

**THE IMPACT OF HUMAN RIGHTS LAW IN TIME**

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## TABLE OF CONTENTS

List of Tables .....	iv
List of Figures .....	v
Chapter 1: The Impact of Human Rights Law .....	1
Chapter 2: Rethinking <i>How</i> and <i>When</i> In The Current Approach .....	32
Chapter 3: Constituent Power, Legal institutions, and Long-Term Change .....	68
Chapter 4: Human Rights in Autocracies: Dissent, Defensive Treaty Ratification, and Democratization .....	96
Chapter 5: Human Rights in New Democracies, Part One: Domestic Demands, Transitional Justice and Short-Term Consequences .....	156
Chapter 6: Human Rights in New Democracies, Part Two: Transitional Justice and the Long-Term Micro-Dynamics of Repression .....	228
Chapter 7: Human Rights After War: Enforcement and the Prevention of Conflict Recurrence .....	266
Chapter 8: Toward Possibilism in Human Rights Politics .....	309
Works Cited .....	328

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## LIST OF TABLES

Table 2.1. A Glimpse at Changes in South Africa Over Time, 1980-2005 .....	63
Table 4.1. Distribution of Autocratic Ratifications .....	119
Table 4.2. Determinants of Treaty Ratifications, 1976-2006 .....	150
Table 4.3. Ordered Probit Models of Short-term Repression, 1976-2006.....	151
Table 4.4. Proportional Hazard Models of Democratic Regime Change, 1970-2010....	152
Table 4.5. List of Human Rights Campaigns, 1970-2006 .....	153
Table 4.6. Summary of Variables Used in Analyses .....	155
Table 5.1. Democratic Transitions.....	220
Table 5.2. Variable Descriptions .....	225
Table 5.3. Determinants of Transitional Prosecutions.....	226
Table 5.4. Short-term Risks Associated with Transitional Justice .....	227
Table 6.1. Fixed-Effects OLS Regressions of Short-term and Long-term Repression ..	264
Table 6.2. Fixed-Effects Negative Binomial Model Predicting Ordinary Prosecutions.	265
Table 7.1. Hypotheses Derived From Theory.....	292
Table 7.2. Description of Post-Conflict Data.....	296
Table 7.3. Cox Models of Conflict Recurrence, Dyadic Level of Analysis .....	307
Table 7.4. Cox Models of Conflict Recurrence, Country Level of Analysis.....	308

## LIST OF FIGURES

Figure 1.1. Trends in Human Rights Legal Actions, 1980-2010.....	15
Figure 1.2. Sanctions and Shaming Over Time, 1980-2010.....	20
Figure 1.3. Human Rights Legal Actions and Torture.....	27
Figure 2.1. Global Mean of Repression Before and After Democratization, 1980-2010. 60	60
Figure 2.2. Global Mean of Repression Before and After Civil War, 1980-2010.....	60
Figure 2.4. The Correlates of Repression Approach.....	66
Figure 2.5. Alternative ‘Process’ Approach .....	66
Figure 3.1. HRLAs, Democracy, and Civil War.....	69
Figure 3.2. Count of Human Rights Treaty Ratifications 10 Years Before and After Democratization, 1970-2010.....	88
Figure 3.3. Count of Human Rights Treaty Ratifications 10 Years Before and After Conflict Termination, 1970-2010 .....	93
Figure 4.1. Non-violent Dissent Events Under Autocracy, 1972-2006.....	126
Figure 4.2. Ongoing Human Rights Campaigns Under Autocracy, 1972-2006.....	126
Figure 4.3. Changes in Probability of Ratification (Logit), 1972-2006.....	131
Figure 4.4. Percent Change in Expected Number of Ratification (Count), 1972-2006..	131
Figure 4.5. Change in Probability of Levels of Repression (PTS), 1976-2006 .....	136
Figure 4.6. Change in Probability of Levels of Repression (CIRI), 1980-2006.....	137
Figure 4.7. Change in Probability of Levels of Torture (CIRI), 1980-2006.....	138
Figure 4.8. Change in Probability of Levels of Killing (CIRI), 1980-2006 .....	138
Figure 4.9. Change in Autocratic Duration Conditioned on Covariates.....	147
Figure 5.1. Previous Repression and Prosecutions .....	201
Figure 5.2. Dissent and Prosecutions.....	202
Figure 5.3. Determinants of Prosecutions.....	208
Figure 5.4. Change in Probability of Violent Events Caused by Transitional Justice....	212
Figure 5.5. Transitional Justice and Ethnic Violence .....	216
Figure 5.6. Transitional Justice and Total Civil Violence .....	216
Figure 6.3. Marginal Effect of TRPs on Overall Repressive Violence in the Short Term .....	252
Figure 6.4 Marginal Effects of Cumulative TRPs on Overall Repression (Long Term)	253
Figure 6.5. Correlation between Cumulative TRPs and Cumulative ORPs .....	257
Figure 7.1. Effect of Amnesties on Likelihood of Conflict Recurrence.....	300
Figure 7.2. Effect of Amnesties on Likelihood of Conflict Recurrence.....	300
Figure 8.1. Percentage of Books Using ‘Unintended Consequences’ Over Time.....	319

**CHAPTER 1: THE IMPACT OF HUMAN RIGHTS LAW**<sup>1</sup>

Concerns over impact have long been used to challenge the work of human rights proponents. In the 1960s, when Amnesty International first began campaigning on behalf of tortured and imprisoned dissidents, its leadership had to dispel criticism that it could actually make things worse for people in danger.<sup>2</sup> Jimmy Carter's rights-sympathetic foreign policy in the late 1970s was blamed for the ascendancy of Iran's Ayatollah Khomeini and the Ortega brothers in Nicaragua.<sup>3</sup> Activists' attempts in early 1980s to hold Latin American military leaders accountable for their paranoid and medieval assault on civilians were derided for jeopardizing democratic advancement with backward-looking and vengeful concerns for justice.<sup>4</sup> Human rights advocates at the UN were later blamed for not doing enough to stop genocide and ethnic cleansing in the mid-1990s, and then they were blamed again for disturbing the peace processes following the Balkan Wars.<sup>5</sup> Today, the human rights movement is charged with myopic legal absolutism in the face of hard political realities. The international human rights legal architecture that has been constructed over the last three decades is disparaged for being either

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<sup>1</sup>This material is based upon work supported by the National Science Foundation under Grant No. 0961226.

<sup>2</sup> Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA: The Belknap Press of Harvard University Press, 2010), 129-30.

<sup>3</sup> Jean Kirkpatrick, "Dictatorships and Double Standard," *Commentary* 68(1979).

<sup>4</sup> Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman, Oklahoma: University of Oklahoma Press, 1991).

<sup>5</sup> Anonymous, "Human Rights in Peace Negotiations," *Human Rights Quarterly* 18(1996). Felice D. Gaer, "Un-Anonymous: Reflections on *Human Rights in Peace Negotiations*," *ibid.*(1997).



inconsequential or, in an opposite vein, for being *negatively* consequential, a source of widespread political reaction.<sup>6</sup>

In its current installment, the debate over human rights impact has largely zeroed in on the potential usefulness of international law in combating rights violations, or in producing rights-observant behavior. Thus, the question of human rights impact is increasingly becoming a question of human rights *legal* impact.<sup>7</sup> Are international criminal tribunals breaking cycles of impunity? Do international human rights agreements promote domestic behavioral ‘compliance’? Can it be shown that the actions of the growing international legal community positively alter the human condition? Is it worth the investment, in time and money, to promote the values of the Universal Declaration of Human Rights, to build legal civil society, to fund conferences on international human rights law, and to produce legal documentation of government abuse if repressive violence remains a mainstay of state control? The *sine qua non* of contemporary questions about impact, however, is whether legal action can prevent repressive violence.

Scholarship about human rights legal impact has done a great deal to demonstrate advancements in religious rights, women’s rights, freedom of information, and freedom of expression. Nevertheless, it has not satisfactorily addressed whether human rights law can combat political violence. One of the most extensive favorable studies of international human rights law’s impact, Beth Simmons’s *Mobilizing for Human Rights*,

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<sup>6</sup> John Mearsheimer, "The False Promise of International Institutions," *International Security* 19, no. 3 (1994/5); Jack Snyder and Leslie Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice," *ibid.* 28(2003/4).

<sup>7</sup> Başak Çali and Saladin Meckled-Garcia, eds., *The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Human Rights Law* (New York: Routledge, 2006).

has great difficulty demonstrating any discernible statistical effect of the international legal regulation of bodily integrity rights on the actual incidents of torture and abuse in the world.<sup>8</sup> Kathryn Sikkink's *The Justice Cascade* demonstrates a positive relationship between human rights criminal prosecutions and lowered repression in democratizing countries, but her work has been challenged by others who question the direct transformative impact of rights enforcement on change in countries.<sup>9</sup> Comparativists who study cross-national trends in rights violations are not surprised by the persistent lack of evidence linking human rights law to better practice. In the area of repressive violence—including political imprisonment, unlawful killing, disappearances, and torture—data seem to suggest that state behavior is only getting worse. As a result, those who study patterns in repressive violence see legal advocacy as at best marginally beneficial, and at worse dangerous.<sup>10</sup>

Most scholarship indicates that the primary causes of widespread repression are three: authoritarianism, democratic instability, and civil war. If we want to make human rights change, then, we must promote orderly democracy and prevent internal violent conflict. The contribution of this project is to demonstrate that human rights legal action has a role to play in doing just that. I argue that the impact of human rights legal action,

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<sup>8</sup> Beth Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge: Cambridge University Press, 2009).

<sup>9</sup> See David Kennedy, "The International Human Rights Movement: Part of the Problem?," *Harvard Human Rights Journal* 15(2002). Snyder and Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice; Philip Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice without Lawyers* (Cambridge ; New York: Cambridge University Press, 2010). Kieran McEvoy and Louise Mallinder, "Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy," *Journal of Law and Society* 39, no. 3 (2012).

<sup>10</sup> Oona A. Hathaway, "Do Human Rights Treaties Make a Difference?," *The Yale Law Journal* 11, no. 8 (2002); Emilie M. Hafner-Burton and Kiyoteru Tsutsui, "Human Rights in a Globalizing World. The Paradox of Empty Promises," *American Journal of Sociology* 110, no. 5 (2005); Daniel W. Hill, "Estimating the Effects of Human Rights Treaties on State Behavior," *Journal of Politics* 1161(2010).

under certain conditions, promotes democracy and prevents conflict recurrence. This takes time. By slowly changing state-society interactions, the pursuit of human rights is causally related to lessened repressive violence. Importantly, though, these contributions are not guaranteed, and they are dependent on the creation of domestic rights constituencies.

In support of my argument, I uncover relationships between human rights legal actions and regime change, broadly defined, that have so far remained unobserved. These relationships have been obscured within the existing literature for two reasons. First, detailed data on various legal mechanisms has until recently been lacking. Greater effort must be made to contextualize—and to disaggregate—types of rights-based legal mechanisms. Too often studies have focused narrowly on single treaties, or single mechanisms like international trials for rights violators, while divorcing them from larger processes of political transformation. Using new data collected over a 3-year period in coordination with the Oxford-Minnesota Transitional Justice Collaborative (OMTJC), in addition to other longitudinal data I have collected from a variety of sources, I address the shortcomings of current studies. Second, to see the impact of human rights legal action on democracy and peace, one must zoom out and observe change over the *long term*. Most studies of human rights impact remain trapped in the event, looking for immediate cause-effect relationships between advocacy and alterations in repressive violence. Short-term fluctuations in repression might correlate directly to shifting tactics of advocacy, but cycles of violence will remain mostly unaltered until repressive apparatuses and structures are fundamentally transformed. This type of transformation can and does

occur, and human rights law plays a role. The central contribution of this dissertation is to demonstrate using a wealth of historical evidence that human rights law is associated with long-term positive change, even though legal action may have seeming or real short-term negative consequences. This dissertation, I believe, is the first to give serious consideration to the issue of time and temporality in the study of human rights.

## **1.2. WHAT IS HUMAN RIGHTS LAW?**

Inter-*national* human rights, by definition, are those agreed upon by states acting together. Therefore, international human rights are tied to the Westphalian state system, and they came into being as soon as state delegations collectively decided to draw up multilateral treaties concerning rights protections, to be guaranteed and enforced by the states themselves. As such, these human rights are tied specifically to a moment of interstate institution-formation. The internationalization of human rights has a discrete moment of origin: the San Francisco-based United Nations Conference on International Organization (UNCIO) in June 1945. Here, the United Nations Charter was drafted and continuously re-drafted in plenary sessions attended by 51 state delegations, all of whom had differing views of human rights. The final draft of UN Charter references human rights seven times, most notably in the Preamble and Chapter One on the purposes of the United Nations. Chapter One states as the third of four goals of the UN, “To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human

rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion...”<sup>11</sup>

Today, the idea of human rights as an area of UN jurisdiction is widely taken for granted, but the inclusion of the term ‘human rights’ within the UN Charter was not a foregone conclusion. The first rough draft of the January 1, 1942 *Declaration by United Nations*, written by the US State Department for the consideration of the Allied Powers, mentions “human freedom and justice,” but never human rights.<sup>12</sup> It has been argued that the inclusion of the term only came with Franklin Roosevelt’s direct insistence.<sup>13</sup> Three years later, provisions establishing a UN Commission on Human Rights were put on the cutting block after three weeks of negotiations at the San Francisco Conference, and direct reference to human rights was almost absent altogether from the Charter. In response to direct urging from the non-governmental Commission to Study the Organization of Peace (CSOP), Secretary of State and Chairman to the US San Francisco Delegation, Edward Stettinius, pushed through amendments altering the language in Chapters I, II, V, and X to grant more safeguards to human rights.<sup>14</sup> International human rights, it seems, had a precarious launch-point at the inception of the United Nations. Only with the efforts of highly organized civic activist groups, whose approach to the world incorporated a concern for individuals and solidarity between peoples in

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<sup>11</sup> United Nations, *Charter of the United Nations and Statute of the International Court of Justice* (United Nations, Department of Public Information, 1985).

<sup>12</sup> Glenn Tatsuya Mitoma, "Civil Society and International Human Rights: The Commission to Study the Organization of Peace and the Origins of the U.N. Human Rights Regime," *Human Rights Quarterly* 30(2008): 617.

<sup>13</sup> Paul Gordon Lauren, *The Evolution of Human Rights: Visions Seen* (Philadelphia: University of Pittsburgh Press, 1998).

<sup>14</sup> Dorothy B. Robins, *Experiment in Democracy: The Story of U.S. Citizens Organizations in Forging the Charter of the United Nations* (New York: The Parkside Press, 1971), 130-31.

international affairs, was the groundwork laid for future development of human rights in international institutions.<sup>15</sup>

Since this time, international human rights law has come a long way. It is recognized as a legitimate and growing body of law, its principal sources being treaties and custom among states.<sup>16</sup> The collections of treaties and rule-based international institutions that had surprisingly persisted beyond the Cold War were, by the turn of the century, only becoming more legalized. Legalization, as a group of scholars argued in a special edition of *International Organization*, is a particular form of institutionalization, which “represents the decision in different issue-areas to impose international legal constraints on governments.” As such, it involves “rules [that] are obligatory, the precision of those rules, and the delegation of some functions of interpretation, monitoring, and implementation to a third party.”<sup>17</sup> Human rights legal action (HRLA) is a term I use to describe pro-active efforts on the part of individuals and groups to *use* or to *strengthen* human rights law. HRLAs include all forms of legal mobilization meant to alter Status Quo governance practices in line with prevailing international human rights laws and norms. Rather than being pure or rationally crafted behaviors, HRLAs are often the outcome of strategic interaction between members of political society and members of

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<sup>15</sup> Particularly instrumental were Quincy Wright, James Shotwell, and John Davis, all of whom placed a premium on civil liberties in the promotion of international peace. See *ibid.* Mitoma, "Civil Society and International Human Rights: The Commission to Study the Organization of Peace and the Origins of the U.N. Human Rights Regime."

<sup>16</sup> David Weissbrodt and Connie de la Vega, *International Human Rights Law: An Introduction* (Philadelphia University of Pennsylvania Press, 2007), 4.

<sup>17</sup> Kenneth W. Abbott et al., "The Concept of Legalization," *International Organization* 54, no. 3 (2000).

civil society, both of which engage transnational networks.<sup>18</sup> In this dissertation, I focus on three types of HRLAs: the promotion and ratification of international treaties, the initiation of international criminal prosecutions, and transitional justice.<sup>19</sup>

### 1.2.1. The Promotion and Ratification of International Treaties

International human rights treaties—like the *International Covenant on Civil and Political Rights* and the *Convention Against Torture*—are legal instruments for regulating the tactics open to governments in controlling their territory. There are currently 11 core international human rights treaties, 8 optional protocols, three major regional conventions on human rights, and a series of additional multilateral agreements on rights issues organized by the Council of Europe and the Organization of American States. One subset of these treaties is devoted in large part to the elimination of abuses to physical integrity violations, while others are aimed at social rights and specific issues areas like the protection of the disabled.<sup>20</sup> Legal treaties pertaining to human rights are unique for because they are “...not reciprocal between states; there is not another state that is the victim or is otherwise offended when a state violates its human rights undertakings.”<sup>21</sup> These treaties started to gain momentum in the late 1970s; since, 192 states around the

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<sup>18</sup> For TANs, see Kathryn Sikkink, "Activists Beyond Border: Transnational Advocacy Networks in International Politics," (1998). For HROs, see Amanda Murdie and Tavishi Bhasin, "Aiding and Abetting: Human Rights Ings and Domestic Protest," *Journal of Conflict Resolution* 55, no. 2 (2011).

<sup>19</sup> I do not pretend to catalogue exhaustively the options open to legal activists. These are the tactics most commonly employed, and most commonly debated in the literature.

<sup>20</sup> These specific treaties include the Genocide Convention, the International Covenant on Civil and Political Rights (ICCPR), the Optional Protocol to ICCPR, the CAT, the Optional Protocol to CAT, and the Rome Statute to the International Criminal Court. See Chapter 4.

<sup>21</sup> Louis Henkin, *How Nations Behave, 2nd Edition*, ed. Council on Foreign Relations (New York: Columbia University Press, 1979), 235.

world have engaged collectively in over 2,200 acts of legal ratification or accession of the core human rights agreements and optional protocols.<sup>22</sup>

Despite the considerable amount of time and effort that states have spent on not only drafting these agreements, but also on debating them in their parliaments at home, rights treaties have only recently begun to receive much attention. One reason for this is that observers of international law, especially those among the American intellectual community, showed a decades-long dismissive attitude toward attempts to legalize human rights.<sup>23</sup> Until human rights law became an important lever in Cold War struggles (i.e. the Helsinki Accords), American lawyers and scholars saw them as mostly window-dressing, or desperately puny attempts to alter great power politics. A second reason treaties have garnered attention is the recent availability of web-based data documenting state signatures and ratifications. Prior to the widespread dissemination of this information, it was difficult to collect the data necessary to study cross-national trends associated with treaty law. This dissertation itself benefits from the publication of treaty information on sites like the United Nations Treaty Collection and the Minnesota Human Rights Library, but as we will see, the widespread use of easy-to-replicate data might also be contributing to questionable conclusions regarding the impact of international human rights agreements.

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<sup>22</sup> Data taken from the United Nations Treaty Collection. See <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>. Last accessed July 20, 2012. Ratification is the passage of a treaty into domestic law after a country initially 'signed' that treaty following its drafting. Accession is the passage of a treaty into domestic law, but not follow a signature.

<sup>23</sup> See Moyn, *The Last Utopia: Human Rights in History*, Ch 5.



### 1.2.2. International Criminal Prosecutions

Indictments against high-profile individuals, including heads of state, have been initiated under the auspices of ad hoc tribunals like those established for Rwanda and the former Yugoslavia; international-domestic hybrid tribunals like those in Sierra Leone, Cambodia, and East Timor; and by the permanent International Criminal Court (ICC). The ICTY has brought 72 cases to trial against national of the former Yugoslavia, and the ICTR has initiated 76 prosecutions for Rwandan nationals.<sup>24</sup> Hybrid tribunals have brought a total of 12 cases in Cambodia and Sierra Leone, and 72 in East Timor. Finally, at the time of this writing, 18 cases in eight situations have been brought before the ICC. These cases apply to individuals from Uganda; The Democratic Republic of the Congo; Darfur, Sudan; Central African Republic; Kenya; Libya; Côte d'Ivoire; and Mali.<sup>25</sup> International trials are undertaken with the express purpose of punishing the most vivid and horrible human rights violations of the post-Cold War period, establishing the global rule of law, and promoting peace and rights-compliant behavior in the future. The hope that human rights legal advocacy can curb repressive violence is often now pinned on the ability of these tribunals to hold individuals accountable.

International trials are a lightning rod for attention and criticism because they represent a direct affront to centuries-old understandings of state sovereignty, specifically the principles of non-intervention written into the customs and mores of the international

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<sup>24</sup> Data taken from [www.transitionaljusticedata.com](http://www.transitionaljusticedata.com).

<sup>25</sup> *Situations and Cases*, INT'L CRIMINAL COURT, <http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases> (last visited July 15, 2013).

state system.<sup>26</sup> The idea that tribunals established by an international organization like the United Nations could actually try state leaders, who have forever enjoyed the absolute protection of ‘state immunity,’ is for obvious reasons seen as an extreme notion.<sup>27</sup> Vehement reactions to the establishment of a permanent International Criminal Court (ICC) have led to common misconceptions, including that the court can intervene willy-nilly into whichever states it chooses. This is decidedly not the case, as the court is subject to the principles of non-retroactivity and complementarity, meaning that it can only become involved in states where treaty law was in effect during the commitment of criminal acts, and in states where local courts are unable to act.<sup>28</sup> Still, stringent and unrelenting criticisms have been lobbed at the ad hoc courts and the ICC since day one, and much of this criticism came from organizations like the US Department of Defense.<sup>29</sup> The high level of scrutiny that has followed international courts over the years is important and necessary, but it also might have left a distorted picture of institutions that have simply not had enough time to achieve long-term influence.

### **1.2.3. Transitional Justice and Domestic Enforcement**

Transitional justice, also known more generally as state remedies, involves the use of domestic legal and quasi-legal mechanisms to address past human rights

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<sup>26</sup> See Ian Clark, *Legitimacy in International Society* (Oxford ; New York: Oxford University Press, 2005), Ch 3.

<sup>27</sup> Hazel Fox, *The Law of State Immunity* (New York: Oxford University Press, 2002).

<sup>28</sup> The ICC can bring indictments against nationals when it is invited to by leaders of the country in question, when it is given a direct Security Council referral, or when the General Assembly approves requests made by the Office of the Prosecutor.

<sup>29</sup> On this point, see David Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton and Oxford: : Princeton University Press 2012).

victimization and to deter future abuses.<sup>30</sup> This type of justice took on the descriptor ‘transitional’ in the late 1980s because it often took place in the context of regime change, when new democratic leaders had to figure out how to address the abuses of their autocratic predecessors. State remedies include criminal prosecution of individual rights violators through domestic courts, judicial reforms, and purges of rights abuses from public office. Since 1970, over 75 countries have pursued some form of state remedy for rights crimes amidst political or conflict transition, often as a result of pressure from civil society organizations.<sup>31</sup> Of these, domestic enforcement mechanisms are the subject of increasing activity. Lawyers are using courts to bring cases against rights violators, judges and prosecutors are initiating investigations, and courts are rendering verdicts against state agents guilty of committing core human rights crimes.<sup>32</sup> In fact, there is more of this activity today than there has ever been. Some deride this as the ‘lawyerization’ or ‘judicialization’ of politics, where others see in it the hope that non-violent legal means can be used to address serious political grievances.<sup>33</sup>

In the 1980s, transitional justice was a phenomenon isolated mostly to Latin America, most notably the innovative efforts of leaders and activists in Argentina and Chile to pursue remedy for victims of the bureaucratic, military counter-insurgency

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<sup>30</sup> For a review, see Geoff Dancy, "Choice and Consequence in Strategies of Transitional Justice," in *The Handbook of the Political Economy of War*, ed. Christopher J. Coyne and Rachel L. Mathers (Chaltenham, UK: Edward Elgar Publishers, 2011).

<sup>31</sup> "Impact Assessment, Not Evaluation: Defining a Limited Role for Positivism in the Study of Transitional Justice," *International Journal of Transitional Justice* 4, no. 3 (2010).

<sup>32</sup> Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York: W.W. Norton, 2011).

<sup>33</sup> Yves Dezalay and Bryant G. Garth, "From the Cold War to Kosovo: The Rise and Renewal of the Field of International Human Rights," *Annual Review of Law and Social Science* 2(2006); Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004).

techniques that swept through the continent. These responsive human rights efforts were largely deemed to be on the political periphery. Activists like Guatemala's Rigoberta Menchú, a Quiché peasant who lost her mother and father to a genocidal war in 1980, struggled for years simply to get human rights concerns on leader's agendas.<sup>34</sup> However, the 1990s witnessed the opening of secret police files, punitive 'lustration' policies, and vetting of officials in post-Communist Eastern Europe; and the watershed proceedings of the South African Truth and Reconciliation Commission. By the turn of the century, transitional justice had spread to every region of the world. This phenomenon was prevalent enough to be heralded by advocates as a 'revolution' in accountability or dismissed by skeptics as a faddish centerpiece of the current *zeitgeist*.<sup>35</sup> One reason that transitional justice might have gained traction over the last decade is that it represents a creative move from "antipolitics to program" on the part of human rights proponents.<sup>36</sup> Seeking justice, establishing enforcement, and securing assurances that states actors will attend to the needs of citizens for the goal of atrocity prevention all move beyond informational shaming campaigns, which can often only react to negative events rather than trying to prevent them. However one explains it, an observer of vicissitudes in world events would agree with Charles Call's 2004 statement that "one of the most dramatic

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<sup>34</sup> Rigoberta Menchú, *I, Rigoberta Menchu: An Indian Woman in Guatemala, 2nd Edition* (Brooklyn, NY: Verso, 2009).

<sup>35</sup> For revolution, see Chandra Sriram, "International Law, International Relations Theory and Post-Atrocity Justice," *International Affairs* 83, no. 3 (2006).

<sup>36</sup> Moyn, *The Last Utopia: Human Rights in History*, 221.

transformations of global politics in recent years is the emergence of a new field known as ‘transitional justice.’”<sup>37</sup>

#### 1.2.4. Trends

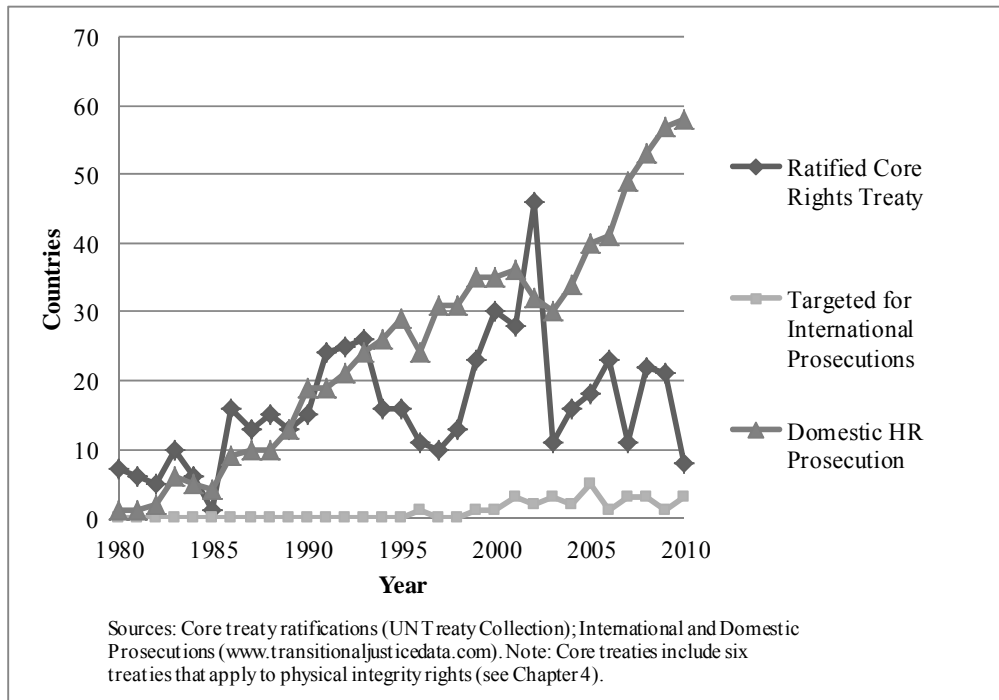
Figure 1.1 depicts trends in the number of countries experiences various human rights legal actions over time, drawn from my cross-national dataset on human rights law.<sup>38</sup> Since 1980, the number of countries in each year with at least one domestic prosecution for human rights crimes has steadily risen from zero to close to 60 countries in 2010. The number of countries ratifying at least one treaty protecting bodily integrity rights in any year has also risen, peaking in the early years of the 21<sup>st</sup> Century. Because once ratified, the treaties regulate each state jurisdiction into perpetuity, perhaps more interesting would be the cumulative number of such ratifications over time, which now equals 810 among all of the countries of the world. The number of countries targeted by international criminal prosecutions remains relatively low in any given year, lending evidence to the idea that we should be focusing more holistically on human rights law enforcement not just at the international level, but also at the domestic level.

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<sup>37</sup> Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge: Cambridge University Press, 2009), 101.

<sup>38</sup> Data on Treaty Ratifications are taken from the Minnesota Human Rights Library and the United Nations Treaty Collection. The data on prosecutions are taken from the Oxford-Minnesota Transitional Justice Dataset. Data is collected from a variety of sources including the United States State Department Annual Country Reports on Human Rights Practices; Keesing’s World News Archive; Human Rights Watch country reports; International Center for Transitional Justice country reports; transitional justice laws and decrees; secondary literature on specific countries; and in-country media sources.

**Figure 1.1. Trends in Human Rights Legal Actions, 1980-2010**



### 1.2.5. What Human Rights Law is Not

For the sake of clarity, it is important to delineate conceptually what human rights law and legal action does *not* include. First, intervention. Human rights legal actions have often been referred to by state targets as ‘interventions’ because they challenge the legitimate control of state governments. But international HRLAs rarely qualify as intervention in the traditional sense of the term, which involve uses of force to oust

leaders or support rebel challengers in order to foment political change.<sup>39</sup> Uses of force are by far the rarest due to the vertical military coordination they require among leaders of world powers. Failures of coordination for these interventions are common, as is evident in the inability of the Security Council to agree on action concerning Bashar al-Assad's Syria. For those studying the power of rights advocacy as a potential source of political change, uses of force might also be the least promising intellectually; because the language of human rights is on the side with overwhelming resources, we cannot isolate impacts attributable to rights legal advocacy from that which is attributable to force.

Also, the 'legality' of humanitarian interventions is still in dispute. Though the Responsibility to Protect (R2P) is an emerging norm that encourages outside military involvement to prevent massive atrocities, the legal ground for this norm is still shaky.<sup>40</sup> The founding document of the R2P movement, written by the International Commission on Intervention and State Sovereignty (ICISS), does not ground its argument for intervention in human rights law, but rather in the authority of the Security Council to make decisions approving of intervention. "Because the prohibitions and presumptions against intervention are so explicitly spelled out in the Charter," the report states, "and since no 'humanitarian exception' to these prohibitions is explicitly provided for, the role

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<sup>39</sup> See Martha Finnemore, *The Purpose of Intervention: Changing Beliefs About the Use of Force*, Cornell Studies in Security Affairs (Ithaca, NY: Cornell University Press, 2003), 9. Finnemore writes, " 'Intervention' is the term used for compromises of sovereignty by other states that are exceptional in some way, yet lines that differentiate and constitute these exceptions are not always clear and have varied over time."

<sup>40</sup> See Ian Hurd, "Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World," *Ethics & International Affairs* 25, no. 3 (2011).

of the Security Council becomes of paramount importance.”<sup>41</sup> Furthermore, the 2005 World Summit Outcome document approved by a High Plenary meeting of the General Assembly notes a responsibility to protect in paragraphs 138-140, but the authority for this is located in Chapters VI-VIII of the U.N. Charter, not human rights legal treaties.<sup>42</sup> In short, though critics have often faulted human rights law for high-profile interventions, technically speaking human rights law nowhere sanctions military interference in a state’s affairs. Even the powerfully worded Genocide Convention leaves the prosecution and prevention of acts genocide to individual state signatories acting as ‘Contracting Parties.’<sup>43</sup>

Second, human rights law is not synonymous with sanctions or material pressure. Human rights sanctions are often initiated by outside governments with the purported aim of depleting the resources of leaderships that are guilty of widespread human rights violations. From 1960 to 2006, there were 52 instances of sanctions enacted against countries that had some pro-democratic or human rights content; 35 of these included provisions specifically aimed at addressing physical integrity rights violations.<sup>44</sup> The most notable of these sanctions were those organized against the South African apartheid regime in varying degrees from 1962-1994.<sup>45</sup> Though sanctions have often been the result

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<sup>41</sup> International Commission on Intervention and State Sovereignty (ICISS), "The Responsibility to Protect," (Ottawa, ON, Canada: International Development Research Centre, 2001).

<sup>42</sup> *2005 World Summit Outcome : resolution adopted by the General Assembly* UN General Assembly, 24 October 2005, A/RES/60/1, available at: <http://www.refworld.org/docid/44168a910.html> [accessed 16 June 2013]

<sup>43</sup> Convention on the Prevention and Punishment of the Crime of Genocide 78 U.N.T.S. 277 *entered into force* Jan. 12 1951, Arts. 5-6.

<sup>44</sup> Wendy Wong, *Internal Affairs: How the Structure of N.G.O.S Transforms Human Rights* (Ithaca and London: Cornell University Press, 2012), 44-46.

<sup>45</sup> On South Africa, see Audie Klotz, "Norms Reconstructing Interests: Global Racial Equality and Us Sanctions against South Africa," *International Organization* 49, no. 3 (1995).



of human rights lobbying, and they at times appeal to rights legal norms, they should be treated separately from human rights legal actions.<sup>46</sup> The reason is that studying the effect of sanctions as human rights laws would muddy the waters between material pressure and the impact of law itself.

Third, human rights law is not the same as shaming. Also known as information campaigning, ‘naming and shaming’ involves recording and publicizing examples of human rights violations committed by state governments in order to foment legitimacy crises. Amnesty International (AI) and Human Rights Watch (HRW) were early innovators of this method. These campaigns involve information sourcing, dissemination of reports, and direct action in the form of letter-writing, the goal of which is to “arouse moral consciousness” and attract enough attention to an abusive regime that it curtails its behavior.<sup>47</sup> Regularized annual and ‘urgent’ action reports are constructed by local human rights organizations, prominent transnational organizations, UN subsidiaries, media outlets, and sympathetic governmental actors like the US State Department Bureau of Democracy, Human Rights and Labor.<sup>48</sup> Shaming is disruptive because it exposes

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<sup>46</sup> Wong, *Internal Affairs: How the Structure of N.G.O.S Transforms Human Rights*. Aryeh Neier, who has served as Director of both the American Civil Liberties Union and Human Rights Watch, has openly admitted that he has lobbied on behalf of sanctions, arguing that they may over time have an effect on repressive practices. See Aryeh Neier, "Economic Sanctions and Human Rights," in *Realizing Human Rights: Moving from Inspiration to Impact*, ed. Samantha Power and Graham Allison (New York: St Martin's Press, 2000).

<sup>47</sup> Thomas Risse and Stephen Ropp, "International Human Rights Norms and Domestic Change," in *The Power of Human Rights: International Norms and Domestic Change*, ed. Thomas Risse, Stephen Ropp, and Kathryn Sikkink (Cambridge: Cambridge University Press, 1999), 244.

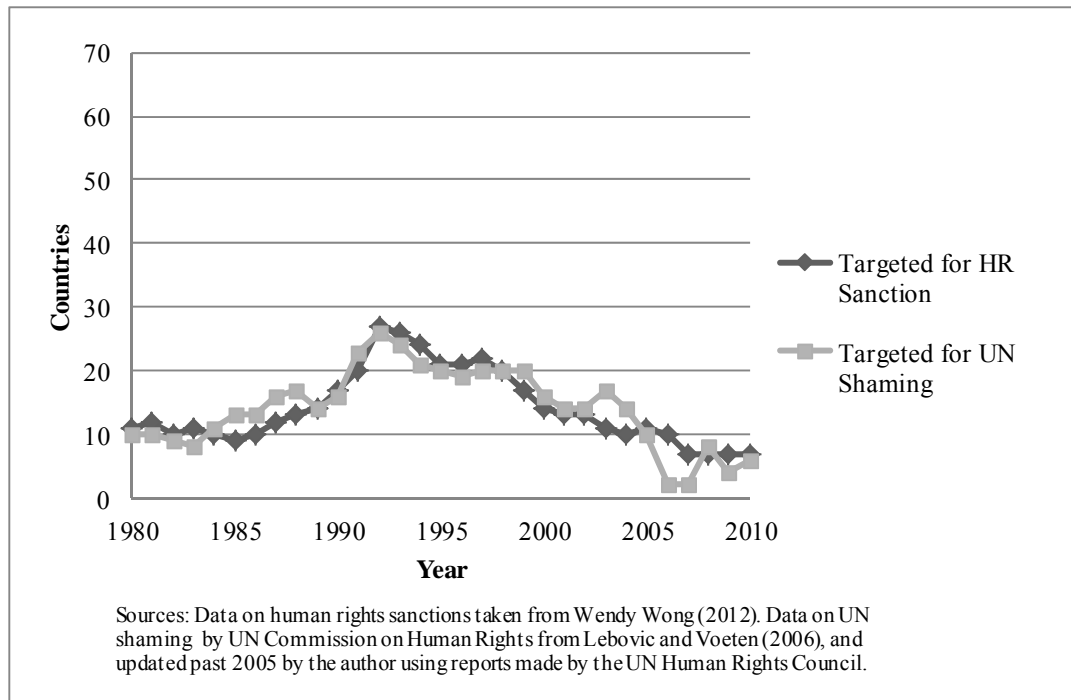
<sup>48</sup> One might also include human rights education and outreach as another form of HRLAS. One thing now very common among human rights organizations is to fund campaigns that educate people on their international human rights. Also prevalent, as in other ‘epistemic communities,’ is the sharing of knowledge and research in international conferences. While this is a crucial part of network-building in global civil society, it would take significant resources to map and study these connections; therefore, it is beyond the scope of this analysis.

citizen treatment that states prefer to keep secret; it is a way of disturbing practices of social control. Prior to the resurgence of international criminal law, shaming was understood to be the primary tactic of the rights movement, one that was effective for its ability to detail the extent to which various governments reneged on their promises. In this sense, shaming fed on hypocrisies that were largely hidden to the global public.<sup>49</sup> Figure 1.2 shows how sanctions and shaming (defined as the passage of public human rights resolutions by the United Nations<sup>50</sup>) have decreased over time. One should compare this to Figure 1.1, which depicts an overall increase in human rights legal actions through time.

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<sup>49</sup> David Rieff, "The Precarious Triumph of Human Rights," *The New York Times*, August 8 1999.

<sup>50</sup> This does not exhaust all types of shaming, but it is arguably the most prominent type. Emilie M. Hafner-Burton, "Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem," *International Organization* 62(2008); James H. Lebovic and Erik Voeten, "The Politics of Shame: The Condemnation of Human Rights Practices in the Unchr," *International Studies Quarterly* 50, no. 4 (2006).

**Figure 1.2. Sanctions and Shaming Over Time, 1980-2010**

Finally, human rights law and legal action is distinct from civil resistance in the name of rights. Civil resistance includes everything from information campaigning and publication of critical reports to public demonstrations including sit-ins, marches, boycotts, and non-violent protests. These are acts of dissent and “they are non-institutional and generally confrontational in nature.”<sup>51</sup> They are not equivalent to litigation, voting, lobbying, or interest-group formation because they operate outside the

<sup>51</sup> Erica Chenoweth and Maria Stephan, *Why Civil Resistance Works* (New York: Columbia University Press, 2011), 12.. See also John Rawls, “Civil Disobedience,” in *Law and Morality, Second Edition: Readings in Legal Philosophy*, ed. David Dyzenhaus and Arthur Ripstein (Toronto: University of Toronto Press, 2001 [1971]).

bounds of state-approved political process. Legal action and civil resistance, while not equivalent, exist in a close relationship. NGOs and domestic rights groups often engage in both protest behavior *and* litigation, criminal or otherwise. They devote resources to both types of activity. Moreover, as I will argue throughout this dissertation (specifically in Chs. 3, 4, and 5), rights-based dissent has had a part to play in the steady increase in human rights legal commitments and legal actions over time.

### 1.3. STATE OF KNOWLEDGE

While it has not always been the case, the recent move toward human rights legalization has turned the discussion of human rights advocacy primarily into a debate over the efficacy of international legal regulation. “When scholars and practitioners talk about ‘human rights,’” write Başak Çali and Saladin Meckled-Garcia critically, “they almost always mean ‘human rights law’ without qualification.”<sup>52</sup> Since 2000, an empirical literature has sprung up over the nature of state human rights legal commitments, international prosecutions, and patterns of domestic state compliance and enforcement of international law.<sup>53</sup> We are just beginning to learn about the impacts of human rights legal actions in the world. The empirical study of treaty ratification began with the germinal work of Oona Hathaway in 2002. Hathaway measured trends and tendencies among treaty-ratifying countries, finding overall that “treaty ratification is not infrequently associated with worse human rights ratings than otherwise expected.”<sup>54</sup> Since, dozens of studies have come out, generating similar findings based on

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<sup>52</sup> Çali and Meckled-Garcia, *The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Human Rights Law*.

<sup>53</sup> This arguably started with Oona Hathaway’s influential work. Hathaway, “Do Human Rights Treaties Make a Difference?.”

<sup>54</sup> *Ibid.*, 1940.

sophisticated techniques. Regarding international tribunals, partially due to the relative newness of the phenomenon, the systematic examination has only recently gotten underway<sup>55</sup>, though most studies that have so far been produced have largely pointed to the weakness, ineffectiveness, or counter-productive nature of these institutions. Finally, transitional justice and domestic human rights enforcement has been subject to a great deal of scrutiny, spawning two new journals specifically devoted to the topic.<sup>56</sup> We are witnessing the beginning of a “what works” movement in the study of transitional justice impact,<sup>57</sup> though according to a well-known report commissioned by the Canadian government, “for now...the empirical grounds to support strong claims about the effects of TJ [transitional justice] are lacking.”<sup>58</sup> Still, for the last decade a number of studies have emerged, and their findings have much to say about the potential impact of pursuing accountability for human rights violations. A good deal of this new research, much like historical attacks against human rights policy and action, is profoundly pessimistic.

#### **1.4. MY ARGUMENT**

The central contribution that I make in this dissertation is to dispel ‘pessimistic’ social scientific criticisms that hold rights legalism to be futile, perverse, or jeopardizing to progress. Against such accounts, I argue that human rights law often develops amidst, and contributes to, progressive political change, and it does so in demonstrable fashion.

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<sup>55</sup> James D. Meernik, Angela Nichols, and Kimi L. King, "The Impact of International Tribunals on Peace and Human Rights after Civil War," *International Studies Perspectives* 11(2010).

<sup>56</sup> See the *International Journal of Transitional Justice* and the *Transitional Justice Review*.

<sup>57</sup> McEvoy and Mallinder, "Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy," 434. “In the realm of transitional justice, there is the beginning of something akin to a ‘what works’ movement.”

<sup>58</sup> Oskar Thoms, James Ron, and Roland Paris, "The Effects of Transitional Justice Mechanisms: A Summary of Empirical Research Findings and Implications for Analysts and Practitioners " (University of Ottawa: Center for International Policy Studies, 2008), 13.

However, the power of human rights law does not necessarily lie in enforcement from ‘outside actors,’ who seek to regulate state leaders through direct coercion; instead, this body of law exerts an influence if and when it is grounded in domestic *constituent power*. I define and develop a theory of constituent power and legal institutions; this theory argues that rights-based social movements and the domestic enforcement of international law are mutually supportive. In countries where constituencies have pressured governments to provide a concerted legal response to human rights violations, a long-term payoff comes in the form of greater institutional protection of civil liberties, adherence to democratic governance, and less violent conflict. Moreover, these long-term payoffs outweigh the short-term negative consequences of human rights legal actions and campaigns. By making this argument, I am addressing two lacks in contemporary research that have often precluded us from ‘seeing’ the positive benefits of human rights law. The first is theoretical, and the second is methodological.

#### **1.4.1. Insufficient Theory of Legal Impact**

The theoretical problem with current research that I highlight is that it is missing a cogent account of legal impact that answers a series of very important questions. First, why would we ever expect law, especially human rights law, to have causal effects on social and political practices? Second, if human rights law does cause change, good or bad, then that means it has power, but how do we conceive of that power? And third, how is human rights law and legal action related to other types of collective action? Those who study international human rights law tend to draw, explicitly or implicitly, on either ‘realist’ or ‘ideational’ perspectives on the impact of law. In these accounts, international

law is either *powerless* because it lacks supra-national mechanisms enforcement, or it is *powerful* because it can persuade or socialize state leaders to change their thoughts and behaviors. I contend that neither of these perspectives adequately captures the ‘certain something’ about law itself that has an influence.

Moving toward an alternative theory of human rights law’s impact requires discovering why it is politically powerful, and this requires that we engage literature on rights-based social movements and institutions. When we think of human rights law as local rallying point or goal for domestic political actors, then we can move beyond realist-ideational argument and understand state control, dissent *and* human rights law as forces in meaningful interaction. Some scholarship has already examined the question of human rights law and social movement resistance as related processes, but it is split down the middle over which factor they deem to be more *fundamental*. Some understand activism to be stronger than, or prior to, the law. On this side are scholars like Sonia Cardenas, who argues that human rights pressure, in the form of shaming, sometimes results in state ratification of human rights legal treaties, as opposed to actual implementation and compliance with laws. For others who find promise in activism, engagement with legal institutions is an ‘establishment’ move that saps the strength of resistance campaigns and dilutes the search for social justice.<sup>59</sup> On the other side are those who see law as the cause of political action. Beth Simmons writes that “...treaties are potentially important resources in domestic mobilization because, under some

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<sup>59</sup> Elke Zuern, *The Politics of Necessity: Community Organizing and Democracy in South Africa*, ed. Steve J. Stern and Scott Straus, Critical Human Rights (Madison, WI: University of Wisconsin Press, 2011). Robert Meister, *After Evil: A Politics of Human Rights* (New York: Columbia University Press, 2011); Reem Abou-El-Fadl, "Beyond Conventional Transitional Justice: Egypt's 2011 Revolution and the Absence of Political Will," *International Journal of Transitional Justice* 6(2012).

conditions, *they raise the expected value of mobilizing to make a rights demand.*<sup>60</sup> In this account, social and political mobilization is the effect of efforts to make human rights legal. Because it can inspire action, the law is seen as catalytic, and in the service of justice. In the first account, law is ‘epiphenomenal’ or reducible to other political forces at play; in the second, law is causal. How do we integrate the findings?

To address the issue of law’s causal power, and to address justified concerns that law is ‘epiphenomenal,’ I adopt a process-oriented strategy that aims to explain both the domestic origins of human rights legal actions *and* the long-term impact of those actions.<sup>61</sup> Chapters 4 and 5 use mixed methods to show how human rights legal actions on the part of governments are frequently a response to demands from domestic constituencies that place a great deal of pressure on political leaders. These chapters can be read as a treatment of how rights legalism emerges in trying times of political change: when autocratic regimes are breaking down, and when democratic regimes are forming. In these contexts, we should not understand domestic human rights legal actions to be independent of political circumstances. At the same time, the relative strength of human rights legal mobilization, and the degree to which government institutionalize human rights guarantees, will have effects that last beyond original moments of institution-formation. I hope to show these effects in Chapters 6 and 7. Because these empirical chapters of my dissertation can be read sequentially, as various steps in a long process of institutional development and impact, and because I also use inferential statistics, one

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<sup>60</sup> Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*, 138.

<sup>61</sup> ‘Epiphenomenal’ is a term used to mean that the phenomenon being studied—in this case law and legalism—is simply the byproduct of other forces; therefore, it is not itself causal.



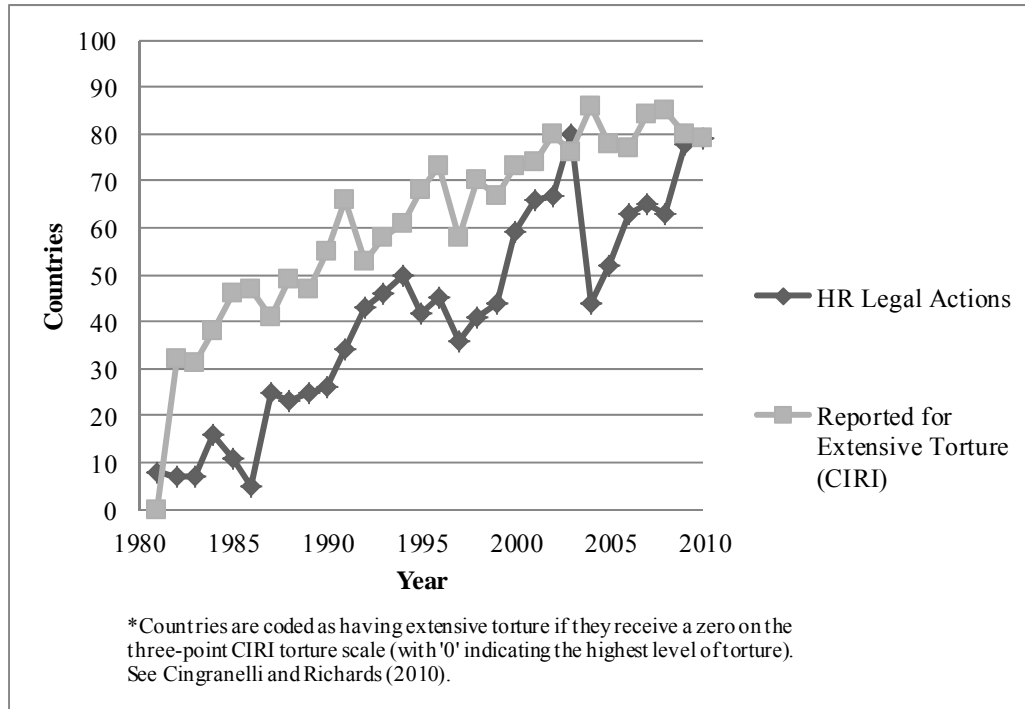
might see my approach something akin to ‘statistical historical institutionalism.’ I do not blend together different methods solely for the purpose of being novel; instead, I do so to address a serious methodological issue in the study of human rights law: short-termism.

#### **1.4.2. Short-Termism**

The second problem I aim to address is that studies of human rights law are increasingly trapped in the event, and by that I mean they do not typically zoom out to observe changes over the long term. With a few notable exceptions,<sup>62</sup> most new scholarship on human rights law is now focused on short-term correlations between various factors and indicators of government repression, while assuming that regime types are relatively fixed or unchanging. In general, studies of repressive violence have formed a kind of sub-literature in international relations and comparative politics. This literature has produced and theorized literally hundreds of informative relationships between individual variables and aggregate measures of torture, imprisonment, disappearance and extrajudicial killing. I refer to the studies in this field as the Correlates of Repression (COR) approach. Within the COR approach, attempts by advocates to stop or alter repression are frequently ill-fated or futile, and the efficacy of human rights legal action depends almost wholly on currently standing structures and institutions.

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<sup>62</sup> See contributions within Thomas Risse, Stephen Ropp, and Kathryn Sikkink, eds., *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999).

**Figure 1.3. Human Rights Legal Actions and Torture**

COR researchers would find Figure 1.3 to be telling. Figure 1.3 charts a count of countries with at least one human rights legal action by year alongside the trend in the number of countries reported as having used extensive torture. I choose to present data on torture because it is by far the most outlawed form of repressive violence under international human rights law. The right not to be subject to torture or cruel and unusual punishment is non-derogable; that means no matter the political situation—war, emergency or otherwise—individuals may not lawfully be tortured. One can clearly see that the number of countries reported as having used systematic torture has increased

steadily over the last three decades.<sup>63</sup> This seems to offer stark evidence that legalization and legal action is doing very little to prevent repressive violence, and comes as no surprise to political scientists. Put simply, as the human rights legal regime continues to develop, incidents of torture and other forms of state brutality carry on. This stylized fact has led to a number of theoretical postulations, detailed in Chapter 2.

But this picture is deceptive because it does not represent crucial variations in different countries over time. Few studies with the COR Approach account for the *importance* of time, or for the difference between the short and the long term. It is my argument that if one wants to see the impact of human rights legal action, one needs to look down the road at change over the long run in different domestic contexts. The time period most often studied by COR scholars, 1980-2010, is replete with examples of human rights campaigns that started amidst risks of backlash in the short term, but ended up producing a situation better than before. Examples that will be used in this dissertation include Chile, Indonesia, Argentina, South Korea, Nigeria, The Philippines, Guatemala, and Namibia. In these places, human rights legal actions have played a role in these shifting political tides, despite calls that they were unrealistic or dangerous in the short term.

## **1.5. PLAN OF THE DISSERTATION**

Chapter 2 will catalogue a bevy of studies on the impact of human rights law, and it will analyze the implications of theoretical and methodological gaps in the study of

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<sup>63</sup> I define ‘extensive’ as having reached the highest threshold on the Cingranelli-Richards (CIRI) three-point scale of measured torture. See David L. Cingranelli and David L. Richards, "The Cingranelli-Richards (Ciri) Human Rights Dataset," (<http://www.humanrightsdata.org>2010).

human rights legal impact. Specifically, I will argue that the literature misses contributions that human rights law makes to large-scale political transformations—like democratization, democratic stability, and conflict prevention, all of which address the root causes of repressive violence. The literature misses these relationships because it does not approach the development of human rights law and legal actions as a political process between domestic actors in conflict, but as a series of de-contextualized mechanisms that are meant ‘act on’ states and immediately cause change. This is a strange way of thinking because most human rights legal action comes from *within* states, and it evolves over time.

Chapter 3 draws on political theory to develop an account of human rights law and legal actions, rooted in conflict, that engages notions of power. Willingly or not, research has become fixated on argument over one kind of power relevant to human rights: regulation. A familiar refrain in this argument is over the enforcement or lack of enforcement imbued to international law. This ignores an entire other kind of power that is embodied in the human rights discourse: constituent power, or ‘people’ power. Human rights law has an impact when it is supported by a latent force: demands from people seeking change to government in line with human rights ideals. These groups I call human rights constituencies. Where law and enforcement advances at the state level, it is due to work by those dissenters who, through demonstration, resistance, and mobilization, will not allow human rights violations to go unaddressed.

After confronting issues with the literature in Chapter 2, and developing a long-term theory of constituent power and human rights law in Chapter 3, I present in Chapters

4-7 four innovative empirical studies that demonstrate the two theoretical contributions of this dissertation: the importance of separating between the short-term and long-term effects of human rights law, and the inseparable bond between human rights law and constituent power within states. In Chapter 4, I show that in autocratic contexts, legal commitments to human rights treaties are defensive in nature, a response to widespread dissatisfaction with the autocratic regime coming from human rights constituencies. Because autocratic weakening is associated with heightened repressive violence, treaty commitments made by dictators will often appear to be correlated with higher levels of repression in the short term. In the long term, however, treaty commitments will be associated with democratic regime change. In Chapter 5, I argue that within democratizing regimes, moves toward transitional justice often have their root in domestic dissent by human rights constituencies; where such constituencies are strong, there is likely to be a legal response to human rights abuses. Against theories that argue transitional justice comes from the outside, or that it is simply an imprudent choice that risks widespread backlash, I contend that holding rights violators accountable for previous abuses is a pragmatic move that balances various threats facing the new democratic government. Furthermore, transitional prosecutions of rights violators is associated with some short-term risks to the survival of young democracies, but these rarely if ever lead to autocratic reversion or war.

In Chapter 6, I turn to the long-term impact of transitional justice on repressive violence. I show that transitional justice strengthens ‘ordinary domestic enforcement’ of human rights. These developments mean a decrease in the overall repressive violence

practiced by state agents. But this change is not uniform; state agents commit more evasive acts of repression when faced with an internal threat. Still, even this evasiveness demonstrates that domestic human rights legal action poses costs to state agents, rather than being merely charades on the part of cynical governments. Finally, in Chapter 7, I turn to the context of civil war. I demonstrate that human rights prosecutions, or enforcement, at the domestic level does little to prevent the recurrence of violent civil war in the short term, but that it helps to produce sustainable peace in the long term. The reasoning behind this is that the regulation of state agents prevents grievances from emerging, and provides a release valve for those who have been wrong by agents of the state. The dissertation then closes with a conclusion that describes the lessons to be learned from a process-oriented approach to human rights law, and that provides a number of prescriptions for policy-makers.

**CHAPTER 2: RETHINKING HOW AND WHEN IN THE CURRENT APPROACH**<sup>64</sup>

In 1987, when the *Convention Against Torture* went into force, skeptics had already begun dashing hopes.<sup>65</sup> One journalist wrote dejectedly that despite the CAT's activation, "in most of the world's dungeons, it's business as usual."<sup>66</sup> Now almost a quarter of a century later, scholarly consensus has started to solidify around more scientific but equally negative assessments of human rights legal instruments like the CAT: they have little discernible, positive effect. In short, the treaties 'do' very little. If anything, human rights treaties 'work' in limited fashion, and only where needed least—in polities already making new inroads to democracy.<sup>67</sup> The implication is that states with preferences out of sync with the law, like dictatorships and those that commonly abuse human rights, cannot be bothered to change their practices. Because the mere existence of international human rights law is unable to generate a change in practices in these places, the cause of justice is 'lost,' its proponents left only with naïve hopes.<sup>68</sup>

Despite such charges, people wake up every day, and they organize protests and demonstrations, believing vehemently in the power of human rights norms. They lobby

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<sup>64</sup> This material is based upon work supported by the National Science Foundation under Grant No. 0961226.

<sup>65</sup> The full name is the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature, ratification, and accession by General Assembly Resolution 39/46 of 10 December 1984.

<sup>66</sup> Gwynne Dwyer. "Nations' foot-dragging blunts U.N. crusade against torture." *The Toronto Star*. July 19, 1987.

<sup>67</sup> Emilie M. Hafner-Burton and James Ron, "Seeing Double: Human Rights Impact through Qualitative and Quantitative Eyes," *World Politics* 61, no. 2 (2009).

<sup>68</sup> Oona A. Hathaway, "The International Law of Torture," in *Torture: Philosophical, Political and Legal Perspectives*, ed. Sanford Levinson (Oxford: Oxford University Press, 2004). "Between Power and Principle: An Integrated Theory of International Law," *University of Chicago Law Review* 72(2005). Hafner-Burton and Tsutsui, "Human Rights in a Globalizing World. The Paradox of Empty Promises; "Justice Lost! The Failure of International Human Rights Law to Matter Where Needed Most," *Journal of Peace Research* 44, no. 4 (2007).

governments, they push for declarations at the United Nations Human Rights Council, they perform site visits, they network, they write reports, they speak with the media, and they run local programs that educate others about their rights. Scholars who have performed research in the field often are inspired by activists' efforts, or the raw passion of justice-driven people with whom they speak. Yet the endeavor to demonstrate at a macro-level the positive and enduring impacts of human rights legal activism is something that remains elusive. Individual stories of success are often derided for not seeing the bigger picture, or for endorsing programmatic action that has severe negative externalities.<sup>69</sup> Critical legal studies scholar David Kennedy, for example, wonders in a provocative article whether human rights law is "more part of the problem than part of the solution."<sup>70</sup>

The number of negative empirical findings is ballooning, but the arguments made using these findings are relatively few, and patterned. The kinds of conclusions that are starting to emerge in the study of human rights law follow closely argumentative archetypes that Albert Hirschman identifies in his 1991 book *The Rhetoric of Reaction*. Hirschman's manuscript is about the tendency of social scientists to make three types of theses in response to progressive social movements: the futility thesis, the perversity thesis, and the jeopardy thesis. The futility thesis states simply that efforts to create change are doomed to failure, that they will not make a dent—and therefore should be abandoned. When applied to human rights law, this argument assumes the following

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<sup>69</sup> See, e.g. Snyder and Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice." Hafner-Burton and Ron, "Seeing Double: Human Rights Impact through Qualitative and Quantitative Eyes."

<sup>70</sup> Kennedy, "The International Human Rights Movement: Part of the Problem?," 101.



form: ‘Legalism can do very little to alter the practices of leaders facing security threats and other matters of state.’ The perversity and jeopardy theses rely heavily on the notion of unforeseen negative consequences, and assume the form of ‘The positive benefits of building a legal architecture for addressing the world’s worst political violence will be outweighed by the backlash it causes’ or ‘Over-pursuing progressive aims after initial successes will lead to a reversal of early achievements.’ These kinds of arguments are to be expected. After all, writes Hirschman, “One of the great insights of the science of society...is this observation that, because of imperfect foresight, human actions are apt to have unintended consequences of considerable scope. Reconnaissance and systematic description of such unintended consequences have ever since been a major assignment, if not the *raison d’etre*, of social science.”<sup>71</sup> Finding unexpected consequences of well-meaning action is in the DNA of social scientists. My concern is that some of these supposed negative consequences associated with human rights are overblown, result from the application of impossible-to-meet standards, or are simply the relic of misleading statistical analysis.

## 2.1. WHAT DO WE KNOW?

In Chapter 1, I introduced three types of human rights legal actions that have received a good deal of attention over the past 20 years. These include international prosecutions, treaty ratification, and transitional justice or domestic remedy for rights abuses. In the last decade, the study of HRLAs has merged together with research on the Correlates of Repression (COR) to adjudicate decades-old arguments about the power or

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<sup>71</sup> Albert O. Hirschman, *The Rhetoric of Reaction: Perversity, Futility, Jeopardy* (Cambridge, MA: The Belknap Press of Harvard University Press, 1991), 35.

weakness of international law. If anything, scholars are now starting to agree that the battle between ways of thinking about international law will be fought using large-scale empirical analyses and statistical inference. Less and less in International Relations do we read historical tone poems about first-order theoretical issues—whether law and institutions can constrain the use of force, or whether global society can evolve beyond balance-of-power politics toward a legal society.<sup>72</sup> Historically illustrated theory has now taken a backseat to hypothesis-testing focused primarily on *where* and *why* we might expect rational state leaders to act in accordance with rights norms, or to subvert legal norms for political gain. Formalized, empirical accounts are typically structured as the following: prior to legalization, state practices were X; after legalization, they had changed into Y. Thus, debates about issues like human rights law are more subtly being played out through the testing of second-order theories, using big data. The marriage between the study of human rights law and the COR approach has generated a good deal of criticism.

### 2.1.1. International Prosecutions

First, of the three HRLAs listed in Chapter 1, those that have received the most critical attention by far are international tribunals, likely due to their high profile and visibility. The ICTR, ICTY, and the ICC have borne the brunt of a veritable barrage. Moreover, the presumed desirability of agents pushing for human rights prosecutions would be challenged before these courts even got their legs under them. When international lawyers focused their efforts on ethnic cleansing in the Balkans, genocide in

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<sup>72</sup> See, e.g., Mearsheimer, "The False Promise of International Institutions; Jeffrey Legro and Andrew Moravcsik, "Is Anybody Still a Realist?," *ibid.*24, no. 2 (1999).

