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## The Impact of Human Rights Trials in Latin America\*

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Since the 1980s, states have been increasingly addressing past human rights violations using multiple transitional justice mechanisms including domestic and international human rights trials. In the mid-1980s, scholars of transitions to democracy generally concluded that trials for past human rights violations were politically untenable and likely to undermine new democracies. More recently, some international relations experts have echoed the pessimistic claims of the early 'trial skeptics' and added new concerns about the impact of trials. Yet, relatively little multicountry empirical work has been done to test such claims, in part because no database on trials was available. The authors have created a new dataset of two main transitional justice mechanisms: truth commissions and trials for past human rights violations. With the new data, they document the emergence and dramatic growth of the use of truth commissions and domestic, foreign, and international human rights trials in the world. The authors then explore the impact that human rights trials have on human rights, conflict, democracy, and rule of law in Latin America. Their analysis suggests that the pessimistic claims of skeptics that human rights trials threaten democracy, increase human rights violations, and exacerbate conflict are not supported by empirical evidence from Latin America.

### Introduction

Historically, government officials who abused the human rights of their populations were able to do so with impunity. Even after

authoritarian regimes transitioned toward democracy, the architects of state-led atrocities typically did not face judicial proceedings for their crimes. Instead, for the sake of stability or reconciliation, transitional leaders preferred to offer amnesties to the human rights abusers of previous regimes. Since the 1980s, however, states are increasingly using multiple transitional justice mechanisms, including trials, truth commissions, reparations, lustration, museums and other 'memory sites', archives, and oral history projects, to address past human rights violations (Jelin, 2003). This article focuses on human rights trials, the most prominent of these transitional justice mechanisms. While amnesties are still common, there has been a dramatic new trend: democratizing states throughout the world are beginning to hold individuals, including heads of state, accountable

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for past human rights violations, especially through the use of trials. This trend has been described by Lutz & Sikkink (2001) as 'the justice cascade', and by Sriram (2003) as a 'revolution in accountability'.

Despite these changes in the international system, there is still little agreement in the comparative politics and international relations literature about the impact of transitional justice trials. Because such human rights trials are relatively recent phenomena, we know little about their strengths and weaknesses, past performances, and prospects for the future (Mendeloff, 2004). The purpose of this article is to provide empirical data on the use of transitional justice mechanisms around the world and to use those data to test the claims about the negative impact of human rights trials.

In particular, we examine the justice cascade in relation to Latin America. We focus on Latin America because cases in this region account for over half of the country trial years in the entire dataset.<sup>1</sup> Further, because many Latin American countries were early innovators of human rights trials as well as truth commissions, we are better able to evaluate their impact. Since more time has passed, we can more fully assess the effect of these transitional justice mechanisms on future human rights practices, democratic consolidation, and conflict than in any other region. Our research shows that holding human rights trials has not undermined democracy or led to an increase in human rights violations or conflict in Latin America.

### **Literature Review: The Possibility, Nature, and Impact of Human Rights Trials**

There has been a lively debate in the comparative politics, international relations, and

international law literatures about the possibility, desirability, and impact of international and domestic human rights trials. In the mid-1980s, scholars of transitions to democracy generally concluded that trials for past human rights violations were politically untenable and likely to undermine new democracies. Huntington (1991: 228), for example, argued that prosecutions could destroy the necessary basis for democracy and, in general, recommended that transitional states not carry out human rights trials. If trials were undertaken, Huntington believed that they had to be carried out immediately after the transition. He argued, 'In new democratic regimes, justice comes quickly or it does not come at all'. In their classic text on transition, O'Donnell & Schmitter (1986: 30) also suggested that in most transitional democracies, holding trials would be very difficult. They admitted that, in certain circumstances, particularly where very grave human rights violations had occurred, 'the "least-worst" strategy in such extreme cases' might be to hold perpetrators accountable, but they were still very pessimistic about the effects of such trials on democracy. They concluded, 'Thus, if civilian politicians use courage and skill, it *may not necessarily be suicidal* for a nascent democracy to confront the most reprehensible facts of its recent past' (1986: 32, emphasis added). Many actors directly involved in transitions were often equally pessimistic. Jose Zalaquett (1992: 1428–1429), a Chilean human rights lawyer who later served on the Chilean truth commission, wrote of 'a post WWII model for prosecuting war criminals that is not fully adequate to deal with perpetrators who still wield considerable power'. He argued, 'Political leaders cannot afford to be moved only by their convictions, oblivious to real life constraints, lest in the end the very ethical principles they wish to uphold suffer because of political or military backlash'.

These authors put forward a number of propositions that we wish to re-examine with new data from our database. In particular, we

<sup>1</sup> We define country trial years as the number of years during which a state is actively engaged in judicial proceedings for individual criminal responsibility for human rights abuse. This number does not reflect the number of trials underway within that state during those years, which may be far greater.

will examine the following arguments: (1) that choices about trials need to be taken in the early period of the democratic regime or such trials will not be held at all; (2) that trials for past human rights violations are likely to undermine democracy; (3) that the decisions taken in the immediate post-transition period will be durable and that amnesties are stable and politically viable solutions to promote reconciliation in post-transition societies; and (4) that transitional justice choices are dichotomous. The transitional justice literature, in the past, often stated that the desires for 'truth' and 'justice' could and should be separated, so that countries might choose between using truth commissions and human rights trials. Zalaquett (1995), in particular, has argued that it is possible and desirable to promote the search for truth via truth commissions but limit the search for retributive justice, and that such an arrangement is more likely to contribute to 'reconciliation' than one that uses trials.

