

2. Key concept: Transitional justice

2.1. Origins and historical developments

The key concept of this dissertation is transitional justice, which has originally been understood as “the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes” (Teitel 2003: 69). The term was coined in the early 1990s, when scholars became increasingly interested in how third wave transition states were coming to terms with their authoritarian pasts.

While some scholars regard transitional justice as a phenomenon that stretches far back into history¹, most trace its origins back to the post-World War II era and the Allies’ measures to deal with the legacies of Nazi Germany.² In light of the horrendous crimes committed by Hitler’s totalitarian regime, the United States, Great Britain, France, and the Soviet Union wanted more than just the negotiation of a cease-fire and a peace agreement. Rather, they strove for a comprehensive investigation of past misdeeds, legal prosecution of major perpetrators, the removal of all Nazis from the state apparatus, structural reforms of the state system, and the ‘reeducation’ and ‘reorientation’ of the German population (see Reichel 2007: 30ff). In the Nuremberg trials held by the International Military Tribunal, 22 high-ranking Nazi officials were tried, seven of whom were sentenced to prison and twelve to death. In addition, American, British, and French tribunals convicted 5,006 German war criminals. 668 received death sentences, out of which 486 were carried out (Meier 2010: 52). By holding major criminals accountable and confronting the public with the past, the Allies hoped to prevent Germany’s return to totalitarian rule and further atrocious crimes in

1 For Jon Elster (1998: 9f) already the restoration of democracy in Athens in 403 BC constitutes “an unambiguous case of transitional justice”. Christian Meier’s (2010) historical investigation of transitional justice also covers ancient Athens, the Middle Ages, and the modern era.

2 The description of the historical evolution of transitional justice draws on Ruti Teitel’s “Transitional Justice Genealogy” (2003).

the future. Thus, the Allies' two principal goals were retribution and deterrence (Brants and Klep 2013: 39).³

Transitional justice was also pursued in other European countries. Belgium, France, and the Netherlands carried out large-scale purges ('lustration') and expelled collaborators from their societies *en masse* (Huyse 1995: 66). Furthermore, tens of thousands of citizens in each country received prison terms, which were often accompanied by other sanctions including fines, confiscations, or police supervision. The number of death sentences amounted to 152 in Holland, 2,940 in Belgium, and 6,763 in France (ibid.).⁴ In the Netherlands, capital punishment, originally abolished in 1870, was reintroduced in 1945 and continued to be practiced until 1952. Overall, "[t]he number of unpatriotic citizens who suffered punishment in one or another form was approximately 100,000 in Belgium, 111,000 in Holland and 130,000 in France" (ibid.: 67).

In Italy, following the fall of Benito Mussolini in July 1943, the new administration under Pietro Badoglio passed a purge law in December of that year as well as the law on the "punishment of fascist crimes and behaviors" in June 1944 (Elster 2004: 55ff). Both laws also targeted large numbers of people, including high-level officials of the old regime, members of the National Fascist Party, and other fascist organizations, as well as any other person who in some way or another had contributed to keeping fascism alive (Woller 1996: 123). Between 500 and 1,000 persons were sentenced to death, while the remaining perpetrators received prison terms (Meier 2010: 81).⁵ In Norway, more than 28,000 persons were arrested as part of a legal purge and punished with fines, imprisonment, and in some cases, death. Like in Belgium and Holland, members of Nazi organizations were automatically found guilty (Elster 2004: 57).

Some European countries also introduced the new charge of "national indignity", a type of low-grade treason, which was punished with the deprivation of political and civil rights (ibid.: 58). The disqualifications comprised the loss of the right to vote and to be elected, to hold public positions, and to exercise certain occupations (e.g. lawyer, doctor or teacher). In France, the state was also allowed to confiscate past *and future* property of perpetrators (ibid.).

3 Not all scholars regard the prevention of future crimes as a main function of the Nuremberg trials however. According to Ruti Teitel (2003: 73) for instance, "the Nuremberg prosecution was primarily intended to justify and legitimate Allied intervention in the war".

4 It needs to be noted that not all of these convictions were carried out. In France, about 10% of the death sentences were executed (Meier 2010: 52), in Holland about 25% (Rückerl 1982: 103), and in Belgium about 8% (Huyse 2006: 168).

