule up to the start of the popular revolt. In his opening remarks, the judge noted that Ceaușescu "has refused, for 25 long years, to have a dialogue with the people, although he claimed to speak in the people's name, as its most beloved son". "On national days of celebration", the judge continued, "the accused used to appear in public together with their *camarilla* dressed luxuriously, at a time when ordinary people had their salami rationed to 200 grams per day", a reference to the harsh living conditions of the 1980s. The Ceaușescus stood accused of genocide, undermining state order, the destruction and neglect of industrial property, and undermining the national economy; that is, the charges related to both the 1989 revolution and Nicolae Ceaușescu's extended despotic rule. The prosecutor and the judge evoked the people who had died because of a scarcity of medicines and the babies who died in hospital incubators because of the frequent electricity cuts of the late 1980s. Rather surprisingly, the most damning accusation was voiced by none other than the defence counsel, Lucescu. Instead of debunking the prosecution's case, Lucescu made reference to "the crime of genocide against the Romanian people perpetrated not only [during the revolution] in Timișoara and Bucharest, but also for the last 20 years. The crime of starvation, of denying central heating and electricity, and the worst crime of all: the crime of enslaving the Romanian spirit" ("Transcriptul 'procesului' Nicolae și Elena Ceaușescu", 1989). In short, because of overriding political and security concerns and its manifold procedural defects, the Ceaușescu trial represented an ineffective means of obtaining justice and truth.

The other four trials were equally unable to promote de-Communization. On 17 November 1985, engineer Gheorghe Ursu died in the Bucharest militia dungeons as a result of extensive beatings received from his cellmate, Marian Clita. Although a Communist Party member from 1944 to 1950, Ursu became disillusioned with Ceaușescu's response to the 1977 earthquake, wrote protest letters to Radio Free Europe/Radio Liberty, and recorded his dissatisfaction in a secret diary. He was arrested after two workmates denounced him for keeping the diary. His death caused an international scandal, as a result of which the United States withdrew Romania's most-favoured-nation status. After the regime change, an inquiry into Ursu's death aroused suspicion that the country's new leaders had organized a cover-up to protect former militia and Securitate officers who continued to be active after 1989. The case dragged on until 2000, when Clita accepted full responsibility for Ursu's death, in a move seen as an attempt to hide the involvement of the guards and

militiamen who had ordered the murder. In July 2003, former militia officers Tudor Stănică and Mihail Creangă were each sentenced to a jail term of 12 years for deliberately assigning Ursu to a cell where violent common criminals were serving time and for preventing their subordinates from intervening when Ursu was beaten up. With the help of their friends and colleagues in the police and the judiciary, Stănică and Creangă went into hiding and reappeared only after the Supreme Court of Justice had reduced their sentences by one year. Clita served two years and Stănică one year in jail. Ursu's diary, which was confiscated by the Securitate, was never found.

In the "Bus Trial" in March 2002, former Interior Minister Postelnicu and eight militia and Securitate officers were sentenced to prison terms of six to seven years for the death of three young people who, on 24 August 1981 in Timiș county, took hostages from among the passengers of a local bus using guns and ammunition stolen from the militia headquarters the night before. To free the hostages, they demanded money and passports to leave Romania. When the Securitate troops stormed the bus, the captors killed the bus driver and five other passengers, including women and children, before being captured. One of them hanged himself in hospital and the other two were killed by Securitate agents when trying to escape. By that time, Postelnicu had already served five years in jail after being convicted in the CPEx trial and the Trial of the Four, so the courts decided against his re-arrest (*Mediafax*, 2002). The trial's long duration reflected the ambivalence of the political elite and the judiciary towards the case. Because the hostage takers behaved like violent terrorists, killing innocent people when the Securitate turned down their demands, many legal minds believed that the three had no right to justice. There were, however, suspicions that two of them were shot not because they tried to flee but because their summary execution was ordered by top Communist Party officials (*Gazeta de Sud*, 2002).

Two more cases are relevant here, although neither was fully heard by the courts. Romania has tried to prosecute the Communist officials involved in the waves of arbitrary arrests, torture and murder that took place from the late 1940s to 1964, the year when most political prisoners were released. Only two torturers were placed under investigation, and both of them were individuals marginalized by Ceaușescu. The decision to channel all efforts into prosecuting two elderly individuals involved in crimes that, although certainly hideous, had taken place decades earlier was seemingly prompted both by their lack of support among the second-echelon Communist leaders who took the reins of the country over from Ceaușescu and by the perception that the earlier Communist regime infringed human rights more than late Communism (the so-called "Ceaușescuism"). As Securitate officers constantly claim, and many a Ro-

manian believes, Romanian Communism was malign during the rule of Gheorghe Gheorghiu-Dej, when torture was widely used, and benign during the rule of Ceaușescu, when the authorities used soft methods such as surveillance. Political support and public apathy (if not sympathy) explain, for example, why the head of the foreign branch of the Securitate, General Nicolae Pleșiță, was never convicted of torturing dissident Paul Goma and ordering the killing of members of the Romanian section of Radio Free Europe (Noel Bernard and Vlad Georgescu), although concrete evidence demonstrating his involvement exists (C. Oprea, 2007).

Alexandru Nicolschi (whose real name was Boris Grunberg) was a Soviet agent and a recognizable leader of early Communist repression in Romania. In 1946 and 1947, he ordered massive waves of arbitrary arrests, before becoming Deputy Director in 1948 of the then newly created Securitate. Representing for Romanians the epitome of calculated sadistic cruelty, Nicolschi was responsible for the arrest of writer Lena Constante, for the torture of young Liberal politician Adriana Georgescu, for the execution of Communist leader Lucrețiu Pătrășcanu in April 1954 following a mock trial of predetermined outcome, for the introduction of the Pitești brainwashing experiment in jails housing student political prisoners, and for ignoring evidence of gruesome torture in his many visits to detention centres (Bacu, 1971; Betea, 2006; Constante, 1995; Georgescu, 2003; Ierunca, 1990). After the Romanian Communist Party leaders distanced themselves from Moscow in the 1960s, Nicolschi was forced into retirement without being denied the luxuries reserved for the *nomenklatura*. He died in 1991 of a heart attack, on the very day he was presented with a subpoena from the Prosecutor General to appear in court to face former political prisoners (Deletant, 1999, 2005).

From 1952 to 1965, first as Minister of State Security and then as Interior Minister, Alexandru Drăghici consolidated the Securitate into a repression tool accountable only to the top party-state leadership. As he declared, “the Securitate is the instrument of the party; it is obliged to respect the law, but we can turn the law into what we want” (Troncotă, 1998). He encouraged the use of terror to crush anti-Communist resistance and extended repression to Communist Party leaders such as Pătrășcanu, who fell from grace for his outspoken criticism of forced collectivization. Once he assumed the party leadership, Ceaușescu launched an investigation into Drăghici’s activity and involvement in condemning Pătrășcanu to death. To be sure, Ceaușescu did not seek to uncover the true extent of Communist repression, since he himself had participated in it, but he did seek additional political capital by blaming his predecessor for past atrocities. The investigation was abandoned in 1968, not before Drăghici was stripped of all his positions in the party-state apparatus. In 1991, the former political prisoners’ groups asked for him to be

investigated, but Drăghici fled to Budapest. Two years later he was condemned *in absentia* not for his role in masterminding some of Romania's worst repression incidents but for ordering the killing of one Ibrahim Sefit. The Hungarian authorities refused to extradite him, and as a result Drăghici died in Budapest on 12 December 1993 (Deletant, 1995, 1999; Pelin, 2007; Tismaneanu, 2006).

Thus, Romania presents a paradox. Although its courts have heard a large number of cases, the vast majority of these cases have dealt with the exit from Communism (the 1989 revolution) and only a handful with the Communist crimes perpetrated between 1945 and 1989. Their scarcity did not make court trials related to transitional justice more efficient. Ceaușescu's trial blamed the person not the system for Communist crimes and allowed his former collaborators to extol the merits of Communist institutional arrangements and national unity around the country's leaders. Although the trial and the ensuing execution brought Romanians instant revenge on the despised couple who for 25 years had invaded their bedrooms, dictated their diet, deprived them of the basic necessities of life, forced them into submission, robbed them of critical thinking and indoctrinated them with nationalist and xenophobic propaganda, they did not help Romanians to understand what had happened to them and why. Because Drăghici and Nicolschi, the Communist leaders most closely associated with the Stalinist repression, died before going on trial, little was revealed about the mechanism of repression or the institutional ties between the Securitate and the Communist Party. The Bus Trial went unnoticed by the public, whereas the extended coverage received by the Ursu Trial, in which three minor figures of Communist repression stood accused, painfully underscored Romania's failure to prosecute notorious torturers drawn from the ranks of the nomenklatura and the secret police. As in other post-Communist countries, court trials in Romania have represented weak instruments of attaining justice and setting the historical record straight. The old age and frail health of key victimizers, the high burden of proof, the statute of limitations, the reappointment of Communist-era magistrates, and the tendency of police and Army forces to cover up the mistakes of their members have conspired to render court trials few in number, limited in scope and weak in effectiveness.

Access to secret files

Law 187/1999 granted Romanian citizens access to the secret files compiled on them. But it was only in 2001 that access was made possible, and only in 2005 that it became meaningful, once the custodian of the files, the CNSAS, had received the majority of the files that were unconnected

Table 15.2 Access to secret files in Romania, 2000–2006

Year	Number of requests received	Number of requests granted
2000	250	0
2001	5,097	2,891
2002	2,568	2,987
2003	1,950	1,501
2004	2,171	1,350
2005	1,568	2,048
2006	3,482	N/A
Total	17,086	10,777

Source: CNSAS (2008).

to issues of “national security”. According to the law, citizens can read their files and/or ask for copies of their secret documents from which the names of third parties have been struck out. Citizens can find out the identity of the full-time officers and part-time informers of the Securitate who contributed information to their files. Both former Communist-era victims and victimizers can access their secret files and obtain copies of selected documents, on request. Overall, Romanians have demonstrated a lack of interest in the secret files. Between 2000 and 2006, only 17,086 of Romania’s 18 million adult citizens demanded to read their secret files, and only 10,777 of those (that is, 63 per cent of all applicants) were granted that right (see Table 15.2). Despite efforts to clear the backlog, which meant that in some years the Council granted more applications than it received, the access rate has remained modest. Several factors account for Romania’s inefficiency in effecting transitional justice through access to secret archives.

The most important deterrent to effective file access has been the slow transfer of secret archival documents to the Council, the sole legal custodian of Communist secret archives. When the Communist regime collapsed in 1989, the secret documents were scattered among several different organizations. The bulk of the Securitate archive (around 80 per cent of all files) was housed with the Romanian Information Service (Serviciului Român de Informații, SRI), heir to the Securitate’s domestic branch, and the External Information Service (Serviciul de Informații Externe, SIE), heir to the Securitate’s foreign branch. Some files remained with the Ministries of Justice and Defence and other state agencies reluctant to give up such valuable collections. By 2005, the Council had received only 10,000 secret files of relatively little political significance. That year, the SRI handed over 1,306,000 files and the card system cataloguing them, following a decision of the Supreme Council of National Defence presided over by President Băsescu. Complete and

reliable file access was possible, therefore, only after the transfer of those files. Before 2005, the Council had to petition the SRI, which released the file or not, according to its political priorities. Since nobody knew which files were extant, it was difficult to contradict the SRI when it refused to hand over the files of well-known Communist-era victims or victimizers.

We still do not know the precise number of extant secret files. In 1993, according to SRI data obtained by Dumitrescu, there were 1,901,530 extant Securitate files. The secret archive totalled 25 kilometres of victims' files, 4 kilometres of informers' files and another 6 kilometres of denunciations (Stan, 2002b). A total of 78,227 files were destroyed between 1989 and 1993, and 100,000 working files (incomplete files of cases under investigation) were destroyed or misplaced during the 1989 revolution by the Securitate officers. In addition, in 1990 7 tons of Securitate files were burned or buried in a ravine in the Berevoiești forest, some 100 kilometres away from Bucharest, and there has been evidence that, since 1989, secret documents from the files of post-Communist political luminaries have been traded on the black market. Finally, after 1968 the Securitate itself carried out the organized destruction of the files of informers recruited from among Communist Party members. Even if the archive were complete, the picture it presents is not reality as it was but reality as seen through the eyes of the political police, and it does not wholly convey the lack of hope experienced by most Romanians at the time (Stan, 2005, 2006d; Tănase, 2002).

Patchy and altered as they are, the extant secret archives remain powerful tools in rewriting the record of Communist repression and terror. But their ability to set the historical record straight lies in the hands of researchers more than of ordinary citizens. Although the opening of the archives to the public did not explicitly include a reconciliation dimension, fears that their dark secrets might lead to civil war have proved unfounded. No victim has sought revenge on the secret agents who once made their life a living hell. True, the overwhelming majority of those unmasked as former spies dismissed the accusations and refused to apologize, but by knowing their identity the public was able to reassess the social status of many luminaries and quietly drive them out of public life.

The Truth Commission

Romania and Germany were the only East European countries to set up truth commissions, a transitional justice tool widely used in other parts of the world (Stan, 2009). Germany set up a Truth Commission in 1992 in the first stages of post-Communist democratization, whereas Romania created one in 2006 in light of its accession to the European Union, a moment that many Romanians consider marks the end of the post-

Communist transition. The German commission was set up by the parliament with representation from parties across the political spectrum, whereas its Romanian counterpart was created by the President with little consultation with the general public, civil society or the political parties. Both commissions were set up with no prompting from the international community, were concerned with truth more than reconciliation, had no subpoena powers and no mandate to grant amnesty to perpetrators, made almost no effort to bring victims and victimizers face to face, produced final reports that were rather academic in nature, and failed to inspire other neighbouring countries as models of reckoning with the recent past.

The Presidential Commission for the Study of the Communist Dictatorship in Romania (Comisia Prezidențială pentru Analiza Dictaturii Comuniste din România) was set up on 11 April 2006 by President Băsescu to investigate the Communist regime of 1944–1989 and to compile the report that allowed the President to officially condemn the *ancien régime* for its human rights abuses (Președintele României, 2006). Elected in 2004, President Băsescu wanted to deliver the official condemnation before Romania's acceptance as a full European Union member on 1 January 2007. Because it had only months at its disposal, the commission was larger than similar bodies constituted in other countries, relied heavily on studies previously published by commission members and independent experts, and did not seek to expand its sources of information by supplementing the archival documents with information obtained from interviews with victims and victimizers and visits to former detention centres.

The commission submitted its final report in time for Băsescu to condemn the Communist regime during the joint session of parliament on 18 December 2006. The report was made available to the public first in 2006 through the presidential website, and then in 2007 as a published volume. Inaccuracies discovered after the report's official submission led to its modification, a move criticized on the grounds that, once adopted by the President as an official document, the report was part of the public record and, as such, unalterable. The 665-page report included three sections dealing with the structure and role of the Romanian Communist Party, the Communist repression and the role of the Securitate, and their impact on society, economy and culture from 1944 to 1989. Because it examined a wide range of human rights abuses, the report represented a good source of documentation on the Romanian Communist regime, but its conclusions were rendered indefensible in a court of law by the use of a definition of genocide that overextended the concept to society, economy and culture. The report included recommendations for furthering transitional justice in Romania, most of which were ignored by a government

and a parliament inimical to President Bănescu and a society preoccupied with its economic well-being.

Overall, the Romanian Truth Commission was effective because it accomplished the task for which President Bănescu created it: to document Communist crimes in a “scientific manner” within a set time period. The commission drafted its report in time for Bănescu to deliver his condemnation days before Romania’s accession to the European Union, and by doing so to become the first head of state in Eastern Europe to officially and publicly blame Communism for its human rights abuses. The report provided a comprehensive account of Communist crimes, detailing the institutional mechanism of Communist repression and identifying many of the Communist officials and secret agents responsible for those crimes. However, its purpose was to establish the “truth” about the country’s recent past, so the commission had no mandate to promote reconciliation, and as such it should not be judged in those terms.

Conclusion

As this chapter suggests, Romanian transitional justice has involved four major accountability mechanisms: public identification of politicians with a tainted past (mild lustration); court trials of both high-ranking and low-ranking Communist officials, police and secret police agents; access to secret archives; and a Truth Commission. Although in the days following the 1989 revolution groups of intellectuals and former political prisoners asked for a resolute break with the Communist past, a full investigation of crimes committed from 1945 to 1989 and the removal from post-Communist politics of former Communist decision-makers and secret agents, concrete measures to investigate and address Communist crimes were taken only a decade later (Table 15.3). This belated reckoning with the past suggests that transitional justice can be undertaken not only within the “window of opportunity” opened immediately after the regime change is effected, as some scholars have contended, but also several years later (Welsh, 2006). Although the vast majority of the political elite tried to ignore it, the past has continued to haunt Romanian society.

In the case of Romania, procrastination led to marked inefficiency (Table 15.4 summarizes the outcomes of four accountability mechanisms in that country). Because of the considerable delay with which transitional justice was effected, most of its outcomes have been rather modest. Procrastination meant that many court cases could no longer be pursued because the defendants were deceased, old or ill, or because crucial evidence documenting their crimes had been tampered with; identification of former secret agents could not restore public confidence in the political

Table 15.3 The timing of accountability mechanisms in Romania

1989	25 December	Trial and execution of Nicolae and Elena Ceaușescu
1999	9 December	Law No. 187 on Access to One's Own Secret File and Unveiling the Securitate as a Political Police comes into effect
2002	March	In the "Bus Trial", Communist Party leader Tudor Postelnicu and eight militia and Securitate officers are sentenced to jail for the death of three young people who, in 1981, demanded to be allowed to leave the country
2003	July	Former militia officers Tudor Stănică and Mihail Creangă are sentenced to jail for their involvement in the death of Gheorghe Ursu in 1985
2005	February	At President Bădescu's request, the Supreme Council of National Defence orders the transfer of over 1 million secret files from the Romanian Information Service to the National Council for the Study of Securitate Archives
2006	22 February	Government Emergency Ordinance No. 16 introduces mild lustration
2006	11 April	Presidential Commission for the Study of the Communist Dictatorship in Romania is created
2006	18 December	Speaking to the Romanian parliament, President Bădescu condemns the Communist regime on the basis of the Presidential Commission's final report
2008	6 February	Decision No. 51 of the Constitutional Court comes into effect, abrogating Government Emergency Ordinance No. 16 and thus ending lustration

or intellectual elites, since time and time again the accused stressed the benevolent and patriotic nature of their secret activities; lustration could no longer aspire to renew the political elite, since many former Communist officials and secret agents had already renounced their political careers; many secret files were altered to protect the confidentiality of the tainted past of influential politicians and judges; and the process of coming to terms with the recent past was discredited by intense political instrumentalization.

Since 1989, social attitudes have changed, making gross human rights abuses unpalatable, but Romanians still prefer to turn a blind eye to non-life-threatening abuses (when not openly supporting them), which are still accepted as part of normal daily life. Compared with Central Europe, in Romania the judiciary, the public administration and the Army, police and secret police forces have for many more years after the collapse of the Communist regime embraced the culture of impunity that, before 1989, allowed them to violate fundamental human rights and avoid taking responsibility for it. Unsurprisingly, former victims feel betrayed by a

Table 15.4 Goals and outcomes of accountability mechanisms in Romania

Mechanism	Goals	Outcomes (accomplished goals)
Lustration	<ul style="list-style-type: none"> • Renew the political elite by sidelining politicians who lied about their involvement in Communist-era political police activities • Make public the identity of former political police agents: <ul style="list-style-type: none"> – full-time officers – part-time informers 	No Modest results Modest results
Court trials	<ul style="list-style-type: none"> • Bring to justice perpetrators of Communist crimes, both the Communist decision-makers who organized the repressive system (“the brains”) and the secret agents and militia officers who executed the crimes (“the muscle”): <ul style="list-style-type: none"> – during early Communism (1945–1964) – during late Communism (1965–1989) 	Modest results Modest results
File access	<ul style="list-style-type: none"> • Allow citizens to read the secret files compiled on them by the Communist Securitate 	Modest results
Truth Commission	<ul style="list-style-type: none"> • Write a report documenting Communist crimes and • Submit it to the President by December 2006 	Accomplished Accomplished

post-Communist state that has constantly sided with former victimizers and has done so little for them. While their life savings and pensions dwindled following the economic crisis of the 1990s, former victims forced to live below the poverty line saw how their former torturers (be they Party apparatchiks, police, secret police or Army officers, or secret informers who spied on them) have retained their political clout, succeeded as prosperous businesspeople, plundered public assets in privatization deals in which they benefited from insider information, and retired with honours to live on pensions often 10–20 times larger than the average. Former victims might not live to hear their torturers say “I’m sorry”, but Romania’s quest for justice and truth has barely begun.

Notes

1. Collaboration verdicts are decided by a simple majority of the 11 CNSAS leaders, if at least 8 of them are present.
2. Romanians recognize only radical lustration (leading to loss of office) as lustration. If citizens and intellectuals were asked if the country had ever instituted a lustration pro-

gramme, they would unanimously deny it. In late 2006, radical lustration was included among the recommendations of the Romanian Truth Commission, several months after Emergency Ordinance No. 16 was adopted. No such lustration programme has been launched to date.

3. According to Ion Iliescu, head of the revolutionary Council of National Unity, which succeeded Ceaușescu. In his words, “our concern was for Ceaușescu to be safe where he was, as much as possible. Protecting a modest military unit was another problem. This is why eventually we decided to have a trial. We had a dispute on this issue. We knew that politically it was preferable to organize the trial in normal conditions. But we realized that, as long as Ceaușescu was alive, the threat of having conflict remained. People were dying every hour. We chose a ‘revolutionary formula’ to organize in precarious conditions in the Târgoviște military unit the trial of the two . . . Afterwards there was debate whether it was right or wrong; that it was improvised. It was, but it could only be improvised. I believe [the trial] was not a mistake: it was a trial in exceptional conditions, in a revolutionary context. These kinds of things happen during revolutions.” According to Iliescu, “the most severe punishment for the two was not execution, but to be allowed to live and see for themselves the consequences of their system” (see Iliescu and Tismăneanu, 2003: 194 and 196).

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16

From Velvet Revolution to velvet justice: The case of Slovakia

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Introduction

During the first 15 years after the 1989 “Velvet Revolution”, Slovakia’s approach to transitional justice made it an outlier among formerly Communist countries. More than most, it seemed disposed towards forgiving and forgetting the injustices of the preceding regime. Whereas Czechoslovakia quickly instituted restitution laws, Slovakia (which split from the Czech Republic in 1993) carried out very little lustration, has prosecuted only one former regime official to date (and suspended the sentence) and was the last country in the region to open the Communist-era secret police files to the citizenry. This contrasts sharply with the Czech Republic’s stringent approach to the same past regime. That said, in late 2004, Slovakia began to employ a new strategy – publishing information about the former secret police online – that has proved more successful than others in sparking a substantive societal conversation about the past.

I explore here the development and progress of Slovakia’s transitional justice strategies: restitution, lustration, prosecution and the opening of the Security Service archives. I look at why state leaders chose these strategies, the debates that surrounded them when they were strongly contested, the extent to which they accomplished their stated goals as well as those often articulated by theorists of transitional justice (justice/punishment, societal reconciliation and the provision of a balanced and impartial historical record), and the reasons for their levels of effectiveness on these counts. I look at the role of political leadership, the broader

society, regional influences and international actors. I begin with a brief background on the Communist regime to which transitional justice responds and then trace its development in Slovakia from the revolutionary period until early 2009, focusing in turn on the different strategies as they emerged. I conclude with some thoughts on key lessons from this case, focusing on the outcomes of different types of leadership and the implications of delayed truth revelation for how we understand both the “window of opportunity” for transitional justice and the length and nature of transition itself.

The Communist era

The Czechoslovak Socialist Republic’s early years were brutal, with the Security Service (Štátna bezpečnosť, ŠtB) terrorizing the population into submission to the new regime. The Stalinist-era show trials were among the bloodiest in the region, continuing even after Stalin died. De-Stalinization did not begin in earnest until the early 1960s. Thereafter, pressure for reform built until hardline leaders were pushed out and the Prague Spring began in 1968, a period of significant liberalization. This was crushed that August by a “fraternal” Warsaw Pact invasion. The resulting regime instituted “Normalization”, intended to retrench the Party’s power and undermine opposition. The Party purged its reformers and instituted repressive policies, in which the ŠtB played a central role. Though imprecise, available figures give a sense of the regime’s oppressive impact on the lives of Czechoslovak citizens. Approximately 250,000–264,000 people received sentences for political reasons, nearly half *in absentia*, between 1948 and 1989 (Kratochvíl and Kratochvíl, 2006: 29). Roughly 100,000 people were imprisoned in forced labour camps (Radio Prague, 2006), many without trial, and 238–248 were executed after being convicted on political charges.¹ Somewhere between 3,000 (Williams, 2001a: 25–26) and 15,726 (Vlašák, 2006: 7) people died in the brutal conditions of prisons, labour camps and uranium mines (mostly during the 1950s), and at least 280 were killed crossing the border (Pulec, 2006: 3). Approximately 7,000 people were imprisoned in psychiatric institutions (BBC News, 2003), and half a million individuals belonging to socio-economic, political and religious groups to which the regime was hostile were expelled from jobs and universities and/or had their property confiscated.

The ŠtB gathered extensive information about citizens by following them, using various forms of surveillance technology (such as phone tapping and bugging) and monitoring mail, “checking” tens of millions of packages per year. In addition, it sought to draw citizens into its network

of informers, often by using positive incentives (for example, money, travel or children's education) and/or blackmail. More broadly, as the Czech human rights community Charter 77 extensively documented, the regime consistently violated the freedoms of the press, expression, association and religion, as well as the rights to education, privacy, information, equal protection under the law, defence in court, to take part in public affairs, to establish trade unions, to leave the country and of prisoners to humane treatment (Charter 77 Declaration, 1 January 1977, reprinted in Skilling, 1981: 209).

In its last decade-and-a-half, the regime focused particularly on repressing political dissidents. In the Czech Republic, it targeted Charter 77. In Slovakia, however, there was no parallel movement, though religious dissidence gained strength during this period. Overall, both post-invasion purges and cultural repression were significantly less harsh in Slovakia, largely because many Slovak Prague Spring reformers had pushed harder for ethno-national rights via federalization of the state than for political liberalization, whereas the Czechs stressed the latter – which was far more challenging to Communist ideology. Federalization (which divided the state into the federal Czech and Slovak republics) was the only major reform to go forward after the invasion, and it fostered Slovak economic, cultural, political and social development. As Gil Eyal (2003: 100–131) has argued, Slovak elites – including nationalist historians, reform Communists and managers of state enterprises – were able to take up projects that they saw as conducive to national progress. Opinion polls show that from this period until the end of the regime Slovaks were more positive about the state than Czechs were (Průcha, 1995: 75). Thus, although in Slovakia the regime was not highly legitimate, in the sense of acting in accordance with broadly accepted standards and principles of governance, it was more legitimate there than in the Czech lands. This had important implications for the Slovak response to the regime after it fell.

