The Prosecution of Human Rights Violations

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Abstract

This article analyzes the central arguments and findings of "transitional justice," the study of how incoming rulers address the human rights abuses of outgoing regimes. A scholarly consensus suggests the balance of political power matters most for explanations of transitional justice decision making. However, other important influences include international factors and the passage of time combined with democratic governance and/or emotions. Our review finds no consensus on the efficacy of transitional justice measures, in part because few studies currently exist. However, existing studies suggest that trials and truth commissions neither destabilize democracy nor foster animosity, respectively. Finally, this article considers whether restricting the study of transitional justice to third-wave democracies is appropriate in light of recent developments in long-established democracies.

INTRODUCTION

It is scarcely possible to read newspapers today without finding mention of a truth commission, trial, or some other process being contemplated or implemented in one country or another. Even in the United States, lawyers and human rights advocates have called for criminal prosecution or a truth commission–like investigation of Bush Administration officials for the torture of suspected terrorist detainees. Beginning in the early 1970s, with what Huntington (1991) described as the "third wave" of democratization, efforts by incoming elites to address the crimes of outgoing repressive rulers have multiplied. Trials (both domestic and foreign), truth commissions, lustration (i.e., evidence of collaboration), restitution, apologies, monuments, etc., are now fixtures on the political landscape of societies transitioning to democracy or emerging from civil wars. Once relegated to the margins of the general study of democratization, "transitional justice," as it is now known, has emerged as a field of study in its own right, with a number of important questions answered and other key questions remaining. This article examines what we have learned about transitional justice decisions during democratization, focusing on what we now know about why, how, and when democratizing states choose to punish or otherwise deal with their repressive pasts. It also asks whether we should expect issues of transitional justice in democracies, whether old or new, to ever be finally settled.

Since the 1970s, there have been approximately 150 political transitions worldwide (Backer 2009, pp. 25–26). However, many of the states undergoing these transitions have not remained democratic or never became democratic in the first place. These political transitions cover a range of undemocratic regimes (i.e., personalistic, warlord, military, communist) and reflect varying levels of institutional development and coercive capabilities. As Diamond (1999) and Geddes (1999) document, a number of the new democracies survived only briefly before being overthrown, and other highly fragile democracies eventually descended into authoritarian rule or warlordism. Still, a large number ended up as what may be described as partial democracies—that is, democracies that possess "some, but not all, of the properties that characterize full democracies" (Epstein et al. 2006, p. 551).

Whatever the outcome of the transitions, human rights abuses are often a contentious topic raised by incoming authorities, domestic and international human rights organizations, and/or victims or their families. These abuses are most frequently, if not always successfully or completely, addressed by democratizing regimes through various justice mechanisms. However, certain of these mechanisms may also appear under authoritarian regimes, where rulers use them to protect and extend authoritarian rule. Repressive rulers in post-Soviet Uzbekistan, for example, established a truth commission on past Soviet crimes in order both to blame their dismal human rights record on their Soviet legacy and to signal their recognition of human rights' significance (Grodsky 2008b). What these rulers recognize, of course, is that Western powers, who often condition political, economic, and military assistance on human rights, desire proof, however flimsy, that human rights matter to the government being assisted. In this instance, a truth commission proved to be a sufficient gesture. Although our concern in this article is transitional justice during and after democratization, it is necessary to acknowledge transitions without justice, which use the same means to meet undemocratic ends.

WHAT IS TRANSITIONAL JUSTICE?

The term transitional justice, which is commonly used to describe multiple mechanisms during democratization, is more than descriptive. It conveys a normative understanding about what these processes are meant to achieve, namely, some measure of justice for victims of state crimes. Legal scholarship, from which the term appears to have first emerged, was most concerned about how justice could be administered fairly in a time of political and

institutional flux. The challenge, for both legal theorists and practitioners, was to identify and preserve principles of justice under severely constrained political and institutional circumstances. As legal theorist Ruti Teitel (2003, p. 76) observes, "What is fair and just in extraordinary political circumstances was to be determined from the transitional position itself." Thus, transitional justice is necessarily an "imperfect and partial" conception of justice, which does not easily conform to "the ideal rule of law" (Teitel 2003, p. 76). So, assuming for the moment that there is some general consensus about ideal justice and the rule of law, legal scholars and practitioners worried about how far afield transitional justice would necessarily drift. There is good reason for these worries, as attempts "to impose accountability through criminal law often raised rule-of-law dilemmas, including retroactivity in the law, tampering with existing laws, a high degree of prosecutorial selectivity, and compromised judiciary" (Teitel 2003, p. 76). A central problem is that these dilemmas would seriously undermine the authority and respect for the rule of law in the new democracies; the inconsistencies between the ideals of the rule of law and the realities of its actual dispensation would simply be too large (Teitel 2003, p. 77). Indeed, the idea of truth as justice, as embodied in truth commissions, is recognition of and deference to these inconsistencies. Because justice as retribution cannot be properly dispensed owing to political constraints, another understanding of justice is required. Here, justice is conceived as "restorative," whereby victims can tell their stories, "confront their tormenters and hold them accountable" (Kiss 2000, p. 8). Although many consider this trade-off between truth and retributive justice unacceptable, Minow (1998, p. 88) argues that "truth commissions are not a second-best alternative to prosecutions," because they allow for a fuller accounting of past events and assist in individual healing and societal reconciliation.

