Seeking Justice During War:
Accountability in Conflicted Democracies

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Abstract

In the past several years, the transitional justice literature has generated theories concerning varying human rights accountability outcomes in states transitioning from authoritarianism and violent conflict. Most of these theories are based on transition and post-conflict dynamics. However, a subset of these cases, democracies that have experienced internal conflict, cannot accurately be explained by these theories. Human rights trials and truth-seeking measures are overwhelmingly conducted *during* the violence in conflicted democracies, thus it is not appropriate to theorize accountability outcomes in these cases based on transition or post-conflict dynamics. Yet, these cases continue to be included in large N datasets and research that formulates explanations on why some countries implement accountability mechanisms while others do not. I assert that it is necessary to consider these cases in a different light. Drawing on fieldwork conducted in Sri Lanka, Northern Ireland and Spain, I argue that the causal mechanisms that shaped prosecutions and truth-seeking measures in these cases were rooted in the pre-conflict milieu. Vertical, horizontal and external relations of accountability, including political competition, civil society pressure, judicial independence and pressure from international institutions, prompted accountability mechanisms in all three countries. The variation across the cases in terms of the prosecution record and the use of truth-seeking measures is explained by the extent to which these relations of accountability were available and operating efficiently prior to the conflict. The efficiency of these relations, in turn, was shaped by the presence/absence of entrenched emergency laws.

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List of Acronyms

AAA - *Alianza Apostólica Anticomunista* (Spain)

ALJ - Association for Legal Justice (Northern Ireland)

ARMH - *Asociación para la Recuperación de la Memoria Histórica* (the Association for the Recovery of Historical Memory) (Spain)

BVE - *Batallón Vasco-Español* (Spain)

CAJ – Committee on the Administration of Justice (Northern Ireland)

CESID - *Centro Superior de Información de la Defensa* (Spain)

COI – Commission of Inquiry (Sri Lanka)

DPP – Director of Public Prosecutions (Northern Ireland)

ECHR – European Convention on Human Rights

ED - *Extrema Derecha* (Spain)

EPA – Emergency Provisions Act (Northern Ireland)

ERs – Emergency Regulations (Sri Lanka)

ETA - Euskadi Ta Askatasuna (Spain)

GAE - *Grupos Armados Españoles* (Spain)

GAL - *Grupos Antiterroristas Liberación* (Spain)

GSP+ - Generalized System of Preferences Plus

HET – Historical Enquiries Team (Northern Ireland)

ICCPR - International Covenant on Civil and Political Rights

ICRC – International Committee for the Red Cross

IIGEP - International Independent Group of Eminent Persons (Sri Lanka)

IRA – Irish Republican Army (Northern Ireland)

JVP - Janatha Vimukthi Peramuna (Sri Lanka)

LLRC - Lessons Learnt and Reconciliation Commission (Sri Lanka)

LTTE - Liberation Tigers of Tamil Eelam (Sri Lanka)

MP – Member of Parliament

NCCL – National Council on Civil Liberties

NGOs - Non-governmental organizations

NICRA - Northern Ireland Civil Rights Association

PA - People's Alliance Party (Sri Lanka)

PNV - *Partido Nacionalista Vasco* (Basque Nationalist Party) (Spain)

PP – *Partido Popular* (Spain)

PSO - Public Security Ordinance (Sri Lanka)

PSOE - *Partido Socialista Obrero Español* (Spain)

PTA 1974 – Prevention of Terrorism Act (Northern Ireland)

PTA 1979 - Prevention of Terrorism (Temporary Provisions) Act (Sri Lanka)

RUC - Royal Ulster Constabulary (Northern Ireland)

SLFP – Sri Lanka Freedom Party (Sri Lanka)

SPA – 1922 Civil Authorities (Special Powers) Act (Northern Ireland)

TULF - Tamil United Liberation Front (Sri Lanka)

UCDP – Uppsala Conflict Data Program

UDR – Ulster Defense Regiment (Northern Ireland)

UK – United Kingdom

UNHRC - United Nations Human Rights Committee

UNP – United National Party (Sri Lanka)

Chapter 1

Introduction

Some of the longest and most devastating wars in the last half of the twentieth century have been fought within the boundaries of democratic states. Israel, Colombia, and India, for example, have confronted decades-long civil strife and yet, democratic governance has, to varying degrees, remained intact. While some attention has been focused on the justice measures these countries are likely to implement in a post-conflict period, we know little about the extent to which state human rights violations were redressed while conflict was still underway. Democracies experiencing internal war are clearly distinct from countries transitioning from authoritarianism to democracy and conflicted non-democracies transitioning to peace, and yet these cases are often included in large N studies[1] examining the conditions that encourage and restrict the use of transitional justice mechanisms. Additionally, the majority of comparative studies that examine the design and implementation of accountability mechanisms focus solely on authoritarian transition cases (Backer 2009). No effort has been made to isolate conflicted democracies in the literature, thus theories that are drawn from drastically different settings are hastily mapped onto these cases.

This project aims to remedy these theoretical and empirical oversights. But, addressing this subject is not simply an endeavor to shift cases into their proper categorization. Analysis of conflicted democracies illuminates a fascinating and largely understudied landscape of justice-seeking efforts and accountability processes. While

[1] See Olsen, Payne and Reiter 2010 and Binningsbø, Elster and Gates 2005.

transitional justice studies are focused on the menu of post hoc accountability processes (e.g. trials, truth commissions, reparations) that have accompanied many transitions in the last thirty years, this project draws attention to the ways in which ex ante democratic norms function, and to what extent, to produce moments of accountability during and after the violence in conflicted democracies. Thus, this project seeks to answer three specific questions: How are human rights violations redressed in conflicted democracies? What conditions enable and limit accountability mechanisms? In what ways, if any, does democratic governance impact accountability mechanisms in these cases?

In this dissertation, I conduct a comparative study of the conditions shaping accountability mechanisms in conflicted democracies. The universe of conflicted democracy cases includes sixteen countries.[2] I focus on three cases, Sri Lanka, Northern Ireland and Spain that provide variation on the implementation of prosecutions and truth-seeking measures and represent different types of democracy experiencing internal conflict. The internal war in Sri Lanka involving violence between Sinhalese and Tamil opposition groups and the government extended between the years 1983 and 2009. The Northern Ireland conflict between warring sectarian factions and the British armed forces transpired from approximately 1969 to 1998, and the conflict that I examine within Spain is the period of heightened violence between the politico-militant group Euskadi Ta Askatasuna (ETA) and the Spanish government immediately following the democratic transition, during the years 1980 – 1992.

[2] The universe of conflicted democracies includes: Colombia, India, Israel, Philippines, Spain, Turkey, United Kingdom (Northern Ireland), United States, Indonesia, Mali, Nepal, Niger, Peru, Russia, Sri Lanka and Thailand.

I argue that the causal mechanisms that shaped prosecutions and truth-seeking measures in these three cases were not located within the conflict period as we might expect. Rather, they were rooted in the pre-conflict milieu. Vertical, horizontal and external relations of accountability, including political competition, civil society pressure, judicial independence and pressure from international institutions, prompted accountability mechanisms in all three countries. The variation across the cases in terms of the prosecution record and the use of truth-seeking measures is explained by the extent to which these relations of accountability were available and operating efficiently prior to the conflict. The efficiency of these relations, in turn, was shaped by the presence/absence of entrenched emergency laws. Relations of accountability in Northern Ireland and Sri Lanka were highly constrained by the landscape in which both countries were formed. Emergency laws operating in the British colonial period were carried over and, to varying degrees, continually enacted by the governments of Sri Lanka and Northern Ireland. These laws contained within them conceptions about the legitimacy and necessity of government actions during crisis. The laws also placed limits on judicial challenges, imposed regulations on civil society groups and legitimized expansive powers of arrest and detention for security force personnel. Thus, the very foundations of the Sri Lankan and Northern Ireland states were shaped by distinct limits on the possibilities for holding the government to account. In contrast, prior to the escalation of violence between ETA and the government in Spain, careful consideration was given by political actors negotiating the democratic transition to the establishment of robust relations of accountability. Political leaders also rejected legislative barriers to accountability, in the form of emergency laws, and the interim anti-terrorist laws enacted during this time

specifically prohibited abuse of government powers and outlined penalties for government violations. As a result, few barriers existed for prosecuting government violations committed in the new Spanish democracy. Thus, the degree to which relations of accountability were operating efficiently to prompt accountability mechanisms in the cases was highly dependent on the presence or absence of entrenched emergency laws prior to the conflict.

In the remainder of the chapter, I examine and critique existing theories on democracy, civil war and accountability. I proceed to outline my research design and methodology followed by a discussion of how I conceptualize and operationalize accountability in this project. I then discuss the theory and findings of the dissertation and I conclude with an outline of the dissertation chapters.

Democracy, Civil War and Accountability: The State of Knowledge

Theories of Democracy and War

Existing theories on democracy and war are largely inadequate for understanding conflicted democracies in that the literatures have predominantly focused either on the ways in which tenets of democratic governance can *prevent* the onset of war or the occurrence of interstate wars between democracies and other regimes. Studies on the relationship between democracy and civil war largely show that civil war is less likely to occur in democracies than non-democracies due to the existing democratic norms and institutions that act to diffuse conflict through voting, mediation and negotiation. Democratic governments are also far less likely than authoritarian regimes to kill their own people on a mass scale (Rummel 1995; Krain and Meyers 1997; Krain 2000). The

democratic peace literature similarly only focuses on the ways in which democratic ideologies and institutions can prevent democracies from engaging in conflict with other democracies (interstate wars). Democratic peace theories suggest, but do not develop, the idea that once a democratic country experiences civil war, democratic norms and institutions might mitigate the conflict or help protect citizens from its effects. However, this literature fails to fully examine the extent to which such constraints remain stable when democracies confront war with their own citizens.[3]

Theories of Accountability

The use of accountability mechanisms, such as human rights prosecutions and truth commissions, on a global scale is a relatively new phenomenon. Prior to World War II, international law requiring states to redress large-scale war atrocities or widespread violence enacted under authoritarian regimes or during conflict was almost nonexistent. An international norm of accountability began to emerge after World War II, evidenced by the trials held in Nuremberg and Tokyo, and it strengthened after 1975 as it cohered with domestic norms of an increasing number of new democracies. In recent years, the use of human rights trials, truth commissions and reparations have become a common strategy enacted by states emerging from authoritarian rule or conflict (Sikkink 2011). Why do some countries pursue accountability mechanisms for human rights violations while others do not? Competing theories on this subject have largely been located within the transitional justice literature, which focuses on how states transitioning from

[3] In a small footnote referencing his list of interstate wars, Doyle comments: "No civil wars that I recall upset the argument of Liberal pacification" (Doyle 1997). It is unclear how Doyle comes to this conclusion and he fails to investigate in this analysis, and subsequent analyses, how the tenets of the democratic peace thesis play out in a democracy experiencing civil war.

authoritarianism or conflict redress widespread human rights violations committed by state and non-state actors. The foundational argument on authoritarian transitions to democracy that has been amended and refined over the last few decades asserts that the balance of power between new and old elites in a transition is a central determinant of accountability mechanism implementation (O'Donnell and Schmitter 1986; Huyse 1995; Zalaquett 1992; Pion-Berlin 1994). If the new elites are stronger than the old elites, governments will opt for more severe methods of justice; if the new elites are weaker than the old elites, more lenient methods of justice will ensue. Several scholars have built on the balance of power argument and highlighted additional relevant variables. For example, emphasizing the nature of the path from authoritarianism to democratization, or the importance of transition type, Stepan (1986) argues that pacted transitions in which a settlement is negotiated may put constraints on justice processes or lead to amnesties. Other scholars have pointed to the length of the regime as a key factor by arguing, the shorter the duration, the more likely justice mechanisms will be introduced given that the memories of suffering are recent and strong (Elster 2004; de Brito, Gonzalez-Enriquez and Aguilar 2001). Finally, O'Donnell and Schmitter (1986), among others, have argued that if repression was particularly severe, old elites may feel threatened during the transition to democracy and they may try to block accountability efforts.

Theories on the nature of the democratic transition find that where there is no rupture, or drastic break with the past, accountability mechanisms are less likely to be implemented because leaders responsible for the repression are likely to either remain in power, or in the case of regimes with a strong military presence, lurk in the wings (Pion-Berlin 1994; Huyse 1995). It could be argued that conflicted democracies resemble

"pacted" transitions, or those in which there was no rupture, because democratic governance continues during and after the violence. Yet, my research demonstrates that prosecutions and truth-seeking measures are not completely absent in conflicted democracy cases. The lack of a regime change in conflicted democracies does not actually result in the total suppression of accountability mechanisms.

The current trend within the transitional justice literature is largely to adapt the theories on authoritarian transitions to democracy and apply them to transitions from conflict to peace. For example, a study on post-conflict justice and sustainable peace discusses the negative impact lengthy authoritarian regimes would likely have on accountability efforts after democratic transition. Then, by "extending this logic to peace-building," the authors predict that longer *conflicts* will also result in less accountability (Lie, Binningsbø and Gates 2007). Similarly, Olsen, Payne and Reiter's (2010) cross-national study of transitional justice mechanisms adapts the factors identified in post-authoritarian studies in order to generate hypotheses concerning post-conflict cases. Both of these studies count conflicted democracies in their datasets, yet neither specify causal mechanisms propelling the use of prosecutions and truth-seeking measures *during* the violence. Instead, hypotheses and findings are developed around the post-conflict moment.

Theories of Civil War

We might expect that the conditions enabling and restricting prosecutions and truth-seeking measures held during the violence will largely be structured by the actual dynamics of conflict. After all, existing theories on accountability mechanisms used

during authoritarian transitions demonstrate that the nature of the transition can have a significant impact on whether accountability mechanisms will be implemented. The civil war literature has examined how the type of civil war (Fearon 2004; Fearon and Laitin 2008) and the nature of warfare (Kalyvas 2005; Balcells and Kalyvas 2007) can impact the severity and duration of the violence. Building on the distinctions between revolutionary and secessionist war,[4] Olsen, Payne and Reiter (2010) make predictions about the likelihood of accountability mechanisms after each type of war in a cross-national statistical analysis, but in the end they find that the type of civil war has no bearing on a country's use of accountability mechanisms. Of the four types of warfare in civil conflict[5] identified by Balcells and Kalyvas (2007), symmetric non-conventional wars, which involves equally weak competing parties, are found to be more often associated with higher levels of violence. In essence, the low amount of resources for both the state and the opposition group can lead to increased fragmentation, greater inability to provide necessary public goods to the population and indiscipline. Olsen, Payne and Reiter (2010) find, however, that the severity of conflict does not increase the likelihood of trials over the use of truth commissions or other accountability mechanisms as they assumed; instead, they conclude that where the scale of violence is greater, *post-conflict* judicial accountability tends to be avoided.

[4] Revolutionary wars are those in which domestic opposition groups violently challenge the government in an attempt to capture power over the state, while secessionist wars involve conflict between the existing government and one or more opposition groups over a certain territory, as opposed to the entire state (Fearon and Laitin 2008).

[5] Balcells and Kalyvas (2007) identify four types of warfare in civil conflict: conventional (characterized by equally strong competing parties), irregular (characterized by a strong state actor competing with a weak non-state group), symmetrical non-conventional (involves equally weak competing parties, state vs. non-state) and urban (involves riots, protests and urban terrorism).

The theories discussed above do not illuminate the conditions supporting or blocking mechanisms that are conducted while the conflict is still underway because they are largely based on specific transition or post-conflict dynamics. Studies that assess the total length and cumulative scale/severity of the violence are also insufficient because they fail to consider why countries might use mechanisms before the conflict ends. The length of the Sri Lankan and Northern Ireland conflicts, approximately 30 years, is about the same and yet, my research demonstrates that their experiences of accountability differ in important ways. Additionally, though the Sri Lankan conflict was certainly more devastating to civilian life than the war in Northern Ireland, the impact of conflict severity on the number of prosecutions held is difficult to gauge when the prosecutions are conducted throughout the violence. At what point in the conflict do we assess levels of violence compared to the number of state actors prosecuted? The evidence gathered for this project challenges the notion that accountability processes are unlikely to follow periods of severe violence. For example, violence related to the internal war in Sri Lanka reached its highest level in the history of the country by the early 1990s. Yet, prosecutions for state violations increased a few years later.

Literature on the quality and type of democracy, the relationship between democracy and human rights, the potential role of domestic institutional factors on accountability mechanisms and the strategies employed by governments to manage internal wars, provides more insight on the possible conditions prompting and restricting accountability processes in conflicted democracies.

Theories on Democracy and Human Rights

Conflicted democracies are far from uniform in the actual functioning and effectiveness of democratic governance, thus, the quality of democracy could matter for the extent to which prosecutions and truth-seeking measures were held in a country. Much has been written about the links between democracy and human rights, in particular the notion that democratic governance can reduce the incidence and severity of human rights abuses (Hofferbert and Cingranelli 1996; Poe, Tate and Keith 1999; Keith 2002). Bueno de Mesquita, Downs, Smith and Cherif (2005) investigate what, if any, aspects of democracy are necessary or sufficient for diminishing or eliminating violations. The authors conclude that progress in human rights practices appears to only improve after the democratization process is virtually complete. When democracies reach a certain threshold, equal to 8 on the -10 to +10 Polity scale,[6] human rights practices by the government substantially improve. Though Bueno de Mesquita et al hold conflict constant in their analysis, drawing upon this finding, we might expect that the higher the quality of democracy, the more likely trials and truth-seeking mechanisms would be implemented during a conflict. Democratic regimes with Polity scores less than 8 during conflict, in turn, may implement fewer accountability mechanisms.

The length of time democracy is in place before the conflict emerges may also play a role in how state violations are redressed. Currently, there is an absence of theories on whether and how democracy shapes the use of accountability mechanisms. However, Moravcsik's (2000) examination of how newly transitioned democratic governments and

[6] Polity rates political regimes on a 21-point scale ranging from -10 (hereditary monarchy) to +10 (consolidated democracy). See Polity IV Dataset Codebook: http://www.systemicpeace.org/polity/polity4.htm.

older, consolidated democratic governments respond differently to the development of a human rights regime provides some useful insights. Using the creation of the European Convention on Human Rights after World War II as a case study, Moravcsik examines whether democratic governments support a binding international human rights regime. He argues sovereignty costs are weighted against establishing human rights regimes, and greater political stability is weighted in favor of it. For example, new democratic governments committed to democracy tend to face internal challenges that threaten it in the future, therefore, they are more likely to support binding human rights regimes to lock in democratic governance and stabilize the status quo. Governments within consolidated democracies, in contrast, do not face the same uncertainty concerning stabilizing democratic governance, and thus, see the human rights regime as potentially nullifying their domestic laws and a general threat to sovereignty (Moravcsik 2000: 229).

Moravcsik finds that the greatest fear for British officials and politicians at the time was that the European Convention would threaten some undemocratic political practices and institutions within the country. During the drafting process, one Lord Chancellor even commented that the Convention would prevent the British government from detaining people without trial during a period of emergency (Moravcsik 2000: 241). British officials were also concerned that because the Convention would alter domestic laws, mobilization of new demands around human rights enforcement would ensue. The European Convention on Human Rights was, in essence, intended to "strengthen existing domestic institutions of judicial review, parliamentary legislation and public action" (Moravcsik 2000: 238) and British officials largely saw this as an affront. Moravcsik's theory illuminates whether and how new and old democracies supported the creation of a

regime that would essentially strengthen existing institutions of accountability. Thus, his theory could be adapted to argue that governments within new democracies that are experiencing conflict might be more inclined to pursue accountability for state violations as a means to lock in democratic governance and stabilize the status quo. Governments within old democracies, in contrast, may be more likely to avoid state accountability because democratic governance is already in place and there is less uncertainty about political stability.

In addition to the type and quality of democratic governance, domestic legal institutions may play an important role in accountability processes. A central route for citizens or civil society groups to demand accountability for state violations is to make claims based on international human rights law that has been incorporated into domestic law. In monist civil law systems, such as Spain, ratified international treaties automatically become part of the domestic legal system, whereas dualist common law legal systems, like the United Kingdom and Sri Lanka, tend to require national legislation to transform international agreements into national law (Glendon 2008). Citizens living in countries with monist civil law systems are therefore likely to have more legal tools at their disposal to bring claims against the state apparatus than citizens living within dualist legal systems (Simmons 2009).

Theories on Emergency and Counter-terrorism Laws

Finally, because prosecutions and truth-seeking measures are largely conducted during the violence in conflicted democracies, the literature on the ways in which a government manages conflict is also relevant. When countries experience the continued

enactment of emergency and counter-terrorism laws over decades, the result is often a sustained lack of judicial independence and an increased centralization of power within the executive (Scheuerman 2006; Gross and Ní Aoláin 2006). Additionally, immunity clauses that are often built into emergency legislation limit the ability for citizens to pursue prosecutions against the state (Coomaraswamy and de los Reyes 2004). Thus, accountability for state violations is likely to be limited in countries where emergency and counter-terrorism laws have been in place for several years.

These theories were systematically evaluated in the process of conducting research for this dissertation. In the following sections of the chapter I outline my research design and methodology and I discuss how accountability is conceptualized and operationalized in this project. I then present the central theory and findings of the dissertation.

Research Design and Methodology

In order to address my research questions, I first identified the number of global civil war cases drawing on data from the Uppsala Conflict Data Program (UCDP), 1946-2010. I then determined the universe of conflicted democracies by comparing the years of internal war coded in the UCDP database with the countries' regime scores coded in the Polity IV database (see further discussion on the universe of cases in Chapter 2). From the sixteen cases of conflicted democracy I identified, I selected three for comparative study: Sri Lanka, Northern Ireland and Spain. I chose these countries because they provide variation on some of the independent variables discussed in the theory section above, including type of legal system, government use of emergency

powers and the type of democracy. For example, the three countries represent different types of democratic governance. The United Kingdom embodies an old, high quality democracy, Spain was a new, relatively high quality democracy when violence emerged between ETA and the government, and Sri Lanka is an old, low quality democracy. The cases also provide variation on the dependent variable: a moderate number of trials and truth-seeking measures were held in Northern Ireland, a large number of truth-seeking measures and fewer prosecutions were held in Sri Lanka and in Spain, no truth-seeking measures were implemented and a fairly high number of prosecutions were held. Finally, I chose these countries because internal armed conflicts have effectively ended in each case. Termination of conflict allowed me to gauge with certainty the range of years accountability mechanisms were adopted during and after the conflict.

Though I draw on UCDP definitions of internal armed conflict to determine the relevant cases in this project, it is important to acknowledge here that international humanitarian law is an additional, relevant framework that can be used to assess whether violence in a country qualifies as an internal armed conflict. Definitions of internal armed conflict within international humanitarian law, however, tend to be fairly broad and imprecise. For example, Common Article 3 makes the four 1949 Geneva Conventions, which prescribe humane treatment without discrimination toward civilians during war, applicable to *all* internal armed conflicts (as opposed to just inter-state conflicts) (Kalshoven and Zegveld 2001). Yet, additional Protocol II 1977 to the Geneva Conventions, which includes provisions *protecting* civilians during internal armed conflict, is not applicable to all internal wars. Instead, Protocol II defines internal armed conflict as: "between its armed forces and dissident armed forces or other organized

armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol" (Kalshoven and Zegveld 2001:132-133).

Further compounding a lack of definitional clarity concerning the threshold of internal conflict within international humanitarian law, the qualification of serious violence as an armed conflict is largely up to the discretion of the state involved. As noted in Chapter 4 on the Northern Ireland conflict, this can pose a serious challenge when the state is a powerful Western democracy. The Geneva Conventions do, however, provide third parties, such as states not involved in the conflict, organs of the UN and the International Committee for the Red Cross (ICRC), tools for exerting pressure on the parties involved in the conflict to respect international humanitarian law (Kalshoven and Zegveld 2001). The ICRC is the most active on this front. They are involved in assisting and protecting civilians during the conflict, monitoring parties' respect for international humanitarian law during conflict and disseminating information about the law to the relevant parties. International judicial bodies, such as the European Court of Human Rights, are also empowered to make their own determination about the application of Protocol II and Common Article 3 to a conflict situation. Specifically, they can assess whether a conflict is, or was, an internal armed conflict based on the relevant rules of the treaties. Historically, states tend to disregard the Geneva Conventions, even if they have ratified them, thus the ICRC and other international bodies often lead the charge monitoring the implementation and enforcement of international humanitarian law.

In order to assess the extent of human rights violations committed by the state and to determine the relevant accountability measures for such violations, I draw on

international human rights law and domestic criminal law as my analytical frameworks. International humanitarian law overlaps considerably with international human rights law, and in recent years, international and domestic human rights organizations have monitored violations using both frameworks. Thus, in the empirical chapters (Chapters 3 – 5) I also briefly discuss the status of each country's ratification of international humanitarian laws and the application of these laws to the situation of conflict.

The central method I employ in this research is the comparative case study method. This method is useful for identifying patterns that can aid in the development of theory, to control for variation in fairly similar contexts and to test existing theories (George and Bennett 2005). The comparative case study method is also a useful tool for determining the conditions under which specified outcomes occur and the *mechanisms* through which they occur. I employ the process-tracing method, tracing events and outcomes through close observation and detailed study, to identify the specific causal mechanisms that prompted prosecutions and truth-seeking measures in the three cases and to evaluate alternative paths through which these accountability measures could have occurred.

In order to evaluate existing theory in relation to the cases, I drew on several key data sources and conducted field research in all three countries during the summers of 2009 and 2010 and winter of 2011. To code human rights trials, I analyzed the annual U.S. State Department Human Rights Reports between 1976 and 2010 for Sri Lanka, Northern Ireland and Spain. I counted prosecutions by coding criminal prosecutorial activity, where state actors were accused of extra-judicial killing, torture, rape or disappearance. Though I discuss convictions and acquittals in the empirical chapters, I

don't base my coding scheme on convictions because only focusing on convictions does not allow for the fact that the result of a criminal trial process may be conviction or acquittal, depending on the evidence available. A verdict of acquittal does not necessarily mean less accountability. In essence, the investigation and prosecution of a case where a state actor is alleged to be involved is a more precise measure of accountability than the verdict.

In order to avoid over-counting, I only coded trials that had commenced, whether or not there had been a verdict. Thus, if a report mentioned that an investigation of a state actor was initiated, or an individual had been charged, I did not code it until the trial proceedings started. In addition, I only coded trials related to the conflicts in each case. Thus, I did not code prosecutions that were held before the conflict started or trials that occurred years after the conflict but were wholly unrelated to the violence (e.g. I did not count the trials in Spain where government actors were accused of torturing suspected Al Qaeda terrorists after the 2004 Madrid bombing). I code the data in this manner because the focus of this project is on state accountability related to internal war in democracies, not general human rights prosecution trends. I also did not code civil trials.[7] I created three original datasets of criminal prosecutions held in each country based on this coding scheme (see Chapters 3 - 5).

I identified the number of truth-seeking measures through primary and secondary literature on these processes and confirmed their focus on state violence by analyzing inquiry mandates, transcripts, and interim and final reports. For example, while a number of inquiries have been held in Northern Ireland concerning the conflict, I only examined

[7] See my discussion of future research in the Conclusion, Chapter 6.

those in which the state was explicitly under examination for allegedly committing human rights abuses.

In order to identify the conditions prompting prosecutions and truth-seeking measures, I analyzed annual human rights reports on each country, produced by both domestic and international organizations, the transcripts of domestic trials and the judgments at the European Court of Human Rights, inquiry mandates, transcripts of the inquiry proceedings and interim and final reports, domestic and international media coverage of trials and truth-seeking measures, emergency and anti-terrorism laws, individual country constitutions and legislation, and secondary sources on the history of the conflicts. I also conducted a total of thirty interviews with attorneys who had worked on specific cases relevant to my research, journalists who covered human rights trials, legal scholars, politicians, members of the police force, leaders of state-led human rights institutions, and staff from local human rights advocacy, peace and development organizations.

Conceptualizing and Operationalizing Accountability

Grant and Keohane state accountability "implies that some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met" (Grant and Keohane 2005). In this project, I conceptualize human rights accountability in a similar fashion and I specify it further as: holding state actors accountable, through one or more formal processes, for their participation in directing and/or committing human rights abuses against citizens during

internal armed conflict. State actors include political leaders and members of the police and security forces. The human rights abuses committed by the state against civilians that I investigate include torture, rape, disappearance, and extra-judicial killing.

I operationalize the dependent variable, accountability for state human rights violations, as: the prosecution record of a country and the number of truth-seeking processes that specifically address state human rights violations. I examine trials and truth-seeking measures, as opposed to other accountability mechanisms, because complete cross-national data is currently only available for these two mechanisms. I determine the prosecution record by dividing the number of civilian deaths investigated and prosecuted by the estimated total number of civilians killed by state forces in the conflict.[8] In Spain, 23 of the 71 civilian deaths caused by state actors were investigated and prosecuted, a prosecution record of 32%. In Northern Ireland, 38 of the 363 civilian deaths caused by the state were prosecuted, a record of 10.5%, while in Sri Lanka, of the 16,745 civilians killed throughout the conflict by state actors, 300 of the deaths were investigated and prosecuted, a record of 1.8%. To determine the number of truth-seeking measures I count commissions of inquiry, public inquiries, and truth commissions. Since, on average, countries enact one or two truth-seeking measures at most to address state (or non-state) human rights violations (Hayner 2011), I coded Northern Ireland's

[8] Though I discuss prosecutions against the state for torture violations in my analysis, I do not include it in the determination of the prosecution record for two reasons. First, the data on the incidence of torture is fairly inconsistent and difficult to verify in each case (see empirical chapters). Second, as I discuss in Chapters 3 and 4, torture cases were largely prosecuted in civil courts in Sri Lanka and Northern Ireland, proceedings I did not code in this project. Thus, to include the number of torture prosecutions in the overall prosecution record would be an inaccurate representation.

implementation of six inquiries as "Medium" (above average) and Sri Lanka's use of fourteen inquiries as "High" (well above average) (see Table 1.1).[9]

Table 1.1

Comparative Accountability Mechanisms

Accountability Mechanisms	Sri Lanka	Northern Ireland	Spain
Prosecution Record	Low (1.8%)	Medium (10.5%)	High (32%)
Number of Truth-Seeking Measures	High (14)	Medium (6)	None

My project focuses solely on human rights violations committed by the state, not with the intention to minimize or ignore the serious abuses committed by non-state actors or the prosecution of these individuals during conflict. Since my particular concern lies with conflicted democracies, my aim is to investigate the tensions that emerge when human rights violations are committed by those actors responsible for upholding democratic governance within the framework of the law. It is also important to note that in many internal armed conflicts, the line is blurred between state and non-state actors who commit human rights abuses. Examples include the shadowy Karuna faction in Sri Lanka, alleged to include paramilitaries in collaboration with government security forces, and allegations of collusion between Loyalist paramilitaries and British security forces in Northern Ireland. For the purposes of cross-national empirical comparison, I maintain a

[9] As I explain further below, my findings indicate, however, that more truth-seeking measures did not, in fact, translate into greater accountability in these cases as I had expected.

separation between violations committed by state actors and those committed by non-state actors. Locating data on crimes committed by factions where there is collusion between state and non-state actors is extremely difficult given the deliberately cloaked nature of these violations. Thus, I chose to only code data that concerns human rights violations committed by political officials, police and security force members.

A Theory of Accountability in Conflicted Democracies

In democracies, three *relations of accountability* are potentially available to check government actions (O'Donnell 1994; Schedler 1999; Pastor 1999): vertical relations of accountability are those in which an inferior actor holds a superior actor to account (e.g. political competition and pressure on the government from human rights advocacy groups); horizontal relations of accountability refers to actors in relatively equal positions of power that hold one another to account (e.g. an independent judiciary's check on executive abuse of power); and external relations of accountability, in which the international community attempts to strengthen horizontal accountability by monitoring domestic institutions (e.g. the impact of European Court of Human Rights rulings on domestic policies and practices). In this dissertation, I argue that in order to understand how and why prosecutions and truth-seeking measures occurred in conflicted democracies, it is necessary to examine the relations of accountability that existed prior to the violence. Through comparative analysis of three cases of conflicted democracy, Sri Lanka, Northern Ireland and Spain, I find that *political competition, pressure on the government from civil society groups, the actions of an independent judiciary and*

pressure from international institutions catalyzed prosecutions and truth-seeking measures (see Table 1.2).

Table 1.2

The Causal Mechanisms Shaping Prosecutions and Truth-Seeking Measures

Constraints on Accountability	**Sri Lanka**	**Northern Ireland**	**Spain**
Entrenched Emergency Laws	X	X	
Enablers for Accountability			
Political Competition (vertical accountability)	X		X
Independent Judiciary (horizontal accountability)			X
Civil Society Groups (vertical accountability)		X	X
International Institutions (external accountability)	X (Donors and International Organizations)	X (European Court of Human Rights)	

Political Competition

In democracies, one of the most important types of vertical accountability across the boundaries of state and civil society is political competition, in which citizens can judge, challenge and punish political leaders through periodic elections (O'Donnell 1994; Schedler 1999). Incumbents who have violated citizens' trust or engaged in illegal activity can be removed through the vote. The democratization and transitional justice literatures have shown how, once elected by the citizenry, political leaders in a new democracy often punish former authoritarian or repressive leaders through purges or prosecutions (O'Donnell and Schmitter 1986; Huyse 1995; Pion-Berlin 1994). What is less understood is the extent to which political competition plays a role for accountability in *conflicted democracies*. I find that under certain key conditions, political competition can incite prosecutions and truth-seeking measures in these cases. Political competition prompted prosecutions and truth-seeking measures in the Sri Lankan and Spanish cases when state accountability was a salient issue across voter constituencies. Accountability tends to become salient after violence reaches a peak and the perception of government illegitimacy is widespread among majority and minority sectors of the population, not solely located within the non-state group opposing the government. Accountability loses its saliency when the violence between warring factions decreases generally and a belief in government legitimacy returns among the majority population. For example, in Sri Lanka, a presidential candidate that developed a platform around government accountability won the election because at the time her party's message resonated across the Sinhalese and Tamil populations. Once elected, she pushed forward two key prosecutions of state actors and prosecutions increased generally under her tenure. In

Spain, the second stage of prosecutions concerning the killing of civilians by a state terror group was prompted by an opposition political party's efforts to tarnish the incumbent as a means to remove them from power. The opposition party ultimately won the election during a time when the legitimacy of government action was deeply in question across majority and minority sectors of the population. Prosecutions of officials from the former administration ensued shortly afterward.

Civil Society Groups

After witnessing several instances in which civil society actors pushed forward democratization processes and peacefully ousted authoritarian leaders during the "third wave" of democratization, scholars began to pay more attention to the ways in which civil society groups acting collectively in the public sphere can make demands on the state and hold state officials accountable. One of the most basic functions of civil society is to be an instrument in containing "the power of democratic governments, checking their potential abuses and violations of the law, and subjecting them to public scrutiny" (Diamond 1994:7). As countries have transitioned from conflict or authoritarianism, human rights NGOs and other civic groups have played a central role in both initiating transitional justice mechanisms and contributing to their efficacy through data collection and government monitoring, providing legal advice and representation to victims, seeking acknowledgment and reparations, and, when the government fails to respond, developing unofficial processes of accountability (O'Donnell and Schmitter 1986; Backer 2003;

Smulovitz and Peruzzotti 2003).[10] However, these groups can be limited in their ability to check government action if they don't possess autonomy from the state in their financial dealings, operations and legal standing (Diamond 1994). Civic action may also be very weak in new democracies emerging from decades of authoritarian rule since such activity was often under severe constraints during the former regime and suppression of activity from the government was high (Diamond 1994; Backer 2003). This was evident in many of the Eastern European countries during the democratization wave in the early 1990s. Though political opposition groups had formed into agents of change through the newly established electoral system, the sphere of civic engagement took many years to develop. O'Donnell and Schmitter (1986) have found, however, that a surge of civil society action sometimes occurs during the immediate transition period, then later wanes.

Civil society pressure on the government was a key causal mechanism prompting prosecutions and truth-seeking measures in Northern Ireland and Spain. Civil society groups, including civil rights and legal aid organizations in the former, and associations of pro-democracy judges and prosecutors in the latter, were effective in their efforts because they were largely free from government controls (e.g. monitoring, legal regulation, intimidation). These groups played a central role at a time when the incumbent governments were failing to address demands for accountability. Civil society groups were also strengthened in their efforts through their links with international networks. In Northern Ireland, for example, international human rights NGOs were important allies to domestic groups advocating for state accountability.

[10] See Chapter 4 on the creation of an unofficial inquiry into Fergal Caraher's death by Northern Ireland citizens.

An Independent Judiciary

Judicial independence can both promote human rights and be an avenue for government accountability in that if it exists, the power of the courts is protected and judges have the ability to review the actions of other government agencies without fear of losing their jobs. Though the defining elements of judicial independence are contested, it is generally understood to be secured through constitutional provisions that guarantee terms of office for judges and restrict their removal; prohibit the prosecution of civilians in military courts; use selection criteria for judicial posts based on merit qualifications; stipulate the courts are a separate branch of government from the executive and the legislature; and ensure that courts are fiscally autonomous (Domingo 1999; Apodoca 2004; Camp Keith, Tate and Poe 2009). More recently, scholars have put forth the argument that judicial independence must be further identified as comprising two components: negative judicial independence, which includes the provisions described above, and positive judicial independence, which refers to what judges actually do in cases where political actors are involved (Russell 2001; Hilbink forthcoming 2012). The latter, in other words, involves examining whether judges regularly challenge powerful government officials in their rulings or tend to defer to the executive.

Spain's position as a new democracy provided a political opportunity structure that opened space for the creation of an independent judicial system. Newly transitioned democracies are not, however, uniformly predisposed to such reforms. Key political actors played an important role in creating robust relations of accountability in this case. Leaders negotiating the transition had incentives to break with the authoritarian past and pro-democracy judges and prosecutors that had organized under Franco were committed

to seeing these reforms through and holding the state to account. Thus, I find that while Moravcsik's (2000) theory of new democracies and lock-in is compelling in its potential applicability to domestic accountability processes, it does not play out in the Spanish case. The incumbent government was not the driver for prosecutions as a means to obtain political stability. Instead, the establishment of an independent judiciary during the democratic transition in Spain was significant for investigations and prosecutions of the state for acts of state terror and the practice of torture. The presence of both positive and negative judicial independence was important for the operation of this causal mechanism in Spain. Judges had the will to check executive abuses and they could do so without fear of retaliation. The lack of prohibition on judicial review or on challenges to anti-terrorism legislation also created an environment supportive of state accountability in Spain. In contrast, judicial independence was constrained in both Northern Ireland and Sri Lanka as a result of restrictive constitutional provisions, and the entrenchment of emergency laws over decades.

In addition, while the variation in the type of legal system (monist vs. dualist) illuminates some important insights when comparing across the cases, it does not appear to be a key causal mechanism enabling or limiting accountability mechanisms. In Spain, the effectiveness of the judicial system was strengthened by the efforts of private and people's prosecutors[11] in a few cases, but this option for victims and their families within the legal system was not the central *driver* for the prosecutions held. Similarly, a dualist legal system was not the main barrier to accountability processes in Northern Ireland and

[11] Private and people's prosecution in Spain enables citizens to participate directly in the criminal trial process and to provide an additional, and often times, alternative perspective to the state prosecutor. See Chapter 5 for further explanation of private and people's prosecution in Spain.

Sri Lanka. However, it is important to note that where the state has a monopoly on prosecution, as it does in common law legal systems, the state is often less likely to prosecute itself. In contrast to Spain, the state had the sole power of prosecution in state violation cases and the executive had fairly extensive control over the judicial sector regarding appointments, tenure and judicial powers in Sri Lanka and Northern Ireland. The decision whether or not to prosecute state officials for human rights violations in common law legal systems is thus typically quite fraught. The option for victims to pursue a private or people's prosecution alongside the state prosecutor in civil law legal systems can be an important means for addressing this challenge. Though I didn't find that this aspect of the civil law system was central to the prosecutions in Spain, the potential importance of the differences between common law and civil law legal systems deserves further attention.

International Institutions

International institutions can frame elites' decisions or pressure states to implement accountability processes (Roht-Arriaza 2006; de Brito et al 2001; Kim 2007; Sikkink 2005; Sikkink 2011). Regional courts, in particular, can play a central role. These courts are not only an additional means by which victims can seek justice against a violator, after domestic processes have been exhausted. The rulings of these courts on, for example, issues concerning the management of conflict, can have significant impacts on the trajectory of domestic judicial processes by mandating governments to respond to citizens' demands for justice. International institutions that applied pressure on the government prompted domestic human rights prosecutions in Northern Ireland and Sri

Lanka. Cases brought by Northern Ireland citizens to the European Court of Human Rights concerning the state's involvement in ill-treatment, torture, extra-judicial killing and emergency laws, influenced domestic judicial practices and British policies throughout the conflict. The Spanish case demonstrates, however, that the length of time a country is within the jurisdiction of the European Court of Human Rights matters. Spain's relatively late entry to the Court's jurisdiction resulted in a legal culture fairly uninformed about the European Convention or the Court during the conflict, and thus, international institutional pressures did not play a role in domestic prosecutions. The absence of a regional human rights court in the Sri Lankan case constrained the possibilities for state accountability in that the government was not subject to binding decisions from an external body. Despite this, in the later years of the conflict a small number of prosecutions and truth-seeking measures were enabled in Sri Lanka through pressures applied by other international institutions, namely the UN and international donors.

My findings on the interactions between domestic law and international institutions are an important contribution to both the international relations and comparative politics literatures. Though the number of studies on comparative judicial politics has steadily increased in recent years, little attention has been paid to the ways in which comparative legal institutions can be affected by pressures from regional courts or other international monitoring bodies.

Entrenched Emergency Laws

The degree to which the relations of accountability discussed above were operating efficiently in the cases to prompt accountability mechanisms was contingent on the presence or absence of entrenched emergency laws prior to the conflict. In this project, I conceptualize entrenched emergency laws as emergency and counter-terrorism laws promulgated by a government over several years or decades as opposed to the temporary enactment then repeal of emergency measures during a crisis. I focus mainly on the specific content of emergency and counter-terrorism laws repeatedly enacted over time, and their impacts on accountability. However, I also acknowledge the ways in which governments can manipulate the system by introducing measures that are not labeled "emergency" as such but still operate to limit the extent to which the state can be held to account (e.g. the role of ordinary inquest legislation in Northern Ireland, see Chapter 4).

Prior to the escalation of violence between the democratic government and ETA in Spain, political leaders eschewed emergency measures from the Franco regime and instead put in place a series of interim anti-terrorism laws that expressly outlined penalties for state human rights abuses. These actions created opportunities for holding the government to account when, some years later, state officials were accused of implementing a state terror operation against suspected ETA members, and torture of detainees became common practice in some jurisdictions.

In contrast, emergency measures originally created in the colonial period were promulgated for decades in Northern Ireland and Sri Lanka. These laws were not simply tools created by the governments to manage the conflicts. The existence of the laws

decades prior to the conflicts produced powerful conceptions of government accountability that shaped the degree to which state actors were prosecuted for violations committed during the conflict. Pre-conflict relations of accountability in Sri Lanka and Northern Ireland, were, as a result, highly constrained by the colonial legacy of emergency laws. Governments used emergency legislation to monitor and control the activities of civil society groups, judicial independence weakened over time, and conceptions about the legitimacy of government action during crisis, embedded in the language of the laws, produced bias within the judiciaries.

I draw on historical institutionalism and Mahoney and Thelen's (2010) theory of institutional change to explain the variation across the cases regarding the pre-conflict environment, and to demonstrate the important ways in which emergency legislation produced different impacts in Sri Lanka, Northern Ireland and Spain. Within the institutionalist literature, institutions are generally understood as "relatively enduring features of political and social life (rules, norms, procedures) that structure behavior and that cannot be changed easily or instantaneously" (Mahoney and Thelen 2010). Historical institutionalism analyzes the origins of institutions and how they change through in-depth examination of historical events, or process-tracing. Central to this approach is the view that institutions are political legacies of concrete historical struggles (Mahoney and Thelen 2010). As such, most scholars within this field place a great deal of emphasis on how power relations are reflected in institutional rules and they view institutional persistence as a product of increasing returns to power. Much of historical institutionalist theory has been dominated by path dependency analysis, which promotes the notion that patterns of sequencing and timing matter and that political outcomes are

often shaped by critical junctures that can shift institutions onto new paths (Pierson 1996).

Recently, in response to the overwhelming tendency within the field to focus on either institutional continuity or abrupt institutional change through exogenous shocks, scholars have developed innovative theories on gradual institutional change. In this project, I draw on Mahoney and Thelen's (2010) theory of institutional change, which asserts that institutional properties, in particular veto power and the degree of rule enforcement, contain within them the possibilities for both continuity and gradual change. I contemplate the sets of emergency and anti-terrorism laws in the three case studies as *institutions* that shaped the possibilities for and the limits on accountability. I show how the properties of the emergency institutions in each country, including the power of the parliament to shape emergency and anti-terrorism laws, and the process of annual and biannual reviews of emergency legislation, produced variation in the ways these laws had an impact on efforts to hold the state to account. In Sri Lanka, emergency laws persisted, with little alteration from their creation in the British colonial period, severely constraining the possibilities for holding state actors to account, while gradual alterations in the meaning and power of the emergency institution in Northern Ireland created some openings for accountability. I also demonstrate in Spain, where repressive emergency legislation was completely avoided, interim anti-terrorism laws were developed instead that, in contrast to the laws in Northern Ireland and Sri Lanka, made provisions for government accountability.

