12 Argentina's contribution to global trends in transitional justice

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Introduction

In order to understand the diverse transitional justice mechanisms discussed in this book, we need to look at developments at the international and regional level as well as within individual countries. The doctrine of complementarity built into the statute of the International Criminal Court can be seen as a metaphor for a much broader form of interaction of the international and domestic legal and political spheres in the area of transitional justice. Developments at the international level depend upon processes at the domestic level, and vice versa.

In addition to discussing the case of Argentina, we will also sketch out some broad international and regional trends in the area of transitional justice. These trends make clear that dramatic changes have occurred in the world with regard to accountability for past human rights abuses. This trend is what Lutz and Sikkink[1] have called "The Justice Cascade" – a rapid shift towards new norms and practices of providing more accountability for human rights violations. The case of Argentina is particularly interesting because far from being a passive participant in or recipient of this justice cascade, Argentina was very often an instigator of particular new mechanisms within the cascade. The case illustrates the potential for global human rights protagonism at the periphery of the system. The Argentine case also supports the general thesis of the volume that multiple transitional justice mechanisms are frequently used in a single case.

To discuss this interaction of domestic and international legal and political contexts and processes, we think about transitional justice occurring within a domestic *and* international political and legal opportunity structure.[2] Social movement theorists define political opportunity structures as consistent dimensions of the political environment that provide incentives and constraints for people to undertake collective action by affecting their expectations of success or failure. Political opportunity structures only invite or constrain mobilization if they are perceived by activists.[3] As we will see in the case of Argentina, social

movements do not only face existing opportunity structures, but can also help create them at both the domestic and the international level.

History and trends of opportunity structures for transitional justice

We focus on an essential aspect of political opportunity structure at both the domestic and the international level – access to institutions, in other words how open or closed domestic and international institutions are to pressures for accountability for past human rights violations. Internationally, this degree of openness has varied significantly over time, across issues, and across regions. There has been an increase in judicialization or legalization of world politics in the last few decades.[4] Depending on how we count, there are now between seventeen and forty international courts and tribunals. The expansion of the international judiciary has been described by one analyst as "the single most important development of the post-Cold War age."[5]

This expansion of international legalization, however, is uneven, in that it is more pronounced in some issues areas and in some regions than in others. Trade issues have high levels of international legalization in hard treaty law, while regional security regimes display less legalization. In terms of region, Europe is by far the most legalized, but Latin America is also relatively highly legalized in comparative terms. Thus, Latin America has a more propitious regional opportunity structure for human rights activism than Asia, for example, because of the existence and density of the Inter-American human rights norms and institutions, while Asia has no such regional human rights regime.[6]

The mere existence of these domestic and international opportunity structures, however, does not matter unless there are actors poised to take advantage of these opportunity structures. Here domestic and international movements become important. Domestic human rights organizations and transnational human rights networks both operate in existing opportunity structures and either take advantage of them or not. They can also help create new opportunity structures.

Before 1976, domestic, regional, and international opportunity structures were relatively closed for demands for accountability for past human rights violations. Human rights activists in the 1960s and early 1970s in the Soviet Union, Eastern Europe and authoritarian regimes in Latin America initially faced this closed situation. United Nations procedures prohibited the institution from acting in the case of a specific country unless there was a clear threat to international peace and security. Protocol prohibited even the naming aloud of a specific country

engaged in human rights violations in the meetings of the Human Rights Commission. The basic human rights treaties, the Covenants on Civil and Political Rights, and on Economic, Social, and Cultural Rights, had been completed and opened for ratification but had not yet entered into force.

After 1976, however, the situation began to change. In that year, the International Covenant on Civil and Political Rights (ICCPR) as well as the International Covenant on Economic, Social, and Cultural Rights received the requisite number of ratifications and entered into force. With the entry into force of the ICCPR, the UN Human Rights Committee was set up to receive government reports and communications on compliance with the Covenant. For countries that ratified the first Optional Protocol to the ICCPR, the Committee was also authorized to receive and consider communications from individuals claiming to be victims of violations. In the UN Human Rights Commission, important changes also began to occur in the 1970s. After 1977, a series of "special procedures" were subsequently developed in the Human Rights Commission to enhance its ability to look into specific human rights situations, including the use of special rapporteurs and working groups.

Before the late 1970s, the Inter-American human rights system was also relatively closed to demands for accountability for human rights violations. The Organization of American States created the Inter-American Commission for Human Rights in 1959, but the Commission was not very active until the 1970s. When the American Convention on Human Rights, which created the Inter-American Court of Human Rights, came into force in 1978, the regional situation began to be more open. Activists began to bring more cases to the Inter-American Commission for Human Rights, and the Commission initiated more on-site investigations of human rights situations in specific countries. The Inter-American Court, however, did not become a more significant structure for accountability until the 1980s.

Activists from countries like Argentina and Chile were not passive beneficiaries of these changes, but active protagonists in helping create the change in opportunity structures. Human rights NGOs and their state allies pushed for the adoption of the special procedures in the Human Rights Commission. These later provided more points of access to the institution, since NGOs could send information to special rapporteurs and working groups, and in some cases, members of NGOs were named as rapporteurs or working group members. Latin American activists also filed more cases with the Inter-American Commission on Human Rights and urged it to conduct on-site visits. Likewise, as states ratified human rights treaties and those treaties went into effect, new

mechanisms for access were created in the form of the treaty monitoring bodies that received reports from countries. Human rights activists (inside and outside of states) succeeded in transforming the international opportunity structure from one that was fundamentally closed, to one that offered some important areas of access.

The human rights context in Argentina

The military coup that brought General Jorge Videla to power in 1976 was preceded by an upsurge in activities by right-wing death squads and by left-wing guerrilla movements. Although disappearances surged after the military coup, over 200 people disappeared before the military took power. Once in power, the military government initiated a program of brutal repression of the opposition, including mass kidnappings, imprisonment without charges, torture, and murder. Estimates still vary about the total number of disappearances. The National Commission on Disappearances (CONADEP) documented a total of 8,960 deaths and disappearances in Argentina during the 1975–83 period. Human rights organizations in Argentina have long used much higher estimates of disappearances, based on the assumption that for every reported disappearance, there were many unreported disappearances. While we do not have agreement on an absolute number of deaths, we do know that over 9,000 people were killed, and that the great bulk of these murders took place in a relatively short time period in 1976 and 1977. Most of the "disappeared" were eventually murdered, and their bodies buried in unmarked mass graves, incinerated, or thrown into the sea.[7]

The early period of human rights activity in Chile, Uruguay, and later in Argentina can be seen as a moment where human rights activists, closed off from domestic institutions by authoritarianism and repression, tried to create new international opportunities within existing international and regional human rights organizations. So, for example, Chileans managed to open new international space in the UN Commission on Human Rights and in the General Assembly to work explicitly on human rights in Chile. The Chilean case was the first time the UN responded to a human rights situation that was not seen as a threat to international peace and security, through country-specific resolutions, requests for on-site visits and for a country rapporteur.[8] Uruguayan human rights activists took advantage of the fact that Uruguay had ratified the Covenant on Civil and Political Rights, and its first Optional Protocol, giving Uruguayan citizens the right to bring complaints before the UN Human Rights Committee. In its early years, the Human Rights Committee decided more cases against the Uruguayan government than

against any other government in the world.[9] Argentine human rights activists were especially active in the Inter-American Commission on Human Rights (IACHR). The IACHR did its first major country report, based on an on-site visit, on Argentina. Likewise, when the Argentine government with the support of the USSR blocked demands for country-specific actions within the UN Commission on Human Rights, Argentine activists and their allies helped create the Working Group on Disappearances, the first such procedural mechanism that would later become a staple of UN human rights activity.