Much of this literature dates from the late 1980s or early to mid-1990s, and, since much has happened empirically since then, it is useful to revisit these claims in the light of new developments. However, scholars of international relations and international law are currently making very similar arguments to those made in the past. Responding to recent developments in international justice, these scholars direct their comments to the effects of international, foreign, and domestic human rights trials. Goldsmith & Krasner (2003: 51) contend that 'a universal jurisdiction prosecution may cause more harm than the original crime it purports to address'. They approvingly cite Scharf, saying that he 'correctly notes' that 'a rejection of amnesty and an insistence on criminal prosecutions "can prolong . . . conflict, resulting in more deaths, destruction, and human suffering"'. So pessimistic is this view that Cobban (2006: 22) concluded, 'It's time to abandon the false hope of international justice'. Snyder & Vinjamuri (2003/2004) make similar claims. They argue

that human rights trials themselves can increase the likelihood of future atrocities, exacerbate conflict, and undermine efforts to build democracy. Like Zalaquett in the early 1990s, current IR trial skeptics argue that those who argue in favor of trials may provoke military coups, thus letting their convictions undermine their long-term goals. According to Vinjamuri & Snyder (2004: 353), the 'proponents of legalistic justice who underrate the centrality of these political considerations cause more abuses than they prevent'.

Clearly, there are many claims about the negative effects of trials but relatively little solid evidence to support them. The purpose of this article is to contribute to efforts to test systematically claims about the impact of human rights trials. Huntington, O'Donnell & Schmitter, and Zalaquett all wrote with special attention to the cases in Latin America. Thus, it is appropriate to evaluate their arguments using data from the Latin American region. While it is possible that trials could have a different impact in Latin America than elsewhere, neither the early transitions literature nor current trial skeptics suggest that modern Latin America would be an exception to global trends or to regional history. Since trial skeptics *do not* limit their arguments with regard to region, evidence from Latin America is relevant to evaluate their claims.

### The Political Reality of the Justice Cascade

To determine the dimensions of the global justice cascade, we have created a new dataset that includes domestic truth commissions and domestic, foreign, and international trials for past human rights violations. We define a truth commission as a temporary body officially authorized by the state to investigate a pattern of past human rights violations and issue a report (Hayner, 2001: 14). Our dataset on trials counts only those judicial proceedings that seek to determine *individual criminal responsibility* for human rights violations. We

define 'domestic trials' as those conducted in a single country for human rights abuses committed in *that* country. 'Foreign trials' are those conducted in a single country for human rights abuses committed in *another* country – the most famous of which are Spain's trials for human rights violations that have occurred in Argentina and Chile (Roht-Arriaza, 2005). 'International trials' also involve trials for individual criminal responsibility for human rights violations in a particular country or conflict and result from the cooperation of multiple states, typically acting on behalf of the United Nations. Examples include the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (Bass, 2000). Our category of international trials also includes the so-called hybrid trials that involve a combination of international and national features, such as those in Cambodia, Sierra Leone, and Timor-Leste (Roht-Arriaza & Mariezcurrena, 2006).

Our dataset of trials and truth commissions from countries in transitions to democracy reveals a rapid shift toward new norms and practices providing more accountability for human rights violations. Specifically, our data reveal an unprecedented spike in state efforts to address past human rights abuses both domestically and internationally since the mid-1980s (see Figure 1). This represents a significant increase in the judicialization of world politics.

The trends in transitional justice follow some distinct patterns. We surveyed data on human rights trials for a 26-year period covering 192 countries and territories. Of the total, 34 countries have used truth commissions, and 49 countries had a least one transitional human rights trial. If we look only at the approximately 84 new and/or transitional countries in the period 1979–2004, well over half of these transitional countries attempted some form of judicial proceeding and more than two-thirds of transitional countries used some transitional justice

mechanism.<sup>2</sup> In sum, the use of a truth commission and/or human rights trials among transitional countries is not an isolated or marginal event, but a very widespread social practice occurring in most transitional countries. We believe that these four types of transitional justice mechanisms (truth commissions, domestic trials, foreign trials, and international trials) are all part of a related global phenomenon of increasing individual criminal responsibility for human rights violations. This article, however, will focus on domestic trials. Nonetheless, we briefly discuss the relationship between truth commissions and domestic trials and the importance of foreign trials to some of the Latin American cases.

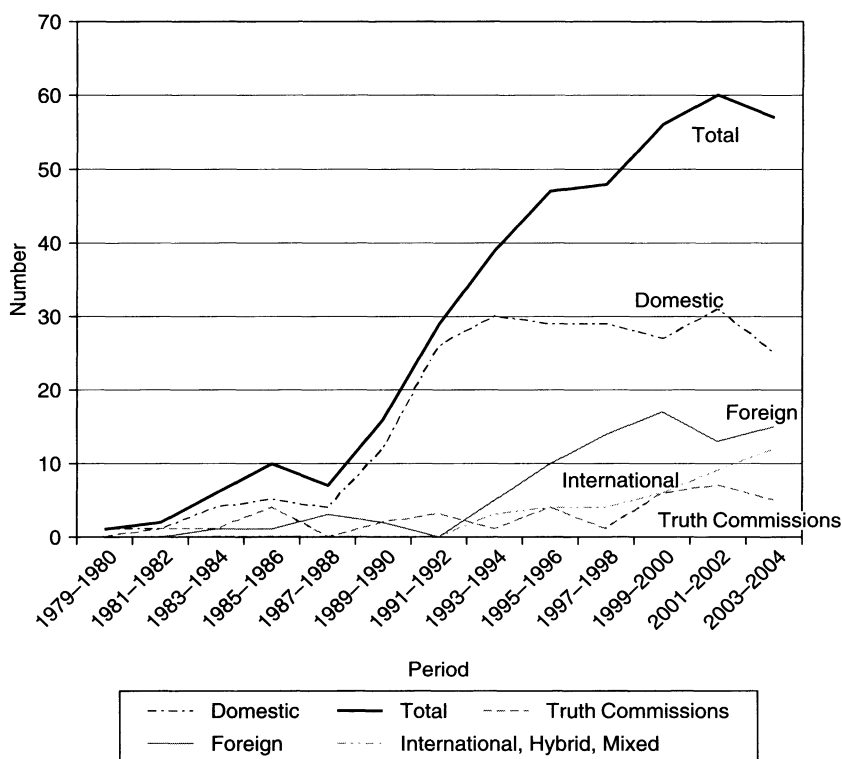
### *Truth Commissions*

Our data reveal that the growth trend in truth commissions is regionally concentrated. Truth commissions are more prevalent in Africa and the Americas than in other regions, each comprising 37% of the total. Our data on truth commissions, when complemented with our data on domestic trials, also illustrate that multiple transitional justice mechanisms frequently are used in a single case. Almost two-thirds of the countries identified in our dataset as establishing truth commissions also held some form of trials to deal with past human rights abuses.<sup>3</sup> Remarkably, *every* country in the Americas region that established a truth commission also held domestic trials. Likewise, many countries that established truth commissions also had amnesties and also held domestic human rights trials. It

<sup>2</sup> We arrive at the estimate of approximately 84 total transitional countries by subtracting from our list of 192 countries the 41 democracies that existed in the world as the third wave of democratization began in 1974 and the 67 non-democracies that still exist in the world today and did not have even a failed experience with transition to democracy (based on coding of Freedom House data) (Diamond, 2003: 3–6).

