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Judging Transitional Justice: An Evaluation of Truth Revelation Procedures

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Abstract

We discuss the relationship between principles of rule of law, such as due process, and transitional justice, especially truth revelation procedures. We argue that the traditional understanding of rule of law is ill-suited for evaluating lustration laws and truth commissions, and that the levels of false conviction and false acquittal are more adequate normative criteria. We distinguish between two types of truth revelation procedures: ITRs induce perpetrators and secret agents of the authoritarian regime to reveal the truth about their past while ETRs rely exclusively on preserved evidence and victims' testimonies, without requiring any activity from the defendant. We demonstrate with a decision-making model that while both procedures are sensitive to the problem of falsified evidence, an ITR performs better with respect to revealing the identity of collaborators whose files were destroyed. Finally, we explain the connection between ITRs and endogenous transitional justice making an argument for the latter over exogenous modes of coming to terms with the past.

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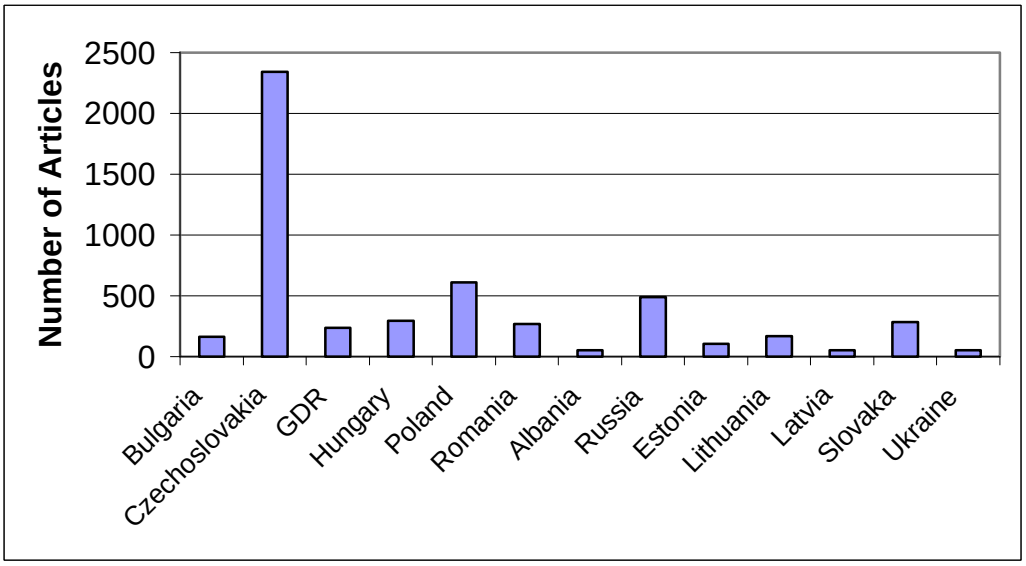
Introduction: Lustration and Related Institutions

Beginning with 1997, all candidates for political office in Poland must deny or declare that they had worked for or consciously collaborated with the communist secret police. Acknowledgments of collaboration are published. However, ex-collaborators are not banned from holding any positions. The voters themselves or, for positions allocated by nomination, an appropriate agency decide whether the ex-collaborator can hold the office in question despite her shameful past. Statements denying collaboration are handed over to a special prosecutor's office which verifies them using files from the secret police archives.[1] The prosecutor compares the declaration with evidence from the archives. When he finds an understatement of collaboration, the politician is accused of a "lustration lie" and tried before a special division of the Appellate Court (Dziennik Ustaw 2002). The law stipulating this requirement, *lustration*, screens politicians for their collaboration with the past authoritarian regime and limits their access to public office. It has drawn a great deal of media attention in post-communist Europe over the last 15 years (see Table 1).

It is important to distinguish lustration from decommunization. Decommunization denotes purging the state's administration and bureaucracy of high ranking communist officials. Lustration and decommunization may be proposed in one bill.[2] An important argument in support of lustration cannot be extended to decommunization, that is, the blackmail vulnerability of former secret agents. The identity of a high ranking communist is common knowledge. She cannot be blackmailed by the threat of revealing compromising information about her past. That is not the case with secret police agents. A former undercover agent is very vulnerable to corruption and may be pressed to breach norms of public service by somebody with an access to her files.

Lustration procedures rely on the examination of the ancién regime's secret police files to verify how closely politicians collaborated with the regime, either as its agents or secret informers. It is often argued that victims, those who were spied on, should have access to their own files after the regime had fallen. However, legislation allowing for the opening of secret police files to the public may interfere with lustration if, as in Poland, it relies on a subtle mechanism of withholding information from potential ex-informers. Therefore, laws regulating how victims can access files must be coordinated with the lustration process.[3] Both lustration and laws regulating the opening of secret police files may inflict serious moral punishment. When compromising information about a collaborator's spying activity is circulated, his professional career is undermined. Another feature of lustration laws is that they do not aim at imposing criminal punishment on former collaborators. Lustration prevents them from holding political and other public or quasi-public positions, such as those of academic teachers, doctors, and attorneys or from holding such offices without making the fact of collaboration public knowledge.

Table 1: Lustration in the Media 1989- 2003



Source: Lexis –Nexis academic universe.

Note: The histogram shows the frequency with which "lustration" or "screening" appeared in the title or lead paragraphs of major daily newspapers in 13 Eastern and Central European countries between 1989 and 2003. The data were obtained by applying the following search criteria in the Lexis Nexis World News search engine: Source of publication: European News Sources; Terms: country AND (screening OR lustration); Date range: 1989-2003.

Lustration may, but need not be preceded by a *truth commission*, a temporary body of inquiry investigating patterns of abuses (Hayner 2001). Truth commissions prepare reports on the criminal activity of the ancién regime. Usually, they conduct public hearings of victims and sometimes name perpetrators or prepare tentative lists of collaborators. Some truth commissions have additional powers such as subpoena or search and seizure rights. The best known truth commission is the South African TRC. Another one, in Peru, released its widely publicized report in 2003. Truth commissions may also be adopted when lustration procedures are not feasible because of lack of documents which could be used as evidence. Lustration is possible only if an authoritarian regime relied on a sizable secret police apparatus which kept archives documenting its activity. Files from such archives form the evidence in lustration procedures.

Lustration, truth commissions, and laws regulating the opening of secret files jointly form what we call *truth revelation procedures*, a part of institutions of *transitional justice* (TJ). Such procedures often closely resemble traditional court proceedings and face similar problems (Posner and Vermuele 2004). One can easily overlook the fact that they are not actual judiciary institutions.

Truth revelation procedures present examples of TJ in the aftermath of transition to democracy as opposed to TJ following wars of independence or the restoration of monarchy. They are also an important part of what Elster (2004) has termed "endogenous transitional justice." Its key features are that it is implemented: (1) by the country in transition itself, not by any foreign power or court; (2) by the legislative or executive branches of the government rather

than NGOs or individuals; (3) shortly after transition rather than decades later; and (4) that it targets the violations of rights that occurred before or during the transition, not after it is over (Elster 1998). On the other hand, exogenous TJ denotes instances where the wrongs committed by the authoritarian regime are prosecuted or their prosecution significantly influenced by international actors. Among the most prominent examples of exogenous TJ are the Nuremberg trials after WW2 and the recent trial of Slobodan Milosevic (see Bass (2000) for an illuminating account of the latter).

An important feature of TJ procedures is that they are legal institutions. What this entails becomes apparent after contrasting it with "private justice." For instance, one of the goals of lustration is to prevent vindictiveness and excess in settling accounts with collaborators of the former political police via extra-legal measures.[4] Sometimes, the demand for punishing former collaborators is so strong that placing them in jail protects them from popular revenge. This happened in 1831 Poland during the anti-Russian uprising when Poles who were former Russian secret agents were incarcerated to protect them from Warsaw crowds frustrated over the insurgents' losses to the Tsar's army. In the end, the loyalists were dragged out of their cells and lynched anyway, proving the precautions of the early lustration commission insufficient. The institutions of TJ preempt and channel the demand for revenge on political opponents. TJ while responding to the urgent need for prosecuting authoritarian wrongdoers, tries to satisfy certain norms of procedural justice, such as impartiality.[5] For this reason the infamous summary trial and execution of Nicolae Ceausescu and his wife has little in common with TJ.

We intend to examine the norms that the rule of law tradition provides for evaluating lustration and truth commissions (Schwartz 1995; Kritz 1995). We present reasons against judging those procedures by identical standards as courts in established democracies. In our analysis, we emphasize the positive aspects of TJ and practical constraints on its implementation. Obviously, we are not attacking or dismissing the idea of normative analysis of TJ *per se*. We consider the ultimate objective of truth revelation procedures to be the reconciliation between members of the society who held opposing views of the past regime. We believe that purely positive TJ research would be deficient without studying its normative implications. However, evaluating the institutions of TJ is an entirely new normative endeavor. As such it calls for a new set of criteria developed specifically for procedures that deal retroactively with authoritarian crimes and misdemeanors.

We begin with a brief discussion of the source of contention between TJ and the rule of law. To illustrate the point that the normative literature has misdirected its efforts in focusing on the rule of law we describe how outgoing autocrats try to defend themselves against TJ by adhering to principles of the rule of law. In Section 3, we make a distinction between two kinds of truth revelation procedures: ITRs and ETRs. Next, we examine how these two kinds of procedures relatively comply with the main component of the rule of law: *due process*. Next, we propose two alternative criteria for evaluating ITRs and ETRs: the avoidance of false conviction and false acquittal. Finally, we make an argument in favor of endogenous TJ, of which both ITRs and ETRs are chief examples.

