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## **Hijacked Justice: Domestic Appropriation of International Norms**

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**HIJACKED JUSTICE: DOMESTIC APPROPRIATION OF  
INTERNATIONAL NORMS**

(Draft version)

by

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## **Abstract**

This paper explores the domestic politics of international norm diffusion, using the global transmission of transitional justice norms as the empirical context of the research. Applying sociological institutionalism as the principal theoretical framework, I argue that the motivation of states to adopt international models of transitional justice has changed over time. The transitional justice norm - that posits that war crimes and massive human rights abuses must be dealt with in a proper legal setting and not through “victors’ justice” or impunity - was institutionalized in large part as the result of a strong domestic demand for transitional justice in countries like Argentina and South Africa. However, as this norm began to diffuse through the international system, states began to adopt international justice but now for very different reasons – to achieve international legitimacy, to get rid of domestic political opponents, to appease international coercion, or out of uncertainty. A paradox, then, is that the more norms of transitional justice become institutionalized internationally, the more likely states will adopt them, but now for reasons that can be contrary to the original objectives of the transitional justice project. This is important because domestic actors can achieve local political goals that are quite different from those advocated by international rules and standards if they give the appearance they are conforming to appropriate norms.

My paper explains why some states adopt and some reject international justice arrangements. I look systematically at a range of motives states put forward in deciding whether to adopt or reject particular international organizational models. I then examine the relationship between state motivation for adopting international justice models and domestic political consequences these models generate. The paper concludes with the

discussion of how domestic politics filters international norms and predicts ways in which we can expect domestic variation of system-level norms in the context of international justice.

## **I. THE RESEARCH PROBLEM**

Over the past sixty years, a global norm has emerged prescribing the appropriate way for states to deal with crimes of the past. This international norm posits that war crimes<sup>1</sup> should be tried in a court of law, and not left to either vengeful justice or forgiveness. While these crimes were previously dealt with through “swift” justice, executions, or “victor’s” trials, they are now considered to be just like other crimes that demand a proper trial and due process. In other words, crimes of such magnitude for which no appropriate punishment was ever possible,<sup>2</sup> have over the past few decades developed into issues that are “triable,” that should be in the purview of courts, not just transitional governments.

This norm of international criminal accountability is embedded in the larger norm of global liberalism, which is evident in the increasing legalization of the international system (Abbott, Keohane et al. 2000) and reliance on the rule of law as the appropriate model of state practice.<sup>3</sup> The move towards internationalization of accountability for human rights abuses and war crimes is also nested in a wider normative shift in world

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<sup>1</sup> To avoid cumbersome language, I use “war crimes” when I mean “war crimes, crimes against humanity, and genocide.”

<sup>2</sup> This is the famous statement by Hannah Arendt about the Nuremberg trials: “For these crimes, no punishment is severe enough. It may well be essential to hang Goring, but it is totally inadequate. That is, this guilt, in contrast to all criminal guilt, oversteps and shatters any and all legal systems. That is the reason why the Nazis in Nuremberg are so smug” (in Arendt, Jaspers et al. 1992:54). For a recent theoretical look at “evil” see Card 2002.

<sup>3</sup> For a theoretical exploration of legalism, see Shklar 1986.

politics that incorporates human rights norms as integral part of international relations and foreign policy (Sikkink 2003).

This normative shift at the international level has led to a massive proliferation of transitional justice initiatives around the world. The institutional designs of transitional justice models are becoming increasingly internationally regulated. The growing international supply of specific models (international or domestic trials, truth commissions, or hybrid domestic/international courts) for dealing with war crimes justice is also creating its own demand from states. States are now expected, encouraged or even coerced by other states, by international organizations, and by the growing international justice expert “industry” - an active group of institutions and individuals with expert authority and policy objectives in the international justice issue area<sup>4</sup> - to conduct transitional justice projects as one of the first steps in post-conflict rebuilding. In fact, the proliferation of transitional justice has reached such levels that one of the leading experts on truth commissions, Priscilla Hayner even declared:

*In virtually every state* [emphasis added] that has recently emerged from authoritarian rule or civil war, and in many still suffering repression or violence but where there is hope for a transition soon, there has been interest in creating a truth commission – either proposed by officials of the state or by human rights activists or others in civil society (Hayner 2001:23).

This is a major change in the way states and international society deal with issues of past crimes. Moreover, the relationship between transitional justice and post-conflict peace building is especially notable, as it is now promoted by various agencies of the United Nations (UN Security Council. 2003), nongovernmental organizations (IDEA 2003; Human Rights Watch. 2004f), and even military strategists (Flournoy and Pan

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<sup>4</sup> My understanding of international justice industry corresponds to what sociological institutionalists call an “organizational field,” defined as “those organizations that, in the aggregate, constitute a recognized area

2002; Hamre and Sullivan 2002) as one of the necessary pillars of successful post-conflict reconstruction.<sup>5</sup>

The professionalized international justice industry now includes many new international organizations, such as international justice NGOs, pressure groups, courts (notably international criminal tribunals for the former Yugoslavia and Rwanda, ICTY and ICTR, as well as the International Criminal Court, ICC) and truth commissions, as well as individuals, acting as international justice entrepreneurs. This industry has taken on itself not only to generally support the international justice regime, but actually design (set up, advise, consult) international and domestic justice institutions. As a consequence of this unprecedented activism, the international justice industry has succeeded in framing the states' choice as one of which model of justice to adopt, not whether any should be adopted at all.<sup>6</sup>

The institutionalization of the international justice norm should predict a number of outcomes. First, we should expect increased isomorphism of organizational models, i.e. we should expect models of transitional justice to look very much alike in very dissimilar political environments around the globe. Second, we should expect that states will adopt these models for reasons that correspond to the international cognitive model of "transitional justice." If a norm truly is institutionalized, then its content should not

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of institutional life: key suppliers, resource and product consumers, regulatory agencies, and other organizations that produce similar services or products," DiMaggio and Powell 1983:66.

<sup>5</sup> UN Secretary General Kofi Annan is explicit in this regard: "We have learned that the rule of law delayed is lasting peace denied, and that justice is a handmaiden of true peace... There cannot be real peace without justice." UN Security Council Press release, September 24, 2003 (UN Security Council. 2003).

<sup>6</sup> To give a flavor of the extent of international involvement in domestic justice initiatives, the International Center for Transitional Justice, only one of the many active international justice organizations, is currently involved in designing, consulting, or setting up truth commissions or alternative transitional justice arrangements in the Democratic Republic of Congo, Ghana, Kenya, Nigeria, Sierra Leone, South Africa, Zimbabwe, Argentina, Guatemala, Mexico, Nicaragua, Panama, Paraguay, Peru, Afghanistan, Burma/ Myanmar, Indonesia, Sri Lanka, East Timor, Bosnia-Herzegovina, Serbia and Montenegro, and Northern Ireland ([www.ictj.org](http://www.ictj.org)).

dramatically change during the process of norm diffusion and internalization by different state actors. In the context of international justice, this means that we should expect states to adopt transitional justice models for the same or similar reasons that international norm entrepreneurs promote them – to “put the past to rest,” to achieve truth, justice, and reconciliation, all of which is assumed to lead to social healing, itself a prerequisite for successful democratic consolidation.

This paper argues that both of these predictions are wrong or, at best, incomplete. First, instead of one organizational model that is universally accepted, there has been a proliferation of different models of international justice. There currently exist four principal models of dealing with past abuses – international trials, domestic trials, domestic truth commissions, and hybrid international/domestic courts – and a number of creative combinations of the four. These different models, although falling under the unifying rubric of “international justice,” are sometimes complementary, but more often than not they are in tension with one another. They pursue different goals, they address different audiences, and they may lead to very different political outcomes.

Significantly, however, a few countries have managed to opt out of international justice mechanisms altogether, deciding to either conduct completely localized justice without any international supervision or standards (DR Congo, Indonesia, Ethiopia), or to reject the very idea that settling past accounts brings about reconciliation and political consolidation (Mozambique, Namibia). We need to provide an explanation for these outliers.

The second prediction I challenge is that transitioning states will adopt international justice models because their domestic constituencies will demand it. The

empirical evidence for this claim comes from early transitional justice projects, particularly in Argentina and South Africa where indeed there was significant social demand “from below” to have some model of transitional justice. However, the expectation that all, or even most, post-conflict societies will demand transitional justice is really only an assumption that needs to be further theorized. In fact, while I do not reject this assumption completely, I argue that domestic commitment to justice today is *only one* in a range of motives domestic actors have in mind when they adopt some sort of transitional justice arrangement.