<sup>3</sup> Countries that had both truth commissions and human rights trials include: Bolivia, Argentina, Uruguay, Chile, El Salvador, Germany, Guatemala, Haiti, Sri Lanka, Burundi, South Africa, Ecuador, Indonesia, Grenada, Sierra Leone, South Korea, Uruguay, Panama, Peru, and Paraguay.

Figure 1. Trends in Transitional Justice Mechanisms



has not been the case that countries necessarily choose between amnesties, trials, or truth during or following democratic transition, as has sometimes been suggested in the transitional justice literature and by security scholars. For further discussion, see Roht-Arriaza & Mariezcurrena (2006).

### Domestic Trials

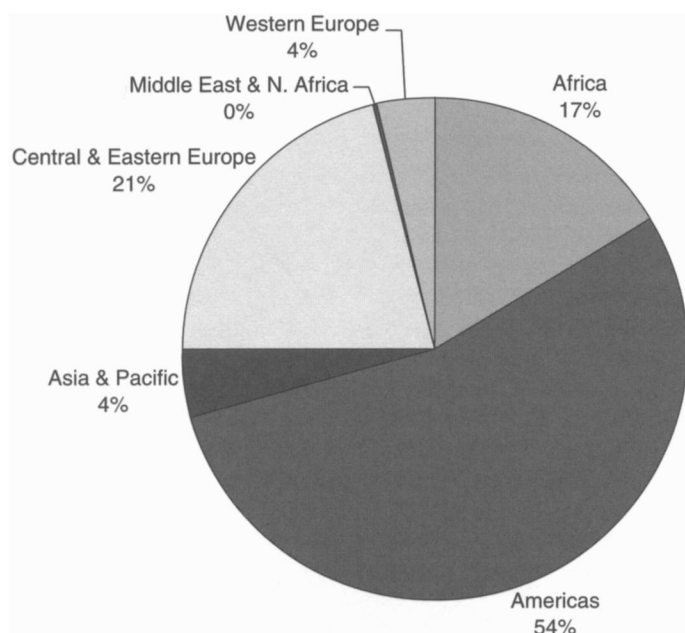
Our dataset on human rights trials includes information on the annual human rights practices and domestic judicial activity using the US Department of State Country Reports on Human Rights Practices, 1979–2004.<sup>4</sup> We gathered data on all domestic judicial

proceedings held in response to human rights abuses committed by government officials or their agents in countries undergoing transitions from authoritarianism to democracy. To be included in the dataset, the judicial activity discussed in the report must inflict costs on a government agent accused of having *individual criminal responsibility* for human rights violations. These human rights abuses include summary execution, disappearances, torture, and arbitrary arrest and imprisonment. We include only human rights trials occurring in *transitional countries* – countries that have experienced or are undergoing regime change from an undemocratic regime to a more democratic political system marked by relatively free and fair elections. The data record the presence of judicial activity

<sup>4</sup> The State Department human rights reports are generally considered to be a reliable source of information on states' human rights practices. See Poe, Carey & Vazquez (2001).



Figure 2. Regional Distribution of Domestic Transitional Trials



meeting the above qualifications in a given state or territory for each year. They do not measure the number of trials or convictions, but rather the persistence of judicial proceedings on past human rights violations in a country over time. The higher the number of 'country trial years', the greater the persistence of judicial proceedings.<sup>5</sup> As Figure 2 indicates, the greatest number of transitional country trial years occurs in the Americas, comprising 54% of transitional trials, with 17 countries in Latin America accounting for 121 country trial years.

### *Foreign Trials*

As in the case of domestic trials, foreign trials are concerned with individual criminal responsibility of state agents for human rights abuses committed in their home country.

<sup>5</sup> Although we will occasionally use the shorthand term 'trials' instead of 'country trial years', it is important to keep in mind that our variable measures persistence, not the actual number of trials.

What differentiates foreign trials from their domestic counterparts is that foreign trials occur in the judicial system of a state other than the state where the abuse occurred. We count foreign trial activity like domestic trial activity, by the year in which judicial activity occurred and for the state in which the accused is being prosecuted.<sup>6</sup> Our database includes 81 foreign trial years. Just over 80% of all foreign trials were held within the region of Western Europe but largely involved human rights violations in Latin America and Eastern Europe. Although the arrest and trial of Pinochet is the most famous of foreign judicial proceedings, the period 2003–05 also saw major developments in this area, despite a slight decrease in foreign trials after 2001. In 2003, the Mexican Supreme Court voted to extradite a former Argentine navy officer, Ricardo Cavallo, to stand trial in Spain for human rights abuses in Argentina. In 2005, Spain convicted Argentine

<sup>6</sup> For this project, we do not consider the more complex issues of the content of the trials and the type of law applied.

naval officer Adolfo Francisco Scilingo for human rights violations in Argentina and sentenced him to 640 years in prison for crimes against humanity. The sentence was a significant affirmation of the principle and practice of universal jurisdiction.<sup>7</sup>

There is often an interaction between domestic and international legal and political spheres with regard to human rights trials. When amnesties block access to domestic courts, human rights activists seek justice in foreign courts. In this sense, domestic amnesties may lead to an increase in foreign trials (Sikkink, 2005). The success of some foreign judicial proceedings in turn may create new incentives to reopen domestic judicial proceedings, since many perpetrators (and governments) prefer trials at home to trials abroad.

