

# INTRODUCTION

## A CROSS-NATIONAL APPROACH TO TRANSITIONAL JUSTICE

Without a proper engagement with the past and the institutionalization of remembrance, societies are condemned to repeat, reenact, and relive the horror. Forgetting is not a good strategy for societies transiting to a minimally decent condition.<sup>1</sup>

**T**his book analyzes the central claims made in the above quote. It asks three main questions: First, which mechanisms “institutionalize remembrance,” and when do countries adopt them? Second, what factors facilitate or impede adopting these mechanisms deemed essential to “transiting to a minimally decent condition?” Third, do these mechanisms achieve the desired goals of avoiding the repetition, reenactment, or reliving of horror?

Regarding the mechanisms that institutionalize remembrance, the book analyzes *transitional justice*—the processes designed to address past human rights violations following periods of political turmoil, state repression, or armed conflict. These mechanisms fall into three broad, overlapping categories: mechanisms of accountability for past crimes, including trials, truth commissions, and lustration policies; victim-oriented restorative justice mechanisms, including reparations, construction of monuments, and public memory projects; and mechanisms of security and peace, including amnesties and pardons, constitutional amendments, and institutional reform.

Little is known about the factors that encourage or impede either adoption of transitional justice or success in achieving its goals. Up to this point, transitional justice advocates have endorsed these mechanisms based largely on faith and belief or on generalizations from single-case or single-mechanism analyses. This project is the first of its kind to compare multiple mechanisms and combinations of mechanisms across so broad a range of regions, countries, and time.

The time is ripe for such a study. These mechanisms have been used widely at least since the 1970s, and they have continued to spread around the world. Most scholarly and policy attention has focused on their use in countries emerging from

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1. Rajeev Bhargava, “Restoring Decency to Barbaric Societies,” in *Truth v. Justice: The Morality of Truth Commissions*, ed. Robert I. Rotberg and Dennis Thompson (Princeton, NJ: Princeton University Press, 2000), 54.

dictatorship and civil war in Latin America, Africa, the Middle East, and Asia. But established democracies have also adopted these mechanisms to deal with past conflicts. The Greensboro Truth Commission and reparations for Japanese-Americans interned during World War II are prominent examples from the United States. Australia has designated a national Sorry Day to acknowledge violations against its aboriginal peoples. European democracies continue to grapple with past authoritarian repression (e.g., Spain) and collaboration (e.g., France), as well as sectarian violence (e.g., the UK). In short, no region of the world has escaped the reach of transitional justice.

Given the widespread adoption of transitional justice to address a range of past violence, the scope of these mechanisms varies dramatically across cases. Trials, for example, occur at the domestic (Greece), international (former Yugoslavia), and hybrid (Cambodia) levels. Some trials target only perpetrators from the commanding ranks of political and military power (Romania), others limit prosecutions to the top echelons within the security force (Argentina), and still others extend their reach to the lowest ranks of foot soldiers and citizens (Rwanda). Truth commissions involve international intervention ranging from direct control (El Salvador) to indirect management (Sierra Leone), to consultative or financing roles (Uganda). Some truth commissions name perpetrators (East Timor), others grant blanket amnesties and anonymity (Uruguay), and still others require perpetrators to confess their crimes in exchange for amnesty (South Africa). Lustration policies purge and bar former perpetrators and collaborators from positions of public influence. These policies range in scope from blanket purges of all individuals with connections to a perpetrator party (Iraq) to banning specific individuals from the government, security, and intelligence apparatus (Czech Republic), to targeting only those seeking public office who fail to disclose their past fully (Poland). In contrast, some countries limit their transitional justice efforts to financial or symbolic reparations (Malawi). Amnesty is used in a number of different political contexts and extended to varying sets of actors. Transitional governments grant amnesties following civil war (Algeria) or after periods of authoritarianism (Argentina). These amnesties may include state actors (Guatemala), nonstate actors (Ecuador), or both (Honduras).

