

Putting Transitional Justice on Trial: Democracy and Human Rights in Post-Civil War Societies

Governments emerging from civil wars often have to decide how to deal with past atrocities as they attempt to build a stable democratic society. These are issues of “transitional justice,” defined by the International Center for Transitional Justice as “the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses.”¹ States in democratic transitions are increasingly turning to transitional justice mechanisms (TJMs), such as war crimes tribunals, truth commissions, reparations, and amnesty. Advocates of TJMs consistently argue that they are a necessary component of a successful democratization process. However, few cross-national empirical studies exist to evaluate these claims.

In addition to an overall claim that TJMs facilitate democratic transitions, the advocates of TJMs also debate whether truth commissions or tribunals are the more effective mechanism. Advocates of truth commissions argue that they have multiple advantages: they give a voice to the victims of abuse, help a society understand and acknowledge its past, bring accountability to political institutions, increase future support for human rights, restore trust in post-conflict societies, and help create the conditions for future democratization. Advocates of tribunals criticize truth commissions as “compromise justice.” They argue that only tribunals hold perpetrators accountable for their crimes, affirm that the victims do indeed have fundamental rights, and deter those who might consider such actions in the future. Again, few cross-national empirical studies exist to evaluate these claims.

The democratic transition literature includes countries with authoritarian governments and civil wars in their past. This paper tests claims made in the democratic transition literature in perhaps the ‘harder’ cases of post-civil war countries only. It analyzes the influence of TJMs on countries going through post-civil war democratic transitions. It compares current levels of human rights and democratization in post-civil war societies that have used TJMs with societies that have not. It also evaluates the levels of human rights and democratization in post-civil war societies that have used war crimes tribunals with post-civil war societies that have used truth commissions. These results support many of the arguments in the transitional justice literature: post-civil war societies that have used TJMs have higher levels of democratization and human rights than those that did not. The results are only significant, however, for war crimes tribunals. There was no statistical difference between countries that used truth commissions and countries that did not.

Transitional Justice

The transitional justice literature is vast, and no attempt is made to comprehensively review it here.² This literature is a subset of the democratic transition literature, which began after a series of regime changes in Latin America in the 1980s. Much of the literature emphasizes the historic events in South Africa and then Eastern Europe after the fall of the Soviet Union. In the post-cold war era, the focus includes post-conflict societies as the number of civil wars – and the amount of international intervention – has increased. A consistent theme in this literature is to explain how TJMs can help facilitate democratic transitions. The following is a typical passage:

There are four basic objectives of any transitional justice program...the first is to determine the truth by establishing a record of human rights abuses. Truth provides validation for victims and is aimed at the instruction of future generations. The second objective is justice. The third is meaningful democratic

reform, entrenchment of the rule of law within society, and building a society with institutions that ensure that the kinds of abuses being dealt with will not recur. The fourth objective is a durable peace with assurance that a return to violence is fairly unlikely...these four objectives are the standards by which all transitional justice programs should be evaluated.³

The literature clearly asserts an expectation that TJMs will increase levels of democratization and human rights in post-civil war countries. Some authors explicitly argue that the way to evaluate the success of truth commissions, a particularly important TJM, is to analyze future levels of human rights and democratization.⁴

Most empirical analyses in the literature, though, are case studies rather than cross-national studies. There are few cross-national empirical studies testing the claims that TJMs do indeed facilitate democratic transitions.⁵ There is also little longitudinal data of political and cultural beliefs before and after the initiation of transitional justice mechanisms. A recent review of this literature concludes that there is insufficient evidence to support any strong claims in this area.⁶

The few studies that do exist show mixed results. Eric Brahm finds no difference in the levels of democracy between transitioning countries that have used truth commissions and those that have not.⁷ Tricia Olsen, Leigh Payne, and Andrew Reiter find in their study of counties in democratic transitions, that no one mechanism, when used alone, improves human rights.⁸ Indeed, they argue that truth commissions, when used alone, had a negative impact on human rights. Only when TJMs were used in combination did they have a positive impact. Kathryn Sikkink and Carrie Booth Walling created an original dataset of truth commissions and trials in Latin America, an analysis of which led them to conclude that human rights trials have a positive effect on human rights, conflict resolution, democracy, and rule of law.⁹ In the most extensive study of its kind, Hunjoon Kim and Kathryn Sikkink look at 100 transitional countries and also

find that trials lead to improvements in human rights. They argue that trials have more influence than truth commissions because trials combine normative pressures and material punishment while truth commissions do not include material punishment.¹⁰

