



# Policy Brief

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## Overview

A society that transitions from authoritarianism or armed conflict to a democracy needs to address important questions of justice and accountability for past human rights abuses in order to build a stable and peaceful future. In the rapidly maturing field of transitional justice an expanding number of initiatives have taken place providing valuable lessons for newly democratizing societies. This policy brief reviews the experiences of transition countries in Latin America and Eastern Europe in undertaking various accountability mechanisms: truth commissions, trials and amnesties in Latin America; and lustration, opening of secret service files, compensation and restitution in Eastern Europe. It identifies variables which may determine the effectiveness of certain mechanisms, and builds on the expanding body of evidence-based research.

Written by VESSELIN POPOVSKI,  
JOHANNA STRATTON and  
KALLE HUEBNER

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## *Comparing the Effectiveness of Accountability Mechanisms in Eastern Europe and Latin America*

**A** SOCIETY EMERGING FROM WAR OR AUTHORITARIANISM seeks to reckon with past human rights atrocities that, if not addressed, can threaten the state's legitimacy and democratic foundations. It is in the interests of sustainable peacebuilding and democratic consolidation to promote reconciliation and healing, and foster human rights and the rule of law. In order to achieve such a transformation over the long term, the organizational strategies, political styles and mechanisms used to consolidate democracy are of critical importance and deserve closer comparative analysis with the aim to provide valuable lessons for newly democratizing societies.

Latin American and Eastern European transition countries have experienced, more or less simultaneously, transitions from authoritarianism/communism or conflict to democratic rule. The record in these two regions reveals the reasons why certain accountability mechanisms were engaged, and the impact that their application has had on human rights protection and democratic practice. It suggests that the mechanisms, when effective, can unlock enabling conditions for the development of a more resilient human rights culture and help pave the path to democracy. If tailored to the specific needs and conditions of a country, transitional justice is an important means to consolidate peace, promote human rights and heal the wounds of past wrongs. Significantly, transitions are usually complex, random and lengthy. They typically evolve in an unmethodical way, as they are contingent on the social, political and legal forces that shape the process. The conditions in which the transition took place, for instance, whether it was a negotiated or a forced transition, or whether the political context was one of armed conflict or authoritarianism, have direct implications on the justice and accountability process that may unfold.

**Diversity of Accountability Mechanisms**

The range of mechanisms can be best understood when comparing cases in various regions, as their deployment is limited in number for any single country. Those seeking to implement a tran-

productive, irrelevant or a waste of precious resources.

**Is there a Best Approach?**

A combination of strategies, rather than a piecemeal approach is more likely to fulfil the needs of a society

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sitional justice process may determine that the full range of accountability mechanisms is not available to them, due to obstacles such as cost, expertise and political will, or they may determine that certain mechanisms are not relevant or appropriate to the local context. The choice of accountability mechanisms is therefore informed by historical traditions, cultural values and the limitations of the domestic, legal and institutional environment in which they will be implemented.

There is no universal, standardized approach for implementing transitional justice mechanisms given that conditions in each society are highly variable. The transitional justice experience, and the suitability of accountability mechanisms in any given country, is defined by context-specific historical, political, institutional, cultural, ideational and international factors, and the way in which these factors interact with each other. What worked effectively in South Africa for example, may not be successfully applied in Afghanistan. Transitional justice processes should be carefully developed in a way that is contextually appropriate and tailored to the specific needs of a society. A formulaic or template approach should be avoided for risk of being counter-

for justice and bring significant results. Such a comprehensive approach should include both judicial and non-judicial mechanisms. These can be top-down initiatives that are typically state-driven, such as institutional reform or adherence to the doctrine of universal jurisdiction, as well as bottom-up efforts that usually stem from civil society demands for accountability. Trials and other judicial proceedings, truth commissions, vetting or lustration, reparations and apologies, amnesties, memorialization, and institutional reform are among the common strategies. The increasing use of these worldwide attests to a broader accountability.

Much of the literature on transitional justice remains prescriptive and universalist and does not necessarily pay attention to whether transitional justice policies are appropriate and deal effectively with the past. While acknowledging this and reflecting on accumulated lessons learned, there is a growing consensus that the most promising approach is a holistic one that addresses truth, justice and compensation issues, and seeks to strengthen democracy and the rule of law. Moreover, the role of citizens in determining which mechanisms are best for their locality is critical, as this

helps to promote a sense of local ownership and responsibility.

