After Oppression

Transitional Justice in Latin America and Eastern Europe

EDITED BY
Vesselin Popovski & Mónica Serrano
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After oppression
Endorsements

“This book has several strengths. The individual chapters provide a solid overview of transitional justice efforts in a variety of jurisdictions. They are detailed, informative and analytic, and convey a tremendous array of insights.”

Mark A. Drumbl, Class of 1975 Alumni Professor of Law and Director, Transnational Law Institute, Washington and Lee University

“Transitional justice has become one of the most important topics studied in comparative politics. There have been many excellent studies, written from various theoretical perspectives, yet there has been no single volume that would summarize the existing knowledge, critically dissect the state-of-the-art theorizing and present up-to-date analysis of important cases (from Latin America and Eastern Europe). This is a volume that splendidly accomplishes all three tasks. A stellar cast of authors provides – finally – a tool awaited by all people interested in transitional justice: a smart, comprehensive and authoritative guide to the field.”

Jan Kubik, Chair, Department of Political Science, Rutgers University

“Latin America and Eastern Europe emerged from dictatorship more or less contemporaneously in the 1980s and ’90s. The contrast in the ways they reckoned with their respective legacies of human rights violations has been a theme of the emerging field of ‘transitional justice’ ever since. With the benefit of a quarter century of experience, After Oppression presents the most comprehensive comparative study of those similarities
and differences. Editors Vesselin Popovski and Mónica Serrano have assembled a most impressive group of scholars and practitioners to conduct this essential study. They combine intellectual rigour with ‘you-are-there’ proximity to the challenges, frustrations and signal successes of the struggle for justice in our time.”

Juan E. Méndez, UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and Visiting Professor, Washington College of Law

“Over the past three decades, it has become widely accepted in different parts of the world that transitions from oppression should be accompanied by a reckoning with past abuses of human rights. The purposes include the need to recognize and acknowledge the suffering of the victims; the importance of holding accountable those responsible for their suffering; and the crucial role of justice in promoting democratization. After Oppression: Transitional Justice in Latin America and Eastern Europe is the most comprehensive and insightful account of this process in two regions where it has played a crucial role.”

Aryeh Neier, President Emeritus, Open Society Foundations

“Democratic consolidation is not merely about institutions and constitutions. It is also about memory, culture and fairness. The latter factors are shaped by complex histories and unique geopolitical contexts and thus there are no legal or political blueprints for handling transitional justice. The contribution of this comprehensive collection of essays is to aid our understanding of the linkage between democratic consolidation and transitional justice in two key regions: Eastern Europe and Latin America. The book is set to become an important source of information and ideas for all those interested in what happens after the fall of authoritarian regimes.”

Jan Zielonka, Professor of European Politics, St Antony’s College, University of Oxford
Contents

List of figures, tables and boxes ................................................. x
List of contributors ............................................................... xii
Acknowledgements ............................................................... xiv

Introduction ............................................................................... 1

1 Transitional justice across continents ................................. 3
   Vesselin Popovski and Mónica Serrano

2 Models of accountability and the effectiveness of transitional justice ........................................ 19
   Kathryn Sikkink

Part I: Latin America ................................................................. 39

3 Accountability, the rule of law and transitional justice in Latin America .................................. 41
   Pilar Domingo

4 “The past is never dead”: Accountability and justice for past human rights violations in Argentina ........................................... 64
   Catalina Smulovitz
5 The paradox of accountability in Brazil ................................. 86
   James L. Cavallaro and Fernando Delgado

6 The unlikely outcome: Transitional justice in Chile,
   1990–2008 ................................................................. 116
   Claudio Fuentes

7 Transitional justice without a compass:
   Paramilitary demobilization in Colombia ......................... 143
   Elvira María Restrepo

8 El Salvador: The peace process and transitional justice ...... 170
   Ricardo Córdova Macías and Nayelly Loya Marín

9 Transitional justice in Guatemala .......................... 196
   Carmen Rosa de León Escribano and María Patricia
   González Chávez

10 Transitional justice and democratic consolidation:
    The Peruvian experience ........................................ 222
    Carlos Basombrio Iglesias

Part II: Eastern Europe ............................ 243

11 On the effectiveness of judicial accountability mechanisms
    in Bosnia and Herzegovina ..................................... 245
    Ernesto Kiza

12 Justice and accountability mechanisms in Bulgaria in the
    Hristo Hristov and Alexander Kashumov

13 After the fall of the Berlin Wall: Transitional justice
    in Germany ............................................................ 298
    Gerhard Werle and Moritz Vormbaum

14 Lustration as a trust-building mechanism? Transitional justice
    in Poland ............................................................ 333
    Monika Nalepa

15 Neither forgiving nor punishing? Evaluating transitional
    justice in Romania ................................................ 363
    Lavinia Stan
16 From Velvet Revolution to velvet justice:  
The case of Slovakia ........................................... 390  
  *Nadya Nedelsky*

17 Accountability for Communist crimes and restitution for  
  victims in Slovenia ........................................ 418  
  *Mitja Steinbacher, Matjaž Steinbacher and Matej Steinbacher*

**Conclusions** .................................................. 437

18 Transitional justice: Reframing the debate .................. 439  
  *Alexandra Barahona de Brito and Laurence Whitehead*

19 Transitional justice and democratic consolidation .......... 463  
  *Mónica Serrano*

20 The complexity and effectiveness of transitional justice  
  in Latin America and Eastern Europe ..................... 485  
  *Vesselin Popovski*

Index ............................................................... 496
Figures

2.1 Trends in transitional justice mechanisms 24
2.2 Regional distribution of domestic transitional trials 26
6.1 Options for human rights cases, 1991 and 2007 136
6.2 Responsibility for human rights violations, 2007 137
6.3 Perception of the education of the armed forces in human rights 137
14.1 Attitudes of trust and mistrust and overall name recognition in relation to roundtable participants in 1988 335
14.2 Respondents’ answers to “Do you agree that, at this point in time, lustration should be carried out?” 339
14.3 Attitudes to lustration by knowledge of individuals persecuted by the secret police 342
14.4 Trust, mistrust and name recognition, by attitudes to lustration 348

Tables

4.1 Argentina 1983–2008: Stages in the transitional justice process 81
5.1 Accountability mechanisms in Brazil 102
6.1 Timeline 120
6.2 Evolution of indictments and convictions by the Chilean court system on human rights cases, 1998–2008 134
8.1 Periods of violence during the civil war in El Salvador, 1980–1992 ................................................................. 173
8.2 Number of time-frames for the fulfilment of commitments by item ................................................................. 175
9.1 Legal cases related to the conflict .................................................. 209
13.1 East German justice: Indictments/applications for penal order (Strafbefehl), decisions/penal orders and sentences, by type of offence ................................................................. 324
13.2 Investigations, investigations concluded and proportion of investigations leading to indictment ......................... 324
13.3 Number of cases, by type of offence ........................................ 325
13.4 Conclusion at main trial and through penal orders, by type of conclusion ................................................................. 325
13.5 Acquittals and convictions, by type of offence ......................... 326
13.6 Sentences by type of offence and type of sanction ................. 326
14.1 Respondents’ attitudes towards purging state institutions of collaborators, 1994–1999 ................................................. 340
14.2 Cross-tabulations of respondents supporting the current lustration process and believing in purges ......................... 341
15.1 Securitate agents officially unveiled by the CNSAS, 2000–2009 ................................................................. 371
15.2 Access to secret files in Romania, 2000–2006 ......................... 379
15.3 The timing of accountability mechanisms in Romania ........... 383
15.4 Goals and outcomes of accountability mechanisms in Romania ................................................................. 384

Box
9.1 Search and arrest warrants issued by Judge Santiago Pedraz in 2006 ................................................................. 208
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This book developed out of an ongoing institutional collaboration across continents on the theory and practice of human rights. The publication of Human Rights Regimes in the Americas (UNU Press, 2010) enabled us to gain much knowledge about the crusade for human rights and the state of human rights practice on that continent. After Oppression is about the efforts of a wider set of people and groups to square up to the grim pasts of human rights violations. Broadly inspired by the lessons learned from Latin American experiences, it goes on to connect with the human rights decisions and actions that accompanied the Helsinki Process and the Velvet Revolutions in Eastern Europe.

The book grew out of a conference that brought together a group of experts from Eastern Europe and Latin America, along with some of the leading theorists on democratization and transitional justice. We had asked them to reflect on the various avenues taken by those who have championed the cause of justice for past human rights violations in their respective societies. There seemed to us to be an inherent value in analysing and contrasting the routes taken by countries in Latin America and Eastern Europe as they transformed themselves from authoritarianism to democracy. But we also aimed higher, moved by our conviction that the questions addressed here are of vital normative importance. Essentially, the focus is on the interplay between transitional justice and democratic consolidation. Specialists in both these broad areas now abound, and specialists are notoriously hard to please. Our hope has been that they will at least be persuaded of the innovative value of straddling the study of
transitional justice experiences across continents. Perhaps, too, they will come to fresh understandings of the empirical and theoretical dilemmas of the challenges of transitional justice and democratization as they act upon each other. And, while much of this book is, as it has to be, about the past, we trust readers will come away convinced that the greater story it tells is unfinished. This, indeed, is what turns our exercise into a testament of courage, bitter disappointments and heroic resilience – a record that cannot fail to leave readers unmoved.

Our efforts to bring together a select group of experts from Eastern Europe and Latin America were made possible in large measure by the institutional and financial support offered by three institutions: El Colegio de México, the United Nations University (UNU) and the University of Oxford. In particular we owe special thanks to Laurence Whitehead for his enthusiastic support from the outset. Nuffield College and the Centre for International Studies at Oxford University offered us an ideal setting for the conversations that accompanied the initial phase of this project. We would like to acknowledge all those who generously participated in the gathering at Nuffield with helpful comments and suggestions: Phil Clark, Lily Gardner-Feldman, Eric Gordy, Andrew Hurrell, Rachel Kerr, Timothy Power and Chandra Lekha Sriram.

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*Vesselin Popovski and Mónica Serrano*
Introduction
1

Transitional justice across continents

Vesselin Popovski and Mónica Serrano

It is now more than four decades since the European Commission of Human Rights, at the request of four of its members, conducted its groundbreaking investigation into human rights violations in Greece in 1968. A newly established democratic government in Greece, as in Portugal, was to conduct unprecedented domestic human rights prosecutions against government officials of the preceding authoritarian regimes.¹

It has been more than three decades since the Inter-American Commission on Human Rights, in its 1974 report on Chile, threw its weight behind the bold idea of domestic trials of state officials for human rights violations.² The 1975 Helsinki Final Act of the Conference on Security and Co-operation in Europe and its periodic review process set off a vibrant trans-Atlantic human rights movement targeting Warsaw Pact countries.

By comparison with many other occurrences in our accelerated cultural times, these events happened long ago. Indeed, for many that is exactly what transitional justice will seem to be all about – events that happened long ago. In some respects, that is right. In some ways, the worlds of oppression that we re-visit in this book are unimaginable today. Yet this did not happen by itself. Indeed, we could say that the making unimaginable of the past worlds of oppression is, unobtrusively, the greatest achievement of the movement to wring amends from those past worlds, which we call transitional justice.

In other ways, though, the stories we will be telling happened only yesterday and are part of tomorrow’s story-lines. For the events we have just
commemorated can now be seen, in retrospect, as part of the beginnings of a new normative international era in which we look set to live for a considerable time to come. To go back, then, is also to understand how we are moving forward.

The “oppression” we are concerned with is that suffered by Latin American and East European countries under authoritarianism and Communism. Those countries made a transition to democratic rule. Their experiences of oppression were different, their ensuing trajectory was common. Their different and common experiences mark the parameters of this book. In it, the reader will find an overview of the challenges faced by political transitions and transitional justice efforts in a wide set of countries. The focus is especially on how various transitional justice mechanisms have worked, or not.

Transitional justice developments have become prominent in Africa and other parts of the world, but we have not attempted global inclusiveness. Our comparative space is that of the two continents whose difference and commonality most fully allow us to see transitional justice as both a diverse and a congruent journey.

The story of transitional justice is one of pasts and futures. On the one hand, what do societies that have come through hell do with their pasts? And then how do they attempt to ensure that darkness never again descends at noon? Beneath all the technicalities, these are the fundamental questions that animate this book. Its contributors do not play up the pathos of their cases, but their collective story is unmistakably that of the struggle against evil of many societies.

Transitional justice is an unprecedented enterprise. In the age of oppression, one or two visionaries imagined that the day of reckoning might one day come for omnipotent dictators and tyrants, but millions died without any shred of consolation that justice would one day be done to them. In previous geopolitical cataclysms, millions had also died on what Hegel – thinking of the French Revolution – called the slaughter-bench of history, yet no one had ever suggested that some kind of reparation be made to their memory and to the survivors. Transitional justice is, then, a phenomenon whose historical novelty ought always to impress us. Behind it is a complex interplay among domestic, regional and international processes in which two forces were becoming paramount: human rights and democracy. Latin America and Eastern Europe are the pioneering, still symptomatic cases where we see this.

Looking back, the adoption of the Helsinki Final Act in 1975 is the beginning of our new horizon. It both embodied broad principles of peaceful coexistence and contained important non-binding human rights provisions applicable to the Soviet Union and East European countries among the 35 sovereign signatory countries. From it, dissident and human
rights groups in Russia, Czechoslovakia, Poland and elsewhere were able to invoke legal international human rights instruments as a way of exerting pressure on their respective governments. Soon, the Helsinki Act and its periodic review provided a unique platform for the systematic public exposure, and shaming, of Soviet and East European human rights practices (Chayes and Chayes, 1995; Neier, 2012). And, of course, human rights were taken up as an issue in Western Europe and across the Atlantic.

It was there, in the United States, that the next great shift occurred. The end of the Cold War was to have a major impact in easing the tension between security policy and human rights that had long tainted foreign policy, of the United States in particular. For the United States, throughout the Cold War period the promotion of human rights had been relegated to, or openly subsumed by, anti-Communism. The priorities of containment had provided US policy-makers with the justification to settle for “regimes whose origins and methods would not stand the test of American concepts of democratic procedure” – as a second-best alternative to accommodating “further communist successes” (US diplomat George Kennan, cited in Sikkink, 2004: 41). This line of reasoning had prompted successive US administrations to grant valuable symbolic support and material aid to authoritarian governments. The consequences of this were particularly dramatic in Latin America, where US policies helped prop up authoritarian and military regimes that had interpreted such signals as a green light for outright repression.

The biggest difference between human rights and transitional justice experiences across our two continents had to do precisely with Washington’s role. The rise of human rights and transitional justice initiatives in Latin America had been hindered by the divide that long pitted conservatives against liberals on human rights issues within the US Congress. Conservatives had tended to vote on human rights to punish left-wing regimes; liberals had resorted to the human rights cause to expose right-wing dictatorships. In contrast to Eastern Europe, where support for human rights and efforts at Communism containment proved more or less compatible, anti-Communism and support for human rights did not make good bedfellows in Latin America. True, by the mid-1970s a bipartisan human rights foreign policy had begun to take shape, but it was in no way equally felt across continents. In the Western hemisphere (with the brief exception of the Carter administration), at least until the second Reagan administration, the cause of human rights had remained hostage to anti-Communist policies oriented to military and right-wing governments.3

The 1980s were marked by the overthrow of national security regimes and the rise of democracy in Latin America. And in 1989 the Berlin Wall came down. These events happened in no small measure because of a
rising wave of democratization and changing international attitudes towards authoritarianism and human rights. Yet an ultimately congruent process was driven by different forces in Eastern Europe and Latin America. In the former case, it was the implosion of the Soviet Union that provided the impetus for democratization. In the latter, democratization was more closely linked to endogenous forces, including the disastrous decision of the Argentine military to go to war with the United Kingdom over the Malvinas, or the protracted process of liberalization that underpinned the transition to democracy in Brazil.

So, although the end of the Cold War had profound consequences for the two regions, the wave spreading transitions to democracy in Latin America preceded the fall of the Berlin Wall. On the other hand, and as iconically represented by figures such as Lech Wałęsa in Poland and Václav Havel and his Charter 77 movement in what was then Czechoslovakia, the protest movement against the Soviet system had a long pedigree too. When 1989 came, the forces that had kept the Communist bloc together were ready for their rapid unravelling.

The fall of the Berlin Wall was the fall of the Cold War’s ideological barriers. From 1989 to 2001, superpower security policies eased up to a remarkable degree. Human rights norms and standards, supported by a plethora of activist organizations and in accord with Washington’s foreign policy objectives, held sway. Further reinforcement would soon come with the application of the European Union’s conditionality policies for the 10 Central and East European countries that were to successfully seek membership. The age belonged to democracy and human rights. The magnitude of human rights violations in the recent past made the recent past look like an aberration for which correction could be made. Violations would meet the demand for accountability; a new normative context would make absolute impunity abhorrent.

The twentieth century closed with two key developments that sealed this new international age for human rights. In 1998, the Rome Statute was opened for signature; this was the treaty that created the International Criminal Court (ICC). Also in 1998, General Augusto Pinochet, former President of Chile, was arrested in London on charges of torture and other serious human rights violations. The establishment of the ICC and the arrest of Pinochet signalled the arrival of new international standards. Those alleged to be responsible for serious human rights violations could find no international refuge from accountability. The world had changed, unimaginably.

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And so it had. Yet the story was also more uncertain than one of the inevitable triumph over evil. Expectations of that triumph would often be dashed.
To begin with, the effects of the end of the Cold War were not evenly distributed. In some places – most tragically the former Yugoslavia and Central Europe – they were accompanied by the unleashing of brutal inter-state conflict. The savage internal wars of Bosnia and Herzegovina also found some equivalence in Colombia and Guatemala. In these latter two countries, political “transition” occurred, but in tandem with vertiginous disintegration, state weakness and extraordinary levels of violence.

Here were the hardest of all cases for transitional justice and, as such, they loom large in this book. In essence, they presented transitional justice’s tragic *agon*: how could truth and justice be satisfied if the justice sector remained captured by perpetrators of human rights violations? The course of local justice in the small country of Guatemala was to remain blocked despite President Bill Clinton’s apology there in 1999, despite the findings of two groundbreaking Truth Commission reports, despite the evidence made public in 2005 upon the accidental discovery of the archives of the National Police, and despite the bold arrest warrants and extradition requests issued by the Spanish justice system.  

Guatemala was an extreme, but not isolated, case. Similar to Romania, it suggested the bleakest of conclusions, namely that where the rule of terror had extended its grasp over a whole society, the chances of an effective pursuit of justice were minimal. As is often the case in small countries, in Guatemala “big” politics and even bigger intelligence apparatuses have persistently obstructed the cause of justice (Goldman, 2007: 140). Now, some 25 years after the transition to democracy, electoral candidacy is still considered by many suspected perpetrators as the best route to secure immunity from prosecution. Although 13 prosecutions in relation to physical integrity rights were registered in Guatemala in the period 1988–2003, systematic intimidation and death threats against victims, judges and prosecutors successfully perverted the course of justice. The majority of the cases of transitional justice closed down.

Yet there was an affront here that could not be allowed to pass either, and again Guatemala was not alone. Where national human rights groups were unable to influence domestic political conditions, international formulas would be applied. In Guatemala’s case, this led to the government’s negotiation with the United Nations for the creation of an International Commission against Impunity in Guatemala (Comisión Internacional contra la Impunidad en Guatemala, CICIG). In Bosnia and Herzegovina (BiH), where national capacities also remained far from adequate, between 1995 and 2002 the internationalization of justice fell to the International Criminal Tribunal for the former Yugoslavia (ICTY).

These were different forms of international intervention and they served different purposes, yet the internationalization of justice is a clear feature of the transitional justice enterprise. A product of the new
international sway of human rights, the belief that external pressure could have a serious impact on domestic justice systems and help lift the barriers to accountability eventually coalesced around the concept of complementarity enshrined by the Rome Statute. The concept spoke for the ambiguities of the new age. Was the purpose of the ICC to supersede domestic court systems? No, its goal was to reinforce and guide domestic efforts at accountability for past human rights violations. Yes, its role was to trigger the reach-out to regional, foreign and ultimately international courts when national justice systems lacked the capacity or the political will to prosecute serious human rights crimes.

Not all of the ambiguity was disabling, by any means. Where governments proved responsive and domestic courts willing and able to rein in impunity, complementarity would most likely succeed. The “Pinochet effect” and its role as the catalyst of both a chain of human rights prosecutions in domestic courts in Chile and a leap in foreign prosecutions illustrate very vividly what complementarity was meant to achieve.

In other situations, though, internationalized transitional justice was an unsatisfactory default option. The jury remains out on whether international prosecutions helped the cause of justice and social peace in BiH, for example.