In sum, our empirical data on human rights trials clearly demonstrate the existence of the justice cascade. States increasingly are holding the human rights abusers of previous regimes criminally accountable for their human rights violations. This very pronounced upward trend in human rights trials suggests that its trajectory is unlikely to be easily reversed, although the balance among the use of different transitional justice mechanisms is likely to continue to vary.

### The Nature and the Impact of the Justice Cascade

In this part of the article, we explore the impact of the justice cascade in Latin America. In particular, we test the hypotheses advanced by transitions scholars and security scholars, the trials skeptics discussed above: (1) that human rights trials must happen quickly after transition or they will not happen at all; (2) that these trials undermine democracy and lead to military coups; (3) that transitional

justice decisions made in the immediate post-transition period, including amnesties, are durable and dichotomous; (4) that human rights trials can increase human rights violations; (5) that these trials increase conflict; and (6) that these trials impede the consolidate of the rule of law. In the future, we hope to evaluate the stronger claims that human rights trials lead to an improvement in human rights through deterrence or preemption, *but we do not advance that claim here*. While this makes our conclusions more modest, we believe that it is necessary to first deal with the old and new arguments about the modalities and dangers of trials before we move on to arguments about their positive effects.

### *The Timing and Sequencing of Trials and Truth Commissions*

First, with regard to Huntington's argument that in new democratic regimes, 'justice comes quickly or it does not come at all', our data clearly indicate that transitional justice continues to happen for many years after the transition itself. The average number of country trial years among transitional countries in Latin America is seven, and these years are often spread out over a much longer time period. In some countries, such as Argentina, trials were held shortly after the transition, and they continue to be held 20 years later. In other countries, such as Chile and Uruguay, no or few trials were held after the transition but began to be held later. In the case of Uruguay, for example, no trials were held for 20 years, but in 2006, a series of important human rights trials were moving ahead in the courts, including a case against the former president during the military regime, Juan Maria Bordaberry.

The time lag in some cases might seem to confirm the skeptics' arguments that human rights trials were a bad idea in the initial transition period. But this would give the skeptics credit for an argument they did not make. None of the skeptics claimed that trials were

<sup>7</sup> For Scilingo's confession, see Verbitsky (1995); the sentence of the Spanish court, Audiencia Nacional, Sala de lo Penal [Penal Court, National High Court] (1997).



impossible in the early period but became possible later after the power of the veto players diminished. Huntington (1991: 228), for example, argued that over time, 'The popular support and indignation necessary to make justice a political reality fade; the discredited groups associated with the authoritarian regime reestablish their legitimacy and influence'. Our data suggest that popular support and indignation does not necessarily fade, nor do the discredited groups associated with the authoritarian regime always re-establish their legitimacy and influence. The military and their civilian allies in Argentina, Uruguay, and Chile, for example, are far more discredited today than they were after the transition. Pinochet was arrested and indicted for kidnapping and torture and remained under house arrest until his death. See Gonzalez (2006). Ex-President Bordaberry and ex-Foreign Minister Juan Carlos Blanco of Uruguay are on trial for specific cases of assassination and disappearance (Pernas, 2006). Trial skeptics did not anticipate that trials might become more likely or possible over time because they believed that the strength of relative actors would be constant and that norms and attitudes would not change. Yet, our cases suggest that Latin America has experienced a profound shift in the norms about transitional justice and that this shift has diminished the influence of once powerful actors and made trials more likely over time. This norm shift was related to other changes in the international and regional context, including the end of the Cold War (Lutz & Sikkink, 2001).

### *Trials and Democracy*

What impact do human rights trials have on democracy? Here we examine the claim that trials are likely to undermine democracy and lead to military coups. If we compare regions that have made extensive use of trials with regions that have not made extensive use of trials, we find that Latin America, which has made the most extensive use of human rights

trials of any region, has made the most complete democratic transition of any transitional region. In the 20th century, political instability and military coups were endemic in Latin America (Smith, 2004). Since 1980, however, the region has experienced the most profound transition to democracy in its history, and there have been very few reversals of democratic regimes. Of the countries in the region, 91% are now considered democratic, well above the level for Eastern Europe and the former USSR (67%) or Asia & Pacific (48%) or Africa (40%). See Diamond (2003: Table 5).

Since 1978, when the first trials were initiated in the region, there have been only three examples of coups in Latin America, and none was provoked by human rights trials.<sup>8</sup> The remaining 14 countries that used trials have not had a successful coup attempt since the use of trials and, in many cases, are increasingly considered consolidated democratic regimes. The data from Latin America provide no evidence that human rights trials have contributed to undermining democracy in the region. The argument that trials undermine democracy came largely from observations of a single case: the early coup attempts in Argentina against the Alfonsín government after it carried out far-reaching trials of the three juntas for past human rights violations. Indeed, both Huntington and Zalaquett discuss the Argentine case at length. But almost 20 years have passed since those failed coup attempts, and Argentina has had more transitional human rights trials than any other country in the world and has enjoyed the longest uninterrupted period of democratic rule in its history.

### *Durable and Dichotomous Solutions: Trials vs. Forgiveness, Truth vs. Justice*

The transitions literature presented the transitional moment as a time when solid bargains were struck about transitional justice that would endure over time. These solutions were

<sup>8</sup> These include the 'self-coup' in 1992 in Peru, and coups in Haiti in 2004 and in Ecuador in 2000.

often presented in dichotomous terms. Huntington (1991: 211), for example, spoke of the decision as 'Prosecute and Punish vs. Forgive and Forget'. The Spanish case was often held up as an example of a durable solution to forgive and forget. O'Donnell & Schmitter (1986: 29), for example, cite the Spanish case as evidence that 'the passage of time attenuates the bitterest of memories', and that all political actors can be invited 'not to dig around in the past'. Zalaquett believed that one could and should pursue 'truth' but not necessarily retributive justice, and, in the transitional justice literature, the discussion was often framed in terms of truth vs. justice. In this framework, reconciliation was often linked to truth and counterposed to justice.