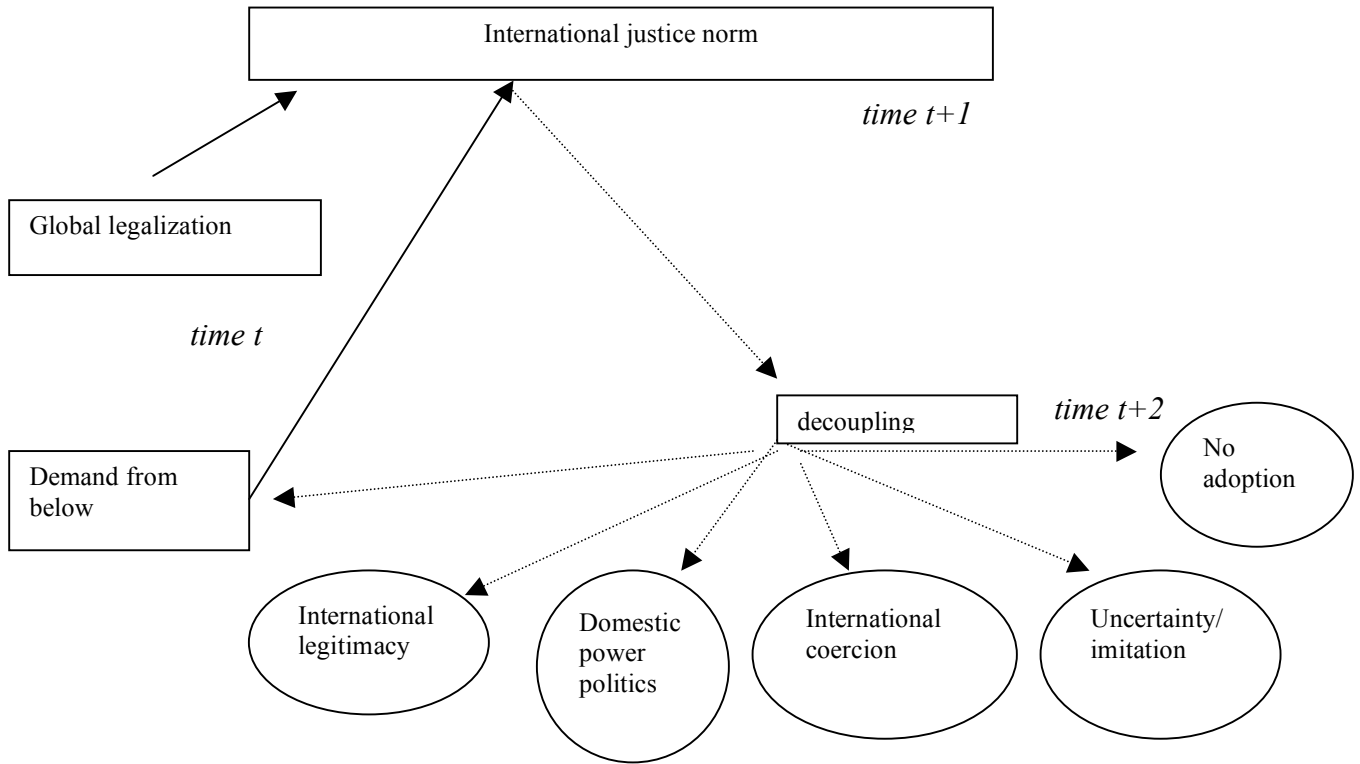
My principal argument is that the motivation of states to adopt organizational models of international justice has changed over time, and that this change is endogenous to the diffusion of the international justice “norm.” I see this development as a causal loop (see diagram I). As stated earlier, the international justice norm is a product of increased global legalization and of incorporation of human rights values into the general conduct of international affairs. Also feeding into the norm institutionalization was the original “demand from below,” or the successful early transitional justice projects (Argentina, South Africa), which gained international prestige and became a model for future transitional justice institutional arrangements. Once the norm became institutionalized, the international expectation (and constructivist theoretical prediction) was that it would spread through the international system and states would adopt international models of transitional justice in more or less the same way and with the same motivation as did the paradigmatic early cases in Argentina, and a decade later, South Africa.

This paper argues that this prediction has not panned out. In fact, instead of the expected “boomerang” loop, by which the institutionalized international norm feeds back to states and strengthens their local demands for international justice (a prediction most explicitly made by Keck and Sikkink 1998), I argue that the decoupling from the international norm has occurred. As the international norm diffuses through the system, down to states, the original “demand from below” motivation now becomes only one in a range of motives states have in adopting international models of justice. Drawing from sociological institutionalism, I argue that early adoption of international justice models was motivated by the desire to “improve performance” (DiMaggio and Powell 1983:65) – in the context of international justice, to achieve the goal of social reconciliation and democratic consolidation through truth seeking and justice. However, as the organizational model diffuses through the international system, a threshold point is reached beyond which adoption of the same model begins to serve other goals – such as providing international legitimacy, getting rid of domestic political opponents, appeasing international coercers, or reacting to political uncertainty by simply mimicking already existing models. The paradox is that the fact that the model is a product of an international norm will increase the likelihood of it being adopted by more and more states, but now for reasons barely recognizable and sometimes even outright contrary to the motives of the original adopters. The great proliferation of available transitional justice models makes adopting these institutions a rather easy way to show compliance with international rules without engaging deeper into domestic normative and behavioral changes. As a consequence, some of the original outcomes of transitional justice – reconciliation and stability – become subordinated to ulterior state strategies, as justice

becomes “hijacked” in favor of international incentives to produce transitional justice mechanisms.

The paper proceeds as follows. Section II discusses existing explanations for why states adopt transitional justice arrangements. In section III, I outline the “demand” – a range of motives for why states adopt or not adopt particular models of international justice. I link these motives with political outcomes they may generate. I conclude Section IV with the theoretical significance of these findings and offer suggestions for further research.

**Diagram I: The Causal Loop**



## **II. EXISTING EXPLANATIONS**

Two distinct sets of literatures in International Relations and Comparative Politics speak to the questions of diffusion and adoption of international justice models. The IR literature on international organizations has largely focused on the establishment of very formalized justice institutions (such as international tribunals) and has paid little attention to what these institutions actually do, and to what effect. The comparative literature on transitional justice has in turn mostly kept the internationalization aspect undertheorized, and has instead focused on issues of institutional design and optimal conditions for reaching the idealized (and largely unproblematized) transitional justice goals (“justice,” “truth,” and “reconciliation”). This literature has mostly centered on truth commissions and much less on international organizations such as the UN criminal courts. This compartmentalization of the problem is unfortunate, as it reveals that both bodies of work have observed the phenomenon somewhat in isolation – the IO literature considered international justice to be another type of “regime” (Goldstein, Kahler et al. 2000; Rudolph 2001), with which states do or do not comply. The transitional justice literature, on the other hand, has been mostly descriptive and prescriptive (Kritz 1995; Hayner 2001). As a consequence, very little has so far been said either about the role of international factors in transitional justice initiatives or the domestic effects of international justice projects.

### **Transitional justice as a social need**

Last decade has seen an unprecedented surge in transitional justice literature, which reflected the great proliferation of transitional justice projects around the world.

However, most of this scholarship has been markedly atheoretical and has instead focused on two major pragmatic and normative debates. The first question is whether societies coming out of violent authoritarian pasts should set up any transitional justice initiatives at all or should they instead focus on the future, leaving the past to rest. The second debate is about institutional design, where the choice for transitional democracies is limited to sequencing – what should come first, trials or truth commissions (“justice” or “truth/healing”).

Most transitional justice literature sees reconciliation as the ultimate goal of transitional justice projects, regardless of the institutional form chosen (Minow 1998; Hesse and Post 1999).<sup>7</sup> Reconciliation can come in many ways. It can include the creation of a reliable record of past events; offer a platform for victims to tell their stories and get some (emotional or material) compensation; propose legal or political remedies to avoid future atrocities; and it can ascertain guilt and determine accountability of perpetrators (Popkin and Roht-Arriaza 1995).

Others, however, argue that opening the wounds of the past never heals the conflict, but instead creates new political and social divisions. Instead of seeking truth and punishing the perpetrators, it is better “not to prosecute, not to punish, not to forgive, and not to forget” (Huntington 1991). This strand in the transitional justice literature warns against the politically destabilizing potential of truth seeking efforts in fragile transitional democracies, as brutal dictators may refuse to hand over power peacefully if they fear prosecution by the new regime (O'Donnell, Schmitter et al. 1986; Zalaquett 1992; Benomar 1993). Snyder and Vinjamuri make a similar argument in their recent,

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<sup>7</sup> For a victim's perspective arguing against reconciliation with perpetrators, see Judah 2004 and Suljagic 2003.

very critical appraisal of international justice initiatives (Snyder and Vinjamuri 2003). They come out strongly against international trials, and approve of truth commissions only if they grant amnesties.

Other scholars and transitional justice activists stress the beneficial consequences of societal catharsis and purge that follows truth seeking efforts and prosecution of perpetrators. In this view, proportionate to the punishment of the perpetrators is the acknowledgment of victims' suffering, which can only come about by the public reconstruction of the violent past (Neier 1990), by establishing "who did what to whom, why, and under whose orders" (Rotberg 2000:3). Furthermore, transitional justice projects can have a demonstration effect, in that procedural justice helps reinforce democratic consolidation, and imbue society with the respect of the rule of law (Mendez 1997; Minow 1998; Teitel 2000).

As is evident from this brief overview, transitional justice literature leaves many questions open. Its most serious failing is the lack of serious theorizing about the causes and consequences of many of these projects. For example, with all the discussion about "truth" and "reconciliation" there are very few clear mechanisms at work here (Gibson 2004; Mendeloff 2004). How, exactly, does truth lead to reconciliation and how does reconciliation lead to democratic stability? But more significantly for the purposes of my argument, most of transitional justice literature assumes that the impetus for setting up transitional justice institutions is domestic in nature, as states will naturally "want" to deal with their violent pasts as soon as the political transition provides them with that opportunity. If international justice institutions are discussed at all, they are understood to be facilitators of a fundamentally domestic desire for justice arrangements. In contrast,

I claim that the international community (and international justice industry embedded in it) has developed a set of expectations for state behavior during democratic transition. Dealing with past crimes has become a fundamental part of the transitional moment, and states adopt these models for reasons that can be profoundly at odds with what the international community has envisaged. This is why we need to understand more fully how domestic societies interpret international normative and organizational models, and we also need to have a systematic explanation for the role of international organizations and norm entrepreneurs in domestic politics of states in which they intervene.

