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**Prepared for the conference
“Human Rights: Challenges of the Past and Challenges for the Future”
Woodrow Wilson International Center for Scholars
Washington, D.C.
June 2, 2009**

**Transitional Justice Struggles and Human Rights
in Latin America in Comparative Perspective**

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Once the “sanctuary of impunity”—to use Eduardo Galeano’s phrase in reference to Uruguay—Latin America has taken bold new steps to hold military and civilian torturers accountable for their crimes. The advance of justice is all the more remarkable, given the historic weakness of Latin American judiciaries, the notorious absence of political will to hold those responsible for such crimes accountable, and the belief, even among some progressives, that trials were not viable, perpetuated conflict, or undermined the opportunity for reconciliation. Yet the global shift in norms in favor of accountability has generated new possibility for local actors to pursue justice in local contexts. In the Peruvian case, this shift motivated survivors and relatives of victims, human rights NGOs and others to persist in their struggle for truth and justice, often in the face of enormous odds. The collapse of the Fujimori regime provided a key opportunity for these groups to push their agenda, which was adopted by state elites in Peru’s transitional democracy eager to set the new regime apart from the corrupt and abusive Fujimori regime. Most importantly, it was in was the determination of a wide gamut of groups, from survivors of rights violations and victims’ family members, to domestic and international human rights groups and social movements,

to progressive intellectuals and politicians, to state prosecutors and judges, to pursue truth and justice —the cry of Latin America’s most iconic human rights movement, the Mothers of the Plaza de Mayo— has shifted the course of history toward this new phase of accountability.

This paper explores four questions regarding the shift toward accountability for grave violations of human rights and crimes against humanity in some parts of Latin America. First, it asks how to explain this shift in those countries where it is observed, and why it is less evident in other countries in the region. Second, it addresses the question of what role prosecutions play in transitional justice processes. Third, it asks, based on my own research and that of colleagues exploring criminal prosecutions in other countries, how trials work and what their achievements, as well as limitations, are. Finally, it advocates an interdisciplinary research agenda into the human rights trials underway in Latin America, arguing for the need for both qualitative and quantitative research to identify progress to date as well obstacles to criminal trials; to evaluate the judicial processes in the region and whether they avoid key problems identified by scholars of criminal prosecutions; to better understand the perspectives of survivors and victims vis-à-vis trials; the intersection between the law and politics; and how trials interact with processes of historical memory formation.

The New Accountability Agenda in Latin America

The international diffusion of human rights norms since the end of World War Two, and especially in the 1970s and 1980s, has facilitated the work of human rights movements across the world in challenging repressive governments and abusive nonstate actors (Risse, Roppe and Sikkink 1999). It has also energized the formation of transnational networks of local and international human rights activists and movements (Keck and Sikkink 1998) while

also generating new efforts to enshrine these human rights norms in international law and through various regional and international treaties. This in turn has given rise to what Lutz and Sikkink (2001) have called the “justice cascade” —a global trend toward the promotion of accountability for those who perpetrated, ordered, or otherwise authorized grave violations of human rights, war crimes, and crimes against humanity.

In an important article outlining the evolving phases of transitional justice since World War Two, international law scholar Ruti Teitel (2003) suggests that this diffusion of human rights norms and the resulting shifts in global responses to atrocity has generated a new phase of transitional justice distinct from the two earlier phases she identifies. The first phase, associated with the Nuremberg and Tokyo trials after the end of the war, saw the establishment of international tribunals to prosecute Nazi and other Axis power officials for crimes against peace, war crimes, and crimes against humanity. The conditions that led to these postwar prosecutions were not easily replicable, however, and in the following years, criminal prosecutions for grave violations of human rights or other crimes against humanity did not become standard practice in the face of violent or abusive regimes, at least partly due to the advent of the Cold War (Teitel 2003). While there were a few instances of prosecutions —newly democratic governments in Greece and Argentina successfully prosecuted the generals who ruled over those nations for long periods in the 1970s and 1980s— the more common response was either to ignore past abuses and move forward, often after the establishment of sweeping amnesty laws (as Brazil and Uruguay sought to do following long periods of military rule in the 1970s and 1980s), or to establish truth commissions to investigate abuses but without any accompanying effort to prosecute. In either case prosecutions were eschewed as a policy option, presumably because the

negotiated nature of the transitions from military rule made such prosecutions difficult if not impossible (as in Chile, El Salvador or South Africa in the 1990s). Pragmatism was the general rule in such transitional democracies, as denoted by the now well-known phrase of Chilean truth commissioner José Zalaquett (1992), who urged political rulers in such tentative situations to seek justice “within the realm of the possible.”¹

Such formulations were sometimes disrupted, however, by actions taken independently of state actors to promote accountability through other means, often in arenas that transcended the nation-state, which Teitel identified as a third phase in the evolution of transitional justice. Prompted by globalization, the diffusion of human rights norms, local and transnational human rights activism, and evolution in international law, the 21st century has seen the rise of a new phase marked by the massification and normalization of transitional justice mechanisms (Risse, Roppe and Sikkink, 1999; Teitel 2003). While criminal prosecutions are by no means the norm in this new phase of “globalized justice,” they are more frequent than they have been in the past, as the work by Lutz and Sikkink (2001) on the “justice cascade” have argued. Spurred by the creation of the International Criminal Tribunals for the former Yugoslavia and Rwanda²; the detention of Chilean dictator General Augusto Pinochet in London in 1998 and the affirmation of the principle of universal jurisdiction that the extradition process entailed³; and the signing, also in 1998, of the Rome

¹ As Teitel (2003) notes, the feasibility of prosecutions was limited by the political context of the transitions; for example, the still powerful military and the ongoing political role played by Pinochet in Chile’s transition made it extremely risky to attempt trials for human rights abuses. In the face of such dilemmas many countries opted to forgo prosecutions in favor of other mechanisms of transitional justice, including truth-seeking and reparations. These were often accompanied by amnesty laws which in some cases were put in place by the previous regime, as in Chile and Brazil, and in others were put in place by the transitional democratic regime, as in Uruguay and El Salvador. Roht-Arriaza (1995) explores some of these cases in detail.

