WHEN DO REINSTATED DEMOCRACIES HOLD THE MILITARY ACCOUNTABLE?
TRUTH COMMISSIONS AND MILITARY TRIALS IN COMPARATIVE PERSPECTIVE

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This paper explains under what conditions prosecutions of military officers who committed human rights violations (HRVs) happen in countries that transitioned to democracy from military rule. It proposes an analytical model and then tests it through case studies and process-tracing the adoption of transitional justice mechanisms in Argentina, Chile, and Brazil. It argues that the issue of holding accountable past violations is a credible commitment problem. Credible commitment is possible when the parts have an incentive to abide by the bargain after it is made. During transition to democracy, the military established institutions that were designed to protect their interests, among them amnesty laws. In the absence of shifts in the power relation between civilians and the military, such institutional shields would stick, thus being self-enforcing. However, the balance of power can tip to the civilian side the more democratizers succeed in removing military prerogatives left during the transition, expose past deeds through truth commissions and advance measures of civilian control of the military. These actions change the balance of power in a way that allows civilians to renege on past promises like amnesties.

Palavras-chave:

Transitional Justice, Truth Commissions, Civil-Military Relations, Institutions
1. Introduction

On May 10 of 2013, the retired colonel Carlos Alberto BrilhanteUstra faced charges of having tortured and murdered political prisoners in a public hearing held by Brazil’s first truth commission, established almost 30 years since transition to democracy. A habeas corpus, granted by the Justice in the day before the hearing, allowed the retired officer to stand in silence. He was also protected by Brazil’s Amnesty Law, enacted in 1979 by the authoritarian government and that still protects perpetrators of crimes committed for “political reasons.”

What was seen by the commission and the whole country in the nightly news was a defiant BrilhanteUstra, who spoke when he wanted, denied any wrongdoings and was said to be proud of having fought against terrorist groups. The protection against criminal prosecutions that he and others retired military members still enjoy in Brazil is now unusual in the rest of the continent. While countries such as Argentina and Chile have had much earlier truth commissions and have prosecuted hundreds of officers by now (CELS 2013b), in Brazil the military has so far been mostly immune to transitional justice mechanisms. The institutions devised by the Brazilian military to transition to democracy without retribution have held stronger than the similar attempts made by other dictatorships in the region. What accounts for this puzzling fact?

In this paper, I seek to explain under what conditions prosecutions of military officers who committed human rights violations (HRVs) happen in cases of reinstated democracies. I argue that the issue of holding accountable past violations perpetrated by former officials is a credible commitment problem. Credible commitment is possible when the parts have an incentive to abide by the bargain after it is made. For institutions to be credible, they have to be self-enforcing (North and Weingast 1989). During transition to democracy, the military established institutions that were designed to protect their interests, among them amnesty laws. In the absence of shifts in the power relation between civilians and the military, such institutional shields would stick, thus being self-enforcing. However, the balance of power can tip to the civilian side the more democratizers succeed in removing military prerogatives left during the transition, expose past deeds through truth commissions and advance measures of civilian control of the military. These actions change the balance of power in a way that allows civilians to renege on past promises like amnesties.

This paper makes several important contributions to the literature on civil-military relations and transitional justice. First, it provides a framework that better accounts for the variation found in prosecutions of officers who committed HRVs in countries that transitioned from military rule. Second, it shows the mechanisms by which changes in the balance of power can happen and which allows civilians to renege on the terms of the negotiations that
brought democracy. This is especially important as the earlier transition to democracy literature predicted that accountability of the authoritarian past most likely would never occur because of the negotiated way that regime change took place, under military tutelage (Stepan 1988, Hagopian 1990, Huntington 1991, Karl 1990, Zaverucha 1993). This work departs from this path dependent view precisely because it highlights the issue of a credible commitment problem – the parts that bargained at the time of the transition cannot fully control how the balance of power would be in the future. Finally, due to space constraints, this version focuses on the theory advanced, but is part of a broader research project where the hypotheses presented here are tested in extensive case studies of Argentina, Brazil and Chile. As such, it is one of the first works that studies in a comparative framework Brazil’s recent effort to hold former officials accountable by way of a truth commission and initiatives that challenge the exiting amnesty law in the courts and in the Congress.  