### **Transitional justice as an international regime**

Within the international organizations literature, two research programs – liberalism and constructivism - have offered insights into why states may adopt certain models of international justice. Working within the rationalist liberal framework that stresses domestic politics and social group interests, Moravcsik suggests that transitional governments in fledgling democracies may deliberately cooperate with international human rights institutions as a means to: 1) lock in and consolidate domestic democratic institutions, and 2) strengthen their credibility and stability in respect to nondemocratic political threats (Moravcsik 2000). While this account may not explain why these institutions emerged in the first place, it does offer a good explanation of why transitional governments may cooperate with them. Moravcsik's "self-binding" explanation therefore corresponds to my hypothesis (more fully developed in the consequent section), which proposes that states use international justice models to get rid of domestic political opponents. However, I identify a broader range of domestic motives for adoption of

international legal models than offered by Moravcsik. In addition to domestic power politics hypothesis, I argue that states adopt international justice models for reasons of legitimacy and symbolic politics, because they are socialized by international organizations into accepting the rule of law as appropriate state practice, or as a consequence of a growing international supply of international justice models that is creating its own demand from states. (I develop these hypotheses more completely in the following section).

Gary Bass offers the most direct application of liberal IR theory to the issue of international legalization of justice (Bass 2000). In his work on the politics of international war crimes tribunals, Bass argues that only domestically liberal states support international war crimes tribunals.<sup>8</sup> This is a result of domestic norms spilling over into foreign policy. Liberal states choose trials because they are in the grip of a principled idea – “war crimes legalism” (Bass 2000, 2003). However, liberal states are hypocritical: they do not risk their own soldiers for the sake of international justice, and are much more likely to pursue prosecution of war criminals when the victims are their own citizens.<sup>9</sup> Bass’s book remains to date the most systematic and illustrative history of the development of international war crimes, but the analysis stops with the creation of international tribunals and does not consider social and political consequences these tribunals had in societies over which they have jurisdiction. His emphasis on state liberalism as the best predictor of state adoption or non-adoption of international justice models<sup>10</sup> leaves out an entire set of domestic motivations for cooperation with these international institutions. In contrast to Bass, I argue that even illiberal states, or rather

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<sup>8</sup> For a liberal perspective in International Law that deals with the same issue, see Slaughter 1995.

<sup>9</sup> For a normative argument in favor of “coercive justice,” see Elshtain 2003.

*specifically* illiberal states may adopt international justice mechanisms, but for quite different reasons than the international community expects them to.

Constructivist approaches have been quite insightful in advancing our understanding of why states choose to adopt certain international practices. States may do that because they want to “look like modern states,” and they learn what that means from proactive international organizations (Finnemore 1996). Or, the consequence to their reputation by strategies of “naming” and “shaming” pursued by transnational advocacy networks and international NGOs may create incentives for states to change their behavior and conform to new international normative expectations (Keck and Sikkink 1998).

Constructivist approaches have already offered significant insights into issues of international justice. Lutz and Sikkink (2000) identify the phenomenon of “justice cascade,” which occurs when the international prestige of a domestic transitional justice arrangement makes the model more attractive domestically and opens up more political space for domestic justice initiatives. Most of the current human rights literature focuses on this, positive, effect (Keck and Sikkink 1998; Risse-Kappen, Ropp et al. 1999; Lutz and Sikkink 2000; Thomas 2001; Dicker and Keppler 2004).

International justice, however, produces other types of effects that need to be theorized, and most current human rights literature does not offer sufficient guidance. In contrast to the “cascade” or “boomerang” model, I suggest that international justice norm becomes decoupled through the process of diffusion, leading to very different, even unrecognizable behavioral outcomes. Employing the insights of sociological institutionalism, I generate a series of hypotheses regarding why we should expect to see

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<sup>10</sup> Note that Bass only considers international tribunals, not truth commissions.

both the proliferation of internationalized transitional justice models and divergent behaviors of states that adopt them. This recasting of the argument enables me to explore under what domestic and international conditions states adopt transitional justice projects and what outcomes those factors produce in terms of achieving the policy ideals.

### **III. CHANGING MOTIVATIONS: WHY STATES ADOPT TRANSITIONAL JUSTICE**

In this section, I discuss state motivation to adopt international justice models. I identify five motives for adoption: societal demand “from below,” legitimacy and symbolic politics, domestic power politics, international coercion, and uncertainty/imitation. I present these motivations as hypotheses to be tested in a number of different political contexts. I then further hypothesize on the kind of outcome each of these motivations produces relative to the policy ideals of the international norm of transitional justice. It is important to emphasize that these motives in real political environments are not as neatly separated. They always interact and are unlikely to appear in isolation from each other. However, I enumerate them here separately for analytical purposes.

#### **Demand from below**

*H1: States adopt transitional justice models because their societies demand it.*

The motivation that most of transitional justice literature (discussed earlier) assumes, explicitly or implicitly, is societal demand from below. States adopt justice mechanisms, according to this ideal-type incentive, as a result of domestic pressures from social movements, victims’ groups, and human rights activists. If a country faces a

strong demand from below, we expect to see vocal demands for justice from victims of crimes, human rights groups and independent legal communities, development of domestic plans for transitional justice institutions, official criminal investigations of past abuses, changes in domestic law to prevent impunity, media coverage of these initiatives, public debates about legacies of past abuses and possibilities of transitional justice, or visits to or by international justice entrepreneurs. Existing research on early “model” transitional justice projects indicates a strong societal demand for some kind of a justice arrangement in South Africa and Argentina, Chile (strong among civil society, but limited among the military and political parties), somewhat less strong in Guatemala, and relatively limited in El Salvador.<sup>11</sup> Other scholars have pointed to strong social demand in Haiti, Peru, Ghana, East Timor, and many other countries currently engaged in setting up a transitional justice project.<sup>12</sup>

More often than not, however, societal demand is *assumed* by the literature and by international justice entrepreneurs, as in the concept that “victims deserve justice” and will support transitional justice projects if they are properly designed and set up. This assumption underlines much of the work of international justice institutions (such as the International Center for Transitional Justice, Human Rights Watch, Amnesty International, Coalition for International Justice), which are spearheading the dramatic rise in transitional justice initiatives around the world.<sup>13</sup>

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<sup>11</sup> See “Strategic Choices in the Design of Truth Commissions,” a joint project by the Program on Negotiation at Harvard Law School, Search for Common Ground, and the European Centre for Common Ground, available at <http://www.truthcommission.org>.

<sup>12</sup> See Hayner 2001 and individual country reports by the International Center for Transitional Justice, at <http://www.ictj.org>.

<sup>13</sup> For their position statements about transitional justice see <http://www.ictj.org>, <http://www.hrw.org/doc/?t=justice>, <http://web.amnesty.org/pages/jus-index-eng>, and <http://www.cij.org>, respectively.

*H1a: If transitional justice projects are adopted as a result of a strong societal demand from below, they stand the strongest chance of achieving the policy ideals of justice.*

The logical extension of the “demand from below” assumption is that, if transitional justice is brought about by societal pressures, the outcomes will be positive and durable. If it was the society that demanded some action to be taken to “put the past to rest,” then presumably society will “own the process,” and citizens themselves would be immediate beneficiaries of justice projects. In order for transitional justice to produce positive, lasting outcomes, three conditions need to be met. First, there needs to be a national consensus - societal, political, and legal - that pursuing justice for former perpetrators is the right thing to do (Lutz 2003). State and society, in a sense, should be in agreement on this issue. Second, former regime spoilers must be weak enough and unable to interfere with justice processes. Third, there needs to be a close convergence of international and domestic norms about the proper way to deal with crimes of the past. If this is the case, then the interaction between international actors pushing for a justice project and domestic actors implementing them will produce smoother, more sustainable outcomes than if international and domestic norms about justice “clash.”

Of course, this idealized set of domestic and international circumstances is very difficult to encounter empirically. Even the two early, and by many accounts most successful transitional justice projects to date – truth commissions in Argentina and South Africa – did not lead to uncontroversially positive outcomes. The societal pressure to address the crimes of the past was widespread and both projects sustained long-term

public and media interest both nationally and internationally.<sup>14</sup> The South African truth commission, although internationally prestigious and flagged as a “model” transitional justice institution, was much more controversial domestically, with some critics even charging that it traded “justice” for “truth” (Brody 2001). The South African TRC granted amnesties in exchange for official, public acknowledgment and full disclosure of crimes committed by individual perpetrators. This practice was highly controversial because it generated selective justice, even in some cases letting off the hook some of the most notorious perpetrators in exchange for a confession of questionable veracity and remorse. Some surveys of South Africans have shown that amnesties were considered politically necessary, but still unfair (Gibson and Gouws 1999; Gibson 2002).

In Argentina, another often-cited transitional justice “success story,” the comprehensive redressing of the past crimes and prosecuting the perpetrators was a much more politically volatile process, with series of governments issuing retroactive amnesties that *de facto* prevented trials of high level perpetrators. Only very recently, in August 2003, did the Argentine Congress annul the Full Stop and Due Obedience laws, which had barred prosecution of military officers for human rights violations, an important step that would lead to reopening of military trials (Human Rights Watch. 2003a).