Tribunals and truth and reconciliation commissions are often heralded as the most effective ways to implement justice, and are regularly engaged as complementary mechanisms. Both are based on the belief that the public or official exposure of truth is a form of justice in itself. Tribunals are judicial bodies with the power to prosecute, try and sentence perpetrators of past crimes. By punishing those responsible for human rights violations, tribunals individualize guilt with the conviction of those most responsible for serious crimes. In doing so, tribunals can achieve a retributive and deterrent effect in a way that other mechanisms cannot.

Truth and reconciliation commissions are most effective if they are independent statutory bodies that are institutionally strong, well-resourced both professionally and financially, representative of the people, transparent, credible and locally owned. Their mandate is to investigate past human rights violations and reconcile the divided society through a process that utilizes restorative justice techniques, and offers common narratives of a nation's past. Commissions work towards the forgiveness of victims and the confession of perpetrators, and seek to integrate former rivals and achieve societal reconciliation as a basis for democratization. With the disclosure of past abuses and the naming of those accountable, commissions encourage victims to rebuild trust in government and the democratic system. The public exposure of offenders can satisfy the demands for justice and pressure former elites to cooperate and acknowledge their crimes, sometimes in exchange for amnesty, although international standards require that certain conduct is

excluded from amnesty provisions.<sup>1</sup>

In Argentina, only high-level officers and several military commanders faced prosecution in the courts; whereas a truth commission that was established to investigate the widespread disappearances following the military coup of 1973, documented about 9000 cases and named a much broader range of perpetrators.

### Assessing Effectiveness

This examination of the comparative effectiveness of accountability mechanisms requires a shared understanding that “effectiveness” refers to the extent to which the mechanisms in question contribute to meeting certain objectives, rather than a reference to whether or not countries have been effective in the act of setting up various mechanisms. Moreover, it is a matter of identifying what the key stakeholders seek to achieve by engaging in the process of transitional justice and democratic accountability. In the broadest sense, effectiveness relates to the goals of reducing human rights violations and promoting a culture of human rights protection, consolidating democratic institutions and accountability, establishing social trust and peace with justice. Not only is there a need for justice, but there is a need for justice to be seen to be done, in order to promote peace and reconciliation.

Such goals are ambitious and difficult to measure. Evaluating effectiveness therefore involves making a comparison relative to a benchmark. And yet, there is no consensus on how to empirically measure the progress of a justice process. Likewise, it is not possible to know the number of potential incidents that can be deterred or prevented by a mechanism, and factors such as forgiveness, reconciliation and public awareness are equally beyond calibration. We suggest three

### About the Authors

*Vesselin Popovski* is Senior Academic Officer at the UNU Institute for Sustainability and Peace.

*Johanna Stratton* is Academic Programme Associate at the UNU Institute for Sustainability and Peace.

*Kalle Huebner* is an Intern at the UNU Institute for Sustainability and Peace.

forms of comparison in evaluating the effectiveness of transitional justice mechanisms: 1) comparison to the ideal, 2) counterfactual reasoning, and 3) empirical comparisons. Thus, effectiveness can be assessed by comparing the result to the perceived ideal outcome of a mechanism, to the outcome of alternative mechanisms, and to the achievements of past cases in which similar mechanisms have been applied.

historical and judicial truths are pursued. The Slovenian transition is an example of a justice process that has been described as “rule by consensus” between communist and post-communist regimes. However, the negotiation of justice that was acceptable for both sides did not meet the expectations of the victims nor bring up issues of historical truth. Similarly, Latin American transitions, such as

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### **Enabling Conditions for Effectiveness**

#### *Agency and Power*

Effectiveness is highly dependent on the agents who implement the mechanisms. To what extent have the newly elected authorities agreed to, and the collective society made demands for, justice to address legacies of past human rights violations? A clearly manifested public expression for justice and accountability can serve as a strong motivating force for the government to adopt a comprehensive set of mechanisms and policies.

Other key factors include the balance of power and the nature of the country’s political and moral leadership, particularly the influence and legitimacy of old elites. The dynamics between old and new political actors is of critical importance as it informs whether a transition is enforced or negotiated, and the degree to which

that in Argentina, were partly negotiated with the military which demanded limitation of prosecution against its officers through legal acts such as the Full Stop Law and the Law of Due Obedience.