Another feature of the transitional justice literature is a debate about the relative worth of truth commissions versus tribunals. Underlying this debate is a theoretical argument that countries must choose between post-conflict goals of justice or peace.¹¹ Should a country prioritize goals like justice, accountability, deterrence, and the rule of law regarding human rights by using TJMs like tribunals and reparations? Or should a country prioritize goals like peace, healing, and reconciliation by using TJMs like truth commissions and amnesty? Should a country punish previous human rights violators and provide reparations to victims, or should a country seek truth and acknowledgement of past atrocities as the proper first step to build a stable post-conflict society?

Truth commissions investigate the alleged atrocities of past warring parties and/or a previous regime, issue a report of their findings, and often make recommendations to prevent future abuses. Advocates of truth commissions argue that they give a voice to the victims of abuse and help a society understand and acknowledge its past.¹² Supporters also cite the therapeutic value for victims of truth telling and receiving acknowledgement from the state of their suffering. Truth commissions incorporate a greater range of victims than tribunals and take a broad view of society that enables them to recommend institutional changes to prevent future atrocities. Overall, the argument is that truth commissions bring accountability to political institutions, increase future support for human rights, restore trust in post-conflict societies, and help create the conditions for future democratization.¹³

Truth commission advocates prefer them to tribunals because they are more likely to facilitate the necessary political and cultural change for reconciliation by focusing on underlying causes of conflict and human rights abuses rather than prosecuting individuals. Truth commission supporters fear that the adversarial nature of trials make reconciliation less likely and may instead promote future violence; that trials focus on a few individuals and are less effective in dealing with systematic abuses; that trials may be unfair if the abuses occurred many years ago or if only lower level perpetrators rather than the leadership are tried; and that trials may be either impractical or a farce if the perpetrators remain too influential during the transition.

Advocates cite the truth commission process in South Africa to illustrate their argument. James Gibson, for example, generalizes from his research on South Africa and argues that truth commissions can lead to reconciliation, democratization, and respect for human rights.¹⁴ He points to “macro” factors contributing to reconciliation: a rule of law culture, political pluralism (competing centers of power), amnesty, and the extent of injuries perpetrated by the previous regime. Gibson also cites “micro” factors contributing to reconciliation: even-handedness (assigning blame to all sides), leadership, and societal penetration of the process.¹⁵ Such factors can facilitate certain components of reconciliation, he argues, including the reduction of political intolerance, support for human rights, institutional legitimacy, and a collective national memory.

Some case studies of truth commissions support Gibson’s arguments. Mark Ensalcado argues that the truth commissions in Chile and El Salvador were successful precisely because they focused on reconciliation and truth rather than justice and punishment.¹⁶ Christian Tomuschat argues that the truth commission in Guatemala helped propel the country toward peace by recognizing the acts committed by all sides.¹⁷ Robert Ameh similarly argues that the

truth commission in Ghana, despite the difficulties in offering an authoritative account of the truth, will ultimately be successful because it did not try to place blame and create a basis for future trials.¹⁸

Even accounts of unsuccessful transitions offer some support for Gibson's viewpoint. Gberie Lansana argues that the truth commission in Liberia was unsuccessful because it placed blame only on one side and the current political leadership did not support the process – two factors highlighted by Gibson.¹⁹ Joseph Nevins and David Webster both argue that the reconciliation process in East Timor was unsuccessful because it did not grant amnesty and tried to prosecute offenders who had fled to Indonesia.²⁰ Without extradition agreements from Indonesia, East Timor was unable to prosecute the alleged offenders, and public support for that approach waned. Elizabeth Evanson argues that the process in Sierra Leone failed because it included the use of truth commissions and tribunals concurrently, which encouraged conflict in the population rather than reconciliation.²¹