Yet ambiguity is not the same as contradiction. The temporary internationalization of justice may well prove highly germane to the eventual success of domestic courts and local institutions. Indeed, the prospects for complementarity in BiH are not necessarily discouraging. The changes associated with the Completion Strategy adopted by the ICTY in 2002 and a number of judicial reform initiatives were very much prompted by the recognition that domestic prosecutions would help bolster the rule of law and make justice less abstract for the population.

Students of international relations will be unsurprised to learn, however, that the internationalization of an issue as sensitive as transitional justice is tricky. As Lavinia Stan highlights in Chapter 15 in this volume, in Eastern Europe international pressures in fact at first privileged the crimes of the Nazi era over the human rights offences committed during the Communist period. It was only in 1996 that the Council of Europe, in Resolution 1096, called on Central and East European countries to dismantle the legacy of the former Communist totalitarian systems.

This has been easier said than done for their transitional justice efforts. Discovering the truth about the oppressive past of nightmarish Big Brother societies in Slovakia, Romania or Poland where party-state structures penetrated so many aspects of political, social, economic and cultural life has involved weighing how much of their populations ought to be liable for the charge of collaboration. Then, too, transitional justice has been manipulated to disqualify political opponents. This was a particu-
larly acute trend in Romania, but also significantly disruptive in Poland. In many instances, the instrumentalization of transitional justice initiatives produced quasi-legalized vengeance and witch hunts. To the extent to which “lustration” policies excluded numerous actors from the political process, it could be argued that they ended up encouraging anti-democratic trends in these societies.

The specific legacy of Communist rule provides, then, a central contrast between East European and Latin American experiences of transitional justice. Transitional justice gravitated in Eastern Europe around the issue of state and party collaboration; in Latin America, most prominently in Argentina and El Salvador, around the need to exclude from the armed branch of the state and the justice sector those officials and agents who had committed human rights crimes. The criteria that guided such reforms were almost exclusively restricted to grave human rights crimes.

Such divergence brings home the ineluctable relativism within the universality of human rights: “crimes against humanity” are also injustices against societies, and societies are always different. Yet we find a commonality here too. Whether in Eastern Europe or in Latin America, the crucial variables of success or failure have been the public’s appetite for, or apathy towards, transitional justice. In some cases, most notably Argentina and East Germany, bottom-up processes, involving the active engagement of local actors and locally generated pressures, had a direct impact in boosting the domestic demand for truth and justice.

In other experiences, however, top-down processes, driven by the changes in international criminal justice and the shift towards individual criminal accountability, had a clear impact in laying the foundations for the gradual emergence of an incipient domestic accountability structure for human rights. Clearly, international actors and institutions can play a pivotal role but the longer-term prospects for human rights will remain tightly linked to developments and implementation at the national level.

In a variety of experiences examined in this volume, but most clearly in Argentina and East Germany, the boundaries of accountability were effectively widened through a creative and dynamic interaction between efforts deployed at the local level and those pursued in the regional and international arenas. In many instances, victims, relatives and human rights lawyers removed obstacles to the course of justice at home by resorting to judicial systems in other countries. As courts in Spain, France and Italy learned about serious human rights cases – involving citizens with dual nationality or cases in which universal jurisdiction could be established – vigorous “intermestic” processes were set in motion. In a number of cases, not only did such trends spark heated debates about
human rights law and international law and their relation to national laws; they also helped activate national justice systems. This trend has become particularly visible in Latin America, the region that accounts for 55 per cent of all domestic human rights prosecutions, but also in Africa, a region that concentrates 22 per cent of total prosecutions (Sikkink, 2011: 22–23). In turn, Europe as a whole accounts for 14 per cent of human rights trials in domestic courts. This suggests that accountability mechanisms *can* catalyse enabling conditions for the development of a more resilient human rights culture and also for the strengthening of democratic state institutions.

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In Chapter 2, Kathryn Sikkink offers a particularly helpful theoretical examination of three models of accountability that are prevalent in the world today. Her analysis depicts a gradual and hard-won evolution from sovereign immunity or “impunity”, to state accountability, to the more recent rise of the individual criminal accountability model. In considering the drawbacks and merits of these models, Sikkink provides an analysis of the effectiveness of accountability mechanisms in terms of their longer-term contribution to reducing human rights violations and/or consolidating democracy. Her findings point to two main conclusions: first, the rise of individual accountability across regions, via an increase in human rights prosecutions; secondly, an apparent correlation between human rights trials, human rights protection and democratic consolidation.

Complementing Sikkink’s analysis, Pilar Domingo delves into the linkages between the rule of law, accountability and transitional justice. The existing literature has focused on transitional justice experiences and rule of law reform as parallel and separate forces, but Domingo argues that the two are highly connected and mutually enforcing processes. In establishing her thesis, she considers how previous and current accountability relates to the evolution of the rule of law in Latin American states over the past two decades. She also provides an interesting insight into how individuals involved in the judicial process, such as judges, are influenced by the interpretation of judicial norms at an international level, and how this has an impact on judicial processes domestically. Although identifying regional trends in transitional justice across Latin America is an important task, Domingo is careful to underline the importance of taking into account specific local contexts and legal cultures.

The justice and reconciliation processes in different countries have been diverse and have been met with different degrees of acceptance: some were successful but others left the victims’ trauma at best half-relieved. No two transitional justice initiatives are identical and each new endeavour yields a fresh set of lessons. The argumentation of Chapters 2
and 3 can be cross-referenced from the seven Latin American case studies. These commence in Chapter 4 with Catalina Smulovitz’s examination of accountability and justice in Argentina. In her detailed analysis, Smulovitz highlights the many challenges faced by civilian authorities and human rights activists as they sought to push forward the boundaries of accountability for past human rights violations. In Argentina, a country that has been characterized as a precedent-setter and a “global leader in transitional justice”, not only were human rights issues inbuilt in the dynamics of democratization; the many setbacks encountered by the human rights movement were also repeatedly met with creative and innovative action, testifying to the remarkable resilience of human rights activists in this country. Smulovitz draws conclusions by considering how the diverse formal and informal “justice outcomes” that transpired in Argentina interacted with each other and contributed to the ongoing task of establishing a new democracy that respects human rights.

Further demonstrating the diversity of experiences in Latin America, in Chapter 5 James L. Cavallaro and Fernando Delgado assess how Brazil “lagged behind” in redressing the human rights violations of its past. They coincide with other experts in attributing insufficient progress to a variety of factors, including the cultural legacy of slavery, the top-down nature of Brazil’s transition to democratic rule and the relatively low numbers of people considered to be victims of state-sponsored violence (at least in comparison with neighbouring countries). What is clear is that the record of transitional justice in Brazil and the relative lack of transnational accountability pressures sharply contrast with the Argentine experience. Although the two countries are now considered fairly consolidated democracies, Cavallaro and Delgado suggest a causal link between failing accountability in previous generations and imperfect support for Brazilian democracy in the current generation. The authors provide an interesting argument in linking transitional justice issues with contemporary Brazilian attitudes to crime. They ask the question of how, paradoxically, the Brazilian public can be so opposed to the military dictatorship yet more tolerant of state-sponsored human rights abuses committed in the name of social order.

Chapter 6 on Chile also attempts to explain the contradictions entailed in another country’s experience related to historical human rights violations. Claudio Fuentes finds out why, despite the obstacles to the pursuit of justice thrown up by the amnesty arrangements that characterized the transition from the Pinochet military regime to democracy, Chile was able to institute so many important steps towards truth and justice, including the indictment of close to 500 active and former military and police officers. Fuentes revises the prevailing thesis that General Pinochet’s visit to London in 1998 was the catalyst for this transformation. Rather,
he argues, changes in the behaviour of key actors – from governments to conservative forces, social actors and the judiciary – and a shifting balance of political power allowed a more pro-justice environment to develop. Fuentes concludes by highlighting the key lessons to be learned from the Chilean experience.

In stark contrast to the progress being made in Argentina and Chile, Elvira María Restrepo describes the transitional justice experience in Colombia as “one of the tardiest in Latin America”. In Chapter 7, she explores the contested demobilization of right-wing paramilitaries and its tortuous evolution towards a *sui generis* transitional justice process. As Restrepo makes clear, not only were the 2005 Justice and Peace Law and the Constitutional Court rulings from 2006 the first Colombian initiatives to experiment with transitional justice, but these took place in a context dominated by the violence associated with illicit drug-trafficking. Although certainly aware of the imperfections of this enterprise, Restrepo argues that paramilitary demobilization and official exposure of atrocious crimes have produced some benefits, including the ability of victims to seek justice and overall improved chances for sustainable peace. Yet Restrepo closes her chapter by pointing to the main shortcomings of this transitional justice effort and to the clash between the executive branch of power and the judiciary. Indeed, whereas the executive sought to re-establish stability through demobilization and limited criminal liability, the justice system reached out to accountability for serious human rights violations to assert its share of state power.

Chapter 8 focuses on El Salvador’s pending account with its past. Ricardo Córdova Macías and Nayelly Loya Marín chart the country’s transitional experience from war to peace, from militarism to demilitarization, and from authoritarianism to democracy. Based on a broad conceptualization of transitional justice, they explore the interactions between security sector reform and mechanisms of transitional justice, and how these dynamics affect the process of democracy-building. They find that, although the peace process and the Truth Commission of the 1990s have contributed to the institutionalization of electoral democracy and the observance of human rights, much has yet to be achieved, especially in terms of acknowledging the role of the state and bringing state actors of the time to account for their atrocities. The authors highlight the importance of the bold move taken in 2010 by President Mauricio Funes in acknowledging the atrocities committed by state and parastatal security forces in El Salvador.

Like El Salvador, neighbouring Guatemala has made a “double transition”, from authoritarian rule to democracy and from armed conflict to peace, since its long-running internal conflict ended in 1996. In Chapter 9, Carmen Rosa de León Escribano and María Patricia González Chávez
analyse the effectiveness, or lack thereof, of the country’s transitional justice mechanisms. In line with Sikkink’s argument, the authors identify the links between accountability for past human rights violations and developments in democratic processes and institutions. By focusing on the existence and effectiveness of these mechanisms, they provide a critical assessment of the quality of democracy in Guatemala. As they remind us, the active involvement of international actors, including the United Nations through the International Commission Against Impunity in Guatemala, has not radically altered the balance of power that has long perpetuated impunity for serious human rights violations in this Central American republic.

In Chapter 10, the final Latin American case study, Carlos Basombrio Iglesias investigates the transitional justice and democratic consolidation processes in Peru. His objective is to consider recent Peruvian history in terms of the complete range of transitional justice mechanisms that can be implemented, and the extent to which they recognize victims and promote peace, reconciliation and democracy. Iglesias focuses on what he calls “the backbone” of Peru’s transitional justice process: the country’s Truth and Reconciliation Commission, the prosecution of human rights violations, the trial of former President Alberto Fujimori, and security sector reform. His central contentions are twofold: first, that, despite the tremendous work that still needs to be done, transitional justice initiatives to date have had a huge positive effect on moulding democracy in Peru; and, secondly, that the chances of future transitional justice mechanisms succeeding will depend heavily on how successful democratic consolidation continues to be.

While the Latin American case studies often combine transition from military rule to democracy with a movement from armed conflict to peace, in Eastern Europe the former transition applies in almost all the cases included in this book. The one exception is in BiH, where, despite being better positioned than most states to make the transition from Communism to democracy according to Ernesto Kiza, the country failed to deal with its complex multi-ethnic legacy and descended into conflict. In Chapter 11, Kiza addresses the unique circumstances in BiH where judicial accountability for war crimes was implemented. Although BiH is lauded internationally for its success in indicting high-ranking individuals for war crimes, Kiza points out how proposals to provide reparations or establish a truth and reconciliation commission were long ignored, and that this contributed to continuing mistrust in the society. Kiza analyses these issues as part of the interactions between judicial concepts and processes at both the regional and international levels. He concludes by identifying the lessons learned from this collective experience, namely that, although international recognition and support for transitional
justice are imperative, ultimately it is up to the society itself to forge a sustainable path to peace.

In Bulgaria, as in most East European countries, transitional justice relates to the transition to democracy since the fall of the Berlin Wall in 1989. In Chapter 12, Hristo Hristov and Alexander Kashumov write about the challenges surrounding responsibility relating to human rights violations committed under the Communist regime. They highlight the importance of knowing what violations took place and for what reasons, with a special focus on disclosure of documentation from the old secret services. They also look at how effective the judicial system has been in assigning accountability for criminal offences committed under the Communist regime. The authors consider these issues in terms of both the country’s unique features as well as the broader Central and East European context.

Chapter 13 on transitional justice in East Germany focuses comprehensively on the various instruments used to address East German injustices. These include: rehabilitation and restitution measures for victims of the regime of the Sozialistische Einheitspartei Deutschlands (SED – Socialist Unity Party of Germany); the establishment of an archive for the files of the former secret service (the “Stasi”); “purging” the East German civil service; and the employment of an Enquete Commission. Gerhard Werle and Moritz Vormbaum make the case that transitional justice mechanisms were overwhelmingly just and effective in dealing with East German state criminality. However, they also argue that legal instruments can provide only part of a solution that allows a society to come to terms with its past and that greater efforts could be made to ensure the past is not simply “filed away and forgotten”.

In Chapter 14, Monika Nalepa looks at the extent to which lustration – which she defines as “revealing links to the former [Communist] secret police of persons running for or holding public office” – is an effective trust-building transitional justice mechanism. The problem she addresses is the distrust of state institutions and political elites upon Poland’s emergence from Communist rule. Although Nalepa believes that lustration, normatively, is the best response to this lack of trust, she argues that it has been co-opted as a tool by political elites to manipulate the democratic process. Unsurprisingly, in her analysis of lustration and other transitional justice mechanisms implemented in Poland, she is critical of their combined performance.

In her evaluation of transitional justice in Romania, Lavinia Stan focuses on how initiatives including trials and truth commissions, among other proposals, have been “systematically blocked by the political elite”. Chapter 15 suggests that Romania continues to require a belated reckon-
ing with its past. Delays in addressing the past have led to suboptimal outcomes for surviving victims, and information has become less reliable with the passing of time. As part of her analysis, Stan looks at how a range of actors, including the Romanian public, the victims themselves and former perpetrators, have responded to these circumstances.

Chapter 16 examines the approach taken by Slovakia after the 1989 “Velvet Revolution”, which differs from that in most other East European countries. Nadya Nedelsky illustrates how the country’s strategy of forgiveness and forgetting persisted until 2004, after which information about the former secret service was published, stimulating a more vigorous discussion about the past. She analyses why various leaders opted for different strategies at differing stages, and records how effective they were in achieving both their own original aspirations and those of transitional justice advocates. In cataloguing the lessons to be learned from the Slovakian case, focusing on how differing leadership types produce differing outcomes, Nadelsky takes into account the role of national, regional and international political actors.

Chapter 17 presents the final case study, that of the former Yugoslavian state and now independent nation-state of Slovenia. As in other East European countries, the post-Communist era has witnessed attempts to implement restitution measures to address the human rights violations of the Communist era. However, despite efforts to compensate victims in Slovenia, Mitja Steinbacher, Matjaž Steinbacher and Matej Steinbacher find that the restitution process was based on achieving an acceptable truth by consensus, rather than on achieving real truth and justice. After assessing the outcomes of the country’s failure to investigate and assign responsibility for widespread abuses, the authors make the case that, for transitional justice processes to be effective, perpetrators must be brought to justice.

In Chapter 18, Alexandra Barahona de Brito and Laurence Whitehead essay a reframing of the debate on transitional justice by drawing from both empirical and normative knowledge. Reflecting the wide ranges of experiences in Latin America and Eastern Europe, they contend that there is no single model of transitional justice that can be applied universally to countries that have made the transition to democracy in recent decades. They illustrate how contemporary experiences of transitional justice have to be understood in terms of the political motivations behind their implementation, which can have the result of either entrenching or stifling the values of democracy. The authors also shine a light on what they call some of the “overly abstract and excessively normative approaches to the topic”, a tendency that this volume as a whole also aims to correct.
In Chapter 19 Mónica Serrano outlines what this large set of country experiences tells us about the conditions under which democratization and transitional justice, so often taken to be antagonists, can in fact be reconciled. Finally, in Chapter 20, Vesselin Popovski addresses both the complexity and the effectiveness of transitional justice across our two continents.

Notes

1. Following the return to democratic rule, trials in Greece, whether for treason or human rights violations, were initiated by private citizens. Although lawyers relied on private prosecution provisions against abuse of power and bodily harm, the Karamanlis government signalled its support for justice. Moreover, the government’s emphasis on due process and its decision to commute the death penalty to life imprisonment created the conditions for the first modern human rights trials. Trials were also conducted in Portugal against officials of the much-hated political police, PIDE, which between 1945 and 1973 had held 12,000 prisoners. The pursuit of justice in Portugal was marred by controversy. Some called for the extermination of PIDE and its members. In other quarters the process was perceived as an exercise in appeasement rather than accountability (Sikkink, 2011).

2. In its 1974 report on Chile, as in its subsequent reports again on Chile in 1977, on El Salvador and Haiti in 1979, and on Argentina in 1980, the Inter-American Commission on Human Rights consistently advocated the prosecution and punishment of perpetrators. There is still a widespread perception that the International Criminal Court was solely born out of the tragic conflict in the former Yugoslavia. This is erroneous. In Latin America, although dictators still represented the norm, a visionary minority was able to predict that the day of reckoning for those dictators would not be far off. The global amnesia about Latin America’s role in setting the course for transitional justice and individual criminal accountability is one of the deficiencies that this book aims to correct (Sikkink, 2011: 66–67).

3. One of the two main Congressional groups was led by Henry Jackson, and revolved around the ex-Soviet Union and Eastern bloc countries. The other group included figures such as Edward Kennedy, Frank Church, Donald Fraser and Tom Harkin. By focusing on right-wing authoritarian regimes this group often clashed with those within the US foreign policy establishment who saw these regimes as a bulwark against Communism. With the publication of the report Human Rights in the World Community: A Call for US Leadership in 1974 (US Congress, House Committee on Foreign Affairs, 1974) a more general human rights vision within the US Congress began to emerge. See Sikkink (2011: 52–53), Carothers (1991: section on “Democracy by Transition in El Salvador” and Chapter 4, “Democracy by Applause”) and Neier (2012: 14).

4. In that year President Clinton visited Guatemala and explicitly said: “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 [Inter-Diocesan Project for the Recovery of Historical Memory] report was wrong . . . and the United States must not repeat that mistake” (cited in Goldman, 2007: 155). Clinton’s apology has been perceived in different ways: whereas Goldman describes it as extraordinary, Stephen Schlesinger (2011) found it rather vague.

5. In September 2007, UN Secretary-General Ban Ki-moon appointed Carlos Castresana, a Spanish judge, to lead the CICIG. The resignation of Castresana in 2010 over the al-
leged reluctance of the Guatemalan government to cooperate in support of justice led to the appointment of Francisco Dall’Anese Ruiz, ex-General Prosecutor from Costa Rica. Although human rights were a leading consideration in the process of establishing the CICIG, its agenda has mostly been designed to unveil and dismantle the clandestine networks that are embedded in the state apparatus and that are perceived in some quarters as being protected by agents of the state. It is not a special tribunal, in that it relies on and uses the country’s criminal code and established judicial proceedings. See Goldman (2007: 368), El Financiero (2010) and Vela (forthcoming).

6. The evaluation system adopted by the ICTY in 1996 established strict rules for national and local prosecutions. Under the terms of this system, no war crime prosecutions were to be conducted without the ICTY’s prior authorization.

7. As Ernesto Kiza makes clear in his contribution to this volume (Chapter 11), the adoption of the Completion Strategy by the ICTY in 2002 followed the logic of complementarity. This strategy sought to bolster the development of national justice capacity and thus to balance the internationalization of prosecutions.

8. As Kiza also points out, these changes led in 2005 to the creation of a War Crimes Chamber (exclusively responsible for high-profile cases) and the establishment of the Court of Bosnia and Herzegovina, which is also the highest authority regarding organized crime, economic crime and corruption. The trends that at one point led BiH to dominate the bulk of indictments for serious violations of international humanitarian law (almost 80 per cent of a total of 161 indictments) at the ICTY may gradually change as a result both of these changes and of pacification and stabilization after war.

9. Transitional justice in Eastern Europe differed in at least one other respect from experiences in Latin America. Communist rule in Central and Eastern Europe was accompanied by large-scale property expropriations and nationalization. Not surprisingly, then, demands for property restitution accompanied transitions to democracy in various Central and East European countries, including Bulgaria, East Germany, Poland and Slovenia. Although many of these countries considered property restitution, privatization proved hugely problematic. Thus in Poland, Wałeśa’s offer to transfer state enterprises to workers prompted property owners to reactivate pre-1945 claims. Not before long, state authorities in Poland were confronted with mounting national and international property claims. Similar considerations led the German authorities to settle disputes over property claims according to the public interest.