Similarly, in Chile, another country with significant, although socially divisive, demand for justice, the process against impunity for past abuses has been incredibly precarious. Chile had a truth commission which documented widespread pattern of state sponsored murder, disappearances and torture, but the commission’s report received much less sustained attention within Chile, where social divisions about the character and abuses of the Pinochet era dictatorship still ran deep. Instead of emerging “from below,”

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<sup>14</sup> See “Strategic Choices in the Design of Truth Commissions.”

it was in fact an external shock – Pinochet’s arrest in London in 1998 following the extraterritorial indictment by a Spanish judge – that has elevated the discussion about crimes of the past to the level of a national debate (Roht-Arriaza 2005). While the Pinochet arrest and, more significantly, his indictment in Chile in 2004, gave much hope to proponents of international justice, disappointment soon followed. In late 2004, the Chilean Congress passed a law denying courts access to the testimonies of torture victims, undermining efforts to prosecute abuses committed under the military regime (Human Rights Watch. 2004a). And in early 2005, Chilean Supreme Court ordered judges to conclude investigations into Pinochet-era abuses within six months, while the government announced plans for a law that would similarly cut investigations short. Interestingly, the Supreme Court justices cited an international norm as a basis for their decision – not the norm of international criminal accountability, but the norm of the right of the accused to a timely trial (Human Rights Watch. 2005a).

While domestic constituencies may have initially strongly supported transitional justice, this support is much more likely to hold if there is domestic reversal of power, i.e. former “victims” are now in positions of authority and can put to trial their former “perpetrators.” However, even in these circumstances, domestic commitment for transitional projects is likely to quickly dwindle if the trials or truth commissions expand their mandates to prosecute alleged perpetrators from the “victims” group currently in power. Put differently, this domestic commitment to justice that is the founding block of much of transitional justice literature is very fickle and narrow; it does not extend to a full commitment to universal criminal accountability, which pays no attention to identity politics (issues of ethnicity, religion, race) and the victim/aggressor matrix. In plain

words, domestic public is much more likely to support transitional justice if political opponents (“the other guys”) are put on trial. It will very rarely offer the same commitment if the perpetrators come from their own midst.<sup>15</sup>

The empirical evidence for this skeptical view is abundant. For example, Croatia and Bosnia, two states that were amongst the earliest supporters of The Hague tribunal have been enthusiastic champions of transitional justice as long as the international tribunal was putting Serbs on trial against Croats and Bosniaks. When the tribunal began indicting Croat and Bosnian nationals for crimes against the Serbs or against each other, the domestic commitment for international justice significantly dropped (Peskin and Boduszynski 2003; Judah 2004). This is particularly the case in Croatia, which has joined Serbia in instituting an almost complete freeze of cooperation with the international tribunal since the ICTY aggressively began to demand extradition of alleged Croatian war criminals to The Hague. A similar pattern has occurred in Rwanda, where the current government supports the trials of Hutu perpetrators, but refuses to cooperate in sending the accused Tutsi to the ICTR (Alvarez 1999). In Indonesia, all Indonesian military and police officials accused of committing atrocities in East Timor were acquitted. The only two individuals convicted were East Timorese (Human Rights Watch. 2002). In Namibia, most explanations for this country’s rejection of transitional justice revolve around the fact that SWAPO, former anti-apartheid forces transformed into Namibian democratic government, are reluctant to open a process that would uncover serious abuses committed by their own troops.

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<sup>15</sup> A rare exception seems to be the “other” South African truth commission set up by the African National Congress to look into abuses of its own paramilitary forces (Hayner 2001).

Problematizing this foundational assumption in transitional justice literature – that states adopt justice mechanisms because societies demand it - is important as it shows how identity politics can trump, or significantly alter, the social demand for justice and lead the justice project into a paradoxical outcome. So, even in cases where there was evident social demand from below, the outcomes of justice are not without controversy and not without historical delay. The theoretical and empirical inadequacy of the ideal-type “demand from below” hypothesis is why I develop four additional motives for states to adopt transitional justice projects.

### **Legitimacy and symbolic politics**

*H2: A transitional state that wants international acceptance (most often after years of isolation under the former regime) is likely to adopt international justice models for reasons of legitimacy and symbolic politics.*

In many ways, a transitional justice project provides an international “certification” that the state values the rule of law and in that sense is a member of a community of liberal states. Adjudicating war crimes or state sponsored human rights abuses in a legal setting sends a message to the international community that the state has stabilized enough after the conflict that it is able to carry out complex legal proceedings. Similarly, a domestic truth commission is a powerful symbol that the state has entered a “new era,” in which politics will be conducted in a different way than in the past. A domestic truth commission is the institutional marker of this new beginning.

Carrying out a transitional justice project also indicates that the state has a robust and independent judiciary and civil society and is ready to join the society of democracies

by delegating problems of criminal accountability into its proper domain – the criminal justice system. On the other hand, if no options are available for domestic adjudication, a state may choose to cooperate with international justice organizations. This decision indicates the state’s commitment to international institutions and obligations that come with membership in the international society. This is consistent with research that has shown how states pursue certain domestic strategies in order to appear “modern” or “democratic” (Finnemore 1996; Eyre and Suchman 1996). To sum up, international justice models may be adopted not for what they *do* but for what they *signify*, for their symbolic and normative properties (DiMaggio and Powell 1983; Scott 1987; Powell and DiMaggio 1991; Meyer and Scott 1992; Barnett and Finnemore 1999). So, what kinds of outcomes can we expect if states institute transitional justice mechanism for this set of motivations?

*H2a: If a state adopts transitional justice models as a strategy of international political legitimation, we can expect domestic and international political bargains that may result in selective justice.*

Research on norms transmission indicates that part of what makes international norms “internalized” domestically is iteration and habit. What may begin as a change in procedure, may set in motion a political process that produces gradual normative, political, and ideational changes (Finnemore and Sikkink 1998). In the context of transitional justice, this claim would lead us to predict that, as long as states conform to the international justice norm and adopt justice models, their participation in the international justice setting will *over time* lead to a change in understanding and ultimately acceptance of international justice and consequently a behavioral shift at

home. However, empirical evidence from a number of countries that have followed the legitimation strategy points to a conclusion that, at least in the short term, pursuing transitional justice projects as a signaling mechanism to international audiences is structurally prone to a series of paradoxical outcomes. In other words, states can “get away” with domestic politics as usual, limiting or blocking serious addressing of crimes of the past and individual and societal complicity in them, as long as they “appear” they are conforming to international norms. This is an unfortunate consequence of a particular set of internationalized justice mechanisms, as the window of opportunity for acknowledging abuses and prosecuting the perpetrators may be limited. The most serious outcome of this strategy – and one that domestic elites may purposefully undertake – is to use transitional justice as a legitimating tool for inaction at home. Once transitional justice project is instituted and gets on its course, it may be very difficult for the same process to be restarted anew, under conditions that may be more desirable from the vantage point of victims, civil society, and international justice community.

This dynamic has been evident in Indonesia. As a consequence of international outrage over the atrocities the Indonesian army and militias committed in East Timor in 1999,<sup>16</sup> the Indonesian government in 2001 set up the Ad Hoc Human Rights Court on East Timor in Jakarta, with the specific mandate of prosecuting perpetrators of crimes in East Timor. Parallel to the Indonesian Ad Hoc Court, the United Nations Transitional Administration in East Timor (UNTAET) established the Serious Crimes Investigation Unit (SCIU) located in Dili, East Timor, with the mandate to investigate and prosecute cases in the locale where atrocities occurred.

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<sup>16</sup> For background on Indonesia/East Timor conflict and subsequent trials, see Orentlicher 1988; Amnesty International USA. 1994; Medina, Lewis et al. 1995; International Crisis Group. 2002b; McDonald 2002.

While Indonesian government initially opposed any form of transitional justice for East Timor, it finally decided to establish the Ad Hoc Court as a counter-solution to the increasing international pressure for an international tribunal, modeled after the already existing courts for Rwanda and Yugoslavia. Appealing to its rights of sovereignty and its status as a transitional democracy that can deal with its own problems in a responsible manner, the Indonesian government promised to “take responsibility for providing justice for atrocities committed by its nationals in East Timor, and that it would do so in a credible manner” (Human Rights Watch. 2002).

However, Indonesian commitment to justice has been anything but credible. The trials in front of the Ad Hoc Court have been widely judged as “intended to fail” (Cohen 2003). Low-level court convictions of all Indonesians indicted for crimes against humanity in East Timor were acquitted or overturned by higher courts. The most recent decision by the Indonesian appeals court in late 2004 makes it virtually impossible for any senior Indonesian military officer to be prosecuted for crimes in East Timor (Human Rights Watch. 2004e). The main reason for continued impunity seems to be the lack of political will by the government to alienate the military by prosecuting senior civilian and military personnel (Human Rights Watch. 2002). Indonesia has also undermined the SCIU in East Timor by refusing to cooperate in sharing evidence, information, and other documentation, all of which has put the future of the local East Timorese transitional justice project in serious peril. In another strategy of preventing serious international involvement in Indonesian trials for East Timor, the Indonesian and East Timorese governments have recently agreed to set up a “truth and friendship commission” to address the issues of the past. The Indonesian government made clear that this new

commission was set up to as an alternative to the UN expert commission that would investigate the progress Indonesia and East Timor had made in fighting impunity for past crimes.<sup>17</sup> So far, the international response to Indonesian strategies of *de facto* sabotaging transitional justice processes for East Timor has been lukewarm at best, which has led some local activists to believe that “it was sufficient simply to go through the motions of holding trials and that their content was of little consequence.”<sup>18</sup>

Partly as a consequence of Indonesian lack of cooperation, and partly due to uncertainty of the future of the local Dili SCIU court, the consensus is growing in the international justice community that justice for the victims of East Timor massacres will be denied (Human Rights Watch. 2002; Cohen 2003; Pigou 2003; Human Rights Watch. 2004e). While the international justice organizations and East Timorese civil society are continuing to appeal to the UN and other international agencies for a fresh approach to transitional justice – they favor an international tribunal – these efforts may be seriously undermined by international justice fatigue. The United Nations and its agencies are unlikely to support the same process twice, when new crises that need to be dealt with are emerging with unsettling regularity. Furthermore, the East Timorese government is opposed to setting up a new tribunal because improving relations with Indonesia are higher on the government’s political agenda than a renewed process of a concept as fleeting as “transitional justice”.<sup>19</sup> In many ways, it seems that the Indonesian strategy of pursuing transitional justice domestically – however shallow – was successful. By

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<sup>17</sup> “Indonesia and East Timor to investigate murders,” *The Guardian*, December 23, 2004.