Is Transitional Justice Retroactive?

Can new laws be applied to past atrocities? Legal and political theorists have long struggled to reconcile TJ with the principles of rule of law (Teitel 2000 pp. 15-18, 21; McAdams 1997; Welsh 1996; Huyse 1995; Schwartz 2000). Incompatibility with the principle of retroactivity

can be considered the most hotly debated normative problem of TJ. By no coincidence the initial name for TJ was "retroactive justice" (Tucker 1999). We discuss arguments that may be viewed in favor and against placing such a heavily loaded label on TJ.

Friedrich Hayek who presents the rule of law as an embodiment of three principles: generality, predictability, and equality before the law, explicitly states that retroactive law stands in contradiction to all three principles (Hayek 1978, ch. 14). Prosecuting the political opposition by authoritarian regimes may well have been consistent with that regime's legislation which recommended using all available means to silence the "counter-revolution." This was certainly true in the Stalinist periods in virtually all Eastern and Central European countries in the Soviet Bloc. Excluding laws baring any characteristics of retroactivity would prohibit rectifying those wrongs.

However, a more careful look reveals that the problem is complex. Even the staunchest supporter of the retroactivity principle could hardly endorse the following interpretation: "If a band of crooks take power, claim that the "old law" is invalid, and rule for a sufficiently long period of time on their own terms which they call "law" – then once they are wiped away, no legal action can be taken against them." Communists were neither crooks nor legitimate rulers. One could place the communist rule in various periods at different points between the above described extreme and the case of a fully legitimate legal system. Hayek and other authors who have theorized on the rule of law also refer to its meta-legal aspect (Teitel 1999, pp. 13-151). The idea of the rule of law has a different status from ordinary legislation. It goes "beyond mere legality" by implying what law *ought* to be. Hayek states that "the principle [of rule of law] would not be satisfied if the law said that whoever disobeys the orders of some official will be punished in some specified manner" (Hayek 1978, 206-207). This was exactly a frequent case with the legislation of communist regimes which, especially in the Stalinist period, was vague and effectively granted considerable discretion to the secret police. For instance, in Poland SB, the communist Secret Police, kept a close watch over tens of thousands of *Solidarity* members. Whenever the regular police were called upon a crime scene, they were required to consult a database in order to verify whether any of the persons involved are under secret political police surveillance. If this turned out to be the case, a high ranking secret police officer would have exclusive authority over collecting evidence, which would then be used to blackmail the ex-solidarity member into cooperation with the SB (Jerzy Dziewulski, interview with author). A similar tactic had been employed by the StB, the Czechoslovak secret police, which was authorized to reduce or extend a political prisoner's sentence depending on his willingness to become a secret collaborator. Czechoslovak dissidents quote stories about former colleagues broken by the prospects of being released from prison early (Petka Sustrova and Petr Uhl, interviews with author).

But does the failure of the past regime to obey the fundamental principles of the rule of law entitle the succeeding democratic regime to rectify authoritarian abuses via retroactive means? One could object arguing that a new democracy should avoid sacrificing the rule of law to other values, such as retribution, even at the price of interpreting the rule of law in the way that is most favorable towards the past regime. We do not endorse such a point of view. Below, we review various arguments that can be used against such a broad application of retroactivity to TJ.

First, the retroactivity principle was implicitly formulated in an entirely different political context. The essence of this legal rule is to prevent incremental changes in law from interfering with the citizens' sense of safety and predictability in a stable political regime. (Hayek 1978;

Fuller 1962). It does not have equally strong appeal during a comprehensive regime change, especially if the past regime had committed numerous atrocities. Thus, we need to distinguish between "incremental" and other kinds of retroactivity.

Second, two main cases are possible in the context of transitional justice. A formerly legal act can be redefined as a criminal one on the basis of some parallel legal system making claims to legitimacy at the time of the act. Also, an act that was criminal according to the past legal system can be examined or re-examined even though its statute of limitation expired or if it was already reviewed by a court before the transition. In the two cases we will talk about *endogenous* or *exogenous* retroactivity, respectively.

The justification for exogenous retroactivity may come from within the ancién regime's legal system itself. It would run along the following line: administrative incompetence, a confusing division of responsibilities among agencies of legal enforcement of the authoritarian regime, or illegal activity of secret police and other services made the prosecution of crimes impossible at the time they were committed. It is thus the responsibility of the succeeding democratic court system to deal with the unsettled violation of laws of the ancién regime. The cases of exogenous retroactivity amount mostly to lifting the statutes of limitation for such criminal activities that, due to the lack of an independent judiciary, had not been prosecuted.[6] The lifting of statutes of limitation is justified by *infeasibility of justice* in the past. One can easily find numerous cases when the secret police or courts routinely violated the legal standards of its own authoritarian regime.[7] On other occasions, as in the case of trial of Father Popieluszko's murderers in 1985, the investigation took place but only low-rank foot-soldiers were successfully prosecuted while no high-rank perpetrators were found. Since the transitions in 1989, exogenous retroactive cases have been re-opened on the grounds of communist law that was in place when the crime was committed.[8]

In specific cases, numerous unexpected problems may arise. For instance, the criminal character of the offense might have been known to the offender but, over time, she has acquired an expectation that she will no longer be punished. If at a time t_0 the offender could expect that with some positive probability p she may be punished for her criminal activity, but at time t_1 this expectation–due to the lifted statutes of limitation–dropped to $p = 0$, does punishing her at time $t_2 > t_1$ violate the rule of law? The Hungarian Constitutional Court believed so, when it struck down a statute allowing for the resuming of prosecutions for crimes committed by the ancién regime. The court explicitly interpreted the rule of law as "predictability and foreseeability" (Solyom 2000).

Endogenous retroactivity, on the other hand, can be justified on the grounds of natural law, after demonstrating the lack of legitimacy of the past regime. While we do not intend to dwell on the legitimacy debate, a summary of important facts is in place. Communism was installed in Eastern Europe by the Soviet Union thanks to the Red Army's residence in the region between 1944 and 1945. In 1948 any remaining opposition was purged. Except for Czechoslovakia, where at least in 1946 the communists won a plurality in democratic elections, the election results were falsified (Brzezinski 1989; Gross 1989). Their rule was never legitimized later by free elections. However, internal resistance to communist takeovers were not the sole form of opposition to authoritarian rule. In many Central European countries it took the institutional form of governments in exile. Theses bodies honored the pre-WW2 laws and devised careful procedures for turning over power within government branches, as holding mass elections was not a feasible option. From their perspective the period of communist rule between 1945 and 1989 was illegal. Following free elections in 1990 and 1991, the governments in exile

surrendered their legal authority in a symbolic form to newly elected presidents and assemblies in East and Central Europe.[9]

Moreover, the communist political system underwent periodic unconstitutional transitions of executive power followed by extensive purges in the remaining branches of government as well as in the military and administration. Blackmail, violent threats and outright homicide (or rather *policide*) were not uncommon methods of replacing an inconvenient first secretary or other top official.[10] Usually, officially released statements referred to poor health as the stated cause of abdication. In a few spectacular cases, such as the Nagy's removal by Kadar in 1956 in Hungary or Dubcek's removal by Husak in 1968 in Czechoslovakia, the illegality of the change according to the then-valid communist law was common knowledge. The new governments and, subsequently, new parliaments, judges, and laws, were illegal even according to the regime's own law.

Internal legal inconsistencies of communist systems were exposed by the ratification of various international treaties, such as the Helsinki Accords concluding the Conference on Security and Cooperation in Europe in 1976. The signatories of the Accords included, along with Western European states, Bulgaria, Czechoslovakia, GDR, Hungary, Poland, Romania, the Soviet Union, and Yugoslavia. Chapter 7 of the Accords was devoted exclusively to the topic of respecting human rights. Over the next 13 years these commitments were repeatedly violated by communist signatories. The Accords contained a commitment to allowing signatories' citizens the right to exercise conscientious objection when drafted for military service. However, the Polish military oath demanded of all conscripts that they swear to fight the enemies of the Soviet Union. Those refusing to take arms were prosecuted. Similarly, the prosecution of underground publishers violated the signatories' commitment to respect freedom of the press.[11] The re-occurring violations sparked opposition in the form of *Helsinki Committees*, which spread throughout the Soviet Block beginning with the Ukrainian Helsinki Union in 1981. Their activity culminated with the issuing of the Helsinki Memorandum in 1986, where "in addition to the usual progressive politicians, academics, and activists form the West (who risked nothing, of course, and were for the most part uninvolved in the process of dialogue anyway), there were over two hundred signatures from Poland, Hungary, Czechoslovakia, East Germany, and Yugoslavia" (Kenney 2003, p. 104).

The only serious claim to legality that the communist regimes could make, in addition to having the silent readiness of the Red Army's tanks, was the wide recognition of their regimes around the world, especially by the United States. However, one can hardly argue that the normative soundness of retroactive legislation in, say, Albania should depend on the Uncle Sam's taste for *realpolitik*.