Historical institutionalists have examined institutions ranging from formal government structures, such as legislatures, to legal institutions, to less formal structures

such as social class. A fair amount of research has focused on the evolution of public policy in such areas as health care, social security, and property rights (Streeck and Thelen 2005; Mahoney and Thelen 2010). In addition, historical institutionalist approaches to the study of law and courts proliferated in recent years, particularly studies on the American Constitution and the Supreme Court (Amar 2005; Clayton and Gillman 1999). Much of this research has centered on judicial behavior and has sought to challenge the notion that courts are mere instruments of powerful political forces; instead, scholars utilizing a historical institutionalist approach to the study of law emphasize how legal ideas and discourses can also shape judicial decisions (Smith 2008). Though a small number of studies have examined courts outside the U.S. through a historical institutionalist lens (Stone 1992), most of the research in this area is centered on American legal institutions. Moreover, few studies have engaged in historical institutionalist analysis to examine the evolution and impact of laws and judicial institutions *in a cross-national comparative study*. I contribute new insights to the historical institutionalist literature by highlighting how the specific design and regulation of key pieces of emergency and counter-terrorism legislation can have profound and variable impacts on accountability efforts. Many scholars of international relations and comparative politics have not paid sufficient attention to the content of specific laws and the effects legislation can have on political outcomes. This dissertation calls attention to how in conflicted democracy cases law can be an instrument for the state to avoid judicial accountability.

In this dissertation, I also argue that the higher number of truth-seeking measures in Sri Lanka and Northern Ireland, compared with Spain (see Table 1.1), does not imply

greater accountability. While the conditions prompting prosecutions and truth-seeking measures are similar, namely political competition and pressure from international institutions, I found that governments in Sri Lanka and Northern Ireland largely turned to commissions of inquiry/public inquiries as a means not to establish a historical record of abuse or to identify the structural causes of violence, but to legitimize their actions to domestic and international publics. Truth-seeking processes in these cases emerged in strikingly different ways than the post hoc truth commissions designed and implemented in transitioning countries. Again, the colonial legacy is relevant. Inquiries in both countries were enacted through colonial-era legislation that establishes parameters for an ad hoc mechanism when trust in the government has been challenged. They were largely enacted, not as an additional mechanism of accountability alongside criminal prosecutions, but rather in response to increasing domestic and international complaints that the ordinary criminal justice process was becoming insufficient to address state violations. The adoption of inquiries in Sri Lanka and Northern Ireland generally was a means for the government to avoid further scrutiny.

This finding that there is a distinction between conditions leading to prosecutions and those prompting truth-seeking measures is important. The impulse to engage in a legitimation exercise in response to domestic and international critiques of the existing criminal justice process is uniquely suited to leaders of democratic states confronting internal war. The inquiry model utilized in Sri Lanka and Northern Ireland is thus distinct from the increasingly adopted truth commission model and should be theorized accordingly. Though the pitfalls of truth-seeking measures in transitional contexts have been noted for their tendency to silence certain narratives and skirt examination of the

underlying structural causes of state violations (Campbell and Turner 2008; Mendeloff 2004; Hirsch 2012), this project illuminates an additional factor to consider, namely, the troubling incentives driving certain types of truth-seeking for a democratic government in the midst of internal war.

This dissertation's analysis of accountability mechanisms in conflicted democracy cases is significant for several reasons. First, it illuminates an understudied political space in which human rights accountability is pursued, contested, enabled and constrained. We know little about how democratic governments confront demands for accountability when war is within their own borders. This analysis demonstrates that the extent to which accountability is possible is not, as we might expect, a product of conflict dynamics (e.g. the comparative severity of the violence). Rather, accountability is shaped by the opportunities for and constraints on government accountability in the pre-conflict period. The availability and efficiency of democratic relations of accountability in conflicted democracies are, in essence, variable in important ways.

Second, this project provides the first social science comparative analysis of how emergency measures directly impact accountability processes. As a result of the global war on terror, emergency and counter-terrorism laws have received a great deal of attention. Scholars have mainly focused on how the counter-insurgency strategies of democratic governments limit civil liberties. Less research has examined how emergency measures directly impact efforts to hold the state to account. This project demonstrates how language originally used in colonial-era emergency legislation concerning the legitimacy of government actions during crisis reverberates in the decisions of trial proceedings against the state and parliamentary debates thirty to forty years later. My

findings on the constraining power of legal models from a colonial era contribute important insights about the comparative effects of these laws.

Third, and related to my second point, my research findings on the conditions that enable and restrict accountability processes in three conflicted democracies have potential generalizability to other significant historical cases, including Israel, India, and Colombia. Emergency legislation is historically relevant in these cases and the connection between the design and regulation of these laws to citizens' justice-seeking efforts is largely unexplored. In future research, I plan to investigate the impact of emergency laws in these countries on accountability efforts. My findings may also have import for the U.S. case. The U.S. government's involvement in the wars in Iraq and Afghanistan during the early twenty-first century is an example of internationalized internal conflict, which is distinct from internal conflict *within* a democracy. Yet, there may be important parallels between these cases regarding the role of domestic and external relations of accountability and the legacy of explicit (and less explicit) emergency and counter-terrorism measures for accountability outcomes.

Organization of the Dissertation

The central concern of this dissertation is to understand the openings, constraints and tensions surrounding efforts to hold state actors to account in democracies experiencing internal war. I challenge the current practice of incorporating these cases into large N analyses without proper attention to their distinctive conditions and dynamics. I also aim to illuminate the utility of historical institutionalist analysis for studies of human rights accountability. Though relations of accountability exist prior to

the onset of violence in these cases, their efficiency and availability to citizens seeking redress are varied. I demonstrate that the very foundations of the democratic state in each case, moments of transition from a colonial period or an authoritarian regime, had significant and lasting effects on the degree to which violent actions taken by the state against citizens were perceived as legitimate. In the following, I outline how the ensuing chapters illustrate my central claims.

In Chapter 2, I discuss the method for identifying the universe of conflicted democracy cases and I compare this group of countries to other cases of conflict in the world in terms of their use of prosecutions and truth-seeking measures to address state human rights violations. I then provide the basis for conducting detailed comparative case study analysis of conflicted democracies by arguing that though it appears conflicted democracies and democratic transition cases utilize more accountability mechanisms than conflicted non-democracies, we do not fully understand what is driving this outcome. I advocate for a more in-depth examination of conflicted democracies in order to understand the conditions enabling and restricting these processes.

Chapters 3 – 5 form the empirical sections of the dissertation. In Chapter 3, I examine the use of prosecutions and commissions of inquiry throughout the internal war in Sri Lanka, which spanned close to thirty years. I argue that the colonial legacy of emergency laws greatly limited the prospects for state accountability through their provision of immunity clauses and their use by the government to monitor and regulate civil society groups. Key aspects of legislation design and regulation contributed to the entrenchment of these laws. Despite these barriers, a small number of prosecutions were catalyzed by political competition and leaders' motivation to respond to pressure from

international institutions. Finally, I provide a detailed examination of the commissions of inquiry. Drawing on interviews conducted during field research, and analysis of commission mandates and reports, I argue that, with only a few exceptions, these processes were largely created as a smokescreen by the incumbent government.

In Chapter 4, I discuss prosecutions and truth-seeking measures held throughout (and, in a few cases, after) the Northern Ireland conflict. This case illustrates how the efforts of civil society groups unfettered from government intimidation and control were a central propellant for both domestic and international prosecutorial activity concerning state violations. In turn, cases heard by the European Court of Human Rights applied pressure on the Northern Ireland and British governments to address domestic policies and practices of accountability. Akin to the Sri Lankan case, however, Northern Ireland citizens were unable to escape from the constraints of a colonial legal model. The continued enactment of emergency laws prior to and during the conflict acted to legitimize violent state action and this gradually produced a bias toward the British state within some sectors of the judiciary. Yet, unlike the trajectory of emergency legislation in Sri Lanka, the laws enacted in Northern Ireland were contested and reformed. The regulation of these measures loosened their constraining power on accountability efforts, distinguishing the two cases in subtle, but important ways.

In Chapter 5, I examine the surge in violence between the democratic Spanish government and ETA in the years immediately following the democratic transition. I argue that in their attempts to cleanly separate from the authoritarian regime, political leaders negotiating the democratic transition established key vertical and horizontal relations of accountability and these conditions were central to igniting the prosecutions

that followed years later. In addition, political actors deliberately avoided carrying over repressive emergency legislation from the prior regime. Instead, they developed temporary laws that sought to manage the rising violence but prohibited state abuse of these powers. I also discuss the avoidance of truth-seeking measures in the Spanish case, demonstrating that such mechanisms were largely irrelevant to the state violence under investigation in this project. I conclude, however, by discussing how Spain may potentially expand the pool of countries employing truth commissions several years after the fact, as citizens continue to press for information and acknowledgment concerning Franco-era abuses.

The three case studies are placed alongside one another in Chapter 6, the concluding chapter, as a means to highlight the distinct comparative findings across the cases. I elaborate on the theory of the dissertation by developing my argument that relations of accountability that existed prior to the conflict are central for understanding the design and implementation of accountability mechanisms in Sri Lanka, Northern Ireland and Spain. I proceed to discuss the five causal mechanisms, which enabled and restricted accountability mechanisms to varying degrees across the cases. I argue that the central variable shaping prosecutions and truth-seeking measures is the presence/absence of entrenched emergency laws in the pre-conflict period. I further develop the central argument of the dissertation by expounding on the key points of the historical institutionalist analysis of emergency and anti-terrorism laws in all three cases. I then conclude the chapter by discussing the theoretical, substantive and normative implications of my findings, in particular their potential applicability to the use of

emergency powers in other cases of conflicted democracy. I also describe my plans for future research, building on the insights and gaps identified in this project.

Chapter 2

The Universe of Cases

This dissertation examines human rights accountability in three conflicted democracy cases, Sri Lanka, Northern Ireland and Spain. In this chapter, I pull the lens back to discuss accountability mechanisms in the universe of conflicted democracies, and I discuss how accountability trends in conflicted democracies compare with those in conflicted non-democracies. In the following, I introduce the method for identifying a group of sixteen conflicted democracy cases and I conduct a preliminary investigation of how these cases might vary in their use of prosecutions and truth-seeking measures. I then place conflicted democracies within the larger universe of conflict cases to discuss trends in global accountability by regime type.

Determining the Universe of Cases

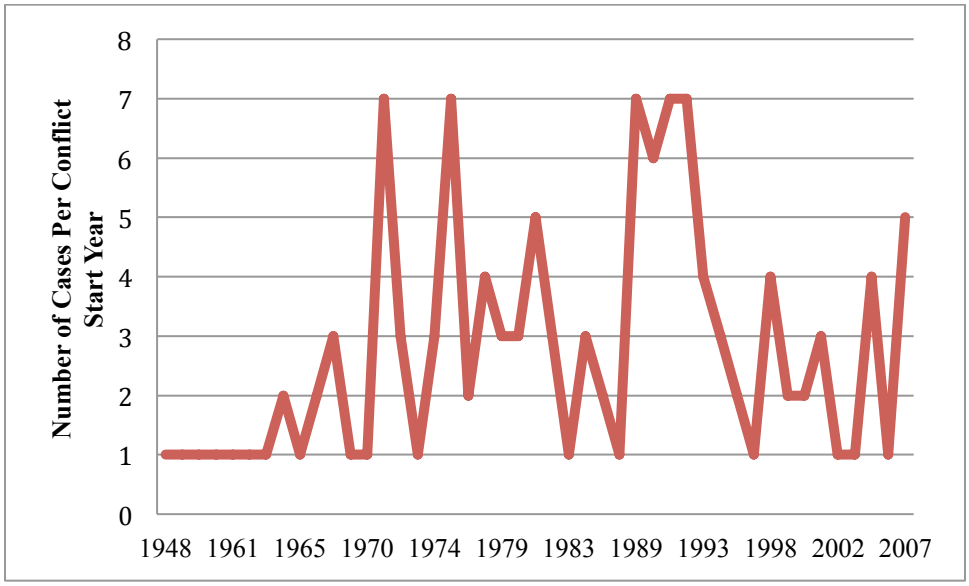
In order to first identify the global cases of internal conflict, I examined data from the Uppsala Conflict Data Program (UCDP/PRIO), Version 4 - 2010 and the Onset of Civil Conflict Dataset, 1946 – 2008 (Gleditsch et al 2002).[12] I chose to focus primarily on the conflict years 1976 - 2010 in order to capture the period, commencing with the third wave of democratization in the 1970s, in which the use of accountability mechanisms surged internationally. Since my research addresses accountability during internal armed conflicts, I focused on those conflicts coded by UCDP/PRIO as a "3" (internal armed conflict) or a "4" (internationalized internal armed conflict, e.g. the

[12] The UCDP/PRIO armed conflict dataset defines armed conflict as: "a contested incompatibility that concerns government and/or territory where the use of armed force between two parties, of which at least one is the government of a state, results in at least 25 battle-related deaths" per year.

current war led by the U.S. in Afghanistan). I excluded conflicts coded as "1" or "2", which include extra-systemic armed conflict between a state and non-state group

Graph 2.1

Global Internal Conflicts



outside its own territory, and interstate armed conflict between two or more states, respectively. I determined the universe of conflict cases to comprise ninety-two countries with a total of 125 internal armed conflicts (e.g. some countries, such as Pakistan, experienced multiple internal conflicts with different start dates). Graph 2.1 charts the trend of these conflicts over time by conflict start date. Conflicts that started before 1976 are included in order to account for those wars with a start date that precedes 1976 but remain ongoing today (e.g. India, Israel and Colombia). The data I used on human rights trials and truth-seeking measures, discussed below, begins with 1976 to coincide with the surge of accountability mechanisms internationally.

Table 2.1

Sixteen Cases of Conflicted Democracy

High Quality Democracies	Conflicted Democracy Years	Polity Scores
Colombia	1964 –present	7, 8 and 9
India	1950 – present	7, 8 and 9
Israel	1949 – present	9 and 10
Philippines	1987 – present	8
Spain	1978 – 1992	9 and 10
Turkey	1984 – present	7, 8 and 9
United Kingdom (Northern Ireland)	1971 – 1998	10
United States	2001 – present	10
Low Quality Democracies		
Indonesia	1999 – 2005 (Aceh)	6 and 8
Mali	1994; 2007 – present	7
Nepal	1996 – 2006	5 and 6
Niger	1991-1997; 2007-8	6 and 8
Peru	1981-1991; 2007 – present	7 and 9
Russia	2000 – 2006	6
Sri Lanka	1984 – 2009	5 and 6
Thailand	2003 – present	4 and 9

In order to identify which cases qualified as conflicted democracies, I matched the 2009 Polity IV dataset scores[13] with the conflict years coded in the UCDP/PRIO Dataset. The

[13] The Polity conceptual scheme examines concomitant qualities of democratic and autocratic authority in governing institutions, rather than discreet and mutually exclusive forms of governance. This perspective envisions a spectrum of governing authority that spans from fully institutionalized autocracies through mixed, or incoherent, authority regimes (termed "anocracies") to fully institutionalized democracies. The "Polity Score" captures this regime authority spectrum on a 21-point scale ranging from -10 (hereditary monarchy) to +10 (consolidated democracy). "The Polity scheme consists of six component measures that record key qualities of executive recruitment, constraints on executive authority, and political competition. It also records changes in the institutionalized qualities of governing authority. The Polity data include information only on the institutions of the central government and on political groups acting, or reacting,

Polity Score assesses regime authority on a 21-point scale ranging from -10 to +10. Polity codes countries with scores between +6 to +10 as "democracies." I therefore chose countries that had a Polity rating between +6 to +10 during their conflict years, resulting in 16 conflicted democracy cases. Bueno de Mesquita, Downs, Smith and Cherif (2005) find that progress in human rights practices appears to only improve after democracies reach a certain threshold, equal to 8 on the -10 to 10 Polity II scale. Utilizing this threshold, I divided the cases into two groupings: eight high quality democracies (Polity Scores = +8 to +10) and eight low quality democracies (Polity Scores = +6 to +7) (see Table 2.1).

The remaining cases within the global universe of internal conflicts are conflicted non-democracies. Conflicted non-democracies include those countries that experienced conflict under non-democratic governance and consistently scored less than +6 on the Polity scale. Within this grouping, countries may have eventually transitioned from authoritarianism to democracy. The category non-democracy simply means that the country experienced a conflict during a non-democratic period. The country is not necessarily non-democratic currently. For example, some countries in this category employed accountability mechanisms after a democratic transition (e.g. El Salvador and Guatemala). Some non-democracies implemented accountability mechanisms during the conflict and before democratic transition (e.g. Ethiopia), while others employed accountability measures without ever experiencing a democratic transition (e.g. Morocco and Zimbabwe). For these reasons, the non-democracy data in Table 2.2 is divided into

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within the scope of that authority. It does not include consideration of groups and territories that are actively removed from that authority (i.e., separatists or "fragments"; these are considered separate, though not independent, polities) or segments of the population that are not yet effectively politicized in relation to central state politics" (Polity IV Dataset Codebook).

two categories: countries that implemented trials and truth-seeking measures under non-democratic governance, and those that largely implemented these measures after a democratic transition.

Table 2.2

Internal Armed Conflicts and Accountability Mechanisms by Regime Type (based on trial years)

Conflicted High Quality Democracy	**Trial Years**	**Number of Truth-Seeking Measures**
Colombia	22	0
India	16	1
Israel	16	0
Philippines (from 1987)	13	1
Spain	17	0
Turkey	25	0
United Kingdom	14	6
United States (2001-present)	0	0
Conflicted Low Quality Democracy	**Trial Years**	**Number of Truth-Seeking Measures**
Indonesia (1999-2005)	11	2
Mali	4	0
Nepal	6	0
Niger	5	0
Peru	26	1
Russia (2000 – 2006)	4	0
Sri Lanka	17	14
Thailand	14	1
Conflicted Non-Democracy I	**Trial Years**	**Number of Truth-Seeking Measures**
Afghanistan	0	0
Algeria	3	1
Angola	0	0
Bosnia/Herzegovina	9	0
Burkina Faso	5	0
Cameroon	1	0
Central African Republic	0	1
Chad	1	1
Congo, Republic of	3	0
Cote d'Ivoire	0	0
DRC	4	1
Egypt	14	0
Eritrea	0	0
Ethiopia	16	1
Gambia	2	0

Ghana	12	1
Guinea	0	0
Guinea-Bissau	0	0
Iran	0	0
Iraq	2	0
Kenya	13	1
Laos	0	0
Lebanon	2	0
Lesotho	0	0
Liberia	1	1
Madagascar	3	0
Malaysia	4	0
Mauritania	1	0
Mexico	20	0
Moldova	1	0
Morocco	6	1
Mozambique	6	0
Myanmar	0	0
Nigeria	6	1
North Yemen	0	0
Oman	0	0
Pakistan	15	0
Papua New Guinea	11	0
Romania	11	0
Rwanda	14	1
Saudi Arabia	0	0
Senegal	4	0
Sierra Leone	7	1
Somalia	0	0
South Africa	20	1
South Yemen	0	0
Soviet Union	0	0
Sudan	1	0
Syria	2	0
Tajikistan	1	0
Togo	0	1
Trinidad/Tobago	3	0
Tunisia	7	0
Uganda	7	2
Uzbekistan	0	0
Venezuela	13	0
Yemen	2	0
Yugoslavia	0	1
Zimbabwe	6	1
Conflicted Non-Democracy II (accountability mechanisms implemented after democratic transition)	**Trial Years**	**Number of Truth-Seeking Measures**
Argentina	24	1
Azerbaijan	2	0
Bangladesh	10	0

Burundi	3	1
Cambodia	3	0
Chile	27	2
Croatia	15	0
El Salvador	16	1
Georgia	2	0
Guatemala	21	1
Haiti	8	1
Macedonia	6	0
Nicaragua	12	0
Panama	17	1
Paraguay	17	1
Serbia/Montenegro	9	0
Uruguay	10	4

Table 2.2 draws on trial year data originally compiled by Kathryn Sikkink and Hun Joon Kim (Kim and Sikkink 2010) in the Department of Political Science at the University of Minnesota, which was later updated through the year 2012 by a team of graduate students.[14] Trial year data counts the number of years that a country has held human rights trials, as opposed to the total number of trials held in a given year across a period of time. A year is coded if there is at least 1 human rights trial occurring in that year. The trial year data codes judicial proceedings based on analysis of annual U.S. State Department Country Reports on Human Rights Practices (1976 – 2012). Though I was able to trace and analyze the nature of the human rights violations and the trials of state actors *related to the conflict* in my research of three case studies, it is difficult to know in all ninety-two countries whether the trials that were coded in the existing database were for state abuses related to the conflict, state abuses related to a repressive regime, or to matters unrelated to both. I acknowledge this limitation in my research.

[14] The updated data that I use is based upon work supported by the National Science Foundation under Grant No. 0961226. Any opinions, findings, and conclusions or recommendations expressed in this dissertation are those of the author and do not necessarily reflect the views of the University of Minnesota nor those of the National Science Foundation.

However, I was able to identify when trials were unrelated to the conflict in a few clear-cut cases, including the Central African Republic, Cote d'Ivoire, Guinea, Guinea-Bissau, Lesotho and Yugoslavia, because the trial years were *before* the conflict emerged. Thus, though human rights trials have been held in these countries on matters unrelated to the conflict, I code the Trial Years as "0" in Table 2.2 because the trials do not address state violations committed during the conflict.

Definitional issues continue to permeate studies on truth commissions and other truth-seeking bodies (Dancy, Kim and Wiebelhaus-Brahm 2010). In her recent book, Hayner identifies a truth commission as: a temporary body, officially authorized by the state under review, which focuses on a pattern of events in the past, and directly engages with the affected communities (Hayner 2011). Though Hayner differentiates in her definition between bodies that focus on *single* events in the past and bodies that concentrate on a pattern of events, she stretches her own parameters by including in her index a truth commission that largely examines one historical event (the Truth and Reconciliation Commission in Greensboro, North Carolina). She then proceeds to exclude the recent truth commission in Colombia because it examines one event, as opposed to a pattern of abuses over time. Freeman (2006) provides a narrower definition of truth commissions than Hayner's definition by focusing on the specific nature and mandate of these bodies and he expands upon her analysis to include commissions of inquiry, which are largely conducted in countries that have a British colonial history.

The current lack of definitional agreement on truth commissions, and, I argue, the repeated, yet, unconvincing argument that "real" truth commissions do not examine single events or a small series of events, leads me to establish the following parameters

for truth-seeking mechanisms. For the global cases of conflict discussed in this chapter, I code all truth commissions included in Hayner (2011) and I code truth-seeking measures that are currently included in the NSF-funded transitional justice database at the University of Minnesota.[15] This database includes official (government-sponsored) truth-seeking bodies that examine a pattern of events *and* single events embedded in larger patterns of abuse or widespread violence. It does not include unofficial truth-seeking bodies, organized by non-state entities. I also code commissions of inquiry that focus specifically on human rights abuses committed by the state during internal armed conflict.[16] For example, I include Northern Ireland's Bloody Sunday (Saville) Inquiry, which investigated the killing of civilians by British security forces during a civil rights march in January 1972. I also include all of the commissions of inquiry in Sri Lanka that focused on state abuses, a total of fourteen. I do not code truth commissions that took place *before* the conflict erupted because these commissions are addressing matters unrelated to state violence during war. For example, I do not code the 1990-1991 Nepal truth commission because it addressed abuses committed during a prior regime, not the conflict that transpired from 1996 to 2006.

[15] The truth commission portion of the NSF-funded project was researched and coded by two undergraduate interns and myself.
[16] To learn more about commissions of inquiry, and how they compare to truth commissions, see Chapters 3 and 4.

Table 2.3

Accountability Mechanisms Employed During Conflict By Country

Countries	Trials	Truth-Seeking
Algeria	Y	Y
Burundi	Y	Y
Cambodia	Y	N
Chad	Y	Y
Colombia	Y	Y
Congo (Republic of)	Y	Y
Croatia	Y	N
Egypt	Y	N
El Salvador	Y	N
Ethiopia	Y	N
Guatemala	Y	N
India	Y	N
Indonesia	Y	N
Israel	Y	N
Liberia	Y	N
Mali	Y	N
Mexico	Y	N
Mozambique	Y	N
Nepal	Y	N
Nicaragua	Y	N
Pakistan	Y	N
Papua New Guinea	Y	N
Paraguay	Y	N
Peru	Y	Y
Philippines	Y	Y
Russia	Y	N
Rwanda	Y	Y
Senegal	Y	N
Sierra Leone	Y	N
South Africa	Y	N
Spain	Y	N
Sri Lanka	Y	Y
Sudan	Y	N
Thailand	Y	N
Turkey	Y	N
Uganda	Y	Y
United Kingdom	Y	N
Venezuela	Y	N

Note: Y = Yes, N = No

Global Accountability Trends

In my research, I find that of the 92 countries that experienced internal armed conflict, 38 (41%) conducted human rights trials and/or truth-seeking measures *during* the conflict (see Table 2.3). All 38 countries employed trials during the conflict while 10 of the 38 countries implemented truth-seeking measures during the conflict. These countries include democracies and non-democracies. As seen in Table 2.3, fourteen conflicted democracies implemented accountability mechanisms. Thus, close to half of the countries that implemented accountability mechanisms during the conflict did so while the country was under democratic governance. The impact of regime type on the use of accountability mechanisms is largely ignored by existing research as an indicator of mechanism adoption because most of the literature has focused on countries transitioning from authoritarianism. Yet, my research on countries that have adopted accountability mechanisms during conflict demonstrates that regime type might influence when countries hold state actors accountable. My research of global internal armed conflicts also suggests that regime type is an important factor shaping the use of accountability mechanisms. Countries that experienced conflict during democratic governance appear to adopt more accountability mechanisms than countries that experienced conflict during non-democratic governance (see Table 2.4). Specifically, 94% (15 out of 16) of countries that experienced conflict during democracy employed trials. 100% (17 out of 17) of countries that experienced conflict during non-democracy but then utilized accountability mechanisms after a democratic transition employed trials, and 66% (39 out of 59) of countries that experienced conflict during non-democracy employed trials.

Table 2.4

Use of Accountability Mechanisms by Regime Type (based on trial years)

Regime Type	Trials	Truth-seeking Measures
Conflicted Democracies (N=16)	94%	50%
Conflicted Non-democracies (with later democratic transition) (N=17)	100%	53%
Conflicted Non-democracies (N=59)	66%	29%

Total N = 92

Table 2.5

Average Trial Years for Conflicted Democracies and Non-democracies

Regime Type	Average Trial Years
Conflicted Democracies	13
Conflicted Non-democracies (trials implemented after democratic transition)	12
Conflicted Non-democracies (trials implemented under non-democratic governance)	4

In terms of truth-seeking measures, 50% of conflicted democracies implemented truth commissions or commissions of inquiry (8 out of 16). 53% of countries that experienced conflict during non-democracy and then utilized accountability mechanisms after a democratic transition employed truth-seeking measures (9 out of 17), while 29%

(17 out of 59) of countries that experienced conflict during non-democracy employed truth-seeking measures. In addition, when I utilize trial year data from the databases described above, I find on average, conflicted democracies have more trial years than non-democracies (see Table 2.5).

Gaps in the Research

The transitional justice literature has documented extensively why and when countries transitioning to democracy utilize trials or truth-seeking measures. We know less about why *conflicted democracies* implement accountability mechanisms at a higher rate than conflicted non-democracies and, more specifically, the number, nature and scope of prosecutions within each trial year. When comparing the number of trial years between high and low quality democracies in Table 2.2, it is evident that high quality democracies have more trial years than low quality democracies. Trial years are a useful means of gauging an approximation of how extensively state actors have been prosecuted for human rights violations in a cross-national comparison. Trial years do not, however, tell us the whole story. For example, in the three case studies examined in this project (see Chapters 3 – 5), Spain and Sri Lanka are coded as having the same number of trial years (17) and yet, when I compared the number of prosecutions against the state to the number of civilian deaths committed by state actors in each case, Spain had a far stronger prosecution record (32%) than Sri Lanka (1.8%). Similarly, though Northern Ireland is coded as having fewer trial years (14) than Sri Lanka, my research finds it actually had a stronger prosecution record (10.5%) than Sri Lanka (1.8%). An examination of other conflicted democracies also illustrates the importance of further evaluating a country's

prosecution record beyond the trial year count. For example, though Israel is coded as having a total of sixteen trial years, I found that in 1988 alone, 36 Israeli soldiers were convicted for abusing detainees in the Occupied Territories (U.S. State Department 1988). Turkey is coded with twenty-five trial years, however, the actual number of total prosecutions of state actors during the conflict is 190.

Through a careful compilation and assessment of the global accountability data, it appears countries that experienced conflict during democratic governance had more trial years and implemented more truth-seeking measures than conflicted non-democracies. This finding suggests that regime type is a significant indicator for the use of accountability mechanisms globally. However, I argue here that though these observed trends are useful as an initial starting point, one of the data sources on which these trends are based, trial years, is limited in a few significant ways. Counting trial years can be somewhat misleading in that it does not capture the actual number of trials held in a country in a given year, nor does it tell us anything about the conditions shaping their occurrence. Countries, such as Spain and Sri Lanka, which are coded with the same number of trial years, appear to be roughly equivalent in their accountability efforts and yet, this could not be further from the truth.

A week before this dissertation was completed, a team of researchers at the University of Minnesota completed coding global human rights trials for each country in an effort to improve upon existing trial year data. I therefore decided to incorporate this data into the chapter as a comparison to existing trial year data. As mentioned previously, the global transitional justice data project at the University of Minnesota is funded through the National Science Foundation. The following three tables provide the

updated data on the number of trials, as opposed to trial years for each country, and updated comparative data by regime type (the truth commission data remains the same in these tables since I had already incorporated the updated data).

First, in Table 2.6, it is interesting to note that the number of trials counted for the three cases under study in this project provide somewhat different results from the previous data on trial years. Spain retains the higher number of trials (77), though the United Kingdom appears to have experienced fewer actual human rights trials (35) than Sri Lanka (54). There are a few explanations for this finding. The trial data within the NSF-funded project is not limited to conflict-related trials as it is in this dissertation. Rather, coders counted every human rights-related trial during both conflict and peacetime. Also, the trials counted within the United Kingdom include human rights trials within the whole of the UK, not just trials related to the conflict in Northern Ireland, which were the parameters for this dissertation.

Second, Table 2.7 strongly corroborates the trial year data in Table 2.4. Conflicted democracies and conflicted non-democracies with a later democratic transition conduct more trials and truth-seeking measures than conflicted non-democracies. There is a small increase in the number of trials conducted by conflicted non-democracies in the updated data (an increase to 73% from 66%) and a slightly fewer number of trials held among conflicted non-democracies with a later democratic transition (a decrease to 94% from 100%).

Table 2.6

Internal Armed Conflicts and Accountability Mechanisms by Regime Type (based on number of trials)

Conflicted High Quality Democracy	Trials	Number of Truth-Seeking Measures
Colombia	126	0
India	102	1
Israel	47	0
Philippines (from 1987)	13	1
Spain	77	0
Turkey	190	0
United Kingdom	35	6
United States (2001-present)	0	0
Conflicted Low Quality Democracy	**Trials**	**Number of Truth-Seeking Measures**
Indonesia (1999-2005)	65	2
Mali	6	0
Nepal	20	0
Niger	7	0
Peru	79	1
Russia (2000 – 2006)	31	0
Sri Lanka	54	14
Thailand	53	1
Conflicted Non-Democracy I	**Trials**	**Number of Truth-Seeking Measures**
Afghanistan	8	0
Algeria	5	1
Angola	0	0
Bosnia/Herzegovina	54	0
Burkina Faso	7	0
Cameroon	10	0
Central African Republic	0	1
Chad	4	1
Congo, Republic of	11	0
Cote d'Ivoire	0	0
DRC	64	1
Egypt	57	0
Eritrea	0	0
Ethiopia	39	1
Gambia	4	0
Ghana	36	1
Guinea	0	0
Guinea-Bissau	0	0
Iran	4	0
Iraq	27	0
Kenya	49	1
Laos	0	0

Lebanon	3	0
Lesotho	0	0
Liberia	3	1
Madagascar	6	0
Malaysia	14	0
Mauritania	1	0
Mexico	85	0
Moldova	8	0
Morocco	14	1
Mozambique	19	0
Myanmar	0	0
Nigeria	35	1
North Yemen	0	0
Oman	0	0
Pakistan	31	0
Papua New Guinea	46	0
Romania	35	0
Rwanda	138	1
Saudi Arabia	0	0
Senegal	8	0
Sierra Leone	16	1
Somalia	1	0
South Africa	56	1
South Yemen	0	0
Soviet Union	0	0
Sudan	14	0
Syria	4	0
Tajikistan	12	0
Togo	0	1
Trinidad/Tobago	15	0
Tunisia	13	0
Uganda	80	2
Uzbekistan	8	0
Venezuela	29	0
Yemen	5	0
Yugoslavia	0	1
Zimbabwe	10	1
Conflicted Non-Democracy II (accountability mechanisms implemented after democratic transition)	**Trials**	**Number of Truth-Seeking Measures**
Argentina	154	1
Azerbaijan	10	0
Bangladesh	30	0
Burundi	19	1
Cambodia	20	0
Chile	62	2
Croatia	78	0
El Salvador	80	1
Georgia	28	0
Guatemala	105	1

Haiti	31	1
Macedonia	20	0
Nicaragua	48	0
Panama	29	1
Paraguay	37	1
Serbia/Montenegro	0	0
Uruguay	11	4

Table 2.7

Use of Accountability Mechanisms by Regime Type
(based on number of trials)

Regime Type	Trials	Truth-seeking Measures
Conflicted Democracies (N=16)	94%	50%
Conflicted Non-democracies (with later democratic transition) (N=17)	94%	53%
Conflicted Non-democracies (N=59)	73%	29%

Total N = 92

Table 2.8

Average Number of Trials for Conflicted Democracies and Non-democracies

Regime Type	Average Number of Trials
Conflicted Democracies	57
Conflicted Non-democracies (trials implemented after democratic transition)	46
Conflicted Non-democracies (trials implemented under non-democratic governance)	18

Third, Table 2.8 also corroborates the trial year data in Table 2.5. The average number of trials in conflicted democracies (57) exceeds both conflicted non-democracies with later democratic transition (46) and conflicted non-democracies (18). More specifically, a total of 912 trials were held within 16 conflicted democracies; 781 trials were conducted in 17 conflicted non-democracies with later democratic transition; and 1088 trials were held within 59 conflicted non-democracies. Thus, the updated global data confirms that regime type matters for when accountability mechanisms are held. But what explains why conflicted democracy cases appear to hold more trials and truth-seeking measures? In what specific ways does democratic governance during conflict make a difference, if at all, for human rights accountability, and what accounts for the differences between conflicted democracy cases? The empirical chapters that follow address these issues directly by engaging in a more in-depth analysis of data on the actual number of prosecutions and truth-seeking measures implemented in each country and by providing evidence concerning the conditions prompting and restricting accountability mechanisms in three cases of conflicted democracy.

Chapter 3

Sri Lanka

Since the end of the war in Sri Lanka in May 2009, there has been intense debate over the role of the government in the deaths of thousands of civilians towards the end of the conflict, and the international community has taken concrete steps to move the discussion toward the implementation of accountability mechanisms. Almost two years after the war ended, a UN panel issued a report in which it found credible allegations that the government of Sri Lanka was responsible for most of the civilian deaths in the final months of the conflict. The report recommended the UN Secretary-General promptly establish an independent international mechanism to monitor domestic accountability processes and independently investigate alleged violations. The UN has yet to create such a body. Though the international community is currently more heavily involved in questions of justice in Sri Lanka than it ever has been, suggesting further interventionism is on the horizon, if we consider the ways in which accountability processes have played out in the past in Sri Lanka, we may be less optimistic about the prospect for a reckoning.

In this chapter, I discuss human rights prosecutions and commissions of inquiry conducted during the conflict in Sri Lanka. I find that government monitoring, regulation and intimidation, limited the possibilities for civil society groups to pressure the government for justice. The historical legacy of emergency laws, particularly their provisions for state immunity, government controls over inquests and prohibitions on judicial challenges, also greatly restricted the prospects for state accountability. Despite

these barriers, a small number of prosecutions were held in Sri Lanka, catalyzed by political competition and leaders' motivation to appease international critics. I also find that though Sri Lanka initiated a large number of commissions of inquiry to investigate state human rights violations, in the end, these bodies rarely led to further pursuit of truth, justice or reparations for victims. The commissions gave the appearance of accountability, with little actual accounting. Thus, the Sri Lankan case demonstrates how an entrenched emergency regime constrained relations of accountability that normally would provide access points for victims seeking accountability for state violations.

The chapter is organized as follows: section II presents historical background to the Sri Lankan conflict; section III provides an overview of the human rights violation and prosecution data; section IV discusses the conditions enabling prosecutions; section V provides a detailed account of the barriers to prosecuting state actors; section VI outlines the commissions of inquiry held and the conditions prompting their enactment; and section VII provides some final remarks on the chapter's findings.

Historical Background to the Conflict

Sri Lanka is a multi-party democracy and the current form of government is a mix of presidential and parliamentary systems. Prior to the 1978 Constitution, the prime minister was the head of state and the president was mainly a figurehead. The 1978 Constitution then created the first office of the Executive President, modeled after the American system, while retaining a parliamentary system of government. The president is now elected directly by the people, members of parliament are elected by a modified form of proportional representation, and the prime minister and other Cabinet members

are appointed by the president from a party or coalition that commands a majority in parliament (Manoharan 2008). Of the 21 million people living on the island, approximately 74% are Sinhalese, 18% are Tamil, 7% are Muslim and 1% comprises smaller ethnic communities, including the Burghers and Veddahs.

After the country's independence from Britain in 1948, politics in Sri Lanka (known as Ceylon until 1972) was dominated by two largely Sinhalese parties, the right wing United National Party (UNP) and the left of center Sri Lanka Freedom Party (see Table 3.1). The first party representing the minority Tamil community, the Federal Party, was formed in 1949 in response to citizenship restrictions placed on Indian Tamil estate workers. Later, in 1972, members of the Federal Party and the Muslim United Front formed the Tamil United Front party, in protest to the anti-minority provisions of the 1972 Constitution. A few years later, the main Tamil parties joined together to form the Tamil United Liberation Front (TULF), which remained the central Tamil political party throughout the war. As communal tensions grew between Sinhalese and Tamils in the early 1980s, the minority Muslim community formed their own party, the Sri Lanka Muslim Congress.

The presidency was held by the UNP from 1978 to 1994. The Janatha Vimukthi Peramuna (JVP), or People's Liberation Front, which formed as a party from a radical, leftist, Sinhalese faction, first fielded candidates in local elections as a political party in 1981 (Sri Lanka Sessional Paper 2000). The party became a main contender with the UNP and the Sri Lanka Freedom Party by the late 1990s. The People's Alliance party (PA), which formed ahead of the 1994 presidential election, was comprised of the Sri Lanka Freedom Party and other coalition partners.

Table 3.1

Chronology of Political Parties in Power During the Sri Lankan Conflict

Years	Political Party	President
1978 - 1989	United National Party (UNP)	Junius Richard (J.R.) Jayawardene
1989 – 1993	United National Party (UNP)	Ranasinghe Premadasa (assassinated in 1993)
1993 – 1994	United National Party (UNP)	Dingiri Banda Wijetunge
1994 - 2005	People's Alliance (formerly Sri Lanka Freedom Party)	Chandrika Kumaratunga
2005 - present	United People's Freedom Alliance (coalition of several parties)	Mahinda Rajapaksa

The PA held the presidency from 1994 to 2005. Before the 2004 elections, a coalition of several parties, including the Sri Lanka Freedom Party and the JVP, formed the United People's Freedom Alliance. The Alliance put forth Mahinda Rajapaksa, who narrowly won in the 2005 presidential election, defeating the prime minister and UNP candidate Ranil Wickremasinghe. Rajapaksa was re-elected for a second term in 2010.

The Sri Lankan legal system is built on a combination of indigenous and colonial (Dutch and British) laws, however, the current system most closely resembles English law (common law). At the time of Sri Lanka's independence from Britain in 1948,

members of the Supreme Court were appointed by the Governor-General on the advice of the Prime Minister (Redden and Schlueter 1990). The Governor-General was a position that led the country in partnership with the Sri Lankan Parliament during the transition to independence. Appointments to the lower courts, including the district and magistrate courts, were made by the Judicial Service Commission, which was comprised of the Chief Justice and two additional judges of the Supreme Court. Between 1948 and 1974, the Supreme Court handled serious criminal offense cases and the District Court managed the majority of civil suits (Redden and Schlueter 1990). The Court of Criminal Appeal, established before independence in 1938, heard appeals from the decisions of the Supreme Court. Strict separation of powers was established by the 1948 Constitution. However, the 1972 Constitution altered this and several other aspects of the legal system.

The 1972 Constitution made Sri Lanka a Republic, and though the initial motivation for its creation stemmed from years of demands for constitutional reform, the 1972 Constitution essentially abandoned the separation of powers enshrined in the former constitution (Redden and Schlueter 1990). For example, it abolished the Judicial Service Commission, granting the executive complete control over judicial appointments and dismissals (Pinto-Jayawardena 2010). In addition, judicial review was abolished and a non-elected president was granted the power to appoint members of the Constitutional Court, which was established to decide the constitutionality of bills presented to Parliament. The 1972 Constitution also altered the structure of the judicial system through the creation of the High Court, which took over from the Supreme Court on all criminal matters. A High Court resides in each of the sixteen judicial zones throughout the country.

The 1978 Constitution, still in effect today, further reformed the legal system in Sri Lanka. While it included the first constitutional section on fundamental rights, including freedom from torture, and attempted to restore the independence of the judiciary through the reinstatement of judicial review and provisions securing judges' tenure, the executive was simultaneously granted wide swaths of power. This was used by various subsequent administrations to intimidate members of the judiciary (see further discussion later in the chapter). The president became an elected post through the 1978 Constitution and this position retained its power to appoint judges of the Supreme Court and the Court of Appeal through an address in Parliament (Redden and Schlueter 1990).

In contrast to civil law legal systems (see Chapter 5), where an investigating judge plays a key role in determining the possibility of an indictment, most of the evidence gathering and investigation in criminal cases within Sri Lanka is conducted by police officers. Thus, when the security forces are responsible for committing a violent crime against a citizen, virtual colleagues of the offender are responsible for investigating the details of the incident and the offender's potential culpability. The Attorney General in Sri Lanka, the chief legal officer of the state, is responsible for making decisions on whether or not to file an indictment in state violence cases. This post has traditionally been appointed by the government in power. During the Sri Lankan internal conflict, the Department of the Attorney General came under fire in several instances over the paradox of its position in state violence cases. Victims of extra-judicial execution, for example, were legally represented by the same entity responsible for the violation. An office of a Director of Public Prosecutions was briefly established between 1973 and 1977 to remedy this matter, but it was subsequently abolished. Calls for an independent

prosecutor's office by human rights advocates and commission of inquiry reports persisted in the 1980s and 1990s, however, the government failed to establish such a body (Pinto-Jayawardena 2010). Though reforms to the Attorney General appointment process were developed in 2001 through the 17th Amendment (see discussion below), these provisions were eventually nullified by President Rajapaksa some years later. In recent years, President Rajapaksa has taken it upon himself to make direct appointments to public offices, including the Attorney General and the appellate courts (Pinto-Jayawardena 2010).

In the last several decades, the Sri Lankan government faced violent insurgencies from both Sinhalese and Tamil opposition groups. Serious internal conflict within the country first emerged after the JVP, prior to becoming a political party, conducted an insurgency in the South of the country in 1971, which was largely based on the economic marginalization of Sinhalese rural youth. Shortly afterward, discriminatory government policies against the minority Tamil community, concerning use of the Tamil language and access to higher education, grew. In 1977, the main Tamil party, Tamil United Liberation Front, called for a separate homeland for Tamils. When anti-Tamil riots followed, Tamil militancy increased, particularly in the north and east, where many Tamils resided. The Liberation Tigers of Tamil Eelam (LTTE) emerged as the dominant Tamil politico-militant group, espousing a separatist agenda. During this time, the 1978 Constitution was passed, significantly increasing the centralization of power within the executive. The party in power, the UNP, also expanded government use of emergency and counter-terrorism measures.

Anti-Tamil violence increased significantly in 1983, when thousands of Tamils were attacked and killed by Sinhalese mobs, following the LTTE killing of 13 Sri Lankan soldiers in Jaffna. This escalation in violence prompted the Indian government to push for peace negotiations, particularly out of concern for spillover effects on its southernmost state of Tamil Nadu (Sriram 2002). The eventual agreement that was reached between the Indian and Sri Lankan governments, the Indo-Lanka Accord, provided an Indian peacekeeping force in the region and plans for the devolution of regional power to the Tamil community. The LTTE rejected this pact and the peacekeeping presence ended in failure after the Indian forces engaged in battle with local rebels, often wielding excessive force against civilians (Sriram 2002). The JVP then launched a second insurgency in 1987 against government politicians and public sector workers, in apparent protest to the Indo-Lanka Accord.

By 1990, however, the opposing factions of the conflict mainly involved the Sri Lankan government and the LTTE. Violence decreased somewhat under the Kumaratunga administration (1994 – 2005) as it attempted negotiations with the LTTE and secured a short-lived cease-fire in the mid-1990s. In early 2002 a second ceasefire agreement was reached, facilitated by the Norwegian government. Ultimately, the ceasefire broke down after the LTTE suspended its involvement a year later and the Sri Lankan government formally withdrew from participation in the ceasefire in 2008. Rajapaksa's rise to power in 2005 resulted in a more powerful, centralized executive, and the continued enactment of repressive emergency and counter-terrorism measures. Splintering within the LTTE followed and violence began to escalate in the north and east regions of the country. In the last few years of the war, the government, aided by a LTTE

splinter group the pro-state paramilitary Karuna faction, moved into a dominant position in the war, regaining territory in the northern and eastern regions and dismantling the LTTE leadership. After almost thirty years of civil war, in which tens of thousands of lives were lost, the conflict in Sri Lanka concluded in May 2009 when the government armed forces defeated the LTTE. Thousands of civilians perished in the final few months of the war and hundreds of thousands were internally displaced. Violence has not resumed on a large scale since 2009, however, the recovery process in terms of rebuilding infrastructure, the reintegration of combatants and the pursuit of accountability, has been slow.