² See for example Schabas (2006) and van den Herik (2005). Other discussions take a more critical vis-à-vis these ad hoc institutions cf. Drumbl (2007) and Zacklin (2004).

³ Roht-Arriaza (2005) provides a thorough account of the Pinochet arrest and its impact.

Treaty that led to the creation in 2002 of the International Criminal Court⁴ (ICC), the justice cascade has energized efforts across the globe—at the international, national, and local levels—to devise mechanisms to secure accountability for war crimes, crimes against humanity, and grave violations of human rights.⁵

In Latin America, human rights organizations, survivors and relatives of victims of human rights abuses, and other civil society groups sought to use the Inter-American system of human rights protection to challenge amnesty laws, push regional governments to investigate, prosecute and punish grave human rights violations, and provide reparations to victims.⁶ The growing responsiveness of the Inter-American system, particularly of the Inter-American Commission for Human Rights (IACHR) and the Inter-American Court for Human Rights, which began to hand down decisions upholding the state's duty to prosecute grave violations of human rights, the right of access to justice for victims, as well as the right to truth, was especially important in supporting local efforts in the region to prosecute and punish perpetrators of grave violations of human rights (Cassel 2006).

While this global norm shift in favor of accountability generated what might be considered the necessary international conditions favoring criminal trials for human rights violators in Latin America, this paper argues that only through a careful exploration of the domestic factors favoring prosecution can we more fully understand (a) the wave of human

⁴ See for example, Schiff (2008).

⁵ In the case of Argentina, for example, as a result of persistent mobilization on the part of the human rights movement; the impact of the 'confessions' of perpetrator of rights abuses; shifting political winds; and perhaps, the passage of time; amnesty laws were declared unconstitutional in 2005, paving the way for new trials (Gil Lavedra 2009). To date, more than 1,200 alleged perpetrators are facing prosecution, with some 60 prosecutions to date (Chillier 2009). In her analysis of the resurrection of domestic trials in Chile following the Pinochet arrest in London, Collins (2008) refers to this as 'posttransitional justice' given that the trials take place several years after the transitional period.

⁶ An collection of essays edited by the Due Process of Law Foundation (2007) provides an excellent overview of such efforts in the region, including a nuanced analysis of why these efforts have been more successful in some cases, such as Peru and Argentina, than in others, such as El Salvador.

rights trials in some parts of Latin America and (b) the fact that there are important variations in this trend, which is more powerful in some countries than in others. It is not sufficient to argue that this is a phenomenon that occurs only with the passage of time, when passions have cooled, militaries have become less powerful, and democratic institutions more firmly established. While this may be the case in some cases it is not so in others.⁷ It certainly does not fully explain the Argentine case, where the trial of the military juntas was conducted in an impartial manner and with a forceful conviction in the immediate aftermath of the transition from authoritarian rule (despite the fact that other trials were shut down by the amnesty laws passed in response to military unrest and the junta leaders who had been convicted were pardoned). Nor does it characterize the Peruvian case, where trials began within a year of the transition to democracy, in 2001.

A comparative examination of cases confirms the arguments laid out in the existing literature suggesting that criminal trials are most likely in the immediate aftermath of transition when the path to transition is via collapse of the previous regime rather than a pacted transition between the previous regime and opposition groups (Nino 1996). Two of the cases under examination where trials immediately followed the transition —Argentina and Peru— both can be characterized as transitions by collapse. The other cases under consideration here —Brazil, Uruguay, Chile, El Salvador, and Guatemala— were all pacted transitions in which there were virtually no prosecutions for human rights violations (in those cases where there were trials these were usually limited to one or two cases that were pursued due largely to external pressure, as in the prosecution of Chile’s former secret police chief Manuel Contreras in the car-bombing of Orlando Letelier in Washington, D.C.). In all of

⁷ Collins (2008) makes the case that the “renaissance” of criminal prosecutions for human rights violations in Chile, which occurred primarily after 1998, should be considered as part of a “posttransition” process.

these cases, amnesty laws of some kind or another were upheld or passed to prevent prosecutions. This is the case independently of whether there was an official truth-telling body (there was no such official truth commission in Brazil or Uruguay, while Chile, El Salvador and Guatemala each had truth commissions —the Chilean truth commission being an entirely national body, while the truth commissions in El Salvador and Guatemala were UN-operated truth commissions).

Transition by collapse may have provided the opportunity structure for criminal prosecutions in Argentina and Peru, but it is crucial to also examine the specific dynamic between the state and civil society groups to understand the full dynamic. This helps explain the dramatic shifts observed in Argentina's prosecutions policy —from full state support for the trial of the military juntas in the early to mid-1980s; to the backtracking on this policy and the turn to amnesty laws to stop the prosecutions process and placate those opposed to it, primarily the military; to the reopening of prosecutions primarily after 2005, when the Supreme Court upholds earlier rulings declaring that the amnesty laws were unconstitutional (Gil Lavedra 2009).