Bold legislative acts of declaring the communist period illegal were considered in virtually all formerly communist countries after the fall of old regimes.[12] If they were abandoned, it was usually in order to uphold former political commitments or due to the lack of resources necessary to handle the likely legal confusion which would result.[13] The pre-WW2 laws were inadequate to resolve disputes arising in the 1990's. All international treaties and other commitments would need to be renewed. Also, many Eastern European countries were severely affected by the frivolous re-mapping of their borders by Stalin after WW2, something Churchill and Roosevelt cynically pretended not to notice. The gainers feared that the losers could revive their legal claims to lost territories, which could balkanize Eastern Europe. Poles and Czechs feared Germans; Slovaks and Romanians feared Hungarians; Ukrainians, Byelorussians, and Lithuanians feared Poles, etc. (Bartoszewski 2003; Naczelna Dyrekcja Archiwow Panstwowych

1986-2001). Both political pragmatism and the paucity of resources contributed to decisions that deprived of a more sound legal foundation.

According to the next argument supporting TJ, adhering to the conservative interpretation of retroactivity benefits unquestionable wrongdoers. Effectively, it promotes a dramatically impotent version of procedural justice and prevents substantive justice to be done. Political actors involved in transition were well aware of this fact. The "rule of law" argument and the retroactivity principle were enthusiastically endorsed by successors of the communist regime while they were negotiating the transfer of power and shortly afterwards, as a shield from TJ. Communists and their successors supported as strong a position of the judiciary in the new system as possible. For example, during the final stage of the Roundtable negotiations in Czechoslovakia, when Vaclav Havel suggested that the new federal government ought to have some authority over the justice system, the communist prime minister Calfa objected "that the judicial structures should be subject to the legislature only and that the judiciary should check the executive." Calfa was counting on the fact that replacing the communist judiciary elites takes longer than the turnover of MPs.[14] Valdemar Komarek, an independent participant of the negotiations, responded that debating checks and balances was entirely superfluous when the communist nomenclature dominated virtually all social and political institutions (Calda 1998). One can similarly interpret the outgoing Hungarian communists' insistence on establishing a constitutional court and the Bulgarian communists' desire to see a constitution in place before handing over power. They tried to construct institutions that would save them from retroactive justice after the transition (Bozoki 2002; Schwartz 2000).[15]

Finally, we believe that all arguments based on retroactivity must take into account the type and severity of punishment. In nine out of 18 cases of truth revelation procedures described in Table 2–labeled as "mild"–the sanction is just releasing compromising information to the public. One can argue that the softer the punishment, the weaker the argument against retroactivity. But a "retroactive" denunciation of a politician's past political activity as a secret police informer may be interpreted as a very basic right of a voter (Solyom 2000)! When applied to elected politicians, as is the case with many lustration laws, putting them in the spotlight amounts merely to what the free media have been doing for many years – or to what candidates in elections have been doing to themselves during campaigns. There is little doubt that a proper court procedure can handle sensitive information about a candidate's past better than the head of the election campaign of her opponent.

Truth Revelation Procedures and Due Process

Truth-revelation procedures are often criticized for their violation of various standards of the rule of law. Many policy oriented human rights organizations frequently issue such criticisms. The *gacaca* ("grass-roots") court procedure recently adopted in Rwanda offers a significant sentence reduction to those responsible for the 1994 genocide who testify to their crimes.[16] In one of its press releases Amnesty International commented on the Rwandese procedure by saying that the "extrajudicial nature of *gacaca* and the inadequate preparation for its start, coupled with the present government's intolerance of dissent and unwillingness to address its own poor human rights record, risk subverting the new system." It urged both the Rwandese government and the international community to "take steps to ensure that *gacaca* complies with minimum international standards of fair trial" (Amnesty International 2002). The international organization

wanted the Rwandese authorities to abandon the self revelation mechanism "because it violated due process."

Before we start analyzing the relation between truth revelation procedures and due process, we need first to define a few concepts. The normative literature on TJ makes a clear distinction between Truth Commissions and Lustration Laws, with the first type predominant in Latin America and Africa, and the second one present in Post-Communist Europe (Hayner 2001; Rotberg 2002; Kritz 1995). As one of us has argued in previous work, another kind of distinction is useful as well (Nalepa 2003). An ITR, Incentive-based Truth Revelation procedure, is legislation that provides ex-collaborators with incentives for revealing themselves, while an ETR, Evidence-based Truth Revelation procedure, does not provide such incentives and operates in a fashion similar to ordinary court system. Examples of ITRs include both Eastern-European lustration laws and various African and Latin American truth commissions (see Table 2). ITRs operate in the reverse order of traditional court proceedings. They create incentives for perpetrators to step forward and testify against themselves. The reward offered to the perpetrator or ex-collaborator is usually immunity from criminal charges or serious sentence reduction. Using such procedures allows for the extraction of statements from those wrongdoers for whom evidence does not even exist.[17] Such effectiveness is impossible in the case of ETRs, which resemble traditional prosecution methods by relying on extricating evidence of collaboration from archival resources or from victims' testimonies. When evidence is found, a report is issued or a politician is held accountable for his involvement as a secret informer. Examples of ETRs also include both lustration laws and truth commissions. Table 2 lists truth revelation institutions and their key characteristics.

ETRs are close cousins of traditional court proceedings while ITRs differ from them in many important respects. Our question is whether prosecution methods relying on incentive-based measures are less compatible with the principles of due process than more traditional methods based on extricating evidence of collaboration from archives.

Due process is a set of principles that date back to Magna Carta when the barons of Runnymede demanded from king John that "No free man shall be taken or imprisoned or desisted or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land." It has involved elements of natural law, as in Locke's political theory, and rules of criminal procedure. By the 17th century these principles had made their way to the American colonies in the Constitution of Virginia of June 1776, the direct predecessor of the Declaration of Independence. Written also by Thomas Jefferson, the Virginia Constitution's second half was devoted exclusively to the rights of an accused in a criminal prosecution such as the right to notice, specificity, confrontation, witnesses, speedy trial, no compulsory self-incrimination, impartial jury and that "no man be deprived of his liberty except by the law of the land or the judgment of his peers" (Miller 1977). Rights originating in natural laws (Bill of Rights) and positive law (rules of criminal procedure) were combined again in the federal Constitution with the Fifth Amendment submitted by James Madison and the Fourteenth Amendment added after the Civil War. Since then they have been associated with preventing arbitrariness in judiciary decisions and guaranteeing the right to legal council. In Britain, due process of law has not received a wording in a bill of rights, but has been frequently associated with such ideas as fairness, impartiality and judicial independence, rationality, openness, certainty and universality (Marshall 1977). Due process has also received the attention of philosophers (Scanlon 1997; Rawls 1971, 1992). Scanlon distinguishes between procedural and substantial principles of due process. The first concept denotes respecting the

Table 2: Truth Revelation Procedures Created in the Aftermath of the Third Wave of Democratization.

Country	Main Targets	Activity, role, or crime	Period Date	Source of Evidence	Type of Institution
Bulgaria [18]	- academics - university administration - bank managers	- m of comm party staff - teaching Marxism-Leninism	1945-1990 12/1992	- register of s service info - Bulgarian comm party archives	harsh ETR LL
Czech Republic [19]	- all non-elected polit - civil servants	- s info or police officer - comm party official - m of the Peoples Militia - m of '68 verification committees	1945-1990 10/1991	- register of collaborators	harsh ETR LL
Estonia [20]	- all citizens	- officer or info of the KGB or Nazi Germany intelligence agencies	1945- 1991 2/1995	- declarations of lustrants - KGB files	harsh ITR LL
Hungary [21]	-cand in national elections	- info for the 3/3 S Police	1945- 1990 12/1996 – 2001	- files from the former 3/3 dept of the ministry of interior	mild ETR LL
Lithuania [22]	- deputies to parl - ministerial departments - empl of state service - city/district administrators and deputies	- KGB officer or info	1940-1991 1991 – 2001	- declarations of lustrants - KGB files	harsh ITR LL
Albania [23]	- cand in parl elections - high gov officials - supreme court justices	- senior party or gov official in the former comm regime - collaborator with s police	1945-1990 9/1995 – 4/1996	- files of the Sigurimi s police	Harsh ETR LL
East Germany [24]	- m of federal and state gov, parl - empl of public service, incl. municipal level, internat. org. of which West Germany was a m, churches - public notaries, attorneys - all managerial positions	- full time STASI empl or info	1951 -1990 1991 –	- files and documents of Stasi, incl. microfiche, film, and electronic records	Harsh ETR LL
Poland [25]	- cand for parl and other national level elected posts - president - justices and lawyers	- s agents - s police, ordinary and military intelligence or counterintelligence	1946-1989 6/1998 (amended from 1997)	- s police files and declarations of all lustrants	mild ITR LL
Bolivia [26]	- military units combating political opponents	- disappearances of 155 persons	1967-1982 1982 – 1984	- v test	mild ETR TC
Argentina [27]	- military officers	- investig. of military against political opponents - disappearances of 8,960 people	1976-1983 1983 – 1984	- several thousand test and 50,000 pages of NGOs' documents	mild ETR TC
Uganda [28]	- military gov of Obote	- arbitrary arrest, detention, torture, and killings by gov security forces	1962-1986 5/1986 –	- test of v and their families	mild ETR TC

