

**Transitional Justice, Conflict, and Democratic Change: International Interventions
and Domestic Reconciliation**

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Marx famously described Communism as a “spectre” haunting Europe. Today a very different sort of spectre is haunting the developing world, as numerous countries are creating temporary institutions designed to document, describe, and recommend remedies for atrocities committed under prior regimes. Criminal prosecutions, reparations, and administrative purges have long been employed as institutional responses to past atrocities. In recent years, truth commissions, which investigate patterns of violence committed under a prior regime, are being established in an ever expanding number of developing countries. These institutions are known as forms of transitional justice. The term, “transitional justice,” was used by Ruti Teitel in debates on “third wave” transitions¹ and became a popular way to characterize responses to past abuses that occur in the context of political change, as efforts to distance a new regime from the practices of a prior regime.

Transitional justice is currently promoted by an expanding array of actors as a basis for democratic change and domestic reconciliation. A number of new specialized organizations and institutes now sponsor comparative research or training in transitional justice.² Several United Nations departments are involved in developing truth commissions and international criminal tribunals. The UNDP has renamed its Justice and

¹ See Crocker 2001

² New transitional justice institutions include the International Center for Transitional Justice in New York, the Harvard Project for Justice in Times of Transition, the Transitional Justice Project at Notre Dame School of Law, the War Crimes Study Center at UC Berkeley, the Transitional Justice Institute at the University of Ulster, and the Institute for Justice and Reconciliation in Cape Town.

Security Sector Reform Team the “Security Sector Reform and Transitional Justice Unit.”³ Recently, Germany and several other countries proposed a UN sponsored “Justice, Rapid Response Initiative,” to provide states with expertise and materials in the field of transitional justice.⁴ The United States has also been active in promoting transitional justice. The U.S. was the “primary impetus”⁵ behind the creation of *ad hoc* international criminal tribunals for Rwanda and the former Yugoslavia (ICTR and ICTY), and continues to support international tribunals developed for Sierra Leone and East Timor. For many years, the U.S. Institute of Peace has funded research designed to evaluate and promote transitional justice.⁶ More recently, USAID’s Office of Transition Initiatives has claimed as one of its central objectives, the promotion of “national reconciliation and conflict resolution by discovering the truth of what happened during the conflict and supporting public acknowledgement of crimes committed.”⁷

Transitional justice advocates are divided on a number of major issues, such as the future role of the International Criminal Court, the legitimacy of amnesties, and the relationship between truth commissions and prosecutions. However, they share the common view, as expressed in the quote above, that official investigation of systematic abuse and repression will contribute to domestic reconciliation and to future respect for human rights. Some have gone further in suggesting that transitional justice is necessary for reconciliation. This view was advanced by former Secretary of State, Madeleine

³ UNDP 2003.

⁴ United Nations Information Service (UNIS) 2004.

⁵ Mertus 2004, 45.

⁶ Neil Kritz of the USIP also edited a massive and influential three volume study of comparative transitional justice practices (1995).

⁷ OTI “OTI Special Focus Areas.” Available: http://www.usaid.gov/hum_response/oti/focus/humright.html

Albright, who argued that “establishing the truth about what happened in Bosnia is *essential* to...national reconciliation.”⁸

“Reconciliation” remains a highly contested concept, but generally refers in some way to the goal of establishing a political community. Although reconciliation is commonly cited as the primary goal of transitional justice, “transitional” justice invokes the goal of transitioning to democracy, as framed in debates on third wave democratization. Historically, reconciliation became a goal of human rights leaders, such as José Zalaquett and Nelson Mandela, as they came to identify it as a precondition for democratic change. Reconciliation is often conceptualized in ways that incorporate features associated with democratic politics. Whereas minimalist conceptions of peace might refer to the “absence of large scale organized violence or war and the extremely low probability of the resumption of war,”⁹ minimalist conceptions of reconciliation have been associated with the principle of democratic reciprocity among conflicting parties or between the governors and the governed.¹⁰ More expansive conceptions of reconciliation typically incorporate a range of features associated with democracy, including tolerance of political and ethnic diversity, rejection of racial or ethnic stereotyping, and respect for human rights.¹¹

To what extent have transitional justice have transitional justice institutions succeeded in advancing these goals? What do we know about the social and political implications of transitional justice institutions? This report provides a critical overview of recent scholarship on transitional justice. It begins by placing transitional justice

⁸ Quoted in Bass 2000, 263.

⁹ Mendeloff 2004, 363.

¹⁰ Gutman and Thompson 2000, Hesse and Post 1999.

¹¹ Gibson 2004, Wilson 2001, Borer 2003.

promotion in historical context by charting the shifting goals and enduring dilemmas associated with these institutions. The remaining sections evaluate dominant claims advanced to support the role of transitional justice. In some cases, transitional justice institutions have played a role in deepening democratic change and establishing a basis for political community. However, it is misleading to suggest that these institutions are necessary to achieving such goals and may, at times, undermine them. Scholars do not provide simple answers to explain why transitional justice succeeds, but they do provide important insights in critically assessing common assumptions and practices. The report concludes by discussing the implications of four trends in transitional justice policy: 1) the reliance on sweeping generalizations regarding the ways in which individuals, communities, and nations “heal” from past conflicts; 2) the conceptual conflation of distinct goals such as democracy and reconciliation, as well as the short term compromises and long term aspirations associated with these goals; 3) the neglect of distributive justice, and 4) the narrow focus on local responsibility for conflicts with significant external intervention.

I. Shifting Goals and Enduring Dilemmas

Transitional justice is not a new or uniquely modern phenomenon. Jon Elster includes the 404 and 411 BC restorations of democracy in Athens in his universe of transitional justice cases.¹² However, the idea of utilizing transitional justice to promote reconciliation is relatively new. Contemporary transitional justice policies may be better

¹² Elster 2004, 3-23.

understood in the context of historical responses to core dilemmas associated with efforts to criminalize political violence. In this century, transitional justice practices have been informed by the nature of prior injustices, by the memory of earlier transitional justice successes and failures,¹³ and by increasing international involvement in domestic transitional justice processes.¹⁴

Post-war retribution

Scholars have focused on three “waves” of contemporary transitional justice, beginning with the post-World War II era. The first wave encompasses a variety of responses to Nazi atrocities by the Allied forces, local German courts, and formerly occupied countries.¹⁵ The Allied forces prosecuted thousands and executed several hundred Nazis under Allied Control Council Law 10. The liberal focus on individual judgment and responsibility at Nuremberg was informed in part by a critical view of the undifferentiated impact of interwar sanctions.¹⁶ This period also involved wide-ranging private forms of retribution and reprisal.¹⁷ Postwar political debates assumed that retribution for Nazi atrocities was appropriate and primarily concerned the question of the appropriate role for the law in framing retribution.¹⁸ Although it is questionable whether the Nuremberg trials are properly classified as a form of transitional justice, they would have a profound impact on the framing of post-Cold War transitional justice practices.¹⁹

¹³ Teitel 2000, Elster 2004.

¹⁴ De Brito et al. 2001.

¹⁵ Ibid.

¹⁶ Teitel 2003.

¹⁷ See Elster 2004.

¹⁸ Bass 2001.

¹⁹ Teitel 1999.

The influence of the Nuremberg trials was initially minimal, as the Cold War tensions stalled the development of international law. When a “second wave” of transitional justice occurred in Southern Europe in the mid-late 1970s, Portugal and Greece did not make use of precedent in international law. In Portugal, transitional justice was conceived as “revolutionary justice.”²⁰ Junta trials in Greece prosecuted crimes against “the people.” Spain opted for an amnesty in 1977 and avoided retroactive punishment for, or investigation of, abuses committed during the civil war and Franco dictatorship.²¹

“Third wave” democratization

International law returned to prominence in what is widely referred to as the “third wave” of democratization. In Argentina (1984) and Chile (1990), successor regimes debated the question of whether to “punish or pardon” human rights violations committed under a prior regime. Argentina’s efforts to prosecute abuses committed during the “Dirty War” ended when military protests destabilized the transition.²² In the Southern Cone, the appeal for “reconciliation” was invoked *in opposition to* calls for prosecution and it was in the interest of promoting national reconciliation that the Aylwin government in Chile opted against prosecution for Pinochet era abuses.²³ The rhetoric of “reconciliation” was viewed by many as catering to apologists.²⁴ Truth commissions were developed in both Argentina and Chile as alternative forms of accountability. Although

²⁰ De Brito et al. 2001, 21.