The competing argument is that tribunals are often more effective than truth commissions.²² Tribunals emphasize deterrence, accountability, punishment, and the rule of law. Tribunals prosecute individuals for alleged acts of genocide, crimes against humanity, and war crimes. While some are international tribunals like those created by the Security Council to investigate war crimes in the former Yugoslavia and Rwanda, most are initiated at the nation-state level. Advocates for tribunals argue that they are the only way to guarantee accountability because not all truth commissions trigger processes that lead to consequences for human rights violators. Similarly, amnesty programs are unacceptable to those who emphasize punishing the guilty.²³ Proponents of this view believe truth commissions are “compromise justice” – inferior alternatives used when the legal system is too weak to prosecute human rights violations.²⁴ Truth

commissions are considered weak because they generally have time limits, restrictions on access to evidence, no enforcement powers, and a poor record of implementing recommendations.

Critics of trials argue that they are often not appropriate in delicate transition situations. Even the prospect of trials may undermine negotiations and present obstacles to ending conflict.²⁵ Why should leaders agree to a negotiated ceasefire and a peaceful transition context if part of that process means they will go on trial for past atrocities? The domestic judicial system may not be well established to handle such controversial trials in post-civil war societies. Critics also argue that deterrence is unlikely because perpetrators will continue to believe that such acts are necessary because the future of their group's survival is at stake.

This debate demonstrates the tensions between peace and justice as post-conflict and/or democratizing goals. Pursuing peace rather than justice may seem inadequate to many if the process does not include the punishment of those responsible. To avoid impunity many human rights advocates cite the necessity of trials. Yet pursuing justice through trials can often hinder the long term goal of peace by alienating the supporters of the previous regime and preventing the development of future power sharing arrangements. Similar dynamics result from the policy options to grant amnesty or seek reparations. Combining truth commissions and amnesty – everyone admits their crimes and no one goes to jail – risks a situation in which the victimized groups in society do not feel that justice was done. Hence, combining trials and reparations may lead to resentment and animosity among the social groups privileged by the previous regime and prevent the reconciliation necessary for long term peace.

Some take these tensions so seriously that they argue that TJMs are ultimately counterproductive. Jack Snyder and Leslie Vinjamuri contend that even truth commissions – if they reveal individual responsibility for crimes – can potentially upset long term peace because

they can foster divergent interpretations of history and generate insecurity on the part of the alleged perpetrators.²⁶ David Mendeloff argues that there is little empirical evidence that tribunals or truth commissions provide psychological or emotional benefits to victims.²⁷ Booth notes that sometimes the truth causes more suffering than a forced amnesia because it removes the incentive for the elites of the old regime to obstruct the process.²⁸ Janine Clark argues that truth commissions cannot deal with the issue of denial – for example, Serbian leaders who do not view their actions as harmful or criminal.²⁹

This article addresses these two features of the transition justice literature. It provides a cross-national empirical test of claims about the effectiveness of TJMs. It tests the overall claim in the literature: democratizing countries that use TJMs are more likely to have successful democratic transitions than countries that do not use TJMs. This article also addresses the debate within the literature about the relative effectiveness of tribunals and truth commissions. It does so, though, specifically for the subset of post-civil war societies and tests the following hypotheses:

H1: Post-civil war societies that have used TJMs have higher levels of democracy than post-civil war societies that have not used TJMs.

H2: Post-civil war societies that have used TJMs have higher levels of human rights than post-civil war societies that have not used TJMs.

H3: Post-civil war societies that have used tribunals have higher levels of democracy than post-civil war societies that have used truth commissions.

H4: Post-civil war societies that have used tribunals have higher levels of human rights than post-civil war societies that have used truth commissions.

Analyzing the Effectiveness of TJMs

The data used to test these hypotheses includes fifty-five countries that have experienced a civil war since 1980 according to the Armed Conflict Database generated by the Uppsala Conflict Data Program and the International Peace Research Institute.³⁰ The Transitional Justice Database Project was used to determine which countries used a particular TJM mechanism.³¹ The countries in the study, and the TJMs mechanisms used in each, are in Table 1. The dataset also includes four dependent variables measuring levels of democratization and human rights and three control variables common in the literature that may also influence the levels of democratization and human rights: per capita GDP, the severity of the civil war, and the region of the country.