10. At times, the logic of lustration simply clashed with the goal of justice for serious human rights violations. As described by Monika Nalepa in Chapter 14 in this volume, in Poland a number of members of Solidarity who had been shamed as collaborators were the key witnesses who made possible the identification of the commander responsible for the shoot-to-kill order during the 1980 miners’ strike in which 15 miners lost their lives.

REFERENCES


Models of accountability and the effectiveness of transitional justice

Kathryn Sikkink

The dramatic new trend in world politics towards holding state officials accountable for past human rights violations cannot be properly understood or evaluated by looking primarily at domestic political processes in individual countries. For this reason, broad comparative projects of the kind envisioned by this volume are a useful exercise. The trend towards accountability in world politics is taking place simultaneously in international and regional institutions and courts, in foreign courts, and mainly in the domestic policies and courts of the country where the human rights violation occurred. I argue that international, foreign and domestic human rights trials are all part of an interrelated trend in world politics towards greater accountability – a trend that Ellen Lutz and I have called the Justice Cascade (Lutz and Sikkink, 2001). It is one form of what Cass Sunstein (1997: 36–38) has called a “norm bandwagon”, which occurs when “the lowered cost of expressing new norms encourages an ever increasing number of people to reject previously popular norms, to a ‘tipping point’ where it is adherence to the old norms that produces social disapproval”. The Justice Cascade is a rapid and dramatic shift in the legitimacy of the norms of individual accountability for human rights violations, and an increase in actions (such as trials) on behalf of those norms. It does not mean that true justice is done – far from it – just that there is a new legitimacy of the norm, as evidenced by the frequency of actions on its behalf. We know we are dealing with cascade or diffusion phenomena when government decisions in one country are “systematically conditioned by prior policy choices” made elsewhere in the world (Simmons...
et al., 2006: 787). Choices about transitional justice are indeed systematically conditioned by prior policy choices, but “diffusion” is all too passive a word to convey the concerted activity and struggle through which ideas about justice have moved around the globe. The focus of this chapter will be on human rights trials, but some of the arguments, particularly those about effectiveness, are relevant to a wide range of transitional justice issues.

Three models of accountability

The history of the human rights regime has been told at length elsewhere, so I will provide only the briefest sketch to situate the current shift in accountability in the earlier history of human rights regulation. We can think of three “models” of accountability for past human rights violations: the sovereign immunity or “impunity” model; the state accountability model; and the individual criminal accountability model.

The sovereign immunity model

Prior to the Second World War, countries virtually never held state officials accountable for past human rights violations. There were isolated examples of accountability in ancient Greece and in revolutionary France, but no sustained attempts at domestic transitional justice until after the Second World War. At the international level, various attempts at accountability for war crimes and mass atrocities prior to the Second World War failed to set up the necessary institutions (Bass, 2002). In general, the doctrine of sovereign immunity held firm. The intellectual history of the doctrine traces it to the ancient English principle that the monarch can do no wrong or to the inherent power of the state to prevent such prosecution. Some give functionalist explanations for sovereign immunity: governments need to be protected from frivolous lawsuits so that they can concentrate on governing and not be distracted from the tasks of office. Whatever the explanations for the doctrine of sovereign immunity, prior to the Second World War it was almost unquestioned that state officials should be free from prosecution for human rights violations both in their own domestic courts and in foreign courts or international tribunals.

The state accountability model

The process of regulating human rights began shortly after the Second World War. The Holocaust was the shock or demonstration effect that led
states and non-state actors to identify the problem as a complete lack of international standards and accountability for massive human rights violations and to initiate action through the newly formed United Nations. The drafting and passage of the Universal Declaration of Human Rights in 1948 helped set the agenda for human rights regulation. The solution that states and non-state actors initially negotiated was a state accountability model. In this model, the state as a whole was held to be accountable for human rights violations and was expected to take action to remedy the situation. States negotiated and produced dozens of human rights treaties in the second half of the twentieth century. Most of these human rights treaties reflect the state accountability regulatory model. It continues to be the model used by virtually the entire human rights apparatus in the United Nations, including almost all of the treaty bodies. It is also the model employed by the regional human rights courts – the European Court of Human Rights, the Inter-American Court of Human Rights, and the new African Court of Human Rights. But under this model, if the state refused to take action, there was little the international community could do. Human rights non-governmental organizations, international organizations and other states mainly relied on reputational accountability via moral stigmatization of state violators. This was the so-called “name and shame strategy” of the human rights movement. Amnesty International, the United Nations or a foreign government would issue a report documenting human rights violations and call on the country to improve its record. In the few cases where stronger enforcement mechanisms existed, especially the regional human rights courts in Europe and the Americas, these courts could find that a state was in violation of its obligations under the Convention and ask it to provide some kind of remedy, usually in the way of changed policy. The actual individuals who carried out human rights violations were not affected.

The individual criminal accountability model

The main changes in regulation between the state accountability model and the individual criminal accountability model involve who is being held accountable and how these actors are held accountable (Ratner and Abrams, 2001). Both models may involve legal accountability, but the old model involves state civil legal accountability, whereas the new regulatory model involves individual criminal legal accountability. Under a state civil accountability model, the state provides remedies and pays damages, whereas under a criminal model the convicted go to prison. Although I focus on individual criminal legal accountability, there is also an increase in individual civil legal accountability, including in US courts, where cases
are brought mainly under the Alien Claims Tort Act, which permits tort claims for violations of international law.

The new criminal accountability model has emerged over the last 20 years, alongside the state accountability model, and recently it has grown more dramatically than the state accountability model. This new individual criminal accountability model is not for the whole range of civil and political rights, but rather for a small subset of political rights sometimes referred to as the “rights of the person”, especially the prohibitions on torture, summary execution and genocide, as well as for war crimes and crimes against humanity. Prior to the 1970s, state officials protected themselves from any individual legal accountability either during the repressive regime or after transition to another more democratic regime. By the 1980s, this had started to change and, since that time, an increasing number of trials for individual criminal accountability have been held around the world. I refer to this rise in individual criminal accountability as the Justice Cascade.

The Justice Cascade is “nested” in a larger norms cascade around accountability for past human rights violations. As of the 1980s, states are not just initiating trials but also increasingly using multiple transitional justice mechanisms to address past human rights violations, including: trials, truth commissions, reparations, lustration or vetting, museums and other “memory sites”, archives and oral history projects (Jelin, 2003). The increasing use of these practices attests to a broader accountability norm cascade, of which the Justice Cascade is only one part. Likewise, practices of state accountability for human rights violations have not diminished but continue to exist side by side with the trials for individual criminal accountability, and these two forms of accountability can reinforce one another.

As Pilar Domingo notes in her contribution to this volume (Chapter 3), the Justice Cascade is also nested in a broader process of strengthening of the rule of law through various forms of justice sector reform. Although better-quality rule of law is neither a necessary nor a sufficient condition for transitional justice, Domingo reminds us that there is a “circularity” in these processes, where developments in the rule of law have contributed to transitional justice, and the success of some transitional justice measures may in turn enhance the rule of law.

The scope and dimensions of the Justice Cascade

What makes the Justice Cascade complicated is that it is occurring simultaneously at three different levels: domestic; foreign or transnational; and international. The domestic level involves trials for individual criminal
accountability conducted in a single country for human rights abuses committed in that country. The foreign or transnational level has included trials 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. Finally, 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 (ICTR). The international trials category also includes hybrid criminal bodies defined by their mixed character of containing a combination of international and national features, such as those in Cambodia, Sierra Leone and Timor-Leste (formerly East Timor).

Our data set of trials and truth commissions from countries in transition to democracy from 1979 to 2004 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 that has occurred both domestically and internationally since the mid-1980s (see Figure 2.1). 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 195 countries and territories. Of the total, 34 countries used truth commissions and 51 countries had at least one transitional human rights trial. Of these 51 countries, many carried out a series of trials, which we capture in our data set as “country-trial years”. If we look only at the approximately 85 new and/or transitional countries in the period 1979–2004, we see that well over half of these transitional countries attempted some form of judicial proceeding. If we add to this list the 12 countries that used truth commissions but did not use trials, well over two-thirds of transitional countries used either trials or truth commissions as a transitional justice mechanism.

In sum, the use of a truth commission and/or human rights trials among transitional countries is not an isolated or marginal practice but a very widespread social practice occurring in the bulk of transitional countries. We believe that these four types of transitional justice mechanism (truth commissions, domestic trials, foreign trials and international trials) are all part of a related global phenomenon of increasing accountability for human rights violations.

The Justice Cascade started in domestic courts in the mid- to late 1970s in Greece and Portugal. By 1993, however, with the creation of the ICTY and the ICTR, the model of individual criminal accountability was
Figure 2.1 Trends in transitional justice mechanisms.
embodied in new international tribunals. Finally, as illustrated when Pinochet was arrested in London in 1998, the new development of individual criminal accountability in foreign courts also joined the trend. These ad hoc and decentralized enforcement mechanisms using individual criminal accountability through domestic courts, foreign courts and the ad hoc Tribunals in turn contributed to the expansion and development of new rules, especially in the form of the Statute of the International Criminal Court (ICC), which embodied the new regulatory model of individual criminal accountability. The doctrine of universal jurisdiction and the creation of the ICC are an important part of this new model of regulation, but it is much more than that. Given how new and embattled the ICC has been, it would be unpersuasive if the new model rested primarily on its shoulders. But, because of the importance of domestic courts, the ICC is not the main institution through which regulation of the new model is enforced. The doctrine of complementarity in the ICC can be seen as a broader expression of the new model of enforcement. Contrary to the ad hoc Tribunals or to the European Court of Justice, which have primacy or supremacy over domestic courts, under the doctrine of complementarity the ICC can exercise jurisdiction only if domestic courts are “unwilling” or “unable” to prosecute (Schabas, 2001: 13, 67).

The primary institutions for enforcement of the new model thus are domestic criminal courts, and the ICC and foreign courts are the back-up institutions or the last resort when the main model of domestic enforcement fails. Such back-up institutions, however, are necessary to create a fully functioning international model. If the model depended only on domestic courts, perpetrators could always escape either by blackmail and veto in the domestic constituencies (for example, the sabre-rattling and coup attempts that former military leaders in Argentina and Chile tried on each time they faced the possibility of domestic prosecution), or by retirement abroad in a friendly third country. The back-up provided by foreign and international trials makes such options less possible than before. When trials were only domestic, the process could be “captured” by domestic repressors, whereas the move to create a more transnational system of regulation reduced the opportunity for capture by domestic repressive forces.

Many critics of the ICC or the specialized courts have not understood their role as the back-up institutions in a global system of regulation. For example, Helena Cobban (2006: 22) argues that international tribunals “have squandered billions of dollars” and that domestic solutions would be more cost-effective. It would indeed be costly if international tribunals or the ICC were designed to provide a comprehensive system of individual criminal justice by themselves, but that is not how the model is currently working. The use of international tribunals or foreign courts as a
back-up is the exception, not the rule, in the new model of regulation. For the most part, the new model uses a decentralized system of enforcement that depends primarily on enforcement through domestic courts. Because the system is decentralized, however, the quality of the enforcement varies with the quality of the criminal justice system in the different countries.

Regions and transitional justice

Although transitional justice is a global phenomenon, it has very distinct regional characteristics. As Barahona de Brito and Whitehead point out in Chapter 18 for this volume, transitional justice experiences in different regions have emphasized or brought to light diverse issues. The South American cases certainly provide evidence of problems of impunity and democratic stability, whereas those in Africa have more often brought to light the problems resulting from ethnically divided societies and weak states. Likewise, the experiences in Eastern Europe have highlighted the issues of due process violations and the political abuse of transitional justice.

As Figure 2.2 indicates, the greatest number of transitional country-trial years occurs in the Americas, which account for 54 per cent of transitional trials, followed by Central and Eastern Europe with 21 per cent and sub-Saharan Africa with 17 per cent. Combined, these three regions

![Figure 2.2 Regional distribution of domestic transitional trials.](image-url)
MODELS OF ACCOUNTABILITY AND EFFECTIVENESS

cover 92 per cent of all country-trial years. In terms of numbers of country-trial years, 17 countries in Latin America accounted for 122, 12 countries in Africa accounted for 39, and 10 countries in Central and Eastern Europe accounted for 48.

Not only do Latin American countries account for the majority of domestic human rights trials, but they are also the subject of the largest number of foreign human rights trials. Most of the 101 foreign trials in our database were held in the domestic courts of European countries for human rights violations committed largely in the Americas. The great bulk of these foreign trials were brought to foreign courts by human rights organizations acting on behalf of human rights victims or their relatives from the country where the human rights violations occurred. But, even in Latin America, there is significant variation among countries in the degree to which they have adopted the new regulatory model, and even variation within a single country as to when it initiates criminal human rights trials. Some Latin American countries such as Argentina and Bolivia were among the very first countries to start making regular use of human rights trials in the mid-1980s. Argentina was both the leader in the region and also a global leader in the number of human rights trials it has held. Argentina’s neighbours Brazil and Uruguay, which experienced similar authoritarian regimes and transitions to democracy at roughly the same time as Argentina, made different choices about trials. Brazil has held no human rights trials for violations during the authoritarian government, and Uruguay held no trials for the first 15 years after the transition, and began a handful of prosecutions only in the early 2000s.

Because of these distinct regional patterns, I will argue that we cannot understand the origins or the effectiveness of transitional justice generally or the use of transitional justice mechanisms in any specific country without being attentive to the international and regional context. Hunjoon Kim’s (2007) research on the adoption of truth commissions and human rights trials in the world indicates that the single most important factor that helps explain why a country decides to use a transitional justice mechanism is the number of other culturally similar countries in the region that have already adopted the mechanism. We do not yet understand completely why regional neighbours play such an important role, but it is probable that cultural and linguistic similarities permit diffusion to occur with greater ease within regions than between regions.

The effectiveness of accountability mechanisms

I now turn to the topic of the effectiveness of accountability mechanisms in Latin America and Eastern Europe. We can think about effectiveness
in various ways. Some people use the term to refer to whether different countries have been effective in setting up various transitional justice or accountability institutions or mechanisms. Others use the term to evaluate whether, once established, these transitional justice institutions or mechanisms actually contribute to meeting certain goals, such as reducing human rights violations or contributing to the consolidation of democracy. I will use effectiveness only in this second way.

There has been a lively debate in the political science and international law literature about the desirability and impact of human rights trials. Many scholars and practitioners believe that such trials are both legally and ethically desirable and practically useful in deterring future human rights violations (Mendeloff, 2004; Roht-Arriaza, 1995). In his review of the transitional justice literature, however, Mendeloff (2004) finds many such claims about the positive effects of human rights trials but relatively little solid evidence to support those claims. As Barahona de Brito and Whitehead point out in Chapter 18 in this volume, much of the literature on transitional justice “remains prescriptive and universalist” and pays scant attention to whether transitional justice policies are always the most appropriate way to deal with the past in diverse settings.

But there is also a literature that is much more sceptical about the effects of human rights trials. Jack Goldsmith and Stephen Krasner (2003: 51) contend that “a universal jurisdiction prosecution may cause more harm than the original crime it purports to address”, and argue that states that reject amnesty and insist on criminal prosecution can prolong conflict, resulting in more deaths. Jack Snyder and Leslie Vinjamuri (2003) also argue that human rights trials themselves can increase the likelihood of future atrocities, exacerbate conflict and undermine efforts to create democracy. They claim that “the prosecution of perpetrators according to universal standards risks causing more atrocities than it would prevent” (Snyder and Vinjamuri, 2003: 5). These arguments suggest that more enforcement or the wrong kind of enforcement can lead to less compliance with international and domestic law. In particular, they suggest that, during civil wars, insurgents will not sign peace agreements if they fear they will be held accountable for past human rights abuses. As a result, these authors claim that the threat of trials can prolong war and exacerbate human rights violations.

A new literature has also emerged that stresses the importance of locally and culturally appropriate measures of transitional justice, including justice rooted in local communal law, such as the gacaca courts in Rwanda. Barahona de Brito and Whitehead argue that we must allow the wishes of local citizens to determine what transitional justice mechanisms are best for their locality. But sometimes such local judgements are based on causal assumptions that may or may not be valid. For example, many
local communities choose not to pursue justice because they believe, or
they have been told, that you cannot have both peace and justice. In
many parts of the world, when ordinary people are given a choice be-
tween peace and justice, they will prefer peace. The argument that tran-
sitional justice blocks peace, however, is often made by self-interested
actors (governments or rebel groups who hope to avoid accountability)
and there is simply not adequate evidence yet to support the claim. Thus
social science research can produce work such as the current volume that
might assist the judgements of such local communities. Indeed, the re-
search from Latin America, discussed below, suggests that the use of
trials has coincided with a very significant reduction in conflict in the re-
gion. Although we cannot say that trials reduce conflict, there is little evi-
dence from Latin America that you have to choose between justice and
peace. This might be a useful and even reassuring finding for commu-
nities that have been told that they must choose between the two.

It is difficult to evaluate the impact of transitional justice mechanisms.
Our conclusions depend greatly on what we mean by effectiveness and
what measures or methods we use to evaluate it. Effectiveness is always
evaluated relative to some other benchmark and, thus, a judgement about
effectiveness always involves some kind of comparison. I will argue that
scholars, policy-makers and activists use three distinct forms of compari-
on in evaluating the effectiveness of transitional justice mechanisms:
comparison with the ideal; counterfactual reasoning; and empirical com-
parisons. These methods are sometimes used explicitly but more often
implicitly, and the type of comparison will often affect the conclusions
about effectiveness.

*Comparison with the ideal*

Evaluations that use comparison with the ideal compare the effects of
actually existing transitional justice mechanisms with our ideals of how
justice should operate. These evaluations sometimes use the mission state-
ments of actually existing transitional justice institutions as the bench-
mark against which the institution is measured, so that the institution is
being evaluated against its own ideals. Comparison with the ideal can
be explicit or implicit. The implicit comparison with the ideal is very
common in discussions of human rights trials and other accountability
mechanisms.

Human rights activists most often engage in comparison with the ideal.
I believe this is what Barahona de Brito and Whitehead mean when they
talk about a “moralistic” approach, and point out that transitional jus-
tice “highlights the eternal contrast between what we hope for and feel
is right and what we are actually able to do”. So, for example, a leading
member of the human rights movement in Argentina described the reaction of Argentine human rights activists to the sentences in the Trial of the Juntas. Instead of being pleased with the life sentences for some of the accused, they were disappointed by the leniency of some of the other sentences. She and some other Argentine human rights activists were at a meeting of human rights groups from the Southern Cone being held in Chile when they got the news. “We got very angry and felt very bad that night. The next day when we entered the conference, various colleagues greeted us with applause. We said, ‘Why are you clapping? Are you drunk?’ They told us: ‘You don’t know how to take advantage of what you have. You aren’t satisfied with anything; that’s how Argentines are.’”

Although I will recommend empirical comparison as the superior method, comparison with the ideal is an important form of ethical reasoning. We need to keep the ability to hold our actual practices up to our ideals and constantly measure where they fall short. Such reasoning is a powerful pressure for change in the international system. It is one of the main tools that advocacy groups use in the world. But it is also very important to be careful how we use this form of the ideal comparison and to distinguish it very clearly from empirical comparison and counterfactual reasoning. Most importantly, comparison with the ideal should be explicit rather than implicit. The author should clarify that the practice or institution in question is being compared not with an empirical example in the world but with a set of ideals of what such a practice or institutions should look like, and those ideals should be explicitly stated and defended.

Counterfactual reasoning

In counterfactual evaluations of the effectiveness of transitional justice, we compare what happened with what would have happened without transitional justice or with a different combination of transitional justice mechanisms.11

So, for example, some people make the counterfactual argument that the military coup attempts against the government of President Alfonsín of Argentina would not have occurred and democracy would have been more stable if he had not held trials for past human rights abuses. This counterfactual analysis was so common at the time that it was one of the reasons that other countries such as Chile chose to use a truth commission but not to pursue trials, in order to avoid what they believed had been the “mistakes” of the Alfonsín government.

But the problem with counterfactual reasoning is that one can often make plausible alternative counterfactual arguments. For example, one
could argue that, if President Alfonsín had not held trials, the military would have been emboldened and the coup attempts would have succeeded. Or one could make the counterfactual that the coup attempts would have occurred regardless of the particular transitional justice strategy pursued. For example, the transitional government in Spain experienced a serious coup attempt in 1981 despite the fact that it had not used any transitional justice mechanisms such as trials or truth commissions. Counterfactuals are tricky because we cannot determine which of these counterfactuals is more valid.