²¹ Ibid. See also Alivizatos and Diamandouros 1997.

²² See Nino 1996, Pion Berlin 1997, Malamud-Goti 1990, Osiel 199, Zalaquett 1992.

²³ Zalaquett 1992.

²⁴ Hayner 2001, 160-161. Several scholars view the current discourse of reconciliation in a similar light, as favoring conservative elements (See for example, Teitel 2003, 84; Meister 2002).

they did not satisfy what some human rights advocates had identified as an “international duty to prosecute” human rights violations committed under a prior regime,²⁵ truth commissions would investigate and condemn violations of human rights as outlined in evolving international legal standards.

In Eastern Europe, purge laws were passed in a number of countries emerging from Soviet rule, though widespread purges only occurred in Albania, the Czech Republic, and Germany.²⁶ A number of highly publicized trials took place in these countries with the prosecution of East German border guards receiving perhaps the most widespread attention. “Truth-telling” was also adopted as a prominent mechanism for dealing with Soviet era repression. East European countries did not develop official truth commissions to pursue state-sponsored official histories, but rather opted for procedures to open secret police files.²⁷

Scholars, political leaders, and human rights advocates began to compare efforts to deal with past abuses in a range of diverse contexts, focusing on a set of common dilemmas or tensions that set transitional justice apart from “ordinary” justice. These dilemmas stem from the broad scope and the political character of the violence at issue, as well as the temporary and extraordinary nature of the response. Transitional justice institutions address systematic forms of violence, which were explicitly or implicitly authorized under a prior regime. A core problem associated with transitional justice stems from the widespread involvement or acquiescence typically associated with systematic political violence. The number of those guilty of participating in such abuses would generally exceed the capacity of even a well-functioning judicial system. Yet in most

²⁵ Orentlicher 1991.

²⁶ Gonzalez-Enriquez 2001, 219.

²⁷ See Rosenberg 1995, Huyse 1995, Cohen 1995, McAdams 1997.

cases, successor regimes are also engaged in rebuilding political and judicial institutions and in no position to process the volume of cases associated with widespread violence and abuse.

The widespread and systematic character of political violence gives rise to a tension between procedural and substantive justice. There is a conflict between “the desire to demarcate oneself from the earlier regime and the desire to punish that regime as severely as it deserves.”²⁸ Procedural standards, such as the prohibition retroactive punishment, maintain the integrity of the law in stable systems of justice. Yet transitions imply paradigm shifts in broad conceptions of justice.²⁹ As Ruti Teitel has argued, the function of law in this context is paradoxical: “In its ordinary social function, law provides order and stability, but in extraordinary periods of political upheaval, law maintains order even as it enables transformation.”³⁰

Transitional justice practices confront a related tension between judgment and political stability. The criminalization of political violence is inherently controversial, whether this takes the form of prosecution and punishment or the acceptance of state responsibility through official acknowledgement, apology, or reparations. It is a process that condemns as shameful actions that may previously have been championed as a matter of duty to a particular political community. What constitutes justice in response to past abuses will, in such cases, be a matter of potentially volatile conflict and transitional justice institutions generally make use of the law in accomplishing political goals.³¹

²⁸ Elster 2004, 237.

²⁹ Teitel 2000, 6.

³⁰ Ibid.

³¹ Ruti Teitel defines transitional justice as encompassing legal responses to wrongdoings of successor regimes (2003: 69). For Elster, the definition is somewhat broader, encompassing private forms of retribution such as the chopping of hair as a penalty for consorting with German occupation forces (2004).

Where a successor regime or occupying power has enjoyed a decisive victory, a condition that has been referred to as “transition by rupture,”³² transitional justice may be viewed as “victor’s justice,” the use of legal procedures as a means to legitimate a political victory.³³ Where the transition has been negotiated or “pacted,” the mandates of transitional justice institutions are limited by compromises and fear of retaliation from the same outgoing elite whose policies are under scrutiny.

In the Latin American context, transitional justice was promoted and supported primarily by human rights organizations and victim groups, often with little regard to the difficulties posed by these dilemmas. The response from many political scientists was to look for variables that could predict transitional justice outcomes. Less attention was given to evaluating the *impact* of various choices, as human rights advocates often insisted that the perpetrators be “brought to justice” regardless of outcomes, while the focus in political science on dynamics of power politics suggested that the very idea of “choices in transition” was misleading.

Post-Cold war reconciliation

In the aftermath of the Cold War, a shift occurred in the framing of policy debates on reconciliation. Whereas all transitional justice practices were to some extent taken to be at odds with reconciliation in previous eras, now truth commissions and criminal tribunals alike were promoted as central tools in achieving national reconciliation. This shift might be traced to several related developments. Human rights assumed a new

³² De Brito et al. 2003.

³³ See Kirchheimer 1961, Shklar 1964.

prominence with the waning of Cold War ideological conflict. Meanwhile, a number of prominent human rights advocates with significant moral authority, including José Zalaquett of Chile, Nelson Mandela, and Desmond Tutu of South Africa, argued that reconciliation would be an important prerequisite for the effective implementation of human rights. Reconciliation would also complement the conclusion drawn by many human rights advocates and others that weak states or “failed states” may be as threatening as overpowering states.

Several leaders associated with South Africa’s Truth and Reconciliation Commission began to argue that the process of investigating past atrocities contributed directly to reconciliation, as well as justice and democratic change. They developed this position to claim that truth commissions should no longer be viewed as “second best” alternatives to trials, but as forms of “restorative justice.”³⁴ Restorative justice theory developed out of a range of alternative dispute resolution practices, including indigenous courts and juvenile justice programs around the world. It centers on the idea that justice must involve an effort to “restore” a lost balance and that prosecution is not the only, or the best, means to attain this balance. Rather, victims, perpetrators, and the broader community should engage in a dialogue that aims to identify and address the underlying social and political causes of crime³⁵ In the mid-1990s, a number of policymakers also began to articulate the view that international criminal tribunals would contribute to national reconciliation. This was articulated, for example, in the Security Council Resolution establishing the International Criminal Tribunal for Rwanda.³⁶

³⁴ Villa Vicencio 1998, Boraine 2000, Tutu 1999

³⁵ Zehr 1990, Galaway 1996, Braithwaite 2002, TRC Report 1998. For a critical assessment of the application of restorative justice to the South African transition, see Leebaw 2001.

³⁶ Security Council Resolution 955 S/RES/955, November 8, 1994.

Despite significant ongoing conflicts, policymakers tend to share certain conclusions regarding the successes and failures of transitional justice efforts throughout the 1990s. Ad hoc international criminal tribunals for Rwanda and Yugoslavia (ITCR and ICTY) are now widely viewed as poor models for future transitional justice institutions. Security Council members have been critical of the high cost and slow pace of the tribunals and pressured them to adopt a “completion strategy” that imposes a 2010 deadline, whether or not they have fulfilled their mandates. When a UN commission of inquiry recommended the creation of an international criminal tribunal to investigate atrocities committed by the Indonesian army and Timorese militia, Secretary General Kofi Annan and the Security Council endorsed the Indonesian government’s plan to prosecute those responsible.³⁷ Transitional justice NGOs and research institutes share the concern voiced by U.S. and UN officials regarding the limitations of ICTY and ICTR, though they tend to be less concerned with questions of cost and efficiency and more concerned with factors such as poor outreach to local populations, and failure to protect witnesses.³⁸

South Africa’s Truth and Reconciliation Commission has also received its share of criticism. Nevertheless, ideas associated with the South African TRC have had a profound impact on newer truth commissions and transitional justice more generally. This is evident in support for restorative justice among UN and U.S. leaders and in truth commission mandates. Although reparations and lustration, or vetting, are still important transitional justice practices, they are not being widely promoted abroad as are truth commissions and criminal tribunals. In the last decade, truth commissions have been

³⁷ Dougherty 2005, 4.

