

“Reconceptualising Transitional Justice: The Latin American Experience”

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Transitional Justice in Latin America: Experiences and Impact (Part I)

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Reconceptualising Transitional Justice: The Latin American Experience¹

INTRODUCTION TO THE BOOK

1. INTRODUCTION

Latin America has long been characterised as a land of impunity. Gross human rights violations committed during brutal dictatorships in the Southern Cone² of the region in the 1970s were soon to be followed by widespread violence and abuse in internal armed conflicts in other parts of the region in the 1980s and 1990s.³ Even once peace accords had been signed and/or authoritarian regimes ended, although truth-telling in the form of official truth commissions was relatively common, full accountability was more the exception than the rule. Amnesty, whether written or unwritten, generally prevented trials for violations of human rights or international humanitarian law. Since the late 1990s, however, a very different pattern is starting to emerge. Today, more perpetrators are facing criminal prosecution, domestic amnesty laws are being dismantled, and victims' rights have entered the public arena in a much more forceful way than during earlier times. Is the former picture of impunity fading? Is Latin America moving from a culture of impunity towards a culture of accountability? Guided by this overall question, this book studies the Latin American experiences of transitional justice occurring since the first democratic transitions of the 1980s, in order to assess the role of transitional justice (TJ) and transitional justice mechanisms (TJMs) in societal shifts between the rule of impunity and the primacy of accountability.⁴ In

¹ This is the draft of the introductory chapter to the book *Reconceptualising Transitional Justice: The Latin American Experience*. The chapter is co-written by Elin Skaar, Chr. Michelsen Institute, Bergen, Norway, Cath Collins, Universidad Diego Portales, Santiago, Chile, and Jemima García-Godos, Norwegian Centre for Human Rights, University of Oslo. The project is funded by *Latin America Program, Research Council of Norway*.

² Geographical term used to refer to the four countries of the region's southern tip: Chile, Argentina, Uruguay and Paraguay. All four were or came under military dictatorship at some point during the 1970s.

³ Inter alia, in El Salvador, Guatemala, Peru and Colombia. The extremely extensive bibliography of these conflicts cannot be fully signalled here, but some useful references include XXXXX.

⁴ Accountability is defined here and throughout as explicit acknowledgement of past abuses and state involvement in or responsibility for them, through means which can include but are not limited to truth recovery, criminal prosecution, reform of compromised institutions, reparations to victims, and efforts to guarantee non-repetition. At some points in the text it is used in a more restrictive sense to refer specifically to criminal responsibility through prosecution: see below.

particular we ask how the combination of newer experiences of democratic transition or peace settlement⁵ with recent major changes to many established transition-era justice settlements⁶ may challenge traditional transitional justice thinking and practice. In Latin America, early (1970s and 1980s) violations occurred in contexts where impunity was part of the landscape and largely taken for granted: elite actors and institutions generally expected, and usually secured, exemption from legal, social and political rules applied to other members of society. Accordingly, most of the transitional settlements of the day privileged formal political system change over accountability for past violence, since it was generally believed that securing peace and/or democracy required concessions to be made to former authoritarians and/or non-state combatants. By contrast, the continued existence and specific deployment of TJMs in Latin America today are if anything suggestive of a move away from impunity. Truth commissions, first used in the 1980s, continue to be the most common response to periods of political violence but since the mid-1990s are much less likely to be accompanied by blanket amnesty laws preventing criminal prosecution.⁷ Reparations to victims and survivors have become a standard part of the post-violence repertoire, with more robust and internationally-enshrined requirements about their scope and comprehensiveness. Accordingly, today we need to look beyond the mere presence of TJMs and analyze their particular workings, progress and limitations, as well as the role of other contextual factors that promote or inhibit accountability. Based on a common conceptual and methodological framework, the chapters in this book relate the findings of a comparative study based on the recent TJ experiences of nine Latin American countries. The common thread is the identification of emerging patterns of change in the location of societies continuum between a ‘culture of impunity’ and a ‘culture of accountability’, terms used here in both a descriptive and an analytical sense (see below for full definitions). This exploration will ultimately lead us to theorize about issues that are central to transitional justice as a field, such as sequencing, timing, context and interaction effects in explaining and predicting the adoption and likely impact of specific TJMs.

In this introductory chapter, we lay out the conceptual and methodological framework applied in the study, focusing on four specific mechanisms: truth-telling, prosecutions, victim reparations, and amnesties. Applying structured thick descriptive structured analysis, our methodological approach is based on a common set of variables for all country cases, with a focus on social actors and surrounding dynamics, and application of process tracing techniques to access nuanced data on how particular TJMs and processes ‘behave’ over time. Our choice to study transitional justice in relation to (possible) shifts from a culture of

⁵ Such as Peru (2000-) or Colombia (ongoing)

⁶ For example, since 2000 transition-era amnesty laws have been overturned or set aside and prosecutions of former perpetrators initiated or renewed in all four countries of the Southern Cone.

⁷ Guatemala’s 1993 amnesty law, for example, was the first to explicitly respect international prohibition of amnesty for crimes against humanity. Subsequent transitions (Paraguay, Peru) abandoned amnesty laws altogether and Colombia’s recent attempted partial amnesty was substantially modified by the country’s Constitutional Court. See, *inter alia*, Collins (2011) in Clark et al (eds) on the gradual decline of attempts to enshrine impunity in domestic legislation since the 1990s.

impunity to a culture of accountability introduces a longitudinal dimension to each country study and to the project as a whole. This element is vital in our opinion to a balanced appreciation of TJ as a dynamic and long-term process, but has often been missing from comparative studies focused essentially on the configuration of official decisions taken at the initial transitional ‘moment’. Latin America, effectively the first region to undergo concentrated TJ experiences in modern times, today offers a unique opportunity to see how these national experiences have evolved and interacted with one another over time in a geographically delimited and culturally/ linguistically related area.⁸

Our notion of cultures of impunity and cultures of accountability has also been partly developed in response to recent and ongoing debates among academics and practitioners alike about ways to conceptualise and measure the possible impact of transitional justice mechanisms on peacebuilding and/or democracy. While impact assessment is a legitimate and much called-for enterprise in international programming, the rush to demonstrate the supposedly positive – or negative - virtues of transitional justice mechanisms through association with indicators of present-day violence or quality of democracy must not blind us to the complexities that underlie social change in any setting. Direct links and/or specific causal connections between transitional justice deployment and subsequent achievements in peacebuilding and democracy are yet to be established, even supposing that the normative and logistical challenges of defining and measuring democratic or peacebuilding ‘progress’ can be overcome. In a much more circumspect and deliberately less ambitious conceptualization, transitional justice mechanisms – which may or may not be adopted because they are believed or supposed to be ‘good for democracy’ – in practice affect and/or constitute the national accountability field. By definition, they therefore play an active role in establishing a dynamic tension between impunity and accountability. This book studies that particular tension and trajectory, offering an alternative approach to the quest for impact assessment by focusing on what TJMs are actually made for: to address and ideally to ameliorate the negative social and political legacy of past political violence.

1.1. Latin American Experiences with Transitional Justice.

The term transitional justice (TJ) is used here to refer to processes and mechanisms for dealing with past atrocities in societies emerging from repressive regimes or armed conflicts. TJ encompasses a range of measures, including prosecution, amnesty, truth-telling, reparations, lustration and institutional reform, developed in post-authoritarian and post-conflict situations.⁹ Latin American countries have been in the forefront of formal “truth and

⁸ While superficial, and often colonially-related, similarities should not be overstated, the existence of roughly homologous formal state and legal systems, and two mutually-comprehensible official languages (Spanish and Portuguese) has undoubtedly facilitated intra-regional exchanges and diffusion of TJ practices at both official and grassroots levels. Within other regions that concentrate transitional or accountability challenges, such as the former Soviet states or Sub-Saharan Africa, neighbouring countries may share some but rarely all of these features.

⁹ This list of transitional justice mechanisms is not exhaustive. See Gloppen, S. (2002). Reconciliation and democratisation: Outlining the research field. Bergen, Chr. Michelsen Institute, R 2002: 5: 1-52..

justice” experiences in recent decades.¹⁰ Latin America is the region which originated and developed the notion of a truth commission (TC). Eleven official and 5 alternative TCs have taken place in 13 different Latin American countries since the 1980s, meaning the region has been home to almost half of the roughly 40 such commissions currently acknowledged worldwide.¹¹ Latin America was the ‘pilot’ experience for the post-cold war UN’s active involvement in peace processes (El Salvador in 1991/2 and Guatemala in 1996/7), preceding UN involvement in setting up the *ad-hoc* tribunals in Rwanda and the former Yugoslavia in the 1990s.¹² Latin American (former) members of the armed forces have been prosecuted since the 1980s in several European courts for involvement in gross human rights violations, including in Spain, France, Italy and Belgium. This, together with the 1998 UK arrest of former Chilean dictator Augusto Pinochet based on extradition requests from Spain, has contributed to unprecedented advances in international human rights jurisprudence and the construction of limited enforceability for existing international human rights norms.¹³ The ‘Pinochet case’ made international legal history as the first successful invocation of universal jurisdiction principles introduced after WWII.¹⁴ Ongoing human rights trials in national courts in Chile, Argentina, Peru and Uruguay today are among the most extensive in the world after World War II; with Peru recently becoming the first country ever to successfully extradite a former head of state and hold him to account in a domestic tribunal for human rights crimes. Although these recent developments in criminal accountability have been predominantly domestic in nature, Latin America is also the second region in the world, after Africa, where the newly established International Criminal Court (ICC) is contemplating involvement (in the ongoing efforts for justice in Colombia). Latin America has also been a

¹⁰ For a visual presentation of deployment of TJMs in the region, see Figure 1: The Global Justice Cascade in Sikkink, K. and C. B. Walling (2007). "The Impact of Human Rights Trials in Latin America." *Journal of Peace Research* 44(4): 427. and/or Collins (2010) Appendix A ‘Transitional Justice in Selected Latin American Countries’

¹¹ For purposes of this calculation we adopt here Hayner’s classic definition of truth commissions as : “bodies set up to investigate a past history of violations of human rights in a particular country – which can include violations by the military of other government forces or armed opposition forces” Hayner, P. B. (1994). "Fifteen Truth Commissions - 1974 to 1994: A Comparative Study." *Human Rights Quarterly* 16(4): 597-655. Numbers are from Hayner (2010) *Unspeakable Truths*, 2nd edition. The definition excludes limited partial commissions set up to investigate a certain incident or very incomplete portion or period of violence, under which definition Uruguay and other Latin American countries would score even more highly.

¹² Although, in keeping with the very different prevailing wisdom of the time, UN involvement in Central America was focused on peace mediation and truth-telling rather than, as in the later cases, actively supporting criminal prosecution.

¹³ See Sikkink and Walling, *op.cit.*, and also Popkin and Bhuta (1999), on ways in which Latin American experiences have shaped the general field. The post-2001 ‘war on terror’ has nonetheless set back the cause of universal acknowledgement of the validity of international standards, as did the early withdrawal of the US from the International Criminal Court.

¹⁴ Although in the final analysis Pinochet was not extradited, the reasons were extra-legal: the outcome of the specific legal debate in the UK House of Lords broadly supported UJ as the basis for the jurisdiction claimed by the Spanish magistrate Baltazar Garzón. See *inter alia* Brett (2009).

forerunner in reparation programs to victims/ survivors and their families, as exemplified by Chile, Argentina and (later) Uruguay and Paraguay. In later years there has been an increased focus on bottom-up, victim-focused reconciliation processes, such as in Peru – which also emphasised the notion of collective reparations for indigenous communities, mirroring recent developments in acceptance of the principle of collective rights - and the recent Victims' Law in Colombia, particularly notable for its historical extensiveness.

In present-day Latin America, three identifiable clusters or groups of cases offer an excellent opportunity for examining, first, how transitional justice has evolved over time within national settings and, second, how the TJ 'menu' itself now reflects the very different international realities of the new millennium as contrasted with the 1980s. One cluster, which we call 'post-authoritarian' cases, represents settings in which the violence question is essentially a human rights legacy: the state was responsible for an overwhelming proportion of the most serious abuses at issue. This cluster includes the Southern Cone countries plus Brazil.¹⁵ In both of the remaining clusters, the question of significant violations of international humanitarian law by non-state armed actors is more present. The first of these, the 'post-conflict' cluster, includes Central America and Peru. The second consists of Colombia, in some senses an outlier as the only case where political violence is still ongoing in its original form.

The region accordingly offers useful lessons for TJ theory and practice in other parts of the world. The rich mix of early (1980s), mid-range (1990s) and recent/ongoing examples of deployment of TJ mechanism allow insights into the dynamic relationship between changing international contexts and the content of domestic TJ solutions (the 'international time' factor). Recent challenges to early transitional settlements in the southern part of the region offer a unique chance to study the effect of large scale shifts from amnesty towards domestic prosecutions at a distance from initial transition. The special study of Colombia meanwhile offers a 'bridge case' to current concerns in conflict studies, terrorism studies, and studies that prioritize other active peace-building settings including Afghanistan, Uganda, the Congo and Sudan. All three of the clusters moreover speak implicitly to the question of the place of rights concerns in motivating and shaping political transition, a dynamic inescapably present in the 2011 wave of political upheaval in the Arab world.