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 and Belkin, 1996: 4). In this kind of counterfactual reasoning, it is helpful if the author spells out the counterfactual so that it can be evaluated by other scholars. Tetlock and Belkin (1996: 4) argue that the alternative to an open counterfactual model is often a concealed counterfactual model. In a concealed model, the reader is aware that the author thinks that other outcomes were both possible and desirable but must infer the preferred alternatives from the critique of what did happen, rather than read them stated clearly with both their possibility and desirability defended.

**Empirical comparisons**

Empirical comparisons involve comparing current transitional justice practices or institutions with other current or historical practices in order to evaluate their effectiveness. In this sense, the effectiveness of the transitional justice mechanisms is judged in relation to other past experiences or to experiences in other countries. So, for example, we can measure the effectiveness of accountability in improving human rights practices and democracy by comparing the human rights situation in individual countries before and after they use trials or other accountability mechanisms such as a truth commission or lustration to see if we can discern the impact of accountability, or by comparing countries that used trials or other accountability mechanisms with other countries that did not.

This is my preferred method of evaluating effectiveness. It is similar to the “comparative historical framework” advocated by Barahona de Brito and Whitehead. To illustrate this method, I will summarize the conclusions from an article I co-wrote with Carrie Booth Walling (Sikkink and Booth Walling, 2007) and discuss the effectiveness of human rights trials in Latin America.
The impact of human rights trials in Latin America

Carrie Booth Walling and I (2007) used the method of empirical comparison to explore the effectiveness of domestic human rights trials in Latin America in terms of the consolidation of democracy and the level of human rights protection. We focus on Latin America because cases in this region account for more of the country-trial years in the data set than any other region. Furthermore, because many Latin American countries were early innovators of human rights trials and truth commissions, more time has passed than in any other region, enabling the evaluation of the impact of these transitional justice mechanisms on future human rights practices, democratic consolidation and conflict. We argue that, 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 also 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 twentieth century, political instability and military coups were endemic in Latin America. 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; 91 per cent of the countries in the region are now considered democratic, well above the level for Eastern Europe and the former USSR (67 per cent) or Asia & Pacific (48 per cent) or Africa (40 per cent) (see Diamond, 2003: Table 5).

Since the 1980s when the first trials were initiated in the region, there have been only four examples of coups in Latin America, and none was provoked by human rights trials. 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 Alfonsin government after it carried out far-reaching trials of the three juntas for past human rights violations. 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.

To explore the impact that trials have on human rights in Latin America, we examined the human rights situation in countries before and after trials to see if we could 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. We excluded from our analysis three countries that had only one country-trial year, including Uruguay. We compared the average PTS score for the 5 years preceding the first trial with the average PTS score for the 10 years after the first trial. Of the 13 countries that held human rights trials for at least two years, 11 improved their human rights situation after trials and in 2 countries (Haiti and Mexico) the human rights situation worsened. The average improvement of the 13 countries was 0.6 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 the transition to democracy rather than to the 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 its transition to democracy in 1985, we see that Brazil’s average score on the PTS was 3.2 in the 5 years before transition and worsened to an average of 4.1 for the 10 years after transition. Brazil experienced a greater deterioration 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 were 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 13 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 0.9 on the five-point PTS, whereas the seven countries that had fewer trials had an average improvement of 0.3 on the PTS.

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 a truth commission and human rights trials had an average improvement of 0.7 on the five-point scale, whereas countries that had only trials had an average improvement of 0.1 on the same scale. 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 democracy. It could be that there is some other factor doing the work here rather than trials themselves – perhaps the existence of the 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 maintain in the face of these data that human rights trials actually lead to more atrocities in the Latin American cases.

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 and Vinjamuri (2003, 2004) argue that human rights trials might interfere with the process of building the rule of law: “Amnesty – or simply ignoring past abuses – may be a necessary tool in this bargaining. Once such deals are struck, institutions based on the rule of law become more feasible” (Snyder and Vinjamuri, 2003: 6). Other legal scholars argue that a strong judicial system, including respect for the rule of law, is essential for states to autonomously implement truth commissions and trials. In either case, the rule of law is seen as something that needs to come prior to the effective use of trials or truth commissions.

In Chapter 3 for this volume, Pilar Domingo makes a rather different argument that suggests that transitional justice and the construction of the rule of law are circular and mutually reinforcing processes. Latin America has been undergoing a process of judicial reform and promotion of the rule of law over the past 15 years that parallels the process of human rights trials we describe here. Rather than see the construction of the rule of law as a process separate from, or that must precede, human rights trials, it has been the case that building the rule of law has coincided with human rights trials in much of the region (Domingo and 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 1980s (Carothers, 2001). The leading promoters of judicial reform recognize this mutual reinforcement of human rights trials and the rule of law.15

The most crucial ingredient of a rule of law system is the idea that no one is above the law. As such, 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 the rule of law has been strengthened at the same time that human rights trials have been carried out in most transitional countries, illustrate that human rights trials and the construction of the rule of law can be two simultaneous and mutually reinforcing processes.

Unfortunately, there are not fully reliable data on the rule of law to test these propositions more rigorously. The International Country Risk
Guide (ICRG) has produced a measure of what it calls “Law and Order”, but it is not fully consistent with the notion of rule of law used here. It looks both at the strength and impartiality of the legal system (close to our definition of the rule of law) and at “popular observance of the law”, including high crime rates and widespread illegal strikes (something not included in many definitions of the rule of law). As the harsh authoritarian regimes and civil wars ended throughout the region, unemployed “men with guns” in many cases contributed to an increase in violent common crime. Even given these issues, 10 of the 14 transitional countries in Latin America that have held trials have seen improvements in their Law and Order score between 2006 and the year they held the first trial, suggesting that holding human rights trials is compatible (not in conflict) with the process of building the rule of law. Brazil, the only Latin American country in the Law and Order database without human rights trials, has seen a decrease in its Law and Order score. This kind of data does not allow us to make any causal claim that human rights trials build the rule of law. However, it calls into question the notion that the rule of law is a necessary precondition for human rights trials. Many Latin American countries had quite low Law and Order scores in the years that they initiated human rights trials, and yet they managed to improve the rule of law and hold human rights trials simultaneously.

It is possible that Latin America is the exceptional region and we will not see the same results replicated in other regions of the world. It is equally possible that, because the trials started early in Latin America, we now have a long enough time-frame to realistically assess the effects of trials. Trial sceptics have often based their arguments on a few powerful but as yet unresolved current 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 to help end conflicts in Uganda or Sudan may fuel current trial scepticism. Just as the transition literature was too hasty in its judgements about the impossibility and undesirability of trials in Latin America, current trial sceptics might be well advised to monitor the situation in the former Yugoslavia and Uganda longer before jumping to conclusions about the pernicious effects of trials.

Conclusion

The benefits of an edited volume of case studies about the effectiveness of transitional justice mechanisms is that it can begin to illuminate the mechanisms through which transitional justice mechanisms have an impact on human rights, democracy, the rule of law or other factors of
interest. Transitional justice more generally, and human rights trials specifically, are only one of the many factors that can contribute to positive human rights change. Although they are not a panacea for human rights problems, they appear to be one form of sanction that can contribute to the institutional and political changes necessary to limit repression.

Notes

1. See also Simmons and Zachary (2004).
2. See the historical narrative in Elster (2004).
3. I use the definition of accountability by Grant and Keohane (2005: 29): it “implies that some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met”. Legal and reputational accountability are two of the seven forms of accountability they discuss.
4. Legal accountability is “the requirement that agents abide by formal rules and be prepared to justify their actions in those terms, in courts or quasi-judicial arenas” (Grant and Keohane, 2005: 36).
5. These include rights from only two or three of the 27 substantive articles of the International Covenant on Civil and Political Rights, those protecting the right to life and prohibiting torture. The new model also provides enforcement of the Genocide Convention, the Convention against Torture, and those parts of the Geneva Conventions prohibiting war crimes.
6. To determine the actual dimensions of the global Justice Cascade, Carrie Booth Walling and I have created a new data set of domestic, foreign and international judicial proceedings for individual criminal responsibility for past human rights violations. I am indebted to Carrie Booth Walling for her permission to use material from our joint data set and for preparing some of the figures based on those data for this book.
7. Our variable measures not the number of trials per se but 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. 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 under way within that state during those years, which may be far greater.
8. We arrive at the estimate of approximately 85 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 a transition to democracy (based on the coding of Freedom House data by Larry Diamond, 2003: Table 1 and Table 3, pp. 3–6).
11. Counterfactuals are subjunctive condition statements (i.e. they take the form, “if x then y would have . . .”) in which the first part of the statement is not true.
12. These include the “self-coup” in 1992 in Peru and coups in Ecuador in 2000 and Haiti in 2004. [Editors’ note: and in Honduras in 2009]

13. 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 data set. 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.

14. Because the PTS begins only in the 1980s we cannot use an average score for 10 years before trials. We use 10 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.


17. There is also a World Bank data set on the rule of law, but it covers a shorter period and is also more concerned about order than about access to and the impartiality of the judicial system.

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<table>
<thead>
<tr>
<th>Term</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>abuse of power</td>
<td>496</td>
</tr>
<tr>
<td>in Bulgaria, 281</td>
<td></td>
</tr>
<tr>
<td>in East Germany, 303, 311, 318, 320–21,</td>
<td></td>
</tr>
<tr>
<td>323–26</td>
<td></td>
</tr>
<tr>
<td>in Poland, 398, 400</td>
<td></td>
</tr>
<tr>
<td>in Slovakia, 398, 400</td>
<td></td>
</tr>
<tr>
<td>accountability for past human rights</td>
<td></td>
</tr>
<tr>
<td>violations</td>
<td></td>
</tr>
<tr>
<td>accountability mechanisms, effectiveness</td>
<td></td>
</tr>
<tr>
<td>of, 27–31</td>
<td></td>
</tr>
<tr>
<td>individual civil legal accountability, 21</td>
<td></td>
</tr>
<tr>
<td>individual criminal accountability, 21–22</td>
<td></td>
</tr>
<tr>
<td>individual criminal legal accountability,</td>
<td></td>
</tr>
<tr>
<td>21</td>
<td></td>
</tr>
<tr>
<td>Justice Cascade, scope and dimensions of,</td>
<td></td>
</tr>
<tr>
<td>22–26</td>
<td></td>
</tr>
<tr>
<td>sovereign immunity model, 20</td>
<td></td>
</tr>
<tr>
<td>state accountability model, 20–21</td>
<td></td>
</tr>
<tr>
<td>state civil legal accountability, 21</td>
<td></td>
</tr>
<tr>
<td>transitional justice in various regions,</td>
<td></td>
</tr>
<tr>
<td>26–27</td>
<td></td>
</tr>
<tr>
<td>transitional justice mechanism, trends in,</td>
<td></td>
</tr>
<tr>
<td>24</td>
<td></td>
</tr>
<tr>
<td>accountability mechanisms</td>
<td></td>
</tr>
<tr>
<td>adaptation to gradual political and</td>
<td></td>
</tr>
<tr>
<td>societal transformation processes and, 492</td>
<td></td>
</tr>
<tr>
<td>in Bosnia and Herzegovina (BiH), 245,</td>
<td></td>
</tr>
<tr>
<td>260</td>
<td></td>
</tr>
<tr>
<td>in Brazil, 101–2, 104–5</td>
<td></td>
</tr>
<tr>
<td>in Bulgaria, 273</td>
<td></td>
</tr>
<tr>
<td>comparison with the ideal, 29</td>
<td></td>
</tr>
<tr>
<td>criminal prosecutions and survival of the</td>
<td></td>
</tr>
<tr>
<td>democratic regime, 473</td>
<td></td>
</tr>
<tr>
<td>effectiveness of, 27–31</td>
<td></td>
</tr>
<tr>
<td>empirical comparisons, 31</td>
<td></td>
</tr>
<tr>
<td>in Guatemala, 196</td>
<td></td>
</tr>
<tr>
<td>human rights violations, longer-term</td>
<td></td>
</tr>
<tr>
<td>contribution to reducing, 10</td>
<td></td>
</tr>
<tr>
<td>leadership can play a role in defining,</td>
<td></td>
</tr>
<tr>
<td>490</td>
<td></td>
</tr>
<tr>
<td>quality of the democratic life and,</td>
<td></td>
</tr>
<tr>
<td>470</td>
<td></td>
</tr>
<tr>
<td>in Romania, 382–84</td>
<td></td>
</tr>
<tr>
<td>rule of law and judicial reform may</td>
<td></td>
</tr>
<tr>
<td>improve, 446</td>
<td></td>
</tr>
<tr>
<td>in Slovakia, 490</td>
<td></td>
</tr>
<tr>
<td>societal needs and need to redress</td>
<td></td>
</tr>
<tr>
<td>suffering of victims, 486</td>
<td></td>
</tr>
<tr>
<td>transitional justice and, 469, 488</td>
<td></td>
</tr>
<tr>
<td>transitional justice processes and, 101</td>
<td></td>
</tr>
<tr>
<td>Africa</td>
<td></td>
</tr>
<tr>
<td>democratic level, 32</td>
<td></td>
</tr>
<tr>
<td>human rights prosecutions, 10</td>
<td></td>
</tr>
<tr>
<td>transitional justice in, 4, 26</td>
<td></td>
</tr>
<tr>
<td>African Court of Human Rights, 21</td>
<td></td>
</tr>
<tr>
<td>Ahrendt, Hannah, 246</td>
<td></td>
</tr>
<tr>
<td>Alien Claims Tort Act [US], 22</td>
<td></td>
</tr>
</tbody>
</table>
American Convention on Human Rights
Argentina and violation of, 53
Brazil's violation of, 91, 99–100, 106, 481n13
El Salvador and, 188
Guatemala and violation of, 207
inter-American system of rights protection, 53–54
Peru and violation of, 238, 480n8
amnesty
in Argentina, 53, 67
in Bosnia and Herzegovina (BiH), 252
in Brazil, 87, 90–91, 93–100, 104, 106, 475
in Chile, 11, 117–23, 128–29, 133–36, 139
in Colombia, 153–54, 157
criminal prosecution vs., 28, 48
in East Germany, 309–10, 322–23
for elites, 494
in El Salvador, 186–88, 191–92
equality before the law and, 443
in Greece, 468
in Guatemala, 202, 205
human rights trials vs., 34
laws under President Alfonsín, 47
for mass atrocity crimes, 467
moralistic language and, 456
in Peru, 54, 232, 237
politics of, 45
in Romania, 381
in Spain, 49–50, 473–74
transitional justice processes and, 442
in Uruguay, 469
Amnesty International, 21, 66, 90, 93
Anna Politkovskaya Association for Free Speech, 287
appropriateness vs. “rightness,” 457–60
Arab–Israeli conflict, 456
arbitrary executions
in Brazil, 107
in Guatemala, 199, 213
archives
in Argentina, 78
in Brazil, 97–98, 100
in Bulgaria, 282, 289, 291, 294
in Colombia, 155, 165n10
in East Germany, 14, 304–5
in El Salvador, 181
in Guatemala, 7, 210–11
in Poland, 345–46
in Romania, 363, 368–69, 379–80, 382–83
in Slovakia, 390, 404, 408–9, 411
Argentina
Agosti, Brigadier, 67, 69
Alfonsin, President R., 30–31, 47, 66, 69
American Convention on Human Rights, violation of, 53
amnesty in, 53, 67
Amnesty International and, 66
archives in, 78
assassinations, 72
Cavallo, Judge Gabriel, 74
Centro de Estudios Legales y Sociales, 74
crime by Captain Adolfo Scilingo, 74
criminal justice reform and criminal code reforms, 52
Decree No. 70/91, 72
democratization in, 6, 48
dictator/dictatorship in, 54, 65, 68, 74, 77
domestic courts in, 65
domestic trials in, 48, 76
Due Obedience Law, 68–70, 74–75, 78–80, 490
Easter Rebellion, 68–69
Federal Appeals Court of Buenos Aires, 67
forced disappearances in, 52, 72, 80
“Full Stop Law” and 300 indicted high-ranking officers, 68, 70, 74, 76, 78–79, 81, 490
genocide in, 52
Grandmothers of the Plaza de Mayo, 73–74
human rights abuses in, 30
human rights activists in, 11, 30
human rights movement in, 11, 30, 71, 79
human rights ombudsmen, 52
human rights trials in, 27, 32
human rights violations and mass disappearances under the junta, 439
human rights violations in, 32, 439
Instructions to Military Prosecutors, 68
Inter-American Commission on Human Rights, 53, 75
Inter-American Court of Human Rights, 71–72
judges, merit-based appointments of lower-level, 52
judicial convictions for human rights violations, 70
judicial councils, 52
judicial strategy and search for legal retribution, 70
Argentina (cont.)
judicial treatment of past human rights violations, 64–65, 67, 71
judiciary, 77
justice and accountability, delayed, 79
kidnapped children, recovery of, 73–74
kidnapping, 67–68, 71, 73–74, 78, 80
Lambruschini, Admiral, 67, 69
Law 24.321, 72
Law 24.411, 72
Law 25.914, 72
Law 24043, 72
Law of National Pacification ("self-amnesty" law), 67, 78, 82n3
law suits in foreign courts, 76
legal retribution claims, 74–75
lustration in, 71, 76–78, 80
Malvinas war and defeat of the military, 66
Massera, Commander-in-Chief of the Navy Admiral Emilio, 67, 69
memorials and commemorations, 77–78
Menem, President Carlos, 47, 52, 69–72, 76, 486
Military Code of Justice (Law 23049), 67
military coups, 30, 65, 488
military junta, 66–67, 70, 73, 82n4, 439
military regime, 65, 83n22
National Commission on the Disappeared (CONADEP), 47, 66–67, 76, 78, 466
Nobel Peace Prize to Adolfo Pérez Esquivel, 66
pardon, presidential, 47, 53, 69–73, 75, 77–78, 80
police reform including training in human rights, 52
public apologies, 65, 71, 74–75, 80
public commemorative monuments, 71, 77, 80
reparations, financial, 71–73, 75, 78
rule of law in, 69
Sabato Commission, 439
Secretariat of Human and Social Rights, 66, 71–72, 76
Senate Agreements Commission, 76
shaming, public, 77
social ostracism in, 71, 76–78, 80
Supreme Council of the Armed Forces, 67
Supreme Court in, 52, 74, 79
torture in, 52, 54, 68, 74–75
transitional human rights trials, 32
transitional justice in, 9, 11, 47–48, 51–52, 65, 78, 80, 439, 486
Trial of the Juntas, 30
truth commission (CONADEP), 47, 66–67, 76, 78, 466
truth trials, 75
Videla, President Jorge Rafael, 67, 69
Viola, President Eduardo, 67, 69
war on drugs, 52
war with United Kingdom over the Malvinas, 6
zero-tolerance policies, 52
ASET (tortured people), 287
assassinations
in Argentina, 72
in Bulgaria, 277–78, 292
in Colombia, 146–47, 156
in El Salvador, 191–92
Berlin Wall (1989), 5–6
BiH. See Bosnia and Herzegovina (BiH)
bill of rights, 43, 51, 428
Bolivia, 27, 486
Bonn Agreement, 158
Bosnia and Herzegovina (BiH)
accountability mechanisms in, 245, 260
amnesty in, 252
Balkan Investigative Reporting Network, 256
Commission for Investigation of the Events in and around Srebrenica, 258
Communist state, ethnic, 245–46
corruption, 253–54
crimes against humanity in, 266
criminal justice, international, 250–253, 261, 264
criminal justice at national level, 253–57
Croatia found support from European Community, 247
Dayton Peace Agreement, 245, 248, 253, 257–60
democratization in, 245–46
domestic courts in, 8, 262
elections, 246, 260
ethnic division, 246
Galić, Stanislav, 261–62
genocide in, 246, 249, 251, 260, 262, 264, 266

torture in, 52, 54, 68, 74–75
transitional human rights trials, 32
transitional justice in, 9, 11, 47–48, 51–52, 65, 78, 80, 439, 486
Trial of the Juntas, 30
truth commission (CONADEP), 47, 66–67, 76, 78, 466
truth trials, 75
Videla, President Jorge Rafael, 67, 69
Viola, President Eduardo, 67, 69
war on drugs, 52
war with United Kingdom over the Malvinas, 6
zero-tolerance policies, 52
ASET (tortured people), 287
assassinations
in Argentina, 72
in Bulgaria, 277–78, 292
in Colombia, 146–47, 156
in El Salvador, 191–92
Berlin Wall (1989), 5–6
BiH. See Bosnia and Herzegovina (BiH)
bill of rights, 43, 51, 428
Bolivia, 27, 486
Bonn Agreement, 158
Bosnia and Herzegovina (BiH)
accountability mechanisms in, 245, 260
amnesty in, 252
Balkan Investigative Reporting Network, 256
Commission for Investigation of the Events in and around Srebrenica, 258
Communist state, ethnic, 245–46
corruption, 253–54
crimes against humanity in, 266
criminal justice, international, 250–253, 261, 264
criminal justice at national level, 253–57
Croatia found support from European Community, 247
Dayton Peace Agreement, 245, 248, 253, 257–60
democratization in, 245–46
domestic courts in, 8, 262
elections, 246, 260
ethnic division, 246
Galić, Stanislav, 261–62
genocide in, 246, 249, 251, 260, 262, 264, 266