Our data suggest that, in many parts of the world, transitional justice solutions have been neither durable nor dichotomous. In the context of a norm shift where trials are becoming commonplace in the world, the passage of time has not attenuated demands for justice but rather encouraged victims in other countries to 'dig around in the past'. Even in Spain, the paradigmatic case of 'forgive and forget', exhumation of mass graves has begun, and new organizations have emerged for 'the recuperation of historical memory' (see Silva, 2005; <http://www.memoriahistorica.org>). The Latin American cases illustrate this trend. In most countries in Latin America, the transitional justice bargains struck in the immediate post-transition period have varied considerably over time. Truth commissions tended to come first, followed, often with a considerable time lag, by trials. Particularly striking is the combination of the use of amnesties and the use of some kind of human rights trials. Amnesties were used in various forms in 16 of the 19 transitional countries in Latin America.<sup>9</sup> Further, many of these countries passed multiple

amnesty laws. Of the 16 countries that passed an amnesty law, 15 also had human rights trials. Only in Brazil did the amnesty appear to have the desired effect of blocking trials, but even in Brazil in 2006 the first trial was initiated against an alleged torturer during the military regime (Moreira, 2006).

This combination of amnesty with trials was possible, first, because each amnesty law was rather different and some exempted certain actors or actions. For example, the Guatemalan amnesty law exempts genocide and crimes against humanity, while the Uruguayan law exempts civilian leaders of the military regime. Second, even amnesty laws without exemptions faced challenges in courts that led to their later erosion or reversal. Recent interpretations of amnesty laws in various countries, including Chile, have concluded that the crime of disappearance, as an ongoing crime, is not covered by the amnesty. Finally, regional and national jurisprudence is pushing towards the reversal of amnesty laws. In 2001, the Inter-American Court of Human Rights declared the Peruvian amnesty law to be contrary to the American Convention of Human Rights, and, in 2005, the Argentine Supreme Court declared its amnesty laws unconstitutional.

This use of multiple and changing transitional justice mechanisms contradicts the notion that bargains in the post-transitional period are stable and dichotomous. It also makes it very difficult to isolate the impact of any particular factor on later developments. Snyder & Vinjamuri (2003/2004: 6), for example, argue that amnesties 'have been highly effective in curbing abuses, when implemented in a credible way, even in such hard cases as El Salvador and Mozambique'. But, at least in Latin America, there is no evidence that amnesties are highly effective, because amnesties are almost a constant. It is difficult to untangle their impact from that of other transitional justice mechanisms. For example, El Salvador passed six different amnesty laws (1979, 1980, 1983, 1987, 1992, and 1993), had a truth commission in 1993, and held

<sup>9</sup> The three transitional countries that did not have amnesties were Grenada, Guyana, and Paraguay. We want to thank Louise Mallander for sharing with us the data on post-1979 amnesties in Latin America from her global dataset on amnesties.

human rights trials (1990, 1991, 1992, and 1998). El Salvador has seen a significant improvement in its human rights record, but it is not clear what explains the improvement: amnesties, the truth commission, trials, redemocratization, or the end of the civil war. There is no evidence that the amnesties in El Salvador or anywhere else in the region were effective *by themselves* in curbing abuses. At least in the Latin American cases, no generalization can be made at all about the effects of amnesty laws except that they have not been effective in preventing human rights trials.

### *Trials and Human Rights*

As the discussion above reveals, it is difficult to evaluate the impact of transitional justice mechanisms. The first dilemma is that evaluating the effect of human rights trials usually involves a counterfactual argument. We compare how many human rights violations a country has to what it *would have had* without transitional justice or with a different combination of transitional justice mechanisms. We cannot eschew counterfactual arguments, because they are ubiquitous in political life. Counterfactual arguments are often contentious, however, because well-intentioned scholars can propose quite different counterfactual scenarios, and it is difficult to prove whether one is more plausible than another (Tetlock & Belkin, 1996: 13–14).

To address the issue, we try two kinds of empirical comparisons: first, using a quantitative measure, we compare the human rights situations in individual countries before and after trials to see if we can discern the impact of trials on human rights; and, second, we compare countries without trials to countries that had trials to gain further insight into the effects of trials. We also compare those countries that had a greater number of trials to those countries that had fewer trials. Note that, in the Latin American cases, we cannot compare the effectiveness of amnesties to trials because every transitional country in Latin

America except Guyana, Grenada, and Paraguay had an amnesty. Nor can we compare the efficacy of just using a truth commission to the effectiveness of trials, because every country in the region that adopted a truth commission also used trials. There are, however, countries that used trials but not truth commissions, so we can compare the effect of using both truth commissions and trials to the effect of using just trials. Each of these involves empirical comparisons of actually existing cases before and after trials or truth commissions. The argument implies a counterfactual (what would have happened in the absence of trials) but does not depend on a purely hypothetical counterfactual to persuade.

First, we should note that an overview of the entire dataset makes it clear that *within regions* there is a connection between the severity of human rights violations and the existence of trials. In the Americas, the 17 cases of transitional trials are in those countries that have experienced the more serious episodes of past human rights violations. Because the severity of human rights violations is associated with the use of trials, it may sometimes give the impression that trials exacerbate human rights problems, since the human rights situation is usually worse in the countries that have had trials than it is in the countries that have not had trials (even after the trials have occurred). Bad human rights situations usually precede trials. Countries in the Americas with relatively good human rights situations rarely initiate human rights trials. There also is a connection within regions between the severity of human rights violations and *the number* of country trial years. Countries with more severe human rights violations have more country trial years. But while the severity of human rights violations explains some variation within regions, it does not explain the variation between regions. The dominance of Latin America in the realm of trials cannot be explained by the fact that more human rights

violations occurred in Latin America than in other parts of the world. Indeed, the number of people killed in a genocidal episode in a single country, such as Rwanda or Cambodia, is greater than an estimate (based on truth commission reports) of the total deaths and disappearances at the hands of governments in the entire region of Latin America for the period under study (1979–2004).