This dynamic is important too in understanding the late prosecutions that emerge in Chile and Uruguay. In the case of Chile, Collins (2008) has argued that the combination of new efforts by civil society groups to push an accountability agenda at a crucial moment —in early 1998, when Gen. Pinochet was to retire as commander in chief of the armed forces and would take up a seat in the Senate as senator for life (by virtue of the 1980 Constitution he engineered)— along with shifts in the judiciary gave rise to the first judicial processes against Pinochet. Of particular importance was the role played by Judge Juan Guzmán —a conservative judge, by his own admission, who had toasted the 1973 coup d'état that put

Pinochet in power with friends and family with champagne— who says that as he conducted his investigations what he saw “opened the eyes of my soul” and led him to process Pinochet three times.⁸ (Pinochet and his lawyers ably manipulated the legal system so that Pinochet died in December 2006 without ever having actually been put on trial.)

My research on the criminal prosecution of former Peruvian president Alberto Fujimori (as well as other cases of human rights violations during that country’s internal armed conflict) suggests a similar dynamic. The role played by civil society actors is crucial to understanding the trials process in Peru, particularly human rights organizations and groups of survivors and relatives of victims, who have pressed tirelessly and often at great cost in favor of criminal prosecutions for human rights violators. Civil society groups pushed both domestically and internationally for criminal prosecutions for human rights violations in Peru. Domestically, they forcefully lobbied the transitional government of Valentín Paniagua (2000-2001) for the creation of a truth commission in the months following the collapse of the Fujimori regime in late 2000. The unified nature of the Peruvian human rights movement was an important element in their ultimate success; in June 2001, Paniagua signed a decree law creating a truth commission and imbuing it with the task of investigating the causes and consequences of the violence that had racked Peru since 1980; but also to identify those responsible so as to prosecute them when possible; as well as to suggest mechanisms of reparations to victims as well as broader reforms so that such violence never recur. Their prior work documenting rights abuses, presenting writs of habeas corpus, litigating human rights cases, and defending victims, was also important in this process. Their international work was also important: the Peruvian human rights community built strong alliances with

⁸ Interview with author, Judge Juan Guzmán, Lima, August 18, 2008. Guzmán’s transformation from conservative to crusading judge is powerfully portrayed in the documentary film *The Judge and the General* (2008) produced by Elizabeth Farnsworth and Patricio Lanfranco.

transnational human rights organizations such as Amnesty International, Human Rights Watch, the International Federation for Human Rights (FIDH), and the Washington Office on Latin America (WOLA), who played key roles in supporting the accountability agenda. The human rights community also sought to use international organizations such as the UN and the Inter-American human rights system to promote truth, justice, and reparations for victims. The role of the IACHR and the Inter-American Court is especially important in the Peruvian case. A 2001 ruling by the Inter-American Court not only determined state responsibility in one of the most notorious massacres committed by state agents in the course of Peru's conflict, the Barrios Altos massacre, and ordered the state to investigate, prosecute those responsible, and provide reparations for survivors and relatives of victims; it is also established that the 1995 amnesty law passed by the pro-Fujimori Congress and promulgated by Fujimori himself violated Peru's obligations under the American Convention on Human Rights and declared the law devoid of legal effect.⁹ This ruling has since been upheld in various legal proceedings in Peru, including in a ruling by the country's Constitutional Tribunal, which has made criminal prosecutions for human rights violations possible. To date there have been over a dozen prosecutions for human rights violations, including a 2008 ruling that found guilty a retired general for the forced disappearance and subsequent murder of nine students and a professor from La Cantuta University in 1992 and sentenced him to 35 years in prison, as well as the conviction in April of former president Fujimori for several counts of homicide and aggravated assault and kidnapping. Fujimori was sentenced to 25

⁹ Inter-American Court, *Barrios Altos Case*, Judgment of March 14, 2001, Ser. C, No. 83, Par. 1. Peruvian human rights NGOs, represented by the National Human Rights Coordinator, litigated this case before the Inter-American Court, and specifically requested the Court to make specific recommendations beyond the investigation and sanction of those responsible for the Barrios Altos massacre in order to dismantle the mechanisms that had guaranteed impunity in Peru. In response the Court ruled that the amnesty law violates the Peruvian state's obligations and declared it without legal effect. See the presentation by Krsticevic summarized in Youngers (2009). In a subsequent ruling, the Court argued that this ruling is valid for the entire region; Inter-American Court, *Barrios Altos Case*, Judgment of September 3, 2001, Ser. C, No. 83, par. 18.

years in prison; he has appealed the decision, which is under review by a new panel of Supreme Court justices.

This suggests that it would be a mistake to isolate civil society mobilization and pressure as the central variable in understanding the rise of criminal prosecutions. The response of states is also central, as is the actions of transnational actors in favor of the accountability agenda. My brief recounting of the Peruvian case suggests the dynamic relationship between civil society, transnational actors, and actors within the state.

The Role of Criminal Prosecutions in Transitional Justice Processes

Much ink has been spilled examining the legal and theoretical implications of criminal prosecutions in transitional justice processes, with some legal scholars pointing to the duty of states to investigate, prosecute, and punish grave violations of human rights, war crimes, and crimes against humanity, as enshrined in international law (Orentlicher 1992; Méndez 1997), while others raise powerful arguments highlighting serious problems and complications arising from seeking to prosecute individuals for what are state crimes (Arendt 1994; Minow 1998; Drumbl 2007).

Here, I would like to focus briefly on the recent debates on transitional justice. Reconciliation has been widely constructed as the desired outcome of transitional justice processes. In this view, societies in conflict, or societies that have experienced long periods of repressive authoritarian rule, should adopt a series of mechanisms to facilitate the transition process, end conflict, promote healing, and consolidate peace. Yet reconciliation is a constructed and therefore eminently contested concept. In this sense, the role of criminal prosecutions in transitional justice processes and in the promotion of reconciliation has also been hotly contested not only in theory but in each of the national contexts considered here.