Rwanda, and the grisly civil war in Sierra Leone, critics scoffed at their efforts, arguing that they were getting in the way of peace-making. The first lead prosecutor of the International Criminal Tribunal for the Former Yugoslavia, Louise Arbour, was doggedly determined to produce indictments and convictions for the Serbian architects of the Srebrenica massacre, and she operated under the assumption that legal punishment would serve a deterrent function in Kosovo.<sup>73</sup> However, the court, which began operations in 1994, was criticized vociferously for not attending to the immediate realities of ongoing conflict, and for producing a ruinous and counter-productive intervention into the Balkans peace process, one that generated greater repressive violence.<sup>74</sup> William Schabas sees this as a fault of lawyers in general, whose theoretical supports for deterrence and punishment are “marked by amateurishness...driven more by intuition than anything else.”<sup>75</sup>

In general, international tribunals have been challenged for being too selective,<sup>76</sup> too costly,<sup>77</sup> too slow and inactive,<sup>78</sup> jurisprudentially illiberal,<sup>79</sup> too political,<sup>80</sup> too

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<sup>73</sup> Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals*, Ch.10, 280.

<sup>74</sup> See, e.g., Anonymous, "Human Rights in Peace Negotiations."

<sup>75</sup> Cited in McEvoy and Mallinder, "Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy," 424.

<sup>76</sup> Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge: Cambridge University Press, 2005).

<sup>77</sup> Jon Silverman, "Ten Years, \$900m, One Verdict: Does the Icc Cost Too Much," *BBC News Magazine*, 14 March 2012; Stuart Ford, "How Leadership in International Criminal Law Is Shifting from the U.S. To Europe and Asia: An Analysis of Spending on and Contributions to International Criminal Courts," *Saint Louis University Law Journal* 55(2010).

<sup>78</sup> Rene Blattman and Kirsten Bowman, "Achievements and Problems of the International Criminal Court," *Journal of International Criminal Justice* 6(2008).

<sup>79</sup> Darryl Robinson, "The Identity Crisis of International Criminal Law," *Leiden Journal of Internatinoal Law* 21(2008).

<sup>80</sup> Victor Peskin, "Caution and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan," *Human Rights Quarterly* 31(2009).

legalist,<sup>81</sup> and culturally ignorant.<sup>82</sup> For our purposes, though, two particular arguments stand out. The first is that international criminal justice is ineffective, or pointless (the futility thesis). As former US ambassador to the United Nations, and reputed *realpolitik* critic of multilateralism, John Bolton wrote in 2001, human rights proponents "...make a fundamental error in trying to transform international matters of power and force into matters of law."<sup>83</sup> He continued, "A weak and distant court will have no deterrent effect on the hard men like Pol Pot most likely to commit crimes against humanity. Why should anyone imagine that bewigged judges in The Hague will succeed where cold steel has failed?"<sup>84</sup> This kind of conservative suspicion has been supported to some degree by systematic empirical research in political science. James Meernik, et al., for example, find that the engagement of international courts in post-conflict zones does not decrease the risk that targeted states will again engage in violent conflict or repression.<sup>85</sup>

A second argument is that the presence of international courts, by posing a threat of impending accountability for abusive leaders, will lead these leaders to hunker down and stay in power through the use of increasingly violent methods (the perversity thesis). Removing the possibility of graceful exit, international criminal justice will cause *more*

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<sup>81</sup> Leslie Vinjamuri and Jack Snyder, "Advocacy and Scholarship in the Study of International War Crimes Tribunals and Transitional Justice," *Annual Review of Political Science* 7(2004).

<sup>82</sup> Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda : Justice without Lawyers*.

<sup>83</sup> John R. Bolton, "The Risks and Weaknesses of the International Criminal Court from America's Perspective," *Law and Contemporary Problems* 64, no. 1 (2001): 175.

<sup>84</sup> *Ibid.*, 176.

<sup>85</sup> Meernik, Nichols, and King, "The Impact of International Tribunals on Peace and Human Rights after Civil War."

repression and longer tenures for repressive leaders.<sup>86</sup> This has been disputed by other authors who argue that ICC intervention in certain situations can cause repressive leaders to lose allies, but the counter-productivity argument comes in other forms as well.<sup>87</sup> Another particularly innovative version, advanced by Jack Goldsmith, is that US opposition to the ICC will increase repression in countries worldwide because it discourages the US from engaging in productive human rights intervention.<sup>88</sup> Despite the increasing popularity of the backlash thesis, few efforts have been made to test these hypotheses systematically; instead, it usually remains at the level of assumption that leaders calculate their chances of being prosecuted by international courts, and accordingly, use this worry as impetus to stay in power through heightened violence.<sup>89</sup>

### 2.1.2. Treaty Ratification

The ratification and implementation of international human rights treaties is another form of legal action whose impact is the subject of wide debate among human rights empiricists. Some prominent scholars have found that human rights treaties encourage rights-based agenda-setting, lobbying, and use of the courts for addressing grievances.<sup>90</sup> Treaty-inspired mobilization, in combination with the presence of

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<sup>86</sup> Julian Ku and Jide Nzelibe, "Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?," *Washington University Law Quarterly* 84(2007); Adam Branch, "Uganda's Civil War and the Politics of Icc Intervention," *Ethics and International Affairs* 21, no. 2 (2007).

<sup>87</sup> Payam Akhavan, "Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism," *Human Rights Quarterly* 31(2009).

<sup>88</sup> Jack Goldsmith, "The Self-Defeating International Criminal Court," *University of Chicago Law Review* 70(2003).

<sup>89</sup> One reason for the lack of evidence is that less than 20 years have passed since the newest round of international criminal justice. It may be that more time will need to pass before these effects can be analyzed.

<sup>90</sup> Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*.

transnational allies, can also discourage governments from using repression.<sup>91</sup> The strongest statement in support of human rights treaty law is Beth Simmons' *Mobilizing For Human Rights*, which states that "...treaties are potentially important resources in domestic mobilization because, under some conditions, *they raise the expected value of mobilizing* to make a rights demand."<sup>92</sup> Simmons and others have discovered that human rights law is productive amongst those regimes transitioning to democracy.<sup>93</sup>

Some critics concede that ratifying treaties may matter in democratic contexts, but they suggest that pursuing legal methods will be futile in non-democratic contexts: "We have no argument with Simmons when it comes to young democracies," write James Hollyer and Peter Rosendorff, "we have focused our attention instead on autocracies."<sup>94</sup> In their formulation, the failure of international human rights law to bring change immediately to non-democratic contexts is taken as a failure of human rights *writ large*—or as proof positive that human rights advocates have little power. In the words of critic Emilie Hafner-Burton, this is evidence that "human rights fails to matter where needed most."<sup>95</sup> In this vein, a particularly blunt claim concerning international human rights law comes from Eric Posner, who writes: "We all have limited resources, and if the result of all this effort is that it becomes a few percentage points more likely that a state will improve human rights outcomes, we should ask whether our resources might be

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<sup>91</sup> Eric Neumayer, "Do International Human Rights Treaties Improve Respect for Human Rights?," *Journal of Conflict Resolution* 49, no. 6 (2005).

<sup>92</sup> Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*, 138.

<sup>93</sup> See also Geoff Dancy and Kathryn Sikkink, "Treaty Ratification and Human Rights Prosecutions: Toward a Transnational Theory," *NYU Journal of Law and International Politics* 44, no. 3 (2012).

<sup>94</sup> Emphasis mine. James R. Hollyer and B. Peter Rosendorff, "Do Human Rights Agreements Prolong the Tenure of Autocratic Ratifiers?," *NYU Journal of International Law and Politics* 44, no. 3 (2012): 792.

<sup>95</sup> Hafner-Burton and Tsutsui, "Justice Lost! The Failure of International Human Rights Law to Matter Where Needed Most."

better used in some other way—for example, through the provision of foreign aid.”<sup>96</sup> Skeptics are quick to remind those arguing on each side for or against human rights advocacy that law and justice have serious limitations, and produce marginal impacts at best; therefore, we should not be charmed by their false promise.<sup>97</sup>

But these critics do not stop there. They also argue that in autocratic contexts, human rights treaties not only have little use, but may in fact *assist* abusive leaders. Some argue that treaties like the *Convention Against Torture* are, paradoxically, associated with greater levels of torture, a fact which has been explained as the byproduct of abusive leaders who make cheap concessions to rights-inspired oppositions, while simultaneously ramping up repression against them.<sup>98</sup> Alarmingly, Hollyer and Rosendorff find that commitment to human rights agreements is historically associated with longer terms in office for tyrannical dictators.<sup>99</sup> The reason advanced by the authors is that the very dictators who make commitments to international human rights agreements are those that are most inclined to cling to power. Because the enforcement powers of the international rights regime are amassing, authoritarian leaders who ratify treaties will be less inclined to leave power for fear of being prosecuted for their abuses by outside actors.<sup>100</sup> For the authors, law leads to lengthier dictatorship, and the upshot is that “earnest attempts by the

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<sup>96</sup> Posner makes these comments in reference to Beth Simmons’ most recent book. Eric A Posner, “Some Skeptical Comments on Beth Simmons’ *Mobilizing for Human Rights*,” *NYU Journal of International Law and Politics* 44, no. 3 (2012): 831.

<sup>97</sup> Jack Goldsmith and Eric A Posner, *The Limits of International Law* (New York: Oxford University Press, 2005).

<sup>98</sup> Hafner-Burton and Tsutsui, “Human Rights in a Globalizing World. The Paradox of Empty Promises; James Raymond Vreeland, “Political Institutions and Human Rights: Why Dictatorships Enter into the United Nations Convention against Torture,” *International Organization* 62, no. 1 (2008); Hathaway, “Do Human Rights Treaties Make a Difference?.”

<sup>99</sup> Hollyer and Rosendorff, “Do Human Rights Agreements Prolong the Tenure of Autocratic Ratifiers?,” 810.

<sup>100</sup> *Ibid.*, 806-07. The authors call this the commitment effect.

developed world to bring the power of international law to bear against the worst violators of civil and physical rights may have *unanticipated consequences* that make the underlying problem worse.”<sup>101</sup>

One deficiency of studies linking the ratification of rights treaties to practice is that they have at times overstated the causal importance of treaty law, though it is not evident *how* such law in itself has an independent impact on domestic politics. Daniel Hill, for example, shows that when comparing countries matched on a series of characteristics, those that have ratified certain treaties (the experiment group) are more likely to use repression than those that have not ratified the same treaties (the control group).<sup>102</sup> But the author never specifies why this would be the case. The main contribution of his article is methodological; by introducing matching techniques, Hill is able to control for the possibility that the same countries that ratify are also those that exhibit certain repressive or non-repressive tendencies. Why, though, does law cause increased repression in his account? We do not know. There is simply no explanation that is given, and it is hard to divine one.

For their part, Hollyer and Rosendorff cannot show convincingly that treaties themselves have an impact on authoritarian politics; this is an argument that remains at a high level of abstraction. If any effect exists between treaties and impacts, it is more than likely attributable to already-existing preferences that would inspire government leaders both to ratify these treaties *and* protect or violate rights. The more convincing theories relating treaties to repression, or lack thereof, are those that pointedly deal with the

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<sup>101</sup> Ibid., 811.

<sup>102</sup> Hill, "Estimating the Effects of Human Rights Treaties on State Behavior."



political interactions that background these ratification decisions. In reality, state leaders accede to treaties because they are under some kind of political pressure from transnational networks<sup>103</sup>—or because new leaderships want the reputational benefits of asserting their agreement with global norms.<sup>104</sup> Rather than being considered an independent cause of change, ratification patterns may best be considered an *indicator* that a particular kind of political interaction is taking between domestic anti-reform groups and transnational pro-reform groups.

### 2.1.3. Transitional Justice and Domestic Enforcement

Transitional justice, or the pursuit of remedy for rights violations that were committed under previous regimes, and the domestic enforcement of human rights law through trial punishment are part of a broader global transformation toward the pursuit of individual accountability for political violence.<sup>105</sup> Still, whether this is a *positive* transformation remains an open question. What is the impact of human rights advocacy, legalization, and enforcement in democratizing countries? Early enthusiasm around democratic transitions in Post-Communist Europe, Latin America, and South Africa—and the opportunities this created for victims to receive recognition for decades of misdeeds they had endured—bred ethical thought concerning the moral imperatives of pursuing human rights in new democracies. But rights enforcement was *assumed* to be a good, rather than proven to be. The lion's share of early thinking around transitional

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<sup>103</sup> On treaty ratifications as a response to pressure, see Risse, Ropp, and Sikkink, *The Power of Human Rights: International Norms and Domestic Change*. And Jay Goodliffe et al., "Dependence Networks and the International Criminal Court," *International Studies Quarterly* 56, no. 1 (2012).

<sup>104</sup> On joining rights regimes as an effort to lock-in the preferences of new leaders, see Andrew Moravcsik, "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe," *International Organization* 54, no. 2 (2000).

<sup>105</sup> Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*.

justice relied on a view that justice was as an end in itself, a normative good of reckoning with former abuses. Analysis, then, focused on whether in certain contexts, it was *possible* to pursue accountability, combat impunity, promote legal integrity, and orient local responses toward victim reparations.<sup>106</sup> Political scientists interested in justice examined the ways in which the political willingness of various parties, or the balance of power between the outgoing regime and the incoming regime, condition the possibilities for addressing victim's demands for justice.

By the late 1990s, observers began to caution that transitional justice against former leaders and military personnel was unproven, and potentially a waste of energy and material. Jon Elster, for one, argued that pursuing backward-looking transitional justice policies might deplete crucial resources that might be more expended in the provision of other useful public goods, like post-conflict reconstruction, social welfare, and education.<sup>107</sup> If expensive transitional justice trades off with policies that could better address persistent inequalities that give rise to conflict and repression in the first place, then one might characterize the desire for remedy as much ado about nothing.<sup>108</sup> If it cannot really solve the structural problems with society, then it is unlikely to generate long-term change. This exact argument has been advanced by authors like Greg Grandin, an American historian of Latin America who served as a commissioner on Guatemala's post-conflict Commission of Historical Clarification. Grandin contends that transitional

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<sup>106</sup> A. James McAdams, ed. *Transitional Justice and the Rule of Law in New Democracies* (Notre Dame: University of Notre Dame Press, 1997); Neil J. Kritz, ed. *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Washington, D.C.: United States Institute of Peace, 1995).

<sup>107</sup> Jon Elster, "Introduction: A Framework for the Study of Transitional Justice", ed. Jon Elster, *Retribution and Reparations in the Transitions to Democracy* (Cambridge University Press, 2006).

<sup>108</sup> Peter J Boettke and Christopher J. Coyne, "Political Economy of Forgiveness," *Society* 44, no. 2 (2007).

justice efforts in Argentina, Chile, and Guatemala were attempts to “distill a violent past into a manageable, lucid story, one that portrays terror as an inversion of a democratic society,” rather than conducting an in-depth public examination of “...economic interests and collective movements, or the unequal distribution of power in society...”<sup>109</sup> David Mendeloff, writing in the language of political science, makes a similar argument—that the mechanisms linking transitional justice to positive social outcomes are not clearly specified, and largely unverified. The idea that truth-telling and retribution will “satisfy victims need for justice, ease their emotional and psychological suffering, and dampen their desire for vengeance, remains highly dubious.”<sup>110</sup> These studies, which catalogue the dimensions along which ‘doing something’ about human rights violations may ultimately prove futile, feed into the determination made by Oskar Thoms et al. in their exhaustive 2008 report on transitional justice: “existing knowledge is still very limited, and does not support strong claims.”<sup>111</sup>

Beyond these criticisms treating moves toward justice and enforcement as empty or ineffectual are those that treat accountability for rights crimes as perverse for endangering nascent democracies and risking greater repression amidst authoritarian reversal. The difficulties posed by poor institutionalization, weak state institutions, elite predation, and war-time orders in domestic contexts frayed the early enthusiasm around transitional justice, pushing many scholars to question on consequentialist grounds

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<sup>109</sup> Greg Grandin, "The Instruction of Great Catastrophe: Truth Commissions, National History, and State Formation in Argentina, Chile, and Guatemala," *The American Historical Review* 110, no. 1 (2005): 48.

<sup>110</sup> David Mendeloff, "Trauma and Vengeance: Assessing the Psychological and Emotional Effects of Post-Conflict Justice," *Human Rights Quarterly* 31(2009): 593.

<sup>111</sup> Thoms, Ron, and Paris, "The Effects of Transitional Justice Mechanisms: A Summary of Empirical Research Findings and Implications for Analysts and Practitioners " 22-3.

whether justice is counter-productive. What if, some wonder, the push for human rights enforcement does more harm than good by disrupting tenuous political compromises that sustain willingness to abide by new democratic procedures and curb repression?<sup>112</sup> Trying those guilty of leading violent and abusive forces into violation of human rights will only provoke loyalists that still see their own leaders and compatriots as heroes.<sup>113</sup> Thus, accountability for rights violators will only end up producing more violence. Critics of justice often argue that forgiving criminal violence through legal amnesties protecting former perpetrators of abuse is a ‘necessary evil’ for states trying to move forward after periods of widespread repression and political violence.<sup>114</sup> Only *after* amnesties calm the fears of former violent actors and smooth the transition can future moves toward rights enforcement be made.

Scholars sympathetic to the cause of human rights enforcement have done some work to address this criticism. Beth Simmons has argued that there is a close relationship between international human rights law and better protections against abuse in transitional democracies, which she theorizes is a result of legal mobilization that is

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<sup>112</sup> See Snyder and Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice." Philip Clark and Zachary D. Kaufman, *After Genocide : Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond* (New York: Columbia University Press, 2009). David Mendeloff, "Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm?," *International Studies Review* 6, no. 3 (2004); McEvoy and Mallinder, "Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy; Freeman, *Necessary Evils: Amnesties and the Search for Justice*; Helena Cobban, "Think Again: International Courts," *Foreign Policy*, no. March/April 2006 (2006); *Amnesty after Atrocity? Healing Nations after Genocide and War Crimes* (Boulder, CO: Paradigm Publishers, 2007). Harvey M. Weinstein and Eric Stover, eds., *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge: Cambridge University Press, 2004); Ku and Nzelibe, "Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?."

<sup>113</sup> Weinstein and Stover, *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*.

<sup>114</sup> Freeman, *Necessary Evils: Amnesties and the Search for Justice*.

inspired by the new tools that multilateral agreements provide.<sup>115</sup> Supportive research has tested this linkage and discovered that the ratification of treaties regulating physical integrity rights are positively associated with the initiation of prosecutions against former rights violators in new democracies.<sup>116</sup> Furthermore, Kathryn Sikkink has argued forcefully that these human rights trials are associated with less political repression. In her book, *The Justice Cascade*, and in an article with Hunjoon Kim, she argues that the conduct of trials, on average, has a deterrent effect on would-be agents of abuse, even when controlling for a number of other factors.<sup>117</sup>

#### 2.1.4. In Sum

Despite some positive findings, a good deal of skepticism directed toward human rights law remains among researchers within political science. Based on correlations with indicators of repression, we ought to conclude that HRLAs are not strongly associated with decreases in repression, save for occasionally in the limited context of democratic transition. This knowledge inspired Emilie Hafner-Burton and James Ron to write,

“By some calculations, just over fifty states have begun a democratic transition since the 1960s. This suggests that only one-quarter of the world’s countries *could have been helped* by international human rights laws and treaties....If correct, this suggests that international human rights laws are likely to help about 10 percent of the world’s current population.”<sup>118</sup>

Taken to its logical extension, as the authors do here, the prevailing model of impact ends up supporting the position that human rights law and legal action ‘does’ little good,

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<sup>115</sup> Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*.

<sup>116</sup> Dancy and Sikkink, "Treaty Ratification and Human Rights Prosecutions: Toward a Transnational Theory."

<sup>117</sup> Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*; Hunjoon Kim and Kathryn Sikkink, "Explaining the Deterrence Effect of Human Rights Prosecutions," *International Studies Quarterly* 54, no. 4 (2010).

<sup>118</sup> Hafner-Burton and Ron, "Seeing Double: Human Rights Impact through Qualitative and Quantitative Eyes," 372.

especially in difficult circumstances. The story is that structures and relatively unchanging domestic institutions are the most important determinants of repression and violence.

## 2.2. BLIND SPOTS

### 2.2.1. What Theory of Legal Impact?

What are the blind spots of this evolving Correlates of Repression (COR) approach to human rights law? The first blind spot I want to emphasize is that critical studies of human rights law coming out of this literature are at odds over the power of law. If law or legal action is futile, it simply means that it has no impact, or that it has *no power* to create change. But what then of the perversity thesis? If human rights law is counter-productive, it means that legal action is far worse than futile: it has a measurable, negative impact. In this formulation, international law has power, but that power is adverse. The futility perspective has a rich pedigree in the history of International Relations. IR ‘Realists’ of various stripes have contented themselves to demonstrate laws inability to overcome material strength or structural inequalities. The strong make the rules, and the weak abide by them. As human rights law has expanded, realists have been diligent in their attempt to relegate it to secondary status. As a school, IR Realism in many ways owes its historical legacy specifically to skepticism about international law and idealist legalism surrounding, first, the failed League of Nations experiment and, second, the slow-developing United Nations Charter.<sup>119</sup> Since the 1950s, traditional IR

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<sup>119</sup> E.H. Carr, *The Twenty Years' Crisis, 1919-1939* (New York: Harper & Row, 1964 [1939]); Hans Morgenthau, "Positivism, Functionalism, and International Law," *The American Journal of International Law* 34, no. 2 (1940).

realists have consistently derided human rights proponents for *being ignorant of power politics*.

Traditional IR Realists view law as solely an enterprise of command that comes from somewhere on high, and that acts on its subjects. With intellectual precedents in John Austin's 19<sup>th</sup> Century legal positivism, realist scholars tend to view law vertically as sovereign directives backed with the threat of sanction. This positivist perspective simultaneously qualifies what should count as law and judges law's efficacy. If law is not backed by force, it is not, properly speaking, law; and if law is not backed by force, it is not effective, or good. The argument is that because no super-sovereign authority exists to enforce international law on all state leaders, human rights law simply does not have the power of enforcement. To again quote the *realpolitik* words of John Bolton, human rights proponents "...make a fundamental error in trying to transform international matters of power and force into matters of law. Misunderstanding the appropriate roles of force, diplomacy, and power in the world is not just bad analysis, but bad and potentially dangerous policy."<sup>120</sup> This positivist position is stylized because it equates power with guns and force, and it ignores the idea that law might tap sources of power that lie outside of material strength. In the more artful words of Seyla Benhabib, "many critics of cosmopolitanism view the new international legal order as if..." it should be "a smooth 'command structure,' and they ignore the 'jurisgenerative power' of cosmopolitan norms."<sup>121</sup>

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<sup>120</sup> Bolton, "The Risks and Weaknesses of the International Criminal Court from America's Perspective," 175.

<sup>121</sup> Seyla Benhabib, "Claiming Rights across Borders: International Human Rights and Democratic Sovereignty," *American Political Science Review* 103, no. 4 (2009): 696.

The second critical perspective, that human rights law and legal action is *perversely* powerful, is a slight departure from traditional realism. It places rights-based legal activism in the realm of principled behavior, or reduces it to a logic of appropriateness rather than to a superior logic of consequences.<sup>122</sup> Attempts to foment change by targeting for trial individual architects of crimes against humanity, or incorporating international law into domestic constitutions, is often framed as unsophisticated, non-strategic, or plagued by a short-sighted understanding of diverse political systems. Even further, rights legal activism is at times classified by scholars as dangerous to the peaceful development of political institutions, or as a distressingly veiled form of political conflict known as ‘lawfare.’<sup>123</sup>

Among critics, perceptions have begun to evolve from the traditional realist treatment of human rights agency as lowly and insubstantial to a new realist view of human rights advocacy as a potential source of radicalism. This is perhaps evidence of a right-shift in post-Cold War American intellectual orientations toward security, and also a tacit recognition that human rights are a source of political action that must be treated with caution, even feared. As opposed to emancipatory criticisms from the left,<sup>124</sup> IR realists tend to support hierarchy, or at least argue for its inevitability in spite of

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<sup>122</sup> Snyder and Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice."

<sup>123</sup> Goldsmith and Posner, *The Limits of International Law*.

<sup>124</sup> For criticisms of human rights that focus on the lack of emancipatory promise, see Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton: Princeton University Press, 1995); "'The Most We Can Hope for...': Human Rights and the Politics of Fatalism," *South Atlantic Quarterly* 193, no. 2/3 (2004). Meister, *After Evil: A Politics of Human Rights*. Where IR criticize human rights for disrupting order, Marxists and critical theorists criticize it for *re-producing* that order.



highfaluting ideals. They dismiss human rights legalism for naively, and recklessly, attempting to upset the order of things.

According to this new perversity perspective, what makes human rights law powerful? The answer is that human rights law threatens legal accountability in a way that is risky or disruptive. In short, it inspires actors to pursue enforcement for human rights violators, which might invite a backlash from these selfsame rights violators. Surprisingly, this kind of perspective has a good deal in common with sympathetic liberal or ideational perspectives on the power of legal action. In such accounts, the development of international human rights law is powerful because it provides tools for ongoing legal enforcement, which constrains actions and ensures future rights protections.<sup>125</sup> But most accounts, critical or supportive, are rather ambivalent about the power of legality itself.

A good deal of new research now implicitly employs a *regulatory model*, where the power of international law lies in its ineffable ability to somehow provoke, or constrain, executives through the external application of rules, even when that application lacks the power to coerce. But how does law do this? Jeffrey Staton and Will Moore, in a thoughtful article, argue that regardless of whether the source of laws regulating government actors is domestic or international, compliance will by necessity rely on willing executives. That is, those leaders in charge of militaries and capable of employing force can choose not to comply with national laws, just as easily as they can choose not to comply with international laws.<sup>126</sup> So the obvious question is why would state leaders

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<sup>125</sup> See Dancy and Sikkink, "Treaty Ratification and Human Rights Prosecutions: Toward a Transnational Theory."

<sup>126</sup> Jeffrey K. Staton and Will H. Moore, "Judicial Power in Domestic Politics," *International Organization* 65, no. 3 (2011).

ever abide by *any* rules without being forced? For our purposes, why don't leaders just ignore human rights law? Why would they bother complying with it, or reacting violently against it? Why is it *not* futile and meaningless?

Analyses within the COR approach attempt to answer this question by converging on a “soft rationalist” blend that attempts to integrate individual interests and social pressure when explaining patterns of compliance.<sup>127</sup> Theories today emphasize the importance of both “norms and costs,” both “power and principle,” both “sincerity and strategy,” or “coercion, persuasion, and acculturation” all together around the question of human rights law.<sup>128</sup> That is, leaders balance what they want and what they believe when deciding whether to violate human rights legal rules. However, these analyses remain stuck with the assumptions of a problematic regulatory model: the body of international law exists wholly outside of the domestic realm, and sovereign leaders freely decide whether to abide by this external source of law. The main deficiency of a regulatory model, and thus most approaches to international human rights law, is that it ignores the *political* power of human rights law *within* states. Leaders pay attention to human rights rules because they have to—because people within their countries demand it. All in all, what is called for is a political theory that accounts for the origins of human rights legal actions within states, one that pays close attention to how they come to exert power over

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<sup>127</sup> For ‘soft rationalism,’ see Christian Davenport, “State Repression and Political Order,” *Annual Review of Political Science* 10, no. 1 (2007): 3.

<sup>128</sup> For quotations, see, in order, Jay Goodliffe and Darren G. Hawkins, “Explaining Commitment: States and the Convention against Torture,” *The Journal of Politics* 68, no. 2 (2006); Hathaway, “Between Power and Principle: An Integrated Theory of International Law; Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*; Ryan and Derek Jinks Goodman, “How to Influence States: Socialization and International Human Rights Law,” *Duke Law Journal* 54(2004).

time. The phrase ‘over time’ brings me to my next point regarding work on human rights law—the problem of short-termism.

### 2.2.2. Short-termism in COR

The second blind spot in the current literature I draw attention to is short-termism. The Correlates of Repression Approach favors analyses around single tactics of legal action and their short-term effects. In COR, different human rights legal actions might all be correlated with negative ‘outcomes’ in the immediate term. In this sense, COR examines the relationship between near-term changes in human rights commitments or legal mobilization and impacts that coincide within one- or two-year periods. If we want to know what causes what—for instance, if we want to know whether legal treaties *cause* repression—a common strategy would be to lag the sanctions variable one year ( $TREATY_{t-1}$ ) and study its influence on a repression variable in the next year ( $REPRESSION_t$ ).<sup>129</sup> This is what some have referred to as synchronic causality: assigning causality to the phenomena that are the most temporally proximate to the outcome in question. For example, scholars ask, what are the effects of the *Convention Against Torture* ratifications on physical integrity rights violations, or what effect do international trials have on rates of killing, or how does legal mobilization impact repression in the following year?<sup>130</sup>

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<sup>129</sup> For this example, which is embedded within a great piece of scholarship, see Reed Wood, "'A Hand Upon the Throat of the Nation': Economic Sanctions and State Repression, 1976-2001," *International Studies Quarterly* 52(2008).

<sup>130</sup> The full name of the treaty is the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Asking questions like these forces a researcher to make two heroic assumptions. The first assumption is that human rights legal actions should in principle have an *immediate*, or near immediate, impact on state repressive practices; if not, they are considered weak. Just as the expectation that an economic recovery program starting in one quarter could stimulate jobs in the next is unrealistic, the expectation that a trial taking place in Lima for former leaders in the Peruvian government might in a matter of one or two years prevent rural police forces in Ayacucho Province from torturing *campesinos* is also fanciful. The work of human rights legal advocates is, for lack of a better term, slow. Having an influence means painstaking fact-finding missions, the careful collection of data, lobbying governments, preparing legal cases, and building support through seminars and educational programs. All of these activities take time, and they are less visible than whiz-bang political events like coups, assassinations, protests, and armed attacks. Observers with a penchant for the extraordinary like journalists and media consumers will miss much of what goes on in the world of human rights law; likewise, academics looking at year-by-year snapshots between HRLAs and repressive violence will likely see mostly spurious correlations.

A second problematic assumption is that human rights legal actions should have an immediate *positive* impact on state repressive practices. Change is a process, one that commonly attracts backlash. That much is true. But should the risk of short-term backlash mean discrediting larger movements for change? Conflict between those conservatives who favor gradualism over radical change has been waged around nearly

progressive movement in history.<sup>131</sup> In the American Civil Rights Movement, the gradualist (or pragmatic) approach to desegregation was centered on the worry that violent backlash in the Southern states, a concern that found its way into debates among the Justices of the Supreme Court. The opposing argument was that the best way to end racial segregation was simply to abolish it wholesale because the potential for violence would never entirely subside.<sup>132</sup> So it is with human rights today. Those drawn to the promise of justice for cruel acts—the promise embodied in state obligations under international customary and treaty law—do not understand legal action to be radical or irresponsible. In fact, some justice-minded theorists understand legal efforts at redress to be *too* conservative because they promise true change only later, after the slow-moving process of legal jurisprudence has lurched forward.<sup>133</sup> Yet political scientists frequently treat human rights legal actions as dangerous, perverse, or negligent because of the risks they entail.

### **2.3. HOW DO WE DECREASE REPRESSION AND VIOLENCE?**

If according to political science, human rights law does not do the trick, what *does* decrease levels of repression and violence across countries? The COR approach places a premium on modeling the ‘decision to repress’ given certain structural or institutions configurations in which leaders find themselves.<sup>134</sup> This approach has taught us a series of key lessons about the sources of repression and state violence—including that

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<sup>131</sup> See Hirschman, *The Rhetoric of Reaction: Perversity, Futility, Jeopardy*.

<sup>132</sup> See Michael J Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford: Oxford University Press, 2004).

<sup>133</sup> See Meister, *After Evil: A Politics of Human Rights*.

<sup>134</sup> Davenport, "State Repression and Political Order."

inequality and poverty breeds repressive violence<sup>135</sup>—but three of these lessons are of crucial importance here. First, repressive force is linked to regime type. Democratic leaderships, or those that grant greater *political* rights to their subjects, are less lethal than autocracies, a finding that has come to be known as the domestic democratic peace.<sup>136</sup> Second, leaders facing increasing levels of dissent, violent or non-violent, are much more likely to repress their subjects in reaction to perceived threat.<sup>137</sup> This inspires escalation on the part of dissenters, and when this turns into civil war, repression becomes even more pronounced, taking the form of counter-insurgency campaigns that punish potential and actual civilian sympathizers.<sup>138</sup> Importantly, the escalatory effect of insurgency and political conflict on violent repression outweighs the positive effects of democratic constraints, meaning that even democratic leaders become more brutal when faced with

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<sup>135</sup> Steven C. Poe and Neal C. Tate, "Repression of Human Rights to Personal Integrity in the 1980s: A Global Analysis," *American Political Science Review* 88(1994); Todd Landman and Marco Larizza, "Inequality and Human Rights: Who Controls What, When, and How," *International Studies Quarterly* 53, no. 3 (2009).

<sup>136</sup> In this relationship, the degree to which the public participates decreases repression more so than does having more veto players in government. Christian Davenport, *State Repression and the Domestic Democratic Peace* (Cambridge: Cambridge University Press, 2007); Poe and Tate, "Repression of Human Rights to Personal Integrity in the 1980s: A Global Analysis"; Steven C. Poe, Neal C. Tate, and Linda Camp Keith, "Repression of the Human Right to Personal Integrity Revisited: A Global Crossnational Study Covering the Years 1976-1993," *International Studies Quarterly* 43, no. 2 (1999).

<sup>137</sup> Steven C. Poe, "The Decision to Repress: An Integrative Theoretical Approach to the Research on Human Rights and Repression," in *Understanding Human Rights Violations: New Systematic Studies*, ed. Sabine C. Carey and Steven C. Poe (Burlington, VT: Ashgate Publishing Company, 2004); Matthew Krain, *Repression & Accommodation in Post-Revolutionary States* (New York: St. Martin's Press, 2000).

<sup>138</sup> Davenport, *State Repression and the Domestic Democratic Peace*; Mark I. Lichbach, "Deterrence or Escalation? The Puzzle of Aggregate Studies of Repression and Dissent," *Journal of Conflict Resolution* 31(1987). Will H. Moore, "Repression and Dissent: Substitution, Context, and Timing," *American Journal of Political Science* 42, no. 3 (1998). Sabine C. Zanger, "A Global Analysis of the Effect of Political Regime Changes on Life Integrity Violations, 1977-93," *Journal of Peace Research* 37, no. 2 (2000); Sabine C. Carey, *Protest, Repression and Political Regimes: An Empirical Analysis of Latin America and Sub-Saharan Africa* (London and New York: Routledge, 2009); Jeff Goodwin, *No Other Way Out: States and Revolutionary Movements, 1945-1991* (Cambridge: Cambridge University Press 2001).

challenges to order.<sup>139</sup> Third, levels of repressive violence are relatively stable; that is, it does not change very quickly in any given country.<sup>140</sup> For this reason, models dealing with state brutality always find that previous levels of repression are a strong determinant of present and future levels of repression.<sup>141</sup> Thus, we have learned from COR a lot about stasis. Taken together, though, what do these findings suggest about *decreasing* physical integrity violations? In other words, how is repression *stopped*? How does COR answer the question, ‘what is to be done?’

### 2.3.1. What Is To Be Done?

Despite its sharp intellectual rigor and revelatory findings, the literature on peace and repression does not have easy, push-button answers to the ‘what is to be done’ question. It is interested in those features of polities that *consistently*, on average, inspire leaders to decide to repress. But this leaves much to be desired in terms of prescriptions for producing change. COR has very clear implications, the first being that democracy should be promoted to decrease repressive violence. Economists agree. They have suggested that democratization will inevitably decrease physical integrity violations because the costs providing more political rights is negatively (and monotonically) related to the cost of repression.<sup>142</sup> However, we know from other work in comparative

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<sup>139</sup> Davenport, *State Repression and the Domestic Democratic Peace*; Courtenay Ryals Conrad and Will H. Moore, "What Stops the Torture?," *American Journal of Political Science* 54, no. 2 (2010).

<sup>140</sup> Christian Davenport, "The Weight of the Past: Exploring Lagged Determinants of Political Repression," *Political Research Quarterly* 49(1995).

<sup>141</sup> Linda Camp Keith, *Political Repression* (Philadelphia, PA: University of Pennsylvania Press, 2012).

<sup>142</sup> Carles Boix, *Democracy and Redistribution* (Cambridge: Cambridge University Press 2003). In Boix’s framework, two actors vie for control of the state: the wealthy and the poor. The poor want to revolt against the prevailing, inequitable mode of governance so that they can expropriate the wealthy’s assets. Knowing this, the wealthy must decide whether to repress the rebellion of the poor, or to acquiesce. They make this decision on the basis of cost: “When the repression cost is low, the wealthy prefer to repress than to allow democratic elections. When the repression cost is high, the wealthy prefer simply to accept a democratic

politics and international security that it is not so easy. Democratization and repressive violence do not necessarily trade off.<sup>143</sup> Rather than automatically decreasing repression, regime change may *increase* the risk of escalating violence: democratization brings more political participation, breeding greater public dissent and contentious political action, which then invites repressive violence in the name of security. This is an empirical problem noticed by Samuel Huntington as early as 1968, and it has led critics to caution against introducing elections too early to institutionally weak societies, because they may usher in periods of internal unrest.<sup>144</sup> Thus, a paradox emerges. To decrease repression violence, it is imperative to bring more people into the political process, but doing so increases the risk that dissent will inspire repressive action to keep order.

Out of this paradox has surfaced a persistent conservative claim, that efforts to topple dictators, to punish perpetrators of war crimes, or to promote democratization for the purpose of decreasing state violence are just too dangerous. This is the reason that many commentators, including those who work on peace and democracy, were reticent to support initially the revolutionaries in Tunisia or Egypt in early 2011. Though these revolutions were inspired by calls for freedom, and though they were supported by local civil society organizations with partners in the global community, they were teetering on

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constitution” (32). If assets are mobile, meaning that they are not tied to land and thus cannot be easily confiscated and redistributed, then the cost of democratization will be lower. In this case, the elite will step aside, abandon repression, and allow for democracy to sweep through the polity.

<sup>143</sup> For more on the democratization-repression tradeoff theory, see Robert Dahl, *Polyarchy: Participation and Opposition* (New Haven, CT: Yale University Press, 1971), 15; Darren Acemoglu and James Robinson, *Economic Origins of Dictatorship and Democracy* (Cambridge: Cambridge University Press, 2006), 29.

<sup>144</sup> Samuel Huntington, *Political Order in Changing Societies* (New Haven, CT: Yale University Press, 1968); Jack Snyder, *From Voting to Violence: Democratization and Nationalist Conflicts, 1st Ed.* (New York: W.W. Norton, 2000); Roland Paris, *At War's End: Building Peace after Civil Conflict* (Cambridge: Cambridge University Press, 2004).



the cusp of the unknown: transitional periods pervaded by uncertainty.<sup>145</sup> William Dobson, a former editor of *Foreign Policy* magazine who is concerned with contemporary authoritarianism and democratic change, writes that "...any regime that has no compunction about jailing, torturing, or murdering its critics will not be easily ousted, so the thinking goes. When they consider all of these conditions, outsiders see little reason to believe anything will change soon. So when the revolution does come...most experts, academics, and policy makers write it off as a fluke, a rare or unique circumstance unlikely to be repeated."<sup>146</sup> Thus, the best prescription that many could offer was to proceed with great caution. Responding to US and Canadian calls for 'orderly transition' in Egypt one academic pithily responded that these governments "might have to choose between 'orderly' and a 'transition.'"<sup>147</sup> Worry over the dangers of political or post-conflict transition is a viable one, but it needs to be embedded in an understanding of a second issue that is often overlooked by work focused on the short term; that is, things often get worse before they get better.

### **2.3.2. Things Often Get Worse Before They Get Better**

When we examine data on repression, it is clear that it increases in the years immediately preceding democratization and civil war termination, and continues to remain high in the two- to three-year period following transitions. Figures 2.1 and 2.2 depict the cross-national concentration of repressive violence in the years leading up to

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<sup>145</sup> Benoit Challand, "The Counter-Power of Civil Society and the Emergence of a New Political Imaginary in the Arab World," *Constellations* 18, no. 3 (2011); Shadi Mokhtari, "The New Politics of Human Rights in the Middle East," *Foreign Policy* October 30, 2012.

<sup>146</sup> William J. Dobson, *The Dictator's Learning Curve: Inside the Global Battle for Democracy* (New York: Double Day, 2012), 10.

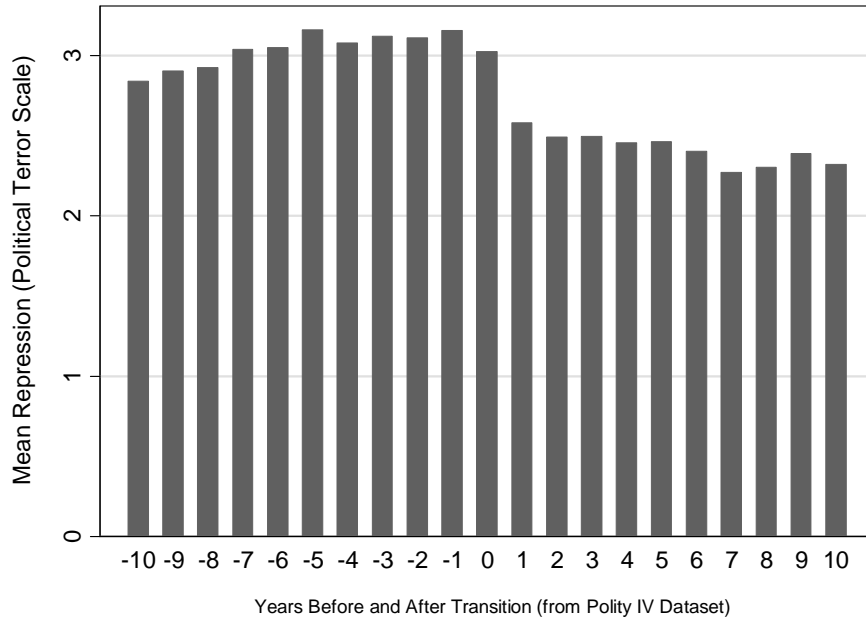
<sup>147</sup> See Roland Paris's comments in Campbell Clark, "Tories' Response to Egyptian Unrest Conservative on Every Front," *The Globe and Mail (Canada)* February 3, 2011.

and following democratization, and in the years leading up to and following civil war termination. These graphs show that there is a general increase in repressive violence preceding democratic transition and the end of civil wars. This ‘last throes’ effect is supported by literature on the logic of political survival. As authoritarian or repressive leaders begin to lose power, members of their winning coalitions, i.e. their supporters, begin to defect. If leaders lack the financial resources or political capital to buy back those supporters whom they have lost, their survival will increasingly depend on the neutralization of opposition groups.<sup>148</sup> If leaders cannot sustain power with incentives or persuasion, the thinking goes, they will resort to brute force to remain in office. At the same time, the noticeable weakening of the regime emboldens dissidents, who translate regime weakness into an opportunity finally to bring the government to its knees.

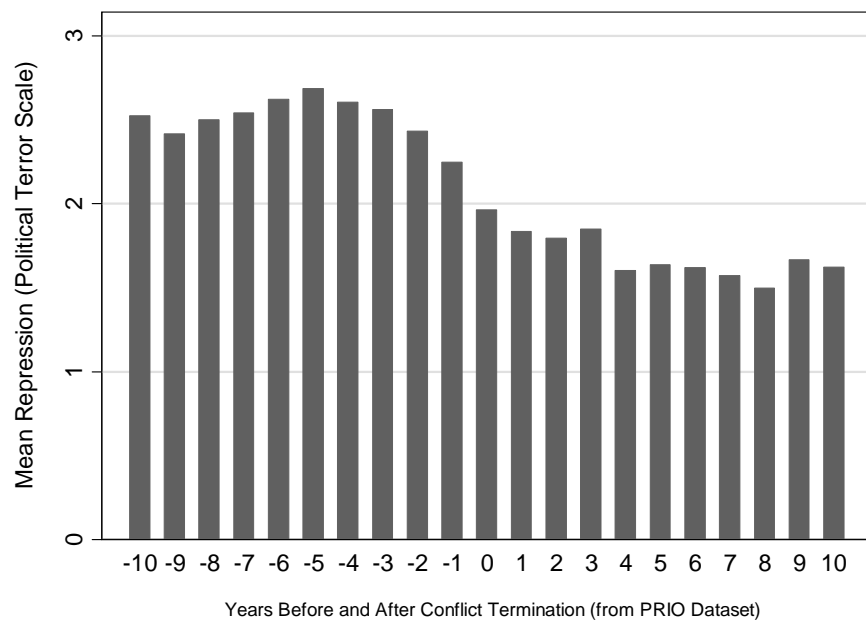
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<sup>148</sup> Bruce Bueno de Mesquita et al., "An Institutional Explanation of the Democratic Peace," *American Political Science Review* 93, no. 4 (1999); *The Logic of Political Survival* (Cambridge: MIT Press, 2003); Wood, "'A Hand Upon the Throat of the Nation': Economic Sanctions and State Repression, 1976-2001."

**Figure 2.1. Global Mean of Repression Before and After Democratization, 1980-2010**



**Figure 2.2. Global Mean of Repression Before and After Civil War, 1980-2010**



Therefore, impending regime failure creates a breeding ground for repression, dissent, and cycles of violence.

This creates a problematic for systematic scholarship: those actions that effectively weaken regimes, or challenge their political survival, will be correlated with greater repression and violence. Indeed, this appears to be a pattern that repeats itself in the empirical record. Take for example South Africa in the late 80s and early 90s. Table 2.1 shows a selection from the dataset I use for this dissertation. The selection shows seven variables over time in South Africa, starting in 1980 and ending in 2005. The light gray area represents the period during which the apartheid regime began to lose power as a result of transnational and domestic campaigning, until the year that repression experienced a drastic decrease following the democratic transition. The dark gray area is the year of transition to democracy. If one were to use common statistical techniques to study the relationship between the variables—including insurgency, dissent, sanctions, ratifications of international human rights treaties, transitional rights trials, and truth commissions—and repression, then the result would be that nearly all of these variables, save possibly truth commissions, are positively correlated with more repression. This would be the case even if the variables of interest were constructed using a number of lags. Furthermore, if we took a snapshot of the pre-transitional period (1989-1991), or of the immediate post-transitional period (1993-1996), we might draw inferences about the counter-productive consequences of actions taken during transition. Ostensibly, the lesson, if disembodied from the South African experience, would be that to prevent repression and violence in this case, one might seek to strengthen rather than weaken a

potentially unstable regime. As we know, this result would be misleading. The literature in comparative politics and international relations has demonstrated beyond a reasonable doubt that sanctions, along with local activism, were crucial for producing a change in what was a long-standing outpost of brutality in the world.<sup>149</sup> And we also know that efforts to deal with the past, while dissatisfying to many activists, had on balance a positive effect.

Not every transitional process results in progressive social change, and that is not my claim. One thinks here of Liberia, where post-conflict elections were held without a hitch in 1997, installing Charles Taylor's administration. Taylor then "immediately began to dismantle the democratic elements of the state and repressed his political rivals, which triggered a new round of fighting."<sup>150</sup> What the South African experience does show, and what will continue to bedevil studies that attempt to model changes amidst transition, is that repression and violence often get worse before they get better. Unless this issue is dealt with seriously, it might mean that systematic cross-national studies focused on synchronic causality will continue to overlook important dynamics attached to moments of democratic or post-conflict transition.

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<sup>149</sup> Klotz, "Norms Reconstructing Interests: Global Racial Equality and Us Sanctions against South Africa; Zuern, *The Politics of Necessity: Community Organizing and Democracy in South Africa*.

<sup>150</sup> Roland Paris, "Saving Liberal Peacebuilding," *Review of International Studies* 36, no. 2 (2010): 341.

**Table 2.1. A Glimpse at Changes in South Africa Over Time, 1980-2005**

Country	Year	Repression	Insurgency	Dissent	Sanctions	Treaty Ratifications	Transitional Trials	Truth Commission
South Africa	1980	Bad	Ongoing	Large Violent	Limited	None	None	None
South Africa	1981	Intermediate	Ongoing	Large Violent	Limited	None	None	None
South Africa	1982	Bad	Ongoing	Small Violent	Limited	None	None	None
South Africa	1983	Intermediate	Ongoing	Small Violent	Limited	None	None	None
South Africa	1984	Bad	Ongoing	Large Violent	Limited	None	None	None
South Africa	1985	Severe	Ongoing	Large Violent	Extensive	None	None	None
South Africa	1986	Most Severe	Ongoing	Large Violent	Extensive	None	None	None
South Africa	1987	Most Severe	Ongoing	Large Violent	Extensive	None	None	None
South Africa	1988	Most Severe	Ongoing	Large Violent	Extensive	None	None	None
South Africa	1989	Severe	None	Large Violent	Extensive	None	None	None
South Africa	1990	Severe	None	Large Violent	Extensive	None	None	Ongoing
South Africa	1991	Severe	None	Large Violent	Extensive	None	None	Ongoing
South Africa	1992	Severe	None	Large Violent	Extensive	None	Three	None
South Africa	1993	Most Severe	None	Large Violent	Extensive	None	None	None
South Africa	1994	Severe	None	Large Violent	Extensive	None	None	None
South Africa	1995	Severe	None	Peaceful	None	Two	Two	Ongoing
South Africa	1996	Severe	None	Small Violent	None	One	Two	Ongoing
South Africa	1997	Bad	None	Small Violent	None	None	None	Ongoing
South Africa	1998	Severe	None	None	None	Four	None	Ongoing
South Africa	1999	Bad	None	None	None	None	None	Ongoing
South Africa	2000	Intermediate	None	None	None	One	None	Ongoing
South Africa	2001	Bad	None	Peaceful	None	None	None	Ongoing
South Africa	2002	Bad	None	Peaceful	None	Two	None	None
South Africa	2003	Bad	None	None	None	One	None	None
South Africa	2004	Bad	None	None	None	None	One	None
South Africa	2005	Bad	None	None	None	One	None	None

#### 2.4. A PROCESS APPROACH

The difference between the short and long terms becomes a problem if we want to take history more seriously. What if, for example, legal advancements have a cumulative effect seven years down the road? What if the policies taken at the beginning of a democratic transition set the tone for policies to follow decades down the road? Or what

if, more importantly, all of the current trends in any country are explained by developments that happened at their moment of independence? All of these questions deal with the issue of temporality. “Temporality,” according to political scientist Tim Buthe, is “the defining characteristic of ‘historical’ explananda.” He continues, “Due to factors such as uneven growth, increasing or diminishing marginal utility, and accumulation or ratcheting effects...the passage of time makes it, *ceteris paribus*, more likely that institutions, actors themselves, and their preferences may change.”<sup>151</sup> If our interest is finding the particular configurations at any given moment that produce the most egregious violence within states—certainly an invaluable enterprise—then examining snapshots of time is perfectly reasonable; if our interest is in examining what processes *disrupt* cycles of violence, then most models that do not account for temporal effects will be disappointing.

Ultimately, two key lessons to be gleaned from COR research are in tension: 1) to interrupt cycles of repression and violence, democracy and peace must be promoted; and 2) promoting democracy and peace can actually be dangerous because, if such promotion weakens the strength of elites versus their challengers, it will lead to greater violence in the short term. These two contradictory lessons of COR research condition the ways that scholars perceive the consequences of change-oriented efforts. Whatever actions disturb violent orders can achieve progressive change over the long term; at the same time, such actions can lead to dire short-term results, i.e. increases in violence, by changing the

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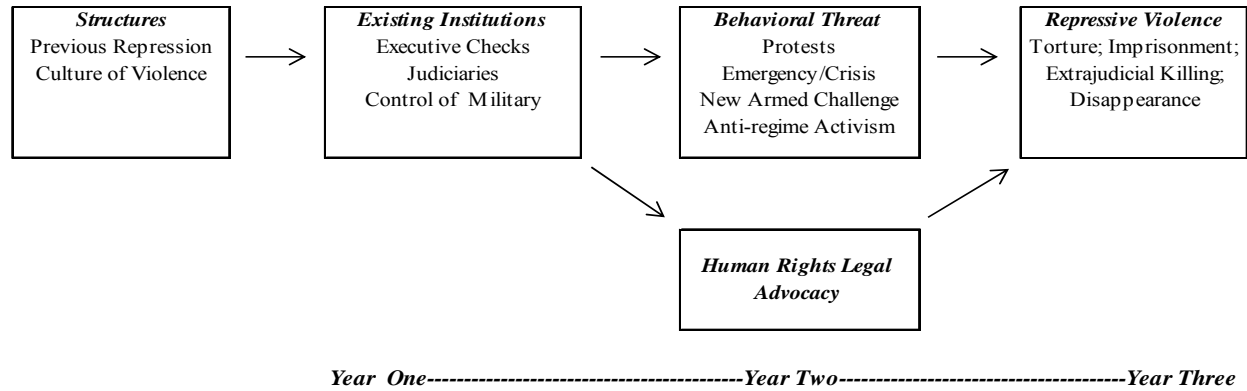
<sup>151</sup> Tim Buthe, "Taking Temporality Seriously: Modeling History and the Use of Narratives as Evidence," *American Political Science Review* 96, no. 3 (2002): 484.

rational calculations of leaders at risk of losing power. Here we can bring the discussion back to the impact of human rights law.

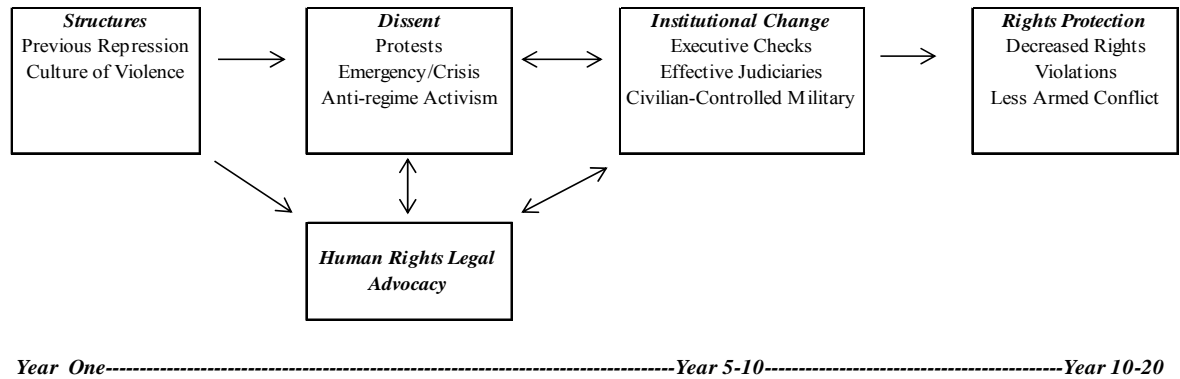
Visualized, the standard COR model of human rights law looks like Figure 2.5. In this conceptualization, the impact of human rights legal action is *conditioned* by domestic institutions, and insofar as HRLAs threaten authoritarian rulers by emboldening challengers, stirring up crises, or exacerbating political divisions, they will have counterproductive impacts. I propose a process-oriented framework, modeled in Figure 2.6. This model appears very similar to the standard COR model presented in Figure 2.5, but with one major difference: Human rights legal actions are not just conditioned by state institutions; they also directly *affect* or *constitute* those institutions. HRLAs can form a cycle with domestic institutions and political behavior, informing the trajectory of future state-society interactions over time.



**Figure 2.4. The Correlates of Repression Approach**



**Figure 2.5. Alternative 'Process' Approach**



## 2.5. CONCLUSION

This chapter has addressed the two concerns raised in the Introduction, that scholarship on human rights law does not have a sufficient theory of legal impact and that it is pervaded by short-termism. Resolving the debates that have arisen over the impact of human rights law, primarily in the terrain of short-term consequentialism, requires making a few necessary interventions, none of which involve abandoning statistical or correlational methods. Indeed, Chapters 4-7 will make extensive use of statistical methods to demonstrate larger processes of change around human rights law. First, we should separate between the short-term and long-term impacts of human rights law, and we should devote energy to constructing appropriate hypothesis-tests that handle issues of temporality. Second, we should embrace that human rights law and legal actions are embedded within larger historical processes specific to different countries. And third, we should develop a theory of that, for lack of a better term, *endogenizes* the power of international law to domestic politics. What this means is that rather we should try and consider how human rights law and enforcement do not simply ‘come from the outside’, but emerge from political interactions that happen within states. The next chapter constructs such a theory. There, I argue that human rights law can have an impact because it is rooted in constituent power—or the power of people to resist abusive government and seek a new order.

**CHAPTER 3: CONSTITUENT POWER, LEGAL INSTITUTIONS,  
AND LONG-TERM CHANGE**<sup>152</sup>

A key component of my argument is that sometimes it is hard to ‘see’ impacts of human rights law using current methods. A lesson from the Correlates of Repression (COR) is that democratization and conflict termination are crucial for halting repression in the world. I suggest that human rights law might be helping in each of those historical processes. Some visual evidence indicates that as HRLAs have increased, the number of democracies worldwide also began to increase, while civil wars declined (See Figure 3.1). I posit that a linkage exists between these long-term historical trends. HRLAs are helping to address the ‘root causes’ of repressive violence—autocracy, democratic instability, and civil war. To study this linkage, an alternative approach to impact of HRLAs is needed.

A ‘regulation’ frame misses important dynamics at play around human rights. Law is not solely a tool for regulating state leaders, and it does not rely only on coercive power from outside forces. Law is also a tool of internal resistance and renewal, which manifests in the slow transformation of domestic institutions.<sup>153</sup> Unpacking this big claim hinges on slightly altering the way that we have come to think about law and power, and the expectations that we have about the quickness of law’s impacts. How does human rights law exert a long-term impact on repression and insurgency? The answer is not that time itself is acting on behavior; it is simply that behavioral change, especially that which

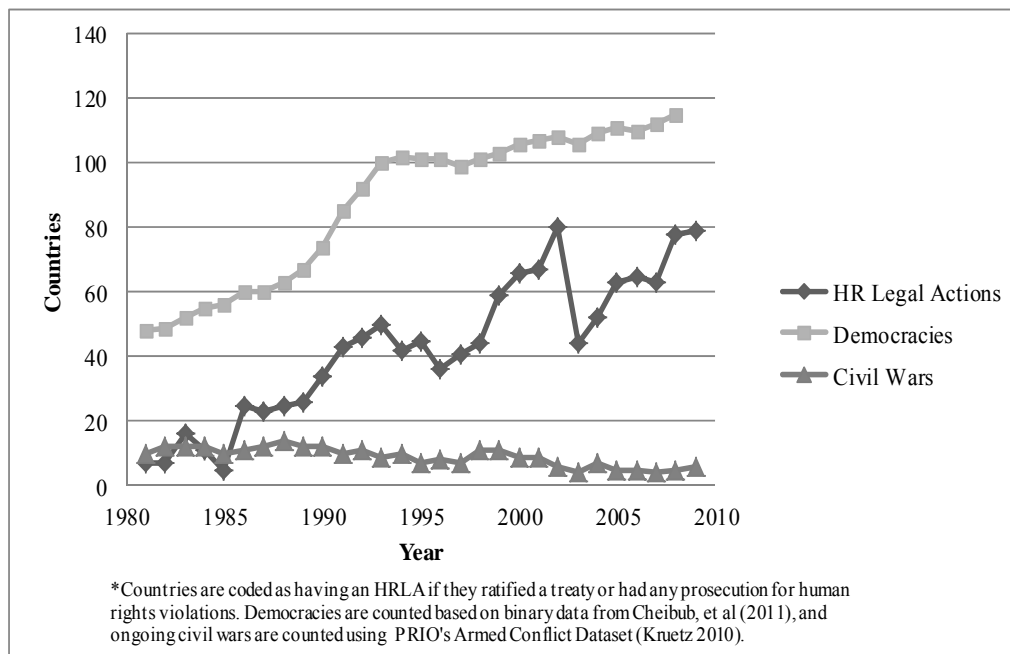
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<sup>152</sup> This material is based upon work supported by the National Science Foundation under Grant No. 0961226.

<sup>153</sup> For a general perspective on this, see Martha Finnemore and Stephen J. Toope, "Alternatives to 'Legalization': Richer Views of Law and Politics," *International Organization* 55, no. 3 (2001). For different types of power, see Michael Barnett and Raymond Duvall, "Power in International Politics," *ibid.* 59, no. 1 (2005).

collects to form into broader domestic institutions in various context, takes years to occur.

**Figure 3.1. HRLAs, Democracy, and Civil War**



In this this chapter, I theorize what is missing from accounts focused on the impact of state regulation. Specifically, I attempt to account for an additional way in which the human rights might exert power in domestic political environments beyond *regulating* or *persuading* state leaders based on international rules. I contend that human rights is a legal discourse that acquires power through dissenting domestic constituencies and their ever-present ability to resist governing authority (constituent power). In short, human rights legal action has its root in political conflict. The second aim of this chapter is to set forth the empirical expectations that will animate the remainder of this

dissertation. I argue that in autocratic contexts, human rights law is made powerful by constituents pushing for regime change. In democratic contexts, however, human rights law is most useful in its ability to create path-dependent legal institutions that reinforce democratic practices. In post-conflict settings, it is useful for both changing the nature of dissent and re-establishing rule of law.

### 3.1. HUMAN RIGHTS AND CONSTITUENT POWER

Human rights law attains power from a source other than coercion from ‘outside’ forces. That source is constituent power. *Constituent power* is a term used in democratic theory by those who attempt to explain the latent property of any body of law that gives it legitimacy. For many democratic theorists, law’s legitimacy resides in its claim to represent the people; therefore, the power of law is in the law’s subjects. As constitutional theorist Andreas Kalyvas writes, “Sovereignty as the command of a superior and the obedience of an inferior is one among various meanings to be proposed and acted on...An alternative definition...was understood not as the ultimate coercive force but instead as the power to found, to posit, to constitute, that is, as a constituting power.”<sup>154</sup> In this account, constituent power belongs to change-minded creators, who harbor a ‘dormant’ desire to change the prevailing order; thus, it is tied to a revolutionary impulse. However, constituent power avails itself in foundational moments, when the order is being reestablished. As such, “The constitutional order is the destiny of the

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<sup>154</sup> Andreas Kalyvas, "Popular Sovereignty, Democracy, and the Constituent Power," *Constellations* 12, no. 2 (2005): 225.

constituent power... The juridical character of the constituent sovereign, its true finality, is to fulfill the idea of law.”<sup>155</sup>

In most constitutional theory, law is not powerful because of its innate characteristics; instead, it finds its source of strength externally. In Kalyvas’s account, embodied in constitutions is a pent up volcanic power that is tied to resistance by the subjects of rule. For him, thinking this way bridges the gap between “politics as the field of factual power and the constitution as the realm of pure normativity.”<sup>156</sup> Law will always appear to support the Status Quo, while also serving as the subject for aspirational political change.<sup>157</sup> In this understanding, a potential tension exists between the constituent power and the constituted power, the former emerging out of resistance to order in the pursuit of justice and other first principles, and the latter representing whatever order is propped up by the current establishment. Once the law no longer resonates with its subjects, then a chasm emerges between constituent and constituted power.<sup>158</sup>

A line can be drawn from this theory of domestic constitutions to human rights law. This is because human rights politics arise in dire situations or moments of re-constitution, and as such, will always be attached to unfavorable social circumstances.<sup>159</sup>

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<sup>155</sup> Ibid., 233.

<sup>156</sup> Ibid., 230.

<sup>157</sup> See, e.g., Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2006).

<sup>158</sup> We should be mindful that this kind of thinking resonates in IR theory. Power-transition theorists have typically held that war erupts when ‘revisionist’ states recognize that the hegemon is no longer deserving of its place at the top of the world’s hierarchy, and thus seeks to challenge its system of order. See Robert Gilpin, *War and Change in World Politics* (Cambridge: Cambridge University Press, 1981).