In the case of Uruguay, the decision of the (democratic) Uruguayan government to ratify the Optional Protocol to the ICCRP before the coup created an international opportunity structure that was not open to the other countries. Chilean human rights activists, on the other hand, taking advantage of the situation in the UN where they had the support of both the Soviet Union and the United States (after Carter took office in 1977) were able to help create international political opportunities within the UN Human Rights Commission and the General Assembly for condemnation of the Chilean regime that were not open to other countries without this broad support. Argentine human rights activists worked closely with the IACHR to provide testimony for its path-breaking country report on Argentina. Essentially, these groups took a situation where both domestic and international institutions were closed to them and converted it into a situation where at least some international and regional political opportunities were more open to their demands.

Not surprisingly, virtually all moves towards accountability for past human rights violations have happened after transitions to democratic or semi-democratic regimes (thus the name transitional justice). Transition to democratic rule would appear to be a necessary condition for establishing accountability for past human rights abuses, but not a sufficient condition. The nature of the transition itself also influenced whether or not activists were able to demand more accountability. Because the Argentine military regime collapsed after its defeat in the Malvinas/Falklands War, the armed forces were not able to negotiate the conditions of their exit from power.

After the elected government of Raul Alfonsín came into office in 1983, one of its early moves was the establishment of a truth commission, the National Commission on the Disappearance of Persons, or CONADEP. This was the first important truth commission in the world, and provided a model for all subsequent truth commissions. The CONADEP report, entitled *Nunca Mas*, was the first published truth commission report. The title has since become a slogan and a symbol of

the transitional justice movement. The CONADEP report, now in its fifth edition, has been constantly in print in Argentina since it was issued in 1985 and has been translated into English and published in the United States.[10] The Alfonsín government might have been satisfied with the path-breaking truth commission report, but the human rights movement continued to push for trials. The government first gave the task of trials to the armed forces themselves, but when they failed to make even a minimum good faith attempt at prosecution, the trials were transferred to a civilian court. The trial (*El Juicio a las Juntas*, as it is known in Argentina) of the nine commanders in chief of the armed forces who had been the members of the three military Juntas that ruled Argentina was as path-breaking as the truth commission had been. It lasted almost an entire year in 1985, was attended by large numbers of members of the public and the press, and produced a vast historical record.[11]

No previous trials of the leaders of authoritarian regimes for human rights violations during their governments had ever been held in Latin America. The Bolivian Congress initiated accountability trials against high-ranking members of the military government of General Garcia Meza in 1984, but the proceedings did not begin until 1986, and the decisive phase of the trial occurred from 1989 to 1993.[12] Globally, if we focus on countries holding their own leaders responsible for past human rights violations, the only precedents to the Argentine trials of the Juntas were successor trials after World War II, and the trials of the Greek colonels in 1974 in Greece. In this sense, just as the Argentine truth commission initiated the cascade of truth commissions, the Argentine trials of the Juntas also initiated the modern cascade of transitional justice trials.

It is quite interesting that Argentina should have been the first in initiating both of the major transitional justice mechanisms explored in this book. It also leads us to question the supposition of early work that framed the debate in terms of "truth" *or* "justice." When the Argentine military carried out various coup attempts against the Alfonsín government, it led the government to decree two laws that were essentially amnesty laws, *Punto Final* and *Obediencia Debida* (Full Stop and Due Obedience laws). This experience was also a formative moment for the transitional justice movement, because it led many to what we characterize as a "misreading" of the Argentine "lesson." Analysts concluded that human rights trials were not viable, because they would provoke coups and undermine democracy. But this analysis misinterprets the actual sequence of events in Argentina. In Argentina, the nine Junta members were tried and five were convicted. The two most important leaders of the first Junta, General Videla and Admiral Massera, were sentenced to life in prison. The remaining three were sentenced to between four and a half

and seventeen years in prison.[13] The coup attempts did not begin until more far-reaching trials against junior officers were initiated. So to read the Argentine case as an example that trials in and of themselves are not possible is to disregard the successfully completed trial of the Juntas. The amnesty laws did not reverse or overturn the previous trials, they simply blocked the possibility of more trials. The government of Carlos Menem that followed the Alfonsín government then offered a pardon to the convicted military officers in jail. This pardon was again interpreted by some as an indication that the trials had been futile. But pardons did not reverse the trials or the sentences. The Junta members were still (are still) considered guilty of the crimes of which they were accused and for which they were convicted. They had served four years of their prison terms. In the words of some of the most astute observers of the Argentine trials, despite the concessions granted by Alfonsín and Menem, the "high costs and high risks suffered by the armed forces as a result of the investigations and judicial convictions for human rights violations are central reasons for the military's present subordination to constitutional power."[14]

The Argentine case was important for the transitional justice movement in multiple ways. It made early use of many important transitional justice mechanisms, including a truth commission, trials, and reparations. Few countries, however, could have followed easily in Argentina's footsteps and held near-immediate trials of the top leaders for human rights violations. Argentina's transition was different from the transition in Uruguay, or Chile, or South Africa, for example, and the nature of transition influenced what transitional justice mechanisms were possible, at least in the early transition period.

