

# From Impunity to Accountability for Human Rights Violations in Latin America: Towards an Analytical Framework

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## ABSTRACT

Why have some countries in Latin America over the last two decades shifted from widespread impunity for past human rights violations to the implementation of various forms of specific accountability measures, while others have not? This paper lays out an analytical and methodological framework which (1) provides a tool for documenting the shift from impunity to accountability on a country-by-country basis, and (2) provides a tool for assessing the relative achievements in accountability across countries. The empirical focus is on the timing, combination, and sequencing of four transitional justice mechanisms: truth commissions, trials, victims' reparations, and amnesties.

## 1. Introduction<sup>1</sup>

Why have some countries in Latin America over the last two decades shifted from widespread impunity for past human rights violations to the implementation of various forms of specific accountability measures, while others have not?

This chapter lays out the analytical and methodological framework subsequently applied to the nine Latin American case studies in this volume. The main focus of the framework is twofold: (1) provide a tool for documenting the shift from impunity to accountability in the respective countries; (2) provide a tool for assessing the relative achievements in accountability across countries. The empirical focus of our case studies is four transitional justice mechanisms: truth commissions, trials, victims' reparations, and amnesties. We pay close attention to the specific context in which transitional justice plays out, discussing a range of institutional and non-institutional factors (actors and structures) that may affect the establishment and implementation of transitional justice measures.

The limited, yet ambitious, focus of this book is to carefully investigate whether a shift from impunity to accountability for human rights violations of the past has indeed come about in Latin America, and to what degree. While important, this analytical framework does not pretend to explain exactly *why* the shift from impunity to accountability has come about. The book does not launch hypotheses regarding causal mechanisms. Instead, we opt for thick description, letting the rich comparative empirical studies speak for themselves. The conclusions drawn on the basis of comparing and contrasting the findings from the nine case studies are presented in the Conclusions chapter of the book.

The rest of this chapter is divided into six parts. The next part provides an overview of where the scholarship on transitional justice stands, and a justification for why we have chosen to focus our analysis on the concept of accountability. In part three, we define and discuss the four TJMs selected for this study. In part four we propose that impunity and accountability could usefully be understood as ideal types, defining two ends of a continuum respectively. The fifth part presents a scheme for operationalizing how to assess the impact of TJMs on accountability and impunity, depending on the timing, combination, and sequencing of the four mechanisms. How to deal with cross-country analysis by applying an accountability index developed for this purpose is the topic of the sixth part, before we round off the analytical framework in the conclusions.

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<sup>1</sup> This is the draft of a book chapter to be included in the book *Reconceptualising Transitional Justice: The Latin American Experience* (co-edited by Elin Skaar, and Jemima García-Godos, and Cath Collins). The chapter is co-written by Elin Skaar, Jemima García-Godos, and Cath Collins. The project is funded by the Latin America Program, Research Council of Norway (2010-2013). Earlier versions of this chapter have been presented at LASA, San Francisco, May, 2012; at an authors' workshop in Santiago, Chile, November, 2012; and at ECPR in Bordeaux, September, 2013. We thank conference participants at LASA, in Santiago, and at ECPR, as well as Rachel Sieder, Eric Wiebelhaus-Brahm, and Catalina Smulovitz for helpful comments on earlier drafts.

## 2. Transitional justice and impact assessment: A critical review

When the notion of “transitional justice” was first launched, there was an almost exclusive focus on criminal accountability. The academic TJ literature has grown enormously over the last two decades, and its scope and scholarly concerns has expanded correspondingly. Whereas the early TJ literature was law-focused and dealt mostly with issues of state-level decisions about truth commissions or criminal prosecutions versus amnesty of perpetrators;<sup>2</sup> more recently the focus has been expanded to include the role of victim reparations<sup>3</sup> and to take account of the protagonist role long exercised by civil society actors and/or informal local initiatives.<sup>4</sup> Over the 1990s scholarly debate also shifted toward problematizing early heuristic definitions of key concepts such as ‘truth’ and ‘justice’ and examining more carefully the mix of short and medium-term aims and claims assigned to particular mechanisms. Recently, concerns have shifted to impact measurement and the relationship, if any, between TJMs and conflict transformation and democratisation.<sup>5</sup> The proliferation of large-n studies investigating the benefits of transitional justice to peace and democracy has come to, in part, very different conclusions (see more on this below).

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<sup>2</sup> Brito, Alexandra Barahona de, C. González-Enríquez, and et. al., eds. 2001. *The Politics of Memory. Transitional Justice in Democratizing Societies*. Oxford: Oxford University Press., Hayner, Patricia B. 2001. *Unspeakable Truths. Confronting State Terror and Atrocity*. New York and London: Routledge., Kritz, Neil, ed. 1995. *Transitional Justice. How Emerging Democracies Reckon With Former Regimes*. Vol. I-III. Washington D.C.: United States Institute of Peace Press., Minnow, Martha. 1998. *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence*. Boston: Beacon Press., Roht-Arriaza, Naomi, ed. 1995. *Impunity and Human Rights in International Law and Practice*. New York & Oxford: Oxford University Press., Rotberg, Robert I., and Dennis Thompson, ed. 2000. *Truth v. Justice. The Morality of Truth Commissions*. Princeton, New Jersey: Princeton University Press., Teitel, Ruti. 2000. *Transitional Justice*. New York: Oxford University Press.

<sup>3</sup> De Greiff, Pablo 2006. "Repairing the Past: Compensation for Victims of Human Rights Violations." In *The Handbook of Reparations*, ed. Pablo De Greiff. Oxford: Oxford University Press., De Feyter, K., S. Parmentier, and et al., eds. 2005. *Out of the Ashes. Reparation for Victims of Gross and Systematic Human Rights Violations*. Antwerpen - Oxford: Intersentia., Du Plessis, M., and S. Peté, eds. 2007. *Repairing the Past? International Perspective on Reparations for Gross Human Rights Abuses*. . Antwerpen – Oxford Intersentia, Rubio-Marín, R. 2006. *What happened to the women? Gender and reparations for human rights violations*. New York: Social Science Research Council. (Torpey 2006).

<sup>4</sup> Stover, Eric, and Harvey M. Weinstein, eds. 2004. *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* xx: Cambridge University Press., Fletcher, Laurel E., and Harvey M. Weinstein. 2002. Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation. *Human Rights Quarterly* 24: 573-639, Huyse, Luc, and Mark Salter, ed. 2008. *Traditional Justice and Reconciliation after Violent Conflict – Learning from African Experiences*. Stockholm, Sweden: IDEA (International Institute for Democracy and Electoral Assistance), Shaw, Rosalind, Lars Waldorf, and with Pierre Hazan, eds. 2010. *Localizing Transitional Justice: Justice Interventions and Priorities after Mass Violence*. Stanford, California: Stanford University Press, Waldorf, Lars. 2006. Mass justice for mass atrocity: Rethinking local justice as transitional justice. *Temple Law Review* 79 (1): 1-88.

<sup>5</sup> See, for example, Skaar, Elin, Camila Gianella, and Trine Eide. 2012. *A Way Out of Violent Conflict: The Impact of Transitional Justice on Peace and Democracy*. (manuscript under review with Routledge).

Largely based on the early Latin American transitional justice experience, the academic literature tends to regard formal (state-level) TJ initiatives such as criminal prosecutions, amnesties, truth commissions and victim reparations as important aspects of peacebuilding and/or democratisation due to their potential to contribute to specific social and political goals held to be desirable. Specific claims made include that TJ measures when undertaken by new authorities can help to: create a break with the past; establish the rule of law and respect for human rights; deter further violence; encourage democratisation; and promote peace, justice and/or reconciliation.<sup>6</sup> Over the course of the 1990s, formal accountability mechanisms became, according to one expert, “part of the standard repertoire of international peacebuilding activities [...] routinely included in negotiated peace settlements”.<sup>7</sup> Yet, the empirical evidence to support the majority of these ambitious claims is highly contested and inconclusive. While transitional justice issues are increasingly being included in the governance and rule of law packages of international development cooperation, a development broadly encouraged by the UN system and by international donor agencies,<sup>8</sup> there is a need to substantiate the claims concerning the positive contributions that these mechanisms are supposed to make to long term peace and democratic governance. Methodological and qualitative issues in evaluation include the question of whether some of the aims assigned to TJ mechanisms are inherently contradictory.<sup>9</sup>

Yet, there are two main core assumptions in the TJ literature that seemingly dominate much of the qualitative as well as statistical studies of TJ processes: (1) The more TJMs, the more democracy and (2) the more TJMs, the more peace.

As the research testing these assumptions across time and across countries shows, empirical evidence is, at best, inconclusive regarding the pros and cons of TJ mechanisms. Since these assumptions can be explored, but not strictly tested, in single case studies, we here refer to a few recent large-n studies to make this point: Analysing 187 post-conflict cases between 1946 and 2003, Lie, Binningsbø and Gates (2007) find that the impact of transitional justice on the duration of peace in general is weak.<sup>10</sup> They find war-crimes trials to be associated with

<sup>6</sup> Bassiouni, M. C., ed. 2002. *Post-conflict justice*. Ardsley, N.Y.: Transnational Publishers, De Greiff, Pablo 2006. "Repairing the Past: Compensation for Victims of Human Rights Violations." In *The Handbook of Reparations*, ed. Pablo De Greiff. Oxford: Oxford University Press, Hayner, Patricia B. 2001. *Unspeakable Truths. Confronting State Terror and Atrocity*. New York and London: Routledge, Roht-Arriaza, Naomi, and J. Mariezcurrera, eds. 2006. *Transitional Justice in the Twenty-First Century. Beyond Truth versus Justice*. Cambridge: Cambridge University Press.

<sup>7</sup> Mendeloff, D. 2004. Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm? 1. *International Studies Review* 6 (3): 355-380.

<sup>8</sup> UN Guidelines on Transitional Justice and Rule of Law (2004, 2011).

<sup>9</sup> On the ‘truth versus justice’ debate, see among others Rotberg, Robert I., and Dennis Thompson, ed. 2000. *Truth v. Justice. The Morality of Truth Commissions*. Princeton, New Jersey: Princeton University Press. and Sriram, Chandra Lekha. 2004. *Confronting past human rights violations: justice vs peace in times of transition*. London: Frank Cass.