<sup>18</sup> Participants in the conference “Justice for Timor Leste: Civil Society Strategic Planning for the Future of Serious Crimes,” Judicial System Monitoring Program (JSMP), 27 September 2004 Press Release.

<sup>19</sup> This is what the president of East Timor Xanana Gusmao had in mind when he appealed to the international community to deal with the issue of justice, instead of asking East Timor to do it on its own. “The international community must take responsibility. Please don’t give us this burden. We have enough to carry on our shoulders.” *The Financial Times*, December 10, 2003.

signaling to the international community that Indonesia is capable of dealing with justice at home, it has in fact paved the road for justice to be at best delayed, and at worst denied.

### **International coercion and selective payoffs**

*H3: A transitional state that is faced with international “sticks” (withholding of aid, investment, club membership, or imposition of sanctions) or “carrots” (admission to international organizations, financial aid) is likely to adopt international justice models to appease international coercion and obtain selective secondary payoffs.*

Some states are internationally coerced into adopting transitional justice. In states where the demand from below is weak and the state unresponsive, the international community may in fact use issue linkage - tying international cooperation with rewards such as foreign aid and investment or membership in international organizations (Kelley 2004) - to effectively coerce the state into adopting a justice project. Some international organizations have even issued very specific guidelines about prospective members' adoption of transitional justice. For example, in its recommendation for Serbia's acceptance to the Council of Europe, this organization conditioned membership with full Serbian cooperation with the ICTY, but also demanded from Serbia to consistently inform its population about war crimes committed by the Serbs against other ethnic groups throughout the Balkan wars (Council of Europe. 2002). This request is remarkable in itself, as it shows the extent to which international institutions take on themselves the role of norm entrepreneurs, advocating for not only policy and behavioral changes, but also changes in attitudes and historical narratives of the past.

In identifying “international coercion” as a motivation for states to adopt transitional justice, I stress coercion instead of shaming or reputational effects, because I believe there are states where international shaming is not the most effective mechanism of bringing about a behavioral change. These states may value other strategic advantages of non-cooperation more than the legitimacy and symbolism of being a member of the international society. Or, they may judge that the domestic benefits of non-cooperation (e.g. nationalist mobilization) may outweigh any international benefits they may gain from being a responsible global citizen. This motive may also be temporally bound – a state may choose to appease domestic opponents first by rejecting international justice, but after the domestic political situation stabilizes and democratic consolidation gets more under way, the state may turn its face outward again and adopt international justice in anticipation of international payoffs. In other words, as incentives for adoption change, so does the motivation, and so ultimately do the outcomes of the justice project.

*H3a: If a state adopts international justice models under international coercion, we should expect to see shallow compliance and selective justice outcomes.*

A brief review of transitional justice projects in Croatia will illustrate this dynamic. Croatia’s commitment to transitional justice has for many years been best described as “one step forward, two steps back.” Croatian government has mostly cooperated selectively, reluctantly, and insufficiently with the Hague Tribunal. The pressures coming from the ICTY but also from other international organizations and individual states had created deep divisions within the Croatian state, with the “Hague issue” dominating domestic political debates and pitting strong domestic interest constituencies against one another. Croatian cooperation with the ICTY, however, began

on a very different footing. Croatia in fact was among the first states to demand from the international community to establish a war crimes tribunal. However, it did so with the expectation that the court would indict and try only Serbian nationals accused of war crimes against Croatian civilians. Already in 1995, however, the ICTY indicted the first Croatian nationals for atrocities committed against Bosnian Muslims in 1993, a move that outraged Croatian government, which soon instituted an almost complete freeze of cooperation with the tribunal for full four years.

Croatia's cooperation with the ICTY ostensibly improved in 1999, when president Tudjman died and was replaced by reformer Stipe Mesić in 2000. While Mesić himself supported the ICTY and appeared himself as a witness in the trial against Milošević, Croatia, however, was badly split on the issue of continuing support for transitional justice. What makes Croatian transitional justice narrative so difficult to accept locally is the fact that the alleged atrocities occurred during the Croatian "war of independence" against Serbian insurgents. In other words, the very memory of the war and its leaders is a constitutive part of Croatia's state identity, as Croatia gained its full independence only through armed conflict with Croatian Serbs. It is a "nation forged in war" (Tanner 1997). In Croatian nationalists' view, the ICTY is questioning the very legitimacy of the conflict by indicting famed war commanders, and by extension, it is questioning the historical basis on which contemporary Croatian state is founded. It challenges the Croatian state itself.

After much domestic bargaining and increasingly tough international pressures, Croatian president's support of transitional justice and the international tribunal in the end prevailed over Croatian hardliners and it is worth exploring the rhetorical tool he

used to persuade his divided country. President Mesic proclaimed that domestic mobilization against international justice is “anti-European and anti-democratic.”<sup>20</sup> He added that Croatia has a strong democratic order; it is firmly dedicated to individualizing culpability for war crimes, and will “build its future in the company of the democratic world and united Europe”.<sup>21</sup> This appeal to adopt transitional justice as a sign of Croatia’s “Europeanness” is particularly resonating as Croatia is now quite far along the path to joining the European Union. In fact, in December 2004, the EU announced that membership negotiations with Croatia would begin as early as March 2005 provided that Croatia cooperates fully with the ICTY. I have discussed earlier the power of international organizations as socializers, and existing work on the EU (Checkel 2001, 2002) indicates that promise of EU membership serves as a powerful tool for domestic policy change. The Croatian case is illustrative in testing the extent to which the “carrot” of exclusive state club membership overrides the domestic pull of powerful political actors, such as right-wing political parties, the Catholic Church, veterans’ associations and the military.

As a consequence of Croatia’s renewed compliance with the international tribunal, the ICTY has transferred some of its caseload to Croatian domestic courts. This is a move Croatia has long demanded, arguing that it is now a consolidated democracy based on the rule of law, capable of adjudicating its own war crimes. However, the Croatian commitment to transitional justice at home has been increasingly selective. In almost all cases where the alleged crimes were perpetrated by Croatian nationals against non-Croat ethnic groups (Serbs or Bosniaks), the trials resulted in acquittals or extremely

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<sup>20</sup> HINA news agency (Zagreb, Croatia), September 25, 2002.

<sup>21</sup> HINA news agency (Zagreb, Croatia), September 25, 2002.

low sentences, bordering on amnesty. On the other hand, Croatia has demonstrated much more eagerness to prosecute Croatian Serbs for war crimes, more than 1,500 of whom had so far been indicted in Croatian courts, and many on ill-substantiated charges (Human Rights Watch. 2004c). Significantly, Croatia has much more leeway in its approach to justice locally, as the EU has attached no comparable conditions for progress on domestic war crimes trials to the ones on cooperation with the ICTY (Human Rights Watch. 2004b). Croatia has brushed off international criticism of its domestic trials, and has gone to great pains to demonstrate how substantially different (more democratic, more “European”) Croatia is from its immediate neighbors – Serbia and Bosnia - when it comes to the quality of its domestic transitional justice.<sup>22</sup>

The disparity in Croatia’s international image as a country that over time has come to willingly face its past and cooperate with international justice institutions and its domestic justice failings that are continuing unchecked, indicates that in those states that adopt justice mechanisms in the hope of international “carrots” or afraid of international “sticks” we can only expect shallow compliance with the international norm. States like Croatia may fulfill their international obligations and may be rewarded, but that may be at the expense of a serious domestic debate about crimes of the past and deeper normative and behavioral shifts when it comes to dealing with historical legacies in a more profound and systematic manner.

The strengthening and institutionalization of the international justice norm over time has made deviation and noncompliance increasingly difficult for states to justify. At the same time, states learn from experiences of other states and can observe a number of

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<sup>22</sup> Vlado Rajić, “Leveling On the Part of Human Rights Defenders,” *Vijesnik* (Zagreb, Croatia), October 16, 2004.

international and domestic payoffs states “adopters” receive for setting up justice initiatives. Transitional justice thus becomes an easy institutional way for states to get to these secondary benefits, producing outcomes far removed from international justice policy ideals.

### **Domestic power politics**

*H4: A transitional state that deals with domestic “spoilers” is likely to adopt international justice models to get rid of its political opponents.*

Transitional states that deal with domestic “spoilers” use international justice models for reasons of domestic power politics – as a way to deal with domestic political opponents. Transitional justice processes open up a political window of opportunity for the new elites to delegitimize their former or current opponents for reasons that may not have much to do with their accountability for past abuses but more with the fragile balance of power during the political transition. The new elites in transitional governments may use the political opening provided by justice projects to disempower the former regime and shift the domestic balance of power away from the old regime’s loyalists. As in the case with international legitimacy, this motivation for adopting transitional justice is very different from the idealized intention of international justice models, which emphasize their projected impact on deterrence and reconciliation.