In addition to this introduction, this paper is divided as follows. In the next section, I address the field of transitional and post-transitional justice and its relation to military prosecutions in cases of reinstated democracies. In the third section I evaluate previous theoretical explanations, such as Huntington’s (static) balance of power (1991), Pion-Berlin’s leadership preference (1994), Collins’ (2010) and Skaar’s judicial independence (2011), and Sikkink’s “justice cascade” (2011) hypotheses, showing that while all of these accounts have made significant contributions to our understanding of the dynamics of transitional and post-transitional justice, they miss some mechanisms, most notably the issue of civilian control of the military and the role of the legislative in gradually removing military prerogatives left by the outgoing regimes. I then present a theoretical argument that reanalysis the issue in terms of a credible commitment problem over the institutions bargained between civilians and the military and its supporters. I claim that prosecutions depend on the erosion of the institutional shield that protects the military from retribution, most importantly the existence of amnesty laws and political and judicial support for maintaining the terms of the transition. The framework developed is illustrated with cases in Argentina, Brazil and Chile. Finally, in section 6, I conclude.

2. Transitional and Post-Transitional Justice

Trials are one of the mechanisms of what has come to be known as transitional justice, which is also composed of truth commissions (hereafter TCs), reparations and ways to honor the memory of victims of an authoritarian regime or period.

1 Available from the author upon request.
While trials seek direct criminal accountability, TCs are a form of soft accountability (Shedler 1999). TCs’ aims to achieve a sanctioned fact-finding and acknowledgment of human rights abuse, reduce the likelihood that such abuses occur in the future and make recommendations for policy change.

TCs and trials do not necessarily go together – it is possible to have one and not the other. However, by exposing and publicly acknowledging human rights abuse, TCs raise the expectation and pressure for trials. They make transparent the political choice of what to do next: prosecute those who were found responsible for human rights violations or avoid it altogether. It can also leave a paper trail that can mobilize civil society groups and judges in cases against former officials (Collins 2010). Moreover, from a constructivist point of view, it might be important for symbolic power, helping to shape actors’ desires, preferences, and motivations (Hay 2011).

Despite the wide geographical scope of transitional justice, cases of regime change after military rule present unique challenges: the military continues to be part of the governmental structure, is in control of heavy armament and has proven its disposition to intervene in politics. Transitions are critical cases of the general task that civilians have to face in establishing democratic civil-military relations. Not surprisingly, the field of civil-military relations tends to stress the importance of control mechanisms that prevent the military in interfering with politics (Huntington 1957, Desch 1999, Feaver 1999). Unfortunately, current theoretical accounts of transitional justice tend to overlook these issues, as I will show next.

3. When to remember and to prosecute

Among the transition problems brought by regime change, Huntington (1991) listed as two key issues the matter of dealing with authoritarian officials who committed HRVs and reducing the influence of the military and involvement in politics. The former question he termed as “the torturer problem” and the latter as “the praetorian problem.”

To Huntington, the ultimate decision on whether to prosecute or not “was shaped almost exclusively by politics, by the nature of the democratization process, and by the distribution of political power during and after the transition.” (Huntington 1991, p. 215). Regime changes that happened through transformation or transplacement (negotiated transition) would not lead to prosecutions, as the outgoing regimes would create barriers against it (like general amnesty laws) and were strong enough to make the terms of the transition stick. Therefore, any attempt to prosecute them in hope of moral gains would be outweighed by high political costs. If new democracies were to prosecute outgoing officials, then no authoritarian leader would accept initiation of regime change. Therefore, amnesty
was the price paid to have democracy and, if one could not prosecute, it is better to forgive and forget.

Cases of regime collapse (or replacement) provided an opportunity – albeit limited – to hold authoritarian officials accountable. Because in such cases the transition was not negotiated, the outgoing governments were either not able to enact protection to their members because they did not anticipate their end or were forced to face an overwhelming pressure of public opinion in support of prosecutions. In such situations – Argentina and Greece being the main examples – Huntington predicted that prosecution would have to come promptly and be limited, excluding middle- and lower-ranking officials. It is within this analytical framework that the author of *The Third Wave* stated that, “In new democratic regimes, justice comes quickly or it does not come at all,” as he believed that support for prosecution would fade with time (Huntington 1991, p. 228).

Leadership preference is another line of argument used to explain variation found in transitional justice mechanisms adopted by democratizers. Pion-Berlin (1994) analyzes the three different courses of action taken by democratic rulers at the onset of democratization in Argentina, Chile and Uruguay. To him, all regimes could be classified as equally responsible for gross human rights violations, but the course of action taken by the first democratically elected rulers differed. Pion-Berlin argues that the balance of power argument shows capacity but not intent, and leadership preference likely explained why Raul Alfonsin pursued investigating human rights atrocities (through a TC) and prosecutions in Argentina while a milder course of action was taken by Patricio Alwin in Chile (only a TC) and an even weaker stance by Julio Maria Sanguinetti in Uruguay. The use of leadership as an explanatory variable is always challenging in political science, and Pion-Berlin’s research design, which involves the analysis of six different potential explanations using three case studies in a single period (the transition), brings substantive inference challenges. Another example of focus on a leader’s preferences can be found in Fletcher, Weinsten and Rowen (2009), who identified great reluctance and ambivalence of Argentinian leaders in addressing crimes committed during the dictatorship. Yet, the authors recognize that over time the political commitment to transitional justice has increased. They do not provide a compelling argument to explain why the more distant in time that the facts occurred the more political will (and ability) to prosecute exists.