<sup>159</sup> This is why Jack Donnelly calls rights claims “self-liquidating” and a choice of “last resort.” They are self-liquidating because people do not make rights claims when their rights are being protected. And they are last resort because people attempt other forms of change before going to the human rights option, which

A corollary to this is that human rights claims are by their nature oriented toward regime change, defined broadly as changes to domestic institutional rules or practices.<sup>160</sup> Human rights claims are used by domestic constituencies seeking change, and they are an expression of the constituent power of global citizens fighting unjust rule at home.<sup>161</sup> As Thomas Franck wrote in 1990, “What is rarely noted in all this systematic inquiry, however, is that obedience to national authority is currently most often challenged in connection with the dissenting citizen's sense of an *international* or supranational obligation, and in connection with some sense of an 'ought' which has its roots in a perceived *international* order. Anti-war, pro-environmental, pro-human rights campaigns throughout the world nowadays pose some of the most salient challenges to national governance and raise the most searching questions about why authority is, or is not, obeyed.”<sup>162</sup> In this sense, human rights are important precisely because they serve as a ready-made, rule-based blueprint of acceptable behaviors on the part of the state, or a marker against which specific state coercive practices can be gauged.

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implies the desire for wholesale modification of the current system. See Jack Donnelly, *Universal Human Rights in Theory and Practice*, 2nd ed. (Ithaca: Cornell University Press, 2003), 12-15.

<sup>160</sup> I defend this even in relation to appeals that are made to human rights within ‘normal’ political movements. The LGBT community in Europe and the United States has recently called out for a protection of their human rights, and this may not be seen as a call for regime change. However, it *is* a call for regime change, in some respects. Appealing to human rights, even for movements like LGBT, is a way of saying that the domestic constitution does not provide enough protection for individuals, and should thus be changed.

<sup>161</sup> This is similar to Hardt and Negri’s concept of the multitude. Hardt and Negri argue that “network power,’ a new form of sovereignty, is now emerging, and it includes as its primary elements, or nodes, the dominant nation-states along with supranational institutions, major capitalist corporations, and other powers.” This they define as Empire. The multitude, on the other hand, is a democratic counter-hegemony, “an open and expansive network in which all differences can be expressed freely and equally...composed of innumerable internal differences that can never be reduced to a unity or a single identity.” The multitude, contends Negri, can resist the global state of war and repression with democratic appeals, and through networked methods. Michael Hardt and Antonio Negri, *Multitude: War and Democracy in the Age of Empire* (New York: Penguin Press, 2004), xii-xiv.

<sup>162</sup> Thomas Franck, *The Power of Legitimacy among Nations* (Oxford: Oxford University Press, 1990), 12. Emphasis his.

It is not the case that human rights claimants always achieve success—or ever achieve all that they set out for. But they do have power, and it is the power attached to the desire to constitute a new order. What is the nature of this constituent power? Constituent power transcends military strength. On this point, it is worth quoting Hannah Arendt in length:

"Power is always, as we would say, a power potential and not an unchangeable, measurable, and reliable entity like force or strength. While strength is the natural quality of an individual in isolation, power springs up between men when they act together and vanishes the moment they disperse...Popular revolt against materially strong rulers... may engender an almost irresistible power even if it foregoes the use of violence in the face of materially vastly superior forces. To call this 'passive resistance' is certainly an ironic idea; it is one of the most active and efficient ways of action ever devised, because it cannot be countered by fighting, where there may be defeat or victory, but only by mass slaughter in which even the victor is defeated, cheated of his prize, since nobody can rule over dead men."<sup>163</sup>

This is perhaps why recent empirical work has demonstrated that civil resistance movements, many of which have been influenced by human rights ideals, are far more successful than violent movements.<sup>164</sup> And this is also why newer theoretical work, countering critiques centered on the powerlessness of human rights advocacy, is rediscovering the ‘insurrectional’ spirit of human rights-based collective action.<sup>165</sup>

Constituent power manifests itself in demonstration and political conflict, thereby relying on the presence of dissenting voices to compel begrudging concessions on the

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<sup>163</sup> Hannah Arendt, *The Human Condition, 2nd Edition* (Chicago: The University of Chicago Press, 1998 [1958]), 200.

<sup>164</sup> Chenoweth and Stephan, *Why Civil Resistance Works*.

<sup>165</sup> See Etienne Balibar, "On the Politics of Human Rights," *Constellations* 20, no. 1 (2013): 25. "...it is tempting to say that human rights are neither ‘moral’ nor ‘juridical,’ they are insurrectional, which means that they are political, but also that the political is not isolated from its “impolitical” side, the democratic invention of the institution beyond its given limitations.”



part of the standing government. In this way, constituent power might be categorized as both productive and compulsory: it is an attempt to get people to think of themselves as rights-bearers entitled to justice, and it is a direct attempt to get leaders to do what they otherwise would not.<sup>166</sup> This kind of power relies on the element of surprise, or disruption to the persistent order. Most importantly, the constituent power that gives human rights law its strength is not reliant on regulation from the outside; it is rooted in domestic resistance.

### 3.2. HUMAN RIGHTS CONSTITUENCIES

*Human rights constituencies* are the instruments of constituent power: they are groups that frame their dissent using human rights claims and methods that endorse peaceful political change or civil disobedience.<sup>167</sup> Human rights constituencies have formed in a number of different contexts, and they continue to emerge. This is a phenomenon that appears to be highly correlated is the drastic increase in the number of ‘human rights international nongovernmental organizations,’ or HRINGOs, over the last thirty years.<sup>168</sup> This collection of organizations coalesces into a hard-to-define entity which some have referred to as the ‘international human rights movement.’<sup>169</sup> Margaret Keck and Kathryn Sikkink have situated these constituencies in transnational advocacy networks, and Mary Kaldor finds them rooted in ‘global civil society’ or *societas*

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<sup>166</sup> Barnett and Duvall, "Power in International Politics."

<sup>167</sup> The connection between human rights and peace is theoretically and historically strong. For example, Quincy Wright, seen by many to be the father of contemporary ‘peace studies,’ was also a human rights proponent. See Quincy Wright, *Human Rights and the World Order* (New York: Commission to Study the Organization of Peace, 1943).

<sup>168</sup> Kiyoteru Tsutsui and Christine Min Wotipka, "Global Civil Society and the International Human Rights Movement: Citizen Participation in Human Rights International Nongovernmental Organizations," *Social Forces* 83, no. 2 (2004).

<sup>169</sup> Aryeh Neier, *The International Human Rights Movement: A History* (Princeton, NJ: Princeton University Press, 2012).

*civitas*.<sup>170</sup> We can say with some confidence that this global public, replete with transnational organizations, judicial communities, policy networks, and locally empowered actors has for years been taking shape since the 1970s.<sup>171</sup> However they are conceived, this movement is expressed in specific sites of struggle; it has been linked to legal mobilization, organized local protests, protests, strikes, and other forms of resistance within particular states.<sup>172</sup> It is only through the public struggle in localities that human rights can become politically salient.

What are examples of human rights constituencies? Argentina's human rights network, composed of street protestors like the Madres do la Plazo de Mayo, and legal organizations like Centro de Estudios Legales y Sociales (CELS) developed in the late 1970s to provide resistance to the very abusive military junta run known as *Proceso*. This network extended beyond Argentina into other countries of Latin America, whose citizens were struggling against a transnational counter-intelligence campaign known as Operation Condor.<sup>173</sup> The 1980s would witness the growth of human rights constituencies among the 'socialist camp' in Europe. Charter 77 in Czechoslovakia, Soviet dissidents, Democratic Opposition in Hungary, and *Solidarnosc* in Poland all reflexively used the language of human rights to challenge their local regimes.<sup>174</sup> This was spurred by the Helsinki Accords in 1975 between the United States and the Soviet Union.. Agents of

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<sup>170</sup> Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca, NY: Cornell University Press, 1998), 10; Mary Kaldor, *Global Civil Society: An Answer to War* (Cambridge: Polity Press, 2003), 10.

<sup>171</sup> On a global public, see Diane Stone, "Global Public Policy, Transnational Policy Communities, and Their Networks," *Policy Studies Journal* 36(2008). On the judicial side of this, see Anne-Marie Slaughter, *A New World Order* (Princeton, NJ: Princeton University Press, 2004).

<sup>172</sup> Murdie and Bhasin, "Aiding and Abetting: Human Rights Ingos and Domestic Protest."

<sup>173</sup> Patrice McSherry, "Tracking the Origins of a State Terror Network: Operation Condor," *Latin American Perspectives* 29, no. 1 (2002).

<sup>174</sup> Balibar, "On the Politics of Human Rights." Kaldor, *Global Civil Society: An Answer to War*, Ch.3.

change like Vaclav Havel recognized that human rights legalism held more promise as a strategy of dissent than did social revolution, precisely because it had a minimal ‘purity’ that escaped cruelties evident on each side of the left-right ideological spectrum.<sup>175</sup>

Human rights constituencies were not limited to Latin America and Europe in the late 1980s. In August 1988, the 26-year military government of Burma installed a civilian leader, Muang Muang, to quell concerns over economic problems in the country. Just one week later, tens of thousands of demonstrators, including monks, movie stars, doctors, and lawyers hit the streets of Rangoon, to protest the regime. The protestors demanded an end to the one-party system, the release of political prisoners, and responsibility for human rights violations.<sup>176</sup> This movement, we know, did not end in a democratic transition, nor did efforts on the part of human rights constituencies in China who faced off against tanks in Tiananmen Square in 1989. But these failures did not stop more constituencies from forming in the future, in difficult and seemingly hopeless contexts like post-war Serbia in 1998. In that year, a student resistance movement, *Otpor*, developed to oppose the strong-armed, non-democratic policies of Slobodan Milosevic. It started with 15 students at University of Belgrade, and within two years blossomed into a movement of 30,000 people and 126 chapters. An observer on the ground in 2000 said of *Otpor* “They keep reminding people of their dissatisfaction, the repression here—things people would rather not think about.”<sup>177</sup> Human rights constituencies have even spread to areas of the world traditionally thought to be impervious to constituent power. In the

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<sup>175</sup> See Moyn, *The Last Utopia: Human Rights in History*, 160-66.

<sup>176</sup> Chit Tun, "General Strike Erupts through Burma," *United Press International* August 22, 1988.

<sup>177</sup> Theresa Agovino, "Campus-Born Resistance Movement Fights for Freedom," *The Chronicle of Higher Education* August 4, 2000.

Middle East, in part continuing the momentum of the Arab Spring, domestic groups have started to call for human rights. To quote expert Shadi Mokhtari, “Domestically, where there have been uprisings (not facing crippling state violence) human rights have emerged at the fore of calls for political change and local human rights activists long relegated to the realm of the out-of-touch Westernized elite, have gained considerably in their legitimacy, numbers, and influence.”<sup>178</sup>

There are two important features of human rights constituencies. First, they help shape the tactics of dissent, and as their ranks swell, the overall nature of dissent in a country can change. As stated before, human rights constituencies prefer the use of non-violent methods. When people join the human rights movement, they are doing so at the expense of joining other terrorist or violent insurgent groups. At times, human rights proponents come *directly from* violent resistance organizations. Linnea Beatty, for one, has found that human rights organizations in Burma commonly work with individuals that used to be part of armed resistance to the military government.<sup>179</sup> Though it has not yet been proven, the development of human rights constituencies in a country should trade off, at least at the margins, with the use of violent methods of dissent.

A second feature of human rights constituencies is that they are not satisfied by the short-term lightening of repressive violence, or the release of a few political prisoners. They push for change that will last; they desire the *institutionalization* of rights. South African ‘civics’ made a strategic choice in the 1980s to expand their

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<sup>178</sup> Mokhtari, "The New Politics of Human Rights in the Middle East."

<sup>179</sup> Linnea Beatty, "Interrelation of Violent and Non-Violent Resistance in Burma," in *American Political Science Association* (Seattle, WA2011).

grievance-based protests into protests geared toward the achievement of political rights (democracy).<sup>180</sup> This same choice has been made more recently by activists in the Arab Spring. To again quote Middle East expert Shadi Mokhtari, “By the same token, pressure to end torture or release a particular detainee can provide only temporary respites from repression, which will inevitably reemerge because it is so vital to these leaders' survival. Thus, the Middle East's protesting populations and human rights activists are increasingly defining the right to political participation as not only a core human right, but one that in the authoritarian contexts in which they live, must precede others.”<sup>181</sup> This is constituent power: people acting in concert to try and create a new relational order, and to make it legal. Its power comes from sources other than material strength or brute force; it, according to Arendt, “springs up between men when they act together and vanishes the moment they disperse...”<sup>182</sup>

### 3.3. HUMAN RIGHTS CONSTITUENCIES AND LEGAL INSTITUTIONS

In struggling for regime change, or to interrupt cycles of repression and insurgency, human rights constituencies push for the legalization of human rights. The impulse is to freeze state obligations into law, in order to provide some guarantees for the future. This is the generation of legal institutions.<sup>183</sup> In general, institutions may be defined as “the rules of the game in a society or, more formally...the humanly devised

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<sup>180</sup> Zuern, *The Politics of Necessity: Community Organizing and Democracy in South Africa*.

<sup>181</sup> Mokhtari, "The New Politics of Human Rights in the Middle East."

<sup>182</sup> Arendt, *The Human Condition, 2nd Edition*, 200.

<sup>183</sup> Antonio Negri calls this ‘constituted power.’ Antonio Negri, *Insurgencies: Constituent Power and the Modern State*, trans. Maurizia Bosagli, vol. 15, Theory out of Bounds (Minneapolis: University of Minnesota Press, 2000).

constraints that shape human interaction.”<sup>184</sup> *Legal* institutions are the rules embodied in a constitution, courts, and further legal commitments made by the state, and they are supposed to constrain state actors and prevent unnecessary coercion well into the future. Douglass North and Barry Weingast, along with the other economic neo-institutionalists of the 1990s, saw in the history of constitutions an effort on the part of political subjects to prevent their rulers from taking their property. “For economic growth to occur, the sovereign or government must not merely establish the relevant set of rights, but must make a credible commitment to them.”<sup>185</sup> Because the state will always have greater coercive capabilities, compliance with rules is always a problem. Institutions are chosen to solve this problem. Constitutions establish legal power by providing a set of rules that are actionable, through which subjects can seek to address their grievances. A necessary addition to neo-institutionalist theory is the historical fact that legal institutions have evolved to assist in the provision of not only economic goods, like contract enforcement, but also political goods, like the provision of security and justice.

I theorize that dissenting human rights constituencies are instrumental in promoting both the acceptance of international legal rules and their continued institutional enforcement at the domestic level. Legal institutionalization is associated with organized human rights advocacy because the two produce each other within the same political space. Though she ultimately continues to use the language of causality,

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<sup>184</sup> Douglass C. North, *Institutions, Institutional Change, and Economic Performance* (New York: Cambridge University Press, 1990), 3.

<sup>185</sup> Douglass C. North and Barry R. Weingast, "Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England," *The Journal of Economic History* 49, no. 4 (1989): 816.

Beth Simmons reaches out to the co-productive nature of state legalization and rights claim-making:

If there is any international issue area in which socialization at the nonelite level is important, this should be it.... The law can be mobilized quite outside of the litigation processes...The law is mobilized whenever ‘a desire or want is translated into a demand as an assertion of one’s right.’ The making of claims based on legal rights is an especially effective way of asserting a political or social demand, because it grounds one’s claims in the legitimacy of law, on which most governments claim that their legitimacy is based.”<sup>186</sup>

In this account, it is not necessarily domestication of international law that causes human rights claims, or human rights claims that cause state commitments to international law. Instead, the two are co-constitutive, and the presence of each is evidence that a specific type of politics is ongoing at a particular time—a politics of legitimation based on international rights law. This politics includes both strategies of legitimation on the part of the state and resistance to those strategies. In this sense, we might see the ratification of particular rights treaties as a behavioral *indicator* that a politics of human rights legitimation is underway, rather than an institutional cause or effect of that politics.

The importance of a theory linking human rights constituencies to legalization is that it provides a key missing link between activism and long-term change. The purpose of institutions is to create “durability,” or to increase the chances that re-arrangements of power produced by “unusual events, such as political crisis or the end of war, becomes institutionalized and translated to future political power.”<sup>187</sup> Why do we observe different results from human rights dissent, or expressions of constituent power? The reason is that

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<sup>186</sup> Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*, 139.

<sup>187</sup> Acemoglu and Robinson, *Economic Origins of Dictatorship and Democracy*, 175.

there is variation in the extent to which human rights constituencies are able to generate, or join forces with, legal institutions—as exercised by capable and effective judiciaries. Comparative politics shows us that judiciaries have varying capabilities, and it is not easy to produce capability. But ‘building the rule of law’ requires mobilization, and legal power is produced by the combination of people seeking to pursue remedies through formal procedures and the inability of recalcitrant elites to block those formal procedures from operating.<sup>188</sup> These dimensions of legal empowerment become path dependent.

Path dependency means that the more institutions are appealed to, the more powerful or effective they become over time. According Margaret Levi, this “does not simply mean that ‘history matters’... Path dependence has to mean, if it is to mean anything, that once a country or region has started down a track, the costs of reversal are very high. There will be other choice points, but the entrenchments of certain institutional arrangements obstruct an easy reversal of the initial choice.<sup>189</sup> For theorists of path dependency, certain policy outcomes produced at ‘critical junctures’ will leave an indelible impression on future political activity in a country—those things already decided condition those things that follow. If human rights reforms are subject to path dependency, it means that prescribing the short-term circumvention of human rights demands might spell future circumvention. Likewise, it would mean that pursuit of rights reforms in critical moments would open up space for further reforms in the future. Does the direction of human rights legal action and reform create path dependency in certain

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<sup>188</sup> Jennifer A Widner, *Building the Rule of Law: Francis Nyalali and the Road to Judicial Independence in Africa* (New York: W.W. Norton, 2001).

<sup>189</sup> Margaret Levi, "A Model, a Method, and a Map: Rational Choice in Comparative and Historical Perspective," in *Comparative Politics: Rationality, Culture, and Structure*, ed. Mark I. Lichbach and Alan S. Zuckerman (Cambridge: Cambridge University Press, 1992), 28.



countries? So far, this is a question that has not been answered by the literature that deals with human rights legal impact, neither from those sympathetic to or those critical of human rights advocacy. In the next section, I apply my theory of rights-based change to different socio-political contexts, making use of the notions of constituent power, legal institutionalization, and path dependency.

### **3.4. HUMAN RIGHTS: CONTEXT AND LONG-TERM CHANGE**

With the above theoretical framework in mind, we might start to produce untested empirical expectations concerning the role of human rights advocacy in creating change in different political contexts. In Chapter 2, I argued that studies of human rights impact were insensitive to larger changes that human rights advocacy helps to bring about. Part of the reason for this is that the literature does not theorize the difference between the short and the long term. When we zoom into the level of the event, we are looking at short-term, precipitant causes. When Burmese citizens protest for the release of political prisoners, this almost always leads to a brutal crackdown from the military. In this sense, human rights action is perilous and misguided. Another reason is that the literature erects the expectation that legalization *should* have uniform effects in all contexts. This is an unreasonable expectation. Applying the notions of constituent power and legal institutionalization, I theorize the short- and long-term impacts of human rights advocacy in three contexts: under autocratic states, in democratizing countries, and in post-conflict situations.

### 3.4.1. Autocratic Contexts

Autocracy is a catch-all term meant to represent regimes that are non-democratic. As such, it embodies a number of types of regime, including totalitarian states (North Korea), monarchies (Jordan), military dictatorships (Burma), and single-party personalist regimes (Zimbabwe). Historically, the difference between totalitarian (despotic) states and dictatorships is that the former are oriented toward the implementation of an ideology that will shape all society, where the latter were seen more as a temporary mode of rule to correct the path of the country.<sup>190</sup> *De facto*, one of the features that is shared by these various types of autocracy is the desire for leaders to remain in power for as long as possible, so that their political program might be implemented, or so that they maximize the rents as possible during their time in charge. This is a phenomenon referred to as political survival. Autocratic leaders have been known to use whatever means at their disposal in order to lengthen their survival in office: they pay off coteries of supporters, they severely repress opposition, and they go to great lengths to maintain a veneer of political legitimacy through institutions. Jennifer Gandhi, for example, has shown that dictators ‘use’ seemingly democratic institutions—like political parties and legislatures—

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<sup>190</sup> See Hannah Arendt, *Responsibility and Judgment* (New York: Schocken Books, 2003 [1966]), 32-33. "Totalitarian forms of government and dictatorships in the usual sense are not the same, and most of what I have to say applies to totalitarianism. Dictatorship in the old Roman sense of the word was devised and has remained an emergency measure of constitutional, lawful government, strictly limited in time and power; we still know it well enough as the state of emergency or of martial law proclaimed in disaster areas or in time of war. We furthermore know modern dictatorships as new forms of government, where either the military seize power, abolish civilian government, and deprive the citizens of their political rights and liberties, or where one party seizes the state apparatus at the expense of all other parties and hence of all organized political opposition. Both types spell the end of political freedom, but private life and nonpolitical activity are not necessarily touched. It is true that these regimes usually persecute political opponents with great ruthlessness and they certainly are very far from being constitutional forms of government in the sense that we have come to understand them--no constitutional government is possible without provisions being made for the rights of an opposition--but they are not criminal in the common sense of the word either."

to maintain power for longer.<sup>191</sup> Leaders with ample resources will use parties to channel payments for loyalty, and when those resources wane, they will resort to imprisoning or killing members of the opposition.<sup>192</sup>

In such contexts, law and courts are also employed to maintain survival. Autocrats have been known to surrender some modicum of power to courts to fulfill a couple of functions that are useful to their continued rule: first, courts can be used to ‘launder blame’ from unpopular decisions that autocrats make; second, courts are used to implement rulings against opposition members and dissenters.<sup>193</sup> In March 2013, for example, Saudi Arabia jailed the two founders of the Saudi Civil and Political Rights Association (ACPRA), Mohammed Fahd al-Qahtani and Abdullah Hamad, for ‘sedition and providing foreign media with false information.’ An economist, Qahtani is a leading member of the Saudi human rights constituency, and in 2012 he stated publicly that “Our goal is to reach a situation where the regime is bound by its own law. It is a duty incumbent on us to educate people and push them forward.”<sup>194</sup> For this, he was jailed for 10 years on trumped up charges. As this example demonstrates, in autocratic contexts legal institutions commonly do little more than reinforce the political position of those in charge.

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<sup>191</sup> Jennifer Gandhi, *Political Institutions under Dictatorship* (Cambridge: Cambridge University Press, 2008); Jennifer Gandhi and Adam Przeworski, "Authoritarian Institutions and the Survival of Autocrats," *Comparative Political Studies* 40, no. 11 (2007).

<sup>192</sup> Bruce Bueno de Mesquita et al., "Policy Failure and Political Survival: The Contribution of Political Institutions," *Journal of Conflict Resolution* 43, no. 2 (1999).

<sup>193</sup> Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt* (Cambridge: Cambridge University Press, 2007).

<sup>194</sup> Laura Edwins, "Two Prominent Saudi Human Rights Activists Receive 10 Years in Jail," *Christian Science Monitor* March 10, 2013.

How do constituent power and legal institutions interact in autocracies? Because legal institutions under autocracy are merely an extension of the executive's will, they are strictly speaking without legal power, and instead are a purer expression of coercive power. This is another way of saying that law in autocracies is not path dependent because it does not have an inertia that is distinct from the whims of the executive. We should not, then, expect legal enforcement in such situations to develop an integrity, or continuity, that translates into more robust practices in the future. While dangerous, the only effectual human rights action in autocratic contexts will be sustained public dissent from activists that want to reform the political order (expressions of constituent power). Autocratic state agents that participate in human rights legalization (the ratification of human rights treaties) are doing so to appease pressure from human rights constituencies. As Risse and Sikkink argue, "Leaders of authoritarian states (like many political scientists) tend to believe that 'talk is cheap' and do not understand the degree to which they can become 'entrapped' in their own rhetoric."<sup>195</sup>

While we have been shown that authoritarian ratification leads to worsening human rights practices in the short term—because it represents the simultaneous demand for rights on the part of subjects and the denial of rights to those subjects through state repression—we do not know from systematic research whether appeals to rights law are linked to more long-term changes to relational order within these countries. Autocratic states that ratify human rights treaties are, in spite of their non-democratic practices,

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<sup>195</sup> Thomas Risse and Kathryn Sikkink, "The Socialization of International Human Rights Norms into Domestic Practices: Introduction," in *The Power of Human Rights: International Norms and Domestic Change*, ed. Thomas Risse, Stephen Ropp, and Kathryn Sikkink (Cambridge, MA: Cambridge University Press, 1999), 27.

making public promises to respect legal rules protecting people's rights. In essence, by making these promises, autocratic leaders are making overtures toward a form of constituent power that is gaining momentum in their countries. We might, then, expect autocratic rights legalization to be associated with regime change. This is a proposition tested in Chapter 4.

### 3.4.2. Democratizing Contexts

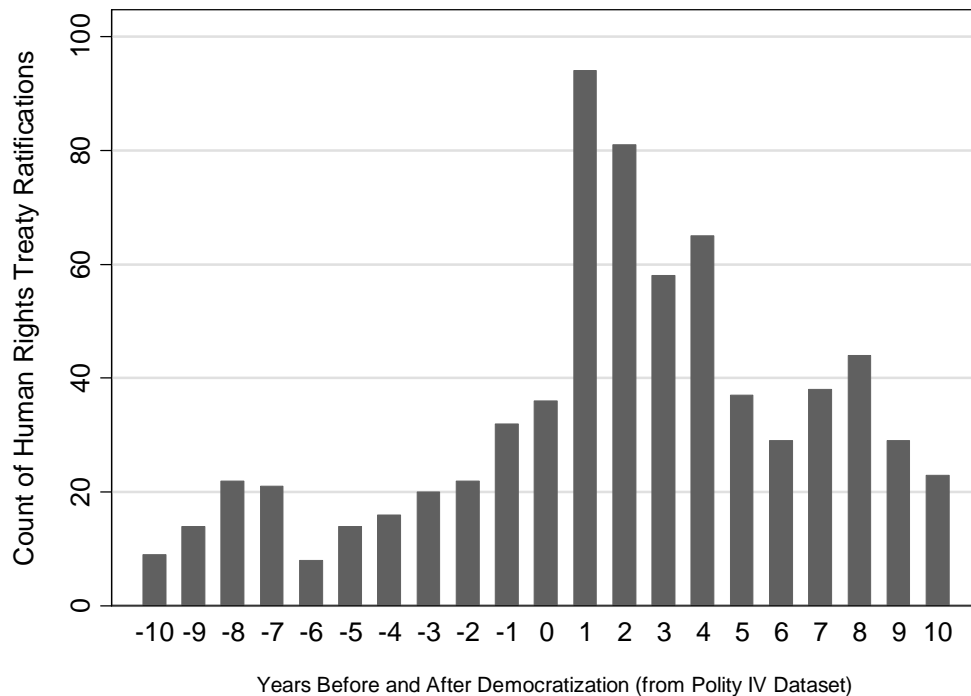
As I argued in Chapter 2, the context of democratization offers the hope that changes will be made to previous patterns of repression and violent dissent. Democratization is usually marked by changes to the domestic constitution in favor of expanding political and civil rights, and as such, it represents an achievement for those forces exerting constituent power that sought the development of a new legal order. For this reason, democratic transitions are often marked by, or seen as the result, of 'revolution.' Among those that have names, examples include the Carnation Revolution in Portugal (1974), the Singing Revolution in Estonia (1989), the Velvet Revolution in Czechoslovakia (1989), the Rose Revolution in Georgia (2003), the Orange Revolution in Ukraine (2001), and the Tulip Revolution in Kyrgyzstan (2005). The changes brought by democratization are not automatically positive, or set in stone. Democratizing environments are delicate, and careful political balances must be achieved in order to move toward democratic consolidation. This is why the process of democratization has been treated as a 'craft' that must be carefully managed and negotiated.<sup>196</sup>

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<sup>196</sup> Giuseppe Di Palma, *To Craft Democracies: An Essay on Democratic Transitions* (Berkeley: University of California Press, 1990).

How do human rights constituent power and legal institutions interact in this environment? Though democratization represents on some level the success of constituent power in producing change, it does not mean the extinguishing of constituent power. Transitions can at times become protracted because of the outpouring of demands that come from those seeking to shape the post-revolutionary, transitional political order. This is why, even two years after the fall of the Ben Ali and Mubarak regimes in Tunisia and Egypt in early 2011, protestors continue to take to the streets to criticize the new direction that the governments are taking. Constituent power will not be satisfied until legal institutions begin to develop in the new democracy. In other words, dissenters will not start to buy in to the new rules of the game until they have some assurances that their demands can consistently be met through newly constitutionalized, legal procedures. Many legal commitments are usually made in new democracies. Transitional democracies, for example, make the greatest number of human rights treaty ratifications by far. Figure 3.2 shows that, across the globe, approximately 300 treaty ratifications have been made to various human rights conventions within the four years following democratization (from 1970-2010). The question for those seeking change is whether these legal commitments, ‘parchment promises,’ will be implemented and enforced.

**Figure 3.2. Count of Human Rights Treaty Ratifications 10 Years Before and After Democratization, 1970-2010**



Enforcement requires legal power. But how is legal power developed after autocratic periods in which courts were complicit in non-democratic practices? This is a question that, surprisingly, still eludes theorists today. Legal institutions, it seems, can only get so far on the new constitutional guidelines that outline their practice. In order to gain power, they have to *behave* as powerful actors. An obvious example is the establishment of judicial review in the United States. As of 1803, judicial review was neither constitutionally guaranteed, nor practiced. But with John Marshall's famous decision in *Marbury v. Madison*, the practice was established, and since, it has become a

taken-for-granted power of the US Supreme Court. Such behaviors become sedimented over time. That is, they become path dependent. Institutional development of this type takes activism, and human rights advocacy might play a role in the development of legal-institutional path dependencies in periods of democratization. One example is from Argentina, where, Catalina Smulovitz argues, society “discovered the rule of law” following the brutal seven-year rule of the junta. In fact, it was one of the primary issues in the 1983 democratic transition. In her description of the decision to try former junta leaders, Smulovitz’s language smacks of the notion of institutional development and path dependency:

“...the Buenos Aires Federal Court of Appeal took the case into its own hands. This act had several consequences: it reintroduced the judiciary to the center of the human rights conflict, and--given the prominence this issue had achieved during the transition--it gave judicial power a strategic place in the political scene. The judiciary had to satisfy society's demand for justice, and, at the same time, it had to show that the rule of law was an authoritative and legitimate mechanism for solving political conflicts.”<sup>197</sup>

The judicialization of politics in Argentina that would follow was not without its problems. It caused numerous “misunderstandings,” including among other things increased expectations of justice that could not be entirely fulfilled. At the same time, though it is now relatively unpopular, the judiciary has successfully inserted itself as a buffer between oppositional groups that had previously resorted to violence to settle disputes.<sup>198</sup> Much of the power the court now has was established in the initial phases of

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<sup>197</sup> Catalina Smulovitz, “The Discovery of Law: Political Consequences in the Argentine Case,” in *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy*, ed. Yves Dezalay and Bryant G. Garth (Ann Arbor: University of Michigan Press, 2002), 251.

<sup>198</sup> *Ibid.*, 250.



democratization, when citizens were actively demanding that something be done to address rights abuses.

In general, one of the more far-reaching demands of human rights constituencies in the last 25 years has been demand for transitional justice. As introduced in Chapter 1, transitional justice represents the legal efforts to reckon with human rights abuses that happened under previous regimes. If, for example, judges in transitional environments answer demands to hold former state agents accountable for gross repressive violence, this is both an exercise in meting out transitional justice and in asserting judicial aptitude. If courts are able to hold former leaders guilty *against the will* of current executives, then this would be an indisputable instance of legal power. Literature on transitional justice suggests that the expression of legal power in these instances will have a beneficial effect on the development of democratic rule of law down the road.<sup>199</sup> Of course, there will be an initial resistance to these moves by members of the old order, and allies of that order. This might create short-term risks. But once courts have taken initial steps to heed the demands of human rights constituencies, and have navigated difficult terrain in the pursuit of justice, then this will potentially lower future barriers erected by rights-violating elite coalitions. It might also mean the development of legal procedures that can be used against state agents that are implicated in repressive violence in real time. We should expect the assertion of greater legal power, thus, to have a couple of long-term benefits. First, because it begins to address the grievances of victims of repression desirous of greater rights protections, it will to be associated with less non-institutional

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<sup>199</sup> Kim and Sikkink, "Explaining the Deterrence Effect of Human Rights Prosecutions."

dissent over time in new democracies, and as an indirect result, less reactive repressive violence. Second, we should expect that the development of legal institutions may have general liberal-procedural dividends: it will constrain newly empowered executives, and it will disincentivize ordinary violence committed by state agents who may be subject to legal action in the future.

### **3.4.3. Post-Conflict Contexts**

If democratic transitions are delicate, then post-conflict transitions are downright brittle. Actors that have previously taken up arms against one another, and that vie for control over state sovereignty, are hard-pressed to cooperate in the future. In fact, right around 50% of armed conflicts between state actors and insurgent groups end up recurring within five years.<sup>200</sup> What is the role for human rights constituencies in these situations? Where such constituencies are most effective for organizing widespread peaceful dissent in autocratic contexts, and where they are most effective for promoting legal enforcement in democratizing context, post-conflict situations require both functions. In order to halt the recurrence of violent insurgency, those oriented toward human rights must both spread the message of peaceful dissent and promote the establishment of a legal order capable of dealing with people's grievances. Of course, this is not an easy task in situations where legal institutions have been wrecked by years of fighting, or where dissenters have previously adopted violent means in order to pursue their goals.

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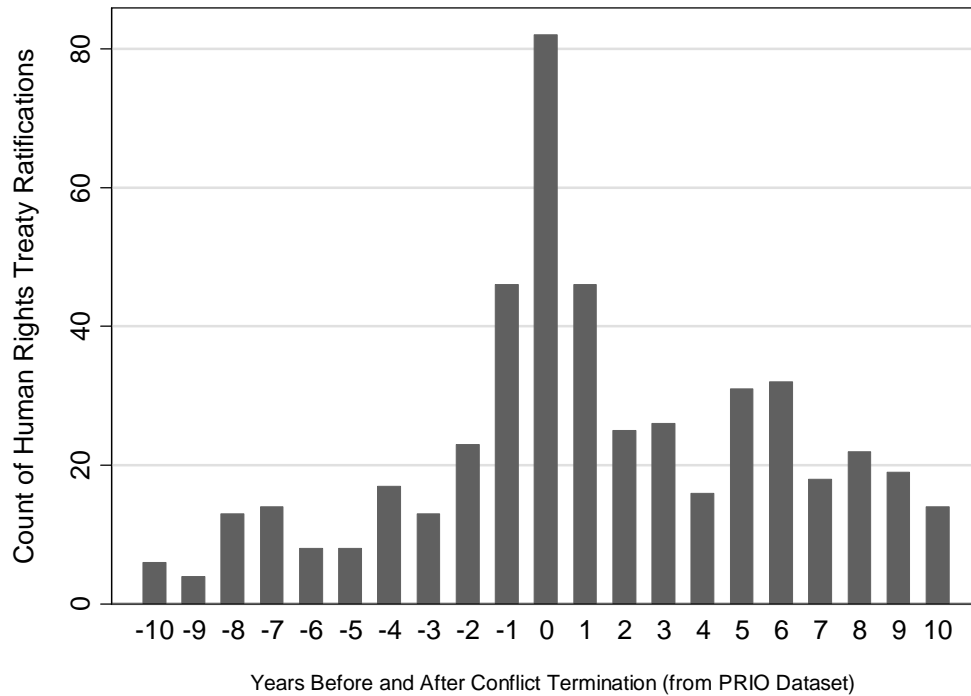
<sup>200</sup> See Chapter 7.

Conflicts end a variety of ways, and for a variety of reasons, but there is evidence that post-conflict contexts create opportunities for the generation of a new legal order. Just as in democratizing situations, where leaders use the opportunity provided by an uncertain environment to make new commitments to international law, leaders in post-conflict environments also ratify a number of human rights conventions. Figure 3.2 shows that in the year directly following conflict (marked '0') and the year following (marked '1'), state delegations have made over 120 total commitments to human rights agreements. Christine Bell has argued that a new international law of peace, combining elements of human rights and humanitarian legal regimes, has emerged over the last twenty years.<sup>201</sup> This law represents a subsidiary effort at legalization around moments of conflict termination, which lies in parallel to attempts at legalization under democratization. As such, it is attached to the same sources of power that are present in pre-democratic and post-democratization contexts: constituent and legal.

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<sup>201</sup> Christine Bell, *On the Law of Peace : Peace Agreements and the Lex Pacificatoria* (Oxford: Oxford University Press, 2008).

**Figure 3.3. Count of Human Rights Treaty Ratifications 10 Years Before and After Conflict Termination, 1970-2010**



The aims of human rights constituencies, to both lessen violence and to legalize protections of human rights at the domestic level, might be at odds with an elite politics of accommodation for conflict groups. Formerly warring parties want to share control, and to avoid responsibility for the acts of violence they have committed in the past. As a result, efforts to enforce human rights law, or to outlaw relations of violence, could themselves be met with violent resistance by armed combatants that fear being held accountable for their wartime actions. For this reason, pushing for the delegitimation of violent tactics and the fomentation of a new legal order might precipitate the recurrence of armed conflict in the short term. However, one might surmise that extended efforts to

promote peace and build legal institutions over time following civil wars could pay off down the road. If human rights constituencies can influence violent actors to accept alternative methods of dispute resolution, then a sustainable peace may ensue. Interestingly, these two expectations—that accountability provokes conflict recurrence and that it alleviates conflict in the long run—are diametrically opposed. What separates the effects of enforcement on conflict, I argue, is time: accountability will be risky in the short term, but it will pay in the long term.

### **3.5. CONCLUSION**

What are the advantages of this theory, combined with these expectations? First, it directly confronts the nature of human rights ‘power’ using an untapped theoretical resource: constitutional thought. It also ‘endogenizes’ legalization to human rights constituency formation. While a number of ideas have been proffered concerning the positive feedback loop between law and social movements, or oppositely, the inimical effect that legal mobilization has on social mobilization, little effort has been made to construct a testable political theory of the nexus between rights-based demonstration and the development of international law. Second, my theory generates expectations about what we should expect in the short and long term in various contexts. Engaging temporality allows for more nuance than is currently offered in treatments of human rights law and political change. The three sets of propositions outlined in this chapter will be further developed and tested in Chapters 4-7. Chapter 4 handles the question of human rights advocacy and legalization in autocratic contexts. Chapters 5 and 6 deal with the

origins and impact of human rights advocacy amidst democratic transitions. And Chapter 7 assesses the impact of human rights legal enforcement in post-conflict contexts.

**CHAPTER 4: HUMAN RIGHTS IN AUTOCRACIES: DISSENT, DEFENSIVE TREATY RATIFICATION, AND DEMOCRATIZATION**<sup>202</sup>

What impact can human rights advocacy and legalization have in autocratic contexts? This is a burning question for human rights constituencies, who repeatedly find their cause met with a difficult combination of authoritarian backlash and scholarly pessimism. Indeed, empirical research seems to be tilting toward a negative view, which is that meddlesome human rights campaigning and legalism endangers people living under unaccountable governments. Savvy researchers have theorized that international human rights commitments give dictators reputational cover, which then serves as a symbolic cudgel to further torment their subjects.<sup>203</sup> Dictators sign onto rights conventions to signal to their opposition how strong they are—so strong that they can openly agree to rules they have no intention of abiding by.<sup>204</sup> With a few notable exceptions off of which I will pivot, research seldom theorizes human rights advocacy and law as the province of local political struggle and resistance to autocrats, and more as a site of elite bargaining or missionary do-gooding within international society.<sup>205</sup> It is no doubt true that in autocratic settings, the options of human rights constituencies are limited. They can protest, publish reports, and push for institutionalization of rights. However, it is also not enough for social science to suggest that on balance these actions

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<sup>202</sup> This material is based upon work supported by the National Science Foundation under Grant No. 0961226.

<sup>203</sup> In this chapter, I will use ‘autocrats’ and ‘dictators’ to mean the same thing.

<sup>204</sup> Hollyer and Rosendorff, "Do Human Rights Agreements Prolong the Tenure of Autocratic Ratifiers?."

<sup>205</sup> Roxanne Doty, *Imperial Encounters: The Politics of Representation in North-South Relations* (Minneapolis: University of Minnesota Press, 1996). Robert Meister, "Human Rights and the Politics of Victimhood," *Ethics and International Affairs* 16, no. 2 (2002).

do not produce the desired results. We should be moving toward theory concerning when, where, and how human rights mobilization produces impacts.

In the previous chapter, I argued that human rights advocates are bearers of constituent power, in that they embody collective dissent against the current relational order and its harmful practices; human rights constituencies seek a new legal order, one that entails long-lasting commitments to civil rights. In this chapter, I aim to support this theory with evidence. I demonstrate that local human rights movements and the domestic legalization of human rights in autocracies are commonly intertwined. Specifically, autocratic legalization of important human rights treaties is often a response to demands from domestic constituencies pushing for change. Thus, it is a defensive move. When autocratic human rights legalization takes place during periods of struggle against autocracy, it will be associated with greater reactive repression in the short term. This explains a common finding in the literature that certain treaty ratifications are associated with heightened repression. Yet there is more to the story. In the long term, both rights-based dissent and rights legalization can exert pressure toward regime change, or democratization. This is not an easy argument to demonstrate, and it comes with two significant conditions. First, the greatest gains for human rights constituencies pushing for changes to the legal order will come among autocratic regimes that are already growing weaker. And second, among the remaining powerful dictatorships, the best option for human rights constituencies is to take to the streets—by all accounts a treacherous affair.



This chapter will develop this argument in four sections. Section 4.1 will briefly outline what we know about the potential of rights advocacy in autocracies, which has recently formed around analyses of the impact of autocratic human rights treaty commitments. The second section (4.2) will, using case studies, trace the process of defensive treaty ratification, which occurs when dictators sign onto treaties in moments of weakness, in response to growing domestic human rights dissent. Section 4.3 moves from case analysis to statistical evidence to demonstrate the correlation between dissent and ratification, and it analyzes the short-term impact of mobilization and rights legalization on repression. The fourth section (4.4) engages the long term. I present evidence that over time, human rights campaigns and legalization under dictatorship increase the probability of democratic regime change.

#### **4.1. AUTOCRACIES AND HUMAN RIGHTS**

Why do dictators ratify international human rights agreements? Asked in another way, why do autocratic regimes make overtures toward human rights legalization? The IR literature has offered a number of slightly different stories, which in the end all present some variant of international legal theorist Louis Henkin's postulation from 1979. "Occasionally," wrote Henkin, "a government will agree to a law with little intention of observing it, in order to gain some kudos and perhaps the advantage of observance by others, especially if it believes that its violation might not be detected."<sup>206</sup>

Over the past 10 years, IR scholars have revisited this theory. Though the literature has created diverse and at times incongruous answers to this question, a

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<sup>206</sup> Henkin, *How Nations Behave, 2nd Edition*, 32.

consistent theme is that when considering ratification, dictators are subject to countervailing pressures based on three factors: international reputation, domestic judicial effectiveness, or domestic autocratic power structures. Earlier work suggested that we should expect dictators to ratify rights agreements in a duplicitous effort to gain reputational benefits from joining the isomorphic institutions endorsed by global society. But because “...the human rights regime is not designed to supply its members with strong institutional tools to enforce compliance,” Hafner-Burton and Tsutsui argue, we should expect a “...gap between ratification and behavior because governments have incentives to ratify human rights agreements they have neither the intention nor the capacity to implement.”<sup>207</sup> Beth Simmons similarly contends that autocratic ratifications derive in part from insincere regional emulation: as agreements receive a critical mass of support, laggard dictators simply want to avoid appearing behind the times. This may seem against the common sense that dictators generally care less about international judgment, but insightful work in constructivist international relations suggests that elites with concentrated powers might be even more sensitive to international reputational concerns since their countries’ foreign policy is understood to be a direct extension of their personal decisions.<sup>208</sup>

A second, and newer, strand of research has found that autocratic ratifications are conditioned by leaders’ calculations of the strength of domestic judicial institutions. Emilia Powell and Jeffrey Staton discovered that *ex ante* expectations about the future

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<sup>207</sup>207 Hafner-Burton and Tsutsui, "Human Rights in a Globalizing World. The Paradox of Empty Promises," 1378. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*, 88.

<sup>208</sup> Alastair Iain Johnston, *Social States: China in International Institutions, 1980-2000* (Princeton: Princeton University Press, 2008), 80-87.

enforceability of international rights provisions—measured by the strength of the judiciary—are tied to a reluctance to ratify. If leaders expect courts to enforce human rights law, they will shy away in order to avoid costly court cases. While this theory is meant to apply to all regime types, it has been extended to apply to ratification of the *Convention Against Torture* in autocratic regimes specifically. Autocracies with stronger judiciaries, it seems, might be slightly less willing to ratify this convention because they, just as democratic leaders, hope to avoid costly penalties exacted by courts.<sup>209</sup>

A third domestic explanation has treated treaty ratifications as a function of interactions within autocratic power structures and political institutions. James Vreeland argues that the presence of operative opposition parties in a legislature will inspire dictators to ratify the *Convention Against Torture* because these parties work to channel real demands on the central government; at the same time, these parties simultaneously attract repressive violence.<sup>210</sup> James Hollyer and Peter Rosendorff push the argument even further, positing that autocrats use commitments to signal to oppositions that they are strong, and that they have no intention of leaving office. Their logic is this: because treaties increase the risk that abusive dictators will be prosecuted in the future, the act of ratifying the certain conventions shows the opposition that the dictator plans to stay put.<sup>211</sup> Proof of the effectiveness of this signaling the authors find in statistical evidence

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<sup>209</sup> Courtenay R Conrad, "Divergent Incentive for Dictators: Domestic Institutions and (International Promises Not to) Torture," *Journal of Conflict Resolution* 56, no. 5 (2012).

<sup>210</sup> Vreeland, "Political Institutions and Human Rights: Why Dictatorships Enter into the United Nations Convention against Torture."

<sup>211</sup> Hollyer and Rosendorff, "Do Human Rights Agreements Prolong the Tenure of Autocratic Ratifiers?," 808.

that dictators who ratify the *Convention Against Torture*, on average, stay in power for longer than those who do not.

This research has drawn out attention to the possibility that autocrats' motivations may extend beyond mere insincerity.<sup>212</sup> Some evidence suggests that dictators are not just ratifying with their fingers crossed, hedging that they will be able to avoid any consequences, but are also actively *using* such treaties for ill. However, two curiosities remain in these accounts. First, to date there has been a peculiar amount of attention devoted to the relevance of the Convention Against Torture specifically, even though there is little reason to expect this treaty to have a uniquely powerful effect versus other international agreements. Second, and more importantly, the role of domestic mobilization in newer political accounts is missing, or ambiguous. Who, for example, are autocrats making concessions to when they ratify these treaties? For Vreeland, the answer is parties, but why do parties care about human rights treaties? My answer is that they are part of, or responsive to, human rights constituencies within the country who are demanding change. These groups, and their mobilizations, are typically left out of accounts of human rights law under autocracy.

#### **4.1.1. Short and Long Term**

Few reasons exist to question suspicions that autocrats harbor bad intentions when they join human rights agreements. However, there are reasons to question the overall conclusions drawn about the impact of rights advocacy and legalization based on these studies. One general curiosity is that when research is analyzing the impact of dictatorial

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<sup>212</sup> For 'insincere ratifiers,' see Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*, 77-80.

treaty ratifications on repression, it is mostly looking at snapshots within broader processes. Hafner-Burton and Tsutsui openly state their concern about short term upticks in repressive violence (see quotation above), and the two examples they use to illustrate their point—Guatemala and Iraq—demonstrate this concern. Guatemala and Iraq they find to be examples of radical decoupling of law and practice because these countries had ratified a majority of the six core rights conventions by 1994 and 1995, the years in which human rights violations “reached an extreme” in each place.<sup>213</sup> Of course, Guatemala was embroiled in a bloody civil war, which was then followed by a precarious but so far long-lasting peace agreement and process of democratization, along with extensive (though embattled) efforts to provide remedy to former victims. Iraq in 1994 was in a post-Gulf War period of autocratic rule under the helm of the notoriously brutal Saddam Hussein (not to mention the fact that Iraq had ratified three of these conventions 24 years before). War is no excuse for human rights violations, but these do not seem to be examples of places where treaties *caused* repressive violence when viewed over the long term.

Still, evidence does exist that treaty ratification will be associated with increased repression in the short term because oppositions pushing for human rights present an easy target for state terror. Some countries that James Vreeland documents as having ratified

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<sup>213</sup> In the article, the authors consider the core rights agreements to be the Convention on the Elimination of Racial Discrimination (CERD), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the ICCPR, the Convention on the Elimination of Discrimination Against Women (CEDAW), the CAT, and the Convention on the Rights of the Child (CRC). It should be noted, also, that some research has questioned data that shows the most extreme violence in Guatemala to have occurred in the mid-1990s. By most accounts, genocidal actions on the part of the Guatemalan government took place in the early 1980s, but this is not accurately reflected in popular data on repression. See Ann Marie Clark and Kathryn Sikkink, "Information Effects and Human Rights Data: Is the Good News About Increased Human Rights Information Bad News for Human Rights Measures?," in *Annual Meeting of the Midwest Political Science Association* (2010).

the CAT, only to torture more in the short term, include Benin in 1992, Burundi in 1993, Chad in 1995, Chile in 1988, Georgia in 1994, Tunisia in 1988, and Poland in 1989. In these examples, human rights constituencies were pressing for change, which may have opened them up for attack. Yet something else stands out in these cases: three of them—Benin, Chile, and Poland—were nearing democratization, which was then followed by decreases in repression. This presents an interesting possibility: some of the same autocracies that ratify CAT and increase repression are doing so because they are losing power. In other words, they are caught in a murderous middle, trying to hold onto rule amidst inevitable transition.<sup>214</sup> This suggests that ratification and short-term repression are at times embedded within *long-term* processes of political transformation.

This brings us to a second curiosity. The only studies of treaty ratification and long-term impacts have focused their efforts on the relationship between treaty ratification—specifically CAT ratification—and the duration of leadership tenure.<sup>215</sup> That is, dictators who have ratified treaties stay in power longer than dictators who have not. Taken in tandem with the finding that treaties do no short term good, this is purportedly evidence that rights-based legal advocacy is doubly exposed: it makes things worse immediately, and it has the added drawback of entrenching the power of abusive rulers for the long term. However, though theory gives us reason to suspect that human rights mobilization has been instrumental to political transitions, *no systematic studies examine*

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<sup>214</sup> The More Murder in the Middle hypothesis holds that repression increases in moments of institutional uncertainty, or within regimes that have ‘mixed’ or transitional qualities. See Helen Fein. *More Murder in the Middle: Life-Integrity Violations and Democracy in the World*, 1987. 1995.

<sup>215</sup> Hollyer and Rosendorff, "Do Human Rights Agreements Prolong the Tenure of Autocratic Ratifiers?"; Courtenay R Conrad and Emily Hencken Ritter, "Treaties, Tenure, and Torture: The Conflicting Domestic Effects of International Law," *Journal of Politics* (2013 (forthcoming)).

*the continued stability of autocratic regimes in the face of human rights pressure.* Centering analysis on the survival of individual autocrats, rather than the survival of autocratic *regimes*, is potentially problematic. In some autocracies, leadership rotates, and this is done to give the appearance of alternation while maintaining the regime's hold on power.<sup>216</sup> What this means is that quite a few autocrats remain in power only for a brief time, but the regime carries on unaltered. Examining tenure between autocratic regimes where leaders stay in power for extended periods of time (Indonesia's Suharto or Chad's Indriss Déby) to those where they do not (Mexico under the PRI) might artificially inflate the effects of certain actions on the duration of leadership.

In the next section, I use compare cases from very different political systems in order to develop a process-based theory of defensive autocratic ratification—a theory that challenges a good deal of recent research.<sup>217</sup> Specifically, I argue that autocrats often embrace human rights agreements not as an effort to dominate oppositions (*offensive ratification*), but to try and co-opt human rights-based constituencies that are gaining power and posing an imminent threat to the regime's legitimacy (*defensive ratification*). While offensive ratifiers no doubt exist, autocratic human rights legalization is routinely a defensive response to human rights constituencies pressing for change. One implication is that we need to move away from framing human rights legalization in autocratic regimes as mostly dictatorial scheming or manipulation. My theory creates specific

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<sup>216</sup> Abel Escriba-Folch and Joseph Wright, "Human Rights Prosecutions and Autocratic Survival," (2013), 20.

<sup>217</sup> One might call this a most-different systems (MDS) case comparison. See Adam Przeworski and Henry Teune, *The Logic of Comparative Social Inquiry* (New York Wiley-Interscience, 1970), Chs 1-2.

expectations that integrate a number of puzzling empirical relationships that have been observed by the literature.

#### 4.2. STRUGGLE AND DEFENSIVE AUTOCRATIC RIGHTS COMMITMENTS

We should not expect that autocrats will approach the protection of human rights with earnestness. The list of dictators who have repeatedly signed onto human rights agreements is an inauspicious group that includes tarnished leaders of past and present: Muammar Gaddafi (Libya), Fidel Castro (Cuba), King Hussein (Jordan), King Hassan II (Morocco), Etienne Eyadema (Togo), Albert-Bernard Bongo (Gabon), Tador Zhikov (Bulgaria), Janos Kadar (Hungary), Idriss Déby (Chad), Yoweri Museveni (Uganda), and Tedoro Obiang Nguema Mbasogo (Equatorial Guinea).<sup>218</sup> Sudan's Omar al-Bashir inexplicably acceded to the Genocide Convention in October 2003, and Syria's Bashar al-Assad acceded to the Convention Against Torture in August 2004—flippant decisions that only a few years later would affect the course of international justice and intervention.<sup>219</sup> It is highly likely that these are political moves made to gain short-term benefits over domestic opponents. In this respect, these dictators are making a 'gamble' for immediate rewards over whatever negligible long-term ramifications such decisions may have.<sup>220</sup> This is *offensive* autocratic ratification.

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<sup>218</sup> These are the leaders whose lengthy periods of tenure drive the results of Hollyer and Rosendorff's (2011, 2012) findings. Information based on the author's replication using treaty information from the United Nations Treaty Collection (available at <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>) and the Archigos dataset on leader tenure. H.E. Goemans, Kristian Skrede Gleditsch, and Giacomo Chiozza, "Introducing *Archigos*: A Data Set of Political Leaders," *Journal of Peace Research* 46, no. 2 (2009).

<sup>219</sup> The difference between accession and ratification is that ratification is tied to the act of signing the treaty, whereas accession is not. If a country does not sign a treaty after its initial drafting, it may later accede to the agreement, but not ratify it. Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals*, 234.

<sup>220</sup> Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*, 80.



#### 4.2.1. Offensive Ratification

It is impossible to get inside the autocratic decision-making process because most of the time it is completely non-transparent, so it is thus difficult to muster hard examples of offensive ratification. However, Robert Klitgaard gives us a glimpse into the nature of this phenomenon in *Tropical Gangsters*, his book-length account of two years spent in Equatorial Guinea working on development for the World Bank. In August 1988, toward the end of Klitgaard's time in the small Western African country, a coup attempt was rumored to have been sniffed out by hired Moroccan security forces while President Teodoro Obiang Nguema Mbasogo was on a tour of the country. Coups were not unusual, as the President himself had come to power in a coup against his notorious uncle, Francisco Macías Nguema, in 1979. Obiang had himself faced an abortive coup in 1983. The August 1988 attempt was for our purposes more significant because it took place less than a year after Obiang's September 1987 accession to the ICCPR, and the ICCPR Optional Protocol. No matter, shortly after the rumors began to circulate in 1988, Obiang's forces rounded up a number of intellectuals, including members of the cabinet, and had them tortured for their suspected involvement.

When Klitgaard, on one of the last days of his stay in the country, got a chance to meet the president in person, he urged that something be done about torture and arbitrary imprisonments in line with the human rights agreements to which the country had just committed. President Obiang deflected, "You would not believe how many military men and how many police I have sanctioned in the last ten years for abuses of various

kinds.”<sup>221</sup> Shortly after this meeting, Klitgaard notes that he heard an announcement from the president that stated, “I promise that the Democratic Party of Equatorial Guinea will uphold and protect absolutely the human rights of the people.”<sup>222</sup> Of course, this was a bald-faced lie. The Democratic Party was, and is, the *only* party allowed in the country, and it does not respect human rights. Since 1988, Obiang (*a.k.a. El Jefe*) has become increasingly brutal in his handling of the very small opposition, has hoarded the vast amount of oil wealth that began flowing in the mid-1990s, and has repeatedly won unfair elections with an excess of 95% of the vote.<sup>223</sup> In October 2002, Obiang deepened the country’s official commitments to human rights by acceding to the Convention Against Torture. Eight months later, the state radio station would declare that the president was in direct communion with God, and that “He can decide to kill without anyone calling him to account and without going to hell because it is God himself.”<sup>224</sup> After the fall of Gaddafi in 2011, Obiang became the longest serving non-royal ruler in the world.

This example demonstrates well the nature of offensive human rights commitments. ‘Insincere’ treaty ratification would be putting it mildly. If Obiang’s commitments to human rights are anything, they are an attempt to assert power over the opposition and maintain the abusive leader’s own political strength, as is evidenced by the president’s proclamations to the people that followed shortly after his acts of accession. These statements are the expression of the dictatorial mentality, a mentality

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<sup>221</sup> Robert Klitgaard, *Tropical Gangsters: One Man's Experience with Development and Decadence in Deepest Africa* (New York: Basic Books, 1990), 266.

<sup>222</sup> *Ibid.*, 273.

<sup>223</sup> Guy Adams, "Teodoro Nguema Obiang; the Lavish Looter Who Could Lose It All," *The Independent* October 27, 2011; "Equatorial Guinea: Visiting Leaders Should Press for Rights," *Human Rights Watch* February 18, 2013.

<sup>224</sup> "Equatorial Guinea's 'God'," *BBC News* July 26, 2003.

oriented toward survival and control, rather than the extension of political participation or emancipation. Still, the presence of such disreputable leadership does mean that offensive ratification is the best model of human rights in hard times, or even that offensive ratification is the most prevalent type of commitment among autocracies. In fact, the list of a dozen or so dictators that routinely resort to rights commitments, which I presented above, is near exhaustive. A host of other leaders do not seem to gain in tenure length from human rights cheap talk. What about these other cases of autocratic ratification?

#### **4.2.2. Defensive Ratification**

An alternative model for thinking about autocratic ratification is that it results directly from the efforts of human rights constituencies organizing within the country. Even if autocrats do not mean well by their rights commitments, dissidents living under autocratic regimes take human rights seriously, and they actively exert public pressure on regimes—through demonstration and information campaigning. This is a process that has been documented by regional experts and qualitative scholars. Risse and Sikink, for example, locate treaty ratification within their spiral model of transnationally inspired change, wherein autocratic regimes go from repression (Stage One) to denial (Stage Two) to tactical concessions to rights networks (Stage Three) and finally to accepting prescriptive norms (Stage Four).<sup>225</sup> Of the recent quantitatively oriented theorists of dictatorial commitments, James Vreeland is the only one who takes seriously that such commitments are embedded within a process of political conflict, rather than a unilateral

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<sup>225</sup> However, they situate ratifications within stage four, indicating that norms are being accepted. Current work, and my theory, would choose to situate autocratic treaty ratifications within the tactical concessions stage. See Risse and Sikink, "The Socialization of International Human Rights Norms into Domestic Practices: Introduction," 20.

assertion of control. He writes, "...the participation of certain dictatorships in the CAT may precisely reflect the division of power and struggle for it on the domestic front."<sup>226</sup>

Vreeland understands the operative mechanism to be the legalization of multiple political parties in the country; because the opposition is becoming institutionalized, it begins to seek formal concession over civil rights. In order to co-opt these groups and maintain power, autocrats make toothless promises to abide by international law. While Vreeland is right to emphasize the element of political struggle, he may be placing too much emphasis on the role of parties. In the record, the legalization of parties is part of a broader package of institutionalization that is happening at the same time that rights commitments are being made; that is, party institutionalization and human rights commitments comes after change has already begun.<sup>227</sup>

What, then, sparks these changes? I argue that dictatorial rights commitments are commonly a response to persistent demands from human rights constituencies. That is, they are defensive ratifications meant to capture the constituent power that is challenging autocratic survival in search of a new legal order. Proof of this is that peaceful public protests, strikes, and demonstrations often precede autocratic rights commitments. What are examples? One stark example comes from Chile, which ratified the Convention Against Torture on September 30, 1988. For years, the military junta dominated by the figure of Augusto Pinochet sought legitimacy from the international community, and those oppositional and human rights constituents within the country that resisted the

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<sup>226</sup> Vreeland, "Political Institutions and Human Rights: Why Dictatorships Enter into the United Nations Convention against Torture," 77.

<sup>227</sup> For evidence, see Section 5.3.

military regime. In the 1970s, human rights groups were the sole bastion fighting the junta, which began its repressive reign with the overthrow of Salvador Allende in 1973. In the late 1970s, “Political parties would play an important, though limited role in contesting political power.”<sup>228</sup> Instead, “The constant barrage of criticism from human rights groups...pushed the government to be even more concerned with its own legitimacy, especially as the coup faded into the background...”<sup>229</sup> These groups included the Chilean Commission of Human Rights (1978), the Chilean chapter of the Service for Peace and Justice (SERPAJ), and the Catholic Vicariate. The junta responded with a 1980 Constitution, that, while meant to deflect criticism with the promise of new political guarantees, also entrenched authoritarian policies—Article 8 banned Marxist political parties, and Article 41 allowed for the preservation of legal states of exception.<sup>230</sup> The passage of this Constitution was followed by a short-term ramping up of repression, which was in many ways coincided with a recession that lasted from 1982-83, an outcome of ineffectual neoliberal reforms undertaken by the government.<sup>231</sup>

From 1985-1988 pressure mounted on the junta regime. The Sebastián Acevedo Movement against Torture began leading a number of nonviolent demonstrations, which coincided with a series of resolutions against Chile authored by the United Nations General Assembly. In August 1985 twenty-one leaders of various movements published

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<sup>228</sup> Darren G. Hawkins, *International Human Rights and Authoritarian Rule in Chile* (Lincoln, NE: University of Nebraska Press 2002), 114.

<sup>229</sup> *Ibid.*, 120.

<sup>230</sup> *Ibid.*, 136.

<sup>231</sup> Tina Rosenberg, *Children of Cain: Violence and the Violent in Latin America* (New York: Penguin Books, 1991), Ch 6.

the *National Accord for a Full Transitional to Democracy*.<sup>232</sup> This document placed a great deal of emphasis on human rights issues, in addition to the legalization of parties and the adoption of electoral laws. Meanwhile, the nonviolent campaign against the junta, which reached a peak membership of 700,000, continued with sporadic demonstrations and protests steadily from 1983-1989.<sup>233</sup> This groundswell was met with continual repressive reactions by the government. Still, the pressure had an effect. The 1980 Constitution had called for a plebiscite on the junta's continued rule to be held by February 9, 1989. In a response to the extensive human rights-based public challenges to the junta's legitimacy, the government moved forward with the plebiscite, in which voters were asked whether they support an additional eight-year term for the ruler. The 'Yes' campaign was run by the military government, and the 'No' campaign was organized by the *Concertacion do Partidos por el No*, which was formed out of an amalgam of Center-Left parties and human rights groups.<sup>234</sup> The 'No' Campaign was a dynamic force all its own. It hired US consultants Sawyer, Miller to help with operations, and it ran extensive television ads. The public relations campaign was galvanizing, at the same time that it reflected the amassing grievances of citizens who had long tired of the Chilean military regime, and which sought a new democratic constitution. In this way, the 'No' Campaign was a figurehead expression of constituent power, in that it represented people who wanted to generate a new legal regime, one that was respectful of civil liberties.

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<sup>232</sup> Edgardo Boeninger, "The Chilean Road to Democracy," *Foreign Affairs* (Spring 1986).

<sup>233</sup> Chenoweth and Stephan, *Why Civil Resistance Works*.

<sup>234</sup> Taylor Boas, "Voting for Democracy: Campaign Effects in Chile's Democratic Transition," (2012).