5 In second instance, most of the sentences were annulled or greatly reduced however.

In sum, the first TJ phase was largely focused on retribution. *Retributive justice* is based on the conviction that perpetrators of human rights abuses must be punished in courts of law or at least publicly confess and beg forgiveness (Anderlini et al. 2004: 2). It aims at deterring future crimes, preventing the return of former criminals to power, countering a culture of impunity, and avoiding vigilante justice (ibid.). Overall, retributive justice is backward-looking, perpetrator-centered, and punitive. Luc Huyse (1995: 66f) observes that in France, Belgium, and the Netherlands, there was a strong tendency “to judge the population under absolute standards of good and bad. Sensitivity to the many shades of grey between ‘black’ and ‘white’ was very low indeed.” Both he and Ruti Teitel (2003: 73) also note that the pursuit of transitional justice in post-war Europe was marred by legal irregularities. In several cases, due-process violations occurred. At that time, international conventions guaranteeing respect for human rights and the rule of law were weak or non-existent. Only the following decades saw a growing global recognition of human rights norms. In 1948, the UN Assembly adopted the Universal Declaration of Human Rights, followed in 1950 by the European Convention for the Protection of Human Rights and Fundamental Freedoms. Sixteen years later, the two International Covenants on civil and political as well as economic, social, and cultural rights were ratified. The four treaties – among others – codify basic human rights and guarantee the right to a fair trial.

During the second TJ phase coinciding with the third wave of democratization, retributive justice was largely abandoned in favor of *restorative justice*. Rather than focusing on the punishment of the offender, restorative justice emphasizes reconciliation and the restoration of relations between victims and perpetrators (Little 1999: 66). It aims at healing wounds and repairing the damages done in order to ensure the peaceful coexistence of former adversaries in the future. Truth-telling, apologies, and reparations are essential elements of restorative justice. Altogether, it is forward-looking, victim-centered, and remedial.

Instead of prosecuting large numbers of perpetrators, leaders in most Latin American transitory states opted for the installation of truth commissions as “alternative forms of accountability” (Leebaw 2008: 90).⁶ These commissions were mandated to investigate and condemn past human rights abuses, thereby constructing an alternative national history that publicly acknowledged the harm done to the victims. Their final reports usually also contained recommendations on how to strengthen peace, democracy, and national reconciliation. Only few

6 For a comprehensive list of Latin American truth commissions, see table 2.1.

were entitled to reveal the identity of the perpetrators however. Famous examples are the Argentinean National Commission on the Disappearance of Persons (CONADEP) installed by President Raúl Alfonsín in 1983 and the Chilean Investigative Commission on the Situation of Disappeared People and its Causes established by President Patricio Aylwin in 1990 (see Hayner 2011: 45ff).

In Eastern Europe, citizens were given access to historical records in order to uncover the truth about the past (Teitel 2003: 79). Moreover, many post-Communist states opted for lustration, but with the exception of the Czech Republic and Albania, these were limited to a small group of people (Leebaw 2008: 99). Reparations also gained increasing importance. While some Latin American states paid monetary compensations to the victims and their families (e.g. Argentina, Brazil, and Chile), Eastern European countries primarily ordered the restitution of agricultural land confiscated by the previous regime (see Elster 2004: 69ff).

In contrast to the first TJ phase, where trials constituted the norm, partial or blanket amnesties became fairly common during the third wave of democratization. A few countries carried out judicial prosecutions, but these only targeted a small number of people, namely the old political or military elite.⁷ The shift in TJ strategies from retributive to restorative justice not least resulted from considerations of the domestic political contexts, in which former perpetrators often still held significant influence. The prevailing paradigm at that time, according to Guillermo O'Donnell and Philippe Schmitter (1986: 28), was to settle a past account “without upsetting a present transition”. The overarching priority was no longer judicial accountability, but the preservation of peace and political stability. Moreover, rule of law principles received greater attention during the second TJ phase. Finally, new actors emerged: Next to governments and courts of law, churches, NGOs, and human rights organizations began to promote transitional justice and carry out their own truth-seeking projects (Teitel 2003: 83).

The third and current phase started in the mid- to late 1990s and is characterized by an “expansion and normalization of transitional justice” (ibid.: 89). Transitional justice instruments are no longer solely implemented after political transformations, but also following military coups, civil wars, genocide, and other gross human rights violations. Like phase I, phase III has a substantial international dimension: perpetrators are not only held accountable in domestic tribunals, but also in international, hybrid, and foreign courts. In 1993, the

7 Among the countries that carried out trials were Argentina, Bolivia, Bulgaria, the Czech Republic, the former German Democratic Republic, Greece, Hungary, Poland, and Portugal.