Slovakia demonstrated the critically important role that leaders may play in affecting the nature and effectiveness of accountability mechanisms, as well as reshaping opinions of legitimate governance. Elites with ties to the former regime inhibited the transitional justice process by exercising their democratically acquired political power, against a background of widespread indifference and/or passivity regarding transitional justice issues, such as secret police repression. In spite of this, Ján Langoš, (the first post-communist Czechoslovak Interior Minister) who seemed to lack institutional and popular support, pushed through legislation that made truth revelation possible. In Slovakia this

kind of initially lonely leadership might be more effective with regard to truth revelation than mechanisms such as prosecutions or vetting, as it requires less active and ongoing cooperation from a large number of individuals in the judicial and executive branches of government, many of whom may be unsupportive of such justice.

The victims and survivors of human rights abuses are important agents, as their priority is to call into effect accountability mechanisms that adopt a victim-centred approach. An active civil society functions as a key enabling factor for effectiveness. For example, in 1999, the House of Lords – at the time the highest appeal court in the United Kingdom – was forced to make a pronouncement on a theoretical principle of universal jurisdiction which had not yet been tested, thanks to the mobilization efforts of relatives of victims of human rights crimes in Chile. Similarly, the *Nunca Mas* publication, initiated by anonymous citizens during the dictatorship in Brazil, is an example of a bottom-up initiative that named over 440 torturers and prevented them from returning to public office. As key stakeholders, as well as beneficiaries of a transitional justice process, the efforts of victims, survivors and their supporters intensified pressure on authorities to carry out fact finding, reveal information on the fate of loved ones, provide opportunities for grievances to be heard and validated (such as the provision of reparations and restitution) and for legal and institutional reforms to be implemented in order to prevent atrocities in the future. Often, the demands of civil society actors for justice go hand in hand with claims for fair elections and democracy, thus paving the way for the consolidation of democratic institutions. Given this, the extent to which “beneficiaries”

or “clients” of transitional justice are satisfied with outcomes is a subjective, yet decisive measure of the effectiveness of accountability mechanisms.

### *Timing*

Time is also a significant factor of effectiveness. In the case of trials in particular, the challenge is to engage the justice process while evidence is available and memories are fresh, but to avoid overly expeditious and harsh responses that deviate from the rule of law – particularly the principle of due process. For example, the rapid quasi-trial and execution of the Romanian dictator Nicolae Ceaușescu and his wife in 1989, or the flawed trial and hanging of Iraqi dictator Saddam Hussein in 2006, seemed to be more akin to legalized vengeance than fair trials. Grave human rights abuses require timely prosecution, as detailed evidence of atrocities may be destroyed, lost or difficult to reconstruct. The old age and ailing health of perpetrators who are not able to stand trial after drawn out or belated legal proceedings is another temporal consideration. In many cases, serious crimes of post-war and Stalinist rule in Eastern Europe were not addressed with criminal justice mechanisms as alleged offenders were either deceased or unfit to stand trial, or cases had exceeded the statute of limitations.

Although there are benefits to early engagement in transitional justice, the process of choosing and implementing the mechanisms should not be rushed or imposed. Experiences from Latin America suggest that the pursuit of justice may be deferred for many years, but can become feasible at a time when political circumstances are more conducive. Soon after transition in Chile, the new authorities were constrained legally by an amnesty decree and politi-

### About this Policy Brief

This policy brief draws on the results of the research project “Transitional Justice and Democratic Consolidation: Comparing the Effectiveness of the Accountability Mechanisms in Eastern Europe and Latin America” which is jointly organized by El Colegio de México and the United Nations University Institute for Sustainability and Peace, in association with the University of Oxford. A book, edited by Vesselin Popovski and Mónica Serrano, is forthcoming with the following authors:

Alexandra Barahona De Brito  
Carlos Basombrío Iglesias  
James Cavallaro  
Pilar Domingo  
Claudio Fuentes  
Maria Patricia González  
Hristo Hristov  
Alexander Kashumov  
Ernesto Kiza  
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Lavinia Stan  
Mitja Steinbacher  
Elvira Maria Restrepo  
Carmen Rosa de León  
Moritz Vormbaum  
Gerhard Werle  
Laurence Whitehead

cally by the former dictator Augusto Pinochet’s influence as commander-in-chief of the army until March 1998. While there was no significant shift in the legal environment, things began to change rapidly with two truth commissions being established in 1991 and 2005, many initiatives on symbolic and monetary reparations being put in place, and the judiciary becoming more active in prosecuting those responsible for human rights abuses.