Transitional justice after the Velvet Revolution

The Velvet Revolution began on 17 November 1989, and toppled the regime over the course of 10 days through a series of massive strikes and demonstrations. By the end of the month, dissident-led umbrella parties – the Civic Forum in the Czech Republic and The Public Against Violence (*Verejnost' proti násiliu*, VPN) in Slovakia – took up the reins of power, and prominent Charter 77 dissident Václav Havel became President.

Restitution

The first transitional justice strategy employed after the Revolution would fall broadly under the category of restitution. In April 1990, the newly democratic Czechoslovak Federal Assembly passed the Law on Judicial Rehabilitation (No. 119/1990), which allowed citizens who had been tried and imprisoned by the Communist state for political reasons to request that the state nullify the verdict against them and compensate them financially. Special judges were charged with adjudicating the claims. Next, what became informally known as the “Small Restitution Law” (Act No. 403/1990) returned 70,000 small businesses and properties confiscated by the state between 1955 and 1961. The following year brought the Law on Extrajudicial Rehabilitation (No. 229/1991, the “Large Restitution Law”), which much more broadly and inclusively returned to previous owners property confiscated by the Communist government. It also provided monetary compensation and rehabilitation for persons who had not been convicted of political crimes but had been persecuted for democratic activities or membership in groups defined by such criteria as social class, property ownership and religion. The redress covered such violations as unjust imprisonment in labour camps, expulsion from schools and termination of employment. The purposes of the laws were both reparation for past harms and, with regard to property restitution, the privatization of the almost entirely state-owned economic sector. In addition, the state reverted the property of the Communist Party and its Youth Organization to the Czech and Slovak Federative Republic (Acts 496/1990 and 497/1990).

Since the “velvet divorce”, the Slovak Republic has passed a number of further laws rehabilitating, making restitution to and/or compensating particular groups harmed by the Nazi-allied wartime Slovak state and/or the Communist state, including churches and religious societies (Act No. 282/1993), those deported to Nazi concentration camps and prisoner of war camps (Act No. 305/1999), soldiers who fought with the Allies or participated in the domestic resistance in 1939–1945 (Act No. 105/2002), political prisoners (Act No. 462/2002), victims of the Warsaw Pact occupation of the country that crushed the 1968 Prague Spring (Act No. 547/2005), and members of the Anti-Communist Resistance (Act No. 219/2006).

These laws raised important controversies. First, there was significant debate over whether to return the actual property confiscated or to offer compensation, either monetary or in the form of vouchers that could be used during the privatization process. In the end, lawmakers chose the first, called “natural restitution”, and only offered compensation when it was not possible to return the property. A second key controversy

concerns the restitution laws' requirement that the claimant be both a Slovak citizen and a permanent resident. This excluded hundreds of thousands of former Czechoslovak citizens who had emigrated, very often for political reasons. Though this requirement has faced repeated challenge, at this writing it remains in effect.

Lustration

Compared with the debates over restitution, the question of what to do with the documents the ŠtB had compiled on citizens, as well as those who had done the observing and compiling, was thornier. Until mid-December 1989, the ŠtB had destroyed and stolen its files. It was disbanded in February 1990, and the files quickly became an important political issue, for two key reasons. One was the "wild" screening that took place during the ensuing period, as some leaders publicly disclosed records of certain individuals implicated by the files, and information from the files became the subject of backroom trading and blackmail attempts.² The second reason was the widespread suspicion that the ŠtB had played a role in the Revolution, seeking to manipulate it to its advantage. To investigate this, the new government set up the "17 November Commission", which was given access to the ŠtB files. It found that many agents and informers occupied high positions, including in the parliament and the government.³ The Commission was then authorized by the Federal Assembly to screen its deputies and employees, federal ministers and their deputies, and the employees of the Offices of the Prime Minister, to see if they had knowingly worked with the ŠtB. Implicated deputies were given 15 days to resign or have their names disclosed on television (this happened to 10, and two more names were added later) and all other employees could leave or be dismissed. When Commission spokesman Petr Toman presented the report on 22 March 1991, he prefaced the disclosures by stating that "the only way to prevent blackmail, the continued activity of the ŠtB collaborators, and a series of political scandals that could surface at crucial moments is to clear the government and legislative bodies of these collaborators" (*Uncaptive Minds*, 1991: 9).

The report met a mixed reaction. Some applauded,⁴ whereas others decried the lack of due process and called it a "witch burning" unworthy of a democracy (CTK, 1991c). Thereafter, pressure grew for a more systematic approach to dealing with the files, which came that autumn in the form of the Lustration Law (No. 451/1991). Its passage followed a stormy debate, during which supporters stressed the need for (using Roman David's summarizations of the central arguments) "personnel discontinuity and minimal justice", "national security and public safety" (especially

concerning the influence of networks of former elites and the potential for blackmail), “protection of rights and the need for legal regulation of the process”, and “truth revelation” (David, 2003: 394–397). The bill’s opponents argued that it violated human rights (often comparing it to McCarthyism), that it was legalized vengeance and that it used the principle of collective guilt (this last was a concern that President Havel shared as well) (David, 2003: 406).

The bill passed by a vote of 148 in favour, 31 against, 22 abstaining, 29 boycotting and 80 absent. The resulting law applied to persons who, between 25 February 1948 (the Communist takeover) and 17 November 1989, were: Communist Party officials from the district level up; several categories of ŠtB employees (including secret informants and agents); People’s Militia members; political officers in the Corps of National Security; members of purge committees in 1948 or after 21 August 1968 (the Soviet invasion); students at KGB schools for more than three months; and owners of ŠtB “conspiracy” apartments.⁵ For five years, these people could not be employed in most elected or appointed positions at the federal and republican levels of government (though, importantly, the position of member of parliament was not included), in ranks above Colonel in the Army, in management positions in state-owned enterprises and joint stock companies, in the official press agency, in top positions in Czechoslovak, Czech and Slovak radio and television, in top academic positions, and in the Supreme Court, judgeships and prosecutorial posts. Employees and applicants for employment would have to be certified by the Ministry of the Interior or be dismissed, demoted or rejected for employment. Citizens 18 years and older could ask to have their files reviewed, though they could not see them personally. Political parties, publishers and radio and television producers could have an employee “who takes part in the shaping of the intellectual contents of the communication media” screened if the staff member consented, and the results could not be publicized unless the person agreed.⁶ Anyone could prompt the investigation of a senior official for a deposit of 1,000 crowns (around US\$35 at the time), which they would lose if the official’s record was clean. The law was set to expire on 31 December 1996.

A November 1992 Constitutional Court ruling modified the law by nullifying its application to “category c” collaborators, which included “candidates” for collaboration,⁷ very few of whom, it turned out, went on to become informers (Williams, 2001b: 76). In its ruling, the Court also rejected a number of other challenges to the law, stating:

A democratic State has not only the right, but also the duty to assert and protect the principles on which it is based. It cannot be inactive in the situation in which the leading posts on all levels were staffed on the basis of political

criteria ... In democratic societies the requirements imposed on the employees of the State and public organs ... include also the compliance with certain prerequisites of State citizenship which can be characterized as loyalty to democratic principles on which the State is based ... Such restrictions may concern also certain groups of persons without these persons being assessed individually ... [The Law] is not a retaliation against individual persons or groups of persons ...

Every State, the more so that which had been obliged to suffer the violation of basic rights and freedoms by the totalitarian power for more than forty years, has the right to apply such legislative measures [for] the establishment of a democratic system [and aimed] at the foiling of the risk of subversion or return of the possible relapse of the totalitarian system.⁸

Notably, when the law came up for a vote, every deputy from the Movement for a Democratic Slovakia (Hnutie za demokratické Slovensko, HZDS) voted against it. The party was founded in March 1991 by then-Prime Minister of the Slovak Republic (and Minister of the Interior from January to June 1990) Vladimír Mečiar, as he and a group of supporters broke away from VPN amidst growing allegations that he was abusing his office. Shortly thereafter, the Slovak National Council dismissed him and his entire cabinet. The Slovak parliament's Defence and Security Committee's resulting investigation produced a report in two parts, released the following November and March, which found that there was evidence not only that Mečiar had been an ŠtB collaborator (though the pages in the register containing his name had disappeared) but also that he had abused the offices of Interior Minister and Prime Minister, and particularly his access to the ŠtB files, in order "to cover up his past, protect and promote his friends, and destroy the careers of his foes" (Obrman, 1992: 13).

The attempt to remove Mečiar from power boosted his popularity. He declared that "the campaign to discredit me was directed from Prague" and carried out by Slovaks subservient to Czech interests (Obrman, 1992: 16), a claim that resonated with many during the frustrating negotiations between the Czechs and Slovaks over how to structure their relationship in the new democracy. With parliamentary immunity, Mečiar remained a deputy, and his HZDS, which was full of former Communists and state enterprise managers and had a left-leaning nationalist-populist orientation, emerged as the most powerful Slovak party in the June 1992 elections. On the Czech side, the victor was Václav Klaus's centre-right Civic Democratic Party (Občanská demokratická strana, ODS), every one of whose deputies had voted *for* the Lustration Law. Thereafter, the HZDS and the ODS led the negotiations over the state's future, which soon deadlocked. Among the demands the HZDS declared "non-negotiable" was the revocation of the Lustration Law – which met no sympathy on

the Czech side (Eyal, 2003: 195). Within months, Czech and Slovak leaders decided that their differences were irreconcilable and, at midnight on 1 January 1993, the “velvet divorce” produced two new states.

Although there had been some lustration in Slovakia under the common state, the law had “only a formal effect” and did not produce thorough screening (Darski, 1993: 78). After the new state’s founding, it was essentially ignored, except for a January 1994 constitutional challenge by the Mečiar government on the grounds that it violated international human rights treaties (US Department of State, 1997). The court rejected this, but the state did not apply the law and it expired in 1996.⁹ Clearly, then, it is problematic to call lustration one of Slovakia’s main transitional justice strategies. Before examining the reasons for this, it is worth briefly examining the nature of governance in the new state, to allow an assessment of the possible implications of the lack of lustration.

Mečiar headed governments from June 1992 to March 1994, and again from December 1994 to October 1998. During the latter period, US Secretary of State Madeleine Albright described Slovakia as “a hole in the map of Europe”.¹⁰ This government’s attempts to secure unaccountable authority involved undermining the separation of powers, excluding opposition members from all positions of influence and decision-making, taking over and using the popular media for its own ends, selling state property to party members and supporters, using the intelligence service to “engage in political sabotage and the physical intimidation of its political rivals”, and intimidating or eliminating sanctioning bodies (Deegan Krause, 2006: 73). The Mečiar government’s use of the Slovak Intelligence Service (SIS, the ŠtB’s successor) even included kidnapping Slovak President Michal Kováč’s son, forcing him to drink a bottle of alcohol, putting him into a car trunk, and dumping him over the Austrian border. Unsurprisingly, during this period both NATO and the European Union downgraded Slovakia’s candidacy.

In the 1998 elections, a somewhat unwieldy but very determined coalition bonded by fierce opposition to the Mečiar government managed to win enough seats to push the HZDS into opposition. The new government, under Mikuláš Dzurinda, steered the state back on track for European integration, and the state was able to join the European Union and NATO. In this context, Slovakia did do some limited screening to gain security clearance for its officials, because a number of Western sources disapprovingly noted the continued presence of former ŠtB members in positions of influence in Slovakia.¹¹ Although sometimes criticized for corruption and, more recently (under the Robert Fico government, elected in 2006), nationalism, there has not been a recurrence of the illiberal, authoritarian tendencies of the Mečiar governments. The public’s view of its state is reflected in polls taken before the 2006 elections, which

asked about Slovakia's "most pressing social problems" (respondents could name three). Unemployment and other economic and healthcare-related concerns ranked at the top; "prevalence of corruption and bribery" came in sixth (16 per cent), "abuse of power" eighth (14 per cent), "performance of the judiciary, enforceability of law and justice" ninth (9 per cent) and "quality of democracy" came in last (4 per cent) (Bútorová et al., 2006: 4). Thus, the abuses characteristic of the Mečiar period are not the public's top concerns.

By 2009, 20 years after the Velvet Revolution, Slovakia could be considered a relatively stable, if imperfect, democratic state. This brings me back to the questions of the reasons for, and the implications of, the lack of lustration in Slovakia. The most-cited reason for Slovakia's choice not to pursue this transitional justice strategy, both in my own interviews and in published analyses on this issue, is that "political will" was lacking. This is an explanation that has several facets. First, given the makeup of the Movement for a Democratic Slovakia, as well as of the (formerly Communist) Party of the Democratic Left (SDL), lustration would have been a disaster for them. Moreover, because under Communism Slovakia had not had a strong dissident movement, it had fewer alternative elites available for leadership in the new democracy than other Central European countries. The Christian Democratic Party, which was at the time led by prominent former dissidents, favoured keeping the Lustration Law but, when the state split, they and other supporters of lustration were in the opposition and not strong enough to force the issue. Lustration's power-political implications for a substantial number of elites are, then, obvious and played into their struggle against its application.

This is not, however, the whole story. As Eyal argues, the Slovak elites' relationship to the former regime was as not as hostile as it was in the Czech Republic and, in the context of the new democracy, many hoped to continue to pursue the best elements of reform communism, the search for authentic sovereignty and the development of national consciousness – all projects that had made progress, despite frustrations, during the previous regime's final two decades. Thus, "the communist past was not to be erased or purified; on the contrary, its remembrance was part of the work of imagining the nation" (Eyal, 2003: 173). This made lustration "the direct symbolic antithesis of the ideological package of the left in Slovakia, and threatened it with symbolic annihilation" (2003: 182). There was, then, a principled objection to lustration's judgement of the past.

The broader Slovak public opinion on this matter also has important complexities. On the one hand, a poll in late January 1993 showed that a majority of Slovak citizens favoured keeping the Lustration Law;¹² over the years since, a number of analysts and authors writing in popular Slovak journals have bemoaned the state's failure on this count. On the

other hand, the serious allegations against Mečiar concerning his involvement with the ŠtB and his abuse of its files did not diminish his popularity; he had the confidence of 80 per cent of the public at the time he founded the HZDS (Zak, 1995: 259). Whether people believed his denials or were not bothered by the evidence against him is hard to judge, but a strong majority of the voting public did not see him as unfit for office shortly after the revelations were made. Moreover, in polls conducted during the early to mid-1990s, Slovaks consistently expressed less interest in de-Communization (phrased as “removing former communist party members from positions of influence”) than the Czechs,¹³ and the issue was also less relevant to their electoral choices (Deegan Krause, 1998).¹⁴ More broadly, opinion polls consistently showed that the Slovaks viewed the Communist regime less negatively than the Czechs.¹⁵

As I have argued in more detail elsewhere, the extent and progress of lustration were shaped by the level of the previous regime’s legitimacy (Nedelsky, 2004). The desire for justice corresponds, to some extent, with the sense of injustice that it is addressing. Slovaks did not tend to see the previous regime as deeply illegitimate and had few alternative elites. This facilitated elites associated with the former regime returning to the political stage in the new democracy. These elites, in turn, were mostly opposed to vigorous transitional justice. Because they regained power quickly, they were able to undermine the legal framework designed to screen influential posts in the public and political spheres, mostly by ignoring it. Thus, the lack of lustration in Slovakia is the result of a combination of elite and societal factors. The law was passed in the context of political union with another nation that was more interested in de-Communization, and many Slovak elites never supported it. And although the Slovak public did express support for it, they also elected a leader who, according to the law’s criteria, should probably have been excluded from positions of leadership.

This raises the key question of the law’s effectiveness. The stated purposes were to protect the new democracy from being undermined by undemocratic elites, though some analysts and critics also hold that its purposes are retributive, punishing members of the previous regime. Either way, because it was not enforced, the law did not achieve any of these effects. Moreover, given that the public had the information about Mečiar well before the 1992 elections, the Slovak electorate gave the HZDS government *informed consent* to govern. It is possible that the citizenry would have questioned the legitimacy of a government that excluded popular leaders. Thus, although lustration was designed to protect democracy, it could be seen as, at least potentially, a very strong *brake* on the democratic process as well, which might have undermined trust in and support for the new state.

Prosecutions and criminality

The one piece of transitional justice legislation passed during the Mečiar period is the 1996 Law on the Immorality and Illegality of the Communist Regime. Parliament modified the original bill's characterization of the Communist Party from "a criminal organization responsible for violating human rights and spreading terror" to "a party which did not prevent its members from committing crimes" (Fisher, 1996). It also holds that cases where there was no indictment or conviction because of political reasons that are incompatible with fundamental democratic principles can continue to be prosecuted, and statutes of limitations do not apply.

Three years later, under the Dzurinda government, former dissident and Minister of Justice Ján Čarnogurský (Christian Democratic Movement – Kresťanskodemokratické hnutie, KDH) set up the Department for the Documentation of Crimes Committed by the Communist Regime. This primarily provided legal advice to people seeking restitution or rehabilitation after having been incarcerated or persecuted by the previous regime. Most of the claims it received sought compensation for job or property loss. Čarnogurský had originally sought to found an office for the documentation of the crimes of Communism (like the one in the Czech Republic), "but did not find support from his coalition partners, and the office turned into just a two-member department of the Ministry of Justice" (*Pravda*, 2001a), including Čarnogurský himself. According to Charter 77 signatory and Slovak political analyst Miroslav Kusý, the founding of the Department for the Documentation of Crimes was due not to the "political will" of Slovak leaders but to Čarnogurský's "stubbornness" (Kusý, 2001: 30).

Thus, although the new state formally recognized that serious crimes occurred under the previous regime, almost nothing has been done to punish those who committed them. The only successful prosecution to date was of General Alojz Lorenc, head of the ŠtB at the time of the Velvet Revolution. He was tried in 1992 for abuse of power and, in particular, using illegal methods against dissidents, and was sentenced to four years' imprisonment, but as the state split he escaped to his native Slovakia. A case was opened against him there in 1995 and he was charged in 2000. In late 2001, he was tried in a Bratislava military court and convicted of similar but fewer crimes than in his original trial, and he was given a suspended 15-month sentence. By then a successful businessman, he emphasized that he felt no guilt for his actions (Holt, 2001). Charges have also been brought against former top Czechoslovak official Vasil Bil'ak for treason (for signing the letter that invited the Warsaw Pact to invade Czechoslovakia in 1968), but a regional court returned the case

to the prosecutor (a decision upheld by the Supreme Court) (*RFE/RL Newslines*, 2002). When, in late 2007, prosecutors described the investigation as being in its “preliminary stage”, Biľak was 90 years old (*Slovak Spectator*, 2007).

After Lorenc’s trial, the Slovak journal *Národná obroda* raised the question of whether the window of opportunity for criminal prosecution could be closing or closed. Noting that the Czech Republic had prosecuted many former officials, it asked several Slovak political leaders, “is it not too late to try the Communist bosses?” (Dzurillová and Borčín, 2001). Ladislav Pittner of Dzurinda’s Slovak Democratic and Christian Union (Slovenská demokratická a kresťanská únia, SDKÚ) pointed to Simon Wiesenthal’s efforts 50–60 years after Nazi crimes, and added, “I only hope that for us it does not take that long”. Augustín Marián Húška of the HZDS disagreed, referring to documents “signed by the former American President Bush and Soviet President Gorbachev” agreeing that there would be no vengeance against “those who lost the Cold War”, and also warning against a tendency to act “papal”. Former religious dissident František Mikloško (KDH) was pessimistic, stating, “I still have the feeling that the Communist crimes will not be punished. They were so many, and so devastating to the country’s people, that I cannot imagine where to begin, and where to end.” Finally, former dissident and member of the Democratic Party (Demokratická strana, DS) Ján Langoš argued that, because there had been only one trial, “it is necessary to rouse public opinion” and to “break down the thick line” between the past and present that allows “communists and former ŠtB to influence politics. And influence them to the disadvantage of the people. This is precisely the reason that also with us it is necessary to come back to the past and dedicate ourselves not only to the injustices, but also to those who caused those injustices” (Dzurillová and Borčín, 2001).

At this writing (early 2009), however, Lorenc remains the only official to have been tried for crimes during the Communist period in Slovakia, and no one has served jail time. One development on this front is the referral in May 2008 by the Nation’s Memory Institute (a body to be discussed below) of 42 killings by Communist-era border guards to the Prosecutor’s Office. The decision about whether to proceed lies with that office (Lesná, 2008a). The prospects seem unpromising: General Prosecutor Dobroslav Trnka dismissively described the Institute’s motion as “just a historical excursion into the past”, and explained that the guards probably killed the people to avoid going to jail for refusing to do their jobs (Lesná, 2008b).

With one trial, then, criminal justice cannot be considered a substantive element of Slovaks’ response to the past, and it has accomplished neither justice via the punishment of those responsible for serious

injustices nor a strong historical record of the previous regime's crimes. The reasons for this are, again, complex. For a start, prosecuting crimes committed by the former Czechoslovak regime is difficult. The passage of time has damaged many cases, because often the victims are no longer alive, there are few or no witnesses and original materials have been destroyed.¹⁶ Moreover, many of the accused were originally police officers, prosecutors, judges and high political officials who had professional knowledge of how to destroy evidence. Many crimes were committed in buildings owned by the state police, when victims were in investigative custody, detention or prison, minimizing the number of witnesses and making it more likely that the crimes would never be exposed. Officials falsified the cause of death on medical records and people pleaded guilty under unacceptable conditions, still giving the appearance of being convicted according to the law (Lesná, 2008a). And, finally, many files were destroyed during the Velvet Revolution.

That said, even facing these challenges, the Czechs have still prosecuted far more individuals from the former regime than the Slovaks have: as of early January 2008, the Czechs had investigated 3,000 cases and prosecuted 192 people. Even though the Czech Republic has roughly twice Slovakia's population, further factors must be at work to explain the extremely low Slovak prosecution rates, and these can be found at both the elite and societal levels. As regards the former, the lack of elite turnover hampers the pursuit of criminal justice. As Kusý observed (quoted in Lesná, 2007b), "it seems that the transition from one regime to another was too smooth. Many high officials of the old regime have become high officials in the new one." Elites who had strong connections with the Communist state are unlikely to take a prosecutorial attitude towards it thereafter. Kusý further noted that screening would have made a difference in this regard. That said, as I argued above, the lack of lustration also reflects a perspective on the past that is less condemnatory than in some countries, and this is also likely to produce a weaker drive for criminal justice.

Marián Gula, Director of the Department for the Documentation of Crimes Committed by the Communist Regime in 2002, offered several further factors. One is that for most of the first 15 years of Slovak statehood the SIS kept custody of the Communist-era files that would be relevant to most prosecutions, where they remained classified and very difficult to access. More broadly, on the societal level Gula noted that there was a lack of upward pressure for transitional justice. "After the separation of the federation," he observed, "in Slovakia, coming to terms with communism practically stopped and even took the opposite course" (*Dilema*, 2002). This was in part because, in a small country, even though the majority of people were not members of the Communist Party, al-

most everyone had someone close to them who was connected to it. And, secondly, Communist rule had produced a kind of “moral nihilism” through its exercise of power – for example, by forcing everyone to vote in sham elections. “Of course,” Gula argued, “such moral traumatization of the nation has a demobilizing effect on the citizen.” This could impede the development of grassroots or civil society pressure for justice and the establishment of a historical record of past wrongs.

One further, crucial purpose of criminal justice in the transition to democracy is deterrence, so that a sense of impunity does not facilitate further rights violations. This is, indeed, an issue in Slovakia, borne out in the case of Ivan Lexa, the head of the SIS during the Mečiar period. He was charged on 12 counts, including sabotage, kidnapping and ordering a 1996 contract killing, but he was not convicted on a single count. One important complication arose from amnesties that Mečiar issued in 1998, and another was the need to secure documents and evidence from the post-Lexa SIS. In the aftermath of the failed prosecutions, former Interior Minister Vladimír Palko observed that “our society does not have what it takes to fundamentally come to terms with what happened in the 1990s. We should just be happy that we no longer have to fear such a gross abuse of the secret police” (Lesná, 2007a). Thus, although the situation has improved, an ongoing sense of impunity for crimes committed by state security is a real concern.

Opening the files

In the autumn of 2001, the journal *Kritika & Kontext* published an issue devoted to the question of the “ŠtB Phenomenon in Slovakia”. The editors asked the contributors to respond to a number of questions, including why, “in contrast to their Czech or Polish neighbours”, there had been such a profound lack of interest in Slovakia in ŠtB-related issues, “even after 1998” (*Kritika & Kontext*, 2001: 29). In his response, Kusý agreed with this characterization, arguing, “I do not think it would be possible to prompt discussion about something that is not a burning issue for the Slovak public”. He noted that, more remarkably, there was also “insufficient interest by the expert community, historians, political scientists, opinion makers. In the Czech lands a young generation of historians has focused on this topic of recent history by writing professional essays and popular articles and publishing books. With us it is still only a couple of people who are professionally engaged with this” (*Kritika & Kontext*, 2001: 30). To explain this, the authors pointed to factors similar to those I noted in the discussion of lustration: there was little opposition to Communism in Slovakia, Normalization was not overly oppressive and in fact supported some national development, and few people came into

contact with dissidents, or even, according to Kusý, sympathized with them.

Despite the lack of broad societal interest, that autumn, former dissidents Langoš and Čarnoguský brought the issue to the parliamentary agenda, each offering a bill that would open the ŠtB archives to the citizenry. Langoš's was more expansive, and included not only the Communist period but also the archives from the Slovak state during the Second World War, which had existed under Hitler's tutelage. Both proposals elicited a generally negative reaction from the HZDS and the SDL. The main lines of criticism were these: the bills contradicted existing domestic law, including criminal law, the law on archives and the law on public order (*Pravda*, 2001b); the bills violated international agreements;¹⁷ the ŠtB archives were too incomplete to be made public;¹⁸ the files might have been tampered with (especially while in Czech custody);¹⁹ file access would disclose the SIS's methods and endanger its operations (Vagovič, 2001); too little time had passed since the events in the files had occurred (Vagovič, 2001); and access was too broad, allowing non-victims to look at the files.²⁰ Some who were not opposed also expressed scepticism, noting that it was a "political gesture" coming much too late to solve anything important.²¹

The bills also prompted vigorous support, among both political leaders and editorial writers. Many argued that, as Marek Vagovič put it, "the principle is indisputable: every nation has the right to know its own past" (Vagovič, 2001). People also frequently noted that "Slovakia is the only post-Communist state in democratic Europe where the archives of the former Security Service (ŠtB) are concealed from the citizens" (Borčín, 2002). This unfavourable comparison with the surrounding region was thus further proof that it was "high time" for Slovakia to open the files.²² Clearly, the norms and practices in the broader "neighbourhood" were an influencing factor.