For Teitel, transitional justice is not just an ideal. It must also be understood and approached pragmatically. The actual administration of justice matters to both the meaning and authority of the rule of law in periods of political transition. Similarly, as political philosophers Thompson (2007) and Luban (2006) observe, the realities of transitional justice severely test the theoretical "oughts" of justice and legal institutions: what ought to constitute justice and how legal institutions ought to operate. For legal theorists and philosophers who seek to clarify and uphold normative conceptions of justice, transitional justice has proven especially challenging.[1]

Political science, especially its early scholarship, tended to focus, both conceptually and empirically, on the exercise of power, so justice was viewed as a reflection of political power. Rather than identifying what should be judged as just or determining how institutions should operate justly, scholars were committed to examining empirical realities. This scholarship is the focus of this essay. Suffice it to say here, however, that taken to its logical conclusion, this reduction of justice to politics itself seems overdrawn. Scholars who would focus only on the "facts on the ground" run the risk of failing "to grasp the various ways in which justice as an ideal exerts power over the social and political practices of which it is a part" (Smiley 2001, p. 1333). This sharp scholarly delineation between the ideals and realities of justice may well have been a reaction against the presumption of an overriding moral imperative, which facts on the ground did not seem to support. However, just as legal theorists and philosophers have had to acknowledge the hard, real-world realities of justice, political scientists have had to take into account normative commitments and conceptions of justice. Elster's (2004, p. 80) recognition

[1]Philosophical scholarship on the morality of prosecution focuses on devising suitable ethical and moral justifications. Classic works include Jaspers (1947) and Arendt (1958). On the moral obligation to prosecute or not, see Orentlicher (1991), Zalaquett (1995), and Nino (1996). On the trade-off between truth and justice, see Malamud-Goti (1996), Minow (1998), and Rotberg & Thompson (2000). Relevant legal scholarship focuses on the tension between procedural and substantive bases of the rule of law. On the capacities of legal procedures to deliver justice, see Minow (1998), Teitel (2000, especially ch. 4), and Meierhenrich (2008).

of how "conceptions of justice and fairness" shape the motivations of individual actors seems a useful counterpart to Teitel's legal, but pragmatic, view of transitional justice. These conceptions are based in reason, interest, and emotion. Both Teitel and Elster are interested in examining how justice actually works, without ignoring the conceptions of justice that undergird its administration or enliven the motives of relevant actors.

An apparent resolution of the tension in approaches has proven helpful in making better sense of transitional justice experiences, where both political power and ideals are at play, although not in equal measure or force. As we shall see, the political-power argument is well-founded and compelling, but it is neither comprehensive in its accounting nor unerring in its predictions. This article reviews a key argument that has animated transitional justice scholarship in political science, namely Huntington's "distribution of power" explanation for transitional justice decisions. I focus on Huntington because his explanation has been, in my estimation, most influential, as scholars either explicitly organize their claims around it or treat it as common knowledge without specific attribution. I evaluate Huntington's power argument and related claims in light of national experiences. Certain aspects of Huntington's explanation are strong, but international factors and the effects of time, democratic processes, and emotions are insufficiently accounted for. The article then analyzes how much we know about the actual effects of transitional justice measures on democratic consolidation and societal reconciliation. Finally, I discuss how recent efforts at historical rectification in long-established democracies alter our understanding of transitional justice and its temporal parameters.

EXPLAINING TRANSITIONAL JUSTICE DECISIONS

The key texts of the transitions-to-democracy scholarship, written in the 1980s, say relatively little about how past atrocities would be dealt with. In keeping with the overriding theoretical task of explaining successful transitions, they predict that such efforts will be highly risky and destabilizing. They advise, therefore, that prosecution be limited to "extreme cases" of abuse, especially when perpetrated by outgoing military regimes. O'Donnell & Schmitter (1986, p. 30), for example, "would argue that, despite the enormous risks it poses, the 'least worst' strategy in such extreme cases is to muster the political and personal courage to impose judgment upon those accused of gross violations of human rights under the previous regime." Huntington (1991) follows up on this line of reasoning, presenting the decisions that democratizers face in stark terms. In addressing what he termed "the Torturer problem," incoming elites must decide whether to punish or forgive human rights abuses. Huntington (1991, p. 211) presents the dilemma as one of polar opposites—either "prosecute and punish or forgive and forget"—suggesting that criminal prosecution or amnesty are the only policy options. However, the empirical record shows that although these two options are the most common, they are not the only ones. Other mechanisms are used, the most favored being truth commissions, which have amounted to a "third way" between punishment and amnesty. Mechanisms of transitional justice exist on a continuum, which now includes trials, truth commissions, amnesties, property restitution, reparations, lustration policies, public monuments, and apologies.

More important, Huntington argues that the decision whether to punish or pardon is largely constrained by the interests of political elites. Legal and moral arguments about the necessity of either punishment or amnesty do not, in the end, well explain actual outcomes. What best explains them are the "nature of the democratization process, and the distribution of political power during and after the transition" (Huntington 1991, p. 215). In short, "might makes right," or more accurately, might defines what is possible. Outgoing authoritarian regimes that commandeer the political transition, which Huntington characterizes as a "transformation" transition, virtually

always grant themselves amnesties. On the flip side, outgoing regimes that are weak and are ousted from power usually face some form of punishment. The interests and the desires of the powerful, those of either strong outgoing authoritarians or strong incoming democratizers, override those of all others, including those of citizens and organized human rights groups who often desire punishment and/or fact-finding investigations. However, demands for justice are relatively short lived. According to Huntington, the general public soon loses interest and their outrage diminishes, and persons associated with the former regime eventually "reestablish their legitimacy and influence" (1991, p. 228). Thus, Huntington confidently concludes that justice is "a function of political power" and that it "comes quickly or not at all" (1991, p. 228). On his view, the likelihood of the delivery of justice is based on the distribution of power and the shortness of time.

Huntington's argument generated a number of predictions. The first is that we should expect amnesties and other forms of nonpunishment rather than prosecution and trials because transitions to democracies are usually brokered processes, with the outgoing leaders exerting considerable power and the incoming regime being necessarily sensitive to their demands. Democracy, after all, is the ultimate goal, and the main veto players are political elites. The second prediction is that whatever efforts at justice are going to occur should emerge within a short period of time during and after the transition. Third, although Huntington acknowledges the role of the international community, specifically international human rights law and norms, which make it impossible for incoming democrats to avoid the human rights issue (as they may well have done in the past), the most important determinants of the transition are domestic, not international.