Here I will examine briefly a handful of cases to highlight this idea, which I think helps situate debates about criminal prosecutions and transitional justice in a broader political context—a context which is often missing in the transitional justice literature, dominated as it is by legal theory and scholarship. This is changing however, and new research provides insights into the ways in which domestic actors engage in local, national, and international strategies to achieve their goals in favor (or against) the accountability agenda.¹⁰

Competing Models of Reconciliation

The debacle surrounding the prosecution of the top generals of Argentina's military dictatorship (1976-83), during which some 30,000 people were tortured and then 'disappeared' by state agents, seemed to reinforce the notion that trials were unattainable. The new democratic government of Raúl Alfonsín established one of the world's first truth commissions with the express purpose of gathering evidence that would then be used in trials against the principal architects of the military's 'dirty war'. The mandate of Argentina's truth commission was to document the facts as part of the evidence that would be presented in state-sponsored trials against the former junta leaders. Thus truth-seeking was inextricably linked to the search for justice. This was a remarkable departure from the policy adopted by Argentina's neighbors, Brazil and Uruguay: official denial and silencing, accompanied by sweeping amnesty laws protecting rights abusers from criminal prosecution.¹¹

Alfonsín and his advisors deemed that some form of accountability was necessary, not only from a human rights standpoint, but also to affirm the very tenets of liberal democracy (Nino 1996). Trials were essential, Alfonsín and his advisors believed, in order to help reestablish the credibility of civilian institutions. By affirming the rule of law and the

¹⁰ An excellent example of this new literature is Tate (2007).

¹¹ There were important societal efforts to achieve truth and justice in Brazil and Uruguay as documented in Weschler (1998).

principle of equality before the law, the trials would help affirm democracy itself.¹² At the same time, Alfonsín and his advisors determined that it would be impossible to hold to account all those responsible for such acts, since torture and disappearance was not the work of a small, specialized unit (as it had been in Nazi Germany) but rather was spread widely throughout the armed forces. It was determined that the top generals of the juntas who ruled during the military government would be held responsible as the intellectual authors of the human rights violations.¹³ In 1984-5, after the truth commission finished its work and documented nearly 9,000 disappearances, the government held trials against nine of the junta leaders, five of whom were convicted and given lengthy prison sentences.

But these convictions, along with civil suits that were being brought against mid- and low-ranking members of the armed forces by Argentine citizens and human rights organizations, prompted a series of military uprisings. In the end, Alfonsín backed down from his maverick human rights policy, passing a series of decree laws that granted effective immunity from prosecution to mid- and low-ranking officers (the Full Stop Law, followed by the Due Obedience Law). This was followed by a sweeping amnesty law passed by Alfonsín's successor, Carlos Menem, as well as the pardoning of the five junta leaders who had been tried and convicted in 1985.¹⁴

The lesson some observers drew from the Argentine experience was that trials destabilized newly democratizing regimes and should be avoided. For example, political scientist Samuel Huntington (1993) asserted that the Argentine case demonstrated that the

¹² See also Malamud-Goti (1996).

¹³ This reflects the notion put forth by Hannah Arendt in her study of the trial of Adolph Eichmann, in which she suggests that in cases of massive and coordinated state violence, the farther one moves from the hand of the individual who actually committed the crime, the more likely one was to find the individual(s) truly responsible for the crime (Arendt 1992).

¹⁴ In the late 1990s, however, several generals were again placed under arrest for the crime of child kidnapping, which was not considered in the presidential pardon. In 2004, the Due Obedience Law and the Full Stop Law were declared unconstitutional, setting the stage for renewed efforts to achieve retributive justice in Argentina.

costs of human rights trials outweighed the moral gains, and that the primary concern of transitional government elites should be democratic stability. From a different vantage point, conservative politicians and other analysts suggested that trials were (a) a continuation of previous political struggles and therefore were invalid; or (b) a form of vengeance; and that in either case, rather than ending the cycle of hatred and violence only fueled them further. Thus, it was reasoned, the pursuit of retributive justice was not only as a danger to democratic stability because of the continued power of the armed forces, but also because it reflected a political strategy of “defeated groups” and as such was contradictory to the larger goal of “national reconciliation”. For these observers, the cases of neighboring Brazil and Uruguay, where demands for truth and justice were systematically denied by the new democratic governments, and full amnesties were granted to perpetrators of human rights violations, were models of how transitional democracies should address the question: leave the past in the past and move on to the urgent task of rebuilding democratic institutions.

Thus emerged a sort of conventional wisdom about the possibility of retributive justice in transitional democracies (though, as will be further argued below, this was vigorously contested by some academics, human rights activists and lawyers, and progressive politicians). Trials were either (a) logistically impossible (they were costly; judiciaries were often weak, still corrupted from the previous authoritarian period; the military and their allies remained powerful; and even if successfully culminated in the short term trials would provoke reactions, as in Argentina, that would destabilize democracy and threaten a return to dictatorship) or (b) undesirable (more pressing issues must be addressed, including socio-economic reforms and consolidating democracy; focusing on the past opens old wounds and prevents national reconciliation, the necessary basis for moving forward both politically and

economically). Some politicians and military officers justified repression outright, suggesting that it was a necessary response to a greater evil (subversion, communism, terrorism, etc.); thanks, not trials, was due to those who committed such acts.¹⁵

In other societies undergoing transitions in the early 1990s, such as Chile, El Salvador, and South Africa, these lessons loomed large. Holding human rights violators accountable for their acts was deemed too politically risky, or was simply impossible given the nature of the compromises made along the way to the transition to democratic rule (Zalaquett 1992). At the same time, however, ignoring the past in the name of ‘reconciliation’ or simply denying the relevance of past abuses—as occurred in Brazil and Uruguay—was increasingly less viable given the growth of transnational human rights movements and the expansion of international human rights law.¹⁶ In this context, transitional elites increasingly turned to truth commissions as an alternative mechanism of transitional justice.