Uruguay [29]	- security forces	- disappearance during military rule	1972-1984 4/1985	- 164 v test	mild ETR TC
Chile [30]	- armed forces and police during the Junta gov	- disappearance, torture resulting in death, executions, killings by Aprivate citizens for political reasons" of the leftist opposition	9/1973 - 3/1990 1990 (9 months)	- test of family m of 3400 v - available death certificates, autopsy reports for v - 160 test of armed forces, police	mild ETR TC
Chad [31]	- political police DDS - Police Security Branch (RG) - National Union Independence and Revolution (UNIR) - Presidential Investig. Service (SIP)	- illegal imprisonments, detentions, assassinations, disappearances, tortures, acts of barbarity	1980-1990 1991 – 1992 (8 months)	- interviews with high ranking DDS and Habre officials - test of v relatives - test of former prisoners	mild ETR TC
El Salvador [32]	- gov officials, judges inv. in civil war - Frente Farabundo Marti para Liberacion Nacional (FMLN)	- connection with death squads of the FMLN or with political police and military of gov side	1980 – 1991 1992 (6 months)	- test of all persons willing to testify, including perpetrators	Mild ITR TC
Peru [33]	- Comm Party of Peru-Shining Path (PCP-SL) - Tupac Amaru Revol. Mov. (MRTA) - state police forces, armed forces, and self defense committees	- participation in political struggle, which resulted in the death of 69,280 persons	1980 -2000 2001-2003	- public hearing of v - documentation from state archives	harsh ETR TC
South Africa [34]	- apartheid military and police forces, armed ANC combatants	- commission of a crime out of a political motive	3/1960 – 3/1993 12/1995 – 2003	- test of v - test of perpetrators	Harsh ITR TC
Rwanda [35]	- foot-soldiers (mostly Hutu) resp. for the "100 day" genocide	- categories 2, 3, and 4 of crimes covered by the genocide laws	1994 (100 days) 2002-	- test of perpetrators offered before gacaca courts	harsh ITR special court

Notes: Column "Main targets" describes the main social groups or organizations whose members' past is supposed to be revealed. Column "Activity, role, or crime" describes the type of past activity, social role, or crime under examination. Column "Period/Date" describes the historic period under investigation, the date of implementing the institution and whether its operation has been restricted with a sunset provision. "Source of evidence" lists archives, depositories, registers, etc., that were the primary source of evidence. "Type of institution" provides information whether an institution was ITR or ETR, and whether it was a Lustration Law (LL) or Truth Commission (TC). Classification of procedures into "mild" or "harsh" is based on type of punishment and the ways the evidence was used. In "harsh" procedures targets had to demonstrate they had not performed targeted activity and faced sanctions going beyond having compromising information about their past made public. In "mild" procedures, the sanction amounts to releasing compromising information about the target to the public.
s – secret; v – victim; comm – communist; m – member or participant; cand – candidate; parl – parliament; gov – government; empl – employee; polit – politician; info –informer; test - testimony

outcome of arbitration after a fair procedure was followed irrespective of its outcome. On the other hand, substantial principles refer to the right to appeal or judicial review by third parties. Scanlon examines the extent to which the state may exercise substantial due process on voluntary organizations and asks questions such as: Was the University of Michigan entitled to give Afro-Americans preferential treatment in admitting them to its Law School? (Scanlon 1977) Questions resembling Scanlon's theoretical discussion have been raised in the TJ context as scholars investigated to what extent can international law standards interfere with TJ policies of independent states (Bass 2000). We will focus on the components of due process that are most relevant in the context of truth revelation:[36]

1. Adversarial public hearings;
2. Right to choose one's lawyer (adversarial rights);
3. Right to appeal;
4. No retroactive legislation or retroactive application of the law;
5. Respect for statute of limitations;
6. Determination of individual guilt;
7. Presumption of innocence (the burden of proof on the prosecution);
8. Right to a speedy hearing (justice not delayed);
9. Right to due deliberation (justice not expedited).

We will discuss in detail the applicability of these principles to truth revelation procedures. First, it is obvious that publicity is a mixed blessing both for ITRs and ETRs. The sole punishment of an ex-collaborator or authoritarian perpetrator often amounts to making his shameful past public knowledge. Defendants would typically prefer their identity be kept secret.

The adversarial rights requirement does not work against a defendant’s interest. Except for trials that are held in court settings, defense lawyers are usually absent from the proceedings. Both in ETRs and ITRs lawyers appear at the appellation level of the procedure.

The right to appeal is satisfied. For instance, in Poland lustration courts are created within the structure of appellate courts. However, in an ITR the lustrant may appeal only when evidence of collaboration is presented following a denial. This does not necessarily mean that ITRs fare unambiguously worse than ETRs with respect to this property. Neither the Czech nor the Hungarian ETRs provide the lustrant with wider appeal options. The infamous Czech case of Jan Kavan is a telling example of how long the questioning of a lustration decision may take under an ETR (Kavan 2002). In Hungary, the lustrant informed that compromising evidence against him exists may appeal, but only after the damaging evidence has already been made public.

Collaboration with the authoritarian regime was not a crime at the time it occurred. Just the opposite: It was encouraged. For this reason the non-retroactivity principle of due process may be in conflict with both types of truth revelation. ITR methods make a better case, since as drafters of the legislation in Poland have argued, and even adjusted the legislation accordingly, the penalty is not for collaboration, but for the act of “public lying.”

The statute of limitation property is not relevant for truth revelation procedures. Since collaboration was not a crime, there could not be a statute of limitation attached to it. ETR lustration laws in the Czech Republic, East Germany and Bulgaria have built in certain sunset provisions with respect to length of punishment. The ban on holding public office is scheduled to expire a few years after implementation.

The determination of individual guilt is built into every ITR institution. The procedure begins with a statement from an individual. A claim to innocence is further verified by a lustration agency or truth commission, again on an individual basis. ETRs, on the other hand,

may frequently overlook the need to determine individual responsibility. A telling example is the lustration procedure adopted in the Czech Republic, where the problem of destroyed evidence was solved by using the well preserved Czechoslovak secret police registers as the sole source of evidence. The StB register (*seznam*) contained citizen contacts, agents, but also persons who had been contacted but refused to collaborate or persons who had been suspected of underground opposition activity. The use of the *seznam* as a source of evidence was criticized for neglecting the obligation to prove individual guilt, both through memoranda issued by international organizations and on the floor of the Czech legislature when it was implemented.[37]

The most problematic principle of due process for ITRs is the presumption of guilt until proven otherwise. In an ITR game, the lustrant must declare his guilt or innocence before the evidence is examined. The "guilty" declaration ends the process while "innocent" starts the verification procedure. Even though a lustrant is not required to prove his innocence, one may argue that the sheer request of filing declarations out places all public persons under suspicion. We do not consider this a strong point against ITRs since everybody files a declaration and the lustration court is still required to prove the defendant's guilt. If a proof cannot be presented, it is declared that there is no evidence to prove the collaboration. Nevertheless, ETRs fare marginally better in adhering to due process as far as the presumption of guilt is considered.

Finally, the compliance with the next two properties is not the part of definition of a truth revelation procedure. One may imagine that an ETR or ITR either violates or complies with them. Supporters of convicting authoritarian wrongdoers could argue that long deliberation violates due process by delaying the trial, while supporters of acquittal might argue the opposite– a swift trial violates due process.[38] The length of a trial undoubtedly depends on the amount of evidence that needs to be found, consulted, and processed. The more time has lapsed between the crime and the trial, the more problematic are these criteria.

Table 3 presents the summary comparison of ITRs and ETRs. The evaluation of truth revelation procedures just in terms of their adherence to due process does not allow to judge either in favor of ETRs or ITRs. It seems that due process is not an adequate criterion for such an evaluation. This is hardly surprising, as the concept of due process had developed in a completely different political environment. It embodied an increasing emancipation of subjects in a transition from feudal monarchy, in contrast to democratization of former authoritarian states which violated human rights secretly and relied for its successful operation on extensive networks of secret police agents. Since the suitability of due process principles for evaluating truth revelation procedures is unclear, we turn now to examining two new criteria that we offer.

Table 3: ITR and ETR procedures evaluated by principles of due process

Principle	**Winner**
Adversarial public hearings	Does not apply
Right to choose one's lawyer	Tie
Right to appeal	Tie
Non-retroactivity (in legislation or application of the law)	ITR
Respect for statute of limitations	Does not apply
Determination of individual guilt	ITR
Presumption of innocence	ETR
Right to a speedy hearing (justice not delayed)	Does not apply
Right to due deliberation (justice not expedited)	Does not apply

Avoiding False Acquittal, Keeping False Conviction Low

The criteria we are going to discuss are associated with two threats to lustration laws and truth commissions. First, the documentation of abuses committed in the past that is at the disposal of lustration agencies and truth commissions may be *incomplete*; second, some of it may constitute *false evidence*. Prosecuting perpetrators with incomplete evidence is unfair because it reaches only those whose collaboration is documented, leaving remaining collaborators intact. A related error of *false acquittal* can be associated with *type II error* in the theory of hypotheses testing in statistics, that is, the failure to accept a true hypothesis. On the other hand, when fabricated evidence is used, innocent persons may be accused of human rights violations. This kind of injustice, failure to protect the innocent or *false conviction*, relates to *type I error* in the theory of testing hypotheses in statistics, i.e., accepting a false hypothesis. Table 4 illustrates when both errors arise.

Table 4: Two Types of Errors in Truth Revelation Procedures

Outcome of truth revelation process	**The target is**	
	Innocent	**Guilty**
Do not name "collaborator"	correct	false acquittal error
Name "collaborator"	false conviction error	correct

The trade-off between reaching all the guilty and protecting the innocent closely resembles that from the theory of hypotheses as well. Changing the legal threshold for placing charges of collaboration affects both the guilty and the innocent. If only minimal evidence is sufficient to place charges, former dissidents might suffer. Their files may include occasional fabricated documents and they can become the postmortem victims of the authoritarian regime with whom they were fighting. If the threshold increases, the innocents will be less likely to suffer but so will the perpetrators whose evidence has been misplaced or partially destroyed.