Truth commission: This variable identifies the countries that have used a truth commission. Fifteen of the fifty-five countries in the dataset utilized a truth commission.

Tribunal: This variable identifies the countries that have used a judicial tribunal. Twenty-seven of the fifty-five countries in the dataset utilized a war crimes tribunal.

Democracy: This variable is based on Polity IV scores, a commonly used 20-point scale measuring democracy levels in countries around the world.³²

Human rights: Three indicators are used for the human rights dependent variable. The first is the Empowerment Rights Index from the CIRI Human Rights Data Set.³³ This index measures government respect for foreign movement, domestic movement, freedom of speech, freedom of assembly and association, workers' rights, electoral self-determination, and freedom of religion. It ranges from 0 (no government respect for these seven rights) to 14 (full government respect for these seven rights). The second is the CIRI Physical Integrity Index, which measures the rights not to be tortured, executed, or imprisoned for one's political beliefs.

The third is the Political Terror Scale,³⁴ which measures levels of political violence based on country reports from Amnesty International and the U.S. State Department.

Table 1 – Post-Civil War Countries and TJMs

Truth Commissions Only

Algeria
Burundi
Chad
Lebanon
Morocco
Sri Lanka

Tribunals Only

Afghanistan
Bangladesh
Congo
Croatia
El Salvador
Guinea Bissau
Haiti
Iraq
Ivory Coast
Liberia
Nicaragua
Peru
Philippines
Romania
Rwanda
Senegal
Serbia
Uzbekistan

Neither

Angola
Azerbaijan
Central African Republic
Cambodia
Columbia
DR Congo
Georgia
Ethiopia
Eritrea
India
Iran
Mozambique
Myanmar
Nepal
Pakistan
Somalia
Sudan
Syria
Tajikistan
Thailand
Turkey
Yemen

Both Tribunals/Truth Commissions

Argentina
Bosnia
East Timor
Guatemala
Indonesia
Nigeria
Sierra Leone
South Africa
Uganda

The three control variables are: 1) the number of deaths within the country during the civil war, according to the Correlates of War Intra State War dataset;³⁵ 2) the per capita GDP of the country, according to the 2011 CIA Country Reports; and 3) the region of the country – whether the country is in Europe, Africa, Latin America, Asia, or the Middle East.

Simple bivariate correlations provide some initial support for the four hypotheses (see Table 2). First, the use of a TJM was significantly correlated with all four measures of human rights and democratization. Second, the use of a war crimes tribunal was significantly correlated with all four measures of human rights and democratization. However, the use of a truth commission was not. While all four measures were in the hypothesized direction, none were statistically significant.

Table 2 – Bivariate Correlations

	Country used TJM	Country used war crimes tribunal	Country used truth commission
Political Terror Scale	-.427** .001	-.469** .000	-.153 .260
Physical Integrity Index	.454** .000	.453** .001	.178 .195
New Empirical Index	.471** .000	.445** .001	.219 .108
Polity IV Democracy Scale	.406** .003	.377** .006	.170 .228

Numerous regression analyses provide further support for the hypotheses (see Table 3). Model 1 includes the TJM index (whether a country used either TJM mechanism) and the three control variables to predict the Polity IV democratization scale. Only the TJM variable was a significant predictor. Model 2 includes those same four independent variables predicting the Political Terror Scale. Both the TJM and per capita GDP variables were significant predictors.

Model 3 includes the same four variables predicting the CIRI Empowerment Scale. As in Model 1, only the TJM variable was a significant predictor. Model 4 includes the four variables predicting the CIRI Physical Integrity Index. Once again, only the TJM variable was a significant predictor. These results suggest that regardless of region, wealth, or intensity of the civil war, countries that use a TJM mechanism are more likely to have higher levels of democratization and human rights.