The variety of mechanisms and countries adopting them has generated much study. Conservatively, more than 2,300 articles and books explore various aspects of transitional justice.<sup>2</sup> Scholarly interest led to the creation of the *International Journal of Transitional Justice* (Oxford University Press) in 2007. Other journals, such as the *Journal of Conflict Resolution*, have dedicated special volumes to the topic.<sup>3</sup> A lively scholarly debate has emerged over what transitional justice is

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2. See Andrew G. Reiter, compiler, "Transitional Justice Bibliography," <http://sites.google.com/site/transitionaljusticedatabase/transitional-justice-bibliography> (accessed Jan. 12, 2010).

3. Marek Kaminski, Monika Nalepa, and Barry O'Neill, eds., "A Special Issue on Transitional Justice," *Journal of Conflict Resolution* 50, no. 3 (2006).

and when it began. Some view it as a phenomenon stretching as far back as ancient Athens,<sup>4</sup> while many tend to mark the modern, international beginnings of transitional justice with the Nuremberg Trials, following World War II.<sup>5</sup> Still others perceive the field as a relatively recent outgrowth of the “third wave” of democratization in the 1980s and 1990s.<sup>6</sup>

New efforts in Colombia, Indonesia, Nepal, the Democratic Republic of the Congo, and Liberia suggest that transitional justice will remain at the forefront of international and domestic policy debates. International and domestic nongovernmental organizations (NGOs) have formed in response to the steady demand for transitional justice mechanisms. The Ford Foundation generously funded the International Center for Transitional Justice (ICTJ), an international nongovernmental organization (INGO) that offers courses and has offices around the world. Universities have begun to create their own institutes and programs, as illustrated by efforts at the universities of Ulster, Oxford, and Minnesota. Online networks such as the Transitional Justice Forum and the African Transitional Justice Research Network have emerged. Many scholars and policymakers now frequent a well-developed circuit of conferences and workshops dedicated to the study of transitional justice.

The existence of an already saturated field of study may argue against yet another analysis of transitional justice. But this study overcomes a frequent complaint about the field: that despite the proliferation of mechanisms, country cases, and scholarship, the study of transitional justice remains underdeveloped. Much of the existing scholarly work relies on single-case or “small-N” studies. These studies provide important insights into key cases and have produced a number of hypotheses on the adoption and effects of transitional justice, yet the hypotheses and assumptions remain untested. As a result, over sixty years after the Nuremberg Trials, neither scholars nor policymakers have a solid understanding of the achievements and failures of transitional justice, or of where it is possible and where it is not.

Scholars and policymakers have repeatedly demanded such a study. In a recent review of the transitional justice literature, David Backer advocates “cross-national analysis to enhance understanding of the initiation, implementation, and impact of transitional justice processes.”<sup>7</sup> In a recent book on truth commis-

4. For an examination of the historical processes, see Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge, MA: Cambridge University Press, 2004); and Gary J. Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton, NJ: Princeton University Press, 2000).

5. Ruti G. Teitel, “Transitional Justice Genealogy,” *Harvard Human Rights Journal* 16 (2003): 70.

6. International Center for Transitional Justice, “What Is Transitional Justice?” [www.ictj.org/en/tj/](http://www.ictj.org/en/tj/) (accessed July 16, 2009). For a discussion of the third wave of democratization, see Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman, OK: University of Oklahoma Press, 1999), 211–31.