United Nations established the International Criminal Tribunal for the former Yugoslavia (ICTY) to prosecute genocide, war crimes, and crimes against humanity committed during the conflicts in the Balkans. The decision to erect an international court was taken in light of ongoing reports about mass killings, torture, rape, and other atrocities, which the UN Security Council classified as threats to international peace and security.⁸ The ICTY was meant to ensure that major perpetrators – no matter what position they held – were put on trial. It became the first war crimes court established by the UN and the first international war crimes tribunal since the post-World War II era.

Only one year later, the International Criminal Tribunal for Rwanda (ICTR) was created to prosecute the perpetrators of the mass murder of ethnic Tutsi and moderate Hutu as well as other grave violations of international humanitarian law committed in the territory of Rwanda in 1994. Next to justice, the main purpose of the ICTR was deterrence by sending “a strong message to Africa’s leaders and warlords”⁹. Both the ICTY and the ICTR constituted ad-hoc criminal courts convened in response to specific crimes committed in a certain country or region. Since 1998, the International Criminal Court (ICC) exists as a permanent international institution to prosecute war crimes, genocide, and other crimes against humanity in cases where states prove unwilling or unable to do so.

The new millennium has seen the emergence of mixed or ‘hybrid’ tribunals in East Timor (2000), Sierra Leone (2002), Cambodia (2003), and Lebanon (2007). Hybrid tribunals employ both national and foreign lawyers and incorporate elements of domestic and international law. As they follow the Nuremberg Tribunal as well as the ICTY, ICTR, and ICC, they are regarded as the ‘third-generation’ of international courts (Holvoet and de Hert 2012: 229).

Evidently, the third TJ phase is again marked by a strong trend towards judicial accountability, even though other TJ instruments are frequently applied as well. This trend also becomes evident in the increasing application of the principle of universal jurisdiction. Universal jurisdiction is a legal doctrine that permits domestic courts to try perpetrators of grave human rights violations regardless of where the crime occurred and regardless of the nationality of the perpetrator or victim. It was most famously applied in the case of the former Chilean dictator Augusto Pinochet. Pinochet, who had repressively ruled from 1973 to 1990, was arrested in 1998 in London by British police officers executing an international

8 UN Security Council Resolution 827, May 25, 1993. http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf (October 2, 2013).

9 See the ‘General Information’ on the website of the ICTR. <http://www.unictl.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx> (October 2, 2013).

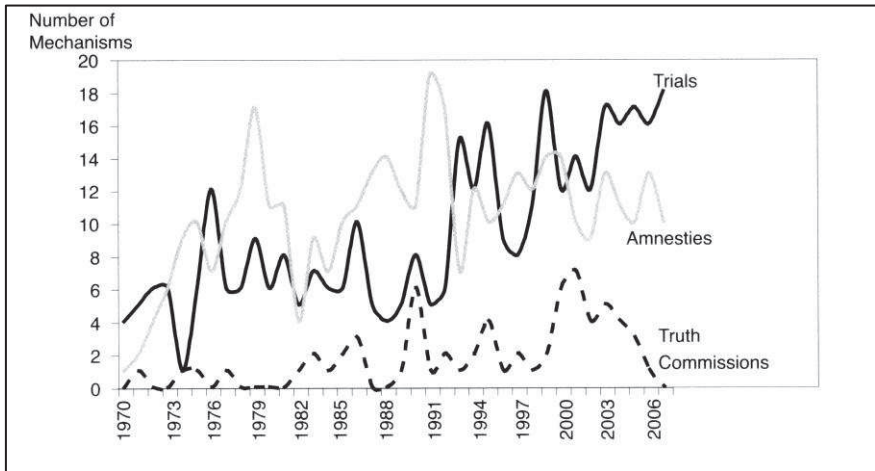
warrant of arrest issued by the Spanish judge Baltasar Garzón. Garzón, who investigated allegations of murder, torture, and disappearance of Spanish nationals in Chile during Pinochet's rule, requested his extradition to Spain to face trial for the alleged offenses. While Pinochet claimed immunity from prosecution as a former head of state and due to a 1978 military self-amnesty, the British House of Lords found that certain international crimes, including torture, were not protected by former head-of-state immunity and that Pinochet could therefore be extradited to Spain (Roht-Arriaza 2001a: 312). Even though the former dictator was eventually allowed to return home without standing trial due to poor health, the ruling of the House of Lords constituted a landmark decision regarding international criminal accountability. It confirmed the right of national courts to try and punish perpetrators of gross human rights violations irrespective of the location of the crime and the nationality of perpetrator or victim. The decision of the House of Lords not only spurred judicial activity in Chile, but also fostered further foreign human rights prosecutions, a development Naomi Roht-Arriaza calls the "Pinochet Effect" (2006a).