In the end, Langoš's bill passed in the summer of 2002. The law set up the Nation's Memory Institute (*Ústav pamäti národa*, ÚPN) where people can access the files, and which was also tasked with investigating and publicizing the darker aspects of the state's fascist and Communist past. Act No. 553/2002, known as the Law on the Nation's Memory, states its rationale and purposes in its preamble; these include "the duty to prosecute crimes against peace, humanity and war crimes", "the duty of our state to achieve satisfaction for those damaged by the state, which violated human rights and its own laws", "the duty of our state to disclose the activity of repressive authorities" and "to express our conviction that those who do not know their past are condemned to repeat it, and that no unlawful act on behalf of the state against its citizens may be protected by secrecy and may not be forgotten".²³

Toward these ends, under Langoš's leadership, the ÚPN was set up over the course of 2003 in a Bratislava court building and began accepting applications to view the files. One serious complication was the SIS's unwillingness to hand over the files, despite the legal requirement, which stalled the ÚPN's ability to carry out its mandate for some time. Finally, in late 2004, the ÚPN undertook its first dramatic disclosure: on 16 November, the day before the fifteenth anniversary of the Velvet Revolution, it published the ŠtB registers from Eastern Slovakia online.

This sparked public interest and prompted much media discussion. One headline read, "Do you have a suspicion that the ŠtB spied on you? Use the Internet" (Forgács, 2004). Another article noted that Slovakia "has a new toy" and, because of it, "today people definitely have more interest than in the past in the corruption of officials" (Stanislav, 2004). Particularly noteworthy was the revelation that a member of the governing SDKÚ, Deputy Minister of Construction Ján Hurný, had been an ŠtB agent. Hurný expressed surprise, declaring "my conscience is clean" (*Národná obroda*, 2004). Intense discussion about whether he should resign ensued. For example, the journal *Sme* asked a number of prominent artists for their view, noting that, in the Czech Republic, public pressure from artists had led an implicated individual to resign from a prominent post (*Sme*, 2004a). The artists agreed with the publication of the names, but differed in their view of the proper consequences. Some thought that having one's name in the registers was not enough evidence for condemnation, and that further information concerning one's motivations and actions was needed, whereas others thought those named should step down immediately. Such perspectives were vigorously debated throughout the media and, over time, pressure built for Hurný for to resign.

On 3 January 2005, he did. Others named in the registers, including SDKÚ member of parliament Jozef Banáš (who *Sme* reported that month was listed in the files that would be published online two months later), however, did not (Jurinová, 2005). These developments "provoked one of the largest public debates on Slovakia's past since the fall of communism 15 years ago" (Stracansky, 2005). Some leaders, such as Smer Party leader Robert Fico, opposed action based on the revelations, stressing that "the published ŠtB volumes are not trustworthy" (*Sme*, 2005a). President Ivan Gašparovič, by contrast, declared that "those who really did actively cooperate with the ŠtB should leave of their own accord. It's down to the morality of those who at the time were in such positions to go before the people and tell them 'Yes, I did wrong and today I should not hold a function where I decide about you'" (Stracansky, 2005). KDH leader and Speaker of Parliament Pavol Hrušovský agreed, stating that "all those who were ŠtB agents, who voluntarily informed on their closest peers, should resign from public life". SDKÚ representative Tomáš

Galbavý went further, stating that he wanted to open a discussion in parliament about passing a lustration law (*Sme*, 2005b). For its part, the ÚPN assured the public that “the Institute does not know of even a single case where the ŠtB registered an agent without their signature” (*Sme*, 2004b).

As the discussion continued, interest in the issue clearly reached far beyond the political elite. For example, the non-governmental organization Civic Democratic Youth published an “appeal” to the former members of the ŠtB to voluntarily resign from their posts, noting (as *Sme* paraphrased them) that “those who knowingly collaborated with the Czechoslovak state security do not have the moral right to hold public office in a free state, whose formation the ŠtB sought to prevent cruelly and systematically for 40 years” (*Sme*, 2005c). Popular news dailies and journals published detailed background information on the methods and motivations of the ŠtB, such as *Sme*’s in-depth interview with “Major E.K.,” a former ŠtB agent in the region whose registers had just been published (Žemlová, 2005a). Blogs and online discussion groups connected with the journals took up the issue as well.

The next round of revelations came in March, when the ÚPN published the registers of Western Slovakia, including the Bratislava region. This time, they included the names of several prominent religious leaders, including Catholic Archbishop Ján Sokol, prompting the Conference of Slovak Bishops to issue a public apology to those harmed (Balogová, 2005). Others implicated included a famous hockey player, a cabinet appointee for expatriate Slovaks and a university Rector. Shortly after the registers were posted online, *Sme* published an opinion poll conducted on its behalf by the MVK agency that found that a striking 82 per cent of respondents “considered it correct for people who are filed as ŠtB agents to resign from public office and leave public life” (*Sme*, 2005d). A second question asked whether knowing that someone was identified as an ŠtB collaborator changed the respondent’s relationship to that person, and found that 36.8 per cent had a worse view of the person, 25.9 per cent perceived them the same, 1.6 per cent had a better opinion of them, 26.2 per cent said they were not interested in the past of people connected with the ŠtB, and 9.6 per cent did not know.

The same issue of *Sme* published the official positions of the major political parties on the revelations’ implications. The KDH, the New Citizens’ Alliance (Aliancia nového občana, ANO) and the Party of the Hungarian Coalition (Strana maďarskej koalície, SMK, the Hungarian minority coalition) “announced they do not want such people in their ranks. The opposition parties Smer and HZDS have avoided a stand on the problem and the coalition SDKÚ announced that it will not engage with the ŠtB volumes” (Žemlová, 2005b). The article also reported that “the Chairman of the Office of Civil Service Ľubomír Plai has a clear

position and he does not want former agents or members of the ŠtB in the civil service. According to him they damage the good name of the civil service and endanger the confidence of the people in the impartiality of its decision-making.” Another article in the issue noted that “some former agents or members of the ŠtB have left their offices, usually, however, only after journalists began to be interested in their past” (*Sme*, 2005e). The article also listed the names of those who had resigned and those who had not. And, finally, the issue included an interview with Langoš, who said that, rather than being surprised by the strong public support for implicated persons to leave public office, “I expected that”. He believed, the journal reported, “that ‘the majority of people have a feeling for justice’ and from their reaction he concludes that bringing the documents into the open has again given them renewed hope” (Žemlová, 2005c).

The discussion sparked by these disclosures continued, but in June 2006 the ÚPN suffered a terrible blow when Langoš was killed in a car crash. The same month, Slovakia held parliamentary elections, which produced a governing coalition made up of Fico’s Smer, Mečiar’s HZDS and the extreme nationalist Slovak National Party (Slovenská národná strana, SNS). In the new cabinet, 11 of 16 members were former Communists, some of whom, according to Slovak media reports, appeared to have ties to the former ŠtB agents via business and family (Nicholson, 2006). Thereafter, months went by without a successful election of a replacement for Langoš. Meanwhile, the ÚPN continued with online disclosures, such as 130 executive orders by Communist Ministers of the Interior over a more than 40-year period (*Slovak Spectator*, 2006). In January 2007, the ÚPN was suddenly and unexpectedly evicted from its offices, which had been remodelled to suit its purposes, with the explanation that more courtroom space was needed. Fico also expressed his disapproval of the ÚPN’s work, stating, “I didn’t believe a word he [Langoš] said” (quoted in Leško, 2007).

Finally, on 31 January 2007, the parliament elected a new ÚPN head. The choice was controversial: Ivan Petranský, a 30-year-old historian, was the candidate of the SNS. Both this party and Petranský’s former employer, the nationalist cultural organization Matica Slovenská, are known for embracing a sympathetic view of the wartime fascist Slovak state and its leaders. That spring, it emerged that Petranský had met with the embattled Archbishop Sokol to discuss a possible amendment to the Act on the Nation’s Memory that would require that all documents it published would have to be “proven to be true” (Lesná, 2007c). This prompted much criticism, and in May one of the ÚPN’s founding members, Charter 77 signatory Miroslav Lehký, announced his resignation. In a subsequent interview he stated that he thought that the “political motto” that had

guided parliament's struggle to choose the ÚPN's new leader was "be sure no second Langoš" (Žemlová, 2007). Highlighting the crucial role the former leader had played, he explained that Langoš approached "coming to terms with communism and Nazism seriously and consistently . . . This began to obstruct many people, not only from the Left, but also from the Right, and today they do not endorse this law. At the same time, it has prestige internationally and Slovakia profited from it a lot."

Despite criticism of his appointment, Petranský continued to publish significant documents. The ÚPN also caused a stir when it announced that it had found 30 documents that had been tampered with (by whom, it was not known), to the *benefit* of agents and collaborators – they were changed to suggest that perpetrators were victims. At a press conference, Petranský stated that the ÚPN had not, however, found a single case where a person was falsely recorded as a collaborator (Lesná, 2007d). In addition, as noted above, he filed cases of killings by Communist-era border guards with the Prosecutor's Office.

In early 2008, shortly after the media published documents from the ÚPN archives that detailed minor infractions during SNS leader Ján Slota's youth (shoplifting and being caught returning to Slovakia over the Austrian border), *Pravda* reported that the governing coalition intended to abolish the ÚPN (*Slovak Spectator*, 2008a). After some discussion and critical press, the SNS withdrew its demand on this count (*Slovak Spectator*, 2008b). Still, some leaders continue with ominous rumblings (Mečiar stated again in July 2008 that "the ÚPN in its current form is not fulfilling its mission" and hinted that it had lost some documents (*Sme*, 2008a). The ÚPN nevertheless moved forward with its work, arranged for new accommodation and continued publicizing elements of the past, such as the names of those who spied on Prague Spring leader Alexander Dubček, the Normalization-era counter-intelligence records (including some agents' photos and resumes) (Nicholson, 2007) and information about the confiscation of Jewish property during the wartime state (*Sme*, 2008b).

The broader societal discussion of the past has also continued. For example, news journals have vigorously pursued Archbishop Sokol's case, and *Sme* published documents that prompted him to admit, after many denials, that he had contacts with the ŠtB (*Slovak Spectator*, 2007). The press has also demanded answers from other prominent individuals named in the files, such as the head of the Slovak Association of Advocates, asking for details of their work with the secret police and whether they planned to resign (Vagovič, 2007). They cover ÚPN revelations and discuss the ŠtB's methods and targets, publishing, for example, surveillance photos taken by agents (Vagovič, 2008). Slovaks also discuss these issues online. Many news journals offer the opportunity to post responses

to articles, which produces lively exchanges. Blogs connected to news journals have also taken up difficult questions raised by the opening of the files. For example, a *SMEblog* piece titled “My Mom Informed for the ŠtB” details the author’s experience with finding his deceased mother’s name in the online archive (Halenár, 2005). Another discusses the question of how journals that have long quoted a prominent political expert’s views should deal with the revelation that he was an ŠtB agent (Šípoš, 2007). Still another published a set of questions and answers from a Communist who offered a defence of the ŠtB’s purposes and methods as “similar to security services in the majority of the developed world” and argued that it protected Slovak citizens from all kinds of international criminal threats (Ondrovič, 2008). The source observes that “today, however, an agent or collaborator with the Communist ŠtB is actually a synonym for murderer, criminal or morally degenerate person. Acceptance of this attitude by society”, he concludes, “is evidence of its moral decline.”

This societal discussion has come a long way from the early 2000s, when the contributors to *Kritika & Kontext* were seeking to explain the “silence” in Slovakia regarding the ŠtB. The first credit for this effectiveness must go to the leadership of Čarnogurský and Langoš, who pushed through legislation on opening the files in a context of societal lack of interest combined with some serious hostility from elites. Under Langoš, the ÚPN – never given an excess of resources – then managed to ignite the public’s interest in the injustices and secrets of the Communist past. Thereafter, civil society has carried the discussion forward and shone the light of public attention on implicated elites complacent in their public offices.

Judged against its own stated goals, the effectiveness of the ÚPN has both strong and weak points. It has fallen short of ensuring the prosecution of past crimes. Its role in developing a strong historical record of past abuses has, however, been impressive, especially as people have paid attention to its revelations. It is also worth comparing its achievements to its original advocates’ hopes. In 2003, Langoš stated that he hoped it would produce “lustration without legal consequences”, in that those implicated by the files would be prompted to leave certain high offices, perhaps on orders from superiors.²⁴ This has happened to some extent, and importantly is due to pressure from both the media and the broader public. Čarnogurský hoped that it would foster societal reconciliation, in that some people would be able to show that, even if they collaborated with the ŠtB, they did so under duress and without the intention to harm anyone – something impossible to prove without access to the files.²⁵ Whether such reconciliation is under way is difficult to gauge, but it would be impossible without people understanding the truth about past

injustices and who suffered them, and, as a society, assessing what it means to be responsible for them. More than any other institution, the ÚPN has laid the groundwork for this and, in doing so, has also mitigated the sense of impunity fostered by the failure of other transitional justice mechanisms.

Conclusion

Nearly 20 years after the Velvet Revolution, Slovakia's experience with accountability mechanisms offers a mixed picture. On the one hand, lustration and criminal justice have been almost entirely ineffective, allowing former elites to escape punishment for rights violations and other abuses and, especially in the 1990s, to remain in office and undermine the development of liberal democracy. On the other hand, most restitution claims have been settled, and the laws themselves acknowledge serious wrongs done by the previous regimes. Moreover, the case shows that, even in inhospitable circumstances, it is possible to disseminate information about the past on the Internet and thereby prompt substantive engagement with the central, thorny questions of what people associated with the former regime are accountable *for* and what the implications of such accountability *should* be.

Slovakia's ambivalent approach to its past highlights the critically important role that leaders may play in determining the extent and functioning of accountability mechanisms, including how these may help reshape understandings of legitimate governance. Elites with ties to the former regime inhibited transitional justice by exercising the political power granted them through new democratic processes (though, clearly, they sometimes overstepped the boundaries of such authority). Their ability to do so was buttressed by the widespread indifference and/or passivity regarding transitional justice issues, such as secret police repression. At the same time, the case shows how a leader such as Langoš, who was backed by far less institutional and popular support, could nevertheless push through legislation that made truth revelation possible. Indeed, it is possible that this kind of initially lonely leadership might be more effective with regard to truth revelation than other forms of transitional justice (such as prosecutions or vetting), because it requires less active and continuing cooperation from large numbers of individuals in the judicial and/or executive branches of government, many of whom appear to be unsupportive of such justice.

It is also worth emphasizing that the ÚPN has passed two critical tests of its effectiveness: it has changed societal attitudes, at least to the point of shifting from lack of interest to broader engagement, and it survived

the death of its crusading founder. The latter success is clearly related to the former, because the ÚPN's work appears to have prompted the development of norms protective of its mission against attempts to curtail its investigations and reimpose secrecy and the resulting impunity from public judgement.

This shift in societal attitudes since the opening of the archives raises two final important points. First, because the opening occurred 15 years after the Revolution, this shows that the window of opportunity for truth revelation (as well as some pressures for informal vetting, if not lustration itself) does not necessarily close quickly, even if it has been delayed. The second and related point concerns the nature of "transition" and how long it lasts. Broadly speaking, a transition can be seen as having (at least) two components: a change in the nature and framing rules of the state's political institutions, and societal acceptance, to the extent it was not pre-existing, of the new regime's legitimacy. This acceptance must include a corresponding rejection of the preceding regime's norms that were hostile or contrary to those central to the new one, especially where they pertain to human rights. Consolidation of the first component is easier to measure, and it is therefore understandable that some would call a transition finished when institutional change is completed and functioning relatively smoothly. Still, if the first component is accomplished without significant progress on the second – if, in other words, there is no broad and robust consensus on the nature and limits of legitimate governance – the regime cannot be considered fully consolidated. In a democracy, human rights will also be at risk, because societal judgements about what is just and unjust are necessary not only for appraising the past but also for protecting citizens against abuses in the future. In such circumstances, then, a transition is incomplete and the role and effects of accountability mechanisms in fostering further normative change merit continuing attention – as will be the case in Slovakia for some time to come.

Notes

1. Figures vary because, as Petr Mallota of the Office for the Documentation and Investigation of the Crimes of Communism (ÚDV) explains, experts have found it difficult to agree on a definition of a conviction on political grounds. For example, they disagree over whether to include cases where charges were completely fabricated or where regime members eventually fell victim to the terror they helped generate. Thus, one source offers the number 227, another 248, and still another 262 (Institute for the Study of Totalitarian Regimes, 2007).
2. For example, Jiřina Šiklová, a Charter 77 dissident, was told by a new democratic elite that someone had attempted to blackmail him based on the information about marital

- infidelity in his file, and the secret police officer assigned to her case before the Revolution told her that many files were for sale. Interview with me, Prague, 20 October 2005.
3. My interview with Petr Toman, Prague, 18 October 2005.
 4. See, for example, CTK (1991a and 1991b).
 5. These are apartments belonging to collaborators where other collaborators met; people close to such collaborators (friends, family) were also vetted by the Communist authorities.
 6. Law 451/1991 in Kritz (1995: 312–321). See also original language text, available at (<http://www.ustrcr.cz/data/pdf/normy/sb451-1991.pdf>) (accessed 8 May 2012).
 7. For an English translation of the Constitutional Court decision on the Lustration Law, 26 November 1992, see Kritz (1995: 346–365).
 8. “Czech and Slovak Federal Republic: Constitutional Court Decision on the Screening Law, November 26, 1992”, reprinted in Kritz (1995: 350–351).
 9. This is not to suggest that the law had no ramifications in Slovakia. Indeed, a Slovak citizen, Ivan Turek, brought domestic legal action after being lustrated and the case ended up with the European Court of Human Rights (ECtHR). In 1992, Turek had felt compelled by a negative lustration certificate to leave his job in education administration, and was thereafter disqualified from certain jobs. In *Turek v. Slovakia* (application no. 57986/00), the ECtHR ultimately found that his rights to respect for private life and to a fair hearing within a reasonable time (Articles 8 and 6 §1 of the European Convention) had been violated and awarded him €8,000 in non-pecuniary damages, plus a further €900 for his expenses. Press release issued by the Registrar, *Chamber Judgment Turek v. Slovakia*, 14 February 2006; available at (<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=801733&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>) (accessed 10 April 2012).
 10. “Slovakia: TASR Reports Albright, Kovac Remarks at Washington Lunch”, Foreign Broadcast Information Service, 29 January 1998, quoted in Deegan Krause (2006: 22).
 11. For Slovak analysis of the issue’s relationship to European/NATO integration, see, for example, Vražda (2001) and *Pravda* (2002).
 12. CTK, 16 February 1993, cited in Bren (1993: 21).
 13. Central European University, “Party Systems and Electoral Alignments in East Central Europe, 1992” [computer file]; see Appendix A in Nedelsky (2004: 114).
 14. The statement the survey used was “It is right to forbid certain positions to people with a Communist past”.
 15. See Mishler and Rose (1993: 18) and Radičová (1993: 51–52).
 16. My interview with Pavel Bret, Deputy Director of the Office for the Documentation and Investigation of the Crimes of Communism, Prague, 19 October 2005.
 17. SDE representative Anton Hoffman, quoted in Živnerová (2001).
 18. HZDS-ES representative Augustín Marián Húška, quoted in Živnerová (2001).
 19. HZDS representative Imrich Andrejčák, interviewed by Borčín (2002).
 20. Lubomir Fogaš, vice-premier and chair of the Legislative Council of the Government, SDE, interviewed by Borčín (2002).
 21. “Unnamed expert”, quoted in Ďurišková (2001).
 22. Parliamentary deputies Jaroslav Paška and Pavol Hamžík, quoted in Ďurišková (2001).
 23. “553/2002 Z.z. ZÁKON z 19. augusta 2002 o sprístupnení dokumentov o činnosti bezpečnostných zložiek štátu 1939–1989 a o založení Ústavu pamäti národa a o doplnení niektorých zákonov (zákon o pamäti národa)”, available at (<http://www.upn.gov.sk/data/zakony/553-2002.pdf>) (accessed 10 April 2012).
 24. My interview with Ján Langoš, Bratislava, 22 May 2003.
 25. My interview with Ján Čarnogurský, Bratislava, 3 June 2003.

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17

Accountability for Communist crimes and restitution for victims in Slovenia

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Introduction

During the Second World War, Communists around Josip Broz Tito gradually took full control over the territory of Yugoslavia.¹ Communist order was formally initiated at the first assembly of the Anti-Fascist Council of the People's Liberation of Yugoslavia (Antifašističko Vijeće Narodnog Oslobođenja Jugoslavije, AVNOJ), held on 29 November 1943. Members of the assembly adopted AVNOJ decrees, thus establishing an interim legislative framework for the new economic order.² The adoption of decrees was based on the right of self-determination of all nations, as they termed it (AVNOJ, 1943). However, at this time, some senior British political and military personnel were supporting Tito, the Commanding Officer of the Partisan Army, thus giving Tito legitimacy and enabling a smoother revolution.³ The support was formalized at the Teheran Conference in November 1943, followed by the Treaty of Vis in June 1944.⁴ Based on these, Tito became President of the interim government and the Partisan Army became the official army to fight the Axis powers. The Allies ratified the Treaty of Vis at the Yalta Conference in February 1945 and the initiators of the Communist order were given the legitimacy they needed.⁵

After the war ended, the Communists implemented a comprehensive programme to take control of economic and political influence. As Stephane Courtois argues, “communist regimes ... turned mass crime into a full-blown system of government” (Courtois et al., 1999: 2). The

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Communists in Slovenia indeed controlled economic affairs and the public, political, cultural and other activities of citizens.⁶ In addition, many individuals who were considered dangerous to the Communist constitutional order were eliminated.⁷ Secret service officers, police officers and military personnel extensively violated citizens' human rights. The most severe atrocities included mass executions in the first year after the Second World War, labour camps, torture, humiliation and intimidation. To gain control over the economy, the Communists destroyed the existing property rights by almost completely expropriating businesses and farms.

The economy drowned in several-digit inflation and shortages at the end of the 1980s, causing the Yugoslav Communist order to collapse under the weight of its own economic inefficiency. After the separation of the Socialist Republic of Slovenia from Yugoslavia on 25 June 1991, a bargaining process began between former Communists and newly established political figures under the umbrella of DEMOS (Demokratska opozicija Slovenije, or Democratic Opposition of Slovenia).⁸

In this chapter we provide a broad picture of the extent of the violence perpetrated by the Communists after the Second World War and explain in more detail the policies and measures taken to address the violence and restore justice in the period after the collapse of the Communist order. In our opinion, restitution as implemented in Slovenia is a type of redistribution process in the sense that Logue (2004) acknowledges. Moreover, a one-sided process that on the one hand acknowledges wrongdoing and grants compensation to injured people and on the other lets the perpetrators walk free should in our opinion not be termed restoration of justice. We put together some thoughts on that in our concluding remarks as well.

The Communists enforcing power

Mass executions

The Communists implemented mass executions mainly between 31 May 1945 and the adoption of the Constitution of the Federative People's Republic of Yugoslavia on 31 January 1946.⁹ Pučnik (1998) identifies five homogeneous groups of assassinated people:

- (a) individuals who surrendered to the British Army and who were then repatriated to the Partisans in May 1945;¹⁰
- (b) soldiers captured by the Partisans;
- (c) civilians captured at home by the Slovenian intelligence and security agency OZNA (Oddelek za zaščito naroda, or Department of National Security);

- (d) Slovenians mobilized to the German Army, captured abroad by the Allies or surrendered to the Allies, and then extradited to the Slovenian authorities;
- (e) soldiers or civilians of other nationalities who were either captured by the Allies or surrendered to the Allies and were then extradited to the Slovenian authorities or captured by the Yugoslav Army while trying to flee.

The executions were carried out without judicial processes. Those assassinated were usually thrown in one of four types of grave, classified by Ference (2005): karst caves, pit shafts, tank ditches and fire trenches, and hand-made caves across Slovenia. It is unlikely that the exact number of those murdered will ever be known, although close to 600 such mass graves have been found. Researchers' estimates extend to at least 80,000 assassinated people (Dežman, 2010).¹¹

After the executions, the Communists instituted many court proceedings against the supposed espionage of particular individuals against the state. The proceedings were initially carried out in military courts, which had been established during the war, and were later undertaken by Slovenian National Courts of Honour. Prosecutions were based on the Act on the Punishment of Crimes and Offences against Slovenian National Honour, adopted on 5 June 1945 by the interim Slovenian National Liberation Council within Yugoslavia (Slovenski narodnoosvobodilni svet, SNOS) and on the Criminal Offences against the Nation and the State Act of 25 August 1945.¹² The latter Act dissolved the National Courts of Honour and the military courts and referred trials to the regular courts. The Act was in force until the adoption of the Penal Code in 1951, which resulted in the entrenchment of accusations against people as enemies of the state. As a corollary, many wealthy industrialists and landowners, intellectuals and political rivals were prosecuted and then either sent to various special-purpose camps all over the country or executed (Pučnik, 1998).

Those legal proceedings depart from what today would be considered a fair trial. The proceedings were organized as a type of public lynching and those accused had basically been declared guilty before the start of the trial. Some well-known trials include the Nagode trial of 1947,¹³ where a group of intellectuals were sentenced to death for their supposed espionage against the state, and others were imprisoned; the 1948–1951 “kulak” trials of wealthy farmers (*kulaks*); and the 1949 Dachau trials, where Dachau internees were prosecuted for their supposed collaboration with the Germans and espionage against the Yugoslav constitutional order. Vodušek-Starič (1992) indicates that between 20,000 and 25,000 individuals were convicted by the Communist regime in the first few post-war years. In addition, Šturm (1998) discusses in more detail the various kinds of oppression by the Communists in the period 1945–1990 in Slovenia.

Confiscations, nationalizations and collectivization, 1945–1963

The Communists implemented mass nationalization of assets and turned them into state possessions.¹⁴ They supported nationalization with legislation and made the state the largest owner and employer in the economy. According to their own reports,¹⁵ the share of state-controlled firms reached 93 per cent (accounting for 99.3 per cent of all employees) and 1 per cent were non-operational under the sequestration, leaving only 6 per cent in private hands (0.7 per cent of employees).

The Communists expropriated assets in four steps: confiscations and sequestrations between June 1945 and December 1946; the first and second waves of nationalization, which occurred from the end of 1946 and from the spring of 1948; the two-phase nationalization and confiscation of farm land from August 1945 and then from 1953 onwards; and the nationalization of building plots, leasehold apartments and other leasehold buildings between 1958 and 1963. All kinds of property nationalization had a legal framework in the Constitution and were detailed in many legislative provisions.¹⁶ Some individuals voluntarily renounced their property on behalf of the common good, but others were compelled by Party officials to sell it to the state.