<sup>10</sup> Lie, Tove Grete, Helga Malmin Binningsbø, and Scott Gates. 2007. "Post-Conflict Justice and Sustainable Peace," *World Bank Policy Research Working Paper 4191*, April 2007. <http://econ.worldbank.org>.

longer periods of peace, but only in states they classify as non-democracies. For democratic countries the positive effect of trials on peace is found to be negligible. Sikkink and Walling (2007) in an analysis of all Latin American countries for the period 1979-2004 show that human rights trials have *not* undermined or reversed formally democratic political arrangements, nor have they led to a detectable increase in human rights violations or exacerbation of existing conflicts in Latin America.<sup>11</sup> Expanding the universe of cases beyond Latin America to include 100 transitional countries across the world for the period 1980-2004, Kim and Sikkink (2010) find that transitional countries with human rights prosecutions are less repressive in the present day than countries without such prosecutions.<sup>12</sup> They furthermore conclude that the experience of having carried out a formal truth commission is similarly positively correlated with improved human rights protection and that, contrary to the findings of Snyder and Vinjamuri (2003)<sup>13</sup>, prosecutions carried out during active civil war conditions do not have a lesser impact on repression when compared to those carried out in peacetime. In fact, Kim and Sikkink (2010) offer some evidence that prosecutions during civil wars may even lead to greater improvements in human rights protection than prosecutions in times of peace. In contrast to Sikkink and Walling (2007) and Kim and Sikkink (2010), Olsen, Payne and Reiter (2010) when using data from their Transitional Justice Database, covering 161 countries over 40 years (1970-2007) find that single TJ mechanisms when deployed alone do not have statistically significant positive effects on democracy and human rights measures.<sup>14</sup> By contrast, the authors show that only certain combinations of mechanisms—trials and amnesties or trials, amnesties, and truth commissions – are associated with improvements in indicators of democracy and of respect for human rights. Notably, they find support for a positive effect proceeding from the combined adoption of two TJ mechanisms—trials and amnesties—that were previously often considered incompatible. The authors suggest that trials may provide accountability while amnesties reinforce stability, the combination of which proves propitious for improvements in democracy and human rights measures. Another interesting finding is that truth commissions when deployed in isolation have an actively negative, rather than the expected positive, impact on democracy and human rights, but may contribute to a positive impact when combined with trials and amnesties. The findings hold across the wide range of geographical and historical contexts incorporated into

<sup>11</sup> Sikkink, Kathryn, and Carrie Booth Walling. 2007. The Impact of Human Rights Trials in Latin America. *Journal of Peace Research* 44 (4): 427.

<sup>12</sup> Kim, Hunjoon, and Kathryn Sikkink. 2010. Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries. *International Studies Quarterly* 54 (4): 939-963.

<sup>13</sup> Snyder, J., and L. Vinjamuri. 2003/4. Trials and Errors: Principle and Pragmatism in Strategies of International Justice. *International Security* 28 (3): 5-44.

<sup>14</sup> Olsen, Tricia D., Leigh A. Payne, and Andrew G. Reiter, eds. 2010. *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy*. Washington D.C.: United States Institute of Peace Press. The main findings are synthesised in \_\_\_\_\_. 2010. The Justice Balance: When Transitional Justice Improves Human Rights and Democracy. *Human Rights Quarterly* 32 (4): 980-1007.

the study – including for Latin America. To sum up, these four statistical studies certainly produce very different findings.<sup>15</sup>

A number of existing cross-country analyses focusing on a small number of countries (and, often, on single TJ mechanisms) also – and not surprisingly – come to widely disparate conclusions regarding whether or not TJ “works”.<sup>16</sup> Most existing impact assessment studies still fall into this category, with many taking the form of single-case studies.<sup>17</sup> Single-case studies usually fail to produce generalizable findings due to the specific nature of their research preoccupations and design; while larger scale statistical analyses may suggest, but cannot *prove*, underlying causal connections to explain observed correlations. However, since statistical approaches to impact measurement are, as we have seen, generating widely disparate findings, there is surely a case to be made for melding the two approaches in ways that attempt to accentuate the positive virtues of each.

We therefore suggest focusing the scholarly efforts in this volume on tracing the observable empirical dynamics connecting specific TJ mechanisms to the truth, justice, and reparation goals which they were designed to pursue. Jointly, we can reasonably assume that they contribute to accountability. This is in itself an ambitious and productive task, given the fact that three major, separate and extensive literature reviews made towards the end of the last decade unanimously support what our review of quantitative work has already suggested: very little is still known for certain about the specific inner workings of TJ processes and their interaction effects in particular national trajectories.<sup>18</sup> In particular, although few countries

<sup>15</sup> This variation is itself open to a number of possible interpretations. Firstly, the studies may not be truly comparable since each operates with a different universe of cases. Whereas Lie et al look exclusively at post-conflict situations (i.e. countries that have suffered civil war), Sikkink and Walling’s findings are limited to Latin America (where all but two of the cases they consider are post-authoritarian). Secondly, the studies cover different time periods, with Lie et al taking their analysis back to the Second World War, while the other three studies focus on the most recent phase of TJ explicitly considered as such (i.e. the past 30-40 years). Thirdly, the studies operate with different numbers, working definitions and indicators of the dependent variables “peace”, “democracy” “repression”, “human rights”, and “democracy”. It is accordingly difficult to draw conclusive inferences regarding the positive, negative or indeterminate impact of trials or truth commissions on peace and democracy; although the fact that the only multi-variable study - also the most recent - seems to contradict received wisdom in the field by detecting *negative* impact may well be worthy of further examination. Note that there are even more recent large-N studies of TJ impact that we have chosen not to refer to here.

<sup>16</sup> See *inter alia*, Brahm, E (2007) Uncovering the Truth: Examining Truth Commission Success and Impact. *International Studies Perspectives* 8 (1): 16-35, and Wiegelhaus-Brahm, Eric. 2010. *Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy*. New York: Routledge. In addition to the Transitional Justice Database amassed by Payne et al., several other large-n data sets in the making will allow for future statistical testing of assumptions in the TJ field. Combined qualitative and quantitative monitoring of recent national human rights trials set up at the Universidad Diego Portales in Chile in 2008 has subsequently been complemented by collaborations and methodological convergence with similar projects in Argentina and Peru, providing publicly accessible data through [www.icso.cl/observatorio-derechos-humanos/](http://www.icso.cl/observatorio-derechos-humanos/); [www.cels.org.ar](http://www.cels.org.ar). A database on amnesty legislation compiled by Louise Mallinder, currently of the Transitional Justice Unit of the University of Ulster, provides an overview of all amnesty laws in the world and is being continuously updated.

<sup>17</sup> In Latin America, empirical research on transitional justice has arguably tended to focus on Chile, Argentina, Guatemala and Peru. Countries like Brazil and Paraguay have been severely under-researched.

<sup>18</sup> Three general literature review studies: Hazan, Pierre. 2006. Measuring the impact of punishment and forgiveness: A framework for evaluating transitional justice. *International Review of the Red Cross* 88 (861): 19-

have employed only a single transitional justice mechanism in isolation, very little of the existing literature explicitly considers interaction effects. Another key issue often flagged but rarely fully explored in existing literature is precisely *how*, rather than simply whether, timing and sequencing in the adoption of TJMs may affect medium and long term outcomes. The application of a single qualitative framework, using shared key indicators, to a related group of cases promises to fill at least some of these gaps.

In this book we opt for a ‘middle way’ solution in two respects: to study a selection of four TJ mechanisms in a delimited but substantial number of cases (9 countries), with a certain degree of qualitative depth. This method allows for a greater nuancing of conclusions and a fuller exploration of apparent causal connections than its large-*n* counterpart, even while the reach and generalizability of its conclusions is correspondingly more modest.<sup>19</sup> Given the contrasting evidence produced by studies trying to gauge the impact of TJ mechanisms on meta-goals such as “peace” and “democracy”, we suggest that it is time to take one step back and take a closer look at what transitional justice fundamentally is intended for: namely to provide some form of accountability for victims and for societies after period of state executed or state sponsored violence against own citizens. In doing so, we bring back to the fore old classics in the TJ literature dealing with the early days of transitional justice<sup>20</sup> as well as enter into dialogue with more recent scholarship on accountability issues.<sup>21</sup>

### **3. Accounting for diversity among four TJMs**

Transitional justice in general has been promoted as necessary to bring closure to past violations and facilitate forward-looking long term processes such as national reconciliation, democratisation, and peacebuilding. As the foregoing section shows, the scholarship on what transitional justice has actually achieved on the ground is still in its infancy. As noted, there is

47.; Mendeloff, David. 2004. Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm? *International Studies Review* 6 (3): 355-380.; Thoms, Oskar N.T., James Ron, and Roland Paris. 2008. "The effects of transitional justice mechanisms: A summary of empirical research findings and implications for analysts and practitioners." In *CIPS Working Paper, Center for International Policy Studies*. Ottawa. 1-91.

<sup>19</sup> We here adopt a mix of two distinct logics in comparative history: comparative history as macro-causal analysis (but note that we contrast different societies to highlight different TJ trajectories rather than engage with strict hypotheses testing) and comparative history as a contrast of contexts. For an in-depth discussion on macrosocial inquiry, see Skocpol, Theda and Margaret Somers. 1980. The Uses of Comparative History in Macrosocial Inquiry. *Comparative Studies in Society and History* 22 (02): 174-197.

<sup>20</sup> Kritz, Neil, ed. 1995. *Transitional Justice. How Emerging Democracies Reckon With Former Regimes*. Vol. I-III. Washington D.C.: United States Institute of Peace Press.; Méndez, Juan E. 1997. Accountability for Past Abuses. *Human Rights Quarterly* 19 (2): 255-282.; Orentlicher, Diane F. 1991. Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime. *The Yale Law Journal* 100 (8 Symposium: International Law): 2537-2615.