The transitions literature called our attention to the differences between the so-called negotiated or "pacted" transitions, where the military negotiate the transition, and ensure significant protections and guarantees for themselves from prosecution for human rights violations, and the "society-led" transitions, or "rupture transitions" where the military are forced to exit from power without negotiating specific protections.[15] Argentina is an example of a society-led transition after a collapse of the military government in the wake of the failure in the Malvinas War. Chile, Uruguay, and South Africa are classic "pacted" transitions. These differences in transitions help explain why it was more possible for Argentina to hold trials of the Juntas almost immediately following the transition, and why it was more difficult to hold such trials elsewhere. The main previous case of domestic trials prior to the case of Argentina came after a similar type of transition: the Greek trials in 1974 came after the collapse of the Greek authoritarian regime after its failure to effectively confront the Cyprus crisis.[16] The case of trials that most closely

followed the Argentine case, that against the military dictator García Meza in Bolivia, also occurred after a society-led movement that provoked a collapse of the military rule and a "transition through rupture" rather than a negotiated transition.[17]

Argentina and the justice cascade

Transitional justice norms and practices have diffused rapidly across the Americas and throughout the world, significantly increasing each decade since CONADEP and the trials of the Juntas made their public impact both in and beyond Argentina in the early 1980s. This book illustrates many of those trends. In order to illustrate the reach and significance of this global justice cascade, we identified truth commissions and trials for past human rights violations using existing data sets, human rights organization reports, government documents, and information provided by non-governmental organizations; and analyzed our data in order to ascertain dominant trends.[18] Analysis of our data demonstrates a rapid shift toward new norms and practices providing more accountability for human rights violations – a shift that is regionally concentrated yet internationally diffuse. Specifically, our data demonstrates a significant increase in the judicialization of world politics both regionally and internationally, and illustrates a notable variance in the degree of openness of domestic and international institutions over time and across regions. This is the first effort to present quantitative evidence of the justice cascade, which has previously been described only in qualitative case studies and legal analysis. It may be particularly useful to persuade skeptics who continue to believe that the justice cascade is not occurring, or is less substantial than our data suggests.

As figure 12.1 illustrates, the number of truth commissions worldwide has increased rapidly over the past two decades with the most dramatic increase occurring between 2000 and mid-2004. Uganda inaugurated the first truth commission in 1974, followed by Bolivia in 1982; however, neither truth commission produced a final report of their findings. In this sense, we argue that Argentina's truth commission was the first major commission that would have a more lasting impact regionally and globally. Following the inauguration of Argentina's truth commission in 1983, an additional four truth commissions were established before the end of the decade. During the 1990s, thirteen new truth commissions were established and sixteen truth commissions were inaugurated between the years 2000 and mid-2004, including the first truth commission in the Middle East and North African region (Morocco, 2004). An additional five truth commissions, not included here, were proposed or

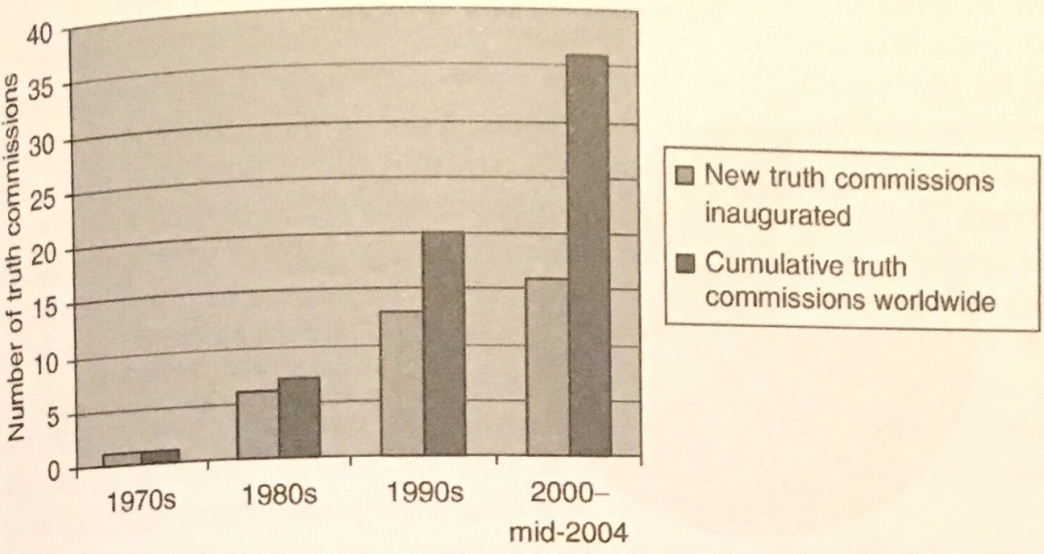

Figure 12.1. Number of truth commissions worldwide.

under development by June 2004, including those in Bosnia-Herzegovina, Burundi, Indonesia, Kenya, and Northern Ireland. Thus, we suspect that this significant growth trend will be much steeper by the end of the decade. Already in 2004, the number of truth commissions newly established at the start of the twenty-first century is only four commissions short of doubling the number of truth commissions inaugurated during the previous decade of the 1990s. In sum, by mid-2004 a cumulative number of thirty-five truth commissions had been established worldwide, the first of which had been established thirty years before.

It is important to note that other forms of transitional justice mechanisms that have been established for the primary purpose of establishing the truth about past human rights violations have been excluded from our data. These include truth commissions or commissions of inquiry reports undertaken by non-governmental organizations (Brazil, 1985), armed resistance groups (African National Congress, 1992 and 1993), special prosecutors (Ethiopia, 1992; Mexico 2002), and commissions that have a mandate limited to a single human rights violation (Côte d'Ivoire, 2000; Peru, 1983).

Our data also shows that truth commissions are regionally concentrated. As figure 12.2 illustrates, truth commissions are more prevalent in Africa and the Americas than in other regions, making up 36 percent and 38 percent of the total respectively. When combined, Africa and the Americas comprise 74 percent of the cumulative total number of truth commissions, whereas 17 percent are found within Asia and the Pacific, followed by only 6 percent in Europe and Central Asia, and 3 percent for the Middle East and North Africa.

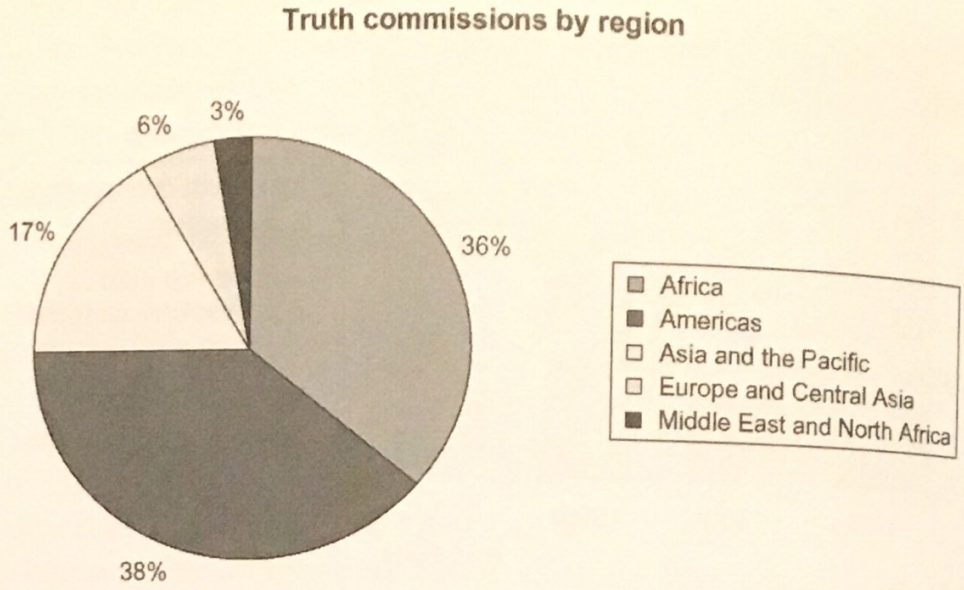

Figure 12.2. Regional distribution of truth commissions.