In the remaining sections of the chapter, I discuss the human rights violations committed by the state during the conflict in Sri Lanka and the accountability mechanisms pursued by citizens in response. Though I largely draw on international human rights law and domestic criminal law for this discussion, as mentioned in Chapter 1, international humanitarian law is a relevant, overlapping framework for analysis of human rights violations in situations of internal armed conflict. Sri Lanka ratified the 1949 Geneva Conventions in 1959 but failed to sign or ratify the 1977 Protocols. Common Article 3 of the Geneva Conventions is therefore the only international humanitarian law, or law of war, that can be applicable to this case. The ICRC consistently made visits to Sri Lanka throughout the civil conflict in order to protect and aid victims, monitor violations and train parties to the conflict in international humanitarian law. However, neither the Sri Lankan government nor the LTTE formally recognized international humanitarian law as applicable to the internal war. In response, third parties, not associated with the conflict, including various NGOs and the UN made

statements concerning the government's violation of the Geneva Conventions. One of the most important moves made by the UN regarding the violations of international humanitarian law (as well as international human rights law) involved its report issued in March 2011, which followed the work of a special panel investigation of the war crimes committed in the final months of the conflict in 2009. Within this report, the UN finds the Sri Lankan government to have violated international humanitarian law, specifically Common Article 3 of the Geneva Conventions, regarding requirements of distinctions between combatants and civilians, the ban on attacks on civilians or civilian objects; the ban on indiscriminate or disproportionate attacks against civilians; the requirement of precautions before and during attacks; the requirement of special protection to medical and humanitarian personnel and objects; the ban on starvation of the civilian population and denial of humanitarian relief; the ban on enforced disappearances; requirements of minimal level of treatment for those deprived of liberty; and requirements regarding the dead and missing (United Nations 2011). At the end of the chapter, I briefly discuss that, though these violations have been carefully documented by the UN, accountability for state actions remains elusive.

Human Rights Prosecutions of State Actors

In Sri Lanka, approximately 16,745 civilians lost their lives at the hands of government actors between 1976 and 2008.[17] Prosecutions of state actors for human

[17] I calculated this total through my research of U.S. State Department reports and domestic non-governmental human rights reports. The total excludes civilian deaths resulting from crossfire between LTTE and security forces and thus focuses more on targeted killings of civilians by security force members and police through extra-judicial executions or massacres. It is also important to note that this number represents deaths only through 2008, omitting the tens of thousands of civilians who died in the final

rights violations were implemented throughout the conflict in Sri Lanka (see Graph 3.1).[18] Of the 28 prosecutions, 13 resulted in conviction, 6 ended in acquittal, 4 remain ongoing and the outcome of 5 trials remain unknown (see Table 3.2). Within these prosecutions, 267 state actors, including army personnel, police and political officials, were tried. Approximately half of the cases involved army personnel, while the other half involved police officers. The majority of charges involved lower level army or police personnel, however, senior leaders were prosecuted in a few cases. For example, in three cases where victims were murdered, senior personnel were convicted, though in two of the three cases, the accused were convicted on lesser charges (e.g. wrongful confinement and failure to control subordinates). The majority of cases involved murder (e.g. massacres, individual extra-judicial killings and murder during detention), or abduction (e.g. disappearance) charges.[19]

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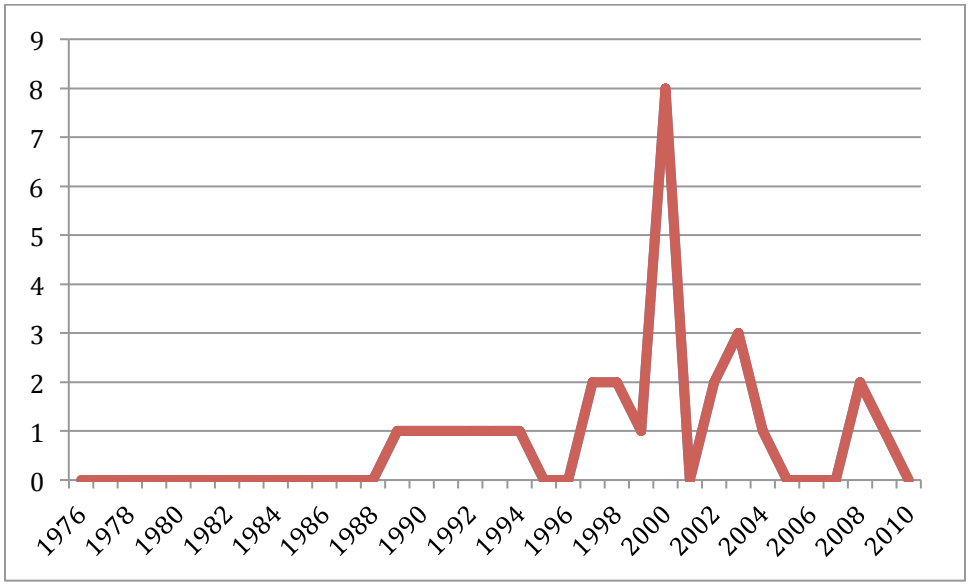
months of the war (January – May 2009). I omit this number mainly because it is still very difficult to discern the responsibility for these deaths. Though the 2011 UN report on the final stages of the war concluded the government was responsible for the majority of deaths, it is unclear how many and in what circumstances. No prosecutions have been held regarding the thousands of civilians killed between January and May 2009.

[18] Data on human rights violations and prosecutions covers the period 1976 – 2010 and is gathered from the U.S. Department of State Annual Human Rights Reports, the Law and Society Trust's Annual State of Human Rights Reports (Colombo, Sri Lanka), Amnesty International reports and data gathered by the Association for Families of the Disappeared (Colombo, Sri Lanka).

[19] It is important to note that abduction was the charge in most cases where victims disappeared because the crime of enforced disappearance does not exist in Sri Lankan criminal law. This matter is discussed later in the chapter.

Graph 3.1

Human Rights Prosecutions of State Actors in Sri Lanka by Year, 1976 – 2010



Though a few state actors were prosecuted for torture in criminal trials, the majority of torture charges were filed in civil courts, as in Northern Ireland (see Chapter 4).[20] In civil cases, citizens can either file a case at the Supreme Court, which has fundamental rights jurisdiction (i.e. rights, such as freedom from torture, that are enshrined in the Sri Lankan Constitution), or file an application for a writ of habeas corpus in the Court of Appeal (Udagama 1998). In these cases victims are awarded compensation and the accused does not receive a prison sentence.

[20] I have gathered some preliminary, yet incomplete data on civil trials concerning torture in Sri Lanka. In future research, I plan to explore this further and compare it to civil trial data in the Northern Ireland case.

Table 3.2 – Sri Lanka Human Rights Prosecution Data

Year	Prosecutions	Convictions	Acquittals	Number of Accused	Type of Accused	Charges
1976	0	0	0	0	--	--
1977	0	0	0	0	--	--
1978	0	0	0	0	--	--
1979	0	0	0	0	--	--
1980	0	0	0	0	--	--
1981	0	0	0	0	--	--
1982	0	0	0	0	--	--
1983	0	0	0	0	--	--
1984	0	0	0	0	--	--
1985	0	0	0	0	--	--
1986	0	0	0	0	--	--
1987	0	0	0	0	--	--
1988	0	0	0	0	--	--
1989	1	0	0	3	Police	Murder
1990	1	1	0	2	Police	Illegal detention, torture
1991	1	1	0	3	Police	Murder in custody
1992	1	1	0	20	Army	Murder
1993	1	1	0	2	Police	Abduction and murder
1994	1	1	0	11	Politician, security forces	Abduction and murder
1995	0	0	0	0	--	--
1996	0	0	0	0	--	--
1997	2	0	1	12	Police, soldiers	Murder
1998	2	1	0	23	Soldiers, police	Murder, rape
1999	1	1	0	7	Army	Abduction with intent to murder, wrongful confinement, torture and murder
2000	8	4	2	121	Army	Abduction and murder; gang rape and murder;

						torture
2001	0	0	0	0	--	--
2002	2	0	1	21	Soldiers, police	Murder, torture and rape
2003	3	0	1	26	Police; soldiers, Navy	Murder; torture/murder in custody; rape/torture in custody
2004	1	1	0	1	Police	Torture
2005	0	0	0	0	--	--
2006	0	0	0	0	--	--
2007	0	0	0	0	--	--
2008	2	0	1	10	Police; Home Guards	Torture; murder
2009	1	1	0	5	Police	Abduction, detention with intent to murder
2010	0	0	0	0	--	--
TOTAL	**28**	**13**	**6**	**267**	**--**	**--**

Of the 16,745 civilians killed throughout the conflict, 300 of the deaths were investigated and prosecuted in criminal trials, a record of 1.8%. The prosecution record is measured by dividing the number of civilian deaths investigated through prosecutions of the state by the estimated total number of civilians killed by state forces in the conflict (e.g. 300/16,745 = 0.0179 or 1.8%). This prosecution record is significantly lower than the record in the other two cases, Northern Ireland (10.5%) and Spain (32%).[21] Though serious internal violence in Sri Lanka escalated after 1983, prosecutions of state actors did not commence until the early 1990s (see Graph 3.1). By this time, Sri Lanka had weathered two insurgencies by the JVP. In addition, Tamil separatist militancy had

[21] See Chapters 4 and 5.

evolved into a serious, organized threat. Reports of extra-judicial killings and disappearances were at an historical high. Between 1983 and 1994, an estimated 14,062 civilians were killed and 25,061 disappearances had been reported in Sri Lanka (U.S. State Department 1983 – 1994; Law and Society Trust 1993-1994; Association for Families of the Disappeared 2009). Though there was significant evidence linking government security forces and police to a large portion of these violations (Amnesty International 1985 – 1988), little had been achieved up to this point in the way of holding specific individuals to account.

A handful of Commissions of Inquiry (COI) had convened prior to and during this time, including the 1977 Sansoni Commission, which investigated the first JVP insurgency, the 1991 Inquiry into the attack on a Médecins Sans Frontières (MSF) vehicle, the 1991 Kokkadicholai COI, investigating an attack on soldiers and the reprisal killing of sixty-seven civilians, and the 1991-1993 Commissions of Inquiry inquiring into disappearances in the 1980s and early 1990s. The politicization of these commissions, however (discussed further below), led to widespread impunity. What explains the poor prosecution record in Sri Lanka, compared with the other two cases, and what enabled the small number of prosecutions that were held?

The Conditions Enabling Human Rights Prosecutions

The Role of Political Competition

In the following, I explain the increase in human rights prosecutions in the 1990s after a period of little accountability. I demonstrate that when accountability was a salient issue across voter constituencies, political competition prompted prosecutions in

Sri Lanka. In the early 1990s, after a lengthy period of intense violence, perceptions of government illegitimacy and demands for government accountability were popular across both Sinhalese and Tamil communities. Political competition gave a political party the incentive to design a platform responding to accountability demands from civil society. After the party's presidential nominee was elected in 1994, human rights prosecutions increased and the president pushed for convictions in a few high-profile cases. Towards the end of the conflict in 2009, a few prosecutions were held under a different administration and at a far lower rate mainly as a means to appease the international community.

During the 1980s, when violence had reached an all-time high in Sri Lanka, civil society groups, particularly those critical of the government, largely operated under a climate of fear. Despite this, by the early 1990s, the number of non-governmental organizations (NGOs) in the country had grown to 3000. In response, the government sought to reduce the influence of these groups by developing emergency measures that regulated and monitored NGO actions. On December 22nd, 1993, the government issued an emergency regulation making registration with the government mandatory for NGOs whose yearly receipts exceeded 50,000 rupees ($454 US dollars) (Law and Society Trust 1993). If receipts exceeded 100,000 rupees ($909 US dollars), a government official was assigned to the organization to monitor all receipts and disbursements. Some NGOs refused to register while others complied. Then, when a provincial councilor was abducted, allegedly by the United National Party, around the same time the emergency law on NGOs was issued, several organizations responded by publicly demanding protection for civil liberties and "clean government" (Law and Society Trust 1994: 17).

The public outcry during this time was more tangible than it had ever been, and it was at this moment that the People's Alliance Party (PA) saw an opportunity.

The PA, which formed from a coalition of the Sri Lanka Freedom Party and other smaller parties, initiated a political campaign focused on government transparency, a society free from fear and corruption, and an end to a powerful executive. The PA also ran on the idea of initiating a peace process with the LTTE. The party manifesto promised to investigate "murder, disappearances, unresolved crimes and political victimization which occurred in the recent past" and stated, "within three months of coming into power we will take immediate steps to provide to families information about the disappeared" (Law and Society Trust 1994). The most widely distributed party poster displayed a picture of the party's presidential candidate, Chandrika Kumaratunga, with the tagline, "To end a period of murder, vote for People's Alliance" (Asian Human Rights Commission 1994). Massive popular support for these ideals contributed to the party's victory at the polls in August 1994 and Kumaratunga's win in the presidential election in November. In addition to strong support from the Tamil population and civil society groups demanding government accountability, the PA won a clear majority among Sinhalese voters generally (Sriram 2002). A ceasefire was declared between the government and the LTTE in January 1995. The process broke down, however, within only a few months and violence continued, primarily in the northern and eastern regions of the country. Prosecutions of state actors visibly increased during Kumaratunga's tenure (1994 – 2005) (see Graph 3.1). In the following, I discuss her involvement in two high-profile prosecutions of security force members to illustrate how under certain key

conditions, political competition shifted the landscape in Sri Lanka, for a time, away from a pattern of impunity.

The first case involved the abduction, torture and murder of more than 50 high school students in Embilipitiya in 1989. The victims' families and local politicians agitated for a judicial response to the crime, spurring public outrage and support from various organizations (International Crisis Group 2007). Though the Human Rights Task Force, a government sponsored monitoring body, had filed a report on the case and made complaints about the delays in bringing the case to trial, charges were not brought against the accused until 1994 (Law and Society Trust 1994; Pinto-Jayawardena 2010). Once in power, Kumaratunga followed through on her campaign promises through two significant actions on the Embilipitiya case.

Only a few months into her tenure in 1994, President Kumaratunga appointed three regional Commissions of Inquiry (COI) to investigate the disappearances that had transpired throughout the country after January 1st, 1988 (Final Reports of 1994 Commissions of Inquiry 1997).[22] The final reports of these commissions implicated top government officials, members of Parliament, council members and local officials, among others, in directing or implementing disappearances (Final Reports of 1994 COIs 1997; Pinto-Jayawardena 2010). The impact of these findings was staggering and illuminated a clear path for further criminal investigation and prosecution though this manifested in only a few cases. The work of one of the three regional commissions, the 1994 Commission of Inquiry into Involuntary Removal or Disappearance of Persons in the Western, Southern and Sabaragamuwa Provinces, was particularly helpful to the

[22] Analysis of these inquiries is included later in the chapter.

Embilipitiya case (Int. 22). The Commission received complaints on fifty-three disappearances of schoolboys from Embilipitiya and in its final report, within a chapter on impunity, the commission challenged the army's claims that a long-term detention facility, in which the schoolboys were likely held, did not exist at the Sevana army camp (Final Report of COI, Sessional Paper No. V – 1997; Pinto-Jayawardena 2010). The Commission also submitted a special report on the Embilipitiya incident to President Kumaratunga.

In addition to creating a swift response to disappearances through the 1994 COIs, President Kumaratunga pushed for accountability in the Embilipitiya case by declining an army officer's promotion after he was acquitted. The 1999 Embilipitiya trial convicted six soldiers and one high school principal for abduction with intent to murder, wrongful confinement, torture and murder (Punyasena 2003; Pinto-Jayawardena 2010). Many activists and victims' families considered the sentence, ten years imprisonment, to be insufficient. Because the crime of enforced disappearance is not enshrined in the Penal Code, the accused were subject to a far less serious charge of "abduction" (Amnesty International 2009; Int. 22; Pinto-Jayawardena 2010). A senior army officer, Lt. Col. Parry Liyanage, acquitted in the case for lack of evidence, filed a fundamental rights petition in the Supreme Court claiming he was due a promotion to Brigadier General. The Supreme Court ruled in favor of Liyanage, however, given his involvement in the Embilipitiya case, and the Commission's findings that he was directly involved in the disappearance of the schoolboys, President Kumaratunga refused to award the promotion (Pinto-Jayawardena 2010).

In addition to the 1994 commissions of inquiry, three other commissions led to prosecutions of security force members or police officers, though given the mixed outcomes, their role in prompting prosecutions should not be overstated. For example, a report submitted by the Sri Lankan government to the UN Committee Against Torture (2004),[23] states that the Disappearances Investigation Unit (DIU), set up by Kumaratunga's administration in 1998, conducted investigations into 3,615 disappearances, following information identified by two of the regional 1994 COIs, the 1998 All-Island COI on Disappearances and the 1996 Board of Investigation into Jaffna disappearances (not a COI). The government report states that the following criminal proceedings resulted from these investigations:

	High Court	**Magistrate Court**	**Total**
Cases Filed	376	56	432
Cases concluded	135	43	178
Pending cases	241	06	247
Accused discharged	123	07	130
Convicted	12	-	12

Source: *Second Periodic Report made by Government of Sri Lanka to Committee Against Torture,* CAT/C/48/Add.2 6 August 2004

Given the large number of cases filed, however, a total of twelve convictions seems particularly low.

In addition, after the 1992 Kokkadicholai Commission of Inquiry report recommended that the culpable soldiers be brought before a military court, the accused were tried in this setting. Seventeen army members were acquitted and one officer in charge was found guilty on two counts, including failure to control his subordinates and

[23] Pinto-Jayawardena (2010) is critical of this government report for its lack of complete information regarding what led to discharges and the lack of geographical information. It is also noteworthy that because Sri Lanka lacks a right to information, it was difficult for me, and others before me, to obtain relevant court files in order to gain a more complete understanding of the data presented.

improper disposal of dead bodies (Pinto-Jayawardena 2010). The officer was then simply dismissed from duty instead of serving a sentence. Finally, nine years after[24] the Batalanda COI report implicated former Senior Superintendent of Police, Douglas Peiris, in the crime of detaining individuals at the Batalanda "torture chamber," he and four other policemen were convicted for the abduction of two men and one youth and unlawful detention with intent to murder (Pinto-Jayawardena 2010).

A second case also benefited from Kumaratunga's rise to power in the mid-1990s. Seventeen year-old Krishanthi Kumaraswamy, a young Tamil woman, was abducted at a Chemmani checkpoint in 1996, then raped and murdered by several army personnel. This tragedy was compounded when her mother, brother and friend disappeared after inquiring about her at a police station. The swift pace of judicial proceedings on this case was unusual for the time. Similar to the Embilipitiya case, because the incident involved a young, innocent person, there was substantial public outcry (Int. 20; Int. 22). It is worth noting, however, that similar crimes had and were taking place in Sri Lanka throughout the conflict. I argue that the swift prosecution and resulting convictions in the Kumaraswamy case benefited more from political competition than the nature of the crime. Once in power, there was clear political will from the Kumaratunga administration to punish the perpetrators in this case (Int. 23; Pinto-Jayawardena 2010). In 1997 the Chief Justice, with input from the President, initiated a trial-at-bar. A trial-at-bar is headed by a panel of judges as opposed to a trial by jury and is argued to be particularly useful in human rights cases because it expedites the proceedings and gives witnesses an opportunity to tell their story in a timely manner, as opposed to years or

[24] The accused had fled the country in the interim years.

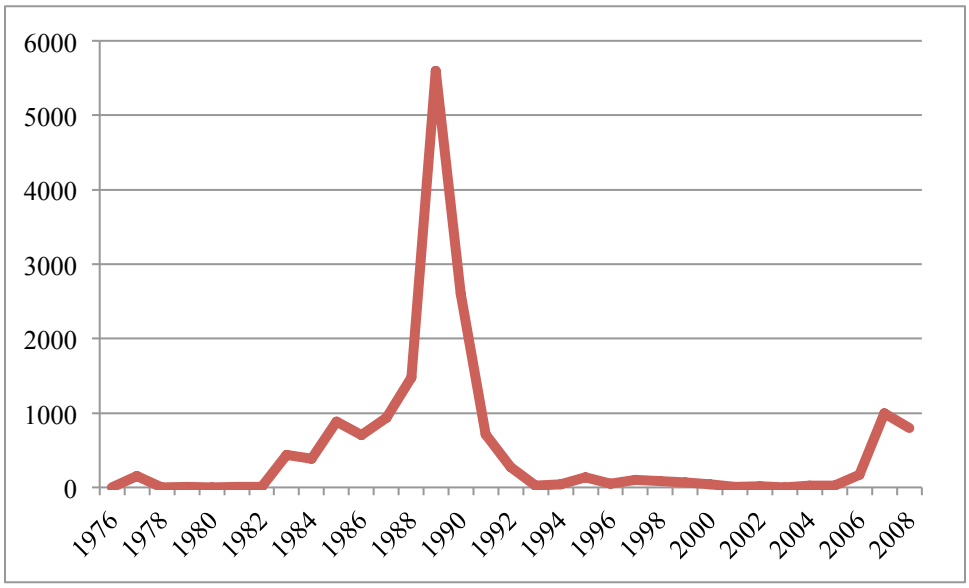
even decades later (Int. 23; Int. 24).[25] In the end, six soldiers were convicted for rape and murder and two soldiers were acquitted (Punyasena 2003; ICG 2007; Pinto-Jayawardena 2010; U.S. State Department 1998).

In addition to a shift from a prior pattern of impunity, the Kumaratunga years were marked by a decrease in extra-judicial killings (see Graph 3.2). The number of enforced disappearances during Kumaratunga's tenure also decreased from previous years, however, the total reported remained quite high. Between 1995 and 2002, 5896 cases of enforced disappearance in the northern and eastern regions of the country were recorded, down from 24,551 disappearances between 1988 and 1993 (Association for Families of the Disappeared 2009). The previous discussion demonstrates that political competition provided incentives for a political party to respond to voter demands for government accountability. As various members of civil society organizations, that aligned themselves with Kumaratunga during her campaign explained to me, the PA saw an opportunity to go after its political rivals by capitalizing on the popular demand for government accountability (Int. 20; Int. 21; Int. 22; Int. 25; Pinto-Jayawardena 2010; Law and Society Trust 1994; Law and Society Trust 1995). One interviewee commented that the high-profile trials and the 1994 COIs were simply a means to "demonize the previous regime" (Int. 20). It is important to note, however, that one of the key prosecutions pushed forward by Kumaratunga, the Kumaraswamy murders, concerned a state crime that occurred during her tenure.

[25] The norm of lengthy delays in most human rights judicial proceedings is one of the most significant barriers to securing convictions given that witnesses may die in the interim, leave the country, or forget details, causing the loss of key evidence.

Graph 3.2

Extra-Judicial Killings of Civilians in Sri Lanka by Year, 1976 - 2008



But, why did political competition prompt prosecutions in one election cycle but not in other cycles later in the conflict? The Kumaratunga administration capitalized on a moment when government accountability was politically popular across constituencies and, once elected, prosecutions increased during her tenure. This pattern failed to persist because accountability became a less salient issue among Sinhalese voters, the majority population. Violence generally decreased during the late 1990s and 2000s (see Graph 3.2) and though the government continued to wage war against the LTTE, these actions were largely contained to the north and east regions of the country. The Sinhalese population in the South was largely unaffected with the exception of sporadic targeted attacks on individuals in Colombo. Additionally, government counter-terrorism efforts

later in the conflict were largely directed at the minority Tamil population, not the majority Sinhalese population, as they had been in the 1980s and early 1990s. Thus, in contrast to the period before the 1994 elections, perceptions of government illegitimacy among the Sinhalese constituency were very low in the mid-late 2000s. As a result, government accountability ceased to be a significant political issue. In addition, political competition generally withered later in the conflict when the Rajapaksa administration increased the power of the executive and extended presidential term limits. Thus, similar to the Spanish case (see Chapter 5), under a few key conditions, political competition prompted prosecutions for state violations in Sri Lanka.

Interestingly, political party strategy also brought about institutional reforms during Kumaratunga's tenure that aimed to improve government accountability. The creation of the 17th Amendment in 2001 illustrates this point. Prior to 2001, the JVP was attempting to make a comeback as a political party. After years of a tarnished image, resulting from their insurgencies in the late 1970s and early 1980s, the JVP sought to expand its constituency, creating a platform focused on good governance and domestic-led human rights accountability (Int. 24; Int. 25). The PA government, led by President Kumaratunga, had recently lost its majority in Parliament after members of the Sri Lanka Muslim Congress withdrew from the government coalition (Law and Society Trust 2002). In an effort to regain the majority, Kumaratunga signed a Memorandum of Understanding with the JVP. Several proposed constitutional changes were included in this document, specifically the call to create a Constitutional Council, the cessation of executive presidency and reforms to the electoral process to increase minority representation (Law and Society Trust 2002). Though the Memorandum was short-lived,

and the government lost its majority when some PA members switched sides to join the United National Party (UNP), the 17th Amendment, based on the JVP's proposals, was passed through parliamentary consensus.

The main component of the 17th Amendment is the creation of a Constitutional Council. This body acts to transfer some power from the executive concerning judicial appointments and other appointments relevant for human rights to a body consisting of nominees of political parties represented in Parliament. Its main task is to appoint personnel to independent commissions and to other key posts identified in the amendment, including the Attorney General, the Chief Justice and judges of the Supreme Court and the Inspector General of Police. The Council identifies individuals, submits recommendations for appointment and the President approves the nominations. The President cannot make appointments without the Council's approval. Thus, the amendment seeks to increase the transparency and independence of bodies, notably the National Police Commission and the Human Rights Commission.

The National Police Commission, developed in 2002, is comprised of civilians and authorized to appoint, promote, transfer, discipline and dismiss police officers, other than the Inspector General of Police, and it can investigate complaints against police (U.S. State Department 2002; Law and Society Trust 2002). It is answerable to Parliament, as opposed to the Executive. Since its creation, the National Police Commission has acted to reduce politically motivated actions within the police force and to monitor complaints against the police, even in the areas of torture, arrest and detention. For example, it rejected the transfer orders of 60 Assistant Superintendents of Police and Officers in Charge because the transfer requests were seen to emanate directly from

certain government ministers and Members of Parliament (Law and Society Trust 2004). In addition, the Commission initiated a public campaign seeking civilian complaints against the police with the aim of investigating such issues. Unfortunately, the force of the Commission's oversight has been fairly short-lived. In 2005, when the body's three-year term lapsed, the Rajapaksa government failed to appoint new commissioners (Manoharan 2008; U.S. State Department 2005).

The Human Rights Commission of Sri Lanka was formed in 1996 under Act No. 21. Though it gained constitutional status through the 17th Amendment, this institution has been widely criticized for its lack of teeth as an investigatory body. This largely results from the fact that its mandate is limited to the investigation of fundamental rights, located within the Sri Lankan Constitution, which do not include all of the civil and political rights that Sri Lanka is obliged to protect through international treaty law, including the right to life[26] (Skanthakumar 2009; Law and Society Trust 2005).

The 17th Amendment also gave powers to the Constitutional Council, as opposed to the president alone, to make appointments to the offices of the Attorney General, the Chief Justice and judges of the Supreme Court and the Inspector General of Police (Law and Society Trust 2002). This move was seen as significant, given the increasing politicization of these offices and their close ties to the executive. Since the Attorney General is responsible for filing indictments on cases involving extra-judicial killings, torture and disappearance, this move was welcomed by many human rights organizations. Cases documented by the University Teachers for Human Rights (Jaffna) demonstrate

[26] Human rights NGOs in Sri Lanka have lobbied various administrations for years to add a right to life amendment to the Constitution, often citing India's constitution as a model.

that some Attorneys General in recent years have sought to act without political interference from the executive (Pinto-Jayawardena 2010).

After President Rajapaksa was elected in November 2005, the Constitutional Council ceased to function. There was disagreement over the appointment of the Council's tenth member (who is determined by majority vote of the smaller parliamentary parties) and this created an impasse. Instead of resolving the issue, the president proceeded to directly appoint members of the Human Rights Commission and the National Police Commission himself, refusing to enable the Council to resume its duties (International Crisis Group 2007). The nullification of the 17th Amendment through the introduction of the 18th Amendment in 2010 has rendered the Attorney General post and other bodies vulnerable to political pressure once again.[27]

For a short time, the 17th Amendment introduced key institutional reforms aimed at increasing government transparency, reducing the politicization of criminal justice bodies and improving victim access to accountability mechanisms. Its creation demonstrates the ways in which political party strategy enabled reforms during the conflict that directly addressed impunity and the institutions and practices that acted to sustain it. Reflecting on the creation of the 17th Amendment in 2001, one interviewee stated, "Democracy works when there is a possibility for change – when a ruling party can become the opposition and the opposition can become the ruling party" (Int. 21).

[27] The 18th Amendment, passed in September 2010, has removed several constitutional constraints on executive power, including term limits on the presidency (see CPA Statement on the Eighteenth Amendment Bill 2010).

Appeasing the International Community

Drawing from the literature that argues international institutions and laws can frame elites' decisions or pressure states to implement accountability processes (Roht-Arriaza 2006; Lutz and Sikkink 2001; Kim 2007; Sikkink 2011), we might expect that countries within the jurisdiction of international human rights courts, such as the European Court of Human Rights, would be more likely to hold state actors accountable than governments that are not beholden to such institutions. Unlike Northern Ireland and Spain, Sri Lanka is not within the jurisdiction of a regional human rights court system, and thus, is not subject to pressures from this type of institution. However, the small number of prosecutions towards the end of the conflict, under the Rajapaksa government, appears to be a response to a different form of international pressure; specifically, a desire to deflect scrutiny and appease external actors, namely the United Nations Human Rights Committee (UNHRC),[28] the Committee Against Torture and various donors. One human rights activist remarked to me that administrations have allowed some prosecutions to move forward so that there is something to report to Geneva (Int. 20). He adds that the government is able to keep up pretenses in this way because the violations "never reached the level of Burma, Argentina or Chile" (Int. 20), suggesting if they had, it would have been harder for the government to keep international critics at bay. This insight is all the more compelling in recent months as the Sri Lankan government faces increased pressure from the international community concerning alleged war crimes committed by the government in the final months of the conflict in 2009. The 2010

[28] The threat of a UNHRC resolution calling for an investigation into human rights violations in Sri Lanka played a significant role in Rajapaksa's appointment of the 2006 Commission of Inquiry, discussed later in the chapter (Amnesty International 2009; Int. 25).

Lessons Learnt and Reconciliation Commission, discussed later in the chapter, is understood by many in the human rights sector and larger civil society as an instrument developed to ward off calls for an international criminal tribunal.

The Generalized System of Preferences Plus (GSP+), a European Union trade concession whose eligibility is based on compliance with international human rights treaties, is illustrative of international donor pressure on the Sri Lankan government. Civil society groups monitoring human rights accountability in Sri Lanka have argued that the government has created the COIs, and allowed prosecutions to go forward in some instances, in order to signal to the EU that the government is doing something about the situation. As one interviewee commented, there has been an element of "stringing them along" (Int. 25). In June 2010, however, after temporarily withdrawing the concession in February due to human rights concerns, and offering an extension to the Sri Lankan government to which there was no reply, the European Union fully withdrew the GSP+ concession (*The Sunday Leader*, July 5th 2010). This example of government *inaction* in response to donor pressure may be a reflection of a recent shift in Sri Lanka, under the Rajapaksa administration, away from democratic institutions enshrined in the India model toward an East Asian model in which economic development is the priority and "talking about rights is irrelevant at best" (Int. 25). Since 2005, the Rajapaksa administration has been steering the country on a more authoritarian, isolationist path. Democracy in Sri Lanka withered under the strains of war, and this trend appears to continue in the post-conflict period.

Victims of state human rights violations in Sri Lanka lack the option to bring their case to a regional human rights court, however, after exhausting domestic remedies,

victims or their counsel, can file a claim with the UNHRC, per the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), which Sri Lanka acceded to in October 1997. If the UNHRC deems the claim to be valid, it will issue a communication to the Sri Lankan government, urging specific actions. Unlike European Court of Human Rights rulings, the UNHRC communications are not binding. Between 2005 and 2009, twelve communications, which found violations of various ICCPR provisions, were issued to the Sri Lankan government by the UNHRC (Law and Society Trust 2007; Pinto-Jayawardena 2010). The Sri Lankan government has failed to implement any of the recommendations (Pinto-Jayawardena 2010; Law and Society Trust 2007).

In a particularly alarming ruling in 2006, commonly known as the Singarasa case, the Sri Lankan Supreme Court responded to the UNHRC's recommendation to provide the complainant with an effective remedy of retrial or release and compensation, by deciding that the *State's accession to the Optional Protocol was an unconstitutional exercise of legislative power and an unconstitutional conferment of judicial power on the Human Rights Committee* (Law and Society Trust 2007). The State's accession to the Covenant itself was deemed constitutional by the Supreme Court, though without domestic force given Sri Lanka's dualist system, which requires the creation of domestic law in order to enforce international treaties the government has ratified. Singarasa's application to the UNHRC and its subsequent recommendations were therefore found to be without legal basis. This ruling was widely criticized for its complete disregard of the State's obligations under ICCPR and its manipulation of constitutional provisions to make a false claim concerning the UNHRC's "judicial power" (Law and Society Trust

2007; Bastiampillai et al 2010). One human rights attorney commented to me that since the Singarasa ruling, he has encouraged complainants to bypass the Supreme Court and instead go straight to the Human Rights Committee because judgments like those in the Singarasa case provide precedent, and serve to legitimize arguments made by "extremists" that the international community is trying to interfere and violate Sri Lanka's sovereignty (Int. 23).

Thus, human rights prosecutions during Sri Lanka's armed conflict largely resulted from political competition and, in recent years, a move to appease international donors and international human rights organizations. The following section discusses the conditions that led to a poor prosecution record in Sri Lanka.

Barriers to Human Rights Prosecutions

International law permits states to temporarily derogate from some of their human rights obligations when confronting an internal crisis by declaring a state of emergency (Art. 4, ICCPR). After a state of emergency is declared, governments often create emergency and counter-terrorism laws to manage internal conflict. Legal scholars, human rights activists and international lawyers have, in recent years, contested the overreaching nature of these laws, particularly their infringement on citizens' civil liberties (Gross and Ní Aoláin 2006; Scheuerman 2006; Ackerman 2006). In this section of the chapter, I demonstrate that these tactics not only place questionable restrictions on citizens' civil rights, as critics contend. Emergency and counter-terrorism laws can also shape how security force members and police are held to account for human rights violations. They do so in three specific ways: the laws often contain immunity clauses

for actions performed by security forces and police during a crisis; the laws often include provisions concerning inquests (the investigation of wrongful deaths by a coroner) that remove state actors from scrutiny, grant more power to the state over the inquest process or abolish the right to an inquest entirely; and they often include clauses on expansive powers of arrest and detention, which can grant legitimacy and cover to state actors who are participating in disappearances, torture and extra-judicial killings. In the Sri Lankan case, immunity and inquest clauses,[29] in particular, narrowed the possibilities for holding state actors to account. In the following, I discuss the history of emergency and counter-terrorism laws in Sri Lanka and demonstrate how the design and regulation of these laws shaped human rights accountability in this case. Specifically, I portray emergency and counter-terrorism laws as an *institution* and I show how institutional properties, including veto power and the degree of rule enforcement, produced an environment in which state accountability was highly constrained.

The History of Emergency Laws in Sri Lanka

Governments often declare a state of emergency when a serious crisis emerges within their own borders. Human rights law jurisprudence generally defines "emergency" as an exceptional and temporary situation of crisis that constitutes a threat to the state, in which measures taken must be proportionate to the scale of the crisis (Gross and Ní Aoláin 2006). International treaty law permits states to adopt emergency measures in periods of crisis and under Article 4, paragraph 2 of the ICCPR, states can derogate from certain rights, meaning they are able to temporarily place restrictions on

[29] Immunity clauses and inquest provisions within emergency laws are not to be confused with formal amnesty laws, which prohibit prosecution of certain actors and are typically created by governments to halt violent conflict or assist a negotiated transition process (Mallinder 2009).

citizens' civil rights, normally protected by international law, when they are confronting an internal conflict or emergency.[30]

The history of emergency laws in Sri Lanka stem from the British colonial period (see Table 3.3). The 1947 Public Security Act (now known as the Public Security Ordinance or PSO) was the last piece of legislation enacted by the British before independence and it was designed to quell agitation from striking leftist trade union members (International Commission of Jurists 2009; Pinto-Jayawardena 2010). Prior to the terms of the PSO the Governor of Sri Lanka, appointed by British King George VI, had the power to declare a state of emergency and assume control of any government department in Sri Lanka (Ceylon Yearbook 1948). The PSO gave powers to the Governor-General, who was also appointed by the King to run the island in partnership with Sri Lankan members of Parliament, as part of the transition to autonomy. The 1947 PSO essentially deemed certain government departments, such as food distribution and transportation, essential to the survival of the nation, and it determined that it was legitimate to infringe on civil liberties in order to protect these sectors (Coomaraswamy and de los Reyes 2004). Later, in the 1970s, instead of designing new regulations to address the onset of political violence, successive administrations relied on the emergency measures outlined in the PSO to declare states of emergency and issue regulations, and the PSO continues to be used today.

[30] States are not permitted to derogate from article 6 (right to life), article 7 (prohibition of torture or cruel, inhuman or degrading punishment), article 8, paragraphs 1 and 2 (prohibition of slavery), article 11 (prohibition of imprisonment because of inability to fulfill a contractual obligation), article 15 (the principle of legality in the field of criminal law), article 16 (the recognition of everyone as a person before the law), and article 18 (freedom of thought, conscience and religion) (ICCPR Art. 4, Para 2).

Table 3.3

Chronology of Emergency and Counter-terrorism Laws in Sri Lanka

Year	Law
1947	Public Security Ordinance
1959	Public Security Ordinance (amended)
1971	Emergency Regulations
1979	Prevention of Terrorism (Temporary Provisions) Act No. 48
1982	Indemnity Act No. 20
1988	Indemnity Act No. 60
1991	Emergency (Miscellaneous Provisions and Powers) Regulations
1992	Emergency Law and Trade Union Rights
1993	Emergency (Miscellaneous Provisions and Powers) Regulations (amended in February)
1993	Emergency (Miscellaneous Provisions and Powers) Regulations (amended in June)
1993	Emergency (Miscellaneous Provisions and Powers) Regulations (amended in December)
1994	Emergency (Miscellaneous Provisions and Powers) Regulations No. 1
1994	Emergency (Miscellaneous Provisions and Powers) Regulations No. 2
1994	Emergency (Miscellaneous Provisions and Powers) Regulations No. 3
1994	Emergency (Miscellaneous Provisions and Powers) Regulations No. 4
1995	Emergency (Establishment of a Human Rights Task Force) Regulations No. 1 (June)
1995	Emergency (Miscellaneous Provisions and Powers) Regulations (1994 regulations amended in September)
1995	Emergency (Harbouring of Offenders) Regulations No. 1
1995	Emergency (Confiscation of Motor Vehicles) Regulations No. 1
1995	Emergency (Establishment of a Prohibited Zone) Regulations No. 1
1996	Emergency (Miscellaneous Provisions and Powers) Regulations (amended)
1996	Emergency (Terms of Office of Local Authorities) Regulations No. 2
1996	Emergency (Terms of Office of Local Authorities) Regulations No. 3 (North)
2005	Emergency (Miscellaneous Provisions and Powers) Regulations (amended)
2006	Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations (amended)
2010	Emergency (Miscellaneous Provisions and Powers) Regulations (amended)

Note: Due to the incredibly high number of ERs in Sri Lanka and the fact that some of them were never published in the government gazette, this table is a representative sample of the emergency and counter-terrorism laws.

Thus, the terms for declaring, altering or revoking emergency legislation throughout the conflict were solely based on a law from the colonial era. As will be shown later, particular aspects of the PSO concerning parliamentary voting rules and immunity clauses were adopted and maintained decades later through several emergency regulations.

Emergency regulations were developed in 1971 to respond to insurgent violence, instigated by the JVP. Increasing riots and violence between the Sinhalese and Tamil populations prompted subsequent regulations. Then, in 1979, former President Jayawardena issued the Prevention of Terrorism (Temporary Provisions) Act (PTA) in response to escalating violence in the North. The PTA is not an emergency regulation but its powers are similar to emergency laws in several ways. Though it was initially created to be temporary, the 1979 PTA was amended to become permanent in 1982. The PTA primarily defines certain terrorism offenses, outlines penalties, and confers certain powers on the Executive. Aspects of the law were modeled on the PTA developed in 1974 by the British government to address the conflict in Northern Ireland, though there are important distinctions between the two (Sieghart 1984). For example, the definition used for acts of terrorism is more narrowly defined in the UK law than the Sri Lankan PTA. The UK law defines terrorism as "the use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear" (Prevention of Terrorism Act 1974), while the Sri Lankan 1979 PTA defines terrorism broadly as "unlawful activities" (Prevention of Terrorism Act No. 48 1979). It is noteworthy that within the preamble of the Sri Lankan PTA, justification for the law is sought by referencing actions taken by other conflicted democracies: "And

whereas other democratic countries have enacted special legislation to deal with acts of terrorism" (Prevention of Terrorism Act No. 48 1979).

Emergency regulations were in force within Sri Lanka continuously from 1983 to 2001, with the exception of five months in 1989 (Coomaraswamy and de los Reyes 2004). Under the terms of the Ceasefire Agreement of February 2002, certain provisions of the PTA were suspended. Specifically, search operations and arrests under the PTA by government forces were to cease and future arrests were to be conducted in accordance with the Criminal Procedure Code (Law and Society Trust 2003). Following the assassination of Foreign Minister Lakshman Kadirgamar in 2005, the Sri Lankan government initiated the Emergency (Miscellaneous Provisions and Powers) Regulations, and after an assassination attempt in December 2006 on Defense Secretary Gotabhaya Rajapaksa (the president's brother), the government announced that provisions of the PTA would be reintroduced through a new set of Emergency Regulations (2006)(Centre for Policy Alternatives 2006; Law and Society Trust 2007). The reinstatement of the PTA, in conjunction with increasing violence between the LTTE and government security forces during this time, signaled the unraveling of the 2002 Ceasefire Agreement. Then, in 2008, the Sri Lankan government formally withdrew from the ceasefire.

More recently, emergency regulations were promulgated on May 2nd, 2010. Several provisions outlined in the 2005 Emergency (Miscellaneous Provisions and Powers) Regulations were repealed at this time, with the exception of the immunity clauses, discussed further below (United Nations 2011). Under Article 4 of the ICCPR, states are to report their derogations to the UN Human Rights Committee once an

emergency is declared. Several states, including Sri Lanka, do not notify the Human Rights Committee of the derogations in a timely manner, if at all. For example, the 2005 Emergency Regulations were not reported by the Sri Lankan government to the Committee until June 2010. In addition, though Article 4 mandates that reasons for an emergency be given when notifying the Committee, the Sri Lankan government has not always obliged. The government notified the Human Rights Committee of Emergency Regulations (ERs) in May 2000 but it did not provide reasons. In its notification of derogation to the UN Human Rights Committee on June 9th, 2010, the Sri Lankan government explains the changes within the 2010 ERs as reflective of the military defeat of the LTTE a year prior, coupled with the "need for vigilance to ensure the complete recovery of arms caches secreted by the LTTE and the reintegration back into society of LTTE cadres, after successfully completing programmes of rehabilitation and of vocational training" (United Nations Human Rights Committee 2010). Despite serious, repeated critique from domestic and international human rights groups, each administration throughout the conflict continually enacted emergency laws.

Immunity Clauses

One of the most direct ways in which emergency laws impact efforts to hold state actors to account in Sri Lanka is through the inclusion of immunity provisions. Both the emergency regulations and the PTA contain clauses explicitly protecting state actors from investigation and prosecution. Defense counsel rarely invokes immunity clauses during human rights trials of security force members or police. However, the "good faith" clause was briefly introduced in the Krishanthi Kumaraswamy case, discussed above, but

was then quickly dismissed (Int. 24; Int. 25).[31] Thus, the clauses preemptively grant legal sanction to state actions taken during the conflict. Immunity provisions are more of a barrier preventing indictments of security force members or police than an obstruction during actual judicial proceedings.

The ICCPR requires states to ensure an effective remedy for victims whose rights are violated (ICCPR Art. 2, Para 3). Though Sri Lanka ratified the ICCPR in 1980, Emergency Regulations and the PTA disregard elements of this treaty by incorporating immunity clauses for security force members and police officers. Several years prior to ICCPR ratification, the government sought to shield state actors from prosecution through Sections 9 and 23 of the 1947 Public Security Ordinance. Section 23 stipulates,

> "No prosecution or other criminal proceeding against any person for any act purporting to be done under any provision of this Part or of any Order made thereunder shall be instituted in any court except by, or with the written sanction of, the Attorney-General; and no such suit, prosecution or other proceeding, civil or criminal, shall lie against any person for any act in good faith done in pursuance or supposed pursuance of any such provision" (PSO No. 25, Sec. 23 1947).

Section 26 of the PTA, passed in 1979, includes the same clause (PTA Sec. 26 1979). After the PTA was passed, the Supreme Court could not review the law's constitutionality because Article 80 of Sri Lanka's 1978 Constitution prevents judicial review of any legislation enacted after 1978 (Coomaraswamy and de los Reyes 2004). The immunity clause within the PTA remains effective today.

A few years after the PTA was passed, the Jayawardene administration created the Indemnity Act 1982, which was extended through 1988 only, and provided similar

[31] When I discussed this matter with a Sri Lankan human rights attorney, she explained that her organization has an interest in tracking this and comparing Sri Lanka with other South Asian countries, including India and Bangladesh. The author plans to follow up with the attorney to determine the status of this proposed study.

protections for government officials, security force members and police, acting while on duty to enforce law or acting "in the public interest" (Indemnity Act 1982). Emergency Regulation 71 stipulated similar protections, until it was repealed in June 1993 (Amnesty International 1994).

Though immunity provisions for state actors were in effect throughout the conflict via the PTA, the Rajapaksa administration, which began in 2005, enacted additional clauses within Emergency (Miscellaneous Provisions and Powers) Regulation No. 73 of 2005 and Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulation 19 of 2006. Both regulations provide protection to persons authorized by the government who have "acted in good faith" (Regulation 73 EMPPR 2005; Regulation 19 ER 2006).