Table 3 – TJM vs. no TJM

	Model 1	Model 2	Model 3	Model 4
	DV: Democracy (Polity IV)	DV: Human Rights (CIRI Empowerment)	DV: Human Rights (CIRI Physical Integrity)	DV: Human Rights (Political Terror Scale)
TJM	.011 * (.972)	.003* (.568)	.005* (.336)	.012* (.164)
War Deaths	.501 (.000)	.520 (.000)	.890 (.000)	.939 (.000)
GDP per capita	.074 (.000)	.275 (.000)	.494 (.000)	.013* (.000)
Region	.233 (.503)	.623 (.295)	.308 (.175)	.571 (.085)

Clustered standard errors in parentheses. *p<0.05 **, p<0.01

Four additional regression models also support the argument that war crimes tribunals have a greater influence than truth commissions (see Table 4). Model 5 includes the tribunal variable, the truth commission variable and the three control variables predicting the Polity IV democracy scale. Only the tribunal variable – not truth commissions – was a significant predictor. Model 6 includes the same five independent variables predicting the Political Terror Scale. The tribunal variable and per capita GDP – but not truth commissions – were significant predictors. Model 7 includes the same variables predicting the CIRI Empowerment Scale. As in Model 6, only the tribunal variable was a significant predictor. Model 8 includes the same

variables predicting the Physical Integrity Index. Again, only the tribunal variable was a significant predictor.

Table 4 – War Crimes Tribunal vs. Truth Commission

	Model 1	Model 2	Model 3	Model 4
	DV: Democracy (Polity IV)	DV: Human Rights (CIRI Empowerment)	DV: Human Rights (CIRI Physical Integrity)	DV: Human Rights (Political Terror Scale)
War Crimes Tribunal	.029* (1.442)	.005* (.828)	.003* (.486)	.003* (.233)
Truth Commission	.387 (1.663)	.404 (.948)	.687 (.556)	.762 (.267)
War Deaths	.479 (.000)	.477 (.000)	.985 (.000)	.840 (.000)
GDP per capita	.090 (.000)	.300 (.000)	.525 (.000)	.014* (.000)
Region	.271 (.524)	.660 (.299)	.263 (.176)	.646 (.084)

Clustered standard errors in parentheses. *p<0.05 **, p<0.01

Conclusion

The transitional justice literature makes important claims about the effectiveness of TJMs in facilitating democratic transitions and increasing respect for human rights. Advocates argue that TJMs are effective facilitators of democratization and human rights for a variety of reasons: 1) they help establish the truth about past human rights abuses; 2) they provide validation, closure, and justice for victims; 3) they hold human rights abusers accountable and potentially deter future abuse; 4) they contribute to the development of the rule of law; and 5) they help reconcile competing groups and establish a durable peace. This paper focuses on a subset of countries undergoing democratic transitions – post-civil war societies – and provides cross-national empirical support for these arguments regarding TJMs. This study shows that post-civil war countries that have used a TJM have higher levels of democratization and human rights than post-civil war countries that have not used a TJM.

The results also show, however, that war crimes tribunals are more effective than truth commissions. The post-civil war countries that used a war crimes tribunal have higher levels of democratization and human rights than post-civil war countries that used a truth commission. Each TJM pursues a different logic – war crimes tribunals emphasize justice, punishment and deterrence; and truth commissions emphasize reconciliation and peace. Those who prefer war crimes tribunals criticize truth commissions as “compromise justice” because they do not guarantee accountability for human rights violators. The critics argue that truth commissions often do not have access to all the evidence and generally do not have the power to implement their own recommendations. Thus, they are not effective facilitators of democracy and human rights in post-civil war situations. The results of this study support those arguments.

There are many reasons to tentatively interpret both of these results. There are a range of other possible reasons not included in this study why post-civil war societies may enjoy increasing levels of democratization and human rights – the situation in neighboring countries, the colonial legacy of the country, the level of international support, the level membership in international organizations, whether the regime or the rebels win the civil war, the level of power-sharing in the post-civil war settlement, among others. It is possible that some combination of these other factors more directly influence democratization and human rights levels, and the countries that are more likely to have higher levels of democracy and human rights are also more likely to use TJMs in a post-civil war setting. The current evidence in favor of TJMs in general and tribunals in particular has not reached the point of strong policy advocacy. For example, we cannot confidently say that tribunals would aid Syria’s post-civil war levels of human rights and democratization.