Of interest for our theory is the way the military leadership conducted itself in the run up to the vote. With the plebiscite looming on October 5, 1988, Pinochet lifted a long-standing state of emergency on August 24, 1988, perhaps as a way of appealing to the voting public.<sup>235</sup> Then, less than one week *before* the vote on September 30, 1988, Pinochet made yet another concession: he ratified the Convention Against Torture. Five days later, he lost the vote 55% to 43%, ushering in a transition to democracy. While we cannot know the true motivations behind the decision to ratify the human rights agreement, the proximity of the decision to political vicissitudes, and incredible pressure from human rights groups challenging the legitimacy of regime, suggests that the CAT ratification was a last-second move on the part of the junta to save itself.

Chile is not the only example of defensive ratification meant to co-opt dissent. Indonesia provides another illustrative case. By the time Indonesia was wracked by the Asian financial crisis in fall 1997, thirty-two long, repressive, and corrupt years under President Suharto were weighing heavily on the country. As the rupiah spiraled into devaluation, protestors began streaming forward, but they did not simply demonstrate against falling wages and government corruption. They also protested for civil rights and political reforms. On December 10, 1997, hundreds of students calling themselves the Committee of People's Action for Change gathered at Gadjah Mada University campus in Jakarta to commemorate Human Rights Day. Indonesian troops, not accustomed to facing protests, which for years under Suharto had been mostly banned or disallowed,

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<sup>235</sup> Hawkins, *International Human Rights and Authoritarian Rule in Chile*, 156.

reacted with beatings and detainments.<sup>236</sup> On January 2, 1998, a throng of protestors stormed a Jakarta courthouse chanting for justice and democracy when the court dismissed a petition by Megawati Sukarnoputri to be reinstated as the leader of the opposition Indonesian Democratic Party (from which she had been ousted in 1996). One protestor stated to the press, "Grassroots people are already aware of their rights and will push their demands for a better life. They cannot be cheated any longer."<sup>237</sup> In March, the Consultative Assembly voted to give 76-year-old Suharto a seventh five-year term, which inflamed the situation. By March, protests had spread East to Solo and over the Sunda Strait into Lampung, where 3,000 students marched at a state-run university. In each case, the government met protestors with beatings, murder, and widespread arrests. Human rights activists were slapped with charges of 'hate-spreading,' which consisted of public expression against the government.<sup>238</sup> Some prominent human rights advocates were killed, and some simply vanished.

By May, these protests had involved well over 10,000 people, out of which 1,200 were killed.<sup>239</sup> In combination with diplomatic pressure from Australia, Western states, and the UN, public outrage led to the resignation of Suharto on May 21, 1998. Suharto sought post-resignation guarantees by personally installing a military loyalist, B.J. Habibie. Human rights dissidents, in addition to the non-violent East Timorese pro-independence group the Clandestine Front, pushed back, suggesting the Habibie would

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<sup>236</sup> "Troops Clash with Students, Marring Human Rights Day," *Jakarta Post* December 11, 1997.

<sup>237</sup> Satya Das, "Changes Looming for Indonesia," *The Vancouver Sun (British Columbia)* January 2, 1998.

<sup>238</sup> Michael Dorgan, "As Dissent Grows So Do Routine Outrages in the Name of Indonesian Justice," *Knight Ridder Washington Bureau* May 13, 1998.

<sup>239</sup> For the 10,000 figure, see Chenoweth and Stephan, *Why Civil Resistance Works*. For the 1,200 figure, see "Repression Expected to Continue in Indonesia, Dissidents Say," *The Associated Press* May 21, 1998.



only continue Suharto's presidency under another name.<sup>240</sup> Repressive violence did indeed continue throughout the remainder of 1998, but it was accompanied by a notable shift in rhetoric. On October 27, 1998, a team of UN experts visited the country to investigate killings, disappearances and rapes that accompanied the demonstrations, and also to begin seeking a resolution to the East Timorese question.<sup>241</sup> One day later, hawkish Foreign Minister Ali Atlas, who had for years led efforts against the East Timorese and willingly jailed dissenters, chaired a human rights workshop emphasizing the importance of free speech and association. The same day, the military transitional government ratified the *Convention Against Torture*, which it had signed in 1985. In June 1999, the country held legislative elections that elected an opposition leader, Abdurrahman Wahid, and it held a referendum on East Timorese independence, which was approved with an 80% vote. Violence was not finished in Indonesia. The military pursued a scorched earth policy as it exited from East Timor in 1999 and 2000. But the Indonesian case represents yet another instance of defensive treaty ratification embedded within a process of change that eventually led to democratization.

#### **4.2.3. Theoretical Expectations**

What I am advancing is an alternative model of human rights advocacy under dictatorship. Commitment to human rights treaties is not itself a causal mechanism in autocratic contexts; the law under such regimes is of questionable value. Instead, legalization is a byproduct of social movements that rally around human rights and freedoms. In other words, mass collective action is a precipitant of dictatorial

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<sup>240</sup> "Repression Expected to Continue in Indonesia, Dissidents Say."

<sup>241</sup> "Un Human Rights Experts to Visit Indonesia," *Associated Press Worldstream* October 27, 1998.

ratifications. Essentially, this is a chicken or egg argument that denies the causal priority of dictatorial ratifications, but it is also an argument about impact. This theory creates both short-term and long-term expectations. In the short term, we might expect dictatorial treaty ratifications to be an immediate effect of social protest, or uprising. Yet there will be another short-term expectation: because autocracies have a penchant for cracking down on expressions of dissent, and because transnational rights advocates respond to turbulent transitions with increased attention and documentation, the ratification of treaties will coincide with upticks in repression. This explains a common finding in the literature, that treaty ratifications are correlated with greater repression, most notably unlawful killing and torture.<sup>242</sup> Long-term hypotheses may also be derived from this theory. If treaty ratifications are a response to organized anti-dictator uprisings, then we might expect both large-scale human rights demonstrations and treaty ratifications to be associated with regime change. Some human rights movements, as in Chile, can take over a decade of sustained efforts (petitioning, publishing, and protesting) to produce desired changes to the legal order. Others movements, as in Indonesia—where the financial downturn created a crisis and an opportunity—produce results very quickly. Because of this variation, our expectations should form around the possibility that change might take time. Stated formally, my expectations form the following three hypotheses:

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<sup>242</sup> Hathaway, "Do Human Rights Treaties Make a Difference?"; Hafner-Burton and Tsutsui, "Human Rights in a Globalizing World. The Paradox of Empty Promises." Vreeland, "Political Institutions and Human Rights: Why Dictatorships Enter into the United Nations Convention against Torture."

***Hypothesis 1:*** *Ceteris paribus, human rights-based dissent will precipitate dictatorial treaty ratifications in the short term.*

***Hypothesis 2:*** *Ceteris paribus, human rights dissent and treaty ratifications will coincide with higher levels of repression in the short term.*

***Hypothesis 3:*** *Ceteris paribus, sustained human rights movements and treaty ratifications will be associated with democratization in the long term.*

#### 4.2.4. Which Treaties?

How well does the theory of defensive ratification, and the attendant three expectations, hold up to the empirical record? Before digging into the data, it is necessary to define which treaties one would expect to be related to the processes discussed. Current studies tend to focus specifically on the impact of the Convention Against Torture (CAT).<sup>243</sup> There may be meaningful reasons for doing so.<sup>244</sup> I choose, however,

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<sup>243</sup> The full name of the treaty is the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment G.A. res. 39/46 [annex 39 U.N. GAOR Supp. (No. 51) at 197 U.N. Doc. A/39/51 (1984)] entered into force June 26, 1987. For studies that are primarily interested in CAT, see "Political Institutions and Human Rights: Why Dictatorships Enter into the United Nations Convention against Torture; James R. Hollyer and B. Peter Rosendorff, "Why Do Authoritarian Regimes Sign the Convention against Torture? Signaling, Domestic Politics and Non-Compliance," *Quarterly Journal of Political Science* 6(2011); Conrad and Ritter, "Treaties, Tenure, and Torture: The Conflicting Domestic Effects of International Law."

<sup>244</sup> First, it is a treaty with powerful, non-derogable provisions, and it was negotiated in a period just prior to the end of the Cold War and the beginning of the 'decade of international law.' CAT was really taking hold at a moment when rights law was becoming a part of the global zeitgeist, and it was seen as a victory by activists seeking to strengthen the already-existing sources of international law outlawing torture. See Jan Herman Burgers and Hans Danielius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, International Studies in Human Rights (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1988), 1. "Many people assume that the *Convention's* principal aim is to outlaw torture and other cruel, inhuman or degrading treatment or punishment. This assumption is not correct... On the contrary, the *Convention* is based upon the recognition that the above-mentioned practices are already outlawed under international law. The principal aim of the *Convention* is to strengthen the existing prohibition of such practices by a number of supportive measures."

to examine six total treaties: the Genocide Convention, the International Covenant on Civil and Political Rights (ICCPR), the Optional Protocol to ICCPR, the CAT, the Optional Protocol to CAT, and the Rome Statute to the International Criminal Court.<sup>245</sup> I expand the focus for three reasons. First, CAT is only one of many important human rights conventions. It is not the only treaty meant to regulate violations of physical integrity, and it is not even the only treaty meant to combat torture. The ICCPR, which entered into force in 1976, pointedly prohibits torture in Article 7, as well as limiting the use of other tactics of repression like arbitrary arrest (Art. 9) and deprivation of life (Art. 6).<sup>246</sup> Furthermore, as a group, these treaties are alike in that they impose potential sovereignty costs on signatory regimes. They outline non-derogable protections of physical integrity (ICCPR, CAT), they require punishment of human rights violators (Genocide, CAT, Rome), and they create additional mechanisms for auditing the performance of state forces (ICCPR Op. and CAT Op.) Secondly, these six treaties, more so than others, are focal points for human rights constituencies pushing for democratization and political rights, and the expansion of civic freedoms.<sup>247</sup> Thus, these

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<sup>245</sup> Convention on the Prevention and Punishment of the Crime of Genocide 78 U.N.T.S. 277 *entered into force* Jan. 12 1951. International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976. Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, *entered into force* March 23, 1976 Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. A/RES/57/199, adopted Dec. 18, 2002 [reprinted in 42 I.L.M. 26 (2003)] and ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, U.N. Doc. 2187 U.N.T.S. 90, *entered into force* July 1, 2002.

<sup>246</sup> International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

<sup>247</sup> See Franck, *The Power of Legitimacy among Nations*; Ellen Lutz and Kathryn Sikkink, "International Human Rights Law and Practice in Latin America," *International Organization* 54, no. 3 (2000).

are the treaties that should be associated with movements seeking a new constitution or legal order.

Finally, the primary reason for examining these treaties pertains directly to the nature of the theoretical expectations. Both the offensive ratification theory and my defensive ratification theory hinge on ratification as an expressive political act meant either to communicate strength or to co-opt rights-based resistance. In order to pursue political gains from ratification, a dictator need only make a commitment that is perceived as imposing costs. Often states, including autocracies, ratify a handful of treaties all at once, opening themselves to scrutiny from a number of treaty bodies in one fell swoop. Focusing on the impact of one single treaty at a time passes over this tendency, treating different ratifications as independent when they are part of the same process. One reason that so much attention may have been devoted to CAT in research is that scholarship builds on what comes before. Once Oona Hathaway discovered a negative correlation between CAT ratification and human rights protections, a number of studies followed up on this counterintuitive finding.<sup>248</sup> The assumptions of this line of research should be challenged in part because little reason exists to think that the act of ratifying the CAT is any more impactful than the act of ratifying other treaties that aim to accomplish similar tasks. In short, if ratifying CAT has impacts, so too should the ratification of other similar treaties.

How many dictators ratify these six treaties? Table 4.1. shows the number of autocratic ratifications since each treaty was opened for signature, along with the percent

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<sup>248</sup> Hathaway, "Do Human Rights Treaties Make a Difference?"; "The International Law of Torture."

of total ratifications that belong to autocratic regimes. One can see that autocrats have been more willing to ratify or accede to the first four—Genocide, ICCPR, ICCPR Op, and CAT—accounting for 40-55% of total state ratifications in each instance. Dictators appear more reticent to agree to CAT Op and the Rome Statute. This pattern could be explained by the stronger enforcement procedures attached to each of the treaties. It may also be explained by a couple of other factors that relate to changes over time: first, the ICC Statute has only been available for ratification since 1998, and CAT Op. has only been around since 2002; second, as democracy advances with globalization, there are simply fewer dictatorships left in the world *to* ratify such conventions.

**Table 4.1. Distribution of Autocratic Ratifications**

	Genocide (1951)	ICCPR (1966)	ICCPR Optional Protocol 1 (1966)	CAT (1984)	Rome/ICC (1998)	CAT Optional Protocol (2002)
<i>Dictatorial Ratifications</i>	65	92	46	63	26	10
<i>Total Ratifications</i>	133	167	114	145	112	48
<i>% of Total</i>	48.87%	55.09%	40.35%	43.45%	23.21%	20.83%

### 4.3. ANALYSIS PART ONE: THE SHORT TERM

#### 4.3.1. Defensive Ratification

According to my process-based theory of defensive ratification, we should expect ratifications of these six treaties to result from domestic human rights social mobilization,

or public dissent, controlling for a number of other factors. To test this hypothesis, I start by selecting a sample of autocratic countries, which I take from new data by Barbara Geddes, Joseph Wright, and Erica Frantz.<sup>249</sup> This data includes a meticulous categorization of different autocratic regime types, which is useful for the long term analyses in Section 4.4. The sample I choose is of all autocratic regimes from 1970-2010. I then construct two different measures of ratification (the dependent variable) using data on these six from the UN Treaty Collection.<sup>250</sup> One measure is dichotomous, and scored one in each year that a country ratified *any* of the six treaties. The other is a count variable that records *how many* treaties a country ratified in any given year. The most that any autocracy ratified in a single year from 1970-2010 is four, and this occurred in Namibia in 1994. In eleven other instances, autocratic regimes ratified three agreements in one year,<sup>251</sup> and 32 states ratified two in a single year. The remaining 129 instances were single treaty ratifications.

Testing the theory also requires appropriate conceptualization and measurement of rights-based domestic dissent and social movements. What counts as human rights-based dissent? Human rights-based dissent consists of two primary features: 1) it makes use of non-violent methods (strikes and demonstrations) and 2) those involved make repeated appeals to *human rights*. Admittedly, no available data allows for the generation of an ideal measure of human rights-based dissent, and new research should attempt to address this deficit. The problems is that current data on dissent either do not delineate

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<sup>249</sup> Barbara Geddes, Joseph Wright, and Erica Frantz, "New Data on Autocratic Regimes," (2012).

<sup>250</sup> Available at <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>.

<sup>251</sup> These are Burkina Faso 1999, Ghana 2000, Chad 1995, Uganda 1995, Somalia 1990, Botswana 2000, Algeria 1989, Libya 1989, Uzbekistan 1995, and Nepal 1991.

action taken in the name of human rights from other types of protest, or they are not able to capture sufficiently larger rights-based social movements that are occurring within any given country. For the purposes of this chapter, I employ two different indicators of human rights based dissent. One measures the presence of any non-violent dissenting events (for Section 4.3), and one measures the *length of ongoing rights-based campaigns* (for Section 4.4). The reason I use two different measures is to allow for more direct tests of the hypotheses. The first two hypotheses from the previous section posit a connection between *acts*: rights-based dissent events will lead both to defensive autocratic ratifications and repressive responses from the government. The third hypothesis pertains more to processes: human rights campaigns will produce long-term regime change. In order to test these hypotheses as precisely as possible, one must use different measures.<sup>252</sup>

To measure non-violent dissent events, I include a lagged binary variable indicating whether any large-scale non-violent protests or demonstrations took place in the country, as recorded by either of two sources: Arthur Bank's Cross-National Time Series Dataset (CNTS) or the Social, Political, and Economic Event Database (SPEED) housed at the University of Illinois.<sup>253</sup> Both of these sources collect data from major news outlets for the time period of interest, though together they are only current through the

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<sup>252</sup> Crucially, which variables are used do not alter the outcome of the models. For example, I included my measure of campaigns in the model predicting treaty ratifications, and the coefficient is significant and robust.

<sup>253</sup> Arthur S. Banks, *Cross-National Time-Series Data Archive Users Manual*, ed. <http://www.databanksinternational.com> (2008). Peter Nardulli and Michael Slana, "Speed's Global News Archive: An Overview and Assessment," ed. Cline Center for Democracy (University of Illinois at Urbana-Champaign 2013).



year 2005.<sup>254</sup> To date no data has been collected specifically on human rights-related protests, but the CNTS and SPEED data sources include non-violent protest and demonstration events that revolve around anti-government, class-based, political rights, and personal security issues. Both of these sources store events data on peaceful demonstrations and strikes, but they present radically different counts. Like with most events history data, we cannot be sure of the validity or differences in counts between these data, but we want to cover the largest period possible within the sample of countries. Therefore, I construct an imputed measure (NON-VIOLENT DISSENT) combining these sources into one binary score, with a ‘1’ in every county-year that has at least one non-violent protest, strike, or demonstration.<sup>255</sup> Even though using a binary eliminates some useful variation, the distribution of data is still ideal for testing the theory: of 2052 autocracy-years in the dataset, 565 had some kind of non-violent protest. Though the count varies, this means that roughly 27% of all autocracy-years had *any* non-violent dissent at all. Therefore, using a binary should at least be sufficient to test a relationship between dissent events, ratifications, and repression.

Dissent can also vary in the degree to which it is organized into movements, or campaigns. For this reason, I look at different sources to gather information on sustained human rights campaigns (used in Section 4.4). HUMAN RIGHTS CAMPAIGNS I take from Erica Chenoweth and Maria Stephan’s *Nonviolent and Violent Campaigns and Outcomes*

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<sup>254</sup> Banks series runs from 1972- 2003, but the SPEED series goes from 1946 to 2005. Because I take the union of the two, the measure I use is available from 1970 through 2005. Because I employ a lagged measure, my analysis goes from 1970 to 2006.

<sup>255</sup> In effect, this flattens variation in the count data, but this is necessary to prevent creating bias in the datasets. It is also acceptable for the purposes of this analysis, which is simply to get an idea of whether, on average, human rights commitments is associated with peaceful dissent, not whether different *levels* of dissent have a greater effect on autocrats.

(NAVCO) data set, which catalogues and details 323 violent and nonviolent resistance campaigns between 1900 and 2006.<sup>256</sup> Of these 323, I selected the 106 cases isolated by the authors which systematically practiced non-violence, and I performed additional research to determine which made regular appeal to ‘human rights.’<sup>257</sup> In the end, this yields a list of 59 total human rights campaigns in 56 different autocratic countries. These campaigns of dissent include, among others, Poland’s eight-year anti-Communist struggle organized under *Solidarnosc*, the three-year Filipino “People Power” revolution organized by Corason Aquino against the Ferdinand Marcos regime, and the three-year Ukrainian resistance campaign against the Kuchma regime from 2001-2004.

While separating between events and campaigns is valuable in terms of precision, neither of the measures that I use is satisfactory. The campaign variable is not sufficiently nuanced to capture the relationship between specific acts of dissent and responses by the government. For this reason, I have to use the events-based measure, a binary of all non-violent demonstration and protest in country. Using this means that I cannot zero in on human rights dissent events specifically. I still include this measure, for one practical reason and one theoretical reason. Practically speaking, though previous research, most notably that performed by Beth Simmons, has posited a relationship between law and social movements, it has not directly tested this relationship.<sup>258</sup> In fact, no studies that I am aware of make any effort to examine the human rights law-dissent nexus. This means

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<sup>256</sup> Chenoweth and Stephan, *Why Civil Resistance Works*, 6.

<sup>257</sup> In order to get an idea of appeal to human rights, I performed Lexis-Nexis searches for each and every campaign listed by Chenoweth and Stephan. I then labeled the campaign as human rights-related if one of the expressed demands of the campaigns was to improve human rights practices in the country, and if those demands were articulated using the term ‘human rights’ itself.

<sup>258</sup> Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*.

that the analysis in this chapter using a general dissent variable, while imperfect, represents a useful advance over what has come before. Second is the theoretical reason for using measures of all non-violent dissent: when it comes to contentious politics, it is difficult to distinguish that which is *primarily* driven by human rights concerns from that which *involves* human rights. Human rights dissent can, and often do, co-exist with protest or movements based on economic issues (anti-corruption or distributive conflict). Frequently these motives are seen as mutually exclusive, but in fact cries for political and civil rights coincide with calls for economic development, labor rights, or economic reform. In some movements, as in South Africa, civil and political rights (and ultimately human rights) came to be understood as a gateway to future economic freedoms.<sup>259</sup> I do not assume that human rights concerns trade off with other issues of contention; my only assumption that human rights activists will use primarily non-violent methods.

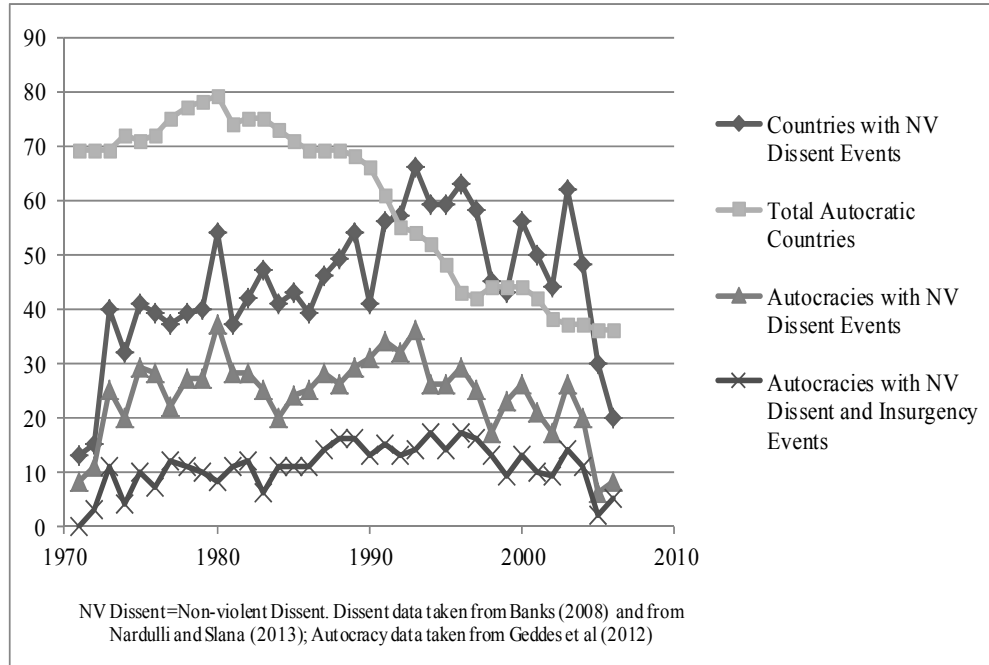
A potential concern for this assumption is that actors involved in human rights movements employ both non-violent and violent tactics; therefore, we must be attentive to the fact that both tactics might be employed simultaneously. Another concern in general is that using binary measures removes interest variation in the data. How do we handle these problems? First, I make an effort to test separately the effects of non-violent dissent and violent dissent in autocratic contexts. Figure 4.1 shows the number of autocratic countries in any given year with non-violent dissent events, and Figure 4.2 demonstrates the number of ongoing campaigns during the same period. Over time, roughly 40% of non-violent dissent events occur in the same year as violent dissent

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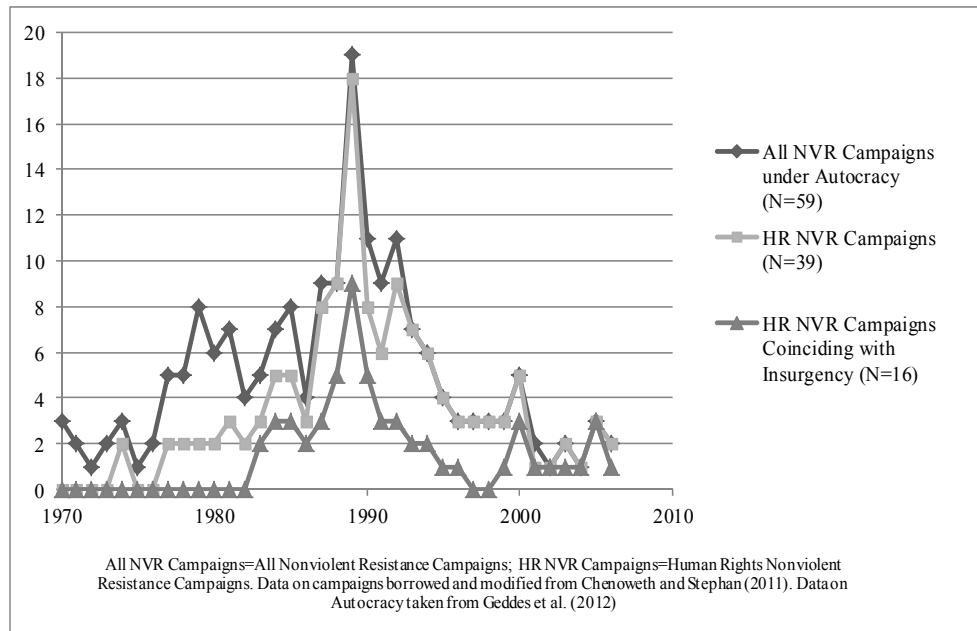
<sup>259</sup> Zuern, *The Politics of Necessity: Community Organizing and Democracy in South Africa*.

events, and the percentage of human rights movements that coincide with insurgency campaigns is also around 40%. Figure 4.1 depicts a downward trend since the mid-1990s in both the number of autocracies and the number of autocracies with non-violent dissent, while it shows a relatively static trend in the number of insurgencies occurring under dictatorship. And Figure 4.2 shows that the number of sustained non-violent movements, including those that made common appeal to human rights, peaked at the end of the Cold War. At the same time, following 1990, a higher share of non-violent movements used the language of human rights, indicating that human rights claims have become more prominent over time. Second, overall, the good degree of variation in the data over time, and the relatively high number of countries that witness non-violent dissent without violent tactics, is encouraging for the prospects of using this binary data to test the theory.

**Figure 4.1. Non-violent Dissent Events Under Autocracy, 1972-2006**



**Figure 4.2. Ongoing Human Rights Campaigns Under Autocracy, 1972-2006**



I expect that human rights dissent creates an impulse among autocrats to make human rights commitments. How well does this hold up to stylized facts? Let's look at just two of the treaties: ICCPR and CAT. Of the 70 ratifications of the ICCPR between 1972 and 2006, 32 were preceded the year before by mass peaceful dissent, accounting for nearly half of all dictatorial ratifications (45.7%). Of the 59 autocratic ratifications of CAT during the same period, 36 were preceded the by incidents of dissent in the previous year (61%). The most compelling counter-explanation of defensive rights commitments is that institutionalized parties demand such concessions. Therefore, we should expect the legalization of parties to precipitate treaty ratification. Using the same data as prior studies of party institutionalization, which comes from Jennifer Gandhi's work, I find that 22 of 70 ICCPR ratifications (31.4%) followed within three years of political party inclusion, and only 11 of 59 CAT ratifications (18.6%) followed their institutionalization.<sup>260</sup> This evidence looks pretty good for my theory, which assigns importance to domestic human rights dissent, but this could be an unfair test: it may very well be that ratification does not follow within three years of *changes* in party institutionalization, instead being the result of even longer efforts from organized parties within autocracy.<sup>261</sup>

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<sup>260</sup> This variable is coded 0-2, and it registers whether there are no parties, or no legislature (0); a legislature with only members from the regime party (1); or a legislature with multiple parties (2). I code legalization as any upward change in this variable. Jose Antonio Cheibub, Jennifer Gandhi, and James Raymond Vreeland, "Democracy and Dictatorship Revisited Codebook," (2009); "Democracy and Dictatorship Revisited," *Public Choice* 143(2011).

<sup>261</sup> James Vreeland, though, does seem to characterize ratification as a consequence of *changes* specifically, but it may not be changes. See Vreeland, "Political Institutions and Human Rights: Why Dictatorships Enter into the United Nations Convention against Torture," 78.

In order to address this issue, I test the theory more systematically, controlling for a number of other explanations. In addition to controlling for the institutionalization of political parties, I also include measures of judicial independence.<sup>262</sup> This is in line with newer work that suggests dictators, for example Mubarak in pre-transitional Egypt, might fear action by somewhat independent courts when they make rights commitments.<sup>263</sup> What are other explanations for why autocrats might sign onto human rights agreements? The first alternative explanation is international pressure. It could be that image-sensitive leaders getting bad international attention might try to improve their reputations by latching onto multilateral treaties.<sup>264</sup> It could also be that more material pressures, in the form of sanctions or the withholding of foreign direct investment, might inspire autocrats to make certain rights commitments. I therefore include measures that capture sources of reputational pressure—the logged number of INGOs within the country and Amnesty News Reports—and sources of material pressure—FDI as a percentage of GDP and the presence of human rights sanctions (for descriptions of all variables, see Table 4.6).<sup>265</sup>

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<sup>262</sup> Taken from C. Neal Tate and Linda Camp Keith, "Conceptualizing and Operationalizing Judicial Independence Globally," in *Annual Meeting of the American Political Science Association* (Chicago, IL2007).

<sup>263</sup> Conrad, "Divergent Incentive for Dictators: Domestic Institutions and (International Promises Not to) Torture."

<sup>264</sup> See Johnston, *Social States: China in International Institutions, 1980-2000*, 98, fn. 31. "As a general hypothesis, then, paradoxically the foreign policy of dictatorships is more likely to express sensitivity to international image, *ceteris paribus*, than that of democracies. Individual leaders in dictatorships are more likely to have a direct effect on the foreign policy process. Thus, their own personal sensitivities are more likely to come into play in the policy process."

<sup>265</sup> Logged number of INGOs from Hafner-Burton and Tsutsui (2005); Amnesty News Reports from James Ron, Howard Ramos, and Kathleen Rodgers, "Transnational Information Politics: Ngo Human Rights Reporting, 1986-2000," *International Studies Quarterly* 49, no. 557-587 (2005). FDI data from World Bank Databank. <http://databank.worldbank.org/data/home.aspx> and human rights sanctions from Wong, *Internal Affairs: How the Structure of N.G.O.S Transforms Human Rights*.

A second alternative explanation is that autocrats with high-performing economies will face fewer demands to make rights-based concessions. This is a favored argument from those who see rights demands as epiphenomenal to economic needs. On one hand, during high-growth periods, the public does not much care about human rights; on the other hand, as growth declines, it leads to unrest, which then creates the need for political compromises. To control for this, I include measures of logged GDP per capita (in 2000 USD) and Growth as a percentage of GDP.<sup>266</sup> Controlling for growth patterns also has the added benefit of testing whether non-violent dissent has a component independent of economic concerns. If the dissent variables are picking up only economic protests, then we should expect no relationship between dissent and human rights concessions. A third alternative explanation is that dictatorships more prone to using repressive violence, and that are involved in fighting insurgencies, may be more likely to make rights commitments. The reason for this is that those facing public challenges meet it with a twin strategy of engaging in cheap talk and ramping up repression of their subjects.<sup>267</sup> For this reason, I control for previous levels of repression and insurgency campaigns.<sup>268</sup> Finally, changes in world time might account for patterns in ratification. For this reason, I include controls for the post-Cold War 1990s and for those years following the onset of the War on Terror (2001-06).

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<sup>266</sup> From World Bank Databank.

<sup>267</sup> Hathaway, "Do Human Rights Treaties Make a Difference?"; Hollyer and Rosendorff, "Do Human Rights Agreements Prolong the Tenure of Autocratic Ratifiers?"; Vreeland, "Political Institutions and Human Rights: Why Dictatorships Enter into the United Nations Convention against Torture."

<sup>268</sup> I used the lagged PTS score and the lagged presence of an internal war or internationalized internal war (PRIO). Mark Gibney, L Cornett, and Reed Wood, "Political Terror Scale, 1976-2009," (<http://www.politicalterror scale.org/2010>). Nils Petter Gleditsch et al., "Armed Conflict 1946-2001: A New Dataset," *Journal of Peace Research* 39, no. 5 (2002).



[TABLE 4.2 HERE]

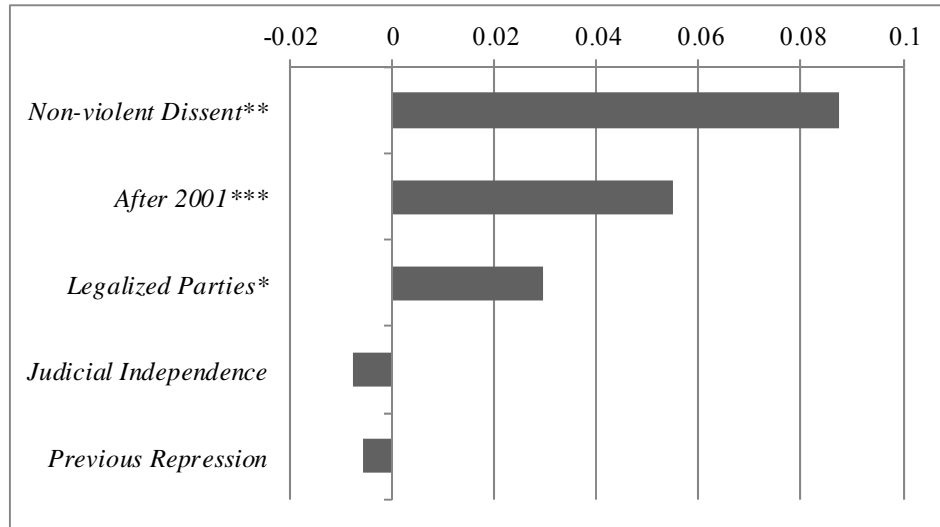
Table 4.2 presents results from two discrete time logits predicting the incidence of any of the six treaty ratifications under autocracy, controlling for time.<sup>269</sup> Because INGO and Amnesty Report data are only available for a restricted period of time, I estimate their effects in different models. It also presents two negative binomial regressions that predict the number of treaty ratifications in any given year, conditional on a number of covariates.<sup>270</sup> All of the variables are lagged to account for reverse causality. Overall, the models demonstrate the difficulty of predicting the choices of autocratic regimes to enter into these agreements. Unlike previous studies, which examine a much more confined time period (usually 1984-1996), my models show far fewer statistically significant covariates. Still, there is a good deal of support for my first expectation, that dissent generates pressure for ratification. In the logits, only three variables approach statistical significance in systematic tests of the sample of 93 different autocracies from 1972-2006. In order of robustness, they are NON-VIOLENT DISSENT, PARTIES, and AFTER 2001, the control for the period 2001-2006. NON-VIOLENT DISSENT is by far the most statistically and substantively significant variable across the four models. PARTIES is significant only at the .10 level, and only in the first logit model.

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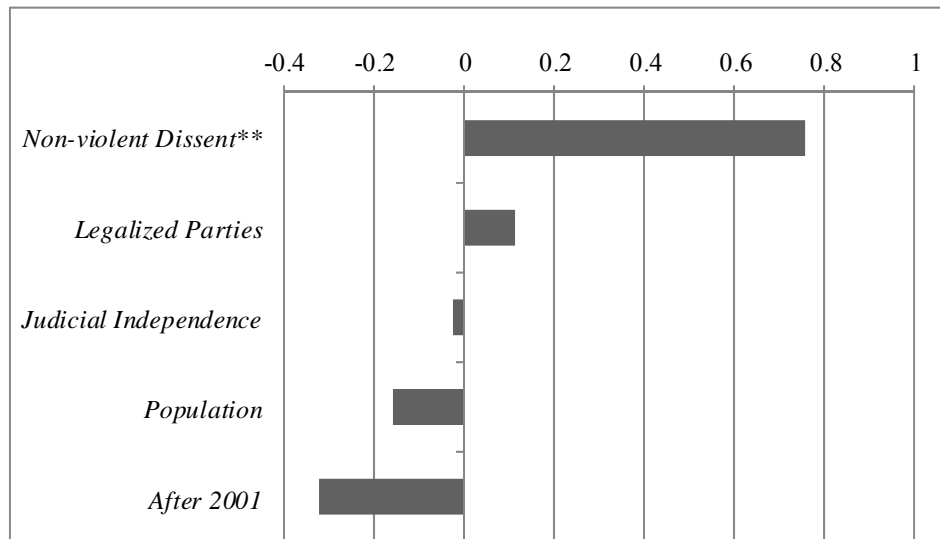
<sup>269</sup> Following Beck et al, I include cubic splines and controls for times since previous incidence of the dependent variable to control for temporal dependence. See Nathaniel Beck, Jonathan N. Katz, and Richard Tucker, "Taking Time Seriously: Time-Series-Cross-Section Analysis with a Binary Dependent Variable," *American Journal of Political Science* 42, no. 4 (1998).

<sup>270</sup> In these models, I control for exposure, meaning that I account for the fact that those states which have already ratified treaties will by definition have diminished options for ratifying more in the future.

**Figure 4.3. Changes in Probability of Ratification (Logit), 1972-2006**



**Figure 4.4. Percent Change in Expected Number of Ratification (Count), 1972-2006**



Figures 4.3 and 4.4 show the magnitude of these findings from the most inclusive samples (Model 1a and Model 1c). Figure 4.3 depicts the change in probability with a move from the minimum to the maximum of the five strongest variables of interest, two of which are statistically insignificant (JUDICIAL INDEPENDENCE, PREVIOUS REPRESSION). One can see that as peaceful dissent increases, the probability of an autocratic ratification increases by close to 9%. Also, autocracies are more apt to ratify in the post-2001 period, by around 5%. A move from no political parties to multiple institutionalized parties increases the risk of a ratification by around 3%. An independent judiciary very slightly decreases the probability of a ratification, as does the level of repression that the dictatorship already practices. Figure 4.3 demonstrates similar relationships based on the expected change in the *number* of ratifications conditioned on the five most robust variables.<sup>271</sup> If the autocratic regime faced a year of peaceful dissent against the regime, then its expected number of ratifications increases by close to 80%. If parties become move to maximum institutionalization, the expected number of ratifications increases by around 10%, other things equal. One deceptive finding is that the direction of the AFTER 2001 control switches. In combination with the logit findings, this might indicate that autocracies are ratifying more often during the 2000s, but that they are agreeing to fewer treaties at a time. Overall, these findings offer strong support for my first theory-driven expectation: that the impulse to ratify in autocracies emanates from peaceful domestic human rights constituencies pressing for change.

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<sup>271</sup> Generated by calculating the factor change in expected count conditioned on each variable.

### 4.3.2. Upticks in Repression

The second expectation in my theory is that in the short term, both peaceful human rights dissent and treaty ratifications will be correlated with increases in repression. There are two interrelated reasons for this. The first reason appeals to a logic similar to that employed by James Vreeland. The dissent that generates pressure on autocratic regimes to make concessions at the same time inspires reactionary violence, often in the same time period. We saw both in the Chile and Indonesia examples that the leadership continued to attack protestors until the end, and that ratifying was a last-ditch effort to make good before democratization. One might surmise that treaty ratifications, then, will tend to correlate with reactionary repression of dissent. And it is likely to be associated with repressive activity that is aimed primarily at protestors: killing and torture.<sup>272</sup> A second reason is that as dissent increases in a country, so too does the amount of information that is published and disseminated on the repressive response. Rights advocates are skilled at challenging the legitimacy of governments, and when suppressed violently, using that violence to prove the original challenge. This has a feedback loop effect, and we might expect that this would inflate the number of repressive incidents that are reported during times of transformation.

In order to test this hypothesis, I run a series of ordered probits using different dependent variables taken from regularly used data on repression. The first is the Political Terror Scale, a five point index of the violation of political and civil rights in a country (with '1' being low and '5' being the most systematic). The second is the Cingranelli-

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<sup>272</sup> Sidney Tarrow, *Power in Movement: Social Movements, Collective Action and Politics* (Cambridge: Cambridge University Press, 1994).

Richards Physical Integrity index, which ranges from 0 to 8, and combines four other measures of torture, killing, political imprisonment.<sup>273</sup> The third and fourth dependent variables I use are the two disaggregated components of the CIRI index, torture and killing, because they are the offenses normally associated with repressive responses to contentious collective action. To estimate the various models of short-term repression, I use the same variables from the analyses above, with three exceptions. First, the binary measure of treaty ratifications (lagged one year) is included in the model, where in the Models 1a and 1b it was the dependent variable. Second, I include a lagged measure of whether a coup, either successful or unsuccessful, recently occurred in the country. The reason for this is theoretical. Among autocratic regimes, we should expect direct challenges to rule to be associated with a repressive response (as the Equatorial Guinea example demonstrated).<sup>274</sup> Third and finally, following standard practice, I include in the equations a lagged measure of the dependent variables, to control for the dynamic nature of repressive relations.<sup>275</sup> In the end, my models look very similar to the ‘standard’ determinants of repression model.<sup>276</sup>

[TABLE 4.3 HERE]

The results of these models are recorded in Table 4.3. A number of the variables that are typically shown to predict repression are robust in my model, and in expected directions: sanctions increase repression (due to the necessity of dictators to repress who

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<sup>273</sup> A CIRI index score of ‘0’ normally indicates the highest level of repression, but I inverted the scale for ease of interpretation in these models.

<sup>274</sup> Jonathan M. Powell and Clayton L. Thyne, "Global Instances of Coups from 1950 to 2010: A New Dataset," *Journal of Peace Research* 48, no. 2 (2011).

<sup>275</sup> Davenport, "The Weight of the Past: Exploring Lagged Determinants of Political Repression."

<sup>276</sup> Keith, *Political Repression*.

those they can no longer buy off)<sup>277</sup>; insurgencies are associated with great increases in repression; growth and wealth are both associated with less repressive violence; and those countries with larger populations repress more. Yet a couple of surprises emerge. First, JUDICIAL INDEPENDENCE is correlated with less repressive violence across the board, a finding which indicates that even autocracies with more robust or ‘effective’ legal institutions are less likely to violate the physical integrity of their subjects. Second, one of the controls included to measure aggregate changes over time, AFTER 2001, is significant in the models using the PTS scale and the CIRI torture index, suggesting either that torture is increasing in the 2000s, or that it being reported more consistently.<sup>278</sup>

How do the expectations of the theory stand up to cross-national evidence? The models show fairly consistent results for NON-VIOLENT DISSENT, which is correlated with short-term increases in repression. However, this finding is only significant in Model 2a, which uses the PTS scale as the dependent variable. When the model is estimated using the CIRI Index (Model 2b), the effects are not statistically significant. Surprisingly, and contrary to expectations, TREATY RATIFICATIONS show mixed and statistically insignificant results in the first two models. In Model 2a, the effect is negative, suggesting that ratifications are associated with immediate decreases in repression. In Model 2b, however, the coefficient is positive, indicating a positive correlation with greater repression, though again, this is a statistically insignificant result.<sup>279</sup> Figures 4.3 and 4.4 show the change in probability of specific scores of the PTS and CIRI scales that

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<sup>277</sup> Wood, "A Hand Upon the Throat of the Nation": Economic Sanctions and State Repression, 1976-2001."

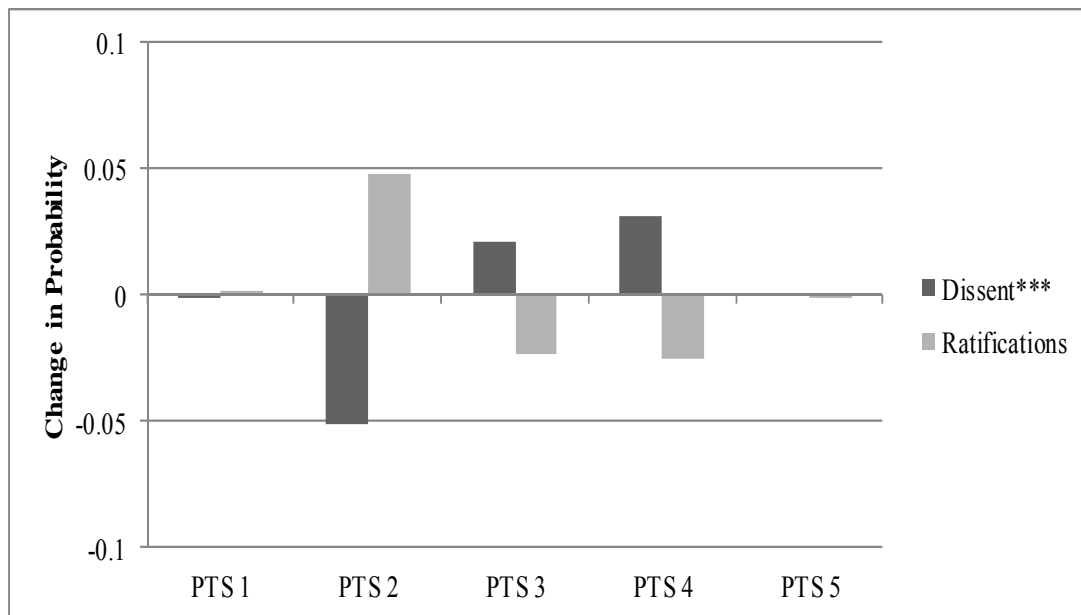
<sup>278</sup> On reporting, see Clark and Sikink, "Information Effects and Human Rights Data: Is the Good News About Increased Human Rights Information Bad News for Human Rights Measures?."

<sup>279</sup> These results do not change when replaced with a count of treaty ratifications.

comes with a one-point change in NON-VIOLENT DISSENT and TREATY RATIFICATIONS.<sup>280</sup>

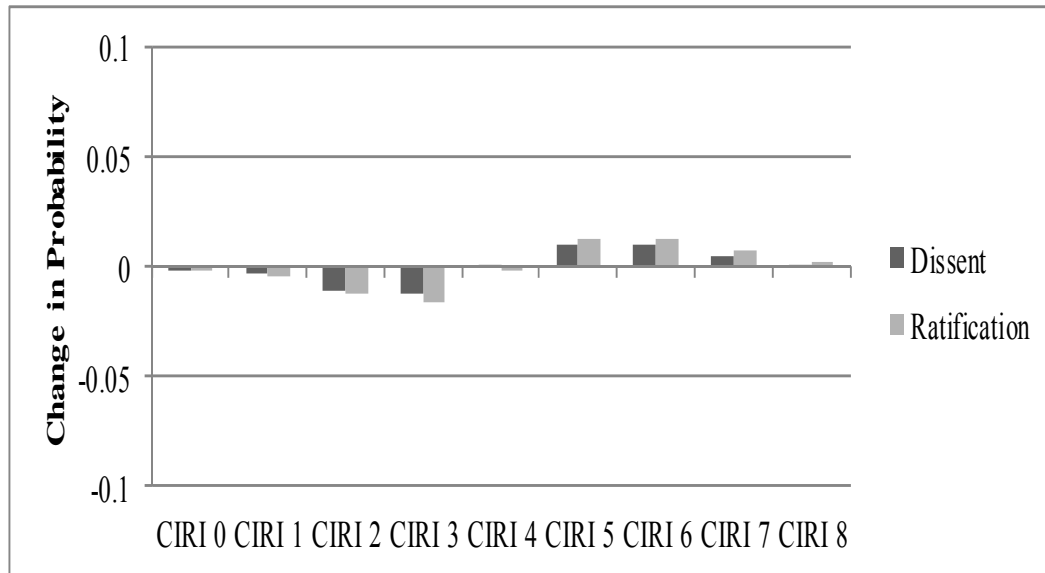
In Figure 4.3, the effects are opposite: the presence of peaceful dissent decreases the probability of a ‘2’ on the PTS Scale, and increases the probability of a 3 or 4 score. Ratifications, however, are associated with an increased probability of a 2 score, and a decreased probability of a 3 or 4 score. Figure 4.4 shows that both dissent and treaty ratifications decrease the probability of lower scores on the CIRI Index, while increasing the probability of higher scores, but the changes in probability are extremely small. In the end, there is little firm evidence of a substantive effect.

**Figure 4.5. Change in Probability of Levels of Repression (PTS), 1976-2006**



<sup>280</sup> These were computed using Gary King’s CLARIFY package.

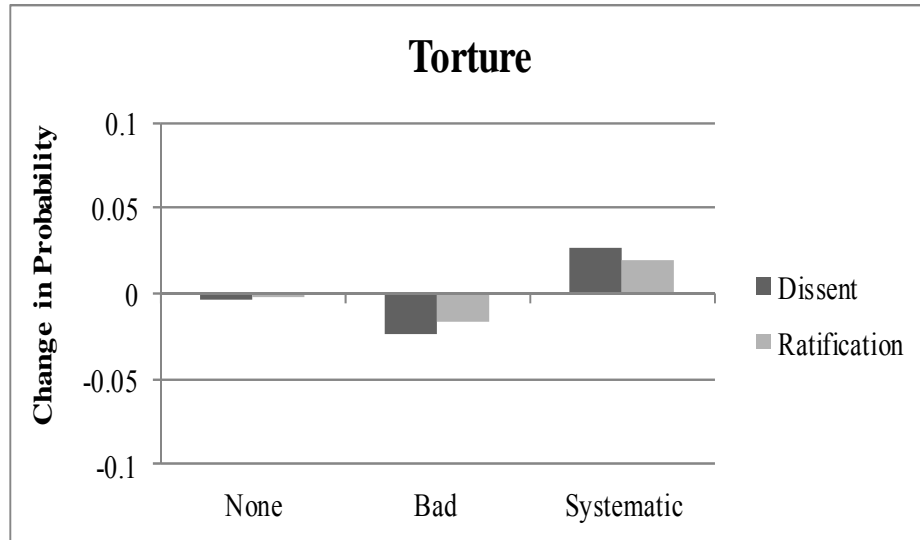
**Figure 4.6. Change in Probability of Levels of Repression (CIRI), 1980-2006**



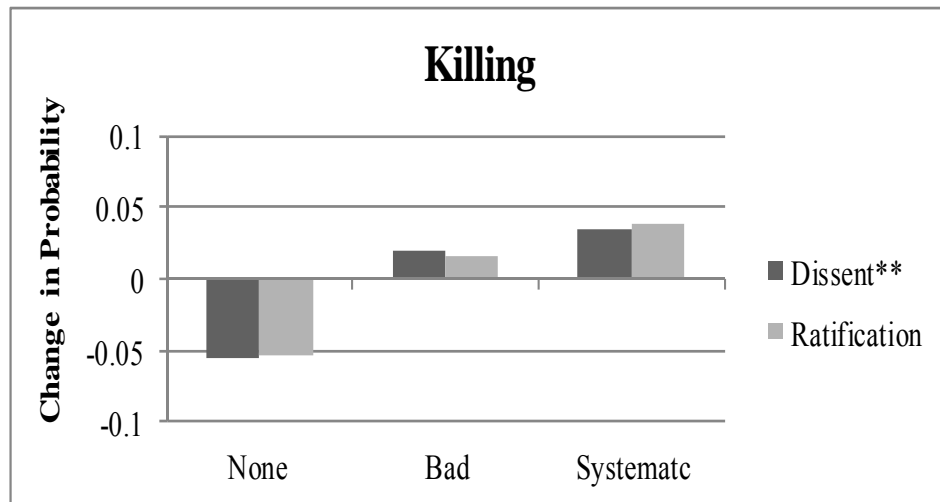
As for the association with specific acts of repression—torture and killing—both dissent and ratifications are in the predicted directions, though they fall short of achieving statistical significance, save for dissent in the model predicting increases in killing. Similar to Figures 4.4 and 4.5, Figures 4.6 and 4.7 show the change in probabilities of specific scores on CIRI’s torture and killing scales that result from a one-point increase in the independent variables. It appears from these charts that, as expected, non-violent dissent increases the chance that protestors will be killed or tortured. While treaty ratification increases the probability of systematic killing, and the effect appears even larger than that of dissent, the statistical insignificance of the finding means we should remain skeptical.



**Figure 4.7. Change in Probability of Levels of Torture (CIRI), 1980-2006**



**Figure 4.8. Change in Probability of Levels of Killing (CIRI), 1980-2006**



### 4.3.3. The Short Term Reconsidered

Considerable evidence exists that human rights dissent is a precursor to autocratic ratification, providing support for the first expectation generated by the theory of defensive ratification. The second expectation receives less support. While dissent is indeed correlated with short-term increases in repression, treaty ratification itself does not appear to be strongly associated with repression. Two conclusions could be drawn from these findings. First, with regard to increases in repression, treaty ratification is a secondary and non-causal factor. What inspires repression are proximate threats to legitimacy or to regime survival, i.e. people hitting the streets to protest the government.<sup>281</sup> Unlike those who posit a role for human rights legal commitments in the outright domination of subjects, I find little evidence that such a role in fact exists. In my estimations, there is absolutely no evidence that autocracies which repress more also ratify human rights treaties at a higher rate, nor is there substantive support that once they have made commitments, dictators will ramp up repressive tactics. Findings that suggest otherwise may be the relic of illusive statistical findings: when treaty ratifications are separated from one another and correlated to practices, it might appear as if some of them are *independently* associated with worse human rights practices. However, assuming independence is unjustified based on this data. In other words, we may be achieving strange statistical results by treating related parts of a process as mechanisms operating independently of all the rest.

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<sup>281</sup> For the strength-threat model of repression, see Poe, "The Decision to Repress: An Integrative Theoretical Approach to the Research on Human Rights and Repression."

When we group treaty ratifications together, we see entirely different findings, which is both interesting and of serious concern for previous studies. The difference between my results and those that have come before could owe to the fact that I am using an expanded sample that includes more years than other studies—or that I model the effects of *all* global treaties that impose costs for violations to physical integrity rights. If the reason for the negligible effects of treaty ratification is a byproduct of these modeling choices, it only points to the sensitivity of analyses correlating ratifications and repression data. Such studies are particularly prone to instrument bias, and should be approached with caution.<sup>282</sup> A second conclusion one could draw from these analyses is more pessimistic. It could be that the reason treaty ratifications are not associated with repression in the short-term is that these commitments are a temporary foil to the international community: leaders are simply relaxing the use of repression while they are being watched. Once global attention moves to the next conflict or calamity, leaders will again ratchet up repression, assert their control, and prolong their survival. This is a concern over the long term, and it is what I address in the last section.

#### **4.4. ANALYSIS PART TWO: THE LONG TERM**

What are the impacts of campaigning and legalization down the road? The third expectation generated by my theory of defensive ratification is that sustained human rights campaigning, and accumulating legal treaty commitments, will be associated with autocratic regime change in the long term. The logic is that mobilized dissent,

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<sup>282</sup> See Christopher J. Fariss, "Have Levels of Political Repression Changed? ," (Unpublished work on file with author2013). The author demonstrates that as the 'accountability standard' has improved over time, and human rights reporting has gotten better and more expansive, bias has been created in time series repression data.

ratification, and democratization are all part of the same process. What starts as an effort by autocrats to co-opt oppositional elements and critics of the regime morphs into a legitimacy crisis, which ultimately results in concessions that lead the way toward the expansion of party participation, voting, and legal power. This is not a general theory of democratization. Democratic transition has an infinity pool of causes, both structural and agentic, both proximal and distal.<sup>283</sup> Studies in the structural-configurational tradition, a la Barrington Moore, have tended to emphasize shifting class relations and distributional conflict, changing levels of inequality, or the cross-generational development of modern democratic cultures.<sup>284</sup> The school of transitology that emerged around the end of the Cold War placed a great deal more emphasis on agency, examining the intentional crafting of democratic institutions, or framing democratization as a result of elite bargaining.<sup>285</sup> In this vein, theorists have turned toward institutional factors that constrain autocrats under pressure for change or, inversely, those factors that allow them to block democratization. I suggest that human rights advocacy will interact with these institutions.

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<sup>283</sup> James Mahoney and Richard Snyder, "Rethinking Agency and Structure in the Study of Regime Change" *Studies in Comparative International Development* (1999); Barbara Geddes, "What Do We Know About Democratization after Twenty Years?," *Annual Review of Political Science* 2(1999); Valerie Bunce, "Comparative Democratization: Big and Bounded Generalizations," *Comparative Political Studies* 33(2000).

<sup>284</sup> Barrington Moore, *Social Origins of Dictatorship and Democracy* (Boston, MA: Beacon Publishers 1966); Ruth Berins Collier, *Paths toward Democracy: The Work Class and Elites in Western Europe and South America* (New York: Cambridge University Press 1999); Boix, *Democracy and Redistribution*; Acemoglu and Robinson, *Economic Origins of Dictatorship and Democracy*; Ronald Inglehart and Christian Welzel, *Modernization, Cultural Change, and Democracy: The Human Development Sequence* (Cambridge: Cambridge University Press, 2005); Stephan Haggard and Robert Kaufman, *The Political Economy of Democratic Transitions* (Princeton, NJ: Princeton University Press, 1995).

<sup>285</sup> Di Palma, *To Craft Democracies: An Essay on Democratic Transitions*; Juan J Linz, "Transitions to Democracy," *Washington Quarterly* 13(1990); Guillermo O'Donnell and Philippe C. Schmitter, "Transitions from Authoritarian Rule: Tentative Conclusions About Uncertain Democracies," in *Transitions from Authoritarian Rule*, ed. Guillermo O'Donnell, Philippe C. Schmitter, and Laurence Whitehead (Baltimore: Johns Hopkins University Press, 1986).

I expect rights-based mobilization and ratifications to be associated with regime change, but importantly, these rights-related phenomena may take time to have an impact. In Chile, as we saw in the example, the anti-regime human rights campaign was organizing demonstrations for six years (1983-1988) until it finally saw a true breakthrough with the plebiscite. Furthermore, human rights treaty commitments could have a delayed effect in autocratic settings. A dictatorial regime that continues to ratify important human rights treaties is, in effect, making various promises to its subjects. In regimes with some institutional organization, these legal commitments could become actionable given slow-moving changes in the judiciary, or in the willingness of various actors to hold autocrats to account for these promises. But we would not expect that treaty commitments will immediately lead to wholesale changes to the regime. In the sample that I use from 1976-2010,<sup>286</sup> of the 70 democratic transitions, 32 were preceded by a CAT ratification or an ICCPR, but these 32 range from 1-5 years before transition.

In order to test my expectations regarding regime longevity, I estimate proportional hazard models, wherein the dependent variable is the length of time that any given autocracy survives before becoming a democracy. As I mentioned before, I do not deem the length of leaders' tenures to be the best measure of autocratic persistence because some autocratic regimes regularly change rulers. Instead of using data on the length of time that particular leaders are in charge, I use a measure of how long an autocratic regime stays intact before transitioning to a non-autocratic regime. I borrow this data from Barbara Geddes et al. because the set they have assembled represents the

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<sup>286</sup> In this analysis, the sample expands because it is no longer limited by missingness in the Banks and Murdie and Bhesin data on public dissent.

most nuanced coding of the length and type of autocratic regimes since World War II.<sup>287</sup> It also contains very clear codings of the duration of each autocratic regime. Because we would not expect immediate changes in the propensity for autocratic failure either from campaigning or from defensive ratifications, I operationalize these covariates using sustained and accumulated coding. In sustained coding, for each autocratic regime in the sample, the variables continue to increase and sustain as more activity happens. If a human rights campaign had continued on for six years, in  $time_{(t-6)}$  the variable would be coded as six. Once it stops, the value returns to zero. For the accumulated variables, the variable increases in value for each instance, and sustained that value until another increase.<sup>288</sup> Coding in this way allows us to capture the increasing returns of institutional-legal changes, and the additive effect of sustained pressure over time.<sup>289</sup>

I include a number of other variables to control for alternative explanations. First, I control for whether the regime is considered a ‘party autocracy,’ or one in which the ruling coalition channels its power through a political party or parties in legislatures. According to Jennifer Gandhi and Adam Przeworski, in party autocracies “the ruler can select the groups to be granted access and control the flow of information about negotiations, all while building the basis of support for the regime”; through political parties, leaders can both drum up support through party functionaries and monitor

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<sup>287</sup> Geddes, Wright, and Frantz, "New Data on Autocratic Regimes."

<sup>288</sup> For example, a country ratified its first treaty in 1990, ratified a second in 1991, and ratified none in 1992, the score would be ‘1’ in 1990, ‘2’ in 1991, ‘2’ in 1992, ‘2’ in 1993, and so on until the next ratification.

<sup>289</sup> Paul Pierson, "Increasing Returns, Path Dependence, and the Study of Politics," *American Political Science Review* 94, no. 2 (2000). For a similar coding scheme, see John Gerring, Strom C. Thacker, and Carola Moreno, "Centripetal Democratic Governance: A Theory and Global Inquiry," *ibid.* 99, no. 4 (2005).

members, providing invaluable information to the center.<sup>290</sup> While dictators tend to directly pay the members of their selected coterie, they channel certain policy concessions through parties and legislatures, no matter how fraudulent. Those dictatorships with parties and legislatures, Gandhi and Przeworski discover, tend to be more resilient, outlasting other forms of autocracy. This is one of the most important considerations for long-term expectations concerning autocratic survival in the face of human rights mobilization. Generally, we should expect that party autocracies will last longer, and in addition, we should expect that the presence of parties will condition the response of autocratic regimes to human rights pressure. Parties allow dictators to channel human rights concerns into institutional outlets, rather than having the full force of constituent power directed at ouster or revolution.

Second, regime change is argued to be highly conditioned by whether leaders are able to negotiate post-exit guarantees of their safety and immunity from legal action.<sup>291</sup> For this reason, I include a measure of accumulated legal amnesties for autocratic leaders passed over the period of the regime's rule.<sup>292</sup> Third, the pervasiveness of military defections and intra-elite challenges that the regime has previously faced is likely to speak to its overall strength. We would expect, then, that the more accumulated coups, the more prone an autocratic regime to failure. A fourth important control is the accumulated level of repression in the country; arguably, those regimes with greater

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<sup>290</sup> Gandhi and Przeworski, "Authoritarian Institutions and the Survival of Autocrats," 1282.

<sup>291</sup> Escriba-Folch and Wright, "Human Rights Prosecutions and Autocratic Survival."

<sup>292</sup> Data taken from [transitionaljusticedata.com](http://transitionaljusticedata.com). See also Tricia D. Olsen, Leigh A. Payne, and Andrew G. Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (Washington, D.C.: United States Institute of Peace, 2010).

coercive capacity are less likely to experience viable challenges to rule.<sup>293</sup> Assuming that violent insurgencies are symptomatic of the failure of regimes to consolidate power, I also control for insurgency. Fifth and finally, it is necessary to control for economic performance, which I do by included general measures of wealth and growth.

[TABLE 4.4 HERE]

The results from two Weibull proportional hazard models are recorded in Table 4.4.<sup>294</sup> In the first model, I examine the net effects across all autocracies, hypothesizing that party autocracies will face less risk of democratization, but that other things equal, human rights campaigns and treaty ratifications will be associated with regime change. The results of the first model are presented in Figure 4.7, which depicts the predicted change in regime duration given a move from the minimum to the maximum of each variable (all of which are statistically significant). As expected, party autocracies are the strongest predictor of regime survival, and economic growth is close behind. Those regimes with political institutions, and those that enjoy positive growth, are less likely to fail. From the coefficients in Table 4.4., we can see that party autocracies, which shore up power by channeling conflict through controlled institutions, on average last 51% longer than autocracies without political parties. Also, for every one percentage point of growth that an autocratic country experiences, its chance of failure decreases by 5%. This finding is encouraging, because it verifies long-standing theories in comparative research

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<sup>293</sup> Christian Davenport, "State Repression and the Tyrannical Peace," *Journal of Peace Research* 44, no. 4 (2007).

<sup>294</sup> I used a parameterized Weibull model instead of semi-parametric Cox because it is clear from the data autocratic failure rates are duration dependent. As time goes on, the risk of failure decreases.



relating regime stability to efficacy, or effectiveness.<sup>295</sup> In terms of our hypotheses, one can also see in Figure 4.7 that sustained human rights campaigns and accumulated treaty ratifications decrease the length of regime survival under autocracy, on par with the effect that coups have on regime breakdown. For each additional year that a human rights campaign publicly resists the government, chances of democratic transition increase by 30%. The correlation between treaty ratifications and autocratic breakdown is very similar: every additional ratification is associated with a 31% increase in the risk of failure. This is a clear indication that, on average across autocracies, both dissent and attempts to coopt dissent through institutionalization of human rights are predecessors to democratic transition.