When analyzed by region, there seems to be a similar upward trend across time, as illustrated in figure 12.1, although the steepness of the upward slope varies by regional grouping. Once a region inaugurates its first truth commission, the number of truth commissions within that region seems to increase each decade. For example, the first truth commission in the Americas region was inaugurated in 1982, followed by an additional two truth commissions during the 1980s. The number of new truth commissions established in the Americas during the 1990s increased to five and already by 2004, only four years into the new decade, five new truth commissions have been established. This upward trend by decade also holds true for Africa, yet it remains to be seen whether or not the trend will hold for both Asia and the Pacific, and Europe and Central Asia as well. Given the overall trend of a justice cascade we anticipate that the pattern will remain consistent.

The data also illustrates that multiple transitional justice mechanisms are frequently used in a single case. In at least eleven of the countries we identified, both truth commissions and domestic trials were implemented.[19] Interestingly, most of these countries were found within the regions of Africa and the Americas and in most cases, truth commissions preceded trials. Thus, it simply does not hold true that countries must choose between trials or truth during democratic transition, although they may indeed choose to do so.

A modern cascade of criminal justice trials is similarly supported by our data. Without an existing comprehensive set of trial data to build upon, we identified our domestic, foreign, international, and hybrid

trials through human rights reports, United Nations documents and Security Council Resolutions, government news services, and information gathered by non-governmental organizations.[20] **Domestic trials** are those conducted in a single country for human rights abuses committed in *that* country. **Foreign trials** are those conducted in a single country for human rights abuses committed in *another* country.[21] **International trials** involve international trials for individual criminal responsibility for human rights violations, such as the international ad hoc tribunals for Rwanda and the former Yugoslavia. **Hybrid trials** are third-generation criminal bodies defined by their mixed character of containing a combination of international and national features, typically both in terms of staff as well as compounded international and national substantive and procedural law.

To graph our results we counted each country once for each year in which at least one transitional justice trial was held. As figure 12.3 indicates, domestic trials were largely insignificant until the 1980s, after which there is a significant and uninterrupted increase in the number of domestic trials in countries having undergone democratic transition. Even when domestic transition trials are separated out from the World War II successor trials, the slope remains relatively unchanged. We suspect that our trial data underestimates the actual number of domestic human rights trials in the world today. So many domestic trials are occurring in different countries that it is difficult to count all of them. If we are in error, it is because we have underestimated the magnitude of the trend and the increasing judicialization of human rights is actually steeper.

In the case of foreign trials, nearly all of which have occurred within the European and Central Asian region, we see a mild increase between the 1960s and 1980s followed by a sharp increase until the mid-1990s, after which the number of foreign trials begins to decline yet still remain significant. It is important to note two dominant trends we discovered in our foreign trials data, once World War II successor trials were excluded. The first trend is that many foreign trials are the result of insider–outsider coalition strategies where crimes committed largely in the Americas, and particularly in Argentina and Chile are tried in European courts, regardless of whether or not the victims are citizens of the prosecuting country. The second trend among foreign trials are trials held largely in European countries for war crimes committed abroad, most notably in the former Yugoslavia, Rwanda, or other states in the Great Lakes region of Africa, by individuals who are arrested on the soil of the prosecuting state and who are not under indictment by a domestic or international tribunal.

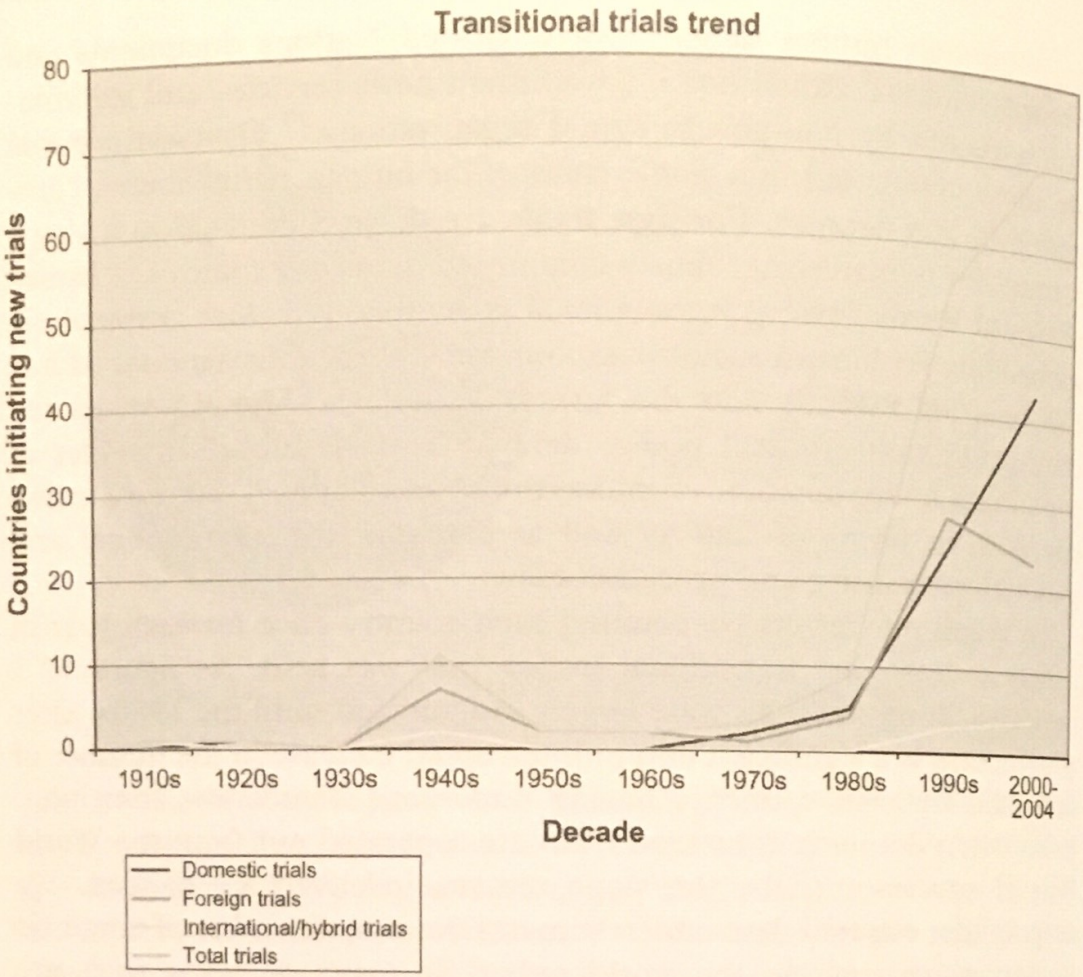

Figure 12.3. Transitional human rights trials.