As Pipes (1999: 215) observes:

The elimination of private property ensured the security of the one-party apparatus ... where the entire population worked for the government. ... [A]ny suspicion of antigovernment activity or even questionable loyalty could lead to dismissal or at least demotion of the suspect and his immediate family by the state, the country's sole employer. To survive one had to collaborate. Along with the political police, endowed with unlimited powers over the lives of the citizens, the monopoly on resources and employment was what made possible the totalitarian system.

It is impossible to know the extent of the damage the Communists did by expropriating assets and completely distorting the existing property rights relationships.

Revelation of mass executions: Reconciliation*Revelation and public debate on reconciliation*

Executions were carried out in great secrecy but, despite the lack of documentation, secret service personnel, local people in the nearby areas and those who survived knew about the mass killings. Bit by bit, pieces of information on the mass killings have been published by Slovenes and others in exile.¹⁷ These writings are a diffuse collection of materials on

the particular experiences and views of the authors on the war, and they lack intellectual clarity in describing the nature of the Communist revolution and its foundations. Yet they are important documents that depict the climate at the time among the Slovene community in exile.

On the other hand, people whose relatives or neighbours had been assassinated and who continued to live in proximity to the perpetrators and mass murderers in Yugoslavia were afraid to speak out and preferred to keep quiet than get caught by the Communists. And so it remained until Edvard Kocbek – a former AVNOJ member, a former minister in Communist governments, a national war hero and a highly ranked political figure from the early Communist period – mentioned the mass killings in an interview he gave to Boris Pahor in 1975 (Pahor and Rebula, 1975). In the interview, Kocbek spoke of the murder of about 12,000 members of the Slovenian Home Guard.¹⁸ The book sold out despite being prohibited by the Yugoslav Communists. Soon after, in 1976, Franc Miklavčič, a former Partisan, spoke up. Since then, nearly 600 mass graves have been identified across the country and estimates of the number assassinated have reached more than 80,000, according to Dežman (2010).

The debate on mass killings was spurred on by Tito's death in 1980. Some became very emotional in describing their views on the issue and calling for reconciliation – for instance, Spomenka Hribar in her poetic essay *Krivda in greh* ("Guilt and Sin") in 1983 (see Hribar, 1990). Just before independence, on 1 November 1989, a symbolic collective burial took place at Ljubljana cemetery in memory of all those who had been illegally murdered by the Communists. This act was followed by a demonstration at a notorious mass grave at the Kočevski Rog caves in Slovenia, where about 30,000 people gathered on 8 July 1990, including the head of the Church, leading former Communists and members of a growing new political movement (DEMOS). The two events have been referred to as examples of unity and how repeating the truth about past violence warns us against repeating it.¹⁹ Public discussions about reconciliation have significantly increased since the collapse of the Yugoslav Communist order in 1990.

Up to the present time, several thousand articles on reconciliation have been published and confidential cables about "cleansing" have been disclosed by the Slovenian media.²⁰ However, the discussion in the media has basically been an exchange of opinions between representatives of the Partisans (and their successors and political supporters) and representatives of the Slovenian Home Guard (and their successors and political supporters). The main argument of the former group is that Home Guard soldiers swore an oath to Nazi Germans, whereas members of the latter group focus more on the mass killings and the initiation of the Communist revolution by Partisan leaders. Both groups publicly condemn mass crimes and talk about the need for national reconciliation.

Prosecuting the perpetrators: The Sprava police investigation

Back in 1994 the Slovenian National Police launched an investigation into the mass killings in the aftermath of the Second World War, and called it Sprava ("Reconciliation"). In their final report released in 2004, a chief investigator on the project, Pavel Jamnik, revealed how liquidations had been organized and inspected by the Slovenian OZNA with the help of Slovenian units of the Corps for the National Defence of Yugoslavia (KNOJ),²¹ and how executions had been carried out by special units of the Bosnia-Herzegovina Division of KNOJ. The report's conclusion mentions that the investigators "failed to associate particular criminal acts to concrete individuals" (Jamnik, 2004). Still inaccessible secret files kept in Belgrade in Serbia could have been useful in this regard.

Police investigators have filed two criminal indictments for crimes against humanity. Of those two indictments, the one from 24 May 2005 stands out. It was filed against Mitja Ribičič, a high-ranking OZNA officer, for allegedly carrying out genocide in the aftermath of the war. However, on 27 June 2006 the panel of judges from the district court in Ljubljana dismissed the case, supposedly owing to insufficient evidence to substantiate the allegations against Ribičič. The issue of accountability for mass crimes committed after the war ended at this point.

In addition to these two criminal indictments, members of parliament instituted the Parliamentary Commission on Post-War Mass Murders, Show Trials and Other Similar Injustices, established on 17 September 1993. Its publicly stated mission was to gather information about mass murders in the aftermath of the war, in particular. Members of the Commission held several hearings of potential suspects, among them Zdenko Zavadlav, a high-ranking OZNA officer, who confirmed the systematic nature of the mass killings by the Communists. The chairman of the Commission was Jože Pučnik and, as a political body, the Commission included politicians from all parties, i.e. nationalists, new socialists and former Communists. It had no powers to impose sanctions and was thus merely a group of political players seated at the same table and voting on mass crimes against humanity. The Commission members launched no criminal investigation through the Slovenian judiciary and the Commission was dissolved in 1996.²²

Lustration

After 1991 a public debate was also promoted on whether and how to deal with people in the public sector administration who had kept their positions in the new democratic political system. The focus was not so much on those employed at lower levels of the administration as on decision-makers who, as the protagonists of lustration demanded, should

have been excluded from decision-making processes in a new Slovenian public sector. Protagonists from the Partisans and the Slovenian Home Guard supported their arguments either with EU Parliamentary Assembly Resolution 1096 (1996) on measures to dismantle the heritage of former Communist totalitarian systems (Council of Europe, 1996) or with the Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia (Skupščina Republike Slovenije, 1991) and the Constitution of the Republic of Slovenia (DZRS, 1991). A Law on Dismantling the Consequences of the Totalitarian Communist Regime, also called a lustration law, was proposed in 1997 but rejected at an extraordinary meeting on 12 December 1997 (DZRS, 1997) in the Slovenian parliament. After that, the issue of lustration was rarely raised in public again.

Dismantling the legacy of a repressive political system by lustration might at first seem a noble cause worth fighting for, but the correct approach, in our opinion, demands an intellectual effort based on understanding its major flaws and, above all, weighing such systems against the system of freedom in public debate.²³ Moreover, to ban anybody from holding a public sector position who has not been prosecuted and convicted in the courts in a due legal process for whatever criminal behaviour, as lustration might suggest, is contrary to the premise of a democratic political system. As we understand it, democracy involves making choices in a market of political programmes where anyone is allowed to sell their ideals to the voters, and a majority decide whose ideal is right. If people are allowed to develop their ideals and sell them to the public, then democracy as a system of competing ideals might, according to Hayek's (1960) reasoning, improve on the coercive nature of political systems over time, as people increasingly substitute good moral codes for damaging moral codes. To make the substitution process smoother and more efficient, voters need to possess key information about the behavioural characteristics of the people selling them ideals in a market of political programmes.

Mass graves

The question of mass graves has been debated by several governmental commissions. It gained some momentum after the discovery of about 2,000 bodies in part of a former tank ditch near Maribor in 1999 and after probes showed it was probably the largest such grave in Slovenia with more than 15,000 bodies (24ur, 2007). In 1999, members of parliament issued a decree demanding that a list of mass graves be made and that the largest graves be declared sites of national cultural importance. After the excavation of two large mass graves in Slovenska Bistrica in 2001, a commission was formed within the Ministry of Labour, Family

and Social Affairs to identify and keep records of the mass graves and the Sprava police investigation was revived (Radio Ognjišče, 2010). The commission soon identified further large mass graves as well as smaller graves and has organized several excavations of corpses.

The currently known number of mass graves located across the country is close to 600. On 19 June 2003, members of parliament passed the War Grave Sites Act, in which they established measures for tending military graves, the graves of war victims, and the mass graves of executions in the aftermath of the war. They also established rules on exhumation and the maintenance, marking and appearance of the graves.

Redressing Communist violence

The authorities passed several legislative acts in which they offered monetary compensation schemes to certain groups of victims and allowed the retroactive abolition of certain judicial rulings from the past. The backbones of the process were the following codes: the Criminal Procedure Act, adopted on 29 September 1994; Amendments to the Register of Births, Deaths and Marriages Act, adopted on 11 May 1995; the Redress of Wrongs Act, adopted on 25 October 1996; and the Denationalization Act, adopted on 20 November 1991.

Resuming legal proceedings

According to the Criminal Procedure Act, a penalty can be imposed only in relation to the actual criminal act and must be decided in a due judicial process. Constitutional Court judges declared that trials in the military courts in the aftermath of the war “were in conflict with the legal principles then generally accepted by civilized nations and insofar as they allowed for the arbitrary use of the law” (Šturm, 1998). The judges further declared that such judgments were not consistent with the *lex certa* premise and also stated that the judiciary should follow the *certa* principle when retroactively deciding about the resumption of legal proceedings. The conditions for resuming legal proceedings were explicitly listed in Articles 406–416 and Article 559 of the Act. The Ministry of Justice maintains a database of individuals who have been declared by the Slovenian judiciary to have been politically convicted.²⁴

Redressing injustices

Those who have been granted the status of politically convicted in a due administrative process are entitled to receive money from public

resources and to rights from the pay-as-you-go (PAYG) pension scheme for the period of their imprisonment. Entitlement schemes and the process for their delivery are detailed in the Redress of Wrongs Act. To this end, the authorities formed a Government Commission for the Purpose of Implementing the Redress of Wrongs Act on 11 September 1997 and the Division for Redress of Wrongs and for National Reconciliation, both being part of the Ministry of Justice. The publicly stated aim of the latter administrative body is to carry out certain specific tasks for the Commission, which has the authority to decide on the recognition of the status of claimants, their right to obtain compensation and the period of exclusion from the PAYG pension system.

Those eligible to apply are those imprisoned or the relatives of those murdered between 15 May 1945 and 2 July 1990 on the territory of Slovenia (or Slovenian residents sentenced on the territory of former Yugoslavia) on the basis of class, political or ideological motives or through the abuse of any other then valid legal code. The Act essentially grants to the judicial system the right to use extraordinary judicial review as a means of overturning the final criminal decisions of the Yugoslav judicial bodies and defines a procedure for their repeal. Claims for obtaining the status of victim and thereby the right to pecuniary entitlements need to be based on Articles 2, 3, 4 and 10 of the Act.²⁵ Originally the deadline for claiming the status of victim under this Act was set as 9 May 1998. The deadline was then extended several times by many amendments to the Act as numerous claims have continued to be filed irrespective of the deadlines, and finally overruled with the amendment to the Act passed by the Slovenian parliament on 27 September 2007. About 17,000 claims have so far been filed (Slovenija v Svetu, 2011). Since 8 March 2001, those entitlements have been paid out of the state's budget according to the Act Establishing the Fund for the Payment of Compensation to the Victims of War and Postwar Aggression (DZRS, 2001).

Denationalization laws

In order to restore property rights in nationalized property, the democratically elected members of the Slovenian parliament adopted the Denationalization Act on 20 November 1991. The Act provides the means for restoration in kind or restoration or compensation in the form of property substitution, securities or cash. To finance the entitlements of the Denationalization Act for property not returned in kind, the Slovenian parliament passed the Slovenian Compensation Fund Act in January 1993, thus establishing a Compensation Fund. The Fund has underwritten several bonds, initially denominated in German Marks and later in euros, usually with a six-month capitalization of interest. In the meantime, its

function of funding liabilities as granted by the state has widened to other areas.

The parliament introduced compensation as recompense for the many restrictions that prevented the return of certain types of property in kind. For instance, Article 35 of the Act stated that a company whose value had more than doubled after nationalization could not be fully returned. Some other assets, such as housing, were also not subject to restitution in kind.²⁶ Instead, the owners of expropriated property became eligible to receive compensation. The value of the compensation in all such cases was determined by the value of the expropriated asset at the time of nationalization according to the dollar/dinar/tolar exchange rate.²⁷ Owners of expropriated property were not allowed to claim for lost (or unrealized) income or yields and they had to apply within 18 months from the adoption of the Act (this period was later extended to 24 months). The Act meanwhile was regularly the subject of reviews by the Constitutional Court, leading to several amendments. Claimants could file their requests based on 27 different Yugoslav laws and two decrees, which resulted in some 39,648 requests; 425 were still pending as of 31 December 2010 (Ministry of Justice, 2011). The Denationalization Act is directly linked to 11 subordinate regulations, which define the various due procedures for the denationalization process, thus making it heavily bureaucratic and inefficient.

According to the Act, only individuals whose Yugoslav citizenship was acknowledged after 9 May 1945, either by the state or by international treaties, were entitled to file for denationalization proceedings. The Act excluded individuals who, at the time of the nationalization, were not registered as Yugoslav citizens (according to the Citizenship Act of Democratic Federal Yugoslavia), unless they were an internee or were fighting against the Axis powers. The Act also excluded all those who had already received, or had the right to receive, compensation in their own countries. For instance, under international peace treaties and the Austrian State Treaty, property confiscated from citizens of occupying armies, mostly Germans, Austrians, Italians and Hungarians, was used as a substitute for war reparations, and those individuals received compensation in their homeland, through claims sent to the Allied Reparations Commission.

Concluding remarks

Communism in Slovenia was, as we have seen, constitutional, and many activities of the Party were by and large legally covered by the legislation, which was strictly enforced. The legislative framework allowed the

authorities to prosecute and imprison anyone they wanted, especially by following legislative provisions forbidding activities against the state.²⁸ Some could argue that the system was not established democratically through a due election process, but was set up by a Communist revolution and implemented by a civil war during the Second World War. Thus the Communist legislation was not legitimate. But would it make any difference to the validity of the Constitution and the subsequent legislation if the government had been elected by the masses, as one can easily imagine might indeed have happened? Were the Constitution of the United States and the Bill of Rights voted on in general elections or were they imposed in a top-down revolutionary manner (the so-called Jeffersonian Revolution)? Can a voting mechanism be the criterion against which we measure the legitimacy of repression or is it the act of repression itself that makes it coercive? Hitler was elected in a due election process and his programme inspired some leading US political figures of the time. Moreover, the masses across Yugoslavia cheered Tito as head of the Communist state and his funeral was attended by a number of international delegations. There can be no other understanding of these acts than that they grant legitimacy to the figure and the work of the Yugoslav Communists.

Although, as mentioned above, the Communist regime essentially made everyone its victim, the members of the Slovenian parliament recognized only particular groups of individuals as victims and conferred on them entitlement to pecuniary compensation. The attempt to make restitution for wrongs by granting pecuniary compensation encouraged the self-perpetuating mechanism of rent-seeking; benefits once offered to particular groups of victims would cause the group to broaden and would also encourage the occurrence of new groups of victims.

Restitution for injustices was based on the principles of *lex certa* and *nullum crimen, nulla poena sine praevia lege poenali*. At the heart of these two principles is the impossibility of objecting to legally covered violence and harm done, at least not by the means of the law defined by those same two principles. The Communists followed them literally, as we have partly shown. The most one can do in this case is to show that certain pieces of the then valid legislation were violated and demand the restoration of justice, which is a generally valid approach in the event that certain codes of law are violated.

The major flaw of the restitution process in Slovenia is that, despite the colossal violence perpetrated by the Communists after the Second World War and despite the fact that some of the leaders of the Communist revolution are still alive, not a single perpetrator has been accused by the Slovenian judiciary of mass killings. This is contrary to basic human morality; everybody involved in mass killings should have been brought to

justice, despite the lack of an existing legal framework, simply on the basis of St Augustine's legal maxim that an unjust law is no law: *lex iniusta non est lex*.

Nor was Communism recognized by democratically elected members of parliament as a system based on perverse moral codes of equality for which severe repression is the only efficient method (see Pipes, 1999, and Courtois et al., 1999). Such condemnation would make it easier to substitute positive moral codes for damaging ones in the process of voting in the market of ideals as we have already mentioned.

What can be said after such a lengthy and still unfinished restitution process in Slovenia? Can it be marked as a success or a failure? The answer pretty much depends on the initial purposes and aims of those setting the process. What were they meant to serve? Were they related to reconciliation, restitution for victims, the punishment of perpetrators, or a mixture, or to something else?

Designing the tools for dealing with such extreme and widespread practices of rights violation is a dynamic process and it is difficult to know how best to serve justice. If restitution is about reconciliation, then the government can do virtually nothing. It could, at most, publicly acknowledge that crimes occurred. That is to recognize something so obvious that it would barely be an act of reconciliation, much less of forgiveness. Forgiveness, as one of the ends of the reconciliation, cannot be achieved through a declaration; it can happen only on an individual basis between a victim and a perpetrator. We need to bear in mind that reconciliation is above all a long and complex psychological process of moral placation, a process of appeasement, and it leaves little space for the redress of injustices based on pecuniary compensation paid by taxes. To serve justice in its clearest form, perpetrators need to pay their victims for all the damage they have caused and compensate them for their suffering.

An obvious fact here is that most of the Communists' activities, no matter how atrocious, were legally based. The rules were, indeed, strongly prohibitive and also strictly enforced. Retroactive laws would not work because their use is contradicted by the impossibility of any individual anticipating future developments in legislation. As Hayek (1978) argued, "no individual would ever be able to predict how laws would affect him, or what actions should he avoid, so as not to violate future retroactive laws". Moreover, retroactivity, once tried, would lead to calls for restoration in every law enforcement, which would change the current relative power of any two individuals or groups of individuals, where one is better off than the other. It seems that this aspect of the whole process of accountability cannot come to an end while any individual – whether a victim or a perpetrator – is still living.

If the process is about the restitution of property, then the question is how to properly assess and make restitution for all the harm done after so many years. After more than 50 years since nationalization and all the technological progress since then, it is part of the ordinary lifecycle of a firm to, *inter alia*, expand, to go bankrupt or to form business alliances or mergers. If one includes all individuals without any initial real assets who were prevented from achieving any kind of wealth, then it is not possible to make fair restitution because the system made everybody a victim.

It seems that by far the fairest way to proceed would be to punish the perpetrators. Human rights violations are concrete actions carried out by concrete individuals. This means that the judiciary should have respect for justice and prosecute what Aukerman (2002: 96) acknowledges as “extraordinarily evil, composed of ordinary crimes, assaults and thefts, rapes and murders”. Of course, it is not possible to expect that amends will be made for all the wrongdoings and that all perpetrators will be punished when the violence happened on such a large scale. But this makes large-scale perpetrators no different from daily murderers or bank robbers: all are criminals who should be prosecuted and punished (if found guilty) and in both cases there is a possibility that the criminal will go unpunished. Another question is the treatment of the judges, police officers, soldiers and others who were loyal in performing their law-enforcement jobs. For instance, it was legal to shoot in order to prevent border crossing. However, none of these cases has to do with reconciliation as such; they should have been part of the judicial system, whose task should have been to treat them as ordinary crimes. If this was the purpose, then it is clear that the reconciliation process can be marked a failure. The judiciary should take full responsibility for not fulfilling this task.

On the other hand, the Slovenian restitution process is a clear demonstration that politically it is easiest to make restitution for property or to monetize the harm through some form of compensation. Posner and Vermeule (2004) claim that demands for justice should be positively correlated with the harm done by the repressive regime. Monetization of harm done so long ago is subject to at least three mismatches, as pointed out by Vermeule (2005): there is a mismatch between wrongdoers and payees, between victims and payees, and between cash forms of compensation and the character of the harm done that prevents fair restitution. Paying the “victims” or their heirs out of taxpayers’ money actually harms all citizens, not just the perpetrators. Besides, extending the usual definition of Communist atrocities to include all those who argue that they were unjustly deprived of jobs, positions, education and property opens up a new array of questions on the issue.

It is clear that the restitution process as established and practised in Slovenia was ill conceived from the beginning, mostly because reconcilia-

tion became a political issue. Reconciliation is what today largely separates left-wing from right-wing political parties. As a consequence, there is an unusual situation of massive crimes but no criminals. Ayn Rand (1957) once wrote that, “[i]n any compromise between good and evil, it is only evil that can profit”. After almost 20 years of the restitution process in Slovenia, this is precisely what eventuated: making concessions over justice neglects the responsibility of individuals while encouraging the emergence of rent-seeking.

In talking about the harm done by the Communists, one dimension seems to be consistently overlooked. Living in a Communist regime deprives individuals of their personality, confuses their values and restricts their abilities, with long-lasting consequences that influence the creation of human capital in the future, as Alesina and Fuchs-Schündeln (2007) emphasize. People are prevented from developing their qualities and knowledge, which leads to many unrealized potential ideas.

It is thus impossible to comprehend the destruction of invisible capital, which certainly affected a majority of the population. Inferior schooling and low investment in human capital reduce work potential. This usually leads to serious economic downturn, which is indeed what happened in the late 1980s and early 1990s in Yugoslavia and gave the final impetus to the collapse of the Yugoslav Communist order.

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Notes

1. Janez Stanovnik, a top-ranking Communist official, admitted that during the war the “social revolution was an integral part of the National Liberation War [Communist movement]” (Stanovnik, 2009 and 2001).
2. AVNOJ was formed on 26 November 1942 in Bihać at its first session.
3. A key Western political figure was Fitzroy MacLean, who was deployed to Yugoslavia by the British Prime Minister, Winston Churchill, in 1943. Pavlowitch (2008) has published a book in English on the development of the Second World War in Yugoslavia, and an extensive piece by Bajt (1999) was published in the Slovenian language.
4. The Treaty of Vis is also known as the Tito-Šubašić Agreement. Ivan Šubašić was the Prime Minister of the Yugoslav Royal Government in exile.

5. One indication of Western political leaders' admiration for Josip Broz Tito was the number of awards and decorations conferred on him. The list of countries includes Belgium, West Germany, Japan, Denmark, France, Norway, the Netherlands and the United Kingdom. Political figures from many countries attended his funeral in Belgrade.
6. In the first years after the war, the Communist regime banned emigration. The opening of the borders in 1963 resulted in an "economic exodus" to Western countries.
7. Goli otok, an island of rocks in the Adriatic Sea, is a notorious former prison and labour camp. The Communists initially opened it to deal with supporters of Stalin and other Communist Party members. It was operational from the early 1950s till the late 1980s, when it was shut down.
8. DEMOS took over political power after the elections held on 22 April 1990. However, many influential members in DEMOS were former Communists and saw this as an opportunity for gaining political influence.
9. Some mass executions had already been organized during the war. There were no trials, despite the death penalty being allowed by the Penal Code of 27 January 1929.
10. On 15 May 1945, General Patrick Scott ordered the repatriation of soldiers and civilians who had surrendered to the British Army in Bleiburg, Austria, to the Yugoslav Army.
11. One should bear in mind that in 1941 Slovenia had a population of 1.45 million (Statistical Office of the Republic of Slovenia, 1991).
12. SNOS was a wartime legislative body of Slovenian Communists.
13. Črtomir Nagode was a founder and a leader of Stara pravda, a socialist political movement, which promoted a centrally planned economy and even opted for joining the Soviet Union during the war (Bajt, 1999).
14. In relation to asset monopolization, Milovan Djilas, a top-ranking Communist leader from Montenegro (Yugoslavia), published a book in 1957 about the emergence of a "second class" consisting of privileged Communist bureaucrats.
15. See the transcription of Ivan Maček's speech on the Slovenian economy on 13 November 1948 (Prinčič, 1992).
16. *Key legislation on confiscations*: Confiscation of Property and the Confiscation Procedure Act, 1945; Act on the Confiscation of Property and on the Course of Confiscation, 1946; Act on the Conveyance of Enemies' Property to State Ownership and on the Sequestration of the Property of Absent Persons, 1946. *Key legislation on nationalization*: Constitution of the Federative People's Republic of Yugoslavia, 1946 (Article 18 allowed ownership to be restricted, expropriated or nationalized, if so required by the common good); first Nationalization Act, 1946; second Nationalization Act, 1996. *Main legislation on colonization of land*: Agrarian Reform and Colonization Act, 1945; Act on the Establishment of the People's Agricultural Land Fund and the Distribution of Land to Agricultural Organizations, 1953.
17. Švent (1992) has compiled an extensive list of publishing activity by Slovenes in exile after the Second World War.
18. Villagers in Slovenia organized village guards as early as November 1941. After their defeat in 1943 by the Partisans, they formed the Slovenian Home Guard under Nazi German patronage. An oath-taking ceremony to the German Army took place on 20 April 1944 in Ljubljana. Pavlowitch (2008) writes that it was the priority task of the Partisans to eliminate anti-Communist forces in the country.
19. It is not our aim to argue this rather awkward statement.
20. Two examples are Jančar (1998) and Golob et al. (2005).
21. The operations of KNOJ (Korpus narodne obrane Jugoslavije) included maintaining security across the whole territory of Yugoslavia.
22. A long record of parliamentary commissions set up by the Slovene parliament teaches us that a group formed by a similar process of voting can by its nature hardly be con-

- cerned with anything other than political goals, i.e. maximizing their influence over the electorate in order to secure votes for the future.
23. By freedom we do not mean democracy, i.e. political freedom; freedom is a much broader principle.
 24. The database is available at http://www.mp.gov.si/fileadmin/mp.gov.si/pageuploads/2005/PDF/ostalo/baza_politcnih_obsojencev.pdf (accessed 11 April 2012).
 25. Social security benefits were granted automatically, whereas the rules and formal procedures regarding pecuniary entitlements were set by an Act establishing a Restitution Fund, which was authorized to underwrite and implement the payments.
 26. As a consequence, many former supporters of the Communist regime are still reaping the benefits of undeserved property, such as living in an appropriated house.
 27. US dollar, Yugoslav dinar and Slovene tolar.
 28. For example, collective action to undermine the political order, propaganda against the state, spreading false information. Most charges had a legal basis in the then valid Penal Code. However, individuals could also be charged and imprisoned for other reasons. For instance, documents reveal that a 42-year-old woman was prosecuted and sentenced to three months of hard labour in 1949 because "she had not been involved in any kind of productive work, but had only cultivated her garden plot" (Jančar, 1998).

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Conclusions

18

Transitional justice: Reframing the debate

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Introduction

Any democratic transition raises public debate about the nature and defects of the preceding regime. This is especially inevitable when there is a legacy of widespread human rights abuse and the legitimate voices of the victims have been suppressed. In such instances, a democratic transition will require some strategy for addressing these legacies. If a sector of the population is not “reintegrated” into a new democratic dispensation through the recognition of their prior violent exclusion and suffering, the new democratic polity will be fragmented and incomplete. As Alexander Wilde (1999) and others have noted, if such needs are suppressed or forcefully postponed, later on they may lead to “irruptions of memory” with destabilizing consequences. So, however problematic and contested such practices may be, they are also inescapable in real transitions.

