Introduction

How do nations heal the wounds inflicted by violence? Is it possible to bring solace to victims of egregious human rights violations? Can states fulfil their international obligation to avoid impunity while at the same time cementing democracy and peace? These were some of the questions that Latin American countries faced in the aftermath of the most recent episodes of authoritarian rule and internal armed conflict. As O'Donnell and Schmitter put it in their 1986 classic *Transitions from Authoritarian Rule*:

> We are here in a situation of most difficult ethical, as well as political, choice. Morality is not as fickle and silent as it was when Machiavelli wrote his expediential maxims of political prudence; transitional actors must satisfy not only vital interests but also vital ideals – standards of what is decent and just. Consensus among leaders to bury the past may prove ethically unacceptable to most of the population. All our cases demonstrate the immense difficulty of this dilemma. (1986: 30)

Indeed, processes of democratization and pacification in the 1980s and 1990s were accompanied by intense debates around the issue of transitional justice (TJ), including whether and how to prosecute those responsible for forced disappearances and torture, establish bodies capable of producing authoritative accounts of the causes and consequences of the violence, and recognize and remember victims' suffering.

As O'Donnell and Schmitter also pointed out, mastering the past poses a special kind of dilemma: 'one that simply cannot be avoided and one that the leaders must attempt to resolve' (1986: 75, n. 16). What they perhaps did not anticipate is that far from being circumscribed to transitional moments, this dilemma and the debates it inevitably triggered would become a permanent feature of the political landscape across Latin America, pitting pro- and anti-impunity coalitions in heated conflicts over memory, institutions, and the law. Interestingly, the protracted nature of victims' struggles, and the recurrence of backlash against progress in the direction of truth, justice, and peace, turned the region into a unique site of both innovation in TJ policies and extreme diversity in the shape and success of such policies – a trajectory that continues to the present day. This Element takes stock of these innovations and explores the factors that explain why some societies moved in the direction of accountability for human rights violations whereas others did not. It also reflects upon the reasons that make the Latin American experience such a decisive one in the genealogy of the global TJ paradigm.

What is TJ? According to the United Nations (2004: 4), the term 'comprises the full range of processes and mechanisms associated with a society's attempt

to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation'. Prominent TJ mechanisms include prosecutions and trials against actors thought to be directly or indirectly responsible for the perpetration of crimes during dictatorships and armed conflicts. These proceedings are usually conducted in national courts (Olsen, Payne, and Reiter 2010). Due to the technical and political difficulties that characterize judicialization, national courts are not always capable or willing to process human rights cases. When that happens, trials sometimes take place in international tribunals. For example, in the 1990s the United Nations Security Council created two ad hoc tribunals to deal with specific instances of mass human rights violations: the international criminal tribunals for the former Yugoslavia (1993) and Rwanda (1994). In 2000, the internationalization of accountability mechanisms received a further boost with the creation of a permanent International Criminal Court (Sikkink 2011: 110–121).

TJ mechanisms are not exclusively punitive in nature. Another prominent approach focuses on truth seeking via the creation of commissions charged with investigating patterns of abuse and issuing reports that produce an 'officially proclaimed and publicly exposed truth' (Zalaquett 1995: 6), assess the root causes of the violence, and propose ways to prevent it from recurring (United Nations 2004: 17). TJ processes also focus on repairing the victims, both monetarily and symbolically – for instance, by encouraging states to issue public apologies or build memorial sites (de Greiff 2008). Finally, some TJ mechanisms delve into the terrain of institutional reform, including efforts to vet security and judicial bureaucracies with the aim of expunging those who perpetrated, aided, or abetted serious crimes (Mayer-Reickh and de Grieff 2008). While not always adopted concurrently, trials, truth-seeking initiatives, reparations, and institutional reforms can work in an interdependent manner to compensate for the limitations of each individual mechanism to materialize the rights to truth, justice, and peace. Importantly, the specific features of these mechanisms vary significantly across national contexts. Indeed, the UN emphatically warns against promoting 'one-size-fits-all formulas' and instead encourages a 'thorough analysis of national needs and capacities' before defining the contours of TJ policies (United Nations 2010: 5).