More recently, a new wave of studies brings judicial courts and non-state actors (such as NGOs) to the scene. Collins (2010) and Elin Skaar (2011) make a distinct theoretical argument to account for the late surge of accountability measures of past HRVs. Both of

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2 The variables that he analyzes are legacy of human rights abuse, balance of power, elite preferences, interest group pressures, strategic calculation and contagion effect.
them use the term “post-transitional justice” to distinguish the measures taken afterwards from the decisions taken during the early years of regime change. Collins focuses on the different responses towards accountability in Chile and El Salvador, while Skaar studies Argentina, Chile, and Uruguay.

Both works put in the forefront domestic judicial changes. Skaar argues that judicial reforms, which increase judicial independence, are the main cause for an upsurge in trials witnessed in the region, with Argentina and Chile ahead of Uruguay, a country where judicial reforms were lacking. While these authors positively bring attention to the courts and judges as independent actors, there are reasons to be skeptical of causal claims in these works. Judicial reforms are not independent of other reforms (approved by the Congress) that advance an agenda of human rights protection and civilian control of the military. In some cases, it is the Congress that provides legal basis for comprehensive trials to happen – for example, by rejecting amnesty laws, as Argentina did in 2003. In addition, while Skaar recognizes that low military threat is a necessary condition to pursue trials, she uses number of years since transition to democracy as coding rule for threat, which makes all of her three cases appear to have low threat, while a coding based on prerogatives (following, for example, Stepan (1988) and Zaverucha (2000)) would result in a different assessment. For example, Brazil and Argentina transitioned to democracy in a similar period, but these two countries have very distinct levels of military power and prerogatives.

Finally, Sikkink (2011) also focuses on courts and the role of human rights activists in pushing transitional justice mechanisms, but puts these efforts in an international context. In her “justice cascade” hypothesis, a process of diffusion of ideas and strategies across countries created new norms that ultimately challenged political constraints, resulting in prosecutions of former heads of states. This hypothesis does not theorize the role played by civilian control of the military in post-transitional justice. Rather, it assumes that civilian control and the decrease of human rights violations is a by-product of previous trials. Within this framework, Sikkink recognizes that Brazil figures as an unexplained outlier and she does not provide institutional and political explanations to account for the lack of prosecutions in this country.

Despite recent contributions, Nobles (2010) considers Huntington’s balance of power argument as the most influential in all the transitional justice scholarship. However, the argument as laid out by Huntington is deeply unsatisfactory due to its static nature – a criticism shared by scholars that subsequently worked on civil-military relations and transitional justice literature (Hunter 1997a, 2001; Collins 2010, Sikkink 2011, Skaar 2011). While the initial balance of power during the transition to democracy is an important starting point, it does not come close to explaining subsequent developments, as even countries that
were deemed to have never held the authoritarian past accountable took a number of measures that neither forgave nor forgot past human rights violations; they engaged in multiple truth commissions and prosecuted hundreds of officers. So we are still left with insufficient explanations of when and why reinstated democracies adopt post-transitional justice mechanisms. If current theories do not explain the empirical variation found, how can we explain when governments hold the military accountable? And why after years of transition to democracy do these issues keep returning instead of being obliterated by more contemporary political and social matters of these young democracies?

4. Towards a dynamic balance of power argument

The framework presented here is a dynamic balance of power argument, which links the outcome of transitional justice (“the torturer problem”) to the erosion of the military prerogatives (“the praetorian problem”) within a neo-institutionalist framework. It becomes necessary to bridge the gap between these two strands of the literature, as surprisingly, transitional justice scholars are seldom attentive to issues of control mechanisms that are in the forefront of much of the civil-military relations field.

In negotiated transitions, immunity from prosecution and other prerogatives were part of the explicit or implicit bargain that made regime change possible. It is analogous to a contract that would stick if both parts have an incentive to not defect. To understand the conditions that made possible future opportunistic behavior by civilians is to uncover which constraints were lifted.

Even when regime change was not a product of a bargain, a contractual framework is still instrumental in understanding the sequence of events. A demoralized military will be more exposed to retribution, thus broadening the role of possible actions of accountability taken just after the transition to democracy. However, if the military can threaten a new coup or behave in open rebellion, it will force civilians to reach an agreement. By show of force, the military can halt accountability measures.