But if transitional justice is both problematic and inescapable, what can we say about the ingredients for (relative) success or failure in different contexts? In 1984, when Argentina carried out the so-called “Trial of the Century” following the findings of the Sábato Commission about systematic human rights violations and mass disappearances under the military junta, the term “transitional justice” had yet to be coined. Two decades later, policies of “truth and justice” have become an almost mandatory part of the politics of regime transition. In 1984, the closest historical precedents for what the newly democratic government of Argentina did to address past injustices were the trials and purges of post-war Europe.

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Today, transitional truth and justice initiatives have been undertaken on four continents (Africa, the Americas, Asia and Europe), so there are innumerable examples that newly democratizing regimes can draw lessons from. Accompanying real-life developments, the literature and expertise have also grown exponentially. In 1984, there were at most two volumes that dealt specifically with this issue; today, constructing a bibliographical essay to account for all the studies on the topic would be a major undertaking.¹ There is now an *International Journal of Transitional Justice*, first published in March 2007; and an International Center for Transitional Justice, based in New York, set up in 2001, dedicated to assisting “institutions and civil society groups . . . in considering measures to provide truth, accountability, and redress for past abuses”.² Scholarly perspectives on transitional justice have also evolved since the precedent-setting Argentine experiment, and, with the accumulation of experiences and analysis, there is plentiful evidence of the various difficulties and pitfalls associated with transitional justice efforts.

Six main strands or approaches can be distilled from the literature. First, there is the work of *human rights organizations*. This can range from “moral denunciation” to sober and sophisticated reports on progress (or lack thereof) with transitional justice measures, analyses of legal issues, reports on the violations themselves, and policy-oriented documents recommending appropriate action. Second, there is an immense *legal-political* literature, which focuses on legal issues and on the national and international laws that are relevant to transitional justice, although some provide a “law and politics” perspective with a more nuanced understanding of realities on the ground.³ Third, there is the literature dealing with *victim trauma and recovery*. This literature does not necessarily pronounce itself on transitional justice measures per se, because it concentrates on the impact that abuse has on individuals and societies. The fourth strand, which was developed more fully with the rise of post-modern cultural studies, goes well beyond the scope of transitional justice and focuses on “*the politics of memory*”. The approach is more sociological and cultural, and it includes analyses of “how societies remember” their collective past, how past events are memorialized (the study of memory sites), and how narratives about the past are constructed, including analyses of how “history is written”. This partly overlaps with the fifth strand, the work of “classic” historians, mostly on the Holocaust and other, more historically distant, collective traumas. Finally, there is the comparative politics/“*political science*” literature, both conceptual and empirical. Most of this literature is within the “area studies” tradition, focusing on specific cases or comparatively on a set of cases; or conversely, examining comparatively one or more transitional justice policies or specific set of actors.

Overall, surveying the whole of this large literature, it is possible to identify some – but very few – attempts to present a “theory of transitional justice”. Indeed, there is no fully elaborated “theory of transitional justice” to speak of. Much of the literature remains prescriptive and universalist, and thus pays scant attention to local conditions. There is a tendency to see transitional justice policies as “a good thing” *tout court*. If contextual conditions are highly variable and consequential, as we believe, then it becomes very questionable whether “one-size-fits-all” policies of truth and justice are really the most appropriate method for dealing with the past in most cases. Furthermore, much of the literature is very short-term in focus, which is to say that it lacks “historical depth” and perspective. In part this is because most of the experiences examined are very recent, so there is little scope to stand back and take a broader view. In order to distinguish between policies that contribute to reinforcing rights and democracy and those that do not, such policies need to be studied in a more historicized and context-sensitive way. Thus, we should broaden the time scope backwards, taking the history of each country into account, and forwards, taking on board the subsequent “politics of democratization”. We believe it is useful to see transitional justice as part of the broader politics of memory, an ongoing process whereby people revise the meaning of the past in terms of what they hope to achieve in the present and the future. Succinctly, we need to “historicize” our perspective to counter what seems to us the unduly ahistorical, abstract and excessively normative views that often characterize writings about human rights issues.

In this chapter, therefore, we contend that there is no single model of transitional justice that applies universally to all recently democratized societies; and that not all transitional justice policies serve to improve human rights and democratic conditions. Some policies are political weapons or opportunities to misappropriate public resources, others are exercises in public recognition; and “truth-telling” raises complex problems of historical reconstruction and the attribution of blame. Equally, some memory-making affirms the values of democracy and tolerance and produces what Paul Ricoeur (2006) has called “happy memories” that establish a basis for future coexistence; but some lends itself to the cultivation of violence, a fixation with past suffering. It is necessary to engage in “an ongoing reflection and critical appropriation of the past”. Simply “enshrining past suffering in memory alone is as likely to blind one to new injustices and to contribute to a narrow obsession with self or narrow group as it is to play a sensitising role or stimulate the moral imagination” (Allen, 1999: 337). Michael Ignatieff (1996) even speaks of the “dream-time of vengeance”, whereby “crimes can never be safely fixed in the historical past; they remain locked in the eternal present, crying out for

vengeance". Thus, a "happy forgetting" may also be a part of memory work, and not simply an escape or omission (Ricoeur, 2006: 503). From this we conclude that only broad-based and historically careful exercises in transitional justice and memory can hope to stand the test of time and contribute to a more tolerant and peaceful future. Above all, the conceptual foundations of most assertions about transitional justice require more in-depth exploration than they frequently receive. Our view is that such evocative terms as truth, justice, memory, forgetting, forgiving, amnesty, reconciliation, reparation and guilt all require careful specification before we can hope to elaborate any encompassing and durable framework for the comparative analysis of transitional justice processes.

The chapter is structured as follows. In the next section, we point to some of the limitations inherent in both overly abstract and excessively normative approaches to the topic. Specifically, we first comment on a couple of suggestions by Jon Elster that, although provocative, strike us as too abstract and rationalistic to do justice to the complexity and diversity of the experiences under consideration. This is followed by some reflections on the global normative approach so well developed by Kathryn Sikkink in Chapter 2 of this volume. Despite its merits, we also detect some pitfalls arising from its prescriptivism and we illustrate these by reference to the companion chapter by Pilar Domingo (Chapter 3). After this, we review four contributions – by Roniger and Sznajder (1999), Wilde (1999), Habermas (1986, 1992) and Ricoeur (2006) – that between them go much further towards encompassing the richness and variety of all the transitional justice experiments under consideration in this debate.

The limits of rationalism and normativism

Let us examine, first, the limits of the rational choice perspective on transitional justice. One such perspective was developed as part of the "due process debate", which emerged primarily in the wake of the transitions in post-war Europe and in post-Communist Eastern Europe. Many countries in post-war Europe instituted policies for rigorous and far-reaching purges, extra-judicial executions, trials by criminal courts, official executions and mass jailing. Severity and speed were prized over adherence to the rule of law, standards of collective guilt were adopted, and there were serious procedural irregularities as courts came under great pressure to sentence people. Retroactive justice was applied in violation of the *nulla poena sine lege* (no punishment without law) principle. Treason, for example, was punished retroactively, Nazi parties were made criminal after the fact and, where the death penalty had been abolished, it was reinstated. More recently, some of the "lustrations" in post-Communist East-

ern Europe raised similar issues, and the border guard trials in Germany raised questions regarding the fairness of exemplary punishment, of trying the “small fish” and letting the “big fish” get away, and of punishing “due obedience” or obedience to a political order that was legal and was then declared criminal.

The relationship between political justice and democracy is undoubtedly a complex one. Speedy and severe responses can be “just”, but complying with due process creates a gap between what is “just” and “justice”. Courts may not be able to establish legally the guilt of people who “everyone knows” to be culpable. In a democracy there cannot be indiscriminate purges or mass trials that assume collective guilt; where such drastic measures are adopted, new injustices are perpetrated. Ironically, non-democratic successor regimes may be better equipped (in philosophical and psychological terms) to implement more “comprehensive” justice policies, owing to limited or non-existent pluralism or a lack of concern with due process (Barahona de Brito, 1997). By contrast, democratic successor regimes must balance the aims of truth and justice with respect for pluralism and the rule of law. It is likely, for example, that, in a context of democratic pluralism, such policies will be limited in scope, because democratizing elites have to take into account the view of all parts of the political and social spectrum (and some may demand trial and truth, whereas others may argue for “forgiving and forgetting”).

These problems, as highlighted by the experiences of post-war and post-Communist Europe and by “de-Ba’athification” in occupied Iraq, have led some analysts to prefer forgetting to punishment. According to Elster (1993), for instance, if one takes into account the basic principle of equality before the law and among citizens, and the fact that it is impossible to try everyone involved in repressive activities at various levels (including enthusiastic participants and the forcibly complicit), it is fairest to try nobody. He proposes a general amnesty and the abandonment of all attempts to compensate victims. But such a blanket forgetting can only be dictated and imposed. This view reflects a triumph of logical abstraction over social and historical context. Taken literally, it would have been “fairest” to allow Nazi leaders to remain at large in democratic Germany; or to ask the Cambodian people to accept coexistence with the leaders of the former Khmer Rouge. This view disregards the legacy of fear and the structures of power that can be expected to linger in the collective memory and to distort the free expression of democratic preferences.

Further, such a view ignores the fact that there is such a thing in jurisprudence (within rule of law traditions) as establishing precedents. Law is not an unchanging entity. New precedents are set. Hence, “justice” is always to some extent political, always about finding a balance, based on a historical consensus of what is appropriate at that time and in that place,

between established law and due process and selective/political justice. The choice is not between doing something correctly and doing nothing, but between doing things in ways that are context appropriate rather than “right” in a purely abstract sense.

The logic underlying the other approach is that “rational choice theory is far more than a technical tool for explaining behaviour. It is also, and very importantly, a way of coming to grips with ourselves – not only what we should do, but even what we should be” (Elster, 1993: 179). The limitation here is that it abstracts from the historical context and collective memory dimensions of transitional justice.⁴ Transitional justice starkly highlights the eternal contrast between what we hope for and feel is right and what we are actually able to do. However, the rational choice approach concludes with a very negative view of attempts to do justice, highlighting the fact that all such attempts are bound to be the source of new injustices – and so arrives at the apparent non sequitur that it may be best to leave the past alone. We prefer to stress the ineludibility of this task and the scope for doing it better rather than worse. Our perspective directs attention to the conceptual and theoretical complexity involved. Below, we draw on the growing comparative evidence available in order to derive some constructive middle-range generalizations about “irruptions” of memory. The key benefit of bringing in this comparative dimension is that it enables us to overcome the short-termism of much standard analysis, and allows us to relativize what are often posed as stark and overly simplified “either/or” conflicts (for instance, between peace and justice, or between due process and rights violations).

Let us now turn to one of the concepts that highlights the challenges of navigating a path between normative universalist positions and retaining an awareness of context, that of the “justice cascade”. Ellen Lutz and Kathryn Sikkink (2001) have proposed that the Justice Cascade is a manifestation of what Cass Sunstein (1997) has called a “norm bandwagon”. Sikkink argues in Chapter 2 in this volume that, just as a norm bandwagon occurs when “the lowered cost of expressing new norms encourages an ever increasing number of people to reject previously popular norms, to a ‘tipping point’ where it is adherence to the old norms that produces social disapproval” (Sunstein, 1997: 36), a Justice Cascade is a “rapid and dramatic shift in the legitimacy of the norms of individual accountability for human rights violations, and an increase in actions (such as trials) on behalf of those norms”. Sikkink also argues that human rights trials and other transitional justice mechanisms are part of a domestic, regional and international trend towards accountability globally, as illustrated by a survey of human rights trials over a 26-year period covering 195 countries and territories.⁵ As she shows, between 1979 and 2004 over two-thirds of transitional countries used either trials or truth

commissions as a transitional justice mechanism. Thus, “the use of a truth commission and/or human rights trials among transitional countries is not an isolated or marginal practice but a very widespread social practice occurring in the bulk of transitional countries”.

Sikkink then goes on to argue that the enforcement literature, the deterrence literature, the rational choice literature on the causes of repression, and the norms literature support the hypothesis that human rights trials will lead to a decrease in human rights violations. Here we encounter the “liberal optimistic” end of the spectrum of views on norm diffusion in which desirable norms progressively reinforce positive practices on the ground, providing the basis for the evolution towards ever greater respect for rights. Although it is undeniably the case that human rights norms have become denser, that new human rights and justice institutions have been created, that new actors have emerged with a capacity to pursue human rights violators, and that human rights discourse is now a part of the political landscape as never before, there are problems connected with “rights inflation” that should not be underestimated. As initially attractive norms become institutionalized and generalized they risk being appropriated and manipulated by those with most power, while those threatened by their enforcement become more ingenious at deflecting their impact. Thus, historical and context-sensitive analysis would lead us to question any overoptimistic generalization of the norms diffusion model. Sikkink does acknowledge that norms may not necessarily translate into better human rights practices on the ground. This suggests to us that more attention should be paid to context and to history. After all, post-9/11 events show that even the most democratic of Western leaders can find themselves taking responsibility for acts that, if committed by their enemies, they would classify quite harshly.

Sikkink claims that transnational justice acts as a deterrent to target individuals, who are identified as those who have committed human rights violations. However, for people who have already committed violations, trials are no deterrent in the sense that they will deter them from committing such crimes. The threat of trials will deter them from traveling abroad, perhaps, but not from committing human rights violations. These crimes are already a *fait accompli*; and, as the current controversy over Darfur indicates, those who are in too deep and have no hope of covering their tracks may be driven by external threat to commit even greater abuses. One might counter that the deterrence effect does not apply to those who have already committed the crimes and that the “target individuals” are therefore those who have as yet not committed human rights abuses but may one day be in a position to do so. But in this case, whether future violators are deterred will depend less on the transnational justice trends of the 1990s and 2000s and more on whether the

mechanisms to prosecute crimes exist when such people are in a position to violate rights. In other words, there are the imponderables of history and context. Further, if the central purpose of deterrence is to contribute to better human rights conditions in the future, the “audience” that must receive the lesson of deterrence comprises citizens of national polities because, although justice may be transnational, crimes are always “national”. And, to understand how such messages are absorbed locally, one cannot but look at local conditions.

Global overviews fail to take *variability* sufficiently into account. In a survey-based approach, all truth commissions and trials are equally valid. But, in reality, the “truth” of some commissions may be very partial, and in some cases the results of such commissions may in practice remain unknown to populations so that their potential benefits are extremely limited. Neither can a survey approach distinguish between trials that respect due process and serve as constructive “political theatre” to educate people about the value of the judiciary and justice, and those that are little more than “legalized” political revenge. The kangaroo court trial of Saddam Hussein provides a sorry recent illustration of this phenomenon. Not all trials publicize equally, and not all publicize the same lessons (some may teach the lesson of legalized revenge). The only way to find out what is going on is to excavate local conditions and establish the “who, why, what, when” of specific justice policies.

Because of this context variability there can be no one single model of “transitional justice”. In Chapter 3 in this volume examining the connections between the different paths of transitional justice in Latin America, and how the rule of law and judicial reform have evolved in much of the region over the last two decades, Pilar Domingo shows how the rule of law depends on how judicial reform may have improved the effectiveness of accountability mechanisms. Trials for past human rights abuses require courts that are minimally receptive to such cases, minimally credible and capable of guaranteeing due process. “Key to understanding the judicial dimension of dealing with past human rights crimes is the question of how courts are situated historically, politically, institutionally, and in terms of the legal culture of the judicial community”. Domingo acknowledges that there is norm thickening at the domestic, regional and international levels; there is the growing power of a global discourse on human rights; and there are more active civil societies that mobilize legal efforts at the national, regional and transnational levels; all of which point in the positive direction emphasized by Sikkink. But she also emphasizes how variable the reality is: justice sector reform “has left an uneven patchwork of institutional and legal innovations that have in the main not resolved many of the challenges of rule of law construction”, so that for the most part “we are talking about incomplete and partial reform processes”.

Moreover, although there is a greater density of international norms and a judicialization of politics (the *routinization* of judges being in the public limelight), which appears to be a positive “cascading” and “rule of law” effect, this positive trend is distorted on the ground as “the courts become a new battleground for disputing power relations and the distribution of resources and . . . law is being appropriated by different actors as a useful instrument to wage these battles”. Domingo also warns that “judicial rulings are becoming more politically visible”, echoing our cautionary note above about “legalized revenge”.

In fact, the recent accumulation of diverse experiences of democratization provides us with a large comparative stock of evidence, including a range of examples of the various difficulties and pitfalls that can be associated with such policies. This includes experiences drawn from quite a few new democracies where it can be said that the main political institutions of the state remain weak, and where attempts to come to terms with the traumas of political violence are far from settled. (Indeed, in some important cases such as Colombia and Iraq, massive political violence remains ongoing despite internationally approved processes of “democratization”.) The post-Cold War world that was supposed to inaugurate “the end of history” has instead brought into question optimistic liberal internationalist assumptions about the cascade effects of human rights values and norms. Nowadays, even the most vocal advocates of “democracy promotion” also deploy large-scale state violence against disorderly civilian populations, and even tacitly condone torture. How can these realities be squared with the idea of truth and reconciliation policies aimed at establishing a stronger democratic social contract?

Finally, therefore, the problem of *reversibility* requires more attention when discussing norms cascades. Whereas the norms cascading view tends to imply ever-upward progress, events since 9/11 show that human rights gains are reversible, even in the most consolidated democracies. During the “end of history” 1990s, the optimism inherent in the view that it was only a matter of time and effort before the world as a whole would gradually succumb to the obvious benefits of liberal democracy and human rights may have seemed appropriate. But in the much darker 2000s, when it has become obvious that the “promoters” of democracy and rights are themselves tainted by the use of extreme force and torture – the very evils that truth and justice efforts are meant to denounce, punish and curb – this is no longer so convincing.

In short, broad comparative overviews that quantify transitional justice efforts are very useful to convey a general picture, but they are not so helpful when it comes to understanding quality and meaning. For that, history and context must come into play. To avoid the prescriptive pitfalls and overly linear views of historical progress, moral concerns need to be

evaluated within a comparative historical framework. One has to be wary of overly optimistic views of human rights rules and values “trickling down” and generating positive change over time. Just as one might suspect the liberal economic “trickle down” theory of being too simplistic, the “cascading” of human rights remedies should be viewed more critically. In the same way that transitologists and scholars of democratization need to re-examine the “sin of the template” – the inbuilt assumption that the established Western democracies are the template against which other experiences are judged – so students of transitional justice should set aside assumptions about the “best models” and adopt more context-oriented analyses. Different contexts and different traumas may require different practices, so there is not necessarily one right way to promote transitional justice. In fact, each possible practice has both positive potential and possible harmful consequences. Emphasis on one practice can be at the cost of neglecting the alternatives.

Broader perspectives on transitional justice

Below we present some alternative approaches that, taken together, provide a more in-depth and historicized treatment of the topic. The issues we cover concern collective identities; irruptions of memory; the theory of communicative action; and truth-telling and forgiveness.

A “collective identities” perspective

Above, we examined two attempts at middle-level theorization – Elster’s rational choice perspective and Sikkink’s view of norm progression. We focus here on a third, exemplified by the work of Barahona de Brito (2001) and Roniger and Sznajder (1999), which emphasizes transitional conditions as well as context and history. The starting point is what might be loosely termed the “balance of power” between authoritarian rulers and their democratic challengers. Short-run transitional justice “outcomes” are broadly conditioned by this balance, but this is only a *starting point*. To understand how societies deal with past repression, these studies consider not just the transitional context but also political and institutional authoritarian legacies, longer-term historical legacies (such as prior experience with democratic government, perhaps the history of churches and their position with regard to human rights issues, among others) and the international context and the historical timing of each transition process. This perspective is therefore macro-comparative in structure.

The argument of Roniger and Sznajder (1999) is that one must look at the social, political and legal traditions of each country; the constellation

of social and political forces; the moment of transition and the sequence of options that emerge therefrom; the way in which each society reacts to the experiences of neighbouring countries; patterns of public mobilization and debate; and the symbolic involvement and collective catharsis of the different sectors of the population. Their study is one of the few that combines transitional justice and the politics of memory. Particularly rich are the last two chapters of their book, on memory and forgetting and on the transformation of collective identities in the Southern Cone of Latin America. They draw on John Davis's distinction between societies that follow the "never again" model and those that tend to think that everything is "always the same" – the former focusing on an undefined future, the latter, more traditionally, on what is immutable. They argue that the Southern Cone countries are situated somewhere between the two extremes, looking forward to the future but also tied to the past. The absence of commemorative sites suggests that there is no broadly shared and institutionalized memory of the past, that recognition of past abuse is only partial, and that many sectors engage in battles over hegemonic interpretations of the past to prevent or promote the canonization of victims. The argument mirrors Elizabeth Jelin's about struggles over sites of memory.⁶

Roniger and Sznajder conclude that such memory issues are necessarily reopened from one generation to another, and that efforts to interpret the past have had an ambiguous impact on collective identities in their countries of study. Perhaps, they argue, the broadest implicit message in continued memories of historical violence is an appeal for the renunciation of violence as a force configuring history. But they ask whether such a renunciation is viable, particularly where it has such deep historical roots. Although the original forces of violence may have been ideologically marginalized, new forms of exclusion that perpetuate violence in different ways can also emerge, reflecting the deep marks left by authoritarian violence. Thus, in the Southern Cone, defending human rights remains a central aspect of defending democratic institutions, even in the twenty-first century.

The "irruptions" of memory perspective

With the exceptions just noted, transitional justice and memory studies have developed along separate paths. Transitional justice studies are part of "transitology" or, more broadly, part of comparative politics and the political science family; by contrast, memory studies belong to sociology and cultural studies. Both emerged in the core democracies of the West after the Second World War and as emancipating currents of thought shaped and constrained by the intellectual climate of the Cold War. But

each has evolved separately and focused on different themes. This is partly a result of specialization: political scientists tend to leave aside the insights produced by historians, cultural analysis and people working in other fields. Specialists in victim trauma have an insight that strategic interaction theorists cannot easily incorporate into their models; a focus on elite bargaining and top-down policies will tend to downplay the role of civil societies and bottom-up initiatives.

This division also results partly from the nature of the topics: transitional pacts are finite in time, whereas the way each society views its past (and consequently imagines its future) is a process that has no natural beginning or end. Transitional justice refers to various government-sponsored efforts to come to terms with the past in a period of regime transition (*official or public memory*), while the politics of memory is about how a society interprets and appropriates its past, in an ongoing attempt to mould its future (*social memory*). The politics of memory extends well beyond the transitional period and has no end point, since memories are revised constantly to suit current identities and new visions of the future. At its broadest, social memory-making is about the creation of imagined communities and concerned with the construction of a moral order. It defines the scope and nature of action, reorders reality and legitimates power holders (Anderson, 1991). Historical memories and collective remembrances can be instruments to legitimate discourse, create loyalties and justify political options. Such memory work is likely to remain essentially contested, or at best just partially completed, when looked at from a long-term and more multi-layered, context-sensitive perspective. Our view is that these two disciplinary perspectives could be usefully brought together, in particular by incorporating the notion of “irruptions of memory”. Moreover, by expanding our range of cases beyond the end of the Cold War, it should be possible to extend transitional justice into a more encompassing and durable framework.

The work of Alexander Wilde (1999) shows how it is possible to bridge the divide. As he notes, the arrest of General Pinochet triggered a generational shift in Chilean discourse on the hidden costs of the 1973 coup and on the unresolved injustices carried over into the 1989 redemocratization settlement. Although a substantial current of Chilean public opinion continued to view the 1973 overthrow of the constitutional order on balance in a favourable light, many younger people – even among conservative sectors – were shocked and dismayed by the details of the crimes being pursued through European courts. The Chilean judiciary was belatedly prodded into taking up these issues domestically, and forensic investigations of grave sites and torture centres brought official recognition of atrocities that had been downplayed or denied. What this

example demonstrates is the capacity for suppressed and overlooked memories to “irrupt” decades after a regime transition had supposedly laid such issues to rest. A painful process of rediscovery, reassessment and possible restitution can remain latent until some event triggers an irruption of memory.

The Chilean situation is not exceptional, but rather is an inherent potentiality, a long-term recurring pattern that needs to be incorporated into any adequate comparative analysis of either justice transitions or democratization pacts. The current Spanish process by which the circumstances of 130,000 executions carried out by the Franco regime between 1936 and 1954 are being documented for official recognition by Judge Garzón confirms that even in Spain, and even after half a century of forgetting, such irruptions have the capacity to destabilize the collective memories of a democratic society. (The legal backlash against Garzón’s anti-Franco initiative within Spain is an instructive contrast to Spanish pride in what the same judge achieved against Pinochet. It is easier to condemn the crimes of rulers in other nations than to digest the historical legacies in one’s own nation.)

As Wilde’s work shows, one way to gain greater breadth is to extend the frame of reference beyond the period of transition and take on board the longer-term dynamics of democratization. When the time-frame is extended – and this was a crucial issue in the debate among Holocaust historiographers – the tendency to judge things in “black and white” seems to diminish. A truth commission set up by a fresh democracy is a “good thing”; but 10 years later, if the democrats who set it up are also responsible for violations, then the truth of the commission – in addition to its undoubted intrinsic value – is also a “truth” that boosts the moral legitimacy of the new violators. In addition to extending the time scope, greater depth can also be gained by establishing a stronger analytical link between “transitional justice” and “the politics of memory” or studies on how “narratives of the past” are constructed. Although the two must be distinguished for the sake of clarity, a more integrated vision could generate analyses that take us beyond the more simplistic, black-and-white assessments, beyond essentializing political science models, and into a more context-sensitive, long-term view of how democratic societies can progressively, if jerkily, come to terms with the past. Long periods of apparent forgetting can elapse but, as the “irruptions” insight has demonstrated, in open societies new generations tend to revisit questions that had been set aside or marginalized and infuse them with new potency. This is how we think the insights of memory studies can usefully deepen the findings and debates that have characterized the literature on transitional justice.

Communicative action and transitional justice

Transitional justice is a public deliberative (and/or judicial) process intended to underpin the transition to a new (presumably democratic) regime. It seeks to articulate and publicize a narrative of national political change. *Before* the transition there were violations of rights, abuses of power and forms of arbitrary and unaccountable rule that, in the course of the transitional justice process, are exposed to public view in order to elicit collective condemnation and consequential political agreement on guarantees against their recurrence under the *future* (democratic) regime.