2. Transitional justice and impact assessment: A critical review

The academic TJ literature has grown enormously over the last two decades. Whereas the early TJ literature was law-focused and dealt mostly with issues of state-level decisions about

¹⁵ Linked, of course, not only by geographical proximity but also by 'Operation Condor', a specific ideological and repressive collaboration between respective military and civil-military regimes through the 1970s and 1980s.

truth commissions or criminal prosecutions versus amnesty of perpetrators;¹⁶ more recently the focus has been expanded to include the role of victim reparations¹⁷ and to take account of the protagonism long exercised by civil society actors and/or informal local initiatives.¹⁸ Over the 1990s scholarly debate shifted toward problematizing early heuristic definition of key concepts such as ‘truth’ and ‘justice’¹⁹ and examining more carefully the mix of short and medium-term aims and claims assigned to particular mechanisms. Recently, as noted above, concerns have shifted to impact measurement and the relationship, if any, between TJMs and conflict transformation and democratisation.

Largely based on the early Latin American transitional justice experience, the academic literature tends to regard formal (state-level) TJ initiatives such as criminal prosecutions, amnesties, truth commissions and victim reparations as important aspects of peacebuilding²⁰ and/or democratisation due to their potential to contribute to specific social and political goals held to be desirable. Specific claims made include that TJ measures when undertaken by new authorities can help to: create a break with the past; establish the rule of law and respect for human rights; deter further violence; encourage democratisation; and promote peace, justice and/ or reconciliation.²¹ Over the course of the 1990s, formal accountability mechanisms became, according to one expert, “part of the standard repertoire of international peacebuilding activities [...] routinely included in negotiated peace settlements”.²² Yet, the empirical evidence to support the majority of these ambitious claims is highly contested and inconclusive. While transitional justice issues are increasingly being included in the governance and rule of law packages of international development cooperation, a development broadly encouraged by the UN system and by international donor agencies,²³ there is a need to substantiate the claims concerning the positive contributions that these mechanisms are supposed to make to long term peace and democratic governance. As various

¹⁶ (Brito, González-Enríquez et al. 2001), (Hayner 2001), (Kritz 1995), (Minow 1998), (Roht-Arriaza 1995), (Rotberg 2000), (Teitel 2000);

¹⁷ (De Greiff 2006), (De Feyter, Parmentier et al. 2005), (Rubio-Marín 2006; Du Plessis and Peté 2007), (Torpey 2006)

¹⁸ (Stover and Weinstein 2004)

¹⁹ And, related, early suppositions about democracy as a natural end goal for transition itself and therefore for TJ.

²⁰ By peacebuilding here we mean both the reduction of violence and the general strengthening of democratic practices and the rule of law. The repertoire of mechanisms available in any transitional setting is restricted by a number of factors, most importantly the balance of power between different interest groups after the transition and the policy preferences of the incoming regime, as well as of international actors. Skaar, Gloppen, and Suhrke (eds) 2005 *Roads to Reconciliation*. Lanham, MD: Lexington Books.

²¹ (Hayner 2001; Bassiouni 2002; De Greiff 2006; Roht-Arriaza and Mariezcurrena 2006)

²² (Mendeloff 2004)

²³ UN Guidelines on Transitional Justice and Rule of Law (2004, 2011); find reference from OECD/DAC.

recent ‘state of the art’ studies have shown, the available evidence is limited and full of gaps and contradictions.²⁴ Methodological and qualitative issues in evaluation include the question of whether some of the aims assigned to TJ mechanisms are inherently contradictory.²⁵ The main claims emerging from the literature relating to the effects (positive and negative) of the four major TJ mechanisms this study will focus on²⁶ are discussed below and summarised in Table 1:

a) Truth telling

Some kind of formal accounting for the past in terms of ‘truth-seeking’, ‘truth recovery’ or ‘truth-telling’ is often held to be an essential component of a successful transition, democratisation or peacebuilding process. Truth-telling is variously assumed to encourage social healing and reconciliation; restore victim dignity through rectifying previous official denial or silence; promote – or sometimes replace – justice; allow for the establishment of an official historical record; serve a public education function; aid institutional reform; help promote democracy; and pre-empt as well as deter future atrocities.²⁷ Truth-telling may be achieved principally or initially through truth commissions, but can also be one result of prosecutions.²⁸ Overall, it is claimed that ‘truth-telling’ intersects with democratisation and peacebuilding by addressing presumed causes of violence and suggesting or promoting non-violent ways of dealing with social conflict in the future. The fact that societies’ felt need(s) for and understanding(s) of ‘truth’ and how best to achieve it vary widely between and across different settings remains essentially unresolved.²⁹

²⁴ *Revista de Derecho Comparado* 2011; Kim and Sikkink 2010; Merwe et al 2009; IJTJ 2010 special issue; Payne et al (2010); Teitel 2010 (Thoms, Ron et al. 2008).

²⁵ On the ‘truth versus justice’ debate, see among others Rotberg, R. I., and Dennis Thompson, Ed. (2000). *Truth v. Justice. The Morality of Truth Commissions*. Princeton, New Jersey, Princeton University Press, and Sriram, C. L. (2004). *Confronting past human rights violations: justice vs peace in times of transition*. London, Frank Cass.

²⁶ Namely, as mentioned above, truth-telling, prosecutions, reparations and amnesty.

²⁷ (Mendeloff 2004)

²⁸ Potentially producing, moreover, cumulative ‘legal truths’ which may, where politically motivated negationism still persists, win a broader adherence than the essentially administrative truths produced by a one-off commission. Much depends of course on the perceptions of objectivity, rigour and efficacy that observers attribute to one or the other instance. ‘Informal’ truth-telling by survivors, journalists, artists and even perpetrators and their sympathisers can also have significant impact, but our concern here is principally with the portion of these ‘truths’ that are taken up and supposedly validated by the state.

²⁹ For an illustrative example from the region, see Ekern, S. (2010). "The modernizing bias of human rights: stories of mass killings and genocide in Central America." *Journal of Genocide Research* 12(3-4): 219-241. The cultural value attributed to written historical narrative in the Western canon is highly debatable in the case of indigenous communities – in Central America, the principal targets of violence – who may preserve oral

b) *Prosecutions*

Formal criminal or civil justice system action against individual³⁰ perpetrators is held by some to be essential to (re)establish the rule of law in transitions that seek to establish democracy and/or a rule of law state.³¹ Indeed, eminent TJ theorist and jurist Ruti Teitel has commented on how “[p]unishment dominates our understanding of transitional justice”, as it is “emblematic of accountability and the rule of law” (Teitel 2000). Justice in the form of prosecution for past violations of human rights or international humanitarian law is, say some, instrumental in, avoiding cycles of extrajudicial or vigilante justice, establishing future respect for human rights, and deterring future abuse.³² With respect to democratisation and peacebuilding, the claims regarding criminal trials are similar to those made for truth commissions. Trials, it is claimed, help achieve (retributive) justice, whether for societies as a whole or solely or principally for victims and perpetrators; and may pre-empt as well as deter future atrocities by making individual (and by implication institutional) responsibilities explicit. Civil claims, whose use has grown in Latin America in recent times, may similarly spur perpetrators and/or institutions including the state³³ to change their behaviour in order to limit future liability. Trials for past atrocity may also support democratisation by demonstrating that the law (now) applies equally to all persons including the formerly powerful, and/or by creating respect for specific institutions (courts and other key justice system actors) that are an essential part of democratic governance. While these claims are usually based on a universal legal concept of justice, they do not necessarily address issues of historical/structural injustice which may significantly expand the range of possible justice claims in particular settings.

traditions and quite distinct notions of how truth is accessed and related. See on this point the controversy over Nobel prizewinner Rigoberta Menchu’s autobiographical account of atrocities in Guatemala.

³⁰ And, increasingly, against institutional and/or corporate perpetrators: cases have been brought or attempted in and about Argentina, South Africa, former Nazi Germany and Colombia, amongst others, against international corporations held to have actively colluded with or knowingly benefited from gross abuses of human rights.

³¹ For a suggestive and sophisticated exploration of the necessary distinction between the democratic state and the rule-of-law state or *rechtsstaat*, see Campbell, Colm and Ita Connolly (2012) *The Sharp End: Armed Opposition Movements, Transitional Truth Processes and the Rechtsstaat* *International Journal of Transitional Justice*, first published online January 24, 2012 doi:10.1093/ijtj/ijr030

³² On deterrence see Nino 1996 and Robertson 2008; but see Sikink 2010 and Olsen et al 2010 for counter claims or empirical findings that do not seem to support this theory.

³³ In Chile, for example, some civil damages awards have been made directly against named perpetrators while others were made against the (present day) state for its failure to prevent, protect and/or investigate. Claims have also been brought or attempted against private entities, usually corporations, in Argentina and Colombia and other settings worldwide.

c) *Reparations*

The provision of reparations to victims, survivors and/or their relatives is generally held to have a positive impact on justice and/or on reconciliation, although with regard to the latter, the potentially counterproductive impact of selective reparations in setting individuals or communities at odds with one another is sometimes acknowledged. The provision of economic reparations to former perpetrators who are also victims has caused empirical controversy - though to date relatively little sustained theoretical reflection – in settings including Peru and in Chile in recent years.³⁴ Forms of reparation vary widely but generally fall into one of two categories. Economic reparations consist of payments and/or health and welfare services designed to ameliorate or reverse specific harm caused to particular groups or individuals. Symbolic reparations, which often take the form of official memorials, monuments, state museums or the like, are designed to restore the ‘good name’ and social standing of victims as well as to emphasise current societal rejection and repudiation of past abuse. While both economic and symbolic reparations are often conceived of as rehabilitative for victims, a restorative justice perspective suggests a focus on perpetrator rehabilitation. Where the state has been the principal or a main perpetrator it is accordingly the state, rather than the victim, which needs to prove itself renewed and newly fit to exercise its proper place in society. This would be partly achieved through the issuing of sincere public apologies, the removal of former perpetrators from public roles, and the establishment of a correct and respectful treatment of former victims.

The underlying assumption of reparations policy is that societies emerging from a violent past evidence physical, psychological and social damage that must be acknowledged and addressed. Reparations generally focus on the victims or survivors of violence and abuse, and usually aim to acknowledge both past suffering and present needs through restoration of the status quo ante; a goal nevertheless often impossible in contexts of gross abuse. A wide range of both ameliorative and compensatory measures have accordingly been attempted (see (García-Godos 2008) and (de Grieff (ed) 2006.)). Debates about the ‘tort’ model of reparations that constructs reparations as a payment from a guilty to an injured party - obviating the question of state or other institutional responsibility - are addressed in Gray (2010), as is the question of efficacy and impact given that prevailing international standards increasingly require active participation of survivors and relatives in the reparations process. Latin America has recently seen a wave of memorialisation activities framed as symbolic reparation, and has also experienced an increasing tendency for justice efforts to produce regional court rulings awarding economic or symbolic reparations.³⁵ Both phenomena make the region, again, a potentially important comparative test case.

³⁴ Internationally, the same holds for Northern Ireland where the 200x Eames Bradley report proposal to extend a single payment to all families with members killed in the Troubles was roundly rejected for drawing no distinction between IRA bombers killed by premature explosions and others killed by the same detonations.

³⁵ Latin America is, together with Europe, one of only two regions of the world to currently have a fully functioning regional human rights enforcement system, in the shape of the Inter-American Commission and Court on Human Rights. Limited by mandate to ruling on state, rather than individual, liability the Commission

d) *Amnesty*

Prosecutions and amnesty are treated in some early literature as binary opposites, as the two ‘extremes’ available under the single heading of justice measures. We nonetheless we choose here to deal with them as conceptually and empirically separate. This treatment better reflects the distinct – usually, much broader – conflict transformation and/or transitional catalyst role that amnesty laws properly understood can play (a role recognised in the specific legal support the Geneva Conventions offer for their deployment). It also better reflects a recent and striking reality in the evolution of TJ: a growth in prosecutions of gross abuses in recent years has been accompanied not by a reduction but by a rise in the deployment of domestic amnesty laws. This apparently counterintuitive association is explained by an increasing tailoring of amnesty laws to ensure they are fit for conflict transformation purposes but cannot be misappropriated to provide blanket impunity.³⁶

In the ‘peace versus justice’ debate, a central argument has been that pursuing prosecutions during an active conflict can delay or otherwise interfere with the negotiation of peace. This perceived dilemma traditionally brought another mechanism to the forefront – amnesty, to guarantee participants immunity from *ex post facto* criminal prosecution and/or civil liability for past crimes. Where trials or the threat of future trials are politically difficult or potentially destabilising, amnesty has been seen as a possible solution. The combination of truth recovery with some form of amnesty became almost routine in the early Latin American experiences, in a Solomonic attempt to provide truth without legal consequences. The particular transitional settlements that followed this initial recipe are amongst the ones that have come under most sustained pressure in recent years, suggesting that it may not be possible to sustain indefinitely a ‘firewall’ between factual acknowledgement and formal accountability.

International law recognises the validity of limited forms of amnesty when used to end conflict. Most forms of domestic amnesty are however not compatible with the emerging internationally-recognised ‘right to truth’, and the longstanding right to justice, to which relatives, survivors and arguably societies as a whole are entitled. Regional human rights mechanisms have repeatedly declared blanket domestic amnesties in Latin America to be incompatible with international obligations. The early Southern Cone examples, essentially one-sided amnesties brought in to favour outgoing authoritarians, have come in for particular criticism. These amnesties are typically viewed as “denials of justice that encourage future impunity” (Thoms, Ron et al. 2008). Yet some scholars maintain that early stage amnesties can usefully pave the way for later truth and justice. In Central America, amnesties genuinely favoured both sides and were undeniably key to ending

and Court have both, in recent years, ordered measures such as inclusion of victims’ names on official monuments or the payment of sums of money to relatives as part of mediated friendly settlements and/or final adverse verdicts against particular member states.