The explanatory force of some of Huntington's claims holds up reasonably well. His central argument about the distribution of political power is robust, largely capturing not only the heterogeneity of national experiences worldwide but also the regional clustering of transitional justice mechanisms. In Latin America and the Caribbean, both trials and truth commissions have been most prevalent (Sikkink & Walling 2007). Most often, powerful authoritarian regimes granted themselves amnesties or otherwise avoided legal prosecution, such as in Chile, Brazil, Honduras, Nicaragua, and El Salvador. In a few countries, weaker outgoing regimes were eventually punished through trials, as in Argentina (1984) and Bolivia (1986–1993). Moreover, in these same countries, along with others, there were also truth commissions. Indeed, Sikkink & Walling (2007, p. 430) find that "every country in the Americas region that established a truth commission also held domestic trials." In some countries the commissions were government created, such as in Argentina (1984), Chile (1990), and Guatemala (1994–1999), whereas in other countries they were established by nongovernmental organizations, as in Brazil (1979–1985), Paraguay (1984–1990), Uruguay (1986–1989), and Bolivia (1990–1993), with each producing unofficial truth commission reports (Barahona de Brito 2001b, pp. 4–5).

Southern European experiences differ significantly, but each is well explained by Huntington's distribution-of-power hypothesis. In Greece, as in Argentina, the military government fell after an humiliating military conflict with an external foe. However, unlike in Argentina, the incoming democratic government swiftly criminally prosecuted military leadership, members of the police force, and enlisted men for human rights abuses. Two years after the democratic transition in late 1976, past crimes had been fully addressed. In contrast, in Portugal, there were not immediate trials but instead purges from public bureaucracies, including the military, as provisional governments of varying ideological orientations governed (Bermeo 2007). In 1974, middle-ranking military officers, who were tired of a three-front, 15-year colonial war that they judged impossible to win, overthrew the Salazar-Caetano dictatorship. Over the following two years, six provisional governments

ruled, led by a mix of military and civilian political elites. Here, the instability and fluidity of provisional governance resulted in a purge process that "was not governed by a clear strategy and revealed no coherent pattern, varying greatly from sector to sector" (Pinto 2001, p. 73). Spain's transition to democracy after General Franco's death in 1975 is characterized by the political decision by all sides to forget and not revisit past crimes. This is often referred to as "the Spanish model." The more powerful Francoist reformers, who had the support of the military, were not inclined to prosecute past abuses. The moderate opposition, who favored democracy and did not want to be marginalized politically by Francoist reformers, did not advocate punishment either (Aguilar 2001, p. 95). Here, Huntington's logic of a pacted transition appears to hold: Decisions regarding transitional justice are negotiated and not imposed by a more powerful democratic opposition.

In formerly communist Eastern European countries, the main transitional justice mechanisms were lustration and property-restitution policies. Here, "lustration" refers to the examination of public officials, politicians, and judges, especially to ascertain whether they had collaborated with or held positions in the secret police or other repressive agencies of the totalitarian regime (David 2003, p. 388). It is important to note that these policies were controversial precisely because they seemed to fly in the face of due process and were highly susceptible to corruption and manipulation. Scholars have argued that trials were comparatively few, for a number of reasons (Tucker 2006, Gonzalez-Enríquez 2001, Walicki 1997). One is that the omnipresence of communist rule entangled politicians and ordinary citizens in a web of complicity, thereby defusing the desire for trials. Also, the "relatively 'soft' nature of political repression" (González-Enríquez 2001, p. 219) in the last decades of communist rule lessened popular demands for trials.

Nonetheless, the general dynamic of the distribution of power best explains the pursuit and timing of lustration policies, leaving aside their integrity or efficacy. Comparing Poland and Czechoslovakia, David (2003, p. 390) finds that although Poland was the first country to topple communism, it was the last in the region to pass a lustration law. In contrast, Czechoslovakia was one of the last countries to abandon communism but the first one to approve a lustration law. David attributes this difference to the distribution of political power among the political parties. The Polish transition was negotiated through round-table talks; the communists retained considerable power in the first post-transition elections, allowing only 35% of the seats of the lower chamber to be electorally contested. In addition, military generals retained the positions of the Minister of the Interior and the President until late 1990 (David 2003, p. 390). Moreover, "the noncommunist political parties elected in 1991 did not provide majority conditions for the approval of lustration laws" (p. 390). It was not until two years after the victory of center-right political parties in 1997 that lustration laws were finally passed. In Czechoslovakia, the communists' surrender of power, referred to as the Velvet Revolution, led to the formation of a coalition government of national understanding, the Civic Forum. Members of the political opposition and "center-right factions dominated this forum, which gradually established political parties" (David 2003, p. 390) and garnered majority support for passage of a lustration bill. Gonzalez-Enríquez (2001, p. 244) makes a similar observation in her study of Poland, Czechoslovakia, Hungary, Romania, Bulgaria, and Albania, confirming that "where the government and opposition negotiated a transition, as in Poland and Hungary, political justice or purges did not occur."

Bratton & van de Walle (1997), in a comparative study of African regime transitions in the 1990s, argue that neopatrimonial rule affected the dynamics and outcomes of democratization, distinguishing African experiences from those of other regions. Neopatrimonial rule is characterized by a fundamental reliance on personal rule and personal relationships. Given the absolute power these personalist leaders exercise, Bratton & van de Walle (1997, p. 177) find that

when they are replaced, there is no negotiated settlement; rather, "regime transitions in Africa were zero-sum processes in which the strongest side tended to win conclusively." We would expect that the consequence for transitional justice, as posited by Huntington, would be the prosecution of overthrown rulers—and indeed this has usually been the case, although attempts at prosecution have not often ended successfully. For example, although Malawi's dictator of more than 30 years, Hastings Banda, was tried for the murders of rival politicians, he was acquitted. The Ethiopian special prosecutor's office, established in 1993 to investigate and prosecute crimes of the military dictatorship, has successfully convicted several officers. In 2008, the Federal High Court passed down sentences to 19 military officers that ranged from the death penalty to decades of imprisonment. The remaining impediment to justice, however, is the actual capture of a number of these officers; 10 of them were tried in absentia (BBC 2008). In addition, some countries have established truth commissions (Hayner 2001, Backer 2009), which have identified perpetrators (in Chad), helped in prosecutions (in Ethiopia), or produced no negative outcomes for perpetrators (in Burkina Faso). The effect of neopatrimonial rule on transitional justice appears to be the severe weakness of state institutions and civil society, which, having been organized to perpetuate personalistic rule, cannot effectively administer or demand justice after the transition.