Berlin Wall (1989), 5–6
BiH. See Bosnia and Herzegovina (BiH)
bill of rights, 43, 51, 428
Bolivia, 27, 486
Bonn Agreement, 158
Bosnia and Herzegovina (BiH)
accountability mechanisms in, 245, 260
amnesty in, 252
Balkan Investigative Reporting Network, 256
Commission for Investigation of the Events in and around Srebrenica, 258
Communist state, ethnic, 245–46
corruption, 253–54
crimes against humanity in, 266
criminal justice, international, 250–253, 261, 264
criminal justice at national level, 253–57
Croatia found support from European Community, 247
Dayton Peace Agreement, 245, 248, 253, 257–60
democratization in, 245–46
domestic courts in, 8, 262
elections, 246, 260
ethnic division, 246
Galić, Stanislav, 261–62
genocide in, 246, 249, 251, 260, 262, 264, 266
High Judicial and Prosecutorial Service Council, 254
human rights violations in, 249
internal wars of, 7
International Center for Transitional Justice, 256
International Committee of the Red Cross, 263
international community and, 248, 250–51, 254, 261–62, 266–67
International Court of Justice (ICJ), 260
International Criminal Court, 265
international criminal law, 252–53, 265
International Criminal Tribunal for the former Yugoslavia (ICTY), 7, 23, 102, 249–55, 257–66, 492
international impunity movement, 251
judicial accountability, 13, 246
judicial and state reform, impact of an international criminal justice system on, 252
judicial concepts and processes, international and regional, 246
judicial institutions, national, 265
judicial law reforms in Bosnia, 254, 261
judicial system, 259, 264, 266
judicial system and judiciary, rebuilding of, 250, 253–55
judiciary, 255–56, 260, 266
Karadžić, Radovan (President of Republika Srpska), 253
lustration in, 260
massacres in, 257–58, 262
Milošević, Slobodan (President of the Republic of Serbia), 248, 253
missing persons initiatives, 258–59
multi-ethnic legacy, complex, 13
National Assembly of Republika Srpska, 258
National Strategy for Processing of War Crimes Cases (NSPWCC), 255–56
National War Crimes Strategy, 258, 268n13
NATO-led peacekeeping mission, 249
Office of the High Representative (OHR), 248, 254, 258
Office of the High Representative in Bosnia, 253
Organization for Security and Co-operation in Europe (OSCE), 249, 253, 256, 260
Plavšić, Biljana (former President of Republika Srpska), 253
political elites, 247
political will in, 257
rape in, 249
reconciliation in, 13, 490
reparations in, 13, 257–60, 267
Republika Srpska, 248, 253, 255, 257, 266
Research and Documentation Center in Sarajevo, 264
Rome Agreement, 254
rule of law in, 254, 256, 260, 262
secret police in, 260
Socialist Federal Republic of Yugoslavia (SFRY), 245, 247
torture in, 249
transitional justice in, 245–46, 249–52, 256, 258–63, 265–66
truth and reconciliation commission (TRC), 257–58, 263, 267
truth commissions in, 252, 256–58, 263
truth-telling in, 257–58
Tudjman, Franjo (Croatian President), 248
UN High Commissioner for Refugees, 249
United Nations Development Programme (UNDP), 255
United States Institute for Peace, 258
UN Mission in Bosnia and Herzegovina, 248
UN Security Council Resolution 1503, 251
UN Security Council Resolutions 808 and 827, 251
victim intimidation and threats, 256
violence between three ethnicities (Bosniaks, Croats and Serbs), 246
war, immediate effects of, 249–50
war crimes, 13, 246, 249, 251–66
war crimes cases, 254–56, 262
War Crimes Chamber, 17n8, 254
Brazil
accountability, assessment of failed, 100–106
accountability mechanisms in, 101–2, 104–5
American Convention on Human Rights, violation of, 91, 99–100, 106, 481n13
amnesty in, 87, 90–91, 93, 95–100, 104, 106, 475
Brazil (cont.)

Amnesty Law (1979), 90–91, 93, 95–100, 104, 106, 108
anti-Communist dictatorship, 89
arbitrary executions in, 107
archives in, 97–98, 100
authoritarian-type abuses and impunity, 106–8
Branco, Humberto de Alencar Castelo (dictator), 87
Brasil: Nunca Mais project, 88, 92–93
Brazilian Amnesty Committees, 90
Brazilian Bar Association, 98
civil trial in São Paulo, 94–95
Collor de Mello, Fernando, 486
Costa e Silva, Artur da, 87–88
criminal justice system, 87, 89
Decree-Law 1.001 (1969), 89
de-licensing, 102–3
democracy, thin support for, 108–9
democracy and human rights practices, 33
democratic rule and relatively few victims of state-sponsored violence, 11
democratization in, 6, 98, 101, 103
dictatorship, military, 11, 86–98, 100, 105–9, 475–76
dictatorship’s laws and policies, 90
enforced disappearance, 88
extra-judicial executions in, 107
forced disappearances in, 88, 99
Guerrilha do Araguaia case, 99–100
homicides, 107, 109n1
human rights abuses in, 11, 86, 95, 102
human rights movement in, 105
human rights practices, deterioration in, 33
human rights trials in, 33, 35
Inter-American Court of Human Rights, 99
judiciary, 99, 102
Justiça Global, 108
Law 9.140, 91–92
liberalization and transition to democracy, 6
lustration in, 102
Médici, General Emílio Garrastazu, 88
memory sites, 102
military regime, 87, 89, 96, 99, 108
Movimento Democrático Brasileiro (MDB), 89
Operation Condor, 89, 95–96, 106
police killings, 107
policy of non-disclosure and sanctioned forgetting, 91
political elites in, 103
political imprisonment in, 90
presidential decree Ato Institucional 5 (AI-5), 87–88
public opposition to military dictatorship but tolerance of state-sponsored human rights abuses, 11
reconciliation in, 90, 98, 101
reparations in, 91, 95, 102, 108
rule of law in, 35, 105–6, 109, 476
Secretary for Human Rights, 107
secret police in, 91, 95, 97
secret police unit (Information Operations Detachment), 95
security forces tortured political detainees, 88
social ostracism in, 102–3
Special Commission on Political Deaths and Disappearances, 88, 92, 98, 108
summary execution in, 89, 99, 107–8
Supreme Court in, 97–98, 100, 475
Supreme Federal Tribunal, 91, 96, 98
Supreme Judicial Military Tribunal, 91
systematic torture, killing, disappearing, jailing, exiling, censoring and harassing of citizens, 88
torture in, 87–90, 92, 94–98, 104, 106–8
transitional justice in, 11, 98–99, 101–4, 475–76, 486
trials, did not hold, 33
truth commissions in, 92, 102
truth-telling in, 90
UN Special Rapporteur on extra-judicial, summary or arbitrary executions, 107
UN Special Rapporteur on Torture, 108
Bulgaria
abuse of power, 281
Access to Documents of the Former State Security Service Act (ADFSSSA), 289–90
Access to Information Programme (AIP), 290–92
Access to Public Information Act (APIA), 289, 291
accountability mechanisms in, 273
anti-communization, 285
anti-communization law, draft, 284
archives in, 282, 289, 291, 294
assassinations, 277–78, 292
bank collapse and loss of 3 billion lev, 282
Bulgarian Agrarian People’s Union, 274
Bulgarian Socialist Party (BSP), 287
Chernobyl accident, 277, 281
“Citizens for a Pure Parliament” initiative, 287
Communist Party, 274–78, 281, 284–86, 288
Communist Party Central Committee, 274–75
Communist period, 274
Communist regime, 14, 273–74, 276–77, 279, 283, 288, 290
Communist regime was criminal by law (2000), 287–88
Communist state secrets, 290
Communist system, 279
Communist totalitarian systems, 285
Constitution, 275–76
Constitutional Court, 284–86, 290
contract killings, 282
corruption, 282–83, 294
corruption and financial fraud, 283
council of Ministers, 290
crimes against humanity in, 279
crimes in Communist camps, 278–80
crimes in Lovech and Skravena camps, 279
criminal prosecutions, time limits for, 278
death sentences of the People’s Court, 277
dossier Committee, 286–87, 292–94
dossiers of State Security Service, 273, 277, 281–82, 286, 289, 294
elections, 286–87, 290, 293
European Anti-Fraud Office, 283
European Convention on Human Rights (ECHR), 275, 286, 288
European Court of Human Rights (ECtHR), 275
European Parliamentary elections, 287
First Optional Protocol to the ICCPR, 275
Gazdov, Nikolai, 279
Gogov, Peter, 279
Goranov, Cviatko, 279
Hristov, Hristo (journalist), 291–92
human rights abuses in, 278
human rights violations in, 273, 275, 288
International Covenant on Civil and Political Rights (ICCPR), 274–75
International Covenant on Economic, Social and Cultural Rights, 274
judicial prosecution of felonies in the Communist camps, 279–80
judicial review of lawfulness, 290
judiciary, 276–83, 294
justice for crimes committed in the Communist era, 277–78
kidnappings, 278
Kostov, Vladimir, 278, 285
Law on the Publicity of the Assets of High-Ranking Officials, 289
Lukanov, Andrei, 275, 295n5, 486
lustration in, 273, 284–87, 294
Markov, Georgi, 274, 278, 291
Military Prosecutor’s Office, 279
Moskwa (Moscow) Fund, 281
Movement for Rights and Freedoms, 284, 287
National Assembly, 288–89
National Intelligence Service (NIS), 292
National Movement for Stability and Progress, 287, 290
organized crime and failure of judicial system, 282
Panev Law, 284
Parliamentary Assembly of the Council of Europe (PACE), 285
political elites in, 277
political imprisonment in, 277
political trials, 277
political will in, 284, 294
property rights in, 275
Protection of Classified Information Act (PCIA), 290
Public Administration Act, 285–86
Public Prosecutor’s Office, 276–79, 281
Radio and Television Act, 285
restitution of property, 273, 275, 283–84
Rujgeva, Juliana, 279
rule of law in, 288
secret service in, 14, 273–74, 284–86, 289
Semerdjiev, General Atanas, 282
Serkedjieva, General Nanka, 282
Bulgaria (cont.)
Shindarov, Chavdar (Chief Sanitary Inspector), 281
Spasov, General Mirtcho, 279–80
State Security Service documents, 274, 277, 281–82, 284, 286, 288–93
statute of limitations, 277, 279–80
Stoichkov, Grigor (Deputy Prime Minister), 281
Supreme Administrative Court, 289–91
Supreme Court, 276–78, 280–82
Supreme Court of Cassation, 282
Supreme Judicial Council, 276
Todorov, General Vladimir, 282
torture in, 277, 280, 287–88
transitional justice in, 14, 273, 275, 277
Turkish name changes, forced, 278
Turkish origin, murder of citizens of, 278
Turkish origin, restitution of property to citizens of, 283
Union of Democratic Forces (UDF), 275, 284–85, 287
Union of the Free Democrats, 287
UN Universal Declaration of Human Rights, 279–80
Zhivkov, Todor, 275, 278–79, 281–82

Catholic Church
in Chile, 130–32
in Poland, 334, 336, 358n2
Chile
Amnesty Decree-Law, 117, 120–23, 128–29, 133–35, 139
amnesty in, 11, 117, 119–23, 128–29, 133–36, 139
armed forces education on human rights, 137
Association of Relatives of Executed Political Prisoners (AFEP), 132–33
Association of Relatives of the Detained-Disappeared, 127
Aylwin, President Patricio, 119–20, 122–23, 127–28, 133
Bachelet, President Michelle, 120, 127
Boeninger, Edgardo, 119, 121
Catholic Church, 130–32
Cheyre, General Juan Emilio (Commander-in-Chief of the Army), 125–26
Chilean Commission for Human Rights (CCHR), 131

Christian Churches Social Assistance Foundation (FASIC), 129, 131, 134
Commission for the Rights of Young People (CODEJU), 131
Communist Party, 124
Constitutional Court rulings, 12
Contreras, General Manuel (secret police), 89, 117, 129, 132, 134
Corporation for the Promotion and Defense of the Rights of the People (CODEPU), 131
corruption, 140
crimes against humanity in, 58, 134
criminal trials, side-stepped, 48
democratization in, 138, 450–51
dictatorship in, 66, 102, 117–18, 124–25, 136
domestic courts in, 8
domestic trials in, 3
executive levels sought limited criminal liability, 12
Frei, President Eduardo, 120, 128, 133
human rights abuses in, 117, 136, 489
human rights activists in, 116, 122, 124, 138
human rights advocacy, 130–33
human rights cases, options for, 136
human rights cases (1998–2008), indictments and convictions by Chilean court system, 134
human rights movement in, 130
Human Rights Observatory of the Universidad Diego Portales, 135
Human Rights Programme of the Interior Ministry, 132
human rights prosecutions in domestic courts, 8
human rights violations (HRVs), 116–19, 121, 123–33, 138–39
Inter-American Commission on Human Rights and, 3, 16n2
Inter-American Court of Human Rights, 99
judges, new generations of, 53
judicial politics, 133–35, 138–39
judicial punishment for HRVs, 64, 120–21
judicial trials against military officers for HRVs, 124
judiciary, 117, 128, 133, 450
Justice and Peace Law (2005), 12
Lagos, President Ricardo, 120, 125, 127, 130
Law Lords decision (U.K.), 54, 58, 489
Lustration in, 139
memorials and sites, 127
military coups in, 116, 120, 125, 127, 132, 137
military junta, 120
military regime, 117, 119, 123–24, 127–28, 130, 135, 139
Museum of Memory and Human Rights, 127
National Commission for Truth and Reconciliation Report (Rettig Report), 120, 123–24
National Commission on Political Imprisonment and Torture (Valech Commission), 120, 125–28
National Corporation for Reconciliation and Reconciliation, 126–27
National Human Rights Institute, 132
National Intelligence Service (DINA), 117, 134
paramilitary demobilization, 12
pardon, presidential, 123
Piñera, President Sebastián, 120
Pinochet, domestic prosecution of, 121, 130
political imprisonment in, 117, 119, 125
pro-justice environment after shift in balance of political power, 12
reconciliation in, 120, 123, 126–27, 466
Rodríguez, Judge Jaime, 128
secret police in, 89
shaming, public, 140
summary executions, 116
Supreme Court in, 128–29, 131, 133–34, 139, 233
torture in, 6, 116, 119–20, 124–27, 132, 450, 489
transitional justice in, 53, 121, 129, 133–35, 138, 140
truth commissions in, 30–31, 126, 138
US Senate investigation into Pinochet’s accounts in Riggs Bank, 120, 138–39
victims of atrocious crimes seek justice and sustainable peace, 12
Christopher, Warren (US Secretary of State), 356
Coalition for Fair Management, 287
Cold War, end of the, 7
Cold War ideological barriers, 470
“collective identities” perspective, 448–49
Colombia
Alejo del Río, General Rito, 155
amnesty in, 153–54, 157
archives in, 155, 165n10
assassinations, 146–47, 151, 156
Bill for Penal Alternatives, 148–49, 151, 154
Bill on Victims and Land Restitution, 144–45, 164–65
Castillo Gil brothers, 146–47
Colombian Commission of Jurists, 149, 159
Constitutional Court, 143, 149–51, 153, 162, 169
Constitutional Court rulings of 2006, 143–44
Constitutional Tribunal, 51
corruption, 144–45
counteragrarian reform, 147
crimes against humanity in, 51, 149–50, 154, 156, 160, 163
criminal justice, 145, 150, 162–63
Decree 1194/1989, 147, 169
Decree 3398/1965, 146, 169
demobilization of combatants, 12, 143–46, 150–51, 157–58, 163
demobilization of right-wing paramilitaries, 12
democratization in, 447
depositions revealed 27,000 crimes and 40,000 victims, 160
drug-traffickers, 146
drug-trafficking, 12, 144, 146–47, 151–52, 163–64
extra-judicial executions of civilians by the state armed forces, 145, 152, 156
Falsos Positivos, 145, 147
Fuerzas Armadas Revolucionarias de Colombia (FARC), 143, 146, 148–49, 151–52, 161, 163
García, Jos. Ever Veloza, 155
gross human rights violations in, 150
Colombia (cont.)
- Historical Memory Group, 145, 150, 154, 157
- homicides, 144, 148
- human rights abuses in, 158
- human rights activists in, 143, 161
- human rights violations in, 150, 152, 157, 164
- Inter-American Commission on Human Rights and, 149
- internal wars in, savage, 7
- International Criminal Court (ICC), 149
- judicial hearings, 150, 153
- judicial investigation of ruling elites, 148
- judicialization of politics, 162
- judicial punishment, 155
- judicial transformation, 151
- judicial truth, 154–56, 160
- judiciary, 162–63
- Justice and Peace Law, 143–64
- justice and politics, 161–63
- kidnappings, 144, 146, 148, 151, 161
- Law 48/1968, 146, 168
- Law 782/2002, 150–51
- massacres in, 147, 157
- mass graves, 144, 155
- Medellín cartel, 147
- National Commission for Reparations and Reconciliation (CNRR), 145, 150, 154, 157–58
- paramilitaries, right-wing, 12, 144–64
- Parapolítica, 145, 148, 152, 162
- pardon, presidential, 144, 149–50, 154
- political elites in, 148–49
- Ralito Agreement, 148
- reconciliation in, 145, 149, 153–55
- reparations in, 145, 149–50, 152–53, 160
- restitution measures in, 144–45, 164–65
- Santa Fe de Ralito Agreement, 148
- Supreme Court in, 154, 162
- Téllez, Edwar Cobo, 155
- torture in, 157
- transitional justice in, 12, 51, 143–45, 148–50, 153, 158, 162–64
- transitional justice process, sui generis, 12
- Trujillo massacre, 157
- truth commissions in, 154–58, 160, 164
- truth-telling in, 146
- UN High Commissioner for Refugees, 160
- United Self-Defence Forces of Colombia (AUC), 147
- Uribe, President Alvaro, 144, 148, 150, 152, 159, 161–64
- war crimes in, 149–50, 154, 156–57
- commemorative holiday in El Salvador, 185
- commemorative monuments in Argentina, 71, 77, 80
- communal law, local, 28
- Communist human rights offenders, 366
- Communist Party
  - in Bulgaria, 274–78, 281, 284–86, 288
  - in Chile, 124
  - in Poland, 334, 336–37, 345, 347
  - in Romania, 363–65, 368, 381
- Communist regime
  - in Bulgaria, 14, 273–74, 276–77, 279, 283, 288, 290
  - in Poland, 335, 357
  - in Romania, 363, 365, 367
  - in Slovenia, 41, 420, 424, 428, 431
- Communist system
  - in Bulgaria, 279
  - in East Germany, 298, 302–3
- Communist totalitarian systems
  - in Bulgaria, 285
  - in Central and East European countries, 8
  - in Romania, 366–67
  - in Slovenia, 423–24
- CONADEP. See National Commission on the Disappeared (Comisión Nacional sobre la Desaparición de Personas) (CONADEP) [Argentina]
- Conference on Security and Co-operation in Europe
  - Helsinki Final Act (1975), 3–5
- Constitutional Tribunal
  - in Colombia, 51
  - in Peru, 226, 232
  - in Poland, 354
- “contagion” effect on other countries, 45
- Convention against Torture, 205
- Convention on the Prevention and Punishment of Genocide, 205
- corruption
  - in Bosnia and Herzegovina, 253–54
  - in Bulgaria, 282–83, 294
  - in Chile, 140
  - in Colombia, 144–45
  - in East Germany, 303, 311, 318, 320–21, 323–26
  - in Peru, 224–27, 233–35
in Poland, 336–37
in Romania, 371, 487
in Slovakia, 397–98
transitional legal systems and, 493
Council of Europe
Resolution 1096 and dismantling of
former Communist totalitarian
systems, 8, 285, 424
crimes against humanity
in Bolivia, 486
in Bosnia and Herzegovina, 266
in Bulgaria, 279
in Chile, 58, 134
in Colombia, 51, 149–50, 154, 156, 160,
163
in East Germany, 310
in El Salvador, 192
in Guatemala, 199, 202–3, 205, 208,
213–14, 217
jurisprudence and case law by regional
human rights courts and
international tribunals on, 467
in Latin America, 45, 51
in Peru, 228
prevention of, 45
prohibitions on, 22
radical repercussions for, 58
in Slovenia, 423
criminal justice. See also international
criminal justice
in Argentina, 52
Bosnia and Herzegovina, 253–57
in Brazil, 87, 89
in Colombia, 145, 150, 162–63
domestic vs. international tribunals or
ICC, 25
East Germany, 301, 318–19, 322–25
evolution of formal justice mechanisms,
45
in Guatemala, 204–10
human rights crimes and escalation in
number of domestic criminal justice
cases, 48
in Latin America, 474
protection of citizens’ rights, 44
in Slovakia, 401–3, 410
in Spain, 50
truth-telling exercises and, 47
Czechoslovak Socialist Republic, 391
Darfur Peace Agreement, 158
de-Ba’athification, 337, 443
de-Communization
in Poland, 337–38
in Romania, 366, 372, 375
in Slovakia, 399
de-licensing, 102–3
democratic norms, 337, 452
democratization
accountability for human rights and, 468
accountability for past human rights
violations and, 473
in Argentina, 6, 48
authoritarianism and human rights,
changing international attitudes
towards, 6
from authoritarian or Communist rule,
472
in Bosnia and Herzegovina (BiH), 245–46
in Brazil, 6, 98, 101, 103
in Chile, 138, 450–51
in Colombia, 447
communicative action theory of, 453
control, conditionality, contagion and
consent, 470
democratic elites and, 460
democratic leaders and, 472
difficulties and pitfalls of, 447
in Eastern Europe, 463
in El Salvador, 171–72, 174, 190
experiences vs. the template of Western
democracies, 448
Habermasian paradigm and, 455
human rights and the emerging rule of
law agenda, 56
human rights foreign policies and, 473
human rights issues and the human rights
movement, 11
implosion of the Soviet Union provided
impetus for, 6
inter-American system of rights
protection and, 53
in Iraq, 447
in Latin America, 463
longer-term dynamics of, 451
in Peru, 223
politics of, 441
post-Cold War and, 58, 447
post-Communism and, 42
rights protection and, inter-American
system of, 53
in Romania, 366, 372, 380
“third wave” of, 36n8, 42, 48, 53, 58, 101,
245
democratization (cont.)
trade-offs between transitional justice, human rights and, 477
transitional justice and, 16, 459, 463–64, 466, 468, 472, 489, 494
de-Nazification
in Poland, 337
de-Stalinization, 391
dictators/dictatorship
in Argentina, 54, 65, 68, 74, 77
in Brazil, 11, 86–98, 100, 105–9, 475–76
in Chile, 66, 102, 117–18, 124–25, 136
in East Germany, 299, 307–8, 311, 316–17
in Peru, 54, 224, 234
in Romania, 365, 373, 381, 383, 491
in Spain, 50
threats of prosecution, 464–65
transitional justice and, 4
transition to democracy from, 487
US senators and right-wing human rights, 5
domestic courts
in Argentina, 65
in Bosnia and Herzegovina, 8, 262
in Chile, 8
European Court of Justice and ad hoc Tribunals, 25
human rights trials in, 10
individual criminal accountability in, 25
judicial decision-making, changing patterns of, 54
Justice Cascade started in, 23
domestic trials. See also foreign trials;
human rights trials; international trials
in Argentina, 48, 76
in Chile, 3
regional distribution of, 26
transitional justice mechanism and, 23
drug trafficking
in Argentina, 52
in Colombia, 12, 144, 146–47, 151–52, 163–64
in Latin America, 470
in Peru, 225