³⁶ See the work of Olsen et al (2010) and of Mallinder and McEvoy (existing and forthcoming) on this point.

long-running civil conflicts. The main argument in favour of amnesties is thus that they support peacebuilding in cases where prosecution would threaten a fragile peace (Mallinder 2008). This can be seen as power politics trumping victims' needs, even in cases where bringing an end to conflict is demonstrably in the short-term interests of existing and/or potential future victims.³⁷ Latin America however offers a unique opportunity to construct more sophisticated comparative analyses of amnesty which include a longitudinal element. Early amnesty laws in the region (in Brazil, Chile, Argentina and Uruguay) were particularly broad and are today under challenge. In one setting - Argentina – they have been overturned altogether. Later amnesties in the region were more nuanced, respecting international law exceptions in the case of Guatemala. The later Latin America transitions – Peru and Paraguay – simply dispensed with the mechanism altogether, while Colombia, still in the midst of an armed conflict, has used partial and conditioned amnesties as an incentive to paramilitary demobilisation.³⁸ This study therefore offers a useful exploration of conditions under which domestic amnesty has and has not persisted, including questions of public opinion and perceived legitimacy of amnesties according to how, and when, they were proposed and passed.³⁹

³⁷ This coincidence cannot always be assumed: scenarios in which not all victims may not desire or prioritize the end of conflict include those where victims include combatants who believe in the possibility of a favourable military outcome and/or conflicts where the terms of an imminent settlement are perceived by some victims to put them on the 'losing side' and/or at risk of future reprisals.

³⁸ García-Godos, J. and K. A. O. Lid (2010). "Transitional Justice and Victims' Rights before the End of a Conflict: The Unusual Case of Colombia." *Journal of Latin American Studies* 42: 487-516.

³⁹ The Brazilian and Chilean amnesty laws were passed during military dictatorships but their Salvadoran, Uruguayan and Argentine equivalents were passed after transition with therefore at least the implicit support of democratic-era legislatures. In Uruguay, additionally, the amnesty law was subjected to specific popular plebiscite not once but twice, surviving intact each time.

Table 1: Claims about possible impacts of TJMs on democracy and peace found in mainstream TJ literature

TJM	IMPACT ON DEMOCRACY		IMPACT ON PEACE	
TRIALS	Negative	Trials may undermine democracy and risk authoritarian reversion/ military intervention (Huntington 1991).	Negative	Trials may undermine peace prospects and lead to renewed violence or an increase in repression (Snyder and Vinjamuri 2003). Under situations of civil conflict and war, human rights prosecutions may exacerbate human rights violations (Kim and Sikkink 2009).
	Positive	Trials strengthen democracy by building the rule of law and allowing the courts to re-establish their democratic credentials	Positive	Human rights trials are both legally and ethically desirable and practically useful in deterring future violations (Méndez 1997, Roht-Arriaza 1995).
TRUTH COMMISSIONS	Negative		Negative	Commissions that name perpetrators, in particular, risk provoking a backlash
	Positive	Truth commissions can strengthen democracy by drawing a ‘thick line’ between new authorities – committed to transparency – and past denial	Positive	Truth commissions can improve human rights practices and deter future violations through recommendations for reform
REPARATIONS	Negative	Resentment towards recipients can reinforce existing social rifts, particularly where recipients are also perpetrators. (Gray 2010)	Negative	The probability of being held liable acts as a disincentive to transfer power (Gray 2010)
	Positive	Reparations acknowledge and reincorporate formerly excluded or stigmatised sectors (victims and/or, sometimes, demobilised combatants), thus strengthening democratic cohesion	Positive	Reparations may redress survivor grievances and/or public perceptions of continued injustice, thus contributing to peace and reconciliation.
AMNESTIES	Negative	Amnesties may undermine democracy by weakening the rule of law and/ or preserving the privileges of de facto power-holders	Negative	Amnesties may undermine long-term peace by storing up resentments and/or provoking community-level summary justice
	Positive	Securing immunity from prosecution for outgoing non-state combatant groups can allow them to become law-abiding mainstream political forces. Immunity for (some levels of) the armed forces can enhance post-transitional reforms and readiness to accept civilian oversight	Positive	The offer of amnesty can help persuade authoritarian regimes or non-state combatants to adopt exit strategies

To add to these diverse and sometimes incompatible general claims, emerging literature on impact assessment shows at least as much variation regarding the putative effects of TJMs on a whole range of major areas of social and political life including democratisation, rule of law, respect for human rights, human rights culture, violence reduction, peace, and reconciliation.⁴⁰ Given the multiplicity of these dependent variables upon which TJMs are assumed or claimed to be acting, the possibility of scaling up existing impact assessment results toward any kind of reliable aggregate indicator is surely very limited even after almost three decades of sustained TJ practice. In addition to studies varying greatly in terms of what they try to measure impact *on*, most existing TJ literature is descriptive rather than explanatory, and focused on single case studies rather than structured comparisons. At the other extreme, emerging large-*n* studies offer the chance to generate testable claims and hypotheses but suffer the shortcomings of excessive ‘standardisation’ of measures or indicators.⁴¹ Four recent studies of this type are discussed below in order to better illustrate the conceptual and methodological difficulties which arise.

2.1. Statistical findings from large-*n* studies of transitional justice impact

Study 1: Peace as the dependent variable

In an early attempt to evaluate the impact of transitional justice mechanisms, **Lie, Binningsbø and Gates** assess the effects of multiple transitional justice mechanisms on the duration of post-civil war peace.⁴² Analysing 187 post-conflict cases between 1946 and 2003, they find that the impact of transitional justice on the duration of peace in general is weak.⁴³ They find war-crimes trials to be associated with longer periods of peace, but only in states they classify as non-democracies. For democratic countries the positive effect of trials on peace is found to be negligible. The ‘peace’ measured by Lie et al., is, however, relatively narrowly defined as the absence of civil war, that is, of the continued lack of a conflict ‘where the use of armed force between two parties, of which at least one is the government of a state, results in at least 25 battle-related deaths’ per year. Other instances or modes of violence are not counted, meaning that post-war countries with high levels of fatal violence considered non ‘battle-related’ and/ or not obviously involving government forces will not be classified as being in

⁴⁰ (Hazan 2006), (Mendeloff 2004), (Thoms, Ron et al. 2008) (der Merwe et al 2009), (Payne et al 2010).

⁴¹ Thus for example, studies that wish to investigate possible correlations between particular TJM processes and the quality of present-day democracy worldwide are generally forced to choose from a limited and flawed range of general rankings including the much-questioned Freedom House democracy index.

⁴² Lie et al. understand peace as negative peace, i.e. the absence of violence. See section 2.1 for a more nuanced discussion of the concept of.

⁴³ Lie, T. G., H. M. Binningsbø, et al. (2007) "Post-Conflict Justice and Sustainable Peace." World Bank Policy Research Working Paper 4191, April 2007 WPS4191, 1-24.

conflict.⁴⁴ These findings cannot therefore be taken to imply that trials are associated with a reduction in overall levels of societal or even of specifically political violence. Mani (2005) makes a related observation when signalling ‘the danger of backlash and relapse into violence’, even in a disguised form, as one of many possible problems associated with war-crimes trials.⁴⁵

Study 2: Democratic irreversibility as the main dependent variable

The effect of human rights trials is further explored by **Sikkink and Walling** in an analysis of all Latin American countries for the period 1979-2004.⁴⁶ Exploring the impact of human rights trials in the region, the authors set out to test pessimistic claims made by trial sceptics that human rights trials threaten democracy, increase human rights violations and exacerbate conflict. Their research shows that human rights trials have *not* undermined or reversed formally democratic political arrangements, nor have they led to a detectable increase in human rights violations or exacerbation of existing conflicts in Latin America. The authors nonetheless make no claims as to the *positive* effects of trials, restricting themselves to refuting the *negative* claims that trials have a deleterious effect on democracy. This is an important distinction: the study merely finds that the deployment of TJMs does not favour interruption of an established democratic order, making no additional claims as to their capacity to create or support the establishment of such an order where democracy did not previously exist.⁴⁷

Study 3: Levels of continued repression as the dependent variable

Kim and Sikkink in a more recent study, further examine the possible impact of human rights trials and truth commissions on the frequency of acts of repression (defined as instances of torture, summary execution, disappearances, and political imprisonment).⁴⁸ This study

⁴⁴ The issue is particularly pertinent for Latin America in the case of Central American countries such as El Salvador and Guatemala, where ‘ordinary’ criminal violence is still endemic and homicide rates have by some indicators actually risen sharply since the formal end of civil war. The issue of ‘disguised’ governmental participation in violence through the use of paramilitary forces was or is pertinent in these cases, as in Peru and, particularly, Colombia.

⁴⁵ Mani, R. (2005). "Rebuilding an Inclusive Political Community After War." *Security Dialogue* 36(4): 511-526.

⁴⁶ Sikkink, K. and C. B. Walling (2007). "The Impact of Human Rights Trials in Latin America." *Journal of Peace Research* 44(4): 427. The authors have created a new dataset on truth commissions and trials for past human rights violations. In this particular article, they only explore the effects of trials.

⁴⁷ We thank Rachel Sieder for drawing our attention to this important qualification: Private communication, 29.06.11.

⁴⁸ Kim, H. and K. Sikkink (2010). "Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries." *International Studies Quarterly* 54(4): 939-963. Note that their independent variable, trials, includes both national and international human rights prosecutions. They use the physical integrity rights index from Cingranelli-Richards (2004) human rights database (CIRI) to measure/code repression (their dependent variable).

expands the universe of cases beyond Latin America to include 100 transitional countries across the world for the period 1980-2004. The authors also explore whether human rights prosecutions can have a demonstrable deterrence impact beyond the confines of the single country in which the trials occur. Their initial hypotheses included:

- Hypothesis 1: Countries that have held domestic human rights prosecutions or whose officials have been the object of foreign international prosecutions will see greater improvements in human rights practices than those countries that have not held or been the object of human rights prosecutions.
- Hypothesis 2: Under situations of civil conflict and war, human rights prosecutions will exacerbate human rights violations
- Hypothesis 3: The use of truth commissions will also be associated with improvement in human rights practices.

Their main finding to date has been that transitional countries with human rights prosecutions are less repressive in the present day than countries without such prosecutions. They also deduce a possible cumulative positive effect of trials on reduction or containment of repression: statistically, within the group of countries that had seen some prosecutions, countries recording more total ‘trial years’ scored as less repressive than countries that recorded fewer trial years. This research suggests that prosecutions may have an impact both through punishment effects and through supporting and promoting normative change.⁴⁹ In sum, the study deduced some empirical support for the claim that human rights trials can help decrease incidence of repression and accordingly contribute to future human rights protection and non-recurrence. They furthermore conclude that the experience of having carried out a formal truth commission is similarly positively correlated with improved human rights protection and that, contrary to the findings of Snyder and Vinjamuri (2003), prosecutions carried out during active civil war conditions do not have a lesser impact on repression when compared to those carried out in peacetime. In fact, and consistent with the findings of Lie et al (2007), Kim and Sikkink offer some evidence that prosecutions during civil wars may even led to greater improvements in human rights protection than prosecutions in times of peace.

Study 4: Quality of democracy and present human rights performance as dependent variables
In another recent study, Olsen, Payne and Reiter use data from the newly created Transitional Justice Database, covering 161 countries over 40 years (1970-2007), to examine which transitional justice mechanisms and combinations of mechanisms are statistically associated with positive or negative changes in indicators of ‘human rights’ and ‘democracy’.⁵⁰ This is

⁴⁹ Although it may also support a rather different interpretation such as that states that are, for exogenous reasons, more law-abiding in the present day are simultaneously less likely to oppress their citizens and more likely to bring previous abusers to book.

⁵⁰ Olsen, T. D., L. A. Payne, et al., Eds. (2010). *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy*. Washington D.C., United States Institute of Peace Press. The main findings are synthesised

the largest and most comprehensive cross-country study of transitional justice to date.⁵¹ In contrast to the second and third studies discussed above (Sikkink and Walling (2007) and Kim and Sikkink (2010) respectively), Olsen et al find that single TJ mechanisms when deployed alone do not have statistically significant positive effects on democracy and human rights measures. By contrast, the authors show that only certain combinations of mechanisms— trials and amnesties or trials, amnesties, and truth commissions – are associated with improvements in indicators of democracy and of respect for human rights. Notably, they find support for a positive effect proceeding from the combined adoption of two TJ mechanisms— trials and amnesties—that were previously often considered incompatible. The authors suggest that trials may provide accountability while amnesties reinforce stability, the combination of which proves propitious for improvements in democracy and human rights measures. Another interesting finding is that truth commissions when deployed in isolation have an actively negative, rather than the expected positive, impact on democracy and human rights, but may contribute to a positive impact when combined with trials and amnesties. The findings hold across the wide range of geographical and historical contexts incorporated into the study.