<sup>21</sup> Lessa, Francesca, and Leigh A. Payne, eds. 2012. *Amnesty in the Age of Human Rights Accountability*. New York: Cambridge University Press.

an ever expanding tool-box of transitional justice mechanisms; formal as well as informal.<sup>22</sup> Since the empirical focus of this volume is Latin America, we hone in on four of the most commonly employed formal TJ mechanisms: truth commissions, trials, victims' reparations, and amnesty laws.<sup>23</sup> Since each of these measures are categories/ groups of measures rather than a singular clearly defined mechanism, it is appropriate to note some of the complexities – both definitional as well as in terms of what these various measures are claimed to achieve.

#### *a) Truth commissions*

Periods of violence/authoritarianism are often characterised by lack of openness regarding the violations that have been committed: the scope, scale, type, and whereabouts as well as the actors involved. Factual knowledge about repression is frequently scarce. Individuals and societal groups have often conflicting perceptions of what violence has consisted of, why it has been carried out, and who has been responsible for the violence. Some kind of formal accounting for the past in terms of 'truth-seeking', 'truth recovery' or 'truth-telling' is often held to be an essential component of a successful transition, democratisation, or peacebuilding process. Truth-telling is variously assumed to encourage social healing and reconciliation; restore victim dignity through rectifying previous official denial or silence; promote – or sometimes replace – justice; allow for the establishment of an official historical record; serve a public education function; aid institutional reform; help promote democracy; and pre-empt as well as deter future atrocities.<sup>24</sup> Truth-telling may be achieved principally or initially through truth commissions, but can also be one result of prosecutions.<sup>25</sup> Truth commissions should address presumed causes of violence and suggest or promote non-violent ways of dealing with social conflict in the future. The fact that societies' felt need(s) for and understanding(s) of 'truth' and how best to achieve it vary widely between and across different settings remains essentially unresolved.<sup>26</sup>

<sup>22</sup> For a comprehensive account of formal and informal TJMs, see Gloppen, Siri 2002. *Reconciliation and Democratisation: Outlining the Research Field*. Bergen: Chr. Michelsen Institute, R 2002: 5.

<sup>23</sup> Unlike the transitions in Eastern Europe, lustration or vetting has not been a commonly employed TJM in Latin America. Similarly, local or restorative justice mechanisms, prevalent in many African countries, have not been commonly used in our region of interest. The protagonist role that Latin America has played with respect to truth commissions, trials and victims' reparations programmes has been detailed in Chapter 1 of this volume.

<sup>24</sup> Mendeloff, D. 2004. Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm? 1. *International Studies Review* 6 (3): 355-380.

<sup>25</sup> Potentially producing, moreover, cumulative 'legal truths' which may, where politically motivated negationism still persists, win a broader adherence than the essentially administrative truths produced by a one-off commission. Much depends of course on the perceptions of objectivity, rigour and efficacy that observers attribute to one or the other instance. 'Informal' truth-telling by survivors, journalists, artists and even perpetrators and their sympathisers can also have significant impact, but our concern here is principally with the portion of these 'truths' that are taken up and supposedly validated by the state.

<sup>26</sup> For an illustrative example from the region, see Ekern, Stener. 2010. The modernizing bias of human rights: stories of mass killings and genocide in Central America. *Journal of Genocide Research* 12 (3-4): 219-241. The cultural value attributed to written historical narrative in the Western canon is highly debatable in the case of indigenous communities – in Central America, the principal targets of violence – who may preserve oral traditions and quite distinct notions of how truth is accessed and related. See on this point the controversy over Nobel prizewinner Rigoberta Menchu's autobiographical account of atrocities in Guatemala.

In this volume we focus principally on formal truth commissions. We adopt the classical definition by Hayner as meaning “bodies set up to investigate a past history of violations of human rights in a particular country – which can include violations by the military or other government forces or armed opposition forces”<sup>27</sup> because it is broad enough to cover truth commissions set up by state as well as non-state agents. One of our central tenants is that it matters in terms of accountability who sets down a truth commission and who endorses and disseminates the findings of truth commissions (more on this below). The type and scope of formal truth commissions vary widely, as will be evident in our country chapters. The follow-up and implementation of the recommendation made by truth commissions is particularly important when considering the accountability function of truth commissions.

### b) *Trials*

Historically – as well as in the history of transitional justice scholarship – criminal accountability for human rights violations committed by state agents (or other agents in civil wars) has been at the core, and is often seen as the ultimate form of accountability. Formal criminal or civil justice system action against individual perpetrators<sup>28</sup> is held by some to be essential to (re)establish the rule of law in transitions that seek to establish democracy and/or a rule of law state. Indeed, TJ theorist and jurist Ruti Teitel has commented on how “[p]unishment dominates our understanding of transitional justice”, as it is “emblematic of accountability and the rule of law”.<sup>29</sup> Justice in the form of prosecution for past violations of human rights or international humanitarian law is, say some, instrumental in, avoiding cycles of extrajudicial or vigilante justice, establishing future respect for human rights, and deterring future abuse.<sup>30</sup> Trials, it is claimed, help achieve (retributive) justice, whether for societies as a whole or solely or principally for victims and perpetrators; and may pre-empt as well as deter future atrocities by making individual (and by implication institutional) responsibilities explicit. Civil claims, whose use has grown in Latin America in recent times, may similarly spur perpetrators and/or institutions including the state<sup>31</sup> to change their behaviour in order to limit future liability.

<sup>27</sup> Hayner, Priscilla B. 1994. Fifteen Truth Commissions - 1974 to 1994: A Comparative Study. *Human Rights Quarterly* 16 (4): 597-655.

<sup>28</sup> And, increasingly, against institutional and/or corporate perpetrators: cases have been brought or attempted in and about Argentina, South Africa, former Nazi Germany and Colombia, amongst others, against international corporations held to have actively colluded with or knowingly benefited from gross abuses of human rights.

<sup>29</sup> Teitel, Ruti. 2000. *Transitional Justice*. New York: Oxford University Press., p. 27. (double-check page no.)

<sup>30</sup> On deterrence see Nino, Carlos Santiago. 1996. *Radical Evil on Trial*. New Haven: Yale University Press. For counter claims or empirical findings that do not seem to support this theory see Olsen, Tricia D., Leigh A. Payne, and Andrew G. Reiter. 2010. The Justice Balance: When Transitional Justice Improves Human Rights and Democracy. *Human Rights Quarterly* 32 (4): 980-1007.

<sup>31</sup> In Chile, for example, some civil damages awards have been made directly against named perpetrators while others were made against the (present day) state for its failure to prevent, protect and/or investigate. Claims have

Trials for past atrocity may also support democratisation by demonstrating that the law (now) applies equally to all persons including the formerly powerful, and/or by creating respect for specific institutions (courts and other key justice system actors) that are an essential part of democratic governance. While these claims are usually based on a universal legal concept of justice, they do not necessarily address issues of historical/structural injustice which may significantly expand the range of possible justice claims in particular settings.

In this volume we distinguish between individual accountability and state accountability. Individual accountability is achieved through free and fair trials in either domestic courts, or alternatively in foreign courts. If found guilty, punishment in the form of serving prison sentences that fulfil domestic expectations of severity for the crime in question, is essential to accountability.

Note that a state can also be held accountable for atrocities committed by state agents. The Inter-American Courts of Human Rights and the Inter-American Commission of Human Rights have played an increasingly central role in holding states in the region to account for human rights violations. The IA Court and IA Commission can publically accuse a state of misdeeds, demand that the wrongs are put right, and also demand the state to pay/make reparations to those who have suffered violations. As such, the regional justice system may also contribute to enhancing accountability at the country level.

For these reasons we focus principally on trials conducted in national courts, but also document trials that take place in foreign courts – and judgements issued by the Inter American Court of Human Rights (though note that these judgements are condemnatory rather than promote criminal justice directly).

### *c) Victims' reparations*

Reparations to those who suffer wrongs or damage are part of any domestic justice system. Reparations can result from civil trials, or they can be part of the sentence in a criminal trial, where the perpetrator is required to pay reparations to the victim who has suffered damage. In a transitional justice context (i.e. after periods of state-sponsored violence or civil war), reparations play a particularly important role in terms of holding the state accountable for violations committed against its citizens.

The provision of reparations to victims, survivors and/or their relatives is generally held to have a positive impact on justice and/or on reconciliation, although with regard to the latter, the potentially counterproductive impact of selective reparations in setting individuals or communities at odds with one another is sometimes acknowledged. The provision of economic reparations to former perpetrators who are also victims has caused empirical controversy - though to date relatively little sustained theoretical reflection – in settings including Peru and in Chile in recent years. Forms of reparation vary widely but

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also been brought or attempted against private entities, usually corporations, in Argentina and Colombia and other settings worldwide.

generally fall into one of two categories. Economic reparations consist of payments and/or health and welfare services designed to ameliorate or reverse specific harm caused to particular groups or individuals. Symbolic reparations, which often take the form of official memorials, monuments, state museums or the like, are designed to restore the ‘good name’ and social standing of victims as well as to emphasise current societal rejection and repudiation of past abuse. While both economic and symbolic reparations are often conceived of as rehabilitative for victims, a restorative justice perspective suggests a focus on perpetrator rehabilitation. Where the state has been the principal or a main perpetrator it is accordingly the state, rather than the victim, which needs to prove itself renewed and newly fit to exercise its proper place in society. This would be partly achieved through the issuing of sincere public apologies, the removal of former perpetrators from public roles, and the establishment of a correct and respectful treatment of former victims.

The underlying assumption of reparations policy is that societies emerging from a violent past evidence physical, psychological and social damage that must be acknowledged and addressed. Reparations generally focus on the victims or survivors of violence and abuse, and usually aim to acknowledge both past suffering and present needs through restoration of the status quo ante; a goal nevertheless often impossible in contexts of gross abuse. A wide range of both ameliorative and compensatory measures have accordingly been attempted.<sup>32</sup> Debates about the ‘tort’ model of reparations that constructs reparations as a payment from a guilty to an injured party - obviating the question of state or other institutional responsibility - are addressed in Gray (2010), as is the question of efficacy and impact given that prevailing international standards increasingly require active participation of survivors and relatives in the reparations process.<sup>33</sup> Latin America has recently seen a wave of memorialisation activities framed as symbolic reparation, and has also experienced an increasing tendency for justice efforts to produce regional court rulings awarding economic or symbolic reparations.<sup>34</sup> In this volume we focus on both economic and symbolic reparations. Importantly, we look principally at state-sponsored initiatives of reparations.