Adopting some form of TJ has gradually become a legal and moral imperative, the 'thing states do' (or at least debate) almost as a matter of course when facing large-scale human rights abuses. This shift in behavioural expectations happened in close connection to changes in the way states understand their obligations vis-à-vis their own citizens and the international community. Such transformations include a growing recognition of the existence of an international 'duty (a) to investigate, prosecute and punish those accused of serious

rights violations; (b) to reveal to victims and society at large all known facts and circumstances of past abuses; (c) to provide victims with restitution, compensation and rehabilitation; and (d) to ensure repetition of such violations is prevented' (United Nations 2015: 4–5). The affirmation and substantive content of these duties is the product of the progressive thickening of the corpus of international law via the adoption of instruments such as the International Covenant on Civil and Political Rights (1966), the Convention Against Torture (1984), the Jionet Principles Against Impunity (1997), and the International Convention for the Protection of All Persons from Enforced Disappearance (2006), as well as through the expansive interpretation of these instruments as rendered by bodies such as the Inter-American Court of Human Rights. This legal evolution mainstreamed and normalized TJ to the point that 'the question for the UN', and for most transitioning societies affected by violence, 'is never whether to pursue accountability and justice, but rather when and how' (United Nations 2010: 4).

The way we understand TJ has been fundamentally shaped by historical experience. While the pedigree of some TJ mechanisms dates back to World War II, the paradigm gained notoriety in the 1980s and early 1990s with reference to the policies adopted during regime transitions in South America and Eastern Europe (Orentlicher 1991; Kirtz 1995; Teitel 2000, 2003; Zunino 2019). In fact, definitions of TJ advanced in seminal scholarly works were directly influenced by these experiences. For example, Ruti Teitel (2003: 69, my emphasis), who coined the term in the early 1990s, defines it 'as the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive *predecessor regimes'*. According to Jon Elster (2004: 1, my emphasis), TJ is 'made up of the processes of trials, purges and reparations that take place after the *transition from one political regime to another*'. Since then, however, the notion of TJ has developed into a powerful legal, political, and discursive apparatus that helps victims in a much wider variety of violence-ridden contexts frame their demands, challenge the acceptability of impunity, and mobilize support. The TJ paradigm has also become a template that influences how international and domestic elites organize institutional responses to these demands under a very diverse set of circumstances. As a field of practice and academic inquiry, TJ is therefore much more encompassing today than it was three decades ago, and this expansion has generated new practical challenges and moral dilemmas.

First, TJ mechanisms are no longer exclusively associated with transitions from authoritarian to democratic regimes, and feature prominently in other kinds of transitions, especially transitions from civil war to peace. In Latin America, for example, TJ was an integral part of peace agreements in

Guatemala (1996), El Salvador (1993), and Colombia (2016). These contexts pose unique challenges for the design, implementation, and success of TJ because armed conflict tends to ravage and severely compromise the institutions responsible for designing and implementing mechanisms such as prosecutions, reparations, and guarantees of non-repetition. By contrast, states emerging from authoritarian rule, where ideas about TJ first developed, usually had more functional institutions, with 'the capacity to make reliable attributions of criminal responsibility, an institutional set-up and the economic capacity to establish large-scale reparations programmes, and institutions sufficiently strong and compliant to withstand reform processes' (United Nations 2017: 8).

Second, TJ is no longer a paradigm or policy tool kit reserved for transitional moments. In fact, human rights prosecutions are still ongoing across Latin America, more than three decades after the onset of the third wave of democratization – a phenomenon that Cath Collins (2011) refers to as 'post-TJ'. Nor are truth commissions strictly reserved for transitional moments, as demonstrated by the cases of Chile, where there have been two commissions since the 1990 transition, and Brazil, where the government established a commission more than twenty years after the transition. More interesting is the use of TJ mechanisms *before* there is any type of transition. For example, following negotiations with paramilitary groups in 2005, several years before the comprehensive ceasefire agreed with FARC rebels in 2016, the Colombian government sponsored a TJ framework known as the Justice and Peace Law. The goal of this initiative was to encourage the demobilization of paramilitary forces and the production of 'truth' in the form of confessions, in exchange for reduced sentences (LaPlante and Theidon 2006). Similarly, victims of the wave of disappearances unleashed by the onset of the 'war on drugs' between Mexican cartels and the military in the mid-2000s quickly adopted the discourse of TJ to frame their demands and promote institutional innovations to help them find their loved ones. Academics, civil society organizations, and even the state also look to the paradigm of TJ in search of possible solutions to this tragedy. As a recent report commissioned by the Mexican National Human Rights Commission puts it, 'the victim count is in the thousands. Ordinary judicial institutions and mechanisms have not been able to address this serious situation and its consequences. The answer many states have found to similar problems is the design and implementation of a TJ policy' (CIDE 2018: 1). In situations such as these, TJ mechanisms initially designed to deal with the causes and consequences of past suffering are pushed into much trickier situations in which violence is still ongoing, perpetrators remain at large, and there is a wider and murkier variety of actors involved, including paramilitaries and drug cartels.