To sum up, these four statistical studies certainly produce very different findings with respect to the specific impact of *trials*. This variation is itself open to a number of possible interpretations. Firstly, the studies may not be truly comparable since each operates with a different universe of cases. Whereas Lie et al look exclusively at post-conflict situations (i.e. countries that have suffered civil war), Sikkink and Walling’s findings are limited to Latin America (where all but two of the cases they consider are post-authoritarian). Secondly, the studies cover different time periods, with Lie et al taking their analysis back to the Second World War, while the other three studies focus on the most recent phase of TJ explicitly considered as such (i.e. the past 30-40 years). Thirdly, the studies operate with different numbers, working definitions and indicators of the dependent variables “peace”, “democracy” “repression”, and “human rights”, “human rights”, and “democracy”. It is accordingly difficult to draw conclusive inferences regarding the positive, negative or indeterminate impact of trials on peace and democracy; although the fact that the only multi-variable study - also the most recent - seems to contradict received wisdom in the field by detecting negative impact may well be worthy of further examination. The current project however chose, for reasons which are alluded to above and further developed below, to opt for a ‘middle way’ solution studying a delimited but substantial number of cases (9 countries) in a certain amount of qualitative depth. This method allows for a greater nuancing of conclusions and a fuller

in Olsen, T. D., L. A. Payne, et al. (2010). "The Justice Balance: When Transitional Justice Improves Human Rights and Democracy." *Human Rights Quarterly*.

⁵¹ The data base used in the book as well as the articles contains data on the following transitional justice mechanisms: trials, truth commissions, amnesties, reparations, and lustration policies. Leigh A. Payne, Tricia D. Olsen, and Andrew G. Reiter: Transitional Justice Data Base - a dataset of over 900 transitional justice mechanisms implemented world-wide from 1970-2007, including trials, truth commissions, amnesties, reparations, and lustration policies. The data are fully searchable and publicly available here: <http://tjdbproject.com/> - a Web site designed by John Fowler Web Consulting.

exploration of apparent causal connections than its large-*n* counterpart, even while the reach and generalizability of its conclusions is correspondingly more modest.

2.2 The specific contribution of qualitative case studies

The statistical studies reviewed here were complemented by consideration of a number of existing cross-country analyses focused on a small number of countries (and, often, on single TJ mechanisms).⁵² Most existing impact assessment studies still fall into this category, with many taking the form of single-case studies.⁵³ Single-case studies usually fail to produce generalizable findings due to the specific nature of their research preoccupations and design; while larger scale statistical analyses may suggest, but cannot *prove*, underlying causal connections to explain observed correlations. However, since statistical approaches to impact measurement are, as we have seen, generating widely disparate findings, there is surely a case to be made for melding the two approaches in ways that attempt to accentuate the positive virtues of each. A manageable number of case settings offers attractive possibilities for tighter conceptual and terminological precision in operationalising hypothesised connections between TJ adoption and large – perhaps over-large – meta-phenomena such as ‘democracy’, ‘reconciliation’ or ‘peace’.⁵⁴ Alternatively, as suggested above, we might usefully focus our

⁵² See *inter alia*, Brahm, E (2007) *Uncovering the Truth: Examining Truth Commission Success and Impact. International Studies Perspectives* 8 (1): 16-35, and Wiebelhaus-Brahm, E. (2010). *Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy*. New York, Routledge. In addition to the Transitional Justice Database amassed by Payne et al), several other large-*n* data sets in the making will allow for future statistical testing of assumptions in the TJ field. Combined qualitative and quantitative monitoring of recent national human rights trials set up at the Universidad Diego Portales in Chile in 2008 has subsequently been complemented by collaborations and methodological convergence with similar projects in Argentina and Peru, providing publicly accessible data through www.icsocj.org/observatorio-derechos-humanos; www.cels.org.ar and XXXXX. A database on amnesty legislation compiled by Louise Mallinder, currently of the Transitional Justice Unit of the University of Ulster, provides an overview of all amnesty laws in the world and is being continuously updated.

⁵³ See, for example, most existing mainstream output concerning South Africa: Chapman, A. R. and H. van der Merwe, Eds. (2008). *Truth and Reconciliation in South Africa: Did the TRC Deliver?* Philadelphia, Pennsylvania, University of Pennsylvania Press. Gibson, J. L. (2004). *Overcoming Apartheid: Can Truth Reconcile a Divided Nation*. New York, Russel Sage Foundation, Gibson, J. L. (2004). "Does Truth Lead to Reconciliation? Testing the Causal Assumptions of the South African Truth and Reconciliation Process." *American Journal of Political Science* 48(2): 201-217.; and Ross, F. (2003). *Bearing witness: Women and the truth and reconciliation commission in South Africa*. London, Pluto Press. Most of the methodologically rigorous single-case studies on transitional justice impact in the African context of which we are aware take reconciliation as their main dependent variable and South Africa as their object of study, resulting in somewhat skewed real-life data availability for the African continent. In Latin America, empirical research on transitional justice has tended similarly to focus on certain cases although the range is somewhat wider: arguably Chile, Argentina, Guatemala and Peru have received most of the mainstream scholarly attention.

⁵⁴ Summary evidence from Hazan, P. (2006). "Measuring the impact of punishment and forgiveness: A framework for evaluating transitional justice." *International Review of the Red Cross* 88(861): 19-47., Mendeloff, D. (2004). "Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm? 1." *International Studies Review* 6(3): 355-380. Merwe, H. v. d., V. Baxter, et al., Eds. (2009). *Assessing the Impact of Transitional Justice. Challenges for Empirical Research*. Washington D.C., United States Institute of Peace Press.

efforts even further to tracing the observable empirical dynamics connecting specific TJ mechanisms to the truth, justice, and reparation goals which they were designed to pursue. This is in itself an ambitious and productive task, given that fact that three major, separate and extensive literature reviews made towards the end of the last decade unanimously support what our review of quantitative work has already suggested: very little is still known for certain about the specific inner workings of TJ processes and their interaction effects in particular national trajectories.⁵⁵ In particular, although few countries have employed only a single transitional justice mechanism in isolation, very little of the existing literature explicitly considers interaction effects. Another key issue often flagged but rarely fully explored in existing literature is precisely *how*, rather than simply whether, timing and sequencing in the adoption of TJMs may affect medium and long term outcomes. The application of a single qualitative framework, using shared key indicators, to a related group of cases promises to fill at least some of these gaps.

3. Transitional Justice and the Shift from a Culture of Impunity to a Culture of Accountability

An additional, and mainly empirically-inspired, reason for a renewed look at Latin America as a 'set' of transitional justice experiences is provided by recent notable innovations, generally neither expected nor predicted, in some of the region's historically earliest cases. Why have some countries in Latin America recently shifted from widespread impunity for past human rights violations to the implementation of various forms of specific accountability, including criminal prosecution, while others have not?

TJMs as public policy decisions are adopted, combined and set in motion according to prevailing desires at the time to either promote or avoid explicit assignation of responsibility for acknowledged wrongdoing to some or all perpetrators of past atrocity. Where mechanisms including amnesty are initially selected and combined precisely to avoid this kind of public accounting, we can speak of a 'culture of impunity'. By contrast, where TJMs are designed or subsequently appropriated to deliver such acknowledgement and/or to add active, specific consequences to public enunciation of the truth, we can properly speak of a 'culture of accountability'. Understanding impunity and accountability in this sense as the two ends of a spectrum or continuum, the section which follows outlines the analytical framework guiding the present research, including the central hypothesis, main concepts, and methodological choices.

⁵⁵ Three general literature review studies: Mendeloff, D. (2004). "Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm?" *International Studies Review* 6(3): 355-380, Hazan, P. (2006). "Measuring the impact of punishment and forgiveness: A framework for evaluating transitional justice." *International Review of the Red Cross* 88(861): 19-47, Brahm, E. (2007). "Uncovering the Truth: Examining Truth Commission Success and Impact." *International Studies Perspectives* 8(1): 16-35. Thoms, O. N. T., J. Ron, et al. (2008). The effects of transitional justice mechanisms: A summary of empirical research findings and implications for analysts and practitioners. CIPS Working Paper, Center for International Policy Studies. Ottawa: 1-91., p. 4 and p. 12.

3.1. Central aim and hypotheses of the study

The overall aim of this study is to apply a single comparative framework to transitional justice trajectories in nine Latin American countries, in order to deepen current understandings of how, when and why common TJMs including truth-telling initiatives, trials, reparations and amnesty are adopted; interact; are shaped or appropriated by different actor communities; and produce both intended and unintended consequences. A specific research interest is the identification of sets of factors or circumstances capable of explaining or predicting currently observable shifts in specific TJ justice outcomes in parts of the region; shifts whose general trend seems to be away from impunity and towards greater accountability over time.

This study is based on the following observations and related hypotheses:

- The development of a socio-political climate ‘propitious’ for clusters of (re)deployment or renewed activation of transitional justice mechanisms results from a combination of conscious deployment of TJMs by transitional and subsequent governments; civil society innovation and the weakening or side-lining of veto players; the passage of time since transition; contextual factors including prevailing international attitudes and practice regarding gross violations, and apparently ‘exogenous’ political-institutional changes including national justice system reform.
- In some countries of Latin America, this changed climate has amounted to a qualitatively new opportunity structure, created or appropriated since the late 1990s by key interest groups who marshal sufficient quantities of domestic or international political capital to stimulate the deepening or reformulation of early TJ settlements.
- Where this reformulation has taken place, results have typically included incremental deepening of early truth-telling and reparations measures combined with innovation in the specific area of formal justice. This innovation has generally consisted in the narrowing or abandonment of domestic amnesty and the introduction or expansion of trials for former perpetrators
- Where this reformulation has not taken place, one or more of the contributing factors named above will be demonstrably absent. Patterns of violence will also be relevant, and we may find for instance that where violence was targeted at smaller, politically-oriented groups, it will prove easier to implement viable subsequent TJ-strategies than where there have been large-scale killings of poor, and poorly organised, victims
- In more recent cases of transition or attempted transition-through-deployment of TJMs (Colombia), the successful deployment of TJMs will similarly depend on the configuration of contributing factors, specifically including the ‘demonstration effect’ of longer established experiences

3.2. Main concepts

The Impunity-Accountability Spectrum

In this book, we consider impunity and accountability for human rights violations as occurring along a continuum. At one end of this spectrum, full accountability suggests the most complete levels of official and social repudiation of past abuses imaginable. This would probably imply at a minimum comprehensive and uncontested truth-telling, a holistic reparations package for direct and indirect victims, and at least the possibility of specific attribution of individual and/or institutional perpetrator responsibility through prosecutions and, where appropriate, penalties proportionate to the gravity of the offence. At the opposite end of the spectrum, a situation of complete impunity might include ideological and practical components such as denial, official silence or justification of past atrocities; non-existent, incomplete or significantly contested truth recovery; and the evasion of specific attributions of guilt through invocation of blanket amnesties for perpetrators. In between, we find various levels of more or less impunity and accountability alongside probable variations in the number of TJMs that have been activated and the degree or intensity with which each has been practised. This impunity-accountability spectrum can be applied to each TJM separately, setting countries along the spectrum according to whether they have or have not deployed each one, or, more profitably in our view, can be used to locate countries relative to one another according to an aggregate assessment of the combined effect of various mechanisms in each one.

Resolving the amnesty-trials dilemma

We have suggested that the simultaneous presence and/or deepening of the four major strands of TJ initially identified in this study should generally be read as indicative of a move toward the accountability end of the spectrum in any particular setting. How to reconcile this observation with the specific natures of two strands, amnesty legislation and trials, which are often albeit mistakenly treated as diametric opposites? As Payne et al, Mallinder and others have shown, it is increasingly misleading to associate the presence of amnesty legislation with the complete absence of prosecution or vice versa. The change is coextensive with evolutions in international and domestic legal practice away from blanket amnesties for any and all atrocities committed in the context of periods of political violence. The trend does not however automatically lead to the complete discontinuation of amnesty: tailored or limited amnesties to permit peace or transition without impeding accountability for gross abuses are perfectly conceivable and would moreover be legitimate in international law.

In order to fully evaluate relative openness to trials it is therefore insufficient to assess in a simplistic binary fashion the presence or absence of specific amnesty legislation. This is so not least because informal, de facto amnesty without explicit legal underwriting can be at least as potent as its explicit equivalent, while being at the same time less susceptible to overt challenge. Mainly, however, and in deference to the findings of Mallinder and of Olsen et al about the possible coexistence of amnesty with prosecutions in an invigorated accountability context, we hold that what should be evaluated for each case is not the simple presence or absence of amnesty legislation but rather (1) its quality, scope and real-life application where

it does exist and (2) actual justice practice (diligence or not in pursuing prosecutions) where it does not. Country study authors were accordingly asked to pay particular attention to the text, spirit, date and/or proximate cause of domestic amnesties as well as to evaluate whether these do or do not exclude internationally recognised human rights crimes from their ambit of application. Only once armed with this nuanced information is it possible to determine with any degree of precision whether a particular amnesty law is on balance positive, negative or neutral for an anti-impunity agenda that would require at least the possibility of prosecution of specific internationally-defined crimes against humanity.