An immediate question is: if there is a trade-off between the two principles, what are the relative weights we should give to them? While the operationalization of the answer must be left to practitioners, this issue can be developed in a normative discussion utilizing the arguments from criminal justice. Consider the following reasoning: "Intrinsic ... to the criminal law... is the escape of some violators from effective enforcement. The escape of some violators is unavoidable and therefore is not unjust. The proper objective of an enforcement program is not the unrealistic one of penalizing all violators, but the practical one of penalizing enough violators to induce a satisfactory degree of compliance. Therefore, the prime requirement of justice is not to penalize all violators, but to avoid penalizing the innocent... Justice is done as long as only the guilty are penalized." (Davis 1996, pp. 81-82).

The argument presented above can be summarized within our terminology with two points. First, false acquittal errors are unavoidable in any criminal justice system. The normative assumption is that the objective of justice is to keep the compliance with law at a "satisfactory" level. This objective of "general deterrence" is maintained by a successful *deterrence* of potential violators. The argument holds that as long as a sufficiently many violators are punished

randomly rather than in a discretionary way, justice is not threatened. Second, false conviction errors are a more serious threat to the operation of a just criminal system. Since satisfactory compliance can be achieved without punishing all violators, it is unjustified to pay the cost of tracking them down, this cost being that of accusing some innocent. The threshold for conviction must be then set high.

This line of reasoning must be modified before we can apply it to the TJ context. First, harsh punishment instead of being a deterrent may create the opposite incentive, as the expectation of harsh TJ may actually prevent dictators holding power from stepping down and making transition to democracy possible. If a dictator expects to be prosecuted for past human rights violations, he has a strong incentive to hold on to his post, even if at the cost of vast atrocities. A perverse scenario of inducing a dictator to fight for his survival could have been realized in the case of Nigeria, where the Prosecutor for Sierra Leone's International Criminal Tribunal's indicted Charles Taylor. This action prevented peacekeeping forces from striking a deal with the former dictator, which arguably could have facilitated a smoother transition. (Wall Street Journal 2003) However, the problem is related only to the top decision makers and highest profile cases.

Second, false acquittal interferes with the most desirable consequence of TJ – reconciliation. It is often argued that naming and punishing human rights' violators promotes reconciliation between former dissidents and the oppressors by healing the wounds of the former and their supporters (e.g., see Hayner's (2002) account of the complaints of victims, who see their oppressor walking freely while other abusers of human rights are prosecuted). Research conducted with focus groups generalizes this insight (Backer 2004).

Third, the biggest problem with truth revelation procedures is non-random selection of targets. In lustration, evidence of past abuses may have been destroyed so as to protect the most prominent functionaries or agents of the authoritarian regime.[39] In truth commissions, victims who suffered more atrocities may be more reluctant to testify. Only ITRs are somewhat equipped to deal with this problem.

Finally and regretfully, the "prime requirement of justice"–not penalizing the innocent– cannot be satisfied. One can never be certain that a given file is not a product of some devilish– though highly unlikely–plot. Secret police officers would receive special benefits for recruiting famous or important agents.[40] Hence, the innocents who fall prey to false accusations are likely to be ex-dissidents or celebrities (see, e.g., Kavan 2002). Widely known in Prague is the extraordinary case of Ladislav Stros, a famous stage director of the State Opera, professor and director of the National Theatre. When after the transition he was re-nominated for his managerial (and lustrable) position, he received a negative lustration certificate. When he was invited to see his file, he got a heart attack. He was listed as a secret police collaborator! He was cleared of charges in a long process. [41]

When former dissidents are unjustly accused of collaboration with the regime, they are re-victimized. It is as if the regime were taking its final revenge through the legal institutions of the new democracy. The problem can be dealt with only by setting the "threshold for declaring a lustrant guilty" sufficiently high. Such a threshold is set independently of whether a truth-revelation institution is an ITR or ETR. Thus, we will evaluate both institutions subject to identical guilt thresholds.

Hence, TJ institutions responsible for uncovering the truth and sanctioning past human rights violations are unavoidably exposed to unjust selectivity and unjust allegations against the innocent. Does this entail that policy and law-makers who wish to avoid these two problems

should refrain from designing such institutions altogether? Accepting such a point of view would be equivalent to accepting an outcome in which all innocents – and unavoidably all guilty as well – are acquitted.

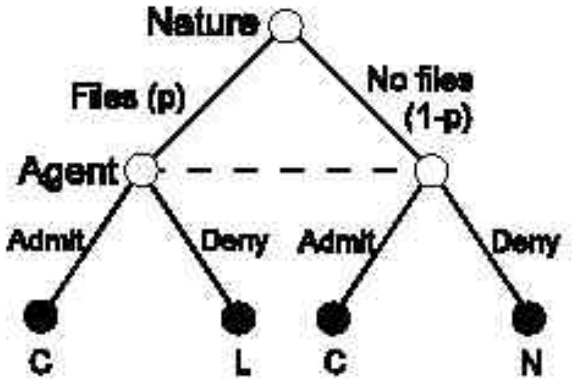
Conceptually, an ETR lustration is simple. Either a lustrant's file meets the legal criteria for declaring him a "collaborator" or not. The ITR case is much more interesting. Consider the following decision model representing the former secret agent's ITR dilemma. The agent, *A*, has to decide whether to admit his collaboration or not. The common knowledge is that a certain proportion of files documenting the secret informer network have been destroyed. However, the decision-maker is ignorant as to whether his particular file was destroyed or not, or whether recriminating information may be retrieved from the files of his victims.[42]

In period t_1, *A* decides whether to reveal his collaboration or not. In period t_2, if *A* revealed himself in t_1, this information is publicized and the outcome is *c* (he is publicly announced a "collaborator"). If *A* did not reveal himself in t_1, the screening agency consults the available files and:

1. With probability *p* the secret files evidencing *A*'s involvement exist, he is uncovered and suffers the sanctions for public lying. The outcome is *l* (he is denounced as a lustration liar as well as a collaborator).

2. With probability *1-p*, *A*'s files have been destroyed and the screening agency has to confirm the former agent's statement. The outcome is *n* (not identified as a collaborator). Figure 1 represents the *A*'s decision problem.

Figure 1: The Former Secret Agent's Dilemma



A – decision-maker (former secret agent)
A's action space – {Admit, Deny}
p – probability with which evidence of collaboration ("files") exists
Payoffs: C (Collaborator); N (Non-collaborator); L (Lustration Liar); L < C < N.

Let the Collaborator's preferences be represented by numbers *L*, *C*, and *N* such that *L* < *C* < *N* are von Neumann-Morgenstern utilities (capital letters denote payoffs associated with the outcomes represented with corresponding small letters). Thus, it is better to be publicly identified

as an agent or collaborator (*c*) than recognized as both an agent and a lustration liar (*l*), but the best outcome is to be considered a non-collaborator (*n*). The ex-collaborator chooses between getting *C* for sure versus a lottery of *L* with probability *p* and *N* with probability 1-*p*. He declares collaboration if and only if $C \quad pL + (1-p)N$, or $p \quad [(N-C)/(N-L)]$. If we normalize the utilities and set the reference utility level of being declared a non-collaborator at $N = 0$, we can state the final condition as

(1) $p \quad C/L$

Condition (1) has a very intuitive interpretation. It is satisfied if the probability of the files surviving is not smaller than the ratio of the punishment (relative to the reference level of being declared a non-collaborator) for being declared a collaborator to the punishment for being a lustration liar. Note that while we assumed identical parameters for everybody, the model could be easily modified to account for personal differences in *C* and *L*. Those parameters may depend on the type of personality of the former collaborator, her social environment, or the political position she aspires to. Also, *p* may be interpreted as a subjective probability of a collaborator that his file survived.

Now, we can compare the performance of ETRs and ITRs. It is quite plausible that under the circumstances of transition to democracy the conditions for revealing collaboration hold for many former collaborators, namely, those who believe that the probability of his file surviving is sufficiently high in comparison to relative punishment. The interpretation of this result is straightforward. Every collaborator for whom the evidence exists will be revealed under both ETR and ITR procedures. However, ITR makes possible to extract more declarations of collaboration than can be supported by existing evidence. Thus, keeping type I error constant, type II errors can be reduced in ITRs relative to ETR procedures. In other words, ITR lustration laws and truth commissions under plausible conditions may be very resistant to false acquittal errors while performing exactly as well as ETRs with respect to false convictions.

ETRs are extremely susceptible to false acquittals, because all perpetrators whose evidence was destroyed will be declared non-collaborators. If however, as it is with ITRs, the procedure makes use not only of the existing evidence, but of the beliefs of perpetrators' about the evidence preserved, it can exploit their uncertainty as to whether evidence documenting their criminal activity exists. *Gacaca* reduce sentences, while the TRC grants amnesty to perpetrators who testify. Polish, Romanian, Lithuanian and Estonian screening laws allow ex-collaborators who acknowledge their past involvement with the secret police to remain in the electoral competition. On the other hand, wrongdoers who refuse to testify and are revealed as human rights violators, or collaborators who are found to be "lustration liars" are exposed to criminal sanctions (*gacaca*, TRC) or have their political careers at least temporarily terminated (lustration). In ITR, the collaborator may choose to accept a mild penalty for sure instead of a lottery that brings a possibility of a harsh punishment.[43] If only the punishment for remaining undercover is sufficiently high, ex-collaborators prefer to pay the cost of testifying about their abusive behavior to risking criminal prosecution or professional banishment. If the incentives in ITR procedures are adequately designed, referral to external evidence might be entirely redundant. The threat of potential evidence against perpetrators may be sufficient and only a few convictions may induce former perpetrators to testify. The South African TRC was designed in such a desirable way. Hayner (2001 pp. 43) reports that just a few high profile trials for apartheid-era activity resulted in convictions substantially contributing to an increase in amnesty applications. In addition, "in order to increase the pressure on perpetrators to apply for amnesty the commission held some investigative hearings behind closed doors, keeping secret the names

mentioned and the crimes detailed." A similar incentive was implemented in Poland. Since the archives with files of the secret police were opened to the public, people who applied for looking into their files have to declare beforehand whether they had been victims and not collaborators. The declarations are verified and only victims can examine the files (see Footnote 3 for more details of this procedure). Under the ideal ITR procedure, only wrongdoers testify to their collaboration, while all the innocent refrain from doing so.