Compounding things further is the fact that these are contexts devoid of the political oxygen generated by moments of clean rupture.

Third, TJ is not associated with strictly punitivist conceptions of justice. This is partly because the theory and practice of TJ gradually elevated the legal and moral standing of alternative goals such as reconciliation. The global reputation of the South African Truth and Reconciliation Commission set up in 1995 played an important part in this process (Rowen 2018). Moreover, the historical record suggests that, for better or for worse, amnesty provisions are very much part of the menu of TJ mechanisms that states consider when seeking to address past violence (Mallinder 2008; Olsen, Payne, and Reiter 2010; Lessa and Payne 2012). This may sound odd given that amnesties are designed to stop or prevent criminal prosecutions against actors responsible for human rights violations – i.e. they stand in the way of 'justice'. But the reality is that in the 1980s and 1990s, debates about the legality and effectiveness of amnesties were central to most TJ processes in Latin America (and elsewhere), either because governments proposed amnesties as a response to instability triggered by prosecutions (Sikkink 2011: 146), or because amnesties formed an integral part of the TJ bargain struck during transitional moments. While a regional and international norm against impunity subsequently gained momentum, contemporary developments – for example, those related to the Colombian peace process – have started to carve out a new discursive and legal space for amnesties in the TJ tool kit. This departure from strictly punitivist conceptions of TJ stems from the realization that when it comes to mastering violent pasts, there are no silver bullets. Reconciling competing objectives such as retribution, truth, and stability can be incredibly difficult. The TJ paradigm is therefore less a ready-made policymaking template and more 'a set of legal, political, and moral dilemmas about how to deal with past violence' (Sharp 2012: 780).

Latin American countries have made crucial contributions to the history, evolution, and meaning of TJ, producing important innovations in the way states respond to victims' demands for truth and justice. In so doing, the Latin American experience has shaped the aspirations of victims and governments worldwide. Section 1 of this Element reviews efforts to advance TJ in Latin America. In what ways have Latin American countries been pioneers in the field of TJ? How has the Latin American experience contributed to the evolution of global TJ norms, redrawing the boundaries of what is imaginable, permissible, and desirable as countries grapple with violent pasts and presents? And how do approaches to TJ vary across the region? The focus will be on describing innovation and variation in the two areas that elicit the most passionate political debates: criminal prosecutions and amnesty laws, as well as truth-telling efforts.

The rest of the Element identifies the political and institutional sources of variation in the success and scope of TJ efforts. I do this in three ways. Section 2, provides a synthesis and evaluation of two influential explanatory approaches: the 'Huntingtonian Model', which emphasizes the centrality of domestic power politics; and the 'Justice Cascade Model', which emphasizes the role of social movements and international norm entrepreneurship. Section 3 makes the case that scholars should complement these dominant approaches with one that recognizes the importance of capacity building and institutional change in TJ processes. The Huntingtonian and Justice Cascade models tend to overlook the difficulties that plague the actual implementation of TJ. In order to translate domestic/international political pressure and human rights norms into concrete outcomes, states must develop what I call 'TJ capabilities'. The capabilities approach highlights the technical dimension of TJ efforts: state actors not only need to be *willing* to pursue these highly complex policies, but must also recruit bureaucratic agents with specific skills and institutional dispositions. Three case studies illustrate the heuristic power of this framework. Section 4 concludes, with a discussion of the historical and structural determinants of Latin America's pivotal role in the history of TJ.

1 Latin American Innovations

In this section I take stock of Latin America's key contributions to the history of TJ, with a focus on criminal prosecutions and amnesty laws, as well as truth commissions. The case studies also reveal wide-ranging variation in the levels of truth and justice achieved by different countries.

1.1 Criminal Prosecutions and Amnesty Laws

Human rights prosecutions are perhaps the most demanding form of TJ. When members of the armed forces or political leaders run the risk of going to jail, the stakes increase dramatically and may lead to instability. Prosecutions and trials also present a number of legal challenges. They involve incredibly complex and unusual investigations, which tend to strain the knowledge and resources of ordinary judicial actors. In particular, judges and prosecutors must balance conflicting legal imperatives emanating from domestic and international sources of law regarding the possibility of prosecuting these crimes. For example, they must answer questions about the legality of amnesties, increasingly repudiated by international law, or the applicability of statutes of limitations for crimes committed in the distant past (Roht-Arriaza 1995, 2015; Gonzalez-Ocantos 2016a: 43–54). In answering these questions, 'the attempt to impose accountability through criminal law often raised rule-of-law

dilemmas, including retroactivity in the law, tampering with existing laws, a high degree of prosecutorial selectivity, and a compromised judiciary' (Teitel 2003: 67). The resulting jurisprudence does not always follow 'core principles of legality . . . the very essence of the rule of law in ordinary times' (Teitel 2000: 215). In what follows I review how Latin American courts navigated the politically and technically daunting world of criminal prosecutions.