Figure 1: The impunity-accountability spectrum



Possible Characteristics:

Widespread official and public denial or justification of past atrocity	Unequivocal social repudiation of atrocity, underwritten by the state
Little or no political replacement	Political alternation (authoritarian regime or combatant state replaced by incoming political authorities not directly implicated in previous atrocities)
High continuity in public administration and/or armed forces and police command posts	Lustration, vetting or gradual (generational) replacement of high level civil servant and security forces personnel and/or explicit recognition and repudiation by existing personnel of previous atrocity
Lack of constitutional/ institutional reform	New constitution and/or reform of previously compromised or collusive institutions to improve democratic responsiveness and/or respect for rights
No acknowledgement of victims, no reparations measures.	Memorialisation and reparations/ rehabilitation services offered to victims and survivors. Public apology?
No individual or institutional criminal responsibility or civil liability for atrocities is assigned or accepted	Access to justice: victims and survivors are free to bring criminal or civil claims; state fulfils duty to prosecute
De facto or de jure blanket amnesty for all politically-motivated crimes in disregard of internationally-mandated exclusions of including crimes against humanity and war	Access to truth
	Absence or limited nature of domestic amnesty

This flexible understanding of impunity and accountability as the opposite ends of a spectrum allows us to consider a variety of measures as indicative (or not) of a culture of impunity or accountability.

Post-conflict or transitional societies are located somewhere along this spectrum according to the particular configuration of measures, actions and attitudes prevalent at any one moment regarding past violence and atrocity. The location of a society on the spectrum is dynamic,

and the passage of time or other specific changes or innovations can move a society toward either end of the spectrum. Although it is our contention that some of the Latin American societies here studied have in recent years moved towards the accountability end of the spectrum, changes are reversible and an overall move in one direction can mask stagnation or counter-change along one or more of the truth, justice and reparations dimensions. The deployment or (re)activation of specific TJMs may be both a symptom and a cause of movement along one or more dimensions: only textured, in-depth exploration of each country case can illuminate the specific drivers of change for each setting. In this sense the specific ‘independent variables’ driving change in TJ settlements will emerge from field data rather than being pre-imposed.

Culture of Impunity and Culture of Accountability as thick-descriptive categories

What characterises a culture of impunity? And what characterises a culture of accountability? We have offered above a selection of some of the kinds of specific characteristics one might expect to find in a society with a highly developed ‘culture of impunity’ and in one with a highly developed ‘culture of accountability’. It is important to stress that these are ideal-type constructions that allow us to perceive more clearly the clusters of activities, behaviours and ideas that might locate a society more closely towards one end of the spectrum. The specific balance of characteristics, and the correct interpretation of particular political phenomenon as representative of one or the other tendency, must be left to on-the-ground expertise. As one example, a truth commission that is agreed to by external imposition, is resented and impeded at every step, and whose conclusions are finally rejected, disputed or ignored by all major interested parties and/or new authorities cannot be considered a marker of accountability in the same way, or to the same extent, as can a commission of domestic gestation which is well resourced and facilitated and whose report is received, acknowledged and acted upon by new authorities. Accordingly, the simple presence or absence of one specific TJM does not in itself constitute a shift towards accountability: a society will be classified as moving closer to one or the other extreme only via a nuanced decoding of the meaning and texture of each TJ action as well as the specific aggregate sum of its TJ actions at a given point in time.

The categories of culture of impunity and culture of accountability are thus, in one important sense, demarcational and descriptive rather than explanatory. Explanations for particular changes or configurations are to be found not in the concept of ‘culture of impunity’ but in the drivers and actors responsible for the decisions and outcomes that place that society in a particular category. Accordingly we proceed by identifying a number of variables and indicators that, when combined, can indicate the predominance a culture of impunity or a culture of accountability in a specific place. From the outset we do not pretend to explain shifts in the impunity-accountability continuum solely as a result of TJM; instead, we consider the absence, presence and renewal of TJMs as both possible contributors to and potential indicators of these shifts.

Table 2: Culture of Impunity and Culture of Accountability – Main features

Aspects/factors	Culture of impunity	Culture of accountability
Power distribution at moment of transition	<p>Former authoritarians retain strong influence and secure exit guarantees by threatening authoritarian reversal or renewed violence</p> <p>Power-sharing between former combatants each of whom were implicated in atrocities and who therefore have a shared interest in installing/preserving amnesty.</p> <p>Incoming authorities open to accountability but subject to veto players (economic and other elites) who oppose accountability</p>	<p>Political replacement a new political constellation where former authoritarians and previous combatants implicated in atrocity have limited or no residual political influence or veto power. May include transition by collapse – outgoing regime militarily economically or otherwise discredited</p> <p>Negotiated or supervised replacement: international supervision or underwriting of transitional arrangements that specifies or requires minimum levels of HR and TJ compliance</p>
Power distribution over time	<p>Power holders supportive of impunity are not replaced, or are replaced by incumbents who share or can be made to share similar views about the inconvenience of reopening past settlements</p> <p>Majority public opinion and main sources of domestic political support are hostile or indifferent to accountability pressures</p>	<p>Alternation of power to former opponents who were not implicated in atrocity and/or to authorities with a modernisation agenda which views continued past impunity as an impediment to international integration and/or perfectibility of rule of law</p> <p>Majority public opinion and/or minority activist groups with access to external support create political incentives for pro-accountability change</p>
Role of military and police in formal political arrangements (where military/ police were involved in atrocity)	<p>Military/ police retain strong formal or de facto political influence and continues committed to defending former repressive actions</p> <p>High command from periods of repression or political violence are not renewed or replaced</p> <p>Military/police have high levels of formal and economic autonomy from civilian political institutions</p> <p>Military justice system is allowed to deal with cases of alleged atrocity</p>	<p>Subordination of military to civilian rule where civilian politicians have an interest in accountability.</p> <p>Reduced military influence in the political sphere: downsizing, geopolitical realignment, abandonment of national security doctrine</p> <p>Military reform generational replacement, ‘modernisation’ eg through desire to participate in peacekeeping operations (for which minimum HR requirements apply)</p>
Government policy discourse about past atrocities	<p>“Turning the page”: dealing more vigorously with the past will hinder reconciliation</p> <p>Calls for understanding and forgiveness; in Latin America often couched in Christian religious imagery and language and supported by ecclesiastical authorities</p> <p>Ambiguous or evasive language about past atrocity; reluctance to assign specific or differential responsibility (‘we were all to blame’). Known in Latin America as ‘la teoria de los dos demonios’</p>	<p>Full accountability seen by new authorities as necessary for establishment of rule of law</p> <p>Commitment to a new social pact, recasting of state-citizen relationship on a rights-based footing</p> <p>‘Refoundational’ discourse where HR issues were key to campaign when in opposition and in manifesto promises</p> <p>Explicit commitment to overturning amnesty provisions</p>

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<p>International environment</p>	<p>Prevalence of National Security Doctrine and/or 'War on Terror' ideology</p> <p>Close/ strategic allies are sceptical or hostile to TJ or to international HR law</p> <p>Regional multilateral institutions are nonexistent, have little leverage over the country in question and/or are anti-HR</p> <p>Economic, military or political dependence on anti-HR or anti-TJ entities</p>	<p>Regional multilateral institutions have leverage and norm convergence around HR</p> <p>Close/ strategic allies are committed to international law principles</p> <p>Post WWII 'norm convergence' away from impunity (reflected in creation of ICC etc)</p> <p>Economic, military or political dependence on pro-HR or pro-TJ entities</p>
<p>Levels of continuing (political or common) violence</p>	<p>Persistence or reirruptions of specific political violence (by state and/or non-state actors) may derail or inhibit TJMs</p> <p>High or rising levels of 'common crime' may reinforce authoritarian nostalgia/ <i>mano dura</i> logic and discredit rights discourse or reform/ reduction of security forces</p>	<p>Steep fall in levels of political violence allay fears of reversal</p> <p>Moderate or stable levels of 'common crime'</p> <p>Demobilisation/ explicit abandonment of armed tactics by non-state combatants</p>
<p>Justice sector</p>	<p>Formal justice system historically weak, institutionally underdeveloped, and/or lacking popular legitimacy or confidence of elites</p> <p>Justice system previously instrumentalised by authoritarian regime or one combatant tendency in order to collude with perpetrators.</p> <p>Absent or limited justice sector reform, including personnel replacement OR reforms which deliberately or incidentally impede continuity of pre-reform investigations</p>	<p>Substantial judicial reform, including generational change in key judicial figures and/or changes in their receptivity to accountability claims.</p> <p>Modernisation and technical change: strengthened police investigative and/or forensic capacity.</p> <p>Change from inquisitorial to adversarial system: this shift took place in much of Latin America in the 1990s. Its effects are in theory INDETERMINATE for accountability as attitudes of new state prosecutors etc can vary. But in practice is usually accompanied by strengthening of salience of international standards</p>
<p>Creation of permanent HR infrastructure</p>	<p>TJ and HR issues dealt with 'ad hoc' and sporadically by mainstream institutions or political authorities, little continuity</p>	<p>Creation of dedicated TJ or HR instances with institutional solidity and public access (eg Ombudsperson) can give focus to continued TJ demands</p>
<p>Truth-telling</p>	<p>Absent or partial official truth-telling mechanisms, explicitly divorced from consequences eg by secrecy laws or bans on naming of perpetrators</p> <p>State dismissal or discrediting of civil society sources and archives</p> <p>Survivors and witnesses absent or fearful due to continued intimidation or trauma</p> <p>Strong discipline/ hierarchy/ loyalty within perpetrator ranks prevents confessions</p>	<p>Initial comprehensive and/or incremental official truth-telling mechanisms with mandate to establish responsibilities and/or execute reforms</p> <p>Active investigative journalism or other forms of progressive revelation about atrocities</p> <p>Significant anniversaries attracting public attention and media coverage</p> <p>Access to information laws and/or discovery of previous official archives</p> <p>Regional developments including extradition requests or document discovery in neighbouring</p>

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		countries
Reparations	Absent because atrocities are denied, forgotten or attributed exclusively to non-state actors Comprehensive reparations packages are explicitly or implicitly formulated as a substitute for justice or other measures ('buying silence' of victims or relatives)	Comprehensive victim reparations programs in place. Access to reparation does not exclude possibility of pursuing criminal or civil liability
Government response to international environment	Absent or limited government or justice sector compliance with international HR standards, norms, and decisions by international institutions.	High or increasing levels of compliance with HR standards and decisions by HR-regional courts
Civil society/HR organisations	Low levels of civil society HR organising (as distinct from political opposition); civil society HR organising drops due to less urgent situation and/or loss of external support and funding HR movement actively side-lined by incoming political forces and/or discredited by implicated parties	Presence of significant number of civil society HR groups interested in deepening TJ actions. Groups acquire high traction or visibility through judicialisation and/or strategic domestic/ regional/ international alliances
Supply-demand balance	Limited survivor/ relative demands for deepening of TJ accountability due to desire to move on; absence of trust in judicial system; small numbers of survivors; fatalism or indifference as to likelihood of success and/ or fear of reprisal.	'Demand inflation' based on earlier achievements or on demonstration/ contagion effects from other-country change (the 'Pinochet effect' and similar)
Victim profile	Very low or very high numbers and proportion (per capita) of victims of gravest atrocities Victims predominantly rural, poor and/or otherwise excluded groups	Victims/ relatives/ survivors groups have or quickly acquire professional profile, political organising experience and access to resources and external allies Motivated, vocal and organised exile community
Levels of fatal violence (relative to other violations)	Proportionately low: legacy of atrocity is a minority concern. Proportionately extremely high: TJMs may in this setting be seen as more urgent but may also be seen as unviable, victimhood not recognized as specific.	Fatal violence at levels that impede invisibility but do not paralyse demand or possible response
Lifecycle issues	Perpetrators, victims and their relatives may want to leave the past behind and/or to allow the next generation to escape the legacy	Towards the end of their lifecycle, some survivors or victims' relatives may want a last push to obtain closure. Some perpetrators may acquire a confessional impulse.
Public sympathy for former authoritarians or combatants	High levels of residual support for outgoing authoritarians or for one or both parties to the civil conflict. Low levels of social repudiation of past violence, reinforced by absent or muted repudiation by new authorities. 'Heroic myths': romantic portrayals of past	Low levels of residual support for outgoing authoritarians or for one or both parties to the civil conflict. High levels of social repudiation of past violence, including by new authorities. Level of economic and social stability permitting attention to and financing of unresolved TJ legacy

	<p>violence by participants, media or other influential actors</p> <p>Discontent with current political or economic situation: authoritarian nostalgia and/or sympathy for proposals of radical or violent change</p>	<p>questions</p>
Global networks	<p>Restricted/ censored citizen access to global networks of information, documentation, and organisations.</p> <p>No transparency or access to information legislation.</p>	<p>Citizen access to and participation in global networks of information, documentation, and HR organisations (although former combatants and authoritarians can also be strengthened by network opportunities)</p> <p>Transparency and access to information legislation in place and enforced.</p>
Unexpected and/or external events	<p>Political unrest, new forms of social or political violence such as the assassination of a major political figure; major economic crisis; security emergencies (including rise of organised crime and other illegitimate power-holding)</p>	<p>Revelations, accidental and otherwise leading to new demands (e.g. discovery of Paraguay Terror Archive 1992, scheduled US State Department declassifications; Pinochet arrest)</p>

As discussed above, Table 2 merely summarizes the main features of the two ideal types at the opposite ends of the impunity-accountability spectrum. We do not expect any society to provide a perfect fit with either ideal type.