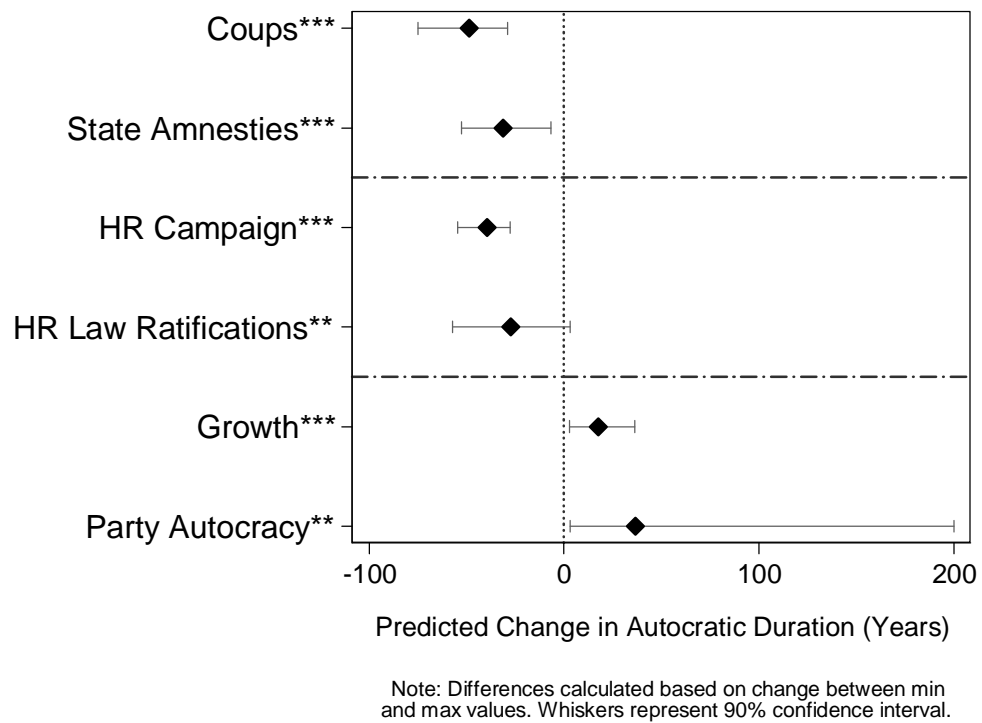
Importantly, these are relationships that have not yet been discovered in empirical research. One reason for this, as I have emphasized in the previous chapters, is that scientists have been preoccupied with examining the correlates of repression, adding new variables to the ‘base model’ to discover new factors that contribute to, or mitigate, the decision to resort to repressive violence. In examining the short-term correlations, they have at times passed over the processes of change that address the root causes of repression. We know from Correlates of Repression (COR) research that autocratic regimes are more likely to engage in abuses to physical integrity, and that regime type in general conditions the effect of other factors like human rights legalization. However, it has never been argued that human rights campaigning, which involves the push for human rights legal development, is positively correlated with regime change. The

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<sup>295</sup> Juan J Linz, "Crisis, Breakdown and Reequilibration," in *The Breakdown of Democratic Regimes*, ed. Juan J Linz and Alfred Stepan (Baltimore: Johns Hopkins University Press 1978).

evidence presented above shows that it is. Human rights constituencies have power, and when they butt heads with regimes, they sometimes win. International law helps inform this resistance, and in turn, it grows stronger with the effort of resisters.

**Figure 4.9. Change in Autocratic Duration Conditioned on Covariates**



When we dig deep enough, what we find in this empirical evidence is not that legalizing human rights treaties *causes* human rights violations. No, what causes governments to resort to repressive violence is the perception that their regimes are under

threat, and that they are growing politically weak.<sup>296</sup> Coincident to this loss of power is the drive to codify human rights principles into law, and this drive comes from the people. The relationship between public outbursts of resistance and the failure of autocratic regimes is starting to be well documented,<sup>297</sup> but the ways in which human rights constituencies are implicated in this resistance has remained unexplored. It takes a process-oriented approach to legalization and human rights-based change to find the obscured relationship between human rights law and autocratic weakness. After examining case histories, in combination with statistical measures of sustained dissent and efforts to legalize human rights, we find that human rights law gets stronger in moments when resistance gets bolder, when repression momentarily flares, and when regimes topple.

#### 4.5. CONCLUSION

This chapter makes several contributions. First, it presents a process-based theory of autocratic rights commitments, defensive ratification, that serves as a viable alternative to the theory of offensive ratification—an alternative that incorporates lessons from a wide literature on the impact of social mobilization. This is the first effort that has been made to theorize and test systematically the relationship between contentious politics and human rights legalization. Second, this chapter modifies and improves Vreeland's party concessions model of treaty ratification. Party institutionalization does not *inspire* treaty

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<sup>296</sup> Poe, "The Decision to Repress: An Integrative Theoretical Approach to the Research on Human Rights and Repression."

<sup>297</sup> Jay Ulfelder, "Contentious Collective Action and the Breakdown of Authoritarian Regimes," *International Political Science Review* 26, no. 3 (2005); José Alemán and David D. Yang, "A Duration Analysis of Democratic Transitions and Authoritarian Backslides," *Comparative Political Studies* 44(2011).

ratifications; only the public activism of domestic human rights constituencies applies such pressure, and it does so even across all dictatorships. Parties, however, might be crucial for channeling these pressures. Third, this chapter revises what we know about the short-term impact of treaty ratification on repression. Contrary to my own hypotheses, I find little substantive evidence that treaties cause greater repression under dictatorship, even though I used the most extensive sample of country-years and data on all six international treaties which should affect relations of repression. In fact, I find little reason to afford treaty ratification itself much causal importance at all. Expectations concerning the constraining potential of treaties are perhaps too high, but treaty ratifications *are* significant for what they tell us about unfolding dynamics between human rights constituencies and regimes leaders. Fourth, this chapter substantially modifies our understanding of the long-term effects of human rights advocacy on autocratic regimes. On average, sustained human rights movements increases the risk of democratization over time, as does the accumulation of legal treaties.

This chapter argues that those human rights constituencies struggling for human rights law do have some positive impact, even in the worse circumstances. The next two chapters will turn to the question of what happens on the other side of regime change, after new democratic institutions have been established. What is the role for human rights law and legal action in promoting democratic survival, future rights enforcement, and decreases in repressive violence?

## TABLES

**Table 4.2. Determinants of Treaty Ratifications, 1976-2006**

	<i>Discrete Time Logit</i>		<i>Negative Binomial Regression</i>	
	<b>Model 1</b>	<b>Model 1b</b>	<b>Model 1c</b>	<b>Model 1d</b>
LEGALIZED PARTIES	0.257* (0.145)	0.210 (0.164)	0.117 (0.131)	0.151 (0.167)
JUDICIAL INDEPENDENCE	-0.0655 (0.157)	-0.333 (0.207)	0.0247 (0.154)	-0.0296 (0.238)
NON-VIOLENT DISSENT	0.976** (0.424)	0.945* (0.505)	0.827** (0.392)	0.796 (0.484)
HUMAN RIGHTS SANCTIONS	-0.0184 (0.271)	0.0479 (0.388)	-0.270 (0.282)	-0.274 (0.345)
AMNESTY NEWS REPORTS		-0.0767 (0.0707)		-0.0888 (0.0666)
INGOs (logged)		0.341 (0.264)		-0.259 (0.258)
FDI (%GDP)	-0.0127 (0.0123)	-0.0405 (0.0317)	-0.00650 (0.0159)	-0.0351 (0.0288)
GROWTH (%GDP)	-0.00858 (0.0129)	-0.00378 (0.0183)	-0.0121 (0.0142)	-0.00540 (0.0166)
GDP per cap (logged)	-0.129 (0.101)	-0.112 (0.141)	-0.123 (0.0938)	0.0124 (0.141)
POPULATION (logged)	-0.0730 (0.0955)	-0.170 (0.170)	-0.139 (0.0880)	-0.0111 (0.155)
PREVIOUS REPRESSION	-0.0331 (0.120)	-0.164 (0.172)	-0.0691 (0.135)	-0.127 (0.167)
INSURGENCY	0.153 (0.261)	0.559 (0.404)	0.202 (0.273)	0.543 (0.347)
1990-2000	0.417 (0.292)	0.396 (0.332)	0.317 (0.256)	0.383 (0.293)
2001-2006	0.732** (0.359)		-0.302 (0.291)	
Spline 1	0.00844 (0.00934)	0.00442 (0.0135)		
Spline 2	-0.00606 (0.00597)	-0.00340 (0.00891)		
Spline 3	0.00138 (0.00133)	0.000804 (0.00202)		
Time Since Previous Ratification	0.0436 (0.173)	-0.0337 (0.220)		
Number Previous Ratifications	-0.463*** (0.166)	-0.601*** (0.231)	1.883*** (0.194)	1.941*** (0.238)
Constant	-0.336 (1.575)	0.163 (2.440)	-0.774 (1.472)	-2.008 (2.149)
<i>Observations</i>	1553	875	1553	875
<i>Number of Countries</i>	93	86	93	86
<i>Log-Likelihood</i>	-385.1	-227.7	-481.5	-298.2

Notes: Panel-corrected standard errors in parentheses \*\*\*p<.01 \*\*p<.05 \*p<.10

**Table 4.3. Ordered Probit Models of Short-term Repression, 1976-2006**

	<i>PTS</i>	<i>CIRI Index</i>	<i>CIRI Torture</i>	<i>CIRI Killing</i>
	<b>Model 2a</b>	<b>Model 2b</b>	<b>Model 2c</b>	<b>Model 2d</b>
LAGGED DV	1.153*** (0.0815)	0.480*** (0.0276)	1.049*** (0.0822)	0.959*** (0.0678)
LEGALIZED PARTIES	-0.0321 (0.0464)	0.00862 (0.0397)	0.0598 (0.0536)	0.0568 (0.0517)
JUDICIAL INDEPENDENCE	-0.202*** (0.0523)	-0.146*** (0.0390)	-0.160*** (0.0546)	-0.0948* (0.0504)
NON-VIOLENT DISSENT	0.165*** (0.0549)	0.0691 (0.0594)	0.0676 (0.0758)	0.152** (0.0670)
TREATY RATIFICATIONS	-0.177 (0.125)	0.0757 (0.108)	0.0473 (0.137)	0.150 (0.125)
HUMAN RIGHTS SANCTIONS	0.349*** (0.0884)	0.155* (0.0841)	0.190 (0.118)	0.353*** (0.104)
COUP	0.184 (0.132)	0.310* (0.168)	0.0956 (0.138)	0.543*** (0.161)
INSURGENCY	0.745*** (0.102)	0.439*** (0.0774)	0.249*** (0.0963)	0.586*** (0.0745)
GROWTH (%GDP)	-0.0158*** (0.00566)	-0.00253 (0.00484)	-0.00143 (0.00596)	-0.00115 (0.00520)
GDP per cap (logged)	-0.0929*** (0.0329)	-0.0629** (0.0292)	-0.0530 (0.0397)	-0.109*** (0.0398)
POPULATION (logged)	0.132*** (0.0277)	0.144*** (0.0240)	0.143*** (0.0359)	0.111*** (0.0302)
1990-2000	-0.0298 (0.0747)	-0.00403 (0.0653)	0.175** (0.0777)	-0.0136 (0.0760)
2001-2006	0.245*** (0.0899)	0.0744 (0.0656)	0.319*** (0.101)	0.131 (0.0906)
Constant	2.142*** (0.486)	0.908** (0.408)	1.606** (0.659)	1.697*** (0.581)
<i>Observations</i>	1608	1470	1481	1474
<i>Countries</i>	89	97	97	97
<i>Log Likelihood</i>	-1378.7	-2372.9	-986.7	-1109.8

Note: Panel-corrected standard errors in parentheses. All non-differentiated variables lagged one year

**Table 4.4. Proportional Hazard Models of Democratic Regime Change, 1970-2010**

	<i>Weibull</i>	
	<b>Model 3a</b>	<b>Model 3b</b>
PARTY AUTOCRACY	-0.704** (0.331)	-0.954** (0.453)
SUSTAINED HR CAMPAGN	0.257*** (0.0567)	0.452*** (0.137)
ACCUMULATED RATIFICATION	0.274** (0.118)	0.163 (0.144)
ACCUMULATED AMNESTIES	0.691*** (0.206)	0.579*** (0.212)
ACCUMULATED COUPS	0.118*** (0.0262)	0.107*** (0.0274)
ACCUMULATED SANCTIONS	-0.0126 (0.0573)	-0.0478 (0.0672)
ACCUMULATED REPRESSION	-0.0117 (0.00746)	-0.0122 (0.00837)
INSURGENCY	-0.322 (0.303)	-0.0908 (0.318)
GROWTH (%GDP)	-0.0429*** (0.0141)	-0.0248* (0.0145)
GDP per capita (logged)	0.00594 (0.104)	0.0106 (0.103)
POPULATION (logged)	0.230** (0.105)	0.192* (0.112)
PARTY*RATIFICATIONS		0.373** (0.215)
PARTY*HR CAMPAIGN		-0.340** (0.138)
PARTY*GROWTH		-0.0877** (0.0361)
PARTY*COUPS		-0.122 (0.142)
PARTY*AMNESTIES		0.810*** (0.297)
PARTY*SANCTIONS		-0.796 (0.690)
p	0.926 (0.084)	0.863 (0.087)
<i>Observations</i>	2552	2551
<i>Countries</i>	106	106
<i>ll</i>	-158.5	-147.7

*Note:* Errors cluster by Country

**Table 4.5. List of Human Rights Campaigns, 1970-2006**

<b>Start</b>	<b>End</b>	<b>Country</b>	<b>Target</b>	<b>Peak Membership</b>
1974	1974	<i>Portugal</i>	Military rule	10000
1974	1974	<i>Greece</i>	Military rule	2500
1976	1979	<i>China</i>	Communist regime	100000
1977	1982	<i>Bolivia</i>	Military juntas	?
1977	1981	<i>Argentina</i>	Military juntas	10000
1979	1980	<i>South Korea</i>	Military juntas	100000
1981	1989	<i>Poland</i>	Communist regime	50000
1983	1989	<i>Chile</i>	Augusto Pinochet	700000
1983	1983	<i>Pakistan</i>	Zia al-Huq	50000
1984	1985	<i>Brazil</i>	Military rule	1000000
1984	1985	<i>Uruguay</i>	Military rule	50000
1984	1994	<i>South Africa</i>	Apartheid	200000
1985	1985	<i>Haiti</i>	Jean Claude Duvalier	30000
1986	1986	<i>Argentina</i>	Attempted Coup	?
1986	1983	<i>Philippines</i>	Ferdinand Marcos	2000000
1987	2000	<i>Mexico</i>	corrupt govt	100000
1987	1989	<i>Panama</i>	Noriega regime	400
1987	1989	<i>Romania</i>	Ceasescu regime	100000
1987	1990	<i>Palestine</i>	Israeli occupation	150000
1987	1987	<i>South Korea</i>	Military government	?
1988	1988	<i>Burma</i>	Military junta	1000000
1988	1999	<i>East Timor</i>	Indonesian occupation	6000
1989	1989	<i>East Germany</i>	Communist regime	70000
1989	1989	<i>Hungary</i>	Communist regime	?
1989	1989	<i>Czechoslovakia</i>	Communist regime	500000
1989	1992	<i>Slovakia</i>	Czech communist government	?
1989	1989	<i>Albania</i>	Communist regime	?
1989	1990	<i>Slovenia</i>	Communist regime	?
1989	1989	<i>Bulgaria</i>	Communist regime	70000
1989	1989	<i>Estonia</i>	Communist regime	300000
1989	1989	<i>Latvia</i>	Communist regime	250000
1989	1991	<i>Lithuania</i>	Lithuanian regime	250000
1989	1989	<i>Belarus</i>	Communist regime	100000
1989	1992	<i>Mali</i>	Military rule	100000
1989	1990	<i>Benin</i>	Communist regime	?



1989	1989	<i>Kenya</i>	Daniel Arap Moi	?
1989	1989	<i>Kyrgyzstan</i>	Communist regime	20000
1989	1989	<i>China</i>	Communist regime	1000000
1989	1990	<i>Mongolia</i>	Communist regime	7000
1989	1990	<i>Bangladesh</i>	Military rule	1000
1989	1990	<i>Nepal</i>	Monarchy/Panchayat regime	200000
1990	1992	<i>Guyana</i>	Burnham/Hoyte autocratic regime	5000
1990	1991	<i>Russia</i>	Anti-coup	700000
1991	1993	<i>Madagascar</i>	Didier Radsiraka	400000
1992	1995	<i>Tanzania</i>	Mwinyi regime	?
1992	1994	<i>Malawi</i>	Banda regime	10000
1992	1992	<i>Thailand</i>	Suchinda regime	200000
1993	1999	<i>Nigeria</i>	Military rule	1000000
1997	1998	<i>Indonesia</i>	Suharto rule	10000
1999	2000	<i>Croatia</i>	Semi-presidential system	100000
2000	2000	<i>Peru</i>	Fujimori govt	50000
2000	2000	<i>Yugoslavia</i>	Milosevic regime	200000
2000	2000	<i>Senegal</i>	Diouf govt	5000
2000	2000	<i>Ghana</i>	Rawlings govt	?
2000	2005	<i>Egypt</i>	Mubarak regime	5000
2001	2004	<i>Ukraine</i>	Kuchma regime	500000
2001	2001	<i>Philippines</i>	Estrada regime	500000
2002	2002	<i>Venezuela</i>	anti-Chavez coup	200000
2002	2003	<i>Madagascar</i>	Radsiraka regime	500000
2003	2003	<i>Georgia</i>	Shevardnadze regime	200000
2005	2005	<i>Lebanon</i>	Syrian forces	1000000
2005	2005	<i>Kyrgyzstan</i>	Akayev regime	20000
2006	2006	<i>Belarus</i>	Belarus government	40000
2006	2006	<i>Nepal</i>	Nepalese govt; martial law	300000

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**Table 4.6. Summary of Variables Used in Analyses**

<i>Variable</i>	N	Mean	SD	Min	Max
Ratifications Binary	3222	.0536934	.2254466	0	1
Ratifications Count	3222	.0713842	.3322571	0	4
Legalized Party	3049	1.13283	.8247332	0	2
Judicial Independence	2217	.5651782	.7092834	0	2
Non-violent Dissent	2052	.38453	.486574	0	1
Human Rights Campaign	3222	.0353818	.1864441	0	2
Human Rights Sanction	3222	.1170081	.3214798	0	1
FDI(%GDP)	2357	2.244691	5.317199	-28.6243	90.7411
Growth(% GDP)	2714	4.122045	6.911991	-51.03086	39.48709
GDP per cap (logged)	2656	6.735142	1.263173	4.414877	11.02475
Population (logged)	2912	16.10151	1.381638	12.6668	20.9856
CIRI Scale Inverted	2131	4.209761	2.125106	0	8
PTS Scale	2622	2.896262	1.039066	1	5
Insurgency	3201	.211184	.4082124	0	1
1990-2000	3222	.1480447	.3551994	0	1
2001-2006	3222	.1657356	.3719008	0	1
Coup	3222	.0512104	.2204609	0	1
Sustained HR Campaign	3222	.11018	.7840157	0	14
Accumulated Ratifications	3222	.8075729	1.201352	0	6
Accumulated Amnesties	3222	.0918684	.3839398	0	4
Accumulated Coups	3222	2.157666	2.758291	0	19
Sustained Sanctions	3222	.7532588	2.797682	0	25
Accumulated Repression	3222	26.03662	26.64744	0	136
Democratic Transition	3222	0.02	0.14	0.00	1.00
Party Autocracy	3222	0.49	0.50	0.00	1.00

**CHAPTER 5: HUMAN RIGHTS IN NEW DEMOCRACIES, PART ONE: DOMESTIC DEMANDS, TRANSITIONAL JUSTICE AND SHORT-TERM CONSEQUENCES<sup>298</sup>****5.1. INTRODUCTION**

In the previous section, I demonstrated that rights-based dissent and legalization are both associated with regime change among autocracies over time, though in the short term both may appear to have a slightly negative impact. This is evidence that even in the worst circumstances, mobilizing for rights law can have an effect. Once democratic transition has taken place, though, the game is not up. Human rights constituencies continue to pursue reforms in an effort to convert the energies of regime change into long-term institutional protections from state abuse. In the language of my power-oriented political theory of human rights, agents bearing constituent power seek to generate legal power.

Within the context of the third wave of democratization—with roots in the Greek and Portuguese transitions to democracy in the mid-1970s—human rights constituencies have increasingly sought change through judicial activism and legal *enforcement* of human rights protections.<sup>299</sup> Since the beginning of the third wave, newly installed democratic regimes have ratified upwards of 300 human rights treaties, and over sixty transitional governments have initiated policies pursuant to transitional justice, which refers to “legal and quasi-legal” efforts to reckon with former human rights violations in

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<sup>298</sup> This material is based upon work supported by the National Science Foundation under Grant No. 0961226.

<sup>299</sup> On the third wave, see Huntington, *The Third Wave: Democratization in the Late Twentieth Century*. On legal mobilization, see Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*. Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*.

times of political change.<sup>300</sup> In this chapter, I address two closely related questions around this phenomenon. First, why do regimes pursue transitional justice after democratization, and second, what are the short-term effects of these efforts? Following cues from qualitative work on social movements, I argue that the move toward human rights enforcement emerges from domestic political conflicts involving advocacy groups, parties, and political elites. Because enforcement targets groups that formerly enjoyed impunity, it will be associated with short-term risks that endanger the new regime. However, as I will demonstrate, these risks have not historically speaking been as pronounced as some predicted.

Beginning in March 2011, former Egyptian President Hosni Mubarak and his former Interior Minister, Habib el-Adly, were issued sentences by an Egyptian court for charges of corruption, illegally profiting from office, and for murdering protestors during the revolution. They would be held guilty. “This marks a new beginning,” said an editor of the popular Egyptian newspaper *El Shorouk*. “For the first time, someone who represented such a brutal force is questioned, interrogated, and held accountable. This is something new for Egyptian politics, and it is new for Egyptian justice.”<sup>301</sup> At the time of this writing, in spring 2013, Mubarak and Habib el-Adly are set to undergo a retrial, as the Egypt’s Court of Cassation accepted an appeal. The two, a former dictator and one of his henchmen, who for 14 years led a security force number up to 400,000 and viciously repressed dissent, are now coursing through the various levels of the legal process. When

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<sup>300</sup> This definition is a slight modification of O’Rourke (2009). Dancy, “Choice and Consequence in Strategies of Transitional Justice.”

<sup>301</sup> David D. Kirkpatrick, “Once Feared Egypt Official Gets 12 Years and Fine,” *The New York Times* May 5, 2011.

Mohamed Morsi of the Muslim Brotherhood gave his victory speech following the elections for president, he promised further justice for victims of the crackdown by the Supreme Council of Armed Forces (SCAF) during the revolution. "I will not give up the rights of our martyrs and wounded. Fair retribution for them is my responsibility, which I will not shirk."<sup>302</sup> This caused unease among the SCAF, which was later issued some protective legal guarantees by Morsi and his constitutional assembly.<sup>303</sup> These events were unfolding at the same time that Bangladesh's homegrown War Crimes Tribunal began trying its third senior member of minor oppositional party Jamaat-e-Islami, Delwar Hossain Sayeedi, who is alleged to be responsible for massacres and rapes during his collaboration with Pakistan in the 1971 War of Independence. In response, youth supporters of Jamaat took to the streets and violently rioted, leaving dozens dead.<sup>304</sup>

Do short-term negative consequences generally result from the domestic prosecution of human rights criminals in new democracies? Are these detrimental to the prospect of democratic survival? To answer these questions, one must first answer: where does the push toward transitional justice come from? Theories concerning political self-interest might reduce the impulse behind human rights trials to opportunistic bids by actors within different branches of government, rather than a genuine desire to see parties held accountable under the law for egregious acts. If in Egypt, the efforts at justice are mainly a driven by activist judges seeking to assert legal power, and the court's actions are unsupported by the still-powerful military, we might feasibly expect a detrimental

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<sup>302</sup> Evan Hill, "Egyptian Protestors Are Still Waiting for Justice over Army Violence," *The Guardian* April 10, 2013.

<sup>303</sup> Ibid.

<sup>304</sup> Shahidul Alam, "A 40-Year Quest for Justice," *The New York Times* March 1, 2013; "Bangladeshi Opposition Leader Charged over 1971 War," *The Express Tribune* June 4, 2012.

military backlash in the form of an anti-regime coup. If in Bangladesh, the War Crimes Tribunal is mainly an effort by the Prime Minister Sheikh Hasina of the Awami League (AL) to consolidate power by eliminating a 'radical' Islamic opposition party, then we might expect the result to be even more widespread partisan violence (in this case religiously charged).<sup>305</sup> Or if, as some have argued in reference to places like Croatia, domestic trials are a direct response to outside, international pressure, then we could expect either type of backlash. In any of the above formulations, trial punishment for rights crimes would be associated with increased violence and threats to democratic survival, thus supporting Snyder and Vinjamuri's claim that such prosecutions are "not highly correlated with the consolidation of peaceful democracy."<sup>306</sup>

In this chapter, I argue that observed domestic human rights prosecutions result from political compromise among new democratic leaders, and as a result, they are not associated with particularly virulent backlash. Contra theories that assign primary causal importance to elite mimicry or hijacking, international pressure, authoritarian legacy, or type of democratic transition, I contend that a crucial underlying cause for the pursuit of domestic prosecutions is the visibility of a domestic pro-rights constituency, which places pressure on the new democratic regime to mete out justice for state violence. Leaders must heed the demands of pro-rights activists in order to fulfill their electoral mandates *and* to prevent disillusionment with the new regime. Doing so causes strain among former rights violators, elements that have authoritarian nostalgia, and beneficiaries of

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<sup>305</sup> "Bangladesh's War-Crimes Trials: Bloodletting after the Fact," *The Economist* March 1, 2013.

<sup>306</sup> Snyder and Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice," 43.

the former regime like those within received rent from patronage.<sup>307</sup> However, the short-term consequences of having trials is muted by two factors: first, those regimes that hold prosecutions are also the ones more equipped to handle political challenges; and second, threats made to new democratic regimes are in fact evidence that the new regime is positively differentiating itself from the former regime. In the end, then, greater human rights enforcement will actually be associated with the survival of democracy.

## **5.2. WHAT LEADS TO TRANSITIONAL JUSTICE?**

### **5.2.1. 'Outside' Factors**

Why do young democratic regimes pursue justice for human rights crimes? This is a puzzling question because holding leaders accountable in court is something that arguably risks backlash, and threatens their power.<sup>308</sup> The most convincing explanations to date emphasize the effect of normative diffusion over time on new democratic leaders. Kathryn Sikkink argues that a global movement has taken shape over the last 30 years, wherein transnational activists, lawyers, and NGOs convince new leaders to do the right thing and advance the cause of human rights and the rule of law.<sup>309</sup> This pressure exists in combination with mechanisms of diffusion: as the third wave of democratization advanced, new leaders began to emulate the practices of their regional neighbors, who

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<sup>307</sup> For authoritarian nostalgia, see Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, 253-58.

<sup>308</sup> Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*, 17.

<sup>309</sup> Ibid. Snyder and Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice." Neil J. Kritz, "Policy Implications of Empirical Research on Transitional Justice," in *Assessing the Impact of Transitional Justice: Challenges for Empirical Research*, ed. Hugo van de Merwe, Victoria Baxter, and Audrey R. Chapman (Washington DC: USIP, 2009).

have also supplied some kinds of accountability amidst transition.<sup>310</sup> At the same time, the increasing legalization of international human rights agreements by transitional regimes creates legal tools for network actors to litigate human rights abuses in regional and domestic courts.<sup>311</sup> And while it has not yet been demonstrated in comparative analysis, an additional explanation assigns a direct role for international courts—like ad hoc and mixed tribunals, as well as the International Criminal Court—in bolstering domestic efforts to try human rights violators. These courts, by assisting in capacity-building and the transfer of cases directly to domestic courts, will increase the number of domestic prosecutions that take place.<sup>312</sup>

A key issue remains unresolved in this scholarship, and it is the degree to which transitional justice comes from the ‘outside.’ It is easy to frame efforts to promote human rights as exogenous to domestic politics, because these efforts appeal to international norms created within the society of states; moreover, international organizations, transnational networks and global media outlets all do a great deal to promote the observance of human rights. For example, the International Center for Transitional Justice promotes the development of legal reforms, the institution of truth commissions, trials, and other policies in the democratizing and post-conflict environments.<sup>313</sup> The Geneva-based group Trial Watch lobbies using its consultative status at the UN, it brings

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<sup>310</sup> Hunjoon Kim, "Expansion of Transitional Justice Measures: A Comparative Analysis of Its Causes" (University of Minnesota, 2008).

<sup>311</sup> Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*; Dancy and Sikkink, "Treaty Ratification and Human Rights Prosecutions: Toward a Transnational Theory."

<sup>312</sup> Sigall Horowitz, "Calibrating International and National Justice Systems in Ongoing Conflicts," in *The Potential Role of Transitional Justice in Ongoing Conflict* (Jerusalem 2011).

<sup>313</sup> See <http://ictj.org/>.



litigation in regional courts, and it tracks and publicizes information on its website.<sup>314</sup> The UN's High Commissioner for Human Rights Yearly Strategic Plan often emphasizes the role of accountability and enforcement in the prevention of rights abuses, and USAID has actively promoted transitional justice in countries like Tunisia.<sup>315</sup> Critical theorists thus see behind the push toward human rights enforcement an industry run by law-wielding technocratic elites, who nudge local actors toward rash engagements with foreign liberal conceptions of justice.<sup>316</sup> But all of this taken into account, can we say definitively that transitional justice is globally *caused*? Endorsing this position would amount to arguing that transitional justice is mostly exogenous to domestic politics. A tension has therefore emerged in scholarship on transitional justice. While some rail against outside interference or 'justice interventions,'<sup>317</sup> others treat justice policies as almost wholly incidental to domestic politics.<sup>318</sup> Still more observers move seamlessly between the two treatments, arguing that domestic politics is responsive to, but independent from, the global normative environment.<sup>319</sup>

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<sup>314</sup> See <http://www.trial-ch.org/index.php?id=800&L=5>.

<sup>315</sup> Office of the High Commissioner for Human Rights, *Strategic Management Plan, 2008-2009* (2009). For USAID, see <http://www.usaid.gov/where-we-work/middle-east/tunisia/our-work>.

<sup>316</sup> See, e.g., Rosemary Nagy, "Transitional Justice as Global Project: Critical Reflections," *Third World Quarterly* 29, no. 2 (2008).

<sup>317</sup> Ibid. Vinjamuri and Snyder, "Advocacy and Scholarship in the Study of International War Crimes Tribunals and Transitional Justice."

<sup>318</sup> Brian K. Grodsky, *The Costs of Justice: How New Leaders Respond to Previous Rights Abuses* (Notre Dame, IN: University of Notre Dame Press, 2010); Luc Huyse, "Justice after Transition: On the Choice Successor Elites Make in Dealing with the Past," *Law & Social Inquiry* 20, no. 1 (1995); Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*.

<sup>319</sup> Jelena Subotić, "Hijacked Justice: Domestic Appropriation of International Norms," in *Human rights and human welfare* (2005); Olsen, Payne, and Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy*; "Conclusion: Amnesty in the Age of Accountability," in *Amnesty in the Age of Human Rights Accountability*, ed. Francesca Lessa and Leigh A. Payne (New York: Cambridge University Press, 2012); Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*.

This is a puzzle if one is trying to theorize the potential risks that the pursuit of justice poses in a transitional environment. Though many of the transitional policies they discuss were generated by primarily domestic agents—Bangladesh, Chad, Ethiopia, Indonesia, Namibia, and Peru, among others<sup>320</sup>--Jack Snyder and Leslie Vinjamuri must rely on the presence of meddlesome actors in the NGO sector and among international organizations as the prime movers behind rights-based legal efforts. If only these groups would stop pushing so hard for punishment and justice, then maybe the transitions could run their course and develop proper institutions. They write, "...the *international community faces a hard choice*: either commit the resources to contain the backlash or offer the potential spoilers a deal that will leave them weak but secure."<sup>321</sup> Only if demands for justice are considered to be outside the transitional equilibrium, and not produced by that equilibrium, could overreach be considered a solvable problem.

On the other side, Kathryn Sikkink unpacks the historical roots of the move toward justice for human rights crimes, which she locates in Greece, Portugal, and Argentina. Each of these transitions was propelled by mostly domestic political actors, though transnational advocacy groups had profound influence during critical times. Although its roots are domestic, the justice cascade that Sikkink documents is conceived as global, advancing and growing stronger from the mid-1980s to the contemporary period. Her evidence of the positive effects of the trend is that human rights trials are

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<sup>320</sup> They consider the following cases: Afghanistan, Angola, Bangladesh, Bosnia, Burundi, Cambodia, Chad, Colombia, Congo/Zaire, Croatia, East Timor, El Salvador, Ethiopia, Guatemala, Haiti, Indonesia, Iraq, Israel/Palestine, Ivory Coast, Kosovo, Liberia, Macedonia, Namibia, Northern Ireland, Peru, Russia/Chechnya, Rwanda, Sierra Leone, South Africa, Sri Lanka (Tamils and Janatha Vimukthi Peramuna [People's Liberation Front]), and Turkey/Kurds. Snyder and Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice," 49.

<sup>321</sup> *Ibid.*, 13. Emphasis mine.

generally associated with less repression, but the models that she presents do not account for the possibility that such trials are beholden to internal politics. She basically treats them as if they are an exogenous causal factor that creates change among state agents, when in her history she frames these trials (rightly so) as a product of domestic political action.<sup>322</sup> This has been an early criticism of Sikkink's argument: trials happen in places like Chile, where an institutional setting already exists for the promotion of human rights enforcement. In other words, Sikkink's cross-national studies do not adequately account for the fact that the presence of rights trials *and* improvements in human rights protections are explained by other features belonging to the domestic environment, namely more capable institutions. The problem for both the critical and the optimistic account, then, is that an endogenous political theory that explains both the precursors to transitional justice *and* its impacts has been lacking.

An additional drawback to global normative explanations is that they have not adequately distinguished between theoretical mechanisms linking world politics to domestic outcomes. It has not been shown whether leaders are responding to direct involvement in the country (capacity-building)<sup>323</sup>; whether they are seeking material incentives or avoiding penalties imposed Western powers (imperial coercion)<sup>324</sup>; whether they are simply copying the policies of other countries in an effort to 'fit in' (mimicking)<sup>325</sup>; whether they are cynically pursuing justice in a way that serves their own

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<sup>322</sup> Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*.

<sup>323</sup> Horowitz, "Calibrating International and National Justice Systems in Ongoing Conflicts."

<sup>324</sup> Hafner-Burton, "Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem."

<sup>325</sup> Kim, "Expansion of Transitional Justice Measures: A Comparative Analysis of Its Causes." On mimicking in general, see Johnston, *Social States: China in International Institutions, 1980-2000*.

ends (hijacking)<sup>326</sup>; or whether they are being pressured by rights-educated domestic constituencies and networks that cannot be denied (social mobilization).<sup>327</sup> One concern, for example, is that the push for transitional justice, while emanating from global notions of what is right, are actually adopted by leaders in simply to deflect criticism and attract investment, or to punish political opponents belonging to different parties, ethnic groups, or patronage networks.

### 5.2.2. Domestic Factors

These global normative explanations for transitional justice compete with those centered on domestic variables. The first set of domestic explanations explores the role of what Samuel Huntington refers to as ‘contextual’ factors—that is, those features of the polity inherited from the previous authoritarian regime that constrain political action.<sup>328</sup> One explanation emphasizes the degree to which the former regime create post-exist guarantees for itself. If the previous authoritarian government passes a self-amnesty or receives informal protections through back-room negotiations with incoming democratic leaders, then this will constrain the ability of the new democracy to hold former architects of repression accountable.<sup>329</sup> This is why some commentators have placed a good deal of importance on what are referred to as ruptured versus negotiated transitions.<sup>330</sup> In

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<sup>326</sup> Jelena Subotić, *Hijacked Justice: Dealing with the Past in the Balkans* (Ithaca, NY: Cornell University Press, 2009).

<sup>327</sup> Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*. Dancy and Sikkink, "Treaty Ratification and Human Rights Prosecutions: Toward a Transnational Theory."

<sup>328</sup> Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, 210.

<sup>329</sup> Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (New York: Cambridge, 2004), 190-99.

<sup>330</sup> Olsen, Payne, and Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy*, Ch 3; Alexandra Barahona de Brito, "Passion, Constraint, Law and *Fortuna*: The Human Rights Challenge to Chilean Democracy," in *Burying the Past: Making Peace and Doing Justice after Civil Conflict*, ed. Neil Biggar (Washington, D.C.: George Washington University Press, 2003); Jorge Correa Sutil, "No

rupted transitions, leaders die, are overthrown by a revolution, or are completely discredited before the transition; thus, they exert little power in the new democratic regime. In these cases, we are more likely to observe prosecutions for human rights abuses.<sup>331</sup> In negotiated transitions, where former military elements or members of the authoritarian repressive apparatus maintain some control, prosecutions are less likely. Ultimately, the logic here is that the balance of power between new leaders and old will determine the path chosen. Another explanation based on contextual factors is that new democratic regimes will be unlikely to use courts if these courts have not undergone significant reforms since the autocratic regime. Oftentimes the same judges that served to support dictatorial rule will maintain their positions in post-transitional judiciaries. If these judges had been complicit in previous repressions, then actors in young democratic regimes will be less likely to litigate cases through the courts.<sup>332</sup>

Another set of domestic explanations focuses on the institutional environment within the transitional polity. One argument is that general judicial independence will enable the pursuit of transitional justice policies, because unconstrained judiciaries will have more latitude to bring legal justice against former perpetrators of abuse. But the literature also gives us reason to expect that the exact opposite might also be true: in places where there is less judicial independence, and fewer checks on the executive in

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Victorious Army Has Even Been Prosecuted...'. The Unsettled Story of Transitional Justice in Chile," in *Transitional Justice and the Rule of Law in New Democracies*, ed. A. James McAdams (South Bend, IN: University of Notre Dame Press, 1997); Huntington, *The Third Wave: Democratization in the Late Twentieth Century*.

<sup>331</sup> For cross-national support of this argument, see Olsen, Payne, and Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy*.

<sup>332</sup> Paloma Aguilar, "Authoritarian Repression, Judicial System and Transitional Justice: The Spanish Case in Comparative Perspective," in *Working Papers* (Madrid: Instituto Juan March de Estudios e Investigaciones, 2011).

general, then leaders are able to force courts into pursuing retribution against former military and government actors.<sup>333</sup> A third and final line of domestic explanations centers on systemic factors that belong to particular states and their regions. Countries which lack ‘stateness,’ conceived of as general institutional capacity, wealth, or government effectiveness, will be unable to pursue justice for human rights issues.<sup>334</sup> For one, they may simply lack the resources to do so. Transitional justice, in Jon Elster’s words, “has to compete with other equally urgent necessities. Funds, personnel, and political attention may be channeled into such forward-looking tasks as constitution-making, economic reconstruction, or economic transformation, rather than into the backward tasks of trials and purges.”<sup>335</sup> Furthermore, states might show differences in their devotion to law, or to their faith in legal institutions. Countries with little history of democracy or reliable criminal law will be less able or willing to pursue human rights enforcement.<sup>336</sup> Moreover, patterns in state capacity and rule of law over the last 30 years vary by region. Some have noted a general penchant for Latin American and European states (of the Western tradition) to be more devoted to law than countries in the Middle East, Asia, and Africa, which is partially a byproduct of regional culture, and partially a byproduct of lacking state centralization.<sup>337</sup>

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<sup>333</sup> Elster, *Closing the Books: Transitional Justice in Historical Perspective*. Grodsky, *The Costs of Justice: How New Leaders Respond to Previous Rights Abuses*.

<sup>334</sup> For stateness, see Juan J Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Baltimore: The Johns Hopkins University Press, 1996).

<sup>335</sup> Elster, *Closing the Books: Transitional Justice in Historical Perspective*, 213. See also Boettke and Coyne, "Political Economy of Forgiveness."

<sup>336</sup> Clark and Kaufman, *After Genocide : Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond*.

<sup>337</sup> Peter Katzenstein, *A World of Regions: Asia and Europe in the American Imperium* (Ithaca: Cornell University Press, 2005). Ethan B. Kapstein and Nathan Converse, *The Fate of Young Democracies*

Three general problems exist with these ‘supply-side’ explanations for the pursuit of transitional justice in new democracies. The first is that they treat the demand for human rights-based action as a constant, assuming that all new democracies will have constituencies that push for transitional justice—or that they will all receive roughly the same amount of pressure to make progress around human rights. In some respects, this is not an entirely invalid assumption because most autocratic regimes are home to relations of repressive violence. However, we have reason to suspect that the demand for justice will vary based on the extremity of previous repression, the degree to which that repression has been publicized, and the visibility of pro-rights constituencies within the country that are seeking change. This brings us to a second problem with supply-side theories of transitional justice, which is a tendency to underestimate the role of the domestic political interaction between politicians and civil society in the development of transitional justice. Normative diffusion has taken place, but it is more bottom-up than top-down. Wherever they come from, domestic demands for justice are made by social actors, and these demands must be translated into action by local politicians. The salience of public demand, and the degree to which leaders are beholden to human rights constituencies, will determine the future trajectory of human rights enforcement within the country. A third problem is that theories do not tie the risks of short-term backlash to the causes of transitional justice. It is normally assumed that transitional justice might have negative unintended consequences because it is forced onto unwilling countries, but

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(Cambridge: Cambridge University Press, 2008), Ch 3. Emilie M. Hafner-Burton and James Ron, "The Latin Bias: Regions, the Anglo-American Media, and Human Rights," *International Studies Quarterly* (Forthcoming).

this could be a mischaracterization based on notion that transitional justice ‘comes for the outside.’ If we consider that transitional justice comes from local politics, then it might change our expectations regarding the risks of backlash. In this next section, drawing on three very different country examples, I develop an endogenous theory of transitional justice initiation that places emphasis on the presence of domestic human rights constituencies expressing demands for human rights. I then test this theory, and examine the possibility that short-term backlash results from transitional justice.

### 5.3. TRANSITIONAL JUSTICE AS A RESPONSE TO DOMESTIC DEMANDS

Transitional justice strategies are formed by executives that have been recently successful in elections, and are placed in charge of governing newly democratic regimes.<sup>338</sup> They are put in place by winning coalitions, and they are supported by aligned party members that are installed in other parts of the government.<sup>339</sup> Executives in new democracies, just like those in consolidated democracies, are concerned over maintaining their vote share, and addressing the concerns of the public. At the same time, though, these executives are preoccupied with challenges to the stability of the young democratic regime. Democratic failure comes in three different forms: 1) anti-regime coups; 2) civil war, revolt, or social collapse; or 3) incumbent takeover, or the refusal of

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<sup>338</sup> For a similar framework, see Grodsky, *The Costs of Justice: How New Leaders Respond to Previous Rights Abuses*, Ch 2.

<sup>339</sup> Bueno de Mesquita et al., "Policy Failure and Political Survival: The Contribution of Political Institutions," 148. "By the selectorate, we mean all those people in a country who have an institutionally granted right or norm that gives them a say in choosing the government. By the winning coalition, we mean those members of the selectorate whose support is essential to keep the incumbent leadership in office. These concepts are explained more fully below."



executives to step down after elections.<sup>340</sup> It is safe to assume that post-transitional executives and the winning coalitions that support them are not worried about preventing incumbent takeover, because they themselves are the source of this potential danger. Instead, executives worry about coups and revolts. Coups typically come from within the ranks of the military, but they require some public support if they are to succeed.<sup>341</sup> And revolts come from organized oppositions that have lost faith in the rules of the game, or feel as if their interests will not be served by continuing to participate in electoral politics.<sup>342</sup>

Thus, in making early public policy choices, leaders must balance the demands of their constituencies with primary threats to the survival of the new democracy—coups and revolts. Of the many constituent demands that take precedence in transitional democracies, those pertaining to human rights and rule of law are of increasing relevance in the contemporary period. “What matters most in such times of ‘abnormal politics,’” writes Terry Karl, “are not the structural conditions that may subsequently shape a polity but rather the short-term strategic calculations of actors.”<sup>343</sup> Democracy experts like Larry Diamond are increasingly placing emphasis on the importance of governing decisions and state-society interactions, over economic factors, when explaining recent

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<sup>340</sup> Milan Svolik, "When and Why Democracies Consolidate: Coups, Incumbent Takeovers, and Democratic Survival," (2009). See also O'Donnell and Schmitter, "Transitions from Authoritarian Rule: Tentative Conclusions About Uncertain Democracies."

<sup>341</sup> Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, 235. “The efforts to overthrow new democratic governments failed because coup makers were unable to win to their side middle-class and other groups in the political coalition that had made democratization possible.”

<sup>342</sup> Joseph Wright, "Political Competition and Democratic Stability in New Democracies," *British Journal of Political Science* 38(2008).

<sup>343</sup> Terry L. Karl, "From Democracy to Democratization and Back: Before Transitions from Authoritarian Rule" (Palo Alto, CA: Center on Democracy, Development, and the Rule of Law, Stanford Institute on International Studies, 2005), 5.

democratic deterioration. Contra Przeworski et al, Diamond states that "...the current period in world history defies these [economic] patterns....the breakdown of democracy that have been occurring largely predate the onset of global recession and are due to bad governance."<sup>344</sup> What are the behaviors associated with poor governance? In addition to corrupt dealings, one recurrent problem involves lack of action on human rights issues, or the active avoidance of accountability in some countries which previously experienced mass violence or state-led terror. Left unacknowledged, troubled pasts make new democracies "...politically unstable, with...still-fresh histories of such violence that have not been laid to rest, or a more general sense that their governments are fragile and could be overthrown."<sup>345</sup>

How are demands for transitional justice expressed, and why are they heeded? According to Charles Epp, these demands derive from "deliberate, strategic organizing by rights advocates."<sup>346</sup> And in the words of Kathryn Sikkink, it is "...a result of the concerted efforts of small groups of public interest lawyers, jurists, and activists, who pioneered strategies, developed legal arguments...and persevered throughout years of legal challenges."<sup>347</sup> But it is little explained why leaders bend to pressure. The answer is that there is a particularly powerful dimension to human rights activism that forces the hand of new leaders: the mobilization of public demand. Human rights constituencies seeking justice for rights violations simultaneously employ electoral, legal, and protest tactics to pursue their strategies. As such, they represent the interests of constituencies

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<sup>344</sup> Larry Diamond, "Why Democracies Survive," *Journal of Democracy* 22, no. 1 (2011): 18.

<sup>345</sup> *Ibid.*, 21.

<sup>346</sup> Charles Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998), 2-3.

<sup>347</sup> Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*, 24.

within the post-transitional winning coalition *and at the same time* represent a potential threat to the overall survival of the new regime, a threat which can assume the form of mass demonstrations to express dissatisfaction. In the context of transitional democracies, this public rallying capability carries over from autocratic period, in which human rights activists were able to organize in the midst of great danger.<sup>348</sup>

That human rights constituencies are part of the winning coalition is evidenced by the fact that democratic leaders in transitional elections commonly appeal to the need for justice in order to obtain deciding votes. Transitional justice is thus part of basic vote-seeking behavior.<sup>349</sup> In the transitional 2000 Mexican elections, the first in which the ruling Partido Revolucionario Institucional (PRI) was defeated in 71 years, Vicente Fox's Partido de Acción Nacional (PAN) was able to win crucial votes by pledging "...to confront head-on all state crimes committed by his predecessors. In fact, this was one of the promises that won him the so-called *voto útil* (useful vote) of those on the left who wanted at all costs to oust the PRI from power."<sup>350</sup> The electoral promise of justice was also a swing issue in many other notable cases of transitional elections, including Argentina in 1983, the Philippines in 1986, South Korea in 1987, the Czechoslovakia in 1989, Poland in 1990, South Africa in 1994, Indonesia in 1998, Nigeria in 1999, Peru in 2000, Serbia in 2000, and as we saw in the introduction, Egypt in 2011. Though they garner votes for the winning candidates, human rights constituencies do not simply trust in their newly elected leaders to follow the right path. They also monitor the new

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<sup>348</sup> Zuern, *The Politics of Necessity: Community Organizing and Democracy in South Africa*.

<sup>349</sup> Elster, *Closing the Books: Transitional Justice in Historical Perspective*, 247.

<sup>350</sup> Sergio Aguayo Quezanda and Javier Treviño Rangel, "Neither Truth nor Justice: Mexico's De Facto Amnesty," *Latin American Perspectives* 33, no. 2 (2006): 58.

government's actions on the part of former victims, and in the pursuit of general human rights protections. In the event that they find leaders shirking their duty to hold rights criminals accountable, they can take to the streets to vocalize their demands for truth and justice. For new leaders, the combination of electoral concerns with mass pressure is enough to make them brave the risk of conservative backlash to pursue transitional justice.

In the next section, I illustrate the robustness of human rights constituent power in the push for transitional justice, and I do so using three cases: Argentina, South Korea, and Nigeria. I use these three cases for a couple of reasons. First, they are from entirely different regions of the world, and they do not share common cultural or political traditions. This allows us to see the distinct pressure that human rights constituencies can exert in a variety of democratizing contexts.<sup>351</sup> Second, these cases show a high degree of variability along other crucial dimensions that have been argued to be the driving force behind the provision of transitional justice: the amount of outside material pressure, the degree to which the transition is ruptured or negotiated, and the effectiveness of the judiciary. We should pay close attention in these cases to the fact that none of these factors appear to determine the pursuit of trial justice of human rights crimes amidst democratization, especially in comparison to the role played by rights-based campaigning and dissent. It is also worth noting that the ratification of international treaties, or legalization from the of international human rights law, does not predict the pursuit of

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<sup>351</sup> As in Chapter 4, one may refer to my method as a Most Different Systems comparative design,. Przeworski and Teune, *The Logic of Comparative Social Inquiry*.

transitional justice, but it precedes along with it, and can often serve a supporting role by providing tools for litigation.

### 5.3.1. Argentina

Argentina is often seen as a paradigmatic case for the positive development of human rights in a transitional and post-transitional democratic environment.<sup>352</sup> This success is commonly attributed to the political opportunity created by the ‘ruptured’ transition that took place between 1982 and 1983. However, despite the delegitimation of military rule with the junta’s embarrassing faceoff with Margaret Thatcher over the Falkland/Malvinas Islands, and its subsequent pummeling in the ensuing naval war, the trajectory of transitional justice was far from predetermined. Prior to the democratic transition in 1983, the country had been mired in decades of maneuvering between populist Peronist leadership and military rule. The election of Raul Alfonsín and his Radical Civic Union (Radical Party) in 1983 would mark only the third non-Peronist or non-military government to be installed since the 1920s, and the first in over 20 years.<sup>353</sup> The formation of the new government brought with it a high degree of uncertainty over how matters of state would be handled, over the way that the civilian leadership would precede in the face of military strength, and over the way that the legacy of brutal repression starting in 1975 would be handled.

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<sup>352</sup> Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca: Cornell University Press, 1998); Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," *International Organization* 52(1998); Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*; Alison Brysk, "From above and Below: Social Movements, the International System, and Human Rights in Argentina," *Comparative Political Studies* 26, no. 3 (1993).

<sup>353</sup> Peter Ranis, "The Dilemmas of Democratization in Argentina," *Current History* 85, no. 507 (1986).

In the aftermath of the Falklands War, the military regime was in a crisis situation. On December 16, 1982, hundreds of thousands of people marched in Buenos Aires in support of democratic rule. Even so, many military leaders remained steadfast, believing “that there should be at least another four years of military rule before it would be safe to hand over power to civilians.”<sup>354</sup> Junta leaders had not yet internalized the importance of human rights, necessarily; instead, they were concerned about continuing in the same direction in the interest of national security and avoidance of internal war. However, finding the probability of loss to be inevitable, ruling president Reynaldo Benito Bignone made the controversial decision, in the face of opposition by military factions, to announce that democratic elections would take place by the end of 1983. To ensure the impunity of its leaders, the junta declared an amnesty, known as the Law of National Pacification, one month before the election took place, on September 23.<sup>355</sup> This despite the fact that on August 19, 40,000 people had marched in the streets of Buenos Aires to protest the proposed amnesty.<sup>356</sup> The following multi-party election on October 30 would be partially decided by candidates’ stances on this amnesty provision. Raul Alfonsín, a proponent of human rights who had been a founding member of the Permanent Assembly for Human Rights (or La Asamblea Permanente por los Derechos Humanos (APDH)) in 1975, promised to ignore the amnesty and mete out trial justice to the former military leaders. Italo Luder, the Peronist candidate, declared that he would

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<sup>354</sup> John Simpson, *The Disappeared and the Mothers of the Plaza* (New York: St. Martin's Press, 1985), 369.

<sup>355</sup> Luis Moreno Ocampo, "Beyond Punishment: Justice in the Wake of Mass Crimes in Argentina," *Journal of International Affairs* 52, no. 2 (1999).

<sup>356</sup> Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*, 70.

uphold the amnesty. Largely on the back of his promises, Alfonsín was elected president.<sup>357</sup>

The president then proceeded to fulfill his mandate in three ways. First, he established The National Commission on Disappeared People (CONADEP) to investigate and collect evidence on those people who had been secretly kidnapped or killed by the junta. Second, on December 18, Alfonsín issued Decree 158, stating that "...all members of the first three military juntas in power from 1976 to 1982 should be brought to trial before the highest military court, the Supreme Council of the Armed Forces."<sup>358</sup> And third, nine days later, he oversaw with help from legislators to passage of Law 23.040, which repealed the Law of National Pacification. After additional constitutional maneuvering, including the passage of Law 23.049 in February 1984—which ensured that the prosecution of military officials in military courts could be reviewed by civilian courts if these offenses had targeted civilians—the trial of the juntas was allowed to begin under the military control of the Supreme Council. By December 1984, the trial was transferred to the civilian Supreme Court, which argued that the military court had unnecessarily delayed the proceedings.

By early 1985, the Trial of the Juntas had gotten underway, trying General Jorge Videla, Admiral Emilio Massera and Brigadier Orlando Agosti of the first junta; General Roberto Viola and Admiral Armando Lambruschini, and Brigadier Omar Graffigna of the second junta; and General Leopoldo Galtieri, Admiral Jorge Anaya, and Brigadier Basilio

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<sup>357</sup> Simpson, *The Disappeared and the Mothers of the Plaza*; Ocampo, "Beyond Punishment: Justice in the Wake of Mass Crimes in Argentina"; Elster, *Closing the Books: Transitional Justice in Historical Perspective*.

<sup>358</sup> Amnesty International, *Argentina: The Military Juntas and Human Rights: Report of the Trial of the Former Junta Members* (London: Amnesty International, 1987), 10.

Lami Dozo of the third junta. By mid-1985, tens of thousands of pro-human rights protestors had already begun hitting the streets again to protest the slow pace of the proceedings.<sup>359</sup> The defense argued that the trials had been initiated by Marxists “who are leading us toward the dictatorship of the proletariat... These are not leftist revolutionaries but anti-national assassins, whereas the military were authentic heroes.”<sup>360</sup> In October, a spate of small bombings and telephone threats to schools and hospitals, attributed to right-wing junta sympathists, provoked the declaration of a state of siege by Alfonsín’s government.<sup>361</sup> Despite a spirited legal defense, and the presence of anti-democratic spoiler activity, on December 11, 1985, five of the nine junta members were held guilty. General Videla and Admiral Massera, the two most identifiable leaders of the first junta, were both given life sentences.

The Argentine human rights constituency was disappointed but emboldened by the Trial of the Juntas, and it pressed for more trials. On the date of the verdict, lawyer and rights activist Emilio Mignone said, “This ruling will not close the chapter on investigations. It will do just the opposite—prolong them indefinitely.”<sup>362</sup> The then-famous Madres de la Plaza de Mayo continued to press for extensive prosecutions of even low-level state agents in large public demonstrations.<sup>363</sup> Individuals used private prosecution procedures to bring suits in civilian courts against up to 300 officers from

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<sup>359</sup> "Argentinians Urge Trials of Human Rights Cases," *The Xinhua General Overseas News Service* March 22, 1985; "Argentine Rallies and Protests," *BBC Summary of World Broadcasts* April 25, 1985.

<sup>360</sup> Ranis, "The Dilemmas of Democratization in Argentina," 30.

<sup>361</sup> The siege was lifted on December 9. "Government Lifts State of Siege," *The Associated Press* December 9, 1985.

<sup>362</sup> "Argentine Activists Pledge to Keep Rights Issue Alive," *Christian Science Monitor* December 11, 1985.

<sup>363</sup> "The Dilemmas of Democratization in Argentina."



mid-level ranks.<sup>364</sup> This activity put strain on Alfonsín's government, which worried about military backlash. On December 21, 1986, parliament passed a compromise Full Stop Law, giving prosecutors only 60 days to bring any new cases to court. This generated a flurry of activity in courts all over the country. Military elements who feared prosecution would stage a failed coup on Easter week in 1987. The coup encouraged widespread anti-military protests, again bringing tens of thousands into the streets. To quell the unrest, the Alfonsín government issued a Due Obedience Law, providing an "almost irrefutable defense for middle- and lower-rank officers."<sup>365</sup>

The quest for justice in Argentina would not end there (See Chapter 6), but the dynamics at play in the first five years after transition do demonstrate a couple of crucial points for this analysis. First, the decision to initiate transitional justice against the former regime was made primarily by the executive, with assistance for party members in other parts of government. Government actors were pushed by elements from their winning coalition, which included human rights activists. Only later would the judiciary come to exert a more powerful role, though it was strengthened by early reforms like the passage of Law 23.049. Second, all along the way human rights constituencies, including the Madres and other groups, continued demonstrations to express anti-military sentiment, support for the trials, and criticism for lack of progress in achieving full justice. Their demonstrations were crucial for transmitting information about public opinion and for shaping the strategies of leaders in office (even though Alfonsín found human rights

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<sup>364</sup> Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*, 75.

<sup>365</sup> Carlos Nino, *Radical Evil on Trial* (New Haven, CT: Yale University Press, 1996), 100.

activists to be burdensome in 1986 and beyond<sup>366</sup>). Third, despite the supposedly determinative ‘ruptured’ nature of the transition, the government had to balance two competing threats to its survival: the threat of a coup against the threat of drastic loss of support from its base, and from the public as a whole. Fourth and finally, transitional justice did inspire a kind of pro-military backlash, but one that ultimately found little support in the public. This follows a general pattern observed by Samuel Huntington, that “coup makers were unable to win to their side middle-class and other groups in the political coalition that had made democratization possible.”<sup>367</sup>

### 5.3.2. South Korea<sup>368</sup>

From the moment that Park Chung-hee overthrew the Second Republic in Korea in 1961, to the June 1987 Struggle, the embattled Republic of Korea had been under the control of brutal military forces. Park declared the beginning of the Third Republic in 1963, but in 1972 he instituted a permanent state of martial law to deal with threats from Communist elements. This Fourth Republic would be under the sole control of Park, who declared himself President for Life. This lifetime presidency lasted only eight years, after which Park was assassinated by Kim Jae-gyu, a member of his own security forces on October 26, 1979. In December, a military faction consolidated power, and on May 17, 1980, it removed all powers from a transitional government, establishing martial law under the National Security Act, outlawing political associated and speech, and

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<sup>366</sup> See David Pion-Berlin, "To Prosecute or to Pardon? Human Rights Decisions in the Latin American Southern Cone," *Human Rights Quarterly* 16, no. 1 (1994).

<sup>367</sup> Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, 235.

<sup>368</sup> For by far the most extensive treatment of transitional justice in South Korea, see Hunjoon Kim, *The Massacres at Mt. Halla: Sixty Years of Truth-Seeking in South Korea* (Ithaca: Cornell University Press, 2014 (forthcoming)).

dismantling the National Assembly. On the next day, students at Chonman National University protested, and when the military reacted with deadly violence, citizens of Kwangju joined the students and occupied the city for a week. In regaining control, the military massacred hundreds of civilians. This initial act of state violence was the origin of the new military regime, and it would reverberate among activists simply as May 18.<sup>369</sup>

The next seven years in South Korea could be seen as an effort by activists to right this original wrong. Protestors against the regime of Chun Doo Hwan, mainly students, lashed out against the government in episodes of mass protest, which often turned violent when they were attacked by the National Police. These student protests, which blended calls for human rights and regime change with anti-imperialist slogans aimed at the United States (for its support of the military regime), were regular affairs that ended with the rounding up of dissidents, jailings, and torture. One of the figureheads of the anti-regime movement was the founder of the Democratic Youth Coalition, Kim Keun-tae. In 1985, he was arrested for aiding Communist North Korea, a go-to charge for the Chun's Democratic Justice Party. In prison, Kim was tortured for 23 days.

Widespread dissent continued through the mid-1980s in South Korea, but began to challenge seriously the regime in late 1986. During this time, the regime attempted a 'tough crackdown' against peaceful protests organized by opposition leaders like Kim Dae Jung and Kim Young Sam." A spokesman for the regime claimed, "The Government is not overreacting. There is sufficient reason to believe the rally could be violent and that

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<sup>369</sup> In Sup Han, "Kwangju and Beyond: Coping with Past State Atrocities in South Korea," *Human Rights Quarterly* 27, no. 3 (2005).

it could get out of control...<sup>370</sup> On January 14, 1987, during the crackdown period, Park Chong-chul, a student organizer at Seoul National University, suffocated to death while being beaten and tortured by policemen.<sup>371</sup> When the opposition New Korea Democratic Party pounced on the news to challenge Chun's regime, the government reacted by sacking the National Police Director, Kang Min-chang. But this was not enough to quell the opposition.<sup>372</sup> Forty-seven religious, human rights, and pro-democracy organizations unified to protest against the slaying of the student in January 1987.<sup>373</sup>

On April 13, Chun suspended talks with the opposition on constitutional reform, sparking an even greater wave of protests.<sup>374</sup> The President fired his Prime Minister and arrested an additional eight police officers in order to "assuage public anger about the student's [Park Chong-chul's] death."<sup>375</sup> By June 1987, the pressure on Chun's regime had become too much. Student protestors were no longer understood to be radicals, and the middle classes began to join their ranks and to declare support.<sup>376</sup> On June 2, Chun named a successor in to his presidency, who technically would compete in elections at the end of the year. This successor, Roe Tae-woo, was a boyhood friend of Chun's and a fellow collaborator in the 1980 military takeover; thus, he was widely distrusted by student protestors and political opposition groups. Still, when elections came around on December 16, Roh emerged successful, an outcome that is attributable to a divide in the

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<sup>370</sup> Clyde Haberman, "Police Block Protest in South Korea," *The New York Times* November 29, 1986.

<sup>371</sup> Edwin Q. White, "Death of Activist Student Stirs Old Passions, New Reactions," *The Associated Press* January 22, 1987.

<sup>372</sup> Thomas Walkom, "Arrest of Policeman Fails to Quell Unrest across South Korea," *The Globe and Mail (Canada)* May 30, 1987.

<sup>373</sup> White, "Death of Activist Student Stirs Old Passions, New Reactions."

<sup>374</sup> Barry Renfrew, "Opposition Blasts President's Choice of Successor," *ibid.* June 3, 1987.

<sup>375</sup> "Opposition Lawmakers on Hunger Strike over Torture Case," *The Associated Press* June 4, 1987.