*H4a: If a state adopts international justice models to get rid of domestic political opponents, we should expect antidemocratic mobilization to follow and justice to be selective.*

The case of transitional justice in Serbia is illustrative for the domestic power politics dynamic, although this state's experience with international justice has also been significantly colored by international coercion and quite substantial material pressures for compliance. However, since I have already laid out this dynamic in the Croatian case, the following paragraphs will focus more on Serbia's motivation to adopt transitional justice as a means to get rid of domestic political spoilers.

Serbia has been opposed to international justice institutions since the very foundation of the international tribunal at The Hague. When the ICTY was established in 1993, Slobodan Milošević was in absolute control of the country. Under his command, Serbia refused to acknowledge the ICTY as a legitimate international institution, and denied any investigative assistance to The Hague, even when ICTY prosecutors were interested in cases of human rights violations against Serbian civilians. The ICTY indictment of Milošević for war crimes in Kosovo in 1999 sealed his reluctance to cooperate with the Tribunal.

Milošević's refusal to engage in transitional justice is hardly surprising. Much more intriguing is the ongoing, at times almost intractable domestic power struggle about how best to deal with legacies of the Milošević era. Since it took power in October 2000, the new governing coalition in Serbia displayed sharp divisions regarding cooperation with the ICTY, or what became known as "The Hague issue." The critical nature of cooperation was most clearly pronounced in the political bargaining regarding

Milošević's extradition to The Hague. President elect Koštunica was strongly opposed to extradition, using the anti-ICTY rhetoric not much different from that of the previous regime.<sup>23</sup> Reformist Prime Minister Djindjić had a different approach. Since Milošević still had significant domestic following, especially among special police forces and the military, he continued to pose a serious danger for domestic political stability. Worried that Koštunica's reluctance to extradite Milošević would undermine international aid and embolden remnants of the Milošević regime, Djindjić decided to immediately transfer Milošević to The Hague. Former Yugoslav president, and chief suspect of the ICTY, arrived to the Hague prison on June 28, 2001.

Djindjić justified his decision to extradite Milošević and continue cooperating with the ICTY on pending extradition cases with primarily economic reasons. Had Serbia refused to cooperate with international justice organizations, he argued, it would receive no international financial aid, which would bring the country to the brink of economic collapse, complicating the repayment of foreign debt, and preventing its membership in international financial institutions. At the same time, Djindjić positioned his own political party as the party of "reform" and "internationalism," juxtaposing it to the "reactionary" party of president Koštunica, which had co-opted many former Milošević loyalists. In this sense, Djindjić used "justice at The Hague" as a domestic political wedge issue, a defining difference between two opposing political groups.

While Djindjić's rhetorical strategy was to couch transitional justice as a purely pragmatic decision, critics pointed out that this approach may have done more harm than

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<sup>23</sup> In his first television interview after ousting Milošević from power, Koštunica proclaimed: "The ICTY is a political institution and not a legal institution; actually it is not a court at all. The Hague court is not an international court, it is an American court and it is absolutely controlled by the American government. It

good, as Serbian citizens came to see transitional justice as a “business transaction” and not an issue of “justice” (Dimitrijevic 2004; Ivanisevic 2004).

Transitional justice in Serbia was soon to become even more complicated. In March 2001, almost out of nowhere and without any significant public debate, president Koštunica, himself a staunch opponent of international justice, established by decree the Serbian Truth and Reconciliation Commission, the only of its kind in the former Yugoslavia. The Serbian TRC initially received much help and advice from some of the premier international justice entrepreneurs, such as Alex Boraine, the former president of the South African TRC and the current president of the International Center for Transitional Justice.<sup>24</sup> The Serbian commission, however, was set up as a historical academic project that would analyze the political causes of the breakup of the former Yugoslavia. It was never designed to facilitate a “truth-finding” process by which Serbian citizens would be faced with the horrific crimes that were committed in their names, by their elected leaders. As a consequence of this controversial mandate, personnel problems and inactivity, the commission was disbanded in 2003 without producing any official report of its findings (Ilic 2004; Peric 2004).<sup>25</sup>

Here again, the purpose of an internationally designed transitional justice project was turned on its head – an institution that is supposed to lead to social reconciliation was designed in a way that had the potential to further inflame preexisting ethnic prejudices

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is a means of pressure that the American government uses for realizing its influence here” (quoted in Bass 2000:316).

<sup>24</sup> See Boraine 2001. The ICTJ has since distanced itself from the Serbian commission (Freeman 2004).

<sup>25</sup> Radmila Nakarada, one of commission’s members, blamed Serbian NGOs for the commission’s demise, arguing that the NGOs have already prejudged “Serbian guilt” for the crimes of the Yugoslav wars and since that was not the position of the commission, NGOs “actively lobbied international donors against the commission,” personal interview, Belgrade, Serbia, September 2, 2004.

and exacerbate social divisions. As a leading Serbian human rights activist put it, “the truth commission perpetuated a fraud on the international community.”<sup>26</sup>

While the establishment and quick demise of the Serbian truth commission captivated the domestic political debate, over time, the reformists’ strategy of slow cooperation with the Tribunal prevailed and Serbia began to reluctantly cooperate with the ICTY, arresting and transferring war crimes suspects, negotiating surrender of indictees, and giving Tribunal investigators access to classified materials and witnesses (International Crisis Group. 2002a:12). More top ranking Serbian officials were arrested or voluntarily surrendered to the Hague Tribunal, while Serbian national courts held the first trial for war crimes in October 2002, convicting four Serbian officers to 3-7 years in prison for war crimes committed against civilians in Kosovo.<sup>27</sup>

As the international community began to acknowledge gradual improvement in Serbian cooperation with the international tribunal under the leadership of Prime Minister Djindjić, in March 2003 the “Hague issue” came back center stage to dominate Serbian politics, when Djindjić was assassinated by a criminal group who referred to themselves as “anti-Hague patriots” (Judah 2004). The codeword name for the operation was allegedly “Stop the Hague.”<sup>28</sup> The high profile assassination created a domestic political crisis of major proportions, and the instability that followed significantly weakened the reformist government, which lost reelection in December 2003. Soon after the new administration was inaugurated, the government spokesman announced that the Serbian government would no longer recognize indictments based on the principle of command

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<sup>26</sup> Sonja Biserko, director of the Helsinki Committee for Human Rights in Serbia, personal interview, Belgrade, Serbia, September 1, 2004.

<sup>27</sup> Radio B92 (Belgrade, Serbia), October 11, 2002.

<sup>28</sup> *Blic* (Belgrade, Serbia), December 26, 2003.

responsibility, no further indictees would be transferred to The Hague, and domestic courts should take over ICTY trials.<sup>29</sup> A few weeks later, the government passed a law to fund and legally facilitate the defense of indicted war criminals before the ICTY.<sup>30</sup>

The latest round of elections, in June 2004, ushered in a new reformist president, who declared to continue Djindjić's legacy and fulfill Serbia's obligations to international justice organizations. The special War Crimes Panel, formed in June 2003, in the immediate aftermath of Djindjić's assassination, opened its first case in March 2004. However, the government is still bitterly divided over transitional justice policies. Koštunica's hardliners are in control of the Parliament, and the continuing power struggle over Hague extraditions and renewed international pressures has led to a virtual government paralysis, where the most fundamental decisions about the country's future (such as possible accession to the EU) are all hostages to the unresolved question of how to deal with legacies of the past.

The uninspiring story of Serbian transitional justice experience, which includes relationship with the ICTY, domestic trials and even a truth commission, indicates the extent to which transitional justice in Serbia was caught up in a domestic power struggle between two fractions of the fledgling Serbian transitional state. The Serbian experience is a cautionary tale of how transitional justice becomes hijacked by domestic political actors who use it as an international and domestic strategy to achieve very specific local goals - turf protection, domestic power struggle, delegitimation of political enemies, perpetuation of nationalistic historical narratives, as well as obtaining international rewards – objectives all very far removed from international justice policy ideals.

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<sup>29</sup> Radio B92 (Belgrade, Serbia), March 6, 2004.

<sup>30</sup> Radio B92 (Belgrade, Serbia), March 30, 2004.

### **Imitation and uncertainty**

*H5: A transitional state that is uncertain about goals of transitional justice is likely to respond strongly to the international justice supply and adopt justice models by mimicking behavior of other states.*

The fourth set of motives I identify is mimetic adoption. This motivation is what sociological institutionalists call “modeling as response to uncertainty” (DiMaggio and Powell 1983:71). This scenario refers to those states that are uncertain how to succeed during the volatile political transition and consequently which, if any, model of transitional justice they should adopt. They do not face considerable societal demand from below, they are ambiguous about international justice goals, but they are influenced by neighborhood effects of international justice diffusion and the increasing supply of organizational models available to them. In other words, this motivation is a direct result of the increasing international supply of justice models. It is in these cases that the international justice industry is most active. In a way, international justice industry here functions as norm “transmitter” or “teacher” (Finnemore 1994; Checkel 2001), providing states with appropriate models of transitional justice arrangements to choose from, educating them about the benefits of instituting a justice project, and the proper ways of going about it.