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<sup>32</sup> See García-Godos, Jemima. 2008. Victim Reparations in Transitional Justice – What is at Stake and Why. *Nordic Journal of Human Rights* 26 (2): 111-130. and De Greiff, Pablo ed. 2006. *The Handbook of Reparations*. Oxford: Oxford University Press.

<sup>33</sup> Gray, David C. A No-Excuse Approach to Transitional Justice: Reparations as Tools of Extraordinary Justice. *Washington University Law Review* 87 (5).

<sup>34</sup> As detailed in Chapter 1 of this volume, Latin America has a fully functioning regional human rights enforcement system, in the shape of the Inter-American Commission and Court on Human Rights. Limited by mandate to ruling on state, rather than individual, liability the Commission and Court have both, in recent years, ordered measures such as inclusion of victims’ names on official monuments or the payment of sums of money to relatives as part of mediated friendly settlements and/or final adverse verdicts against particular member states.

d) *Amnesty*

Amnesties are often understood as “legal measures adopted by states that have the effect of prospectively barring criminal prosecution against certain individuals accused of committing human rights violations”.<sup>35</sup> But amnesties can also be de facto; that means they are not legally coded but are still observed on the ground and therefore effectively preclude criminal accountability. Prosecutions and amnesty are treated in some early literature as binary opposites, as the two ‘extremes’ available under the single heading of justice measures. We nonetheless choose here to deal with them as conceptually and empirically separate. This treatment better reflects the distinct – usually, much broader – conflict transformation and/or transitional catalyst role that amnesty laws properly understood can play (a role recognised in the specific legal support the Geneva Conventions offer for their deployment). It also better reflects a recent and striking reality in the evolution of TJ: a growth in prosecutions of gross abuses in recent years has been accompanied not by a reduction but by a rise in the deployment of domestic amnesty laws. This apparently counterintuitive association is explained by an increasing tailoring of amnesty laws to ensure they are fit for conflict transformation purposes but cannot be misappropriated to provide blanket impunity.<sup>36</sup>

In the ‘peace versus justice’ debate, a central argument has been that pursuing prosecutions during an active conflict can delay or otherwise interfere with the negotiation of peace. This perceived dilemma traditionally brought another mechanism to the forefront – amnesty, to guarantee participants immunity from ex post facto criminal prosecution and/or civil liability for past crimes. Where trials or the threat of future trials are politically difficult or potentially destabilising, amnesty has been seen as a possible solution. The combination of truth recovery with some form of amnesty became almost routine in the early Latin American experiences, in a Solomonic attempt to provide truth without legal consequences. The particular transitional settlements that followed this initial recipe are amongst the ones that have come under most sustained pressure in recent years, suggesting that it may not be possible to sustain indefinitely a ‘firewall’ between factual acknowledgement and formal accountability.

International law recognises the validity of limited forms of amnesty when used to end conflict. Most forms of domestic amnesty are however not compatible with the emerging internationally-recognised ‘right to truth’, and the longstanding right to justice, to which relatives, survivors and arguably societies as a whole are entitled. Regional human rights mechanisms have repeatedly declared blanket domestic amnesties in Latin America to be incompatible with international obligations. The early Southern Cone examples,

<sup>35</sup> Lessa, Francesca, and Leigh A. Payne. 2012. "Introduction." In *Amnesty in the Age of Human Rights Accountability*. New York: Cambridge University Press., ed. Francesca Lessa, and Leigh A. Payne. New York: Cambridge University Press. 1-16., p. 4.

<sup>36</sup> On this point, see the work of Olsen, Tricia D., Leigh A. Payne, and Andrew G. Reiter, eds. 2010. *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy*. Washington D.C.: United States Institute of Peace Press. and Mallinder, Louise, and Kieran McEvoy. 2011. Rethinking amnesties: atrocity, accountability and impunity in postconflict societies. *Contemporary Social Science* 6 (1): 107-128.

essentially one-sided amnesties brought in to favour outgoing authoritarians, have come in for particular criticism. These amnesties are typically viewed as “denials of justice that encourage future impunity”.<sup>37</sup> Yet some scholars maintain that early stage amnesties can usefully pave the way for later truth and justice. In Central America, amnesties genuinely favoured both sides and were undeniably key to ending long-running civil conflicts. The main argument in favour of amnesties is thus that they support peacebuilding in cases where prosecution would threaten a fragile peace.<sup>38</sup> This can be seen as power politics trumping victims’ needs, even in cases where bringing an end to conflict is demonstrably in the short-term interests of existing and/or potential future victims.<sup>39</sup> Latin America however offers a unique opportunity to construct more sophisticated comparative analyses of amnesty which include a longitudinal element. Early amnesty laws in the region (in Brazil, Chile, Argentina and Uruguay) were particularly broad and are today under challenge. In one setting - Argentina – they have been overturned altogether. Later amnesties in the region were more nuanced, respecting international law exceptions in the case of Guatemala. The later Latin America transitions – Peru and Paraguay – simply dispensed with the mechanism altogether, while Colombia, still in the midst of an armed conflict, has used partial and conditioned amnesties as an incentive to paramilitary demobilisation.<sup>40</sup> This study therefore offers a useful exploration of conditions under which domestic amnesty has and has not persisted, including questions of public opinion and perceived legitimacy of amnesties according to how, and when, they were proposed and passed.<sup>41</sup>

We distinguish between self-amnesties, pseudo-amnesties, blanket amnesties, and conditional amnesties. We also distinguish between *de jure* (legal) and *de facto* (actual) amnesties.<sup>42</sup>

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<sup>37</sup> Thoms, Oskar N.T., James Ron, and Roland Paris. 2008. "The effects of transitional justice mechanisms: A summary of empirical research findings and implications for analysts and practitioners." In *CIPS Working Paper, Center for International Policy Studies*. Ottawa. 1-91..

<sup>38</sup> Mallinder, Louise. 2008. *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide*. Oxford and Portland, Oregon: Hart Publishing.

<sup>39</sup> This coincidence cannot always be assumed: scenarios in which not all victims may not desire or prioritize the end of conflict include those where victims include combatants who believe in the possibility of a favourable military outcome and/or conflicts where the terms of an imminent settlement are perceived by some victims to put them on the ‘losing side’ and/or at risk of future reprisals.

<sup>40</sup> García-Godos, Jemima, and Knut Andreas O. Lid. 2010. Transitional Justice and Victims' Rights before the End of a Conflict: The Unusual Case of Colombia. *Journal of Latin American Studies* 42: 487-516.

<sup>41</sup> The Brazilian and Chilean amnesty laws were passed during military dictatorships but their Salvadoran, Uruguayan and Argentine equivalents were passed after transition with therefore at least the implicit support of democratic-era legislatures. In Uruguay, additionally, the amnesty law was subjected to specific popular plebiscite not once but twice, surviving intact each time.

<sup>42</sup> For more detailed discussions on different types of amnesties, see Lessa, Francesca, and Leigh A. Payne. 2012. "Introduction." In *Amnesty in the Age of Human Rights Accountability*. New York: Cambridge University Press., ed. Francesca Lessa, and Leigh A. Payne. New York: Cambridge University Press. 1-16.

## 4. The Impunity-Accountability Spectrum: Ideal Types

We define accountability throughout this volume as *an explicit acknowledgement of past grave human rights violations, and of state involvement in or responsibility for them, through means that can include but are not limited to the recovery and diffusion of truth, criminal prosecution, reparations to victims, and efforts to guarantee non-repetition*. We define impunity as the negation of accountability in the extended sense.

In general terms, TJMs as public policy decisions are adopted, combined and set in motion according to prevailing desires at the time of transition/peace agreement to either promote or avoid explicit assignation of responsibility for acknowledged wrongdoing to some or all perpetrators of past atrocity. Where mechanisms including amnesty are initially selected and combined precisely to avoid this kind of public accounting, we can speak of ‘impunity’. By contrast, where TJMs are designed or subsequently appropriated to deliver such acknowledgement and/or to add active, specific consequences to public enunciation of the truth, we can properly speak of ‘accountability’.

In this book, we consider impunity and accountability for human rights violations as occurring along a continuum. At one end of this spectrum, full accountability suggests the most complete levels of official and social repudiation of past abuses imaginable. This would probably imply comprehensive and uncontested truth-telling, a holistic reparations package for direct and indirect victims, and at least the possibility of specific attribution of individual and/or institutional perpetrator responsibility through prosecutions, and penalties proportionate to the gravity of the offence. At the opposite end of the spectrum, a situation of complete impunity might include ideological and practical components such as denial, official silence or justification of past atrocities; non-existent, incomplete or significantly contested truth recovery; and the evasion of specific attributions of guilt through invocation of blanket amnesties for perpetrators. In between, we find various levels of more or less impunity and accountability alongside variations in the number of TJMs that have been implemented and the degree or intensity with which each has been practised. Accountability and impunity as ideal types are presented in Table 1.