³⁸ See Stover 2004.

developed in a range of new countries, including Sierra Leone, East Timor, Ghana, Nigeria, Peru, Serbia and Montenegro, South Korea, Uruguay, and Liberia.³⁹

Efforts to reform international criminal justice institutions aim to enhance their contribution to national reconciliation by strengthening the role of local participants. The International Resources Group recently reported on a meeting with Neil Kritz of USIP, Michael Miklaucic of USAID, and Pierre-Richard Prosper, US Ambassador-at-large for War Crimes Issues. The report supports a more responsive approach to criminal justice, arguing that “various local legal practices and traditional forms of meting out justice” should be considered for incorporation into international transitional justice mechanisms.⁴⁰ A recent report compiled for UN Secretary General, Kofi Annan calls for greater responsiveness to local context and rejects a uniform approach to transitional justice: “Too often, the emphasis has been on foreign experts, foreign models, and foreign-conceived solutions to the detriment of durable improvements and sustainable capacity.”⁴¹

Newer ad hoc international tribunals, developed in Sierra Leone and Cambodia were designed with varying degrees of international and local control. One rationale for this “hybrid” form has been that the inclusion of local officials will allow these courts to better fulfill their mandate to promote national reconciliation.⁴²

³⁹ See Cobban 2005 for a comprehensive chart outlining the work of truth commissions since 1974. Available: <http://www.people.virginia.edu/~hc3z/>

⁴⁰ International Resources Group 2004. A recent report by the Post-Conflict Reconstruction Project, co-authored by the Presidents of the Center for Strategic and International Studies, and the Association of the U.S. Army makes the same point (Hamre and Sullivan 2002).

⁴¹ Annan 2004, 6.

⁴² Dougherty 2005. Other hybrid forms of justice have appeared in Cambodia, where national officials will outnumber international representatives on a new ad hoc tribunal, and in East Timor and Kosovo, where international and local judges sit on special panels developed to prosecute violations of humanitarian law.

Even the International Criminal Court has incorporated a commitment to responsive justice with a view to enhancing domestic reconciliation. Gilbert Bitti, who heads the victim unit of the ICC argues that the drafters of the ICC envisioned the court as a vehicle for promoting both restorative and retributive justice.⁴³ Recently, prosecutor Luis Moreno Ocampo met with community leaders from the Acholi, Lango, Iteso, and Madi communities in Uganda to discuss their concerns regarding the implications of ICC intervention for the peace process. The meeting resulted in a joint statement in which all parties committed “working towards an end to violence, all parties agreed to continue to integrate the dialogue for peace, the ICC and traditional justice and reconciliation processes.”⁴⁴

II. Evaluating Transitional Justice

As transitional justice became associated with the goal of reconciliation, a much wider array of organizations, research institutes, and political leaders became involved in the study and support of these organizations. These advances have stimulated a vast array of new efforts to define criteria for success, evaluate outcomes, and learn from past experience. An important starting point in evaluating this research is to address some of the conceptual conflation in transitional justice advocacy.

The close identification of reconciliation with democracy is in keeping with scholarship that identifies democracy a basis for long term peace. In this volume, Valerie Bunce observes that democracy is “more inclusive in its definition of the political

⁴³ Interview with Gilbert Bitti, The Hague, Netherlands, 23 Jul. 2003. On restorative justice at the ICC, see also Muttukumaru 1999.

⁴⁴ International Criminal Court 2005.

community than other forms of government.” Political science scholarship has suggested that democracies are less likely to suffer from civil wars.⁴⁵ John Harbeson argues that in the African context, democracy may contribute to state-building in ways that have not been fully appreciated. Yet scholars have also argued that prominent strategies associated with democratization may be in tension with strategies associated with peace-building. Roland Paris observes that both democracy and capitalism thrive on conflict, yet rely on stable institutions to manage conflict, as well as inequality.⁴⁶ Mansfield and Snyder have argued that countries in the early phases of democratization show higher levels of conflict than those in non-democratic states.⁴⁷ The following sections distinguish between claims regarding the role of transitional justice in promoting democracy and reconciliation, as well as long term and short term transitional goals. This provides a basis for examining the various arguments and evidence cited in support of transitional justice, as well as identifying tensions between prominent claims and strategies.⁴⁸

Transitional justice and democratic change

In literature on democratization, success involves the consolidation of democratic reforms. Consolidation has been defined as transformation of uncertain characteristics of the transition period into “relationships that are reliably known, regularly practiced and

⁴⁵ Gleditsch 1999, Hegre et al. 2001, Mendeloff 2004.

⁴⁶ Paris 1997.

⁴⁷ Mansfield and Snyder 1995.

⁴⁸ This study focuses primarily on truth commissions and criminal tribunals as the dominant approaches promoted by transitional justice advocates and deals with lustration and reparations only indirectly. It also focuses on shared claims regarding the role of investigations, while addressing debates on the relative merits of truth commissions and trials only indirectly.

normatively accepted” in conformity with basic standards of citizenship.⁴⁹ Critics of the literature on transitions to democracy have charged that consolidation was too closely associated with the regularization of elections, which, in many cases, did little to open channels of power.⁵⁰ In response, scholars have moved to expand indicators of consolidation to include other forms of accountability and to widen the debate on democratization to encompass the goal of “deepening” democratic change by improving the quality of democracy.⁵¹ The following arguments regarding the contribution of transitional justice to democratic change may be better understood as efforts to *deepen* democracy by allying reform processes with just responses to past abuses. However, strategies for doing so have historically conflicted with compromises deemed necessary for stabilizing the consolidation of regime change.

Identifying responsibilities and causes

Perhaps the most common contemporary rationale for prosecuting past political violence is to promote democracy by holding people accountable for abuse, repression, and violations of human rights.⁵² Prosecutions are also held to discredit leaders associated with repressive regimes or extremist ideologies and underscore the commitment of a new regime to basic principles of human rights or humanitarian law. Truth commissions offer a variation on this theme by identifying broader patterns and causes of political violence as a basis for recommending institutional reforms.⁵³ For example, findings of the truth commission for El Salvador were used to vet military officials, though under the strain of

⁴⁹ Schneider and Schmitter 2004, 62.

⁵⁰ Carothers 2002.

⁵¹ Aguilar 2002, Diamond and Morlino 2004.

⁵² O’Donnell and Schmitter 1986, Malamud-Goti 1995, Kritz 1995, Hayner 2001, De Brito et al 2001.

⁵³ Hayner 2001, TRC 1998.

U.S. pressure.⁵⁴ Rachel Seider argues that official responses to past violence in Honduras “proved critical” in efforts to subordinate the military to civilian control.⁵⁵

Where transitional justice institutions are not seen as legitimate, it is difficult for them to promote accountability or institutional reform. Yet establishing the legitimacy of a new regime is one of the central goals of the transitional justice process. In the aftermath of the divisive Argentine prosecutions, many human rights advocates argued that an “international duty to prosecute” would address this problem by removing the question of whether to “punish or pardon” from the volatile national context.⁵⁶ This optimism, however, rested on a problematic pair of assumptions that *international* laws and institutions would be widely accepted as legitimate, and that they would succeed in establishing independence from local elites.

The ad hoc international criminal tribunals have depended on state cooperation for access to archives, permission to conduct forensic investigations, permission to interview witnesses, and the ability to make arrests.⁵⁷ Moreover, the legitimacy of ICTY and ICTR has been challenged by substantial populations in Rwanda and the former Yugoslavia.⁵⁸ Instead of alleviating national conflicts over the question of whether to punish or pardon, international tribunals appear to have compounded the dilemma with an equally volatile debate over “whether to cooperate or not to cooperate.”⁵⁹ A study of the Croatian response to ICTY suggests that the tribunal has inadvertently strengthened the position of nationalist leaders. The right wing in Croatia mobilized around defending

⁵⁴ Seider 2001.

⁵⁵ Seider 2001, 180.

⁵⁶ Orentlicher 1991.

⁵⁷ Peskin 2001.

⁵⁸ Human Rights Center et al. 2000, Peskin 2001, Snyder and Vinjamuri 2003, Democratic Institute for International Affairs 2002. Mark Drumbl adds that international criminal law also remains dependent upon modalities of domestic law (2005).