Any such theatrical performance requires a defined audience, a resolution of the dramatic tension and a unifying moment of closure, at which point participants and spectators alike are supposed to come together around an agreed set of conclusions. These conclusions constitute the outcome of the transitional justice procedure, and they require a coherent deontological structure. That is to say, they should identify past wrongs, future goods and the changes required to underpin a permanent shift from one collective state (“authoritarian rule”) to a successor (“democracy”). For the transitional justice narrative to be reasonably coherent and convincing, it needs to set out a conception of what was wrong in the past and how those wrongs can be averted in the future, something that amounts to a collective inter-subjective agreement (a “pact”, a “consensus”, a “constitutional bargain”) over what is to count as a democratic outcome in this particular context.

All this bears a striking resemblance to what the German political philosopher Jürgen Habermas has set out (in more abstract terms) in his “theory of communicative action”, through which actors coordinate actions and pursue joint or individual goals on the shared understanding that these goals are inherently positive or reasonable, and which is intended to improve on alternative accounts of what lies at the core of any modern democracy (Habermas, 1986, 1992). The key premise is that the engagement of autonomous citizens in this kind of action is constitutive of a deliberative democracy. Democratic norms are generated by and “discovered” through these interactions. Habermas seeks to privilege the discovery of such norms, a process analogous to the “discovery” of truth and reconciliation through transitional justice procedures, in contrast to what he considers the Anglo-Saxon tradition of identifying an outcome through the application of an external stipulative definition.

Alternative understandings of democracy range from the excessively broad and all-encompassing (in which it becomes impossible to distinguish democracy from a “good society” in its totality) to the excessively narrow (the so-called “procedural minimum” conception in which all that is needed are periodic, fairly conducted competitive elections that make

the rotation of public office holders in accordance with electoral preferences possible). In between these two extremes there is a variety of overlapping but competing conceptions that revolve mainly around (1) how much weight to give to *political participation* (not an ingredient that would be important if the good society was securely in place, and also not a mandatory requirement under the narrow procedural definition); (2) how far to emphasize the *equality of citizenship rights* and duties (not in tension in the “good society”, and not valued in the narrow procedural conception); and (3) how to guarantee *personal freedom* under a neutral *rule of law* that also holds *rulers to account* for their discharge of their public responsibilities (more or less taken for granted in a good society, and only implicit in the narrow proceduralist account).

All variants of a transitional justice narrative necessarily touch on those three interrelated issues. The “bad old” regime is to be stigmatized for its failings under the second and third headings, whereas the incoming democratic order (whatever its precise characteristics) is supposed to be grounded on a surge of political participation around values of responsibility, accountability and inclusiveness that are to be affirmed through the transitional justice process and then to be promoted and reaffirmed as constituent elements of the new regime, not only at election time but throughout its existence. These three components of democracy are also central to the communicative action theory of a democratization process. This theory is obviously more precise than any generalized conflation of democracy with good outcomes in general and more encompassing than the view of democracy as a mere technique for organizing elite circulation.

The theory of communicative action has considerable advantages for our purposes here. It could help to integrate the normative and empirical sides of transitional justice and to bridge the disciplinary divides in democratization studies, thereby aligning them more closely with discursive approaches and with memory studies. The Habermasian approach offers an attractive strategy for grounding the normative requirements for democracy construction – with its rule of law compulsions – on ethically compelling and empirically testable foundations. It is built around a notion of popular sovereignty that is articulated and monitored through deliberative procedures. Transitional justice processes – with their associated sanctions, either legal or moral – fit neatly within this broader framework and can be normatively grounded and empirically tested and compared in parallel with his larger proposal.⁷

Yet any attempt to encompass all recent experiences of transition from authoritarian rule and the constitutionalism of new post-transition regimes within this framework will encounter a variety of awkward cases, from Afghanistan to Zimbabwe. The diversity of the empirical cases

exposes the limitations of the theoretical proposal. To use Habermas's term, some "lifeworlds" are more truth and justice friendly than others (Habermas, 1992). Either the definition of "communicative action" has to be so narrowed as to exclude any outcomes that may fall outside a core understanding of democracy, or it turns out that the idealized process and outcome is only one option among several possibilities. After all, in actual practice, communication between people is not just the idealized communicative action identified by Habermas; it can take the form of sermons, prophecies, traditionalist appeals, as much as secular and egalitarian affirmations of citizenship.

All of these variants of public discourse can be used to create support for a new post-transition political order with its rule of law authority. Indeed, they frequently turn out to be as influential as the calm and fair-minded liberal constitution-writing that is hypothesized as the core element of the Habermasian theory. The theory of communicative action is associated with Habermas's theory of discourse, the idealized prerequisites of which could exceed the capabilities of actors in most real situations. Consider such theoretical requirements as not excluding anyone who can make a relevant contribution; speaking freely and honestly without deception or self-deception; having an equal voice; and preventing any coercion from entering into the procedure. Even taking account of Habermas's concession that these are standards "for a self-correcting learning process", and so will always be variably fulfilled, they do seem extraordinarily demanding. In some situations, the scope for deliberation is so limited as to severely cripple a transitional justice process.

In the same way, transitional justice processes can either be defined so narrowly that only those exclusively oriented towards core democratic values get included; or a broader comparative survey would have to include too many other forms of communicative action. Even leaving aside the influential but aberrant examples of victor punishment of the vanquished (from the Nuremberg trials to the kangaroo court execution of Saddam Hussein), transitional justice hearings frequently include special pleading for some categories of victim (for instance, Albanians more than Serbians; Jews more than Gypsies; Tutus rather than multicultural Hutus). In any case, in practice communicative action is also likely to involve other choices that may not be seen as truly democratic, in the sense of neutrally reconciling liberty with equality. Such choices might include forgetting, a clean slate (*borrón y cuenta nueva*), selective guarantees against retaliation or prohibitions on restitution, among others. These are choices that any rule of law regime will have to make, because courts need clear guidance on the principles to apply when adjudicating between rival claimants. The choices that are made may be democratic in the narrow sense of being procedurally legitimate without meeting what

many would consider the minimum normative standards for substantive justice. Thus, unfortunately, although transitional justice processes can be neatly fitted within the Habermasian paradigm, that does not exempt them from the conceptual limitations of his idealized schema. By broadening the debate to include this dimension of the comparative democratization literature, we once again uncover conceptual and theoretical lacunae underlying the transitional justice approach.

Reconciliation and forgiveness: A view from Ricoeur

The emblematic debate about reconciliation illustrates the pitfalls of generalizing a monotonal moralistic discourse. This debate was most fully developed as a result of the South African experience, although the Chilean precedent was also important. It was a term that emerged as a result of the influence that churches and religious figures have had in the transitions in both countries. Just as the link between punishment and democratization is open to debate (and, conversely, the link between peace and forgetting is disputable), so the connection made by many between truth-telling and reconciliation and/or forgiveness merits more critical analysis.

As the critics pointed out, it is artificial to present reconciliation or forgiveness as collective political objectives. Jonathan Allen (1999) writes very eloquently about this in his critique of “reconciliation” in the South African context, where *ubuntu* or “recognition of the humanity of the other” was a central slogan of the process. What was meant by reconciliation? What was the “rainbow nation” described by Desmond Tutu? Could one “make whole” what was torn asunder? Was there ever such a “whole” to begin with? Is it possible to create an epic for a single, consensual imagined community? Individual victims may forgive or even become “reconciled” with their victimizers, but can a process of this kind be reproduced at the national level? It is highly unlikely. It is likely that old hatreds will persist and that many will not forgive, be they victims or even victimizers who feel they fought to “defend the nation” or some other such abstract value.

As Ricoeur reminds us, reconciliation comes about as a result of forgiveness, but forgiveness cannot be legislated or institutionalized: “forgiveness can find refuge only in gestures incapable of being transformed into institutions”, because “[w]hat is at issue here is nothing less than the power of the spirit of forgiveness to unbind the agent from his act” (2006: 458, 459).⁸ Making such claims for truth commissions, then, may lead people to become disappointed when they cannot produce the transformative effects they seem to promise. Further, as Allen (1999) argues, reconciliation as unity can mean many things. Unity may be elusive

and even undesirable if it is conceived of in a non-democratic way. By contrast, consensus around the need for democracy, a system of rules, laws, procedures and values that call for peaceful coexistence among all kinds of groups, whether friendly or not, is a lower threshold and a more practicable possibility. So, rather than talk about reconciliation, it may be more appropriate to ask whether accountability processes can contribute to affirming democratic governance and peaceful pluralism.

Whereas some have held reconciliation up as the key goal to pursue, others have rejected forgiveness for its kinship with impunity. Again, we should think critically about this. Derrida (2001) asserts that it is impossible to separate the guilty person from their act by forgiving the person but not the act, since that would be to forgive a “subject” other than the one who had committed the act.⁹ Nor can forgiveness be conceived of as an exchange (forgiveness requested, forgiveness given), since there is something radical about it that has nothing to do with exchange: “love our enemies unconditionally” is the “impossible commandment” and the only one that matches “the height of the spirit of forgiveness. The enemy has not asked for forgiveness: he must be loved as he is” (Ricoeur, 2006: 481). Forgiveness, that is, is not an action prone to institutionalization. In order to get a broad, historical, humanistic perspective on “the evils we do to one another” in the name of one political project or another, we need to retain, alongside our capacity for outrage and solidarity with the victim, a capacity to see the human-ness of the torturer.

Moralistic language can also obscure some crucial, if fine, distinctions, such as the one between forgetting and amnesty. Ricoeur points out that whereas commanded forgetting or amnesty do not serve societies well – “in rubbing shoulders in this way with amnesia, amnesty places the relation to the past outside of the field in which the problematic of forgiving would find its rightful place along with dissensus” – there is such a thing as “happy forgetting” (2006: 455, 412). This forgetting is not amnesia but rather a process of mourning, a “working through” the past, such that traumatic memories are not just understood but accepted. This kind of forgetting (mourning embodied) is what permits reconciliation and the formation of “happy memories” (those that are useful to move towards a positive future) and of an “appeased memory” in which things are remembered without anger or prejudice. He suggests that what is important in such memories is not that they are factually precise but that they are exemplary – they are useful for future generations.

Some cases of prolonged war or civil conflict, such as the Arab–Israeli conflict, make it very obvious that there can be no “justice” or “truth” that does not take the truth and justice of both into account. Perhaps because it is a conflict between peoples (rather than one within a single polity) it becomes easier to see, from a third-party point of view, how taking

sides or labelling one side evil and the other the victim is neither credible nor the way to find a solution. In this particular example, neither side can hope to defeat the other and impose a solution and a “self-redeeming narrative”. Both sides are psychologically caught up in a long historical “dance of death”, and there is no transitional truth and justice that can work until both sides agree that it is better to live in peace than to “win the argument”. But this third-party distance may also be necessary in cases where it may be harder to accept the need for solutions that involve both sides and are not simply policies imposed when the “good guys” win.

For obvious reasons, any human rights issue is particularly prone to a “good vs. evil” perspective. We tend to divide actors into “evil ones” (the torturers) and “good ones” (the victims). But many torturers (clearly for most soldiers following orders) are also victims; most people involved in abuses are ordinary people caught up in terrible times. And, as studies of the East European cases show, guilt is often so “collectivized” that only exemplary trials (and thus “selective justice”) are possible. The argument here is not that justice should *not* be done but rather that we need to think about these categories in a critical way. Although one cannot but support rule of law solutions to torture and other abuses by state agents, the “moral perspective” has its dangers.

Appropriateness vs. “rightness”: Recognition of the other and *thymos*

This chapter has endeavoured to convey the complexity of the underlying issues raised by the politics of memory. It has tried to show why truth and justice practices – for all their diversity and inner tensions – are inescapable parts of democratization and need to be taken very seriously. But it has also argued that they need to be assessed with full awareness of their problematic theoretical underpinnings. If they are taken too much on their own terms, they risk generating as much injustice in the future as they uncover in the past, feeding moral one-sided certainties and intolerances.

We have argued that there is a need to broaden the time horizon and soften the moralizing for comparative purposes; we have also argued that we need to bridge transitional justice and memory studies, and that the “irruptions of memory” perspective exemplifies how this might be done; we have noted how norms cascades have some validity as a way of linking discrete processes, but that they can be reversible and are always contextually contested; and we have also exemplified how an overly abstract perspective, such as that found in rational choice, misses crucial

dimensions. Whereas the moral view tends to invoke unquestionable foundational certainties, truth and justice, memory studies, amnesia or reconciliation are all much more shifting, socially constructed, perspectival or, in Gadamer's (1989) hermeneutic parlance, "prejudiced". From our comparative historical perspective, it is what a given society comes to understand about its past that matters most, and this shifts over time. This is not to say that crude relativism wins the day: there *is* untruth and injustice at the abstract level; it is just that there are different contextual ways of interpreting those generalities in each society.

Thus, we have highlighted a comparative understanding of how societies view justice and rights, as exemplified in the work by Roniger and Sznajder; we have noted how Wilde's work on irruptions of memory broadens the time-frame and adds depth to an analysis of transitional justice; by reference to Ricoeur we have shown that individuals remember, forgive, reconcile or continue to resent, but that scaling that up to the collective level may be somewhat artificial and incomplete. Deliberation and memorialization are devices that can help with this scaling-up procedure, but they can never fully overcome the underlying separation of subjectivities. Finally, we have also shown how Habermas's notion of communicative action presents a procedure for "discovering" the morality that might guide democratic outcomes – and, in this instance, transitional justice processes. He does this by showing that the specification of broad values is the result of interaction between specific people inserted in specific "lifeworlds", although we have noted that his idealized conditions for free discourse are problematic in practice.

In this conclusion, we would like to explore the idea that the quest for esteem and recognition is perhaps a universal driver of human participation in collective life and at the core of the need to redress past injustice. The underlying rationale for truth and reconciliation is, as Ricoeur argues, that relations between human beings are in large measure about a quest for mutual esteem for the worth that each of us has by reason of both our common humanity and our individual uniqueness. This echoes a much earlier Platonic idea of *thymos*, the part of the personality that encompasses the need for recognition and that prompts people to be motivated not just by some calculation of self-interest but also by pride, indignation and shame.¹⁰ *Thymos* was the quality that gave man moral autonomy, and it coexisted with reason (*logos*) and animal appetites (*eros*). Whereas *eros* ensured physical survival and *logos* mastery of life's complexities, *thymos* was the cause of action beyond reason and of risking all out of pride or indignation, to stamp out shame or gain recognition. Fukuyama (1992) has claimed that liberal Western market democracy is the best system we have found to sublimate the thymotic urge, but that urge remains alive and well even in the most "pastoral" Western

settings.¹¹ Wherever and whenever there has been a gross denial of recognition of even the humanity of the other, then transitional justice exercises are called for, even though what states and civil societies can produce will always fall far short of what the “bristling hurt” of the surviving victims will feel is necessary.

“Recognition of the other” is important, because this is central to any legitimate truth and justice exercise. Such policies carried out under even minimal rule of law conditions imply “recognition of the other” (the “other” as a citizen with rights and duties, the right to fair trial, the duty to treat others as human beings). When no such recognition exists, such policies are not possible, or can be regarded as pure revenge. According to Ricoeur, the logic of justice (a logic of equivalence, of an eye for an eye) is one that must be tempered by “consideration”. This does not mean “not doing justice” but rather means introducing compassion into a logic that inherently tends towards vengeance. Ideally, rule of law justice has mechanisms built into it that ensure at least a minimal “consideration” and “recognition of the other”.

It is only because of their acceptability to collective opinion in the present that some past actions are judged “natural” whereas others are seen as outrageous. Our views keep shifting – on slavery, the death penalty, torture, heroic soldiering, arms-trafficking and opium- or tobacco-trading. Our contemporary priorities promote omissions or suppressions of memory, as well as evocations. Thus, authoritarian regime memories are no doubt particularly false and brittle, and the transition to democracy does create the possibility of a more genuinely plural and corrigible historical memory. Still, there are elements of reality in the memories of most defeated and discarded regimes, even the more manipulative and authoritarian ones. There are also strong elements of falsification in the “history of the victors” told by today’s ascendant democracies. So what assurances can we seek to help democracies achieve and sustain the higher level of self-understanding needed to differentiate them from authoritarian regimes?

Transitional justice processes can help as a necessary but partial component of democratization, understood in terms of the need to live with the antinomies and instabilities of any large-scale political settlement. The relative appropriateness of any particular experiment depends on the context. There needs to be a narrative frame within which the discourse of wrong action can be integrated. But all narratives of origin/tradition/purpose exalt some antecedent behaviour as meritorious and castigate/exclude others. In this sense, the politics of memory is never innocent, and often the narratives are harshly discriminatory. So memory is both indispensable for social existence and always an interested and selective interpretation of the past.

Hence, the test of success or failure for the experiments is too stark. That of appropriateness is better. The measure of appropriateness must be partly ethical but also partly practical. It also needs to be contextual – the citizenry must learn to accept that what democratic elites judge to be an adequate settlement is indeed recognized as “appropriate” by the larger society. And this depends not solely or even primarily on the inner content of the truth and justice policy adopted; it mostly depends on the broader effectiveness of the democratization process in which it is embedded.

Notes

1. As far as we know, the first such effort was undertaken by Barahona de Brito (2001), but there are now various bibliographies, notably at <http://sites.google.com/site/transitionaljusticedatabase/> and <http://www.peacemakers.ca/bibliography/bib44forgivenessapology.html> (accessed 12 April 2012).
2. Available at <http://ictj.org/about/> (accessed 9 April 2012).
3. One important area of study within this strand concerns transnational justice.
4. In an otherwise excellent treatment, we see the failings of an overly schematic approach in the “five retributive emotions” discussed by Elster (2004). The causality between emotion and policy is too simplified: many varied and conflicting emotions can coexist in one person, and one cannot predict a policy option on that basis. The division between emotion and rationality is also suspect, as various philosophers and current neuro-science point out. Out of a huge literature we select Putnam (2002), Hampshire (2000) and Damásio (2003).
5. Sikkink explains that the domestic level includes national trials for individual crimes committed in *that* country; the foreign or transnational level includes trials in one country for violations committed in another; and the international level includes trials for crimes committed in one country resulting from cooperation among various states, usually on behalf of the United Nations.
6. It should be noted here that Jelin (2003a, 2003b), along with Wilde and with Roniger and Sznajder, is one of the trio that has most explored the links between transitional justice and memory.
7. In practice, of course, all the actual cases of democratic deliberation and transitional justice-making that we are considering here necessarily combine strategic action with communicative action. Habermas’s theoretical exercise separates the two, but in fact all such deliberation requires the commitment of political actors who would be wasting their time and defrauding their followers if they took part with no strategic intentions.
8. Ricoeur says that forgiveness is part of the “same family” as joy, wisdom, extravagance, or love, hope and faith (2006: 467). Forgiveness is kept out of politics by virtue of its relation to love, and there is no reliable or possible institution of forgiving.
9. Ricoeur disagrees: on the matter of “unbinding the agent from the act” he argues that a much more radical uncoupling is called for: “Under the sign of forgiveness, the guilty person is to be *considered capable of something other than his offenses and his faults*.” It is an action that amounts to saying “*you are better than your actions*” (2006: 493; emphasis added).
10. *Thymos* can be translated as “spiritedness” or the spirited element in humans and animals that leads them to fight back under threat or insult. It causes dogs to defend their

turf; it makes human beings stand up for their kin, their religion, their country, their principles, because the thymotic urge extends beyond the Self to encompass caring for the dignity of other people. Plato saw it as being central to conceptions of value and honour, the urge to participate in public life and the ability to wage war. Underlying the need for power and money, there is the need for recognition, and, when that need is denied, people can be driven to extremes of violence.

11. For Fukuyama (1992: chapter 17), all regimes are inherently unstable because they do not fully recognize the worth of each individual, but liberal democracy does it best and has thus solved the problem of megalothymia by constraining and sublimating it. However, it is questionable whether the economic world promotes the worth of all individuals, and one might argue that, rather than sublimating, Western societies have been doing a lot of “exporting” of the thymotic urge (Iraq, Guantánamo, Abu Ghraib). Vain-glory can be as damaging to harmony and peace when it is pursued by elected politicians who claim to be “exporting” democracy or vanquishing terrorism as when it is attributed to samurai or feudal knights.

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19

Transitional justice and democratic consolidation

Mónica Serrano

It is nearly three decades since Argentina embarked upon the odyssey that has most influenced modern experiences of transitional justice. Along the way, the story of transitional justice became wrapped up in the narrative of democratization. On their different voyages to democratization, countries in Eastern Europe and Latin America acknowledged the importance of aspirations for transitional justice, but little beyond that. Across continents, new authorities came under varying pressures to reckon with their countries' respective pasts. Had the goals of transitional justice been easy to achieve, its story would have ended there. On the whole, it did not. As the cases included in this volume vividly illustrate, determining how to reconcile transitional justice and democratic consolidation is anything but easy. Yet, as the Arab Spring moves on a season, it again becomes clear that the way in which countries manage this tension will most likely define the character of new regimes in North Africa and the Middle East. Experiences in Eastern Europe and Latin America amply indicate that the readiness or disinclination of authorities to pursue old crimes has an impact on the behaviour of security and intelligence forces in the immediate present. So, the experiences of transitional justice and democratization in Eastern Europe and Latin America are not closed chapters. Their potential to instruct about the future is surprisingly fertile.

The aim of this chapter is to draw together some of the common threads of the country experiences. The idea is to identify and explain the different ways in which authorities and societies fared as they sought to reconcile transitional justice and democratic consolidation. I start by

considering the main arguments put forward by both sceptics and supporters of transitional justice as they relate to stability, democratization and peace. There follows a brief discussion of the main trends that are important in explaining the new international context in which transitional justice now takes place. The second section then provides an overview of the relationship between transitional justice and democratic change. It does so by referring to previous historical experiences and to international processes of contagion and diffusion. A third and final section delves further into the relationship between democratic consolidation and the quest for justice, processes that have more often been treated separately. It thus draws out what the various experiences in Eastern Europe and Latin America tell us about the conditions under which transitional justice and democratic consolidation can effectively reinforce each other.

Transitional justice, democratic change and the international environment

At the heart of most discussions of retroactive or transitional justice are the efforts deployed by societies and newly elected authorities to address the legacies of past human rights abuses with a view to building a more democratic and just order. Put like that, transitional justice represents an aspiration with which few now would want to quarrel. Yet transitional justice is a controversial area. Supporters need to contend with sceptics. Over the years, the positions of both have become very recognizable.

To begin with, the sceptical position has been informed by two main strands, one coming from the arguments developed by the most conservative literature on democratization. Secondly, and perhaps more credibly, scepticism about transitional justice has been informed by the theses held by the literature on transitions from war to peace. Backed by various combinations of these two strands, sceptics have long contended that the pressures associated with the activation of transitional justice mechanisms and the threat of prosecution of human rights offenders can exacerbate political and social tensions, derail democratic transitions and, more to the point, increase the risks of greater human rights violations.¹ In their view, the pursuit of transitional justice with disregard for the political realities underpinning transitions from authoritarian rule and conflict can jeopardize these processes and trigger authoritarian reversals. For sceptics, lack of political prudence in the pursuit of transitional justice could in fact risk causing more atrocities than it would otherwise prevent. More recently, sceptics have again pointed to the perverse effects that threats of prosecution can entail, ranging from encouraging dictators to

cling on to power, to the way in which such threats can complicate diplomatic mediation and negotiations and/or stand in the way of exit strategies. Critics have thus consistently warned of the risks that the deployment of justice mechanisms can trigger in terms of both upsetting fragile political balances and reigniting conflict.

Supporters of transitional justice, on the other hand, have long argued that a society that makes the transition from authoritarianism or armed conflict to a democracy needs to address important questions of justice and accountability for past human rights abuses in order to build the foundations for a stable and peaceful future. In their view, societies emerging from war or authoritarianism often carry with them legacies of past human rights atrocities that, if left unaddressed, in the medium and long term are bound to threaten the state's legitimacy and the democratic foundations of the new regime. Hence, in the course of time, the failure to address past wrongs and to deliver justice in the courts can erode the rule of law, foster a culture of impunity and, worse still, even unleash waves of retributive violence and vigilante justice. Drawing on moral, political and legal imperatives, many have thus argued that it is in the interests of sustainable peace-building and democratic consolidation to promote reconciliation and healing and to foster human rights and the rule of law (Méndez, 1997; Roht-Arriaza and Mariezcurrena, 2006).

Reduced to its barest bones, this is the debate between "peace and justice".² In the abstract, as will be readily seen, it is unresolvable. To a large degree, this is because the position of each side is easily exaggerated into inflexibility. Some sceptics tend to magnify the shadows of the past and inflate risks; others see transitional justice efforts as originating in imperial interests. And perhaps, in the past, supporters of transitional justice overestimated the capacity of justice mechanisms to deal with intractable political and social problems, and wished upon them a transformative power to shape institutions and social behaviour. Yet, as with so many other deadlocks, what has happened to this one is not that a winning argument has been declared, but instead that the current has moved one way rather than another.

So it is that the "justice" arguments for curbing impunity and preventing the risk of future crimes have found stronger resonance in many quarters. Among experts, practitioners and policy-makers – including those representing the 121 states parties to the Rome Statute and the 2,500 non-governmental organizations that have mobilized in favour of international justice – the debate is less about a need to choose between stability and justice and more about the specifics of viable "justice" strategies. In other words, it is about the sequencing of various mechanisms, the appropriate mix of policies and tools and, equally important, the need to tailor justice responses to particular contexts (see, for example,

Fletcher et al., 2009, and Olsen et al., 2010a, 2010b). The emphasis is thus on sequencing and the right combination of policies and mechanisms that can fit the complexity and the needs of a given situation. Supporters of transitional justice have conceded that there is no one standard approach that will fit all country situations. But that is the limit of their concession: the overarching question remains how best to pursue justice in new and unstable democratic contexts. This has also been our question in this volume.

The thorough analyses of Argentina and East Germany in Chapters 4 and 13 reveal how, under certain circumstances, a given initiative can spark related reforms which can have the power to complement and strengthen earlier ones. Thus, reconciliation and truth commissions that at one point may be perceived by radical critics as a craven rejection of justice can actually help advance the cause of accountability by documenting the evidence necessary to expose a regime's involvement in human rights violations. Truth and reconciliation commissions are often predicated on the belief that the public or official exposure of truth is a form of justice in itself. This was clearly the case in Argentina in 1984 when the National Commission on the Disappeared (CONADEP) identified 340 clandestine detention centres, concluded that 8,960 people remained unaccounted for and referred to the actions of the military government as "systematic atrocities". A similar case can be made in relation to the 1991 report of the National Commission for Truth and Reconciliation in Chile, which verified the killings and disappearances of a large number of people. The Chilean commission documented approximately 3,000 murders and disappearances, while acknowledging that it could not clarify the fate of many who were still missing.