7. David Backer, “Cross-National Comparative Analysis,” in *Assessing the Impact of Transitional Justice: Challenges for Empirical Research*, ed. Audrey Chapman, Hugo van der Merwe, and Victoria Baxter (Washington, DC: United States Institute of Peace Press, 2009).

sions, Eric Brahm laments the “impressionistic, anecdotal” focus of the literature on transitional justice.<sup>8</sup> A recent report on transitional justice, conducted by the Centre for International Policy Studies, refers to those few studies that have conducted systematic cross-national comparisons as “pioneers.” The report summarizes other studies in this way: “The empirical TJ [transitional justice] research to date has been analytically weak, relying largely on impressionistic descriptions of a small number of well-known cases, rather than systematically comparing impacts across a broad range of cases, including societies in which TJ has not been pursued.”<sup>9</sup>

This project has responded to those demands by systematically analyzing the claims made in the literature and pulling from the literature specific, central hypotheses that were largely untested. These hypotheses fall into two broad categories: those that attempt to explain the adoption of transitional justice in particular situations and those that explain the outcome of transitional justice. To test both sets of hypotheses, we developed the Transitional Justice Data Base. We analyze transitional justice in 161 countries during 1970–2007. The database includes the following mechanisms: trials, truth commissions, amnesties, reparations, and lustration policies. While these are not the only mechanisms that states pursue, they constitute the main focus of the theoretical literature thus far. The database includes 848 transitional justice mechanisms implemented over nearly four decades. We use the database, along with existing data on factors such as democracy and human rights, to explore both the adoption of transitional justice and its success in achieving the primary political goals of strengthening democracy and reducing human rights violations. This book summarizes the findings and develops a new theoretical approach to transitional justice, grounded in cross-national empirical analysis.

## Chapter Outline

The first two chapters present the project’s theoretical and empirical foundations. Chapter 1 presents the central debates in the literature in two main areas. First, we examine how transitional justice is understood as a dependent variable. Specifically, we outline the hypotheses that have emerged in the literature to explain why countries have adopted specific transitional justice mechanisms. We identify the factors and conditions that scholars and policymakers consider crucial to the successful implementation of transitional justice. The literature highlights constraints and opportunities that should influence adoption. We

8. Eric Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy* (New York: Routledge, 2009).

9. Oskar N. T. Thoms, James Ron, and Roland Paris, “The Effects of Transitional Justice Mechanisms: A Summary of Empirical Research Findings and Implications for Analysts and Practitioners,” Centre for International Policy Studies working paper (2008), 5.

present these hypotheses, then test them. Second, we examine the debates in the literature about the mechanisms' likelihood of success—transitional justice as an independent variable. Although many goals of transitional justice are not easily tested, well-respected databases on democracy and human rights allow us to test the relationship of transitional justice mechanisms to progress on these two essential goals. Chapter 2 provides a description of the Transitional Justice Data Base: the variables, coding schema, and descriptive data on transitional justice worldwide.

The chapters that follow the two framing chapters present the analysis and findings. Each chapter introduces and tests hypotheses from the transitional justice literature, then presents the findings and the theoretical insights derived from those findings. For example, in considering the factors that explain the adoption of transitional justice, we examine various economic, social, and political factors. For transitional justice as an independent variable, we explore whether mechanisms have a meaningful impact on the two primary transitional justice goals, strengthening democracy and reducing human rights violations.

Chapter 3 presents the arguments made in the literature on the politics of transitional justice. Scholars and policymakers assume that domestic political factors constrain or facilitate the adoption of transitional justice mechanisms. The chapter focuses on factors associated with the characteristics of the authoritarian regime, the new democracy, and the type of transition. The findings suggest that the fear of spoilers may not constrain transitional justice choices as much as the literature assumes. On the other hand, legacies of authoritarian rule appear to prevail long after they should threaten nascent democracies. This is consistent with the findings discussed below: new democracies tend to move cautiously, making it difficult to test the assumption that moving too far, too fast threatens democracy.<sup>10</sup>

Chapter 4 assesses the political economy constraints believed to influence new democracies' transitional justice choices. Some scholars contend that democracies facing hard economic constraints will eschew expensive transitional justice mechanisms, such as trials or truth commissions, in favor of less expensive amnesties. The findings confirm the importance of domestic economic conditions in shaping new democracies' choices: the stronger the economy, the greater the likelihood that a country will adopt expensive transitional justice mechanisms.