The tentative nature of these results also applies to the findings regarding truth commissions. Post-civil war truth commissions have been implemented in a wide variety of ways; perhaps some are more effective than others. Perhaps different TJMs are more appropriate in different contexts, and truth commissions can be effective in other democratic transition contexts other than civil wars. Overall, however, these results show that truth commissions in a post-civil war context are a ‘half-measure’ that do not effectively lead to increased levels of democratization and human rights. War crimes tribunals, though, were consistently a good predictor throughout this study. This suggests that if a country wants higher levels of democracy and human rights after a civil war, it should not have unpunished war criminals in its society. Establishing the rule of law, even with the risk of alienating groups and reducing the chances for peaceful reconciliation, is often a more effective way to increase democracy and human rights.

Endnotes

¹ International Center for Transitional Justice. “What is Transitional Justice?” <https://www.ictj.org/about/transitional-justice>.

² Excellent reviews include Neil Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Washington DC: United States Institute of Peace, 1995); Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (New York: Routledge, 2001); Naomi Roht-Arriaza and Javier Mariecurrena (eds.), *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (Cambridge: Cambridge University Press, 2006); Hugo Van der Merwe, Victoria Baxter, and Audrey R. Chapman (eds.), *Assessing the Impact of Transitional Justice* (Washington DC: US Institute of Peace Press, 2008); Laurel E. Fletcher, Harvey M. Weinstein and Jamie Rowen, “Context, Timing, and the Dynamics of Transitional Justice: A Historical Perspective,” *Human Rights Quarterly* 31, no. 1 (2009): 163-220; David Backer, “Cross-National Comparative Analysis,” in *Assessing the Impact of Transitional Justice*, edited by Hugo Van der Merwe et al (Washington DC: US Institute of Peace Press, 2008) 23-90; and Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun and Friederike Mieth. *Transitional Justice Theories* (New York: Routledge, 2014).

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⁴ For example, see Eric Brahm, "Uncovering the Truth: Examining Truth Commission Success and Impact," *International Studies Perspectives* 8, no. 1 (2007): 16-35.

⁵ Those making this criticism include Mark Arenhovel, "Democratization and Transitional Justice," *Democratization* 15, no. 3 (2008): 570-87; Paige Arthur, "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice," *Human Rights Quarterly*, 31, no. 2 (2009): 321-67; and David Mendeloff, "Trauma and Vengeance: Assessing the Psychological and Emotional Effects of Post-Conflict Justice," *Human Rights Quarterly* 31, no. 3 (2009): 592-623.

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⁹ Kathryn Sikkink and Carrie Booth Walling, "The Impact of Human Rights Trials in Latin America," *Journal of Peace Research* 44, (2007): 427-45.

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¹⁴ James Gibson, "The Contribution of Truth to Reconciliation: Lessons from South Africa," *Journal of Conflict Resolution* 50, no. 3 (2006): 409-32; and James Gibson, *Overcoming Apartheid: Can Truth Reconcile a Divided Nation?* (New York: Russell Sage Foundation, 2004).

¹⁵ Gibson, "The Contribution of Truth to Reconciliation: Lessons from South Africa," 421.

¹⁶ Mark Ensalcado, "Truth Commissions for Chile and El Salvador," *Human Rights Quarterly* 26, no. 1 (1994): 409-29.

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- ³² The Polity IV dataset includes a variety of indicators to form a composite democracy scale, including the relative competitiveness of executive recruitment, the relative openness of executive recruitment, the amount of constraints on the executive, and the overall competitiveness of political participation. The user manual is at <http://www.systemicpeace.org/inscr/p4manualv2013.pdf>.
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³⁴ The Political Terror Scale is available at <http://politicalterror scale.com>.

³⁵ The Correlates of War Project is available at <http://www.correlatesofwar.org/data-sets>.