**Table 1:** The four TJMs and the impunity-accountability spectrum

Impunity ←-----→ Accountability		
TJMs	Impunity as ideal type	Accountability as ideal type
Truth commissions/ Truth telling	<p>Absent or partial official truth-telling mechanisms, explicitly divorced from consequences e.g. by secrecy laws or bans on naming of perpetrators</p> <p>State dismissal or discrediting of civil society sources and archives</p> <p>Survivors and witnesses absent or fearful due to continued intimidation or trauma</p> <p>Strong discipline/ hierarchy/ loyalty within perpetrator ranks prevents confessions</p>	<p>Initial comprehensive and/or incremental official truth-telling mechanisms with mandate to establish responsibilities and/or execute reforms</p> <p>Active investigative journalism or other forms of progressive revelation about atrocities</p> <p>Significant anniversaries attracting public attention and media coverage</p> <p>Access to information laws and/or discovery of previous official archives</p> <p>Regional developments including extradition requests or document discovery in neighbouring countries</p>
Victim reparations	<p>No acknowledgement of victims, no reparations measures.</p> <p>Absent because atrocities are denied, forgotten or attributed exclusively to non-state actors</p> <p>Comprehensive reparations packages are explicitly or implicitly formulated as a substitute for justice or other measures ('buying silence' of victims or relatives)</p>	<p>Memorialisation and reparations/ rehabilitation services offered to victims and survivors. Public apology.</p> <p>Comprehensive victim reparations programs in place.</p> <p>Access to reparation does not exclude possibility of pursuing criminal or civil liability</p>
Trials	No individual or institutional criminal responsibility or civil liability for atrocities is assigned or accepted	Access to justice: victims and survivors are free to bring criminal or civil claims; state fulfils duty to prosecute
Amnesties	De facto or de jure blanket amnesty for all politically-motivated crimes in disregard of internationally-mandated exclusions of including crimes against humanity and war	Absence or limited nature of domestic amnesty

The impunity-accountability spectrum can be applied to each TJM separately, empirically locating countries along the spectrum according whether they have or have not deployed each TJM, or, more profitably in our view, can be used to locate countries relative to one another according to an aggregate assessment of the combined effect of various mechanisms. The categories of impunity and accountability are thus, in one important sense, demarcational and descriptive rather than explanatory. **From the outset, shifts in the impunity-accountability continuum cannot solely be explained as a result of TJM;** instead, we consider the absence, presence and renewal of TJMs as both possible contributors to and potential

indicators of these shifts. Explanations for particular changes or configurations are to be found not in the concept of ‘impunity’ but in the drivers and actors responsible for the decisions and outcomes that place that society in a particular category. Accordingly we proceed by identifying a number of factors, variables and indicators that, when combined, can indicate the predominance of impunity or accountability in a specific place.

TJMs do not occur in a vacuum. Indeed, one of the central tenants of this volume is that the presence or absence of TJMs is not sufficient to explain the overall regional shift from impunity to accountability. There are also a number of contextual factors to take into account. Some of these may have a direct and independent effect on impunity/accountability – and hence form part of the ideal types of the impunity-accountability spectrum. Other factors explain why TJMs are established (or not) and/or affect how they operate. These factors may be said to have an indirect effect on impunity/accountability. Rather than try to spell out all combinations of indirect/direct causal effects between a large number of factors and impunity/accountability, it is possible to distinguish between groups of factors that may indirectly or directly impact accountability. Factors are grouped into four main categories: power holders or state institutions; government policies and prevailing norms; institutional factors; and other factors (see Tables 2a-2d in Annex). Factors have been identified as how they would be observed on the ground, if contributing to impunity and accountability respectively. Tables 2a-2d below merely list up in more detail the main features of the impunity-accountability spectrum. We do not expect any society to provide a perfect fit with either ideal type.

Just as there are certain power constellations that are more conducive to accountability than others (Table 2a), accountability is also strongly influenced/framed by how the government (during or after a transition) perceived the need for dealing with past atrocities and how government discourse on human rights is formulated. Arguably, the international environment (both normatively and through institutions) may influence policy discourse and also governmental human right policy (Table 2b).

Similarly, some institutional frameworks may be more conducive to transitional justice than others. How rights are framed and guaranteed in constitutions; the strength, independence and recourses of the justice sector (which directly affects how criminal justice/accountability plays out) and the creation of permanent human rights structures are particularly relevant (Table 2c).

There are also a host of other factors that may contribute to more accountability – or segment impunity (Table 2d). At the time of transition, the demand for truth and justice from civil society can be crucial in placing TJ on the political agenda – as well as with the courts. The demands are invariable linked to the type and scope of violations that have taken place. The profile of victims, which again is linked to the type of violations that have taken place, are important for how, where and when claims for truth, justice and reparations are made, and also for how they are received by the government. The global networks of civil society may factor in, as may domestic public sympathy for former authoritarian power holders or former

combatants. There is also the role of unexpected or unforeseen events that may have a dramatic impact on domestic TJ processes: the arrest of Pinochet in London or the arrest of Fujimori in Chile and later extradition to Peru to stand trial for past atrocities are two well-known examples from the region.

In sum, this flexible understanding of impunity and accountability as a continuum allows us to consider a variety of measures as indicative (or not) of impunity or accountability. Post-conflict or transitional societies are located somewhere along this spectrum according to the particular configuration of measures, actions and attitudes prevalent at any one moment regarding past violence and atrocity. The location of a society on the spectrum is dynamic, and the passage of time or other specific changes or innovations can move a society toward either end of the spectrum. Although it is our contention that some of the Latin American societies here studied have in recent years moved towards the accountability end of the spectrum, changes are reversible and an overall move in one direction can mask stagnation or counter-change along one or more of the truth, justice and reparations dimensions. The deployment or (re)activation of specific TJMs may be both a symptom and a cause of movement along one or more dimensions: only textured, in-depth exploration of each country case can illuminate the specific drivers of change for each setting. In this sense the specific ‘independent variables’ driving change in TJ settings will emerge from field data rather than being pre-imposed.

### ***Impunity and Accountability as thick-descriptive categories***

What characterises impunity? And what characterises accountability? We have offered above a selection of some specific characteristics one might expect to find in a society with high levels of ‘impunity’ and in one with high levels of ‘accountability’. It is important to stress that these are ideal-type constructions that allow us to perceive more clearly the clusters of activities, behaviours and ideas that might locate a society more closely towards one end of the spectrum. In the empirical studies we use thick, rich descriptions of transitional justice processes to nail down what these processes actually look like on the ground, and how they are perceived by the people living in these countries. The specific balance of characteristics, and the correct interpretation of particular political phenomenon as representative of one or the other tendency, must be left to on-the-ground expertise. Accordingly, the simple presence or absence of one specific TJM does not in itself constitute a shift towards accountability: a society will be classified as moving closer to one or the other extreme only via a nuanced decoding of the meaning and texture of each TJ action as well as the specific aggregate sum of its TJ actions at a given point in time.

We have done two things in this section: (1) Established the ideal types of accountability and impunity and with respect to our four TJMs and (2) identified various kinds of contextual factors that either influence the establishment and operation of the various TJMs in question (and therefore have an indirect impact on accountability/impunity) and/or have a separate and direct effect on accountability/impunity. A simple way of reading the tables would be that society A characterised by all the factors/features/characteristics on the left hand side of Tables 2a-2d would be a society where impunity was prevailing. By contrast, society B with

many features listed on the right hand side of the Tables 2a-2d would have high levels of accountability. How to methodologically deal with the grey zone in the middle, where countries are actually located empirically? How to identify and measure/weight/assess signs of impunity and accountability in real life settings is the topic of the next section.

## **5. TJ and the Impunity-Accountability Spectrum: Basic assumptions**

This book assesses the place of TJMs in a process of potential societal movement between the primacy of impunity and the prevalence of accountability over past atrocity. We look at various stages of the transitional justice process: the establishment of TJ mechanisms; the implementation of the TJMs; and the estimated impact of the TJM on accountability. For each of these stages we carry out a detailed empirical analysis of the TJ process, paying close attention to the actors who drive or oppose the TJ processes; the official policies and discourses in which TJ policies are framed; and the legal, institutional and normative framework in which the TJ process takes place. How these factors are observed to contribute to either impunity or accountability is detailed in Tables 2a-2d in the foregoing section.

The time frame for the empirical studies is defined from the time of transition (i.e. the first free and fair democratic elections held after period of military rule, or the signing of a lasting peace agreement after the end of civil war or armed conflict) up to the end of 2012 (which marks the end of data collection). We also take into account the period immediately preceding the transition, to gauge the violence committed (to which TJ is a response) and the balance of power between central actors (such as various political parties, the military, and paramilitary groups – see Annex, Table 2a) that set the initial scope for TJ action. In other words, we are looking at long, complex historical trajectories.

The prime focus of the analysis is the four mentioned TJMs. Yet we know that accountability is more than the sum of TJMs. Our chapter authors analyze each TJM separately, presenting the empirical trajectories of TJM implementation as well as discussing and analyzing the debates surrounding each TJM, facilitating factors, and obstacles. The specific order in which the TJMs are presented varies somewhat from chapter to chapter, though, given the chronology of actual TJ implementation in each country. Some chapters treat trials and amnesties together since they often are intrinsically linked. An assessment of each TJM's contribution to accountability (alternatively: impunity) is given before each chapter author concludes with an overall evaluation of the joint contribution of TJ initiatives to accountability. Some contextual variables may impact heavily into the final evaluation of the status of accountability in each country at the end of 2012. Below we add more meat to the bones about how we go about the empirical analyses in more detail.

### **Assumptions on which the empirical analysis is based**

Our study starts with the assumption that each of the four TJMs addressed in this volume matters for accountability – positively or negatively. Our second assumption is that *how* and in *which ways* each TJM affects accountability depends on a wide range of institutional as

well as non-institutional factors. When going into the details of the TJ trajectory in the individual case studies, we need to find some way of measuring the impact of TJMs on accountability (i) across time within each country and (ii) between countries. We propose to do this in a step-wise fashion.

***Assumption 1: The presence of TJMs in a country matters for accountability***

We assume that states that have established TJMs have made a conscientious effort to address violations of the past. Other things being equal, we therefore expect these countries to achieve more in terms of accountability than countries that have not established TJMs. The first step in our analysis is thus to record the presence or absence of the four TJMs. Each country chapter in this volume empirically documents this through a historical analysis of TJ trajectories for the country in question, using the definitions of TJMs provided in section 3 above. The findings are recorded in Table 3 below, where x indicates the presence of a given TJM.