In Chile, for example, after seventeen years of dictatorial rule under General Augusto Pinochet, the new democratic government of Patricio Aylwin created a truth commission to investigate the abuses that occurred under the military dictatorship. But fearful of a military backlash, the Aylwin government did not challenge the 1978 amnesty law decreed under Pinochet’s rule to prevent punishment for the worst crimes of the dictatorship. Thus the truth commission could investigate what happened but could not mete out punishment. The truth commission investigated extrajudicial killings, disappearances, and cases of torture leading to death (but not torture on its own). It produced a report documenting the murder and disappearance of some 3,000 Chilean citizens. It also recommended the implementation of

¹⁵ New research on the memories of repressors is coming to the fore. See for example Payne (2003) and Stern (2004).

¹⁶ As described earlier in this paper. See also (Brysk 2002)¹

monetary and symbolic reparations programs for survivors of the dictatorship. Impunity, however, remained in tact, and no trials, with a few exceptions, were forthcoming.¹⁷

A similar scenario prevailed in El Salvador. Though a truth commission was established under the aegis of the United Nations in the context of a peace process between the state and the Farabundo Marti National Liberation Front (FMLN), it was limited from the outset by an agreement by the two armed actors that favored a blanket amnesty. In its final report, the truth commission found that most of the politically motivated violence committed during that country's brutal civil war was perpetrated by state agents and their proxies (primarily paramilitary organizations run and financed by the armed forces and sectors of the economic elite). Nevertheless, the commission refrained from recommending trials in its final report. According to one of the commissioners, Thomas Buergenthal (1994), trials were virtually impossible for at least two reasons: (a) the continued power held by the armed forces in the context of a negotiated peace process between the conservative government and the FMLN; and (b) the fact that the judiciary had been completely corrupted and subordinated to the military regimes that there was no faith in its ability to be able to pursue fair and timely trials. Instead, the final report included a list of those individuals in the armed forces responsible for the worst abuses in an attempt to find alternative mechanisms of accountability; many of these individuals were indeed forced out of the armed forces. But days after the commission's report was released, Congress acted upon the President's

¹⁷ One of the crimes that was brought to trials was the murder of Orlando Letelier, a former Chilean Foreign Minister under Salvador Allende, who was killed, along with his American assistant, Ronni Moffit, in the suburbs of Washington, D.C. in a car bomb planted by Pinochet regime operatives. Manuel Contreras, head of Pinochet's secret police, was tried and convicted of this crime. It is also worth noting that after the 1998 arrest of Pinochet in London, which led to the affirmation of the concept of universal jurisdiction, the political winds have shifted in Chile and new inquiries into torture have occurred, as well as limited trials, including possibly against Pinochet himself.

suggestion that a blanket amnesty should be declared, effectively precluding the possibility of any trials for human rights violations (Buergenthal 1994).

The case of South Africa diverges from Chile and El Salvador to some degree, even as it reinforced the notion of a trade-off between truth and justice. The end of apartheid was negotiated between the existing apartheid government and the African National Congress in the early 1990s. Similarly to the case of El Salvador, as part of the negotiations the parties agreed on a policy of amnesty for perpetrators of human rights violations. A Truth and Reconciliation Commission was established, but in an effort to avoid the Chilean and Salvadoran scenario—i.e. a blanket amnesty—the TRC interpreted its mandate creatively, adopting a policy whereby amnesty was not automatically granted but rather had to be applied for on an individual basis. In other words, the TRC would grant amnesty to an individual only after fully confessing to his or her crimes. Many applauded this as an innovative strategy to get more fully at the truth of what happened during the apartheid regime, and claimed that it provided an alternative form of justice to criminal (or retributive) justice (Minow 1999; Rotberg 2000; Boraine 2001).

These cases —particularly the South African case— seemingly reinforced the notion that transitional societies faced a trade-off between truth and justice, and that the explosive nature of the latter demand made it politically expedient to forgo trials and retributive justice altogether and focus instead on truth (in order to establish the historical record of what occurred), dignifying victims (whose pain and suffering had been denied under the previous regime) and reconciliation (an effort to bridge the past divides to create the bases for national unity and development towards the future). Given that elements of the former repressive regimes may still hold power; that the judiciary may have been implicated in the prior regime

or otherwise weak, corrupt, and unable to carry out fair trials; the fear of upsetting delicate transitions to democracy; scholars and policy makers alike began to argue that truth-telling might be an acceptable substitute for justice. This became increasingly referred to as restorative justice because of its focus on the victims and the restoration of their dignity by acknowledging the crimes of the past, which had been systematically denied (Minow 1998; Rotberg 2000). Truth telling is seen as a centerpiece of such processes, and in some cases is seen as actually preferable to retributive justice as a means, presumably, of avoiding conflict and achieving societal reconciliation (Gutmann and Thompson 2000).