Therefore, civilians had to deal with rebellious or politically powerful military. Part of the task of new elected leaders was to curb the autonomy of the armed forces in a way that was compatible with a democracy – and the gamut of reforms was just too broad to be done swiftly. This long-lasting effort involved fundamental changes in five camps: 1) professionalism; 2) mission; 3) leadership and organization; 4) size and equipment; 5) status (Huntington 1991). To sum up the broad concerns of the civil-military field during transition to democracy, the armed forces had to be depoliticized, reoriented from internal to external
security missions, cleared from nonmilitary responsibilities, composed of military leaders that were loyal and trustworthy to elected civilians and democratic values and report to a civilian command (such as a Minister of Defense). Such long-term agenda involved fundamental changes to a rather conservative institution like the armed forces (Barany 2012).

The balance of power presented above, as put by Huntington, explains the variation found at the onset of democratization in different third-wave democracies, as show in Table 1. Regimes born under negotiated transition at most pursued a TC, and even that was highly constrained by open opposition of the military, which limited the access to documentation and testimonials of officers and victims who felt intimidated. In case of regime collapse, the incoming regime could pursue both TC and trials, but the latter had to be limited to the top echelons of command, to avoid widespread rebellions.

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<th>Transition</th>
<th>Mechanism</th>
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<tr>
<td>Regime Collapse</td>
<td>TC / Trials (limited)</td>
<td>Low civil-military control</td>
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<tr>
<td>Negotiated transition</td>
<td>TCs (limited)</td>
<td>High level of prerogatives, low</td>
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These outcomes would have been stable if the armed forces maintained their level of prerogatives and their capacity to credibly threaten civilians in case of divergence of preference. The belief that the military could continue to be in a strong position vis-à-vis the civilians was frequently present in the works of scholars that analyzed the conditions that led to transition to democracy from a military regime and how this shaped future strategic interactions, such as Stepan (1988), O'Donnell (1988), Karl (1990) and Zaverucha (1993, 2000). This heavily path-dependent type of argument can be illustrated by the notion of a “birth defect”, as Karl put it: “Accords between political parties and the armed forces set out the initial parameters of civilian and military spheres. Thus, what at the time may appear to be temporary agreements often become persistent barriers to change, barriers that can even scar a new regime with a permanent ‘birth defect’” (Karl 1990, p.8). Civilians had to walk a thin line between the pressures for accountability and assurance that the military would not reverse the democratization process.

So what changed and allowed more comprehensive post-transitional justice mechanisms, such as trials? I argue that reforms that erode military prerogatives and ensure civilian control of the military can successfully decrease the ability of the armed forces to
pursue a politically autonomous agenda and offer direct opposition to TCs and trials. *Accountability measures will come faster and will be deeper in democracies that more successfully reduce the military institutional shield and establish mechanisms of civilian control of the armed forces.* To understand when young democracies employ post-transitional justice mechanisms is to identify the conditions that allowed civilian leaders to defect.

What drives changes or continuities from what happens during the initial regime change to the post-transitional phase is determined by the balance of power. In turn, the balance of power can be altered by either exogenous or endogenous processes. The former, for instance, can take the form of pressure from a foreign power or conditionalities imposed during the negotiation of an international treaty. Such types of events can tip the balance in favor of civilians. Conversely, any event that reinforces the power of the military will reduce the likelihood of engaging in post-transitional justice. Change can also be endogenous, driven by the gradual modifications of institutions that ultimately amount to “real change”, as suggested by Thelen and Streeck (2005). Following their lead, reforms that enhance civilian control of the military and decrease the institutional shield can be seen as incremental processes of change that add up to major historical discontinuities with respect to post-transitional justice mechanisms. This process will be facilitated if the ballot continuously expresses support for reformist governments and for accountability measures, as coalition partners – and even the opposition – may perceive that it is in their favor not to block changes. The main point is that a change in the balance of power in favor of civilians allows them to defect from the terms of the transition – enshrined in the institutional shield – and the source does not have to be an exogenous shock; it can be a process of institutional conversion.

Next, I will define the dependent variable analyzed here, the institutional shield, as well as the independent variables of civilian and military power.

**Institutional Shield**

Following North’s (1991) definition, institutions are the rules of the game in which a society interacts, arising from formal and informal norms, including laws, customs and traditions. The institutional shield consists of prerogatives (or privileges), such as amnesties, laws, autonomy in deciding budget allocation, rank promotions, and custodian powers over

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3Turkey’s negotiation process to join the European Union – although it ultimately failed – resulted in profound constitutional changes in its civil-military relations, where previously it was a notorious praetorian state (Bac 2005).
the rule of law. The specific configuration and extent of the institutional shield varies, as it is a process of historical bargaining. For example, in Chile it included appointed senators, which was not present either in Argentina or in Brazil. However, the defining characteristic of the institutional shield is that it protects and insulates the military from civilian interference.