What these cases suggest is that initiatives for transitional justice are not necessarily static or mutually exclusive and, equally important, that they are likely to have an impact and to evolve in tandem with the political bargains that accompany the process of democratization. As pressures for accountability increase, views and expectations about what is possible are in turn altered. Not only did early efforts to bring state officials to account and early trials alter people's expectations of what transitional justice could deliver; in some cases they helped to increase the demand for justice. Although these developments, whether in Eastern Europe or Latin America, have of course not conformed to a linear utopian course, in their own and different ways they contributed to a significant international normative transformation.

It would be difficult to ignore the trends observed over past decades, whether in terms of the multiplication of truth commissions throughout the world or in the proliferation of domestic, third-country and international trials and prosecutions. The significance of these trends lies

not in the actual numbers but in the fact that together they have brought transitional justice to the forefront of international politics. Indeed, the need to come to terms with the past has found expression in the burgeoning of truth commissions – as of early 2011, some 40 official truth commissions – and the craving for justice has manifested itself in the rise of individual criminal accountability and the corresponding “justice cascade” (see Bassiouni, 2011; Hayner, 2011: 376; Sikkink, 2011: 342).

As a normative enterprise, transitional justice is thus now to be understood as the activation of complementary judicial, quasi-judicial and non-judicial mechanisms aimed at addressing past human rights violations while embarking on a major political transformation. As an important feature of international politics, transitional justice has been closely associated with transitions from authoritarianism in Latin America and from Communism in Eastern Europe. (Less commented upon but also critically important is the conjunction between the rise of transitional justice and the casting around by the United States, in the wake of its retreats from Somalia and Rwanda, for a safer humanitarian option to military intervention.³)

Although differences of outlook still dominate discussions about past atrocity crimes, key developments have altered the international legal environment in which transitional justice now operates. Four immediately come to mind: first, the jurisprudence and case law developed by regional human rights courts and international tribunals vis-à-vis war crimes, crimes against humanity and genocide; secondly, the entry into force of the Rome Statute and the establishment of the International Criminal Court; thirdly, the evolving law and changing practice within the United Nations on the question of amnesty for mass atrocity crimes; and last, but not least, the presence of a vigorous transnational advocacy network determined to uphold the cause of victims across regions.⁴ By bringing victims’ grievances to the attention of regional and international institutions, human rights and non-governmental organizations have been key drivers in this institutional and legal reconfiguration.⁵

Without a doubt, the tension between concern for stability and the commitment to democracy and human rights will continue to prompt some searching questions. However, these trends have come together to produce not just a change in priorities but also a major transformation of the national and international legal and institutional environment in which the implementation of transitional justice initiatives now takes place.

The chapters included in this volume have identified the various transitional justice efforts deployed in more than a dozen countries across continents and provide some important insights into the impact of different

policies and mechanisms in diverse contexts. Overall, the analysis of transitional justice efforts in Eastern Europe and Latin America offers significant evidence of the positive impact of certain policies and proceedings over others in rapidly changing democratic contexts.

An overview of the relationship between transitional justice and democratic change

Policy-makers face many challenges as they embark on processes of democratization and accountability for human rights. Unravelling the different paths and interactions between democratization and transitional justice efforts continues to present a challenging task. Yet what seems uncontroversial is that both democratic consolidation and efforts to build accountability for human rights are courses of action that require adroit handling. Indeed, such processes are characterized by a combination of impediments and opportunities, as well as risks and rewards, for political and social actors committed to the consolidation of democratic rule and the effective protection of human rights. Undoubtedly, the decision to embark on this dual course of action involves difficult judgements, and whether these two processes can be simultaneously pursued is a major question for which there are no easy answers. But there are at least two aspects of this complex relationship that merit special consideration. First, the choice of tackling the legacy of the past is intensely political in nature and, as the controversy over transitional justice attests, tensions are inevitable between the actions routinely prescribed for democratic consolidation and the objectives of truth and justice. Accordingly, the way in which political actors frame and implement their decisions and handle the risks can prove decisive for both the future of democracy and that of justice for human rights.

As the cases discussed in this volume amply show, these processes are bound to be fraught with major difficulties, but they are also accompanied by significant opportunities that are there for agents to seize. Clearly, the ability of relevant actors to navigate obstacles, to seize available openings and to master the instruments at their disposal has been a major factor in the success or failure of these endeavours. Among the many cases discussed in the existing literature, the Greek experience has been singled out as a paradigmatic case. Not only did political leaders capitalize on the military defeat at the hands of Turkey, they also skilfully mobilized society and allies within the armed forces to enact legislation that successfully challenged the amnesty law. Under the leadership of Constantine Karamanlis, army officers were effectively brought to justice. Soon after, the wave of court cases brought by victims of torture revealed

the systematic manner in which torture had been conducted.⁶ Although, at the time, numerous criticisms were levelled at the process, it is now largely considered to be a successful example of both effective prosecution and institutional reform of the security agencies and the armed forces.

By contrast, the experience of Uruguay offers a sober reminder of the insidious challenges that lie in the way of retroactive justice. In a country that had seen 10 per cent of its population forced into exile, the military wielded the resources and power to resist efforts to settle accounts with their past rule. As a result, transition to democracy in Uruguay was accompanied by an enduring stalemate between those institutions led by the military – with the Supreme Court determined to uphold a comprehensive amnesty – and the victims demanding criminal prosecutions. For a long period the stalemate prevented not only changes in human rights policies but also any profound democratic reconfiguration of the regime, including in relations between civilians and soldiers.⁷ Although by 2006 the cause of justice appeared to prevail with the arrest and subsequent conviction of former President Juan Maria Bordaberry for his role in the 1973 coup, three years later the bedrock of opposition to dismantling an amnesty law that exclusively protected the military remained intact. A replay of the 1989 referendum to remove the 1985 amnesty law and the 1986 immunity law (*Ley de Caducidad*) again failed to achieve majority support. It is only recently that the strength of amnesty laws, including in Uruguay, has been sapped through innovative judicial strategies deployed both by national supreme courts and by regional courts.⁸

Flanked by the Greek and Uruguayan examples at the two ends of the spectrum, the country cases in this volume illustrate the complexity of the challenges faced by political actors as they seek to expand the frontiers of democratic consolidation and human rights accountability. As the 14 cases show, there is indeed no one ideal or single path to tackle the legacy of serious past violations. Evidently, processes and routes towards accountability vary across borders and regions. The transitional justice experience and the suitability of accountability mechanisms for any given country are defined by context-specific circumstances that involve a web of interconnections among historical, political, institutional, cultural, ideational and international factors. What worked effectively in South Africa, for example, may not be successfully applied elsewhere. Transitional justice processes should be carefully developed in a way that is contextually sensitive and tailored to the specific needs of a society.

Clearly, the trajectories of countries in Eastern Europe, like those followed by the Latin American republics, have not followed an ideal route either, in the sense of attaining optimal ends. This is not to say that important progress has not been made in both regions on both the democracy and the human rights fronts. However, it would be a mistake to

make hasty judgements based on an initial reading of human rights policies, or to overlook the fact that some states have been slow or unable to fully commit themselves to high standards of accountability. As many of the authors in this volume testify, once the third wave of democracy stabilized in these two regions, with a few exceptions lingering questions remained about the quality of the democratic regimes and the status of the protection of human rights.

On the one hand, the weight of past legacies and abuses was often seen as hindering efforts at democratic consolidation. On the other, the endurance of weak accountability mechanisms was also perceived as a major factor undermining the quality of the democratic life. In addition to this, the rise of new problems, including the explosion of drug violence in Latin America, has added new and intractable pressures to the region's human rights record. What the record of both regions suggests is that, in itself, the transition to democracy may offer little or no guarantee that human rights will be effectively protected or that accountability mechanisms will be successfully activated. Furthermore, the conditions under which a transition took place – an authoritarian or conflict-ridden context; a negotiated or forced transition; the relative distribution of political power during and after the transition; the presence of a conducive external environment – all had direct implications both for the quality of the democratic life and for the justice and accountability process that eventually unfolded.

It would be foolish to suggest that a formulaic or template approach could yield objective truth and effective justice, but it *is* possible to sustain the thesis that societies can and have learned from each other's experiences in transitional justice. Indeed, the rapidly maturing field of transitional justice has been fostered by an expanding number of initiatives and developments that provide valuable lessons for newly democratizing societies. Although doubts remain as to where these trends may lead, the breaking down of Cold War ideological barriers suggests an intense diffusion of transitional justice initiatives and mechanisms within and across regions.

As was the case with synergies observed among the four international dimensions of democratization – control, conditionality, contagion and consent – the mechanisms underpinning the wave of diffusion of transitional justice have involved a variety of drivers, ranging from cultural, to persuasive to coercive instruments (Whitehead, 2001). The numerous transitional justice initiatives explored in this book are indicative of a vigorous diffusion process. The spread of transitional justice initiatives has also at times been explained as resulting from processes of contagion (by which the adoption of a given practice in one place increases the probability of its occurrence in another place), yet it is the logic of diffu-

sion that offers the most persuasive avenue to account for the significant normative and institutional shift that the chapters in this volume describe. Diffusion in this sense involves processes of socialization through the transmission of norms and normative agendas from dedicated organizational advocacy platforms. In the transitional justice realm, such organizational platforms have involved state, non-state and intergovernmental normative agents. Over recent decades, the promotion and activation of transitional justice initiatives have encompassed the efforts of norm entrepreneurs, regional and international organizations (including UN and regional human rights commissions and courts), international and national human rights organizations and specialized agencies such as the International Center for Transitional Justice.

Whether in Eastern Europe or Latin America, the experience of the countries included in this volume indicates that, most often, the successful pursuit of transitional justice initiatives at the national level requires some form of international support. In both Latin America and Eastern Europe, individuals committed to standards of accountability for human rights abuses created or mobilized state and non-state institutions that helped document and publicize human rights violations. Over time, such institutions emerged as key “organizational launching pads” for the spread of the goals of transitional justice across continents and around the world (Finemore and Sikkink, 1998; Sikkink, 2011; Strang, 1991). Indeed, at the level of international organizations, the UN and regional courts and institutions have played a leading role in pushing the frontiers of accountability. But no one can deny the significance of the contribution to higher levels of accountability for human rights violations originating among some governments and many societies in Eastern Europe, Latin America and Africa.

Democratic consolidation and the quest for justice

Democratic consolidation and building accountability for human rights violations are closely related but somewhat independent processes whose courses of action tend to follow their own logic. Occasionally these logics can be mutually reinforcing, but time and again they have found themselves in contradiction with each other. Although, without some attention to serious past human rights violations, democracy may lose its legitimacy and become endangered, processes of democratic change and democratic consolidation are bound to be complex, erratic and lengthy. Such transitions have typically evolved in an unmethodical way, as they have been contingent on the social, political, economic and legal forces shaping the process.

In transitions from war to peace, these difficulties have found expression in the much-debated tension between peace and justice (Hannum, 2006). In the context of democratization from authoritarian or Communist rule, such hurdles have time and again stood in the way of democratic consolidation.

Two realities must be recognized at the point of gauging the relationship between transitional justice and democratization. First, in the short term, the success or failure of democratization will broadly depend on the ability of committed leaders to navigate around the authoritarian challenges originating within the transition process itself. One thing we have learned from transitions to democracy – whether in the Americas, Eastern Europe or elsewhere – is that endogenous or “hard” constraints, inherent in the very dynamics of the transition process, have often hindered or delayed the pursuit of justice. Those responsible for past abuses often retain significant military and political power. Thus, in the short term, the risk of punishment for past violations can induce leaders of tyrannical regimes to embark on defensive strategies aimed at holding on to power. Likewise, attempts to alter authoritarian legacies can upset the delicate balance upon which democracy all too often rests. As the experiences of Argentina and Colombia show, there are evidently circumstances in which the correlation between democratic and authoritarian forces has simply not favoured the goals of transitional justice. At the very least, the pursuit of justice would be enough to alarm surviving authoritarian constituencies. And few would disagree that, in certain circumstances, its inflexible pursuit could imperil fragile democracies. However, as these and other experiences make clear, in the medium and short term the commitment to deepen democracy may help democratic leaders to secure the necessary room for manoeuvre to eventually confront thorny justice agendas.

Whether or not justice and democratization come to fruition depends not just on the capacity of democratic leaders to manage and contain these authoritarian impulses, but on the broader external context – which is the second overriding reality. The cases examined in this volume indicate that the success or failure of various transitional justice pathways is also dependent upon the range of exogenous constraints facing fragile democracies. The experiences examined here vividly illustrate how financial pressures and political calculations among competing priorities can also affect and shape the available options (Elster, 2004).

Internal and external realities generate dilemmas and political pressures. So it is that leaders wholeheartedly in favour of human rights – including Václav Havel and Adam Michnik in Eastern Europe, Felipe González in Spain and Corazon Aquino in the Philippines – were prompted to advocate forgiveness and forgetting (Nino, 1996: 21, 30). In

most of these cases, concerns were raised about the potential implications for the survival of the democratic regime of proceeding with accountability mechanisms and criminal prosecutions.

Although the decision to embark on the route of truth and justice can involve serious risks, the experience of a number of countries – most prominently Spain – also suggests that the choice of holding off from, or sidetracking, past accountabilities is not without its perils either. Back in the 1970s, the Spanish political class opted for a “Pact of Silence” or a “Pact of Forgetting”, which paved the way to the 1977 amnesty law (Encarnación, 2011; Encarnación, 2012: 187). It is true that over subsequent decades the quality of democracy in Spain improved significantly. However, the more recent questioning of Spain’s past has intensified the acrimony around efforts of justice advocates to apply in Spain the same principles that Madrid has promoted internationally. As political fractures surfaced over the status of the 1977 amnesty law and about the relationship between domestic law and international law, the ghost of unchallenged legacies has cast a shadow over the country’s democracy and rule of law. These trends have come together to question the old orthodoxy about the need to subordinate justice to the imperatives of political and democratic stability. In Spain, where the justice system had once been praised as the “symbol of justice for atrocity victims around the world”, many reached the conclusion that justice itself had become the victim (Brody, 2010).

The trade-offs between democratization and human rights provide one possible set of explanations for the rather patchy record in matching democratization and accountability for past human rights violations. However, there is much more to the relationship between accountability for human rights and democratic change than is contained in the analysis of how political actors either resolve or capitulate to such tensions and dilemmas.

Significantly, earlier returns to democratic rule were not accompanied by human rights agendas or significant human rights expectations vis-à-vis investigations for past human rights violations. This can be partly explained by the slow and tortuous pace of human rights norm-building. Certainly, the story of the greater salience of human rights and human rights expectations could not be explained without reference to the normative processes that helped advance the codification of human rights norms and the promotion of international human rights standards within both the United Nations and other regional multilateral institutions. Whilst the salience of these processes cannot be underestimated, the fact of the matter is that human rights foreign policies materialized only in the late 1960s and mid-1970s.⁹ The impact of these policies would spread, but only after quite a few years, and the results were not always evident in processes of political change and democratization. Hence, the presence

of an incipient regional human rights regime in Europe did not seem to have much bearing on the much-praised Spanish transition.

Indeed, the democratic opening in Spain – one of the paradigmatic cases of a successful transition to democracy and democratic consolidation – proceeded against the backdrop of two amnesty laws for political crimes. Although the 1976 and 1977 laws paved the way to the restitution of the rights of workers and political prisoners who had been incarcerated under the Franco regime, they also granted immunity to those responsible for the institutional violence unleashed during the Franco years. This implied that the crimes committed both during the vicious Civil War and in the immediate post-war period remained in limbo.¹⁰ It is true that the amnesty provided by these laws did not materialize in a pact of silence or amnesia, and that multiple and engaged memories continued to dwell on the Spanish past. However, the decision of leading political actors to “pact” the transition by freezing the discussion of the past was attractive in the short term but yielded diminishing returns: the freeze began to thaw.

Over the past few years, events culminating in the enactment of the 2007 Law of Historical Memory triggered the re-politicization of Spanish politics around the cleavages of the 1930s and the reopening of the wounds of the Spanish Civil War (*El País*, 2010a, 2010b). What this experience demonstrates is how, over time, “unsettled accounts” can challenge the pacts underpinning otherwise consolidated democratic transitions and turn deeply problematic. Indeed, the ghosts of rehabilitation and reparations have more recently come back to haunt Spain’s democratic life not only in the clash of memory against memory but in open political confrontation. This confrontation, which has threatened to curtail the career of Judge Garzón and with it the pivotal role that Spanish justice has played in giving a life to international criminal justice and transitional justice efforts in Latin America (amply illustrated in this book), could have repercussions well beyond Spain. Underlying the politically driven case opened against Judge Garzón – based on charges pressed by an extreme-right political organization, Falange, and an enigmatic trade union body known as *Manos Limpias* (“Clean Hands”) – is an attempt to abort investigations into the 116,000 forced disappearances that occurred during the Franco years. Even more fundamental is a clash of interpretations over the status of national laws and international human rights law.¹¹

At a minimum, it thus seems clear that ignoring past atrocities can upset longstanding democratic stability. But the campaign unleashed by a residual fascist minority group against Judge Garzón also exposed the degree to which Spain’s judicial system had become politicized (*Financial Times*, 2010).

There is also a good deal of evidence to suggest that, where democratic governance has proved weak, there may be little impetus to sustain key institutional reforms. Yet these reforms are critical both for democratic consolidation and for the resilience and effective protection of human rights. This means that there is something intuitively logical about the idea that democratic consolidation and human rights protection are two faces of the same coin. It is clear that the way in which countries manage to resolve the tension between these two complex processes will most likely define the future character of their democracy. As Carlos Basombrío Iglesias, James Cavallaro and Fernando Delgado and others in this volume remind us, not only can the failure of institutional reforms and the breakdown of efforts at accountability result in impunity; they may also provide the conditions for an authoritarian relapse. In Peru, electoral irregularities leading to a third contested election of the Fujimori–Montesinos duo coincided with the country's manifest non-compliance with two key judgments of the Inter-American Court of Human Rights and Fujimori's attempt to withdraw Peru from the Court's jurisdiction. Thus, the challenge to democratic rule and regional human rights institutions prompted the activation of the relevant mechanisms within the Organization of American States (OAS), including Article 65 of the OAS Charter (Tanner, 2009: 994). It took a decisive move by Judge Antônio Augusto Cançado Trindade and the OAS's forceful implementation of democratic electoral standards for an unusually clear alignment of the stars of human rights and democracy to happen.

This experience contrasts sharply with the record of democratic standards and human rights observed in Brazil so far. In this country, the political weight of enduring hardcore throwbacks, including members of the armed forces, long enabled authoritarian actors to dictate the terms and scope of transitional justice and to keep firmly in place the immovable 1979 amnesty law (Law No. 6683/79).¹² It is certainly true that for nearly three decades electoral cycles have proceeded smoothly and allowed for the election in 2002 and re-election in 2006 of Luiz Inácio Lula da Silva, the long-time left-wing contender. However, three decades after the transition to democracy, doubts still remain about the military's commitment to civilian authority. As Cavallaro and Delgado point out in Chapter 5, bowing to military pressures, the Lula administration closed down all discussion of the status of the amnesty law in 2008. Yet, as in Peru, the unyielding blockade of Brazil's justice system prompted national and international actors to reach out to international institutions and international law. Thus, six months after the Supreme Court had confirmed the validity of the amnesty law, in a landmark decision issued in December 2010 the Inter-American Court of Human Rights contested the law's legal status and the protection it granted to those who had committed

atrocities during the country's military dictatorship.¹³ Partly as a result of these pressures, in September 2011 Brazil's Congress approved the creation of a Truth Commission charged with investigating and clarifying human rights violations, including those committed during the years of military dictatorship (*New York Times*, 2011a, 2011b). Although the courses followed by Brazil and Peru have not been without setbacks and dangers, these experiences suggest that calibrated efforts to deal with unresolved accounts and "contentious debate" over truth, justice and impunity do in fact foster democratic practices and advance the cause of democratic consolidation (Nino, 1996: 131).¹⁴

Most of the existing literature has focused on transitional justice experiences and rule of law reform as parallel and separate forces. There is no doubt that transitional justice and law reform may be treated separately for analytical purposes but, as the case studies in this book make clear, in practice they interact and reinforce each other. Whether in Romania, Brazil or Guatemala, institutional continuity with the authoritarian past is likely to obstruct the rule of law and the cause of justice for past human rights crimes. In some countries, entrenched corporate interests and the entrenchment of magistrates and judges from authoritarian times has obstructed the course of justice. In others, the police and the armed forces have an active interest in maintaining the status quo and rather weak justice systems. More problematically, in countries such as Guatemala, suspected perpetrators have sought electoral office for the impunity from prosecution that it gives them. As they move from being deputies to senators, such people are able to subvert the rule of law and to distort the democratic electoral cycle into a circuit of impunity. What is clear is that the incapacity of the justice system to pursue effective trials and to attain justice bespeaks a generally weak rule of law. In developing this argument, Pilar Domingo emphasizes in Chapter 3 the way in which previous and ongoing accountability efforts in transitional countries are intrinsically linked to the evolution of the rule of law. Her analysis of rule of law trends in Latin America makes clear that efforts to build the rule of law in this region have coincided with the vigorous trend favouring accountability for past human rights violations.

It would be wrong to suggest that initiatives to address the past and transitional justice mechanisms can by themselves guarantee the smooth functioning of democratic life. However, by drawing attention to human rights violations they can help send a clear message that acts such as those committed in the past will not be tolerated and allowed to happen again, that nobody is above the law and that state officials are in no way beyond the confines of the law. Indeed, those who advocate transitional justice agendas and mechanisms depart from the assumption that serious human rights violations are consciously committed by voluntary agents

who have ethical options before them. In so doing, policies for transitional justice aim at setting in place both deterrents and sanctions for would-be perpetrators.¹⁵ In other words, these mechanisms target specific deeds that can collectively be described as “radical evil” (Nino, 1996) and that have most often been carried out in permissive environments created by authoritarian or totalitarian contexts. But there is also the deep-seated concern that, in the absence of transitional justice efforts and investigations, serious human rights abuses may carry on or recur. Carlos Santiago Nino has eloquently emphasized the need for a “public acknowledgement” of such deeds as a way of overcoming the “grasp of radical evil” (1996: 146).¹⁶

The logic of these arguments can best be captured by the normative shift favouring a holistic approach to transitional justice, one in which the full package of formal and informal mechanisms ought to be available for use. Much of the disagreement among competing justice approaches has been narrowed down by this normative shift. This is well illustrated by many of the country cases included in this volume, as well as by recent studies that indicate that the dichotomy between justice and democratization may not be the great barrier we once thought it was. The need for empirical study that can shed further light on the individual or combined impact of various paths and proceedings cannot be underestimated, yet the experiences accompanying transitional countries and recent research findings suggest that the trade-offs between transitional justice, democratization and human rights may have been overstated. Time, that is, has left the sceptics behind.

Undoubtedly, the collapse and discredit of a “rights-violating regime” is by far the most conducive environment for improvements on both the human rights and the democracy fronts (Forsythe, 2011: 93). Yet there is an increasing recognition that, under certain conditions, a positive correlation can be found between certain varieties of transitional justice and democracy and human rights. Indeed, studies conducted on the interface between transitional justice, democracy and human rights increasingly suggest that certain specific combinations of transitional justice mechanisms – trials and truth commissions; trials and amnesties; and trials, amnesties and truth commissions – do have a positive effect on democracy and human rights. While these studies have shown that no single mechanism can, on its own, significantly improve democracy and/or reduce human rights violations, on the whole they indicate that transitional justice and efforts to address past violence tend to have a positive impact on the overall quality of democracy and human rights.

As is often the case with national justice systems, the deterrent capacity of transitional justice mechanisms to halt and prevent serious human rights crimes is no doubt limited. However, in the findings of the

studies carried out by Kathryn Sikkink and by Olsen, Payne and Reiter, a number of conclusions stand out. First, it is futile to seek a magic algorithm. There is a spectrum of options that can be coloured in according to circumstances: truth commissions and trials and/or trials, truth commissions and amnesties.¹⁷ Secondly, trials are indeed essential to improvements in human rights and democracy. In a study of 100 countries that experienced a transition either from authoritarianism to democracy, or from war to peace or by state creation for the period between 1980 and 2004, those countries which undertook prosecutions of former officials exhibited lower levels of repression and physical integrity violations (Sikkink, 2011). Thirdly, contrary to the expectations of those who regard amnesties and trials as incompatible courses of action, transitional experiences have shown that, in certain conditions, they have worked in harness with each other to yield improvements in human rights and democracy. In the view of these scholars, it is the balance between truth commissions and prosecutions and among amnesties, trials and truth commissions that creates the conditions under which accountability and democratic stability could be reconciled (Olsen, Payne and Reiter, 2010a, 2010b). Last but not least, the deterrent effect of these mechanisms is in no way limited to the costs associated with the likelihood or severity of the punishment against perpetrators; it also extends to the costs associated with their longer-term impact on broader socialization patterns and “logics of appropriateness”. As Kathryn Sikkink persuasively argues (2011), both the processes that accompany truth commissions and human rights prosecutions entail the communication and dramatic enactment of social disapproval that are essential to a social environment conducive to respect for human rights standards.

Newly democratic countries, whether in Eastern Europe or Latin America, were forced to travel the learning curve of human rights and transitional justice in their own way. Throughout both continents, each country followed a distinct transitional path. Whatever the end result, the interplay between internal and external developments was critical in firmly planting the flag of human rights in the landscape of unfolding democratic transitions. Indeed, some of the experiences in Eastern Europe and Latin America explored in this volume confirm the view held by Moravcsik and others which maintains that, for a variety of ideational, reputational or self-defensive reasons, democratic settings can help unleash enabling conditions for the development of a more resilient human rights culture (Moravcsik, 2000, 2003; Simmons, 2009).

The apparent propensity of incipient and young democracies to reach out and ratify human rights treaties and conventions as a lock-in safety mechanism has provided human rights supporters with valuable instru-

ments. Likewise, it is possible to glimpse the potential effects that the rise of human rights standards and international criminal justice can have on “authoritarian enclaves” left over by pacted and negotiated transitions. Whatever the reasons and motivations prompting political actors to engage with human rights discourses, the centrality of the human rights agenda is beyond question. The thrust of the changes accompanying this third wave of transitions sharply contrasts with earlier periods, when human rights considerations simply did not figure on the political agenda. If this is not progress, one would have to ask what is.