Defining political transition and/or the end of conflict

We use transition here in its general, and most widely accepted, usage to denote the process of a society's moving from one set or type of formal political arrangement to another, one which is moreover qualitatively and recognisably distinct in the sources, ends and means used to assign and exercise power. More specifically, the first group of countries included in this study are those which formally ended a period of authoritarian, often military, political rule and (re)implemented an electoral democratic system during the 1980s or 1990s. This set of cases formed the backbone of much modern 'transitology' literature, also applicable in many ways to the structurally similar changes away from totalitarian political arrangements that occurred in the former Soviet states after 1989. This particular context and direction of political change, from authoritarian to electoral political organisation, is however only one of many possible forms and modalities of political transition. Transition may take place *from* an authoritarian regime, a one-party state, a military dictatorship, an apartheid state, a civil war, a situation of anarchic generalised violence, a situation of genocide or, of course, from an electoral democracy. Transition's destination is accordingly as indeterminate as its origin: transitions may take place *to* democracy, war, peace, authoritarianism, dictatorship or any number of other situations. However, and in keeping with the main thrust of so-called 'third wave'⁵⁶ transition literature, for present purposes we focus on transitions from situations of

⁵⁶ The term was coined by Samuel Huntington, who considered that in an international historical perspective, 1980s transitions from authoritarian to formal-democratic rule could be considered to constitute the third time that a critical mass of states had undergone almost simultaneous and interrelated normative and empirical shifts in prevailing forms of social and political organisation.

authoritarian rule to situations of electoral democracy and/ or from situations of generalised political violence or civil war to situations of peace.

Empirically, the Latin American cases considered here all adopted electoral liberal-democracy as the implicit or explicit end-goal of the relevant political transformations that we will consider: some, such as El Salvador or Colombia, in fact did not formally depart from this model during the period of violence during which atrocities were committed.⁵⁷ Colombia, in fact, is the extreme case of our nine since in this as in many other ways it is an incipient case of ‘transitional justice without transition’: a setting where mechanisms initially designed for application *after* conflict are instead being adopted during ongoing conflict. It remains to be seen whether TJMs can in this sense be used as independent variables or tools to bring about some desired goal such as a lasting peace. The use of a single set of terms and mechanisms, grouped under the TJ heading, to discuss three such varied groups of cases (shifting, respectively, from authoritarian rule to democracy, war to peace, and open to hopefully less acute conflict) may be considered a conceptual weakness but in fact it faithfully reflects and exposes one of the main characteristics of the TJ field itself. Often modelled quite closely on the early Latin American experiences that were its testing ground, TJ as a practitioner enterprise took the truth commission-amnesty provision-reparation menu or model that had evolved in post-authoritarian Southern Cone contexts and ‘exported’ it to Central American ‘hot wars’ for which it had not been specifically designed.

Accordingly, just as there are endless debates to be had about the exactitude or otherwise of fit between TJ aims - including accountability - and requirements for the construction of liberal democracy, one might similarly question the assumed coincidence of TJ processes with conflict cessation or transformation. In each case, additionally, the question of periodisation and demarcation presents itself. Exactly when can a transition-to-democracy can be said to have ended? With the first set of formal elections? Once a new constitution or rule of law is in place? There is a large and inconclusive scholarly debate about when the transition phase ends and democratic consolidation or deepening begins. Likewise, at what point can we declare that a state or society has reached a stage of ‘peace’? Is peace achieved once a permanent ceasefire has been signed? How much residual violence can be tolerated, and for how long, before the advent of ‘peace’ is placed in doubt? How to distinguish between ‘ordinary’ violence and political violence in diagnosing peace and, importantly, how to distinguish between conflict contained or disguised through authoritarian or totalitarian takeover and conflict transformed through the channelling of power contestation into more genuinely or more permanently non-violent modes? The exact onset and completion of ‘transition’ is in each case not only empirically but also conceptually difficult if not impossible to determine categorically. For present purposes, and in keeping with our proposition that transition, like transitional justice, is a much more extended and dynamic process than is commonly appreciated, we accordingly asked our country study authors to

⁵⁷ Peru arguably also preserved some vestiges of its formal republican arrangements, but in practice most observers agree that the significant changes wrought by president Alberto Fujimori, elected in 1990 but moving rapidly to an authoritarian political style with military backing and a dissolved legislature, amounted to an authoritarian interruption of the democratic cycle. Fujimori was deposed in 2000.

distinguish between formal moments of initiation of major change and later deepening of such moments, and to attend in their analysis to both. Accordingly we attend to the formal moment of handover of power or deposition of declared conflict but also to later significant milestones and/or reversals in these same processes.

There is of course merit to attending specifically to prevailing conditions at the marker point, which can be precisely dated for each of our first two groups of cases: the moment when democracy or peace were formally restored/ declared. Specifically, for transitions from authoritarian rule we adopt the marker point of the holding of reasonably free and open (usually) presidential elections together with the effective implementation of their results through a transfer of formal political power (inauguration of the new president and/or Congress).⁵⁸ As early transitologists suggested, the location of control and balance of power between and among protagonists and brokers of change at this moment allows us to classify the resulting transitions as, variously, negotiated, pacted, controlled, imposed, by collapse, or by force (whether via internal revolution or external invasion for the purposes of imposing regime change). The primary origin and pace of change may also vary: transitions may take place “from above”, “from below” or “from without” and may be swift or may take years.

As we have already signalled, for our particular set of post-authoritarian Latin American contexts, the direction and end goal of transitions have been from less to more formally (liberal) democratic arrangements; while for our post-conflict and ongoing conflict settings, transition moved or aimed to move societies from an openly violent to a more peaceful mode of coexistence. To assess whether or not it succeeded in this aim, an approach adopted by some scholars of civil war or other violent conflicts has been to adopt a threshold of battle-related deaths below which the conflict is effectively considered inactive or extinguished.⁵⁹ Although this approach has its merits it does not fully resolve the problem of the ‘fungibility’ of different types of violence mentioned above. Accordingly we asked country study authors, particularly those working on the Central American, Peruvian and Colombian cases, to

⁵⁸ Most Latin American political systems are heavily, some would say excessively, presidential. Accordingly the significant marker point for the end of authoritarian rule was usually signalled by the holding of presidential elections, coterminous or not with legislative elections depending on the country’s previous political traditions and constitutional arrangements. In post-conflict settings the question of power handover is secondary as the relevant marker point is the signing of peace accords. Dates for new elections may often be set as part of peace negotiations but it is rare for the signatory authorities to be required or agree to step down immediately. In these cases we asked our country study authors to indicate the particular significance of subsequent electoral calendars or changes (in El Salvador, for example, the presidency continued to be held by the pre-Peace Accord incumbent. Prior legislative elections had nonetheless given armed opposition forces effective – though not official – representation in the legislature even before the post-Accord transformation of the FMLN guerrilla movement into a legal political party.

⁵⁹ Using, for example, thresholds such as 25 battle-deaths per year to construct a scale where below 25=less violent, from 25-1000 = more violent, and over 1000=very violent). See Lie, T. G., H. M. Binningsbø, et al. (2007) "Post-Conflict Justice and Sustainable Peace." *World Bank Policy Research Working Paper 4191*, April 2007 WPS4191, 1-24.; Olsen, T. D., L. A. Payne, et al., Eds. (2010). *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy*. Washington D.C., United States Institute of Peace Press.

explore and contrast available evidence about classification and categorisation of political and non-political fatal violence before, during and after transition/ peace.⁶⁰ In general, in order to declare a genuine moment of initiation of peace we looked for the absence of evident continuity of systematic state sponsorship of violence or widespread mass or targeted killings by state or non-state forces. The use of qualitative indices to rank subsequent social violence or prevalence of HR abuses is in our view unduly mechanistic and precarious, as the construction of such indices takes little account of variations in definition and data capture, the extremely complex multiple causality operating in both of these phenomena, and the almost certain absence of reliable control data for the same country before the specific repressive or violent period under analysis.

3.3. Case Selection and the Role of Context

This book reviews the implementation, process and trajectory of TJMs in nine selected case studies: Argentina, Chile, Brazil, Uruguay, Paraguay, Peru, El Salvador, Guatemala, and Colombia. Accordingly, as discussed above, two major recognised types of transition are represented: post-authoritarian to democratic regimes (here called transition type 1), and conflict to post-conflict societies (here called transition type 2). There are enough substantive differences between these two types of context to warrant a deeper inquiry into how we should expect TJ to operate.⁶¹ The subdivision of our nine cases into three groups was therefore designed to maximise, for control and comparison purposes, similarities within groups and differences between groups on the following dimensions: timing of and time elapsed since transition (domestic and ‘international’ timing); type of conflict and transition; type and scale of violations and victim profile); number and sequencing of TJMs; “drivers of justice”; salience and types of regional networking and international involvement. See Table 3 for a summary comparison of some of this basic data.

Group 1 - Type 1 transitions (post-authoritarian, PA):

Argentina, Chile, Uruguay, Brazil and Paraguay illustrate some or all of the following dynamics: 'one sided' violence; effective self-amnesty; (attempted) securing of exit guarantees, subsequent significant tensions in civil military relations; reactions to initial or later challenges to impunity in the courts; the possible operation of modernising justice system reform as a (sufficient) independent variable capable of producing post-transitional accountability in the form of trials

⁶⁰ The issue is a particularly fraught one for Colombia, where figures for violence and attributions of responsibility for it are routinely deployed or appropriated as propaganda weapons. The independent monitoring carried out under the auspices of the Jesuit-linked NGO CINEP is one of the most widely respected sources within the country.

⁶¹ Olsen et al (2010, chapter 7) address the importance of context (post-authoritarianism versus post-conflict) as an important dimension when explaining the choice of TJMs at the end of conflict. However, they do not carry through the analysis to look at what these different contexts may imply for the success of/impact of TJMs.

Group 2 - Type 2 transitions (post-conflict, PC)

Peru, Guatemala and El Salvador represent countries with civil/internal⁶² wars followed by peace processes and/or amnesties that were used to secure peace. Issues illustrated include: whether amnesty is seen as more domestically 'valid' where violence is widespread and/or there is genuinely more than one armed actor, whether subsequent social pressure for accountability is actually lower where violence is massive yet essentially 'indiscriminate', relationship between past impunity and present high levels of social violence, low levels of justice system functionality.

Group 3 – Ongoing conflict/ incipient or desired transition

Colombia, an instance of ongoing and long-lasting armed conflict where TJMs are currently being mooted and deployed partly to try and bring about, rather than signal, a transition to peace.

⁶² Peru's extensive political violence between 1980 and 2000 was never formally acknowledged as a civil war, although the type (state and nonstate combatants) and impacts of violence (including massive internal displacement and rural 'scorched earth' policies) clearly place it closer to the Central American contexts than to the PA group in this study

Table 3: Case selection

COUNTRY	DATE OF FORMAL TRANSITION	CONFLICT OR REGIME TYPE	MAIN TYPE OF VIOLATIONS	TYPE AND SEQUENCING OF OFFICIAL DEPLOYMENT OF TJ MECHANISMS		PRIMARY DRIVERS OF INITIAL TJ SETTLEMENT
				Initial	Later	
Argentina	Early (1983)	Military dictatorship	10 000 – 30.000 dead and dd ⁶³ , torture (figure contested)	TC, trials, amnesty, reparations	Large-scale trials from 2000	Nationally driven
Uruguay	Early (1984)	Military dictatorship	Ca. 190 dead and dd, Ca. 200 000 tortured (figure contested)	TC, amnesty,	Incipient trials	Nationally driven
Brazil	Early (1985)	Military dictatorship	Ca. 350 dead and dd, extensive torture	Amnesty	TC announced for 2011	Nationally driven
Chile	Medium (1991)	Military dictatorship	Ca. 3000 dead and dd, Ca. 70 0000 tortured	TC, amnesty, reparations	2 nd TC; large-scale trials from 1998	Nationally driven
El Salvador	Medium (1991)	Civil war	Ca. 50 000 killed and dd	TC, amnesty		UN brokered
Guatemala	Medium (1996)	Civil war	Ca. 200 000 killed in genocide	TC, limited amnesty		UN brokered
Peru	Late (Milestone 2000)*	Authoritarian regime/ Internal armed conflict	69 000 dead and dd 600 000 IDPs ⁶⁴	TC, trials recommended, reparations	Fujimori conviction 2009, other ongoing high level trials	Nationally driven
Paraguay	Late (2003)**	Military dictatorship/1-party rule	Ca. 400 dead and dd, Ca. 20 000 tortured	No amnesty Later TC		Nationally driven
Colombia	Late/ ongoing (2005 milestone)*	Internal armed conflict	Large scale killings, Ca. 4 million IDPs	Justice and Peace Law 2005, trials, amnesties, reparations, commission of inquiry		Nationally driven with high levels of international consultation/ICC involvement

* 2000 marks the end of the authoritarian Fujimori presidency (1990-2000) and the beginning of discussion of TJMs. The transition to democracy from military dictatorship took place in 1980, also the year when the internal armed conflict started.

** Dictator Stroessner was ousted in a palace coup in 1989, but his Colorado party continued in power until 2008. The Paraguayan TC investigated HRVs between 1954 and its establishment in 2003.

*** Year of the passing of Law 975, known as the Justice and Peace Law, which established the legal framework for the implementation of TJ mechanisms in Colombia.