One may raise the point here that ITRs' superior status over ETRs can be defended only on the grounds of consequentialist theories of justice. A successful ITR results in revealing the truth about past human rights violations or about collaboration with the secret communist police, but the success in inducing ex-collaborators to step down comes at a price: the immunity from criminal liability or the continuity of their professional careers. The incentive offered in exchange for truth inhibits the execution of justice in any deontological sense. Kant and Hegel's *lex talionis* interpretation of justice requires that crimes be rectified by punishment matching the crime, whatever the consequences of inflicting such punishment: "Let the world perish, but all guilty be punished" (Kant 1970). According to deontologists revealing the truth does not come close to compensating the wrongs committed by authoritarian regimes. It falls short of satisfying even the mild contemporary interpretation of retribution of Reiman (1997), which demands that the punishment be merely proportional to the crime. To make the case for ITRs' supremacy, one must demonstrate that the consequentialist perspective is more appropriate for the transitional context. In fact, consequentialism at the transition stage and deontology at a later stage are not inconsistent. Transitional justice procedures are not meant to be a permanent part of the political system. They are intended to operate only in the initial stage of the transition, when the demand for holding the wrongdoers accountable for human rights violations persists. While one may argue that in constitutional democracies laws should be executed in a deontological fashion, one may also agree that their design should be governed by forward looking considerations. In other words, once in place, laws of the newly democratized state should be abided by "no matter what." However, in the stage of institutional design one should be guided by the long-term desirability of their future outcomes.

Moreover, in some cases of lustration the reward for revealing oneself is not immunity from criminal charges for past offenses but only the eligibility for a political position.

Finally, another important criterion makes the advantages of ITRs over ETRs apparent. ITRs reduce the workload of a transitional court system. Similarly to martial courts, ITRs are applied whenever time or other resources are unavailable to carry out full scale procedures. The preemptive declarations result in truth unburdened with the transaction costs of (unfeasible) court justice. The mechanism at play is similar to that described by the US Supreme Court in its defense of plea bargaining: "Plea bargaining is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities" (Santobello V. New York, 260, 1971).

This last point suggests a possible reason why ITRs have been adopted exclusively in endogenous modes of transitional justice. International tribunals firmly reject the possibility of plea bargaining. The prohibition of "bargaining with war criminals" has come at the cost of letting authors of gross human rights violations thrive unpunished. [44] After the Nuremberg trials, selectivity in prosecuting war crimes by international tribunals has grown to incredible dimensions. Almost all guilty are left unpunished![45]

Imperfection or Impotence: In Defense of Endogenous Transitional Justice

Endogenous transitional justice, especially both ITRs and ETRs, can be viewed as one of the foundational acts of a new democracy (Schmitter and O'Donnell 1986). However, some legal theorists dismiss it on the grounds that it gives the former dissidents an excuse for taking political revenge on authoritarian wrongdoers. Giving the new democracy a free hand in punishing its own perpetrators is criticized for promoting "victors' justice" or even more harshly, "witch hunting" (Rosenberg 1995). The two categories of transitional justice examined here: lustration and opening the authoritarian regime's secret police files, are particularly criticized for retroactivity and undermining the rule of law. They are relegated to the role of violent political revenge almost on a par with the crimes of the authoritarian regime itself (Cepl 1992). But if the proponents of exogenous transitional justice are correct in reducing endogenous transitional justice to acts of bare political vengeance, how could they explain the post-communists undertaking such "acts of violence" against themselves? (Kaminski and Nalepa 2004). Remorsefulness of the ex-autocrats is hardly an explanation for auto-lustration and opening the ancién regime's secret police files authorized by the very persons who are implicated by them. Most importantly, no criticism of lustration procedures can ignore the harshness of punishment. There is a notable difference between having Mr. Ceausescu shot dead in front of a TV camera and having a note that Mr. Ceausescu was a communist official published in the Romanian government bulletin. (At least we believe that Mr. Ceausescu himself would have agreed with us had he been given a chance to register his opinion.)

The incentives in exogenous and endogenous transitional justice remind those attributed by Mancur Olson to "bandits" and "stationary bandits," respectively (Olson 2000). Like "bandits," international actors do not have any vested interest in the long term prosperity of their subjects. The careers of prosecutors are not linked in any meaningful way with the success of transition in Rwanda, South Africa, or Hungary. Attempting to "help" a post-authoritarian country in bringing its wrongdoers to justice, they are rewarded by the immediate publicity effects their actions will have on the international community. They doubt the post-authoritarian country is capable of inflicting justice on its own perpetrators and make the local politicians puppets in their own country. However, democratic consolidation depends critically on reviving the citizens' spirit and reconciling the former oppressors with the former dissidents. Outside intervention can be of little help in this process. A country's prospects for reconciliation and, eventually, consolidation are rather dim if at the outset of its democratic experiment the most crucial judicial decisions are monitored or performed by international courts. The Serbian reaction to Milosevic's trial in Hague is a telling example. Milosevic's popularity surged when his trial started in Hague as upset Serbs, deprived of the right to try the dictator by their own courts, were increasingly taking their compatriot's side. Rwanda's resort to *gacaca* tribunals in response to the impotence of the International Criminal Tribunal for Rwanda provides another illustration.[46] International courts and tribunals earn praise and attention for doing justice in the short term and in few spectacular cases. In the long term they may leave a society incapable of coming to terms with its own past.

References

Amnesty International On-line (2002). Rwanda: Gacaca - gambling with justice. Amnesty International Press Releases, http://www.amnesty.org.

Backer, J. (2004). American Political Science Association Meeting, Chicago, IL.

Bartoszewski, W. and R. v. Weizsacker (2003). Doswiadczenia Graniczne. Mlodziez bada polsko-niemiecka historie. Warszawa: Fundacja KARTA.

Bass, G. J. (2000). Stay the hand of vengeance : the politics of war crimes tribunals. Princeton, NJ: Princeton University Press.

Bozoki, A. (2002). The Roundtable Talks of 1989. The Genesis of Hungarian Democracy. Analysis and Documents. Budapest: CEU Press.

Brzezinski, Z. (1989). Grand Failure: The Birth and Death of Communism in the Twentieth Century. New York: Scribner.

Cerny, O. (2004). interview, May 27, 2004. M. Nalepa. Prague, Czech Republic.

Czubinski, A., J. Gaworski, et al. (1997). O Stanie Wojennym w Sejmowej Komisji Odpowiedzialnosci Konstytucyjnej. Warsaw: Wydawnictwa Sejmowe.

Dziennik Ustaw (2002). Ustawa o ujawnieniu pracy lub sluzby w organach bezpieczenstwa panstwa lub współpracy z nimi w latach 1944-1990 osób pelniacych funkcje publiczne.

Dziennik Ustaw (1999). nr 38 poz 36

Dziewulski, J. (2004). interview, January 22, 2004. M. Nalepa. Warsaw, Poland.

Elster, J., Ed. (2004). Closing the books. Transitional Justice in Historical Perspective, New York: Cambridge University Press.

Fuller, L. L. (1962). The Morality of Law. New Haven: Yale Univeristy Press.

Gibson, J. L. (2002). Truth, Justice and Reconciliation: Judging the Fairness of Amnesty in South Africa. American Journal of Political Science 46(3): 540-556.

Gross, J. (1989). The Social Consequences of War: Preliminaries to the Study of Imposition of Communist Regimes in East Central Europe. East European Politics and Societies 3(2): 198-214.

Gruntorad, J. (2004). interview, June 18, 2004. M. Nalepa. Brno, Czech Republic.

Halmai, G. and K. L. Scheppele (1997). Living Well is the best Revenge: The Hungarian Approach to Judging the Past. Transitional Justice and the Rule of Law in New Democracies. A. J. McAdams. Notre Dame: University of Notre Dame Press.

Hayner, P. (2001). Unspeakable Truths. Confronting State Terror and Atrocity. New York and London: Routledge.

Huyse, L. (1995). Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past. Law and Social Inquiry.

Kaminski, M. and M. Nalepa (2004). Suffer a Scratch to avoid a Blow? When Post-Communists Punish Themselves.

Kant, I. (1970). Political Writings H. Reiss, ed. New York: Cambridge University Press.

Kavan, J. (2002). McCarthyism Has a New Name- Lustration. Transition to Democracy in Eastern Europe and Russia, Greenwood Publishing Group.

Kenney, P. (2003). A Carnival of Revolution. Central Europe 1989. Princeton: Princeton University Press.