The institutional shield is an essential byproduct of the power asymmetry that brought the transition to democracy. As Przeworski (1986) remarks, no substantive compromises can be guaranteed under democracy. However, as he observes, it is possible to reach institutional agreements, design institutions that shape prior probabilities of the realization of the interests of the parts of the bargain. The institutional shield reduced the military's uncertainty in handing over the power.

When the military plans its transition out of the government, it has both more time to add protective institutions as well as more room to negotiate with the civilian leadership the steps and terms of the transition. On the other hand, if the military is forced out of power or has to leave without preparing its transition, both the range of privileges as well as the legitimacy of any rights will be smaller.

Stepan defines military institutional prerogatives as “those areas where, whether challenged or not, the military as an institution assumes they have an acquired right or privilege, formal or informal, to exercise effective control over its internal governance, to play a role within extramilitary areas within the state apparatus, or even to structure relationships between the state and political or civil society.” (Stepan 1988, p. 93). It should be clear that the more military institutional prerogatives are in place, the more constrained civilians will be. Higher levels of prerogatives force civilians to cooperate in a broader range of areas with the armed forces, which would lead to more attrition if, at the same time, civilians engage in transitional justice mechanisms such as trials.

**Civilian Power**

Civilian Power is here defined as congressional support, control of the military and symbolic power. Through political power, civilians can approve laws that weaken the institutional shield, for example, by increasing executive and legislative oversight over defense matters. They can also influence the composition of existing institutions by appointing ideologically-aligned members, such as in the process of judge nomination and rank promotion. TCs, also set by civilian power, will reduce the military symbolic power by exposing past deeds. Mostly consequential for trials, civilians who seek accountability and are powerful enough can void existing amnesty laws.
Civilian control of the military refers to the capacity of the civilians to make decisions within the sphere of military action and have its order obeyed without a menace of rebellion or a coup threat. That includes authority to decide budget allocation, enlistment size, mission, doctrine, and war authorization. Michael Desch suggests that the best indicator of civilian supremacy is to identify, over a range of issues, “who prevails when civilian and military preferences diverge” (Desch 1999, p. 4). It does not mean that civilians will always be the best advisor in military matters, but, as Feaver puts it, “civilians have the right to be wrong” (Feaver 1999, p.216).

A range of control mechanisms has been proposed to ensure civilian supremacy in civil-military relations (Desch 1999, Burk 2002). For cases after regime change, it may include speeding up the removal of officers linked to the authoritarian regime by others who share democratic values, and redirecting the military from internal security affairs to foreign threats and peacemaking missions. Time and generational shift are also possible mechanisms of achieving civilian control, as new officers join the army at a time where training, mission and values may be different, thus weakening the solidarity link with older officers that may be subject to prosecution. For cases of disrupted transition, where the amount of prerogatives that the armed forces can secure is comparatively low, the main task of civilians is to achieve control of the military. In negotiated transitions, civilians have the additional task of having enough political capital opposed to maintain a praetorian role for the military.

To dismantle military prerogatives left by a previous regime, it is necessary to vote in the Congress bills that deal with military matters, such as budget and veto powers. The higher the congressional support, the easier it will be for a ruling majority seeking accountability to proceed with institutional changes. Furthermore, the more ideologically homogeneous this majority is – in the opposite spectrum of the previous military regime – the easier it will be to weaken the institutional shield. Conversely, a government with a weak majority or with a heterogeneous base will face more difficulties in dismantling the military institutional shields, especially if it involves changing constitutional prerogatives, which requires a qualified majority.

Lastly, civilians can use TCs to increase their symbolic power vis-à-vis the military. The coverage of human rights violations can successfully decrease the support for the military institutional shield. TCs – and other forms of critically exposing the past – can have legal and political consequences: judges may reinterpret laws that previously benefited the

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4 See also Mendeloff (1994, p. 236) for another argument of generational shift in promoting institutional change within the military corporation and Barany (2012, p. 168-169) for the support by young Chilean officers of prosecution of senior military officers that violated human rights.
Military, and politicians may become wary that by serving as veto points in defense of military prerogatives, they may risk their seats or not form ruling majorities.