<sup>376</sup> Steven R. Weisman, "Korea Addresses Abuses of Its Past," *The New York Times* May 24, 1989.

democratic opposition that split votes. Roh's election marked a negotiated transition from autocracy to democracy, as he was part of the military establishment, but he was fairly chosen in the country's first multi-party election in 16 years. According to Samuel Huntington, "Chun Doo Hwan undoubtedly backed his colleague Roh Tae Woo for president on the assumption and with an implicit understanding that he and his associates would not be prosecuted for any actions they took during their seven years of authoritarian rule."<sup>377</sup>

The negotiated manner of the transition, however, would not prevent transitional justice from taking place. On January 14, the date marking the one-year anniversary of Park Chong-chul's death, students protested on a wide scale. Former National Police Chief Kang Min-chang was arrested and tried, along with five other police officials who covered up the case.<sup>378</sup> When Roh took office promising his own version of glasnost, opposition protestors were incredulous.<sup>379</sup> Their incredulity seemed justified when Roh staffed his Cabinet with eight members of Chun's government and failed to include some important political prisoners in a large-scaled amnesty that was being drafted.<sup>380</sup> This led to yet more protests on the part of relentless pro-democracy and pro-justice students. Well into May, these protests revealed "the anger of Koreans at official failures to guarantee human-rights protections."<sup>381</sup> A member of the Korean Bar Association's Human Rights Committee claimed that he could "feel change on the surface...But I don't

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<sup>377</sup> Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, 225.

<sup>378</sup> "Former National Police Chief Arrested," *United Press International* January 16, 1988.

<sup>379</sup> Gavin Bell, "Korea Bending to the Wind of Change," *The Times (London)* February 2, 1988.

<sup>380</sup> Spencer Sherman, "Student Dissidents Launch Spring Offensive," *United Press International* March 5, 1988.

<sup>381</sup> Gordon Winch, "Everything New Is Old Again," *The Globe and Mail (Canada)* June 8, 1988.

see fundamental change in our justice system.”<sup>382</sup> By December, Roh was encouraged to move forward with some crucial reforms to assuage dissenters, including a prisoner amnesty and the repeal of the National Security Act. At this time, an appellate court ruled that four officers would have to stand trial for the 1985 torture of Kim Keun-tae, the prominent rights activist.<sup>383</sup>

By May of 1989, the issue of “whom to punish and whom to compensate for the excesses of South Korea’s authoritarian past” had become a national issue. Students demanded that the repressive national security apparatus be dismantled, that former torturers be brought to trial, and the American troops be expelled from Korea. Roh responded by encouraging former president Chun to testify about his excesses to the National Assembly, but this testimony only further angered opposition groups because the leader did not issue an apology, and was shifty about his admissions. The Roh government attempted to stall on the justice issue in its final three years, leading to its growing unpopularity and ultimate defeat by the opposition leader Kim Young Sam in 1993.

Though a devoted democrat, Kim too worried about avoiding backlash from fellow leaders who formerly served in the military, even though his election came five plus years after the initial transition. As a result, he stalled, maintaining a cautious line on the pursuit of truth and justice for victims of torture and the Kwangju massacre. He contended “that the truth should be reserved for future historical judgment,” and “that

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<sup>382</sup> Daniel Sneider, "Grappling with Rights Abuses in S. Korea," *Christian Science Monitor* December 15, 1988.

<sup>383</sup> "Four Officers to Stand Trial for Torture," *United Press International* December 15, 1988.

punishment might lead to renewed conflict...<sup>384</sup> However, protestors continued to push for action, and lawyers brought evidence of prior misdeeds to court. The District Public Prosecutor's Office conducted an investigation of the 1980 coup around the crimes of mutiny, insurrection, and murder, but decided that it had "no authority to prosecute."<sup>385</sup> This failed to satisfy the people, and "anger and resistance mounted."<sup>386</sup> Under pressure from public demonstration, President Kim issued directives to his party to pass a law allowing the prosecution of the Kwangju massacre, which passed through the National Assembly in December 1995. A new team of prosecutors began investigating the crimes, and they took former presidents Chun Doo Hwan and Roh Tae-woo to court in an affair that would be called the 'centennial trial', or trial of the century, by a rapt public.<sup>387</sup> The defense cried foul, arguing that the trial was politically driven, and illegal, but in August 1996, they would be found guilty for treason and murder in the Kwangju massacre, along with 13 other ex-generals who took part.<sup>388</sup> On the day of the verdict, thousands of people stopped work to watch the final session. One office worker stated, "It confirmed the simple truth that anyone who commits crime should be brought to the court of history."<sup>389</sup> Korea had finally dealt with its historical demons head-on.

The Korean case reaffirms three lessons from the Argentine example, and it adds one more. The first is that transitional justice is initiated as a response to public demand. The same protestors that for years had been adamantly opposed to military rule continued

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<sup>384</sup> Han, "Kwangju and Beyond: Coping with Past State Atrocities in South Korea," 1005.

<sup>385</sup> *Ibid.*, 1006.

<sup>386</sup> *Ibid.*

<sup>387</sup> *Ibid.*, 1007.

<sup>388</sup> Reid Miller, "Kwangju's Ghost Laid the Rest," *Courier Mail (Queensland)* August 27, 1996.

<sup>389</sup> *Ibid.*

to demand justice for the wrongs committed by that regime, even after democratic transition. The demonstrative pressure that human rights constituencies exerted was influential both in inspiring early but limited justice efforts under Roh and more extensive efforts under Kim. However, because the human rights constituency was not part of Roh's winning coalition, he was less responsive than Kim, who faced both electoral pressure and the potential for widespread civil resistance. Second, while new democratic leaders were concerned about conservative backlash against transitional justice by military elements, these concerns could not outweigh the countervailing pressures coming from the public. Part of the reason is that even if a coup had been attempted following 1987 to halt justice efforts, it would have received very little public support, which had already shifted to pro-democracy groups. Third, the judiciary did not lead in the efforts toward transitional justice, but followed directives from the executive. The public prosecutor was unresponsive until Kim gave it a nudge with new legislation. An additional lesson from Korea is that negotiated transitions can also result in maximal justice for former architects of repression. Contextual factors make a difference, but what appears to outweigh these factors is the strength of domestic human rights constituencies.

### **5.3.3. Nigeria**

Nigeria underwent a precarious democratic transition in 1999 with the May 29<sup>th</sup> election of Olusegun Obasanjo, a Yoruba man from the Southwest of the country. With this election, the country would attempt to alter a political culture mired by regional patrimonialism, corrupt patronage networks, and most importantly, hyper-militarism. The domination of the military dates back to the early 1960s. Obasanjo himself came to



power previously as the result of a military coup in 1976 (though the coup was arguably not under his leadership). In 1979, he called for multiparty elections that resulted in the election of the Fulani man, Shehu Shagari, whose regime would be overturned by a coup in 1983. The leader of the coup, Major General Muhammadu Buhari, would wage a ‘war against indiscipline,’ in part by establishing a strict and brutal National Security Organization police force. Buhari’s rule was also short-lived, as he was also ousted by a military coup under the direction of Islamic General Ibrahim Babanginda (a.k.a. IBB), who served as a member of Buhari’s Supreme Military Council. IBB was responsible for vicious repressive violence, and he himself had to defeat a coup in 1990. In 1993, after mass campaigns in favor a democracy mounted pressure, elections were held by IBB’s regime, and the Yoruban M. K. O. Abiola of the Social Democratic Party (one of two parties established by IBB) emerged victorious. Abiola had run on his very successful Hope ’93 campaign with a promise to address poverty and corruption. However, IBB refused to honor the July election result, sending the Yoruba-dominated Southwest region into mass acts of civil disobedience. As a response, IBB stepped down, replacing himself with a transitional administration under the leadership of British-trained lawyer and traditional chieftan Ernest Shonekan. Shonekan’s administration would only last three months before it was overpowered by a coup under General Sani Abacha, an Islamic Kanuri from the Borno province.

Abacha’s regime was notoriously repressive. His henchman imprisoned and tortured a number of oppositional leaders. Abacha sent the recognized statesman and elected leader Abiola into prison under charges of treason. He was held in solitary

confinement and urged to renounce his electoral mandate, which he refused to do. In 1998, Abiola died under mysterious circumstances that the government attributed to heart failure. The de facto President also imprisoned Obasanjo and General Shehu Musa Yar'adua, who were charged with an abortive coup attempt in 1995 (though most believe the coup to be a fabrication). The Abacha crackdown on civil resistance claimed the lives of Kudirat Abiola, wife of the former president-elect who had made a political charge after her husband's death. Olisa Agbakoba, a lawyer and head of Human Rights Law Services (HURILAWS) in Nigeria, stated that "the Abacha years witnessed unprecedented violations of human rights and brutalization of civil society...it is only the peace of a structured and well-orchestrated design by the military to dominate and appropriate the country."<sup>390</sup> Even the internationally recognized Minister of the Interior and *Guardian* correspondent Alex Ibru, a critic of the Abacha regime, was targeted for an assassination by machine gun fire in 1996, though he would survive the attack. The regime would come to an abrupt end when Abacha, a known Lothario, died on June 8, 1998 of heart failure while in the company of four prostitutes at his presidential suite in Aso Rock.<sup>391</sup> His regime had already been under heavy pressure from Lagos-based civic organizations—including the National Democratic Coalition (NADECO) and the Joint Action Committee of Nigeria (JACON), which brought under its umbrellas 65 other pro-democracy groups.<sup>392</sup> In response, Abacha had called elections for August 1, 1998, but he

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<sup>390</sup> Remi Oyo, "Nigeria: Rights Groups Vow to Keep the Military in Barracks," *IPS-Inter Press Service* May 18, 1999.

<sup>391</sup> Some claimed that earlier in the night he had eaten a poisoned apple. Jyoti Malhotra, "Did Indian Girls See Nigerian Dictator Die?," *Indian Express* August 21, 1998.

<sup>392</sup> "Fighters for the People," *The News (Lagos)* January 4, 1999.

did not live to see them take place. Most democrats saw this as a blessing because no one expected the leader to honor the results.

After Abacha's death, General Abdulsalami Abubakar came to the helm of government in a transitional regime called the Provisional Ruling Council (PRC). He promised reforms and elections in February, but no one had reason to trust these promises. However, he promptly released from prison Olusegun Obasanjo, who had become an internationally known political prisoner. Obasanjo declared his intention in November to run for president under the People's Democratic Party. His electoral campaign was organized around the idea that he had previously ushered in democracy in 1979, and his slogan was "He will do it again."<sup>393</sup> In response to demonstrators in Lagos, Obasanjo also declared that he planned to set up the equivalent of a South African Truth Commission to confront the history of military abuse in the country dating back to the 1960s, and to hold former abusers accountable. This was the fundamental issue that won him 63% of the vote on February 27, 1999, especially given that he lost the vote within his home Southwestern region because of his unpopularity among local clans. HURILAW's Olisa Agbakoba, among others, reaffirmed the importance of human rights commitments: Agbokoba insisted during the last throes of the PRC in May that he expected in the first six months of Obasanjo's regime "the repeal of all absolutist decrees...a probe of past expenditures of governments, a trial of human rights abusers...and a restructuring of the police force."<sup>394</sup>

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<sup>393</sup> "Olusegun Obasanjo," *OnlineNigeria.com*. Accessed January 5, 2013.

<sup>394</sup> Oyo, "Nigeria: Rights Groups Vow to Keep the Military in Barracks."

After the vote, the issue of transition was still open. A hardliner faction headed by General Ishaya Bamaïyi was bristling over the election, and Obasanjo's promise to shake up the military. According to one report, "If it were possible for some powerful officers in government to stop Obasanjo's election, they would have done that. They hate the man and his guts."<sup>395</sup> In a decisive meeting between the military brass on March 3, 1999, Bamaïyi and his supporters encouraged Abubakar to stay in power well into the year 2000, and to keep remaining 'coupists' and other political prisoners in jail. But surprisingly, Abubakar stood the hardliners down, and decided to move forward with a May 1999 election and transition. While Bamaïyi and others decried this 'hasty transition agenda', Abubakar held firm.<sup>396</sup> He might have seen the writing on the wall, which was that the military had lost popular support. Under Abacha especially, "the Nigerian military was completely ostracized. Europe and the Americas refuse to contribute in the training of Nigerian soldiers because they had become agents of destabilisation."<sup>397</sup> Many of the young officers who joined the military to gain an education, affluence, or influence had been severely disappointed. The hardliner faction represented those who clamored to the prestige of the military, but the prestige was not there.

Abubakar transferred power to Obasanjo's civilian government on May 29. Only 16 days later, the new president established the Judicial Commission for the Investigation of Human Rights Violations headed by Justice Chukwudifu Oputa (called the Oputa Panel). Over the next three years, the Oputa Panel would go on to investigate the cases of

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<sup>395</sup> "Nigeria's Army Stirs ", *Africa News* March 17, 1999.

<sup>396</sup> Ibid.

<sup>397</sup> Toby Babatunde, "Obasanjo and the Demystification of the Military," *ibid.* September 27, 2000.

10,000 victims of military abuse since 1960.<sup>398</sup> But Obasanjo did not stop there. In mid-October, charges were brought against General Bamaiyi for the attempted murder of Alex Ibru in Lagos in 1996, along with Major Hamza al-Mustapha. Al-Mustapha was also on trial for an additional crime, the murder of Kudirat Abiola and General Shehu Musa Yar'adua while they were imprisoned. In this trial, al-Mustapha was in the dock alongside Muhammed Sani Abacha, son of the previous dictator, along with four other participants in the murder, including Dr. Ibrahim Yakassai, who had come to be known as Dr. Death.<sup>399</sup> This 'great murder trial' was held in the Federal High Court of Lagos to please the pro-democracy and human rights constituencies there.<sup>400</sup> This was an issue for al-Mustapha's defense; he claimed that this put his client in danger of being attacked by Yoruba nationalists, who hated the Northerner.<sup>401</sup>

The government did in fact go to great lengths to guarantee the safety of those charged, moving them often and keeping the location of the hearings secret until the last minute. They provided so much latitude that they faced an attempted prison break by General Bamaiyi, who was assisted by some close supporters in the military guard.<sup>402</sup> The trials would undergo a number of additional delays caused by their publicity and their political importance. Johnnie Cochran, defense counsel for O.J. Simpson and Abacha supporter, attended the trial of Muhammed Abacha in April 2000 to 'ensure fairness.' Around the same time, the trial was delayed to allow for appeal.<sup>403</sup> Meanwhile,

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<sup>398</sup> See [transitionaljusticedata.com](http://transitionaljusticedata.com).

<sup>399</sup> Demola Abimboye, "The Great Murder Trial," *The News (Lagos)* October 18, 1999.

<sup>400</sup> "Son of Late Nigerian Military Ruler on Trial," *Agence France Press* October 13, 1999.

<sup>401</sup> "Nigerian Government Rejects Fears over Abacha Trial," *Agence France Presse* October 12, 1999.

<sup>402</sup> Bamidele Johnson, "License to Flee," *Tempo (Lagos)* March 29, 2000.

<sup>403</sup> "Lagos Court Delays Trial of Abacha's Son," *Agence France Presse* April 7, 2000.

the testimony from a number of former military personnel was being publicly given at the Oputa panel. The combination of the trials and the Oputa proceedings angered the northern elite in the Arewa Consultative Forum. They felt that the “northern zone had the greatest quote in the list of culprits...”<sup>404</sup> The trials continued, but they were further delayed in June 2001 when Bamaiyi and al-Mustapha were given time to leave Kirkiri prison to testify at the Oputa Panel.<sup>405</sup> The trial resumed in the fall, and in December, al-Mustapha’s defense stuck to the line that he and his fellow indictees were subject to selective justice, and that they were being tried simply because they were not Yorubas.<sup>406</sup> For their part, the Abacha family claimed that the government was fueled by personal vengeance, and that the Oputa panel and trials had been initiated as payback for the imprisonment of Obasanjo under the former regime.<sup>407</sup> The unpopularity of the transitional justice efforts, and of Obasanjo in general, led some in Kano to riot. These riots were a deliberate attempt to discredit the leader, as admitted by a local Kaduna chieftan.<sup>408</sup>

In July 2002, an appeal from Muhammed Abacha was upheld by the Supreme Court and the charges were dropped, ending a trial that involved mainly a “complex web of legal technicalities.”<sup>409</sup> Justice Modibo Belgore stated in his decision, “Suspicion, however well founded, does not amount to a prima facie case.”<sup>410</sup> The ruling was a

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<sup>404</sup> "Acf's Release Bamaiyi Campaign," *Post Express (Lagos)* December 13, 2000.

<sup>405</sup> "Apperance of Bamayji, Al-Mustapha at Oputa Panel Stalls Lagos Trial," *The Guardian* June 28, 2001.

<sup>406</sup> "Contempt in the Face of Court: Accused Becomes Accuser," *Africa News* December 11, 2001.

<sup>407</sup> "'Oputa Panel Set up to Spite Abacha Family,'" *Africa News* December 19, 2001.

<sup>408</sup> "Kaduna Politician Says Kano Riots Aimed at Discrediting Obasanjo," *BBC Monitoring Africa* October 21, 2001.

<sup>409</sup> "Is Judgment Less Law, More Politics?," *Africa News* July 12, 2002.

<sup>410</sup> *Ibid.*

surprise to pro-democracy activists, who speculated cynically this was an attempt by Obasanjo to shore up support from the Abachas prior to the 2003 elections. However, this ruling could feasibly be interpreted as the proper functioning of a court that found too little evidence to support conviction, a possibility that is usually ignored by victims seeking justice. The trials of al-Mustapha and Bamaiyi would continue, though they ran into even more delays. In October 2003, Justice Ade-Alabi stepped down from the proceedings, stating “I have the feeling that the circumstances surrounding the suspects’ trial have become muddy and murky.”<sup>411</sup> To some, this move was interpreted as cowardice on the part of the justice, who had been accused by al-Mustapha of asking for a bribe in exchange for a bail ruling.

Four years later, in 2007, the al-Mustapha trial was still lurching forward after early setbacks, when presiding Judge Oyewole stepped down, handing it over to yet another judge.<sup>412</sup> In 2008, the accused were separated into different trials, and Bamaiyi was acquitted due to lack of evidence.<sup>413</sup> But in 2012, al-Mustapha and a fellow conspirator were held guilty by Justice Mojisola Dada for the attempted murder of Alex Ibru.<sup>414</sup> Following the marathon of justice, traditional leaders in the North convened an emergency meeting in Kaduna to try and figure a way to free the former Abacha supporter.<sup>415</sup>

A historical argument still wages over the legacy of Obasanjo’s reforms, military and otherwise. The Oputa Panel has been criticized for being too weak in the face of

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<sup>411</sup> "Bamaiyi/Al-Mustapha: Between Law and Politics," *Africa News* October 17, 2003.

<sup>412</sup> "Judge Hands Off Mustapha's Trial," *Africa News* December 11, 2007.

<sup>413</sup> "Bamaiyi's Tortuous Journey to Freedom," *Africa News* April 7, 2008.

<sup>414</sup> "The Politics, the Trial and Conviction of Al-Mustapha," *Vanguard (Lagos)* February 4, 2012.

<sup>415</sup> *Ibid.*

blatant untruths, and for not confronting glaring problems within the judiciary.<sup>416</sup> Still, others see as laudable the president's effort to change the country's culture. As one author wrote in 2000, "I think the one-year old democracy has also revealed to soldiers that they are not above the law...the trial of the former Chief of Army Staff General Bamaiyi and Major Mustapha...and the refusal of the army to give him any moral backing is an indication that those who still believe that they are above the law because they wear khaki should know that they are only hiding behind the finger of time."<sup>417</sup> Richard Sklar et al. note that Obasanjo demonstrated the way toward democratic consolidation, despite his attempt at extending his presidency beyond the two-term limit in 2007. The reason is that when this caused public uproar, Obasanjo stepped aside.<sup>418</sup> His efforts were an attempt to move beyond the 'godfather' politics dominated by regional tribal elites. Whether this is enough to keep the democracy thriving well into the future remains to be seen, but one thing is for certain at the time of this writing: the democracy, though embattled by North-South conflict and the rise of Islamic extremism, continues to sputter along over a decade later.<sup>419</sup>

The Nigerian case again demonstrates the importance of human rights constituencies, who consistently pushed Obasanjo to act after his election; pro-justice demonstrations had even more of an effect because Obasanjo understood that his electoral mandate had in part come from these groups. The example also shows how

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<sup>416</sup> Iyiola Solanke, "Accountable Judges and Their Role in Prosecuting Serious Violations of Human Rights," *International Journal of Transitional Justice* 6(2012).

<sup>417</sup> Babatunde, "Obasanjo and the Demystification of the Military."

<sup>418</sup> Richard L. Sklar, Ebere Onwudiwe, and Darrent Kew, "Nigeria: Completing Obasanjo's Legacy," *Journal of Democracy* 17, no. 3 (2006).

<sup>419</sup> Abimbola Adesoji, "The Boko Haram Uprising and Islamic Revivalism in Nigeria," *Africa Spectrum* 2(2010).



threats from the military are relatively weak. Though hardliners under General Bamaiyi rattled their sabers, both Abubakar and Obasanjo moved forward with reforms aimed at changing the military culture in the country, including directly targeting some officials for retirement, and others for trial. The reason is that transitional leaders saw that the military had lost clout, and that whatever threats they made would not resonate in the public.

Nigeria also adds two more factors information to our assessment of domestic transitional justice. First, one can easily observe the influence of the ethno-religious dimension of Nigerian politics, and the effect of corruption based on regional patronage networks. The tension between the Southern Yoruba and various Northern clans was present throughout the transition and the transitional justice proceedings. The center of the civil resistance to the military government was in Yoruba-dominated Lagos, and that is where the government deliberately held trials in a move to assuage rights groups. Additionally, North-South divisions, which had *previously* been widened under the Abacha regime, cast a shadow over the trial and Oputa panel proceedings, but it would be a stretch to argue that it *caused* escalation of violence. A second point is the importance of strong judicial institutions. Argentina and Korea, though riddled with other problems, at least had judicial institutions that were mostly functional during the period of transition. Nigeria's efforts at justice were weakened by the lack of judicial effectiveness. The specter of corruption directly haunted the proceedings, for example, when al-Mustapha accused one judge of asking for bribes, which influenced that judge to recuse himself. The results of judicial weakness were extended delays, weak prosecution, and

inability to convict all of the defendants (which paradoxically is also a positive sign of fair procedure).

#### 5.3.4. Summary

What bearing do these three cases have on our understanding of the causes of transitional justice, and its short-term impacts? First, while the influence of international factors was observable, these remained mainly on the normative level. The Alfonsín government did not receive direct outside assistance in its justice efforts, but it was influenced by human rights advocates that had absorbed ideas about what was appropriate in relation to rights protections. The Korean rights constituency was actually hostile to US and outside influence in the country. And in Nigeria, while international opprobrium weakened the military, and the Obasanjo regime made direct reference to South Africa, efforts at transitional justice did not seem *driven* by outside actors in the aid or NGO sectors. Instead, in each case what propelled new democratic governments was the need to respond to a very public demand to address endemic problems in relations of violence.<sup>420</sup> This demand expressed itself through conduit voting publics and through acts of public dissent. Only after some of the initial conditions of democracy, and after transitional justice measures were commended, did the regimes start to receive greater aid and some military support.<sup>421</sup>

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<sup>420</sup> For a similar point regarding the domesticity of transitional justice, see Cath Collins, *Post-Transitional Justice : Human Rights Trials in Chile and El Salvador* (University Park, PA: Pennsylvania State University Press, 2010), 220-25. "...the existence of previous legal experience and strategic awareness among domestic accountability actors, plus changed domestic judicial receptivity, are particularly significant factors shaping post-transitional accountability trajectories."

<sup>421</sup> For example, see "U.S. To Train Three New Battalions," *The Guardian* June 27, 2001. Aid for democracy promotion and human rights remained paltry in Korea and Argentina prior to the late-1990s. Nigeria received a small jump in this kind of aid after the fall of Abacha, but it would not start receiving

A note on international treaty commitments is also relevant here. Argentina did not ratify the ICCPR, its Optional Protocol, or the Convention Against Torture until August 1986. These treaties were thus not instrumental in the *beginning* stages of transitional justice (though these and other regional sources of international law would play a role in the 1990s and 2000s<sup>422</sup>). The timing of ratification might have been a byproduct of the Alfonsín government's attempt to 'lock in' democratic reforms amidst stirrings of military unrest, or it might have been yet another attempt to appease rights protestors. Korea did not ratify the ICCPR and the Optional Protocol until 1990, two years into Roh's unpopular presidency, and following the country's national dialogue on what to do about previous rights abuses under the military. Nigeria's ratification patterns are very interesting in light of the theory presented in Chapter 4. The Ibrahim Babanginda government ratified the ICCPR directly after it refused to honor the democratic selection of MKO Abiola in July 1993. The huge public outcry that this caused not only inspired IBB to begin putting together a transitional regime, but perhaps also to defensively ratify this rights convention. Nigeria's ratification of CAT came under Obasanjo's regime in June of 2001, coinciding with three developments: the public hearings of the Oputa panel, calls for changes to the Nigerian constitution by Yoruba and Igbo groups, and the resumption of US military assistance to the fledgling democracy.<sup>423</sup>

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large sums until well into the 2000s. See <http://www.aiddata.org/content/index> for outlays of aid coming from the US and all other countries of the world earmarked for democracy and human rights promotion.

<sup>422</sup> Dancy and Sikkink, "Treaty Ratification and Human Rights Prosecutions: Toward a Transnational Theory."

<sup>423</sup> "Soyinka, Others Want National Confab," *The Guardian* June 27, 2001; "The Yoruba Commandments," *Tempo* June 28, 2001; "U.S. To Train Three New Battalions."

A second takeaway from these three cases compared is that the perceived balance of power between outgoing and incoming forces is not enough to explain the initiation of justice efforts. Argentina had problems with the military, even though it was a ruptured transition following a severe weakening of the junta. Furthermore, Korea and Nigeria, both negotiated transitions, also targeted military actors, and did not experience significant backlash early on. A third point is that efforts in each country were not *driven* by strong judiciaries, but they were affected by them. Nigeria's weakness of this front is perhaps representative of larger problems of stateness facing non-Western regions, including the Middle East and North Africa, Sub-Saharan Africa, and most parts of Asia. Fourth and finally, with regard to short-term backlash, there appears to be some reason to worry over threats on two fronts: military coup (Argentina) and ethno-religious conflict (Nigeria). In each case, though, reprisals were threatened, but these threats did not amount to full-scale existential challenges to the new democratic regime. What this might indicate is that leaders, when pursuing transitional justice policies, already take into account the various threats to the regime and balance them.

#### **5.4. TESTING THE ARGUMENT**

What I have offered is an endogenous theory of transitional justice, which argues that the most important impulse behind the initiation of human rights trials and other measures is domestic public demand for redress for previous rights violations. In terms of backlash, I have argued that the short-term negative risks of these efforts are significant but ultimately unrealized, as the military has already lost crucial clout prior to the transition and beginning of justice policies. Finally, I have noted the possibility that

countries in regions with weak and divided states, the propensity for ethnic conflict might be associated with transitional justice. How well do these impressions hold up to cross-national analysis?

#### **5.4.1. Determinants of Transitional Justice**

The first expectation that I have regarding the initiation of transitional justice is that it will result from public demand. If this is the case, we should expect two factors to be associated with the pursuit of justice: high levels of previous repression under autocracy and public opinion in favor of redress for victims of that repression. The first factor can be measured using standard datasets on repression. The second is more difficult. Adequate public opinion data is not available across all transitional countries to assess whether the widespread approval of justice efforts coincides with government policies. But as we saw in the examples, public demand commonly expresses itself in the form of public demonstration. An alternative way of evaluating the influence that human rights constituencies have on the pursuit of transitional justice, then, is studying the association between public expressions of dissent and human rights trials. In this section, I specifically analyze the relationship between non-violent acts of protest and transitional human rights prosecutions across 123 transition in 95 countries from 1970 to 2006, roughly aligning with the Third Wave of Democratization (See Table 5.1).<sup>424</sup> For the dependent variable, I employ a count measure of the number of transitional human rights prosecutions that began in any given year in each of the years following democratic

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<sup>424</sup> These transitions were selected using the Polity IV dataset, because the Oxford-Minnesota Transitional Justice Database was designed to be used with this dataset. A democratic transition is defined as any period following a change from a negative score on the POLITY II variable to a score greater than 1, which also coincides with a 2 or 3 score on the REGTRANS variable. Also, new states that came into existence as democracies are included.

transition in these countries.<sup>425</sup> To qualify as ‘transitional’ prosecutions, the government must have indicted state agents involved in human rights violations committed prior to the democratic transition.<sup>426</sup> In my dataset that extends through the year 2010, a total of 588 such prosecutions took place across 69 post-transitional periods in 57 countries.

The independent variables of interest are level of previous repression and non-violent dissent. For previous repression, I simply use the mean of Political Terror Scale values over the duration of the previous autocratic regime.<sup>427</sup> For the second, I use the same events-based measure of non-violent dissent that I did in Chapter 4, which is a lagged binary variable indicating whether any large-scale non-violent protests or demonstrations took place in the country, as recorded by either of two sources: Arthur Bank’s Cross-National Time Series Dataset (CNTS) or the Social, Political, and Economic Event Database (SPEED).<sup>428</sup> Both of these sources collect data from major news outlets for the time period of interest, though they are only current through the year 2005.<sup>429</sup> To date no data has been collected specifically on human rights-related protests, but the CNTS and SPEED data sources include non-violent protest and demonstration events that revolve around socio-economic, anti-government, class-based, political rights, and personal security issues. While it is difficult to discern in the data whether the protest

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<sup>425</sup> See [transitionaljusticedata.com](http://transitionaljusticedata.com)

<sup>426</sup> For more on definitional issues, see also Kim and Sikkink, "Explaining the Deterrence Effect of Human Rights Prosecutions." Dancy and Sikkink, "Treaty Ratification and Human Rights Prosecutions: Toward a Transnational Theory."

<sup>427</sup> Mark Gibney, L. Cornett, and Reed Wood, "Political Terror Scale 1976-2008," <http://www.politicalterroryscale.org/>.

<sup>428</sup> Banks, *Cross-National Time-Series Data Archive Users Manual*. Nardulli and Slana, "Speed's Global News Archive: An Overview and Assessment."

<sup>429</sup> Banks series runs from 1972- 2003, but the SPEED series goes from 1946 to 2005. Because I take the union of the two, the measure I use is available from 1970 through 2005. Because I employ a lagged measure, my analysis goes from 1970 to 2006.

event was staged specifically around transitional justice, it is justified to use a measure combining various other grievances because more often than not protestors themselves group demands with justice together with other concerns—as we saw in the Korean example when students rallied against torture while also fighting against US imperialism, and in Nigeria where protestors called for trials while also calling for the end to corruption.

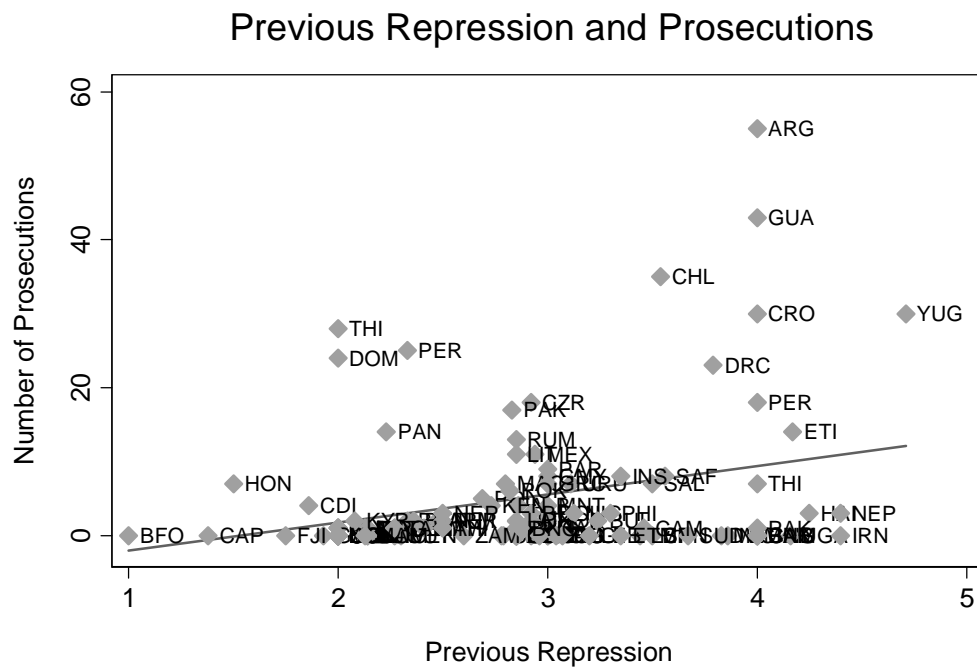
Figure 5.1. is a scatter plot showing the relationship between previous repression and the number of transitional prosecutions following democratization. The fitted line drawn through the data demonstrate a clear trend between the level of previous abuses and the number of trials. To some extent, this is enhanced by countries in the upper right quadrant, including Argentina, Chile, and Croatia. However, quite a few cases are situated directly on top of the fitted line, indicating that outliers are not driving the relationship. This plot clearly demonstrates what we would expect: in places where citizens have faced greater abuses at the hands of autocrats, the post-transitional regime is more likely to address the problem by pursuing trial justice. Figure 5.2 is a bar graph showing the number of transitional human rights prosecutions initiated following non-violent dissent events. The grouping variable, which country-years with and without non-violent dissent, is lagged one year. As one can observe, far more transitional prosecutions (359) took place following public protests and demonstrations, where only 141 were initiated following years with no dissent.<sup>430</sup> This amounts to 70.1% of all transitional prosecutions from 1970-2006. Still, this figure represents only suggestive evidence that

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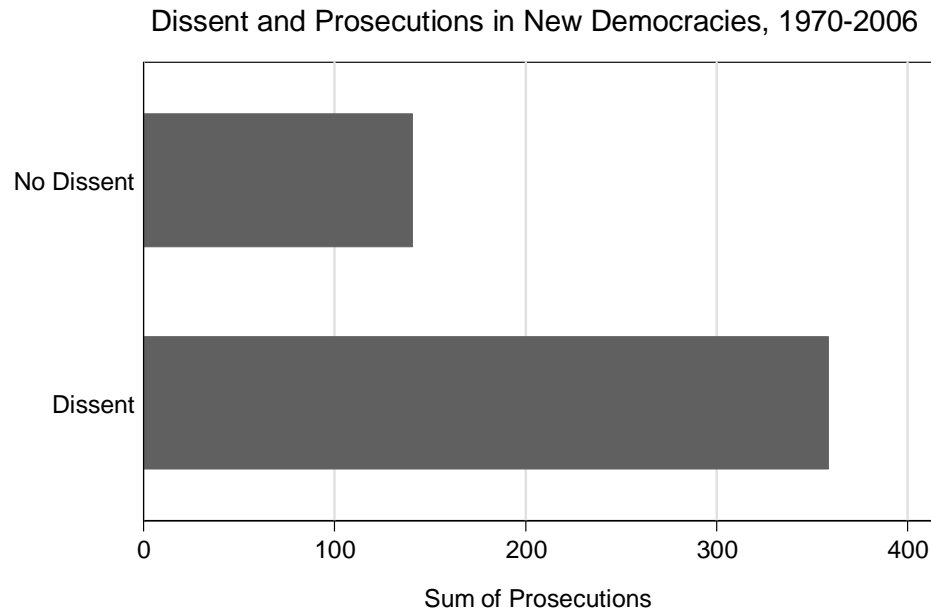
<sup>430</sup> This adds up to a total of 500 prosecutions. The remaining 88 in the dataset happened after 2006, the last year in this particular sample.

public demand is behind transitional justice. Taken together, this evidence suggests that the theory resonates. Regimes following those that were very abusive, when pushed, will answer the call for justice by putting those responsible in the dock. Still, in order to test the power of this explanation, we must conduct more extensive statistical analysis, while controlling for other factors.

Figure 5.1. Previous Repression and Prosecutions





**Figure 5.2. Dissent and Prosecutions**

Because I am using a count of transitional prosecutions as my dependent variable, I employ negative binomial regression models. In my models, I include other two other variables to account alternative issues related to demand. The first is the presence of violent methods of dissent like riots and terrorism. This allows me to test whether it is non-violent demonstration specifically that is encouraging governments to act. The second is a binary indicator that takes on a value of “1” if the country-years are within five years following the transition, the idea being that demand for transitional justice might wane over time.<sup>431</sup> Additionally, I incorporate variables controlling for other vectors of normative diffusion. These include a logged measure of the number of INGOs

<sup>431</sup> Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, 228.

in the country, and an index measure of how many physical integrity rights treaties the country has ratified.<sup>432</sup>

It is also necessary to control for a number of other possible explanations for the pursuit of justice. Other factors that might influence the decision to initiate transitional justice include (1) direct international involvement in the country, (2) elite mimicking or hijacking, (3) authoritarian institutional legacy, (4) features of the transitional polity, and (5) favorable systemic characteristics like wealth and democratic history. To control for international material involvement, or the notion that the push for transitional justice comes mainly from outside actors, I include variables for amount of foreign direct investment in the country as a percentage of GDP and the total number of foreign aid outlays targeted to democracy promotion and rule of law in the country.<sup>433</sup> Because there is reason to suspect that previous experience with international ad hoc tribunals might spur future domestic judicial activity through capacity-building, I also include a measure of the previous number of international prosecutions that have taken place in the country.<sup>434</sup> To control for elite mimicking, where leaders simply pursue certain actions because they are the new fad, I include a logged count of the number of domestic transitional trials that have taken place in the country's region. If elites are pursuing transitional justice in an effort to be like everyone else, then we would expect this measure to be positively correlated with the initiation of trials. And to address hijacking, where elites misuse normatively promoted policies to further their own goals, I include a

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<sup>432</sup> The first is borrowed from Emilie Hafner-Burton, and the second is taken from Dancy and Sikkink, "Treaty Ratification and Human Rights Prosecutions: Toward a Transnational Theory."

<sup>433</sup> The first comes from the World Bank databank. <http://databank.worldbank.org/data/home.aspx>. The second is from AidData2.0. <http://www.aiddata.org/content/index/AidData-Raw>.

<sup>434</sup> Available at [www.transitionaljusticedata.com](http://www.transitionaljusticedata.com).

measure of ethnic fractionalization.<sup>435</sup> If executives are simply attempting to use transitional justice to target oppositional groups, or to promote their own ethnic groups at the expense of others, we would expect a positive correlation between ethnic fractionalization and the use of trials.<sup>436</sup>

To control for authoritarian institutional legacy, I include a measure of whether the transition was ruptured or negotiated<sup>437</sup>, and a sum of previous legal amnesties that have been provided to protest state agents.<sup>438</sup> These allow me to capture the effects of balance of forces on transitional justice. I also include a measure of whether the former regime was a ‘party autocracy.’ It has been shown that party autocracies are usually supported by strong militaries.<sup>439</sup> We might, then, expect countries in which authoritarianism has been channeled through parties to be less likely to pursue justice. Finally, I insert a measure of the average strength of the judiciary under the previous autocratic regime, calculated using Drew Linzer and Jeffrey Staton’s comprehensive comparative measure of judicial effectiveness.<sup>440</sup> The more complicit the judiciary was in the previous regime, the thinking goes, the less likely suspicious activists will be to pursue legal justice for human rights. To control for transitional institutions, I include a measure of executive constraints taken from Polity IV, and a measure of whether

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<sup>435</sup> I draw on James D. Fearon and David D. Laitin, "Ethnicity, Insurgency, and Civil War," *American Political Science Review* 97(2003). Data are extrapolated through the sample.

<sup>436</sup> Hijacking theories are normally built around the idea of subversion by elites showing ethnic favoritism. See Subotić, *Hijacked Justice: Dealing with the Past in the Balkans*.

<sup>437</sup> Taken from Olsen, Payne, and Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy*.

<sup>438</sup> [www.transitionaljusticedata.com](http://www.transitionaljusticedata.com)

<sup>439</sup> Jose Antonio Cheibub, "Presidentialism, Electoral Identifiability, and Budget Balance in Democratic Systems," *American Political Science Review* 100, no. 3 (2006).

<sup>440</sup> Drew A. Linzer and Jeffrey K. Staton, "A Measurement Model for Synthesizing Multiple Comparative Indicators: The Case of Judicial Independence," (<http://userwww.service.emory.edu/~jkstato/page3/index.html>2012).

executive elections happened in the past two years (World Bank).<sup>441</sup> The more latitude that the executive has to act, the more likely she is to push through justice reforms. I also include a measure of the difference in judicial effectiveness in each post-transitional year from the average level under the previous autocracy. The logic here is that as the judiciary gets progressively more effective following transition, the more likely the country will be to pursue transitional justice. Finally, to control for favorable systemic features, I include a logged measure of GDP per capita, the logged number of previous years the country has been democratic, and a binary measuring whether the country is “Western” (that is, whether it is within Europe or Latin America). For a summary of the variables used in the analysis, see Table 5.2.

Table 5.3 reports the results from two different models. The first is the fully specified model, whose results are graphically depicted in Figure 5.3. This graphic demonstrates the magnitude of one-unit changes in each of the statistically significant covariates from the model. Because I used negative binomial regression, I calculated the percent change in the expected count of prosecutions conditioned on these one-unit changes. We can see that the hypotheses generated by the theory perform relatively well. As the amount of previous repression increases by one level of severity, the expected number of prosecutions increases by a little over 50%. Furthermore, those governments facing non-violent dissent had a 50% higher number of trials than those that did not. Interestingly, governments appear to respond specifically to peaceful protests and

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<sup>441</sup> Monty G. Marshall, Keith Jagers, and Ted Robert Gurr, "Polity Iv Project: Political Regime Characteristics and Transitions, 1800-2010: Data User's Guide," ed. Center for Systemic Peace (Fairfax, VA 2011). Philip Keefer, "Database of Political Institutions: Changes and Variable Definitions. Codebook," ed. World Bank Development Research Group (2009).

demonstration rather than violent dissent, which is negatively related to the pursuit of transitional justice. While the number of regional prosecutions is not significant in the model, suggesting the mimicking is less of an explanatory factor than previously surmised, the number of INGOs operating in the country is highly significant. As the logged value increases by one-unit, the percent change in the expected value increases by over 100%. Moreover, this diffusion does not appear to be based on direct international involvement or material pressure (the INTERNATIONAL PROSECUTIONS, FDI, and DEMOCRACY AID variables are all insignificant). If diffusion is taking place, it occurs through relationships between global non-governmental organizations and domestic publics. This is evidence of Keck and Sikkink's boomerang effect, which has also been confirmed by recent research that shows a nexus between NGO activity and domestic protest.<sup>442</sup>

With regard to contextual and transitional factors, very few prove to be significantly related to the pursuit of transitional justice. It does not appear to make a difference, for example, whether the transition was ruptured or negotiated, or whether a country previously amnestied its state agents for human rights violations. What *does* make a difference is whether the previous regime was a party autocracy. Democracies emerging from party autocracy initiate 50% fewer prosecutions against state agents for rights violations. The reason for this is that party autocracies, by bringing more shareholders into the dictatorial regime, implicate more people in the abuse of citizens.<sup>443</sup>

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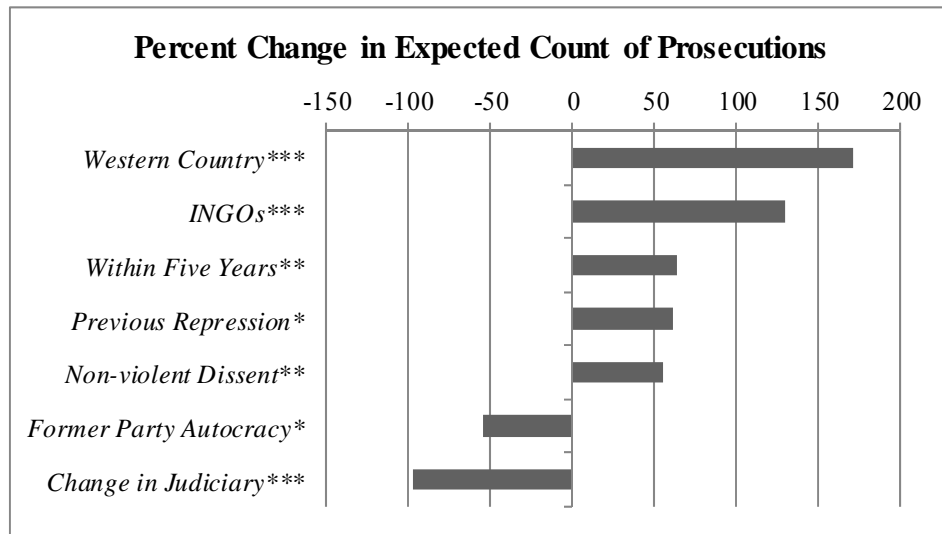
<sup>442</sup> Keck and Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*; Murdie and Bhasin, "Aiding and Abetting: Human Rights Ingos and Domestic Protest."

<sup>443</sup> Gandhi, *Political Institutions under Dictatorship*.

This militates against anti-regime outrage and public demand for justice in the wake of transition. One of the more surprising findings is that the more effective the judiciary becomes in the post-transitional period, the less likely transitional justice will be pursued. There are two possible reasons for this. First, judicial effectiveness could be an overall indicator for the strength of democratic institutions in the country over time. As democracy advances, the need to address previous abuses wanes. This is supported by the finding represented in Figure 5.3 that justice is more likely to come within the first five years following transition. A second possible reason is that executive strength is necessary to force courts to accept thorny cases regarding prior abuses. However, the EXECUTIVE CONSTRAINTS variable is insignificant in the model, indicating that this is the less plausible explanation. Yet a third reason comes from literature on comparative judicial institutions. Lisa Hilbink, for example, finds that some judiciaries that are technically independent remain that way by avoiding political divisive rulings that may undermine its credibility.<sup>444</sup> Thus, more effective judiciaries might be less apt to be revisionist, or less willing to challenge the status quo.

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<sup>444</sup> Elisabeth Hilbink, *Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile* (New York: Cambridge University Press, 2007).

*Figure 5.3. Determinants of Prosecutions*

A final note regarding the full model is the strength of the WEST dummy, which is a highly suggestive indication that the move toward transitional justice might be driven by countries in Latin America and Europe. But whether this simply reflects the fact that more transitional justice has taken place in Western countries, or whether political dynamics are fundamentally different in Western contexts remains to be seen. The second model I run is truncated, and the results have some relevance for this issue. In this truncated model, I removed those covariates that had less coverage in order to increase the number of observations (these include INGOS, VIOLENT DISSENT, FDI, DEMOCRACY AID, and EXECUTIVE ELECTIONS). Interestingly, when a wider sample is analyzed, ethnic fractionalization becomes very significant, both statistically and substantively, while

WESTERN COUNTRY becomes insignificant. This suggests that those ethnically fragmented, fragile states—the same that have missing data on a number of big-data indicators in from the World Bank, etc.—pursue transitional justice too, and at quite a high rate. It might also suggest that the Western region dummy is not capturing significant variations. This warrants further investigation in the future.

#### **5.4.2. Short-term Impacts**

The previous section presents strong cross-national evidence that domestic demand for justice emanating from previous rights abuses under autocracy is largely responsible for the pursuit of human rights prosecutions. A global dimension exists, as those states with INGO networks appear to be more likely to initiate transitional prosecutions. But this does not seem to be forced through material pressure, or simply an issue of elite mimicking. The role of norm ‘hijacking,’ though, is unclear. In the expanded model, ethnic fragmentation proved to be a significant predictor of transitional justice. This could very well mean that in some states, ethnically charged groups are pressing for justice, but against those that do not belong to their own group. What do these findings mean for the possibility of negative consequences in the short term?

In Section 5.3 I argued that on the mind of transitional leaders are the existential risks posed by two threats to the new democracy: military coups and revolts. Elites pursue transitional justice in an effort to balance these competing risks, which come from military elements and from aggrieved groups that do not buy in to the new democratic regime. If they do not pursue prosecutions, they betray their winning coalition and risk seeing their government challenged by mass civil resistance (as in South Korea); if they



do pursue prosecutions, they risk angering the military (as in Argentina), or sending into a frenzy groups that feel they are unfairly targeted by the justice policies (as in Nigeria). The fact that transitional justice is a response to dissent has two potential implications: first, if the military perceives rights-based dissent and prosecutions as a threat to the regime that the new civilian government is not handling, it might choose to coup; second, if those pushing for transitional justice are doing so out of hatred for an ‘other’, including ethnic, tribal, or religious enemies, then we might expect prosecutions to be associated with civil conflict. While there has been a good deal of speculation on these short-term negative consequences, or on the propensity for transitional justice to exacerbate tensions within a country, these possibilities have not been tested with any rigor. Below, I comprehensively examine the effect of transitional justice on the risk of coup and on the risk of violent civil conflict.

I run tests on a series of dependent variables, with transitional human rights prosecutions (lagged) as an independent variable. The dependent variables of interest are four binary measures: (1) whether a coup successfully overthrew the government or regime; (2) whether coup was staged but ultimately failed; (3) the onset of civil war after at least one year of termination; and (4) the onset of ethnic civil war after at least one year of conflict termination.<sup>445</sup> In my dataset on post-transitional countries, there were 35 successful coups, 41 failed coups, 68 civil war onsets, and 67 ethnic conflict onsets. If transitional justice exacerbates the risk of short-term consequences, then we should

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<sup>445</sup>Data on successful and failed coups taken from Powell and Thyne, "Global Instances of Coups from 1950 to 2010: A New Dataset." Data on the onset of civil war taken from PRIO: see Gleditsch et al., "Armed Conflict 1946-2001: A New Dataset." Data on the onset of ethnic civil war taken from Lars-Erik Cederman, A. Wimmer, and B. Min, "Why Do Ethnic Groups Rebel? New Data and Analysis," *World Politics* 62, no. 1 (2010).

observe a significant correlation between the initiation of prosecutions and the probability of any of the events occurring, holding other factors constant.

For each of these four variables, I implement a discrete time logit, which allows one to control for the effects of temporal dependence in the data.<sup>446</sup> Because I also need to control for other factors that predict transitional justice, to account for endogeneity, I incorporate any predictors from the previous models that achieved levels of significance. I made only two adjustments. First, I substituted a measure of GDP growth for level of GDP. The thinking here is that positive growth makes any of these events less likely, no matter the overall level of wealth in the country. Second, I changed the WEST dummy variable to its opposite, NON-WEST, in order to more easily interpret the relative risk that non-Western countries face. The results of the four tests are reported in Table 5.4. The results demonstrate that, generally speaking, non-western states are at a higher risk of coups and violent civil conflicts. For this reason, I charted the change in probabilities that comes with higher numbers of human rights prosecutions, conditioned on West and Non-West. These plots are depicted in Figure 5.4.

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<sup>446</sup> Beck, Katz, and Tucker, "Taking Time Seriously: Time-Series-Cross-Section Analysis with a Binary Dependent Variable."

**Figure 5.4. Change in Probability of Violent Events Caused by Transitional Justice**

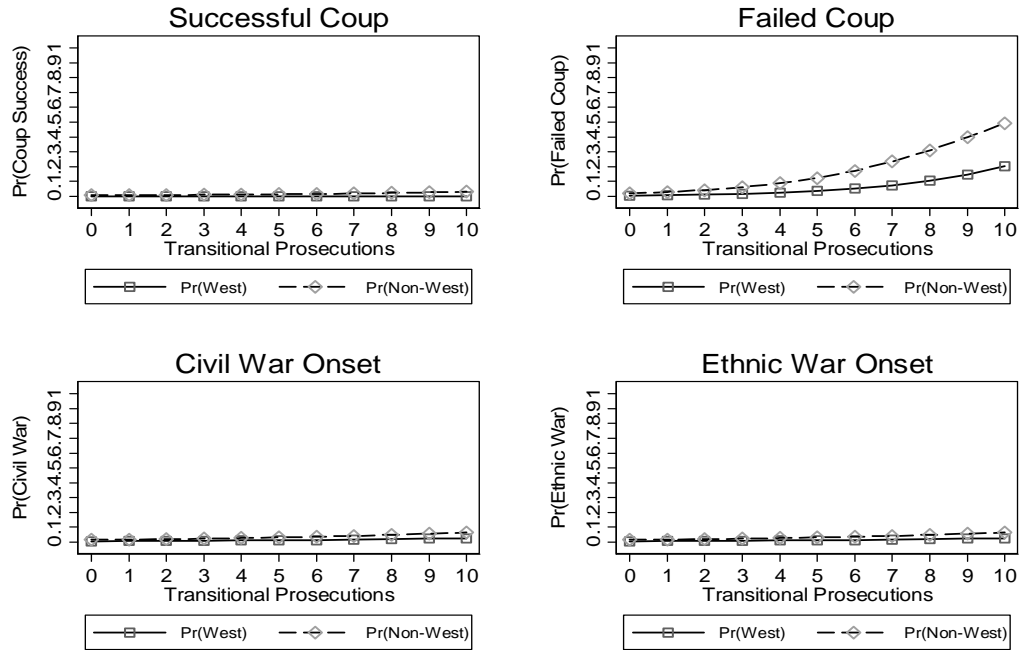


Figure 5.4 shows us that of all the consequences potentially associated with transitional justice, the only one that is significantly correlated is failed coups. In the empirical record, the institution of transitional prosecutions is simply not followed by the successful coups, civil war onset, or the onset of ethnic war—despite claims to the contrary. The relationship between trials and failed coups meets expectations coming from my theory, and from the case examples. The new Argentine democracy faced a coup attempt, and a good deal of saber-rattling, from the mid-level ranks of the military in 1986 and 1987. While some did fear that the coup was successful, it is now thought in

retrospect that there it was simply a threat used to achieve a political goal, a military amnesty, rather than a true attempt to topple the new democracy.<sup>447</sup>

Another illustrative example which appears in the dataset is the failed coup in the Philippines in 1987. Corazon Aquino, in her second year of office following the fall of Marcos, had been struggling to end the counter-insurgency against Communist rebel forces while also keeping the military on her side. She pursued a dual strategy of extending a conditional amnesty to the Communists, while prosecuting some of the most abusive soldiers for human rights violations. This led, in August 1987, to a coup attempt staged by followers of a former aide to a fired Defense Ministers, Juan Ponce Enrile. Around 800 soldiers joined Colonel Gregorio ‘Gringo’ Honasan to attack 40 government buildings, including the presidential palace. Honasan had only the year before been planning a coup against Marcos, and at the last minute he decided to ally the coup with Aquino’s People Power movement to prevent it from being a disaster. This “colorful colonel with a penchant for coups” was repulsed by the Filipino Marines, and within two days hundreds of soldiers wound up under siege at Camp Aguinaldo Army Headquarters. Honasan escaped by helicopter.<sup>448</sup> The soldiers had rallied behind the colonel on the basis of complaints about pay, and about being limited by human rights ideals in their fight against Communists.<sup>449</sup> Still, even though 40 people died in the coup attempt, some blame the affair on a miscalculation by Honasan, rather than treating it as a serious attempt to assume control of government. The Colonel never thought it would end in

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<sup>447</sup> Huntington, *The Third Wave: Democratization in the Late Twentieth Century*.

<sup>448</sup> "Colorful Colonel with a Penchant for Fiery Coups," *Sunday Mail (QLD)* August 30, 1987.

<sup>449</sup> Clayton Jones, "Philippine Coup Attempt Highlights Military Problems," *Christian Science Monitor* August 31, 1987. Seth Mydans, "Coup Crushed in Philippines: In a Two-Crisis Week, Aquino Shows Her Nerve," *The New York Times* August 30, 1987.

fighting between the Marines and the Army. Believing in the tradition that “soldiers would not shoot fellow soldiers,” Honasan dared to threaten a coup to shake up the regime’s military policy. His coup was crushed, and the military fell in line.

This example provides yet more demonstration that by the time transitional justice gets under way, the military has already begun to change, meaning that rights prosecutions will not pose an overwhelming threat. What about the second sources of threat, revolts or ethnic conflict? According to the results recorded in Table 5.4 and depicted in Figure 5.4, there is little to no risk that transitional prosecutions will lead to the onset of either civil war—defined as a contested incompatibility between the government and an opposition that results in at least 25 battle deaths—or a civil war driven by ethnic groups. Thinking that this finding might have to do more with the arbitrary thresholds in the data than with historical realities, I examined the relationship between rights prosecutions and various levels of ethnic and civil conflict, as measured by the Major Episodes of Political Violence dataset gathered by the Center for Systemic Peace.<sup>450</sup> This dataset makes available categorical variables relating to extremity of civil violence, going from sporadic (1) to limited (2) to serious (4) to systemic (6). If no conflict is ongoing, the values are 0. Table 5.4 also reports the results from ordered logits testing the effects of transitional justice on different levels of civil conflict, ethnic and general. Figure 5.5 demonstrates the negligible relationship between transitional justice and the higher probability of ethnic violence. In non-Western contexts, higher numbers of

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<sup>450</sup> Available at <http://www.systemicpeace.org/>.

prosecutions appear to be slightly associated with sporadic violence, but this relationship is statistically insignificant.

Figure 5.6 shows the relationship between transitional prosecutions and total civil violence, which is not necessarily ethnicity-driven. According to the ordered logit model, this is a statistically significant relationship. In both Western and non-Western contexts, transitional justice is associated with increases in sporadic civil violence of any type, ethnic or otherwise. In non-Western contexts, the more trials that are initiated, the higher the risk for serious political conflict and war. To be clear, though, these probabilities of higher violence are very low, moving from near-zero at low numbers of trials to .10 and with the highest numbers of trials. This is at least some vindication for theories that predict backlash from the pursuit of transitional justice, but the findings mainly show that the biggest risk facing the pursuit of accountability for human rights violations will be unsupported and unsuccessful coup attempts, and sporadic violence among various actors within states. Wholesale military hostility rarely follows from transitional justice, nor does widespread ethnic unrest and war.

Figure 5.5. Transitional Justice and Ethnic Violence

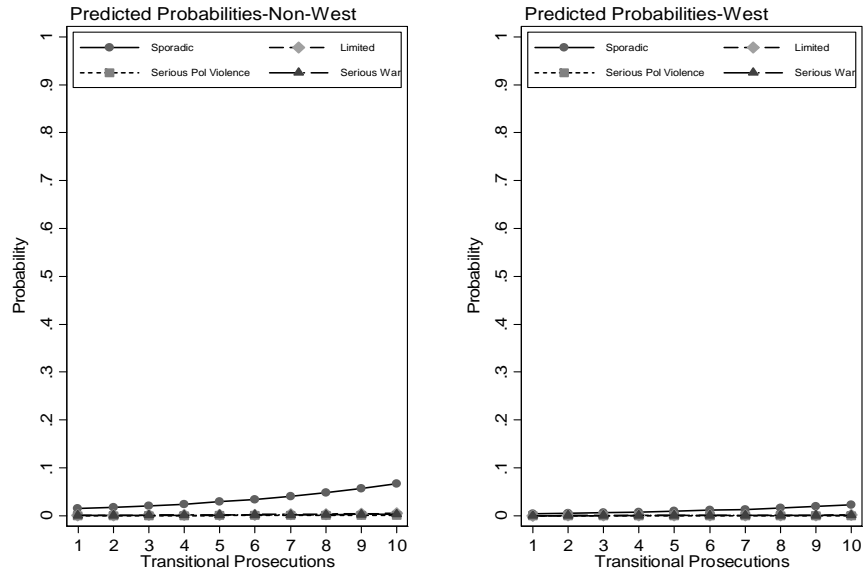
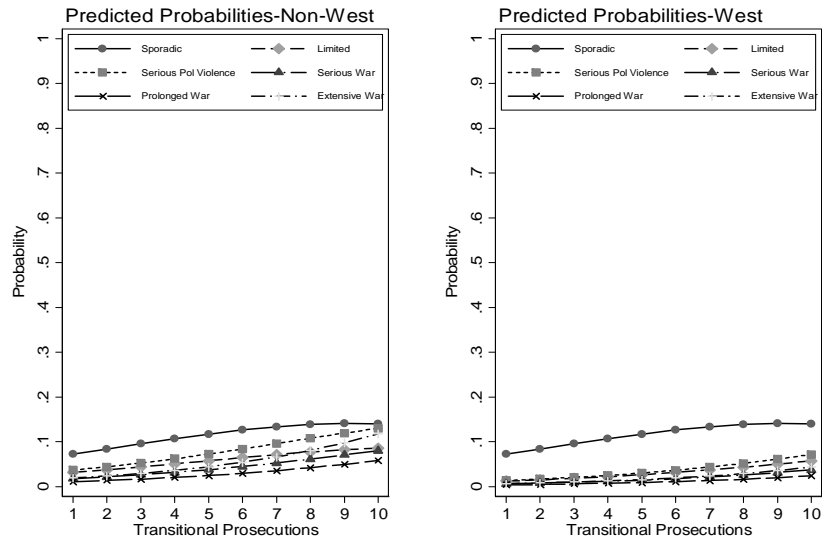


Figure 5.6. Transitional Justice and Total Civil Violence



## **5.5. CONCLUSION**

I have aimed to accomplish two main goals with this chapter. The first is to clarify our understanding of where the push for transitional justice comes from. No doubt there is truth in the notion that changes in the global *zeitgeist* have made human rights a cause célèbre, and this has informed the UN's agenda, foreign policies, and international non-governmental organizations. Leaders of countries around the world are all on notice concerning human rights, and they are aware of policies in other countries. However, the reason that leaders in new democracies pursue transitional justice, specifically prosecutions for rights violations, is not that they are being forced by outside actors, that they are thoughtlessly mimicking policies in other countries, or that they are hijacking international norms to attack their enemies (though cases of each of these definitely exists). Instead, what they are doing is answering a domestic demand that is hard to deny or ignore. This domestic demand is framed by opposition activists and demonstrators that are well-informed about human rights, who participate in global networks, and who urge that transitional justice take place, along with other reforms to improve their country's political and social relations. These activists have withstood periods of serious repression, and they want to see progress away from the old order. Sometimes the demands they make are openly hostile to interference from the Global North, and sometimes they happen take place within the context of complex political divisions. But they are what drive leaders to seek answers for the difficult questions that have been raised by a history of lies, violence, and denial.



The second aim was to try and pin down the short-term risks associated with transitional justice. Once we approach transitional justice as the primarily domestic affair that it is, rather than a tool of ‘intervention’, then it tempers our academic judgments and prescriptions regarding the short-term negative consequences of seeking justice. When controlling for all of the causes of transitional justice—including non-violent dissent, a legacy of repression, and whether the former regime was a party autocracy—the short-term consequences appear minor. Coups that take place in response to human rights efforts are hardly ever successful, and apparently it is because the public has grown weary with cycles of coups and counter-coups that autocratic rule has brought in the past. Also, the civil conflict and disruptions that result from transitional justice are sporadic, and ephemeral. Most of the concerns that scholars have had might be based on isolated events of ethnic riots, or small-scale interpersonal violence. This, of course, is a worry as well, but very rarely has civil conflict started on a large scale as a result of demands for rights and justice.

Why do the findings in this chapter matter? First and foremost, they suggest that the way leaders and society actors behave makes a difference. Democracy is a game of cooperation between groups who do not necessarily trust one another. Behavior that signals some concessions on the part of rights-seeking groups and control-minded leaders will keep the game going longer. In these scenarios, actors are not simply vessels through which structures enact themselves. Difficult decisions must be made concerning resources, and institutions are sticky, but there remains room for maneuver. Second, mine is a *political* theory of the human rights law, rather than a theory that assumes the

right combination of formal laws and institutions will automatically produce good outcomes. To borrow a phrase from Choudhury and Krebs, making institutions work involves ‘mobilizing moderates.’<sup>451</sup> Human rights legalism in a democratizing context has been treated by some theorists as immoderate, or excessively risky. However, I suggest that this account is near-sighted; it simply does not acknowledge that political leaders must win support from newly activated civil society actors. When we take account of the power that people have in these democratizing contexts, it is obvious that the pragmatic choice for political elites can be to activate the courts, or at least to allow the courts to be activated. For political leaders, the law is not surrender, and for activists it is not hubris. The law, instead, is prudence.