To explore the impact that trials have on human rights, we examine the human rights situation in countries before and after trials to see if we can discern any impact of trials on human rights. Using averages of the Political Terror Scale (PTS) as a measure, we examined the human rights conditions prior to trials and after trials in all of the Latin American countries with two or more trial years.<sup>10</sup> We excluded three cases of countries that had only one country trial year from our analysis, including Uruguay. We compared the average PTS score for the five years preceding the first trial to the average PTS score for the ten years after the first trial.<sup>11</sup> Of the 14 countries that held human rights trials for at least two years, 11 improved their human rights situation after trials, and in 3 countries (Haiti, Mexico, and Venezuela) the human rights situation worsened. The average improvement of the 14 countries was .6 on a five-point scale, where 1 is the best human rights score and 5 is the worst human rights score. It is very likely that much of this improvement is due to transition to democracy rather than to

trials. This is difficult to test, because there are only two transitional countries – Brazil and Guyana – that did not hold trials. If we look at Brazil before and after transition to democracy in 1985, we see that Brazil's average score on the Political Terror Scale was 3.2 in the five years before transition and worsened to an average of 4.1 for the ten years after transition. Brazil experienced a greater decline in its human rights practices than any other transitional country in the region. The Brazil case suggests that transition to democracy, in and of itself, does not guarantee an improvement in basic human rights practices.

We also are able to partially isolate the effects of trials from the effects of transition to democracy by looking at the differences between transitional countries that had a greater number of trials and those that had fewer trials. All 14 countries that held trials for two or more years went through processes of democratic transition. And yet, the countries that held more trials had a higher average improvement in human rights than the countries that had fewer trials. So, the seven countries in the region that had more trials experienced an average improvement of .9 on the five-point PTS, while the seven countries that had fewer trials had an average improvement of .3 on the PTS (see Table I).

Countries in Latin America that held more trials were also more likely to have a truth commission than countries that held fewer trials. The countries that had both truth commissions and trials had better scores than countries that just had trials. Countries that had both truth commission and human rights trials had an average improvement of .7 on the five-point scale, while countries that only had trials had an average improvement of .1 on the same scale (see Table II). These results, together with the evidence from Brazil, suggest that the use of transitional justice mechanisms, in and of themselves, may have some independent effect separate from that of transition to

<sup>10</sup> The PTS is a quantitative scale from 1 to 5 measuring extreme human rights violations, including summary execution, torture, disappearances, and political imprisonment (with 1 as the best score and 5 as the worst). The scores are coded from Amnesty International and US State Department annual human rights reports. The PTS tracks the same human rights violations as those captured by our dataset. The countries with two or more trial years in Latin America are Argentina, Bolivia, Chile, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, and Venezuela.

<sup>11</sup> Because the PTS only begins in the 1980s, we cannot use an average score for ten years before trials. We use ten years after the first trial because many countries had multiple trials, and this allows us to look at changes that may occur from multiple trials over time.

Table I. The Effects of Trials on Human Rights in Latin America

<i>Transitional countries with eight or more country trial years</i>				
<i>Country</i>	<i>Trial years</i>	<i>Pre-trial PTS average</i>	<i>Post-trial PTS average</i>	<i>Change in PTS average</i>
Argentina	19	4	2.3	1.7
Chile	15	4	2.8	1.2
Guatemala	13	4.4	4	0.4
Paraguay	12	3.2	2.6	0.6
Panama	11	3	2	1
Honduras	9	3.2	2.5	0.7
Peru	8	4.8	3.9	0.9
Total average change				0.929
<i>Transitional countries with six or fewer country trial years</i>				
<i>Country</i>	<i>Trial years</i>	<i>Pre-trial PTS average</i>	<i>Post-trial PTS average</i>	<i>Change in PTS average</i>
Haiti	6	3	3.8	-0.8
Ecuador	5	3	2.7	0.3
Mexico	5	3.2	3.4	-0.2
Nicaragua	5	3	2.7	0.3
El Salvador	4	4.6	3	1.6
Venezuela	3	3.2	3.5	-0.3
Bolivia	2	4	2.6	1.4
Total average change				0.329
<i>Transitional countries with zero country trial years</i>				
<i>Country</i>	<i>Trial years</i>	<i>Pre-transition PTS average</i>	<i>Post-transition PTS average</i>	<i>Change in PTS average</i>
Brazil	0	3.2	4.1	-0.9
Guyana	0	2	1.9	0.1
Total average change				-0.4

democracy. It could be possible that there is some other factor doing the work here rather than trials themselves – perhaps the existence of political will to hold perpetrators accountable for past human rights violations. It is not clear, however, how one could separate out the political will to hold trials from the existence of trials themselves. Regardless of which part of the human rights improvement comes from transition to democracy, from political will for accountability, or from trials, it remains hard to sustain in the face of these

data that human rights trials actually lead to more atrocities in the Latin American cases.

In this kind of analysis, it is not possible to ‘control’ for democracy. Table III below suggests that democracy levels are important for understanding human rights practices. In general, the PTS levels correspond to levels of democracy. Yet, if we group countries together by their level of democracy in 2004 (measured by Freedom House political rights scores) and we compare the level of democracy to the PTS for the same year, we see

Table II. Difference in Effects of Trials and Truth Commissions on Human Rights in Latin America

<i>Transitional countries with trials and truth commissions</i>				
<i>Country</i>	<i>Trial Years</i>	<i>Pre-trial PTS average</i>	<i>Post-trial PTS average</i>	<i>Change in PTS average</i>
Argentina	19	4	2.3	1.7
Chile	15	4	2.8	1.2
Guatemala	13	4.4	4	0.4
Paraguay	12	3.2	2.6	0.6
Panama	11	3	2	1
Peru	8	4.8	3.9	0.9
Bolivia	2	4	2.6	1.4
Haiti	6	3	3.8	-0.8
El Salvador	4	4.6	3	1.6
Ecuador	5	3	2.7	0.3
Total average change				0.83
<i>Transitional countries with trials but no truth commissions</i>				
<i>Country</i>	<i>Trial Years</i>	<i>Pre-trial PTS average</i>	<i>Post-trial PTS average</i>	<i>Change in PTS average</i>
Honduras	9	3.2	2.7	0.5
Nicaragua	5	3	2.7	0.3
Mexico	5	3.2	3.4	-0.2
Venezuela	5	3.2	3.5	-0.3
Total average change				0.075