Clauses on Inquests and Post-mortems

In addition to clauses directly providing immunity for state officials acting under the emergency regulations or the PTA, successive administrations in Sri Lanka have also promulgated impunity through regulations on inquests and post-mortems.[32] A forensic autopsy performed at a coroner's inquest can be an important tool for human rights advocacy. For example, government culpability may be ascertained scientifically by "matching the circumstances under which a person was last seen with identification of his or her body and signs of ill treatment" (Clark 2001). The UN *Manual on Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* codifies

[32] As is evident in the following discussion, these provisions have been in force and rescinded at different times throughout the conflict under various regulation numbers, including Regulation 15A, Regulation 55FF, Regulations 45 and 46 and later, Regulations 54 – 57.

such investigative procedures (see also the purpose and creation of the "Minnesota Protocol" in Clark 2001). Ordinary law in Sri Lanka mandates an inquest when a person dies in custody of the police or military or when a person dies at the hands of police or military in the line of duty (Code of Criminal Procedure Act No. 15 1979). In 1983, Emergency Regulation 15A was created by the government, allowing security force members to dispose of bodies without a post-mortem or inquest. At the time, this regulation complicated efforts to determine whether people who disappeared during communal violence in July were dead or missing (U.S. State Department 1983). The regulation also acted to effectively destroy physical evidence in possible disappearance, extra-judicial or torture cases, making it enormously difficult to bring charges against perpetrators (Sieghart 1984; Law and Society Trust 1994; Law and Society Trust 2001).

In February 1990, the provision authorizing security force members to dispose bodies without inquest was rescinded by the Premadasa administration. However, ER 55(B-F), which placed limits on complete, public inquiries into the causes and circumstances of deaths, remained in force. Amnesty International criticized these regulations on the basis that they failed to provide for a complete, impartial investigation, that proceedings were not public and that they still allowed for extra-judicial killings to be covered up (Amnesty International 1991). In 1993, the Premadasa government revised certain amendments within the emergency regulations. Regulations 45 and 46, concerning inquest procedures and post-mortems, were rephrased to permit police to bypass ordinary law only when police or a member of the armed forces had reason to believe that the death took place in the course of an "armed confrontation," and that the victim was waging war against the state (Law and Society Trust 1993). The Law and

Society Trust, based in Colombo, argued that this revision remained inadequate. The organization called for the full restoration of the normal law of inquests whenever a person dies in custody in order to ensure an impartial investigation when security force members are responsible for the death (Law and Society Trust 1993). The government did not heed this request.

In addition to local human rights organizations, the commissioners leading the 1994 commission of inquiry into disappearances in the northern and eastern provinces criticized emergency regulations on inquests in their final report. The report states that these regulations "encouraged a section of the Army to cross the invisible line between the legitimate Security Operation and large scale senseless arrests and killings" (Sessional Paper No. VII 1997: 5). The government also did not respond to this particular aspect of the report.

In May 2000, ER 55FF, a regulation on inquests, was briefly introduced by the Kumaratunga administration then reportedly removed from the newly issued Emergency (Miscellaneous Provisions and Powers) Regulations No. 1. An Amnesty International report (2000) asserted, however, that inquest procedures continued to be highly inadequate. Emergency Regulation 55D(1), which remained in force during this time, mandated that when a person dies at the hands of the armed forces or police or in their custody, the police must notify a magistrate, who will order a post-mortem examination (Amnesty International July 2000). After the exam is performed, however, the police could return the body to relatives or, in the interest of national security and maintenance of public order, bury or cremate the body (Amnesty International July 2000). In addition, if the Inspector General of Police applied for a High Court inquiry into the death under

the emergency procedures, no other inquiry could be initiated, closing off attempts to investigate the death through normal procedures (Amnesty International July 2000).

In 2005, Regulations 54 to 57 of the Emergency (Miscellaneous Provisions and Powers) Regulations, reproduced the provisions found in Regulation 55FF, which had been revoked in May 2000, by allowing a police officer or security force member to deviate from normal criminal law if the officer "has reason to believe that the death may have been as a result of any action taken in the course of duty either by him or by an officer subordinate to him, or where any person dies in police custody or military custody" (Regulation 54 EMPPR No. 3 2005; Law and Society Trust 2006). Regulation 56 dictates that the magistrate cannot order a post-mortem nor determine the manner of the disposal of the body without receiving information from the Inspector General of Police. This indicates that there is space for possible interference by the Inspector General of Police, particularly in cases where the deceased person has been subjected to torture (Civil Rights Movement 2005). Regulations 54 to 57 were repealed shortly after enactment on October 13th, 2005; however, they were brought back in through the 2006 emergency regulations (Law and Society Trust 2006, 2007). In a confusing turn, the May 2010 ERs claim to repeal the 2005 inquest regulations 54 – 58. Thus, it is unclear if the regulations on inquests were actually ever repealed in October 2005. Regardless, they were brought back in less than a year later. The regulations on inquests and post-mortems were thus in force during the final years of the war in Sri Lanka.

The previous discussion illustrates the extreme lack of clarity about when certain provisions within emergency laws are rescinded and sustained. The general inaccessibility of emergency regulations to the public compounds the issue. Emergency

regulations go into effect before they are actually published in the government gazette and they are usually published along with a myriad of other notifications. Further, ERs are rarely announced publicly, therefore, key revisions or the continuation of regulations on state immunity or inquests, often go unnoticed by those who are most affected. Inconsistencies among the Sinhala, Tamil and English versions of emergency regulations have also been a recurring problem. These barriers make it difficult to investigate and eventually prosecute state actors involved in extra-judicial killings, torture and disappearance.

Voting Rules and the Lack of Domestic Contestation on Emergency Laws

The power of immunity and inquest clauses to limit human rights accountability in Sri Lanka was strengthened by the absence of substantive monitoring and regulation of emergency and counter-terrorism laws. Laws created by the Northern Ireland and British governments were, in contrast, consistently subject to scrutiny by parliaments, which often led to revisions and reform (see Chapter 4).

Sri Lanka's constitution contains provisions allowing for emergency powers and limitations on certain rights during a crisis period (Sri Lanka Const. Art. 155 (2 and 3). The PSO, enacted in 1947 just before Sri Lanka gained independence from Britain, enables the president to declare a state of emergency and to create emergency regulations under Section 5 as necessary (Coomaraswamy and de los Reyes 2004; International Crisis Group March 2009). A limited degree of parliamentary control over emergency regulations is given by Section 5(3) of the PSO, which provides that a regulation may be added to, altered or revoked by resolution of Parliament. Articles 155 (5) and (6) of the

Constitution restrict the operation of a regulation to a period of one month and requires the proclamation to be approved by parliament within 14 days, however, there is no requirement that new regulations be presented to Parliament for approval (Goodhart 1997). Though Parliament is given the opportunity to debate emergency legislation, in practice this rarely occurs. In addition, the limited powers granted to the Sri Lankan Parliament to scrutinize and regulate emergency laws have in fact never been exercised (Coomaraswamy and de los Reyes 2004; Goodhart 1997; Welikala 2008). The Prevention of Terrorism Act is subject to even less oversight. Unlike in the Northern Ireland case, the Parliament has no power to periodically review the PTA (Welikala 2008).

In addition, emergency regulations in Sri Lanka are construed as superior to ordinary criminal law. The law through which regulations are enacted, the PSO, stipulates that emergency regulations can override any legislation that may be contrary or inconsistent with it (Public Security Ordinance No. 25, Sec. 7). The constitution has the same provisions with the exception of the constitution's articles (Sri Lankan Const. Art. 155(2)). In addition, though certain fundamental rights are guaranteed within the Constitution, they are constrained in that, with the exception of freedom from torture and freedom of thought, the rights are subject to "restrictions as may be prescribed by law in the interests of national security" (Sri Lankan Const. Chapter III, Art. 15; Manoharan 2008).

The result has been an entrenched emergency regime in Sri Lanka in which laws regulating the conflict override ordinary laws and stifle institutional reform of the criminal justice system. Calls for critical changes to the Penal Code by domestic and

international human rights groups to address impunity have gone unheeded by various administrations for years. The limitations placed on legal reform by the perpetual emergency regime has had an enormous impact on human rights accountability efforts, particularly concerning the provision for command responsibility and the crime of enforced disappearance.

The provision for command responsibility allows superiors to be held responsible both for dereliction of duty and, where warranted, for crimes of subordinates (Amnesty International 2009; Pinto-Jayawardena 2010). It is sanctioned by Principle 19 of the UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (Economic and Social Council Resolution 1989/65 May 24th, 1989), the UN Convention for the Protection of All Persons from Enforced Disappearance under Article 6 (which Sri Lanka has yet to ratify), Protocol I to the Geneva Conventions (Art. 32-34) and the Rome Statute under Article 28 (Amnesty International 2009; Pinto-Jayawardena 2010). The absence of this principle in Sri Lanka's Penal Code has created barriers in several human rights cases. Often, junior officers are held responsible by courts for human rights violations, while commanding officers are either not investigated or acquitted for lack of direct evidence linking them to the crime. For example, in the Embilipitiya case, though Lt. Col. Liyanage was in charge of the camp where 53 abducted children were kept, he was acquitted on the basis that no direct evidence was found regarding his responsibility for their disappearance (Pinto-Jayawardena 2010).

The absence of an enforced disappearance crime within the Penal Code has also created limitations to effectively prosecuting human rights cases.[33] Though many democracies do not have such a law on the books, it is important to note its absence in Sri Lanka given the shockingly high number of disappearances there. 32,932 disappearances were documented throughout the conflict (Association for the Families of the Disappeared 2011). The 2006 International Convention for the Protection of All Persons from Enforced Disappearance obligates signatories to enforce this crime domestically and defines enforced disappearance as,

> "the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law" (Convention on Enforced Disappearance, Art. 2, 2006).

Sri Lanka has not ratified the 2006 Convention. Thus, within the criminal justice process, accused persons are typically charged with abduction or abduction with intention to murder in suspected enforced disappearance cases. Acquittals, or sentences lighter than would normally be issued for a crime defined by international law, are therefore common in these cases (Pinto-Jayawardena 2010; Amnesty International 2009; Int. 22).

Thus, the power of the president to issue emergency regulations in Sri Lanka, and the virtual absence of parliamentary power or political will to debate the merit of the laws or check the executive, allowed for the entrenchment of a highly unregulated emergency regime. Calls for the reform of laws that would serve to limit impunity went unheeded

[33] Some countries, including Colombia, have criminalized the act of enforced disappearance (see Law 589 of 2000). However, definitional ambiguity in Law 589 has caused several cases to be registered as "kidnapped" as opposed to "disappeared" (International Commission on Missing Persons Report April 2008).

since emergency laws were deemed superior to ordinary criminal legislation. In addition, possibilities for reform or the elimination of immunity and inquest clauses were non-existent given the utter lack of parliamentary power in the creation and enactment of these laws. Efforts to hold the state to account suffered significantly as a result.

Judicial Challenges to Emergency Laws

The PSO states that neither the existence of an emergency or an emergency regulation, nor an order, rule or direction made under such a regulation, may be called in question in any court (Secs. 3, 8 PSO; Goodhart 1997; Welikala 2008). Despite this, a few successful legal challenges have occurred, though with little effect on the implementation of emergency laws or accountability efforts. Attempts were made by the Supreme Court in the early 1990s to curb executive abuse of emergency powers. An emergency regulation was struck down as unconstitutional in the *Joseph Perera v. Attorney General* (1992) case, and in the *Channa Peiris v. Attorney General* (1994) and *Sunila Rodrigo v. de Silva* (1997) cases, the Supreme Court upheld the rights of freedom from arbitrary arrest and detention under emergency rule (Welikala 2008; Pinto-Jayawardena 2010).

The assertiveness of the judiciary in the realm of emergency measures was short-lived, however, and likely a reflection of a general weakening of judicial independence in Sri Lanka since the signing of the 1978 Constitution. As discussed earlier, the 1978 Constitution, which is in effect today, significantly reduced the ability for the court to be a check on the executive. For example, the Constitution does not permit suits against the incumbent president and the Supreme Court's rulings can be over-ridden in most cases by

a super-majority of two-thirds of parliament. In addition, political constraints on the judiciary continued for decades. Presidents often stacked the Supreme Court with political allies, and from 1999 – 2009, Chief Justice Sarath Silva, notorious for shutting down dissent on the bench, repeatedly sought to ensure that judges with independent views, such as Mark Fernando and Justice C.V. Wigneswaran, did not sit on significant constitutional cases (International Crisis Group June 2009). The 2001 17th Amendment, discussed earlier, sought to improve the integrity of the courts by removing the power of the president to solely appoint members of the higher judiciary and creating a Constitutional Council to administer this task (International Crisis Group 2009). However, these provisions were curtailed when the 18th Amendment was passed in 2010. Sri Lanka's emergency regulations and Prevention of Terrorism Act remain on the books today, years after the war's conclusion in 2009. As discussed earlier, in addition to the politicization of the judiciary, the Attorney General's Office suffers from a perpetual conflict of interest resulting from its dual tasks of advising the government on the legality of counter-terrorism measures and prosecuting cases in which the state has breached legal limits (International Crisis Group 2009). The lack of independence within the AG's office has also created a trend in which the state is simply investigating itself in human rights cases (Final COI Report of All Island Disappearances 2001; Pinto-Jayawardena 2010).

There have been no judicial challenges to emergency laws in Sri Lanka at the international level though there has been critique from various domestic and international bodies. The UN Human Rights Committee and the UN Working Group on Enforced or Involuntary Disappearances has criticized Sri Lanka's emergency regulations as

incompatible with international standards and recommended their reform or elimination (Amnesty International 2000). Domestic organizations and bodies have also called for reforms. For example, the final report of the 1998 Commission of Inquiry recommended, "the utilization of the powers under the Emergency Regulations be minimized" and "parliament to scrutinize each Regulation before promulgation and Human rights Groups (sic) be given the opportunity to make submissions" each time a regulation is under review (Sessional Paper No.1 2001: 85). The government has done little to respond to these criticisms, thus the emergency regime has largely remained unchanged in Sri Lanka. In contrast, in Northern Ireland neither emergency provisions nor any other law prohibit challenges concerning emergency regulations in domestic or regional human rights courts. This difference led to contrasting outcomes between the two cases regarding judicial challenges on emergency laws (see Chapter 4).

The weakening of both "positive" and "negative" judicial independence (Hilbink Forthcoming 2012), a fairly repressed civil society and an entrenched emergency regime, were the central mechanisms producing a poor prosecution record in this case. The reason why Sri Lanka implemented more truth-seeking measures than Northern Ireland and Spain, however, is explained in section IV of the chapter.

Truth-Seeking Measures: Commissions of Inquiry

In Sri Lanka, fourteen commissions of inquiry (COIs) were established throughout the conflict to address state human rights violations. The creation of these commissions largely stemmed from motivations by an incumbent leader to punish the previous regime, and appeasement in the face of international pressure. In only a few

cases, the creation of a commission was influenced by pressure applied by victims' families. The aftermath of these commissions, little to no action on the part of the government to pursue truth, justice or reparations, demonstrates that these bodies were largely smoke screens, or illusions of accountability. Though the gathering of historical evidence provided an accounting of the violations, in the end, it rarely led to justice, apology and acknowledgment, or reparations. Inquiry proceedings in Sri Lanka, similar to the Northern Ireland case, tend to be government-led processes of legitimation. I argue that these exercises in legitimation are unique to the conflicted democratic state. Non-democracies, aiming to avoid judicial accountability, usually do nothing in the face of citizen demands for accountability. The ritual of implementing commissions in Sri Lanka illustrates a tension uniquely reserved for a conflicted democracy: while rule of law is diminishing, the government has incentives to maintain an image of government responsiveness, both to the citizenry and the international community. In the following, I discuss the historical use of COIs in Sri Lanka and the conditions prompting their creation.

Table 3.4 (located at the end of the chapter) presents information on fourteen COIs conducted in Sri Lanka in the last thirty years of conflict. While some transitional justice scholars have identified the 1994 COIs as the only legitimate truth-seeking body in Sri Lanka,[34] I argue that in order to fully understand the use of these mechanisms, it is necessary to go beyond the 1994 commissions to examine the origins of these bodies in the Commission of Inquiry Act, to identify the motivations fueling the commissions and determine why they were enacted at particular moments. The COIs in Sri Lanka are ad

[34] See Priscilla Hayner (2011), Olsen, Payne and Reiter (2010) and Freeman (2006).

hoc mechanisms, created as a response to institutional failings within the criminal justice system. The combined use of trials and COIs during the conflict is distinct, and often this strategy produced less than desirable outcomes. For example, though the commissions, as investigatory bodies, could have served as launching pads for further inquiry and prosecution, this happened in only a handful of instances.

All the COIs in Sri Lanka are created under the Presidential Commission of Inquiry Act No. 17 of 1948, the same year that Sri Lanka gained independence from the United Kingdom. The Commission of Inquiry model originated in the UK with the Tribunal of Inquiry (Evidence) Act of 1921 and since this time, several Commonwealth member states and former British colonies have utilized this mechanism, including Canada, India and Sri Lanka (Freeman 2006; Donohue 2000). Commonwealth commissions of inquiry resemble truth commissions, and, in fact, as a model, largely influenced the modern truth commission, in that they are typically vested with subpoena powers, the authority to hold public or closed hearings and the power to make recommendations in a final report. Unlike truth commissions, they were not created with the sole purpose to investigate human rights violations (Freeman 2006). Commissions of inquiry and truth commissions also differ in that the latter tends to be more victim-centered, focused on a large number of cases as opposed to one incident, and commissioners leading the process are often drawn from a range of backgrounds, as opposed to a domestic judge or panel of ministers (Freeman 2006). As is evident in Table 3.4, the COIs in Sri Lanka have addressed both a large number of incidents, as in the 1994 and 1998 commissions on disappearances, and one specific incident, such as the Palampiddi-Iranai Road Inquiry and the Kokkadicholai Commission. The varying

mandates across these commissions reflects the fact that the 1948 Commission of Inquiry Act was not specifically intended for inquiries into human rights violations. Rather, the act intended to provide the president with a mechanism for establishing inquiries into the administration of public offices or allegations of misconduct by a member of the public sector (COI Act 1948; Amnesty International Report 2009). The Act stipulates that the president set the term of reference for COIs, appoint members, add or remove members at his/her discretion, and cease the operation of the COI at any point; it does not require Commission reports to be made public or that the inquiry itself be held in a public sphere (Amnesty International 2009; Pinto-Jayawardena 2010).

The first COI to address human rights violations was the 1977 Sansoni Commission. The commission examined widespread violence, largely targeting Tamils, that had ensued after an election in which the UNP won the majority and the Tamil United Liberation Front (TULF) became the major opposition party, ousting the predominantly Sinhalese Sri Lanka Freedom Party (SLFP) (Pinto-Jayawardena 2010). TULF had campaigned with a secessionist platform and through the election had secured massive support from constituents in the North. Tremendous political pressure was placed on the Sansoni Commission, evidenced by threats to the commissioners, the leading of police witnesses by state counsel, and the questionable admittance of confessions in the proceedings (Pinto-Jayawardena 2010). While perpetrators of the violence were identified in the 1980 report, none were prosecuted, and a short time later, the government introduced the Indemnity Act (1982), providing protection to officials' actions during the very time period under investigation (Report of the COI, Sessional Paper No. VII – 1980; Amnesty International 2009) (emphasis added by author):

> "No action or other legal proceeding whatsoever, whether civil or criminal, shall be instituted in any court of law for or on account of or in respect of any act, matter or thing, whether legal or otherwise, *done or purported to be done with a view to restoring law and order during the period August 1, 1977, to August 31, 1977*, if done in good faith, by a Minister, Deputy Minister or person holding office under or employed in the service of the Government of Sri Lanka in any capacity whether, naval, military, air force, police or civil, or by any person acting in good faith under the authority of a direction of a Minister, Deputy Minister or a person holding office or so employed and done or purported to be done in the execution of his duty or for the enforcement of law and order or for the public safety or otherwise in the public interest and if any such action or legal proceeding has been instituted in any court of law whether before or after the date of commencement of this Act every such action or legal proceeding shall be deemed to be discharged and made null and void" (Indemnity Act 1982).

In many ways, the Sansoni Commission set the tone for future COIs in Sri Lanka. With the exception of the 1994 and 1998 COIs, discussed below, most of the commissions have suffered from intense political pressure or they were established as a means to highlight a prior administration's transgressions. For example, though President Kumaratunga developed the 1994 COIs in an effort to deliver on her campaign promises of reform, good governance and accountability, when she was pressured to initiate a COI concerning disappearances that occurred on her watch in 1996, she resisted and instead appointed a weaker body, the Board of Investigation into Complaints of Disappearances in Jaffna (Pinto-Jayawardena 2010). President Kumaratunga did, however, convene the Bindunuwewa Commission in 2001 to inquire into the deaths of twenty-eight Tamil youth at a detention center, which occurred during her tenure. The commission report, which was not published, identified two senior police officers as responsible for not preventing the killings and junior officers for direct involvement in the deaths (Pinto-Jayawardena 2010). Two officers were convicted on the charge of murder by the High Court in 2003, however, the Supreme Court overturned the

convictions in 2005 (Law and Society Trust 2004; State Department Report 2003). The Commission's findings were not used as evidence in the trial proceedings.

The COIs in Sri Lanka are often argued to be a "show-piece gesture" (Int. 25), created in order to demonstrate to domestic and international audiences that the government is providing a response to serious human rights violations and to avoid outside interference. The lack of concrete reforms in the criminal justice system, outlined earlier, has, in a sense, led to a perpetual cycle of weak, fairly ineffective truth-seeking bodies in Sri Lanka. Despite this trend, administrations have also set up commissions in a few cases as a direct response to domestic pressure from civil society and victims' families. The Kokkadicholai Commission is emblematic of the cross-purposes driving some COIs. In a highly typical example of the type of violence wielded throughout Sri Lanka's conflict, in June 1991, sixty-seven civilians were killed by soldiers acting out of retaliation for the bombing death of two army personnel just hours before. Six days later, President Premadasa appointed a Commission of Inquiry, whose mandate included recommendations on criminal proceedings against members of the Armed Forces (Final Report, Sessional Paper No. II, 1992). Soldiers were prosecuted in a military court per the Commission's recommendation. This move has since been highly criticized given that the use of military courts for the crime of extra-judicial killings and enforced disappearances is not sanctioned by international law, largely because this process is seen to lack independence (Pinto-Jayawardena 2010). All of the accused were acquitted on the basis that no evidence existed directly linking soldiers to the crime.

The creation of the 1994 COIs, a direct result of Kumaratunga's rise to power on a platform of peace and government accountability, is also an exceptional case. The

integrity of the commission, including the extensive documentation of 16,800 cases of enforced disappearance, produced an important historical record, largely of state human rights violations. Individuals within the human rights community in Sri Lanka acknowledge this notable achievement, while simultaneously remarking that it was only possible because, unlike some other commissions, the 1994 COIs examined the *previous* administration (Int. 24; Int. 25). The political will to thoroughly investigate the cases was in abundance. Vigorous calls for prosecutions were evident in each of the three regional COI reports (Final Reports of 1994 COIs 1997). Yet, few prosecutions, compared to the vast number of disappearances, resulted in the end. This outcome may be attributable to the disappearances and extra-judicial killings that occurred during Kumaratunga's administration (Pinto-Jayawardena 2010). Kumaratunga may have considered prosecutions in this climate to be too risky, potentially inciting "political insecurity" (Int. 25). Thus, the limited reach of the 1994 COIs largely resulted from political calculations, namely political survival.

The creation of the 1998 All Island Disappearances Commission also reflected strong political will at the outset to improve human rights accountability, followed by weak judicial action against the accused. The 1998 commission's sole purpose was to tackle the disappearance cases, including 10,316 files, that the 1994 COIs failed to consider due to time constraints. Its mandate was expanded to the entire island, considered to be a great improvement from its predecessor, and the commission sought to recommend legal proceedings to be issued against persons identified as responsible for enforced disappearances (Final Report, Sessional Paper No. 1 – 2001; Pinto-Jayawardena 2010). The commission's final report implicated agents of the state and paramilitaries

acting in collaboration with the government in 4,473 cases (Final Report, Sessional Paper No. 1 - 2001). The final report also included some of the most thorough and responsive recommendations to date, including: tasking the Sri Lankan Human Rights Commission with identified torture cases; the creation of an independent human rights prosecutor to handle disappearance cases; that "the utilization of the powers under the Emergency Regulations be minimized" and that "human rights groups be given the opportunity to make submissions" each time an emergency law is under review; the creation of a crime of enforced disappearance; and inclusion of the concept of command responsibility in the Penal Code (Final Report, Sessional Paper No.1 – 2001). None of these recommendations were implemented and only a few prosecutions resulted (Pinto-Jayawardena 2010).

Pressure from the international community played a more central role in the 2006 commission and the recent Lessons Learnt and Reconciliation Commission, established in 2010. In 2005, UN Special Rapporteur on Extra-judicial, Summary or Arbitrary Executions, Philip Alston, paid a visit to Sri Lanka, in which he highlighted increased violence in the region, the problem of impunity and declared the urgent need for an international monitoring presence (Amnesty International 2009). In conjunction, international donors, including the Swedish government, began to question their provision of funds to Sri Lanka for human rights trainings in the armed forces and police, among other peace initiatives. In response to growing domestic and international pressure to develop an international monitoring mechanism, President Rajapaksa declared in September 2006 he would invite an international and independent commission, not a domestic commission of inquiry, to examine the growing number of disappearances and

extra-judicial killings throughout the country. Amidst an enormously positive response to this proclamation from local and international human rights groups, the president changed his tune only a few days later, deciding to appoint the International Independent Group of Eminent Persons (IIGEP) to act as observers to a domestic-led Commission of Inquiry (Amnesty International 2009).

The 2006 commission of inquiry was tasked with investigating sixteen cases involving allegations against the LTTE and the security forces. Despite the government's rapid decision to introduce a domestic mechanism in place of an international body, some sections of civil society held out hope that the commission's focus on egregious cases would bring about improvements in accountability. Rajapaksa's government continued to experience international pressure during this time. For example, in 2007, the European Union announced that they would introduce a resolution on Sri Lanka before the UN Human Rights Council, concerning the recent intense escalation of conflict (*The Morning Leader*, August 29th, 2007). The Sri Lankan government reacted swiftly, sending a delegation to lobby the EU and member nations to drop the resolution, citing improvements in the human rights situation (*The Morning Leader*, August 29th, 2007). A member of the human rights community commented to me that the "whole North-South politics kicked in," at the UN and eventually the resolution was defeated (Int. 25).

Progress on the cases examined by the 2006 COI was remarkably slow, witnesses were threatened causing some to flee the country, and after months of frustration, a number of civil society groups that had participated in the COI proceedings, including Centre for Policy Alternatives, INFORM, the Law and Society Trust and Mothers and Daughters of Lanka, withdrew from the process (Amnesty International 2009). The

IIGEP repeatedly expressed concerns that they were unable to conduct their work due to political interference and obstruction and lack of access to necessary documents (CPA Policy Brief No. 2, 2007). The IIGEP withdrew in protest in April 2008.[35]

The 2006 COI did not publish a report and by the final months of the war in 2009, only four of the total sixteen cases had received public hearings. The investigation into the Trincomalee deaths commenced and recommendations have yet to be published. In a shocking turn, the 2006 COI reportedly determined in regards to the murder of seventeen Action Contre la Faim aid workers, that Action Contra la Faim was to blame, given they had allowed their employees to work in an area of intense violence (U.S. State Department 2009). Security forces were exonerated and blame was placed on the LTTE, despite significant evidence to the contrary. Some interviewees commented that the President's appointment of the IIGEP signaled from the start that there was never an intention on the part of the government to bring perpetrators to account and that the entire process was simply an effort to "placate international opinion" (Int. 24; Int. 25). Similar sentiments surrounded the Lessons Learnt and Reconciliation Commission established in 2010.

The final months of the civil war in Sri Lanka involved the highest number of civilian casualties to date. Estimates range between 30,000 and 40,000 deaths, while hundreds of thousands of civilians were displaced and deprived of adequate food, water and medical care (International Crisis Group 2010). The Lessons Learnt and Reconciliation Commission (LLRC) was established in August 2010 to inquire into

[35] In 2008, an amendment was added to the COI Act (1948), which gave power to the Attorney General to begin criminal proceedings in a court of law concerning an offense based on material gathered during a COI. The actual use of this measure by the AG is not yet clear given that during the most recent COI, the Lessons Learnt and Reconciliation Commission, prosecutions were not initiated.

matters occurring between February 21st, 2002 and May 19th, 2009, to recommend measures to prevent the recurrence of conflict, and to report whether any person, group or institution bears responsibility for the incidents (Ministry of Defence, Sri Lanka 2010). Local human rights activists and attorneys argued that the LLRC was established in order to keep international calls for a war crimes tribunal at bay (Int. 20; Int. 21; Int. 24; ICG October 14th, 2010). Given these concerns, Amnesty International, Human Rights Watch and International Crisis Group refused to participate in the commission's proceedings. The commission's lack of independence, and failure to adequately protect witnesses testifying at the hearings, were also cited as evidence of the LLRC's illegitimacy (Int. 20; Int. 23; Int. 24; ICG October 14th, 2010). In the first months of the commission's proceedings, thousands of people testified in the north and east and one human rights activist I spoke with argued that this was likely effective in demonstrating to the government and the commissioners the significant number of citizens affected by the conflict; he added that if NGOs were presenting all the evidence to the LLRC, it would likely not have the same effect (Int. 20). Critical examination of actions taken by both the government and the LTTE, however, was relatively absent from these hearings.

On November 15th, 2011, the LLRC's final report was submitted to the government and it was released to the public in mid-December. Despite broad evidence of government culpability in civilian deaths, the report's recommendations concerning human rights accountability were minimal. The commission concluded that no systematic targeting of civilians transpired on the part of security forces and where evidence existed of state responsibility for civilian casualties in a few cases, the commission recommended further investigation and prosecution; however, it suggested

these processes be led by the security forces and the Attorney General, who are themselves under scrutiny and who have been critiqued for ignoring past government abuses.

Some months before the LLRC issued its final report, a UN panel issued a report in April 2011 in which it found credible allegations that the government of Sri Lanka was responsible for most of the civilian deaths in the final months of the conflict (United Nations 2011). The report recommended the UN Secretary-General promptly establish an independent international mechanism to monitor domestic accountability processes and independently investigate alleged violations. The report also imparted serious criticism of the LLRC, arguing it failed to fulfill international standards of impartiality and independence. The Rajapaksa administration responded to the UN report with disdain, calling it "misleading" and "baseless," and it announced the Attorney General would prepare a report to counter the allegations (*The Sunday Times,* April 17th, 2011).

After the Sri Lankan government failed to act on the recommendations of the UN report, in March 2012, the UN Human Rights Council passed a resolution, strongly supported by the U.S., which urged the Sri Lankan government to investigate the deaths of thousands of civilians at the end of the war in May 2009 and to implement all the recommendations set forth in the LLRC final report. The resolution requires that the UN High Commissioner for Human Rights report back to the Council in 2013 on whether the government has implemented the recommendations stated in the UN resolution (Cumming-Bruce 2012). The resolution appears to have emerged out of concern that the government has failed to enact commission report recommendations in the past. The Sri Lankan government vehemently opposed the March 2012 resolution and organized a

large protest effort before the UN vote, claiming that it had started to implement the LLRC's recommendations. Local critics of the LLRC counter that the government has been slow to initiate judicial processes and reparations to families. The panel that compiled the April 2011 UN report continues to call for an independent investigatory body to determine responsibility for mass civilian casualties at the end of the war. It is not yet clear whether such a body will form and what, if any, cooperation the Sri Lankan government would be willing to offer. The recent debate over the LLRC and actions taken by the UN indicate that the international community is becoming cognizant of the troubling operation of commissions of inquiry in Sri Lanka. It is too early to know whether the Rajapaksa administration will fully carry out the recommendations set forth by the LLRC. The fear from some sectors of society that it will not is unfortunately grounded in precedent.

Conclusion

Conflicted democracies are unique from other conflict cases in that, to varying degrees, relations of accountability exist prior to the onset of conflict. I argue that the degree to which these relations of accountability provide opportunities for citizens to hold the state accountable during the violence is highly dependent on the existence of an entrenched emergency regime in the country. The Sri Lankan case demonstrates how decades of emergency legislation weakened judicial independence, increased regulation of civil society groups and promoted impunity. Significantly, the emergency regime was in place years before the conflict started, and key aspects of legislation design and regulation contributed to its entrenchment. In the following chapter, I discuss how the

emergency regime in Northern Ireland was also a barrier to accountability, though less so due to the lack of immunity clauses and greater regulation from the British Parliament. Then, in Chapter 6, I examine in more depth how the emergency regimes in the two cases compare, arguing through historical institutional analysis that meanings of accountability were enshrined in both sets of laws prior to the conflict periods. The degree to which these meanings had an impact on prosecutions and truth-seeking measures was shaped by the diverging systems of legislation design and regulation in each case.

Table 3.4

Commissions of Inquiry in Sri Lanka

Date	Title	Mandate	Report
November 9th, 1977	Sansoni Commission	Communal violence in August and September 1977	July 2nd, 1980
May 9th, 1991	Palampiddi-Iranai Road Inquiry	To inquire if attack on Médecins Sans Frontières (MSF) vehicle by government helicopter was intentional or accidental	June 1991
June 18th, 1991	Kokkadicholai Commission	Inquiry into whether death of soldiers by explosion in 1991 and killings of 67 civilians nearby were connected	March 9th, 1992
January 11th, 1991	Presidential Commission of Inquiry (appointed by President Premadasa)	Inquiry into allegations of involuntary removal of persons from their residence	Not published
January 13th, 1992	Presidential Commission of Inquiry (appointed by President Premadasa)	Inquiry into allegations of involuntary removal of persons from their residence	Not published
January 25th, 1993	Presidential Commission of Inquiry (appointed by President Premadasa)	Inquiry into allegations of involuntary removal of persons from their residence	Not published
September 13th, 1993	Presidential Commission of	To inquire into past involuntary removal of	Not published

	Inquiry (appointed by President D.B. Wijetunge)	persons during 1991 – 1993	
November 30th, 1994	Three Commissions of Inquiry into Disappearances (appointed by President Kumaratunga)	To inquire into disappearances in three regions of the country: Western, Southern and Sabaragamuwa Provinces; Central, North Western, North Central and Uva Provinces; Northern and Eastern Provinces	September 1997
December 15th, 1995	Batalanda Commission	Detention and disappearance of two police investigators and the use of a detention center as a site for torture of civilians	2000
April 30th, 1998	All Island Disappearances Commission	Involuntary removal of persons (sought to take on what 1994 COIs were unable to finish)	March 2001
July 23rd, 2000	Presidential Truth Commission on Ethnic Violence in 1981-1984	Gross human rights violations and damage to property during ethnic violence, 1981 – 1984	September 2002
March 8th, 2001	Bindunuwewa Commission	Detention practices at Bindunuwewa Center and attack on detainees causing serious injury and death	November 2001 (not published)
November 2nd, 2006	The Commission of Inquiry Appointed to Investigate and Inquire into Serious Violations of Human Rights Which Are Alleged to Have	Sixteen cases of human rights violations allegedly committed by both state actors and the LTTE	Not published

	Arisen in Sri Lanka Since 1 August 2005		
August 2010	Lessons Learnt and Reconciliation Commission	To inquire into matters occurring between February 21st, 2002 and May 19th, 2009	December 2011

Chapter 4

Northern Ireland

Fourteen years after the signing of the Belfast Peace Agreement in Northern Ireland, controversies over violence committed during the conflict continue. Though various local groups and a handful of government-funded initiatives have sought to address victims' concerns, consensus on reconciling the past remains elusive. The level of violence in Northern Ireland has continued to decrease since the Agreement, but paramilitary activity has not fully ceased, and the stark divisions between Catholics and Protestants in housing and education have largely been maintained (Nolan 2012). The unsettled nature of the post-conflict setting is not unique. Many countries confront the challenge of reckoning with past abuses. Northern Ireland, like Sri Lanka, is different in that some accountability efforts transpired while the conflict was underway. However, some victims were left unsatisfied by these processes, which partly explains the current malaise. In this chapter, I discuss the human rights violations committed by members of the Northern Ireland police and British security forces, and the human rights prosecutions and truth-seeking measures established in response. Based on my findings, I argue that two key causal mechanisms created openings for state accountability domestically and at the international level. A strong civil society relatively unfettered from government control in Northern Ireland and with links early on in the conflict to international human rights organizations enabled the prosecution of state actors for human rights violations. In addition, cases brought by citizens to the European Court of Human Rights acted as a form of external accountability that aimed to strengthen horizontal relations of

accountability domestically. Rulings at the court pressured the British government to respond to demands for accountability within Northern Ireland and they influenced policy changes concerning arrest and detention practices and emergency measures. The reach and success of these efforts, however, were limited by the state's emergency law framework, a remnant from the British colonial period. In particular, accountability was restricted by conceptions concerning the legitimacy of government action during crisis built into the laws, which tended to produce a bias within some sectors of the judiciary. I find, however, that the constraints of this colonial legal legacy were somewhat loosened and reconfigured by key factors and conditions not present in the Sri Lankan case, specifically, the absence of immunity clauses in emergency legislation, parliamentary voting rules, parliamentary contestation, and judicial challenges to emergency laws at the European Court level.

The following chapter is organized as follows: section II presents historical background to the Northern Ireland conflict; section III provides an overview of the human rights violations data and prosecutions as well as the conditions enabling the prosecutions; section IV discusses the central barriers confronting efforts to prosecute state actors; section V outlines the main commissions of inquiry held during and after the conflict concerning state violations; and section VI provides some final comments on the case.

Historical Background to the Conflict

The conflict in Northern Ireland (1969 – 1998) emerged out of centuries of British dominance in the entire island. The British colonized the region as early as the twelfth

and thirteenth centuries, and by the seventeenth and eighteenth centuries, the majority Catholic population in Ireland was largely overpowered by the military strength of the British government and their Protestant allies. Though Catholic communities engaged in some resistant efforts during this time, particularly concerning land rights, a fully formed opposition movement did not emerge until the early 20th century. Irish nationalists mounted a political and militant struggle for independence from Britain and the Irish Republican Army (IRA) pursued various tactics of guerilla violence. In response, the British government eventually created the Government of Ireland Act in 1920, which established a parliament in Belfast to rule over the six counties in the north of the island, often referred to as Ulster. Through a partition process, the remaining twenty-six counties in the south of the island became the independent nation of Ireland. Northern Ireland was defined since its inception by a stark division between two communities: Nationalists, mainly Catholic, who supported the unification of all the counties in Ireland independent from British rule, and Unionists, mainly Protestant, who supported the northern counties' union with Britain.

From 1922 until the 1960s, the largely Protestant Ulster Unionist Party held power in the Northern Ireland Parliament and many Catholics living in the region refused to recognize the Northern Ireland state. The few nationalist politicians elected to Parliament vacillated between abstention and participation in government affairs during this time (Ruane and Todd 1998). The security forces and police in Northern Ireland emerged out of pre-partition Protestant defense organizations and thus were predominantly comprised of Protestants and those who supported unionism. The

majority of the judiciary was also largely Protestant. In this milieu, discrimination against Catholics in housing and public sector employment grew.

In the mid-1960s, a civil rights movement modeled after the movement in the U.S. was initiated with a focus on reforming the policies of exclusion directed at Catholics. After a time, the civil rights movement's marches became a sectarian battleground and British security forces were brought in to manage the growing unrest. Though some reforms were made by the Northern Ireland Parliament, under pressure from the British government to address the movement's demands, by the early 1970s, paramilitary groups representing warring ideologies, were embroiled in an intense conflict with one another and with the British security forces. The central paramilitaries during the conflict included a Republican group, the Provisional Irish Republican Army, who were committed to seeking a united Ireland independent from Britain through militant means, and the Loyalist groups, the Ulster Volunteer Force, the Ulster Defense Association and the Red Hand Commando, who were committed to maintaining unity with Britain. Various splinter groups emerged from these groups in later years of the conflict. The shooting of thirteen civilians by British paratroopers during a civil rights march in Derry in January 1972 launched the domestic crisis into a more permanent form of instability. In March of the same year, the Northern Ireland Parliament (Stormont) was prorogued and direct rule of the region by the British government began. Several attempts were made to turn power over to a localized power-sharing administration but at different intervals both Nationalist and Unionist parties refused to accept the proposed arrangements.

After an intense period of violence, the British government initiated the Anglo-Irish Agreement in 1985, which reiterated that the status of Northern Ireland remained dependent on the will of a majority, recognized the community of nationalists throughout Ireland, and provided the Irish government with a role in developing policy in the region (Ruane and Todd 1998). Though the Agreement was passed, talks among the Northern Ireland political parties and the Irish and British governments over the nature of a political settlement continued into the early 1990s with little consensus. In August 1994, the IRA announced a complete ceasefire and the loyalist paramilitaries soon followed. At this moment, the beginning stages of peace negotiations were underway. Then, after almost thirty years of conflict, and approximately 3600 lives lost, the Northern Ireland conflict ended with the signing of the Belfast Agreement in 1998. The Agreement established the terms of a compromise, a power-sharing government in the region and continued ties with Britain. By the end of October 2000, 433 political prisoners from both sides of the conflict (193 Loyalists, 229 Republicans and 11 others) were released after an independent commission review process (McEvoy 2001).

In the years since the peace agreement, Northern Ireland continued to confront political instability and bouts of paramilitary violence. Intense debates also arose concerning the need for more formal processes of justice and reconciliation. Compensatory schemes for victims were established by the 1998 peace agreement through a national Victims Unit (Hamber and Kelly 2005). Several local peace initiatives also emerged to address various issues related to the conflict, including victims' rights, political prisoner and ex-paramilitary reintegration, youth programs aimed at dismantling sectarianism, the creation of memorials and storytelling projects. In 2005, under pressure

from the European Court of Human Rights to address unresolved cases from the conflict period that involved violations of Article 2 (right to life), the Historical Enquiries Team (HET), a unit within the Police Service, was created. The HET was tasked with re-examining over 3,000 unresolved deaths between 1968 and 1998 with the purpose of bringing some form of resolution to victims' families, and to ensure that all evidentiary and investigative opportunities were exploited. The HET is not a traditional truth-seeking body in that it focuses on micro-level information recovery, as opposed to a pattern of events, outside individuals are not invited to give testimony on the cases, and, if there is sound evidence to pursue criminal charges, the HET forwards the case to the Public Prosecution Service (Lundy 2009; Int. 9). As of summer 2010, approximately 1000 cases had been completed and only a few cases had been forwarded to the Public Prosecution Service (Int. 9). Most recently, in 2007, a consultative project was commissioned by the Northern Ireland government to examine ways for the country to move forward and determine appropriate justice processes. The final report on this project, issued in 2009, recommended, among several other matters, that new public inquiries into state violations should not be established in the future (Eames and Bradley 2009). In the later sections of the chapter, I discuss what actions have been taken to hold state actors to account for human rights violations committed during the conflict.

After the partition of Ireland in 1920, distinct legal systems were established in the northern and southern regions of the island. In Northern Ireland, the judicial sector falls under the common law legal system. The superior courts include the High Court, the Crown Court and the Court of Appeal. The High Court primarily handles civil cases while the Crown Court hears serious criminal matters, including murder, manslaughter,

rape and robbery (Dickson 1989). The Court of Appeal is positioned above the High Court and Crown Court and cases may be further appealed from here to the House of Lords in London. The inferior courts manage more minor offenses and include county courts and magistrates' courts. Prior to prosecution in the High Court or Crown Court, committal proceedings are held in a magistrates' court to determine if there is *prima facie* evidence to proceed and, if so, the case proceeds to trial. A citizen can apply for a writ of habeas corpus on the grounds that his/her detention is believed to be unlawful, if access to a solicitor is denied, or if a person is maltreated during detention (Dickson 1989). Habeas corpus applications are made to the High Court and thus are considered civil, as opposed to criminal proceedings.

The Attorney General in Northern Ireland is the chief law officer of the government whose main responsibility is advising the government departments and representing the government's interests in legal proceedings. The British Prime Minister has traditionally appointed this position. Prior to direct rule of the country by Britain in 1972, Northern Ireland retained its own Attorney General; between 1972 and 2010, however, the British Attorney General acted for Northern Ireland (Dickson 1989). In 2010, after policing and criminal justice powers were transferred from Britain to Northern Ireland, a local Attorney General was appointed by the Northern Ireland First Minister and Deputy First Minister.

The Attorney General is also responsible for appointing and removing the Director of Public Prosecutions (DPP). Prior to 1972, many prosecutions in Northern Ireland were conducted by police officers. The Coroner's (Amendment) Act 1926 had altered the investigative function of the coroner, placing this, as well as prosecution, in

the hands of the police (Ní Aoláin 2000). However, through the Prosecution of Offences (Northern Ireland) Order 1972, the Office of the Director of Public Prosecutions was created to assume responsibility for serious criminal prosecutions. The police retained their investigative function and under this new framework, they would submit their investigation of a crime to the Director of Public Prosecutions (this body is now known as the Public Prosecution Service). Police officers in Britain were also largely responsible for prosecuting cases until the Crown Prosecution Service was created in 1985. The history of police conducting prosecutions in the United Kingdom stems from the UK Prosecution of Offenses Act 1879. This act established terms for the police to perform most of the investigations and prosecutions in criminal cases.

The DPP in Northern Ireland decides whether a prosecution is justified, the charges, and initiates the committal proceedings in a magistrate's court (the pre-trial stage) (Dickson 1989). If the DPP decides to commit a person for trial, all the necessary materials are sent to barristers of the Crown Counsel at the Belfast Crown Court, and one of these barristers prosecutes the case. The Crown Counsel represents the British government in all criminal cases. Though the creation of the DPP in 1972 was a marked improvement from prosecutorial power in the hands of the police, it has been argued that the state continued to largely investigate itself because the DPP relied heavily on the police for investigation and evidence, even in cases where the police were charged with a crime. Since the DPP was appointed by and reported to the Attorney General, there may have been space for executive interference where the state was implicated. The lack of turnover within the DPP has also caused some human rights advocates in Northern Ireland to question its integrity in that there has been little room for reform (Int. 5; Int. 7).

Since 1972, only two people have headed the DPP. In contrast, DPP leaders in England are appointed every five years.