The demystification of the short-term backlash criticism, while useful, speaks very little to the question of whether the pursuit of justice does *any real good*. It might be that transitional justice avoids starting new fires, but does it put any out? In the next chapter, I will examine the long-term effects of transitional justice. Specifically, I will examine the relationship between transitional justice, ordinary human rights enforcement, and repressive relations over time.

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<sup>451</sup> Arjun Chowdhury and Ronald R. Krebs, "Making and Mobilizing Moderates: Rhetorical Strategy, Political Networks, and Counterterrorism," *Security Studies* 18(2009).

*Table 5.1. Democratic Transitions*

Region	Country	Year Start	Year End	Time	Fail	Transition Type	Amnesty	TC	Int'l Trials	Trans Trials	TRT Guilty	Ordinary Trials
Amer	Argentina	1973	1976	4	yes	negotiated	1	0	0	0	0	0
Amer	Argentina	1983	2010	28	no	rupture	8	1	0	55	26	93
Amer	Bolivia	1982	2010	29	no	negotiated	0	1	0	3	2	24
Amer	Brazil	1985	2010	26	no	negotiated	0	0	0	2	0	126
Amer	Chile	1989	2010	22	no	negotiated	0	1	0	35	16	18
Amer	Dominican Rep	1978	2010	33	no	rupture	1	0	0	24	11	57
Amer	Ecuador	1979	2010	32	no	negotiated	0	1	0	0	0	40
Amer	El Salvador	1982	2010	29	no	negotiated	3	1	0	7	5	58
Amer	Guatemala	1986	2010	25	no	negotiated	3	1	0	43	22	73
Amer	Guyana	1992	2010	19	no	negotiated	0	0	0	0	0	22
Amer	Haiti	1990	1991	2	yes	negotiated	0	0	0	0	0	0
Amer	Haiti	1994	1999	6	yes	rupture	0	1	0	3	0	1
Amer	Haiti	2004	2010	7	yes	rupture	0	0	0	1	1	5
Amer	Honduras	1980	2010	31	no	negotiated	5	1	0	7	1	57
Amer	Mexico	1994	2010	17	no	negotiated	1	0	0	11	7	46
Amer	Nicaragua	1990	2010	21	no	negotiated	3	0	0	0	0	34
Amer	Panama	1989	2010	22	no	rupture	2	1	0	14	8	11
Amer	Paraguay	1989	2010	22	no	rupture	0	1	0	9	8	25
Amer	Peru	1979	1992	14	yes	negotiated	0	0	0	25	9	22
Amer	Peru	2000	2010	11	no	rupture	1	1	0	18	13	15
Amer	Uruguay	1985	2010	26	no	negotiated	1	2	0	7	1	9

Europe	Albania	1990	1996	7	yes	negotiated	0	0	0	4	2	2
Europe	Albania	1997	2010	14	no	negotiated	2	0	0	1	0	3
Europe	Armenia	1991	1996	6	yes	newstate	0	0	0	2	0	2
Europe	Armenia	1998	2010	13	no	rupture	0	0	0	1	1	33
Europe	Azerbaijan	1992	1993	2	yes	rupture	0	0	0	0	0	0
Europe	Belarus	1991	1995	5	yes	newstate	0	0	0	0	0	0
Europe	Bosnia	1995	2010	16	no	foreign occ	0	0	8	20	15	14
Europe	Bulgaria	1990	2010	21	no	negotiated	0	0	0	3	1	30
Europe	Croatia	1999	2010	12	no	rupture	0	0	6	30	19	1
Europe	Czech Republic	1993	2010	18	no	newstate	0	0	0	18	12	17
Europe	Czechoslovakia	1989	1992	4	no	negotiated	0	0	0	2	1	0
Europe	Estonia	1991	2010	20	no	newstate	0	1	0	0	0	13
Europe	Georgia	1991	2010	20	no	newstate	0	0	0	0	0	30
Europe	Germany	1990	2010	21	no	newstate	0	1	0	8	5	19
Europe	Greece	1974	2010	37	no	rupture	1	0	0	7	6	34
Europe	Hungary	1989	2010	22	no	negotiated	0	0	0	2	2	23
Europe	Kosovo	2008	2010	3	no	newstate	0	0	0	0	0	0
Europe	Latvia	1991	2010	20	no	newstate	0	0	0	2	2	8
Europe	Lithuania	1991	2010	20	no	newstate	0	1	0	11	4	5
Europe	Macedonia	1993	2010	18	no	newstate	1	0	1	7	2	10
Europe	Montenegro	2006	2010	5	no	newstate	0	0	0	4	0	2
Europe	Poland	1989	2010	22	no	negotiated	0	0	0	5	4	6
Europe	Portugal	1974	2010	37	no	rupture	6	0	0	2	1	20
Europe	Moldova	1991	2010	20	no	newstate	1	0	0	0	0	12
Europe	Romania	1989	2010	22	no	rupture	1	0	0	13	7	27
Europe	Russia	1989	2010	22	yes	newstate	4	0	0	1	1	33

Europe	Slovakia	1993	2010	18	no	newstate	0	0	0	0	0	7
Europe	Slovenia	1992	2010	19	no	newstate	0	0	0	0	0	0
Europe	Spain	1975	2010	36	no	negotiated	1	0	0	0	0	73
Europe	Ukraine	1991	2010	20	no	negotiated	0	0	0	0	0	31
Europe	Serbia	2000	2002	3	no	rupture	0	1	15	30	25	2
Africa	Benin	1990	2010	21	no	negotiated	0	0	0	2	0	3
Africa	Burkina Faso	1977	1980	4	yes	negotiated	0	0	0	0	0	0
Africa	Burundi	2001	2010	10	no	negotiated	0	0	0	2	1	19
Africa	Cape Verde	1990	2010	21	no	negotiated	0	0	0	0	0	1
Africa	Central Af Republic	1993	2003	11	yes	negotiated	0	1	0	0	0	1
Africa	Comoros	1990	1995	6	yes	negotiated	0	0	0	0	0	0
Africa	Comoros	1996	1999	4	yes	negotiated	0	0	0	0	0	0
Africa	Comoros	2002	2010	9	no	negotiated	0	0	0	0	0	0
Africa	Rep. Congo	1991	1997	7	yes	negotiated	0	0	0	0	0	1
Africa	Cote d'Ivoire	1999	2002	4	yes	rupture	0	0	0	4	3	1
Africa	DR Congo	2004	2010	7	no	negotiated	2	1	9	23	18	25
Africa	Djibouti	1999	2010	12	no	negotiated	0	0	0	0	0	0
Africa	Ethiopia	1994	2010	17	no	rupture	0	0	0	14	9	19
Africa	Gabon	2009	2010	2	no	negotiated	0	0	0	0	0	0
Africa	Ghana	1970	1972	3	yes	rupture	0	0	0	0	0	0
Africa	Ghana	1978	1981	4	yes	negotiated	0	0	0	1	0	0
Africa	Ghana	1996	2010	15	no	negotiated	0	1	0	1	1	28
Africa	Guinea-Bissau	1991	1998	8	yes	negotiated	0	0	0	1	0	0
Africa	Guinea-Bissau	1999	2003	5	yes	negotiated	1	0	0	0	0	0
Africa	Guinea-Bissau	2005	2010	6	no	negotiated	0	0	0	0	0	2
Africa	Kenya	2002	2010	9	no	negotiated	0	1	0	4	2	9

Africa	Lesotho	1993	1998	6	yes	negotiated	0	0	0	0	0	0
Africa	Lesotho	2000	2010	11	no	negotiated	0	0	0	0	0	1
Africa	Liberia	2003	2010	8	no	negotiated	1	1	0	0	0	4
Africa	Madagascar	1991	2010	20	no	negotiated	1	0	0	1	1	5
Africa	Malawi	1994	2010	17	no	negotiated	0	0	0	1	0	15
Africa	Mali	1991	2010	20	no	rupture	2	0	0	1	1	6
Africa	Mozambique	1994	2010	17	no	negotiated	0	0	0	0	0	15
Africa	Niger	1991	1996	6	yes	negotiated	1	0	0	1	1	0
Africa	Niger	1999	2009	11	yes	rupture	0	0	0	0	0	5
Africa	Niger	2010	2010	1	no	??	0	0	0	0	0	0
Africa	Nigeria	1978	1984	7	yes	negotiated	0	0	0	0	0	0
Africa	Nigeria	1999	2010	12	no	rupture	0	1	0	3	0	23
Africa	Senegal	2000	2010	11	no	negotiated	0	0	0	0	0	1
Africa	Sierra Leone	2001	2010	10	no	negotiated	0	1	7	0	0	9
Africa	South Africa	1992	2010	19	no	negotiated	2	1	0	8	8	30
Africa	Uganda	1980	1985	6	yes	rupture	0	0	0	0	0	0
Africa	Zambia	1991	2010	20	no	negotiated	0	1	0	0	0	20
Africa	Zimbabwe	1970	1987	23	yes	rupture	0	1	0	0	0	0
Africa	Zimbabwe	2009	2010	2	yes	negotiated	0	0	0	0	0	1
MENA	Algeria	2004	2010	7	no	negotiated	1	0	0	0	0	5
MENA	Iran	1997	2004	8	yes	negotiated	0	0	0	0	0	1
MENA	Lebanon	1970	1975	30	yes	??	0	0	0	0	0	0
MENA	Lebanon	2005	2010	6	no	rupture	0	2	0	0	0	3
MENA	Sudan	1985	1989	5	yes	negotiated	0	0	0	0	0	0
MENA	Turkey	1973	1980	8	yes	negotiated	0	0	0	0	0	0
MENA	Turkey	1983	2010	28	no	rupture	1	0	0	2	5	166

Asia	Bangladesh	1972	1974	4	yes	newstate	0	0	0	0	0	0
Asia	Bangladesh	1991	2007	17	yes	rupture	0	0	0	1	0	20
Asia	Bangladesh	2009	2010	2	no	rupture	0	0	1	0	0	9
Asia	Bhutan	2008	2010	3	no	negotiated	0	0	0	0	0	0
Asia	Cambodia	1988	1997	10	yes	negotiated	2	0	0	1	1	1
Asia	Cambodia	1998	2010	13	no	rupture	0	0	7	0	0	16
Asia	Fiji	1990	2006	17	yes	rupture	0	0	0	0	0	3
Asia	Indonesia	1999	2010	12	no	negotiated	0	1	0	8	5	42
Asia	Kyrgyzstan	2005	2010	6	no	rupture	0	0	0	2	1	4
Asia	Malaysia	2008	2010	3	no	negotiated	0	0	0	0	0	2
Asia	Mongolia	1990	2010	21	no	negotiated	0	0	0	0	0	0
Asia	Nepal	1990	2002	13	yes	negotiated	0	1	0	3	0	3
Asia	Nepal	2006	2010	5	no	negotiated	0	0	0	3	1	5
Asia	Pakistan	1973	1977	5	yes	newstate	0	1	0	0	0	0
Asia	Pakistan	1988	1999	12	yes	negotiated	0	0	0	17	3	17
Asia	Pakistan	2007	2010	4	no	negotiated	0	0	0	1	1	9
Asia	Philippines	1986	2010	25	no	rupture	0	1	0	3	1	66
Asia	South Korea	1987	2010	24	no	negotiated	2	2	0	6	6	14
Asia	Taiwan	1992	2010	19	no	negotiated	0	0	0	1	0	12
Asia	Thailand	1974	1976	3	yes	??	0	0	0	0	0	0
Asia	Thailand	1978	1991	14	yes	negotiated	0	0	0	1	1	1
Asia	Thailand	1992	2006	15	yes	negotiated	2	0	0	28	8	24
Asia	Thailand	2007	2010	4	no	negotiated	0	1	0	7	2	4
Asia	Timor-Leste	2002	2010	9	no	newstate	0	1	0	0	0	22

**Table 5.2. Variable Descriptions**

<i>Variable</i>	N	Mean	SD	Min	Max	Source
INGOs (Logged)	1225	6.336548	.9652382	0	8.339023	Hafner-Burton
Treaty Ratification Index	1691	.4982456	.286196	0	1	Dancy and Sikkink
Non-violent Dissent	1363	.5436537	.4982735	0	1	Banks/SPEED
Violent Dissent	1183	.183432	.3871839	0	1	Banks
Legacy of Repression	1623	2.816519	.6871584	1	4.71	Political Terror Scale
Five Year Dummy	1691	.3347132	.4720297	0	1	Polity IV
FDI (% of GDP)	1444	3.209332	5.754321	-2.75744	117.91	World Bank
Democracy/Rule of Law Aid	1691	43.09462	66.1376	0	530	Aid Data 2.0
International Prosecutions	1691	.0301597	.320375	0	7	Oxford-Minnesota TJD
Regional Trials (Logged)	1691	1.366744	.9563284	0	2.995732	Oxford-Minnesota TJD
Ethnic Fractionalization	1622	.4399838	.2462206	0	.9302	Fearon and Laitin
Ruptured Transition	1691	.2738025	.4460407	0	1	Olsen et al.
Sum of Previous Amnesties	1691	.8225902	1.547813	0	9	Oxford-Minnesota TJD
Former Party Autocracy	1691	.3784743	.4851502	0	1	Geddes/Svolik
Former Judicial Effectiveness	1652	.2715404	.1608623	.019881	.8962212	Linzer and Staton
Change in Judicial Effectiveness	1557	.2353137	.2026275	-.66965	.80234	Linzer and Staton
Executive Constraints	1691	.5712596	.4950424	0	1	Polity IV
Executive Election	1525	.3003279	.4642394	0	2	World Bank
GDP per capita (Logged)	1648	7.243321	1.293129	4.480213	10.15113	World Bank
Previous Years of Democracy (Logged)	1691	2.726359	1.144699	0	4.828314	Polity IV
Western Country	1691	.5659373	.4957798	0	1	UN



**Table 5.3. Determinants of Transitional Prosecutions**

	<i>Negative Binomial Regression</i>	
	<b>Full</b>	<b>Truncated</b>
INGOs (Logged)	0.833*** (0.272)	
Treaty Ratification Index	-0.298 (0.475)	-0.0122 (0.458)
Non-violent Dissent	0.442** (0.182)	0.437** (0.195)
Violent Dissent	-0.384* (0.220)	
Legacy of Repression	0.483* (0.266)	0.639*** (0.232)
Five Year Dummy	0.493** (0.220)	0.293 (0.216)
FDI (% of GDP)	0.0286 (0.0418)	
Democracy/Rule of Law Aid	-0.00420 (0.00350)	
International Prosecutions	0.0562 (0.243)	-0.0610 (0.203)
Regional Trials (Logged)	0.0749 (0.112)	0.197* (0.108)
Ethnic Fractionalization	0.890 (0.654)	1.438** (0.632)
Ruptured Transition	0.182 (0.314)	0.222 (0.304)
Sum of Previous Amnesties	-0.0229 (0.0724)	-0.0300 (0.0753)
Former Party Autocracy	-0.767* (0.438)	-0.777** (0.373)
Former Judicial Effectiveness	-0.473 (1.132)	0.103 (1.117)
Change in Judicial Effectiveness	-3.504*** (1.346)	-2.103* (1.201)
Executive Constraints	0.0927 (0.325)	0.201 (0.320)
Executive Election	0.166 (0.170)	
GDP per capita (Logged)	0.0802 (0.209)	0.393** (0.190)
Previous Years of Democracy (Logged)	-0.170 (0.185)	-0.229 (0.157)
West	0.999*** (0.373)	0.545 (0.361)
Constant	-8.269*** (1.533)	-6.280*** (1.243)
Observations	971	1234
Transitions	95	101
Log-Likelihood	-686.6	-864.3

*Errors clustered by transition. All covariates lagged one year*

\* $p < .10$  \*\* $p < .05$  \*\*\* $p < .01$

**Table 5.4. Short-term Risks Associated with Transitional Justice**

	<i>Discrete Time Logit</i>			<i>Ordered Logit</i>		
	<b>Successful Coup</b>	<b>Failed Coup</b>	<b>Civil War Onset</b>	<b>Ethnic War Onset</b>	<b>Ethnic Violence</b>	<b>Civil Violence</b>
Previous Coups	0.0486 (0.0699)	0.0797 (0.0588)				
Transitional Prosecutions	0.162 (0.268)	0.386*** (0.129)	0.156 (0.164)	0.146 (0.168)	0.176 (0.140)	0.211*** (0.0754)
INGOs (Logged)	-1.038** (0.527)	-0.360 (0.263)	0.238 (0.265)	0.297 (0.274)	1.475** (0.690)	0.150 (0.130)
Non-violent Dissent	0.700 (0.648)	0.715 (0.460)	0.0552 (0.422)	0.158 (0.427)	1.596*** (0.440)	1.588*** (0.221)
Legacy of Repression	0.292 (0.551)	-0.498 (0.346)	-0.122 (0.249)	-0.101 (0.251)	-0.0122 (0.291)	0.282** (0.129)
Ethnic Fractionalization	1.346 (1.333)	0.535 (1.014)	0.382 (0.833)	0.847 (0.802)	6.352*** (1.250)	-0.00349 (0.372)
Ruptured Transition	-1.138 (1.003)	0.959** (0.461)	0.367 (0.378)	0.446 (0.380)	0.573 (0.455)	0.102 (0.200)
Former Party Autocracy	-1.755* (0.910)	0.382 (0.634)	-0.482 (0.430)	-0.508 (0.445)	-1.749*** (0.533)	-0.685*** (0.222)
Change in Judicial Effectiveness	-4.789** (2.383)	0.569 (1.385)	-1.528 (1.030)	-1.344 (1.053)	0.432 (0.886)	-4.584*** (0.579)
GDP Growth	-0.0172 (0.0341)	-0.0611* (0.0364)	-0.0839*** (0.0223)	-0.0891*** (0.0221)	-0.0963** (0.0377)	-0.0546*** (0.0140)
Previous Years of Democracy (Logged)	-0.259 (0.306)	0.197 (0.284)	-0.414* (0.243)	-0.456* (0.250)	-1.222*** (0.234)	-0.0893 (0.114)
Non-Western	3.744*** (1.334)	1.338** (0.572)	0.948* (0.510)	0.879* (0.528)	1.134* (0.611)	1.072*** (0.246)
Previous Failures			0.387** (0.186)	0.400** (0.188)		
Spline 1	0.0000506 (0.0108)	0.0166 (0.0144)	0.00724 (0.0143)	0.00518 (0.0143)		
Spline 2	-0.00300 (0.00879)	-0.0103 (0.00985)	-0.00804 (0.0139)	-0.00646 (0.0138)		
Spline 3	0.00182 (0.00275)	0.00267 (0.00310)	0.00509 (0.00709)	0.00447 (0.00698)		
Constant	-2.240 (1.839)	-2.668* (1.613)	-3.727** (1.635)	-4.434*** (1.617)		
Observations	1102	1102	1091	1106	1094	1094
Log Likelihood	-56.46	-102.0	-137.8	-134.4	-173.5	-703.2

*Robust standard errors reported \*p<.01 \*\*p<.05 \*\*\*p<.01*

**CHAPTER 6: HUMAN RIGHTS IN NEW DEMOCRACIES, PART TWO: TRANSITIONAL JUSTICE AND THE LONG-TERM MICRO-DYNAMICS OF REPRESSION**<sup>452</sup>**6.1. INTRODUCTION**

In the previous chapter, I argued that the main impulse behind the pursuit of transitional justice among new democracies is demand from domestic human rights constituencies. These constituencies, which employ tactics of social mobilization, pressure threat-balancing governments into justice policies that are political risky. Justice policies, though, rarely produce the widespread violent backlash that has been predicted by skeptics. Based on an endogenous theory of transitional justice, I attribute the lack of short-term consequences to the fact that the governments which pursue transitional justice are operating in an environment where threats from the military or other regime opponents are weaker than the threats posed by government inaction on the question of human rights. Human rights are a salient issue that some governments cannot afford to ignore, especially in countries emerging from a period plagued by gross abuses to the physical integrity of its citizens. However, the evidence that I presented is exposed to a viable criticism. An equally plausible counter-explanation is that justice policies do not provoke backlash in these circumstances *because they do not do anything*—that transitional justice is a fig leaf intended to appease human rights groups, but also to avoid any real long-term reform that would encounter resistance from conservative groups.

The question that naturally emerges from this consideration is the following: does transitional justice really have any positive impact? Specifically, does transitional justice

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<sup>452</sup> This material is based upon work supported by the National Science Foundation under Grant No. 0961226.

promote the future protection of human rights and the instantiation and democracy over time? And in the language of my theory in Chapter 3, can constituent power join with effective *legal* power over time? One persistent claim made by human rights constituencies is that holding leaders or governments accountable for their prior depredations and moral lapses is that it will send a clear signal that things have changed, and that abuse will no longer be tolerated. As the Nigerian journalist stated in 2000, “I think the one-year old democracy has also revealed to soldiers that they are not above the law...”<sup>453</sup> But in 2013, over 15 years after the transition, soldiers continue to run amok in Nigeria. In May of 2013, President Goodluck Jonathan declared a state of emergency in the Borno, Yobe and Adamawa states to counteract the ‘extraordinary violence’ between Boko Haram and security forces.<sup>454</sup> In this imbroglio engulfing the North of the country, the military has been accused of massacring a number of members of the radical Islamist group Boko Haram, and later torching villagers where the group operated.<sup>455</sup> In this circumstance, it is not a stretch to say that the previous trials of military officers were absent from the minds of soldiers fighting their counter-insurgency. They committed brutal acts in spite of the previous precedent that was set.

Argentina, another country whose early experience with transitional justice was profiled in the previous chapter, would undergo many more developments following the passage of the amnesty laws in 1986 and 1987, officially halting transitional

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<sup>453</sup> Babatunde, "Obasanjo and the Demystification of the Military."

<sup>454</sup> "Nigeria President Declares State of Emergency," *Al Jazeera* May 15, 2013.

<sup>455</sup> Adam Nossiter, "Massacre in Nigeria Spurs Outcry over Military Tactics " *The New York Times* April 29, 2013.

prosecutions.<sup>456</sup> During the 1990s, the question of human rights was put on the backburner by Raul Alfonsín's successor to the presidency, Carlos Menem, who came into office in 1989 with the promise of increasing workers' salaries amidst problems of serious hyperinflation. Even so, constitutional reforms in 1994 would incorporate international human rights treaties directly into Argentinian domestic law, opening the way for future litigation. Prosecutions were undertaken for previous crimes that did not fall under the ambit of the two amnesty laws, including kidnapping and the falsifying the identity of children of the disappeared that were later adopted by other families. Also, so-called 'truth trials' were undertaken, not to make criminal judgments but to use the subpoena power of the courts to collect evidence on the fate of a number of the disappeared. In 2003, the amnesty laws were nullified, and in June 2005, the Supreme Court ruled the amnesties unconstitutional due to their violation of international legal norms and regional jurisprudence from the Inter-American Court of Human Rights.<sup>457</sup> This opened another chapter in the prosecution of rights violators in Argentina. Still, modern-day Argentina is far from a human rights paradise. As Francesca Lessa writes, "...despite reforms to the judiciary and the armed forces since democratization...in a context of rising crime, insecurity, and social protests", society is "...tolerating recourse to violence by security institutions."<sup>458</sup> Of those issues plaguing contemporary Argentina is police brutality. A militarized police force that engages in gun battles and summary

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<sup>456</sup> These include the Full Stop Law of December 1986 and the Due Obedience Law of June 1987. See [www.transitionaljusticedata.com](http://www.transitionaljusticedata.com).

<sup>457</sup> Kathryn Sikkink, "From Pariah State to Global Protagonist: Argentina and the Struggle for International Human Rights," *Latin American Politics and Society* 50, no. 1 (2008).

<sup>458</sup> Francesca Lessa, "Beyond Transitional Justice: Exploring Continuities in Human Rights Abuses in Argentina between 1976 and 2010," *Journal of Human Rights Practice* 3, no. 1 (2011): 26-7.

executions of suspected criminals and gangs in metropolitan areas like Buenos Aires are responsible for up to 2,753 deaths over the last decade.<sup>459</sup>

Taken together, do these examples from Nigeria and Argentina suggest that pursuing transitional justice and formal judicial reforms amidst democratic transitions is a fool's errand, or that it does little good? Not necessarily. But this question does raise a theoretical issue that requires further study: whether prosecuting state agents for human rights violations can prevent future violations in general, and if so, why. In this chapter, I will make the argument that transitional justice does have a long-term deterrent effect that is independent of the political balance that is struck amidst transition—and independent of other democratic institutions, regional variations, or temporal effects. To develop this argument, I rely on a principal-agent model of repression. This model proposes that the challenge for governments in transitional democracies is not necessarily to prevent themselves from committing centrally organized, politically driven acts of violence, but to reign in hard-to-control police and security forces that are accustomed to using repression to battle domestic enemies.

## **6.2. DOES LAW SLOW REPRESSIVE VIOLENCE?**

Two primary studies have examined the influence of transitional justice on the protection of citizens from repressive violence. The first is Hunjoon Kim and Kathryn Sikkink's "Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries."<sup>460</sup> In this piece, the authors use sophisticated statistical methods to demonstrate (1) that years in which any post-transitional country had at least one

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<sup>459</sup> *Ibid.*, 36.

<sup>460</sup> Kim and Sikkink, "Explaining the Deterrence Effect of Human Rights Prosecutions."

human rights prosecution (prosecution years) were followed by decreases in average repression scores in the year following and (2) that the more *cumulative* prosecution years that a transitional country has experienced, the lower the average repression scores. These correlations, based on the Cingranelli-Richards 9-point physical integrity abuse index, are independent of other features of the polity like level of democracy or presence of civil war, and they are also independent of the promotion of rights norms writ large.<sup>461</sup> Kim and Sikkink thus attribute them to a general deterrent effect that is based on an increased probability of arrest and punishment, and the fear that state ‘officials’ have of being sanctioned for their actions.<sup>462</sup> As they clearly write, this is based on the rational expectations of potential repressors: “...the main mechanism through which prosecutions lead to improvements in human rights practices is by increasing the costs of repression for state officials at the same time that the benefits of repression remain constant.”<sup>463</sup> In an important concluding statement, the authors clarify that trials do not have a specific deterrent function, meaning that they cannot prevent *already* abusive individuals from continuing abuse; instead, the deterrent effect operates on potential, would-be human rights violators.

The second major test of the relationship between transitional justice and rights protection was performed by Tricia Olsen, Leigh Payne, and Andrew Reiter in *Transitional Justice in Balance*, and it was released in the same year.<sup>464</sup> Olsen et al.

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<sup>461</sup> Kim and Sikkink control for this by including a measure of truth commissions, which have no enforcement powers, and also a measure of regional trials, which do not directly influence actors in-country.

<sup>462</sup> Kim and Sikkink, "Explaining the Deterrence Effect of Human Rights Prosecutions," 943-44.

<sup>463</sup> *Ibid.*, 944.

<sup>464</sup> Olsen, Payne, and Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy*.

conduct a battery of OLS regressions relating various transitional justice policies initiated within five or ten years following democratization, to averages of democracy and repression scores drawn from those same five- or ten-year periods. The unit of analysis, thus, is the transition. They find, using a combined measure of all different policies—including trials, truth commissions, and amnesties—that addressing rights violations has a positive effect.<sup>465</sup> However, they also find an intriguing result: prosecutions themselves have no discernible impact on rights protections, and neither do amnesties themselves. Instead, the *combination* of prosecutions, with amnesties protecting state officials from prosecutions, produces more positive practices.<sup>466</sup> They draw two conclusions from these counter-intuitive findings. The first relates to time: “...transitional justice, in general, appears to have a positive and significant influence on democracy and human rights. But this positive outcome takes time. The analysis shows that the effect often does not appear until a decade after the transition.”<sup>467</sup> The second concluding point relates to the positive combined effect of trials and amnesties. The authors have two suggestions for why this may be the case. One is that combining trials and amnesties reaches a pragmatic political balance between wholesale justice for all human rights violations (which would anger holdover, spoiler elements in the security forces) and blanket amnesty for former rights violators (which would anger victims and send a signal of tolerance for rights abuse). A second possible explanation is that this balance works because the policies are sequenced properly. Amnesties are initiated early in the transition, and later court cases are brought

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<sup>465</sup> Ibid., 141-42.

<sup>466</sup> Ibid., 146-47.

<sup>467</sup> Ibid., 146.



in feats of “delayed justice” that do little to provoke widespread outrage.<sup>468</sup> Unfortunately, Olsen et al. cannot directly test the plausibility of these arguments concerning time because their data are not dynamic, i.e. they cannot distinguish between variations *within* transitional periods.

Similarities exist between Kim and Sikkink and Olsen et al.’s studies. First, they both assume that general deterrence is an operative mechanism linking prosecutions to decreased repression. And second, they find evidence of this in aggregate measures of physical integrity rights, including CIRI’s physical integrity index and PTS. Though they agree on these points, they diverge in three main ways. First is over the role of amnesties. Kim and Sikkink do not examine the relationship between amnesties and trials in their models, whereas Olsen et al. argue that trials simply *cannot* have a positive effect without amnesties in tandem. Second, they both argue that temporal dynamics are at play, but For Kim and Sikkink, a higher number of cumulative prosecution years exerts a linear negative effect on repression over time, starting from the initial point that trials began. For Olsen et al, transitional justice takes 10 years to have any impact. And third, they disagree over how to measure trials. Where Kim and Sikkink use a binary measure of whether any national of a country was subject to an international and domestic prosecution in a given year, regardless of verdict, Olsen et al. use binary measures of international and domestic prosecutions that resulted in verdicts.

I aim to address these disagreements in my analysis, but I want to draw focus to three theoretical ambiguities in these studies. The first regards who is acting, and who is

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<sup>468</sup> Ibid., 147-49.

being deterred in each of these models. Kim and Sikkink describe those who are being deterred from committing human rights violations alternately as state officials, individuals, or state agents within security forces. But in this model, who is doing the deterring? Kim and Sikkink do not specify, and for their part, Olsen et al. simply label the actors behind prosecutions as ‘democratic governments.’<sup>469</sup> In the case of international trials initiated by the UN, external actors would be responsible for deterrence; however, if we focus on domestic trials (by far the bulk of human rights prosecutions), then the actors responsible for prosecution *and* those targeted by prosecutions might accurately be labeled as ‘state officials’ or ‘agents.’ Logically speaking, when we focus on domestic trials, it is state agents that are deterring and other state agents that are being deterred from committing human rights violations. Thinking of transitional justice in this way calls out for a theoretical model that differentiates between actors within the state. Such a theoretical model needs to be very clear about the nature of repressive violence and its causes within newly democratic countries. Because previous studies have relied on aggregate measures of repressive violence that combine together different types of abuse into single scores, in addition to treating agents of violence as uniform, it is also difficult to discern whether transitional justice is effective at preventing certain actors from committing different types of abuse.

The second theoretical issue relates to time. The relationship between time and repressive practices is one that is often disregarded. Both of these studies, however, pay close attention to temporality. Kim and Sikkink argue that a negative correlation between

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<sup>469</sup> Ibid., 147.

cumulative prosecution-years and repression scores is evidence of a lasting impact of trials: “These long-term effects are permanent effects that become realized after several years.”<sup>470</sup> However, the data that the team employs are not sufficient to separate the impact of different levels of trial activity from time. This is because the measure that they use is a binary indicator of whether *any trial* happened in a given country-year that additively accrues over time as such activity continues. By combining the effect of time with the dichotomous prosecution-year measure, they are both losing within-year variation and rendering the impact of trials indistinguishable from time itself. For Olsen et al., the argument that transitional justice takes ten years to exert an effect is essentially based on a parameterization of time that the authors impose on the data. Because they take averages of transitional justice and repression scores over five- and ten-year periods, they are constructing their tests in a way that produces five- or ten-year results. We cannot know, for example, if transitional justice decreases repression in year two, which is followed by an increase in repression in year four, and then another decrease in year eight. These years are added together to make averages.

This critique is not meant to diminish the seminal efforts of both teams; each made choices based on the nature of the data they were working with. In addition, their differences led them to form the Oxford-Minnesota Transitional Justice Collaborative to root out discrepancies and address them with even better data. That collaboration, of which I am a part, has produced a much more nuanced collection of information on these processes. Looking back at the previous studies does help point to areas in which new

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<sup>470</sup> Kim and Sikkink, “Explaining the Deterrence Effect of Human Rights Prosecutions,” 952.

studies might make improvements. It draws our attention to a theoretical issue involving time, which is this: what it is about transitional justice that creates a lasting effect? For both teams, it is assumed that the more prosecutions that have taken place in the past, the higher the future probability of being tried for rights violations. Neither team, though, provides a theory that provides linkages between past transitional justice and future human rights enforcement. In the next section, I develop a principal-agent theory of deterrence in young democracies that engages issues of temporal effects of transitional justice, in addition to modeling variations in state agents and the types of repressive violence that may be deterred by trial punishment.

### **6.3. A PRINCIPAL-AGENT MODEL OF DETERRENCE**

Repressive violence is used in response to counter domestic threats to the regime.<sup>471</sup> In young democracies, real or imagined threats come from a variety of sources, including opposition groups that do not buy into the electoral process and militant organizations that seek the violent overthrow of democracy. Executives in new democracies, as in most regimes, rarely engage directly in the violation of physical integrity rights of members of threatening groups. Instead, repressive acts are delegated to military and security forces. These forces are relied upon to combat threatening groups, like Nigeria's Boko Haram, through their own methods of coercion, including violent combat, capture, and interrogation. In these situations, executives are principals, and security forces are agents in a principal-agent relationship. A principal-agent relationship is one in which "the agent has an informational advantage over the principal

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<sup>471</sup> Poe, "The Decision to Repress: An Integrative Theoretical Approach to the Research on Human Rights and Repression."

and takes actions that impact both players' payoffs. The principal has the formal authority, but in [principal-agent relationships], the attention is on a particular form of formal authority: the authority [of the principal] to impose incentives on the agent."<sup>472</sup> When it comes to neutralizing threats to the democratic regime, executives have a tenuous bond with security forces: they must rely upon them for crucial and stabilizing uses of force, but they also seek to control the methods with which they engage in these uses of force. Because soldiers and police know what is happening on the ground, they can choose to withhold information. If central government leaders want to keep these agents in line, they must create mechanisms for monitoring and controlling agents' actions.

As I demonstrated in the previous chapter, executives are under pressure from local human rights constituencies to alter the tactics employed by the state's coercive forces, especially in contexts where a high level of repression was previously employed by autocratic rulers. Courtenay Conrad and Will Moore have demonstrated that pressure on executives in democracies, primarily through electoral mechanisms, leads them to issue directives to security agents not to use repressive violence.<sup>473</sup> In their model, this pressure leads executives to implement *ex ante* and *ex post* controls to limit acts of repression. *Ex ante* controls include the development of training programs and other institutional checks meant to prevent torture, whereas *ex post* controls are monitoring and legal enforcement mechanisms. Though they theorize that executives use such controls to

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<sup>472</sup> Gary J. Miller, cited in Conrad and Moore, "What Stops the Torture?," 461. See Gary J. Miller, "The Political Evolution of Principal-Agent Models," *Annual Review of Political Science* 8(2005).

<sup>473</sup> The authors focus specifically on torture. See Conrad and Moore, "What Stops the Torture?."

limit repressive violence, the authors never directly test this mechanism, and they lament that cross-national information on *ex post* controls does not exist.<sup>474</sup> Prosecution of human rights violators, though, is one of the most stringent forms of these *ex post* controls, and we now have a good deal of data on these mechanisms. When agents commit un-sanctioned or undirected acts of repressive violence, one method of control that executives have in their arsenal is to empower courts to try and convict those agents.

Tamir Moustafa, a theorist of law and society, explains why executives pass authority to the courts: "...courts inevitably serve as dual-use institutions, simultaneously facilitating some state functions while paradoxically opening new avenues for activists to challenge regime policy."<sup>475</sup> Oftentimes the advance of accountability efforts through the judiciary is seen as being in direct conflict with the control of the executive. No doubt this is frequently the case. Judicial intervention is commonly a nuisance for presidents and parties. At the same time, executive control is also enhanced by the political legitimacy that a functioning, independent judiciary affords, whether that independence is illusory or real.<sup>476</sup> Governments use independent courts to provide political cover, to resist denunciation, or to 'launder blame' on thorny policy issues.<sup>477</sup> How to reckon with human rights abuses is one such thorny issue for political elites, who do not want to offend their fellow members of government, but who have to answer the popular demand

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<sup>474</sup> Ibid., 463.

<sup>475</sup> Moustafa, *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt*, 20. It is important to note that Moustafa develops this theory in reference to authoritarian governments. However, I contend that it applies to all courts, even in democracies.

<sup>476</sup> This is the very reason why some activists become frustrated with a legal approach: in some ways, it supports the same state they are trying to resist. See, e.g., Al-Haq, "Legitimising the Illegitimate? The Israeli High Court of Justice and the Occupied Palestinian Territory," (Ramallah: Al-Haq, 2010).

<sup>477</sup> Moustafa, *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt*.

for justice. Handing transitional justice issues over to the courts is one way of dealing with the human rights problem. Doing so can create costs for an executive if members of its branch are targeted, but mobilizing courts can also provide benefits because it allows the executive to distance itself from being directly responsible for punishing its agents.

The processes of change that accompany democratic transition create an even larger divide between the interests of executives and state agents responsible for using force. That is, democratization widens the distance between principals and agents. Why? The reason is that elected executives in charge of the new democracy are not able to conduct a wholesale re-staffing of state security and military forces. This means that new leaders must cope with old forces, some of whom will be hostile to the incoming regime. After transition, a mismatch develops between the culture of the armed forces inherited from the previous regime and the ethos of the new government, which seeks to promote the narrative that things are changing within the country. These cultures are not impossible to change, but changing them certainly takes a good deal of time because representatives of the old order need to be replaced, retrained, or reformed. Part of this involves the erection of controls over those forces. Like any disciplining tactic, punishment for abuse serves to inform agents that they cannot act against the wishes of their leaders and get away scot free.

### **6.3.1. Temporal Effects**

This principal-agent theory of control over individuals responsible for repressive violence yields clear expectations regarding transitional justice's impact over time. Whether they are sincere or not, transitional justice policies are started by leaders seeking

to make a statement about what will be tolerated or not tolerated among agents of state violence. But we should not expect that prosecutions of state forces by courts will be immediately effective at preventing abuse. Though they find that prosecution-years are followed in the next year by average decreases in overall repression, Kim and Sikkink rightly argue that the deterrent impact of prosecution likely takes time. There are two reasons for this. First, legal proceedings are often slow to gain momentum, especially in new democracies where institutions are relatively weak. For these proceedings to have a deterrent impact, they must be afforded time to send a signal to those who will serve in security forces, and these forces must have time to undergo a change in procedures and organizational culture. Second, the impulse behind the pursuit of transitional justice comes from dissenting groups that might themselves be seen by security forces as a threat to the polity. In the first few years following transition, military and police forces that fear the disorder that comes with even peaceful demonstrations might react to the public expression of dissent with repressive violence. Therefore, one of the primary causes of transitional justice, rights-based domestic dissent, *might also inspire repressive reaction in the short term*. The greater the demand, and the greater the response in the form of more rights prosecutions, might then be associated with upticks in the overall level of repressive violence in the short term following democratization.

*Hypothesis 1: More transitional human rights prosecutions will be associated with greater repressive violence in the short term.*

Despite the possibility of short-term negative impacts, transitional justice will likely have a generally positive impact in the long term. There are two reasons to suspect that this is the case. The first pertains to signaling: prosecuting former agents of abuse



sends a clear signal to future agents that certain tactics are now taboo, that the new regime intends to punish wayward behavior, and that future agents will be subject to prosecution. Signalling explanations have been advanced by a number of theorists. Mark Osiel writes that trials of state officials strengthen norms against abuses because they promote *civil dissensus*.<sup>478</sup> Through public prosecutions, citizens in new democracies learn to deliberate and disagree productively over issues of national concern. While hardly any sector of society is completely satisfied with trials given that their outcomes are always suboptimal for at least one side, they help to transmit procedural notions of dispute resolution.<sup>479</sup> A second unexplored reason for the potential lasting effects of transitional justice involves the strengthening of the judiciary. Early efforts at transitional justice could create the opportunity structure for greater pursuit of justice through courts by setting legal precedents for future litigation, demonstrating to local rights constituencies that the judiciary is now an open arena for pursuing remedies, and for emboldening prosecutors and judges that were previously cowed by autocratic leaders. The sudden availability of judicial options after periods of autocratic exception leads in some places to what Catalina Smulovitz calls the “discovery of law.”<sup>480</sup> For instance, the importance of judicial reforms that accompany transitional justice, such as the development of private criminal prosecution procedures, has been shown to increase the overall number of trials brought by victims of human rights violations in transitional

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<sup>478</sup> Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick, NJ: Transaction Publishers, 1997).

<sup>479</sup> For this point, see A. James McAdams, "Transitional Justice: The Issue That Won't Go Away" *International Journal of Transitional Justice* 5(2011): 309. As long as the parties to a controversy have opposing views of moral responsibility under dictatorial rule, at least one side, but frequently both, will be dissatisfied with the steps their government takes.

<sup>480</sup> Smulovitz, "The Discovery of Law: Political Consequences in the Argentine Case."

countries.<sup>481</sup> Taken together, the two mechanisms outlined—signaling and the strengthening of the judiciary—could increase the pressure on state agents to fall in line with acceptable norms pertaining to uses of force and the limitation of repressive violence.

*Hypothesis 2: A higher number of cumulative transitional human rights prosecutions will decrease overall repressive violence in the long term.*

What of the impact of amnesties on this principal-agent relationship? We know from the work of Olsen et al., in addition to other nuanced work on amnesties for rights violators, that state amnesties exist in a complex relationship with the pursuit of justice for victims of abuse.<sup>482</sup> Amnesties have the opposite effect of prosecutions: they absolve previously offending agents of responsibility for the acts that they have committed. Amnesty laws are passed for a variety of reasons, but we might expect that the motivation differs by *when* they are issued. On average, amnesties are passed five years following transition.<sup>483</sup> If these laws are passed in the direct aftermath of transition, within the five-year post-transitional timeframe, the signal sent is in direct contradiction to the notion that the regime is making a clean break from the autocratic past. Instead, it seeks to move forward without publicly engaging the horrors that were previously unleashed by repressive agents. Early amnesties also signal to agents that the executive does not intend to monitor—or empower other institutions like the judiciary to control—the behavior of

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<sup>481</sup> Verónica Michel-Luviano, *Access to Justice, Victims' Rights, and Private Prosecution in Latin America: The Cases of Chile, Guatemala, and Mexico* (Ph.D. Dissertation: University of Minnesota, 2012).

<sup>482</sup> Olsen, Payne, and Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy*. See also "Conclusion: Amnesty in the Age of Accountability." Louise Mallinder, *Amnesty, Human Rights and Political Transition: Bridging the Peace and Justice Divide*, vol. 21, Studies in International Law (Oxford: Hart, 2008). Freeman, *Necessary Evils: Amnesties and the Search for Justice*.

<sup>483</sup> Based on author's calculations using the Oxford-Minnesota Transitional Justice Database. See [www.transitionaljusticedata.com](http://www.transitionaljusticedata.com).

the military or security forces. Such a signal might amount to a continuation of previous toleration for rampant repressive violence when countering internal threats. Amnesties that are passed later, however, are evidence that the executive is seeking to slow the advance of an encroaching judiciary. In Argentina, the opening of the courts led to an outpouring of cases that soon became a political risk for the Alfonsín regime. He was thus forced to push through an amnesty to protect lower-level soldiers.<sup>484</sup> One might then interpret more amnesties passed later in the transition as a *response* to the advances made by human rights constituencies in the field of enforcement. Amnesties, then, could be an indicator that rights enforcement is increasing in strength. When applying my theory, I diverge from Olsen et al. in that I do not have reason to expect a combined positive effect to come from amnesties. For this reason, I do not generate hypotheses concerning the interaction between prosecutions and amnesties, but I control for the impact of amnesties through various measures.

## **6.4. ANALYSIS**

### **6.4.1. Short Term v. Long Term**

The unit of analysis for this study is the country-year, and as before, the sample analyzed is all new democracies that underwent regime transition since 1970. In this sample, Portugal and Greece, both of which began their transitions to democracy in 1974, are the oldest in the sample, having reached the age of 37 by the year 2010. Though data from the 1970s informs some of the independent variables measuring cumulative experience, the temporal domain of this study is 1980-2009 because the Cingranelli-

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<sup>484</sup> Raúl Alfonsín, "'Never Again' in Argentina," *Journal of Democracy* 4, no. 1 (1993).

Richards (CIRI) data used to measure the dependent variable, levels of repression, is only available for that period. (In my analyses, I use inverted CIRI scales as my dependent variables, so that higher numbers indicate more repressive violence.) Following previous research, I begin by studying the effects of human rights prosecutions on overall levels of repression, controlling for a number of other features. The independent variables of interest in my analysis are drawn from the Oxford-Minnesota Transitional Justice Database. The measures this dataset allows us to create are a marked improvement over previous data. For one, rather than having to rely on binary indicators by year, we now have counts of the number of prosecutions and amnesties that were initiated in any given year in any transitional country. We also now have disaggregated data on types of trials, appeals, and final verdicts.

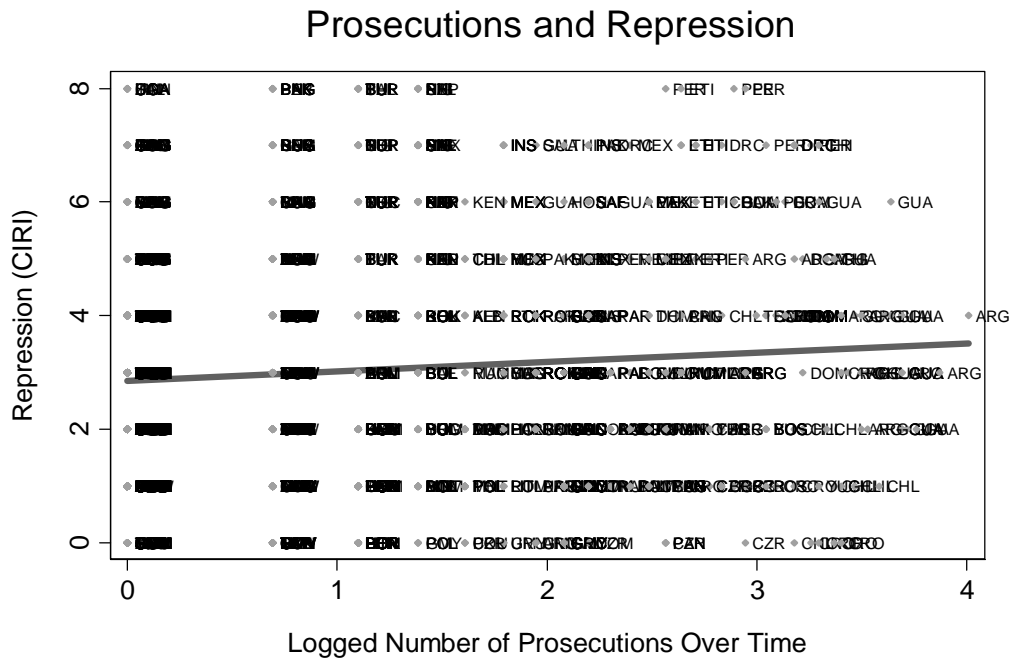
One of the main benefits of the new data is that it allows us to separate between ‘transitional’ and ‘ordinary’ prosecutions for human rights crimes. *Transitional human rights prosecutions (TRPs)* are trials against state agents that at a minimum reach the level of indictment for violations to physical integrity rights that occurred under the previous autocratic regime, and *ordinary prosecutions (ORPs)* are trials against state agents for the same kinds of rights violations, but which occur under the new democratic regime. Whereas transitional prosecutions are target prior or ‘historical’ crimes, ordinary prosecutions target crimes committed in real time under the new government. In the panel dataset on democratic transitions, the maximum number of transitional prosecutions in any given year is 9 (Peru 1986), and the maximum number of ordinary prosecutions in any year is 17 (Turkey 1995). The highest number of cumulative transitional prosecutions

over time in any new democracy is 55 (Argentina), and the highest number of ordinary prosecutions is 166 (Turkey). The data also allow us to distinguish between types of amnesties. Amnesties may be extended to opposition groups, armed combatants, political prisoners, or state agents, and they may cover a number of different crimes. For this purpose of this analysis, I examine transitional amnesties. *Transitional amnesties* are those laws that protect agents of the former autocratic regime against prosecution for human rights violations. The maximum number of transitional amnesties in any given year is three (Argentina 1990), and the maximum number across any transitional panel is eight (also Argentina).

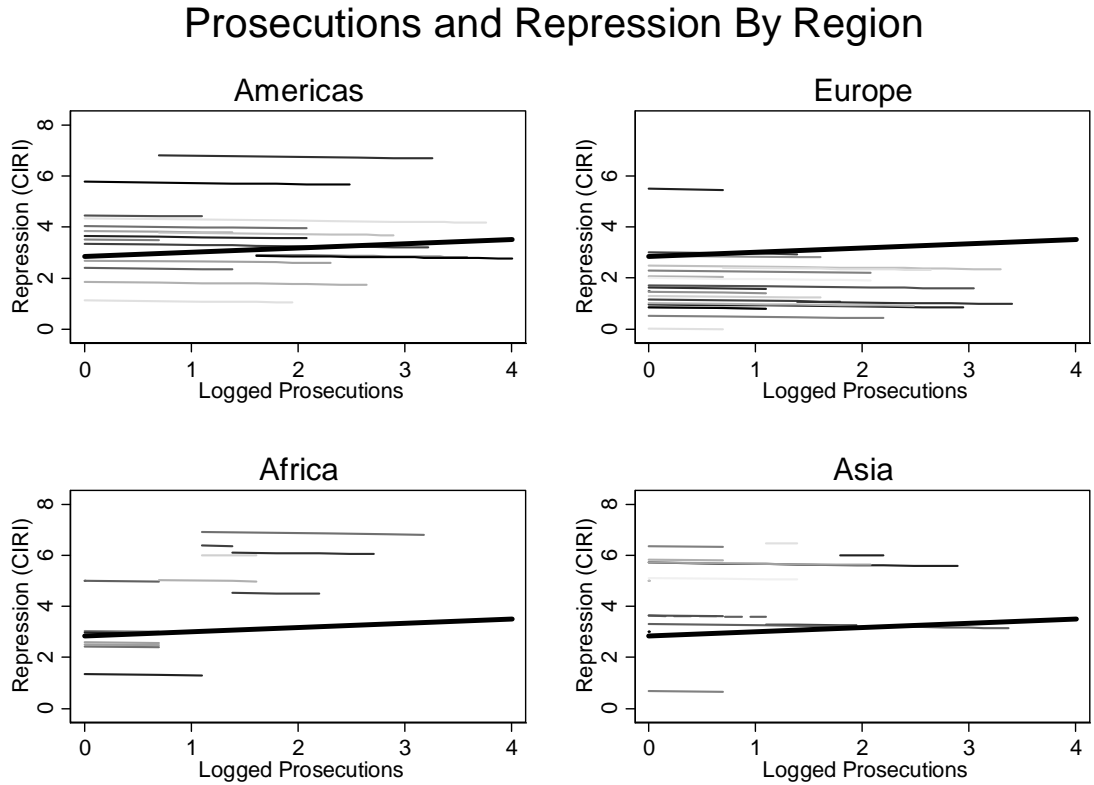
Though the models I use differ by type of estimator, they all take advantage of fixed effects, which are identified by each democratic transition panel. Using fixed effects allows us to explore the relationship between predictor and outcome variables within each transition, based on the assumption that each transition has its own individual characteristics that may influence its use of prosecutions and repressive violence. A brief glance at the data shows that using fixed effects is called for when studying the nexus of transitional justice, deterrence, and repression. Figure 6.1 shows a general scatter plot between the logged number of transitional human rights prosecutions over the whole transition period and the CIRI Physical Integrity Rights Index, with a fitted line drawn through the data. When each observation is treated as independent across panels, we can easily observe a general correlation between more transitional trials and higher repression scores. Figure 6.2 depicts what this data look like when the transition panels are separated. For the sake of illustration, I distinguish between different democratic

transitions by region. In each of the four region plots, the relationship between cumulative trials and repression scores is plotted for each transition, and compared to the fitted line from the general graph in Figure 6.1. One can see that, in general, the relationship between trials over time and repression is negative, regardless of region. What this demonstrates is that though a general cross-national correlation may exist between trials and repression, when we separate each transition, a general pattern of more trials and less repression appears to emerge. We thus have reason to employ fixed effects when studying the effect of transitional justice on repression.

*Figure 6.1. Prosecutions and Repression*



**Figure 6.2. Prosecutions and Repression by Region**



The presentation of cumulative prosecutions and repression scores, while revealing, is jumping ahead. The first proposition that I made is that a greater number of transitional human rights trials in any given post-transitional year will be associated with increased repressive violence in the short term. The second proposition that I made is that the more transitional prosecutions over time, the less the repression score in the long term. A crucial distinction that I am making, thus, is between the short and the long term.

For the sake of this study, the short term is operationalized as the first five years following transition. While creating a five-year cutoff is arbitrary, it follows scholarship on democratic transitions, which generally holds that young democracies are at high risk of autocratic reversal and general mayhem in the first five years of their existence.<sup>485</sup> The five-year cutoff also allows me to test dynamically some of the findings regarding timing and sequencing that are presented in Olsen et al.'s research.

The first hypothesis I need to test is whether higher numbers of transitional prosecutions are associated with more overall repression in the short term. To do this, I counted the number of TRPs and Amnesties that took place in each year in every young democracy within the first five years of the transition and lagged them one year. These are the two variables of interest in the models (SHORT-TERM TRPS and SHORT-TERM AMNESTIES). Because of the lagged effect, each of these variables is a count for years 2-6 of the transition, and they are coded "0" for the remainder of the transitional panel. In essence, this allows for a unique test of the early transitional justice isolated from years that may be characterized by democratic consolidation. To test for a possible combined effect between prosecutions and amnesties in the short term, per the suggestion of Olsen et al.'s research, I also include an interaction term between SHORT-TERM TRPS and SHORT-TERM AMNESTIES.

It is possible that whatever effect attributable to prosecutions in general could also be explained by other types of transitional justice, including truth commissions. If the

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<sup>485</sup> See Kapstein and Converse, *The Fate of Young Democracies*, xviii. "...newly democratic states are especially at risk of reversal during their first five years of existence, a crucial point that the international community needs to understand if it seeks to support their consolidation."



costs associated with possible prosecution matter less than the information or signaling effect regarding the unacceptability of prior human rights violations, then truth commissions might have just as large an effect as trials.<sup>486</sup> For this reason, I control for whether a truth commission was in operation in any transitional country-year. I also control for a number of other factors. First, to account for regional effects, I separately interact the SHORT-TERM TRPS and SHORT-TERM AMNESTIES variables with a dummy indicating whether the transitional took place in a non-Western country (Africa, Asia, or the Middle East/North Africa). Second, I incorporate controls for features of the country that are known to affect the level of repressive violence. These include whether a civil war was ongoing, the level of democracy (Polity II), GDP per capita, and an index of commitments the state has made to international human rights agreements regulating physical integrity rights.<sup>487</sup> Third, to control for whether the impact of prosecutions is a byproduct of general judicial strength, I include a measure of judicial independence.<sup>488</sup> And fourth, to control for the dynamic nature of the repression data, I insert a lagged dependent variable measure ( $CIRI_{t-1}$ ).

I estimate a fixed-effects OLS regression with errors clustered by country. The results are presented in Table 6.1 in the left panel. As one can see from the coefficient on SHORT-TERM TRPS, for each additional prosecution that is initiated in a country within the first five years following democratic transition, the 9-point CIRI Index increases by

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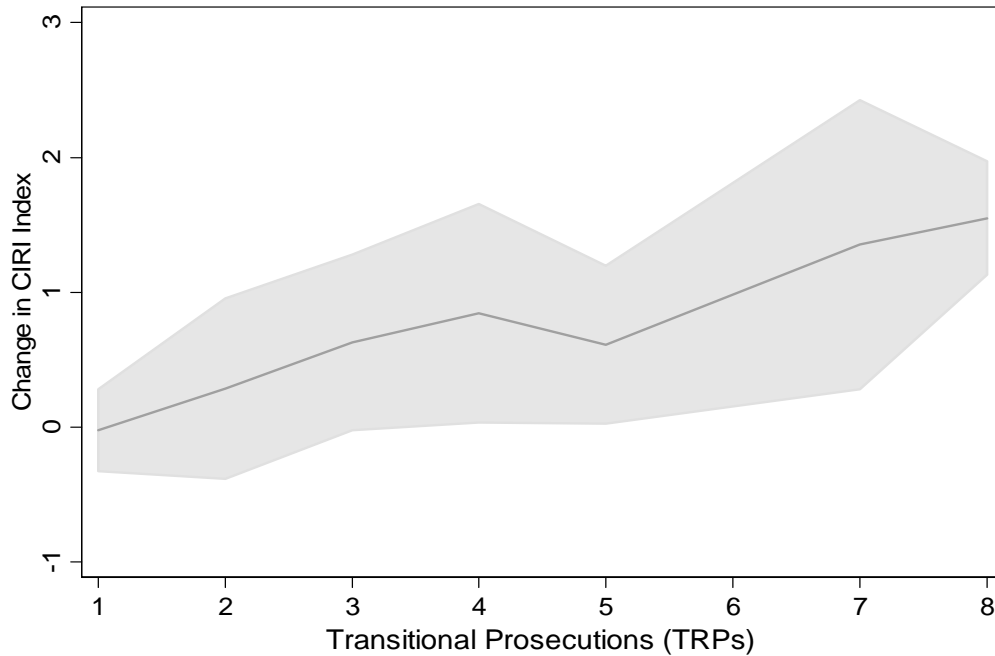
<sup>486</sup> For this argument, see Kim and Sikkink, "Explaining the Deterrence Effect of Human Rights Prosecutions."

<sup>487</sup> Conflict data taken from PRIO, GDP data from the World Bank, and treaty ratification from Dancy and Sikkink (2012). Dancy and Sikkink, "Treaty Ratification and Human Rights Prosecutions: Toward a Transnational Theory."

<sup>488</sup> Borrowed and updated from Tate and Keith, "Conceptualizing and Operationalizing Judicial Independence Globally."

0.17. If the number of TRPs goes from the minimum of 0 to its maximum of 8, the level of repression in the next year would increase by 1.36, an effect which I depict in Figure 6.3. This is evidence that directly contradicts previous studies, which show a linear negative impact of trials on repression across time periods. The relationship between more TRPs and higher repression in the transitional short term could be explained by a number of factors, but it is likely the case that the military and security forces in the country are reacting to ‘threatening’ social mobilization at the same time that that mobilization is producing pressure to change relations of repression in the country. Another related explanation is that democratizing countries that pursue trials are *already more repressive* than those that do not; in other words, these countries have a greater need to reign in the violence of state agents. Because these countries start the transition with higher levels of repression, then short-term efforts at prosecution will be generally correlated with greater repression. In sum, the lesson is this: when transitional justice is borne out of political conflict in the immediate aftermath of transition, then it is likely to coincide with greater repression. In the language of economics, in places with more violent relations of repression, the demand for and supply of human rights enforcement will be higher.

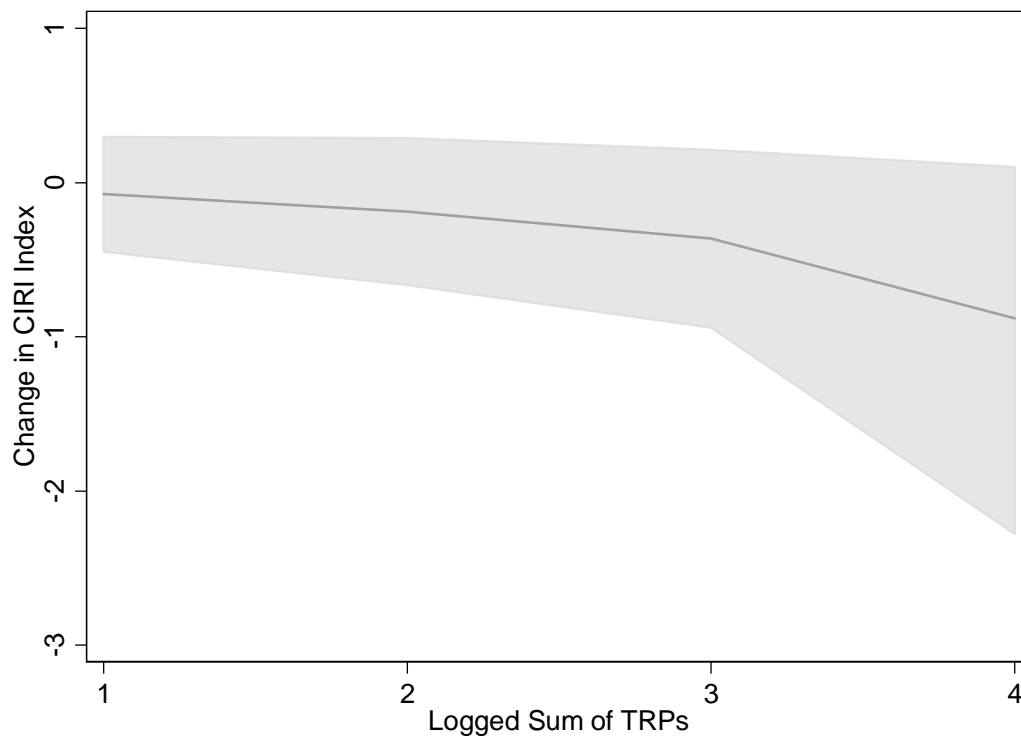
**Figure 6.3. Marginal Effect of TRPs on Overall Repressive Violence in the Short Term**



What about the long term? The right-hand panel of Table 6.1 shows the results of a fixed-effects OLS regression with the same controls, but with variables capturing the cumulative experience that each transitional regime has had with transitional justice. Instead of a lagged count of the number of trials or amnesties initiated, I use a logged sum of previous TRPs and Amnesties over the transitional period. In order to test theories concerning the amnesty-prosecution sequence, i.e. whether early amnesties inspire late justice or vice versa, I also want to test for the lasting effects of early transitional justice that took place within the first five years of transition. Including counts would generate problems of collinearity, so I use two binary measures: one indicating whether any

prosecution took place within the first five years, and whether any amnesty was passed in the first five years. While I include the same general controls as before, I also add an additional time parameter, which is simply a count of the number of years since the beginning of the democratic transition. Departing from previous research, I do this in order to distinguish the cumulative effects of transitional justice measures from time itself.

**Figure 6.4 Marginal Effects of Cumulative TRPs on Overall Repression (Long Term)**



The results are very interesting, and in many ways more telling than the short-term model, which relies on snapshots during a turbulent five-year post-transitional period. In

this model, the cumulative number of prosecutions is a statistically significant predictor of overall decreases in repressive violence, independent of time (See Figure 6.4). This is almost assuredly evidence of a long-term deterrent effect of some kind, given that this result holds even when controlling for civil war, regional effects, the strength of the judiciary, and the level of democracy. It is not just institutional features that have an effect on repressive relations, but also the actions that governments take. A second fascinating feature of this model is the role that amnesties play in this process. While it is the case that more amnesties over time are associated, in statistically significant fashion, with lower repression scores, *early* amnesties that occur within a five-year post-transitional period are associated with worse practices. The coefficients are such that the average effect of an early amnesty would nullify the positive benefits of later amnesties. Additionally, the interaction term, TRPS\*AMNESTIES, is not significant, contradicting previous research that has shown a positive outcome produced by amnesties and trials in combination.