Eastern Europe
authoritarianism and Communism, oppression from, 4
democratic level, 32
democratization in, 463
extra-judicial executions in, 442
international community in, 366
lustration in, 442–43, 494
restitution measures in, 15, 494
secret police in, 494
statute of limitations in, 491
torture in, 457
transitional justice in, 8–9, 14
transition from Communism to democracy, 13
East Germany
abuse of power, 303, 311, 318, 320–21, 323–26
accountability widened by interaction of local, regional and international arenas, 9
accusation of “victor’s justice,” 322–23
acquittals and convictions, 326
amnesty in, 309–10, 322–23
archives in, 14, 304–5
Basic Law, 299, 306, 309, 327n4
border guards shot East German citizens, 312, 315, 321–22
Brandt, Willy (West German Chancellor), 299
Bundesgesetzblatt I (1992), 301
Bundesgesetzblatt I (1994), 301
case law, 314–15
Cold War, 298
Communist system, 298, 302–3
convictions dealt with abuse of power, corruption, and electoral fraud, 318, 320–21, 324
corruption, 303, 311, 318, 320–21, 323–26
crimes, weaknesses in dealing with, 322
crimes against humanity in, 310
criminal justice, 301, 318–19, 322–25
criminal prosecution, basic principles of, 318–19
dictatorship, SED, 299, 307–8, 311, 316–17
doping of German athletes, 313
East German civil service, “purging” of the, 14
East German Constitution, 302, 315
East German criminal law and reversal of criminal convictions, 300
East German Judges Law, 306
East German judicial system and East German criminal law, 320
East German law, human rights-friendly interpretation of, 315–16
elections, 299, 311–12, 321
electoral fraud, 311–12, 318, 320–21, 323–26
Enquete Commission, 14, 307–9
European Court of Human Rights and, 316
European Human Rights Convention’s ban on retroactive punishment, 316
extra-judicial measures and arrest warrants, 301
Federal Civil Service Law, 306
Federal Republic of Germany (FRG), 298
Federal Supreme Court, 315–17, 322
Forum for Investigation and Renewal, 310–11
GDR state criminality, prosecution of, 299
general amnesty for East German crimes, 309–10
genocide in, 319
German Communist Party (KPD), 298
German Democratic Republic (GDR), 298–99, 311–13, 319–23
Herrenchiemsee Conference (1948), 299
Honecker, Erich (SED General Secretary), 299
human rights abuses in, 492
human rights movement in, 309, 321, 323
human rights violations in, 318–20
indictments/applications for penal order, 324
international criminal law and, 322
investigations concluded and leading to indictment, 324
judicial system, 320, 322–23
judiciary, 298, 315, 319–20, 322–23
justice mechanisms and East German state criminality, 14
kidnappings, 313
killings, government-instigated, 317
Ministry for State Security (Stasi) files, 304–5
Nazi crimes, 310, 317
Nuremberg principles, 317
offences, the number and type of, 325
Party of Democratic Socialism (PDS), 309
past wrongs, acknowledgement of, 320–22
political imprisonment in, 300, 324, 326
political will in, 320
Property Law, 305–6
prosecutions, assessment of, 319–23
prosecutions, conclusions from, 325
prosecutions, legal framework of, 313–14
Radbruch formula, 315–17
reconciliation in, 308–9, 311
rehabilitation and restitution measures for victims of Socialist Unity Party of Germany (SED), 14
Rehabilitation Laws, 300–302
reparations in, 300–302
restitution laws, 303
restitution of property, 14, 300, 302–4
rule of law in, 300–301, 307, 312, 314, 316
Saxon Civil Service Law, 306
secret service (the “Stasi”), 14, 305, 492
sentences by type of offence and type of sanction, 326
Social Democratic Party of Germany (SPD), 298
Socialist Unity Party of Germany (SED), 14, 298–301, 304, 306–13
Stasi Files Law, 305–6
state criminality, 311–13
statute of limitations in, 322
Supreme Court in, 315–18, 322
transitional justice in, 9, 14, 299–311, 323
Trusteeship Agency, 302–3
truth commissions in, 308–10, 380
unemployment after reunification, 302
West German criminal law, 311, 313
ECHR. See European Convention on Human Rights (ECHR)
elections
in Bosnia and Herzegovina, 246, 260
in Bulgaria, 286–87, 290, 293
in East Germany, 299, 311–12, 321
in Guatemala, 197, 203, 208, 210
in Peru, 223, 225–26, 238
in Poland, 333, 338, 345, 349–51, 355
in Romania, 364–69
in Slovakia, 396–97, 399, 403, 407
in Slovenia, 428
electoral fraud
in East Germany, 311–12, 318, 320–21, 323–26
in El Salvador, 171
in Guatemala, 199
elites. See political elites
El Salvador

Ad Hoc Commission, 175–78, 189–90
Agreement on Constitutional Reform (Mexico Agreement), 174, 183
Agreement on Human Rights, 174
American Convention on Human Rights, 188
amnesty in, 186–88, 191–92
Amnesty Law, 187–88, 192
archives in, 181
assassinations, 191–92
Christian Democrat Party (PDC), 172
commemorative holiday, 185
Commission for the Consolidation of Peace (COPAZ), 175
crimes against humanity in, 192
democratization in, 171–72, 174, 190
electoral fraud, 171
extra-judicial executions in, 192
Final Peace Accords, Mexico, 174
Frente Farabundo Martí para la Liberación Nacional (FMLN), 172–75, 179, 181, 184, 192
General Agenda and Timetable for the Comprehensive Negotiation Process, 174
Geneva Agreement to initiate UN-mediated negotiations, 174
human rights abuses in, 178
human rights activists in, 192
human rights violations in, 173, 177, 180, 183–84, 186, 189, 191
Inter-American Commission on Human Rights, 16n2, 187
Inter-American Court of Human Rights, 99, 180
internal armed conflicts, 170, 173
International Center for Transitional Justice, 170
judicial reform, 185
judicial system, 175
judiciary, 175, 179
kidnappings, 191–92
Law of General Amnesty for the Consolidation of Peace, 187
Law of National Reconciliation, 187
Martínez, General Maximiliano Hernández, 171
military regime, 171
National Civil Police, 175–77, 185
National Search Commission for Disappeared Children, 191

New York Act I, 174
New York Act II, 174
New York Agreement, 174, 189
Office of the National Counsel for the Defence of Human Rights, 185
Peace Accords of Chapultepec, 170, 172, 174–76, 178, 181, 183–85, 187, 190
peace negotiations, 172–74
reconciliation in, 179, 185, 187–89, 191
reparations in, 170, 177, 196
rule of law in, 178
Salvadorean civil war, 12-year, 172
security sector reform, 176–78
security sector reform and transitional justice impact on democracy-building, 12
summary execution in, 173
Supreme Court in, 175, 184–87
Supreme Electoral Tribunal, 175
time-frames to fulfil commitments, 175
torture in, 192
transitional justice in, 9, 12, 170–71, 176, 178–93
transition from war to peace; militarism to demilitarization; and authoritarism to democracy, 12
trials for military officers, 192–93
Truth Commission, 172, 175–86, 193
truth commissions in, 170, 175, 178–84, 186–89, 191, 193
UN Observer Mission in El Salvador (ONUSAL), 185
violence (1980-1992), periods of, 173
equality before the law principle, 44
equality of citizenship rights, 453
European Anti-Fraud Office, 283
European Convention on Human Rights (ECHR), 3
in Bulgaria, 275, 286, 288
European Court of Human Rights in Bulgaria, 275
in East Germany, 316
human rights treaties and state accountability, 21
in Slovakia, 412n9
European Court of Justice, 25
European Union
conditionality policies for 10 Central and East European countries, 6
Parliamentary Assembly Resolution 109, 424
Parliamentary elections, 287
executions, arbitrary. See arbitrary executions
extra-judicial executions
in Bolivia, 486
in Brazil, 107
in Colombia, 145, 152, 156
in Eastern Europe, 442
in El Salvador, 192
in Guatemala, 209
in Peru, 238
in post-war Europe, 442
forced disappearances
in Argentina, 52, 72, 80
in Brazil, 88, 99
in Guatemala, 199, 202, 205–6, 213–14
in Peru, 227, 229, 238
in Spain, 474
foreign trials, 23, 27. See also domestic trials; human rights trials; international trials
France, 20
French Revolution, 4
gacaca courts in Rwanda, 28
Geneva Conventions, 133, 187
genocide
in Argentina, 52
in Bosnia and Herzegovina, 246, 249, 251, 260, 262, 264, 266
in East Germany, 319
in Guatemala, 199, 202, 205, 207–9, 211, 214
prohibitions on, 22
in Romania, 373, 375, 381
in Slovenia, 423
Genocide and Torture conventions, 54
geopolitical cataclysms, 4
German Constitutional Court’s “proportionality test,” 150
Ghali-Boutros, Boutros (United Nations Secretary-General), 189
good governance agenda, 44
Greece, 3, 468–69
gross human rights violations. See also human rights abuses
Amnesty International, 480n12
in Colombia, 150
legal proceedings on, 486
in Peru, 228
in Romania, 383
Guatemala
accountability for human rights violations and developments in democratic processes and institutions, 13
accountability mechanisms in, 196
Agreement on the Establishment of the Commission for the Historical Clarification of Human Rights Violations and Acts of Violence, 201
Agreement on the Strengthening of Civilian Power and the Role of the Armed Forces in a Democratic Society, 202
American Convention on Human Rights, violation of, 207
amnesty in, 202, 205
apology by President Bill Clinton, 7
arbitrary executions in, 199, 213
archives in, 7, 210–11
Army, 197, 199, 202–3, 205, 207–10, 215
Catholic Church, 211
Christian Democrats, 197
Commission for Historical Clarification (CEH), 198–99, 203, 206–7, 211, 213
Comprehensive Agreement on Human Rights, 201, 217
Constitutional Court, 205, 208–9
Convention against Torture, 205
Convention on the Prevention and Punishment of Genocide, 205
crimes against humanity in, 199, 202–3, 205, 208, 213–14, 217
criminal justice, 204–10
elections, free, 197, 203, 208, 210
electoral fraud, 199
exhumation and forensic work, 209
extra-judicial executions in, 209
forced disappearances in, 199, 202, 205–6, 213–14
Framework Agreement for the Resumption of the Negotiating Process, 216
García, Romeo Lucas, 208
genocide in, 199, 202, 205, 207–9, 211, 214
Group of Friends of the Guatemalan Peace Process, 216
Guatemala: Memory of Silence, Report of the Commission for Historical Clarification, 198
Guatemalan National Revolutionary Unity (URNG), 197, 216
Guatemala (cont.)

Historical Archive of the National Police, 210–11
human rights violations in, 196, 198–201, 203–4, 210, 212, 215, 218
insurgent movement, 198
Inter-American Commission on Human Rights and, 207
Inter-American Court of Human Rights, 99, 207
inter-American human rights system, 206
internal armed conflict, 36 years of, 196
internal wars in, savage, 7
International Commission Against Impunity in Guatemala (CICIG), 7, 13, 200
international community in, 216–18
judicial system, 212
kidnappings, 211
Law of National Reconciliation, 202, 205, 214
legal cases related to the conflict, 209
massacres in, 147, 157, 199, 205–9, 211
military archives, 210
military coups in, 199
murder of Bishop Gerardi, 206
murder of Myrna Mack (anthropologist), 206
National Civil Police, 210, 214, 216
National Police, archives of, 7
National Reparations Programme, 212, 219
National Security Doctrine, 198, 213
Office of the Human Rights Ombudsman, 206, 209
Office of the Public Prosecutor, 204–6
Playa Grande massacres, 207
political elites in, 198, 215–16
political imprisonment in, 199
political will in, 202, 214
rape in, 199
reconciliation in, 201–2, 204–5, 211–12, 214, 218
reparations in, 196, 200–202, 212–13, 219
repression of all opponents of government and the elimination of all political participation, 198
restitution measures in, 212
Río Negro massacre, 206–7
Santiago Pedraz (Spanish judge), 7, 207–8
security sector reform, 213–16
torture in, 199, 202, 205–7, 209, 211, 214
transitional justice in, 7, 13, 196, 199–204, 206, 210, 212, 214–18, 476
transition from authoritarian rule to democracy; armed conflict to peace, 12
Truth Commission reports, two groundbreaking, 7
UN Verification Mission in Guatemala (MINUGUA), 205, 216
violence, systemic, 200
Xamán massacre, 207
Guyana, 33

Habermas, Jürgen, 442, 452–55, 458
Haiti, 16n2, 33
Hannah Arendt Center, 287
Helsinki Final Act (1975), 3–5
Holocaust. See also Nazi crimes; Nuremberg trials
Holocaust, the, 20–21, 366, 440, 451
human rights groups, 5, 7, 30, 93, 188
NGOs, 21, 74
norms, 6, 46, 59, 445, 473
treaties, 21, 397, 478
human rights abuses. See also gross human rights violations
in Argentina, 30
in Brazil, 11, 86, 95, 102
in Bulgaria, 278
in Chile, 117, 136, 489
in Colombia, 158
domestic trials for individual criminal accountability for, 22–23
in East Germany, 492
in El Salvador, 178
legacy of widespread, 439
in Peru, 222–24, 229, 233, 238
in Poland, 334
reoccurrence of, in the absence of transitional justice efforts and investigations, 477
in Romania, 367, 373, 381–83
state and non-state institutions document and publicize, 471
state efforts to address past, spike in, 23
state-sponsored, 11
time required for proper and impartial investigation, 491
transitional justice to address legacies of past, 464–65
human rights activists
INDEX 511

in Argentina, 11, 30
in Chile, 116, 122, 124, 138
in Colombia, 143, 161
comparison with the ideal, 29
in El Salvador, 192
justice sector reform and the cause of human rights, 43
in Peru, 239
Human Rights Institute at Jos. Simeón Cañas” Central American University, 188
human rights movement
in Argentina, 11, 30, 71, 79
in Brazil, 105
in Chile, 130
in East Germany, 309, 321, 323
Helsinki Final Act of the Conference on Security and Co-operation in Europe and, 3
“name and shame strategy,” 21
rule of law assistance and, 34
Warsaw Pact countries, targeting, 3
human rights trials. See also domestic trials; foreign trials; international trials
amnesty vs., 34
in Argentina, 27, 32
in Bolivia, 27
in Brazil, 33, 35
comparison with the ideal, 29
culturally similar countries in region used, 27
empirical comparisons of effectiveness of, 31
in Guyana, 33
in Haiti, 33
human rights change, contribute to positive, 36
improvement of human rights situations after trials, 33
judicial reform and promotion of the rule of law, 34
in Latin America, 27, 32–35
in Mexico, 33
rule of law and, 34–35
transitional countries and, 23, 45
in Uruguay, 27
human rights violations
amnesty for, 34
in Argentina, 32, 64–72, 75–80, 439
in Bosnia and Herzegovina, 249
in Brazil, 86, 88, 95, 99, 102, 108, 476
in Bulgaria, 273, 275, 288
in Chile, 116–19, 121, 123–33, 138–39
in Colombia, 150, 152, 157, 164
complementary judicial, quasi-judicial and nonjudicial mechanisms for, 467
“concrete actions carried out by concrete individuals,” 430
democratic consolidation and accountability for, 471
democratic rule and human rights expectations, 473
in Eastern Europe, Latin America and Africa, 471
in East Germany, 318–20
in El Salvador, 173, 177, 180, 183–84, 186, 189, 191
foreign trials (101) held in domestic courts of European countries for violations committed largely in the Americas, 27
in Guatemala, 196, 198–201, 203–4, 210, 212, 215, 218
human rights trials and, 28, 445
human rights trials in Latin America, 32–35
increasing accountability for, globally, 23
International Criminal Court and, 54
Justice Cascade and norms of individual accountability for, 444
legal proceedings need to be “de-emotionalized,” 486
Năstase, Adrian (ex-Prime Minister of Romania), 487
no single mechanism can reduce, 477
in Peru, 222, 226–29, 233, 235, 237, 239, 476
reconciliation and truth commissions are a rejection of justice for, 466
in Romania, 372
rule of law in Latin America and, 476
rule of law systems and, 34
state accountability for, 22
state and non-state institutions documented and publicized, 471
trade-offs between democratization and human rights and the patchy record of accountability for, 473
transitional justice and judicial investigations into, 55
transitional justice and threat of prosecution of human rights offenders may increase risks of, 464
transitional justice institutions reduce, 28
human rights violations (cont.)
  transitional justice mechanisms to address, 22
  transnational justice acts as a deterrent for, 445
  trials for individual criminal responsibility for, 23
  Tymoshenko, Yulia (ex-Prime Minister of Ukraine), 486–87
Human Rights Watch, 232
Huntington, Samuel, 101