During the conflict and until very recently, the judges of the Court of Appeal, the Crown Court and the High Court in Northern Ireland were appointed and removed by the Queen on the advice of the Lord Chancellor, who is a Minister of the British Government, the Speaker of the House of Lords, and appointed by the British Prime Minister (Dickson 1989). The Lord Chancellor was generally responsible for overseeing the Northern Ireland Court Service, the administration for courts and tribunals in the country. In 2010, when policing and criminal justice powers were devolved from the British government to the Northern Ireland government, the Court Service became an agency under the Access to Justice Directorate of the Department of Justice for Northern Ireland.

The United Kingdom ratified the 1949 Geneva Conventions in 1957. The government did not, however, ratify the 1977 Additional Protocols until the conflict in Northern Ireland was effectively over, in January 1998. Similar to Sri Lanka, though the level of violence in Northern Ireland appeared to meet the threshold of conflict in Common Article 3, particularly in the early years of the war, and the European Court of Human Rights ruled in a few cases that the political violence qualified as a public emergency, the British government's consistent position was that the violence in Northern Ireland did not amount to internal armed conflict (Campbell 2005; Ní Aoláin and Campbell 2005). Though the ICRC occasionally visited the prisons in Northern Ireland, the organization did not formally acknowledge the applicability of Common Article 3 to the conflict. The delayed ratification by the British government of the

Additional Protocols to the Geneva Conventions may have largely been intentional, as Protocol I granted prisoner-of-war status to combatants and Protocol II outlined the provision of amnesty to prisoners post-conflict (Campbell 2005). The British government was thus in a convenient position in the early stages of the war to at some measure deny responsibility for actions that would have been construed as violations of international humanitarian law. Despite this, international human rights law and domestic criminal law played a key role in how state accountability was pursued by citizens in this case.

Human Rights Prosecutions of State Actors

In this project I focus on human rights violations committed during the conflict by political actors, security force members and police, including extra-judicial killings, torture, rape and disappearance. Security force members and police were responsible for the deaths of 363 civilians throughout the conflict in Northern Ireland (CAJ 2008). There were no *documented* cases of state-perpetrated disappearance or rape related to the conflict.[36] The number of civilian detainees subjected to torture by security forces or police is fairly difficult to gauge given the available data is relatively inconsistent across time.[37] Table 4.1 gives a partial picture of the allegations of torture and ill-treatment during the conflict years. A total of 30 prosecutions, charging security force members

[36] The sources I used for data collection did not identify any cases of state-perpetrated disappearance or rape. Recent studies have discussed, however, the largely ignored problem of gender violence in the conflict. See, for example, Catherine O'Rourke (2009) "The Law and Politics of Gender in Transition: A Feminist Exploration of Transitional Justice in Chile, Northern Ireland and Colombia. PhD diss., Faculty of Social Sciences, University of Ulster.

[37] A possible route for obtaining data estimates on torture is to count the number of civil trials involving torture or mistreatment allegations. In this project I only count criminal trials where the accused faces a possible sentence of imprisonment. However, due to the regular use of civil trials for cases of torture in many common law legal systems, I plan to pursue this data in future research.

and police, were held throughout the conflict and a few years after the conflict, between 1974 and 2010 (see Graph 4.1).[38] Within the total number of prosecutions, 38 of the 363 civilian deaths were investigated, a prosecution record of 10.5%. This record is higher than the record in the Sri Lankan case (1.8%) and far less than the record of 32% in the Spanish case (see Chapters 3 and 5). A discussion of the conditions prompting the variation in these cases is found in Chapter 6.

27 of the 30 prosecutions concerned extra-judicial killings of civilians, two cases involved the assault of civilians while in police or army custody,[39] and one charge involved conspiracy to murder a civilian (see Table 4.2).[40] In many ill-treatment or torture cases, complainants tended to pursue the claim in civil courts for compensation because there was a lower evidentiary standard. In the early years of the conflict, interrogation techniques were not recorded, thus it was very hard to prove torture in a criminal trial (U.S. State Department 1993). Silent video recording was introduced into detention centers through legislation in 1998 and audio recording was added in 1999 (U.S. State Department 2000). If a complainant wished to file a writ of habeas corpus concerning mistreatment while he/she was unlawfully detained, the resulting trial would be a civil proceeding, held in the Belfast High Court (Dickson 1989). According to the Attorney General of Northern Ireland, Sir Peter Rawlinson, within the first few years of the conflict, 150 civil actions were brought against the Crown for alleged assaults by security force members (Dickson 2010).

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[38] The prosecution data is based on my research of U.S. State Department reports, Belfast Crown Court transcripts, reports from the Committee on the Administration of Justice, Amnesty International and Human Rights Watch, as well as media coverage of trial proceedings in *The Irish Times, The Guardian, The London Times,* and other local media sources.
[39] *R v. Hassan* (1981) and the trial of RUC officers Neill and Magowan (2000).
[40] The trial of Brian Nelson (1992).

Table 4.1[41]

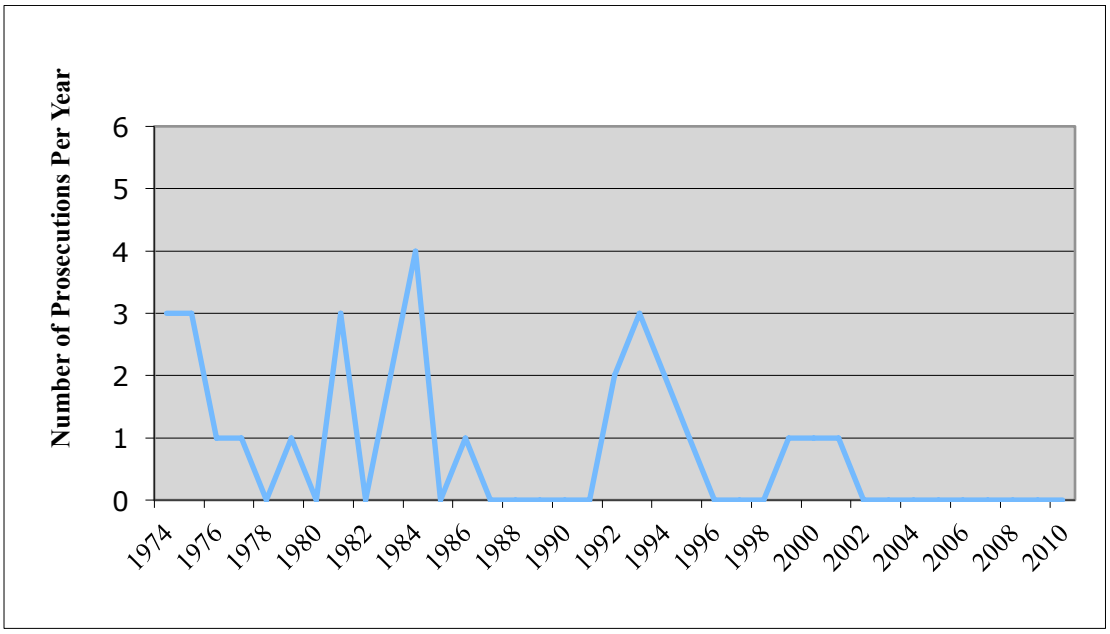
Torture and Ill-treatment Complaints Against Police in Northern Ireland

Year	Complaints	Year	Complaints
1976	384	1993	12
1977	671	1994	2810
1978	327	1995	--
1979	159	1996	--
1980	148	1997	--
1981	--	1998	--
1982	--	1999	--
1983	30,691	2000	7880
1984	--	2001	7148
1985	1	2002	3193
1986	--	2003	2976
1987	--	2004	2885
1988	2	2005	3192
1989	--	2006	--
1990	--	2007	--
1991	--	2008	--
1992	--	2009	--
		2010	--
		TOTAL	**62,479**

[41] Note: the complaints filed between 2000 – 2005 do not all consist of torture or ill-treatment. These are general complaints filed against the police and reported to the Police Ombudsman. Thus, these numbers are likely higher than the actual number of torture and ill-treatment complaints. The -- symbol represents missing data.

Graph 4.1

Prosecutions of State Actors in Northern Ireland



Of the 30 prosecutions held, the majority of charges involved British soldiers, followed by police officers (see Table 4.3). Out of 30 prosecutions, eight resulted in conviction, and 22 ended in acquittal (see Table 4.2). Thus, security force members and police were found guilty in 27% of the cases in which they were prosecuted. It is worth noting, as a comparison, that between 1984 and 1987, *civilians* who were prosecuted under scheduled offenses (outlined as terrorist offenses in emergency and counter-terrorism laws) were convicted on average in 93% of the cases; in non-scheduled offenses (other offenses not covered under emergency laws), civilians were convicted on average in 92% of the cases (Dickson 1989).

The majority of the victims in these cases were young Catholic men. In one particularly controversial criminal proceeding against Royal Ulster Constabulary (RUC) Constable John Robinson in 1984, though the two victims, Seamus Grew and Roddy Carroll, were found unarmed, Robinson admitted to firing fifteen shots into their car as it approached a roadblock, reloaded then fired four to five shots at close range into the car because he believed he had been shot at and his life was in danger (Jennings 1984). It was revealed during the trial that the RUC had been engaged in a cover-up to hide the fact that anti-terrorist units were involved in the incident and to falsely claim that one of the victims had driven through the roadblock injuring an officer (Jennings 1984). Despite the presentation of this evidence, Robinson was eventually acquitted. The challenge to obtain a conviction, even when a fair amount of evidence to support a guilty verdict was presented, decreased the trust victims' families had in the Northern Ireland legal system over time.

When a British soldier was released in 1988 without a trial after being charged with manslaughter for the death of a civilian hit by a ricochet bullet, Seamus Mallon, deputy leader of the Nationalist Northern Ireland Social Democratic and Labour Party, stated, "The odds are staked against an individual when there is a conflict of evidence involving the police or a soldier. Over the years this perception has seriously diminished confidence in the process of law" (Heast and Joyce 1988). Five years later, when two British soldiers, Lance Corporal Richard Elkington and Marine Andrew Callaghan, were acquitted of murdering Fergal Caraher in 1990, when he drove through an army checkpoint after a verbal exchange with the soldiers, Caraher's widow Margaret stated,

"We feel disappointed but not surprised. It was what we have come to expect from the judicial system in Northern Ireland" (Bowcott 1993).[42]

Table 4.2 - Northern Ireland Human Rights Prosecution Data

Year	Prosecutions	Convictions	Acquittals	Number of Accused	Type of Accused	Charges
1974	3	0	3	3	British soldiers	Manslaughter
1975	3	0	3	3	British soldiers	Manslaughter murder
1976	1	0	1	1	British soldier	Manslaughter
1977	1	0	1	1	British soldier	Manslaughter
1978	0	0	0	0	--	--
1979	1	0	1	2	British soldiers	Murder
1980	0	0	0	0		--
1981	3	1	2	6	British soldiers, RUC	Manslaughter, assault and bodily harm
1982	0	0	0	0	--	--
1983	2	1	1	6	British soldiers, UDR RUC,	Murder
1984	4	1	3	6	British soldier, UDR	Murder, manslaughter
1985	0	0	0	0	--	--
1986	1	0	1	1	RUC	Manslaughter
1987	0	0	0	0	--	--
1988	0	0	0	0	--	--
1989	0	0	0	0	--	--
1990	0	0	0	0	--	--
1991	0	0	0	0	--	--
1992	2	1	1	2	British Army, RUC	Conspiracy to murder, murder
1993	3	1	2	10	Royal Marines, British soldiers	Murder, evading investigation
1994	2	1	1	2	RUC, Irish Regiment	Murder, manslaughter (guilty in

[42] See section V about the citizen-led inquiry organized to investigate Caraher's death.

						latter)
1995	1	1	0	2	British soldiers	Murder
1996	0	0	0	0	--	--
1997	0	0	0	0	--	--
1998	0	0	0	0	--	--
1999	1	0	1	1	British soldier	Murder (in a retrial)
2000	1	1	0	2	RUC	Assault of detainee
2001	1	0	1	1	RUC	Aiding, abetting and procuring murder
2002	0	0	0	0	--	--
2003	0	0	0	0	--	--
2004	0	0	0	0	--	--
2005	0	0	0	0	--	--
2006	0	0	0	0	--	--
2007	0	0	0	0	--	--
2008	0	0	0	0	--	--
2009	0	0	0	0	--	--
2010	0	0	0	0	--	--
TOTAL	**30**	**8**	**22**	**49**	**--**	**--**

Table 4.3

Number of Prosecutions in Northern Ireland By Type of Perpetrator

British Army	Ulster Defense Regiment (UDR)[43]	Royal Irish Regiment[44]	Police	Total Prosecutions
19	2	1	8	30

[43] The Ulster Defense Regiment (UDR) was created in 1970 as a locally recruited regiment of the British Army.
[44] The Royal Irish Regiment was a regiment of the British Army that was created when the UDR and the Royal Irish Rangers merged in 1992.

The low conviction rate in Northern Ireland is likely due in part to the structure of charges. To determine criminal charges, courts in Northern Ireland relied on ordinary criminal law, which stipulated that when a member of the security forces or police used excessive force against a civilian, the accused must be charged with murder, as opposed to manslaughter. Many soldiers and police officers argued that their actions against civilians were out of self defense. Even when it was found that the victim did not have a weapon, courts were often reluctant to issue a conviction in a murder case because a sentence of life imprisonment was mandatory (Amnesty International 1991; Ní Aoláin 2000; Dickson 2010). In cases where it was believed the accused was acting out of self-defense, and not engaging in excessive force, the charge issued was typically manslaughter. In my research, I found that state actors were acquitted at a slightly higher rate in manslaughter cases when compared with murder cases. In the 12 manslaughter cases, 10 resulted in acquittal and two resulted in conviction; of the 16 murder cases, 11 resulted in acquittal and five resulted in conviction (the remaining two assault cases resulted in one acquittal and one conviction). In addition to the problem of how charges were structured, it appears that civilian deaths caused by the security forces and police were often seen as justified by the courts, either because it was believed that the accused faced an imminent threat or their actions were viewed as necessary for a state defending itself against terrorism. In section IV, I discuss how the entrenchment of emergency laws in Northern Ireland, and the control by the state over inquests, operated to shape judicial perceptions of culpability and accountability for state violations.

The Conditions Enabling Human Rights Prosecutions

Though the record for prosecutions in Northern Ireland is fairly poor when compared to the number of civilians killed by state actors, it is important to examine the factors supporting cases that did make it to the courts. Many of the prosecutions early in the conflict were prompted by actions taken by the Association for Legal Justice (ALJ) and the Northern Ireland Civil Rights Association (NICRA). The Association for Legal Justice focused its efforts on two actions: misconduct of security forces in cases where criminal charges were brought against suspected terrorists (e.g. the validity of emergency laws and security force personnel powers) and civil and criminal action against individual security force members for assaults, contested shootings and other unlawful activities (Boyle et al 1975). The organization helped victims and families to bring cases to court, publicized state abuses and illegal actions in the press and wrote letters applying pressure on the British government. According to an attorney who worked with both organizations during this time, ALJ and NICRA operated relatively free from government threat or intimidation and were therefore quite successful in generating domestic and international attention on cases and applying pressure to the British government (Int. 26).

Along with NICRA, ALJ also worked to bring cases early on in the conflict to the European Court of Human Rights, most notably *Donnelly v. United Kingdom* in 1974. In this case, seven applicants alleged they were victims of ill-treatment while in police custody and they claimed that the practice of torture and inhuman or degrading treatment was systematic and widespread in Northern Ireland (Hannum 2009; Dickson 2010). The European Commission declared the case admissible on April 5th, 1973 and a small initial success was won. The Commission ruled at this time that if an individual makes a

complaint concerning systematic abuse as an administrative practice, the individual does not have to first exhaust domestic remedies because the question of the effectiveness of domestic remedies will be under consideration as well (Dickson 2010). There was, in a sense, an assumption that given the nature of the claim, it would likely be difficult for an individual to win a domestic remedy. In the end, however, the Commission ruled on December 15th, 1975, that the alleged administrative practice of torture was not in violation of the European Convention on Human Rights because evidence had in fact not been presented to show that domestic remedies were ineffective or inadequate. This ruling was based on the fact that three of the seven victims were in the middle of civil proceedings in Northern Ireland concerning ill-treatment and the remaining four had already been awarded some compensation through civil proceedings (Dickson 2010).

Later in the conflict, some of the domestic cases brought against the state were initiated and/or supported by the National Council on Civil Liberties (NCCL), based in London, and the Committee on the Administration of Justice (CAJ), a Belfast non-profit organization formed in 1981 "to secure the highest standards in the administration of justice in Northern Ireland by examining the operation of the current system and promoting discussion of alternatives" (Whelan 1992). These organizations were also active at the European Court level. In *Marshall v. United Kingdom* (1998), the CAJ brought a case on behalf of a man who had been held in Castlereagh Holding Center for 6 days and 2 hours. Paul Mageean, his solicitor, argued that at that time, the security situation in Northern Ireland had changed considerably and the government should not be allowed to impose a permanent state of emergency. The Court held the application to be "ill-founded" because the detention was justified under the derogation notice issued by

the British government. The Court ruled that the British national authorities were a better judge of the security situation than the Court and therefore deferred to the derogation (Dickson 2010). This is understood formally as the "margin of appreciation" doctrine. The margin of appreciation doctrine refers to the space granted by Strasbourg to national authorities when they are fulfilling their obligations under the European Convention on Human Rights. The Court has largely attempted to balance sovereignty of the Member States with their obligations.

Civil society groups in Northern Ireland also worked closely with international NGOs from the early years of the conflict. CAJ, for example, had ties with Amnesty International and Helsinki Watch. The NCCL also helped CAJ gain lobbying access to the Labour party as early as 1985 and provided support when CAJ publicized government abuses (Whelan 1992). In the early 1990s, CAJ made submissions to the UN Human Rights Committee and the UN Committee Against Torture concerning the conflict in Northern Ireland (O'Brien 1996). CAJ also organized a conference in 1991, which focused on the use of international organizations and treaties as a means to encourage government responsiveness to civil rights concerns (Whelan 1992). The external organizations in turn routinely applied pressure on the British government throughout the conflict. During a survey conducted by CAJ for a 2008 report on lessons learned from the Northern Ireland conflict, one participant commented, "One of the greatest safeguards in Northern Ireland was the ability to secure pressure on government from outside the jurisdiction" (CAJ 2008: 88).

The strong organization and response from civil society groups in the Northern Ireland case was an important form of vertical accountability (Schedler 1994). The

ability of these actors to push for prosecutions, largely free from government harassment or intimidation,[45] was important to their success. In contrast, during the conflict in Sri Lanka, human rights NGOs were subject to government threats and, at times, murder. Much of the government scrutiny in Sri Lanka began with a 1993 emergency regulation, which mandated NGOs to register with the government. Since this time, harassment of human rights NGOs in Sri Lanka increased significantly (see Chapter 3).

In addition to pressure from internal and external human rights organizations, some of the domestic prosecutions of state actors were influenced by the increasing number of cases brought against the British government at the European Court of Human Rights in the early years of the conflict. As Boyle et al (1975:160) explain, "The efficacy of domestic remedies was an important issue in (Strasbourg) cases involving allegations against the security forces, and it is likely that authorities were induced as a result to insist on a more thorough investigation and consideration of the possibility of prosecution." The *Ireland v. United Kingdom* and *Donnelly v. United Kingdom* cases (see above) were particularly important in this regard because though they were not complete successes, they acted to generate a great deal of publicity and awareness concerning the extent of the government's abuse of emergency powers and practice of inhumane treatment and torture.[46] In *Ireland v. United Kingdom*, the government of Ireland filed a case at the European Commission in 1971 concerning the use of internment without trial. The Irish government asserted that the emergency powers in

[45] Some defense lawyers working on cases of alleged collusion between loyalist paramilitary members and the police or British security forces experienced intimidation. See, for example, the Rosemary Nelson Inquiry Report.

[46] A more complete analysis of the impact of these cases on domestic torture prosecutions will be conducted by the author in future research of the civil trials in Northern Ireland.

Northern Ireland exceeded what was required by the situation and were exercised in a discriminating manner, and that British police and security forces had engaged in torture and ill-treatment of detainees, a violation of Article 3 of the ECHR (Hannum 2009; Dickson 2010). Five years later, the Commission found that the British interrogation practices in Northern Ireland constituted torture and inhuman treatment, that the emergency powers in use met the requirements for the conflict situation and were not used in a discriminating way. The Irish government appealed to the European Court of Human Rights, which gave a similar ruling to the Commission, except it found that complaints of ill-treatment constituted inhuman or degrading treatment as opposed to torture. Though this ruling was not a total success for the Irish government, the case set an important precedent; because the case was brought by another democratic state, it enhanced the legitimacy of the claims made against the British government concerning practices of torture and ill-treatment during detention. The case ultimately applied pressure on the British government, causing it to cease its use of the interrogation techniques under question while the Commission deliberated the case, and the British government later told the Court that these particular practices would not be reintroduced (Hannum 2009).

The cases at Strasbourg also influenced British government policy during the conflict.[47] For example, in 1972, Westminster Parliament passed the Northern Ireland Act (1972), which authorized the Northern Ireland Parliament to "legislate in respect of the armed forces of the Crown in so far as that was necessary to the maintenance of peace and order in Northern Ireland" (Boyle et al 1975:132). After Ireland brought a charge

[47] Discussion of how the Strasbourg cases brought against the British government influenced the design of emergency laws is in section IV of the chapter.

against the British government (*Ireland v. United Kingdom,* 1971) concerning ill-treatment of detainees, it brought a second charge in 1972 concerning the retrospective nature of the 1972 Northern Ireland Act. During the oral hearings, the Irish government withdrew their second petition after the British government agreed that no one would be prosecuted for actions that did not constitute a crime before the 1972 Act (Boyle et al 1975).

Later in the conflict, in the early 1990s, prosecutions of security force members or police rise after a relative lull (see Graph 4.1). These prosecutions followed a period of intense lobbying by organizations including CAJ, British Irish Rights Watch and Amnesty International, at the UN Human Rights Committee, the European Court and to the Special Rapporteur on Summary and Arbitrary Executions. It is possible that the increased pressure by these groups on the British government prompted domestic prosecutions concerning extra-judicial killings within Northern Ireland (O'Brien 1996).

The preceding discussion on how the European Court cases influenced domestic judicial practices as well as British policy during the conflict aligns with existing theories that show how international institutions and laws can frame elites' decisions or pressure states to implement accountability processes (Roht-Arriaza 2006; de Brito et al 2001; Kim 2007; Lutz and Sikkink 2001; Sikkink 2011). The large number of cases brought by Northern Ireland citizens to the European Court of Human Rights also illustrates some unique features of this case. Though the United Kingdom had ratified the European Convention on Human Rights in 1951, it was not binding upon the UK in domestic law until the UK-wide Human Rights Act came into force in 2000. This act incorporated ECHR articles 2-12, 14 and 16-18, which include, among other rights, the right to life,

freedom from torture, and right to liberty and security. Prior to this, Northern Ireland citizens could invoke the ECHR in domestic courts but not as binding domestic law. Since the UK does not currently have a Bill of Rights, this was an important feature absent from the UK legal system. These constraints may have encouraged citizens who had exhausted domestic remedies to take the step of bringing their challenges against the state to the European Court of Human Rights. In Chapter 5, I demonstrate that the length of time a country is within the Court's jurisdiction matters for the extent to which the Court can have an impact on accountability processes. Spain entered the game rather late and this had important implications for the awareness of and engagement with the ECHR and the Court in Spanish legal culture.

Though a robust civil society in Northern Ireland was central for the incidence of prosecutions, other relations of accountability prior to the conflict were fairly ineffective or completely absent. As discussed, sectors of the judiciary were biased toward the Protestant population and the British government, a structural remnant from colonial domination of the region prior to the creation of the Northern Ireland state. In addition, after the British government imposed direct rule over Northern Ireland in 1972, political competition as a form of vertical accountability was effectively removed as an option for citizens. The country operated without a local parliament, though citizens were able to vote in British Parliament elections. A partial political administration was in place but the general lack of local political representation precluded the possibility of petitioning local leaders for change. In Chapter 5, I explain that the stronger prosecution record in Spain compared with Northern Ireland and Sri Lanka is strongly connected to the robust relations of accountability that were established during the democratic transition.

Spanish political leaders aiming to shed the country's authoritarian trappings and progress toward a more rule of law system established an independent judiciary and a system of political competition. These mechanisms were central for the state prosecutions that ensued. In the following, I provide a more detailed analysis of the ways in which emergency and counter-terrorism laws in Northern Ireland also shaped the pre-conflict landscape and the opportunities for and constraints on human rights accountability.

Barriers to Human Rights Prosecutions

As discussed in Chapter 3, emergency and counter-terrorism laws can shape how security force members and police are held to account for human rights violations in three specific ways: the laws often contain immunity clauses for actions performed by security forces and police during a crisis; the laws often include provisions concerning inquests (the investigation of wrongful deaths by a coroner) that remove state actors from scrutiny, grant more power to the state over the inquest process or abolish the right to an inquest entirely; and the laws often include clauses on expansive powers of arrest and detention, which can grant legitimacy and cover to state actors who are participating in disappearances, torture and extra-judicial killings. In the Sri Lankan case, immunity and inquest clauses, in particular, narrowed the possibilities for holding state actors to account.

In Northern Ireland, immunity clauses were absent from the laws, though expansive arrest and detention powers, and non-emergency laws on inquests influenced accountability outcomes. In addition, the shadow of the emergency regime in Northern

Ireland had a dampening effect on accountability efforts because domestic judges, and some international bodies, including the European Court of Human Rights, often perceived British government actions as legitimate, even where the actions constituted human rights violations. The entrenchment of emergency laws in Northern Ireland's history illustrates how "the power exerted by a legal regime consists less in the force that it can bring to bear against violators of its rules than its capacity to persuade people that the world described in its images and categories is the only attainable world" (Gordon 1984). It is evident in the court transcripts of prosecutions against security forces and police in the 1970s and 1980s, that though judges were attempting to consider these cases within the confines of ordinary criminal law, this was largely overridden by their belief in and support for the power vested in state actors by emergency laws (Belfast Crown Court, 1975, 1976, 1979, 1981, 1984, 1986, 1988). For example, in the *R v. Jones* (1975) case, in which a British soldier was acquitted on the charge of murder for shooting and killing civilian Patrick Anthony McElhone as he ran away, Judge McDermott made this comment:

> "In some measure their (the British Army's) rights and duties are to be gleaned from a consideration of the terms of the Emergency Provisions Act 1973 and they are I believe protected if they act reasonably in various situations to do with carrying out their duties……Mr. Curran (prosecutor for the Crown) is of course quite right when he says that the existence of the emergency does not give the troops carte blanche to shoot as and when they choose. But the existence of the emergency and the actual particular problem facing the soldier on the ground are relevant factors when assessing what is reasonable, because in any sphere of our law reasonableness is not some abstract, ill defined concept; reasonableness always depends on all the circumstances, not on a limited selection of them" (Belfast Crown Court 1975, pgs.6-7).

In the following section, I discuss the history of emergency laws in Northern Ireland and discuss the ways in which their colonial legacy and continued enactment shaped accountability for state violations in this case.

The History of Emergency Laws in Northern Ireland

The history of Britain's use of emergency laws within Ireland goes further back than the history of these laws in Sri Lanka. Between 1800 and 1921, the British Crown implemented over 100 Coercion Acts in Ireland to quell violence and restore order (Donohue 2001). The 1914-15 Defense of the Realm Act and the 1921 Restoration of Ireland Acts, which established regulations for maintaining order in all the British colonies and Ireland, respectively, set an important precedent for emergency laws designed later to address the conflict in Northern Ireland. The 1922 Civil Authorities (Special Powers) Act, created in response to growing political violence in Northern Ireland after the partition of the island, drew its provisions directly from the 1921 Restoration of Ireland Act (Donohue 2001). Thus, the regulation of disorder and violence by the British government is part and parcel of the historical evolution of the Irish state and the creation of Northern Ireland (see Table 4.4).

The 1922 Civil Authorities (Special Powers) Act, or SPA, remained in force in Northern Ireland until 1973, after it was made permanent by the Northern Ireland Unionist Government in 1933 (Donohue 2001). In 1972, in response to a Belfast High Court ruling (*Regina (Hume and others) v. Londonderry Justices)*, which challenged the Northern Ireland government's order that British armed forces in Northern Ireland were to act under the 1922-1943 SPAs, the British government immediately introduced a bill

to retrospectively legalize all security force actions taken prior to 1972 (Donohue 2001). In this case, two Northern Ireland MPs, John Hume and Ivan Cooper, who engaged in a sit-down demonstration against the actions of the British troops in Derry, were charged with refusing to obey the order of an Army officer, who was acting under the power conferred on him by Regulation 38 of the Special Powers Act to disperse public assemblies (Boyle et al 1975). The local magistrate convicted the MPs but they won their appeal in the Northern Ireland High Court, which held that by conferring powers on the British Army, the regulation was in fact not lawful given that the limitations stipulated by the 1920 Government of Ireland Act did not allow the Northern Ireland government to order the armed forces of the Crown to take action (Boyle et al 1975; Donohue 2001). The 1972 Northern Ireland Act was passed by both Houses. The law was not an explicit amnesty law nor did it contain specific immunity provisions, like those in Sri Lankan emergency laws, which allowed protection from prosecution. Its objective was to challenge the High Court ruling by retroactively legitimizing the actions taken by the British armed forces in the *Regina (Hume and others) v. Londonderry Justices* case. It is significant, however, in that as the British government assumed control over all functions of Northern Ireland through devolution in 1972, a tone was set concerning the legality of a British presence in the region. The 1972 Northern Ireland Act was eventually repealed in 1999.

Table 4.4

Chronology of Emergency and Counter-terrorism Laws in Northern Ireland

Year	Law
1914-1915	Defense of the Realm Act (DORA)
1921	Restoration of Ireland Acts (ROIA)
1922	Civil Authorities (Special Powers) Act (SPA)
1939	Prevention of Violence Act
1973	Northern Ireland Emergency Provisions Act (EPA)
1974	Prevention of Terrorism Act (PTA)
1975	Northern Ireland Emergency Provisions Act (renewed)
1976	Prevention of Terrorism Act (renewed)
1978	Northern Ireland Emergency Provisions Act (renewed)
1987	Northern Ireland Emergency Provisions Act (renewed)
1989	Prevention of Terrorism Act (renewed)
1991	Northern Ireland Emergency Provisions Act (renewed)
1994	Criminal Justice and Public Order Act
1996	Prevention of Terrorism Act (renewed)
1998	Northern Ireland Emergency Provisions Act (renewed)
1998	Prevention of Terrorism Act (renewed)
2000	Terrorism Act (United Kingdom)
2006	Terrorism Act (United Kingdom) (renewed)

The 1972 Northern Ireland Act is an example of what Gross and Ní Aoláin (2006: 131-132) describe as "Acts of Indemnity." This type of legislation enables a government to pursue measures, with approval from parliament, that make a state actor's actions legal after the fact. This act did not therefore effectively sanction all behavior by the British Army in the region from that point forward; rather, it legitimized the actions of officers in the Hume case. Immediately after the British Government reintroduced direct rule over Northern Ireland, amidst growing political violence in 1972, it created the 1973 Emergency Provisions Act (EPA). This legislation reenacted almost all of the provisions within the 1922 SPA, including measures related to detention and internment (Donohue 2001). The EPA was slightly amended in 1975 then reenacted in 1978, 1987, 1991 and 1998 (see Table 4.4).

The 1974 Prevention of Terrorism Act was a United Kingdom-wide law rushed through Parliament with little debate or discussion after an IRA bombing in Birmingham, England. The law focused on the proscription of terrorist groups, exclusion orders, and powers of arrest and detention. This act also largely drew from existing legislation, including the 1939 Prevention of Violence Act, the 1922 SPA and the 1973 EPA (Donohue 2001). The 1974 PTA was initially subject to biannual reviews in the British Parliament, but this was changed to annual reviews in 1976. It was reenacted in 1976 and 1989, amended by the Criminal Justice and Public Order Act (1994), reenacted in 1996, and amended and maintained in 1998.

The historical legacy of emergency laws in the Northern Ireland case is significant. The measures that were first enacted to maintain order in all the British colonies in the early 20th century were adopted in whole or slightly refined to regulate the

Northern Ireland conflict. The decision by successive British and Northern Ireland administrations to utilize laws from the colonial period to regulate the conflict maintained certain conceptions of state culpability and accountability and closed off other possibilities. Notions of how and whether the state should be held to account, within emergency regulations promulgated over a hundred years ago, can be understood as a type of institution (Thelen 1999) that, through continued reenactment, shaped the ways in which state culpability and accountability were perceived throughout the conflict. In the following, I demonstrate how institutional rules and institutional context allowed for some flexibility and gradual change in the emergency laws over time in Northern Ireland. Specifically, certain aspects of emergency law design and regulation, including immunity and inquest clauses, voting rules and domestic contestation, and judicial challenges at the international level, shaped the extent to which emergency measures had an impact on human rights accountability.

Immunity and Inquest Clauses in Emergency Regulations

One of the most direct ways in which emergency laws can impact efforts to hold state actors to account is through the inclusion of immunity provisions. In Sri Lanka, both the emergency regulations and the Prevention of Terrorism Act contain clauses explicitly protecting state actors from investigation and prosecution for actions performed under emergency powers. In addition, successive administrations in Sri Lanka have promulgated impunity through regulations on coroner's inquests and post-mortems, allowing for the disposal of victims' bodies without a proper inquest and for the police to have extensive control over the inquest process where security force personnel are

implicated. Northern Ireland's emergency laws and Prevention of Terrorism Act, in contrast, do not contain immunity clauses. There is no provision that explicitly limits prosecutions of security force members and police for human rights violations. However, inquests were for a time regulated through emergency laws in Northern Ireland as a means to protect security forces from prosecution (Donohue 2001: 30). Limitations on the inquest procedure were included in the 1922 SPA in that the Minister of Home Affairs, "for the purpose of preserving the peace and maintaining order," had the power to prohibit the holding of an inquest by coroners of deceased persons in Northern Ireland (Section 10(a)(b)(c), Civil Authorities (Special Powers) Act 1922). This provision was modeled on Regulation 81 of the 1920 Restoration of Order in Ireland Act, which also remained in force until it was repealed by Westminster through the 1953 Statute Law Revision Act (Donohue 2001: 18). Concerns about these clauses were raised in the Northern Ireland Parliament at the committee stage of the bill. One Member of Parliament stated: "If these inquests are prohibited it raises a suspicion that will enable the enemy to blacken us further as far as that may be possible" (Dohonue 2001: 30). The claim made to counter this allegation was that the government could not trust some coroners in the region and access to special powers was therefore necessary.

The inquest provision was later removed from the 1973 EPA, likely as a result of its controversial nature discussed above. Prior to this, however, aspects of the inquest regulations were incorporated into non-emergency legislation, the Coroner's Act (Northern Ireland) 1959 and the Coroner's (Practice and Procedures) Rules 1963. Specifically, the 1959 Coroner's Act limited the coroner's investigation to the facts alone, namely who died and how he/she died, abolishing the prior power of this independent

body to commit a person for trial on a charge of murder, manslaughter, or infanticide (Public Records Office Northern Ireland). The act also replaced local authorities with the Minister of Home Affairs to oversee the functioning of the coroner's courts. Though some of these changes followed recommendations made by the government-sponsored Wright Committee Report, the elimination of the power of coroners to issue verdicts appears to be a direct response by the Northern Irish government to the conflict situation and a sense of its increasing vulnerability in terms of its role in civilian deaths (Ní Aoláin 2000).

In addition, Rule 9 of the Coroner's Rules (Northern Ireland) 1963 stipulated that a person causing a death was a non-compellable witness. Thus, police or security officers who caused a civilian death by the use of force were never required to attend an inquest nor were they exposed to cross-examination or verification of their testimony in coroner's courts. Notably, there was no equivalent legislation in England or Wales during this time. Further, Rule 17 of the Coroner's Rules allowed the inclusion of statements made by non-compellable witnesses, even though these statements were not given under oath and the witness was not required to be present (Ní Aoláin 2000).

The controls placed by the state on coroners' inquests likely enabled state actors to avoid prosecution in some cases. When comparing these provisions in Sri Lanka and Northern Ireland, limitations on the inquest process in Sri Lanka appear to have restricted the extent to which security force members and police were held accountable to a greater degree than in Northern Ireland in that the former advocated for the complete removal of evidence and denied the right to an inquest altogether. It is also notable that the consistent incorporation of immunity clauses in Sri Lankan emergency legislation, a

powerful means by which the Sri Lankan executive legally sanctioned actions conducted by security forces and police during the conflict period, was absent from Northern Ireland emergency laws.

Voting Rules and Domestic Contestation of Emergency Laws

The power of immunity and inquest clauses to limit human rights accountability can be further compounded by the absence of substantive monitoring and regulation of emergency and counter-terrorism laws. Oversight of emergency laws was virtually absent in Sri Lanka. In contrast, the laws created by the Northern Ireland and British governments were consistently subject to scrutiny, which led to some reforms.

In Northern Ireland, emergency legislation is not deemed superior to ordinary law through constitutional provisions or other laws, and is thus not permitted to override ordinary laws, as it is in Sri Lanka. Members of parliament, as opposed to the executive, create emergency and counter-terrorism laws. When the 1922 SPA was debated in the Northern Ireland Parliament, there was little opposition to its purpose or the wholesale adoption of language from prior emergency legislation. This was likely a result of the fact that at the time the Parliament was mainly comprised of unionists, since nationalists were holding a boycott of the sitting government (Donohue 2001). Though the National Council on Civil Liberties, based in London, issued a report in 1936 seriously criticizing the SPA, and sectors of the nationalist community protested the measures, it was not until the civil rights movement of the 1960s that significant opposition manifested from some members of the Northern Ireland Parliament (Donohue 2001: 115-116). After direct rule of the country by the United Kingdom was introduced in 1972, members of the British

Parliament took over the creation of emergency laws and they were then subject to either biannual or annual reviews. A two-thirds majority in the British Parliament was needed to pass each piece of emergency legislation and, as a result, there was often a great deal of contestation at this stage concerning the legitimacy and effectiveness of these laws.

During the Northern Ireland conflict, every Emergency Provisions Act, first passed in 1973, amended in 1975, then reenacted in 1978, 1987, 1991, and 1998 (see Table 4.4), was preceded by an independent review of the law's provisions and the issuance of recommendations, with the exception of the 1987 act. The initiation of these reviews often followed calls from political leaders, including the Northern Ireland Secretary of State, or from opposition parties within the British Parliament, most notably the Labour party. The Standing Advisory Commission on Human Rights (now the Northern Ireland Human Rights Commission) also produced reviews of each Emergency Provisions Act, though the British government rarely incorporated its recommendations (Donohue 2001).

The independent reviews often provided recommendations on curtailing or even abolishing certain emergency or counter-terrorism laws. However, their conclusions typically supported the notion that an emergency did exist within Northern Ireland, requiring extraordinary measures. For example, though both the 1975 Gardiner Committee report on the 1973 EPA and the 1983 Baker Committee Report on the 1978 EPA recognized the laws' incursion on civil and political rights and the growing permanency of the emergency regime, respectively, both reports concluded that the EPAs were legitimate and highly necessary (Donohue 2001). The Shackleton and Jellicoe reviews of the Prevention of Terrorism Act in 1974 and 1976, largely initiated by the

Labour Party's claim that emergency laws violated civil liberties in Northern Ireland, were limited in power given their narrow terms of reference (CAJ 2008). Lord Shackleton did, however, make clear his concerns about the continued use of these measures in the region:

> "The powers of arrest and detention of Section 12, including the extended detention, are regrettably necessary if the police are to be enabled adequately to prevent acts of terrorism of the kind we have experienced ... Although it is not for me to judge what measures may, in the longer term, be necessary to deal with terrorism, I hope that the temporary concept of this legislation will not diminish. It would be highly regrettable if the view were to gain ground that these powers should in some way slide into part of our permanent legislation" (U.S. State Department 1978).

Between 1984 and 1988, members of the Labour Party routinely challenged the PTA but Conservative majorities in Parliament continued to pass the laws.

Despite this trend in the early years of the conflict, some reviews led to important revisions. For example, in response to the Baker Committee's concern that emergency rule had lasted nearly twenty years, the 1987 EPA incorporated a provision that placed a five-year maximum on the act; as illustrated in Table 4.4, however, the EPA was continued for several years (Donohue 2001). In addition, when amending the 1991 EPA, the British government responded to a recommendation made by an independent reviewer, Lord Colville, suggesting it address charges that security forces in Northern Ireland were abusing emergency powers. Sections 61 and 62 of the 1991 EPA were added requiring the Secretary of State to make codes of practice regarding detention, treatment, questioning, the identification of those persons detained and police powers (Donohue 2001: 199-200). This was short-lived, however, and during the parliamentary

review of the 1996 EPA, the measures on codes of practice were removed on the basis that such codes were in fact never issued by the Secretary of State (Donohue 2001).

Though the 1996 EPA incorporated much of the provisions in the 1991 EPA, following the recommendation from Lord Colville's review, the British government added a clause introducing silent video recording of interrogations. This marked an important step forward in response to the hundreds of torture allegations raised by detainees against police and security forces in prior years. During this same time period, Lord Lloyd was commissioned to assess whether there was a continued need for counter-terrorism legislation in the United Kingdom. The terms of reference for the Lloyd Review were expanded to all emergency and counter-terrorism laws and it was to consider the UK's obligations to the European Convention on Human Rights and the International Covenant on Civil and Political Rights (Donohue 2001). This review followed a series of legal challenges to the emergency regime brought by Northern Ireland citizens to the European Court of Human Rights (discussed in further detail below). Lloyd noted in his report the UN Human Rights Committee's call for the elimination of emergency laws in Northern Ireland and the 1991 UN Committee Against Torture's concerns about detention practices. He also recognized that the emergency laws had tarnished the UK's international reputation in the realm of human rights protection (Donohue 2001). He therefore advised a reduction in powers of detention.

In light of the waning conflict in Northern Ireland, in the end, Lloyd focused much of his review on the growing threat of international terrorism. Thus, as opposed to concluding that existing emergency laws be seriously amended or abolished, he recommended that in the face of global terrorism, all emergency and counter-terrorism

laws should be consolidated into one act and rendered permanent. After the Labour Party gained a victory in the 1997 election, and following the 1998 Omagh bombing in Northern Ireland, the party changed its tune regarding the necessity of these laws. Following Lloyd's recommendations, the Labour government created the 2000 UK Terrorism Act, which combined all emergency and counter-terrorism laws into one piece of legislation. It was renewed in 2006.

As seen in Chapter 3, the power of the president to issue emergency regulations in Sri Lanka, and the virtual absence of parliamentary power or political will to debate the merit of the laws or check the executive, allowed for the entrenchment of a highly unregulated emergency regime. Calls for the reform of laws that would serve to curtail impunity went unheeded as emergency laws were continually deemed superior to ordinary criminal legislation. In addition, possibilities for reform or the elimination of immunity and inquest clauses were non-existent given the utter lack of parliamentary power in the creation and enactment of these laws. Efforts to hold the state to account suffered significantly as a result. In contrast, immunity provisions were absent from emergency laws enacted in Northern Ireland and the requirement of parliamentary approval produced a consistent review procedure independent from government control. Though at points these reviews may have been a means for the British government to legitimize derogation procedures (Rolston and Scraton 2005), the structure of voting rules and contestation within the Northern Ireland and British parliaments conditioned the trajectory of emergency legislation in different ways than the Sri Lankan case, where parliament had little to no power to alter or contest the laws.

Judicial Challenges to Emergency Laws

After exhausting domestic remedies, several applications were made to the European Commission and the European Court of Human Rights concerning emergency and counter-terrorism laws throughout the Northern Ireland conflict. In the early years of the Court, all the applications were lodged with the European Commission with the potential to go on to the European Court. When the caseload facing the Court grew substantially in the 1990s, Protocol 11 of the ECHR was passed in 1998 to eliminate the Commission while retaining the European Court of Human Rights as the sole judicial body.

After 1966, individuals within the United Kingdom gained the right to submit individual applications to the European Commission. Though many applications were lodged at this time concerning the validity of the Special Powers Act (1922), most applications were deemed inadmissible due to a failure by applicants to clearly articulate the claim or the mismanagement of the case by attorneys (Hannum 2009; Dickson 2010). Several of the later challenges to emergency and counter-terrorism laws by Northern Ireland applicants in Strasbourg were also ill-fated due to the precedent set by *Lawless v. Ireland* in 1957. This case involved a challenge to Ireland's use of emergency laws, particularly the use of internment. The case examined whether derogation was justifiable and if the measures taken were "strictly required by the exigencies of the situation" (Dickson 2010; Art. 15 ECHR). The European Commission ruled in 1959 that there was a public emergency in Ireland at the time, though the few dissenters on the Commission argued that the main activities of the IRA were largely in Northern Ireland (Dickson

2010). When the case went on to the European Court, it unanimously confirmed the Commission's decision. The Court did not require significant evidence to support the claim that there was an emergency in Ireland, mainly relying on the Irish government's own assessment of the situation, or the margin of appreciation doctrine. Dickson argues that this ruling effectively sent a message to states at the time that the ways in which they designed and implemented emergency laws would not receive a great deal of scrutiny at the European Court level (Dickson 2010).

Despite this trend, a few key judicial challenges were successful. One of the most influential cases brought to the European Commission and later the European Court included a challenge to the SPAs from another democratic government. In *Ireland v. United Kingdom,* the Irish government charged, among other matters discussed above, that the manner in which the SPAs were being implemented in Northern Ireland brought Britain into violation of its obligation under Article 1 of the ECHR to secure to everyone within its jurisdiction the rights and freedoms defined in Articles 2 to 18 (Dickson 2010). In the end, though the Court ruled against the UK government concerning claims of ill-treatment of detainees, in terms of the validity of the SPAs, the European Court ruled that the UK government had legitimately derogated from the application of the articles referred to in the claim when, in 1957, it had lodged with the Council of Europe a notice under Article 15 of the ECHR declaring a public emergency (Dickson 2010: 64).

Several years later, in 1984, in the *Brogan v. United Kingdom* case, an application made by four men detained in Northern Ireland for a period ranging from four to six days, challenged the provision within the PTA allowing for a maximum seven-day detention of suspected terrorists. In 1987, the applicants gained a small success. The

European Commission ruled four days, eleven hours was acceptable but five days, eleven hours was not (Dickson 2010). The European Court then ruled in 1988 that Article 5(3) of the ECHR had been breached in relation to all four applicants. Though this was a clear success for the applicants and critics of emergency laws, the government's only response was to derogate again from the European Convention on Human Rights in order to justify extended detentions in future arrests (Dickson 2010).