Chapter 5 explores international constraints and opportunities believed to affect transitional justice. Specifically, it examines the role that international governmental organizations (IGOs) and INGOs play in shaping the transitional justice decisions of new democracies. We find that INGOs play a critical role in advancing prosecutions, whereas IGOs do not. Nonetheless, signing on to one

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10. Guillermo O'Donnell and Philippe C. Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (Baltimore, MD: Johns Hopkins University Press, 1986).

international law instrument in particular—the Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG)—is a strong predictor of a country’s decision to hold trials.

Chapter 6 explores the notion of a justice “cascade” or “revolution.” Some scholars contend that the recent spate of transitional justice mechanisms around the world marks a shift away from amnesty and impunity and toward accountability for past human rights violations. Accountability takes the form of human rights trials principally and truth commissions to a lesser degree. The findings partially confirm this notion: trials have experienced an upswing. At the same time, the ratio of trials and amnesties to democratic transitions has remained constant. Thus, the findings suggest that the justice cascade measures an increase in transitions, as well as delayed trials adopted by democracies from the earlier waves of transitions. The findings cannot confirm the thesis that international justice norms have reduced the adoption of amnesties for human rights violations following democratic transitions.

Chapter 7 explores the “peace dividend,” or the relationship of transitional justice to civil wars. The literature considers transitional justice primarily as a response to transitions from authoritarian rule and state terror but not as a response to civil war or genocide. This chapter explores whether political and international factors have the same influence on governments’ choices regarding transitional justice in response to internal armed conflict. We find that despite the weak role of IGOs in postauthoritarian situations, the presence of UN peacekeepers increases the likelihood that states will adopt trials or truth commissions in the aftermath of war. We also find that the *type* of conflict—specifically, genocide and politicide—strongly favors the decision to prosecute perpetrators. Amnesty, on the other hand, tends to result from the nature of conflict termination, specifically, cease-fires or peace agreements, rather than military defeat. Thus, the worst atrocities and those conflicts that draw in international actors lead more often than not to accountability, while the necessity of bargained peace agreements leads to amnesty.

Chapter 8 shifts the analysis to make transitional justice the key independent variable and asks, “Does transitional justice work?” We explore whether specific transitional justice mechanisms achieve the two primary goals of strengthening democracy and increasing human rights protections. We find that transitional justice in general does bring improvements to democracy and human rights, though we cannot confirm many of the hypotheses generated by scholars regarding the role of specific mechanisms. Truth commissions by themselves, for example, tend to have a negative effect on democracy and human rights. Neither trials nor amnesties on their own significantly affect human rights or democracy. Indeed, the use of multiple mechanisms, or a holistic approach, is the most effective way to generate positive change. We find that combinations of trials

and amnesties, or trials, truth commissions, and amnesties, prove positive for democracy and human rights.

The book's conclusion briefly summarizes the findings and uses them to present a new theoretical approach to transitional justice. Our "justice balance" approach explores when, why, and how specific transitional justice mechanisms contribute to improvements in democracy and human rights, and under what conditions countries are most likely to adopt those mechanisms. The justice balance thus draws together the two parts of this project. It uses the data analysis to show, on one hand, that economic and political constraints on new democracies do not necessarily prevent countries from adopting transitional justice (as previous studies have assumed). But where those constraints prevail, countries' success on the democracy and human rights fronts depends on particular choices that protect them from economic and political vulnerabilities. The justice balance claims that combining and sequencing mechanisms can provide that protection and lead to success on democracy and human rights goals. Based on this new approach, we then develop guidelines for policymakers working on transitional justice. Because many transitions are now under way, the findings will likely change over time. We thus also identify promising areas for future research to track these changes.

This project contributes to policymaking and scholarly debates on transitional justice. On the policy side, we provide a theoretically informed and empirically tested transitional justice blueprint for states emerging from civil war or authoritarian rule and for IGOs and INGOs concerned with such processes. We advance scholarship by testing existing theoretical assumptions and generating a new, empirically grounded theoretical approach to transitional justice and its effects on democratization and human rights.