Ellen Lutz and Kathryn Sikkink (2001) describe the increase in domestic and international judicial prosecutions metaphorically as a "justice cascade". According to the authors, since the last two decades of the 20th century, there has been "a major international norms shift towards using foreign and international judicial processes to hold individuals accountable for human rights crimes" (ibid.: 2). The justice cascade, propelled by transnational advocacy networks, occurred in the context of a larger "norms cascade", i.e. a global trend towards acknowledging the legitimacy of universal human rights principles. Since 1948, a dense network of international pacts and conventions has been created codifying basic human rights and enshrining the duty to prosecute the perpetrators of gross human rights violations.¹⁰

Other authors confirm this trend towards judicial accountability, but note that other TJ instruments – including amnesties – have also regularly been implemented throughout the past decades (see Olsen et al. 2010: 99ff). This is also illustrated in figure 2.1.

10 Together the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights (both ratified in 1976) constitute the "International Bill of Rights" (Nußberger 2010: 93). The duty to prosecute is enshrined, inter alia, in the Genocide Convention (1951), the Apartheid Convention (1976), the International Convention Against Torture (1987), and the Inter-American Convention on the Forced Disappearance of Persons (1996).

Figure 2.1. Transitional justice mechanisms implemented 1970-2007



Source: Olsen et al. 2010: 100. The sample comprises 161 countries.

In sum, since the mid-20th century, transitional justice has gained increasing importance around the globe. Particularly in the western world, a consensus emerged that transitory and post-conflict societies need come to terms with their burdened pasts.

2.2. Conceptual definition and instruments

In this dissertation, transitional justice is understood as “a set of judicial and non-judicial measures to address the legacies of authoritarian rule and past human rights violations”. The measures comprise 1) judicial prosecutions, 2) amnesties, 3) truth commissions, 4) lustration, and 5) reparations. Overall, TJ does not have one common definition nor one fixed set of measures. Some scholars exclude amnesties from their conceptual definition (e.g. Roht-Arriaza 2006b), others include institutional reforms in the judicial and security sector (e.g. van Zyl 2005), yet others also look at memory projects like monuments, museums, and art (e.g. Buckley-Zistel 2007). The conceptual definition of this dissertation is oriented on Fuchs and Nolte (2004: 6) and Olsen et al. (2010: 31ff), focusing on

measures implemented by state organs to redress the wrongdoings of the past. Institutional reforms are excluded, because they form part of larger democratization and peace-building agendas and instead of addressing previous misdeeds aim at preventing human rights violations in the future.

Altogether, transitional justice is understood as a holistic approach to come to terms with the past, requiring the implementation of more than one of these measures (see Olsen et al. 2010: 24f). Nicaragua's policy of *borrón y cuenta nueva* does not meet this criterion.

Judicial prosecutions

According to international legal standards, war crimes as well as crimes against humanity (i.e. murder, ethnic cleansing, torture, rape, forced disappearance, enslavement, deportation, and other inhumane acts practiced in a systematic manner) must be legally prosecuted and perpetrators be held accountable. The criminal offence of 'crime against humanity' first appeared in 1945 in the London Charter of the International Military Tribunal, which laid down the laws and procedures by which the Nuremberg trials were to be carried out (Nußberger 2010: 111). The Nuremberg trials have come to epitomize legal prosecutions of severe human rights violations (Olsen et al. 2010: 32).

The duty to prosecute is enshrined in a number of international conventions and treaties such as the 'Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity', adopted by the UN General Assembly on December 3, 1973. There, it is stated that:

1. War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment.
(...)
5. Persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes. In that connection, states shall co-operate on questions of extraditing such persons.¹¹

11 See the website of the Office of the United Nations High Commissioner for Human Rights at <http://www2.ohchr.org/english/law/guilty.htm> (October 4, 2013).