⁵⁹ Peskin and Boduszynski 2003

the sanctity of Croatia's war by protesting ICTY's indictments of Croatian generals.⁶⁰ Nationalist leaders have been able to reassert themselves as defenders of Croatia's national sovereignty by attacking the tribunal as an aggressor that, as one General put it, "seeks to erase our history, condemn our freedom, and remove our memories of the proud days of struggle for a free Croatia."⁶¹

Preventing denial and promoting political responsibility

Other proponents of transitional justice institutions have suggested that they further democratic change by documenting the extent and effects of past violence. In his opening address to the Nuremberg tribunal, Justice Robert Jackson famously announced that the trials would aim to "establish incredible events by credible evidence." Establishing a record of past violence is seen as a way to counteract present or future revisionism and denial. Jurgen Habermas suggested that an ongoing public confrontation with the horror of past atrocities would reinforce a national commitment to liberal democracy.⁶² Thomas McCarthy draws on a similar logic to argue that the general lack of awareness, among whites in the United States, of the extent and impact of slavery, segregation, and lynching, undermines the quality of our democracy.⁶³ These arguments suggest that documenting the effects of past violence might inform a broad political responsibility to deepen democratic change by addressing the legacies of past injustices.⁶⁴

The role of transitional justice institutions in addressing denial may not be immediately evident and is difficult to disentangle from the impact of other political and

⁶⁰ Peskin and Boduszynski 2003.

⁶¹ Ibid., 1135.

⁶² Habermas 1997.

⁶³ McCarthy 2002.

⁶⁴ On the concept of "political responsibility," see Jaspers 1947.

social events. In several cases, transitional justice investigations seem to have played an important role in generating awareness of abuses that were previously hidden or denied. Historian Jeffrey Herf writes that following the Nuremberg trials, “no major national political figure in either of the two parties questioned the factual occurrence of [Nazi] crimes.”⁶⁵ In Argentina, installments of truth commission reports sold an average of 200,000 copies per week.⁶⁶ South Africa’s truth commission aired public hearings on a weekly television show. Based on a series of surveys, James Gibson reports that the vast majority of South Africans now accept the TRC’s claim that apartheid was a “crime against humanity.”⁶⁷ The report of Guatemala’s Historical Clarification Commission was criticized by the right wing, but neither the government nor the military openly disputed its findings.⁶⁸

In other cases, the findings of transitional justice investigations have been ignored, rejected, or not even disseminated. Although confronting denial is ostensibly a major goal of transitional justice, officials associated with ad hoc tribunals have tended to frame their work for audiences of international lawyers rather than the affected local populations.⁶⁹ Where the legitimacy of transitional justice institutions is successfully challenged, this undermines their impact in addressing denial. In El Salvador, the military and the Supreme Court accused the truth commission of political bias and the president condemned the report for failing to meet expectations for reconciliation. Five days later,

⁶⁵ Herf 1997 373.

⁶⁶ De Brito 2002, 156.

⁶⁷ Gibson 2003, 115.

⁶⁸ Seider 2002, 117.

⁶⁹ In a 2002 survey 87.2 % of Rwandan respondents claimed that they were either not well informed or not informed at all about the ICTR proceedings (Des Forges and Longman 2005, 56).

an amnesty law was passed.⁷⁰ A recent poll conducted in Serbia, half of the respondents said they did not believe Serbs had committed war crimes during the 1990s.⁷¹

The use of transitional justice to confront past denial is also likely to clash with the pursuit of peace. “Armed with the knowledge of the genocide committed against them,” asks David Mendeloff, “is it really surprising that Tutsi have carried out bloody reprisals against Hutus in Rwanda?”⁷² While some proponents of transitional justice argue that establishing a historical record contributes to reconciliation by providing a common national history, others observe that even when people can agree on basic facts, interpretations of past atrocities may continue to divide them.⁷³ Although ICTY convened four trials focusing on a massacre in the village of Amhici, Stover and Weinstein report that even the testimony of a dozen Bosnian Croat defendants “has not transformed the way in which Croats in the village interpret what happened on that fateful day” and Amhici remains a divided village.⁷⁴

Transitional justice investigations are also commonly designed in ways that limit the extent to which they will confront denial. The typical focus on identifying victims and perpetrators of severe human rights violations means that truth commissions tend to understate the significance of low level forms of complicity and limit the number that can qualify as “official” victims for the purposes of truth commission investigations.⁷⁵ In South Africa, TRC investigations addressed only victims of “gross violations of human rights,” which did not include abuses that were legal under apartheid, such as forced

⁷⁰ Seider 2002, 171.

⁷¹ Judah 2005.

⁷² Mendeloff 2005, 371.

⁷³ Ignatieff 1996.

⁷⁴ Stover and Weinstein 2005, 332.

⁷⁵ Borer 2003. See also Mani 2002.

removals, but only extreme forms of physical abuse. In Chile, truth commission investigations addressed only murdered victims and did not document the vast number of torture cases that did not result in death.

Expanding participation and democratic dialogue

Some scholars have argued that transitional justice fosters democracy by cultivating dialogue across lines of political and social conflict.⁷⁶ South Africa's TRC suggested that it came closest to fulfilling its goals by "listening carefully to the complex motives and perspectives of all those involved," and by trying to "provide an environment in which all possible views could be considered and weighed, one against the other."⁷⁷ Gutmann and Thompson argue that truth commissions can contribute deliberative democracy by encouraging "accommodation to conflicting views that fall within the range of reasonable disagreement."⁷⁸ In their view, truth commissions can "express respect for differing points of view without either endorsing them as clearly correct or rejecting them as clearly incorrect," leaving it to the participants and observers to determine what constitutes the "range of reasonable disagreement."⁷⁹

In this way, they suggest, truth commissions contribute to both democracy and reconciliation. Yet this non-judgmental vision for truth commissions is at odds with one of the central activities of these institutions: the criminalization of past political violence by labeling acts once considered legally or politically appropriate, "human rights violations." As long as truth commission claim to render a moral condemnation of past

⁷⁶ Osiel 1997.

⁷⁷ TRC Report 1998, 113.

⁷⁸ Gutman and Thompson 2000, 41.

⁷⁹ Ibid.

violence and an assessment of what caused human rights violations, the uncritical display of varying perspectives on past violence is unlikely to function as a neutral listening exercise.

Others have argued that truth commissions and criminal tribunals can foster a more inclusive democratic dialogue by providing official spaces for previously marginalized or silenced populations to share their stories.⁸⁰ This is a limited space, however, available only to those who qualify and identify as “victims” under the terms of transitional justice mandates. Even among those who do qualify, many may not come forward because they do not identify with the victim label. Gibson’s surveys found that “surprisingly few South Africans accept that they were victims of the apartheid system.”⁸¹

It is more likely that truth commissions will contribute to the expansion of political participation where victims and communities organize in response to the investigations. Rachel Seider and Victoria Sanford have both argued that the Guatemalan Historical Clarification Process contributed to the political empowerment of marginalized groups. In Guatemala, where changes at the elite level have been minimal, a “grassroots memory politics” emerged around the official work of the truth commission. Activities such as the exhumation of mass graves and construction of monuments have, according to Seider, contributed to the formation of transregional communities of survivors and “with the support of international observers, many rural Mayans have come to reject military domination and to demand their rights.”⁸² In South Africa, the Khulumani Support Group on Behalf of Victims and Survivors of Apartheid organized in response to

⁸⁰ TRC of South Africa Report 1998.

⁸¹ 2004, 40.

⁸² Seider 2001, 187.

the TRC and has been a vocal critic of the disappointing reparations process in South Africa. Khulumani also launched a civil suit, under the U.S. Alien Tort Claims Act, against a number of corporations for complicity in the apartheid system.

As organized victim groups are empowered by transitional justice institutions, democratic debate may widen, participation may expand, and new critical perspectives on the legacy of the past may inform further democratic change. Yet in some contexts, the expansion of organizing around the experience of victimhood might have negative ramifications for democracy as well as reconciliation. Mobilization around victim identities has been closely associated with extremism, rejection of compromise, and rationalization of brutality as self-defense.⁸³

The paradox of transitional justice and democracy

Transitional justice does not necessarily improve the quality of democracy. As De Brito et al. have observed, “[d]emocracy is just as strong and deep in Spain, Hungary, and Uruguay, where there was no punishment or truth telling, as it is in Portugal, the Czech Republic, or Argentina, which did experience purges and trials.”⁸⁴ Studies of transitional justice institutions suggest that success in deepening democracy is paradoxically more likely in cases where the balance of power already favors democratizing groups. When forces from the old regime remain powerful, transitional justice policies will often generate threatening conflict.⁸⁵ Mendeloff adds that a minimal level of democracy is important for any effort to sustain public debate on the findings of

⁸³ For an analysis of victimhood in U.S. conceptions of transitional justice, see Meister 2002.