Kritz, Ed. (1995a). Transitional Justice. How Emerging Democracies Reckon with Former Regimes. Country Studies. Washington, DC: United States Institute of Peace Press.

Kritz, Ed. (1995b). Transitional Justice. How Emerging Democracies Reckon with Former Regimes. General Considerations. Washington, DC: United States Institute of Peace Press.

Kritz, Ed. (1995c). Transitional Justice. How Emerging Democracies Reckon with Former Regimes. Laws, Ruling and Reports. Washington, DC: United States Institute of Peace Press.

Marshall, G. (1977). Due Process in England. Due Process. Nomos XVIII. J. R. Pencock and J. W. Chapman. New York: New York University Press.

McAdams, A. J., ed. (1997). Transitional Justice and the Rule of Law in New Democracies. Notre Dame: University of Notre Dame Press.
Miller, C. A. (1977). The Forrest of Due Process of Law. Due Process. Nomos XVIII. J. R. Pencock and J. W. Chapman. New York: New York University Press.
Naczelna Dyrekcja Archiwow Panstwowych (2001). Polska-Ukraina:Trudne Pytania, Fundacja KARTA.
Nalepa, M. (2003). Punish All Perpetrators or Protect the Innocent? Designing Truth Revelation Procedures. Annual Meeting of the American Political Science Association, Philadelphia, apsanet.org.
O'Donnell, G. A. and P. C. Schmitter (1986). Tentative Conclusions about Uncertain Democracies. Baltimore: Johns Hopkins University Press.
Posner, E. and A. Vermuele (2004). "Transitional Justice as Ordinary Justice." Harvard Law Review.
Rawls, J. (1996). Political Liberalism. New York: Columbia University Press.
Rawls, J. (1971). A Theory of Justice. Cambridge, MA: Harvard University Press.
Rawls, J. (1992). Political Liberalism. New York: Columbia University Press.
Reiman, J. H. (1997). Justice, Civilization, and the Death Penalty.
Rotberg, R. and D. Thompson, eds. (2002). Truth v. Justice. The Morality of Truth Commissions. Princeton: Princeton University Press.
Rychetsky, P. (2004). interview, June 22, 2004. M. Nalepa. Brno, Czech Republic.
Scanlon, T. (1977). Due Process. Due Process. Nomos XVIII. J. R. Pencock and J. W. Chapman. New York: New York University Press.
Schwartz, H. (1995). Lustration in Eastern Europe. Transitional Justice. How Emerging Democracies Reckon with Former Regimes. General Considerations. N. J. Kritz. Washington, D.C.: United States Institute of Peace Press. I: 461 - 488.
Schwartz, H. (2000). The Struggle for Constitutional Justice in Post-Communist Europe. Chicago: University of Chicago Press.
Solyom, L. (2004). interview, March 17, 2004. M. Nalepa. Budapest, Hungary.
Solyom, L. and G. Brunner (2000). Constitutional Judiciary in a New Democracy. The Hungarian Constitutional Court. Ann Arbor: University of Michigan Press.
Sustrova, P. (2004). interview, May 24, 2004. M. Nalepa. Brno, Czech Republic.
Teitel, R. (2000). Transitional Justice. New York: Oxford University Press.
The Irish Times, April 3, 2002 on Lexis Nexis Academic Universe
Tucker, A. (1999). Paranoids may be prosecuted: post-totalitarian retroactive justice. European Journal of Sociology 40(1): 56-100.
Uhl, P. (2004). interview, June 23, 2004. M. Nalepa. Poland, Czech Republic.
Urbaniak, M. (2004). interview, January 30, 2004. M. Nalepa. Krakow, Poland.
Wall Street Journal. (2002). Charles Taylor indicted by Sierra Leone Prosecutor.
Walicki, A. (1997). Justice and the Political Struggles of Post-Communist Poland. Tranistional Justice and the Rule of Law in New Democracies. A. J. McAdams. Notre Dame: University of Notre Dame Press**:** 185-237.
Welsh, H. (1996). Dealing with the Communist past: Central and East European Experiences after 1990. Europe - Asia Studies 48(3): 413-428.
Zak, V. (2004). interview, June 20, 2004. M. Nalepa. Prague, Czech Republic.

Cases: (Santobello V. New York, 260, 1971).

Endnotes

[1] Prior to June 1998 this function was supposed to be performed by a lustration court, whose 21 members were to be elected by regional councils of the judiciary. Due to widespread opposition toward lustration amongst the Polish judiciary (the first task of the lustration court was to lustrate itself) in some of the councils no one volunteered to run in the elections (Polish News Bulletin August 27, 1997).

[2] Czechoslovakia until 1993, and later the Czech Republic, was the only country where joint lustration and decommunization gained approval of all veto players in the legislation process. Decommunization also initially accompanied lustration in the Bulgarian and Albanian bills, but was soon struck down by constitutional courts or presidential vetoes.

[3] In Poland, the agency overseeing the archives of the former secret police, the Institute for National Remembrance (INR), makes files available exclusively to victims. Every person wishing to inspect her file must declare in the application that she was a victim of the system but not an informer. Similarly as with the lustration procedure, the declaration is confronted with the contents of the archives. The INR's response to an application is either: (1) positive – indicating that the applicant's files as a victim are in possession of the INR, or (2) negative – indicating that no such files implicating the applicant as a victim of informing have been found. The negative response does not specify whether the applicant is denied viewing because her files as a victim have been lost or because the files implicate her as an informer. (Dziennik Ustaw 1999 nr 38 poz 36).Thus, a former collaborator who asks for his file pretending to be a victim cannot learn more than he already knows.

[4] Other goals of lustration include preventing officials from being blackmailed as well as eliminating from public service persons who because of their role in the ancién regime are considered not trustworthy.

[5] For a definition of procedural justice and its different types see Rawls (1971). Since TJ procedures manage to satisfy these norms only partially, they present an example of imperfect procedural justice. For a useful discussion of the pre-emptive role of TJ see Elster (2004).

[6] Helmke (2002) has shown that a judiciary that is not fully independent does not necessarily meekly follow orders from an authoritarian executive, especially when this executive is losing power. Her evidence comes from Latin American constitutional courts. However, European communist states had no high echelon courts, such as constitutional courts which could compete with the communist executive. Manifestations of disobedience in lower echelon courts were infrequent. No wonder that in communist Europe instances of “strategic defection” of the kind described by Helmke were rare.

[7] The reader may imagine the scale of such violations from the following story. One of the authors was imprisoned in 1985 in Poland on the basis of an illegal “arrest warrant” for publishing uncensored books, an activity that was consistent with the Helsinki Accords. No search warrant was presented on entry to his landlord’s apartment. The SB officer called his university with a lie about a catastrophic water leakage in order to bring him home. No protocol was prepared to list confiscated books and cassettes. No rights were read to him. No contact with a lawyer was allowed. The communist-controlled TV broadcasted a defaming news clip describing the books as “pornography.” He spent five months in jail as “temporarily arrested.” No trial concluded his case. Finally, as he later discovered, the corrupted secret police channeled the confiscated books back into the underground Solidarity's distribution network.

[8] Examples include the trials of border guard shootings in Germany and the Czech Republic (Prokop, interview with author), trials of the military and police for baring arms against peaceful demonstrators in the Wujek coalmines and Gdansk shipyards in Poland (Czubinski 1997) and the village of Salgatorjan in Hungary (Halmai 1997). Also trials of high ranking secret police officers for homicide acts against Polish dissidents in Poland, such as the above quoted Popieluszko case, the case of student anti-communist activist from Krakow, Stanislaw Pyjas, and the case of high school student and son of Solidarity leader, Grzegorz Przemyk (Urbaniak, interview with author).

[9] For instance, in Poland President Kaczorowski, the last head of the London-based government on exile, returned the insignia of power to Lech Walesa only after the latter was elected president in the first fully free elections in postwar Poland in 1990.

[10] In the most spectacular series of internal turnovers from 1920s to 1950s, the powerful heads of Soviet secret police were murdering or supervising murders of their predecessors. According to some versions, the Cheka creator Dzerzhinsky was poisoned by Menzhinsky, who was later replaced by Yagoda, whom removed Yezhov, himself purged by Beria, who in the process of the post-Stalinist purges was strangled or shot in 1953. In an externally enforced turnover in 1956, Polish first secretary Bierut “came from his Moscow holidays in a wooden jacket,” as a Polish joke put it; officially, he died of heart attack.