Indeed truth commissions are a powerful mechanism, particularly in societies where the fact of state repression was routinely denied, silenced or justified, and a means of documenting, explaining, and acknowledging past abuses. Moreover, there is no 'one-model-fits-all' approach to truth commissions, and indeed, new truth commissions have adopted distinct and sometimes quite innovative strategies to avoid the pitfalls of their predecessors. For example, the South African Truth and Reconciliation Commission sought to avoid the blanket amnesty approach that had proven so divisive in Latin America by creating a formula whereby perpetrators of human rights crimes had to apply for amnesty and were required to provide truthful testimony of their involvement in these crimes so as to reach a fuller account of what happened in South Africa during the era of apartheid. Advocates of this model suggest it is a paradigm for transitional countries, a sort of 'third way' in that it does not allow complete impunity yet favors reconciliation over retribution, while also acknowledging the complex political and economic realities of that country's transition to democracy (Boraine 2000). Truth commissions may also provide a broader historical understanding of

what happened and why, something trials, with their focus on individual crimes, presumably cannot do (Minow 1999, Hayner 2001).¹⁸

This approach has not been without its critics, of course. Many in the human rights community remained unconvinced that truth was an adequate substitute for holding the torturers accountable for their misdeeds (Mendez 1997, Brody 2001). Torture, rape, the forced disappearance and extrajudicial execution of individuals because of their presumed political beliefs and affiliations are crime against humanity that deserve, indeed require, according to international law, punishment. Favoring reconciliation over divisive trials may limit conflict in the short run —as evidenced in later developments in Argentina, Chile, Uruguay, and elsewhere— it will not likely stop victims from seeking alternatives means of pursuing justice.

This discontent with the emphasis on truth-telling would seem to reflect the fact that truth without justice perpetuates the structures of impunity that critics charge make human rights violations possible in the first instance. At a recent symposium I co-organized in Washington, D.C., entitled *Accountability After Mass Atrocity: Latin American and African Examples in Comparative Perspective*, Graeme Simpson, who worked with the South African Truth and Reconciliation Commission made a related point: “a bicycle thief won’t respect the law if assassins get away with murder.” A Uruguayan human rights lawyer pointed to the absence of prosecutions in that country until very recently contributing to the creation of a culture of impunity similar to that which Simpson describes.

It thus seems striking the shifts that have occurred in the region in the past several years in favor of accountability. In Argentina, human rights organizations, lawyers, and

¹⁸ It should be noted that historians and others are questioning whether an historical truth about past abuses can in fact be definitively written, and have raised questions of historical representation, which truths are incorporated into the truth commission narrative, and which truths are marginalized or silenced.

relatives groups continued to push the accountability agenda even in the face of the amnesty laws. On June 8, 1998, police detained the head of the first military junta, Jorge Videla—who had been prosecuted in 1985 and then released after Menem's presidential pardon—on charges of baby kidnapping.¹⁹ Relatives of victims and human rights lawyers had sought tirelessly to find ways around the amnesty laws, and a judge finally accepted the argument that the amnesties did not cover the crime of baby kidnapping. In Chile, similarly, in early 1998, Judge Guzmán had determined that a human rights case against Pinochet could move forward, since it involved forced disappearances. Guzmán argued that forced disappearances are an ongoing crime because no body or remains have been found, and thus determined that the 1978 amnesty law was not applicable in this case. The arrest of Pinochet in London later that year (October 1998) and the efforts to extradite to stand trial in Spain on charges of crimes against humanity electrified local efforts to bring those responsible for human rights violations to justice. In Chile, it led to the formation of second truth commission to examine cases of torture, which had not been included in the first truth commission's mandate. In 2001, in Argentina, a lower court ruled that the amnesty laws were unconstitutional.

The election of left or center-left governments in Argentina, Chile as well as Uruguay created new political opportunities to press the accountability agenda. In Argentina, the Kirchner government adopted a favorable attitude towards the accountability agenda, and in this context, in 2005 the Supreme Court upheld the lower court ruling declaring the amnesty laws unconstitutional, paving the way for the reopening of criminal trials in Argentina. (In 2007, the Supreme Court ruled that the pardon of the junta members was also unconstitutional and most of them were placed under house arrest.) To date, some 1,250

¹⁹ "Former dictator arrested for stealing children during dirty war," NACLA Report on the Americas, July 1, 1998; "Argentine Dictator Runs out of Pardons," Washington Post, July 8, 1998, p. A24; "Ex Argentine leader arrested on baby-snatching charges," The Independent, July 10, 1998, p. 15.

alleged perpetrators face indictment and many cases are in judicial process. To date, some 60 cases have been successfully prosecuted²⁰ (Chillier 2009). In Chile, the Bachelet government was also more receptive to the accountability agenda, though Bachelet —herself a survivor of Pinochet’s torture camps— did not promote trials as state policy (Collins 2008). Though the 1978 amnesty law remains on the books, judges have stopped applying it in cases involving crimes against humanity; to date, cases involving approximately 650 defendants, mostly members of the police and armed forces, are in process, with some 250 convictions (Collins 2009). Uruguay has faced a more difficult process, given that the amnesty law²¹ there was upheld by a popular referendum in 1989. The Frente Amplio government headed by Tabaré Vázquez said he would not seek to overturn the amnesty law, but he did interpret some of its articles differently than previous democratic governments. The amnesty law states that in any case involving military or police personnel accusations of human rights violations, the judiciary must consult the executive about whether the case could proceed. In the past, the answer was always no. Vázquez began to say yes in several cases, in accordance with Article 3 of said law, and to date some 20 cases are in process, including the trial of former president Juan María Bordaberry, who was elected under questionable circumstances in 1973 and then suspended democratic institutions and ruled with the backing of the armed forces until he himself was deposed in 1976, for a series of political murders. Notably, a ruling was handed down earlier this year finding eight members of the armed forces, including one of the leaders of the military dictatorship, General Gregorio Álvarez, guilty of 28 politically motivated assassinations and sentenced them to 20 to 25 years in prison.