⁸⁴ De Brito et al. 2001, 312.

⁸⁵ De Brito et al. 2001, 314.

transitional justice institutions.⁸⁶ In study of the role of truth commissions and trials after between 1989 and 2003, Snyder and Vinjamuri conclude that “trials contribute to ending abuses only when spoiler groups are weak and the domestic infrastructure of justice is already reasonably established.”⁸⁷ Based on a comprehensive study of transitional justice with five detailed case studies, Chandra Sriram argues that international factors may play an important role in facilitating greater levels of domestic accountability, but even where external actors are involved in transitional justice, the “shape of the challenges remains similar.”⁸⁸

This paradoxical relationship between transitional justice and democracy stems from the fact that prominent transitional justice strategies are designed to deepen the quality of democratic change, but are in tension with strategies associated with consolidating reforms in the short term. It is puzzling, then, that transitional justice became associated with the goal of reconciliation. The following sections take a closer look at dominant strategies for using transitional justice to promote reconciliation and argue that these strategies tend to limit the critical role of transitional justice by shifting the focus of attention from away from questions of responsibility and institutional reform to largely psychological responses.

Transitional Justice and Reconciliation

“Reconciliation” is often used as shorthand for transitional compromises necessary to end conflict or consolidate a reform process, yet the term also encompasses

⁸⁶ Mendeloff 2004, 376.

⁸⁷ Snyder and Vinjamuri 2003/4, 20.

⁸⁸ Sriram 2004, 120.

a hoped for consensus on the terms of membership in a political community. Dominant claims regarding the role of transitional justice in promoting reconciliation tend to invoke the long term aspiration of political community. However, they are designed primarily to promote the short term goal of attaining acquiescence to compromises by responding to potentially violent emotions, or by advancing conciliatory interpretations of past abuses. Although transitional justice advocates have suggested that reconciliation and democratization are mutually reinforcing goals, these arguments imply strategies for designing investigations that are in conflict with many of the strategies outlined above.

The alternative to revenge: transforming volatile emotions

It is commonly argued that transitional justice investigations promote reconciliation by addressing volatile emotions resulting from past violence. Antonio Cassese, the first ICTY president, has argued that trials are the only “civilized alternative to revenge” and that without justice, “feelings of hatred and resentment seething below the surface will, sooner or later, erupt and lead to violence.”⁸⁹ Similarly, Bass argues that “if the international community does not punish war crimes, then, in many cases, victims will be tempted to take justice into their own hands.”⁹⁰ According to Kenneth Roth, executive director of Human Rights Watch, this has been a dominant cause of violence in Haiti. “Frustrated by their inability to bring persecutors before a court of law,” he argues, “many Haitians took matters into their own hands.”⁹¹

In many cases, however, transitional prosecutions are clearly ineffective as a response to vengeful or volatile emotions. Jon Elster has argued that the demand for

⁸⁹ Quoted in Williams and Scharf 2002, 21.

⁹⁰ Bass 2000, 305.

⁹¹ Roth 1999, 95.

reprisals is historically strongest in the immediate aftermath of abuses and fades over time.⁹² The slow pace of criminal proceedings may thus inevitably limit their role in addressing cycles of revenge.⁹³ Substantial reprisal killings have taken place in Kosovo and Rwanda since the creation of ICTY and ICTR. Eric Stover, who interviewed eighty-seven ICTY witnesses, concludes that in many cases, ICTY and ICTR seemed to exacerbate painful or volatile emotions associated with past violence. Victims and survivors have commonly perceived the sentences as too lenient and they have been frustrated to see sentences overturned on appeal.⁹⁴ On the basis of a series of surveys, focus groups, and informant interviews in Rwanda, Croatia, and Bosnia, Stover and Weinstein conclude that “there is no direct link between criminal trials...and reconciliation.”⁹⁵

Some champions of truth commissions propose that these institutions are better than trials at addressing trauma, anger, or fear.⁹⁶ Restorative justice has combined ideals associated with therapeutic healing and the traditional use of informal justice as a tool for mediating conflict. South Africa’s TRC developed this therapeutic conception of its mission by hiring “briefers,” who were specially trained in mental health, to provide assistance to victims who appeared at public hearings.

The claim that testimony has a cathartic healing effect on individuals has become a dominant rationale for transitional justice, yet evidence cited in support of this claim is often anecdotal. David Backer, who conducted a systematic survey of participant experiences at South Africa’s TRC, found that victims in general were “reasonably

⁹² Elster 2004, 223.

⁹³ Mendeloff 2004.

⁹⁴ Stover 2005, Peskin 2000.

⁹⁵ Stover and Weinstein 2005, 323.

⁹⁶ Zalaquett 1992, Minow 1998, Sachs 1998.

satisfied” with their engagement with the truth commission, but that many had experienced the process as an “emotional roller coaster” with initial feelings of relief followed by anguish, confusion and frustration.⁹⁷ Backer reports that some victims felt stigmatized as a result of their exposure through the TRC process and a few describe having been “shunned” by their communities after they appeared at public hearings.⁹⁸ Rosalind Shaw’s ethnographic study of local responses to Sierra Leone’s TRC finds that the concept of healing through truth resonated in powerful ways with certain very vocal constituencies, but was starkly at odds with dominant local strategies for reintegrating ex-combatants through “social forgetting.”⁹⁹ Another study conducted in Sierra Leone concluded that the reconciliation rituals associated with the truth commission did have a powerful cathartic impact on communities, but that this effect was not a result of success in getting at the truth. Rather, the process of confession functioned as an elaborate prelude for the closing ritual.¹⁰⁰ Finally, a number of scholars have reported that it is common for victims to link their participation in truth commission processes to the hope for some form of economic assistance.¹⁰¹ This suggests that participants do not view testimony alone as a basis for their recovery process.

Claims regarding aggregate individual responses to truth commissions do not necessarily translate into conclusions regarding the political implications of these institutions. Transitional justice officials and advocates often explain the connection between individual healing and political reconciliation by way of metaphor, suggesting that by facilitating a public “working through” of the past, these institutions will

⁹⁷ Backer 2004, 16.

⁹⁸ Ibid., 18.

⁹⁹ Shaw 2005.

¹⁰⁰ Kelsall 2005.

¹⁰¹ Dougherty 2005, 7; Shaw 2005, 8.

contribute to a national “healing process.”¹⁰² As Vanessa Pupovac has argued, this analogy “promotes emotional adjustment for societies, rather than material advancement of their circumstances.”¹⁰³ When individual healing is used as a metaphor for national healing, this implies a pre-existing body politic or a single collective psyche, which can obfuscate ongoing divisions, as well as differential responsibility for the wounds of the past.¹⁰⁴ This shifts attention away from the project of institutional and social reform to addressing painful feelings resulting from past violence. The focus on attaining “closure” through the processing of painful memories, may neglect the extent to which individual trauma is bound up in real or perceived continuities with a prior repressive era, as well as new forms of repression carried out in the name of reconciliation.

Long and Brecke offer support for the claim that “truth-telling” processes contribute to political reconciliation, yet they specify that investigations must confront denial and promote institutional change in ways that may be destabilizing in the short term. Based on a study of eleven civil conflicts, they argue that where reconciliation processes were confined to negotiated bargains, this did not lead to long-term restoration of peace. In contrast, countries that engaged in “protracted processes of recognition of harm and public truth telling” succeeded in restoring lasting social order.¹⁰⁵ In success cases, they argue, parties were able to forgo the option of revenge in order to break the “cycle of injury and counterinjury.” Success cases also involved “partial justice,” and

¹⁰² See Boraine and Levy 1995.

¹⁰³ Pupovac 2004.

¹⁰⁴ Ignatieff 1996, Leebaw 2001, Des Forges and Roth 2001.