Table III. Comparison of Democracy and Terror Levels in Relation to Human Rights Trials by Country in Latin America, 2004

<i>Country</i>	<i>Level of democracy 2004 (Freedom House political rights index)</i>	<i>Terror Scale 2004 (PTS)</i>	<i>Number of human rights trial years</i>
Chile	1	1	15
Panama	1	2	11
Argentina	2	2	19
Brazil	2	4	0
El Salvador	2	2	4
Guyana	2	3	0
Mexico	2	3	5
Peru	2	2	8
Bolivia	3	2	2
Honduras	3	3	9
Nicaragua	3	2	5
Paraguay	3	2	12
Venezuela	3	3	3
Guatemala	4	2	13
Haiti	6	5	6



some interesting discrepancies. For example, Brazil's level of democracy in 2004 was a 2, and thus identical to the scores for Argentina, Peru, Mexico, and El Salvador, and yet its political terror score for 2004 was worse than any of the countries listed above which had carried out human rights trials. To the contrary, Guatemala, with the third-highest number of country trial years among our transitional countries, continued in 2004 to have a very poor level of democracy (a 4 on the Freedom House political rights scale) and yet by 2004 had reached a level 2 in the political terror scale, equal to, for example, similar countries like Nicaragua and El Salvador that had held fewer trials.

Once again, we do not find any evidence that trials worsen democracy, and, in some outlier cases like Brazil and Guatemala, it may be the case that the presence or absence of trials leads to human rights scores different from what one would expect given the democracy scores by themselves.

### *Trials and Conflict*

Another key claim in the security literature is that human rights trials can lead to more conflict. Latin America experienced many internal conflicts between 1979 and 2004 – the years for which we have data on trials. According to the PRIO/Uppsala Armed Conflict Data Base, 17 Latin American countries experienced some form of internal or international conflict (from minor to a full-fledged war) in the period 1970–2003: Argentina, Chile, Colombia, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay, and Venezuela.<sup>12</sup> The only countries that had transnational trials but did not have either type of conflict were Bolivia and Honduras. If we compare the dates of the conflict to the dates of the trials, however, we find that, in

most cases, judicial proceedings followed rather than preceded conflict (see Table IV). In other cases, there was some overlap between the earliest trials and the armed conflict, but the conflicts did not extend significantly in these cases, and trials continued after conflict had ended. There is not a single transitional trial case in Latin America where it can be reasonably argued that the decision to undertake trials extended or exacerbated conflict.

Quantitative studies have demonstrated that conflict is the best predictor of human rights violations (Poe, Tate & Keith, 1999). It appears that conflict indeed leads to human rights violations, but human rights trials have not led to more conflict.

After a history of fairly extensive internal conflict for decades, the region is now largely free of internal and international wars and conflict. Indeed, there is only one case in the entire region where significant internal conflict continues to date, and that is a non-transitional case: Colombia. Because Colombia is not a case of transition, it is not included in our transitional trial dataset. There is an important debate in Colombia today about amnesty and conflict resolution (Guembe & Olea, 2006). While we do not underestimate the importance of that debate, with 121 country trial years in Latin America between 1979 and 2004 and only a single case where conflict continues to date, it is difficult to sustain the argument that trials have contributed to exacerbating conflict in the region.

### *Trials and the Rule of Law*

Most scholars recognize that for human rights violations to decrease, countries need to strengthen their rule of law systems. This raises the crucial issue of how to build the rule of law in such countries. Snyder & Vinjamuri (2003/2004: 6) argue that human rights trials might interfere with the process of building rule of law. 'Amnesty – or simply ignoring past abuses – may be a necessary tool in this bargaining. Once such deals are

<sup>12</sup> [http://www.prio.no/cwp/armedconflict/current/conflict\\_list\\_1946-2003.pdf](http://www.prio.no/cwp/armedconflict/current/conflict_list_1946-2003.pdf).

Table IV. Dates of Conflict and Human Rights Trials in Latin America

<i>Country</i>	<i>Dates of conflict(s)</i>	<i>Dates of human rights trials</i>
Argentina	1973–77 1982	1983–90, 1993–96, 1998–2004
Bolivia	–	1983, 1995
Chile	1973	1986, 1991–2004
Ecuador	1995	1992–95, 1997
El Salvador	1979–91	1985, 1990–92, 1998
Grenada	1983	1991
Guatemala	1965–95	1988, 1991–94, 1996–2003
Haiti	1989, 1991	1986, 1987, 1989, 1995, 1996, 1997
Honduras	–	1992, 1993, 1996, 1997, 1999–2002, 2004
Mexico	1994, 1996	1992, 1993, 2002, 2003, 2004
Nicaragua	1978–89	1992–96
Panama	1989	1991–99, 2002, 2004
Paraguay	1989	1989, 1991, 1992, 1994–99, 2002–04
Peru	1980–99	1978, 1990, 1993–95, 2001–04
Suriname	1986–88	1989
Uruguay	1972	2002
Venezuela	1992	1991, 1994, 1995

struck, institutions based on the rule of law become more feasible.’ Latin America has been undergoing a process of judicial reform and promotion of the rule of law over the last 15 years that parallels the process of human rights trials we describe here. Rather than see the construction of rule of law as a process that is separate from or must precede human rights trials, it has been the case that building rule of law has coincided with human rights trials in much of the region (Domingo & Sieder, 2001). Indeed, the rise of the field of rule of law assistance in the 1990s in large part grew out of the human rights movement of the 1970s and the 1980s. As the human rights movement pushed for transitional justice mechanisms, it ‘raised the profile of law and legal institutions as a cause of external attention and internal reform in the region. As such, it paved the way for the current nature of rule of law aid in the region’ (Carothers, 2001: 5). The leading promoters

of judicial reform in the region recognize this mutual reinforcement of human rights trials and rule of law (Binder, 2006).