That foreign trials continue to decrease at the same time that domestic trials continue to increase highlights the interaction between domestic and international legal and political spheres with regard to human rights trials. When domestic opportunity structures are closed, international activism is often used as an alternate option to seek justice. Similarly, as new norms and practices of transitional justice begin to cascade, including putting human rights violators, among them former heads of state, on trial for their domestic crimes, the need to access available international opportunity structures diminishes. As domestic political and legal opportunity structures increasingly open up in the Americas, for example, we can expect the number of foreign trials to decrease. Similarly, as we move further away in time from the wars in the former Yugoslavia and the genocide in Rwanda, the number of cases related to these conflicts will also likely diminish. We can expect that the number of foreign trials may also continue to decrease as European governments begin to revise their judicial practices, and indeed their laws, because of political and economic pressure from powerful states.

In 2003, for example, Belgium modified its universal competence law after the United States threatened to move NATO headquarters from Belgium because of controversial charges brought against members of the US presidential administration and military command.

International trials were instituted following both World War I (Constantinople, 1919) and World War II (Nuremberg, 1945; Tokyo, 1946). International trials for humanitarian law violations and human rights abuses remained closed until the International Criminal Tribunal for the former Yugoslavia (ICTY) was established by Security Council Resolution 827 in 1993, followed shortly thereafter by the International Criminal Tribunal for Rwanda established by Security Council Resolution 955 in 1994. Subsequently, hybrid trials combining international and domestic features were initiated in Kosovo (1999), Timor Leste (2000), and Sierra Leone (2002) and are currently under development for Cambodia (2003). The recent emergence of hybrid trials, described elsewhere in this volume, illustrates what seems to be increasing support for the belief that domestic judicial procedures are preferential to alternate international remedies and that when domestic political and legal structures are not sufficiently developed, hybrid trials containing some national elements are preferable to international trials.

Activists within and beyond borders: Insider–outsider coalitions

Argentina fits nicely into these trends, indeed, has been a trailblazer in creating them. The Argentine case is an example of what can happen in a country in which both international and domestic opportunity structures are relatively open to questions of legal accountability for past violations of human rights. Domestic activists privileged domestic political change, but kept international activism as a complementary and compensatory option. Domestic political change is closer to home and more directly addresses the problems activists face, so they concentrated their attention there. However, activists who learned how to use international institutions in an earlier phase kept this avenue open in case of need. We call this the insider–outsider coalition category.

The insider–outsider model is of particular importance because it is not limited to Argentina but may be a key dynamic in the future as more countries face increasingly open domestic and international opportunity structures for transitional justice.

After the amnesty laws were passed in 1986 and 1987 human rights organizations implemented a two-track strategy. They launched a series of innovative legal challenges to try to make an end run around the

amnesty laws, and they cooperated with and initiated some international and regional tactics as well.

The first regional legal opportunity structure that activists turned to was that offered by the Inter-American human rights system (made up of the Commission [IACHR] and the Court [Inter-American Court]. In 1992, the IACHR concluded that the Argentine laws of *Punto Final* and *Obediencia Debida*, and the pardons issued by President Menem for crimes committed during the dictatorship were incompatible with the American Convention.[22] This opened a regional legal option that human rights activists could try to take advantage of by bringing the case of the amnesty laws again to the Inter-American system should they be completely stymied in the domestic legal arena. In 2001, this possibility was heightened when the Inter-American Court adopted the Commission's analysis to declare in the *Barrios Altos* case that two Peruvian amnesty laws were invalid and incompatible with the American Convention on Human Rights.[23]

The innovative domestic legal challenges included efforts by the legal team of the Grandmothers of the Plaza de Mayo to hold military officers responsible for the kidnapping and identity change of the children of the disappeared, who in many cases had been given up for adoption to allies of the military regime. The Grandmothers' lawyers argued that because the crimes of kidnapping of minors and changing their identity had not been covered in the amnesty laws, they were not blocked from pursuing justice for these crimes. The kidnapping of minors exception, along with other exceptions for property theft and for crimes involving civilians, became one of the wedges that domestic groups used to open a breach in the amnesty laws. Their legal strategy began to succeed by the mid-1990s, but initially most of those found guilty were lower level military and the adoptive families.[24]

But on June 9, 1998, Federal Judge Roberto Marquevich ordered preventative prison for ex-president General Rafael Videla for the crimes of kidnapping babies and falsifying public documents. It is often overlooked that when Pinochet was detained in London three months later, Argentine courts had already done the equivalent by ordering the preventative detention of an ex-president for human rights violations. And they had done it using domestic political institutions. But, even in this case, the international sphere was also involved. Videla had been tried for human rights violations during the trials of the Juntas in 1985, convicted, and sentenced to life in prison, but he had been released in 1990 under President Menem's pardon. Why, all of a sudden, was Videla back under arrest?

At the end of May of 1998, President Menem came back from a diplomatic trip to Scandinavian countries. Instead of the economic contacts he had been seeking, both the Finnish and the Swedish governments asked for an investigation of the cases of two disappearances: that of the Swede, Dagmar Hagelin, and the Finn, Hanna Hietala. European human rights activists and family members of the disappeared had made these cases *causes célèbres* in their respective countries and had recruited allies at the highest levels of the relevant European governments. The European press focused its coverage of the Menem visit on these two cases. These two cases in turn are connected to two other cases of disappearances, those of two French nuns, Alice Domon and Leonie Duquet, because all were kidnapped by a Navy group in which the notorious Captain Alfredo Astiz had participated. Menem realized that in his upcoming visit to Paris a week later he would also face demands for the extradition of Astiz to France, where he had been condemned *in absentia* for the kidnapping of the nuns. Menem was scheduled to meet with French President Jacques Chirac, who had publicly stated that he wanted Astiz to be extradited to France. Just a few hours before the Chirac–Menem meeting, Judge Marquevich decided to detain Videla. In his meeting with the French press, instead of facing criticism, Menem was greeted as a human rights hero. Menem told reporters that "this is one more sign that we have one of the best justice systems in the world."[25]

This is an excellent example of an insider–outsider coalition at work. Domestic human rights organizations using innovative legal strategies had done all the preliminary legal and political work to secure Videla's arrest. They still needed some help from their international allies, however, for the final push to put a top-level military leader in jail. The judge who ordered Videla's arrest was not known for his commitment to human rights, but for his intense loyalty to President Menem, who had appointed him. There is strong reason to believe that Judge Marquevich was responding to Menem's political agenda in his trip to France when he ordered the detention.[26]

Four months later, after Pinochet had been detained in London, and the Spanish court had issued arrest warrants for a wide range of Argentine military officers, another Menem loyalist on the bench ordered the preventive detention of Admiral Emilio Massera, ex-head of the Navy and Junta member, and, after Videla, the second most powerful leader in Argentina during the most intense period of repression. The context and timing of Massera's arrest suggests that the decision to imprison Massera was apparently a preemptive measure in response to Spanish international arrest warrants for Argentine military

officers.[27] On November 2, 1998, Judge Garzón in Spain issued indictments against 98 members of the Argentine military for genocide and terrorism. Three weeks later, the Argentine judge ordered the preventative imprisonment of Massera for kidnapping babies.