IACHR. See Inter-American Commission on Human Rights (IACHR)
ICC. See International Criminal Court (ICC)
ICCPR. See International Covenant on Civil and Political Rights (ICCPR)
ICJ. See International Court of Justice (ICJ)
ICRG. See International Country Risk Guide (ICRG)
ICTR. See International Criminal Tribunal for Rwanda (ICTR)
ICTY. See International Criminal Tribunal for the former Yugoslavia (ICTY)
Ignatieff, Michael, 441
Inter-American Commission on Human Rights (IACHR)
  Argentina and, 53, 75
  Chile and, 3, 16n2
  Colombia and, 149
  El Salvador and, 16n2, 187
  Guatemala and, 207
  Haiti and, 16n2
  Peru and, 226
Inter-American Court of Human Rights about, 53, 475
  Argentina and, 71–72
  Brazil and, 99
  Chile and, 99
  El Salvador and, 99, 180
  Guatemala and, 99, 207
  Peru and, 54, 99, 226
  pro-human rights jurisprudence in, 53
  Suriname and, 99
International Center for Transitional Justice, 170, 222, 256, 440, 471
International Committee of the Red Cross, 263
international community
  in Bosnia and Herzegovina, 248, 250–51, 254, 261–62, 266–67
  in East European countries, 366
  in Guatemala, 216–18
  human rights treaties and the state accountability, 21
  in Peru, 225
  in Poland, 357
  in Romania, 366, 381
International Court of Justice (ICJ), 260
International Covenant on Civil and Political Rights (ICCPR), 54, 274–75
International Covenant on Economic, Social and Cultural Rights, 274
International Criminal Court (ICC)
  Bosnia and Herzegovina (BiH), 265
  Colombia and, 149
  criticized for being too expensive, 492
  in The Hague, 251
  human rights violations, ICC to reinforce and guide domestic efforts at accountability for past, 8
  Rome Statute and, 6
  Rome Treaty established, 54, 467
international criminal justice. See also criminal justice
  in Bosnia and Herzegovina, 250–253, 261, 264
  transitional justice and, 9
international criminal law
  in Bosnia and Herzegovina, 252–53, 265
in East Germany, 322
International Criminal Tribunal for Rwanda (ICTR), 23, 251, 492
International Criminal Tribunal for the former Yugoslavia (ICTY), 7, 23–24, 102, 249, 492
International Day of Human Rights, 116
International impunity movement, 251
International Journal of Transitional Justice, 440
international trials. See also domestic trials; foreign trials; human rights trials
courts in Cambodia, Sierra Leone and Timor-Leste, 23
human rights violations, global phenomenon of increased accountability for, 23
International Criminal Tribunal for Rwanda (ICTR), 23, 251, 492
International Criminal Tribunal for the former Yugoslavia (ICTY), 7, 23–24, 102, 249–55, 257–66, 492
international politics, 466–67
transitional justice mechanism and, 23
International Union of Property Owners, 356
Iraq, 337, 443
“irruptions” of memory perspective, 46, 122, 439, 444, 449–51, 457–58, 484
judges, four key influences on, 56–57
judicial accountability
  Bosnia and Herzegovina (BiH), 13, 246
  in Latin America, 41–42
judicialization of politics, 447
judicial system
  in Bosnia and Herzegovina, 250, 253–55, 259, 264, 266
  in Bulgaria, 273, 282
  in East Germany, 320, 322–23
  in El Salvador, 175
  in Guatemala, 212
  in Peru, 229
  in Slovenia, 430
  in Spain, 474
  universal, 246
judiciary
  in Argentina, 77
  in Bosnia and Herzegovina, 255–56, 260, 266
  in Brazil, 99, 102
  in Bulgaria, 276–83, 294
  in Chile, 45, 117, 128–29, 133
  in Colombia, 162–63
  in East Germany, 298, 315, 319–20, 322–23
  in El Salvador, 175, 179
  four main tasks of, 43–44
  in Guatemala, 212
judicial dealing with past human rights crimes, 446
in Peru, 229, 232, 237–38
“political theatre” to educate people about the value of the, 446
in Romania, 368, 370, 372, 376, 383
in Slovakia, 398, 410
in Slovenia, 423, 425, 428, 430
Justiça Global, 108
Justice Cascade, 19, 22, 444, 467
  at domestic, foreign or transnational levels, 22–26, 45–46
justice sector reform
  accountability mechanisms, effectiveness of, 41
  cost-effectiveness improved with strengthening of domestic, 493
  evolution of transitional justice processes and, 46
  human rights, furthers the cause of, 43
  in Latin America, 50–53
  rule of law and, 22, 50, 59
kidnappings
  in Argentina, 67–68, 71, 73–74, 78, 80
  in Bulgaria, 278
  in Colombia, 144, 146, 148, 151, 161
  in East Germany, 313
  in El Salvador, 191–92
  in Guatemala, 211
  in Peru, 229, 233
  in Slovakia, 397, 403
Latin America
  authoritarianism and Communism, oppression from, 4
  crimes against humanity in, 45, 51
  criminal justice in, 474
  democratization in, 463
  drug violence in, 470
  Figliolia, Luisanna (Italian judge), 95
human rights trials and truth commissions, early innovators of, 32
human rights trials in, 27, 32–35
judges and interpretations of judicial norms at an international level, 10
judicial accountability in, 41–42
justice sector reform in, 50–53
military coups in, 32
Nunca Mas! (“Never Again”) initiatives by citizens, 489
rule of law depends on judicial reform, 446
rule of law in, 10, 34–35, 41
third wave of democratization in, 48
torture in, 489
transitional justice in, 9, 41, 47, 49, 58
transition from military rule to democracy; and armed conflict to peace, 13
truth commissions in, 32–33
Law Lords decision (UK), 54, 58, 489
Law of Historical Memory, 49–50, 474
Ley de Caducidad (Uruguay immunity law), 469
“lifeworlds,” 454, 458
lustration
in Argentina, 71, 76–78, 80
in Bosnia and Herzegovina, 260
in Brazil, 102
in Bulgaria, 273, 284–87, 294
in Chile, 139
defined, 14, 102n
in Eastern Europe, 442–43, 494
empirical comparisons of, 31
for human rights violations, justice vs., 17n10
justice mechanisms for past human rights violations, 22
in Peru, 239n1
in Poland, 333, 337–51, 355, 358
in Romania, 363, 367–68, 370–72, 382–84
Saddam Hussein, kangaroo court trial of, 446
as tool for political elites to manipulate the democratic process, 14
massacres
in Bosnia and Herzegovina, 257–58, 262
in Colombia, 147, 157
in Guatemala, 147, 157, 199, 205–9, 211
in Peru, 227, 233
mass graves
in Colombia, 144, 155
in Slovenia, 419–20, 422, 424–25
mass killings
in Guatemala, 207
in Slovenia, 421–23, 428
memory sites, 22, 102, 440
Mexico
Mexican Supreme Court and extradition of Ricardo Miguel Cavallo (Argentine naval officer), 54
Political Terror Scale, 33
Supreme Court in, 51–52, 54
transitional justice in, 51–52
military coups
in Argentina, 30, 65, 488
in Chile, 116, 120, 125, 127, 132, 137
in Guatemala, 199
in Latin America, 32
military junta
in Argentina, 66–67, 70, 73, 82n4, 439
in Chile, 120
military regime
in Argentina, 65, 83n22
in Brazil, 87, 89, 96, 99, 108
in Chile, 117, 119, 123–24, 127–28, 130, 135, 139
in El Salvador, 171
National Commission on the Disappeared (Comisión Nacional sobre la Desaparición de Personas) (CONADEP) [Argentina], 47, 66–67, 76, 78, 466
Nazi crimes, 310, 317, 356, 366, 401. See also Holocaust
norm bandwagon, 19, 44
norms cascading view, 447
norms diffusion model, 445
Nuremberg trials, 156, 373, 454. See also Holocaust
oral history projects, 22
Organization for Security and Co-operation in Europe (OSCE), 249, 253, 256, 260
Oxford Research International (ORI), 263
pardon, presidential
in Argentina, 47, 53, 69–73, 75, 77–78, 80
in Chile, 123
in Colombia, 144, 149–50, 154
Parliamentary Assembly of the Council of Europe (PACE), 285
Peru
American Convention on Human Rights, 238, 480n8
amnesty in, 54, 232, 237
Anti-terrorist Court, 232
arms trafficking, 225
Army Intelligence Service, 233
authoritarianism, internal war that led to, 223–24
authoritarian regime collapse and transition to democracy, 224–27
burials sites (4,600), 228
Commissioners for Peace, 235
Commission for the Comprehensive Restructuring of the Armed Forces, 236
Commission for the Restructuring of the National Police, 236
Comprehensive Plan for Reparations, 230
Constitutional Court, 224
Constitutional Tribunal, 226, 232
Corazao, Valentín Paniagua, 226
corruption, 224–27, 233–35
crimes against humanity in, 228
democratization in, 223
dictator/dictatorship in, 54, 224, 234
drug trade and money laundering, 225
elections, 223, 225–26, 238
extra-judicial executions in, 238
forced disappearances in, 227, 229, 238
Fujimori, Alberto (President), 13, 54, 222, 224–26, 232–34, 237–39, 486
gross human rights violations, 228
human rights abuses in, 222–24, 229, 233, 238
human rights activists in, 239
human rights violators, prosecuting, 231–33
Human Rights Watch and, 232
insurgent groups, 224
Inter-American Commission on Human Rights and, 54, 226
Inter-American Court of Human Rights, 54, 99, 226
Inter-American Democratic Charter, 226
internal armed conflict, 228–30
international community in, 225
judicial system, 229
judiciary, 232, 237–38
kidnappings, 229, 233
lustration in, 239n1
massacres in, 227, 233
military forced to apologized to country, 227
Modernization Commission, 234
Montesinos Torres, Vladimiro (Army Captain), 225, 233
Organization of American States (OAS), 225
Peace and Development Plan, 231
Peruvian National Police (PNP), 234–35
Police Human Rights Ombudswoman, 235
political elites in, 236
rape in, 238
reconciliation in, 13, 222, 227, 229–30
reparations in, 222, 230, 237
rule of law in, 233
security sector reforms, 233–37
Special Commission for the Restructuring of the National Police, 234
Supreme Court in, 228, 475, 480n8
terrorist attacks in, 227, 234
Toledo, Alejandro (President), 225, 227, 231, 234, 236, 238
torture in, 228–29, 238
transitional justice in, 13, 222–23, 227, 231–33, 237–39, 486
Truth and Reconciliation Commission (CVR), 13, 222, 227–31
truth commissions in, 222, 227, 232
Túpac Amaru Revolutionary Movement (MRTA), 227–28, 230
victim compensation, 222
victims (69,280), 228
violence against women in, 227–29
Washington Office on Latin America (WOLA), 232
Poland
abuse of power, 398, 400
archives in, 345–46
attitudes of trust and mistrust, 335
attitudes to lustration by knowledge of individuals persecuted by the secret police, 342
attitudes towards lustration and purges, 341
attitudes towards purging state institutions of collaborators, 340
Catholic Church, 334, 336, 358n2
Centre Agreement, 350
Communism, fall of, 336
Communist apparatchiks, 336
Communist authorities, 335, 354, 357
Communist candidates, 334
“Communist crimes,” statutes of limitation on, 346
Communist era, 336
Communist government, 334, 349
Communist intelligence and counter-intelligence, 344
Communist military and police forces, 349
Communist nationalization, 355
Communist Party, 334, 336–37, 345, 347
Poland (cont.)

Communist party-state structures, 8
Communist perpetrators, trials of former, 352
Communist regime, 335, 357
Communist rule, 333, 351
Communists, 335, 344
Communist secret police, 14, 343–44, 349–50
Constitutional Court, 344–45, 349, 360n16
Constitutional Tribunal., 354
corruption, 336–37

crisis of trust in post-Communist Poland, 337
de-Communization, 337–38
Democratic Left Alliance (SLD), 345
de-Nazification, 337
elections, 333, 338, 345, 349–51, 355
human rights abuses in, 334
Institute of National Remembrance (IPN), 346–47
international community in, 357
judicial murder, 349
Kaczyński, Lech and Jarosław, 349–50
Law and Justice party, 346
League of Polish Families (LPR), 346
limitation period on “Communist crimes,” 346
Lustration Court, 345
lustration in, 333, 337–51, 355, 358
lustration laws, 333, 337–38, 340–43, 345, 347, 349, 351, 360n16
Macierewicz scandal, 344
Ministry of Internal Affairs, 336
Nazi Party, 337
nomenklatura, 336, 347, 359n5
Non-Party Bloc for Supporting Reforms, 350–51
Party Policy in Modern Democracies (PPMD), 347
PiS party, 349–50
Polish Peasants’ Party (PSL), 345
Polish Union of Property Owners, 355–57
Polish United Workers’ Party (PZPR), 334, 344
political elites in, 14, 333–38, 340, 343, 349, 351, 358
post-Communist coalition of SLD and PSL, 350
post-Communist parties, 345, 355–57

Public Opinion Research Center (CBOS), 335–38, 340–41–342, 347, 359n6
reconciliation in, 358
reparations in, 351, 354–55
restitution of property, 333, 351, 355–58
rule of law in, 354
secret informer network, 347
secret police, 14, 335–37, 340–47, 349–52
secret police agents, 344, 347, 351
Social Democracy of Poland (SDPR), 345
Solidarity (trade union), 334, 336, 350, 352–56
Solidarity Electoral Action (AWS), 345
Szczypkowski, Janusz, 356
as tool for political elites to manipulate the democratic process, 14
transitional justice in, 8–9, 333, 335, 338, 343, 347, 349, 351, 358
Treaty of Riga, 355
trials and prosecutions, 352–54
truth commissions in, 333
Union for Real Politics (UPR), 343
victim compensation, 333
Walesa, Lech, 6, 350–51, 355
World Jewish Restitution Organization, 356–57
Wujek case, 352–53

political elites
acknowledgement of their crimes in exchange for amnesty and forgiveness, 494
bargaining and top-down policies of, 450
Bosnia and Herzegovina, 247
in Brazil, 103
in Bulgaria, 277
in Colombia, 148–49
democratic pluralism and, 443
in Guatemala, 198, 215–16
in Peru, 236
in Poland, 14, 333–38, 340, 343, 349, 351, 358
in Romania, 14, 363, 365–66, 369, 372–73, 376, 382–84

political imprisonment
in Brazil, 90
in Bulgaria, 277
in Chile, 117, 119, 125
in East Germany, 300, 324, 326
in Guatemala, 199
in Slovakia, 393, 400, 426
Political Terror Scale (PTS), 32–33
political will
in Bosnia and Herzegovina, 257
in Bulgaria, 284, 294
in East Germany, 320
in Guatemala, 202, 214
human rights crimes, to prosecute serious, 8
human rights violations, to hold perpetrators accountable for past, 33–34
in Romania, 366
in Slovakia, 398, 400
transitional legal systems and, 493
politics of memory, 45, 440–41, 449–51, 457, 459
Portugal, 3
post-war Europe extra-judicial executions, 442
principle of equality before the law, 443
property rights
in Bulgaria, 275
in Slovenia, 419, 421, 426
PTS. See Political Terror Scale (PTS)
public apologies
in Argentina, 65, 71, 74–75, 80
in Slovakia, 405–6
“rainbow nation,” 455
Rand, Ayn, 431
rape
in Bosnia and Herzegovina (BiH), 249
in Guatemala, 199
in Peru, 238
in Slovenia, 430
rational choice theory, 444
reconciliation, 466, 487, 489
an abstract notion that cannot be meaningfully defined, assessed or quantified,
in Bosnia and Herzegovina, 13, 251–52, 257–58, 262–63, 490
in Brazil, 90, 98, 101
in Chile, 120, 123, 126–27, 466
in Colombia, 145, 149, 153–55
democratic social contract and, 447
between different groups, sectors of society or views whose difference or opposition led to the original conflict or to state-led violence, 44
in East Germany, 308–9, 311
in El Salvador, 179, 185, 187–89, 191
forgiveness and, 455–57
in Guatemala, 201–2, 204–5, 211–12, 214, 218
justice to promote peace, reconciliation, human rights protection, accountability and establishment of social trust, 495
as long-term vs. short to medium-term transitional justice, 44
moral view vs., 458
mutual esteem by reason of both our common humanity and our individual uniqueness, 458
pact of silence vs., 50
in Peru, 13, 222, 227, 229–30
in Poland, 358
political and social processes of, 45, 48
as rejection of justice, 466
in Romania, 367, 373, 380–82
rule of law and, 44
in Slovakia, 390, 409
in Slovenia, 421–23, 426, 429–31
in society and victim’s rights, 489
in South Africa, 493
sustainable peace-building and democratic consolidation promotes, 465
transitional justice and, 442, 452, 486
reparations
in Argentina, 71–73, 75, 78
in Bosnia and Herzegovina, 13, 257–60, 267
in Brazil, 91, 95, 102, 108
in Colombia, 145, 149–50, 152–53, 160
in East Germany, 300–302
in El Salvador, 170, 177, 196
in Guatemala, 196, 200–202, 212–13, 219
in Peru, 222, 230, 237
in Poland, 351, 354–55
in Romania, 363, 367
in Slovakia, 393, 427
in Spain, 474
as transitional justice mechanisms, 22
for victims/survivors and their families, 4, 44
Republican Conservative Institute, 287
Republika Srpska, 248, 253, 255, 257, 266
restitution measures
  in Bulgaria, 273, 275, 283–84
  in Colombia, 144–45, 164–65
  in East European, 494
  in East Germany, 14, 300, 302–4
  in Guatemala, 212
  as “justice,” 45
  in Poland, 333, 351, 355–58
prohibitions on, and selective guarantees
  against retaliation, 454
  in Romania, 363, 367
  in Slovakia, 390, 393–94, 400, 410
  in Slovenia, 15, 418–19, 427–31
  in Spain, 474
retributive violence, 465
Ricoeur, Paul, 441, 455–56, 458–59, 460n8–9
rights
  of the accused, 52
  of children, 229
  of citizens, 44
  of criminals and criminal defendants, 109
  of detainees, 229
  of families of political émigrés, 277
  of former Communist officials and secret collaborators, 367
  of indigenous people and their communities, 230
  of indigenous populations, 229
  of the individual, 316
  of particular groups in terms of status, gender and ethnic background, 267
  of the person, 22
  of the victims, 153
  of women in the police force, 235
  of workers and political prisoners incarcerated under the Franco regime, 474
Romania
  accountability mechanisms in, 382–84
  amnesty in, 381
  anti-Communist resistance, 363
  anti-Communist social segments, 363
  archives in, 363, 368–69, 379–80, 382–83
  Băsescu (President), 381–83
  “Bus Trial,” 374, 376, 383
  Ceaușescu, Nicolae, 365, 373–78, 383, 385n3, 491
Christian Democratic National Peasants’ Party, 368
Communist atrocities, 365
Communist authorities, 363, 367
Communist crimes, accountability for, 367
Communist crimes, judicial and non-judicial accountability for, 367
Communist-era human rights abuses, 364–65, 373
Communist-era magistrates, reappointment of, 378
Communist-era political prisoners, rehabilitation of, 367
Communist human rights offenders, 366
Communist leaders, trials against, 363
Communist officials and secret agents, trials of, 373–78
Communist officials and secret collaborators, 364, 367
Communist officials and Securitate agents, 368, 370–71, 382
Communist Party, 363–65, 368, 381
Communist party-state structures penetrated most aspects of political, social, economic and cultural life, 8, 364
Communist past, dealing with, 365–82
Communist perpetrators, 368
Communist political elite, 372
Communist political police, 364, 368
Communist regime, 363, 365, 367
Communist repression, 368, 372
Communists tried to undermine democracy, 366
Communist torturers, 370
communist totalitarian systems, dismantling, 366–67
Constitutional Court, 372, 383
corruption, 371, 487
Council of Europe and Resolution No. 1096, 366–67
de-Communization, 366, 372, 375
Democratic Liberal Party (PDL), 372
democratization in, 366, 372, 380
dictator/dictatorship in, 365, 373, 381, 383, 491
elections, 364–69
Emergency Ordinance 16/2006, 372
External Information Service (SIE), 379
files of Communist-era classified as unavailable, 369
financial compensation, 363
genocide in, 373, 375, 381
Government Emergency Ordinance No. 16/2006, 370
Greater Romania Party (PRM), 364, 366, 369–70
gross human rights violations, 383
human rights abuses in, 367, 373, 381–83
human rights violations in, 372
international community in, 366, 381
Jewish property, confiscation of, 366
judiciary, 368, 370, 372, 376, 383
Law 187/1999, 370–72, 378
lightenment in, 363, 367–68, 370–72, 382–84
Năstase, Adrian (ex-Prime Minister), 487
National Council for the Study of Securitate Archives (CNSAS), 368–72, 378–79
National Liberal Party, 368
National Salvation Front (FSN), 364–65, 367–68, 373
Nazi regime collaboration and involvement in the Holocaust, 366
official apologies, 363, 367
persecution of Orthodox, Greek and Roman Catholic and Protestant faithful for their religious beliefs, 363
Plesita, Nicu (General), 377
political elites in, 14, 363, 365–66, 369, 372–73, 376, 382–84
political will in, 366
post-Communist transitional justice, 364
Presidential Commission for the Study of the Communist Dictatorship in Romania, 381–83
reconciliation in, 367, 373, 380–82
reforms of the security sector, 363
reparations in, 363, 367
restitution of property, 363, 367
revolts by miners, 363
Romanian Communist Party, 363, 377, 381
Romanian Democratic Convention, 368
Romanian Information Service, 379–80
Romanian Truth Commission, 382
rule of law in, 367, 476
secret archives, 363, 369, 379–80, 382
secret files, access to, 378–80, 383
secret police, 378, 382–84
secret police agents, 382
Securitate (Communist political police), 364, 366–81, 383–84
Securitate agents and collaborators unveiled by CNSAS, 371
Securitate archive, 379, 383
Social Democratic Party (PSD), 363–64, 366, 369–72
statute of limitations in, 373–74, 378
summary execution in, 376
Supreme Council of Magistrates, 371
Supreme Council of National Defence, 379–80, 383
Supreme Court in, 370, 373, 376
Timișoara Declaration, 367–69
torture in, 363, 370, 373–74, 376–78, 384
transitional justice in, 8–9, 14–15, 363–66, 372, 374, 378–82, 476
trials of Communist officials and secret agents, 373–78, 384
Truth Commission, 380–82, 384
truth commissions in, 14, 363, 366–67, 380, 382, 384, 385n2
Tudor, Corneliu Vadim (poet), 364, 369
Rome Statute (1998), 6, 8, 252, 261, 465, 467
Rome Treaty (1999), 54
rule of law in Argentina, 69
authoritarian past and obstruction of justice for past human rights crimes and, 476
bill of rights and, 43
in Bosnia and Herzegovina, 254, 256, 260, 262
in Brazil, 35, 105–6, 109, 476
in Bulgaria, 288
as citizen with rights and duties; right to fair trial; and duty to treat others as human beings, 459
courts are a battleground for disputing power relations and distribution of resources, 447
democratic successor regimes must balance the aims of truth and justice with respect for pluralism and, 443
democratization and respect for human rights and, 494
domestic prosecutions to bolster, 8
in East Germany, 300–301, 307, 312, 314, 316
in El Salvador, 178
guarantee of personal freedom under, 453
in Guatemala, 197, 213–14, 217–18, 476