*H5a: If a state adopts international justice models out of uncertainty/imitation, we should expect limited societal connection to the project and commitment to justice to be short-lived.*

Transitional justice in Burundi will serve as an illustration of mimetic processes in adoption of transitional justice. Violent conflict in Burundi has been ongoing for more

than a decade between the rebel, majority Hutu, National Liberation Forces (FNL) and the combined forces of the Burundian military, traditionally dominated by the Tutsi minority, and a former rebel Hutu group, the Forces for the Defense of Democracy (FDD).<sup>31</sup> Widespread violence broke out in 1993, and after reports began coming in of deaths in the range of 50,000, the government of Burundi asked the United Nations to establish an international commission of inquiry to investigate the crimes. This request for a preliminary justice initiative was submitted without any domestic debate and without any serious input from civil society, but it was done in the wider context of regional developments at the time. In submitting a request for an international war crimes commission, the Burundian government hoped that establishing a justice institution would help deter violence from escalating into massive genocide, like the one that was going on roughly at the same time in similarly ethnically stratified, neighboring Rwanda (Hayner 2001).

The government officially submitted its request to the UN in September 1994. The following excerpt from the request is illustrative in its direct appeal to the expertise of international institutions in being best arbiters in helping Burundi deal with justice for mass atrocities:

“What we tried to have is help from the international community; we were looking for *a kind* [emphasis added] of international commission to help a judicial inquiry into the assassination of the President, into the massacres and into the impunity now going on” (cited in Amnesty International. 1995:22).

However, with the atrocities in Rwanda taking an unimaginable toll, UN Security Council was hesitant to establish a war crimes commission, fearing this could spark further violence in Burundi and open the door to another Rwanda type mass slaughter.

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<sup>31</sup> For background on the civil war in Burundi, see Longman 1998; Human Rights Watch. 2000a, 2000b; Sculier and Des Forges 2003.

Other international organizations expressed similar concerns, but still advocated a commission for Burundi as an important step towards ending impunity. In fact, precisely because they argued that Burundi itself is incredibly polarized, international justice organizations came out strong in support of an internationally led transitional justice project, which would include identification of perpetrators as well as a wider reform of the Burundi judiciary, led by a task force of international justice advisors (Amnesty International. 1995).

While the impetus for creating a commission was directly influenced by the unfolding events in neighboring Rwanda, the actual design of the commission was also a result of imitation. The commission was designed in large part by the UN special envoy to Burundi, a Venezuelan lawyer who had played an integral part in the design of the truth commission in El Salvador (Hayner 2001:68).<sup>32</sup> The commission worked for ten months, and was prepared to release its report on the massacres of 1993-1994 and recommend measures to bring justice. However, on July 25, 1996, a coup overthrew the government of Burundi and the report was withheld by the UN Security Council, which feared it could further exacerbate the conflict. After this initial delay, the report was finally released, indicating that “acts of genocide” were committed in Burundi, and recommending international jurisdiction over prosecution of war crimes. After a new outbreak of fighting and a new ceasefire, there have been renewed efforts to establish a transitional justice mechanism in Burundi. In 2004, the UN launched a mission to assess the feasibility and suitability of establishing a new international commission of inquiry, a

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<sup>32</sup> This is not the first time the El Salvadoran commission was “imitated.” The design of the commission in El Salvador also served as Guatemala’s main model when a truth commission was set up there (Hayner 2001:45).

project once again spearheaded by international justice organizations, such as the International Center for Transitional Justice, International Crisis Group, and others.<sup>33</sup>

Justice for mass atrocities in Burundi, however, is still fleeting. The government and FDD signed a peace agreement in 2003, granting “provisional immunity” to all combatants on all sides of the conflict, justifying it with the need to bring as many parties to the negotiating table as possible. The international justice community, however, was unimpressed, arguing that the Burundian government is deceiving the international community in the field of transitional justice, as it is “squeezed” between domestic political pressures to ignore past crimes and pressures to demonstrate its commitment to the rule of law to the international community (Human Rights Watch. 2003b), a dynamic I have identified in previous cases. And indeed, no definitive transitional justice mechanism is currently at work in Burundi, even though the Burundian government announced a law establishing a new National Truth and Reconciliation Commission in January 2005, with a sweeping mandate that would establish the truth about past crimes, identify the perpetrators, propose measures to promote reconciliation, as well as educate the population about the past.<sup>34</sup> While the Arusha peace accords of 2000 stipulate that an international commission is to be set up to investigate crimes, there has been no meaningful action in this area from either the international or domestic actors. The Burundian government declared its commitment to international justice, including passing over cases to the International Criminal Court (in this case imitating the action already taken by the Democratic Republic of Congo<sup>35</sup>), but did not begin with any

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<sup>33</sup> See ICTJ Activity in Burundi, at <http://www.ictj.org/africa/burundi.asp>.

<sup>34</sup> “Burundi establishes NTRC,” News 24 (South Africa), January 5, 2005, available at [http://www.news24.com/News24/Africa/News/0,,2-11-1447\\_1643369,00.html](http://www.news24.com/News24/Africa/News/0,,2-11-1447_1643369,00.html).

<sup>35</sup> See Human Rights Watch. 2004d.

domestic justice proceedings in front of national courts (Human Rights Watch. 2005b). After initial moves to adopt transitional justice models by imitating neighboring countries and fearing negative spillover effects from regional conflicts, Burundi has failed in sustaining a long-term commitment to transitional justice.

### **Rejection of transitional justice**

*H6: States may reject transitional justice models if they calculate that the social cost of revisiting crimes of the past is likely to produce further domestic instability and conflict.*

Even in the context of increasing international pressure to adopt transitional justice models, some states still reject them. Empirical evidence suggests that the most common reason state “rejecters” put forward is that unearthing of past horrors and identifying the culprits will destroy the painstakingly difficult process of post-conflict political stabilization. The state rationale for rejecting justice models is that the imposition of international norms of justice could aggravate tensions that could be more easily resolved through an unspoken mutual understanding to “move on.” This has been the case most clearly in Mozambique and Namibia.

After sixteen years of brutal civil war between the Front for the Liberation of Mozambique (FRELIMO) and Mozambique National Resistance (RENAMO), which left a million civilians killed and tortured in incredibly gruesome ways, Mozambique finally reached peace in 1992.<sup>36</sup> The decision to reject transitional justice was immediate – the peace accords of 1992 already ensured that neither party to the civil war was required to

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<sup>36</sup> For background on the conflict and reconstruction in Mozambique, see Andersson 1992; Finnegan 1992; Human Rights Watch. 1992; Hume 1994; Lindholt 1997; Costy 2000; Alden 2001; Manning 2002.

publicly take responsibility for its crimes, while the Parliament subsequently granted general amnesty for crimes committed by all sides during the civil war. While the central narrative of the postwar transition in Mozambique was social “reconciliation,” this concept was used to indicate an entirely different set of mechanisms for dealing with the past than the same term used in the context of South Africa, which was coming out of the apartheid regime at the same time. In Mozambique there is no social demand for accountability, justice, or truth seeking, there is no clearing the government ranks of alleged perpetrators of atrocities, there are no trials or truth commissions. People are so reluctant to discuss past crimes that there is almost a feeling that “if you talked about the war, it might come back” (quoted in Hayner 2001:189).

International justice entrepreneurs have been mostly baffled by Mozambique’s persistent denial to adopt a transitional justice model, especially in the international environment where pursuing some form of justice for past crimes today is expected to almost automatically follow regime change. Hayner (2001) has identified three principal reasons why Mozambique is continuing to reject transitional justice. First, any transitional justice project in Mozambique would be logistically overwhelming, as the number of individual crimes committed and persons involved is staggering. This logistical nightmare would open itself to a possibility of revenge accusations, and could bring about more injustice than justice. Second, there is a political agreement between the two parties not to bring up the crimes, as both sides were responsible for massive atrocities during the war. Today, they have no interest in bringing up the past which, as one Mozambican official said, “is still part of the present” (in Hayner 2001:195). Finally, Mozambique has substituted the international model of transitional justice adopted by

most other countries with a local healing mechanism, where traditional healers, *curandeiros*, provide help and support for both victims and perpetrators of the war.<sup>37</sup>

Namibia is another country that has consistently refused to adopt transitional justice mechanisms.<sup>38</sup> Namibia's rejection is even more striking as it shares the history of the brutal apartheid regime with its neighbor South Africa, but the way the two countries dealt with legacies of the past could not have been more different. In Namibia, thousands of people disappeared during the protracted, 30 years long struggle between the white apartheid regime and SWAPO, the former liberation movement that, after the end of the conflict, became Namibian government. However, unlike South Africa, after the declaration of independence in 1990, the new Namibian government declared that reconciliation has taken place and no institutionalized mechanisms of transitional justice are needed to deal with atrocities committed by both sides in the conflict. The government argued that rejecting transitional justice is necessary for a successful political transition, which requires cooperation among former adversaries (Dobell 1997).

The dynamic of transitional justice rejection in Namibia follows in part that of Mozambique (national consensus that revisiting crimes of the past will lead to political instability), but another factor in the Namibian case is that a full investigation of war crimes would inevitably uncover a number of serious abuses committed by SWAPO, whose members – now government officials in power – wanted to avoid prosecution. Most of these abuses deal with charges that thousands of suspects were imprisoned and tortured in SWAPO camps in Zambia and Angola (Conway 2003). The former detainees

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<sup>37</sup> The ongoing *gacaca* community justice projects in Rwanda work under similar assumptions that justice is best achieved by restitution to the community, not retribution against individuals.