**Table 3:** Presence of TJMs in nine Latin American countries (2012)

TJM	A	B	CH	PA	U	PE	G	EL	C
Trials	x		x		x	x	x		x
Truth comm.	x	x	x	x	x	x	x	x	x
Reparations	x	x	x	x	x	x	x	x	x
Amnesties	x	x	x	x	x	x	x	x	x

As Table 3 demonstrates, most of the nine countries analysed in this volume have employed one or more of the four TJMs in focus. Indeed, all of the countries have had amnesty laws and two thirds of our cases have employed all four mechanisms. As such, there is arguably little variation in the independent variables in numerical terms – at least at first glance. Importantly, this is where a statistical analysis would stop: by recording the presence/absence of a TJM without any reference to scope, type of TJM, or quality of TJM. We propose that to say anything sensible about the potential links between these four TJMs and the different countries' accountability level, we need a much more nuanced approach. The advantage of having similar independent variables (trials, truth commissions, victims' reparations, and amnesties) and different outcomes in the dependent variable (measured along the impunity-accountability scale) is that we can dig deeper into the different features of each TJM (i.e. its types/qualities, the intentions behind the TJM, the actors who push for it or obstruct it etc.) and see how this plays out with respect to accountability.

***Assumption 2: The combination, timing and sequencing, and quality of TJMs matter for accountability***

In our empirical analysis we investigate three hypotheses which come out of recent scholarship on transitional justice, but which remain under-examined:

- 1A: the type of combinations of TJMs matters for accountability
- 1B: the timing and sequencing of TJMs matter for accountability
- 1C: the quality of TJMs matters for accountability

*1A: Combinations of TJMs*

We assume that the state's commitment to TJ processes (and indeed: to accountability) is reflected not only in the number of TJMs but also in the various combinations of TJMs. Some combinations are arguably more potent in achieving positive effects than others. For instance, Olsen et al (2010) find that, statistically speaking, amnesty in combination with trials is associated with improvements in indicators of democracy and respect for human rights (implicitly: positive impact on accountability levels) whereas truth commissions in isolation is reported to have no effect (implicitly: no impact on accountability levels). They also find that any TJM in isolation has no impact on democracy. Apart from the Olsen et al study (2010), we are not aware of any other study that has systematically examined all possible combinations of the four TJMs that we investigate in this volume. We investigate in more depth and detail than statistical studies can offer how various combination of TJMs may, or not, contribute to accountability. We challenge Olsen et al (2010)'s findings: though single TJMs do not have any impact on democracy, they may still positively (or negatively) affect accountability.

The four TJMs (truth commissions, trials, victims' reparations and amnesties) may, in theory, result in 16 different combinations: one with nothing (no TJMs); four with only one TJM (A only, TC only, T only, and R only); six combination of two TJMs (A+TC, A+R, A+T, TC+R, TC+T, R+T); four combinations of three TJMs (A+TC+R, A+TC+T, A+R+T, TC+R+T) and one combination featuring all four TJMs (A+T+TC+R).

In Table 4 below we have tried to rank these combinations and their expected impact on accountability in the order from low to high, giving tentative justification for our ranking. As a rule of thumb we assume that (1) any given combination of TJMs is better without amnesty than with amnesty; (2) any combination of TJMs is better with trials than without trials; and (3) truth commission are more important for accountability than reparations. We thus suggest that criminal accountability in the form of prosecution of alleged perpetrators through courts is the highest ranking type of accountability that a society can achieve, followed by the societal accountability brought about by truth commissions, and last reparations. The reason for this ranking is the level of contention surrounding these TJMs and their implications for state accountability. Whether or not to prosecute those guilty of/responsible for violations has been the politically as well as legally most contentious issue in Latin American countries undergoing transitions from military rule to democratic rule, or from civil war/armed conflict to peace. Assigning individual guilt to perpetrators of human rights violations is considered more politically destabilising (and hence: more important) than documenting the patterns of abuse. Truth commissions were for a long time seen as a "second best" option in Latin America, and less of a threat to state authorities as names of perpetrators were as a general rule not given. Reparations are in general seen as least contentious of these three pro-accountability measures.

We therefore rank our variables in the following order in terms of their impact on "accountability", other things being equal: **T>TC>R>A**.

**Table 4:** Combinations of TJMs and levels of accountability

COMBINATION OF TJMs	COMMENT	IMPACT FOR ACCOUNTABILITY
Amnesty only (A)	(Blanket) amnesty precludes trials. No other TJMs in place to enhance accountability, so nothing will be done about past human rights violations.	Worst-case scenario (lowest level of accountability)
Nothing	Better than amnesty because there is no de jure law in place legally hindering trials. Accountability must be achieved through other means than TJMs.	Second-to worse scenario
A+R	Reparations signal state recognition that violence has taken place, though the “truth” about violence remains undocumented.	Low levels of accountability
A+TC	People will know what happened, and knowledge of hrv is likely to lead to demands for justice. These demands will not be met if broad amnesty laws are in place. Type of amnesty law will matter.	Low levels of accountability
A+T	Technically not impossible combination. Partial amnesty law may allow for some kinds of trials.	Some levels of accountability
R	Reparations without truth and justice	Some levels of accountability
TC	Truth without trials	Some levels of accountability
T	Trials without truth	Medium levels of accountability
A+ TC+R	Truth and reparations but no criminal prosecutions	Medium levels of accountability
A+ R+T	Partial amnesty, reparations and some trials	Medium levels of accountability
A+TC+T	Truth and limited trials	Medium levels of accountability
TC+R	Truth and reparations	Medium levels of accountability
R+T	Trials and reparations	Medium levels of accountability
TC+T	Truth and trials	High levels of accountability
A+TC+R+T	Certain types of trials may be precluded because of amnesty law	High levels of accountability
TC+R+T	Accountability on all measures	Best-case scenario (highest levels of accountability)

As the above table shows, the worst case scenario is amnesty only. This would (per definition) effectively preclude trials, and no other measures in place to compensate for or ameliorate the absence of criminal justice or any other form for compensation to victims. The best case scenario is the combination of trials, truth commissions, and victims’ reparations – with no

amnesty laws imposing restrictions on criminal prosecutions. All other combinations are a matter of call of judgement.

### **1B: Timing and sequencing of TJMs**

It does not only matter what combination of TJMs we have. The timing and sequencing of these TJMs also matter for the following reasons: First, right after a political transition or the end of an armed conflict, violations are fresh in people's mind and demands for truth and justice are often passionate, while state responses are frequently perceived as inadequate. Research has shown that it may not be politically possible (or even desirable) to address human rights violations right after a transition to democracy has been achieved, or a peace agreement has been secured.<sup>43</sup> We envision that the first TJMs that are established in response to strong (domestic or international) demands and have high expectations attached to them. Their chances to "succeed", however, are limited. As the domestic as well as international context shaping the scope and limit for transitional justice changes over time, what is deemed impossible at one historical moment may turn out to be possible only years later.

Since TJMs have multiple goals and visions, their establishment and implementation may either reinforce the desired impacts, or be counterproductive.<sup>44</sup> For instance, if a truth commission is set up prior to trials being held, information gathered by the truth commission can be used as evidence in the trials. As Juan Mendez argues, "with respect to domestic prosecutions... some reasonable sequencing can be helpful because the state needs time to restore the credibility and legitimacy of its judiciary, and a period of truth telling can lay the groundwork for later prosecutions".<sup>45</sup> A strong truth commission recommending reparations programs may result in more government commitment to victims' reparations than if not recommended by such a commission. Some scholars maintain that early stage amnesties can usefully pave the way for later truth and justice. We do not know much about sequencing as this is still a big gap in the TJ literature.

Exactly how the timing and sequencing of TJMs plays out in real life is detailed in the nine case studies. We divide our analysis for each country into two main phases: T1 and T2, where T1= five first years after transition (or first elected government period after transition) and

<sup>43</sup> This is the classic "balance of power" argument. See Correa Sutil, Jorge. 1997. "No Victorious Army Has Ever Been Prosecuted . . .": The Unsettled Story of Transitional Justice in Chile." In *Transitional Justice and the Rule of Law in New Democracies*, ed. A. James McAdams. Notre Dame, IN: University of Notre Dame Press. 123-54. However, the balance of power between actors changes over time, as do opportunity structures. See Hunter, Wendy. 1998. Negotiating civil-military relations in post-authoritarian Argentina and Chile.

*International Studies Quarterly* Vol. 42 (No. 2,): pp. 295-317. and Skaar, Elin 1999. Truth commissions, trials - or nothing? Policy options in democratic transitions. *Third World Quarterly* 20 (6): 1109-1128. The international context too has arguably become more conducive to accountability. See Lessa, Francesca, and Leigh A. Payne, eds. 2012. *Amnesty in the Age of Human Rights Accountability*. New York: Cambridge University Press.

<sup>44</sup> On this point, see Leebaw, Bronwyn Anne 2008. The Irreconcilable Goals of Transitional Justice. *Human Rights Quarterly* 30 (1): 95-118.

<sup>45</sup> Méndez, Juan E. 2012. "Foreword." In *Amnesty in the Age of Human Rights Accountability*, ed. Francesca Lessa and Leigh A. Payne. New York: Cambridge University Press. xvii-xxxii., p. xxvii.

T2= five years or more after the transition (up to the present). The increase in the number of TJMs over time is recorded in table 5 below.

**Table 5:** Timing and sequencing of TJMs

COUNTRY	T1	T2
A	A+R+TC+T	A+R+TC+T-A
B	A+R	A+R+TC
CH	A+R+TC+T	A+R+TC+T
PA	A	T+TC
U	A+TC+R	A+R+TC+T-A
PE	A+TC	A+R+TC+T(-A)
G	A+T	A+R+TC+T
EL	A+TC	A+R
C	A+R+T	A+R+TC+T

Note that the nine countries in our study have different time spans: from 30 years (Argentina) to 8 years (Colombia). This means that the time from transition to the present varies considerably. We therefore speak of two types of time: actual time (in the country where the TJ process takes place) and “world time”, i.e. the historical regional and international context in which the transition takes place and TJ dynamic play out.<sup>46</sup> The countries undergoing a political transition in the early 1980s took place in a dramatically different regional context than what Colombia is going through today. This gives a unique opportunity to gauge the influence of regional human rights institutions and prevailing human rights norms and discourse on domestic transitional justice trajectories.

How and in which ways has this proliferation of TJMs contributed to more accountability in the societies in question?