⁶³ dd = *detenidos desaparecidos* (detained-disappeared)

⁶⁴ IDPs = internally displaced persons

Colombia has been selected as a special case for four reasons: First, Colombia provides the to date only country in the Latin American context where TJ mechanisms are being suggested and implemented before the end of an internal armed conflict. This provides a unique opportunity for a baseline study of what happens when TJMs are employed at an early stage in the peacebuilding process, as opposed to after the conflict has ended (as in Guatemala, El Salvador, and Peru). Second, Colombia is the only non-African country where the International Criminal Court (ICC) has to date signalled its intention to start investigations unless national prosecutions are carried out. Following this process closely will add greatly to our present understanding some of the legal and political tensions arising from the activation of multilateral accountability mechanisms – an issue also illuminated by the increasing role played by the Inter-American Human Rights Court rulings in domestic challenges to existing TJ trajectories. It will also provide an interesting contrast case of use or attempted use of fully internationalised justice venues in TJ processes, since to date Latin America’s TJ and/or transitional processes have been almost exclusively nationally driven (eg the Southern Cone plus Brazil) or have featured an international actor in an essentially mediatory and supervisory role (El Salvador and Guatemala). Third, although most of the other studies demonstrate significant sequencing and spacing of TJMs Colombia, in a position to learn from almost three decades of accumulated TJ experience in the rest of the region, has chosen initially to attempt simultaneous implementation of all four of the TJMs on which this study focuses (truth, justice, amnesty, and reparations).⁶⁵ Fourth, Colombia’s Constitutional Court, almost uniquely activist in the region and with a strong rights-guaranteeing profile, has already successfully intervened to soften the impunity implications of early transitional justice legislation. Again, this raises the question of whether ‘usual’ trajectories will be foreshortened in this most recent case, since in the earlier regional examples such challenges did not take root domestically until well after transition had begun. In general, Colombia’s process will take place in a climate of substantially more complete and stringent international norms setting down rights to truth, justice and reparations for victims; allowing the chance to assess enforceability through examination of whether and to what extent the existence of this new framework is visible in the decisions that are finally taken at a national level.

3.4. Dynamics of impunity and accountability: Actors and process-tracing

Our analysis will pay particular attention to the dynamic interaction between social and political actors, both elite and non, who make their presence felt in the process of dynamic (re)location of a particular society along the spectrum between a culture of impunity and a culture of accountability. This will be done by identifying and mapping significant actors – tracking who enters, and who leaves, the arena of TJ contention during and after transition, and by process tracing of major shifts or milestones in the TJ balance in a particular setting.

⁶⁵ It also contemplates the issue of restitution of land and property as an effective form of reparation. The institutional arrangements for this are currently being put into place. Given the extent of the internally displaced persons situation in Colombia today (estimated to affect up to 4 million people), the issue of return and restitution is vital for any serious attempt towards permanent peace in Colombia.

over time. For actors, we will focus on identity, origins, policy preferences and interactions with others at some or all of the following significant points:

- (i) pre-transition (ie before the formal TJ process starts) – who, if anyone, is pushing for or obstructing truth, trials, amnestu or reparations measures at this stage?
- (ii) during transition negotiations and process – with particular attention to shifts in the balance of power between and among elite and non-elite actors
- (iii) in the early phase of establishment of TJMs, if any measures
- (iv) during the subsequent period, with particular attention to milestones, renegotiations or innovation in one or more of the four major TJ areas

(Process tracing will complement the analysis in the following ways:⁶⁶)

In sum, we believe the methodological framework set out here allows optimal use to be made of in depth, qualitative data and analysis from country experts by offering a common yet flexible core framework identifying many more exploratory dimensions than statistical analysis of existing indices alone would permit. The rich specific analysis and thick description of each country study lends focus to the importance of context for understanding the multi-layered inter-relation of variables and outcomes, something which is difficult to access and/or to subsequently adequately interpret through large-n analysis. Third, working from a theoretical frame to empirically grounded comparative data and back again helps avoid the twin pitfalls of unfounded extrapolation from one case – a main disadvantage of single case studies – and theorising onto, rather than from, the data: our initial frame identifying key areas and dimensions for empirical attention is open to redesigned if initial field results suggest new hypotheses or additional significant variables.

4. TJ and the Impunity-Accountability Spectrum: Applying the Analytical Framework

This study assesses the place of TJMs in a process of potential societal movement between the primacy of impunity and the prevalence of accountability over past atrocity. In order to do this, we propose a five-step research design, corresponding roughly to four distinct time periods in any TJ trajectory, that allows specific identification of the variables and indicators most pertinent for appreciating the origins, drivers and contextual significance of each step

- Step 1: Context before and leading into transition
- Step 2: The transitional moment: modalities and power dynamics
- Step 3: Establishment of initial TJMs

⁶⁶ Paragraph on process tracing will be included in next draft.

- Step 4: Implementation of initial TJMs
- Step 5: TJMs and subsequent movement along the impunity-accountability spectrum

Each of the steps is applied to all country cases, facilitating in this way, comparative analysis. Each step is discussed in more detail below.

Step 1: Context before and leading into transition

Elements to be taken into consideration include the following:

The pre-transition period: nature, length, severity, type and extent of human rights violations, armed actors

In cases of armed conflict, it is necessary to ascertain the *nature* of conflict – i.e. the root causes of the conflict (ideological, racial, ethnic, identity based, economic, or socio-economic) – in order to assess the appropriateness of specific TJM choices and the realistic possibility that they will address root causes sufficiently to prevent relapse or medium term recurrence.⁶⁷ Similarly, how far back in time the main violations lie at the moment of transition may be significant in deciding which mechanisms are to be established (*time of occurrence*). Note that the *length* of a conflict is not always easy to determine, as different scholars operate with different cut-off points for conflicts and transitions.

For violent conflicts, the *severity* of a conflict is frequently measured by using criteria such as battle-related deaths. In our opinion, this kind of measurement is bound to miss out on a wide range of (gross) abuses routinely employed during violent conflict, frequently surpassing the scope and importance of battle-related deaths. Accordingly we set the goal of exploring and quantifying, insofar as existing historical data permit, the full range of major violations of human rights and humanitarian law that were committed over the course of each specific violent conflict or authoritarian period. Since TJMs often address some but not all kinds of abuses, in order to assess their comprehensiveness it is important to have an overview of at least the *range of abuses* that have been committed in the first place.

It is also essential to identify the *main parties to the conflict or repression*, be they state agents, paramilitary or guerrilla groups, or unarmed civilians. This configuration affects at a very basic level what types of international crime may have been committed and the kinds and levels of state and non-state responsibilities implied, as well as frequently having a bearing on what TJMs are later considered desirable and/or viable.

Step 2: The transitional moment

Once conflict or regime termination has at least begun, a different set of potentially important factors suggest themselves:

⁶⁷ Fletcher, L. E., H. M. Weinstein, et al. (2009). "Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective." *Human Rights Quarterly* 31: 163-220.

Transition type and dynamics; parties/actors in the transition, elections, regime change, peace agreements and the balance of power

Much has been written on the importance of the *nature of transition* and its potential impact for the choices made with respect to transitional justice mechanisms.⁶⁸ Arguments typically revolve essentially around some variation of the concept of *balance of power*. Although a full actor perspective has to date been largely and surprisingly absent in studies of transitional justice processes (Wiebelhaus-Brahm, Olsen et al 2010 etc), there is a growing literature on the role of *international actors* such as the UN, in such processes. Understanding the political and legal reasoning of different domestic as well as external actors, and assessing their relative sources and channels of power during as well as after the transitional moment will give valuable insights into what the mechanisms proposed, selected and finally deployed were actually expected or hoped to achieve by their various proponents, as well as how less committed parties and/or veto players may have attempted to circumvent or short-circuit these stated goals at the design stage.

Step 3: Establishment of initial TJMs⁶⁹

The transition type to a large extent determines the *initial* scope of politically available choices of transitional justice mechanisms, although it is our contention that later TJ trajectories, at least in Latin America, prove much less path-dependent than early scholarship might lead us to expect. Even initial choices, and certainly actual design and deployment, of mechanisms, also depend on a whole range of other factors, such as the health of the economy and/or availability of alternative resources.⁷⁰ Although we will necessarily, for reasons of space and focus, principally depict the four main TJM areas already outlined (trials, truth commissions, reparations and amnesties), this section will also capture data on tailor-made, unique and/or complementary TJMs that may have been developed for a given country.

⁶⁸ Panizza, F. (1995). "Human Rights in the Process of Transition and Consolidation of Democracy in Latin America." *Political Studies* XLIII: 168-188.; Roniger, L., and Mario Sznajder (1999). *The Legacy of Human Rights Violations in the Southern Cone. Argentina, Chile, and Uruguay*. New York, Oxford University Press.; Skaar, E. (1999). "Truth commissions, trials - or nothing? Policy options in democratic transitions." *Third World Quarterly* 20(6): 1109-1128.; Walsh, B. (1996). "Resolving the Human Rights Violations of a Previous Regime." *World Affairs* 158(3): 111-135.; Zalaquett, J. (1992). "Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations." *Hastings Law Journal* 42(6): 1425-1438.

⁶⁹ We here draw on the work of Mendeloff, D. (2010). *Transitional Justice and Violent Conflict: A Call for Conceptual and Theoretical Clarity in Assessing Impact. A Way Out of Violent Conflict? The Impact of Transitional Justice Mechanisms*. Solstrand, Bergen, Norway, 4-5 June.; Thoms, O. N. T., J. Ron, et al. (2008). *The effects of transitional justice mechanisms: A summary of empirical research findings and implications for analysts and practitioners*. CIPS Working Paper, Center for International Policy Studies. Ottawa: 1-91. Root, R. K. (2009). "Through the Window of Opportunity: The Transitional Justice Network in Peru." *Human Rights Quarterly* 31(2): 452-473.

⁷⁰ See chapter 4 in Olsen, T. D., L. A. Payne, et al., Eds. (2010). *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy*. Washington D.C., United States Institute of Peace Press.

(c) Actors behind the selection and establishment of TJMs

As mentioned above, focusing on the key actors in the transitional justice process will help to clarify how committed the various parties are to certain choices of TJMs over others and, subsequently, to making the chosen TJM “succeed” (in the sense of achieving its stated goals). In particular, it will be important to examine the role of *civil society* and links to *transnational networks* to account fully for the demand side of transitional justice: both elite and non-elite, state and non-state actors may be active in promoting impunity or in promoting accountability

(d) Public debate and political discourse surrounding establishment of TJMs

The presence or absence, and particular content, of contemporaneous *public deliberation* around the adoption of TJMs gives a guide to prevailing majority opinion and also helps understand or predict the likely reception and initial impact a particular mechanism will have. Media reporting of the expressed views of key individual, group, and institutional actors, including new power-holders, may also be instructive in this regard..

(e) Explicitly stated goals of TJMs

TJMs have a wide range of explicitly or implicitly stated goals and hopes attached to them. Given the impossibility of comprehensively surveying, particularly in retrospect, all possible tangible and intangible aspirations and desires attached to each mechanism, we necessarily focus mainly on the explicit goals that the mechanism itself or the main public record of the time ascribe to it. Nonetheless, given the considerably controversial and delicate practical, legal and moral terrain upon which early TJ often operates it is also necessary to exercise caution when evaluating official claims and counterclaims about these goals. One clear example is in the specific area of trials. Where international legitimacy or the avoidance of ICC intervention dictate that the semblance of criminal accountability would be useful, but domestic conditions and the balance of power suggest that it might also be unwise or imprudent, one may find isolated cases of judicial prosecution of official atrocities occurring even before transition. Nonetheless, it would be wise to look for the presence of due process guarantees, procedural rigour, enforcement of verdict, and existence of similar trials in all or most cases of similar characteristics before concluding that a single trial can be read as a valid indicator of a pro-trials TJ decision or policy. Thus, for example, a methodology that simply counts ‘trial years’ (the presence of *some*, any, kind and level of activity in the courts over violent atrocity) would risk failing to distinguish between the routine consideration and rejection of almost 10,000 habeas corpus writs by a supine Chilean court system in the years between 1973 and 1990 – clearly constitutive of the construction of impunity – and the substantial activity, often over the *same* cases, which has seen around 270 former regime agents convicted since 2000 of crimes related to repression. A failure to consider who is and also who is not being prosecuted at certain junctures would also prevent appreciation of the essentially ‘show trial’ nature of the handful of pre-peace accord cases brought in 1980s El Salvador or of the evident decision both there and in Peru to restrict pre and early transition period prosecution efforts exclusively to non-state actors.

Accordingly, not only the existence but also the quality, fairness and extent of trials for past atrocity are important. Is criminal prosecution even a state decision at all? Does it respond to and is it reflected in a mandate or instruction to state prosecutors to actively exercise the state's duty to investigate and punish, or is it a privately-impulsed affair to which the relevant judicial and political authorities have responded reluctantly and/ or in open contradiction one with the other? Have sufficient resources been allocated to ensure free and fair trials which respect the rights of the accused but also protect witnesses and provide full access to justice for relatives and survivors? The hierarchical reach of trials into command levels of both state and non-state perpetrating institutions is also important: whether only commanders, only foot-soldiers or both groups plus their political allies are being subjected to prosecution and whether these patterns respond to objective factors such as the availability of concrete evidence or to political decisions or unwritten agreements. Similarly, it matters whether proportionately just a handful, the full range, or a sample somehow held to be 'representative' of perpetrators is being prosecuted.⁷¹ In short, with trials as with each of the other four TJMs or strands considered, it is important to evaluate the 'sincerity' of any given action according to whether it can most reasonably be considered to have been an intended contribution to full or partial impunity or accountability.