<sup>38</sup> For background on Namibia, see Dicker 1992; Keulder 2000; Good 2004.

have demanded a full confession and apology from the perpetrators, suggesting a transitional justice process modeled after the South African TRC (Dobell 1997).

Even though some victims' groups have disclosed the abuses while the war was still ongoing, larger civil society was apparently reluctant to discredit SWAPO while the conflict lasted, as SWAPO was seen to be the only force of good in the moral struggle against apartheid (Conway 2003). In this sense, transitional justice that would subject the liberating forces against the oppressive regime to questioning was perceived as fundamentally "immoral."

Issues of past abuses still resurfaced on occasion. The report with the most impact domestically was a book by a German pastor, anti-apartheid activist and former SWAPO supporter, *Namibia: The Wall of Silence* (Groth 1995). The book helped mobilize victims' groups, and a new organization, Breaking the Wall of Silence, was set up to lobby for justice for former SWAPO detainees. Their activities, however, were met by great government hostility, and no official effort was undertaken to investigate the book's charges, which were dismissed by the government as "unpatriotic" and "against reconciliation" (Dobell 1997). In 1997, South Africa's Truth and Reconciliation Commission requested that hearings be held in Namibia. This request was greeted favorably by Namibian human rights activists, who looked to South Africa to see how a similar legacy of apartheid oppression is being handled (Dobell 1997). Namibian government, however, was quick to reject the request. Today, even these isolated calls for transitional justice have ended, and Namibian power elites, even in the presence of quite vibrant civil society, seem to have firmly rejected the international pull to adopt transitional justice.

Both of these “rejection” cases occurred in the early stages of international justice norm institutionalization: no *ad hoc* tribunals or other international courts were yet in place, and the South African TRC was only just beginning, its phenomenal international impact at the time still unknown. It is certainly plausible to argue that the “early” timing of a potential transitional justice project in Namibia (1990) and Mozambique (1992) helps explain why the new governments “got away” with *de facto* ignoring that crimes have been committed and rejecting justice initiatives. By contrast, in “later” cases of Serbia and Croatia (not so much the fact that the year was 1993 but that the international outrage over crimes in the former Yugoslavia was pivotal in institutionalizing the war crimes regime and establishment of the *ad hoc* tribunal) – the international justice norm has become so assertive as to leave the two countries no choice but to, reluctantly, cooperate with the international court. Significantly, serious international pressure on Cambodia, which has also persistently rejected transitional justice initiatives, has also come about after the mid-1990s. After many rounds of failed negotiations, the United Nations and Cambodian government approved in March 2003 a hybrid trial framework for the Khmer Rouge, although there is still much skepticism in the international justice community about the legitimacy and legal standard of any Cambodian trial (Human Rights Watch. 2003c).

If we take the timing issue seriously, it is possible to argue that, in the coming years, we should expect fewer and fewer countries to outright reject international justice models. In fact, as the international justice landscape has considerably changed over the past ten years, we should expect more countries to continue to adopt various justice arrangements, but for an array of different reasons than those put forward by

paradigmatic early adopters, such as Argentina or South Africa. Because the international community now expects countries to set up commissions and/or courts as one of the first justice initiatives during a democratic transition, many countries feel the need to conform with the expected behavior, but end up doing so for reasons that may have little or nothing to do with seeking either truth or justice.

The table in the appendix gives some preliminary, and very cursory examples of transitional justice models adopted in a selected number of countries, and according to variables and hypotheses identified above. Even this preliminary typology points to many different ways in which states interpret international cognitive models and use them for domestic reasons that may be quite different from the organizational model and norm (of accountability, justice, law) institutionalized at the international level.

#### **IV. CONCLUSION**

This paper offers another way of understanding the workings of the international system, specifically the diffusion of international organizational models. Sociological institutionalism and IR constructivism have put forward accounts of institutional diffusion, but we need to know more about how these models are interpreted domestically. International norms and institutional designs do not diffuse linearly; they are filtered, contested, reinterpreted and appropriated, even misused domestically for quite local political purposes. In addition to the outright rejection and acceptance of the international norm - which is in itself a complex process that can involve localization (Acharya 2004), grafting or transplantation (Farrell 2001) - there also exists a full range of options in-between. These *degrees of conforming* populate most of the space where

normative exchanges occur but have so far received inadequate theoretical attention. This is why we should expect systemic international norms to produce extensive domestic normative and behavioral variation. In other words, decoupling is endemic to the process of norm diffusion.

International relations field has witnessed a “normative turn” over the past decade, but there has been surprisingly inadequate attention paid to the domestic politics of international normative diffusion and many different ways in which international norms are experienced inside the states and societies that adopt them. We need to add this dimension to our understanding of how norms and models diffuse through the international system – and this is the paper’s principal theoretical contribution. In this sense, I take seriously the constructivist challenge to expand our analysis to focus on “ways in which international norms worked their effects inside the many states of the system, and... the ways in which the norms were eventually affected by those individual state experiences” (Finnemore 1996:137).

My analysis therefore contributes to the “second wave” scholarship of norm diffusion that looks at domestic impact of international norms (Cortell and Davis 2000). International norms and domestic politics do not act in isolation from each other. Instead, they always interact, and it is this interaction that can produce positive outcomes, when international and domestic normative orders converge (Checkel 1998), but it can also lead to paradoxical outcomes, such as the phenomenon of “hijacked justice,” when international and domestic strategies do not match. My analysis therefore identifies the limits international norms face. Although international models may develop for all the right reasons, they may have the wrong effect if they are adopted as part of contradictory

local political strategies. In other words, my research is a story of how “good” norms can produce “bad” outcomes. The theoretical implications of my project travel beyond international norms of transitional justice into other areas of international politics. I expect similar relationships to develop when other international policies are adopted under conditions similar to the ones I identify, in areas such as anti-drug policies, terrorism or human trafficking.

This project also has practical implications for future transitional justice projects. Understanding the motives behind adoption of transitional justice helps explain its domestic political effect. While my work does not offer a definitive model of effective institutional design, it does point to some salient questions policy makers need to ask before they set up new transitional justice projects. What is the level of domestic commitment to transitional justice among social groups, not just political elites? What domestic political payoffs will the elites obtain from setting up a transitional justice initiative? Are these payoffs acceptable “collateral” byproducts or are they fundamentally at odds with international goals? If the demand from below is weak, what are the mechanisms by which a justice project will open up the domestic debate about crimes of the past? If the transitional justice arrangement is internationally imposed upon a disinterested society, will it create a justice backlash? What domestic political conditions (e.g. deeply divided societies, presence of old regime “spoilers,” urgent need for international financial aid) increase the likelihood of transitional justice being adopted? Finally, can international organizations be legitimate arbiters or interpreters of local histories, and if so, how should they most effectively go about doing this? Because transitional justice projects are proliferating at an amazing rate – ongoing trials of past

leaders of the former Yugoslavia, Sierra Leone and Rwanda, and the greatly anticipated trial of Saddam Hussein are just the most publicly visible examples of this trend – these questions must be urgently addressed.

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<b>Timing of adoption</b>	<b>Country Case</b>	<b>Model adopted</b>	<b>Type of conflict</b>	<b>Type of transition</b>	<b>Motive for adoption</b>	<b>Domestic commitment</b>
<b>Early</b>	South Africa	TRC	Racial oppression	Regime change	Demand from below	High
	Argentina	TRC	Military repression	Regime change	Demand from below	High
	Chile	TRC	Military repression	Regime change	Demand from below	Medium
	Uruguay	No adoption	Military repression	Regime change	No adoption (fear of destabilization)	Low
	Namibia	No adoption	Racial oppression/civil war	Regime change	Reconciliation through no adoption/domestic power politics	Medium
	Mozambique	No adoption	Civil war	Regime change	Reconciliation through no adoption	Low
<b>Middle</b>	Bosnia	International trials/future TRC	Ethnic conflict/genocide	Partition	Legitimacy/ domestic power politics	Medium (Bosnian-Croat federation) Low (Serbian entity)
	Serbia	International trials/TRC	Ethnic conflict/genocide	Partition	International coercion/ domestic power politics	Low
	Croatia	International trials	Ethnic conflict/genocide	Partition	International coercion/ domestic power politics	Low
	Rwanda	International trials	Genocide	Ethnic replacement of power	Legitimacy/ domestic power politics	Low
	Guatemala	TRC	Civil war/genocide	International settlement	Demand from below/domestic power politics	Medium/High

	Burundi	International commission	Civil war	Peace accord	Imitation	Low
	El Salvador	TRC	Civil war	International settlement	Demand from below/domestic power politics	Medium/High
<b>Late</b>	Sierra Leone	Hybrid	Civil war	International settlement	Imitation/domestic power politics	Medium
	Peru	TRC/hybrid	Civil war	Regime change	Imitation/legitimacy	High
	Indonesia/East Timor	Domestic trials/hybrid	Ethnic conflict/state repression	Partition	Legitimacy (Indonesia) Demand from below (East Timor)	Low (Indonesia) High (East Timor)
	Mexico	Domestic trials/hybrid	State repression	Regime change	Legitimacy	Low
	Kosovo	Hybrid	Ethnic conflict	International settlement	Legitimacy/ domestic power politics	Low
	Iraq	Domestic trials/Hybrid	State repression	Occupation	legitimacy/ domestic power politics	Medium
	Cambodia <sup>1</sup>	No adoption	Genocide	Regime change	Reconciliation through no adoption	Low
	Afghanistan	No adoption	State repression	International settlement/occupation	No adoption (destabilization)	Low

<sup>1</sup> “Early” crimes but “late” discussion about justice models.