¹⁰⁵ Long and Brecke 2003. Long and Brecke include countries where groups in civil society initiated a process of investigating the past, as well as countries that had official state-sponsored truth commissions. Thus, their group of successful “truth-telling” cases includes two countries (Mozambique and Uruguay) that are often listed among those that succeeded without truth commissions. s

“redefinition of identities and social roles of antagonists.”¹⁰⁶ “Redefinition of identities” was successful, in their view, when investigation and dialogue about past violence was connected with institutional reforms, such as judicial reform, depoliticization of the military, or reparations to victims.¹⁰⁷ Long and Brecke observe that in the short term, such investigations entail “substantial risks to social order” and should be viewed as part of a broader process of reconciliation, rather than the sole basis for change.

Healing Truths

Like contemporary transitional justice advocates, Plato was concerned with the question of how to generate social cohesion as a basis for justice. In *The Republic*, Socrates proposes a “Big lie” that might be useful in advancing this goal. The students are to be told that the earth is the mother who bore them and that the rest of the citizens are their brothers. The “Big lie” is a political myth designed to establish a common heritage and commitment to community. Yet the lie contains a message that many take to be the core truth promoted by the human rights movement—that despite all of the differences that divide people, we can identify certain shared human experiences as the basis for a broader political community.¹⁰⁸ The “Big lie” is not considered immoral because it uses myth to convey something that Socrates takes to be true.

Many arguments in support of transitional justice are based on a similar logic. The value of investigating past violence is not attributed to specific findings, but rather to broad messages that transitional justice institutions might convey about past violence that contain what might be referred to as healing truths: individuals, not groups, are

¹⁰⁶ Ibid., 65.

¹⁰⁷ Ibid., 70.

¹⁰⁸ See Seery 1990, 115-116.

responsible for political violence; all sides made grave errors in past conflicts; victims on all sides experience suffering; no one is above the law. In another famous discussion of political myth, Ernst Renan argued that the essence of a nation is that “all individuals have many things in common and also that they have forgotten many things.”¹⁰⁹ Similarly, this set of messages promoted by transitional justice institutions as a basis for national reconciliation, draws attention away from divisive questions regarding complicity, political responsibility, and institutional reform.

Perhaps the most promising evidence in support of the role played by the “truths” or messages of transitional justice institutions comes from James Gibson’s survey research on South Africa’s TRC. Although Gibson refers to these truths as the conclusions of the *TRC Report*, they are messages that TRC officials sought to promote from early on in the process and used as the basis for determining what would be included or excluded from their investigations. Gibson found that acceptance of certain general messages promulgated by the truth commission was correlated with greater levels of interracial reconciliation among substantial proportions of the population.¹¹⁰ For the white population, he found this to be a reciprocal relationship in the sense that readiness to accept the “truths” of the TRC was predicated on favorable pre-existing attitudes towards racial reconciliation. Based on these and other findings, Gibson suggests that the TRC process contributed to attitude changes in South Africa through the creation of “cognitive dissonance” and by mitigating “cognitive dogmatism.” In this regard, he suggests that the most important truth promoted by the TRC was that “both sides in the

¹⁰⁹ Renan 1990, 19.

¹¹⁰ Gibson developed a measure of racial reconciliation using a series of indicators to evaluate levels of trust, comfort, and stereotyping of other racial groups.

struggle did horrible things.”¹¹¹ He also found some evidence that acceptance of TRC’s messages contributed to support for rule of law.¹¹² Richard Wilson’s ethnographic research in South African townships identifies the limitations of South Africa’s healing truths. Wilson concludes that “[p]ublic recognition of formerly repressed narratives allowed greater mutual understanding between the sections of South African society separated by the racialized boundaries of apartheid.”¹¹³ However, the reach of the TRC was limited in part because its message clashed with a widespread desire for vengeance in the townships.¹¹⁴

A common argument for transitional justice is that “individualizing guilt” will minimize feelings of vengefulness, stereotyping, and reinforce respect for the law. On the role of ICTY in the Balkans, Payam Akhavan writes: “By telling the truth of what transpired in the former Yugoslavia and ascribing individual guilt to those responsible for manipulating ethnic tensions, the ICTY can counter the campaign of collective demonization instigated by political elites.”¹¹⁵ This argument rests on the premise that widespread participation in systematic political violence either is, or should be portrayed as, a product of elite manipulation of the masses. The question as to why large numbers of people became involved in systematic violence is deliberately avoided in this formulation.

The idea of “individualizing guilt” is appealing in theory because it shifts attention away from the controversial terrain of explaining and responding to widespread

¹¹¹ Ibid., 160.

¹¹² Ibid., 204. Support for rule of law was measured with a survey designed to evaluate willingness to suspend or ignore the law to address problems and emergencies, or break laws passed by political leaders that one does not support (186-7).

¹¹³ Wilson 244.

¹¹⁴ Ibid., 155.

¹¹⁵ Akhavan 1998, 764.

involvement and participation in systematic violence. However, studies suggest that people are much more troubled by the complicity of local community members in systematic atrocity than they are with the guilt of high level elites.¹¹⁶ Moreover, transitional justice efforts to individualize guilt have foundered in cases where leaders succeeded in identifying their indictments as attacks on the broader collectivity. Both Serbs and Croats complain that they are unfairly targeted by the ICTY.¹¹⁷ Finally, to the extent that the logic of “individualizing guilt” is successful, it offers individuals “the opportunity to rationalize or deny their own responsibility for crimes committed in their name.”¹¹⁸ Although a number of scholars cite the Nuremberg trials as a precedent for the power of individual guilt, Mendeloff observes that “[m]ost of the world and the Germans themselves still hold ‘Germans’ collectively guilty for the crimes of World War II.” He suggests that this has been a positive thing and contributed to a broad willingness to make amends for past wrongs.¹¹⁹

The focus on individual guilt is also at odds with the goal of illuminating institutional and political causes of political violence. Gibson finds that despite the TRC’s effort to condemn apartheid as an institution, a plurality of South Africans are willing to attribute abuses to individuals, rather than state institutions, and that many view apartheid as a “good idea poorly implemented.”¹²⁰ Gibson speculates that the “daily exposes of the actions of apartheid’s rascals...may well have helped deflect blame away from the political system and focus it on specific individuals.”¹²¹

¹¹⁶ Van der Merwe 1998, Fletcher and Weinstein 2002,

¹¹⁷ Snyder and Vinjamuri 2003, 21; Peskin and Bodyszinski 2003.

¹¹⁸ Fletcher and Weinstein 2002, 601. For a similar argument, see Mamdani 1996.

¹¹⁹ Mendeloff 2004, 368. See also Drumbl 2005.

¹²⁰ Gibson 2004, 84.

¹²¹ *Ibid.*, 85.

A third prominent healing truth associated with transitional justice is that the assertion of legal or moral judgment of past abuses will “end impunity” and reinforce respect for the law. Transitional justice institutions are extraordinary, temporary, responses to past abuses, which places them in tension with core principles associated with rule of law. However, it is hoped that by judging highly placed individuals, they will convey the message that in the new regime, no one will be above the law.¹²² Arguments regarding the role of transitional justice in “ending impunity” tend to assume that the pragmatic compromises that narrow the scope and efficacy of transitional justice will not serve to undermine the intended symbolic message of their principled judgments. Yet lenient sentences, plea bargaining, and the refusal or inability to attain custody of key suspects, such as Ratko Mladic, Radovan Kardzic, and Charles Taylor, have dramatically undermined the perception of international tribunals as “ending impunity.”

Although healing truths are invoked as a basis for long term reconciliation, they seem also to function as a means to legitimate short term bargains and concessions associated with negotiating and end to overt hostilities. Their success in doing so rests on the ability to locate some basis for shared values or judgment, while also appeasing the fears of various conflicting constituencies. This means that healing truths may be so abstract that they are subject to various and conflicting interpretations. It also means that healing truths will tend to clash with the use of transitional justice to promote democratizing change through accountability, assessment of cause and political responsibility, or responses to the impact of past political violence. In their efforts to alleviate the fears of extremists, healing truths tend to soften and evade such claims.

¹²² Orentlicher 1991.