### ***1C: The quality of TJMs***

The fact that a state implements a TJ mechanism signals a commitment to accountability. Yet, exactly how this TJM plays out with respect to accountability is a matter of empirical investigation. We here introduce the concept of “quality of TJM”, meaning how a particular TJM is intended, designed, established and implemented on the ground. To give some examples: A truth commissions with trusted commission members, a large budget, highly competent and trained personnel, and a broad mandate is likely to have more clout than a commission where the members are perceived as political appointees, the budget is

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<sup>46</sup> In a nutshell, “world time” represents the complex environment in which TJ initiatives are framed, promoted or obstructed. For further discussion, see Skaar, Elin, and Eric Wiebelhaus-Brahm. 2013. Drivers of Justice after Violent Conflict: An Introduction. *Nordic Journal of Human Rights, Special Issue on "Drivers of Justice"*, guest editors Elin Skaar and Astri Suhrke 31 (2): 119–126.

inadequate, the personnel few and non-trained, the mandate narrow etc. Similarly, a truth commission report that is officially launched, officially supported, and widely disseminated will arguably contribute to higher levels of accountability than a report which is not made public, not endorsed by the government, or written in a language inaccessible to most inhabitants of the country. Furthermore, a truth commission that issues a wide range of recommendations (for instance with respect to victims' reparations or legal and institutional reform) and where these are taken seriously and implemented by the government will contribute to more accountability than a truth commission whose recommendations are few, poor, or ignored by the government.

We investigate whether the state has set in motion programs of victim reparations' programs to individuals or collectives. Programs that are extensive in terms of type (material and symbolic) and scope (who is eligible for reparations, what type of victims and for what kind of crimes) will arguably contribute more to accountability than limited reparations programs that are inaccessible for most victims and survivors. Another important point is whether the state is granting reparations in good faith, i.e. do the reparations have a symbolic and reparatory value that goes beyond rights that citizens are entitled (for instance pensions or health rights).

We do not only count the number of trials (which is where large-n studies stop). We also consider who is on trial for what crimes, receiving what kind of sentences, and serving under what kind of prison conditions (i.e. in special prisons or at home). In general, wide reaching trials against a high number of perpetrators from all ranks of the military conducted in a free, fair and efficient manner are likely to contribute to higher levels of accountability than trials of only a small number of alleged perpetrators, prosecuted for a very limited number of atrocities, and where (if found guilty) the imposed sentences are lenient or the time served in prison very short.

The type, scope, and timing of amnesties are important factors to consider when assessing to what extent amnesties endorse impunity. Amnesties are invariably designed and intended to limit or prevent criminal prosecution for human right violations. Although amnesties have been argued to, in some cases, to have a political stabilising effect (thus facilitating transitions to democracy or the signing of peace accords) and that they therefore can pave the way for justice later, amnesty in itself hardly promotes accountability. Criminal accountability can only happen in the legal space not covered by amnesty. The country chapters pay particular attention to the type of amnesty laws and to whether or not they have been seriously challenged by state branches such as the judiciary, parliament, or the executive. They also survey where domestic amnesty laws have been challenged by the IACtHR, and whether the scope for prosecution of perpetrators has been broadened as a result.

#### *Resolving the amnesty-trials dilemma*

We have suggested that the simultaneous presence and/or deepening of the four major strands of TJ initially identified in this study should generally be read as indicative of a move toward the accountability end of the spectrum in any particular setting. How to reconcile this observation with the specific natures of two strands, amnesty legislation and trials, which are

often albeit mistakenly treated as diametric opposites? As recent scholarship shows, it is increasingly misleading to associate the presence of amnesty legislation with the complete absence of prosecution or vice versa.<sup>47</sup> The change is coextensive with evolutions in international and domestic legal practice away from blanket amnesties for any and all atrocities committed in the context of periods of political violence. The trend does not however automatically lead to the complete discontinuation of amnesty: tailored or limited amnesties to permit peace or transition without impeding accountability for gross abuses are perfectly conceivable and would moreover be legitimate in international law.

In order to fully evaluate relative openness to trials it is therefore insufficient to assess in a simplistic binary fashion the presence or absence of specific amnesty legislation. This is so not least because informal de facto amnesty without explicit legal underwriting can be at least as potent as its explicit equivalent, while being at the same time less susceptible to overt challenge. Mainly, however, and in deference to the findings of Mallinder and of Olsen et al about the possible coexistence of amnesty with prosecutions in an invigorated accountability context, we hold that what should be evaluated for each case is not the simple presence or absence of amnesty legislation but rather (1) its quality, scope and real-life application where it does exist and (2) actual justice practice (diligence or not in pursuing prosecutions) where it does not. Country study authors accordingly pay particular attention to the text, spirit, date and/or proximate cause of domestic amnesties as well as to whether these do or do not exclude internationally recognised human rights crimes from their ambit of application. Only once armed with this nuanced information is it possible to determine with any degree of precision whether a particular amnesty law is on balance positive, negative or neutral for an anti-impunity agenda that would require at least the possibility of prosecution of specific internationally-defined crimes against humanity.

## **6. Assessing TJ trajectories in the Impunity-Accountability Spectrum**

By looking at the establishment and implementation of TJMs over time in each of our nine countries we do two things:

- (1) *document and evaluate* the TJ trajectory over time for each country (Chapters 3-11).
- (2) *compare* general accountability trends between countries (Conclusions).

### ***Accountability at the single country level***

For this we need to establish the starting point and end point for the level of accountability. For each of the country studies, the contribution to accountability of each of the four TJMs

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<sup>47</sup> See chapters by Sikkink, Kathryn. 2012. "The Age of Accountability: The Global Rise of Individual Criminal Accountability." In *Amnesty in the Age of Human Rights Accountability*, eds. Francesca Lessa and Leigh A. Payne. New York: Cambridge University Press. 19-41. and Mallinder, Louise. 2012. "Amnesties' Challenge to the Global Accountability Norm? Interpreting Regional and International Trends in Amnesty Enactment." In *Amnesty in the Age of Human Rights Accountability*, eds. Francesca Lessa and Leigh A. Payne. New York: Cambridge University Press. 69-96.

has been ranked on a scale from 0-10, where 0 marks no contribution to accountability and 10 marks full contribution to accountability. For each TJM, chapter authors identify 8-10 events that in their opinion contribute to either accountability or impunity. On the basis of detailed knowledge of the country context supplied with interview material and data collection, the authors make a qualitative judgement on how much each TJM has contributed to accountability. Each “event” is given a maximum of one point on the accountability scale. The analysis starts with the year of transition and ends December 2012, when field work for the nine country studies was concluded. Note that if any TJMs, or other measures that impact on accountability (such as amnesty laws) were in place before the transition, the years immediately preceding the transition are also included in the time frame.

For each country study, graphs are made individually for each TJM detecting movement along an impunity-accountability spectrum from a low of 0 to a high of 10. The highest total sum possibly achieved for truth commissions, trials and reparations jointly is 30.

Note that amnesties are hard to score. Because amnesties generally aim to preclude or hamper criminal accountability (and frequently also demand silence on factual information regarding truth finding, and on accountability issues in general), it is essential to distinguish between different types of amnesties. The presence of a de facto or de jure blanket amnesty law would give an accountability score of 0. A limited amnesty law, precluding only certain kinds of prosecutions for certain kinds of crimes or certain kinds of perpetrators would give a slightly higher accountability score. If an amnesty law is annulled or revoked, thus (at least legally and technically) allowing the full range of prosecutions for the full range of prosecutions within given law, we give it a higher accountability score. In essence, the amnesty dimension measures the *possibility* for criminal trials to take place. Whether trials actually take place or not, is captured by the trials dimension.

Chapter authors in their conclusions provide a summary of the trajectory from impunity to accountability across time. Here, an overall assessment of the progress and setbacks in terms of accountability is given jointly for all four measures (trials, truth commissions, reparations, and amnesties).

### ***Accountability achievements across countries: The Accountability index<sup>48</sup>***

To facilitate cross-country comparison of the TJ trajectories, we have created an accountability index to measure the joint impact of the 4 TJMs on accountability/impunity.

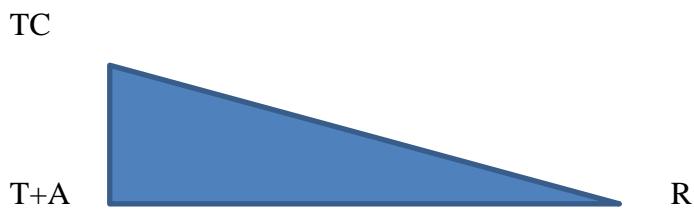
The index has three dimensions: one joint dimension for trials and amnesties (since these two often cancel each other out) (T+A); one dimension for truth commissions (TC) and one dimension for victims reparations (R). Visually, this is presented in a triangle; one for each of the nine country studies. The *length* of each of the three sides of the triangle denotes the relative contribution to accountability of each of the TJMs. The *shape* of the triangle

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<sup>48</sup> We thank Catalina Smulovitz for fruitful discussions regarding the development of an accountability index.

determines where the biggest advances in accountability have been. The *size/area* of the triangle denotes the total level of accountability (for past human rights violations) in the year 2012. The values assigned to the length of each side of the triangle corresponds to the level of accountability recorded for the particular TJM in question in 2012 as denoted by the individual graphs described above in the foregoing section. So, if a country scored 8 for truth commission, 4 for trials, and 5 for reparations for the year 2012, these are the numerical values on which the triangle is based. The accountability triangle only captures the levels of accountability attributed directly to the four TJMs in question. It does not capture the potential direct effect of other institutional or non-institutional measures.

**Figure 2:** The accountability triangle<sup>49</sup>



By comparing and contrasting the size and shape of triangles for the nine countries, we get a snap-shot impression of how the countries have been doing on the different dimensions of accountability as well as their overall progress in the trajectory from impunity to accountability as understood in this volume.