1.1.1 The Argentine Breakthrough of the 1980s

According to Kathryn Sikkink (2008: 2) 'Argentina was the source of an unusually high level of human rights innovation'. Argentina's influence in the development of TJ began in the early 1980s, when the country transitioned to democracy after a military dictatorship (1976–1983). President Alfonsín moved quickly to fulfil his promise to address the tragic legacy of human rights violations. Crucially, the administration introduced a policy of criminal prosecutions that was then without parallel in democracies around the world. The few well-known precedents at the time included the Nuremberg and Tokyo trials, but these had been conducted by international military tribunals, not domestic courts.[1] Alfonsín therefore stepped into unchartered territory. As we shall see, the consequences of his decision to try the military framed formative debates about TJ.

Aware of the dangers of aggravating the military establishment, the president sought to limit the judicialization process to officials with the highest levels of responsibility. He also sponsored legislation that gave military courts original jurisdiction over the proceedings, but time-limited this prerogative to avoid delays or inaction (Osiel 1986; Nino 1996). When the Supreme Council of the Armed Forces proved unwilling to cooperate, the case against the leaders of the military juntas moved to a federal court in the city of Buenos Aires. According to one of the judges:

> People in *Tribunales* [the headquarters of the federal judiciary] did not support us. They were scared, afraid. When we bumped into them in the corridors, they asked us: 'Is it true that you will hold this trial? Are you nuts?' (Gil Lavedra, quoted in Eliaschev 2011; my translation)

Indeed, the trial that ensued was truly unprecedented because for the first time in history a democracy was set to try former military dictators in a civilian court. It was also unprecedented in terms of the sheer complexity of the crimes and the number of hours of witness testimony they would require (Speck 1987). In

[1] There was also a less well-known precedent in Greece (Sikkink 2011: 36–50).

December 1985, after months of hard work and intense scrutiny, the judges convicted five junta commanders and acquitted the rest.[2]

The ruling had huge implications for the meaning and future of TJ. First, the court proved that it was possible to assign individual criminal responsibility to those in command of deeply opaque clandestine organizations. Doing so is extremely difficult because such organizations make use of the state apparatus to erase traces of their structures, internal procedures, and activities. Scepticism about the legal viability of prosecutions therefore suffered a blow, and trials were vindicated as a component of what would later become the TJ paradigm. Argentine judges accomplished this feat at a time when the doctrines of international human rights law and criminal law specially designed to facilitate the prosecution and punishment of these crimes were not yet fully in vogue. In fact, international law did not feature prominently in these initial debates about justice in Argentina.[3]

Second, the judges taught the world important lessons about how to prosecute systematic human rights violations. For example, they demonstrated that a selective prosecutorial strategy – i.e. not investigating every single complaint – is often crucial in managing highly complex cases. Furthermore, observers also credit the 1985 trial for introducing and legitimizing distinct evidentiary standards for human rights cases. Argentine judges understood that the types of perpetrators and crimes inevitably force those investigating mass atrocities to rely on indirect and contextual evidence. As a result, courts must be prepared to assign more value to potentially biased or inconsistent witness testimonies than is common in ordinary trials.[4] These witnesses are 'necessary' because they are usually the only available source to reconstruct patterns of clandestine criminal activity and assign individual criminal responsibility. Argentine judges specifically 'noted that the lack of more objective witnesses resulted from the methods of operation chosen by the defendants' (Speck 1987: 506). Enhancing judges' ability to recognize the specificities of human rights crimes, and adapt decision-making templates and standards so that it is possible to succeed in evidence-poor environments, would later become a key focus of those seeking to promote trials elsewhere.

Third, far from putting an end to the trials, the 1985 judgement fuelled further prosecutions. The judges instructed military courts to begin new proceedings

[2] Cámara Federal de Apelaciones de la Ciudad de Buenos Aires, *Causa 13/84 Videla, Jorge Rafael y otros*. 9 December 1985.

[3] The ruling relied on criminal definitions included in the criminal code at the time of perpetration rather than on the international criminal categories that would later become a staple in this kind of trial (e.g. crimes against humanity).