²⁰ CELS maintains a blog and a database on the trials. See: CELS JUICIOS: Crímenes de terrorismo de Estado: Weblog de las causas, <<http://www.cels.org.ar/wpblogs/>>.

²¹ Known as the Ley de Caducidad de la Pretensión Punitiva del Estado.

Peru is not a case of posttransitional justice, as may be argued is the case with the previous cases mentioned. In the Peruvian case, the collapse of the Fujimori regime in 2000 meant that conditions were more favorable toward trials for human rights crimes. Indeed, the massive citizen indignation that followed in the wake of Fujimori's flight to Japan (where he was granted citizenship and protected from extradition) and the revelation of massive networks of corruption prompted the new transitional government of Valentín Paniagua to pursue investigations into these corruption cases, which involved high-ranking generals, politicians, businessmen and media moguls, among others. It soon became evident that those responsible for corruption were among those also responsible for grave violations of human rights, and the government gave some state lawyers permission to pursue these cases (Gamarra 2009). This led to the opening of cases against members of the Colina Group Death squad, which involved Fujimori's top security advisor Vladimiro Montesinos and army chief Gen. Nicolás Hermoza Ríos. At the same time, the Paniagua government, in an effort to restore Peru's international credibility, decided to return Peru to the contentious jurisdiction of the Inter-American Court (which had been withdrawn by Fujimori in 1999). Paniagua also agreed to abide by the Court's rulings in all cases pending involving human rights violations, accepting state responsibility, and promising to pursue justice and reparations for victims. This led to the opening of a number of important cases, including the Barrios Altos case in 2001. Prompted by human rights groups and others, the Paniagua government also established a truth commission, which explicitly sought to avoid the trade-offs between truth and justice evident in other transitional democracies. The Truth and Reconciliation Commission (CVR), renamed and ratified by the Toledo government (2001-2006), adopted an integral model of transitional justice, favoring truth-telling, retributive justice for those

responsible for grave violations of human rights, reparations for survivors and relatives of victims, and recommendations for reform to prevent the recurrence of such violence in the future. In the end the CVR recommended 47 cases for prosecution; the Ombudsman's office took up an additional 12 cases, for a total caseload of 59 human rights cases being actively prosecuted by the state. Human rights organizations report hundreds of other cases being brought by individuals, human rights lawyers, and rights organizations, particularly in the Ayacucho region, the epicenter of the political violence.

The Fujimori Trial

Despite these advances, few Peruvians believed that Fujimori, safely ensconced in Japan, would ever be held accountable for human rights atrocities committed during his decade-long rule. Japan steadfastly ignored repeated attempts by the Peruvian government to extradite Fujimori. In November 2005, however, he surprisingly left his safe haven in Japan for Chile, where he presumably planned to launch his political comeback by running for president in Peru's 2006 elections. There is ample speculation, but little concrete evidence, about why Fujimori left his safe haven in Japan. Certainly the fact that the Peruvian government was persisting in its claims to have Fujimori extradited played a role; in the face of Japan's refusal to respond to Peru's extradition requests, Peru decided to take Japan to the International Court of Justice. This may have undermined the willingness of Japanese authorities to continue to harbor Mr. Fujimori. Clearly Fujimori's advisors believed that he would be safe in Chile; Fujimori had good relationships with key Chilean business elites, and the conservative Chilean Supreme Court was known for refusing to admit extradition requests.

However, in this “age of human rights,”²² Fujimori and his advisors should have known that he would be vulnerable to arrest and possible extradition. Within a few hours of his arrival in Chile, Fujimori was arrested by Chilean authorities, and the Peruvian government immediately announced it would seek his extradition to face charges for human rights violations, usurpation of authority, and corruption in Peru.

Peru’s human rights community immediately mobilized to support the extradition request. (They had been similarly active while Fujimori was in Japan.) Relatives of victims and human rights activists made numerous trips to Chile over the course of the next two years, organizing public events, sit-ins, protest marches, and seeking out meetings with Chilean government and judicial officials to plead their case. On a few occasions they were accompanied by students, trade unionists, and other supporters. In Chile, groups of relatives of victims and human rights organizations actively supported their Peruvian counterparts, participating in their public events and protests, facilitating meetings with government and legal officials, and providing logistical support.²³ International human rights organizations, including Amnesty International, Human Rights Watch, and the International Federation of Human Rights (FIDH), also played a central role by providing legal arguments supporting the extradition request and lobbying Chilean government and legal officials.²⁴

The initial ruling handed down by Judge Orlando Álvarez rejected the extradition request. The ruling was appealed, and Peruvian and international human rights groups again mobilized in support of extradition. Finally, in September 2007, the Chilean Supreme Court reversed course, and ruled in favor of extradition on the basis of a handful of cases of corruption, usurpation of authority, and human rights violations (the specific cases is

²² The phrase comes from the title of Roht-Arriaza (2005).

²³ Author interview, Gisela Ortiz and Carmen Amaro, Lima, XXXX.