Military Power

Military power is composed of direct coercive power (the resort to violence and rebellions), informal power (threats, saber-rattling, non-institutionalized channels of negotiation), and symbolic power (perceived legitimacy of the institution and its past governmental intervention). While the military always has the option to use coercive power, it will use this card only on rare occasions, as this undercuts other forms of negotiation, legitimacy and incurs repression costs. Therefore, violence and rebellions are a measure of last resort that risks provoking deep divisions within the institution. This will be especially true as generational change and purges within the army decreases the number of officers potentially affected by post-transitional justice mechanisms, who would have the most interest in resorting to extreme options in order to halt accountability. High symbolic power can guarantee prestige to the military and assure the institution a political base that will be favorable to their demands, thus working on behalf of the maintenance of their institutional shield. As Pion-Berlin (2009) shows, saber rattling and other forms of informal channels of negotiation have been used by the military to oppose accountability for human rights abuses.

Summarizing my argument, regime change implies a risk to those who are leaving power. To mitigate the risk, institutions are established to put constraints on future political dynamism (Przeworski 1986). Such constraints increase the barrier for change – for example, by imposing qualified majority in the Congress. This can prevent, or at least, delay changes. However, by the nature of the credible commitment problem, an unequal evolution in the balance of power between civilians and the military puts in jeopardy the agreement over institutions. If the military gets weaker, civilians can defect, revoke amnesties, and pursue trials.

In Figure 1 below, I present the mechanisms that link the transition to democracy to the different possible outcomes of transitional and post-transitional justice. When a transitional justice mechanism can be adopted, but under severe constraints, I code it in Figure 1 as “L”, standing for a low level instance. “H” refers to a high level unconstrained realization of the mechanisms, and “M” marks a mid-range possibility.

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5 A pure division between military and civilian power is an ideal type simplification for theoretical purposes. Some civilians might prefer to form alliances with the military – but, by doing so, they ultimately reinforce the power of the armed forces rather than the autonomy of civilian rulers.
In cases of transition from regime collapse, the military has few channels of negotiation and low reputation (symbolic power). Therefore, civilians can quickly remove their institutional shield and initiate TCs and trials. However, as prosecution risks spreading throughout the institution and precisely because the military has already lost other components of power, it will more likely close the ranks and resort to armed rebellion. Threatened by force, civilians may have to come to terms with the military and negotiate a new agreement. In negotiated transitions, powerful militaries craft their institution of choice and return to the barracks with high prestige. In absence of change in the power relation, a praetorian regime emerges, with the military taking the role of custodian of the political system. Where the ballots express support for parties ideologically distant from the military’s preference, civilians seeking accountability may use multiple TCs to reduce the military symbolic power, promote officers not linked to past human rights abuse – thus solving an adverse selection problem – and sponsor bills that promote civilian control of the military and reduce the institutional shield.

While civilians in pursuit of accountability will prefer the adoption of all transitional justice mechanisms – reparations, TCs, and trials – the military would rather have the policy of forgive and forget. If that is not possible, it will oppose more trials than TCs, and more TCs than reparations.
5. Transitional Justice in Argentina, Brazil, and Chile

Elsewhere (Lima-de-Oliveira 2013), I test the theoretical framework previously presented to in three cases of reinstated democracy: Argentina, Brazil and Chile. They provide similarities and enough variation in the outcome variable to allow for a structured, focused comparison (George 1979). A within-case analysis through process tracing is employed, a standard methodological tool for a small-n design that aims to make inferences and adjudicate between alternative causal processes and mechanisms (Collier and Mahoney 1996, Bennet 2010). In all the cases, I systematically look for the following: How did the military leave power and what amount of prerogatives did they secure? How did the policy towards transitional justice evolve over time after the regime change? Did the military react against attempts by civilians (if any) to reduce their power and engage in transitional justice mechanisms? If so, how (by rebellions, saber rattling, political connections)? In which way are changes in the mechanisms of civilian control of the military linked to outcomes of post-transitional justice?

The three cases selected are of reinstated democracies, two of which pursued prosecutions of military officers and one which has not. Argentina, a case of regime collapse, is a most likely case for trials. Yet, after military rebellions that forced a new amnesty law, it was believed in the 2000s that the human rights issue was “more or less resolved” (Fitch 2001), which proved to be an incorrect assessment. Chile and Brazil are least likely cases (Gerring 2001), as these two countries transitioned to democracy through pacts.

The same cases – either individually or in comparison to other countries, but not all three together – have also been used by other scholars as case studies in the field of civil-military relations and transitional justice (Zaverucha 1993, Pion-Berlin 1994, Norden 1996, Hunter 1997b, Saavedra 2006, Collins 2010, Skaar 2011, Barany 2012). This design allows the evaluation of the proposed theoretical framework with competing theories applied to the same cases.