The *Brannigan and McBride v. United Kingdom* case in 1989 followed up the British government's 1988 derogation notice with a challenge by two applicants held longer than four days in detention in Northern Ireland. In 1991, the Commission ruled that Article 5(3) had not been breached and the 1988 derogation notice to be valid (Dickson 2010). The European Court concurred in 1993. Notably, Amnesty International and the Belfast-based Committee on the Administration of Justice made appeals to the European Court, arguing that if states are to be allowed a margin of appreciation when derogating from the Convention, the margin should be narrower the longer the emergency is in effect (Dickson 2010).

In 1986 and 1991, Northern Ireland citizens won two more legal cases against the British government. The European Court ruled that the UK's EPA and PTA violated the European Convention concerning arrest powers, reasonable suspicion, access to a solicitor and the court's right to draw inferences based on a detainee's silence (Donohue 2001; see *Fox, Campbell and Hartley v. United Kingdom* and *Murray v. United Kingdom*). Finally, though the conflict, and thus an emergency, had largely been over since the ceasefires of 1994 and 1995, the Court ruled in *Marshall v. United Kingdom* (1998), discussed above, in 2001 that the detention of a man for six days, two hours, had

been justified because the British government had issued a derogation notice prior. The Court deemed the government a better judge of the security situation than the Court, despite the claim by the applicant and his solicitor that a permanent state of emergency was unlawful (Dickson 2010).

The Court's deference to the British government in many of these cases reflects a trend in which democracies are often granted more leeway than non-democracies by international courts and monitoring bodies, such as the UN Human Rights Committee, concerning their use of emergency legislation. There is, in essence, a belief across these institutions that democracies are more able than other regimes to assess the internal threats they confront and should therefore be trusted to develop and implement measures to combat the threat (Gross and Ní Aoláin 2006). As my research demonstrates, the permanency of an emergency regime in democracies experiencing conflict deserves further scrutiny from monitoring bodies given the potential for such a regime to promulgate state impunity.

Though the European Court had fairly minimal enforcement power to pressure the British government to change emergency laws or improve accountability processes, the accumulation of cases at Strasbourg, and the handful of successful wins against the British government, did produce an impact. The repealing of the SPA was "certainly influenced by the complaints at Strasbourg" and this was made clear in the design of the Northern Ireland EPA (1973), which reflected aspects of the European Convention, particularly in the area of administrative detention (Boyle et al 1975). In addition, as discussed earlier, in direct response to the series of cases brought before the European Court, the Lloyd Review in 1996 was asked by the British government to consider, for

the first time, the necessity of emergency laws and the compatibility of the laws with the European Convention and the ICCPR, which resulted in key reforms. The legal successes also had a direct effect on British policy concerning the domestic investigation and prosecution of state actors for conflict-related human rights violations, as discussed earlier in the chapter (Boyle et al 1975; O'Brien 1996; Dickson 2010). In the 1990s, several important cases brought against the state regarding extra-judicial killings and torture, were successful at the European Court level.[48] This may have resulted from the fact that the conflict was in the process of being resolved during this time, and thus the Court was willing to be stricter in their judgments against the British government (Dickson 2010). The access to this court was thus an important means by which Northern Ireland citizens were able to seek accountability for state violations and potentially influence future accountability outcomes domestically.

In contrast, the few domestic legal challenges to emergency measures in Sri Lanka produced no real changes to the laws and, given the UN Human Rights Committee's recommendations are not binding, they were largely ignored. Citizen access to an international court, despite the relatively weak enforcement power of these bodies, would have likely applied pressure on Sri Lankan administrations to produce reforms and improve domestic accountability processes. While the European Court of Human Rights is not a body that formally regulates the use of emergency laws in signatory states, the Northern Ireland case demonstrates that the ability for citizens to

[48]See *McCann and others v. United Kingdom* (1996), *McKerr, Kelly and others v. United Kingdom* (2002), *Jordan v. United Kingdom* (2003), *Shanaghan v. United Kingdom* (2006), *McShane v. United Kingdom* (2002), and *Finucane v. United Kingdom* (2003).

challenge these laws through the Court did produce some regulatory effects on how the laws were reformed and implemented.

Truth-Seeking Measures: Public Inquiries

In addition to human rights prosecutions, six inquiries (see Table 4.5) were held to investigate state human rights violations during and after the conflict. Similar to Sri Lanka, the inquiry process utilized in Northern Ireland is a relic of the British colonial past. Inquiries are typically enacted through the UK Tribunal of Inquiry (Evidence) Act (1921).[49] In the early years of the conflict, two inquiries were created under the terms of the Tribunal of Inquiry (Evidence) Act (1921) to address state human rights violations: the Scarman Tribunal on Violence and Civil Disturbances in Northern Ireland in 1969 and the Widgery Tribunal on the events of January 30th, 1972 in Derry, otherwise known as Bloody Sunday.[50] The Scarman Tribunal involved an examination of the deaths and injuries of civilians at the hands of the police, otherwise known as the RUC. The Widgery Tribunal examined the deaths of thirteen civilians allegedly at the hands of British security forces during a civil rights march in Derry. Neither of the inquiries resulted in prosecutions despite evidence provided in the reports of state actor culpability. This was likely the result of the narrow terms of reference given to the commissioners at

[49] The 2005 Inquiries Act repealed this act. One of the later public inquiries was therefore enacted through this legislation instead. Inquiries have also been established under other statutes including the Police (Northern Ireland) Act 1998, which has provisions on inquiries involving actions by the police.

[50] Other investigations were held at this time, including the Cameron Commission on Disturbances in Northern Ireland between October 1968 and March 1969, the Compton Inquiry into allegations against the security forces of physical brutality in August 1971 and the Parker Committee on methods of interrogation. These investigations were not inquiries, however, in that they were not enacted under inquiry legislation nor did they have the power to subpoena witnesses. The Cameron and Compton inquiries were Royal Commissions, which are bodies appointed by the British or Northern Ireland governments to look into specific or more general matters (Cameron Report 1969; Compton Report 1971; Dickson 1989).

the start and the failure to examine the underlying causes of the violence, in conjunction with a tendency for commissioners to favor evidence given by the Army over other sources (Boyle et al 1975). The police were also notorious for engaging in codes of silence when allegations were made against them. This made it very difficult for commissioners to obtain evidence or testimony to aid in their investigation.

Table 4.5

Public Inquiries into State Violations in Northern Ireland

Year	Title	Mandate	Report
1969	Scarman Tribunal on Violence and Civil Disturbances in Northern Ireland	Deaths and injuries of civilians at hands of police	April 1972
1972	Widgery Tribunal	Events of January 30th, 1972	April 1972
1998	Saville (Bloody Sunday) Inquiry	To revisit the events of January 30th, 1972	June 2010
2004	Robert Hamill Inquiry	To inquire whether Hamill's death in 1997 was in any way affected by actions of or negligence by the police	Final report pending (interim report issued in January 2010)
2004	Billy Wright Inquiry	To inquire whether the prison service or other state agency was involved in Wright's death	September 2010
2004	Rosemary Nelson Inquiry	To inquire whether Nelson's death was facilitated by the police	May 2011

Interestingly, in response to these failings, civilians formed their own unofficial inquiries into deaths caused by the security forces. The Gifford Inquiry was set up in 1971 to address the shooting of two civilians in Derry by the British Army and was led by Lord Gifford, Paul O'Dwyer and Albie Sachs (Boyle et al 1975). Councillor Hugh Smith organized an unofficial inquiry into the shooting of two Protestants in 1972 by the British Parachute Regiment and the International League for the Rights of Man organized an inquiry in response to the Widgery Tribunal, led by American Professor Samuel Dash (Boyle et al 1975). The Cullyhanna Inquiry into the 1990 murder of Fergal Caraher was significant in that it later led to the prosecution of two Royal Marines in 1993 (*R v. Elkington and Callaghan* 1993*;* Rolston and Scraton 2005). The soldiers were eventually acquitted. Though the other inquiries did not lead to prosecutions, the strength of a civil society response to state impunity in Northern Ireland at the time is evident in these actions.

After the conflict ended in 1998, there was much debate about the prospect of a truth commission in Northern Ireland, though because there was little consensus on whether this was an appropriate move, one was never implemented (Lundy and McGovern 2008). That same year, over 25 years after the incident, Prime Minister Tony Blair launched the Saville or Bloody Sunday Inquiry under the terms of the Tribunal of Inquiry (Evidence) Act (1921). The Bloody Sunday Inquiry was set up in response to criticisms of the 1972 Widgery Inquiry findings, and in response to new evidence on the case that had been presented to the British government by local political officials, families of the victims and the Irish government (House of Commons Official Report 1998). The British government claimed an interest in increasing public confidence

concerning investigations of the event and saw a fresh inquiry as the best possible way to achieve this. Though the inquiry focused mainly on the events of January 30th, 1972, it also examined the events leading up to this day. In particular it took into account as evidence the increasing violence between civilians, police, paramilitaries and British security forces during this time and it considered allegations that the events in January 1972 were part of a government policy. The Inquiry received 2500 statements and 922 individuals, including civilians, security force members, police, media personnel and former paramilitary members, were called to give testimony.

Though the Inquiry was not without controversy during its proceedings, the public release of the final report in June 2010 improved perceptions of its efficacy for some sectors of society.[51] Issued twelve years after the Inquiry commenced, the report did not make formal recommendations. Instead, it produced conclusions concerning the events of January 30th, 1972, including that a serious and widespread loss of gunfire discipline transpired among the soldiers responsible for the civilian deaths; the firing of a British Army regiment caused the deaths of 13 civilians and injuries to several others, none of whom posed a threat to the soldiers; and the events of that day strengthened the Provisional IRA, increased nationalist resentment and hostility towards the British Army and generally exacerbated the conflict (Report of the Bloody Sunday Inquiry 2010). Prosecutions were not recommended in the final report largely because the British Attorney General had previously stipulated that any written material or oral evidence provided by a witness at the Inquiry could not be used to incriminate that witness in any

[51] The full text of the Bloody Sunday Inquiry final report can be accessed at the archived Inquiry website: http://webarchive.nationalarchives.gov.uk/20101103103930/http://bloody-sunday-inquiry.org/index.html

later criminal proceedings.[52] This was seen as essential for reaching the truth of the events on Bloody Sunday in that witnesses would likely not refuse to co-operate on the grounds that they might incriminate themselves. Criminal proceedings against an individual could commence in the future as long as the evidence they provided to the Inquiry was not used against them. After the report was released, Prime Minister David Cameron issued a public apology for the crimes committed under the past administration.

Some years earlier, in 2001, Canadian Judge Peter Cory was appointed by the British and Irish governments to investigate allegations of collusion between the British and Irish security forces and paramilitaries concerning six cases related to the Northern Ireland conflict. In 2004, while the Bloody Sunday Inquiry was underway, Judge Cory issued a report recommending that four inquiries be established concerning the deaths of Robert Hamill, a Catholic civilian, Rosemary Nelson, a human rights attorney, and Billy Wright, an imprisoned loyalist paramilitary member. An inquiry was also recommended concerning the death of Pat Finucane, a human rights lawyer. The British government initially claimed it could not proceed in the Finucane case due to a criminal prosecution of one of the alleged perpetrators (Rolston and Scraton 2005). The Finucane family did not agree to the commencement of an inquiry due to concerns that it would not be a fully independent process. The introduction of the 2005 Inquiries Act, which replaced the 1921 Tribunal of Inquiry (Evidence) Act, deepened their concerns on this matter given the act provided increased power to government ministers over the content, process and findings of future inquiries (British Irish Rights Watch 2005).

[52] Evidence of perjury in the report, however, raises the question as to whether this stipulation will hold in the future.

In the Robert Hamill case, Hamill was attacked by a group of loyalist civilians in Portadown, County Armagh, and died from his injuries in 1997. The Hamill Inquiry was established "with a view to determining whether any wrongful act or omission by or within the Royal Ulster Constabulary facilitated his death or obstructed the investigation of it, or whether attempts were made to do so; whether any such act or omission was intentional or negligent; whether the investigation of his death was carried out with due diligence; and to make recommendations" (Hamill Inquiry Interim Report 2010). The Hamill inquiry and the Nelson Inquiry were originally established under Section 44 of the Police (Northern Ireland) Act 1998, which allowed for an inquiry into matters relating to the police. After the 2005 Inquiries Act was passed, the Hamill Inquiry was converted to operate under the terms of this act. The Nelson Inquiry remained under the terms of the Police Act (1998) and, like the Hamill inquiry, included an investigation into whether the police helped to facilitate Rosemary Nelson's death in 1999.

Nelson, a human rights attorney, died as a result of injuries sustained in a car bombing in Lurgan, County Armagh. The Red Hand Defenders, a splinter loyalist paramilitary group, claimed responsibility for her death.

The Billy Wright case involved the 1997 death of a loyalist paramilitary member. Wright was killed as a prisoner by members of the Irish National Liberation Army, who were also incarcerated at the prison. The Wright inquiry investigated whether the prison service or other state agencies facilitated or were culpable in Wright's death. This inquiry was first established under Section 7 of the Prisons Act (Northern Ireland) 1953, however, in 2005 it was converted to fall under the terms of the 2005 Inquiries Act.

Reports were issued in the Nelson, Hamill and Wright cases. The Wright report issued in September 2010 heavily criticized the prison service and other state agencies for negligence and ineffective investigation, but dismissed the charge of collusion between state forces and paramilitary members. In the Hamill case, an interim report was issued on March 12th, 2010 calling into question the decision by the Public Prosecution Service (formerly the DPP) to discontinue the prosecution of a police officer "for conspiracy to pervert the court of justice" (Hamill Interim Report 2010). Then, in December 2010, the Public Prosecution Service announced that it would initiate criminal proceedings against three individuals on the charge of perverting the course of justice. The final report is pending until these proceedings are complete. Finally, the Nelson report, issued in May 2011, found that the police, the Northern Ireland Office and the Army and Security Service were not directly responsible for facilitating Nelson's death. The report did find that the police and the Northern Ireland Office were negligent in several ways concerning her safety prior to the incident and during parts of the investigation (Nelson Report 2011). Prosecutions were not recommended in any of these reports.

The conditions enabling the inquiries in Northern Ireland differ somewhat from the conditions leading to the commissions of inquiry in Sri Lanka. The early inquiries in Northern Ireland were conducted during the conflict. There may have been political will initially by the British government to address egregious state violations, however, both Scarman and Widgery turned out to be highly ineffective due to the narrow terms of reference, the obstruction of investigations by security force members and the police, political bias among commissioners and the lack of concrete action, through the courts, or otherwise, after the close of the proceedings. These barriers are also common to truth

commissions operating in the last thirty years, particularly when they are conducted while violence is underway (Hayner 2011). In Sri Lanka, a different set of factors prompted the creation of commissions of inquiry during the conflict, namely, motivation by the incumbent to punish the previous regime and appeasement in the face of international pressure. The lack of concrete reforms in the criminal justice system in Sri Lanka led to a perpetual cycle of weak, fairly ineffective ad hoc truth-seeking bodies as a response to the increasing rates of impunity. In only a few cases, commissions were set up as a result of domestic pressure from civil society and victims' families.

The inquiries that were held after the Northern Ireland conflict ended were prompted by a set of distinct conditions related to the post-conflict milieu. The Bloody Sunday Inquiry was instigated by years of pressure applied on the British Government by victims' families, political leaders and the Irish government. The Irish government, in response to requests from the Finucane family and victims' organizations, also submitted a report to the Northern Ireland Office requesting a public inquiry into the death of human rights attorney Pat Finucane (Rolston and Scraton 2005). The inquiry was never held, as discussed previously, due to the British government's intransigence and the family's concern about the lack of transparency and independence in a potential inquiry process. The commission of the Cory Report by the British government, which recommended the Wright, Hamill, Nelson and Finucane inquiries, in contrast, stemmed from political negotiations during the peace process.

Ultimately, however, the use of the inquiry model in both Northern Ireland and Sri Lanka suffer from similar limitations. The fact that the inquiries were largely created and administered by a state whose actions were under investigation has meant that state

accountability through this process has been limited. Though some of the recent inquiries in Northern Ireland were led by foreigners in an effort to demonstrate impartiality, the introduction of the Inquiries Act in 2005 has granted increased power over the inquiry process by British government ministers. The purpose of many of the past and recent inquiries is arguably to manage the problems driving their creation, as opposed to resolving them (Rolston and Scraton 2005). Though they are often established to ascertain a sort of truth about historical events, when the state is responsible for the terms of reference as well as the outcome, the state discourse tends to reign instead. Inquiry proceedings in both Northern Ireland and Sri Lanka therefore tend to be government-led processes of legitimation. The troubling role of the inquiry in the conflicted democratic state, and its distinction from truth commissions is discussed further in Chapter 6.

Conclusion

The findings of this chapter illustrate the relative weakness or absence of relations of accountability prior to the conflict in Northern Ireland. This landscape was shaped to a large degree by the presence of entrenched emergency laws, which served to dilute opportunities to hold the state to account. Unlike Sri Lanka, however, legal constraints in the form of an emergency institution were loosened and reconfigured by key institutional properties, including veto power and mechanisms of review and regulation. In the next chapter, I demonstrate how Spain differs from Northern Ireland and Sri Lanka. During the Spanish democratic transition, there was a fresh urge to separate from an authoritarian past, including draconian emergency laws, and a strong motivation to establish robust

relations of accountability. This landscape produced a stronger accountability record compared to the first two cases.

Chapter 5

Spain

> *"The state was both the law and its transgression….yet in the next moment it was the state against itself, as it were, or the good, democratic state against the bad state that was resorting to authoritarian habits"* (Aretxaga 2000: 60).

In recent years, Spain has wrestled with its authoritarian past, though many thought it was put to rest decades ago during the democratic transition. Citizens have formed organizations to lobby for a truth commission, while others have organized the exhumation of mass graves in hundreds of sites across the country. The reopening of old wounds has shaken Spanish society and forced some sectors to confront the notion that the transition to democracy from decades of repression under Franco may not be the "model" transition it was thought to be. While much of the recent focus is understandably on the atrocities of the civil war (1936-1939) and the Franco regime that followed, this watershed in historical memory is also an important opportunity to examine the years immediately following the transition. What was the aftermath of the drive toward democracy without looking back?

In this chapter, I examine the human rights violations committed by the state after Spain transitioned to democracy in 1976, and the prosecutions that followed. Violence escalated between the Spanish government and the Basque separatist group Euskadi Ta Askatasuna (ETA), or Basque Homeland and Liberty, after the democratic transition. The Uppsala Conflict Database (UCDP) evaluates the existence of internal war within countries, measured by at least 25 battle deaths per year. Though ETA committed

violence against the Franco regime in its final years of existence, according to the UCDP database, Spain reached the threshold of internal war under democratic governance between the years 1980 – 1992. ETA's aim was to gain independence from Spain for the Basque region, which includes the four northern provinces Alava, Guipuzcoa, Vizcaya and Navarra. ETA had begun using violence against the Franco regime years before the transition, but when the transition negotiations did not meet their demands for Basque independence, ETA continued their attacks on political officials and civilians. State-sponsored death squads responded by carrying out targeted extra-judicial killings against suspected ETA members. Many of these killings transpired in French towns bordering Spain, where several ETA members sought refuge. During this time period, as the state significantly increased its arrests of suspected ETA members, torture allegations from detainees also surged.

State actors were prosecuted on charges of extra-judicial killing and torture in 196 human rights prosecutions between 1976 and 2010. 192 of the 196 prosecutions resulted in conviction. The prosecutions for state violations in Spain were shaped by relations of accountability that were created during the negotiated transition to democracy and prior to the escalation of conflict between ETA and the democratic government. A newly empowered, independent judiciary, actions taken by a civil society group comprised of judges and prosecutors, and political competition were the central causal mechanisms prompting prosecutions of state actors. The attempts by political actors to break with the authoritarian past also resulted in the rejection of repressive emergency laws and the creation of legislative constraints on government immunity, which further enabled prosecutions of state actors in this case. Thus, the transition to democracy in Spain

provided an opportunity structure for reform in Spain, which was taken up by key actors who initiated changes to the judicial and political systems.

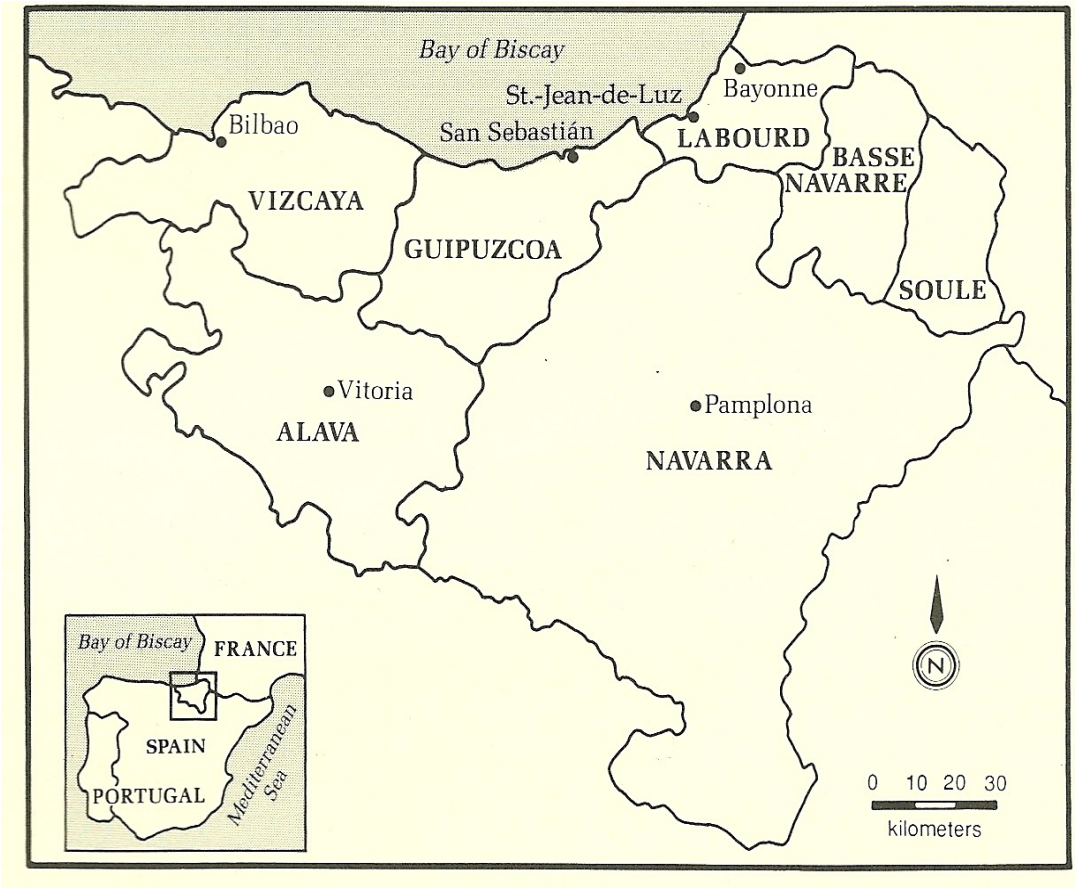
The following chapter is organized as follows: section II provides historical background to the Basque conflict in Spain; section III discusses the prosecution data gathered for this project and highlights some of the trends during 1976-2010; section IV examines the conditions that prompted the prosecutions for state violations; section V discusses the lack of legislative barriers to these trials; section VI explains the absence of truth-seeking measures in Spain historically and recent efforts to address abuses under the Franco regime; and finally, the chapter concludes in section VII with some comments that preface the comparative analysis in Chapter 6.

Historical Background to the Conflict

The Basque region of Spain comprises four provinces in the north of the country, which include Vizcaya, Alava, Guipuzcoa and Navarra, and some Basques consider the three French provinces that border Spain, including Soule, Labourd and Basse Navarre, to also form part of the Basque Country (see Figure 5.1). The relationship between the Basque region and the rest of Spain has been in tension for over a hundred years. Before Franco led a coup against the Second Republic in 1936, Basques attempted to negotiate autonomous status for the northern provinces, based on the region's economic success and a strengthening nationalism. During the Spanish civil war (1936-1939) that followed, Basques sided with Socialists and Communists in defense of their autonomy and the Republic. Their demand for self-rule, and much of their identity, including the

Basque language (*Euskera)*, was suppressed during the years of Franco's dictatorship (1939 – 1975) (Woodworth 2001; Idoiaga 2006). An estimated 300,000 people lost

Figure 5.1 – The Basque Region of Spain



Source: Robert P. Clark (1990).

their lives during the Spanish civil war, and under Franco's repressive regime, an estimated 400,000 people were imprisoned or forced to work in labor camps, thousands were executed, and over one hundred thousand people were disappeared (Aguilar 2001; Davis 2005).

Several youth groups formed in the Basque region to resist Franco's rule and to salvage Basque culture and identity, including a university student group called *Ekin,*

which means "to act" in *Euskera* (Aiartza and Zabalo 2010; Woodworth 2001). *Ekin* joined with youth members of the Basque nationalist political party, *Partido Nacionalista Vasco,* (PNV*),* to form ETA in 1958. ETA's initial aims were to challenge the Franco regime and seek Basque independence, and at first, its actions were confined to robberies, bombings and property damage (Idoiaga 2006). After 1968, however, as resistance to Franco's power strengthened, ETA increased the severity of its violence, engaging in various kidnappings and political assassinations.

Following Franco's death in 1975, opposition parties organized to develop plans for a democratic transition. The moderate political parties placed little emphasis on justice though there was a great deal of interest in creating democratic institutions to replace some of the existing government structures (Aguilar 2001). In contrast, Basque nationalists called for a total dismantling of the repressive institutions. In the end, as violence grew between left and right-wing factions, and Spaniards began to fear further destabilization, the transition embodied a relatively cautious shift in power. Though the transition was not a ruptured transition, where previous power holders are marginalized, the development of a new constitution and corresponding democratic institutions did mark a major break with the authoritarian past. Spain did not utilize accountability mechanisms as it moved from decades of repression to democracy. The Amnesty Law of 1977 was a central demand from the democratic opposition, not Franco's allies. It was passed by the new democratic government to permit the release of political prisoners, who were mostly ETA members, and prohibit prosecutions of those who committed human rights violations during Franco's dictatorship (Aguilar 2001).

The 1978 Constitution, passed through a referendum, granted autonomous status to three Basque provinces (Vizcaya, Alava and Guipuzcoa) now known as the Basque Autonomous Community and Navarra, as well as other regions of Spain, including Catalonia. This arrangement provided the Basque region with its own parliament and president, the power to collect and regulate taxes and the freedom to establish its own police force, health care and educational systems. The constitutional referendum received meager support from Basque citizens. The majority of Basques abstained from voting and 34.9% supported it, while 87.9% of the rest of Spain supported the referendum, and 7.91% opposed (Aiartza and Zabala 2010). The lack of reform in the security forces and the co-optation of the Basque region within the Spanish state are argued to have fueled ETA's continued campaign of violence after the democratic transition (Woodworth 2001). The sentiment within the Basque population that the Spanish transition was a failure was evident almost two decades later: in a 1994 poll, when asked if the transition made them proud, less than 50% of Basques responded yes, while over 80% of the rest of Spanish citizens responded yes (Aguilar 2001: 117).

Spain was established as a parliamentary democracy in which the monarchy holds the constitutional head of state and the head of government is the prime minister, elected by the Congress. The Parliament, or *Cortes Generales*, is a bi-cameral body made up of the Congress (the lower house with a total of 350 seats) and the Senate (the upper house with a total of 266 seats). A party list proportional representation system is used for most elections with the exception of the Senate, which uses a plurality system. The two main

Table 5.1

Chronology of Political Parties/Coalitions in Power Since the Democratic Transition in Spain

Year	Political Party/Coalition in Power	Prime Minister
1977	Unión de Centro Democrático (UCD) (minority government)	Adolfo Suárez González
1979	Unión de Centro Democrático (UCD) (with People's Alliance, Andalusian Party and Aragonese Party)	Adolfo Suárez González (1979–1981, then resigned) Leopoldo Calvo-Sotelo y Bustelo (1981–1982)
1982	Partido Socialista Obrero Español (PSOE) (majority government)	Felipe González Márquez
1986	Partido Socialista Obrero Español (PSOE) (majority government)	Felipe González Márquez
1989	Partido Socialista Obrero Español (PSOE) (with Canarian Coalition)	Felipe González Márquez
1993	Partido Socialista Obrero Español (PSOE) (with Convergence and Union Party and Basque Nationalist Party)	Felipe González Márquez
1996	Partido Popular (PP) (with Convergence and Union Party, Basque Nationalist Party and Canarian Coalition)	José María Aznar López
2000	Partido Popular (PP) (majority government)	José María Aznar López
2004	Partido Socialista Obrero Español (PSOE) (with United Left Party and Republican Left of Catalonia Party)	José Luis Rodríguez Zapatero
2008	Partido Socialista Obrero Español (PSOE) (minority government)	José Luis Rodríguez Zapatero
2011	Partido Popular (PP) (majority government)	Mariano Rajoy Brey

political parties vying for power since the democratic transition include the center-right *Partido Popular* (PP) and the center-left *Partido Socialista Obrero Español* (PSOE). The Basque Nationalist Party (*Partido Nacionalista Vasco*) or PNV is a minority party in the Spanish Parliament but it is the largest political party in the Basque Autonomous Community and it has led the Basque regional government for over two decades (see Table 5.1).

During the years 1975 - 1992, Spain experienced intense violence between ETA and various right-wing groups covertly sponsored by the state, including the GAL (*Grupos Antiterroristas Liberación*). The GAL was a covert state-sponsored death squad that targeted suspected ETA members during the 1980s through bombings, kidnappings, torture and extra-judicial killings. Civilian mercenaries carried out most of the killings, though members of the police and security forces in the Basque region and various members of the Spanish government orchestrated the funding and the operations of this group. After the GAL violence dissipated, ETA continued a one-sided campaign of violence, involving political assassinations and targeted attacks on civilians, in the Basque region and throughout Spain from 1992 to 2010. Almost 900 lives were lost as a result of ETA's actions since the democratic transition (COVITE 2010).

The Spanish government's approach to ETA's tactics has ranged from violent confrontation through the use of illegal death squads in the 1980s, to expansive policies of arrest, detention and extradition (see section V of the chapter), to periodic negotiation. ETA declared a series of ceasefires in the last two decades but all ended in failure. In recent years, the demands from Basque nationalists have shifted from a focus on Basque

independence, toward a model of shared sovereignty (Idoiaga 2006). Bilateral relations between political groups in Northern Ireland and the Basque region have also influenced ETA to devise a less violent strategy in favor of a purely political one.

In October 2011, an international conference was held in the Basque Country concerning the Basque question and plans for peace negotiations. Attendees included former UN Secretary General Kofi Annan and political actors from the Northern Ireland peace process. Immediately following the conference, ETA announced a permanent ceasefire and called for the French and Spanish governments to engage in dialogue in order to determine a solution to the conflict (Gurruchaga 2011). General elections were then held in November 2011, ushering in new political leadership with the *Partido Popular* (PP). In the past, the Spanish government has consistently refused to negotiate with ETA while it remains active and armed and thus it is not yet clear what is in store for peace negotiations under the new administration. However, the weakening of ETA in recent years, and its recent commitment to a more definitive end to violence, is encouraging for many Spaniards.

The Spanish legal system is distinct from the legal system in Sri Lanka and Northern Ireland in a few important ways. In particular, Spain has a civil law legal system as opposed to a common law legal system. As such, the criminal trial process is notably different from the one employed in Northern Ireland and Sri Lanka. Criminal prosecution in Spain involves two phases: the judicial investigation (*instrucción)* and a trial in open court (*juicio oral)*. The first phase involves the investigation of the case under an investigating magistrate or judge. An investigation may be prompted by an accusation (*denuncia)* about an alleged offense by the police or an injured party or

witness. It can also be prompted by a complaint (*querella)* made by an involved citizen, or in instances of alleged offenses against the public order or the public interest, an uninvolved citizen(s) can initiate a *querella* (Woodworth 2001; Merino-Blanco 2006). The evidence against the suspect is examined during this phase by the investigating magistrate and a state or public prosecutor (*fiscal del estado)*, the latter of which reports to the Attorney General (*Fiscal General del Estado).* The incumbent government appoints the Attorney General.

Significantly, the state prosecutor in Spain does not have the exclusive right of prosecution in criminal proceedings. In addition to the state prosecutor, a case can also be examined by lawyers acting on behalf of the victim or his/her family (*acción particular)*, or lawyers acting on behalf of the general public (*acción popular*). The former is understood as the private prosecutor, while the latter is known as the people's prosecutor (Woodworth 2001; Merino-Blanco 2006). The suspect is represented by defense lawyers.

In contrast to common law legal systems, criminal procedure codes within civil law systems have traditionally provided victims the right to actively participate in the criminal trial process. Historically, this right was conceived within civil law countries as a control mechanism over the state's duty to prosecute a crime (Michel and Sikkink 2011). Globally, the right to private or people's prosecution has been maintained and expanded by victims' rights movements in the 1980s and 1990s. For example, various Latin American countries have experienced significant judicial reforms in the last twenty to thirty years concerning private prosecution, mediation and restorative justice programs (Michel and Sikkink 2011). The rights for victims to be present in the criminal trial

process vary greatly by country, but generally the right to private prosecution enables victims to participate in various stages of the criminal trial process under the advice of an attorney, who formally acts as the private prosecutor. The private prosecutor can request investigations and challenge the public prosecutor's decision to dismiss a case. As evidenced in some specific cases discussed below, the presence of a private or people's prosecutor can shape the trajectory of a trial and, at times, the outcome of a case, by representing the interests of parties other than the state.

During the investigation stage, the investigating judge has powers to seek further information from police or other authorities, and while he/she usually conducts the investigation in chambers, they can also visit crime scenes and interview suspects and witnesses. The investigating judge decides whether a person should be indicted and produces a report to a panel of judges on his/her recommendation (*auto de conclusión)* (Woodworth 2001). The panel of judges will then determine whether to proceed to trial or dismiss the case for lack of evidence.

During the second phase of the criminal trial process, the investigating judge has no role in the trial (*juicio oral)* itself though he/she has a great deal of influence in directing the path of the trial based on his/her investigative report.[53] A different judge or judges with no previous contact with the case will then preside over the trial. This judge determines the final judgment, verdict and sentence (Woodworth 2001).

[53] An interesting thing to note about the Spanish trial process is the use of *careos.* These are face-to-face confrontations between witnesses and suspects whose evidence is contradictory during a trial (Woodworth 2001). They were used quite frequently throughout the GAL trials and were known to be rather dramatic and controversial.

Two main courts have jurisdiction over the entire territory of Spain, including the Autonomous Communities. The *Tribunal Supremo* is the highest court in the country and it has five chambers: civil, criminal, administrative, social and military. The *Audiencia Nacional* sits below the *Tribunal Supremo* and has jurisdiction in criminal, administrative and labor matters (Merino-Blanco 2006). Most of the cases involving members of the state-sponsored terror group, the GAL, were tried in the *Audiencia Nacional*. The court was specifically created in 1977 by the *Real Decreto-Ley* 1/1977 to centralize investigation and prosecution of terrorism cases (Aguilar 2001; UN Human Rights Council 2008). This court has six examining magistrates and six trial chambers, each of which are presided over by a three-judge panel. Crimes in this court's jurisdiction are not subject to trial by jury. All terrorism-related cases are tried in the *Audiencia Nacional.* One of the GAL cases, involving the kidnapping of civilian Segundo Marey, was tried in the Supreme Court because a Member of Parliament (MP) and former minister, Jose Barrionuevo, was indicted. A sitting MP can only be indicted if Parliament agrees to waive his/her privileges (Woodworth 2001). Before Barrionuevo was indicted, the Marey case was investigated at the *Audiencia Nacional.*

If a criminal trial is held in the Supreme Court, appeals can be made to the Constitutional Court. The Constitutional Court is generally tasked with interpreting the Constitution and one of its responsibilities is protection of the fundamental rights and freedoms enshrined in the Constitution; criminal cases concerning rights violations committed by the state may therefore at times proceed to the Constitutional Court. From the Constitutional Court, citizens can pursue their case at the European Court of Human Rights. Regional courts in Spain include the *Tribunales Superiores de Justicia,* which

have jurisdiction in civil, criminal, administrative and social matters within each of the Autonomous Communities, and the *Audiencias Provincials,* which have jurisdiction in civil and criminal matters in the Spanish provinces (Merino-Blanco 2006).

Chapters 3 and 4 make evident that in Sri Lanka and the United Kingdom, the executive retains power over the organization and functioning of much of the judicial sector. In contrast, the 1978 Constitution in Spain made key provisions for judicial independence. Specifically, it created the *Consejo General del Poder Judicial* (General Council of the Judiciary). This body is comprised of 21 members, including judges and lawyers, who are appointed by both chambers of Parliament, as opposed to the executive (Merino-Blanco 2006). These members elect the President of the *Consejo,* who is also the President of the Supreme Court, and they have the power to nominate the presidents of both the *Tribunal Superiores de Justicia* and the *Tribunal Supremo* (the Supreme Court). The *Consejo* is also responsible for promotions, sanctions and suspensions of judges. The members of the *Consejo* hold their positions for five years, and with the exception of the President, cannot be re-elected (Merino-Blanco 2006). Thus, there is far less opportunity in Spain, compared with Sri Lanka and Northern Ireland, for the executive to punish or dismiss judges whose decisions run counter to the interests of the incumbent government.

Spain ratified the Geneva Conventions in 1952 and the Additional Protocols in 1989. Though the ICRC was active in Spain after the Spanish civil war (1936-1939), it was not a monitoring presence during the internal violence that followed the democratic transition. The internal war that transpired between 1980 and 1992 appears to meet the broad definition of internal conflict identified in Common Article 3. However, there is

no evidence that international humanitarian law was invoked by the Spanish government, ETA or a third party during these years.

Human Rights Prosecutions of State Actors

Domestic Trials

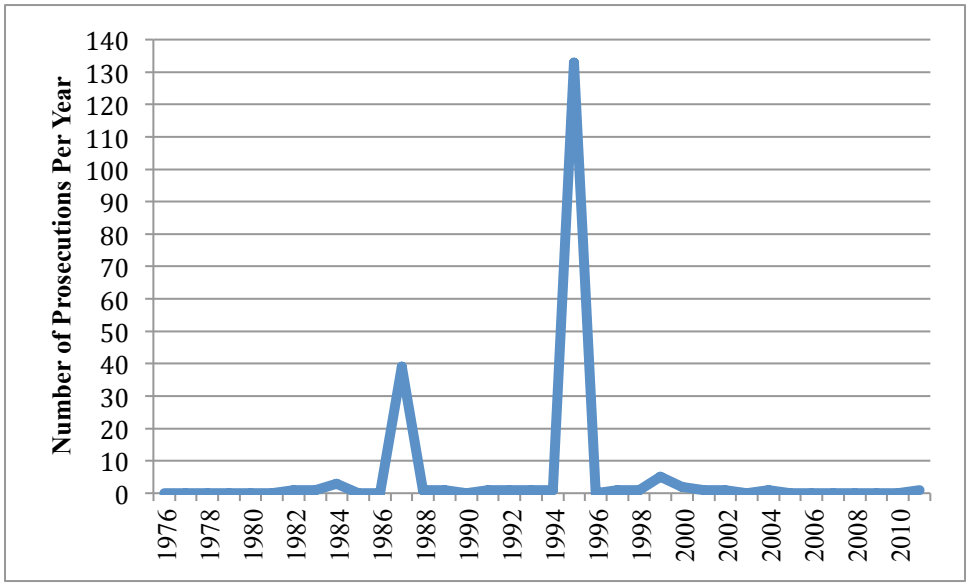
After the democratic transition in 1976, the Spanish government under Prime Minister Suarez continued to face violent attacks from ETA. Interim anti-terrorist laws[54] were created during the first years following the transition, and after Suarez resigned in 1981, Prime Ministers Leopoldo Calvo Sotelo (1981-1982) and Felipe Gonzalez (1982 – 1996) continued to enforce these laws in various forms. These laws provided expansive powers of arrest and detention to police and security force members and facilitated torture as a common practice, particularly of those suspected to be members of ETA. As many as 815 people were detained under anti-terrorist laws in 1980 (Amnesty International 1981) and in 1984, the government received 137 complaints of torture (State Department 1984).[55] Though the Spanish government was under some pressure from international human rights groups concerning its torture practices, Amnesty International reports show that similar rates of torture were used by police officers in other European countries during these years (Aguilar 2001). A number of prosecutions were held in the 1980s and 1990s (see Graph 5.1) charging police, *Guardia Civil* (military police) and security force members with torture and mistreatment of detainees.

[54] These laws are discussed in more detail in Section V of the chapter.
[55] The data on torture in Spain is inconsistent and sporadic. It is also hard to discern whether some of the counts are accurate because some sectors of society argue that ETA members falsely claim torture once they are arrested as part of their political strategy. The use of torture by the state has been substantiated through trials in some cases, but the total number of torture allegations is difficult to determine.

Of the 196 total prosecutions counted between the years 1976-2010, 187 prosecutions involved torture or mistreatment charges, and of these, 185 resulted in conviction (see Table 5.2).[56]

Graph 5.1

Human Rights Prosecutions of State Actors in Spain



In addition to the torture allegations made against police during the early post-transition years, the first "dirty war" was also underway. Several right-wing groups, including AAA (*Alianza Apostólica Anticomunista*), BVE (*Batallón Vasco-Español*), ED (*Extrema Derecha*) and GAE (*Grupos Armados Españoles*), engaged in violent attacks against suspected ETA members and other civilians in the early years of the democratic

[56] I code the total number of prosecutions in a given year. The prosecution number does not always represent the number of the accused since some trials concerning one case may involve several suspects. The total number of accused is therefore counted in a separate column.

transition (1975-1981). Though they operated outside the government, these groups were often sponsored or condoned by the post-Franco administrations (Woodworth 2001: 46).[57] Thirty-eight people died at the hands of these groups, and the majority of deaths were committed by the BVE, a group that formed in 1975 to target ETA (COVITE 2010). Between 1983 and 1989, a covert state-sponsored death squad that identified themselves

Table 5.2

Spain Human Rights Prosecution Data

Year	Prosecutions	Number Accused	Convictions	Acquittals	Charges
1976	0	0	0	0	--
1977	0	0	0	0	--
1978	0	0	0	0	--
1979	0	0	0	0	--
1980	0	0	0	0	--
1981	1	2	1	0	Murder, att. murder
1982	1	3	1	0	Murder
1983	3	6	2	1	Torture, mistreatment
1984	0	0	0	0	--
1985	0	0	0	0	--
1986	39	39	39	0	Mistreatment
1987	1	"several"	1	0	Torture
1988	1	7	1	0	Disappearance and presumed death
1989	0	0	0	0	--
1990	1	5	1	0	Torture
1991	1	2	1	0	Attempted murder
1992	1	5	1	0	Torture
1993	1	5	1	0	Appeal denied (torture)
1994	133	155	133	0	Torture and illegal detention
1995	0	0	0	0	--
1996	1	2	0	1	Murder (and torture)
1997	1	3	1	0	Torture
1998	5	30	5	0	Kidnapping, torture
1999	2	6	1	1	Funding/organizat

[57] Franco died in 1975, but these groups continued to operate through the democratic transition.

					ion of murder, partial pardons on torture appeal
2000	1	5	1	0	Kidnapping and murder
2001	1	8	1	0	Torture
2002	0	0	0	0	--
2003	1	3	0	1	Murder
2004	0	0	0	0	--
2005	0	0	0	0	--
2006	0	0	0	0	--
2007	0	0	0	0	--
2008	0	0	0	0	--
2009	0	0	0	0	--
2010	1	4	1	0	Torture
TOTAL	**196**	**240**	**192**	**4**	**187 torture cases; 9 murder cases**

as the GAL (*Grupos Antiterroristas Liberación*) waged a second "dirty war." It is likely that members of the BVE were also present in the GAL operations. While Aguilar (2001) argues that it is difficult to prove whether the lack of purges in the police and military forces during the transition led to the second dirty war - given that other European governments had also utilized such practices without prior dictatorships - others have argued that the lack of reform in the security arena likely caused policies, personnel and practices from the authoritarian regime to carry over to the democratic administration (Encarnación 2007). Though these conditions would lead us to expect very little in terms of human rights accountability for state violations, in section IV of the chapter I discuss how the establishment of relations of accountability during the transition challenged a legacy of state impunity.

In addition to the 38 deaths caused by right-wing death squads in the early years of transition, the GAL was responsible for the deaths of 28 individuals between 1983 and 1989. Additionally, *Guardia Civil* and police unrelated to the GAL were responsible for

the deaths of five civilians in 1982, 1988 and 1996.[58] Thus, the total number of civilian deaths committed by the state under democratic governance during Spain's internal war is 71.

The first prosecution for extra-judicial killings by the state occurred in 1981. Iturbe and Zabala, members of the BVE were convicted in 1981 for seven murders and two attempted murders (Woodworth 2001). Of the total 196 prosecutions, nine of the charges involved murder, attempted murder or the funding of murder and 187 prosecutions involved torture. It is worth noting that 240 state actors were prosecuted and 192 of the 196 prosecutions resulted in conviction (see Table 5.2). State actors or state-sponsored terror groups were responsible for 71 deaths after the democratic transition and 23 of these deaths were investigated and prosecuted at a ratio of 32%.[59] When comparing the Spanish case to the other two cases under study, the ratio is substantially higher than in Northern Ireland (10.5%) and Sri Lanka (1.8%).