The major exceptions to the pattern of replacement transitions in Africa were the negotiated transitions of "settler oligarchies," such as in South Africa (Bratton & van de Walle 1997, p. 178). As is well known, the opposition African National Congress (ANC) desired prosecution of National Party leaders and other officials of the apartheid regime. The National Party desired amnesties. The compromise was the Truth and Reconciliation Commission (TRC), which offered amnesty to those who fully and publicly confessed their crimes before the commissioners, family members, and the interested public. Here, as discussed above, truth as justice replaced conventional retributive views of justice. In South Africa, testimony before the TRC replaced prosecution. This is in stark contrast to Argentina, where, for example, the incoming democratic regime established a truth commission, the National Commission on the Disappearance of People (CONADEP), whose published report, *Nunca Más*, aided in criminal prosecutions. In South Africa, the trade-off between truth and justice has been presented not only as a political necessity but as a political virtue. The argument is that the TRC, through its truth-seeking mechanism, advances societal reconciliation. Efforts to assess the truth of that claim are discussed in a later section of this article.

The cases described thus far largely confirm Huntington's central political-power argument. They also, however, point up distinct theoretical shortcomings, namely, the failure to adequately account for (*a*) the effects of the passage of time on the democratic process, (*b*) the role of the international community, and (*c*) the relationship between time and the emotions of relevant political actors, especially victims and/or their families and civil society organizations.

Time necessarily interacts with democratic processes in explaining whether justice policies are pursued or not. Argentina is especially instructive, in part because it has so prominently demonstrated the difficulty of trials. Huntington characterizes Argentina as a replacement transition, where the military junta, humiliated by military defeat in the 1982 Falklands War against Great Britain, and presiding over an economic downturn, was replaced by democratizing forces intent on punishment. The military was weak and ultimately unable to shield itself from prosecution, although efforts were made. For example, shortly before the 1983 free presidential elections, the weakened outgoing military passed a self-amnesty law ("National Pacification Law"), which was promptly annulled by the democratically elected President Raúl Alfonsín. The incoming government had to reconcile two competing efforts: prosecuting the military while not stoking military

fears of destruction at the hands of the new democratic leadership. A government law allowed the commanders-in-chief of the armed forces and the heads of the military juntas to be tried in their own court, the Supreme Council of Armed Forces (Acuña 2006, Barahona de Brito 2001). This same legislation, however, created a loophole whereby "atrocious and abhorrent acts" could be prosecuted by civilian courts, and a late senatorial amendment to the law allowed "civilian courts to act in the case of delay or negligence after six months" (Barahona de Brito 2001, p. 121). These laws provided for civilian-led prosecutions if military courts proved unwilling. By the end of 1985, the Federal Court of Appeal had prosecuted the nine heads of the military juntas, sentencing two to life-long imprisonment and three to shorter sentences, while absolving the remaining four. Yet, even with these prosecutions, human rights groups continued to bring their claims against lower-ranking military officers, prompting Alfonsín's government to pass the "Full Stop Law," which put a time limitation on bringing cases to court. Military unrest led to subsequent passage of the "Law of Due Obedience," which guaranteed that junior officers could not be prosecuted. President Carlos S. Menem, who succeeded Alfonsín, issued pardons in 1989 and 1991, freeing all military officers, junta leaders, and former guerillas jailed for human rights abuses.

The outcomes of Argentina's transition, at least in the early years, largely confirm Huntington's and the early transitions scholarship's skepticism about the ultimate efficacy of prosecutions, even in replacement transitions, where they are possible. Yet, once the time horizon is lengthened, the assessment of the viability and efficacy of any given transitional justice method usually changes. In the case of Argentina, a number of the generals whom President Menem pardoned, along with other lower-ranking officers, were subsequently jailed for illegally abducting and adopting children during Menem's tenure as President. These convictions, along with other measures, are largely the results of continued advocacy by human rights organizations, a responsive judicial system, and other government agencies dedicated to reparations and compensation. In short, depending on the time period you examine, you may draw quite different conclusions about the possibility of prosecutions in Argentina. At the same time, Huntington's core argument that the distribution of power matters most is largely upheld, even if his predictions about time and eventual rehabilitation of former authoritarians and their allies are not. Over the course of Argentina's democratization, it is clear that the civilian leadership and government institutions have strengthened and that those of the military have greatly diminished, thereby making the legal pursuit of military crimes possible over successive democratic governments—even when the leadership, as under President Menem, opposes such efforts (Acuña 2006).

Similarly, scholars of postcommunist transitions emphasize that it is not only "macro variables" (Williams et al. 2005) or "old elites versus new elites" (Grodsky 2008a) that explain transitional justice, but also the legislative process and the desire to win the democratic contest, looking forward. In the cases of the Czech Republic, Poland, and Hungary, scholars argue that the discursive strategies of politicians changed in response to the electoral process, so that "lustration" came to have broader meanings. In the early years of the transition, advocacy of lustration policies was associated with small anticommunist factions, either liberals or conservatives, with "impeccable dissident credentials" (Williams et al. 2005, p. 27). However, over time, lustration was reframed and "became a shorthand for a host of issues that would engage a wide portion of the electorate for current and future concerns, and not the past" (Williams et al. 2005, p. 39). For Williams et al., then, transitional justice is neither at odds with democracy nor a prerequisite for it; rather, transitional justice is reframed to encapsulate issues that can be addressed by a democratic electorate. Similarly, Grodsky (2008a, p. 369) argues that political elites in postcommunist states act "*as if* they were operating in

a fully functioning democracy. In other words, in their attempts to pursue or counter justice policy, they act within institutionally defined borders with the expectation that their behavior may expedite these voter shifts to their party or slow shifts away" (italics in original). Here, the transition and early elections throw into doubt the certainty that the outgoing elite's interests will always be protected. This uncertainty is, of course, a predictable outcome of democracy. Democratic governance itself necessarily qualifies the assurance of amnesty or other forms of leniency. "Under conditions of democracy and the rule of law, however, negotiators may be *unable to deliver* on any promises they might make on behalf of future legislatures and courts" (Elster 2004, p. 190; italics in original). Huntington's confident declaration that "justice comes quickly or not at all" collides with his expectation that those associated with the authoritarian regime inevitably regain their influence and legitimacy. As we have seen, once the time line of the post-transition period is extended, justice may, in fact, come. Moreover, the time line need not be extended too far in the future. Renewed interest in justice mechanisms usually emerges early on in the postauthoritarian election cycles, consistent with the electoral advantages that may be gained by appealing to transitional justice issues.