Due to space constraints, here I will touch only briefly on the case analysis. The main takeaway from the examination of the timing and type of transitional justice mechanism adopted is the importance of civilian control of the military in enabling accountability of HRVs, which can be seen by a thorough analysis of decrees and legislative pieces that deals with security matters in all three countries (Lima-de-Oliveira 2013). Among these stand the removal of military prerogatives, promotion of officers not linked to past abuses and allegiances to the authoritarian regime, and transfer of internal security and intelligence affairs to civilian control. Various sources signal that during the democratic regime the military lost resources in the three countries. Pool data (Latinobarometro, various years),
budget numbers (from the SIPRI Military Expenditures Database) and the number of soldiers per 1000 inhabitants (the Military Balance, various years) demonstrate the general weakening of military power in terms of public support, resources and size. However, individual cases show a more nuanced picture, especially regarding Brazil. The Brazilian military is comparatively more autonomous (Zaverucha 2005), kept a broader number of prerogatives and is still frequently used for internal security.

Argentina is a case where the military transitioned to democracy in a weak position, incapable of defending its prerogatives and had to face early trials. However, by use of force, such as open rebellions, the military regained an amnesty law in 1987. While the security forces accomplished protection from trials, they were not able to overcome the negative image left by the failed experience in the government and in the war effort. They remained weak in defending their institutional shield. After establishing control of the military through a combination of reforms and appointment of loyal officers, the civilians defected from the concession of amnesty and a new wave of prosecutions started in the 2000s.

Chile, like Brazil, is a least likely case for military trials. The military negotiated its way out of the government and designed institutions that would protect their resources, autonomy and immunity to prosecutions. In addition, during the early years of the transition, the military reacted with saber rattling when their interests were threatened. However, a center-left coalition was electorally successful for 20 years, allowing civilians to take a number of steps that gradually weakened the once all powerful military. Multiple TCs revealed to the public episodes of human rights violations. Judicial reforms opened cracks in the judiciary regarding the interpretation of the amnesty law. The image of the military and its highest leader, General Augusto Pinochet, was also affected by revelations of corruption charges – what led old supporters, like right-wing parties, to distance themselves and vote for reforms that severely reduced the military prerogatives. Civilians also struggled for control of the military through reforms that strengthened the civilian-led Ministry of Defense and through the appointment of officers committed to democratic rule. The civilian leadership decided, since the beginning of the transition, to not accept a policy of forgive and forget, and a number of convictions that explored loopholes in the current legislation have been taking place.

The military in Brazil planned its transition out of government and worked to secure privileges and immunity from prosecution. The amnesty law passed by the authoritarian government in 1979 is still on the books and applied by the judiciary virtually in its entirety – while in Chile it is subject to different interpretations (Schneider 2011). A comparison with its neighbors shows that in Brazil, civilian authorities engaged far less in exposing past deeds of the authoritarian regime (no official TC took place between 1985-2011), in reducing prerogatives of the military and in denying promotions to officers linked to violations and
internal security doctrines. As the ruling coalition shifted from the center-right to the center-left, however, post-transitional justice mechanisms started to gain traction and the institution of amnesty started to be questioned.

**Conclusion**

In this paper I set to solve the following puzzle: why the institutions created to protect the military from retribution were more successful in Brazil than in other third-wave democracies, like Argentina and Chile? Three hypotheses were identified: the balance of power during the transition to democracy (Stepan 1988, Hagopian 1990, Karl 1990, Huntington 1991), leadership preference (Pion-Berlin 1994), and judicial independence and the diffusion of judicial practices (Collins 2010, Skaar 2011, Sikkink 2011). All of them proved to be unsatisfactory. While the balance of power matters because of the different constraints it imposed on civilians at the time of the transition, it does not explain subsequent developments, as even highly constrained transitions, such as Chile, managed to hold criminally accountable senior military officers. Contrary to what Karl (1990) suggested, democracies born out of pacted transitions are not necessarily tainted with birth defects. The leadership preference hypothesis errs on the other side by ignoring the constraints faced by leaders who wanted to come to terms with the authoritarian past. Even democratizers who could not engage in trials, such as Chile’s Patricio Aylwin, advanced measures of civilian control that later were instrumental in furthering post-transitional justice mechanisms. Last, the judicial independence hypothesis is unable to explain the lack of trials in a case of reinstated democracy like Brazil. In fact, contemporary works either neglected the Brazilian case (as Collins 2010 and Skaar 2011) or classified it as an outlier (Sikkink 2011).

Next, I presented a framework to account for the variation of institutional shield found in the transition and post-transition phases, putting it in terms of a credible commitment problem. For institutions to be credible, they have to be self-enforcing, otherwise one of the parts will have an incentive to defect (North and Weingast 1989). A strong military that initiates regime change will be better able to negotiate the terms of the transfer of power by devising an institutional shield to protect from retaliation. A weak military that transfers power to civilians will be less able to keep prerogatives and, therefore, will be more exposed to transitional justice mechanisms. However, depending on the extent of retaliation, the military can close ranks, rebel and force civilians to accept a bargain.