[11] For examples of successive violations of the Accords see Kenney (2003, pp. 63, 95, 104, 116, 155).
[12] For instance, in the Czech Republic the Act on the Illegality of the Communist Regime and Resistance to it was passed on July 9, 1993. It was upheld by the Czech Constitutional Court on December 21, 1993.
[13] A proposal of a law declaring the implementation of Martial Law illegal was put forward by MPs from the ex-dissident party the Confederation of Independent Poland in February 1992. It failed to gain the support of other ex-dissident MPs who participated in Roundtable negotiations with Generals Jaruzelski and Kiszczak, the two top communists who mastermind the military Martial Law in 1981 (Walicki 1997).
[14] This intuition was correct. In Czechoslovakia, the first democratic parliament emerged by means of "cooptation." Existing MPs would decide who amongst them was too compromised by their involvement in the ancién regime to continue work in parliament. Such persons were replaced by members of the dissident Civic Forum. The internal reform proceeded very swiftly. On the other hand, the judiciary took a very long time to change. Justices of lower echelon courts had their life-tenure appointments substituted with five-year contracts. A constitutional court independent of the communist executive was not operational until 1992.
[15] Hungarian communists wanted to set up the constitutional court prior to free elections in order to get the widest control over the nomination of justices (Halmai 1995, see also Schwartz 2001, pp. 77-78). The developments on the Hungarian Constitutional Court took an unexpected turn when Imre Konya and Laszlo Solyom rewrote the draft legislation for setting up the constitutional court so that the nomination of justices could not be controlled by the outgoing communist regime.
[16] The gacaca courts have authority over three categories of detainees (categories 2, 3 and 4 of Rwanda's genocide legislation). The self-revelation mechanism applies to prisoners in the second category, comprising of alleged perpetrators or "accomplices to intentional homicides or serious assaults that led to death." (Amnesty International 2002) In return for confession, the accused may have their sentences reduced up to 50%. For many detainees this means immediate release, as they have remained imprisoned since the Arusha Peace accord in 1995 (Rae-Olson 2002). Category 2 defendants who do not confess and are convicted face maximum terms of imprisonment of between 25 years and life. Category 3 contains persons accused of other serious assaults against individuals. Category 4 covers persons who committed property crimes. Category 1 relates to the "most serious genocide offences and includes individuals who allegedly organized, instigated, led or took a particularly zealous role in the violence. Category 1 defendants will continue to be tried by the formal court system." (Amnesty International 2002)
[17] Certain procedures resemble ITRs but lack their fundamental property of putting a lustrated person under incomplete information and verifying his declarations. In post-WW2 Germany, after the Germans had taken over the responsibility for de-nazification from the Allies, they distributed a questionnaire among civil servants, teachers, doctors, lawyers and the wider state bureaucracy. The aim was to identify former Nazis. 11,674,152 responses were returned. However, the answers were not confronted with existing evidence and each questionnaire was processed separately without cross-examination. Thus there was no incentive on part of the questioned to reveal the truth except, perhaps, the psychological benefit of coming to terms with one own's personal past (Frei 2002, p. 38). A similar problem appeared in the Czech screening process for verifying who was a member of the Peoples' Militia. Since no central register of all members ever existed, it was impossible to verify the truthfulness of declarations.
[18] LL was ruled unconstitutional in 7/1992 (banks) and 2/1993 (academia). The refusal to provide statement was regarded as "admission that the person does not meet the requirements for membership in those [academic] organizations@ (Kritz 1995, pp. 701).
[19] Over 420,000 persons have been subjected to LL. Source: author's interview with Ales Sulz, chair of Security Division in Ministry of Interior, 6/2004.
[20] "Thousands of Estonians to be affected." Source: Ministry of Interior according to Keasings Record of World Events.
[21] About 600 persons were subject to LL. Targets proven to be collaborators were "advised to leave office," but this "advice" was not enforced. Source: Halmai (1997).
[22] Source: Kritz, vol 3, p. 427-8.
[23] Candidates positively screened were banned from politics for 5 years (The Financial Times, October 25, 1995).
[24] Source: Kritz, vol 3, p. 278-9.
[25] A total of 23,000 persons were subject to LL. Source: author's interview with Jerzy Lesinski, director of State Prosecutor's office, 1/2004.
[26] Commission was disbanded without completing work. Source: Hayner (2001).

[27] The Argentinian CONADEP was victim- rather than perpetrator-oriented. Hayner (2001, p. 34) writes that "the information collected by the commission, and especially the great number of direct witnesses identified in its case files was critical in the trials of senior members of the military juntas." Source: Hayner (2001).
[28] The commission have not completed its work in nine years. Source: Kritz vol 3 pp. 256-8 and Hayner (2001).
[29] Mandate did not extend to cases of torture which were much more frequent than disappearances. Source: Kritz vol. 1.
[30] Commission could not name perpetrators, but could forward all the evidence it collected to courts. Source: Kritz vol 3, pp. 101 -168.
[31] The commission named perpetrators in the report and advised authorities of the post-transition state not to rehire former DDS employees. Source: Decree # 014 creating the Commission of Inquiry into the Crimes and Misappropriations committed by ex-President Habre (in Kritz, vol 3, p. 48-100).
[32] The commission was entitled to offer confidentiality. The policy was known as the "open doors [for testimony]-closed doors [for confidentiality] policy." Source: Kritz, vol 3 p. 186.
[33] Source: Peruvian Truth and Reconciliation's Final Report, Vol. VIII, available and translated into English at International Center for Transitional Justice (www.ICTJ.org).
[34] Perpetrators who committed crimes out of political motives were granted amnesty after giving full details of their crimes. 23,000 statements were obtained from victims and their families and 7,000 applications for amnesty were filed. Source: Boraine (2000), Gibson (2004).
[35] During the genocide about 800,000 people were killed in 100 days and 124,800 suspected participants in the killings were incarcerated. In late 2001, more than 10,000 gacaca tribunals were set up; they involved 260,000 adults of "integrity, honesty and good conduct" selected by local communities to serve as magistrates. At that time, 110,000 Rwandese were awaiting trail since 1995 in detention centers. Source: Rossouw (2002). For definitions of crime categories, see footnote 9.
[36] The list is taken from Elster (2004).
[37] The International Labour Organization issued a *Recommendation to the Czech Federal Assembly to Repeal the Screening Act of October 16, 1991* (Kritz 1995 III: 322-334); The Council of Europe issued a *Memorandum on the Applicability of International Agreements to the Screening Law. Transitional Justice* (Kritz 1995 III: 335-345). For internal criticism about collective guilt of the screening law see speeches to Federal Assembly of the CSFR on October 16, 1991 (www.valda.cz/s017076/119.htm.), and also author's interviews with Uhl, Kavan, Jicinski, and Mikule.
[38] A similar scenario indeed unfolded in Poland during the trial of policemen charged with using firearms against striking coalminers during Martial Law. (Gazeta Wyborcza October 31st, 2001) One should mention here that although the Martial Law decrees rendered striking illegal, according to some experts the entire procedure for implementing Martial Law violated the communist constitution. Finally, the "shooting to kill" that the police forces applied when pacifying demonstrations was illegal even according to the Martial Law decrees.
[39] For instance, according to an anonymous historian of IPN, the most valuable agents of Polish secret police were granted an opportunity of destroying their own files. However, since a "valuable" agent was typically very active, the records of his activity were usually well-preserved in the files of his victims (Gazeta Wyborcza Du¿y Format, p. 11, 23.08.2004).
[40] Recruiting an émigré dissident gave the secret police officer a chance to accumulate quite a sum out of per diems paid in foreign currency (author's interviews with Kavan and Dziewulski).
[41] A tragicomic story of his very thick file unfolds as follows: In 1967 Stros traveled to Edinburgh with the National Theatre. At that time he was introduced to a man who presented himself as "from the Czechoslovak ministry of culture." Stros did not find his company particularly worthwhile. His wife did. Mrs. Stros, an otherwise quiet housewife, appreciated that someone took interest in her. She met with the StB officer in Edinburgh on a couple of occasions, and then back in Prague, where the officer opened a file "Olivier" for Mr., not Mrs. Stros. Over the next ten years Mrs. Stros told the StB officer anything he wanted to learn about her husband. The officer was rewarded with promotions and finally with early retirement. To prevent someone from taking over his recruit and discovering his trick, he asked his supervisors to end the collaboration altogether explaining that working with the famous stage director was too sensitive to survive a change of leading officers. His request was approved, Stros' file was closed and sent to the archives. As most closed files, it survived the transition since mostly files of active or "live" informers were destroyed (author's interviews with Cerny, Prokop, Gruntorad, and Sustrova). In light of the Czech lustration law Stros was guilty of collaboration. He was cleared of charges in the lustration appeal case only because

his lawyer found the retired officer and convinced him to testify in court to Stros' innocence (Rychetsky, interview with author).

[42] Our naming convention is from the lustration context. An ITR truth commission can be represented with exactly the same mathematical model after suitable changes of terminology.

[43] In the case of the TRC, even though the perpetrator is granted amnesty, having to make a public confession is itself a form of punishment. This is the view of Justice Richard Goldstone: "the perpetrators suffered a very real punishment–the public confession of the worst atrocities with the permanent stigma and prejudice it caries with it." (quote from Gibson 2002: 544).

[44] In Nuremberg, plea bargaining was offered to some medium-rank Nazi criminals. Erich von dem Bach, the commander of Nazi forces fighting with the 1944 Warsaw Uprising, was responsible for the death of over 200,000 civilians in Warsaw and mass executions in Belarus, Estonia and eastern Poland as well as the idea of setting up the concentration camp in Auschwitz. "In exchange for his testimony against his former superiors at the Nuremberg Trials, von dem Bach was never accused of any war crimes. Similarly, he was never extradited to Poland and the USSR." (http://en.wikipedia.org/wiki/Erich_von_dem_Bach).

[45] Although the International Criminal Tribunal for Rwanda was established in 1995, shortly after the Yugoslavian Tribunal, it had achieved just eight convictions and one acquittal (as of April 2002). The number of detainees responsible for the 100 day genocide of 800,000 Tutsis is around 124,800 (The Irish Times, April 3, 2002 on Lexis Nexis Academic Universe). One cannot even say they are falsely acquitted, since 99.99% of the guilty had never even been charged.

[46] In addition to criticizing the International Criminal Tribunal for Rwanda for being slow, the Rwandan government has frequently accused it of being ineffective or even biased. The ICT has also been enmeshed in scandals, such as when three international judges burst out laughing during the cross-examination of a rape victim. (The Irish Times, April 3, 2002 on Lexis Nexis Academic Universe).