With regard to truth-telling, another of our four principal analytical fields, *truth commissions* as a generic category have set themselves and/or been assigned dozens of separate and not always compatible goals, as visible in their mandates and in the secondary literature surrounding them. Again, it is therefore essential for a full account to carefully survey actually existing commission(s) in order to see how modest or ambitious each is in the goals it sets itself. Where official truth-telling has been incremental it is instructive to see how and why these goals broaden; where it has not, it is important both to ask why and to see whether unofficial truth production has emerged to fill the gaps.⁷²

In other words truth commissions, like trials, may mean a wide and contradictory range of things and though in quantitative analysis might be represented as the same entity might in this more nuanced analysis have to be registered on opposite sides of the impunity/accountability dichotomy. The stated goals of specific truth commissions will therefore be accessed through a review of their mandates and surrounding legislation, but a fuller account of the comprehensiveness or otherwise of the effort at truth-telling that they represent will require parallel consideration of the full scope of time periods and violations that they do or do not aim to address.

⁷¹ See Paul Seils on the significant distinction between 'illustrative' and 'paradigmatic' cases in this regard. Seils, P (2003) 'La justicia transicional' in APRODEH Conference Report "La judicialización de las violaciones a los derechos humanos en el Perú" APRODEH: Lima

⁷² For example, a second Chilean truth commission was held in 2003/4 to redress the exclusion of survivors from the first one, which focused primarily on deaths and disappearance. Meanwhile in Uruguay and Brazil all official and semi-official truth-telling to date has focused exclusively on deaths and disappearance even though in both cases the totals for these violations are extremely small when compared to the much more extensive practice of torture and prolonged political imprisonment by the respective military regimes.

Reparations programmes are perhaps one of the empirically most incremental of the mechanisms we look at: most Latin American countries have substantially modified their reparations policies over time, usually, though not always, in the direction of broader scope and greater inclusivity. The study will capture, among other things, the principal political logic(s) behind launching and subsequent modification of reparations measures, whether economic or symbolic, and evolution/ controversy over criteria for eligibility and the distinction between ‘victim’ and ‘perpetrator’

With respect to *amnesties*, we investigate the principal proximate and deeper causes of the adoption of amnesty laws and assess their content as to principal groups and/or crimes include or excluded. The fit of domestic amnesty laws with prevailing international standards is one guide to assessing their intent as mechanisms of impunity and/or accountability, although with such a wide historical spread of amnesty legislation dates this exercise should take into account growing awareness and salience of these criteria for later cases. Accordingly, subsequent official attitudes to the (re)interpretation, annulment or reassertion of amnesties might prove a more accurate comparative yardstick. The absence of de jure amnesty should also not be taken automatically to indicate a pro-accountability position: the possible existence of de facto or unwritten impunity in the form of absent or deliberately desultory prosecution attempts should also be considered. The basic distinction between a self-amnesty and one with somewhat stronger claims to objectivity and/or democratic legitimacy, too often overlooked in TJ studies, will also be considered as will the significant possible and actual conflicts that have arisen over tensions between democratic logic and international obligations, on the one hand; and moral versus legal imperatives in assigning retroactive effect to legislative changes, on the other.⁷³

(f) Institutional arrangements

The institutional set-up put into place for administration and implementation of TJMs can be decisive in their subsequent relative success or failure. These institutional arrangements include the legal and normative framework, administrative procedures, oversight, autonomy, financial resources, staffing, relationships with other relevant official bodies and contact with stakeholders including civil society groups

(g) Timing for the establishment of TJMs

As mentioned above, TJMs may be employed or modified at various different points in the transition process. We differentiate at least three significant possible points:

⁷³ The Uruguayan amnesty law has on some readings been twice reaffirmed by plebiscite in democracy: the Supreme Court nonetheless recently pointed out that the citizenry is not free to suspend or revert certain fundamental guarantees (viz the principle of irrenunciability in human rights doctrine). In Argentina, amnesty provisions were annulled in the mid 2000s in ways that potentially contravened basic principles of non-retroactivity in criminal law.

1. *During transitional (pre)negotiations or the transitional moment* itself This is particularly relevant for transitions from violent conflict as TJMs are increasingly implemented as part and parcel of a wider peacebuilding package. The TJM most frequently employed before the end of a conflict is some form of amnesty. This point should however be distinguished from the premature use of (self) amnesty during authoritarian regimes, and long before a definite transition was on the horizon, in Chile, Brazil and El Salvador.⁷⁴
2. *Immediately after the initial transitional moment:* This point of application can be observed in both type 1 transitions (from authoritarianism) and type 2 transitions (from violent conflict).
3. *Well after the initial transitional moment* This dynamic can be observed in both types of transition included in the study. For example, trials as well as proposals to introduce or strengthen amnesty have emerged up to a decade after transition in each case.⁷⁵ The Latin American case with to date the longest lapse between initiation of transition and installation of an official comprehensive truth-telling instance is Brazil (1985 to 2012, respectively). This particular moment or point, increasingly the longest single period in existing TJ experiences, is the main focus of Step 5 since it is the phase in which substantial shifts from initial impunity-accountability balances may or may not occur.

(h) (Deliberate or causal/ consequential) sequencing of TJMs

Where two or more TJMs eventually emerge in a setting that initially implemented only one, we may find that there is a necessary or sufficient causal connection between them and/or that the first acted as a stepping stone for the second or subsequent. Truth-telling that establishes official victim registers has often been used as a basis for the allocation of individual reparations. Or, if a truth commission precedes trials, the information gathered by the TC may subsequently come to be used as supplementary or even primary evidence in court (although unsupported TC reports have in practice rarely been admitted without independent corroboration). Even where TC mandates explicitly rule out judicial effect and/or do not name perpetrators, the narrative that they set out may, if properly acknowledged, become part of the general historical record in ways that directly or indirectly motivate or nourish trials.⁷⁶ Conversely, if trials precede truth commissions, the information

⁷⁴ In the first two examples the self-amnesty was subsequently preserved and still limits or impedes trials. (In Argentina and Peru, attempted self-amnesties were simply ignored or overturned by incoming authorities). In El Salvador, repeated wartime amnesties were used to permit non-state combatants to return to the country and/or take part in peace negotiations. The generally progressive character of these amnesties misled some human rights groups into supporting the 1993 transition era amnesty law in the belief that it would be of a similar character.

⁷⁵ Calls for or attempts at amnesty were made in Peru in 2010 and 2011, and for the strengthening of existing amnesty were made repeatedly, including most recently in 2011, in Chile.

⁷⁶ For instance, a 2011 Uruguay case verdict ruled that a general presumption could henceforth be made that torture and other violations had indeed occurred in cases of politically motivated imprisonment and

disclosed through trials may prompt demands for comprehensive truth-telling. Running trials alongside truth commission inquiries (as in the case of Sierra Leone) creates yet different dynamics and expectations. The sequencing and impact of earlier TJMs accordingly plays an explanatory role in demand for and implementation of subsequent ones.

(i) TJM in a wider context

TJMs may occur in isolation, or be part of a larger, more comprehensive policy towards past and present human rights violations. For instance, in situations of negotiated peace after a violent conflict, TJMs may form part and parcel of a package for peace that also implies the strengthening of international rights commitments and the introduction of specific bodies charged with rights promotion and protection (viz El Salvador's human rights ombudsperson's office, implemented in the early 1990s due to a stipulation in the relevant peace accords). In transitions from authoritarianism towards democracy, holding trials or establishing a truth commission can be part of a conscious government policy to strengthen the rule of law and create respect for democratic practices.⁷⁷ Transitional justice is almost always part of a broader agenda of socio-political change⁷⁸ - or, conversely, of the management and containment of such change. The major thrust of transition-era politics should therefore be examined in order to pinpoint possible points of overlap or divergence with the specific TJ agenda.⁷⁹ Transitional justice mechanisms can also, of course, be manipulated or appropriated in the service of this broader agenda rather than for the specific purposes for which they were designed or terms in which they are justified.⁸⁰

Transitional justice as an overall process also needs to be distinguished from the specific, time-limited TJ programmes or projects which form some of its components. One such programme could include a designated package of mechanisms or measures to be carried out in a limited period of time and/or up to a maximum designated resource spend. The whole process would nonetheless consist of the totality of such projects as well as the 'interstitial', non-official or intangible spinoffs, outcomes or side effects they may generate. TJ processes accordingly need to be evaluated against their whole socio-political context.

disappearance, since officially-sanctioned historical investigation had obviated the need to prove this from first principles in each individual accusation.

⁷⁷ See Carlos Nino on the conscious hope that the Argentine junta trials would cultivate civic virtues including increased allegiance to democratic principles

⁷⁸ V.d. Merwe (2010).

⁷⁹ As one example, the incoming centre-left coalition that took over from the Pinochet regime in Chile was forced to modify or abandon some of its early anti-impunity proposals given its simultaneous commitment to maintaining a neoliberal economic model requiring cultivation of good relations with economic elites sympathetic to outgoing authoritarians.

⁸⁰ Merwe, H. v. d., V. Baxter, et al. (2009). Introduction. *Assessing the Impact of Transitional Justice. Challenges for Empirical Research*. H. v. d. Merwe, V. Baxter and A. Chapman. Washington D.C., United States Institute of Peace Press: 1-11.; Saffon, M. P. and R. Uprimny (2007). *Uses and Abuses of Transitional Justice in Colombia*. Bogota, DeJusticia: 1-39.

Step 4: Implementation of TJMs, including TC recommendations

The fourth moment we aim to analyse corresponds to the actual implementation phase of specific transitional justice mechanisms or programmes, and is particularly concerned with identifying concrete *outputs* (eg amnesty bills, court verdicts, truth commission reports, reparation payments or memorials) and exploring how they have been achieved. Where relevant – eg for TC recommendations requiring further action or legislation - the *degree of completion* should also be measured or estimated. Do indicators exist that allow evaluation of whether TJM objectives are, in general, being met? Or are TJ measures aborted or truncated after having been set in motion? (Such as trials which produce sentences subsequently reversed or left without effect by discretionary pardons; or commissions of enquiry which are set up but never issue a final report).

(j) Implementation: How and by whom

The actual mechanics of implementation, and the assignment of leadership responsibility for it, are significant in predicting likely shifts from impunity towards accountability or vice versa. It matters, for example, whether trials are carried out nationally or internationally, whether judges are well regarded or dismissed as corrupt etc. Likewise, we expect it to matter, who is selected to sit on a truth commission, how and how well it is resourced, who if anyone is charged with implementing its eventual recommendations etc. etc. The “how” and “who” questions matter for legitimacy, trust, and eventually for impact. Mandates are one guide to these questions for TCs, but subsequent legislative initiative including political party protagonism can also be significant in, for example, overcoming executive reluctance or indifference. Judicial branch autonomy and willingness to exceed or overrule executive or legislative enthusiasm can also be a factor: we may need, in other words, to disaggregate or nuance our assessments of the views or actions of ‘the state’ at any single point.

(k) Duration of TJMs

Transitional justice is a long process, but TJMs are often employed for very different time periods. Truth commissions may operate for just a few months or for many years. Trials may be swift (as in the case of Saddam Hussein) or prolonged over several years or even decades (as in the case of Slobodan Milosevic). Since the length of the process is likely to have an impact on how different people evaluate the mechanism (as fair, serious, timely, legitimate, irrelevant, too costly, too rushed, a farce etc.), it is important to not only record the presence or absence of a given TJM but also to specify when and for how long that particular TJM operated and/ or saw its work implemented over time.

(l) Were stated goals and outputs achieved?

If stated goals have not (yet) been implemented or achieved, it is pertinent to ask why not. Abandonment, failing political will, political replacement, resource scarcity, redrawing of priorities, discovery of flaws in design or timing may all operate to derail or delay initial plans. Figuring out the “why not’s” may give us valuable insights to intended and non-intended consequences arising during and from implementation of TJ measures. Here it should also be noted that a particular TJM may have both short term and long term goals, some achieved and

some not (yet). Detailed empirical analysis will allow us to address these complexities in more detail.

(m) Follow up measures and recommendations

This is especially relevant for truth commissions, often tasked with providing recommendations in their final reports. The scope of asked-for recommendations may vary widely from immediate legacy measures (reparations, exhumations, identifications, prosecution or amnesty of perpetrators) to preventive and remedial actions (institutional reform, legislative change, rights education, documentation centres, etc. We will also analyse to what extent and in which ways recommendations of truth commission reports are followed up and implemented by successive governments. Note that the issue of follow-up measures adds an important aspect to the time dimension: the work of a truth commission is far from completed when its report has been issued.

Step 5: TJMs and subsequent movement along the impunity-accountability spectrum

This step is based on the thorough review of the factors identified and explored in steps 1-4, with particular attention perhaps on the role of a wider circle of actors – domestic civil society, international civil society and regional/ international institutions – in directly or indirectly contributing to later change in the balance, number, social importance, direction of operation or content of TJMs. The extent to which general political and social life beyond and after designated TJ ‘moments’ throws up the kinds of issues and features set out in table 2 is the main preoccupation for this step, corresponding in most of our cases to the present and most recent period of ‘post’ transition or ‘post-peace’ politics. By comparing the extent, direction and origins of observable movement(s) between impunity and accountability in a particular setting with the specific variations in its adoption or implementation of dedicated TJMs, we will be able to partly isolate and identify the specific contribution that TJ as such – and as official or as unofficial praxis - has made to present day impunity-accountability outcomes in our nine country cases.

4. Closing remarks

To be added in next draft.

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