The case of Chile's General Pinochet dramatically points up the role of international actors, combined with the passage of time. As is widely known, the Chilean military junta, led by General Augusto Pinochet, tightly controlled that country's transition to democratic rule. Before leaving power, the military passed a 1978 amnesty law that covered all of the crimes committed by the security forces from 1973 through 1978. In addition, the junta created nine appointed senatorial seats that were filled by junta supporters, and added constitutional provisions that "allowed for the continuity in power of the military leaders, the judiciary, and the commander in chief of the army until 1997" (Acuña 2006, p. 225). General Pinochet remained commander in chief of the army until 1997 and then continued to serve as a "senator for life." The first democratic government, led by President Aylwin, established a truth and justice commission that investigated human rights abuses. However, given the aforementioned statutory and constitutional constraints, the commission could not prosecute the military, although a sizeable segment of Chile's citizenry desired it. (The commission did provide reparations to victims.)

Most observers of democratic Chile might well have considered the matter of Pinochet's amnesty settled, if they considered domestic factors to be solely determinative. However, the 1998 arrest of General Pinochet in London for crimes of genocide and terrorism casts the issue of transitional justice in another light (Roht-Arriaza 2005). The basis for Pinochet's arrest was universal jurisdiction, meaning "neither the nationality of the accused or the victims nor the location of the crime is significant" (Aceves 2000, p. 154). Had not Spanish and English lawyers intervened, General Pinochet likely would not have faced a trial, or so it is reasonable to assume. Although Huntington acknowledges that international actors matter in transitional justice, their roles are not well specified. However, this case dramatically challenges, on both the theoretical and empirical levels, the automatic privileging of domestic determinants in explaining transitional justice.

International factors play more than a secondary role (Lutz & Sikkink 2001, Sikkink & Walling 2007). Scholars theorize that a "justice cascade" is central to the pursuit of human rights in Latin America and other regions. On their view, transnational activists have used foreign judicial proceedings to push for the prosecution of human rights abuses. These activists, mostly lawyers, form a "transnational justice network," which pressures offending governments and assists individuals in pursuing claims outside their country when domestic avenues are blocked. What is most important here, for our purposes, is the introduction of a set of actors (the transnational justice network) and instruments (international law) that are needed to make transitional justice possible in some

countries. Moreover, the justice cascade is also descriptive, in that it describes efforts to hold abusers accountable for state crimes, mostly through trials. These works introduce important international factors into Huntington's power argument. International norms and their purveyors are dynamic, not static. They matter not just in putting human rights abuses on the table at the time of the transition, but, as importantly, in keeping them there as the democratic process moves from transitional to normal politics. Other scholarship examines how transnational actors, constituted in epistemic communities, have assisted both in the spread of truth commissions and in changing the meaning of truth (Hirsch 2007).

Indeed, it is the presumed power of international actors in shaping domestic outcomes that has led certain scholars to urge caution against international interventions. Snyder & Vinjamuri (2003/2004) argue, for example, that advocacy for criminal prosecution, in the form of trials, by international activists may be normatively satisfying but politically imprudent. As they see it, the proper course of action must be guided not by a norms-derived "logic of appropriateness" but rather by a "logic of consequences" (2003/2004, p. 7). This logic is derived from the reality of political bargaining among domestic political actors. According to Snyder & Vinjamuri, amnesties are preferable to trials because their consequences will not be polarizing or introduce remedies that the country's institutions cannot competently execute. Their argument is very much in keeping with the skepticism about trials expressed by Huntington and the early democratic transitions literature. "Where trials threaten to create or perpetuate intracoalition antagonisms in a new government," caution Snyder & Vinjamuri (2003/2004, p. 13), "they should be avoided." They also point out the importance of "robust administrative institutions that can predictably enforce the law" (2003/2004, p. 6). Although Snyder & Vinjamuri do not refer to Pinochet's arrest, their suspicion of international intervention suggests, at least, that they would be wary of Spanish and British intervention.

How much Pinochet's prosecution was the result of international justice (the "justice cascade") or emerging domestic factors is the subject of some disagreement. Pion-Berlin (2004b) strikes a well-supported balance between domestic and international factors, arguing that the European intervention served as a catalyst for Chilean action. Activities by Chilean courts were already under way, but the British intervention set Chile on a course with a "steeper trajectory" than it otherwise would have had. Chile's executive branch was pushed into action by international shaming. The intervention forced them to show that they were willing to pursue and capable of achieving justice. The theory here, borrowing from Keck & Sikkink (1998), is that international politics is now shaped, in significant ways, by the ideas and practices of human rights. A state's reputation in the world's state system is judged, in part, by how closely its conduct conforms to the human rights standards it endorses through international treaties and conventions (Pion-Berlin 2004b, p. 486). International intervention had indirect effects on the Chilean courts, as the Chilean government felt the heat and then applied pressure on the courts. At the same time, Pion-Berlin's argument also supports Snyder & Vinajmuri, as it emphasizes the importance of strong institutions, especially Chilean courts, which have successfully reformed and can now credibly administer justice.