INDEX 519
rule of law (cont.)

human rights and, 48, 57
human rights trials and, 34–35
human rights violations and, 34, 476
idea that no one is above the law, 34
International Country Risk Guide’s “Law
and Order” measure, 34–35
judicialization of political and social
conflict and, 55
judicial reform and, 446
jurisprudence and, 443
Justice Cascade and, 22
justice sector reforms in Latin America
and, 50–53, 59
justice sector’s legitimacy and
effectiveness and, 44
justice system’s incapacity and weak, 476
in Latin America, 10, 34–35, 41
legal accountability for positions of
political power, 41
in liberal democracies, 43
with minimal “consideration” and
“recognition of the other,” 459
new post-transition political order and,
454
normative requirements for democracy
construction and, 453
patchwork of institutional and legal
innovations and, 446
in Peru, 233
in Poland, 354
principles of fair trial, due process and,
491
rights-based democracy and, 59
rights component of, 44
in Romania, 367, 476
solutions to torture and other abuses by
state agents, 457
in Spain, 473
standards of collective guilt and, 442
state’s capacity to deliver minimal, 41
state–society relations in the new
political order, 44
sustainable peace-building and
democratic consolidation and, 465
transitional countries and evolution of,
476
transitional justice and, 10, 22, 34–35,
41–46, 50, 56, 58, 476, 493
truth, justice and compensation
strengthen, 489
truth commissions, trials and, 34

rule of law compulsions, 453
Rwanda

gacaca courts in, 28
International Criminal Tribunal for
Rwanda (ICTR), 23, 251, 492

secret police
in Bosnia and Herzegovina, 260
in Brazil, 91, 95, 97
in Chile, 89
in Eastern Europe, 494
in Poland, 14, 335–37, 340–47, 349–52
in Romania, 378, 382–84
in Slovakia, 390, 403, 408, 410
secret police agents
in Poland, 344, 347, 351
in Romania, 382
secret service
in Bulgaria, 14, 273–74, 284–86, 289
in East Germany, 14, 305, 492
in Poland, 350
in Slovakia, 15
in Slovenia, 419, 421
Serbia, 35
SFRY. See Socialist Federal Republic of
Yugoslavia (SFRY)
shaming, 5, 77, 140
Slovakia
abuse of power, 15, 398, 400
accountability mechanisms in, 490
Act on the Nation’s Memory, 407
archives, Security Service, 404–6, 409
archives in, 390, 404, 408–9, 411
Catholic Archbishop, 406, 408
Charter 77, 6, 392, 400, 407
Christian Democratic Party, 398
Civic Democratic Party (ODS), 396
Civic Democratic Youth, 406
Civic Forum, 392
Communist-era files, 402
Communist-era secret police files, 390
Communist party-state structures, 8
compensation for victims in, 15
Constitutional Court, 395
corruption, 397–98, 405, 486
criminal justice, 401–3, 410
Czechoslovak Federal Assembly,
393
Czechoslovak Socialist Republic,
391
de-Communization, 399
democratic Party (DS), 401
Department for the Documentation of Crimes Committed by the Communist Regime, 400
de-Stalinization, 391
Dzurinda’s Slovak Democratic and Christian Union (SDKU), 401
elections, 396–97, 399, 403, 407
ethno-national rights, 392
European Court of Human Rights, 412n9
executions for political reasons, 391
Havel, Václav, 6, 392, 395, 472
high officials of old regime become high officials in new one, 402
judiciary, 398, 410
kidnappings, 397, 403
Langoš, Ján (former dissident), 401, 404–5, 407–10, 490
Law on Extrajudicial Rehabilitation, 393
Law on Judicial Rehabilitation, 393
Law on the Immorality and Illegality of the Communist Regime, 400
Law on the Nation’s Memory, 404
Lustration Law, 394–96, 398, 406
Mečiar, Vladimír, 396–400, 403, 407–8, 486
Movement for a Democratic Slovakia (HZDS), 396–97, 399, 401, 404, 406–7
Nation’s Memory Institute (UPN), 401, 404–11
Nazi crimes, 401
Party of the Democratic Left (SDL), 398, 403–4
political elites in, 392, 395, 398–99, 402, 406, 409–10
political imprisonment in, 393, 400, 426
political sentences for 250,000 – 264,000 people, 391
political will in, 398, 400
Prague Spring, 391–93, 408
prosecutions and criminality, 400–403
psychiatric institutions, 7,000 people imprisoned in, 391
Public Against Violence (VPN), 392, 396
public apologies, 405–6
reconciliation in, 390, 409
registers of Western Slovakia published, 406
reparations in, 393, 427
restitution laws, 390, 393–94
restitution measures, 390, 393–94, 400, 410
secret police, 390, 403, 408, 410
secret service, 15
Security Service (ŠtB), 391, 394–97, 399–401, 403–9
Slovak Federative Republic, 393
Slovak National Party (SNS), 407
“Small Restitution Law,” 393
Stalinist-era show trials, 391
strategy of forgiveness and forgetting, 15
Supreme Court in, 395, 401
Toman, Petr, 394
transitional justice in, 8, 15, 390–93, 397–400, 402, 410, 486
“Velvet Revolution,” 15, 390, 392, 398, 400, 402, 405, 410
war crimes in, 404
Warsaw Pact invasion, 391
Slovenia
Act Establishing the Fund for the Payment of Compensation to the Victims of War and Postwar Aggression, 426
Act on the Punishment of Crimes and Offences against Slovenian National Honour, 420
Amendments to the Register of Births, Deaths and Marriages Act, 425
Anti-Fascist Council of the People’s Liberation of Yugoslavia (AVNOJ), 418, 422
Austrian State Treaty, 427
Citizenship Act of Democratic Federal Yugoslavia, 427
Communism, 427, 429
Communist atrocities, 430
Communist legislation, 428
Communist order, 418–19, 422, 431
Communist regime, 41, 420, 424, 428, 431
Communists, 418–19, 421–23, 428
Communist totalitarian systems, 423–24
Communist violence, redressing, 425–27
confiscations, nationalizations and collectivization (1945–1963), 421
Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia, 424
Constitutional Court, 427
Constitution of the Federative People’s Republic of Yugoslavia, 419
Corps for the National Defence of Yugoslavia (KNOJ), 423
crimes against humanity in, 423
Slovenia (cont.)

Criminal Offences against the Nation and the State Act, 420
Criminal Procedure Act, 425
Dachau trials, 420
Democratic Opposition of Slovenia (DEMOS), 419, 422
Denationalization Act, 425–27
denationalization laws, 426–27
elections, 428
European Union Parliamentary Assembly Resolution 109, 424
extraordinary judicial review to overturn the final criminal decisions of the Yugoslav judicial bodies, 426
genocide in, 423
Government Commission for the Purpose of Implementing the Redress of Wrongs Act, 426
inflation and shortages in the 1980s, 419
judicial processes, 420, 425
judicial rulings from past, abolition of, 425
judicial system, 430
judiciary, 423, 425, 428, 430
“kulak” trials of wealthy farmers, 420
Law on Dismantling the Consequences of the Totalitarian Communist Regime, 424
mass executions, 419–23
mass graves, 419–20, 422, 424–25
massive crimes but no criminals, 431
mass killings, 421–23, 428
mass nationalization of assets and collectivization, 421
Nagode trial of 1947, 420
Parliamentary Commission on Post-War Mass Murders, Show Trials and Other Similar Injustices, 423
pay-as-you-go (PAYG) pension scheme, 426
Penal Code (1951), 420
property rights in, 419, 421, 426
prosecuting the perpetrators, 423
public lynching, 420
rape in, 430
reconciliation in, 421–23, 426, 429–31
Redress of Wrongs Act, 425–26
restitution measures in, 15, 418–19, 427–31
secret service, 419, 421

Secret service officers, police officers and military personnel, 419
Slovenian Compensation Fund Act, 426–27
Slovenian Home Guard, murder of 12,000 members of, 422
Slovenian judiciary has not accused a single perpetrator for the mass killings, 428
Slovenian National Courts of Honour, 420
Slovenian National Liberation Council, 420
Slovenian National Police, 423
Slovenian OZNA, 423
Socialist Republic of Slovenia, 419
St. Augustine’s legal maxim, 429
Teheran Conference (1943), 418
Tito, Josip Broz, 418, 422, 428
transitional justice in, 15
Treaty of Vis at the Yalta Conference (1945), 418
Socialist Federal Republic of Yugoslavia (SFRY), 245
social ostracism in Argentina, 71, 76–78, 80 in Brazil, 102–3
South Africa
Promotion of National Unity and Reconciliation Act
reconciliation in, 493
truth-telling in, 90
Soviet Union, 6
Spain
amnesty in, 49–50, 473–74
dictatorship in, 50
forced disappearances in, 474
Franco, General, 49–50, 451, 474
Garzón, Judge, 46, 50, 451, 474
criminal system, politicized, 474
Law of Historical Memory, 49–50, 474
Manos Limpias (“Clean Hands”), 474
“Pact of Silence” or “Pact of Forgetting,” 473
reparations in, 474
restitution measures in, 474
rule of law in, 473
Spanish Civil War, 474
Spanish Socialist Workers’ Party, 50
transitional justice in, 58
statute of limitations
in Bulgaria, 277, 279–80
in Eastern Europe, 491
in East Germany, 322
in Romania, 373–74, 378
sub-Saharan Africa, 26, 42, 44
Sudan, 35
summary executions
in Brazil, 89, 99, 107–8
in Chile, 116
in El Salvador, 173
prohibitions on, 22
in Romania, 376
Supreme Court
in Argentina, 52, 74, 79
in Brazil, 97–98, 100, 475
in Bulgaria, 276–78, 280–82
in Chile, 128–29, 131, 133–34, 139, 233
in Colombia, 154, 162
in East Germany, 315–18, 322
in El Salvador, 175, 184–87
in Mexico, 51–52, 54
in Peru, 228, 475, 480n8
in Romania, 370, 373, 376
in Slovakia, 395, 401
in Uruguay, 469
Suriname, 99
terrorist attacks in Peru, 227, 234
torture
in Argentina, 52, 54, 68, 74–75
in Bosnia and Herzegovina, 249
in Brazil, 87–90, 92, 94–98, 104, 106–8
in Bulgaria, 277, 280, 287–88
in Chile, 6, 116, 119–20, 124–27, 132, 450, 489
in Colombia, 157
in Eastern Europe, 457
in El Salvador, 192
in Guatemala, 199, 202, 205–7, 209, 211, 214
in Latin America, 489
in Peru, 228–29, 238
prohibitions on, 22
by “promoters” of democracy and rights, 447
in Romania, 363, 370, 373–74, 376–78, 384
shifting views on, 459
tacit condoning of, 447
in Turkey, 468–69
United Nations Committee against Torture, 107
transitional justice. See also domestic trials; foreign trials; international trials; truth commissions
accountability mechanisms and, 488
in Africa, 4, 26
after authoritarianism, 485
in Argentina, 9, 11, 47–48, 51–52, 65, 78, 80, 439, 486
in Bosnia and Herzegovina, 245–46, 249–52, 256–63, 265–66
as both a diverse and a congruent journey, 4
as a bottom-up process, 9
bottom-up rights revolution and, 55
in Brazil, 11, 98–99, 101–4, 475–76, 486
in Bulgaria, 14, 273, 275, 277
in Chile, 53, 121, 129, 133–35, 138, 140
“collective identities” perspective, 448–49
in Colombia, 12, 51, 143–45, 148–50, 153, 158, 162–64
communicative action and, 452–55
cost and, 492–93
counterfactual evaluations of the effectiveness of, 30–31
credibility of justice sector and to its level of acceptance, 55
crimes committed by non-state actors, 43
criminal prosecution and, 47
defined, 222
democracy, human rights and, 477
democratic change and, 464–71
democratization and, 16, 459, 463–64, 466, 468, 472, 489, 494
democratization vs., 16
domestic criminal justice and, 48
domestic transitional trials, regional distribution of, 26
in Eastern Europe, 8–9, 14
in East Germany, 9, 14, 299–311, 323
in El Salvador, 9, 12, 170–71, 176, 178–93
empirical comparisons with other current or historical practices, 31
in France, 20
transitional justice (cont.)

in Guatemala, 7, 13, 196, 199–204, 206, 210, 212, 214–18, 476
holistic approach to, 477
human rights abuses and, 445
human rights and, 43
human rights law and, 59
human rights norms and practices, 46
human rights trials and, 23, 28, 444
human rights vs., 5
impact on human rights, democracy, the rule of law, 35
impact on human rights practices, democratic consolidation and conflict, 32
international and regional context of, 27
International Center for Transitional Justice, 170, 222, 256, 440, 471
internationalization of justice and, 7
International Journal of Transitional Justice, 440
international prosecutions and, 8
“irruptions” of memory perspective, 449–51
judicial accountability and, 41
judicialization of politics and, 56
judicial politics and, 45
justice sector reforms and, 53
justice system’s lack of resources or incapacity and, 48
in Latin America, 9, 41, 47, 49, 58
legal-political literature on, 44
local contexts and legal cultures, 10
locally and culturally appropriate measures of, 28
mechanism (truth commissions, domestic trials, foreign trials and international trials), 23
mechanisms, 22, 23–24, 29–31
memory studies and, 457–58
in Mexico, 51–52
no single model of transitional justice, 15, 441, 446, 488, 494
objectives of, 44
in Peru, 13, 222–23, 227, 231–33, 237–39, 486
in Poland, 8–9, 14, 333, 335, 338, 343, 347, 349, 351, 358
political factors facilitating or inhibiting, 45
political opponents disqualified, 8
political transitions and, 4
politics of memory and, 440–42
public’s appetite for, or apathy towards, 9
regional characteristics of, 26–27
respect to grievances vs. strategies for societal reconciliation, 486
role of courts in, 47–50
in Romania, 8–9, 14–15, 363–66, 372, 374, 378–82, 476
rule of law, accountability and, 10
rule of law and, 22, 34, 41, 44–45, 58
rule of law and a rights culture, 52
rule of law and legal oversight of judicial accountability, 42
rule of law reform and, 50–57
in Slovakia, 8, 15, 390–93, 397–400, 402, 410, 486
in Slovenia, 15
in Spain, 58
timing and, 491–92
as a top-down process driven by international criminal justice and individual criminal accountability, 9
trust and a new political community, 44
truth-telling exercises and, 45
US views on human rights vs., 5
victim trauma and recovery literature, 440
Western democracies’ templates for, 448
trials, 49. See also domestic trials; foreign trials; human rights trials; international trials

Trindade, Antônio Augusto Cançado (Judge), 475, 479–80n5

truth commissions

advance cause of accountability by documenting evidence to expose a regime’s involvement in human rights violations, 466
in Argentina, 67, 78, 80
in Bosnia and Herzegovina, 252, 256–58, 263
in Brazil, 92, 102
in Chile, 30–31, 126, 138
in Colombia, 154–58, 160, 164
culturally similar countries in the region used, 27
democracy and human rights, have positive effect on, 477
in East Germany, 308–10, 380
in El Salvador, 170, 175, 178–84, 186–89, 191, 193
empirical comparisons of, 31
human rights violations, to address past, 22
international politics, have brought transitional justice to the forefront of, 466–67
in Latin American countries, 32–33
National Commission for Truth and Reconciliation [Chile], 111n21
National Commission on the Disappeared [Argentina], 111n21
new norms of accountability for human rights violations, 23
in Peru, 222, 227, 232
in Poland, 333
as rejection of justice, 466
respect for the rule of law and, 34
in Romania, 14, 363, 366–67, 380, 382, 384, 385n2
as social practice occurring in the bulk of transitional countries, 23
spirit of forgiveness and, 455
transitional justice mechanism and, 23
tribunals and, 48
Truth Commission (CONADEP) [Argentina], 47, 66–67, 76, 78, 466
Truth Commission [Colombia], 154–58, 160, 164
Truth Commission [El Salvador], 175–76, 179–91, 193
“truth” of some commissions may be very partial, 446
truth-telling exercises, 45
two-thirds of transitional countries used either trials or truth commissions as a transitional justice mechanism, 444–45
truth-telling
in Bosnia and Herzegovina, 257–58
in Brazil, 90
in Colombia, 146
effectiveness of, 45
forgiveness and, 448
reconciliation and/or forgiveness and, 455
in South Africa, 90
Turkey, torture in, 468–69
Tutu, Desmond, 455
Tymoshenko, Yulia (ex-Prime Minister of Ukraine), 486
Uganda, 35
UNDP. See United Nations Development Programme (UNDP)
United Nations (UN)
Committee against Torture, 107
High Commissioner for Refugees, 160, 249
human rights apparatus in the, 21
Human Rights Council, Universal Periodic Review of, 256
International Commission against Impunity in Guatemala (CICIG), 7, 13
Mission in Bosnia and Herzegovina, 248
Observer Mission in El Salvador (ONUSAL), 185
Office of the High Representative (OHR), 248, 254, 258
Office of the High Representative in Bosnia, 253
Security Council Resolution 1503, 251
Security Council Resolutions 808 and 827, 251
Special Rapporteur on extra-judicial, summary or arbitrary executions, 107
Special Rapporteur on Torture, 108
Universal Declaration of Human Rights, 21, 116, 279–80
Verification Mission in Guatemala (MINUGUA), 205, 216
United Nations Development Programme (UNDP), 255
United States (US), 5, 7, 258
universal judicial system, 246
universal jurisdiction prosecution, 28
Uruguay, 27, 64, 465, 469
vigilante justice, 465
violence against women, 227–29
war crimes
in Bosnia and Herzegovina, 13, 246, 249, 251–66
in Colombia, 149–50, 154, 156–57
new criminal accountability model and, 22
prior to Second World War, 20
in Slovakia, 404
war on drugs, 52
Washington Office on Latin America, 232
Wiesenthal, Simon, 401
World Jewish Congress, 357
World Jewish Restitution Organization, 356–57
World Organisation Against Torture, 210

Yugoslavia
 Anti-Fascist Council of the People’s Liberation of Yugoslavia (AVNOJ), 418, 422
 Citizenship Act of Democratic Federal Yugoslavia, 427

Completion Strategy by ICTY, domestic prosecutions and rule of law, 8
Constitution of the Federative People’s Republic of Yugoslavia, 419
Corps for the National Defence of Yugoslavia (KNOJ), 423
International Criminal Tribunal for the former Yugoslavia (ICTY), 7, 23–24, 102, 249–55, 257–66, 492
Socialist Federal Republic of Yugoslavia (SFRY), 245, 247