Compromise and political community

Dominant reconciliation strategies involve efforts to address volatile emotions and put forth unifying interpretations of past violence. These strategies gesture to the possibility of political community with a basic moral consensus on how to interpret past violence and move forward. Yet they are designed to address a context where consensus is absent and to advance transitional compromise by avoiding controversial efforts to promote accountability, confront denial, or advance institutional change. Healing truths appear to be subject to a paradox similar to that discussed in relation to accountability efforts. They aim to soften judgment, while nevertheless retaining some semblance of judgment, which means that they are likely to alienate apologists for the old regime, as well as those pushing for greater change, while exerting their greatest influence over people who already held somewhat moderate views. Yet it is not clear how well these measures contribute to the aspiration for moral consensus and political community in the absence of substantial reform.

Conclusions: Into the Future

Transitional justice institutions, especially truth commissions and criminal tribunals, are currently promoted by the U.S., the UN, NGOs, and major foundations, as tools for advancing democratic change and domestic reconciliation. Some of these projects can claim significant successes, while others have clearly been unsuccessful. The array of scholarly research on transitional justice does not provide unqualified support for these institutions, nor does it lend support to those who would prefer to abandon them.

Instead, this review of the transitional justice literature calls for rethinking some of the sweeping causal claims that continue to frame transitional justice policy, appreciating tensions between long term and short term transitional goals, addressing the relationship between transitional justice and inequality, and thinking critically about what kind of histories are produced by transitional justice institutions.

1) “Articles of faith”

In a 1996 article, Michael Ignatieff questioned a series of “articles of faith” that had come to animate transitional justice advocacy: “[C]an a nation or contending parts of it be reconciled to their past, as individuals can, by replacing myth with fact and lies with truth?”¹²³ Since that time, a number of scholars have challenged core claims associated with transitional justice policy. However, transitional justice advocates and policymakers continue to rely on sweeping causal claims and neglect evidence that challenges these claims.

Claims regarding the role of transitional justice in healing individuals, communities, and nations, continue to serve as articles of faith for transitional justice policy. Early enthusiasm for the healing potential of truth commissions was connected to the view that human rights advocates, in their drive to promote prosecution, had neglected the needs of those damaged by past abuses. The subsequent attention to the psychological dimension and the needs of affected populations is a welcome development. However, a number of studies have raised questions for the assertion that testimony heals individuals and communities. Anecdotal evidence, often based on

¹²³ Ignatieff 1996.

comments made in the immediate aftermath of a hearing, served as the primary basis for these claims. More recent studies suggest that victim participation in transitional justice processes can be positive and empowering, but this depends on the social, political, and economic context, the type of abuse under investigation, the quality of outreach and follow up communications. Moreover, victim responses may fluctuate significantly over time with initial feelings of relief and even catharsis giving way to disappointment and feelings of betrayal.

Transitional justice promotion has also been associated with sweeping claims regarding the relationship between international and local authority. The pursuit of international institutions was animated by the hope that such efforts would legitimate transitional justice decisions by insulating them from the dilemmas and struggles of domestic conflict. Reacting to the failures of ICTY and ICTR, officials in the U.S., the UN, and many NGOs have swung the other way on this issue, arguing that the problem of legitimacy for transitional justice institutions can be addressed by restoring local initiative and control. The danger is that this replaces one sweeping assumption with another. Although local initiative and participation in the design of transitional justice institutions are crucial for any kind of success, it is misleading to suggest that local leadership will enhance prospects for legitimacy and reconciliation in contexts where such leaders were implicated in past or present abuses. Conflict zones and times of political transition are characterized by struggles over mutually exclusive values and conceptions of membership. Invoking local traditions and values as the basis for transitional justice evades the extent to which “the local” may mean very different things to different local people. Finally, efforts on the part of intervening organizations or

leaders to engage local participation may be misleading to the extent that they rely upon unrepresentative, yet vocal, local leaders.¹²⁴ In efforts to contribute to more responsive transitional justice institutions, consultants should also be sensitive to the likelihood that local leaders in impoverished, war-torn countries might pay lip-service to ideas that are popular in international aid circles in the hopes of securing much needed financial assistance.

2) The confusion of short term and long term “transitional” goals

One problem with the “transition paradigm” adopted by the U.S. government in the mid-1980s, according to Thomas Carothers, was the view that initial “breakthroughs” would lead to the progressive implementation of democracy.¹²⁵ Transitional justice institutions and advocates have typically adopted a similar logic in relation to the goal of reconciliation. The term, “reconciliation” commonly conflates strategic compromises made to end conflict with long term aspirations for moral consensus, implying that initial compromises should lead inexorably to an enduring basis for political community. Yet this is far from obvious. Although transitional compromises may be necessary as a basis for democracy and shared political community, they are also often in tension with these long term aspirations. Strategies to neutralize potential spoilers often involve placing limitations on the reform process or granting power to those who have a strong interest in obstructing reform.¹²⁶

¹²⁴ See Mertus and Sajjad 2004 for an analysis of this problem as an obstacle to establishing a truth commission for Bosnia.

¹²⁵ Carothers 2002, 7.

¹²⁶ See Snyder and Jervis 1999.

Distinguishing between short term and long term transitional goals provides insight into what are often unacknowledged trade-offs in designing transitional justice investigations. Strategies to promote democratization through accountability, institutional reform, and assessing the underlying cause and effects of past abuse, were designed to contribute to “deepening” of democracy over the long term. Yet such strategies have often threatened to destabilize transitional compromises and the expansion of international law and institutions have complicated, but not alleviated, this problem. As transitional justice became a tool for promoting reconciliation, this involved new strategies for designing investigations in ways that would facilitate acceptance of compromise by addressing violent emotional responses and promoting conciliatory interpretations of past abuse. However, it is unclear how well these strategies contribute to the long term aspiration for a shared political community.

There is no simple answer as to how leaders ought to address this tension between short term compromises and long term transitional aspirations. However, studies on transitional justice suggest a few general points for consideration. First, leaders should not devalue the process of domestic compromise, or disavow the role of pragmatism in their own decisions. External intervention can assist parties in reaching stable compromises, but international criminal law is ill-suited for this purpose in the short term. Numerous studies suggest that transitional justice best contributes to democratic change when a coalition is in place to support reform. In this volume, Bunce and Woodward both observe that the longer internal conflicts last, the harder they are to resolve. Internal wars not only destroy institutions, writes Bunce, but “create new ones that undermine both the state and democracy.” When leaders disavow their own

pragmatism, paying lip service to transitional justice ideals that they are not committed to upholding, institutions, such as ICTY are “designed to fail” without the resources and support needed to facilitate their operation.¹²⁷ Alternatively, as Jose Zalaquett once observed, transitional justice policy should explicitly recognize the relationship between principle and pragmatism.¹²⁸

It is also important to recognize that a certain amount of instability in the short term may not always undermine long term prospects for peace. Many of the success cases identified by Long and Brecke experienced periods of destabilization in the short term as a result of efforts to investigate the past. Nevertheless, they maintain that these efforts are responsible for their success in establishing a long term basis for peace.¹²⁹ Moreover, compromises with elites who are responsible for widespread abuses can undermine the legitimacy of a new regime by appearing to condone past abuses.¹³⁰ For those that back amnesties as a tool for peace, an underlying assumption is that powerful elites responsible for abuse are in a position to destabilize peace, whereas former victims are generally weak and their demands can be more safely denied. Yet some compromises, such as amnesty and power sharing for Foday Sankoh, will backfire. And where leaders responsible for past abuses remain in power and the demands of former victims are abandoned altogether, this will undermine the quality of democratic change, as well as reconciliation, over the long term.

Second, transitional justice is best conceived as an ongoing process that may not have a linear trajectory. The idea that the purpose of transitional justice investigations is

¹²⁷ Ibid., 42.

¹²⁸ Zalaquett 1992.

¹²⁹ Long and Brecke 2003, 68.