[4] For instance, individuals who escaped from clandestine detention centres.

against lower level officers. They did so in open defiance of the Executive's intention to contain the judicialization process. Once again, military judges refused to cooperate, leading federal courts throughout the country to usurp jurisdiction and begin new trials. In December 1986, the government revived its policy of limited prosecutions and imposed a 60-day limit to file new cases (Ley de Punto Final). Judicial personnel responded by extending their working hours, thus allowing victims to file as many cases as possible before the deadline. By February 1987, more than 300 officers were facing judicial proceedings (Acuña and Smulovitz 1995). These developments demonstrated that even if TJ initiatives are carefully orchestrated and centrally planned, they often take on a life of their own – a realization that surely inspired hope among victims, but also fear among elites involved in difficult processes of democratization and pacification. One key lesson in this respect was that the unpredictable nature of TJ is enhanced when such policies are framed in technical terms and conducted within judicial structures governed by relatively autonomous legalistic logics capable of ignoring or defying the limits of political possibility.

Fourth, the 1985 ruling and its immediate consequences led to backlash from the military establishment. Indeed, following two military uprisings (Norden 1996), Congress approved a second amnesty law in June 1987 (Ley de Obediencia Debida). The Supreme Court affirmed the constitutionality of the law, effectively killing all momentum in favour of prosecutions. These developments anticipated what would become one of the distinctive characteristics of Latin American politics during the decades that followed: the fluctuating and non-linear nature of TJ achievements. Argentina thus taught the world that TJ achievements cannot be taken for granted.

1.1.2 Defining the Contours of Amnesty

While the 1985 trial was not thought of at the time as an instance of TJ, subsequent political and academic debates about the merits, limitations, and implications of this unique initiative began to define the field and operationalize the meaning of the term.[5] Argentine federal judges had shown that despite being politically and technically challenging, human rights trials were indeed possible. The backlash that ensued – in the form of two amnesty laws and a set of presidential pardons issued in 1990 in favour of the junta commanders – also showed the precarity of criminal accountability during transitional moments.

[5] See Arthur (2009: 48–57) for an account of a conference organized in 1988, which played a pivotal role in framing ideas about TJ. The conference was organized partly in response to events taking place in Argentina. See Section 2.

And this contrast spurred seminal discussions about the difficult balance between justice and political stability in TJ processes (see Section 2).

In the realm of politics, however, stability concerns quickly gained the upper hand. Indeed, by the mid-1990s Latin America was drowning in a sea of amnesty laws designed to prevent prosecutions. In Chile (1978) and Brazil (1979), military dictators passed amnesty laws long before regime change was even on the horizon. The Argentine saga of the late 1980s did little to encourage incoming democratic administrations in either country to challenge these provisions. Sikkink (2011: 90) suggests that Chilean elites 'explicitly designed their justice strategy to avoid what they considered the "mistakes" of the Argentine experience'. Similarly, when Uruguayan civil society forced a referendum on the amnesty law passed in 1986 following the 1985 transition, voters decided to play it safe and keep it (Lessa 2012). The agreements that put an end to Central American civil wars also led to the adoption of amnesty laws in El Salvador (1993) and Guatemala (1996). And when the violence of Peru's internal armed conflict subsided, President Fujimori passed an amnesty law in 1995 that shielded civilian and military officials involved in counterterrorism operations from the threat of criminal prosecutions.

All of these laws severely constrained the possibility of implementing TJ. For example, by the mid-1990s several Supreme Courts – including those of Argentina, Chile, El Salvador, and Peru – had declared the constitutionality of the amnesties. Such decisions are a testament to the weakness of the international anti-impunity norm at the time. Judges and politicians did not yet feel bound by the international legal doctrines that in subsequent years would lead to a more or less generalized repudiation of amnesties. Some courts did not believe international law was directly applicable, especially if the relevant treaties had come into effect after the perpetration of the crimes. For others, the legality of amnesties was a strictly political question, and one that the courts should not try to answer. Yet other judges looked to certain international instruments, most notably Protocol II of the 1949 Geneva Conventions, to show the lack of an international consensus on the need to repeal amnesty laws (Roht-Arriaza and Gibson 1998).[6]

In sum, courts found a variety of reasons to legitimize amnesties and thus block prosecutions. The impunity regimes constructed on the back of these interpretations proved extremely resilient. Argentina's laws of Punto Final and Obediencia Debida stayed on the books until 2005. In Uruguay and El Salvador, the amnesties were only declared unconstitutional in 2009 and 2016, respectively. Peru's was the shortest-lived amnesty: it was only in force between 1995

[6] Protocol II allows amnesties after the end of 'hostilities'.