The most important point, for our purposes, is that international intervention alters how the balance-of-power argument is understood, shifting its focus away from domestic determinants alone. Roht-Arriaza (2005, p. 197) argues that the Pinochet cases "strengthened the idea... that domestic laws enshrining unfair trials or shielding perpetrators are subject to outside scrutiny and cannot per se bind foreign courts." Indeed, the possible trial of the former Chadian dictator, Hissène Habré, in neighboring Senegal provides clear support for this claim (Fiss 2009). Beginning in 2000, Chadian citizens living in Senegal and Belgium filed complaints against Habré in the courts of their respective countries of residence, alleging

human rights violations. Although the Senegalese court dismissed the claims owing to lack of jurisdiction, Belgium agreed to hear them, claiming universal jurisdiction. Belgium then demanded that Senegal extradite Habré, who had lived in exile in Senegal since being ousted. Senegal's courts refused, declaring again lack of jurisdiction. However, in the face of United Nations allegations that Senegal, in failing either to extradite or prosecute, was itself in violation of the Convention Against Torture—and at the African Union's urging—Senegal in 2006 agreed to allow Habré's prosecution in its domestic courts. Domestic legislation has since been passed that allows Senegal to proceed under universal jurisdiction, thereby effectively converting Senegal's judiciary into an international tribunal.

Finally, and somewhat curiously, emotions have not figured prominently in prevailing political science accounts of transitional justice. Huntington (1991, p. 211) recognizes the power of emotions when he writes, "Democratic governments succeeding authoritarian governments faced a much more serious, emotion-charged, and politically sensitive issue." Yet, as we know, his explanation is fundamentally one of political power; the decision to prosecute or not "was shaped almost exclusively by politics," (p. 215) where the most powerful act to protect and further their interests. Politics, here, means the exercise of power, which evidently includes rational interest and reason—and also presumably the emotional motivations behind its exercise. Elster (2004) explicitly includes emotion, along with interest and reason, in his explanation of transitional justice. He also includes the powerful and relatively powerless in his account of relevant political actors. Different and complex emotions account, in part, for the actions of political actors—politicians, victims or their families, advocates—in ways not easy to discern or disentangle (Pion-Berlin 1993a, Elster 2004). Nonetheless, it is indisputable that emotions, especially those felt by direct victims and their families, have mattered to actual outcomes.

Moreover, Elster theorizes that emotions interact with time. The "demand for retribution decreases with time intervals," beginning with the time interval between the wrongdoing and the transition, and between the transition and trials. The one exception to this "law," as Elster half-heartedly describes his observation about time, is that "counteracting mechanisms may keep memory and resentment alive" for many years (Elster 2004, p. 77). Certainly in most cases, victims and/or their families have kept the memories alive, insisting most persistently for remedy and accountability. Here, the governing emotions appear to be anger toward the crime's presumed perpetrator(s), desires for retribution and/or compensation, and sadness for their losses. In Argentina, for example, the Mothers of the Plaza de Mayo have remained organized, continuing their advocacy for decades. In Spain, beginning in the late 1990s, more than 20 years since the transition, citizen groups, such as the "Association for the Recovery of Historical Memory" (ARMH), have formed to advocate for recognition of and compensation of General Franco's victims (Golob 2008, p. 134; Anderson 2009, p. 46). With the election of a socialist prime minister in 2004, these groups, composed of descendants of Spanish Republicans, succeeded in getting a 2007 law passed ("Law of Historical Memory") that requires the state both to support the exhumation of mass graves and to grant Spanish citizenship to descendants of Spanish Republicans forced into exile (Anderson 2009, p. 46). Spain, as mentioned above, has served as the paradigmatic case of national forgetting. Current events certainly call this characterization into question. Finally, it is important to emphasize that victims' groups work closely with nongovernmental human rights organizations, which are driven, in part, by fidelity to their views about justice and human rights. These organizations, in addition to providing empathy, also assist in a range of activities, such as data collection, advocacy, and consultation (Backer 2003). Moreover, these organizations are usually also internationally linked, thereby reinforcing the dynamic influence of international human rights norms and networks.

BUT DOES IT WORK? ASSESSING THE EFFECTS OF TRANSITIONAL JUSTICE

In the literature making the argument for transitional justice, it has not been enough to advocate the remedy of harms suffered by individual citizens. The argument is much broader, insisting that the benefits are societal and political. Probably the most contested claim about transitional justice measures is about their effects on democratic consolidation. Proponents of accountability and punishment presume that these measures are necessary for ensuring a more robust and secure democracy. Opponents of transitional justice argue that such measures are in fact destabilizing because they put the ex-authoritarian leaders on edge, making them less likely to commit to the political compromises needed for a successful transition. Other supposed benefits of transitional justice efforts include societal reconciliation and strengthening of faith in democratic institutions and processes, especially the law. As important as strong institutions, an engaged civil society, and rule of law are to democratic governance, whether and how much these efforts contribute remain the key questions, still to be answered definitively across a range of cases. Indeed, the absence of evidence that prosecutions and other measures matter for democracy's success is openly acknowledged. As Barahona de Brito et al. (2001c, p. 312) observe, "It would appear to be the case that trials and truth commissions do not have a determining impact on the quality of the new democracy, when observed some years after the transition. Democracy is just as strong and deep in Spain, Hungary, and Uruguay, where there was no punishment or truth-telling, as in Portugal, the Czech Republic, or Argentina, which did experience purges and trials."

The central task challenge is establishing causality. It may well be that the elements that make a democratic transition successful (e.g., strong institutions, adherence to the rule of law) also make a successful prosecution or some mechanism of transitional justice possible. Here, then, successful democratization, due to historically established state institutions, produces successful transitional justice policies, rather than such policies contributing to or ensuring democratic stability. Referring specifically to truth commissions, Snyder & Vinjamuri (2003/2004) level a similar charge; they argue that the alleged success of truth commissions is due to pre-existing political conditions, namely a "prodemocracy coalition [that] holds power in a fairly well institutionalized state" (p. 20) and the amnesty policies that accompany truth commissions. Likewise, Meierhenrich (2008, p. 3) argues that "legal norms and institutions, even illiberal ones," like South African apartheid, "have a structuring effect on democratic outcomes." Without convincing evidence of causality, which is admittedly difficult to provide, it seems that the mechanisms of transitional justice may be ultimately superfluous to insuring democratic consolidation, which includes, among other things, "reconciled" societal relations.