The majority of victims in these cases were ETA members or suspected ETA members, and many of the latter turned out to have no affiliation with ETA. Though the judicial investigations of the GAL's actions began as early as 1983, the first prosecution related to the GAL did not commence until 1991. The GAL trials were significant in that 22 state actors, including a former Minister of Interior, the Director of State Security, the civil governors of two Basque provinces, the Chief of Police in Bilbao and an army general, were convicted for crimes related to a state-sponsored death squad. Several

[58] The victims in these three cases were suspected ETA members and one of the deaths was preceded by torture.
[59] As stated in Chapter 1, the prosecution record is measured by dividing the number of civilian deaths investigated through prosecutions of the state by the total number of civilians killed by state forces in the conflict (e.g. 23/71 = 0.32 or 32%).

mercenaries (civilians) of French, Portuguese and African descent who worked for the GAL were convicted as well. The investigations and the trials were neither swift nor without controversy, spanning the years 1983 – 2003. Five main trials were held throughout this time to address the GAL violence and to investigate the state's complicity in the GAL's actions. The private and people's prosecutions, discussed above, played a role in the first investigation against Bilbao Police Superintendent Jose Amedo Fouce, and his deputy Michel Dominguez (see section IV). Both were convicted in 1991 for six attempted murders, illegal association, falsification of documents and public use of assumed names, and sentenced to 108 years (State Department 1991; Woodworth 2001). They were released through a partial pardon after serving less than two years, but were then convicted again in 1998 for the kidnapping of civilian Segundo Marey.

The private and people's prosecutions were also present in the 1998 Segundo Marey kidnapping trial, during which the former Interior Minister, Jose Barrionuevo, former Director of State Security, Rafael Vera and Julian Sancristobal, former Civil Governor of Vizcaya and former Director of State Security, were convicted and sentenced to 10 years (Woodworth 2001: State Department 1998). The seven other individuals convicted, including the Police Chief of Bilbao, received shorter sentences. Despite the prosecution's efforts, none of the ten were found guilty of membership in an "armed gang," mainly because Marey had been kidnapped very early on in the conflict and there was a lack of evidence linking the state apparatus to the crime (Woodworth 2001). A central part of the corroborative evidence against the suspects, however, was the Interior's failure to effectively investigate the Marey case. The lack of adequate investigation is a charge that has also been used in a few Northern Ireland domestic cases

as well as cases brought by Northern Ireland citizens to the European Court of Human Rights (see discussion below). Barrionuevo and Vera were barred from holding public office for 12 years and fines totaling 30 million pesetas were levied against them and the other defendants to compensate the victim (Woodworth 2001). However, after serving 105 days in prison, Barrionuevo and Vera received a reduced sentence of three years and were released through a partial pardon.[60]

The third trial in 1999, addressed the 1984 murder of Basque doctor Santiago Brouard. Lieutenant-Colonel Rafael Masa and Julian Sancristobal were convicted for organizing and funding the murder but were released only a few months later pending new investigations (Woodworth 2001). The difference between the sentences for state actors and civilians is stark. Ismael Miquel Gutierrez, a civilian police informer, was convicted earlier that year and sentenced to 45 years for recruiting a mercenary to murder Robert Caplanne in 1985.

The fourth trial in 2000 involved the kidnapping and murder of two young ETA members, Lasa and Zabala, almost two decades prior. This was one of the most closely followed cases when, after years of little information concerning the victims' disappearance, their bodies were discovered, buried in quicklime (Woodworth 2001). General Galindo, Julen Elgorriaga (PSOE Civil Governor of Guipuzcoa during the GAL period), Felipe Bayo (a *Guardia Civil* agent), Enrique Villalobos Dorado (a *Guardia Civil* sergeant) and *Guardia Civil* Colonel Angel Vaquero were convicted in April 2000 for the kidnapping and murder of Lasa and Zabala (State Department 2000; Woodworth

[60] Within the Spanish legal system, there are various ways in which to reduce one's sentence after conviction though this right has been somewhat diminished over the years. The partial pardon was a political move made by Prime Minister Aznar in order to secure a bipartisan position on the Basque question during an ETA ceasefire (Woodworth 2001).

2001). Galindo was sentenced to 71 years, Elgorriaga sentenced to over 60 years, and the remaining suspects received slightly shorter sentences. General Galindo was released after five years in 2006 for health reasons (Behatokia 2007). Private prosecutor Iñigo Iruin, who represented Lasa and Zabala's families, played a role in advancing evidence against the suspects (see section IV).

The most recent trial was held in 2003 and involved a revisiting of the Brouard case. Jose Amedo, Jose Luis Morcillo (a civilian businessman) and Rafael Masa were acquitted for the murder of Santiago Brouard (Woodworth 2003). The investigation of this case passed through several magistrates' hands, and its sustained life over the years is largely due to efforts made by the victim's families' lawyer, private prosecutor Txema Montero (Woodworth 2001).

Cases at the European Court of Human Rights

In Chapter 4, we learned that the European Court of Human Rights played a pivotal role in domestic and international human rights prosecutions in Northern Ireland. The cases brought to Strasbourg applied pressure on the British government at various intervals, at times regardless of the outcome. The Northern Ireland case was also remarkable in that citizens brought cases concerning state violations quite early in the Court's life span and in the first few years of the conflict. We might expect that Spain, now a consolidated European democracy, would display a similar pattern, but this is not the case. A small number of cases have been brought to Strasbourg concerning state human rights violations in Spain, but most of these were heard in the 2000s. Thus, pressure from European Court cases on the Spanish government to "clean up" the

domestic trial process where state actors are implicated does not figure here as it did in the Northern Ireland case. What explains Spain's slowness to engage with Strasbourg?

In part, Spain's later entry to the Council of Europe (1977) and ratification of the European Convention on Human Rights (1979) provides an explanation. Ratification of the ECHR placed Spain within the jurisdiction of the Court when its democratic constitution was only one year old. Spain's status as a young democracy, new to the Court, is significant because it meant that the democratic legal culture in the country was relatively immature, particularly when compared to the United Kingdom. The UK had been in the Court's jurisdiction for two decades by the time the conflict in Northern Ireland erupted. Thus, as one human rights attorney explained to me, many Spaniards obtaining a law degree in the 1980s or before did not have training in the European Convention on Human Rights or the Court in Strasbourg (Int. 18). The fact that the Court only uses French and English was an additional barrier for Spanish citizens (Int. 18; Yllera 2012). In Spain, citizens can appeal to the Constitutional Court after the Supreme Court, and then from there, move on, if they wish, to the European Court (Merino-Blanco 2006). But this has been a relative rarity in Spain.

The first judgment concerning Spain at the European Court was in 1988 (*Barbera, Messegue, and Jabardo v. Spain*) in which the government of Spain was found to have violated Article 6 (right to a fair trial) in its handling of the transfer of detainees from Barcelona to Madrid and the proceedings that followed. Cases heard at the Court involving Spain then gradually increased over time. Another judgment was made in 1989 and in the 1990s, 20 judgments were handed down. During the 2000s, the Court issued over 60 judgments. As of January 2011, the total number of judgments involving Spain

is 91 (in 56 cases violations were found, in 31 cases no violations were found and four cases are categorized as "other judgment") (European Court of Human Rights 2011). In contrast, the total number of judgments at the Court involving the United Kingdom is 443.

Cases involving allegations of torture against the state are fairly recent. In the 2004 case of *Martinez Sala v. Spain*, the European Court of Human Rights ruled that a failure to conduct a thorough and effective investigation into the applicant's allegations of torture and ill-treatment resulted in a violation of Article 3 of the ECHR (European Court of Human Rights 2004; Scheinen 2008). In a similar ruling, on September 28th, 2010 the Court ordered the government to pay 23,000 euros to ETA member Mikel San Argimiro Isasa for not having undertaken an "effective investigation" into his complaint of torture, which he suffered in Madrid after his arrest for planting a car bomb in 2002 (*San Argimiro Isasa v. Spain*). The Court indicated that the government had violated Article 3 of the ECHR (torture) from a procedural point of view due to the lack of investigation, but it had not violated it from a substantive point of view since there were no conclusions that torture had in fact taken place (European Court of Human Rights 2010). The Spanish government complied and awarded compensation (State Department 2010).[61] On March 8th, 2011, the Court issued effectively the same ruling in the case of *Beristain Ukar v. Spain*, and the government was again directed to provide compensation to the victim. The rulings by the Court in these cases resemble those brought by

[61] The precedent for ruling on effective investigation concerning torture or ill-treatment is the 1998 Court judgment, *Assenov v. Bulgaria.*

Northern Ireland citizens against the British government concerning the lack of effective investigation into unlawful killings by the state (Article 2 of ECHR).[62]

A recent Court ruling in 2009 reflects a growing concern in the Basque community that the Spanish government is increasingly restricting the civil and political rights of those fighting for a separate Basque state. In 2003, the Basque political parties, Herri Batasuna and Batasuna were banned via the 2002 Political Parties Law (*Ley Orgánica 6/02 June 27th)*. Bans of certain Basque civil society groups preceded this law. The government justified its decision based on the parties' links to ETA. One of the attorneys I interviewed who worked on the European Court case commented that the same could have been said of Herri Batasuna in the 1980s but the party was not banned then. He believes the ban is the government's response to a perceived political threat, a powerful and growing leftist movement (Int. 18). The political parties' attorneys took the case to the European Court of Human Rights and claimed violations of Article 10 (freedom of expression) and Article 11 (freedom of association). In the end, the Court ruled in favor of the ban, citing Articles 10 and 11 had not been violated given that the mission of the parties, in their affiliation with ETA, constituted a threat to Spanish democracy (*Herri Batasuna and Batasuna v. Spain* 2009).

Interestingly, one of the only European Court of Human Rights cases that emerged from the period of GAL violence involved an application concerning Article 10, freedom of expression. In 1985, a Basque attorney and MP Miguel Castells filed an application with the Court, after he was convicted in the Supreme Court and lost his appeal to the Constitutional Court, for denouncing in a newspaper article that the right-

[62] See Chapter 4.

wing death squads were not being investigated (*Castells v. Spain,* Application no. 11798/85). The Court ruled in favor of Castells in 1992 determining that there had been a violation of Article 10 (freedom of expression) and the Court directed the Spanish government to pay Castells three million pesetas (approximately 23,000 US dollars) for costs and expenses (*Castells v. Spain,* Application no. 11798/85).

Regional human rights courts, such as the European Court of Human Rights, are not only an additional means by which victims can seek justice against a state violator after domestic processes have been exhausted. The rulings of these courts on, for example, issues concerning the management of conflict, can have significant impacts on the trajectory of domestic judicial processes by mandating governments to respond to citizens' demands for justice, as was seen in the Northern Ireland case (see Chapter 4). The Spanish case demonstrates that the length of time a country is within the jurisdiction of the European Court of Human Rights matters. Unlike the Northern Ireland case, which had been in the Court's jurisdiction since 1951, two decades prior to the onset of civil conflict, Spain was slow to bring human rights violation cases concerning state violence to Strasbourg because it signed the European Convention on Human Rights in 1979, only a few years after the transition. Therefore, while a handful of cases involving state use of torture were brought to the Court in the 2000s, no cases were brought concerning state involvement in extra-judicial killings during the internal war of the 1980s and 1990s. Pressure from the European Court of Human Rights, or other international institutions, was not therefore a central causal mechanism for prosecutions in the Spanish case. What then explains the series of domestic prosecutions of state actors in a relatively young democracy not yet exposed to pressures from an international

court? In the following section of the chapter, I discuss the conditions enabling the human rights trials in Spain.

The Conditions Enabling Human Rights Prosecutions

"El fuego no le llegó" (Int. 19).[63]

In this section of the chapter, I argue that state violence cases were greatly shaped by the relations of accountability created before the violence between ETA and the democratic government escalated in the 1980s. Specifically, I demonstrate that the establishment of an independent judiciary, efforts by a civil society association of judges and prosecutors, and political competition between parties in a new democracy prompted prosecutions for state violations.

While more human rights prosecutions for state violations were held in Spain than in Northern Ireland or Sri Lanka, this does not result from the incumbent government's motivation to lock in democracy. Instead, I find that Spain's position as a new democracy created a political opportunity structure that generated space for key political and judicial reforms. In the mid-late 1980s there is evidence of judicial will from Spanish judges, in collaboration with French judges across the border, to prosecute state actors for their involvement in a dirty war against ETA. The pursuit of prosecutions against the state by these judges was possible because of an independent judiciary, which was the result of careful negotiation by political actors during the democratic transition to establish a judicial sector that broke with the former authoritarian regime (Hilbink 2009).

[63] This translates as, "the fire did not reach him." The interviewee, a journalist who covered the GAL trials, is referring to the fact that though the GAL investigations hotly pursued Prime Minister Felipe Gonzalez, he managed to avoid prosecution (the fire). Those directly under Gonzalez, however, were not so lucky, and they likely took the fall for the Prime Minister.

After the democratic transition, the judiciary in Spain was established as formally independent with a high degree of judicial assertiveness, a move that stemmed from previous years of judicial activism resistant to the Franco regime (Hilbink forthcoming 2012).

I also find that the ability of the judiciary to check government abuses was enhanced in some cases by the option in the Spanish legal system to a private or people's prosecutor. In one case, the availability of a people's prosecution enabled victims to pursue a case against a state actor when the state prosecutor was slow to move the case forward, while in other cases, the efforts of private prosecutors secured important evidence against state actors during the trial process. Though actions taken by private and people's prosecutors contributed to the effectiveness of the judiciary in Spain, the option to this right does not appear to be a central causal mechanism *driving* the investigations and prosecutions of state violations.

The driver for prosecutions in the mid-late 1990s, however, emanates from the political strategies of an opposition party attempting to dislodge the incumbent. The institutions of democracy literature (Dahl 1971; Lijphart 1999; Hellwig and Samuels 2008) demonstrates how political competition can be an important means by which citizens can hold political leaders accountable because they can oust them with their vote. In addition, the democratization and transitional justice literatures have shown how political leaders in a new democracy punish former repressive political officials through purges and prosecutions. However, the latter does not adequately account for the dynamics that emerge between political players in a new democracy when an incumbent

engages in human rights violations. The Spanish case illustrates how under certain key conditions, political competition incited prosecutions of state actors.
Political actors pushed for their democratic rivals to be prosecuted as a form of political strategy, and this was ultimately successful when government accountability became a salient issue across voter constituencies.

The center-right opposition party in Spain in the 1980s and early 1990s (*Partido Popular* or PP*)* used the center-left incumbent government's (*Partido Socialista Obrero Español* or PSOE) involvement in dirty war tactics to woo voters, despite the fact that PP would likely have engaged in the same human rights violations if they had been in power. After violence reached its peak between the GAL and ETA in the early 1990s, and as it became increasingly clear that the PSOE administration was intimately involved in orchestrating covert death squads, public support for PSOE weakened. The PP proceeded to unseat the PSOE in the 1996 presidential elections through a fairly narrow victory. The PP obtained 38.8% of the votes while PSOE obtained 37.6%. In addition, twenty-two state actors, including a former Minister of Interior, the Director of State Security, the civil governors of two Basque provinces, the Chief of Police in Bilbao and an army general, were convicted for crimes related to the GAL. In the following, through a discussion of two stages of the GAL investigations, and the prosecutions for state torture practices, I explain the operation of the main causal mechanisms prompting prosecutions in the Spanish case: the actions of an independent judiciary, political competition and the efforts of a civil society group of judges and prosecutors.

The First Stage of the GAL Investigations: 1985 – 1992

Many Spaniards view the prosecution of 22 state actors for GAL-related violence as the manifestation of competition between two major political parties, the center-right *Partido Popular* and the center-left *Partido Socialista Obrero Español.* After the PSOE won a third election in 1993, the PP grew uneasy (see Table 5.1). By this point, the violence between ETA and the GAL had reached its peak and the GAL investigations were in the news on a regular basis. PP party insiders have since admitted that they believed they had to oust Prime Minister Gonzalez through other means because they were failing to do so through the normal election process. Thus, the PP devised a political strategy, using financial and media resources, to see that Gonzalez was brought to trial on GAL charges, and, ideally, to ensure his imprisonment (Maravall 2003; Int. 13, 14, 17 and 19).[64] Ultimately, the PP succeeded in tarnishing the PSOE administration enough to obtain power in 1996, though they failed in their pursuit to see Gonzalez behind bars. Instead, several top political officials took the fall for Gonzalez, including the Interior Minister and the Director of State Security. Before discussing the importance of political competition in the manifestation of the GAL trials in the 1990s, it is necessary, however, to examine the years of judicial investigations that preceded the trials. Though Maravall (2003) provides a useful analysis of the PP's strategy against the PSOE after 1993, he fails to explain what ignited and then sustained the investigations of the GAL in the preceding ten years. The PP took a keen interest in the progression of the GAL trials in 1993, *after* the investigations had been underway for several years and one

[64] Maravall (2003) makes this point and in my fieldwork I explored his theory through interview research. The claim that PP's political strategy was to oust PSOE through the courts was corroborated by my interviews.

key trial had already been held. What, then, initially prompted an investigation of the government's links to a dirty war against ETA?

Mercenaries of Portuguese, French, and African descent, hired by the Spanish police, were responsible for carrying out most of the GAL killings. Because the GAL operations were largely conducted just over the Spanish border in the southern French provinces, the French judicial system played an important role in the beginning. In the mid-1980s, French judges in Bayonne (Labourd province) prosecuted several mercenaries, and these individuals increasingly began to reveal important information about their superiors in the police force, who organized the targets and funded the GAL operations (Woodworth 2001). In particular, the noose tightened around Police Superintendent of Bilbao, Jose Amedo Fouce, one of the first state actors to be prosecuted for GAL crimes. In November 1987, two French judges, Armand Riberolles and Christophe Seys, held a special hearing in Madrid with Spanish magistrate, Carlos Bueren, during which they interrogated Amedo (Int. 19; Woodworth 2001). At this time, two investigative journalists, Ricardo Arques, and Melchor Miralles, both working for the newspaper *Diario 16*, handed over a significant number of documents they had gathered from an anonymous tip that provided detailed information on the GAL's strategies and resources. This prompted Judge Bueren to initiate a more in-depth investigation of Amedo (Woodworth 2001). Soon afterward, Judge Castro Meije took on the case against Amedo and his deputy, Michel Dominguez, but then he quickly resigned. Judge Baltasar Garzón replaced Meije and became one of the central players in the GAL investigations from this point forward.

In the early years of democratic governance, the Spanish government had a difficult time gaining cooperation from the French government in combating ETA on the border. The relationship between the French and Spanish governments after the democratic transition was complex. The Gonzalez administration initially struggled to obtain help from the French to extradite ETA members from the French Basque region to Spain. The French government eventually issued a statement demonstrating their willingness to be a bit more cooperative on this front, and it has been argued that France's hesitation stemmed from their desire to first see improvements in Spain's human rights record before increasing the extradition of ETA members (Clark 1990: 59-60). Others have argued that the eventual shift to a more collaborative extradition policy resulted from the ideological affinity between the French and Spanish socialist governments in the mid-1980s (Vercher 1992: 398). Spain's entry to the EEC in 1986 also may have granted it legitimacy in the eyes of the French government. Combating ETA was perhaps not only about eliminating a political threat for the Gonzalez administration; ETA's violence may also have been seen as a barrier for Spain to becoming "European" (i.e. modern and successful) (Aretxaga 1999).

Despite some of these early tensions between the two governments, French judges, particularly in the border town of Bayonne, appeared to have few qualms coordinating an investigation with Spanish judges on the GAL crimes and its chain of command (Clark 1990; Int. 19A). Judicial will on the French side of the border to pursue the GAL investigations appeared to be matched with the same degree of enthusiasm on the Spanish side. One of the central barriers, however, confronting victims of state violence in conflicted democracies is the reality that the state is ultimately investigating

itself. As mentioned in section III of the chapter, the opportunity for other members of society to present charges against a person in the public sector (e.g. private and people's prosecutors) was important to some of the initial investigations and prosecutions of the GAL.

During the investigation of Police Superintendent Jose Amedo Fouce, led by Judge Garzón in the mid-late 1980s, 101 citizens brought a claim against Amedo because they felt that the state prosecutor was not moving forward with the case (Int. 19A; Woodworth 2001). This claim formed the people's prosecution side of the case, led by attorney Fernando Salas. In the summer of 1989, the people's prosecution went a step further than Judge Garzón, by calling for the trial of two of Amedo's superiors, Miguel Planchelo (head of police anti-terrorist intelligence in the Basque region) and Martinez Torres (chief of police intelligence under PSOE) (Woodworth 2001). Though neither was prosecuted in this trial in the end, Planchelo was later convicted in the Marey kidnapping trial. During the 1991 trial of Amedo and Dominguez (Amedo's deputy), Miguel Castells, the private prosecutor on behalf of GAL victims, worked to ensure that the detailed statements made by GAL mercenaries in the French prisons were incorporated into the proceedings despite the fact that for security reasons the French government refused to transport the prisoners to the court to deliver their testimony in person (Woodworth 2001). Both Amedo and Dominguez were repeatedly identified as mercenary contractors in these statements. The people's and private prosecutors also took a stronger stance against the defendants during the trial proceedings than the state prosecutor, Jose Aranda. People's prosecutor Salas "directly accused the government of creating the GAL," and private prosecutor Castells argued that the existence of the GAL

was much worse than ETA because it tarnished the legitimacy of the state (Woodworth 2001: 240). In the end, Amedo and Dominguez were convicted for organizing two violent attacks in which several people were injured, and they were acquitted of the Garcia Goena murder, one of the GAL's civilian victims.

A private prosecutor was also important in the Lasa and Zabala investigation, which began in 1995. Iñigo Iruin was the private prosecutor representing the families of Lasa and Zabala, two ETA members kidnapped and murdered in 1983. The PSOE government had refused to declassify key documents from the CESID (*Centro Superior de Información de la Defensa)*, the Spanish military intelligence service, which many believed would show the GAL chain of command and evidence of death squad orders in southern France. Iruin appealed to a specialized chamber of the Supreme Court (*La Sala Tercera de lo Contencioso-administrativo del Tribunal Supremo*), the Third Chamber of the Supreme Court for Judicial Review of the Central Administration, for a judicial review of the government's refusal to declassify these documents (Woodworth 2001: 320). On April 10th, 1997, the Supreme Court judges ruled that some of the CESID papers would be declassified while others would not (due to their ability to affect the security of the state). Though this ruling left some gaps in evidence for the prosecutors, notably the audiotapes, which would have provided actual names, generally Iruin's efforts provided access to key evidence for both the Marey and Lasa and Zabala trials (Woodworth 2001: 329). Fifteen state actors were eventually convicted in these trials.

The Second Stage of the GAL Investigations: 1993 - 2003

The preceding discussion demonstrates that the conditions prompting the GAL investigations were not solely a result of political competition. Key actors within the judicial sector pushed forward the early investigations and prosecutions, and the existence of an independent judiciary supported these efforts because the executive did not have the power to control judges' tenure nor their decisions. Political competition did, however, play a considerable role after the PSOE gained power for the third time in the 1993 elections. It is now clear that the PP began to devise a strategy for taking PSOE Prime Minister Gonzalez down in order to win at the polls in 1996. The PP's tactics involved manipulating the right-wing media for political gain (Maravall 2003; Int. 13; Int. 14; Int. 17; Int. 18; Int. 19). This second stage of the GAL investigations and trials involved more of a "*complot"* (conspiracy) than the first stage (Int. 19). As one journalist covering the trials explained to me, what the PP wasn't doing publicly in Parliament to oppose the PSOE, they did through right-wing media outlets to link the PSOE government to the GAL crimes (Int. 19). *El Mundo*, a right-leaning newspaper, was central in driving much of the information concerning the GAL cases during this time. The initial years of GAL investigations linking sections of the PSOE government, the police and security force members to the GAL demonstrate that the PSOE administration had a hand in the violence, though as one journalist explained to me, "they (the PP) would have loved to have done it themselves" (Int. 17). Interestingly, though the PP were determined to bring down the PSOE, after they gained power in 1996, they agreed to a partial pardon for former Interior Minister Barrionuevo and former Director of State Security Vera in 1998 because during this time, they were issuing ETA prisoner

releases under a ceasefire and they faced pressure to produce a bipartisan position on a possible resolution to the Basque question (Woodworth 2001). Thus, political strategy wove its way through the second half of the GAL investigations as well as the aftermath, shaping accountability outcomes.

Democracy was in its infancy when the GAL violence began in the early 1980s. Throughout this period, some news outlets regularly published editorials highlighting the "antithesis between the democratic rule of law and the practice of state terrorism" (Woodworth 2001: 99 ft. 10; see also *El Pais* editorials 1983 - 1992). As discussed earlier, there was also a fair amount of judicial will early on to pursue investigations of the GAL, a factor that emanated from a newly empowered independent judiciary. In essence, there appeared to be an active debate between those sectors of society that felt that the state should be held accountable for its actions, and those who believed that *La Razon del Estado* (reasons of state) override the democratic right to information (Woodworth 2001: 214). As I have made evident, in the Spanish case, the incumbent government was not actively pursuing human rights trials in order to stabilize democracy. The actions taken by independent judges and private and people's prosecutors in state violence cases indicates that some Spaniards saw the GAL trials as an opportunity to hold a mirror up to society to inquire, "How are we moving forward as a democracy given our authoritarian past?"

Prosecutions of State Actors for Torture Charges

The propellant for the high number of torture prosecutions[65] in Spain throughout the 1980s and 1990s is also linked to the reforms emanating from the Spanish democratic transition. The 1978 Spanish Constitution contains an article specifically prohibiting the use of torture, or inhuman or degrading punishment or treatment (Article 15, 1978 Constitution). In the early years of democratic governance, a group of judges and prosecutors actively sought to ensure that the Spanish government would abide by the provision on torture and pursue their fight against ETA lawfully (Hilbink 2007). Their actions were significant, particularly in the Basque region, as ETA violence surged and arrests of Basque citizens increased dramatically. These judicial actors were members of *Jueces para la Democracia* (Judges for Democracy) and *Unión Progresista de Fiscales* (Progressive Union of Prosecutors), two associations comprised of individuals personally committed to seeing the Spanish government adhere to the rule of law. Both groups emanated from *Justicia Democratica* (Democratic Justice), a collective of judges and prosecutors that organized in the final years of the Franco regime to promote judicial independence, freedom for civil society groups and civil rights protections (Hilbink 2007).

Thus, like prosecutions for state terrorism cases, the torture prosecutions reflected the establishment of an independent judiciary after the democratic transition. The efforts of judicial actors committed to upholding the domestic ban on torture, keeping government officials in line as they confronted domestic terrorism, and who organized

[65] The high number of prosecutions for torture compared with lower numbers in the other two cases can be explained by the fact that most of the torture cases in Northern Ireland and Sri Lanka were handled in civil courts, which I do not count in this project, but have plans to in future research (see Chapters 3 and 4).

and engaged in activism outside the formal justice system, also represents an important aspect of Spanish civil society that carried over from the pre-transition period. While civil rights groups in Northern Ireland worked to push forward state prosecutions, members of the judicial system in Spain prompted trials through their work in and outside of the courts. The spikes in the torture prosecutions in 1986 and 1994 (see Graph 5.1) may be attributed to the fact that the number of deaths resulting from ETA attacks were at their peak in the 1980s and early 1990s (COVITE 2010), and thus, resulting arrests and detention of suspected ETA members were also at their highest level. There may have also been an incentive within the Spanish government to maintain a consistent response to human rights violations as it steadily worked toward membership in the European Economic Community (EEC),[66] though it is difficult to draw direct links between these latter factors and the torture prosecutions.

In addition to the GAL cases, the role of the private and people's prosecution has been important for some cases in which state actors were accused of torture. For example, in a 2001 trial in which eight *Guardia Civil* were convicted for torturing seven suspected ETA members, the state prosecutor initially requested the release of the accused before the evidence was given. The private and people's prosecutors opposed this decision and the trial commenced. After evidence was put forth against the *Guardia Civil* members by the private and people's prosecutors, the state prosecutor accepted their guilt and recommended a fairly light sentence. The private and people's prosecutors requested a lengthier imprisonment and a longer term of disqualification from office

[66] European countries were admitted to the EEC based on specific criteria, including the existence of stable institutions guaranteeing democracy, human rights and the rule of law (See Copenhagen Criteria June 1993 of the European Commission). Prime Minister Gonzalez signed Spain's Act of Accession to the EEC in 1985 and the country became a member in 1986.

(TAT 2001). The accused were convicted in the end with a sentence that resembled the request made by the private and people's prosecutors.

The Absence of Legislative Barriers to Human Rights Prosecutions

If emergency laws are extended over several years or decades, a sustained lack of judicial independence and an increased centralization of power within the executive are likely, reducing the ability for victims to hold the state accountable (Scheuerman 2006; Gross and Ní Aoláin 2006). In contrast to Northern Ireland and Sri Lanka, an entrenched emergency regime does not exist in Spain. The government never declared an emergency, nor were measures enacted to regulate a state of crisis. Interim anti-terrorist laws were developed after the democratic transition; however, as opposed to containing immunity or inquest clauses for state officials, evidenced in the other two cases, the Spanish laws explicitly prohibited abuse of these powers and established terms for punishment. The fact that Spain was a new democracy at this time is significant. Political leaders negotiating the transition had a great interest in avoiding measures reminiscent of the Franco dictatorship, particularly those that centralized power within the executive and limited judicial independence (Hilbink 2009). As a result, unlike the Northern Ireland and Sri Lankan cases, human rights prosecutions of state actors were not limited by emergency measures.

In the following, I provide a history of anti-terrorist laws in Spain and discuss their lack of impact on human rights accountability efforts. While these laws may have helped to facilitate torture in Spain in the early years of democracy, it is clear from the data I collected that they did not completely thwart efforts to prosecute state actors who

practiced torture (see years 1986-1999 in Table 5.2). The decrease in the incidence of trials concerning torture after 2003 may be the result of the introduction of certain legal safeguards, including the "Garzón Protocol," though this is difficult to ascertain because allegations of torture remain relatively high between 2007-2009.[67] The "Garzón Protocol" was developed by Judge Garzón and allows for constant video surveillance and examinations by doctors of the detainees' choice, though it only becomes applicable through a judicial decision in an individual case, so it often does not apply from the moment of arrest (HRC 2008). In addition, only one third of the investigating judges on terrorism cases applied the protocol as of 2011 (Int. 19A; HRC 2008).

Given the nature and timing of the anti-terrorist laws in Spain, outlined below, they were not a central barrier to the prosecutions. The reasons why the GAL trials did not go further than they did (i.e. not all of the deaths resulted in charges and prosecutions) appear to result from other factors separate from the anti-terrorism laws. In particular, the GAL trials were limited by the obstruction of justice by members of the PSOE administration.

A History of the Anti-Terrorism Laws in Spain

There has never been an emergency regime under democracy in Spain.[68] Spain ratified the International Covenant on Civil and Political Rights on April 27th, 1977, and since this time, the country has not declared a state of emergency. Thus, unlike Sri Lanka

[67] In 2007, 720 people filed complaints of mistreatment to the Council of Europe's Committee for the Prevention of Torture. In 2008, 520 complaints were lodged and in 2009, complaints increased to 624 (State Department 2007 – 2009).
[68] Franco imposed the first state of exception in 1956 in response to student protests in Madrid and this effectively continued until the democratic transition (Vercher 1992).

and Northern Ireland, Spain has not made requests for derogation to the UN Human Rights Committee, nor has it developed emergency or state of exception laws (UN HRC 2011). Anti-terrorist legislation was in effect under Franco during the early 1970s and it was largely directed at the Basque region as ETA violence steadily increased (Aguilar 2001; Encarnación 2007). In 1976, King Juan Carlos repealed the law created by Franco before his death, the Law on Prevention of Terrorism (Clark 1990: 38). Then, in 1977, the Royal Decree Law (RDL - 4/1977) abolished the National Movement (*Movimiento Nacional)*, the single regime party under Franco after the civil war, and the related political institutions (Aguilar 2001: 110). By 1978, no anti-terrorist laws were on the books.

The 1978 Constitution, created during the democratic transition, provides for the suspension of certain rights *if* a state of emergency is declared (Art. 55(1) 1978 Constitution). Article 55(2) includes provisions for state accountability: "Unjustified or abusive use of the powers recognized in the foregoing organic law shall give rise to criminal liability where it is a violation of the rights and liberties recognized by law" (Art. 55(2) 1978 Constitution). Torture is also prohibited in Article 15 of the Constitution. After the democratic transition, interim anti-terrorism laws were developed by the Suarez government as parliament worked on developing a new penal code and code of criminal procedure (see Table 5.3) (Amnesty International 1978). These interim decree laws (*decretos-leyes)*[69] were passed by parliament from 1978 – 1979. The decree

[69] Decree Laws, or *decretos-leyes,* are rules created by the Executive in times of urgency that have the force of law (*ley)* as permitted by Art. 86(1) of the 1978 Constitution. Limitations on this power include: the *decreto-ley* cannot affect the basic institutions of the state, the civil rights and liberties outlined in Title I of the Constitution, the powers of the Autonomous Communities or the general electoral regime. The

Table 5.3

Chronology of Anti-Terrorism Laws in Spain

YEAR	LAW
1978	*Decreto-Ley 21/1978* (June 20th)
1978	*Decreto-Ley 56/1978* (December 4th)
1979	*Decreto-Ley 3/1979* (January 26th)
1980	*Decreto-Ley 3/1979* (renewed for one more year)
1980	*Ley Orgánica 11/1980* (replaces *Decreto-Ley 56/1978)*
1981	Law in the Defense of the Constitution (created after coup attempt)
1981	*Ley Orgánica 4/1981, de 1 de junio, de los Estados de Alarma, Excepción y Sitio* (never invoked)
1983	*Ley Orgánica 14/1983* (December)
1984	*Ley Orgánica 6/1984 (Habeas Corpus Law)* (May 24th)
1984	*Ley Orgánica 8/1984* (December 26th)
1988	Repeal of *Ley Orgánica 8/1984*
1995	*Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal*

laws largely created expansive powers of arrest and detention in order to combat the increasing number of ETA attacks in the early years of democracy. The use of *incommunicado detention*[70] through the *decretos-leyes,* which allowed the authorities to

Executive also must submit the *decreto-ley* to Parliament for approval within 30 days (Merino-Blanco 2006).

[70] International law does not out-right prohibit the use of incommunicado detention but the UN Human Rights Committee issued a General Comment No. 20 in 1992 that recommends provisions be taken against this practice since it is seen as likely to increase the incidence of torture and ill-treatment (HRW 2005: 24). In 2006, two proposals were submitted to the Spanish Congress in April and September, backed by almost

detain a suspect for as long as necessary provided they bring him/her before a judge within 72 hours of arrest, received criticism from Amnesty International in several reports and it was believed to be the reason for the growing allegations of torture during this time (Amnesty International 1978-1981; Clark 1990). Most of the torture allegations were from people living in the Basque region who were arrested on suspicion of ETA membership.

After growing concern from opposition parties that the *decretos-leyes* were enabling human rights violations by the police and security forces, an ordinary law, Organic Law 11/1980 was passed by Parliament with overwhelming support (of the 350 members, only two voted against and seven Basque deputies abstained) which retained some of the powers of Decree Law 56/1978 (Clark 1990; AI Report 1981). Subsequent ordinary laws (*Leyes Orgánicas)* continued to provide expansive powers of arrest and detention and limited rights to legal counsel for suspects. In May of 1983, Minister of Interior Jose Barrionuevo and Director of State Security Rafael Vera announced Plan ZEN (*Zona Especial del Norte* or Special Northern Zone), which was approved by Parliament in September. The plan, which was not formally legislation, sought increased funding to crack down on terrorism in the Basque region through the media, political groups, and police operations (Clark 1990; Int. 13; Int. 14). However, the Basque parliament refused to cooperate with the plan and passed a resolution stating their opposition. Plan ZEN was then dismantled.

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all of the minority parties, demanding the elimination of the incommunicado regime. Votes from the PSOE (the leader of government at the time) and the PP blocked the proposal (Behatokia 2007).

In 1984 two moves were made in the Spanish Parliament to increase protections for detainees and generate provisions on state accountability. First, Organic Law 6/1984 (May 24th), or the *Habeas Corpus Law,* was introduced for the first time. According to this law, the detainee, their spouse, companion, or guardian in case of a minor, the Public Prosecutor, the *Defensor del Pueblo* (Ombuds Institution) and the instructing judge, can all file writs of habeas corpus (Amnesty International 1985). In practice, however, this right was rather limited because existing anti-terrorist laws established *incommunicado detention* as *a priori* legal. Thus, habeas corpus petitions were rarely filed after the law was enacted (HRW 2005).

Second, Organic Law 8/1984 (December 26th) was introduced, which maintained the terms of earlier laws and additionally authorized government bans on political parties and other groups (AI Report 1985; Clark 1990). Despite the growing restrictions placed on citizens within anti-terrorist laws, Organic Law 8/1984 did include a provision concerning state accountability. Article 18(3), Safeguards and Controls in Relation to the Provisions, states, "Any person making unwarranted or improper use of the powers contained in the foregoing articles shall be punished in accordance with the provisions of Article 194 of the Penal Code, unless the action constitutes a more serious offense" (Organic Law 8/1984, cited in Amnesty International 1985). After much opposition to this law from Basque political leaders, the Basque parliament in 1985 officially asked the Constitutional Court to declare unconstitutional 10 of the law's 22 articles. In 1987, 2 articles were deemed unconstitutional, 6 of the 22 articles lapsed, and the government requested a repeal of the remainder articles (Clark 1990).

Then, in November 1987, the Gonzalez administration introduced legislation to repeal Organic Law 8/1984 and transfer most of its provisions into the regular penal code. Incommunicado detention was also effectively reduced from 10 days to 5 (Clark 1990). Organic Law 8/1984 was then completely repealed in 1988. Between 1988 and 1995, stand alone anti-terrorist laws ceased to exist. Terrorism matters were folded into the existing criminal code and plans were set to overhaul the criminal code entirely in the coming years (Amnesty International 1993; Merino-Blanco 2006). On November 23rd, 1995, Organic Law 10/1995 (*Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal*) was passed by Parliament as the new penal code and it remains the penal code to this day. Terrorist crimes are defined in the regular Criminal Code (*Codigo Penal)*, and the Code of Criminal Procedure (*Ley de Enjuiciamiento Criminal)* establishes the powers of law enforcement agencies and judicial authorities to investigate crimes of terrorism, while at the same time proscribing the rights of terrorist suspects (HRW 2005).

The 1995 Penal Code has been criticized for maintaining fairly expansive powers of arrest and detention and broadening the terrorism definition.[71] A staff member at a Basque human rights organization commented to me that the current definition of terrorism is like a "flexible suit, a suit that can fit anybody" (Int. 13). Some argue that the expansive definition is the cause of an increasing number of arrests in the Basque region and arrests of members of immigrant communities after September 11th and the March 11th, 2004 train bombings in Madrid. However, in contrast to the immunity clauses within emergency laws in Sri Lanka, penalties for state officials engaging in the practice of torture are outlined in the 1995 Penal Code. Article 174 of the Penal Code

[71] See Articles 509, 520, 527 and 571-579 of the *Codigo Penal*.

states: "Any public official that commits torture to obtain information or a confession, or for any act he has committed or is suspected of committing, or for any reason based on discrimination, involving physical or mental suffering, will be punished with imprisonment from 2 to 6 years if the attack is severe, 1 to 3 years if it is not and there will be a penalty of disqualification from public office from 8 to 12 years" (1995 Penal Code, Article 174).[72]

The nature and timing of Spain's anti-terrorist laws do not serve to limit accountability efforts concerning state violations in that they do not form part of an entrenched legal regime, they are void of immunity or inquest clauses, and they have been subject to important reforms that enhance state accountability when actors abuse their powers. In Chapter 6, I discuss in more detail a comparison of emergency and anti-terrorism laws across the three case studies, arguing that the absence of entrenched emergency laws in Spain contributed to a stronger prosecution record when compared to the other two cases.

Truth-Seeking for the Franco Years: On the Horizon?

Truth-seeking mechanisms have not been implemented in Spain concerning the state violence that occurred in the new democracy. Unlike Northern Ireland and Sri Lanka, Spain does not have a historical legacy of truth-seeking bodies (e.g. the commission of inquiry model) stemming from British colonial rule and law.[73] The absence of truth-seeking measures in Spain likely also results from the fact that Spain avoided any such proceeding during the transition from authoritarianism to democracy.

[72] Author's translation.
[73] See Chapters 3 and 4.

A few investigations commenced during the transition concerning particular acts of abuse and torture under Franco, but these did not move forward given the enactment of the 1977 Amnesty Law (Aguilar 2001).[74]

In the last ten years, however, a few movements within Spain have begun historical memory work concerning the thousands of individuals who were disappeared during the civil war and the early years of Franco's dictatorship. One of the main organizations, *Asociación para la Recuperación de la Memoria Histórica* (ARMH or the Association for the Recovery of Historical Memory) began in 2000 through the efforts of journalist Emilio Silva, who was searching for the remains of his grandfather. Interest from families in finding their loved ones grew, and over the next five years, 300 exhumations were conducted in sites throughout the country (Davis 2005). ARMH initially focused on obtaining government funds to support investigations and the exhumation of repression victims, as opposed to pursuing judicial action against perpetrators. When the Aznar government (1996 – 2004) refused to act upon ARMH's demands, the group submitted a report to the UN Working Group on Enforced or Involuntary Disappearances in 2002 (Davis 2005). The UN Working Group recommended the Spanish government support the investigations, and in 2002 the Aznar administration issued a parliamentary resolution that condemned the uprising that led to the civil war and recognized victims' suffering

[74] The Spanish government has provided compensation to victims of terrorism. In 1999, the Aznar administration enacted the Law for Victims of Terrorism **(***Ley 32/1999, de 8 de octubre, de Solidaridad con las víctimas del terrorismo).* This law provided compensation to survivors of terrorism and victims' families. Terrorism is defined in the law as all acts of violence carried out by illegal groups since 1968, which include ETA, extreme right and left groups and the GAL (*Ley 32/1999*; Woodworth 2001). 23 million pesetas (US $180,000) were awarded to families of victims who died and 65 million pesetas (US $514,500) were awarded to victims suffering a severe disability (*Ley 32/1999).* A few years after the law was passed, in the context of a renewed campaign of ETA violence, Prime Minister Aznar added a qualification to the law that members of ETA wounded by the GAL could not be compensated through this law though families of ETA members killed by the GAL could receive compensation (Woodworth 2001).

under Franco (Davis 2005).

A similar movement to ARMH has emerged in the Basque Country. Lau Haizetara Gogoan is an association of groups working toward obtaining truth, justice and reparations for the widespread abuses perpetrated during the Franco regime. In their 2010 report on disappearances in the Basque Country under Franco, which included 5480 individuals, Lau Haizetara Gogoan demands the repeal of the 1977 Amnesty Law, a recognition by the courts of the non-applicability of the statute of limitations concerning crimes against humanity, the creation of a commission on truth, justice and reparations for the loss of life during the civil war and the years of dictatorship that followed, and a judicial inquiry into the enforced disappearances under Franco (Lau Haizetara Gogoan 2010).

Though the Aznar government publically expressed some acknowledgment of the abuses under Franco, the administration did not provide additional support to ARMH. The Zapatero administration (2004 – 2011) provided a stronger response to victims' demands with the passage of the 2007 Law of Historical Memory, though ultimately it failed to satisfy many victims. This law included provisions for panels to review judicial sentences made by Franco military tribunals against regime opponents and Republican veterans. Victims were recognized and compensated but perpetrators were not prosecuted (Golob 2008). In the end, the continuation of impunity and the absence of support for some form of truth-seeking initiative within the law alienated several sectors of society on the left and angered many on the right, who saw it as divisive and vengeful.

Then, in 2008, a new development in truth-seeking and justice efforts emerged. Judge Baltasar Garzón opened an investigation into a complaint lodged by victims'

families through an *acción popular,* requesting the Audiencia Nacional investigate the disappearances and executions of thousands of people during the Spanish civil war and the Franco regime. Garzón concluded that the crimes outlined in the petition constituted crimes against humanity[75] and, therefore, according to international law, the statute of limitations did not apply. State prosecutors announced their intention to appeal Garzón's ruling based on the 1977 Amnesty Law, and within a month Garzón shut down his investigation. The investigation effort concerning disappearances and executions under Franco has effectively been stalled since early 2009 because, through the mechanism of private prosecution, right-wing groups sympathetic to the Franco regime filed criminal complaints against Garzón in the Supreme Court, charging that he had overstepped and abused his power by acting contrary to the amnesty law. The Supreme Court accepted the petition against Garzón and, though he appealed this ruling, he was later indicted in 2010 on charges of abusing his power. In March 2011, Garzón filed a suit at the European Court of Human Rights against his indictment citing again that crimes against humanity have no statute of limitations, as evidenced in the body of international case law (Woolls 2011). Garzón was then indicted in two additional cases involving a wiretapping order in 2008 and an alleged improper relationship with the Spanish bank, Santander (Minder and Simons 2012). On February 9th, 2012, Garzón was convicted on the wiretapping charge, which suspended him for 11 years from his duties as a judge, and

[75] The term "crimes against humanity" refers to certain acts committed as part of a widespread or systematic attack
directed against any civilian population. Crimes against humanity include murder, unlawful confinement, enforced disappearance, extermination, enslavement, deportation or forcible transfer of population,
torture, rape and sexual slavery, persecution against a group, apartheid, intentionally causing great suffering or
serious injury to the body or to mental or physical health (Article 7, Rome Statute of the International Criminal Court 1998).

the charge involving Santander was dropped. A few weeks later on February 27th, 2012, Garzón was acquitted on the charge of abusing his powers by investigating human rights violations during the civil war and Franco's regime.

Despite the attention on Garzón's behavior in recent years, victims' groups continued their efforts, extending years of persistent work toward the recovery of loved ones. One Basque human rights advocate commented to me that the controversy surrounding Garzón should not overshadow the years of dedication demonstrated by victims' groups. From her perspective, it is important to remember the current debate concerning Spain's authoritarian past and the rights of victims' families exists because of the citizens' efforts, not because of Garzón (Int. 13). A Basque human rights attorney pointed out to me that the public issuing of the Bloody Sunday Inquiry final report in Northern Ireland in June 2010 had a tremendous impact on victims' groups in Spain (Int. 18). As discussed in Chapter 4, the Bloody Sunday report was published at the conclusion of a public inquiry into the deaths of thirteen civilians during a civil rights march in 1972. After twelve years from the start of the inquiry hearings in 1998, the commissioners issued a report that acknowledged the culpability of the British security forces in the civilians' deaths. Since most of the perpetrators of disappearances and executions under Franco are no longer alive, many victims' families focus their efforts not on prosecution, but on official acknowledgment from the government of their loss, financial support to locate the remains of their loved ones and some form of truth-seeking measure that would establish a historical record of the abuses. The Bloody Sunday report addressed some of the same concerns for victims' families in Northern Ireland and thus, the report provided hope to some in Spain.