Why would international arrest warrants lead local judges to order arrests in Argentina? International arrest warrants for Argentine military officers created international and domestic pressure to extradite the officers to Spain to stand trial. But the Argentine military was adamantly opposed to extradition, and nationalist sentiment in Argentine political parties resisted the idea. The relevant international legal precept was that a state must either extradite or try the accused domestically. To fend off political pressures to extradite many officers, the Argentine government apparently decided to place under preventative detention a few high profile, but now politically marginalized officers, like Videla and Massera.

Another key legal innovation in Argentina was the concept and practice of "truth trials." After the amnesty law blocked trials for most past human rights violations, the relatives of victims nevertheless encouraged judges to develop trials to learn the truth about the fate and whereabouts of the disappeared. In 1995, family members associated with the Center for Legal and Social Studies (CELS) presented the first petition arguing that although the amnesty laws had blocked criminal proceedings, family members still had the "right to truth" and they could pursue that right through judicial investigations. When a Federal Court of Appeals allowed the petition, it began to establish a judicial process that would come to be called the "truth trials," where Argentine courts solicited and analyzed information and testimony (mainly from members of the Armed Forces) to find out the truth about the disappeared.

In 1998, when truth trials were stalled in Argentina, human rights activists once again sought help outside their borders when they filed a petition with the IACHR. The Commission in turn reached a friendly settlement of the case with the Argentine government that provided a framework for truth trials to proceed in Argentina. Since 1998, truth trials have been underway not only in Buenos Aires, but also in courts in various other cities of Argentina. For the purposes of this volume, the concept of the "truth trial" is particularly interesting because it brings together elements from both truth commission and criminal justice. It also illustrates yet another example of Argentine leadership in developing new human rights tactics and mechanisms.[28]

Perhaps the most challenging of the legal battles was the case led by CELS to have the amnesty laws declared null, or unconstitutional. Once again, using the case of a kidnapped child of the disappeared, CELS

argued that the amnesty laws put the Argentine judicial system in the untenable position of being able to find people criminally responsible for kidnapping a child and falsely changing her identity (more minor crimes) but not for the more serious original crime of murder and disappearance of the parents that later gave rise to the crime of kidnapping. Additionally, they argued that the amnesty laws were a violation of international and regional human rights treaties to which Argentina was party, and which were directly incorporated into Argentine law. CELS solicited international groups to write amicus briefs for their cases, and succeeded in establishing for the first time in the Argentine judicial system the practice of using foreign amicus briefs.

A judge of the first instance found the arguments compelling, and wrote a judgment that was a lengthy treatise on the significance of international human rights law in Argentine criminal law.[29] Argentina offered a propitious environment for this kind of decision because the 1994 Constitution gave international human rights treaties constitutional status, and because the courts had earlier found that customary international law could be applied by domestic courts. The Appeals courts supported the decision, but it seemed unlikely that the Supreme Court would follow suit. However, the new President of Argentina, Nestor Kirchner, changed both the composition of the Supreme Court and the political climate for the idea of accountability for past human rights violations. Specifically, Kirchner placed three new judges on the Supreme Court, including Raúl Zaffaroni, a noted legal theorist and expert on criminal law, and Carmen Argibay, a judge on the Ad Hoc Tribunal for the former Yugoslavia. In June 2005 the Supreme Court found the amnesty laws unlawful by a 7–1 vote.[30] The effect of this law was to permit the reopening of the human rights cases that had been closed for the past fifteen years.

Other actions of the executive and legislature have moved in the same direction. In 2003, Kirchner announced that he was revoking the decree of the De La Rua government that denied all extradition requests, and was returning the decision about extradition back to the control of the judiciary.[31] Although no individual has yet been extradited from Argentina to stand trial abroad, Kirchner's announcement signaled a return to a more activist human rights policy on the part of the executive. In August 2003, the Argentine Congress, with the support of the Kirchner administration, passed a law that declared the amnesty laws (*obediencia debida y punto final*) null and void. According to observers, this was an unexpected political and legal development.[32]

Human rights advocates in Argentina had been working for years to get the amnesty law repealed, annulled, or declared unconstitutional.

But it was not until they found greater support from the executive branch that they were able to secure their goal. The political history and orientation of President Kirchner himself and some of his top advisors helps explain this change in executive branch policy. Kirchner is the first president of Argentina to come from the generation most affected by the dictatorship's practice of disappearances. Although he himself did not suffer from repression, Kirchner was a member of the 1970s generation of the Peronist party that was decimated by the repressive apparatus. This generational tone has affected all of his government's policies, but has been most pronounced in the area of human rights.[33]

Although Kirchner's move to have the amnesty laws declared null was mainly the result of his political orientation and that of his closest advisors, it also took place in the context of the international legal opportunity structure discussed above. Just days before the Congress passed the law declaring the amnesty laws null, Judge Canicoba Corral, following the government's new policy on extraditions, had provided for the extradition to Spain of 45 members of the military and one civilian, requested by Judge Garzón. This provided some impetus for reopening domestic trials.

The Kirchner government was also aware of how to use international law as a vehicle to provide support for its chosen policy alternative. The day before the Congressional debate on the law to declare the amnesty laws null, the Kirchner government signed a decree implementing the "Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity." In addition to declaring that no statutory limitation shall apply to war crimes and crimes against humanity, the Convention obligates governments to punish these crimes and to adopt all necessary measures to make extradition possible, irrespective of the date the crimes were committed.[34] The Convention essentially prohibits amnesties for these crimes. The Convention entered into force in 1970. The Argentine Congress ratified the Convention in 1995, but the executive had never deposited the ratification instrument. By its decree, the Kirchner government ensured that the treaty would enter into effect in Argentina, and at the same time, it sent to Congress a law that would give the norm constitutional status. Through this move, the government provided additional incentives to the Congress to annul the amnesty laws, but it also provided additional reasons why the amnesty laws should be seen as contrary to international law and to the Argentine constitution. In this we have the case of the government explicitly creating international opportunity structures to support its domestic political moves.