Gibson (2004a, 2006b) sets out to examine the effect of South Africa's Truth and Reconciliation Commission (TRC) on reconciliation. His research is organized around a fundamental question: Did truth lead to reconciliation? His answer is based on a cross-sectional survey of 3727 adult South Africans in a representative national sample. Gibson conceptualizes "truth" as the truth that the TRC itself produced. This truth, which hardly constitutes the harsh truth of apartheid, is instead a "moderate view of apartheid" (Gibson 2004a, p. 99), which assigns blame to all parties, preventing any side from claiming moral purity, and requires that all sides take seriously the views of others. Those South Africans who accepted the TRC's truth, according to Gibson, were more committed to reconciliation. Gibson (2004a, p. 4) conceptualizes "reconciliation" broadly. It comprises four subconcepts that include not only feelings toward fellow citizens (i.e., interracial reconciliation and political tolerance) but views toward government (i.e., support for human rights principles and the legitimacy of political institutions).

He argues that his study "supports the view that truth caused reconciliation" (Gibson 2004a, p. 335), even as he acknowledges the weaknesses of that claim. A key problem is that we do not know the respondents' prior views about the history of South African apartheid, so we do not know whether the TRC changed these views. It may well be, as Gibson (2004a, p. 29) recognizes, that "people with certain types of beliefs... may be more likely to be reconciled in the first place." Moreover, as Gibson acknowledges, cross-sectional surveys that measure concepts at the same point in time further complicate the task of detecting causality (p. 29). We also do not know the effects of the transitional period, including the establishment of the TRC itself, on the respondents' attitudes. Given these limitations and others, Gibson's conclusions are circumscribed, but still bold: "truth and reconciliation do indeed go together," if it is a certain kind of truth (2004a, p. 335–36). In a subsequent article, Gibson (2006b) defends his argument that truth led to reconciliation. He concedes that South Africa's rule-of-law culture and its institutions likely predisposed South Africans toward reconciliation. Nonetheless, Gibson (2006b, p. 427) maintains that "the success of South Africa's Truth and Reconciliation process was far from preordained" and that this success is, in some significant measure, due to the TRC and the "collective truth" that it produced. Finally, amnesty was important for the TRC's success, to be sure, but Gibson argues that the TRC amounted to much more than its amnesty policy.

As discussed above, one of the key arguments against trials is that they lead to political instability in democratizing societies. Sikkink & Walling (2007) focus specifically on the impact of Latin American trials and find no evidence that human rights trials undermine democracy. Indeed, comparing Latin America with other regions during the years 1979–2004, they find that although Latin America "has made the most extensive use of human rights trials of any region," it has "made the most complete democratic transition of any transitional region" (Sikkink & Walling 2007, p. 434). Specifically, 54% of the world's domestic transitional trials were conducted in Latin America (p. 432). It is important to note that these authors do not make the stronger claim that human rights trials strengthen democracy. Their claim is more modest: "data from Latin America provide no evidence that human rights trials have contributed to undermining democracy in the region" (p. 434). Moreover, they note that scholars based their argument about trials' deleterious effects on the sole case of Argentina in the years immediately following the transition. But, as we know, Argentina's experiences today provide proof that trials can have neutral and arguably positive effects on democratic stability. Finally, Sikkink & Walling (2007, p. 442) find it unreasonable for scholars to assert that human rights trials and the ongoing strengthening of the rule of law in Latin America are "two different or mutually contradictory processes."

Research, like that of Gibson and Sikkink & Walling, which attempts to assess the efficacy of transitional justice measures is still relatively rare. Scholars recognize, however, that this type of scholarship is the next necessary step in the study of transitional justice. As we have seen, attempting to isolate the effects of one transitional justice measure, such as truth commissions, is difficult enough (Brahm 2007). This difficulty is compounded because in several countries, more than one mechanism has been used, either concurrently or serially. Moreover, at present, most of the literature focuses on large macro-level outcomes, such as the effects of transitional justice mechanisms on regime stability, strength of legal and political institutions, or societal reconciliation. Very few studies (excepting Gibson's) measure their effects on the attitudes and opinions of individual members of these societies. This is an empirical lacuna that scholars are beginning to address. For example, a 2000 survey of political prisoners of the former communist Czechoslovakia found that transitional justice policies that help to reduce material inequality and restore the social status of victims help to lessen desires for the criminal prosecutions of

perpetrators (David & Choi 2009). More longitudinal studies of the effects of transitional justice measures are needed. Anthropological approaches that capture the nuances and complexity of individual experiences with transitional justice at the local and community levels would also be welcome additions (Backer 2009, p. 62). Without this type of data, our conclusions are static and flat, unable to capture the dynamism of transitional justice measures and their potential effects over time. After all, normative commitments, emotions, and political calculations are all important parts of this story as individuals, organized groups, and politicians remain engaged long after the purported closing of the books.

CONCLUSION: DOES TRANSITIONAL JUSTICE REALLY EVER END?

The recent cases of apologies, reparations, and demands for such in long-established democracies call into question the basic assumption of "closing the books" and suggest that transitional justice eventually becomes normal politics, in which grievances, historical or relatively recent, are part of the political lexicon. For the most part, transitional justice scholarship has said little about these cases, if mostly because they fall outside of its established topical parameters. It is true that in historical injustices, the motivations for asking for remedy and the desired outcomes are less clear than in recent democratization. The passage of time makes the rectification of most claimed injustices difficult, if not impossible. Without the possibility of direct remedy, might symbolic gestures (e.g., apology) or compensation (e.g., token reparations) be regarded as severely deficient? In my view, as I have argued elsewhere, these efforts are pursued by numerically small minority groups in order to change the terms of national membership (Nobles 2008). Political elites may also want to change the terms and meanings of national membership, which partly explains their support of these efforts. Indigenous peoples in Australia, Canada, New Zealand, and the United States have demanded apologies and policy reforms in order to strengthen "aboriginal rights," which generally means greater political, economic, and social autonomy. They want to change the terms of their association with the majority populations with whom they live. Their claims of mistreatment are rooted in the democratic founding of these countries, as each made its transition from colony to independent state and from monarchical rule to democratic governance. Nonetheless, the fundamental difference, of course, is that these claims and demands are advanced in long-standing democracies, with established channels for grievance resolution, and not in consolidating democracies.