## 7. Conclusions

This chapter has mapped out the analytical framework to be systematically applied to the nine country studies featuring in this volume. Applying structured thick descriptive structured analysis, our methodological approach is based on a common set of variables for all country cases, with a focus on social actors and surrounding dynamics, and application of process tracing techniques to access nuanced data on how particular TJMs and processes ‘behave’ over time. Our choice to study transitional justice in relation to (possible) shifts from impunity to accountability introduces a longitudinal dimension to each country study and to the project as a whole. This element is vital in our opinion for a balanced appreciation of TJ as a dynamic and long-term process, but has often been missing from comparative studies focused essentially on the configuration of official decisions taken at the initial transitional ‘moment’. Latin America, effectively the first region to undergo concentrated TJ experiences in modern times, today offers a unique opportunity to see how these national experiences have evolved and interacted with one another over time in a geographically delimited and culturally/linguistically related area.

<sup>49</sup> Note that other authors too find the triangle useful for presenting cross-country data on three dimensions. See, for example, Brinks, Daniel M. and Varun Gauri. 2008. "A New Policy Landscape: Legalizing Social and Economic Rights in the Developing World." In *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*. New York: Cambridge University Press. 303-352.

## Annex: Impunity and Accountability Factors

**Table 2a:** Power holders and institutions that affect impunity and accountability

Aspects/factors	Impunity	Accountability
Power distribution at moment of transition	<p>Little or no political replacement. Former authoritarians retain strong influence and secure exit guarantees by threatening authoritarian reversal or renewed violence</p> <p>Power-sharing between former combatants each of whom were implicated in atrocities and who therefore have a shared interest in installing/preserving amnesty.</p> <p>Incoming authorities open to accountability but subject to veto players (economic and other elites) who oppose accountability</p> <p>High continuity in public administration and/or armed forces and police command posts</p>	<p>Political alternation (authoritarian regime or combatant state replaced by incoming political authorities not directly implicated in previous atrocities) Political replacement a new political constellation where former authoritarians and previous combatants implicated in atrocity have limited or no residual political influence or veto power. May include transition by collapse – outgoing regime militarily economically or otherwise discredited</p> <p>Negotiated or supervised replacement: international supervision or underwriting of transitional arrangements that specifies or requires minimum levels of HR and TJ compliance</p> <p>Lustration, vetting or gradual (generational) replacement of high level civil servant and security forces personnel and/or explicit recognition and repudiation by existing personnel of previous atrocity</p>
Power distribution over time	<p>Power holders supportive of impunity are not replaced, or are replaced by incumbents who share or can be made to share similar views about the inconvenience of reopening past settlements</p> <p>Majority public opinion and main sources of domestic political support are hostile or indifferent to accountability pressures</p>	<p>Alternation of power to former opponents who were not implicated in atrocity and/or to authorities with a modernisation agenda which views continued past impunity as an impediment to international integration and/or perfectibility of rule of law</p> <p>Majority public opinion and/or minority activist groups with access to external support create political incentives for pro-accountability change</p>
Role of military and police in formal political arrangements (where military/police were involved in atrocity)	<p>Military/ police retain strong formal or de facto political influence and continues committed to defending former repressive actions</p> <p>High command from periods of repression or political violence are not renewed or replaced</p> <p>Military/police have high levels of formal and economic autonomy from civilian political institutions</p> <p>Military justice system is allowed to deal with cases of alleged atrocity</p>	<p>Subordination of military to civilian rule where civilian politicians have an interest in accountability.</p> <p>Reduced military influence in the political sphere: downsizing, geopolitical realignment, abandonment of national security doctrine</p> <p>Military reform generational replacement, ‘modernisation’ e.g. through desire to participate in peacekeeping operations (for which minimum HR requirements apply)</p>

**Table 2b:** Policies and prevailing norms that affect impunity and accountability

	Impunity	Accountability
Government policy discourse about past atrocities	<p>Widespread official and public denial or justification of past atrocity</p> <p>“Turning the page”: dealing more vigorously with the past will hinder reconciliation</p> <p>Calls for understanding and forgiveness; in Latin America often couched in Christian religious imagery and language and supported by ecclesiastical authorities</p> <p>Ambiguous or evasive language about past atrocity; reluctance to assign specific or differential responsibility ('we were all to blame'). Known in Latin America as 'la teoria de los dos demonios'</p>	<p>Unequivocal social repudiation of atrocity, underwritten by the state</p> <p>Full accountability seen by new authorities as necessary for establishment of rule of law</p> <p>Commitment to a new social pact, recasting of state-citizen relationship on a rights-based footing</p> <p>'Refoundational' discourse where HR issues were key to campaign when in opposition and in manifesto promises</p> <p>Explicit commitment to overturning amnesty provisions</p>
International environment	<p>Prevalence of National Security Doctrine and/or 'War on Terror' ideology</p> <p>Close/ strategic allies are sceptical or hostile to TJ or to international HR law</p> <p>Regional multilateral institutions are non-existent, have little leverage over the country in question and/or are anti-HR</p> <p>Economic, military or political dependence on anti-HR or anti-TJ entities</p>	<p>Regional multilateral institutions have leverage and norm convergence around HR</p> <p>Close/ strategic allies are committed to international law principles</p> <p>Post WWII 'norm convergence' away from impunity (reflected in creation of ICC etc.)</p> <p>Economic, military or political dependence on pro-HR or pro-TJ entities</p>
Government response to international environment	Absent or limited government or justice sector compliance with international HR standards, norms, and decisions by international institutions.	High or increasing levels of compliance with HR standards and decisions by HR-regional courts

**Table 2c:** Institutional factors that affect impunity and accountability

	Impunity	Accountability
Constitution	Lack of constitutional/ institutional reform	New constitution and/or reform of previously compromised or collusive institutions to improve democratic responsiveness and/or respect for rights
Justice sector	<p>Formal justice system historically weak, institutionally underdeveloped, and/or lacking popular legitimacy or confidence of elites</p> <p>Justice system previously instrumentalised by authoritarian regime or one combatant tendency in order to collude with perpetrators.</p> <p>Absent or limited justice sector reform, including personnel replacement OR reforms which deliberately or incidentally impede continuity of pre-reform investigations</p>	<p>Substantial judicial reform, including generational change in key judicial figures and/or changes in their receptivity to accountability claims.</p> <p>Modernisation and technical change: strengthened police investigative and/or forensic capacity.</p> <p>Change from inquisitorial to adversarial system: this shift took place in much of Latin America in the 1990s. Its effects are in theory indeterminate for accountability as attitudes of new state prosecutors etc. can vary. But in practice is usually accompanied by strengthening of salience of international standards</p>
Creation of permanent HR infrastructure	TJ and HR issues dealt with 'ad hoc' and sporadically by mainstream institutions or political authorities, little continuity	Creation of dedicated TJ or HR instances with institutional solidity and public access (eg Ombudsman) can give focus to continued TJ demands

**Table 2d:** Other factors that affect impunity and accountability

	Impunity	Accountability
Levels of continuing (political or common) violence	Persistence or irruptions of specific political violence (by state and/or non-state actors) may derail or inhibit TJMs  High or rising levels of ‘common crime’ may reinforce authoritarian nostalgia/ <i>mano dura</i> logic and discredit rights discourse or reform/ reduction of security forces	Steep fall in levels of political violence allay fears of reversal  Moderate or stable levels of ‘common crime’  Demobilisation/ explicit abandonment of armed tactics by non-state combatants
Civil society/HR organisations	Low levels of civil society HR organising (as distinct from political opposition); civil society HR organising drops due to less urgent situation and/or loss of external support and funding  HR movement actively side-lined by incoming political forces and/or discredited by implicated parties	Presence of significant number of civil society HR groups interested in deepening TJ actions. Groups acquire high traction or visibility through judicialisation and/or strategic domestic/ regional/ international alliances
Supply-demand balance	Limited survivor/ relative demands for deepening of TJ accountability due to desire to move on; absence of trust in judicial system; small numbers of survivors; fatalism or indifference as to likelihood of success and/ or fear of reprisal.	‘Demand inflation’ based on earlier achievements or on demonstration/ contagion effects from other-country change (the ‘Pinochet effect’ and similar)
Victim profile	Very low or very high numbers and proportion (per capita) of victims of gravest atrocities  Victims predominantly rural, poor and/or otherwise excluded groups	Victims/ relatives/ survivors groups have or quickly acquire professional profile, political organising experience and access to resources and external allies  Motivated, vocal and organised exile community
Levels of fatal violence (relative to other violations)	Proportionately low: legacy of atrocity is a minority concern.  Proportionately extremely high: TJMs may in this setting be seen as more urgent but may also be seen as unviable, victimhood not recognized as specific.	Fatal violence at levels that impede invisibility but do not paralyse demand or possible response
Lifecycle issues	Perpetrators, victims and their relatives may want to leave the past behind and/or to allow the next generation to escape the legacy	Towards the end of their lifecycle, some survivors or victims’ relatives may want a last push to obtain closure. Some perpetrators may acquire a confessional impulse.
Public sympathy for former authoritarians or combatants	High levels of residual support for outgoing authoritarians or for one or both parties to the civil conflict.  Low levels of social repudiation of past violence, reinforced by absent or muted repudiation by new authorities.  ‘Heroic myths’: romantic portrayals of past violence by participants, media or other influential actors  Discontent with current political or economic situation: authoritarian nostalgia and/or sympathy for proposals of radical or violent change	Low levels of residual support for outgoing authoritarians or for one or both parties to the civil conflict.  High levels of social repudiation of past violence, including by new authorities.  Level of economic and social stability permitting attention to and financing of unresolved TJ legacy questions
Global networks	Restricted/ censored citizen access to global networks of information, documentation, and organisations.  No transparency or access to information legislation.	Citizen access to and participation in global networks of information, documentation, and HR organisations (although former combatants and authoritarians can also be strengthened by network opportunities)  Transparency and access to information legislation

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		in place and enforced.
Unexpected and/or external events	Political unrest, new forms of social or political violence such as the assassination of a major political figure; major economic crisis; security emergencies (including rise of organised crime and other illegitimate power-holding)	Revelations, accidental and otherwise leading to new demands (e.g. discovery of Paraguay Terror Archive 1992, scheduled US State Department declassifications; Pinochet arrest)

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