The most recent ruling on Garzón, however, suggests that victims will not receive support from the judicial system in the future to achieve these goals. In its ruling on Garzón's acquittal, the Supreme Court recognized the legitimacy of victims' demands but in the same breath argued that courts are limited to investigating the criminal responsibility of a defendant, as opposed to determining a "truth" concerning a former government's abuses (Tribunal Supremo 2012).[76] The ruling goes on to offer solid support for the 1977 Amnesty Law, arguing that the law was created through an agreement among all political players during the democratic transition. In other words, it is not a self-amnesty or a measure enacted by a victorious party. This, in the judges' view, substantiates their belief that the pursuit of *criminal justice* for Franco-era crimes is not justified nor is it legal. The verdict also cites that cases similar to the demands made by victims have been brought to the European Court of Human Rights. Thus, the next step forward for ARMH and other groups may be the pursuit of a truth commission, though it is not yet clear whether the Spanish government would support such a process.

The previous discussion highlights a few interesting paradoxes. Though Spain has a stronger prosecution record as a conflicted democracy than the other two cases, it experienced far less accountability than many other transitional regimes concerning its authoritarian past. In addition, the Spanish conflicted democracy case suggests that though truth-seeking measures, such as inquiries, were not an available mechanism for Spanish citizens under democracy as they were in Northern Ireland and Sri Lanka, it is possible that truth-seeking was not pursued by citizens because the prosecutions for state

[76] It is worth noting that where the courts in Argentina are unable to determine criminal responsibility due to existing amnesty laws, "truth trials" have been held to aid family members in determining the whereabouts of their relatives. It is not clear if such an option will be available for victims' families in Spain.

violence in the 1980s and 1990s were found to be fairly satisfactory. As discussed in Chapters 3 and 4, the government largely pursued truth-seeking measures in Sri Lanka and Northern Ireland as a means to legitimize their actions and to respond to accusations that they were failing to bring state actors to account though the ordinary criminal justice process. In essence, the absence of truth-seeking in Spain for violence committed during democracy does not necessarily translate into a poor accountability record as we might expect. The use of truth-seeking measures in Sri Lanka and Northern Ireland demonstrates that these mechanisms can actually be useful tools for the government to avoid judicial scrutiny.

Conclusion

In this chapter, I argue that a newly empowered, independent judiciary and political competition shaped human rights accountability for state violations in Spain. Spain is unique from Northern Ireland and Sri Lanka in that as a new democracy, it was buoyed by a fresh democratic impulse within society. In contrast, the years of democratic governance following colonial rule in Northern Ireland and Sri Lanka provided fertile ground for the entrenchment of fairly draconian laws, which had an impact on accountability efforts. In Spain, though the transition was one of reform as opposed to rupture, the opportunity to establish new laws and institutions did provide some important measures of resistance to the lurking elements of authoritarianism. The power of the Spanish parliament to design (interim) anti-terrorism laws (as opposed to the executive), create reforms and incorporate the concerns of Basque parliamentarians, were important for how Spain managed the conflict, and thus, how administrations were

held accountable for abuse of power. In the concluding chapter, I conduct a comparative analysis of the main conditions prompting and restricting human rights accountability across the three cases, incorporating a historical institutionalist frame for the discussion of emergency and counter-terrorism laws.

Chapter 6

Conclusion

The discussion of global accountability trends in Chapter 2 (The Universe of Cases) illustrates that while conflicted democracies appear to conduct more prosecutions and truth-seeking measures than conflicted non-democracies, we do not yet fully understand what is at work in these cases. In order to address these issues, in Chapters 3 – 5, I provide detailed evidence of the conditions prompting accountability mechanisms in three cases of conflicted democracy. In this chapter, I conduct a comparative analysis of the findings across the cases and I further develop the central argument of the dissertation. I then discuss the central implications of the dissertation and plans for future research.

The central questions driving this project include: What conditions enable and limit accountability mechanisms in conflicted democracies? In what ways, if any, does democratic governance make a difference in these cases? In Chapter 1, I discuss how existing theories within the transitional justice, civil war and democratic peace literatures are inadequate to explain the conditions prompting and restricting human rights prosecutions and truth-seeking measures in conflicted democracies. In response, I develop an alternative theory. I propose that in order to understand how and when prosecutions and truth-seeking measures are implemented in conflicted democracies, it is necessary to direct our gaze to *the relations of accountability that existed prior to the onset of violence*. These relations of accountability operate as a check on government actions and they are avenues through which state actors can be held to account if they

commit human rights violations. Vertical relations of accountability are those in which an inferior actor holds a superior actor to account (or vice versa), such as when citizens judge their representatives through periodic elections or when civil society groups monitor government actions and campaign in opposition to illegitimate behavior (O'Donnell 1994; Schedler 1999). Horizontal relations of accountability refer to actors on relatively equal footing that hold one another to account, as in the checks and balances system among the executive, legislature and judiciary. A third dimension of accountability refers to the ways in which the international community (IGOs, foreign governments, NGOs) can strengthen horizontal accountability in countries by calling to account encroaching institutions, enhance vertical accountability in countries by making sure elections are successful through monitoring, regulation and training (Pastor 1999) or increase the capacity of local civil society. I refer to the latter examples as external relations of accountability. I argue that human rights accountability in the three case studies (operationalized as prosecutions and truth-seeking measures) is shaped by political competition and pressure on the government from civil society groups (vertical accountability), actions taken by an independent judiciary (horizontal accountability) and pressure from international institutions on the government (external accountability). The variation in terms of the prosecution record and the use of truth-seeking measures across the three cases can be explained by the extent to which these relations of accountability were operating efficiently prior to the conflict, and the efficiency of these relations is shaped by the presence/absence of entrenched emergency laws. For example, prior to the onset of violence between ETA and the democratic government in Spain, political leaders negotiating the democratic transition aimed to make a clean separation from the country's

authoritarian past. Repressive emergency laws, common during the Franco regime, were therefore wholly rejected, and a commitment was made to establish robust vertical and horizontal relations of accountability, including an independent judiciary and political competition. As a result, there were no legislative barriers protecting state actors from prosecution, and the newly established relations of accountability played a key role in moving investigations of state actors forward.

In contrast, decades of emergency laws in Sri Lanka provided legislative protections for state actors. The laws also contributed to a gradual weakening over time of judicial independence and the ability for civil society groups to freely monitor and criticize the government was severely curtailed. The emergency regime in Northern Ireland had fewer legislative protections for state actors by design, and the regulation of emergency laws allowed for some reforms. Yet, as discussed in Chapter 4, the continued enactment of emergency laws encouraged the perception within the judiciary that government actions were legitimate, which resulted in a fairly poor prosecution record compared to Spain.

Later in this chapter, I explain the variation in outcomes across the cases by drawing on theories of historical institutionalism. I argue that key institutional features including the power of the parliament to shape emergency and anti-terrorism laws, and the process of annual and biannual reviews of emergency legislation, led to regulatory mechanisms in the Northern Ireland and Spain cases, prompting gradual change and fewer constraints on accountability. Control over the design and regulation of emergency laws by the executive in Sri Lanka, in contrast, resulted in relative continuity and persistence of the laws over time, resulting in greater barriers to accountability efforts.

Additionally, though the conditions prompting prosecutions and truth-seeking measures are similar, there are important distinctions between the two that require further discussion. While truth-seeking measures were enabled by existing relations of accountability, governments also used these processes as tools of legitimation. In the following, I discuss the comparative empirical findings across the cases concerning prosecutions, supporting my argument that the use of prosecutions was dependent on available relations of accountability and the presence/absence of emergency legislation. I then discuss the unique and troubling conditions prompting truth-seeking measures in Northern Ireland and Sri Lanka and I proceed to further develop my argument by engaging in a historical institutionalist analysis of the impact of emergency and anti-terrorism laws in Sri Lanka, Northern Ireland and Spain.

Comparative Human Rights Prosecutions: Five Causal Mechanisms

In this project, I compare the prosecution records of Sri Lanka, Northern Ireland and Spain. The accountability rate in the Spanish case is substantially higher than the rate in Northern Ireland and Sri Lanka (see Table 1.1). In the following, I draw on my empirical research to discuss how the cases compare and I demonstrate how existing relations of accountability shaped the prosecution record in each case. I explain how the degree to which these relations of accountability were operating efficiently was highly dependent on the presence/absence of entrenched emergency laws prior to the conflict. These laws narrowed the prospects for accountability through their inclusion of immunity

clauses for state actors, and they eroded existing relations of accountability by placing limits and controls on their functioning. The central variable shaping human rights accountability outcomes in these cases is thus the presence/absence of entrenched emergency legislation before the conflicts emerged (see Table 1.2).

Judicial Independence

Through my research, I found that an independent judiciary played a central role in enabling prosecutions of state actors in Spain. Political leaders negotiating the transition had a great interest in avoiding measures reminiscent of the Franco dictatorship, particularly those that centralized power within the executive and limited judicial independence (Hilbink 2009). Thus, there was a great deal of effort to secure negative judicial independence by creating constitutional provisions that limited control of the judiciary by other branches of the government. The resulting establishment of an independent judiciary before conflict escalated between ETA and the government in the new democracy was thus crucial for the later prosecutions. In my research of the GAL trials, I also found evidence of positive judicial independence in the 1980s and 1990s. Spanish judges, in partnership with French judges, initiated some of the early investigations and charges against police and security officials, and there was a clear commitment to investigating the chain of command, which eventually led to prosecutions of officials in the upper echelons of government. It was clear in my historical research and interviews with journalists, attorneys and human rights activists, that judges had incentives during this time to bring government officials to account for their actions

because there was little fear of retaliation from the executive. The option for private and people's prosecution also strengthened the Spanish judicial system by providing an alternative path of action separate from the state prosecutor to victims and their families.

In contrast, the independence of the judiciary in Sri Lanka was severely weakened prior to the conflict through provisions in the 1978 Constitution, including the prohibition on judicial review of legislation, and the provision allowing the legislature to override Supreme Court rulings through a super majority. Emergency laws also eroded judicial independence in Sri Lanka. The 1947 Public Security Ordinance (PSO), through which all emergency regulations are enacted, states that neither the existence of an emergency or an emergency regulation, nor an order, rule or direction made under such a regulation, may be called in question in any court. Thus, the power of the judiciary in Sri Lanka to challenge laws that were, in fact, the central barrier to state accountability, was virtually non-existent. Similarly, in Northern Ireland, an entrenched emergency regime prior to the conflict provided a degree of legitimacy to state actions. I find evidence in court transcripts that judges often perceived the emergency laws as legitimizing state human rights violations. In addition, the creation of Northern Ireland on a foundation of emergency legislation carried over from the colonial period resulted in a judiciary mostly comprised of Protestants who were in favor of ties with Britain and preserving the emergency regime.

Political Competition

As discussed in Chapters 3 and 5, this form of vertical accountability was also central to the prosecutions held in both Spain and Sri Lanka. During Spain's democratic

transition, political leaders established multi-party political competition in order to break from the stranglehold of Franco's one-party regime legacy. After government officials became embroiled in accusations of conducting a dirty war against ETA in the first decade of democratic governance, the party in opposition (PP) pushed for members of the incumbent party (PSOE) to be prosecuted as a means to remove them from power. Ultimately, their tactic was successful and several government officials were investigated and put on trial. The PP also managed to remove PSOE from power, winning the 1996 election by a fairly narrow margin. The 1996 election followed an intense period of violence between ETA and the government. The belief that the incumbent government was acting illegally and debasing a fundamental tenet of democracy, the rule of law, was held, not only among many Basques, but among PSOE and PP supporters as well. As noted in Chapter 5, the PP did not obtain a landslide victory over PSOE. Some PSOE supporters were likely embittered by PP's tactics, yet the party's aim to remove PSOE by highlighting the GAL violence resulted in an important, albeit narrow, win for the party. State violence in Spain decreased dramatically after the final prosecutions of state officials in the late 1990s, thus it is difficult to know whether had the state continued to commit violations political competition would have prompted additional prosecutions of the newly elected leaders. It is safe to assume, however, that since the opposition party pushed for the prosecutions that manifested in the 1990s, once in power this party likely knew they too would be vulnerable to similar efforts should they continue to engage in human rights violations against suspected ETA members.

The catalyst for the small number of prosecutions in Sri Lanka also stemmed from political competition. As discussed in Chapter 3, during the 1994 presidential election,

Kumaratunga and her party capitalized on a moment when government accountability was politically popular across Sinhalese and Tamil constituencies. Once elected, Kumaratunga personally pushed forward two prosecutions against the state and prosecutions increased generally during her tenure (1994 – 2005). However, this pattern did not persist because accountability became a less salient issue among Sinhalese voters in subsequent elections. Violence generally decreased during the late 1990s and 2000s (see Graph 3.2 in Chapter 3) and though the government continued to wage war against the LTTE, these actions were largely contained to the north and east regions of the country. In contrast to the period before the 1994 elections, perceptions of government illegitimacy among the Sinhalese constituency were very low in the mid-late 2000s. Thus, though political competition was an important factor for accountability in both Spain and Sri Lanka, the context differs in important ways.

Significantly, local political competition was not available for Northern Ireland citizens after the British government imposed direct rule over the country in the early years of the war, though citizens were able to vote in British Parliament elections. The country's status as only one constituency among others in the United Kingdom resulted in little power for citizens to effect change through the vote. The lack of local political representation also precluded the possibility of campaigning against state violence through political party platforms or elections. As a result, efforts by civil society groups, discussed further below, were a central vehicle for issuing demands on the state.

Thus, political competition as a causal mechanism is operative when accountability for state violations is a salient issue across constituencies. Accountability becomes salient after violence reaches a peak and the perception of government

illegitimacy is widespread, not solely located within the opposition. Accountability loses its saliency when the violence decreases generally, and belief in government legitimacy returns among the majority population.

Civil Society Groups

The ways in which civil society groups can organize in response to government violations in a conflicted democracy is, like political competition, a form of vertical accountability. Inferior actors challenge the decisions and actions of superior state actors as a means to bring about policy change or secure some form of punishment (Schedler 1994; Smulovitz and Peruzzotti 2003). However, these groups can be limited in their ability to check government action if they don't possess autonomy from the state in their financial dealings, operations and legal standing (Diamond 1994). This point is significant for understanding the role these relations of accountability played for prosecutions in Northern Ireland and Sri Lanka.

Early on in the Northern Ireland conflict local organizations focused on challenging policies of discrimination against Catholics and campaigning against state human rights abuses were central in helping families bring state violation cases to domestic courts. These groups also worked closely with international NGOs to bring cases to the European Court of Human Rights and apply pressure directly on the British government to change judicial practices and government policies. In contrast, civil society groups in Sri Lanka, including human rights, peace, women's rights and development organizations, had a limited role in state accountability efforts because they were often subject to government monitoring, strict legal and financial regulation through

emergency measures, and intimidation. This is not to suggest that civil society is on the whole weak in Sri Lanka; rather, though an abundance of diverse groups exist, because their activity is largely limited by government controls and harassment, the prosecutions that were held largely did not result from their efforts. This form of vertical accountability was thus not a central causal mechanism in the Sri Lankan case.

In Spain, some media outlets were important in their role disseminating information about prosecutions, and countering the "official" version of the events, but human rights organizations or other groups were not central in moving investigations forward as they were in Northern Ireland. However, as discussed in Chapter 5, in addition to the efforts of judges and prosecutors working within the court system to hold state actors to account, judges and prosecutors also organized outside the judicial system through civil society associations. The formation of *Justicia Democratica* before the democratic transition was significant because once regime change was enacted, the subgroups *Jueces para la Democracia* and *Unión Progresista de Fiscales* developed with the aim of ensuring officials within the democratic government would adhere to the rule of law. The consistent prosecution of torture cases in Spain can largely be attributed to the efforts of judicial actors both within and outside the system. In recent years, civil society action concerning redress for Franco-era abuses has been well organized and strong, and this is likely due to the impact of global accountability norms on the domestic sphere in the last two decades (Sikkink 2011).

International Institutions

Recently, several studies have moved beyond the domestic realm to investigate the ways in which international institutions can frame elites' decisions or pressure states to implement processes that address past legacies of violence (Roht-Arriaza 2006; de Brito et al 2001; Kim 2007; Sikkink 2005). International organizations are often viewed as legitimate actors intervening in democratization processes and thus, they can play a central role in how states choose transitional justice processes. In addition, international human rights organizations have acted as watchdogs for states and influenced policy reform and development. For example, after Czechoslovakia's lustration law was criticized by the International Helsinki Committee and the International Labor Organization, Central and Eastern European countries began to refer to international laws on human rights when considering and crafting their own lustration laws. The pressure that these institutions can place on governments to redress state abuses is an external form of accountability that aims to strengthen domestic horizontal relations of accountability (e.g. separations of powers) (Pastor 1999). I find that the European Court of Human Rights represented an external form of accountability in Northern Ireland. Cases brought by Northern Ireland citizens to the Court concerning state involvement in ill-treatment, torture, extra-judicial killing and the perpetuation of emergency laws, influenced domestic judicial practices and British policies throughout the conflict. The Spanish case demonstrates, however, that the length of time a country is within the jurisdiction of the European Court of Human Rights is important. Unlike the Northern Ireland case, which had been in the Court's jurisdiction since 1951, two decades prior to the onset of civil conflict, Spain was slow to bring human rights violation cases

concerning state violence to Strasbourg because it signed the European Convention on Human Rights in 1979, only a few years after the transition. This time lag meant that the legal community in Spain was not properly trained in much of international law or the European Court system in the conflict period. Therefore, while a handful of cases involving state use of torture were brought to the Court in the 2000s, no cases were brought concerning state involvement in extra-judicial killings during the internal war of the 1980s and 1990s.

Unlike Northern Ireland and Spain, Sri Lanka is not within the jurisdiction of a regional human rights court system, and thus, is not subject to pressures from this type of institution. Victims of state violations can file a claim with the UN Human Rights Committee, but the resulting recommendations for the government are not binding. The small number of prosecutions in the final years of the Sri Lankan conflict appears to instead be a response to a different form of external accountability: pressure from the UN and donors, including the European Union. A donor relationship with the European Union through the GSP+ program (see Chapter 3) was predicated on the government's compliance with international human rights treaties it had ratified. This and other international partnerships also prompted the creation of truth-seeking measures in Sri Lanka.

Entrenched Emergency Laws

Accountability for state human rights violations was constrained by entrenched emergency laws in Northern Ireland and Sri Lanka. These laws were entrenched in that they were promulgated by the governments in each case for decades. The empirical

chapters demonstrate how the specific content of these laws had an impact on accountability by providing immunity to state actors and shaping the judicial sectors' perception of the legitimacy of government actions. The example of ordinary inquest legislation in the Northern Ireland case illustrates how governments can also develop protections for state actors within *non-emergency* laws. In essence, the shadow of an emergency regime can extend into other areas of the law, resulting in further barriers to accountability.

The Sri Lankan government established emergency laws to monitor and regulate the actions of various civil society groups and some of the provisions limiting the power of the courts eroded judicial independence. Emergency laws also restricted prosecutions through the inclusion of immunity and inquest clauses. In the Northern Ireland case, though a strong sector of civil society groups pushed for domestic and international prosecutions of state actors, the continued enactment of emergency legislation visibly produced a bias toward the British state among some members of the judiciary.

In contrast, the absence of entrenched emergency laws in Spain was central to producing a stronger prosecution record because there were, in effect, no immunity provisions for state actors, nor was there an uninterrupted legacy of repressive legislation shaping conceptions of government accountability within the judiciary. Political leaders in Spain designed new legal frameworks and relations of accountability that broke with the past regime and this provided fertile ground for holding the state to account in the early years of democracy.

In the final section of this chapter, drawing upon institutional change theory, I discuss how emergency laws can be understood as institutions that structured the

possibilities for accountability in these cases. In the next section of the chapter, I discuss the conditions prompting truth-seeking measures.

Comparative Truth-Seeking Mechanisms: An Exercise in Legitimation

Fourteen commissions of inquiry were held in Sri Lanka concerning state human rights violations and all but one of these was held during the conflict. In Northern Ireland, six inquiries concerning state violations were held during and after the conflict. Though inquiries in these two cases were prompted by similar conditions as those leading to human rights prosecutions, their purpose and use by democratic governments warrants a separate discussion. Political competition, and pressure from civil society groups and international institutions propelled these processes in both countries. The creation of commissions of inquiry (COIs) in Sri Lanka largely stemmed from political leaders' incentives to punish the previous regime once elected, and appeasement in the face of international pressure. In Northern Ireland, inquiries emerged after international pressure was placed on the Northern Ireland and British governments to investigate unresolved and often controversial cases of state violence. The use of the inquiry mechanism in these two cases is distinct from prosecutions, however, in a few important ways.

Significantly, though the inquiries utilized in Northern Ireland and Sri Lanka resemble truth commissions in their focus on state human rights violations, they are not historically grounded in a model of truth-telling for state abuses. In both cases, most of the inquiries were enacted through colonial-era legislation, namely the UK Tribunal of Inquiry (Evidence) Act (1921) and the Commissions of Inquiry Act (1948). They were thus not created in the midst of a transitional or post-conflict moment akin to the

traditional truth commission model of the past thirty years; they emerged as relatively ad hoc mechanisms after public confidence in the government had been diminished. This distinction is important because it illuminates that the underlying impulse for governments to initiate these inquiries was largely an exercise in legitimation. Unlike the process of criminal investigation and prosecution, inquiries were often created to "give the appearance of scrutiny while protecting state interests" (Rolston and Scraton 2005: 558). I argue that this process of legitimation is unique to conflicted democracies. Non-democratic governments facing a crisis in legitimacy are unlikely to develop a costly inquisitorial mechanism to either save face or avoid judicial accountability. Authoritarian leaders can and will simply shut down the possibility of state accountability. Government officials in Northern Ireland and Sri Lanka had incentives, located in domestic and international human rights obligations, to produce a response in which state accountability was pursued without reaching a damaging level of scrutiny. The emergency laws had eroded relations of accountability that normally would act as a check on government abuses. Thus, the creation of inquiries in this landscape was a response from the governments to address both continued complaints about cases that had not been investigated, and increasing pressure from the international community that domestic mechanisms of accountability were becoming inadequate (Hegarty 2003). Some cases concerning state violations were addressed through prosecutions, though most were not. The higher number of inquiries in Sri Lanka compared to Northern Ireland is reflective not of greater accountability but rather the degree to which the government had incentives to legitimize its behavior. These incentives manifested from international pressure after domestic remedies were seen as failing. The record of prosecutions and

truth-seeking measures is therefore distinct in important ways. Though inquiries emerged from similar conditions as those prompting prosecutions, I find that governments simultaneously utilized inquiries to create an image of accountability as the rule of law gradually buckled under an entrenched emergency regime.

As discussed in Chapter 5, the inquiry model, a remnant from British colonial rule, is not part of Spanish legal norms. Truth-seeking (and prosecutions) for abuses committed during authoritarian rule were deliberately avoided during the democratic transition. Truth-seeking efforts in recent years have largely been directed at abuses committed during the Franco regime from families who want to obtain more information on the disappearance or execution of their loved ones. Given these developments, a traditional truth commission focused on the Franco years may be in the future. Citizens have not demanded additional inquiries concerning the violations committed by the government in the early years of democratic governance largely because the prosecutions reached the upper levels of the police force and the government. In addition, the years of investigation and prosecution of state actors for the GAL crimes successfully tarnished the ruling party and cost them an election. Punishment had, in a sense, been meted out.

Emergency Laws and Accountability

The intervening variable that shaped the degree to which relations of accountability were able to check government abuse is the presence/absence of prior entrenched emergency laws (see Table 1.2). In this section of the chapter, I elaborate on how emergency laws can be understood as *institutions* that contributed to the prosecution records in the three cases. Though the differences between the prosecution records in Sri

Lanka and Northern Ireland are relatively small, the analysis that follows is important for a few specific reasons. First, the analysis builds on the evidence presented in the empirical chapters to illustrate the precise institutional properties that distinguish the legacy of emergency laws in Northern Ireland from Sri Lanka. Second, it demonstrates that not all institutions are stubborn, monolithic entities. There can be a great deal of contestation over the content and implementation of the rules and procedures within an institution. This may not lead to grand transformations, but it can cause gradual alterations in the meaning and power of the institution. The fact that emergency laws in Northern Ireland were under scrutiny and debate throughout the conflict is important because it produced some reforms to the laws. It is also significant because it illustrates that there was awareness at various moments among some political actors that the emergency institution was illegitimate and contributing to negative outcomes. The institutional analysis that follows illustrates how and why the emergency institution in Sri Lanka persisted over decades while the emergency institution in Northern Ireland underwent gradual change. The analysis also demonstrates how interim anti-terrorism laws in Spain, created in the early years of democratic governance, failed to become an institution that constrained state accountability.[77]

[77] Though I rely solely on historical institutionalism to support my central argument, it is worth noting some of the parallels of my analysis with assertions generated in post-colonial theory. Specifically, in line with Hall's (2000) statement that "Nations cannot be understood outside of empire," I demonstrate how accountability outcomes in conflicted democracies cannot be theorized without attention to the development and maintenance of democratic norms and institutions prior to the violence. The creation of these norms and institutions in a post-colonial milieu is significant in that certain knowledge and understandings of state accountability established under colonial rule can constrain and shape questions of accountability decades later (Stepan 2000). Reliance on post-colonial theory only for this analysis is inappropriate, however, in that the British colonial era in Sri Lanka is distinct in several important ways from the colonial legacy in Northern Ireland.

As the empirical chapters demonstrate, though emergency measures were tools used by the governments to manage the conflict, their creation in Northern Ireland and Sri Lanka long preceded the actual onset of the violence. In both countries, conceptions about the legitimacy of state actions during crisis were embedded in emergency laws that were first enacted in the British colonial period. The laws were then adopted in both cases by successive governments to regulate the civil conflicts. In contrast, anti-terrorism laws in Spain were created in direct response to rising ETA violence and had no relation to Franco-era legislation.

The historical legacy of emergency laws in the Northern Ireland and Sri Lankan cases is significant. The decision by successive administrations to utilize laws from the colonial period to regulate the conflicts maintained certain conceptions of state culpability and accountability and closed off other possibilities. Emergency and counter-terrorism laws can be understood as a type of *institution* that shaped the degree to which state actors' behavior was perceived as legitimate throughout the conflict. These institutions are comprised of the various rules and norms structuring the legal limits of state actor behavior during internal crisis, how terrorism is defined and adjudicated, and how/whether state actors are held accountable for their actions. Existing accounts of institutionalism often fixate on the continuity and persistence of institutions over time. Here, I examine how and why the institution of emergency laws persisted in Sri Lanka, the institution in Northern Ireland underwent gradual change and the laws in Spain did not act to limit state accountability. Exogenous shocks creating what historical institutionalists term "critical junctures" are not part of the story here. Instead, drawing

on Mahoney and Thelen's (2010) theory of institutional change, I highlight conditions that enabled endogenous changes in the Northern Ireland and Spain cases.

Central to historical institutionalist accounts of institutional change is identifying the ideological and material foundations that sustained the institution before it experienced internal and external pressures (Thelen 1999). Since the creation of Northern Ireland in 1921, the Northern Ireland government operated under a "security response," a remnant from when the region was under control and fought over by the British and Irish, as opposed to a "due process response" (Boyle et al 1975). This resulted in the Northern Ireland government opting to repress violence through whatever possible means instead of suppressing violence by relying on the ordinary criminal justice system (Boyle et al 1975). The police were not reformed after partition and thus, the majority of its members were Protestants, and loyal to the British Crown. Similarly, Protestants held most of the judicial posts (Boyle et al 1975; Ní Aoláin 2000) and seats in the Northern Ireland Parliament (Donohue 2001). The Protestant, Unionist community had a vested interest in maintaining the institution of emergency laws, carried over from the colonial period, as a means to ensure continued power in the region. After the British government imposed direct rule over the region in 1972, and emergency law design and regulation fell under the control of the British Parliament, contestation over the laws ensued, resulting in alterations in the meaning and power of accountability enshrined in emergency legislation.

In the Sri Lankan case, clauses concerning the centralization of executive power and government immunity for actions performed under an emergency, were carried over from laws created in the colonial era through to emergency regulations implemented in

the 20th and early 21st century, with little to no debate about their validity or relevance. For example, as discussed in Chapter 3, the wording concerning state immunity in the 1979 Prevention of Terrorism Act is lifted directly from the immunity provision in the colonial-era 1947 Public Security Ordinance. Alternative paths for the emergency institution were not pursued in Sri Lanka, largely because Parliament did not have the same degree of veto power over emergency laws as the British Parliament. No parliamentarians in Sri Lanka challenged the validity of emergency regulations to an extent that spurred contestation or reform.

In Spain, though some emergency measures were used under the Franco regime, these were not carried over during the transition to democracy. The democratic government never declared an emergency, nor were measures enacted to regulate a state of crisis. *Interim* anti-terrorist laws were newly developed shortly after the democratic transition to manage growing ETA violence. However, as opposed to containing immunity or inquest clauses for state officials, or diverting inquest provisions into ordinary legislation, the Spanish laws explicitly prohibited abuse of these powers and established terms for punishment. These laws were then later folded into the Penal Code.

Institutional properties, in particular veto power and the degree of rule enforcement, contain within them the possibilities for both continuity and gradual change (Mahoney and Thelen 2010). I find that key institutional features, including the power of the parliament to shape emergency and anti-terrorism laws, and the process of annual and biannual reviews of legislation, led to regulatory mechanisms in the Northern Ireland and Spain cases, prompting gradual change in the institutions. In contrast, the degree to which the executive had control over the design and implementation of emergency laws,

the absence of a review process, and limits on the right to challenge these laws in the court system resulted in relative continuity and persistence of the emergency institution in Sri Lanka. Table 6.1 illustrates the relevant properties of each institution that enabled either continuity or gradual change.

Immunity clauses

Unlike Sri Lanka, emergency laws and anti-terrorism laws in Northern Ireland do not contain immunity clauses. Thus, there is no provision that limits the number of prosecutions of security forces and police for human rights violations. The regulation of inquests through emergency laws in Northern Ireland was also more short-lived than in Sri Lanka and largely predated the conflict. Critical reforms of the inquest procedure were made, however, in *separate non-emergency legislation* at the start of the conflict, though the extent of state control over inquests was far less in the Northern Ireland case. Though coroners' duties were restricted through non-emergency legislation, and likely had an impact on the number of prosecutions held, these laws did not include provisions that directly facilitated impunity, such as the inquest regulations in Sri Lanka allowing security forces to dispose a body without a proper inquest or bypass ordinary law in the interest of national security. The interim anti-terrorism laws in Spain also did not include protections for state actors; in fact, these laws contained specific provisions outlining penalties for state violations. In contrast, the continued enactment of immunity provisions and limitations on the inquest process in Sri Lanka deflected scrutiny of questionable state actions and limited the extent to which security force members and police were held to account.

Table 6.1

Properties of the Emergency and Anti-Terrorism Institutions in Sri Lanka, Northern Ireland and Spain

Sri Lanka's Emergency Laws	Northern Ireland's Emergency Laws	Spain's Interim Anti-Terrorism Laws
Immunity clauses for state action	No immunity clauses	No immunity clauses
Emergency laws created by President	Emergency laws created by Parliament	Interim anti-terrorism laws *newly* created by Spanish and Basque Parliaments (note: not carried over from Franco regime)
Parliament has little power to alter/revoke laws	Two-thirds majority of Parliament required to pass laws	Majority of Spanish and Basque parliaments required to pass laws
Emergency laws not subject to annual independent reviews	Emergency laws subject to annual and biannual independent reviews	Interim laws were subject to regular reviews
Judicial challenges to emergency laws are prohibited	Judicial challenges to emergency laws are not prohibited	Judicial challenges to laws are not prohibited

Veto Power

In order to understand the possibilities for institutional change, it is necessary to examine whether defenders of the status quo have strong or weak veto power (Mahoney and Thelen 2010). In Sri Lanka, the executive in successive administrations had an incentive to maintain the emergency institution because it centralized power in the hands of the president and provided protections for state actors' behavior during a crisis. The power of the president to create and implement emergency laws with little to no input or regulation from Parliament afforded the executive strong veto power. As noted in

Chapter 3, though Parliament had some powers via the PSO to revoke, alter or amend a regulation created by the President, members of Parliament rarely took advantage of them to check the executive. In contrast, in Northern Ireland, members of Parliament created and passed emergency and counter-terrorism laws, not the executive. Members of the Northern Ireland Parliament first created these laws, then, after direct rule of the country by the United Kingdom was introduced in 1972, members of the British Parliament created the laws and they were subject to either biannual or annual reviews. A two-thirds majority in the British Parliament was needed to pass each piece of emergency legislation and, as a result, there was often a great deal of contestation at this stage concerning the legitimacy and effectiveness of these laws. Defenders of the status quo in this case were often members of the Conservative Party, which led the British government throughout most of the conflict years. The opportunity for contestation, resistance from the opposition, which was typically comprised of members of the Labour Party, and the annual/biannual process of independent reviews, resulted in some legal reforms. There is evidence during the conflict of political struggles within the British Parliament among competing "scripts" (Thelen 1999) on the (il)-legitimacy of emergency legislation. For example, some reviews of the emergency laws in the mid-1970s were initiated after members of the Labour Party argued that the laws were not essential for national security as Conservatives claimed, but rather, a violation of civil liberties. Those political actors invested in the emergency institution therefore had relatively weak veto power.

Unlike Sri Lanka, where emergency regulations were largely under the control of the president, opposition parties in the Spanish Parliament and members of the Basque Parliament initiated many of the important reforms that sought to curb government abuse

of anti-terrorism legislation and increase government accountability. Thus, the power of the president to issue emergency regulations in Sri Lanka, and the virtual absence of parliamentary power, or political will, to debate the merit of the laws or check the executive, allowed for the entrenchment of a highly unregulated emergency institution. Possibilities for reform, or the elimination of immunity and inquest clauses were non-existent given the utter lack of parliamentary power in the creation and enactment of these laws. Efforts to hold the state to account suffered significantly as a result. In contrast, immunity provisions were absent from emergency laws enacted in Northern Ireland and the requirement of parliamentary approval produced a consistent review procedure independent from government control. The review processes resulted in revisions to the laws concerning state abuse and legislation entrenchment. The reforms to the laws in Northern Ireland and Spain were not wholesale transformations of the laws; rather, they involved what Mahoney and Thelen (2010) refer to as "layering," or the addition of new rules alongside old ones. This layering altered the logic of the institutions over time by challenging abusive practices and providing clauses that sought to curb human rights violations.

Judicial Challenges

Legal challenges to the emergency institution in Northern Ireland also led to reforms. Access to the European Court of Human Rights after domestic remedies had been exhausted was a central means by which Northern Ireland citizens brought cases against the British government for abuse of emergency laws and to challenge the laws' validity. In contrast, the few domestic legal challenges to emergency measures in Sri

Lanka produced no real changes to the laws and, given the weak enforcement power of the UN Human Rights Committee, its recommendations concerning the laws were ignored. While the European Court of Human Rights is not a body that formally regulates the use of emergency laws in signatory states, the Northern Ireland case demonstrates that the ability for citizens to challenge these laws through the Court did produce regulatory effects on how the laws were reformed and implemented in the future. Spain's anti-terrorism laws did not prohibit judicial challenges to the laws and no cases were brought to domestic or international courts during the brief fifteen-year period in which they were on the books. Political leaders negotiating the democratic transition aimed to avoid all measures reminiscent of the Franco dictatorship. As a result, there were no legislative barriers in Spain preventing prosecution or granting legitimacy to state actions.

Thus, the properties within each institution led to key regulatory mechanisms in the Northern Ireland and Spain cases, prompting gradual change in the laws and little to no regulation in the Sri Lankan case, leading to relative continuity and persistence of the emergency institution (see Table 6.2). The nature and timing of Spain's anti-terrorism laws did not limit accountability efforts concerning state violations because they did not form part of an entrenched legal regime, they were void of immunity or inquest clauses, and they were subject to important reforms that enhanced state accountability.

Though the preceding analysis focuses on the use of emergency laws in conflicted democracies, these laws are not of course unique to these cases alone. There are countless examples in history of non-democracies that have resorted to extraordinary measures in order to crack down on civil liberties and control the populace. However,

research has shown that democracies are often given more leeway by international bodies, such as the UN Human Rights Committee, than non-democracies when declaring emergencies and derogating from their human rights treaty obligations because there is an assumption that democratic governments are acting legitimately (Gross and Ní Aoláin 2006). What is important about my analysis is that I show this trust in democratic governments is unwarranted. Democracies' use and abuse of emergency laws not only place questionable restrictions on civil liberties. These laws also directly impact the ways in which the state may be held to account for committing human rights violations.

Table 6.2

Continuity/Change within Emergency and Anti-terrorism Institutions in Sri Lanka, Northern Ireland and Spain

Sri Lanka: Continuity	Northern Ireland (UK): Change	Spain: Change
No independent reviews of regulations	Every law is reviewed by independent body leading to some reforms of laws	Anti-terrorism laws regularly reviewed
The president has strong veto power which leads to little to no contestation among parties in Parliament over content or continuation of laws, blocking change	Requirement of two-thirds majority in Parliament prompts regular contestation between Labour and Conservative parties, leading to some reforms	Opposition parties in Spanish and Basque parliaments initiate key reforms curbing abuse and addressing government accountability
Handful of judicial challenges to the laws do not produce reforms	Cases at the European Court of Human Rights challenging emergency laws impact British policy on detention practices, torture and domestic prosecutions	No judicial challenges to laws; in 1995, measures are folded into the Penal Code

While democratic governance matters in these cases in that relations of vertical, horizontal and external accountability available prior to the conflict can push prosecutions of state actors forward, it only matters to the extent that governments have/have not designed legislative barriers to accountability. The prosecutions in Northern Ireland and Sri Lanka would not have been possible without the efforts of civil society groups and political competition, respectively; the potential larger impact of these efforts was constrained, however, by the presence of entrenched emergency laws. Similarly, the prosecutions in Spain would not have been possible without the presence of an independent judiciary and political competition, and they were further enabled because state actors were not protected from prosecution through legal measures. The comparative analysis presented here illustrates the need to consider conflicted democracy cases in a different light. In contrast to analyzing the democratic transition or post-conflict moment, the causal mechanisms structuring accountability processes in these cases are located in the *pre-conflict* period. Examining the pre-conflict period illuminates what relations of accountability are available and to what degree, and it sheds light on the ways in which legal models from a colonial era can constrain political outcomes.

Thus, by isolating conflicted democracies from the existing transitional justice literature, this project illuminates a significant and understudied political space. Democracies experiencing internal war confront unique opportunities for and constraints on accountability than other conflict cases. The nature of democratic governance prior to the conflict, in terms of the availability and efficiency of relations of vertical, horizontal and external accountability is variable and highly dependent on the presence/absence of

constraining legal models. We cannot understand accountability in these cases without reference to the past.

Implications

The findings of this dissertation have several important implications for theoretical and substantive accounts of democracy, human rights and war as well as for the current and future deployment of emergency and counter-terrorism laws within democratic states. First, little has been written about how democratic governments respond to demands for accountability when they confront war with their own citizens. War undoubtedly alters the strength and functioning of existing democratic norms and institutions. What this analysis shows, however, is that the extent to which state violations are redressed is not, as we might expect, shaped entirely by the nature or the strength of the violence. Accountability in these cases is largely shaped by the opportunities for and constraints on relations of government accountability in the pre-conflict period. In essence, when internal war erupts within a democratic state, what matters most for issues of accountability is not the resilience of institutions in the midst of violence, but their historical emergence and effectiveness before the country descended into war.

Second, the dissertation's comparative analysis of how emergency measures directly impact accountability processes has important implications for the study of these laws and their actual design, regulation and implementation. In the last ten years, academic and policy worlds have been abuzz about the use and abuse of emergency and counter-terrorism laws in the war on terror effort. Democratic governments, in particular,

have come under scrutiny for violating citizens' civil liberties and using the expansive powers included in such laws to justify or cover human rights violations, abroad and at home. The frame often used, particularly in the U.S. case, is that these controversies represent a new era in which democracies must wield extraordinary law as a means to confront violent non-state actors. Yet, as this project demonstrates, the tension between democratic governance and extraordinary legal measures is not a recent phenomenon. Democracies are indeed facing a global terror effort today, but for many years, democracies have also experienced internal armed conflict. Current research on the tactics democracies employ to counter the threat of global terrorism and the effects of these measures could benefit from the analysis presented here in a few key ways. For example, I show the importance of tracing the historical emergence of such legislation. Emergency and counter-terrorism laws are often not isolated responses to a security threat, but rather originate from legislation prior to the threat. The result is often a confused or inappropriate application of measures previously generated in response to matters unrelated to internal war or related to an entirely different kind of war. The negative effects on government accountability, as I have shown, are numerous. In addition, as my research suggests, control over the design and regulation of emergency and counter-terrorism laws is dependent on veto power and the degree to which these laws are monitored, contested and reformed. Countries in which emergency legislation is largely created by the executive, as opposed to the parliament, will likely experience a highly constraining, continuous emergency regime. Tracing the origins and emergence of these laws matters greatly for understanding their impact and persistence.

Third, my research provides the first analysis of the precise ways in which emergency and counter-terrorism laws have direct implications for how and whether state actors are held accountable for extra-judicial killings, torture and the disappearance of civilians. This has potential relevance for other cases of conflicted democracy. Both Israel and India, for example, have legal models and institutional structures that are remnants from the British colonial period and both countries have experienced emergency regimes for decades. Debates on the Israeli government's adherence to rule of law and international human rights norms are numerous, but little work has been done to examine the ways in which relations of accountability and legal models established during the state's creation have shaped the possibilities for and limitations on government accountability. Similarly, while India has confronted a variety of internal conflicts since independence from Britain, no research has examined the diversity of accountability outcomes across Indian states and their potential relevance to existing democratic institutions and emergency legislation. The findings in this project are of course not a one-size-fits-all model for accountability in all conflicted democracies. Yet, the apparent patterns between the case studies in this project and the remaining universe of cases suggests that the five causal mechanisms I have identified may be fairly generalizable. At the very least, historical institutionalist analysis will be an important tool for understanding accountability processes in other democracies experiencing internal war.

Fourth, this dissertation contributes important insights to historical institutionalist approaches to the study of law. Existing research in this area has largely focused on American courts and judicial behavior. This project's cross-national comparative examination of the historical evolution and impact of emergency and counter-terrorism

legislation on accountability efforts is therefore quite novel. Additionally, this project highlights important ways in which domestic law interacts with international institutions. Scholars of comparative politics have not always paid sufficient attention to international institutions and their relationship to comparative judicial politics. The evidence presented demonstrates how decisions at the regional court level can be significant for judicial reforms at the domestic level.

Fifth, existing analyses of the design and implementation of accountability mechanisms in the transitional justice literature tend to argue that the same sets of conditions (e.g. type of transition, length of regime) propel prosecutions and truth commissions. This dissertation contributes new insight on the distinct conditions fueling prosecutions and truth-seeking measures in conflicted democracies. While inquiries in Northern Ireland and Sri Lanka tended to also emerge from the mechanisms of political competition and international pressure, their creation largely reflected the government's impulse to avoid further scrutiny. Unlike truth commissions adopted in transitional countries, inquiries were largely enacted, not as an additional mechanism of accountability alongside criminal prosecutions, but rather in response to increasing domestic and international complaints that the ordinary criminal justice process was becoming insufficient to address state violations. In essence, these processes were a means for the government to engage in an exercise of legitimation. The higher number of inquiries in Sri Lanka compared with Northern Ireland is reflective not of greater accountability but rather the degree to which the government had incentives to legitimize its behavior.

Future Research

Most transitional justice studies that analyze the use of human rights trials focus only on *criminal* prosecutions of state (and non-state) actors, and this project is no exception. This trend has been supported by a few key arguments. In criminal prosecutions, perpetrators face a clear punishment, typically a prison sentence or a suspension from employment. Civil courts, in contrast, usually are only empowered to award compensation to victims or their families, if anything. Criminal trials have been considered a more reliable count of justice or accountability because victims and their families see a penalty administered to the accused. Victims are not, in effect, "bought out" or silenced by the government through monetary rewards. As I note in the chapters on Sri Lanka and Northern Ireland, however, in contrast to Spain, civilian claims of torture were often filed in civil courts or in a Supreme Court that had fundamental rights jurisdiction. Though the civil trial route for human rights violations is a contested one, state violations are *recognized* and *adjudicated* in this space within some countries, and thus, it deserves greater attention. Studying civil trials may also potentially illuminate patterns in the practice of torture by democratic governments during war. Data on incidents of torture tends to be incomplete and, at times, unreliable because abuse is not always reported by victims, and there is evidence that it is sometimes falsely claimed by opposition groups aiming to generate support for their campaign. Knowing when charges are brought, and then deemed admissible for trial by civil courts, may ameliorate some of these challenges and produce a clearer picture of the extent to which ill-treatment and torture is practiced by the government. In future research, I plan to create original datasets of torture violations investigated through civil trials in Northern Ireland and the

Sri Lankan Supreme Court by conducting archival research in the court records offices within both countries. This will greatly enhance the research findings of this project and contribute an important new line of inquiry, human rights civil trials, to the fields of transitional justice, comparative law and human rights.

Finally, as indicated above, I also plan to conduct further research on the relevance of my findings to the remaining cases of conflicted democracy. In order to be consistent, I will research the U.S. State Department annual human rights reports in a sample of the remaining cases and conduct field research to obtain complete data on criminal and civil trials as well as truth-seeking measures. Similar to the three cases analyzed in this project, Israel, India, Colombia, and the Philippines have also been included in large N datasets for studies on post-conflict justice without regard for the fact that the majority of accountability mechanisms in these cases have been conducted during the violence and under democratic governance. Thus, in addition to providing important insights about the origins of accountability measures and emergency law models and their effects on justice efforts in contemporary conflicts, future research will also further demonstrate the importance of isolating conflicted democracies from transitioning countries.

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