But while pursuing these domestic judicial and political strategies, Argentine activists did not neglect the international realm. Once a case

against members of the Argentine military was initiated in the Spanish Audiencia Nacional in 1996, many Argentine family members of the disappeared traveled to Spain to present testimony and to add their cases. Argentine human rights organizations cooperated actively with requests from the Spanish courts and from human rights organizations based in Spain to provide documentation and case material.

One of the most surprising developments came in 2001 when the Mexican government agreed to extradite an Argentine national living in Mexico, Ricardo Miguel Cavallo, to the Audiencia Nacional of Spain, to stand trial for human rights violations he is accused of committing in Argentina during the dictatorship. This is the first case where one country extradited a national of another country to stand trial in yet a third country for human rights abuses committed in his country of origin. The Argentine government did not oppose Cavallo's extradition to Spain, nor did it submit its own extradition request. In other words, Cavallo is the minor official now following the path that Pinochet could have followed, had the Chilean government not secured his return to Chile.[35] Meanwhile, another minor Navy officer, Adolfo Scilingo, was tried and convicted in Spain in early 2005 for his role in murdering prisoners, France continues to request the extradition of Alfredo Astiz, and Germany has issued extradition requests for Argentines accused of human rights violations during the dictatorship.

The Grandmothers of the Plaza de Mayo also pursued an insider–outsider coalition strategy. During the international process of drafting the Convention on the Rights of the Child, the Grandmothers lobbied the Argentine government to include specific provisions in the Convention that they believed would enhance the success of their domestic trials. Specifically, they realized that domestic law did not provide a legal basis for arguing that the kidnapped children had standing in court. So the Grandmothers convinced the Argentine foreign ministry to press for provisions on the "right to identity" in the Convention on the Rights of the Child. In the final Convention they are included as Articles 7 and 8 and are informally called the "Argentine Articles". Because the Argentine constitution incorporates international law directly into domestic law, once Argentina had ratified the Convention, these Articles provided the Grandmothers with the legal basis to argue that children had a right to identity, and thus to permit judges to order blood tests even when opposed by the adoptive parents, to establish whether or not the children were the sons and daughters of the disappeared.[36] In this case, the Grandmothers of the Plaza de Mayo, a domestic Argentine human rights movement, helped to change international opportunity structure by changing the wording of a treaty, and that in turn

changed their domestic opportunity structure and made it easier to get convictions.

In other words, domestic groups concentrated primarily on their very active domestic judicial agenda, but they moved with relative ease and fluidity, in foreign, international, and regional institutions as a complement and/or back-up to their domestic work. International and regional activism remains one of the tactics in the repertoires of these groups. At times it is more latent than others, but always there. But it is not a privileged sphere, largely because there has been so much domestic space in which to participate.

The Argentine case also illustrates a point frequently made by social movement theorists that political opportunities are not only perceived and taken advantage of, but are also created by social actors. Argentine political actors faced a more open political opportunity structure for their human rights demands after the transition to democracy in part because the failure of the military in the Malvinas/Falklands War led to an abrupt transition where the military had little bargaining power. This is in contrast to the situation in Chile or Uruguay, where negotiated transitions gave the military more veto power and more control over the agenda. And yet, the tactics groups chose also made a difference. Argentine activists have been unusually active and innovative in this field and have often pursued legal strategies in the face of political opposition.

These social movements and legal strategies are so extensive that we consider Argentine social movement activists, and at times, even members of the Argentine government to be among the most innovative protagonists in the area of domestic human rights. They are not emulating tactics they discovered elsewhere, but are developing new tactics. On a number of occasions, they have then exported or diffused their institutional and tactical innovations abroad. Argentina, which never was a passive recipient of international human rights action, has gone on to become an important international protagonist in the human rights realm, involved in actively modifying the international structure of political opportunities for human rights activism. For example, Argentina was one of the four or five most active countries in the development of the International Criminal Court, and an Argentine attorney and former deputy prosecutor of the Junta Trials, has been named the new prosecutor for the ICC, perhaps the most important position in the Court.[37] This dynamism of the Argentine human rights sector is even more interesting and important in the context of active US hegemonic opposition to the expansion of international human rights law, because it suggests that the advancement of human rights institutions may proceed even in the face of opposition from the United States.

It has now been over twenty years since the transition to democracy in Argentina. We argue that Argentina is more than just another case in a volume on transitional justice. Argentina helped innovate the two main accountability mechanisms that are the topic of this book. Though the actual process of diffusion from Argentina to other countries is not always clear, the Argentine example was very influential for other experiences of transitional justice. The Argentine model suggested that accountability mechanisms like truth commissions and trials need not be mutually exclusive options, but can be beneficially combined. Indeed, Argentina has innovated a type of trial – the truth trial – that actually combines elements of trials and truth commissions. With the recent reopening of blocked human rights trials, however, the pressure for truth trials is likely to decline. The case of Argentina today suggests that it is in the process of innovating yet another mechanism – legislative and judicial strategies for declaring amnesty laws null and void, and permitting blocked human rights trials to proceed. Other countries are beginning to follow suit, as evidenced by efforts underway today in Chile and Uruguay to find judicial strategies to evade amnesty laws. The trends in transitional justice over the last twenty years suggest that Argentina is not an exceptional case or an outlier, but just ahead of its time, and thus a good way to get a glimpse of the future.

NOTES

1. Ellen Lutz and Kathyrn Sikkink, "The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America", (2001) *Chicago Journal of International Law* 2, p. 1.
2. Kathryn Sikkink, "The Transnational Dimension of the Judicialization of Politics in Latin America", in *The Judicialization of Politics in Latin America*, ed. Rachel Sieder and Line Schjolden (New York: Palgrave/Macmillan, forthcoming).
3. Sidney Tarrow, *Power in Movement: Social Movements, Collective Action, and Politics* (New York: Cambridge University Press, 2nd edn, 1998).
4. Alec Stone Sweet, "Judicialization and the Construction of Governance", (1999) *Comparative Political Studies*, 32, pp. 147–84; Judith Goldstein et al., *Legalization and World Politics*. (Cambridge: MIT Press, 2001).
5. Cesare Romano, "The Proliferation of International Judicial Bodies: The Pieces of the Puzzle", (1999) *New York University Journal of International Law and Politics*, 31(4), p. 709.
6. On the low level of legalization in Asia, see Miles Kahler, "Legalization as Strategy: The Asia-Pacific Case", in Goldstein, *Legalization and World Politics*.
7. *Nunca Mas: The Report of the Argentine National Commission on the Disappeared* (New York: Farrar, Straus & Giroux, 1986), pp. 209–234.
8. Menno Kamminga, *Inter-State Accountability for Violations of Human Rights* (Philadelphia: University of Pennsylvania Press, 1992).