²⁴ See Human Rights Watch (2005), Amnesty International (2007), and FIDH (2007).

described further below). As some observers noted, this number was greatly reduced from the original 60 cases for which Fujimori's extradition was initially sought. This is significant since by the rules of Peru and Chile's extradition treaty, Fujimori can be prosecuted in Peru only for the cases for which he was extradited. Within hours of the extradition ruling, Fujimori was returned to Peru. Human rights groups around the world hailed the decision as a major precedent for global justice efforts.²⁵

Fujimori was extradited for several cases involving corruption, usurpation of authority, and human rights violations. The first public trial, which started on 10 December 2007, focused on three cases of human rights violations:

(1) the Barrios Altos massacre, which took place on 3 November 1991, in which 15 people, including an eight-year-old child, attending a neighborhood barbecue were killed and four others were gravely wounded in a commando-style assault by the Colina Group, a clandestine death squad that operated out of the Army Intelligence Service (SIE) and whose purpose was to eliminate suspected guerrilla sympathizers;

(2) the disappearance and later killing of nine students and a professor from La Cantuta University on 18 July 1992, also carried out by the Colina Group²⁶; and

(3) the kidnapping of journalist Gustavo Gorriti and businessman Samuel Dyer in the aftermath of the 5 April 1992 coup d'état in which Fujimori closed congress, suspended the constitution, and took control over the judiciary with the backing of the armed forces.

After sixteen months of deliberations, the Special Criminal Court found Fujimori guilty of all counts of homicide and aggravated assault and kidnapping and sentenced him to 25 years in prison. The Court also ordered Fujimori to pay several thousands of dollars in

²⁵ See for example Estrada (2007).

²⁶ The partial remains of the students were located one year later, after an intelligent agent leaked a map of the clandestine burial site to journalists.

reparations to the survivors and family members of the victims. Fujimori has appealed the decision, which is now under review by a second panel of five Supreme Court justices. Their decision, which is expected to be handed down by the end of 2009, is not subject to further appeal.²⁷

The Fujimori trial marks the first time that a democratically elected president in Latin America has been found guilty of committing crimes against humanity. It is also the first time that a former head of state has been extradited to his home country to face charges for such crimes. Trials of other heads of state —such as Charles Taylor or Slobodon Milosevic— have been carried out by internationally constituted courts.²⁸ Peru, in contrast, has shown that national governments can hold their former leaders accountable, and that not even a head of state is above the law. It remains to be seen, however, whether the Fujimori trial will set a new standard for other similar processes in Peru, or whether the hundreds of other cases will be sidelined due to legal inefficiencies, political interference, or both.

Progress and Obstacles in Criminal Prosecutions for Human Rights Violations & Future Research

I can only outline a couple of key issues here. One critical issue relates to the slowness of the court systems, especially the long time that has elapsed in many cases between the commission of the original crimes and the trial processes. Witnesses and perpetrators have died, evidence has been lost or gone missing, and so on.

²⁷ The second public trial, which is scheduled to start soon, involves the illegal transfer of \$15 million in public funds to Vladimiro Montesinos when he fled the country in September 2000. When this trial concludes, the third and final public trial will take place. This trial will group together three cases: (1) the illegal wiretapping of opposition leaders; (2) bribing members of congress; and (3) the embezzlement of state funds for illegal purposes. Aside from the public trials, a summary trial was held and concluded on 11 December 2007. In this trial, Fujimori was found guilty of usurpation of authority for authorizing and participating in the illegal raid on the home of Trinidad Becerra, Montesinos' wife, in 2000, presumably to secure and remove compromising evidence. Fujimori was sentenced to six years in prison, which was upheld on appeal.

²⁸ The volume edited by Lutz and Reiger (2009) provides an analysis of the global phenomenon of prosecutions against former heads of state. The editors identify 67 such trials, distinguishing trials on charges of corruption and human rights violations. Contributors to the same volume provide useful analyses of several case studies.

The question of selectivity—who to prosecute?— is still an unanswered one in Latin America and elsewhere. Should efforts focus on prosecuting the top leadership with authorized and made possible the massive violation of human rights? Should material authors also be punished? Where, and under what criteria, should the line be drawn, if at all? There is little empirical work on how this issue is being debated and carried out in practice in Latin America today.

Another critique of trials focuses on the way trials focus on individual perpetrators and victims. This is a necessity of liberal legal systems. However, critiques of this nature are correct in asserting that by individualizing the crimes committed, the social nature of state (and in some cases insurgent) terror is left unaddressed. In other words, violence is targeted against individual bodies, but it is directed more broadly to the social body. Can prosecutions vindicate and restore individual victims while also restoring and repairing broader social harm done by dictatorship and violence?

Another issue is related to the relationship between criminal prosecutions and the broader political scene. In some cases, as in Argentina, there is little vocal public support for the military and police officials who are being prosecuted; indeed, as Chillier (2009) has noted, virtually no one in Argentina contests the legitimacy of the human rights trials. This is not the case in other places, such as Uruguay, where the process remains extremely tentative and fragile, or in Peru, where *Fujimorismo* remains a potent political force, and where it seems as if strong alliances are being forged between current rulers and the armed forces to cut short other judicial proceedings that go beyond Fujimori and the Colina Group.

Osiel (2000) has argued that trials can help create a meaningful framework for publicly exploring traumatic memories of political violence. Much work remains to be done

as to whether this is the case. In fact there is little empirical evidence to date available that would allow a meaningful discussion of the real achievements of human rights trials. In theory trials uphold democratic ideals that are central to the rule of law, including equality before the law and the duty of the state to hold all those accountable for the crimes they have committed regardless of privilege or position.

This is related to my final point comes in: the urgent need for an interdisciplinary research agenda into the human rights trials underway in Latin America. There is a need for both qualitative and quantitative research to identify progress to date as well obstacles to criminal trials; to evaluate the judicial processes in the region and whether they avoid key problems identified by scholars of criminal prosecutions; to better understand the perspectives of survivors and victims vis-à-vis trials; the intersection between the law and politics; and how trials interact with processes of historical memory formation. Only then will have a better understanding of the long-term implications of human rights tribunals in Latin America.