¹³⁰ Sriram 2003, Wilson 2001.

to “close the book” on the past fails to acknowledge the provisional nature of these investigations and the extent to which they are limited by compromises with those responsible for past abuse. This confusion of compromise with consensus and provisional transitional responses with ideal justice undermines what Teitel has referred to as the “critical space between the practicable and the redemptive” in transitional justice.¹³¹ Where this critical space is retained, so is the possibility for expanding accountability over time. In Argentina and Chile, prosecutions once threatened the stability of democratic consolidation, but are now being pursued without fear of destabilization. Argentina recently revoked the blanket amnesty for abuses committed during the “Dirty War.” Chile recently convened a commission to investigate tortures that did not result in death, which were excluded from the original truth commission.¹³²

Some have argued that “transitional justice” should be executed quickly, or not at all.¹³³ One concern with the idea of transitional justice as an ongoing process is that this will prolong social and political tensions associated with past conflicts. Yet recent events in Argentina and Chile suggest that political tensions may linger where responses to past repression are widely perceived as having been too limited.¹³⁴ Others have been concerned that transitional justice may generate a preoccupation with past crimes and so undermine “visionary modes of imagining the future.”¹³⁵ This concern should be taken seriously by acknowledging the limitations of transitional justice as one of many dimensions in democratization and peacebuilding processes. However, a number of

¹³¹ Teitel 2000, 228.

¹³² See Human Rights Watch 2005

¹³³ Huntington 1991, based on his observation that the swift prosecutions in Greece were more successful than the prolonged Argentine prosecutions. Orentlicher (1991) adapts the same lesson to her argument for a “duty to prosecute,” arguing that where prosecutions are selective and bounded, they will not destabilize democratic transitions.

¹³⁴ See Sriram 2003.

¹³⁵ Torpey 2003, 1. For a similar argument applied to “identity politics” see Brown 1995, 66.

scholars have argued, people are more likely to remain caught in a preoccupation with past abuses when their losses are not acknowledged.¹³⁶ This suggests that the problem is lies not in the persistence of demands for transitional justice, but ineffective responses to such demands. De Brito observes that in the Southern Cone, a prolonged process of transitional justice has furthered political reform. The “continued search for truth and justice may be a factor in breaking down key parts of the authoritarian constitutional order” she writes, by challenging “a narrow version of democracy based on an imposed consensus.”¹³⁷

3) Transitional justice and inequality

Dominant approaches to transitional justice have neglected the relationship between transitional justice and inequality. In human rights advocacy, “justice” is commonly used as shorthand for formal prosecution and retributive justice. Restorative justice advocates countered this with a preference for informal, responsive justice defined as healing and social repair. In theory, restorative justice is committed to addressing underlying social and political problems that cause crime and violence. Yet as applied to the transitional justice context, restorative justice has often retained only the psychological dimensions of repair. A number of truth commissions have made recommendations for reparations, yet reparations are not generally designed for, or suited to, the task of addressing inequality and poverty.¹³⁸

¹³⁶ See for example, Corkalo et al. 2005, Du Toit 2003.

¹³⁷ De Brito 2002, 154.

¹³⁸ Torpey, De Grieff

Although South Africa's Truth and Reconciliation Commission was a success in many ways, it illustrates the potential significance of this problem. The decision to examine "gross human rights" abuses that were *in excess* of apartheid, while excluding the violence of the apartheid system itself was a political decision designed to appease National Party members in parliament.¹³⁹ This facilitated a central focus on abuses committed by all parties to the conflict, which arguable enhanced the TRC's contribution to reconciliation. However, this meant that the TRC would draw attention away from racialized economic inequalities resulting from apartheid.¹⁴⁰ A recent study by the Institute for Justice and Reconciliation in collaboration with James Gibson found that 55% of black South Africans believe themselves to be victims of land injustice and that land discontent appears to be growing.¹⁴¹ The study also found that just short of three quarters of black South Africans voiced support for forceful action against landowners. The authors refer to this problem as a "storm on the horizon" and observe that "slow and inadequate land redistribution can result in masses of landless people asking what benefits democracy brings them. This may lead to a loss of confidence in the legal and democratic way of trying to solve the problem."¹⁴²

It is important to recognize that transitional justice institutions cannot be responsible for solving complex social and political problems. These institutions aspire to document and condemn past injustices that can be remedied only in very limited or symbolic ways. In doing so, transitional justice institutions declare a commitment to reject certain policies and practices of the past and to demonstrate how present conflicts

¹³⁹ Leebaw 2003.

¹⁴⁰ See Mamdani 1996 and Meister 1999.

¹⁴¹ Institute for Justice and Reconciliation 2004, 7.

¹⁴² *Ibid.*, 14.

are related to past practices. Yet when transitional justice investigations exclude economic injustices from consideration, they may function to normalize social and political inequalities or obfuscate significant obstacles to long term aspirations for political community and ongoing democratic change by implying that reconciliation is primarily a psychological problem, or a misunderstanding between parties that need to communicate better. This problem was recognized in the text of the TRC's final report, which identifies the neglect to address the legacy of inequality resulting from structural injustices as a "failure of emphasis," which "must be addressed if South Africans are to seize the future."¹⁴³ However, it is not clear that this insight has been carried into efforts to develop new truth commissions based on the South African model.

4) Accountability and Intervention

Finally, in keeping with the "national reconciliation" rationale for transitional justice, the mandates of truth commissions and criminal tribunals have typically been framed in ways that exclude consideration of external involvement in local conflict and abuse. One worrisome implication of this is the very real danger that the phenomena of transitional justice is functioning to construct a revisionist history of Cold War era repression that portrays it as an entirely local affair, while effectively shielding the U.S. the implications of our historical interventions abroad. The proliferation of truth commissions in the developing world has led to some critical debate and reflection on U.S. Cold War policies. However, attention to U.S. responsibility has been muted by the close identification of truth commissions and international tribunals with the goal of national reconciliation and local responsibilities. A number of commentators have called

¹⁴³ Truth and Reconciliation Commission 1998, 132.

for truth commissions to investigate various U.S. actions.¹⁴⁴ However, as transitional justice institutions investigate atrocity and conflict in Central America, East Timor, and now Cambodia, there has been very little effort to consider U.S. involvement in these conflicts.

The report of Guatemala's truth commission, however, did make mention of U.S. responsibility in relation to atrocities dealt with in the investigation, stating that U.S. military assistance "had significant bearing on human rights violations during the armed confrontation," and that U.S. anti-communism and the National Security Doctrine, were expressed in Guatemala as "anti-reformist, then anti-democratic policies, culminating in criminal counterinsurgency."¹⁴⁵ In a March 1999 speech in Guatemala City, Clinton apologized for U.S. involvement in Guatemala: "It is important that I state clearly that support for military forces or intelligence units which engaged in violent and widespread repression of the kind described in the report was wrong."¹⁴⁶ A few years later, Clinton was asked about his delay in cutting off aid to the Indonesian military in 1999. "You want to look backward," he countered, "have at it, but you will have to have help from someone else."¹⁴⁷ The message is that while it is imperative for conflict-ridden developing countries to reflect on past violence and abuse, U.S. actions should remain exempt from scrutiny.

The framing of transitional justice advocacy has also implied that mature democracies are not responsible for atrocities and have already effectively dealt with

¹⁴⁴ Brody 2001, Valls 2003.

¹⁴⁵ Guatemalan Commission for Historical Clarification 1996.

¹⁴⁶ Babbington 1999.

¹⁴⁷ Embassy of the United States of America, "Peace, Democracy in East Timor Long-Term U.S. Goals," Kelly, Clinton Remarks at opening of U.S. Embassy in Dilli (May 21, 2002).

historical abuses. Yet we know that this is not the case.¹⁴⁸ In the absence of a regime change to signal a shift of state identity and given the commitment to civil and political rights as central to their legitimating ideologies, some have argued that mature liberal democracies may have an even harder time than new democracies in reflecting on the implications of past or present abuse.¹⁴⁹ This may help to explain why broadcasted images of U.S. troops engaged in torturing Iraqi detainees at Abu Ghraib have had so little impact on American public debate.

In a 1999 statement to an audience assembled in Jakarta, Richard Holbrooke endorsed the official investigations of a new Human Rights Commission in Indonesia. “Americans believe profoundly in accountability, he stated. “But when I talk about accountability,” he added for emphasis, “Americans mean full accountability.”¹⁵⁰ As the Americans proceed with promoting transitional justice abroad, it would be worthwhile to revisit the question of what role accountability has played and should play in the United States, and our own limitations in relation to the goal of “reconciliation” across lines of racial and social conflict in this country.

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¹⁴⁸ For a discussion of the “shallow” histories of transitional justice, see Torpey 2003.

¹⁴⁹ Aoálin and Campbell 2005.

¹⁵⁰ Holbrooke 1999.

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