Indeed, the window of opportunity for truth revelation does not necessarily close quickly, even if transitional justice initiatives have been delayed. Mechanisms such as historical archives, memorials, museums and the work of truth commissions are less time sensitive than trials, and can be effective even decades after a transition. Even today, the German Office of the Federal Commissioner reveals new insights into past human rights abuses by the former East German secret service that spark heated public debate in German society, almost two decades after transition.

The assumption that once a country’s socio-political context changes, a certain amount of time elapses which creates an insurmountable barrier to transitional justice initiatives is seriously challenged both by the efforts of successive generations in countries like Guatemala, Chile and Argentina and also by the recursive nature of accountability mechanisms deployed in several Eastern European states, where recent tensions compete for attention with abuses from the communist period and those from the second world war.

### Cost

Effectiveness is typically measured by the barometers of time and money in the business world. In this analysis, money is certainly a relevant factor as

a misappropriation of funds or a sense of dissatisfaction with the amount of money spent versus the result gained can have a negative impact on proceedings in other countries, or even in the future. The *ad hoc* International Criminal Tribunals for the Former Yugoslavia and for Rwanda and the hybrid Special Court for Sierra Leone were criticized for being too expensive. Some suggest that the amounts spent on the prosecution of perpetrators should have been distributed among the victims; this also highlights another problem – that these tribunals do not provide funds or procedures for compensation of victims. The South African Truth and Reconciliation Commission made a significant contribution to the bloodless transition to democracy, but it incurred problems when it failed to pay promised compensation. Cost is indeed one reason for looking at other models of justice and enforcing international humanitarian law. Conversely, not spending enough to deter future crimes may result in the need to expend greater financial resources at a later date.

### Justice Sector Reform

Justice sector reform is crucial for improving the effectiveness of accountability mechanisms. In order to achieve some level of judicial accountability, courts should be receptive to cases dealing with past human rights abuses, and be minimally credible and capable of guaranteeing a measure of due process. Members of the judiciary may, in turn, be positively affected in terms of their own interpretation of the law vis-à-vis human rights cases by developments in transitional justice initiatives. The thickening of norms, rules and institutions at the domestic, regional and international levels are also likely to have an impact on the attitudes

and legal culture of judges, and this is increasingly true in the wake of the *third wave of democratization*, and the post-cold war era. The deliberate and global effort to strengthen the rule of law through various forms of justice sector reform in recent years has helped to spread acceptance and adoption of the idea of universal norms of human rights worldwide. Countries where the rule of law is well observed are more likely to provide an environment that is conducive and supportive of various transitional justice initiatives, which in turn improves their likelihood of being effective.

### Limits to Effectiveness

Activating mechanisms of transitional justice raises significant practical difficulties. Often, new governments are unwilling to accept far-reaching initiatives that might have unforeseen consequences for their own legitimacy or for the stability of the political system at large. Even if political will exists, there may not be sufficient judicial capacity to prosecute thousands of alleged perpetrators, especially given that transitional court systems are weak and prone to corruption. And the compensation of large numbers of victims may exceed the resilience of transition economies. Notably, the choice of appropriate mechanism is highly critical. The prosecution of a small number of perpetrators, for example, might be seen as political revenge if there is no effort to establish non-judicial mechanisms such as a truth commission or a victim compensation scheme. Furthermore, mere compensation can be seen as an attempt to buy the silence of victims. Truth-telling may seem an empty exercise if abusers are not challenged and if there is no element of retribution present.

### Policy Recommendations for Effective Implementation

- Transitional governments and new authorities should consider the high cost of impunity, the consequences of failing to punish atrocious crimes committed by prior regimes on a sweeping scale and their duty to safeguard against future violations by prosecution of past crimes;
- Responses to massive human rights violations should be integrated and holistic, but also balanced with victim-sensitive and culture-sensitive approaches;
- Informed and pragmatic discourse, incorporating expertise and best practices, and obtaining independent people's opinions (through civil society involvement) should be conducted;
- Justice should be de-politicized with the transitional process given broader legitimacy;
- Key institutions, especially the justice sector, should be created or reformed;
- Justice and accountability should be delivered by national actors; when needed, independent international actors may help with expertise, skills and training.

### Note

- 1) Amnesty may not be granted for conduct amounting to the international crimes of genocide, crimes against humanity, war crimes, or gross violations of human rights.



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**INSIDE:**  
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