9. See Session 1–Session 18, "Decisions and Views of the Human Rights Committee", http://www1.umn.edu/ humanrts/undocs/alldocs.html
10. *Nunca Mas: The Report of the Argentine National Commission of the Disappeared.*
11. See, for example, the *Diario del Juicio*, a weekly newspaper published during the entire period of the trials of the Juntas, with transcripts of testimony, interviews, and legal and political analysis.
12. René Antonion Mayorga, "Democracy Dignified and an End to Impunity: Bolivia's Military Dictatorship on Trial", in *Transitional Justice and the Rule of Law in New Democracies*, ed. A. James McAdams (Notre Dame: University of Notre Dame Press, 1997).
13. "La Sentencia", *El Diario del Juicio*, No. 29, December 11, 1985.
14. Carlos H. Acuña and Catalina Smulovitz, "Guarding the Guardians in Argentina: Some Lessons about the Risks and Benefits of Empowering the Courts", in *Transitional Justice and the Rule of Law in New Democracies*, p. 94.
15. Alfred Stepan, "Paths Toward Redemocratization: Theoretical and Comparative Considerations"' in *Transitions from Authoritarian Rule: Comparative Perspectives*, ed. Guillermo O'Donnell, Philippe C. Schmitter, and Laurence Whitehead (Baltimore: Johns Hopkins University Press, 1986), p. 64–84.
16. Nicos C. Alivizatos and P. Nkikforos Diamandouros, "Politics and the Judiciary in the Greek Transition to Democracy", in McAdams, *Transitional Justice*, pp. 27–60.
17. Mayorga, *Democracy Dignified*, p. 67.
18. The data on truth commissions was gathered using Priscilla Hayner's study of truth commissions, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (New York: Routledge, 2001), and a draft "Afterwards" for a new edition of *Unspeakable Truths* (May 1, 2004), the United States Institute for Peace Truth Commission Digital Collection, and publications of the International Center for Transitional Justice. We want to thank Priscilla Hayner for sharing her draft "Afterwards" with us. The truth commissions identified include: Argentina (1983); Bolivia (1982); Burundi (1995); Central African Republic (2002); Chad (1990); Chile (1990); Democratic Republic of Congo (2003); Ecuador (1996); El Salvador (1992); Federal Republic of Yugoslavia (2001); Germany (1992); Ghana (2002); Grenada (2000); Guatemala (1994); Haiti (1994); Indonesia (1999); Liberia (2003); Morocco (2004); Nepal (1990); Nigeria (1999, 2001); Panama (2001); Paraguay (2003); Peru (2001); Philippines (1986); Sierra Leone (2000); South Africa (1995); South Korea (2000); Sri Lanka (1994); Timor Leste (formerly East Timor, 2001); Uganda (1974, 1986); Uruguay (1985, 2000); and Zimbabwe (1985).
19. The countries we identified as having both truth commissions and domestic trials include Argentina, Bolivia, Burundi, Chile, Federal Republic of Yugoslavia, Germany, Guatemala, Haiti, Indonesia, Peru, and South Africa.
20. The data on transitional justice trials was gathered from Human Rights Watch reports, United Nations Documents and Security Council Resolutions, and information found in the United States Institute for Peace Digital Collections, International Center for Transitional Justice, and the following

non-governmental organizations: Prevent Genocide International, REDRESS, Universal Jurisdiction Information Network, Global Policy.org, and Track Impunity Always (TRIAL). Domestic, foreign, international and hybrid trials were included.

The **domestic** data set includes: Argentina (1984, 1985, 2003, 2004); Bosnia-Herzegovina (1993, 2004); Bolivia (1984, 1989–93); Brazil (1998); Burundi (2002); Cambodia (2000–03); Chad (1993, 2001); Chile (2000, 2003); Colombia (2000–01); Croatia (1996, 1999); Denmark (1999); Ethiopia (1992, 1994, 1997, 1999–2000, 2003); France (1945, 1994, 1998); Germany (1921, 1976, 1980, 1990, 1999); Greece (1974); Guatemala (1998, 1999, 2001, 2002, 2004); Haiti (2000); Indonesia (2000–03); Iraq (2003, 2004); Latvia (1999–2002); Lithuania (1999, 2001); Mexico (2001, 2004); Peru (1992, 2001); Poland (1949, 1993, 1999, 2001); Romania (1989, 1990); Russia (2002); Rwanda (1995, 1997–2002); Serbia and Montenegro (2002, 2003); South Africa (2004); Uruguay (1998).

Foreign include: Argentina (France, 1985, 1990; Spain, 1996–1999, 2000, 2003; Netherlands, 2001; Italy 1993, 2001; Germany, 2001; Switzerland, 1977; Sweden, 2001); Austria (France, 1954; Germany 1961, 2001); Belgium (Switzerland, 1948); Belorussia/Belarus (United Kingdom, 1995, 2000); Bosnia-Herzegovina (Austria, 1994; France, 1994; Denmark, 1994; Switzerland, 1995; Belgium, 1995; Sweden, 1995; Netherlands, 1997; Germany 1997, 1999, 2001); Chad (Belgium, 2000; Senegal, 2000); Chile (Belgium, 1998; France 1998; Italy 1995; Spain 1998); Democratic Republic of Congo (Belgium, 2000; Netherlands, 2004); Germany (USSR, 1943, 1947; United Kingdom, 1946; France, 1946, 1952, 1987; Italy, 1947, 1998, 1999; Israel, 1961, 1987; Latvia 2000); Guatemala (Spain, 2000); Honduras (Spain, 1998); Hungary (Canada, 1990); Israel (Belgium, 2001); Iraq (Denmark, 2001); Italy (Germany, 2001); Japan (Russia, 1949); Mauritania (France, 2002); Rwanda (France, 1996; Switzerland, 1998; Belgium, 2001); Soviet Union/Russia (Latvia, 2000); Suriname (Netherlands, 2000); Sudan (United Kingdom, 1997).

International and hybrid trials include: Turkey (Constantinople, 1919); Germany (Nuremberg, 1945); Japan (Tokyo, 1946); former Yugoslavia (ICTY, 1993); Rwanda (ICTR, 1994); Kosovo (1999); Timor Leste/East Timor (2000); Sierra Leone (2002); Cambodia (2003).

21. These are referred to as transnational trials elsewhere in this volume.
22. IACHR reports are generally not seen as binding on member governments. But the opinion of the IACHR may reveal a position that the Court might later adopt, should the case be brought before it. Leonardo Filippini, "La Corte Suprema Argentina y la Convencion Americana sobre Derechos Humanos: Analisis Jurisprudencial", (LLM thesis, Palermo University, 2004).
23. Inter-American Court of Human Rights, Sentence of March 14, 2001, Caso Barrios Altos (*Chumbipuma Aguirre y otros* v. *Peru*) paragraph 41. For more discussion of the case, see Chapter 3 on Peru.