Notes

1. See, among others, Huntington (1991: 214), Goldsmith and Krasner (2003), Snyder and Vinjamuri (2003/2004) and Cobban (2006).
2. The literature on transitional justice has been markedly restricted in its view of the greater historical sweep of this dilemma, one that – for instance – shaped the settlement at the termination of the American Civil War.
3. This is a view shared by Richard Goldstone (2000), Gary Bass (2000) and David Forsythe (2011: 87), among others. According to this point of view, the move towards international criminal justice was a tragic surrogate for the lack of much-needed military action in Rwanda and the former Yugoslavia.
4. The changes in the UN practice on amnesties have been traced back to 1999. In that year the Secretary-General instructed his Special Representative, in the context of the Lomé peace negotiations on Sierra Leone, to declare that “the United Nations holds the understanding that the amnesty and pardon in article IX of the agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law” (United Nations, 1999: para. 7). Also in 1999, a set of guidelines for mediators, developed under the leadership of the UN diplomat Alvaro de Soto, endorsed the new “normative boundaries for UN engagement”. The new UN policy against amnesty for such crimes was reaffirmed in a 2004 Secretary-General’s report which recommended that the Security Council reject “any endorsement of amnesty for genocide, war crimes, crimes against humanity ... [and] ensure that no such amnesty previously granted is a bar to prosecution before any United Nations-created or assisted court” (United Nations, 2004: para. 64(c)). See Schabas (2011) and Hannum (2006). The 2006 version of the guidelines for mediators can be found on page 5 of the *United Nations Juridical Yearbook 2006*; available at http://untreaty.un.org/cod/UNJuridicalYearbook/html/volumes/2006/dtSearch/Search_Forms/dtSearch.html.
5. Judge Antônio Augusto Cançado Trindade has linked the greater attention given by inter-American human rights institutions to a chain of massacres and a new generation of “disturbing cases” to greater awareness about the existence of an international jurisdiction and to the commitment of non-governmental organizations to take up the causes of victims. In his view, the salience gained by grave cases – including the 2001 Barrios Altos and La Cantuta cases concerning Peru, the 2003 Myrna Mack Chang case and the 2004 Plan de Sánchez Massacre case concerning Guatemala and the cases concerning the Mapiripán, Ituango and Pueblo Bello massacres in Colombia – can only be

- explained by the devoted and persistent efforts of human rights organizations. As Judge Trindade eloquently put it, “they have been responsible for bringing these cases to the attention of the organs of the Convention . . . because the Commission and the Court do not act *ex officio* on the petitioning system, they have to be provoked in order to pronounce themselves” (Tanner, 2009: 989).
6. The decision to show mercy to the convicted and to commute the death penalty to life sentences avoided the risk of producing martyrs. In the course of only two years, between 1975 and 1976, 100–400 court cases occurred across Greece (Nino, 1996: 19–20).
 7. Although the proponents of transitional justice in Uruguay succeeded in getting a referendum held in April 1989, the call to keep immunity in place won by 54 per cent. It is true that the efforts deployed in the 1984–1989 period encouraged debate and some degree of investigation into human rights abuses, but the power of the military was not significantly affected (Nino, 1996: 34–36).
 8. In 2001, the Inter-American Court of Human Rights resolved that the Peruvian amnesty law contravened the American Convention on Human Rights. This same ruling was applied a decade later, in December 2010, to the Brazilian amnesty law. As early as 1998, the Supreme Court in Chile determined that disappearances of unlocated bodies were not covered by the amnesty law. In 2005, in the *Poblete* case, the Argentine Supreme Court ruled on the unconstitutionality of the country’s amnesty laws. Five years later, in November 2010, in a second ruling the Supreme Court in Uruguay resolved the unconstitutionality of the country’s amnesty law (Sikkink, 2011: 145–148; *New York Times*, 2011b).
 9. Human rights foreign policies are often understood as comprising two related but analytically independent parts: a bilateral policy and a multilateral policy. The bilateral dimension refers to those cases in which a country (for example, the United States in the second half of the 1970s) adopts specific mechanisms for integrating human rights concerns into its foreign policy in a manner that can effectively influence foreign policy decisions. The multilateral dimension refers in turn to those policy decisions by which states show their readiness to adhere to human rights norms and regimes, and most importantly to submit their own human rights practices to some international review (Sikkink, 2004: 10–11).
 10. On memory, memories and democratization in Spain, see Aguilar (1997, 2008), Barahona de Brito et al. (2001) and Juliá (2006).
 11. The amnesty covered crimes committed during and after the Civil War. In the immediate post-war period, between 1939 and 1942, more than 200,000 Spanish citizens died in prison. In Spain, democratization proceeded both upon a tacit condemnation by the relevant political actors of the 1936 coup and upon the juridical framework provided by the previous regime. Although the Socialist government settled for a non-policy on this particular issue, once in power the right-wing party of José María Aznar left little doubt of its inclination to again justify the coup and the war (see Nino, 1996: 17, and Huntington, 1991, especially Chapter 5). For a pertinent account of the skilful management of the transition to democracy in Spain, see Aguero (1995: 316).
 12. In April 2010 the Supreme Court ruled (seven to two) to uphold the interpretation that crimes committed by members of the military regime were political acts and therefore covered by the amnesty. This ruling effectively blocked attempts at reinterpreting the 1979 amnesty law, which “protects members of the former military government from being put on trial for extrajudicial killings, torture and rape. . . . Unlike Argentina, Bolivia, Chile, Peru and Uruguay, Brazil has not brought to justice those accused of gross human rights violations committed during past periods of military rule” (Amnesty International, 2010).

13. In *Gomes Lund v. Brazil*, the Inter-American Court found that, by impeding the investigation of grave human rights violations, the 1979 amnesty law flies in the face of the American Convention on Human Rights, to which Brazil is a party (Osberg, 2011).
14. For an analysis of “contentious debate” and the way in which transparency, critical thinking and practical debate about the past can provide opportunities to build a stronger democratic culture, see Payne (2008).
15. The deterrent argument is a recurrent theme in the literature on transitional justice. Historical evidence and the accumulation of “never again” moments bring into question the deterrent power of the threat of prosecution. Yet current trends in both domestic and international trials for atrocity crimes point to reduced levels of repression or violation of physical integrity in countries where prosecutions have taken place. See Kim and Sikkink (2010) and Sikkink (2011: 184–185).
16. Nino was alluding to the philosopher Thomas Nagel, who had early adopted the then-minority view that justice should not be sacrificed to pragmatism.
17. The studies conducted by Kathryn Sikkink and Carrie Booth Walling and by Sikkink, Booth Walling and Hunjoon Kim come to the conclusion that both human rights prosecutions and the high-profile trials associated with truth commissions do have a positive impact on levels of repression (Sikkink and Booth Walling, 2007; Sikkink, 2011). The studies show that prosecutions, and more precisely “cumulative prosecutions”, have a much greater deterrent effect, but also demonstrate that truth commissions can help improve human rights protection. A truth commission, on its own, may help bring down the repression score by about 0.19 in the short term and by 0.43 in the longer term, but in combination the impact of a truth commission and human rights prosecutions can secure a reduction in repression of approximately 0.35 and 0.80 in the short and long term, respectively. These findings are not consistent with those presented in the study by Olsen, Payne and Reiter (2010a, 2010b). In the latter, neither truth commissions nor prosecutions in themselves are associated with significant improvements in democracy and human rights. Truth commissions on their own may even lead to an erosion of human rights protection, and it is only the combination of prosecutions and amnesties and/or prosecutions, amnesties and truth commissions that can bring about a significant improvement in human rights.

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20

The complexity and effectiveness of transitional justice in Latin America and Eastern Europe

Vesselin Popovski

The violations of human rights by the authoritarian regimes in Latin America and Eastern Europe created growing popular anger that exploded in mass uprisings and demands for change, bringing the regimes to an end. It was a bottom-up process: a gradually rising discontent of ordinary people who, in the aftermath of the changes, made continuous calls for justice and for the perpetrators to be brought to account, and simultaneous calls for compensation for the victims. The demands for justice and compensation faced initial reluctance, partly because political forces connected to previous regimes remained powerful and influential. The processes of transitional justice have been controversial and complex, sometimes involving demands for extra-judicial punishment or similarly unacceptable calls for blanket forgiveness.

Complex transitions

One inherent complexity of transitional justice after authoritarianism, compared with post-conflict justice, is the demarcation between victims and perpetrators. In armed conflicts, the evolution of international humanitarian law crystallized a distinction between combatants and non-combatants, between victims and perpetrators, between individual and collective responsibilities, between the architects of violations, the commanders, and rank-and-file executioners. In post-authoritarian transitions, however, the distinctions could be more problematic: almost everybody

suffered from authoritarian regimes but not many can establish the guilt of a particular state official. Ironically, the same individuals may simultaneously be identified as “silent supporters” and as “hidden victims” of the same regime. In Eastern Europe, many talented workers were accepted as members of the Communist Party as a kind of “reward” for their good work, but they remained hidden dissidents. In 1989, such people became “ex-Communists” overnight, facing potential stigmatization without having been privileged by the Communist regime. In contrast, people who were not Communist Party members prior to 1989 could pretend to be “heroes” and demand unwarranted privileges.

Another complexity is that the highly sensitive nature of gross human rights violations has to be “de-emotionalized” when parties enter into legal proceedings. Justice means dealing with evil in a civil way, facing inhumane acts with a humane approach. Judgments in courtrooms need to be reached through undisputed evidence and respect for the defendants’ rights. For some victims and relatives, experiencing deep trauma, these legal niceties might look cold and indifferent to their suffering; however, justice and accountability mechanisms are guided by broader societal needs in addition to the need to redress the suffering of the victims. Transitional justice has had to perform a balancing act: paying full respect to grievances – traumatic and divisive as they are – while also taking into consideration strategies for societal reconciliation.

To add another layer of complexity, not only junta or Communist leaders but also democratically elected officials, who came to power during the transitions, became subjects of investigation and prosecution. The first Slovak Prime Minister, Vladimír Mečiar, was investigated for destroying secret documents. Andrei Lukanov (ex-Prime Minister of Bulgaria) was arrested for embezzlement; the charges were later dropped, but, in a sad irony, he would have been safer in prison. Instead, he was murdered outside his house. The first democratically elected President of Brazil, Fernando Collor de Mello, was forced to resign because of corruption charges and impeachment threats from the Senate. Carlos Menem, ex-President of Argentina, was arrested on charges of arms-trafficking; he was exiled to Chile and investigated later on embezzlement charges. Gonzalo Sánchez de Lozada (twice President of Bolivia) was forced to resign and is facing charges for extra-judicial killings and crimes against humanity. In what is probably the most notorious case, Alberto Fujimori (ex-President of Peru), after extradition from Japan and a landmark trial, received the maximum 25-year sentence for grave human rights violations committed during his term in office. Democratically elected leaders in Eastern Europe have also received prison sentences. Yulia Tymoshenko (ex-Prime Minister of Ukraine) received a seven-year sentence for abusing her powers of office in a gas deal with Russia, a sentence that provoked wide-

spread suspicions of political bias. Adrian Năstase (ex-Prime Minister of Romania) received a two-year sentence for corruption; his defence also appealed against the sentence, claiming this was an act of revenge by a political rival.

A major lesson derived from the East European and Latin American experiences is the importance of detaching the justice processes from the battle between political parties at elections. If political parties use power for revenge, or use justice mechanisms as a tool to win elections, both processes may be exposed to manipulation. What we have also learned is that collective memory of the past may never be fixed or frozen forever. History can be re-investigated and even rewritten, but it is necessary to avoid doing this on the basis of political or nationalistic interests. In this context, the past can be understood as a social schism between victims, who suffered, and perpetrators, who enforced authoritarian ideologies. Interestingly, because many people are situated in between, this large group – neither victims nor perpetrators – was often influential in balancing the historical claims.

Diversity and the complementarity of justice mechanisms

Many authors have previously addressed the variety of transitional justice mechanisms, some focusing on particular experiences in either Latin America, Africa or Europe,¹ but no book has so far comprehensively presented the transitions from dictatorship to a democratic system in two continents in a simultaneous timeline, as we have tried to do in this volume. This comparative analysis helps reveal both specific issues and common issues and is instructive for further evaluation and assessment. The range of justice mechanisms can be best understood when comparing cases across various regions, because only a small number are used in any one country.

Both tribunals and truth and reconciliation commissions represent crucial mechanisms for implementing justice. Tribunals are judicial bodies with the power to prosecute and sentence perpetrators. By punishing those responsible for past crimes, tribunals individualize guilt and stigmatize communities or groups that otherwise might be viewed as collective perpetrators. In doing so, tribunals can achieve a retributive and deterrent effect that other mechanisms cannot. In comparison, truth and reconciliation commissions are most effective if they have an independent and institutionally strong statutory body, are well resourced professionally and financially, and also are representative, transparent, credible and locally owned. Their mandate is to investigate past human rights violations and reconcile the divided society through a process that utilizes

restorative justice techniques and offers a common narrative of the nation's past. Although the official uncovering of truth is a form of justice in itself, I regard tribunals and truth commissions as complementary and not as alternative mechanisms that can basically substitute for each other. Tribunals deliver justice whereas commissions deliver truth, and both can award compensation to victims. Both types of mechanism are essential and they should be provided in parallel. Victims cannot simply be given the choice of one or the other. They need to see justice done and perpetrators punished, but they also need to know the whole truth of what happened and have access to verified historical records. In Argentina, for example, trials prosecuted only high-level officers and a few military commanders, whereas a Truth Commission investigated the "dirty wars" that followed the military coup of 1973, documenting about 9,000 cases and implicating a broader range of perpetrators. With the disclosure of past abuses and the naming of those accountable, truth commissions encourage societies to rebuild trust in government and democratic systems.

There can be no standardized approach to implementing transitional justice mechanisms because the paradigms that define them are unique in terms of historical, political, institutional, cultural and other factors. Transitional justice is developed in a way that is contextually appropriate and tailored to the specific needs of a society. Combinations of strategies are more likely to satisfy a society's needs for justice and should include both judicial and non-judicial mechanisms. These could be top-down efforts that are typically state driven, such as institution-building or institutional reform, the adoption of restrictive legislation (lustration), adherence to international treaties and conventions, and respect for the doctrine of universal jurisdiction. Or these could be bottom-up initiatives, which usually stem from civil society demands for accountability and are more historically rooted in the particular traditions of the country. The significance and increasing use of such initiatives worldwide attest to their broader legitimacy and accountability. Civil society can offer leadership, if that is what is missing or inadequate in state authorities; it can put pressure on the state, but also support it to develop legal and institutional reforms aimed at preventing oppressive policies in the future. Often the demands of civil society actors for justice go hand in hand with calls for fair elections and democracy, thus paving the way for strengthening democratic institutions. Given this, the extent to which the "beneficiaries" or "clients" of transitional justice are satisfied with the outcome is a subjective yet decisive measure of the effectiveness of accountability mechanisms. It is crucial to hear the voices of the victims and survivors of abuses, and such victim-centred approaches and calls for accountability are catalysts for action. For example, thanks to the mobilization efforts of relatives of vic-

tims of torture, detention and other human rights abuses in Chile, the Law Lords in the United Kingdom made a landmark progressive pronouncement in 1998 in the Pinochet case on the basis of the principle of universal jurisdiction, which had never before been tested. Similarly, *Nunca Mas!* (“Never Again”) initiatives by citizens in Latin America successfully prevented former torturers from returning to public office by naming them. Reflecting on lessons learned, there is a growing consensus that the most promising approach is a holistic one that not only addresses all three aspects of victims’ rights – truth, justice and compensation – but also builds reconciliation in society and strengthens the rule of law. The role played by citizens and civil society as a whole has been critical, both in determining which mechanisms are most appropriate and in promoting a sense of local legitimacy and responsibility.

Assessing effectiveness

Some transitional justice literature has been over-prescriptive, following a model and not always paying sufficient attention to whether the processes have been appropriate to the particular country and effective. A difficult methodological challenge lies in analysing the effectiveness of the mechanisms and choosing what benchmarks can be used to judge their success. Even more challenging would be to ask the question “effective for whom?” in order to differentiate between effectiveness for victims, for states and for societies as a whole.

In Chapter 2 in this book, Sikkink offers three parameters to judge effectiveness: (1) comparison with the ideal; (2) counterfactual reasoning (would an alternative mechanism have served justice better?); and (3) empirical comparisons (what are the public’s feelings about the process and the final results?). This is an excellent start to thinking about effectiveness. The various elements of justice are difficult to quantify and evaluate and we may never know the number of potential violations that have been deterred through using one or another justice mechanism. Moreover, forgiveness, reconciliation and apology are abstract notions that cannot be meaningfully defined, assessed or quantified. For example, one cannot easily measure the independent impact of the justice initiatives undertaken by an incoming regime on the consolidation and stabilization of a transitional society. Transitional justice often coexists with and is implemented alongside other processes such as political and public reform, economic reconstruction, institution-building and democratization. It would be difficult, if not impossible, to measure the effectiveness of the justice component of such a variety of initiatives and to isolate it from other political and social processes that unfold in times of transition.

In my view, effectiveness should refer to the extent to which justice mechanisms contribute to the broader satisfaction of goals and meeting certain objectives, rather than to whether or not countries have been effective in setting up various mechanisms. To give an example, in Bosnia-Herzegovina all of the various possible mechanisms, including an international tribunal and a domestic truth and reconciliation commission, have been established, yet satisfaction is still far from accomplished, as Chapter 11 in this book demonstrates. It is a matter of identifying what the key stakeholders seek to achieve by engaging in the process of transitional justice and accountability. In the broadest sense, effectiveness relates to the goals of promoting a culture of human rights protection, consolidating democratic institutions and accountability, and establishing social trust and peace through justice. There is a need not only for justice *per se* but also for justice to be done as part of a broader strategy to promote peace and reconciliation. One methodological challenge is to calibrate the effectiveness of the various mechanisms found out about from the case/country study. For that matter, it would be useful to assess the rationale of establishing justice goals and how obstacles were dealt with. In addition, it would be constructive to ask whether or not the *modus operandi* of the mechanisms was successful in relation to the original goals set by transitional justice.

Effectiveness is highly dependent on the agents who implement the justice mechanisms. In this regard, one can investigate, for example, to what extent the newly elected authorities have agreed to address the legacy of the past regime and whether society has made collective demands for justice. A clearly manifested public call for justice and accountability can serve as a strong motivating force for the government to adopt a comprehensive set of mechanisms and policies. Other key factors include the balance of power, the nature of the country's political and moral leadership and the influence and behaviour of the old authoritarian order. The dynamics between old and new political actors form a critical basis on which to judge whether a transition is enforced or negotiated and the degree to which historical and judicial truths are pursued. The Slovenian transition is an example of a negotiated justice process that has been described as "rule by consensus". The negotiation of justice between the authoritarian and post-authoritarian regimes may not satisfy the victims. For example, the transition in Argentina was partly hindered by the military, which demanded immunity from prosecution for its officers through the use of legal acts such as the "Full Stop Law" and the "Due Obedience Law". Slovakia demonstrated that leadership can play a role in defining accountability mechanisms as well as reshaping opinions towards legitimate governance: it was Ján Langoš (a former dissident) who, although lacking institutional support, campaigned for legislation

that made truth revelation possible. This kind of grassroots leadership might be more effective than prosecutions or vetting in uncovering the truth because it requires minimal cooperation from individuals in the judicial and executive branches of government, many of whom may be otherwise unsupportive of retributive justice.

I would also add time and cost considerations in judging the effectiveness of the justice mechanisms. Generally, the ability to derive maximum gain in the shortest possible time and at minimal expense defines effectiveness in any enterprise. For the analysis of transitional justice, time and cost are also important categories, but in a more complex manner. Quick and cheap justice can be the worst kind of justice. Not dedicating enough resources to delivering justice initially may result in the need to spend comparatively much more in the future, if further crimes are committed. Deterrence or prevention are similarly a major element of justice, as is the satisfaction of the victims of past crimes, but these may have different time–cost parameters.

Timing

Time forms a critical element in transitional justice and this is particularly the case in trials, where both the evidence and the availability of witnesses are crucial. The challenge is to find the best balance between “not too fast” and “not too late”. One has to avoid overly hasty processes and harsh sentences that depart from the rule of law and the principles of a fair trial and due process. For example, the swift trial and execution of the Romanian dictator Nicolae Ceaușescu and his wife in 1989 seemed problematic and led to similarly rushed decisions later, and were not instrumental in the subsequent transitional justice process. Human rights abuses require proper and impartial investigation, but this often takes time. Former dictatorial regimes may have destroyed detailed evidence of atrocities, which is then difficult to reconstruct.

On the one hand, a decent amount of time for a full investigation and a proper and fair trial is crucial for justice. On the other hand, time may work against transitional justice if victims do not see the perpetrators being investigated and prosecuted, on account of old age or ailing health. In many countries in Eastern Europe, alleged offenders had either died or were unfit to stand trial, or the cases against them had exceeded the statute of limitations. There is indeed a time dilemma: although there are benefits to early transitional justice, choosing the mechanisms and the actual process should not be rushed. Experience, for example in Chile, suggests that the pursuit of justice can be deferred and may mature when political circumstances are more favourable. One may also argue, however, that the windows of opportunity could be shorter and should not

be missed. Justice initiatives soon after a regime change are likely to be better received, more supported and more effective. Conversely, a combination of the regrouping of former ruling forces and a culture of forgetfulness later may create insurmountable barriers to justice. This dilemma has been tested in countries such as Guatemala, Chile and Argentina and also in several post-Communist states, where abuses from the Communist period were coupled with some older unresolved tensions from the period after the Second World War.

Time, therefore, can play a significant role in effectiveness, and the challenge remains how to accomplish the justice process while the evidence, memories and testimonies are still fresh but avoid the danger of justice being too hasty, biased and based on revenge. Balancing the time factor is further complicated because accountability mechanisms may need to adapt to gradual political and societal transformation processes. Time can also play different roles for different mechanisms. For example, truth commissions, memorials and historical records are necessarily less time sensitive than trials and can have an effective role even decades after the transition. Examples from almost everywhere suggest that it is never too late to investigate if new evidence comes to light, and it is never too late to re-examine past stories and to address grievances when goodwill exists. In this vein, the Office of the Federal Commissioner for the Files of the State Security Service in Germany continues to pursue new insights into past human rights abuses by the former East German secret service more than two decades after 1989 in order to establish a full historical record.

Cost

Expenses form another and different basis upon which to calculate effectiveness. As with the time factor, when applied to justice mechanisms the cost factor does not operate in the same way as in the business-as-usual world, where cheaper and faster means more efficient. Money certainly plays a significant part in justice mechanisms because the misappropriation of funds and dissatisfaction with the large amounts of money spent compared with the inadequate results achieved can have a negative impact on justice proceedings. The high costs of justice may add to victims' feelings of bitterness, for example when comparing the costs involved in the prosecution of the oppressors with the amount of material compensation paid for their suffering. The ad hoc International Tribunals for Former Yugoslavia and Rwanda and the permanent International Criminal Court have been criticized for being too expensive, and there have been suggestions that it would have been more effective if some of those funds had been distributed as aid to the victims (see also Mettraux, 2009).

Cost-effectiveness can be improved by greater efforts to strengthen domestic justice sector reforms and their adaptation to international standards of fair trial. Countries with a strong rule of law are more likely to provide an environment that is conducive to, supportive of and cost-effective for various transitional justice initiatives. However, there are some practical difficulties too. Often new governments are unwilling to accept far-reaching initiatives that might jeopardize their legitimacy or stability. Even when the political will exists, there may not be sufficient funds and capacity to prosecute perpetrators, especially in poor countries or where the transitional legal systems are weak and/or prone to corruption.

This highlights yet another shortcoming: even if perpetrators end up in jail, victims may remain dissatisfied if governments or courts fail to offer reasonable compensation. Truth and reconciliation commissions may serve as a better model for compensating victims, as demonstrated by the South African experience. However, compensation for large numbers of victims may exceed the capacity of transition economies. Interestingly, it is often ignored that compensation may be measured in ways other than money, for example by the therapeutic elements of non-material satisfaction, fact-finding and forgiveness. The question of catharsis through truth revelation also needs exploration in a more empirical manner than one based on arguments of principle.

Another consideration is the high cost of the alternative of impunity and the consequences of failing to punish atrocious crimes committed by a previous regime. The duty of governments is to invest in depoliticized justice mechanisms to prevent future violations, to give the transitional process broader legitimacy and to create or reform key institutions, especially within the judicial sector.

Conclusion

This book demonstrates how countries in Latin America and Eastern Europe approached and applied transitional justice to address past suffering and how these processes have been complex and tentative, and sometimes have even encouraged anti-democratic impulses. One common lesson is that the way in which the new democratic regimes treated the former Communist or junta regimes served as a test of their own anti-authoritarian style of government and respect for human rights.

The book has benefited from the gradually maturing field of transitional justice and more significantly from bringing together case studies from Latin America and Eastern Europe, which has never been done before. One interesting question that remains unanswered and invites future research is whether one can identify regional models of transitional

justice or, less ambitiously, whether and to what extent neighbours can influence each other in the process of transitional justice. Readers of the book will notice that the Latin American chapters address more cases of truth commissions, trials and amnesties, whereas the East European chapters address more cases of lustration, purge laws, the opening of secret police files and property restitution. In Eastern Europe, the justice process has been influenced by regionalism, with the process of joining the European Union often providing the context for policies. High-profile prosecutions in one country had an impact on neighbouring countries. Therefore, even though there may not be a standardized approach to implementing transitional justice, nevertheless neighbourhoods generally do matter and regions can develop similar affinities with justice mechanisms. Nonetheless, the transitional justice processes still have to be contextually appropriate and tailored to the specific needs of a society. A combination of strategies that includes both judicial and non-judicial mechanisms is more likely to fulfil a society's need for justice.

A major lesson is that the justice mechanisms should be transparent, credible and locally owned. They should investigate past human rights violations, reconcile divided communities through restorative justice techniques, and attempt to offer a common narrative of the past. With the disclosure of past abuses and the naming of those accountable, societies can encourage victims to rebuild trust in good governance. The exposure of offences can put pressure on former elites to cooperate and acknowledge their crimes, sometimes in exchange for amnesty and forgiveness.

The book has not avoided the difficult question of how transitional justice can be evaluated in terms of effectiveness. It has added some utilitarian thinking to the approach towards transitional justice, seeing it not simply as an absolute end in itself but also as a means to achieve other ends – such as democratization, rule of law and respect for human rights – in the particular circumstances in a specific country. The experiences in Eastern Europe and Latin America help to contextualize transitional justice both as a duty and as a results-based exercise, providing the empirical and regional background to compare and judge effectiveness. The book identifies variables to determine the effectiveness of certain mechanisms and has built on the notion that, when tailored to the specific requirements of a country, transitional justice can form an important means to consolidate peace and promote human rights and democracy as well as to heal past wounds. The effectiveness of justice mechanisms has been approached from the angle of the extent to which these mechanisms contribute to meeting certain objectives, rather than in relation to whether or not countries have been effective in setting up various mechanisms. In the broadest sense, not only is there a need for justice, but there is a need

for justice to promote peace, reconciliation, human rights protection, accountability and the establishment of social trust.

Note

1. To list a few of the most well known: Bassiouni (2002); Roht-Arriaza and Mariezcurrena (2006); Teitel (2000).

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