Specific human rights trials can also help build rule of law, as they did in Argentina. The trials of the Juntas in 1985 in Argentina encouraged ‘the discovery of law’, as ordinary citizens perceived a system of law as more viable and legitimate if law could be used to hold the most powerful former leaders of their country accountable for past human rights violations (Smulovitz, 2002). The most crucial ingredient of a rule of law system is the idea that no one is above the law. For this reason, it is difficult to build a rule of law system while simultaneously ignoring recent gross violations of political and civil rights, and failing to hold past and present government officials accountable for those violations. Of course, human rights trials are not the only means of building the rule of law, but the Latin American cases, where rule of law has been

strengthened at the same time that human rights trials have been carried out in most transitional countries, illustrate that it is unreasonable to portray human rights trials and construction of the rule of law as two different stages or mutually contradictory processes.

## Conclusions

Our research calls into question some basic assumptions in the transitions literature, including the arguments that trials undermine democracy, that decisions about trials must be made immediately in the post-transition period or they will not be possible, and that choices about amnesties and trials taken in the post-transition period are likely to be stable and durable. We have shown that, throughout the world, human rights trials are on the increase, and many of these trials take place in countries that at least formally granted amnesties. Frequently, trials occur decades after transitions to democracy and not infrequently in countries that signed various forms of amnesty. In other words, trials are not a single option chosen in the moment of transition, but are an ongoing process that may occur at any point, often many years after transition. Thus, when we evaluate the impact of trials, we need to look at their impact over the longer term, not just in the fragile moment of transition.

Second, it has been argued that countries must choose between 'truth and justice' and, in particular, that truth commissions represent a viable alternative strategy to human rights trials. But, once again, it appears that strategies of 'truth' (truth commissions) and 'justice' (human rights trials) are more likely to go together than serve as alternatives. In Latin America, every country that used truth commissions also held human rights trials. In other words, transitional justice mechanisms are not a dichotomous choice but a continuum of options, and those countries that choose one option are more likely to choose

others as well. In Latin America, countries that choose to implement both trials and truth commissions seem to have better human rights practices than countries that choose to use fewer alternatives.

The most powerful hypothesis of the early transitions literature is that trials undermine democracy. This belief continued to be strongly held as late as 1998, when Pinochet was arrested in London, and large numbers of the population of Chile were convinced that a coup would result. We show that, at least in Latin America, there is not a single case of a country where democracy has been undermined because of the choice to use trials. Nor is there evidence that trials lead to worsening human rights situations. Rather, in 14 of the 17 cases of Latin American countries that have chosen trials, human rights seem to have improved.

Just at the time that we might finally put to rest some of the most pessimistic claims of the transitions literature with regard to transitional justice in Latin America, a new international relations literature has emerged repeating the same claims and adding even stronger hypotheses about the dangers of trials. Our data have also shown that general claims made by security scholars are not adequately supported by empirical evidence from Latin America. Our evidence has shown that, in Latin America, the advocates of trials do not inadvertently promote atrocities; that trials do not increase human rights violations, exacerbate conflict or threaten democracy; and that amnesties cannot be proven to be deterrents to future human rights abuses. Our data likewise show that countries at the moment of transition in Latin America did not have to make a single durable choice about justice. Almost all the countries of the region have been revisiting and revising their transitional justice strategies over time. Countries have not had to choose between truth and justice. Rather, in many societies, the situation has been one of 'partial truth and partial justice' – where

countries have held both truth commissions and human rights trials.

One question raised by this article is whether there is some kind of Latin American exceptionalism at work so that trials have a different impact in Latin America than they do elsewhere in the world. We cannot test this hypothesis in the current article, since we deal with only Latin American cases. Because Latin America has a strong rule of law tradition and a strong regional human rights regime compared with other developing regions (Lutz & Sikkink, 2000), we cannot rule out Latin American exceptionalism at this point. But we note that the early transitions literature focused on Latin America and did not at all anticipate that modern Latin America would be an exception to global trends or to regional history. Current IR trial skeptics *do not* limit their arguments with regard to region and make sweeping statements about the dangers of trials anywhere in the world. Reading their articles, it would appear that they are particularly concerned with regions currently plagued with civil wars and insurgencies, especially in Africa, but at no point is their argument framed with regard to region, and Latin American cases, such as El Salvador, are used to buttress claims (Snyder & Vinjamuri, 2003/2004). While it is possible that Latin America is the exceptional region, it is equally possible that the trial skeptics have based their arguments on a few powerful but as yet unresolved cases. Just as the frightening but ultimately unsuccessful coup attempts in Argentina drove some of the early pessimism in the transitions literature, the failure of international justice to dampen nationalism in Serbia or prevent ethnic cleansing in Kosovo or to help end conflicts in Uganda or Sudan may fuel current trial skepticism. And, just as the transition literature was too hasty in its judgments about the impossibility and undesirability of trials in Latin America, current trial skeptics might be well advised to monitor the situations in former Yugoslavia and

Uganda longer before jumping to conclusions about the pernicious effects of trials. One benefit of the Latin American cases is that they provide these longer time horizons to evaluate outcomes, because more time has passed since transitions to democracy.

Our research suggests that we need to pay more attention to how conditions for trials change with the passage of time. We show that while trials were considered impossible in many transitional countries immediately after transitions, with the passage of time conditions changed and trials became not just possible but likely. This has also not been anticipated by the trials skeptics. We think our arguments here should encourage the trial skeptics to begin to delimit their arguments with regard to region and time – something they do not currently do.

It is time to put false dichotomies behind us and begin a more nuanced debate about transitional justice. The choices are not between truth and justice, between trials and democracy, or between idealists and pragmatists. Instead it is much more interesting to examine under what conditions trials can contribute to improving human rights and enhancing rule of law systems, or what sequencing or judicious combination of transitional justice mechanisms can help build democracy and resolve conflicts.

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