If democratizers succeed in advancing measures of civilian control, expose past atrocities committed by the dictatorship and gather a political base to the opposite ideological spectrum of the past regime, then the balance of power shifts towards the civilian power. As
it swings in one direction, the incentive for civilians to keep their term in the bargain decreases, allowing them to renege and engage in transitional justice mechanisms, such as trials.

The theory was illustrated with the cases of Argentina, Brazil and Chile. I argued that shifts in the balance of power between civilians and the military explain changes in the institutions that protect the terms of the transition. In sum, there is compelling evidence that the timing and kind of post-transitional justice policy adopted, such as the occurrence of trials, can be explained by the credible commitment framework and by the power struggle between civilians and the military.

In this respect, I follow Hunter (1997a; 2001), who argues that changes in civil-military relations are possible due to the interaction of rational actors in strategic ways. When the interest of politicians and the military collide, such as in the allocation of resources, politicians will have more incentive to fund projects that can bring votes, which may not include buying tanks and pleasing generals. This seems to be the case particularly in Chile, where the military created a strong shield that protected their immunity, resources, and also policy preferences achieved though the placement of loyalists all over the administration and the existence of appointed senators. However, for this strategy to be ultimately self-sustained, it required the continued identification of right-wing politicians with the preferences of the military leaders. Chile’s electoral rules guaranteed to the right-wing a representation strong enough to serve as a veto power, but the presidency was still reserved for the side who obtained the majority of votes. When the right-wing perceived that it was not in their best interest to act only as the veto power of the military, they defected and reforms proceeded.

In light of this, the claim made by Acemoglu, Johnson and Robinson (2005) that Pinochet accepted the transition to democracy because he would be immune from prosecution as senator, and that, “It was only when he left the country that he was vulnerable” (Acemoglu, Johnson and Robinson, 2005, p. 431) seems naïve. When Pinochet returned to Chile, his immunity was stripped by the Supreme Court following a long and gradual process of erosion of prerogatives and also political support. While ex-ante the institutional constraints he imposed on the new government seemed to perfectly tie the hands of the civilians, ex-post it is clear that the institutions he created to shield himself and the military in general – designated senators, a loyalist Supreme Court, the armed forces as guarantor of institutional order – bought him time, but they were all endogenously changed through a combination of victories of the center-left, distancing of the right-wing parties, and gradual changes within the army itself, including the ascension of less politicized officers. Finally, while Pinochet was the commander-in-chief, he successfully used show of force to
threaten accountability efforts, but once he stepped down from the armed forces he lost a significant leverage of power.

In post-authoritarian Argentina the military was never popular and the fallback in transitional justice between 1991 and 2002 can be interpreted as a strategic maneuver. During these years, the Menem and de la Rúa administration limited the use of the military in internal security, restructured the armed forces and reformed the intelligence system. This paved the way, during Nestor Kirchner’s administration, for annulment in 2003 of the amnesty granted to the military in order to quell rebellions, which was confirmed in 2005 by the Supreme Court.

Brazil, however, has been mostly the “dog that didn’t bark” in terms of transitional justice – and recent works in this field failed to analyze the reasons why no officer has been prosecuted in this country and why it took so long to approve a TC there (Collins 2010, Skaar 2011, Sikkink 2011). The explanation presented here lies in the fact that civilians pursued with less vigor measures that advance civilian control of the military and reduce prerogatives, largely explained by the fact that right-wing parties were more successful in winning the popular vote and make ruling coalitions. In this setting, the reparations program that started in 2001 and paid over US $1.5 billion for individuals who claimed to be victims of the dictatorship has been successful in pleasing one side without directly confronting the military. The TC was the first direct type of confrontation and came after the government yielded to military pressure against showing support for criminal prosecution. Finally, taking the Chilean and Argentine experience into consideration to speculate about the prospects of Brazil’s TC, if the present commission presents strong findings, political and judicial pressure can accumulate towards seeking accountability, going beyond changing textbooks and providing payments to victims.

If political careers can be advanced by sitting on defense committees in the Congress, removing tutelary powers and prerogatives and by exposing past deeds, then the prospects of transitional justice in Brazil would increase. However, the longer it takes, the fewer the officers will be alive who could stand trials for accusations of forced disappearance and torture. And if that is so, from the point of view of the military who designed the transition to democracy, Brazil would stand as the most successful regime change in the Southern Cone. Or, conversely, the least successful, when analyzed from the victims’ angle.
References


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