In important ways, democratizing states and long-established democracies face the same basic issues, albeit at different times: Dealing with past injustices is an ongoing process, not a one-shot deal. In newly democratizing states, the incoming leaders must decide how to address the political abuses of outgoing regimes. First, they must decide what they can do, given multiple constraints, and for how long. The same is true in long-established democracies. Yet in older democracies, these decisions are in need of more explanation precisely because the claimed injustices, many dating back to national beginnings, are seemingly too deeply and complexly implicated in the founding and settlement to be effectively remedied by actions taken today. Despite differences, both the old and the new share this fundamental similarity: There are injustices that are seen to require attention and action, even if they cannot be fully remedied. As mentioned above, Elster (2004, p. 77) recognizes that certain "mechanisms may keep memory and resentment alive for a century or more." In cases of historical injustices, the chief mechanisms that keep memories alive are past state policies and individual and group perceptions of their ongoing deleterious effects. Minority groups are mobilized by grievances that are framed in terms of present-day disadvantages derived from historical mistreatment.

Yet, the question remains, why would elected officials favor or oppose these demands

for remedy? As we have seen, scholars now study legislative and electoral dynamics over time to explain why and how transitional justice issues persist, where early theories of democratization presumed they would not. In certain cases of historical injustice (at least those of indigenous peoples in New World British colonies), the electoral incentive is not strong. In these countries, indigenous issues are of negligible electoral salience, especially in national elections. These groups comprise small and even tiny segments of the national population, and their issues have historically been marginalized. So, if the electoral incentive is weak, why do elected politicians pay attention? The motivations, my research shows, are mostly partisan and ideological, and also, to a certain extent, emotional (guilt-driven) and moral. In general, political elites who support minority group rights for ideological reasons tend to be more sympathetic and responsive to demands based in historical injustice. Conversely, those political elites who oppose minority group rights on ideological grounds, favoring individual rights instead, and do not think that the past provides a suitable justification for future policy, do not support remedies based in historical injustice.

In the conventional transitional justice literature, debate has focused on which mechanisms are likely to be used and whether they will be effective. In historical injustice cases, the preferred mechanisms differ slightly, as we would expect, given the strength of democratic governance and the historical distance of the transgressions. Trials are sometimes pursued, most often for restitution. Not surprisingly, the success rate has not been very high. For example, the early legal cases against the Australian government for the policy of forced child removal have failed. In the 2000 test case (*Cubillo v. Commonwealth*), the presiding judge decided that the Aboriginal plaintiffs had not been wrongly imprisoned and that neither the Director of Native Affairs nor the Commonwealth had breached their statutory duties of care and fiduciary responsibilities (Clarke 2001, p. 228). Similarly, African-American survivors of the 1921 Tulsa race riot were unsuccessful in securing reparations from the state of Oklahoma and the city of Tulsa. In May 2005, the U.S. Supreme Court declined to hear their case, against which the Tenth Circuit of Appeals had earlier ruled owing to the expiration of the statute of limitations. On the other hand, in 1993, the state of Florida established a $2 million fund to compensate the eleven African-American survivors of the 1923 Rosewood race massacre. In general, lawsuits against governments usually fail because courts grant governments sovereign immunity, rule that too much time has passed, or find that the government bears no direct responsibility. In cases of regime replacement, prosecution at the hand of incoming democratizers is presumed certain. This certainty is not present in historical injustice cases.

The preferred course has been a combination of truth commission–like bodies and legislation that furthers the political goals and policy preferences of minority groups. In Australia, New Zealand, and Canada, for example, minority groups first advocated attention to a specific issue or range of issues; their efforts resulted in the establishment of commissions, which Hayner (2001, p. 17) describes as "historical truth commissions." In Australia, government officials, child welfare advocates, and Aboriginal organizations called for a national investigation into the states' child-removal policies. Similarly, the Maori in New Zealand supported the Waitangi Tribunal, which was established to hear Maori claims regarding the breach of the Waitangi Treaty, the foundational document governing interactions between the Maori and English settlers. In 1991, the Canadian prime minister tasked Canada's Royal Commission on Aboriginal Peoples (RCAP) to conduct a comprehensive investigation of aboriginal political, economic, and social life.

These commissions issued recommendations that have been implemented to varying degrees in each country. As is true in the study of truth commissions, study of the impact of these commissions remains to be done in a comprehensive way. Preliminary

research shows that the commissions have tended to respond more readily and directly to specific policy breaches, such as child-removal policies, than to sweeping historical indictments. For example, Canada's RCAP initially allotted CAN$250 million to assist residential-school victims. That sum eventually swelled to ~CAN$2 billion after a subsequent legal settlement. The Canadian government has been far less generous in providing financial and political support for Aboriginal political autonomy. In summary, these truth commissions, which function inside the legislative process, should be treated as a study of the legislative process. More fine-grained research is required to assess the political, social, and economic effects of historical truth commissions, apologies, and other such mechanisms in established democracies. As a general proposition, however, it appears that such measures are tools that political actors (i.e., politicians and organized groups) use to express their ideological and moral views and advance their political interests.

The experiences of long-established democracies provide a glimpse into the future of third-wave democracies. To be sure, historical, institutional, and political experiences differ significantly, making facile comparison unwise. However, the basic fact is that harms remain grist for the political mill, even as with each passing year they recede further into history. Political parties will champion or ignore claims of past injustices for electoral advantage, ideological expression, or moral satisfaction. Organized citizen groups and even individual citizens will do the same. Political action, in new democracies and old, is driven by fact and myth, reason and emotion. The transitional justice literature's implicit expectation that somehow these matters will be immediately and finally settled is, perhaps, the most puzzling expectation of them all.

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