As paragraph 5 states, perpetrators of gross human rights violations are meant to be held accountable in national courts. Yet, when these lack either the will or the legal infrastructure and resources to do so, international or hybrid tribunals can take over their function. As noted above, individual foreign courts may also put perpetrators of crimes against humanity on trial due to the legal principle of universal jurisdiction. Judicial prosecutions are based on a notion of individual guilt and draw a clear line between perpetrators and victims (Buckley-Zistel 2007: 3).

Scholars and politicians are divided on the necessity and benefits of trials. Proponents of judicial accountability not only point to the corresponding articles in international treaties and conventions, but also emphasize that prosecutions are a moral duty owed to the victims and their families (Malamud-Goti 1990: 13). By investigating the past and punishing the culprits, the state acknowledges the harm that has been done. Moreover, it is argued that by holding perpetrators accountable, the state demonstrates its respect for democracy and the rule of law, which in turn increases its legitimacy. “Democracy is based on law, and the point must be made that neither high officials nor military or police officers are above the law” (Huntington 1991: 213). States failing to prosecute human rights abusers, so the argument goes, run the risk of upsetting great parts of the population, particularly the victims and their relatives, which can negatively affect the latter group’s willingness to abide by legal principles in the future (Weiffen 2001: 54). According to Laurence Whitehead (1989: 84), without legal investigations and punishment, there can be “no real growth of trust, no ‘implanting’ of democratic norms in the society at large; and therefore no genuine ‘consolidation’ of democracy.” Finally, judicial prosecutions are meant to prevent vigilante justice and deter future human rights abuses.

Opponents of trials on the other hand maintain that these keep old wounds open and thus hinder societal healing and national reconciliation. A nascent democracy, in their view, can only prosper, when former adversaries set aside their enmities and learn to peacefully co-exist. Furthermore, critics of prosecutions warn of the potentially destabilizing effects of trials on the political system. Accused persons – who often still retain power and influence – may be prompted to stage a coup in order to prevent legal investigations and convictions (Benomar 1993: 4). Amnesties are therefore regarded as the best means to achieve peace and political stability. In line with this argument, some assert that historical investigations and public discussions may achieve the same goals as prosecutions, but without endangering the democratic system (Osiel 2000: 120). Moreover, in cases where the judiciary is still controlled by lawyers loyal to the old regime,

perpetrators are likely to get away, which in turn will damage the credibility of the new regime. Jack Snyder and Leslie Vinjamuri (2003/04: 15), who are among the most outspoken critics of prosecutions, state:

When a country's political institutions are weak, when forces of reform there have not won a decisive victory, and when potential spoilers are strong, attempts to put perpetrators of atrocities on trial are likely to increase the risk of violent conflict and further abuses, and therefore hinder the institutionalization of the rule of law.

Another argument against trials is that in many countries a clear demarcation between perpetrators and victims is difficult to make. In civil wars, which divide the population into two opposing camps, persons may be victim and perpetrator at the same time. Moreover, where large numbers of people were involved in atrocities, it is sheer impossible to put all culprits on trial. Analyzing the case of Argentina, Jaime Malamut-Goti (1990: 2f) notes, "the thought of trying all military personnel responsible for every sort of offense during the period of the dictatorship was untenable." Some therefore advise to only hold the highest ranks accountable, not least to set an example; yet, drawing a line between blameworthy and blameless persons may be regarded as artificial and morally arbitrary (Osiel 2000: 125). The state may seem to single out only a handful of scapegoats, while most culprits emerge unscathed.

A number of authors also point to the legal principle of *nullum crimen sine lege*, *nulla poena sine lege*, according to which actions that were not considered illegal at the time of their commission, cannot be prosecuted and punished later on (Huyse 1995: 59f). States facing severe internal or external military threats are entitled to adopt states of emergency, which allow for the temporary suspension of certain human rights. Finally, the western notion of 'doing justice' through trials may not be suitable in all cultural contexts (see Vieille 2012). Indigenous populations in Latin America or Africa for instance, often pursue other avenues when dealing with perpetrators of crimes. An example are the Rwandan *gacaca* community courts, which since 2002 operate next to the ICTR, but primarily aim at promoting truth and national reconciliation (see Brounéus 2008: 56).

Transitional Justice in Nicaragua 1990-2012

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