These findings provide evidence of two empirical trends yet undiscovered: first, amnesties for state actors passed early in the transitional period seem to have an inimical effect on practice in the long term. The reason for this is that they halt efforts to control agents of state violence. Second, if amnesties are at all associated with improved human rights protections, it is because the same places that have had many trials over time have also had a few amnesties along the way. So, while late amnesties do not contribute to the effect of trials (shown by the insignificance of the interaction term), they might generally coincide with improved practices. In short, amnesties do not lead to direct accountability.

Quite the opposite: trials precede and direct amnesties. Moreover, if trial justice comes before amnesties, then the overall outcome is likely to be more positive for democratic citizens.

#### **6.4.2. Why the Long-term Effect?**

In addition to arguing that previous work did not disentangle the relationship between transitional justice, time and repression—by separating the variable measures of prosecutions and amnesties *from* time variables—I also argued that theories linking the pursuit of prosecutions to less repression in the long term lack an internal link between backward-looking justice for human rights violators under the former regime and the deterrence of would-be abusive agents in the future. Why would new agents under the current regime fear prosecution if the only prosecutions that had taken place were for those operating under a discredited former regime? I proposed two answers for this in my theory: (1) as a symbolic and cultural gesture, transitional justice might send a signal that reverberates for years or (2) it can serve as a boon for future judicial mobilization and development around the issue of rights.

In Argentina, the early moves toward justice for victims of rights violations led to a political back and forth between those who want to strengthen the judiciary and those who want to put the issue of previous human rights violations to rest with the assistance of amnesties and other measures. With time, the judiciary managed to assert itself, making use of international legal precedents and constitutional reforms. While police violence is certainly a problem, judicial institutions work under difficult financial and social constraints to counteract this violence. One might argue that what has emerged is a

kind of ‘legal dialectic’ that, while unsatisfactory, is integral to the thriving of democracy.<sup>489</sup> One might also argue that early transitional justice provided the spark that emboldened rights constituencies, who have not since ceased pushing for justice. Because the repressive violence of today harks back in some respects to that which came before, and because the judicial response draws the accumulated experience of rights constituencies, reasons exist for suspected that transitional justice has long-lasting effects. Or, as Francesca Lessa writes, “TJ [transitional justice] and human rights can be explored along a continuum of time, where past, present and future are tightly interrelated and their joint study offers us a lens to better understand the state of human rights....”<sup>490</sup>

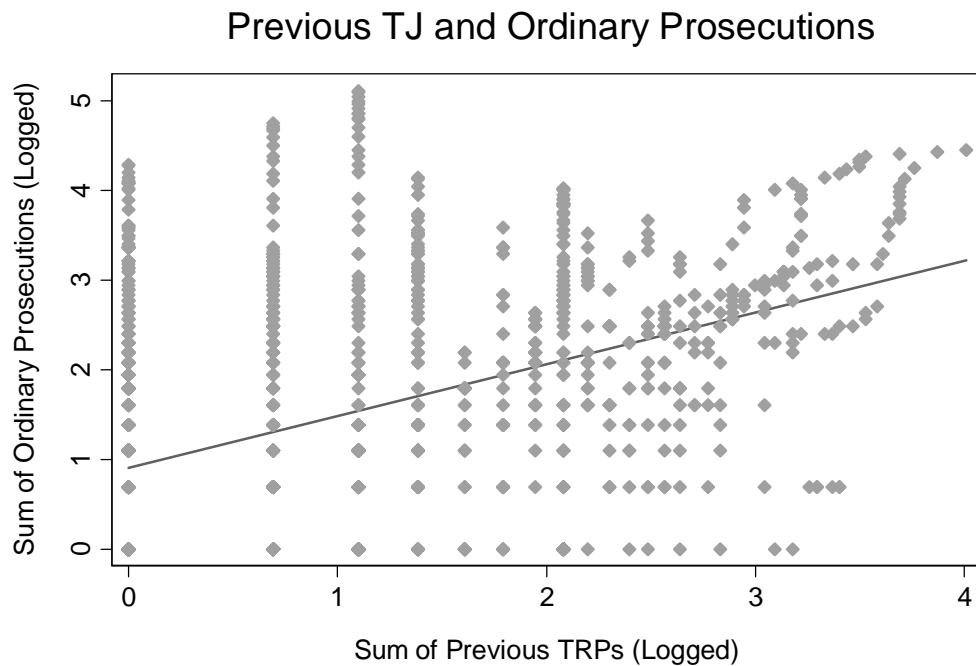
The presence of symbolic signals or judicial openings is hard to measure, but we can attempt to test the long-term linkage between transitional justice and future human rights protections by observing the relationship between transitional human rights prosecutions (TRPs) and ordinary human rights prosecutions (ORPs). If transitional justice influences the future control of state agents, then we should observe a relationship between previous TRPs and current ORPs. Figure 6.5 demonstrates that relationship between the sum of TRPs and ORPs over time. We can see that those transitional countries that have initiated more transitional prosecutions are, on average, also more likely to initiate ordinary prosecutions.

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<sup>489</sup> For legal dialectic, see James Ron, "Savage Restraint: Israel, Palestine, and the Dialectics of Legal Repression," *Social Problems* 47, no. 4 (2000).

<sup>490</sup> Lessa, "Beyond Transitional Justice: Exploring Continuities in Human Rights Abuses in Argentina between 1976 and 2010," 29.

**Figure 6.5. Correlation between Cumulative TRPs and Cumulative ORPs**



This relationship also holds up to statistical analysis. Table 6.2 shows the results of a fixed-effects negative binomial regression predicting the number of ordinary prosecutions for human rights violators initiated in any post-transitional year. Even controlling for judicial independence, democracy levels, general commitments to international human rights law, wealth (GDP), and other forms of transitional justice like truth commissions, a statistically significant correlation between the number of previous TRPs (logged) and future ORPs exists. As the logged number of previous TRPs increases by 1, indicating a move of roughly 8-10 prosecutions, the expected count of future



ordinary prosecutions in any given year increases by 20%. Even more powerful is the effect of short-term transitional justice. If a new democracy had *any* TRP within the first five years of transition (PREVIOUS SHORT-TERM TRP), then the count of future ordinary prosecutions in any given year increases by around 90%. Another finding of note is that, as one might expect, amnesties are not correlated with future prosecutions, and if they are pursued in the short term, they appear to be negatively correlated with ordinary prosecutions in the future (though this relationship does not reach traditional levels of statistical significance, with a p-value of .15). If anything, then, early amnesties only seem to preclude any future enforcement, and to sap the ability or willingness of judicial institutions to hold state agents guilty for human rights crimes.

Taken together with the previous analysis, this suggests that TRPs, though coincident with higher repression scores in the transitional short term, might in fact have a lasting effect on the future of legal human rights enforcement in a country. In the language of historical institutionalism, this is an indication that the pursuit of judicial controls of state agents is subject to “increasing returns,” meaning that “the probability of further steps along the same path increases with each move down that path.”<sup>491</sup> This is also known as path dependency.<sup>492</sup> As a concept, path dependency was originally applied to economic institutions, which are known to be rather slow-developing, sticky and long-lasting, but the notion of increasing returns jibes well with political and judicial institutions in democratic transitions because such moments involve some degree of

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<sup>491</sup> Pierson, "Increasing Returns, Path Dependence, and the Study of Politics," 256.

<sup>492</sup> Levi, "A Model, a Method, and a Map: Rational Choice in Comparative and Historical Perspective," 28. Levi writes "...path dependency has to mean, if it is to mean anything, that once a country or region has started down a track, the costs of reversal are very high. There will be other choice points, but the entrenchments of certain institutional arrangements obstruct an easy reversal of the initial choice."

institution-formation.<sup>493</sup> In other words, institutions are being revived after periods of dormancy under autocracy, and the form that they take early on might have lasting effects. Because institutions, once formed, are biased toward the regeneration of the status quo, it is reasonable to expect that decisions made early in democratization will resonate down the road, *even if these decisions are in the moment made on the basis of short time horizons.*<sup>494</sup> Moves toward transitional justice may indeed lead to the discovery of the law, mobilization of the courts, and the future protection of human rights through legal means.

## 6.5. CONCLUSION

This chapter that has done much to show that human rights enforcement has a positive impact on practice in the long term. This study represents the most extensive test of the dynamic effects of human rights prosecutions and amnesties that has been conducted to date. And it also presents a new theoretical model that explains *how* a deterrent effect operates. I have argued that if repressive violence is to be decreased, then central government actors must erect controls that prevent state agents from responding to threats with violations to the bodily integrity of innocent citizens. One such *ex post* control is prosecution for human rights abuses. Along with previous theories, I find evidence that transitional justice efforts undertaken after democratization and directed toward former regime actors can have create lasting change, by increasing the cost of repression for would-be agents of abuse. However, I add to previous research by

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<sup>493</sup> Di Palma, *To Craft Democracies: An Essay on Democratic Transitions*.

<sup>494</sup> Pierson, "Increasing Returns, Path Dependence, and the Study of Politics," 261. "Many of the implications of political decision—especially complex policy interventions or major institutional reforms—only play out in the long run. Yet, political actors, especially politicians, are often most interested in the short-term consequences of their actions; long-term effects tend to be heavily discounted."

providing an internal link between trials for members of the former regime and deterrence of future abuses. The mechanism linking transitional justice to future deterrence is the pursuit of ordinary criminal prosecution against abusive agents. Ordinary justice is more likely to take place in young democracies that have had early and sustained experiences with transitional justice.

The preventative capacity of prosecutions on repressive violence, though, is not reached early in the transition, or at least within the first five years. The data show that a higher number of trials in any given year during the first five post-transitional years is likely to be followed by brief upticks in repressive violence. As in previous chapters, this again demonstrates the paradox of short-term reforms. Making early inroads toward human rights enforcement through transitional justice has a long-term effect on the future use of ordinary prosecutions and lower levels of repressive violence, but in the short term it may appear to do ill. Transitional justice does not lead to debilitating political backlash, nor does it *produce* civil conflict (see Chapter 5). But more prosecutions in the immediate aftermath of transition are associated with higher levels of repressive violence. The reason is that rights-based dissent, repressive reaction from security forces, and the initiation of government control of state agents all coincide in the early years of regime change. It takes time for reforms to gather momentum and affect future practice by altering military cultures and the calculations of individuals delegated with the power to use force.

The findings in this chapter also shed light on debates about timing and sequencing of reforms in transition. Conservative or ‘realist’ commentators often hold

that some policies ought to precede others or, depending on the nature of the transition, policies should be arranged in an order conducive to the optimal generation of democratic consolidation and respect for rights protections. For example, maybe it makes the most sense to pass an amnesty to appease reactionary groups, and then develop a robust truth commission that gathers witness testimony and evidence, and only then move forward with trials for key rights violators beyond the realm of forgiveness. If these things are done out of order, or if they are timed improperly, they could result in a political backlash, in deleterious social relations, or in the resumption of civil war. The central idea underlying some reactions to transitional justice is that efforts to acknowledge victims' suffering, hold leaders responsible for their depredations, and reinforce civil and political rights must wait for another day in the indeterminate future—a day when political equilibria will not be disturbed. Thomas Carothers, writing about realist reactions to the rise of a global pro-democratic zeitgeist in the 1990s, argued that “Sequentialism has found a vital place in this more generalized pessimism thanks to its concrete policy implications and intuitive appeal: Pursuing a sequential path promises to rationalize and defang democratic change by putting the potentially volatile, unpredictable actions of newly empowered masses and emergent elected leaders into a sturdy cage built of law and institutions.”<sup>495</sup>

I find that amnesties passed early in the transition, rather than shoring up political space for future human rights enforcement, actually appear to have an inimical effect on rights protections in the long term. At the same time, more amnesties over time are

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<sup>495</sup> Thomas Carothers, "The 'Sequencing' Fallacy," *Journal of Democracy* 18, no. 1 (2007): 13.

associated with improved practices. I attribute this to the possibility that amnesties are actually a response to moves toward prosecutions. Regardless, while it might hold that controls over state agents must be given time to have an impact, lending credibility to a notion of gradualism, it is not the case that justice can simply be put off, or that it can be delayed until conditions are more conducive to the promotion of rights. If judicial reform and empowerment that is being sought in democratizing contexts—which conservative critics also tend to champion as a value—then the best way to strengthen the judiciary is to use it, rather than to temporarily circumvent it. Amnesties can block the development of momentum toward rights enforcement, and early criminal prosecutions (even if they are abortive) can influence future attempts. But in many places, the pursuit of justice will develop momentum gradually, building off of sustained efforts to promote rights institutionalization and enforcement. In the end, this means that the best model for transitional justice might be gradualism without sequencing. Rights-based change may take time, but it must be consistently pursued, and without delay.

Finally, this chapter presents convincing evidence that a principal-agent theoretical model is most appropriate for analyzing the problem of repression in post-transitional contexts. The biggest difficulty facing new democratic governments—including executives and judiciaries—is reigning in hard-to-control security forces, which for their part are accustomed to behaving in a particular way when engaging ‘the enemy.’ With time, the culture of security forces can be altered, and individuals can be trained to fall in line. Yet all along the way efforts to exert control over state agents will inspire complaints, criticisms, and threats. As opposed to meaning that institutions meant to

control violence should be abandoned in order to avoid backlash, complaints and threats are some evidence that agents are concerned about attempts to limit their unbridled activity. Over time, prosecuting agents might be an effective way of doing just that.

In the end, the two main takeaway points are, first, that transitional justice, which is instituted at the behest of domestic human rights constituencies seeking transformation, do have an impact. Even though trial processes might seem fraught, and even though they do not satisfy victims in most cases, they do appear to have an effect the practice of state agents over time. Moreover, the long-term impacts of transitional justice and human rights enforcement hold despite other the presence of amnesties or political balancing, the type of institutions present in the country, or the region to which the country belongs. In very few models did region appear to be a determinative factor regarding the impact of human rights law. Second, though state agents shift tactics, perhaps cynically, in an effort to evade the law, it does not mean that law is impotent. As we saw, on balance the gains made through enforcement are positive, meaning that less overall repression happens as a result of efforts to control agents. Furthermore, we should be reminded that no law is ever enforced 100%, nor does it ever deter criminals in 100% of cases. There will continue to be repression, even in democracies. However, a good course of action for dealing with this problem is to continue to regulate through the law, and to continue to seek accountability for those who should be held responsible.

**Table 6.1. Fixed-Effects OLS Regressions of Short-term and Long-term Repression**

<i>Short Term Model</i>		<i>Long Term Model</i>	
Short Term TRPs (t-1)	0.170*** (0.0566)	Logged Sum of TRPs (t-1)	-0.163** (0.0969)
Short Term Amnesties (t-1)	0.418 (0.734)	Logged Sum of Amnesties (t-1)	-0.995*** (0.348)
TRPs*Amnesties	-0.0854 -0.291	TRPs*Amnesties (t-1)	0.183 (0.114)
		Previous Short-term TRP	-0.130 (0.241)
		Previous Short-term Amnesty	1.160** (0.551)
Truth Commission (t-1)	-0.159 (0.110)	Logged Sum of TC Years (t-1)	-0.00579 (0.0243)
Short-term TRPs*Non-Western	-0.161 (0.101)	Sum Prosecutions*Non-Western	0.197 (0.173)
Short-term Amnesties*Non-Western	0.188 (1.151)	Sum Amnesties*Non-Western	-0.0320 0.398
		Time	0.0237** (0.00997)
CIRI Index (t-1)	0.315*** (0.0388)	CIRI Index (t-1)	0.284*** (0.0258)
Ongoing Civil War (t-1)	0.711*** (0.249)	Ongoing Civil War (t-1)	0.643*** (0.136)
Judicial Independence (t-1)	-0.136** (0.0662)	Judicial Independence (t-1)	-0.121* (0.0631)
Polity II Scale (t-1)	-0.0323 (0.0242)	Polity II Scale (t-1)	-0.0739*** (0.0192)
GDP per capita	0.385 (0.238)	GDP per capita	0.0219 (0.293)
Treaty Ratification Index	0.471* (0.239)	Treaty Ratification Index	0.331 (0.229)
Constant	-0.671 (1.688)	Constant	2.274 (2.068)
Observations	1412		1385
Log-Likelihood	-2019.5		-1955.8
Countries	107		106
Transitions	90		89

**Table 6.2. Fixed-Effects Negative Binomial Model Predicting Ordinary Prosecutions**

Judicial Independence (t-1)	0.0101 (0.0675)
Polity II Scale (t-1)	0.0646** (0.0315)
GDP per capita	0.330*** (0.0940)
Treaty Ratification Index	0.101 (0.229)
Logged Sum of Prosecutions (t-1)	0.190** (0.0924)
Logged Sum of Amnesties (t-1)	0.395 (0.283)
Prosecutions*Amnesties (t-1)	-0.0205 (0.0884)
Sum of Truth Commission Years (t-1)	-0.00468 (0.0238)
Previous Short Term TRP	0.653*** (0.212)
Previous Short Term Amnesty	-0.401 (0.301)
Constant	-3.543*** (0.609)
<i>Observations</i>	<i>1347</i>
<i>Log-Likelihood</i>	<i>-1634.6</i>
<i>Countries</i>	<i>88</i>
<i>Transitions</i>	<i>102</i>



**CHAPTER 7: HUMAN RIGHTS AFTER WAR: ENFORCEMENT AND THE PREVENTION OF CONFLICT RECURRENCE**<sup>496</sup>**7.1. INTRODUCTION**

Chapter 5 argued that the pursuit of transitional justice in democratizing countries does not cause civil war, even when it seriously threatens military or opposition groups. Chapter 6 then showed that the legal enforcement of human rights decreases repression over time, though in democracies that face violent insurgency, enforcement is unlikely to prevent all kinds of repressive acts. These are both findings that add to our knowledge of the impact of human rights law, and limn a more positive picture than the one that has been painted by realist scholars and skeptics. However, there is another possible gap in my account, and it forms around post-conflict situations. Human rights enforcement in some weakening autocratic and democratizing countries has positive impacts, but those are not the only contexts on which human rights legal advocacy is focused. Post-conflict situations are the most prominent lightning rod for the human rights community because civil wars at once attract the most attention from global society and because they represent a ‘hard test’ for the human rights ideology. If human rights activists and lawyers cannot help to transform warring parties into reconciled parties, then what good are human rights activists and lawyers?

When civil wars end, warring factions, transitional governments, the international community, and transnational civil society groups all consider whether attempts to provide redress for past human rights violations will reignite fighting or promote long-

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<sup>496</sup> This material is based upon work supported by the National Science Foundation under Grant No. 0961226.

term stability. Broadly speaking, two camps have formed around the wisdom of pursuing human rights enforcement and accountability. Rule of law proponents, often oriented within supranational bureaucratic networks, argue that the pursuit of justice through trials or truth commissions is necessary to achieve lasting peace.<sup>497</sup> A case in point, the global human rights movement's most visible accomplishment, the International Criminal Court (ICC), has primarily become involved in situations following atrocities or civil wars, and it performs its work under the banner of "Peace through Justice." For its part, the UN Office of the High Commissioner for Human Rights continues to promote its 2004 policy series "Rule of Law Tools for Post-Conflict Societies."<sup>498</sup> Rule of law proponents contend that holding state agents responsible for human rights abuses makes post-war peace more durable. Forgiving agents of gruesome violence in exchange for commitments to future non-violence, however, impedes peacebuilding by reinforcing impunity.<sup>499</sup> Witnessing the fall of Goma to predominantly Tutsi M23 rebels, who had just three years before been integrated into the Congolese military through a negotiated agreement, UN High Commissioner of Human Rights Navi Pillay blamed the resumption

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<sup>497</sup> Siri Gloppen, "Roads to Reconciliation: A Conceptual Framework," ed. Elin Skaar, Siri Gloppen, and Astrid Suhrke, *Roads to Reconciliation* (Lanham, MD: Lexington Books, 2005). For a similar examination of 'legalist' and 'pragmatist' positions, see Vinjamuri and Snyder, "Advocacy and Scholarship in the Study of International War Crimes Tribunals and Transitional Justice." Our categories are not exhaustive. Critics of both positions include 'holists' and 'transformative justice' proponents. See, e.g., Alex Boraine, "Transitional Justice: A Holistic Interpretation," *Journal of International Affairs* 60, no. 1 (2006). and Wendy Lambourne, "Transitional Justice and Peacebuilding after Mass Violence," *International Journal of Transitional Justice* 3(2009).

<sup>498</sup> See, e.g., UN Office of the High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States: Prosecution Initiatives*, 2006, HR/PUB/06/4, available at: <http://www.unhcr.org/refworld/docid/46cebb6c2.html> [accessed 15 October 2012]

<sup>499</sup> See Diane F. Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime," *The Yale Law Journal* 100(1990-1991). It is worth noting that conditional amnesties are coming to occupy a more ambiguous position within the 'new law of transitional justice,' as described by Christine Bell. While blanket amnesties are still frowned upon, conditional amnesties that facilitate demobilization are allowable. See Bell, *On the Law of Peace : Peace Agreements and the Lex Pacificatoria*, 238-42.

of conflict on lack of justice. “Peace will only take root if the leaders of DRC and neighbouring countries jointly decide to make it happen and, in particular, show genuine resolve to end the devastating impunity of serial human rights violators....”<sup>500</sup>

By contrast, ‘peace studies’ and ‘dispute resolution’ experts argue straightforwardly that the peace-promoting potential of justice policies is either nonexistent or attributable to other features of post-conflict societies.<sup>501</sup> Within these fields, an emphasis is placed on accommodation of all parties, even if some of the parties are human rights abusers. Accommodationists can be found among the ranks of peace negotiators and diplomats, and for them, stable peace is facilitated by skillfully devised power-sharing arrangements, supported by favorable circumstances. The supposed peace dividend of justice for rights violations is a figment produced by wishful thinking, principled logics of appropriateness, or legal romanticism. Even worse, when ill-timed, rule of law measures may *cause* violence. Critics argue that the ICC’s actions in Sudan, Uganda, and Libya have hampered local peacebuilding initiatives by discouraging power-brokers from engaging one another to put an end to fighting. The prospect of post-conflict justice, the thinking goes, raises tensions between opposing groups and angers leaders who are directly targeted for their role in perpetrating human rights abuses, thereby derailing peace deals.<sup>502</sup> The alternative, extending amnesties in exchange for

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<sup>500</sup> Navi Pillay, "End the Impunity of Congo’s War Criminals," *The Guardian* November 23, 2012.

<sup>501</sup> For the distinction between human rights and dispute resolution, see Stephan Sonnenberg and James L. Cavallaro, "Name, Shame, and Then Build Consensus? Bringing Conflict Resolution Skills to Human Rights," *Washington University Journal of Law & Policy* 39(2012): 257. Beyond the legal academy, in the past twenty years, human rights and conflict resolution have become two of the leading approaches (if not the leading approaches) to situations involving conflict, rights abuse, and mass atrocity around the world.

<sup>502</sup> Tom Hadden, "Punishment, Amnesty, and Truth: Legal and Political Approaches," in *Democracy and Ethnic Conflict*, ed. Adrian Guelke (New York: Palgrave Macmillan, 2004).

assurances of future non-violence, is a much more prudent option; by striking a chord of compromise, amnesties exert a calming influence during fragile transitions and contribute to a more durable peace through demobilization and reconciliation. Accommodationists contend that societies can move toward sustainable peace only after amnesties have alleviated the worries of potential spoilers.<sup>503</sup>

The debate between rule of law and justice versus amnesties and accommodation in the post-conflict context is unresolved for two reasons. First, the discussion of post-conflict situations should be distinguished from the discussion concerning democratizing contexts—though these discussions are often problematically lumped together. Defenders of amnesties are usually not supportive of amnesties that guarantee impunity for former autocrats; instead, they endorse the types that forgive former combatants for their acts of violence during insurgency and counter-insurgency campaigns. This latter kind of amnesty, they argue, can very much assist in ending conflicts over the long run. On the other side, those who argue against amnesties usually do not pay close attention to variation *between* amnesties, and in their desire to achieve justice for rights violations, they assume that all amnesties are equal obstacles to human rights goals. In this way, then, many commentators speak past one another within a wider ‘peace v. justice’ debate. Second, few scholars have gone about testing the claims that are made on either side. Rule of law proponents have truly lacked data and the ability to study the over-time effects of legal developments on the propensity for conflict resumption. And while it is

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<sup>503</sup> Snyder and Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice."

almost taken as a given that amnesties can help create sustainable peace, almost no systematic research has been devoted to providing evidence of that claim.

In this chapter, I examine the short and long-term impacts of human rights enforcement and amnesties on the recurrence of civil war in all post-civil periods from 1970 to 2010. In so doing, I develop an argument linking domestic human rights enforcement and rule of law to long-term peacebuilding. In this model, I distinguish *peacebuilding* from *peacemaking*. Though it may have long-term payoffs to peacebuilding, pursuing trial justice is not a good option for preventing specific actors from returning to hostilities (recidivism) in the short term. What this indicates is that domestic human rights enforcement may have a *general* preventative effect, but not a *specific* preventative effect. Furthermore, if international criminal prosecutions are to have positive impact on long-term peacebuilding, it will have to be through strengthening domestic institutions. In the next section of the chapter, I will explain what we currently know about the relationship of post-conflict justice and amnesties to the future of peace. In the following section, I will explain my theory of short-term and long-term prevention. Then, I will test this theory against empirical evidence, drawing on our new data on human rights prosecutions and amnesties.

## 7.2. WHAT DO WE KNOW?

To reiterate, the debate between human rights proponents and dispute resolution experts is over the relative merits of prosecutions and amnesties. The former see prosecutions as favorable to peace, and amnesties to be inimical to peace. The latter understand trials to be a pursuit that risks conflict incitement and amnesties to be a way of easing tensions. To date,

attempts to resolve the rule of law-accommodation debate have been unsatisfying. Claims are often based upon normative grounds or impressionistic conclusions drawn from individual case studies.<sup>504</sup> Both the ‘rule of law model’ and the ‘accommodationist model’ rest on reasonable logics and have extensive anecdotal support. One reason these two perspectives remain at loggerheads is that both perform reasonably well some of the time when used to interpret historical evidence. In other words, they are both partially true. One may look to South Africa and Bosnia-Herzegovina as countries where rule of law promotion and post-conflict justice generated a net positive effect on post-conflict society,<sup>505</sup> but see in Uganda and Serbia mostly impotent efforts by international human rights advocates.<sup>506</sup> Scholarship on post-conflict justice is left with two basic problems. First, it is lacking a theory that moves beyond all-or-nothing assessment of justice efforts. Often critics are so relentless that the only solution appears to be wholesale rejection of post-conflict justice, whereas proponents are too willing to ignore certain failures with the approach. Second, systematic studies of post-conflict justice policies are still rare. As James Meernik et al. state, “[r]igorous and empirical testing in the post-conflict environments of nations across time and space has only recently begun in earnest.”<sup>507</sup> This is especially important given that the main differences between scholars are over evidence, rather than philosophy.

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<sup>504</sup> Mendeloff, "Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm?."

<sup>505</sup> Alex Boraine, "Truth and Reconciliation in South Africa: The Third Way," in *Truth V. Justice*, ed. Robert Rotberg and Dennis Thompson (Princeton: Princeton University Press, 2000); Lara J Nettelfield, *Courting Democracy in Bosnia and Herzegovina: The Hague Tribunal's Impact in a Postwar State*, Cambridge Studies in Law and Society (Cambridge: Cambridge University Press, 2010).

<sup>506</sup> Branch, "Uganda's Civil War and the Politics of Icc Intervention; Subotić, *Hijacked Justice: Dealing with the Past in the Balkans*.

<sup>507</sup> Meernik, Nichols, and King, "The Impact of International Tribunals on Peace and Human Rights after Civil War," 311.

What little cross-national research we have on the peace v. justice question in post-conflict has yielded mixed results. Snyder and Vinjamuri's strong judgments of 'legalism'—where they declare that “[j]ustice does not lead; it follows [the establishment of order]”—are based on a brief engagement of 32 individual cases.<sup>508</sup> In the piece, they only discuss a few high-profile cases in any detail, and their conclusions are inconsistent. While they argue that amnesties are crucial to “shore up peace and an improved human rights situation,” their evidence from Sierra Leone, Cote d’Ivoire, and El Salvador appears to contradict this claim; amnesties in each country attracted widespread disaffection with peace deals.<sup>509</sup> Perhaps foreseeing this criticism, they follow with the statement, “Amnesties are likely to succeed only if they are accompanied by political reforms that curtail the power of rights abusers....”<sup>510</sup> Presumably, the kinds of the reforms they are talking about here are the very same that they simultaneously disparage for being error-laden, namely, efforts to hold individuals accountable and enforce the law. However, because the authors take aim at a wide variety of accountability procedures in their critique, it is near-impossible to discern which they favor and which they do not.

Other cross-national studies have made some effort to address the effects of justice policies and amnesties on patterns of conflict. Tove Grete Lie et al., for example, examine in a study commissioned by the World Bank the effect of trials, purges, reparations, truth commissions, amnesties, and exile on the duration of peace following

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<sup>508</sup> Snyder and Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice."

<sup>509</sup> *Ibid.*, 33.

<sup>510</sup> *Ibid.*, 34.

civil wars that occurred between 1946 and 2003.<sup>511</sup> Although they find some evidence that post-conflict justice helps make peace more durable, the effect is weak and inconsistent depending on the model of conflict termination. James Meernik et al. explore the impact of international trials on the duration of peace following civil wars that ended between 1982 and 2007.<sup>512</sup> They find no evidence that prosecutions make countries more or less prone to renewed conflict, even confining the sample to democratic states. Erik Melander concludes that peace agreements containing amnesty provisions significantly reduce the risk of conflict resumption in authoritarian states during the first two years following the agreement. By contrast, amnesties enacted in democracies or in transitional polities increase the risk of conflict resumption.<sup>513</sup>

Finally, in an insightful study of the usefulness and evolution of amnesties over the last half-century, based on a decade of extensive fieldwork and a database of over 530 amnesty laws in 138 countries, Louise Mallinder and Kieran McEvoy make two main contentions. The first is that post-conflict amnesties themselves have come to involve citizens' deliberation to a higher degree, are now far more nuanced than they used to be, and as such, can "no longer be caricatured as the last act of the outgoing general as he signs the sweeping amnesty to protect now and forever all loyal assassins and toenail pullers just before departing the presidential palace."<sup>514</sup> The second point is that

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<sup>511</sup> Tove Grete Lie, Helga Malmin Binningsbø, and Scott Gates, "Post-Conflict Justice and Sustainable Peace," in *World Bank Policy Research Work Paper* (2007).

<sup>512</sup> Meernik, Nichols, and King, "The Impact of International Tribunals on Peace and Human Rights after Civil War."

<sup>513</sup> Erik Melander, "Justice or Peace? A Statistical Study of the Relationship between Amnesties and Durable Peace," in *JAD-PbP Working Paper No. 4* (2009).

<sup>514</sup> McEvoy and Mallinder, "Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy," 439.



“properly constituted, amnesties bring law to a previously lawless domain in the exercise of post-conflict mercy.”<sup>515</sup> At the same time, the impact of these acts of mercy, as the authors dub them, has not been examined across cases. The authors themselves admit that they are not aware of any “meta-analysis on reoffending rates for those who have been granted an amnesty.”<sup>516</sup>

This last observation is correct, but it is also correct for those who have studied the impact of trials. We have very little knowledge about the probability of a return to hostilities in countries that have had extensive experience with human rights enforcement. In addition to this, the studies detailed above exhibit two main shortcomings. First, previous research provides mostly weak theoretical explanations for why trials or amnesties might have any impact on conflict recurrence. Studies often employ an all-or-nothing peace versus justice framework, or they simply do not develop ideas about sustainable peace that incorporates lessons from a voluminous literature on civil war onset and termination. Second, previous research does not adequately distinguish between various trial mechanisms. Previous research is either too narrowly focused on the International Criminal Court (ICC) and the UN’s ad hoc tribunals, or they are focused too broadly on *any* trials that follow conflict, some of which have no human rights content whatsoever.

The focus on international trials is understandable, as these are high-profile undertakings initiated by the global community, but these trials are still relatively rare and do not exhaust the opportunities for human rights enforcement in the world. As

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<sup>515</sup> Ibid., 440.

<sup>516</sup> Ibid., 433.

Kathryn Sikkink has demonstrated, the global ‘justice cascade’ is still largely a domestic affair.<sup>517</sup> Those studies that *do* incorporate domestic prosecutions in research on post-conflict justice have included in their analyses a blend of unfair or partisan trials and those that might be characterized as legitimate ‘human rights trials.’ The World Bank study by Lie et al., for example, groups together trials in post-genocide Rwanda or post-war Croatia, which targeted those who had been complicit in crimes against humanity, with trials that could only be characterized as shrewd victor’s justice. One example of the latter (out of many examples) comes from Ghana. In 1981 Jerry Rawlings took power through a coup, instituting a military dictatorship called the Provisional National Defense Council (PNDC). Two years later, in June 1983, an unsuccessful coup was led against the PNDC. Rawlings held a secret trial, but the fate of those in the dock was predetermined: the 16 coup participants were found guilty of conspiracy against the PNDC, and sentenced to death.<sup>518</sup> The post-conflict justice database used for Lie et al.’s study would include this as an instance of trial justice,<sup>519</sup> but it goes without saying that this brand of prosecution is markedly different from the brand that targets former rapists, torturers, and *genocidaires* for their role in mass atrocity. Studies should be careful to maintain a distinction. In the next section, I aim to address these shortcomings of previous research by extending my theory of human rights enforcement to the question of

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<sup>517</sup> Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*, 18. “I believe that what is emerging is a decentralized but interactive system of accountability for violations of core political rights with fragmented enforcement, which is primarily undertaken by domestic courts.”

<sup>518</sup> See Keesing’s Record of World Events. Volume 26, September 1980, p. 30437, and Volume 29, December 1983, p. 32549.

<sup>519</sup> See <http://www.justice-data.com/>.

conflict prevention. Within this theory, I consider the contributions of ‘outside’ and ‘domestic’ prosecutions, as well as amnesties.

### 7.3. RIGHTS ENFORCEMENT AND SUSTAINABLE PEACE

Human rights and the rule of law are liberal democratic mainstays, and they exist in a complex and multi-faceted relationship with armed conflict. These complexities may be illustrated through the oft-cited case of the former Yugoslavia. Viewed through the prism of rule of law, refusal to heed legal commitments could be reasonably understood as a source of fresh grievances that inspires future conflict.<sup>520</sup> One victim of the 1995 Srebrenica massacre stated clearly, “if we are deprived of the right to justice, then we shall seek the right to revenge.”<sup>521</sup> Furthermore, negotiators’ policy of accommodating known rights abusers, rather than bringing them to justice, arguably served to legitimate ongoing abuses in real time by appeasing the architects of ethnic cleansing. For instance, the inability of the nascent ICTY to indict senior Serbian officials in the mid-1990s might have contributed to the repetition of similar atrocities in Kosovo, and the policy of accommodating Serb leaders in order to ‘save lives’ on the ground was perceived as a marked failure by international peacekeeping troops, who witnessed the intentional commitment of war crimes following negotiations.<sup>522</sup> Seen through the prism of accommodation, over-zealous legal activism aimed at powerful individuals can discourage formation of power-sharing deals that sue for peace among armed opponents.

Peace negotiators deployed in the former Yugoslavia, including David Owen, Warren

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<sup>520</sup> Oskar N. T. Thoms and James Ron, "Do Human Rights Violations Cause Internal Conflict?," *Human Rights Quarterly* 29(2007).

<sup>521</sup> Michael Scharf and Paul R Williams, "The Functions of Justice and Anti-Justice in the Peace-Building Process," *Case W. Res. J. Int'l Law* 35(2003): 173.

<sup>522</sup> Brendan Simms, *Unfinest Hour: Britain and the Bosnian War* (2001).

Christopher, and Richard Holbrooke strenuously resisted initial efforts to indict Milosevic and Radovan Karadzic, going as far to compliment them both for being men for their ‘graciousness’ and ‘rough charm,’ and emphasizing their indispensable place as partners in peace.<sup>523</sup>

Skepticism of the human rights model centers on the premise that the promotion of democratic rule of law, including justice for rights violators, is disruptive of post-conflict equilibria. Two reasons support this skepticism. The first is that transnational advocacy for accountability is *foreign*. Foisting templated Western institutions on unready, illiberal societies will not help generate local democratic and non-violent practices. Oliver Richmond contends, for example, that peace-building efforts in Cambodia have created an artificial, “transnational middle class framed by the liberal peace but disconnected from their [sic] own state.”<sup>524</sup> Indeed, the lion’s share of criticism of post-conflict justice comes from observers disgruntled over high-profile interventions in Bosnia-Herzegovina, Cambodia, Rwanda, Serbia and Montenegro, Sierra Leone, the Sudan, Timor-Leste, and Uganda. Out of this criticism has emerged a general viewpoint that justice from above is disruptive, failing to achieve legitimacy at the local level and reproducing zero-sum factionalized conflict. The second and related reason for the reported failure of rule of law promotion is its potential short-term incitement of spoilers. In specific reference to legal accountability, Adam Branch and others have written that the pursuit of criminal indictments causes violent competitors—like Joseph Kony of

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<sup>523</sup> Scharf and Williams, "The Functions of Justice and Anti-Justice in the Peace-Building Process," 172-3.

<sup>524</sup> Oliver P. Richmond, *A Post-Liberal Peace* (London: Routledge, 2011), 69.

Uganda's LRA—to begin fighting anew after negotiation because they know that surrender will lead to their eventual prosecution for war crimes.<sup>525</sup>

The two critical insights regarding the imposition of foreign justice and short-term danger ring true, but they are not adequately formalized, nor are they completely damning for the prospects of human rights in post-conflict situations. A good theory of human rights and sustainable peace might integrate arguments from both proponents and skeptics. To do this, I take cues from Richard Goldstone, whose experience as a judge in South Africa during the democratic transition would serve him during his time as the chief prosecutor for the International Criminal Tribunals for the Former Yugoslavia and Rwanda (1994-1996). In a retrospective of the work of international courts, Goldstone wrote, "...if one is talking about short term ceasefires, short term cessation of hostilities, it could be that the investigation of war crimes is a nuisance. But if one is concerned with real peace...then in my respectful opinion, there is and can be no contradiction between peace and justice."<sup>526</sup> Goldstone is drawing a very useful distinction, one between *peacemaking* and *peacebuilding*. When trying to make peace between already hostile forces, legal interventions will be destabilizing because of spoilers, but when trying to build sustainable peace over the long term, legal enforcement of rights norms will be necessary. The argument, then, boils down to spoilers and cultures. The key to peacemaking is appeasing spoilers in the short term, and the key to peacebuilding is promoting domestic legal cultures in the long term. In the remainder of this section, I will

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<sup>525</sup> Branch, "Uganda's Civil War and the Politics of Icc Intervention."

<sup>526</sup> Richard Goldstone, "The United Nations' War Crimes Tribunals: An Assessment," *Conn. J. Int'l Law* 227(1997): 233-34.

generate hypotheses regarding the effects of three mechanisms—amnesties, international human rights prosecutions, and domestic human rights prosecutions—in the short- and long-term conflict prevention processes.

### 7.3.1. The Short Term

Those policies most effective in preventing the recurrence of armed conflict in the short term are those that operate on a logic of *specific prevention*, where the goal is to stop already-armed individuals and spoiler groups from returning to the battlefield.<sup>527</sup> Deals that are exceptional in nature—that are forged out of the demands made by elites, commanders, or direct participants in fighting—are most likely to succeed at preventing the recidivism of specific conflict actors. Peace agreements with selective amnesties are a primary form of such exceptional deals. These agreements are meant to be one-shot affairs that typically reside outside of the constituted normative legal order. Mark Freeman defines an amnesty as an “extraordinary legal measure whose primary function is to remove the prospect and consequences of criminal liability for designated individuals or classes of persons in respect of designated types of offenses....”<sup>528</sup> While amnesties differ widely in their intention, their target, and the crimes they excuse, they are often used to reduce the threat posed by potential spoilers. Parties promise not to investigate and punish the past in exchange for the promise of ending violence. Generally speaking, amnesties are beneficial in post-conflict environments, providing fighters an incentive to remain off the battlefield, or at least “to encourage lower-level combatants to

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<sup>527</sup> For ‘spoilers’, see Stephen John Stedman, “Spoiler Problems in Peace Processes,” *International Security* 22, no. 2 (1997).

<sup>528</sup> Freeman, *Necessary Evils: Amnesties and the Search for Justice*, 13.

break rank.”<sup>529</sup> Theoretically, then, amnesties targeted at either state forces or opposition groups, when enacted in the post-conflict period, will inspire peace in the short term because they represent an elite bargain between specific oppositional dyads. One example is Uganda’s 2000 Amnesty Act, which was the result of campaigning by religious and political leaders in the Northern regions devastated by violence. The law established an Amnesty Commission to consider applications from former members of the Lord’s Resistance Army and to interact with the public on issues of reconciliation.<sup>530</sup> Between the swearing in of Amnesty Commissioners and the end of 2006, 21,000 former rebels had been demobilized and re-inserted into society.<sup>531</sup>

In this short-term period, transplanted and over-reaching rule of law mechanisms, including high-profile international criminal trials brought by the international community, will have the opposite effect of amnesties. They will introduce short-term danger. Already-violent groups will not want to cooperate with trial justice, and fear of being punished might inspire them to resume fighting. And there is reason to suspect that international justice is particularly unsavory to targeted groups. Some evidence suggests that an ICC arrest warrant creates a sense among combatants that they are isolated without social bonds in their struggle. Rather than inspiring surrender, though, international punishment causes them to dig in their heels. While this may seem counter-intuitive, this was precisely Joseph Kony’s logic when the ICC opened its sealed

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<sup>529</sup> Cobban, *Amnesty after Atrocity? Healing Nations after Genocide and War Crimes*; Mallinder, *Amnesty, Human Rights and Political Transition: Bridging the Peace and Justice Divide*, 21.

<sup>530</sup> McEvoy and Mallinder, "Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy."

<sup>531</sup> Louise Mallinder, "Uganda at a Crossroads: Narrowing the Amnesty?," in *Beyond Legalism: Amnesties, Transition and Conflict Transformation* (Queen's University Belfast: Institute of Criminology and Criminal Justice, 2009), 29-34.

indictment on July 29, 2004, while Kony was engaged in backchannel peace negotiations with arbiter Betty Bigombe. According to the testimony of Kony's former compatriot Samuel Kolo in the Klaartje Qurijs film *Peace v. Justice*, the ICC indictment suddenly made Kony feel as if it were him versus the world.<sup>532</sup> He then took his war to the bush in the Democratic Republic of Congo.

Another reason that international courts might be dangerous in the short term is that they are unable to follow through on their threats of arrest. In turn, armed leaders might interpret this as evidence of their own position of strength. The head prosecutor of the ICTY, Louise Arbour, was repeatedly stonewalled by US, UN and NATO forces in her effort to arrest members of the Serbian military forces. The non-cooperation of these forces signaled to Milosevic and his commanders that they international community was not going to challenge when they chose to pillage Kosovo, and repeat the tactics of ethnic cleansing they previously employed in Bosnia.<sup>533</sup> Both of these examples, which suggest a kind of 'failed coercive logic' of international punishment, we might expect attempts at outside justice to fall short in attempts to prevent spoilers from returning to hostilities.<sup>534</sup> A third reason for the potential negative effect of high-profile prosecutions is that, where effective, they may create martyrs or new grievances that fuel renewed conflict.<sup>535</sup> Retributive justice could incite groups who understand their own war heroes to be the

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<sup>532</sup> Klaartje Qurijs, "Peace Versus Justice," (<http://www.itvs.org/films/peace-versus-justice/2012>).

<sup>533</sup> Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals*.

<sup>534</sup> David Mendeloff, "War Crimes and Hollow Threats: Assessing the Coercive Logic of Icc Intervention in Ongoing Conflicts," in *The Potential Role of Transitional Justice in Ongoing Conflict* (Jerusalem, Israel 2011).

<sup>535</sup> Weinstein and Stover, *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*.



subject of condemnation, or they see the courts willingness to try war criminals on each side as drawing unfair moral equivalence between perpetrator and victim groups.<sup>536</sup>

What about the short-term impact of domestic post-conflict justice? The former Yugoslavia is a very visible and highly contested example, but it does not necessarily represent the additional complications that emerge when partition is not an available option, and former fighting groups must together arrive at a lasting *modus vivendi* during waning periods of conflict. The literature demonstrates that in such situations—as in contemporary Colombia, Peru, or Sri Lanka—post-conflict justice policy is almost entirely the product of strategic actors interacting to achieve gains for their respective sides. As Colm Campbell and Ita Connolly argue, “armed opposition movements see TJ as a site for advancing their political projects,” as do government actors, who are continually working to bolster legitimacy.<sup>537</sup> Knowing this, the limited prosecutions and other justice policies that are settled upon in the immediate post-conflict period will almost invariably be fraught and politically compromised. As such, we should not expect domestic efforts at justice to disturb post-conflict equilibria, *because they are a byproduct of those equilibria*. In sum, spoilers will not overreact to domestic justice because it does not present a great threat.

One example of domestic human rights prosecution in the wake of conflict comes from Guatemala, where rights activism has existed in an uneasy balance with violence and repression since the 1980s. The country of Guatemala had since 1960 been engaged

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<sup>536</sup> Subotić, *Hijacked Justice: Dealing with the Past in the Balkans*.

<sup>537</sup> Colm Campbell and Ita Connolly, "The Sharp End: Armed Opposition Movements, Transitional Truth Processes and the *Rechtsstaat*," *International Journal of Transitional Justice* 6(2012): 36.

in a bloody civil war pitting a series of military governments and paramilitary groups called *Patrullas de Autodefensa Civil* against leftist rebels, many of whom came from Mayan villages in the rural areas of Guatemala. General Efraín Ríos Montt came to power in 1982, in a coup against Fernando Romeo Lucas García, whose democratically elected regime was characterized by targeted killings, torture, and disappearances of unionists and *campesinos*. Under Ríos Montt, however, the civil war against leftist guerillas reached catastrophic proportions. The Pentecostal preacher and Army General, whose regime had the overt support of President Ronald Reagan,<sup>538</sup> unleashed a scorched earth policy against Mayan villages, destroying thousands of homes and up to 200,000 lives. The Human Rights Data Analysis Group has estimated that from April 1982 to July 1983, 5.5% of the Mayan Ixil population was decimated.<sup>539</sup> Though a democratic transition took place in 1986, bringing Vinicio Cerezo to power, the war did not end. Only in 1996, under mediation by the UN, did the government and a collection of guerilla organizations under the title *Unidad Revolucionaria Nacional Guatemalteca (URNG)* arrive at a peace agreement called the *Acuerdos do Paz*. With the peace accords came a National Reconciliation Law (NRL), which established a truth commission under the United Nations (The Commission for Historical Clarification) and granted an amnesty to the military and to guerillas. However, the amnesty did not protect against criminal prosecution for acts of genocide or crimes against humanity.

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<sup>538</sup> Reagan had referred to Ríos Montt as “a man of great personal integrity and commitment” and relied on him as a Central American ally in the fight against the *Sandinistas* in Nicaragua and against leftist rebels in El Salvador. See Elisabeth Malkin, "Former Leader of Guatemala Is Guilty of Genocide against Mayan Group," *The New York times* May 10, 2013.

<sup>539</sup> The leader of HRDAG, Patrick Ball, would later testify to this in the trial of Ríos Montt. See <https://hrdag.org/guatemala/>.

Only one year after the Peace Accords, prosecutions began against some military officers, soldiers, and paramilitaries for their roles in various massacres in rural Guatemala during the civil war. In 1997, Army Sergeant Major Manuel Pop Sun and 17 others were charged for their involvement in the *Las Dos Erres* Massacre on December 6, 1982, where 200 people including women and children, were murdered.<sup>540</sup> This trial, in addition to others that began in the post-conflict period and continue today, was significantly affected by the intimidation of witnesses and judges. It is quite common for judges to be issued direct or veiled threats to their lives by former paramilitaries, criminals, and others that do not want to be held accountable.<sup>541</sup> Despite this fact, those charged with massacring civilians at *Las Dos Erres* would be held guilty by the *Tribunal Primero A de Alto Riesgo* in 2011, and Ríos Montt would be found guilty of genocide by a Guatemala City court in May 2013.<sup>542</sup> In terms of this analysis, this case illustrates two crucial issues. Domestic human rights prosecutions, even directly following the establishment of peace, did not lead to conflict resumption; this is likely because the stakes were simply too high, and rather than resuming war, those targeted by trials simply threatened the rights activists, NGOs, and the judiciary. Second, though criminal homicide and violence still plagues the country, and legal institutions face threats and financial constraints, the trials have moved forward and held some influential leaders accountable for their role in gross human rights abuses.

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<sup>540</sup> See [www.transitionaljusticedata.com](http://www.transitionaljusticedata.com).

<sup>541</sup> Michel-Luviano, *Access to Justice, Victims' Rights, and Private Prosecution in Latin America: The Cases of Chile, Guatemala, and Mexico*, Ch. 5.

<sup>542</sup> As of the time of this writing, the Constitutional Court of Guatemala has overturned the decisions, and the trial is under way yet again.

This theoretical discussion produces three expectations regarding peacemaking in the short term, which involves preventing specific armed combatants from returning to war after it the conflict has already subsided.

*Hypothesis 1a: Following the termination of conflict, amnesties decrease the risk that specific conflict actors will return to violent conflict.*

*Hypothesis 1b: Following the termination of conflict, international prosecutions aimed at actors increases the risk that those actors will return to violent conflict.*

*Hypothesis 1c: Following the termination of conflict, domestic prosecutions do not affect the risk that specific conflict actors will return to violent conflict.*

### **7.3.2. The Long Term**

Those policies most effective in preventing the recurrence of armed conflict and building peace in the long term are those that operate on a logic of *general prevention*, where the goal is to stop *potential* armed actors from beginning a violent insurgency.<sup>543</sup> A good deal of rule-of-law-based theorizing has proposed that the strengthening of legal institutions and the legal justice for rights violations over time could generally prevent or deter violent conflict. Why? First, the strengthening of law might inhibit the resumption of conflict in the long term by moving away from general states of exception, or cultures of impunity.<sup>544</sup> In such contexts, aggrieved groups resort to violence because they have no reason to trust or seek resolution to conflict through state institutions unbound by rule of law. Human rights enforcement provides some modicum of acknowledgement that wrongs have been committed, signifying a shift toward the re-inclusion of formerly

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<sup>543</sup> On specific and general deterrence, see Mark Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: Cambridge University Press, 2007), Chs. 3-4.

<sup>544</sup> For states of exception, see Giorgio Agamben, *States of Exception*, trans. Kevin Attell (Chicago: University of Chicago Press, 2005).

excluded citizens.<sup>545</sup> Pushing for legalized responses to violence begins to lay the groundwork for the rule of law, as opposed to perpetuating an unpredictable, whatever-works approach to social order. Attempting to make behavior more representative of the demands for justice even when institutions are not ideal might nudge states away from the power struggle and corruption that predominates in war toward regularized, forward-looking policy.

Second, over time, a human rights legal discourse itself can have a transformative effect on groups that might have previously considered violent options as the only resort to challenge the state. As we have seen in previous chapters, dissenting groups focus energy on attaining legal punishment and redress for the crimes that they have suffered under state coercive forces. This choice to pursue legal justice can trade off directly with violent forms of resistance. Kieran McEvoy has convincingly argued, for instance, that the Republican resistance in Northern Ireland started by instrumentally appealing to human rights in the early 1980s, but this move eventually altered the nature of Irish resistance to one that embraced alternatives to violence in their political pursuit of autonomy.<sup>546</sup> And William DeMars contends that across Latin America, the move toward legal justice for human rights violations represented a strategic shift among leftists away from violent, Maoist revolution to one that embraced change through legal and political

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<sup>545</sup> Osiel, *Mass Atrocity, Collective Memory, and the Law*; Catalina Smulovitz, "Petitioning and Creating Rights: Judicialization in Argentina," in *The Judicialization of Politics in Latin America*, ed. Rachel Sieder, Alan Angell, and Line Schjolden (New York: Palgrave Macmillan, 2005).

<sup>546</sup> Kieran McEvoy, "Law, Struggle, and Political Transformation in Northern Ireland," *Journal of Law and Society* 27, no. 4 (2000).

institutions.<sup>547</sup> How might the operation of the three mechanisms discussed here—amnesties, outside justice, and domestic justice—affect these processes?

I theorize that the strength of amnesties in the short term becomes their weakness long term. First, amnesties are the product of a balance of power that prevails only at a particular moment in time. As this balance shifts, the usefulness of amnesties becomes outdated. Second, amnesties are often selective and unfair to citizens, who interpret their existence as the state's continued evasion of responsibility for past suffering. This is a well-known response to amnesty in countries like South Africa.<sup>548</sup> Third, and most important for our theory regarding states of exclusion, the passage of amnesties is a process that often takes on a life of its own. Once the executive discovers it can simply exempt certain actors from criminal sanction, it might continue to use this exceptional form of law-making to make repeated deals with opponents. While seemingly sound politics, this has the drawback of decreasing trust in the state because of the continual circumvention of public institutions. As individual trust in state institutions erodes, so does the belief that grievances can be remedied through peaceful public channels, leaving only violent opposition. To compound this concern, if would-be dissenters have witnessed fighting forces of the past get a 'free pass' for egregious violence, they might then be inspired to engage in similar acts.

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<sup>547</sup> William E. DeMars, *Ngos and Transnational Networks: Wild Cards in World Politics* (London: Pluto Press, 2005).

<sup>548</sup> Mahmood Mamdani, "Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (Trc)," *Diacritics* 32, no. 3-4 (2002); David Backer, "Watching a Bargain Unravel? A Panel Study of Victims' Attitudes About Transitional Justice in Cape Town, South Africa," *International Journal of Transitional Justice* 4(2010).

One example of this negative feedback loop created by continued amnestying comes from Thailand. Since 1978, Thailand's government has issued a total of 21 amnesty laws, some to state actors and some to insurgents and coup-plotters. In 1992, for example, popular protests in Bangkok from May 17-20 against the regime of General Suchinda Kraprayoon led to a brutal crackdown that included torture, killing, and disappearances. Suchinda and his forces would only four days later issue an Amnesty Decree for their role in the repressive violence.<sup>549</sup> The government had also passed over a dozen amnesties to try and promote peace in the Malay Pattani region in the South, where a number of Islamic and ethnic separatist organizations have been fighting against the government.<sup>550</sup> What Thailand, has is a combination of political amnestying and conflict-related amnestying that has done little over the last three decades to halt conflict. Political instability involving tensions between civilian and military government, coupled with fighting in the South, represent two fronts of civil conflict, neither of which have been cured by the passage of numerous amnesty laws.

Above I predict that high-profile international prosecutions will be destabilizing in the short term because they threaten state legitimacy and anger armed spoilers. What happens over the long run? This is a difficult question to answer because the revival of international justice, after the Nuremberg precedent was set nearly 70 years ago, is only two decades old. Additionally, the operation of international courts is far-removed from

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<sup>549</sup> Amnesty International, *Thailand: The Massacre in Bangkok* (<http://www.amnesty.org/en/library/info/ASA39/010/1992/en1992>).

<sup>550</sup> These include the Mujahideen Pattani Movement (BNP), the Pattani United Liberation Organization (PULO), Pattani Mujahideen Movement (GMIP), Mujahideen Islamic Pattani Group, the National Revolution Front (BRN), Pattani Liberation National Front (BNPP), Jemaah Islamiyah (JI), and Runda Kumpulan Kecil (RKK).

local conflict and until recently, has not benefited from continued and extensive engagement with local populations.<sup>551</sup> Therefore, we should not expect in empirical evidence international trials have had a noticeable long-term effect on conflict prevention. Furthermore, case-study research indicates that if international courts are to have a long-term impact, it will be through their ability to build local capacity and assist countries in developing human rights norms on the ground. Lara Nettelfield has argued that the ICTY has had a positive, measurable effect on local legal and democratic practices in Bosnia-Herzegovina, and a similar argument has been made by Sigall Horovitz in reference to Rwandan courts.<sup>552</sup> International courts may assist countries directly by transferring cases on which they have gathered evidence, and by transmitting resources. However, this does not speak to any direct impact that international prosecutions themselves will have on the country in the long term.

If anything, domestic criminal prosecutions of state actors are more likely to have an observable long-term effect on conflict prevention. As we saw in the previous two chapters, these prosecutions are quite numerous, and are more common, more localized, and more inclusive than international prosecutions. Many Latin American countries, for example, end up pursuing criminal cases in response to the initiative of private victims of conflict, who employ *querrela* procedures to bring cases to court.<sup>553</sup> Domestic criminal justice is doled out for rogue police officers, soldiers, and security service officials, who

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<sup>551</sup> I say ‘until recently’ because evidence does show that the ICC and ad hoc tribunals have lately made inroads into local outreach. See, e.g., Jessica Lincoln, *Transitional Justice, Peace and Accountability* (New York: Routledge, 2011), 144-45.

<sup>552</sup> Nettelfield, *Courting Democracy in Bosnia and Herzegovina: The Hague Tribunal's Impact in a Postwar State*; Horovitz, "Calibrating International and National Justice Systems in Ongoing Conflicts."

<sup>553</sup> Michel-Luviano, *Access to Justice, Victims' Rights, and Private Prosecution in Latin America: The Cases of Chile, Guatemala, and Mexico*.



use unsanctioned torture or murder to exert control locally. Retributive justice, performed in the name of legal rights, is most likely to convey a general devotion to constitutional principles of state-society interaction, and to reflect positively on the administrative control of the state. Domestic and local trial proceedings can revive a dormant judiciary, challenge the normative acceptability of violence, and communicate to victims that the new regime is committed to defending their rights as citizens, thereby discouraging extra-legal modes of resistance. The potential long-term effects of legal activism might be witnessed from the earlier Guatemalan example, where thwarted initial attempts to change the culture of violence have led to a gradual opening for rule of law over time.

Another example is Namibia. Namibia is typically treated as a country that did almost nothing about justice demands when facilitating its post-conflict transition following its independence from South African occupation in 1990. As Snyder and Vinjamuri write, "...doing nothing has been a viable strategy for consolidating peace...Namibia's durable peace settlement was not disturbed by the failure to prosecute crimes that had been committed by both sides in the war."<sup>554</sup> However, Namibian leaders faced the dilemma of how to deal with former combatants from SWAPO movement's People's Liberation Army of Namibia (PLAN), the South Africa-led SWATF military, and the vicious paramilitary counter-insurgency police unit known as Koevoet (crowbar). Over 10,000 of roughly 75,000 fighters from each side were integrated into the Special Field Force (SFF) by 1995. As one might imagine, these ex-fighters are still prone to periodic spates of violence against civilians, even though they are well-trained in human

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<sup>554</sup> Snyder and Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice," 34.

rights norms.<sup>555</sup> At the same time, the government has answered these abuses with dozens of trials against police officers who overstep their bounds.<sup>556</sup> While no high-profile international justice cases have taken place, there has been consistent activity on the part of the SWAPO-led government to address local legal issues. In line with my theory, I surmise that domestic trials, by serving as a type of inclusive justice, increase trust and dissuade would-be perpetrators of violent conflict from taking up arms in the long-term. Indeed, recent survey evidence from the 2008 Afrobarometer seems to bear that out in the Namibian case. When a representative sample was surveyed, and overwhelming 74% responded that it trusted the courts,” while 82% agreed that police were doing their job well.<sup>557</sup>

This theoretical discussion produces three expectations regarding peacebuilding in the long term, which involves generally preventing all actors from returning to war after prior conflict has already subsided.

*Hypothesis 1a: Following the termination of conflict, the sustained use of amnesties will increase the risk that any future actors will engage in violent conflict.*

*Hypothesis 1b: Following the termination of conflict, the sustained pursuit of international human rights prosecutions targeted at a state does not affect the risk that any future actors in that state will engage in violent conflict.*

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<sup>555</sup> Lalli Metsola, "The Special Field Force and Namibian Ex-Combatant 'Reintegration'," in *State Violence and Human Rights: State Officials in the Shout*, ed. Andrew M. Jefferson and Steffen Jensen (New York: Routledge & Cavendish, 2009).

<sup>556</sup> For data, see [www.transitionaljusticedata.com](http://www.transitionaljusticedata.com). The count is around 36 such trials that have been reported by the US State Department alone.

<sup>557</sup> "Afrobarometer Summary of Results: Round 4 Afrobarometer Survey in Namibia." Research Facilitation Services. 2008. Available at <http://www.afrobarometer.org/data/data-by-country-n-z/namibia>.

*Hypothesis 1c: Following the termination of conflict, the sustained pursuit of domestic human rights prosecutions will decrease the risk that any future actors will engage in violent conflict.*

#### 7.4. TESTING THE ARGUMENT

My argument hinges on the relationship of amnesties, outside justice, and domestic justice to short-term and long-term peace. To reiterate, I argue that high-profile human rights trials will inspire specific conflict recurrence, while amnesties will serve the aims of short-term conflict prevention. However, repeatedly practiced exceptional amnesties will falter in the long term, increasing the risk of general conflict recurrence, whereas domestic human rights prosecutions will promote long-term conflict prevention. Table 7.1 presents these hypotheses in a 3-by-2 table format. As one can see, I do not expect a relationship between sustained international prosecutions on general conflict recurrence, nor do I expect a significant relationship between domestic prosecutions and specific conflict recurrence.

***Table 7.1. Hypotheses Derived From Theory***

	<b>Specific Conflict Recurrence</b>	<b>General Conflict Recurrence</b>
<i>Amnesties</i>	Decreased Risk	Increased Risk
<i>International Prosecutions</i>	Increased Risk	Null
<i>Domestic Prosecutions</i>	Null	Decreased Risk

To test these hypotheses, it is necessary to operationalize specific and general conflict recurrence. I do this by using two dependent variables, the duration of *dyadic* post-conflict peace spells and the duration of *general* post-conflict peace spells. A *dyadic post-conflict peace spell* is the number of months that a particular conflict dyad did not resume fighting after it initially stopped. In other words, it is how long any given state-challenger pair that previously fought continued to remain peaceful, even if other conflict dyads in the country remained at war. A *general post-conflict peace spell* is the length of time in months in which *all* conflict dyads within a country remained terminated after a period of war. Using two different units of analysis—the civil war dyad and the civil war country—allows us to test the specific preventative effects of human rights enforcement and accommodation mechanisms on previous conflict participants, and the general preventative effects of various mechanisms on any would-be conflict actors in the future who are uninvolved with past wars in-country. To code peace spells, I borrow from UCDP/PRIO's Armed Conflict and Termination Datasets, which define armed conflict as "...a contested incompatibility that concerns government and/or territory where the use of armed force between two parties [a conflict dyad], of which at least one is the government of a state, results in at least 25 battle-related deaths."<sup>558</sup> They also define a conflict dyad as having terminated if the 25-death threshold has not been met for at least a year. In some countries, many conflict dyads are simultaneously active.<sup>559</sup> My dataset on dyadic post-conflict peace includes 253 spells with a total of 29,571 years at risk; 138

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<sup>558</sup> Joakim Kreutz, "How and When Armed Conflicts End: Introducing the Ucdp Conflict Termination Dataset," *Journal of Peace Research* 47, no. 2 (2010).

<sup>559</sup> Nils Petter Gleditsch et al., "Armed Conflict 1946-2001: A New Dataset," *ibid.* 39, no. 5 (2002); Lotta Harbom and Peter Wallensteen, "'Armed Conflict, 1989-2011'," *ibid.* 49, no. 4 (2012).

of these spells experienced the resumption of conflict. My dataset on general post-conflict peace at the country level includes 162 post-conflict peace spells with a total of 17,254 years at risk, 98 of which resumed fighting.

Operationalizing the independent variables—amnesties, international prosecutions, and domestic prosecutions—is a task I accomplished using a few sources, most notably the Oxford-Minnesota Transitional Justice Dataset (OMTJD), which codes amnesties and prosecutions in 125 democratic and democratizing periods from 1970 to 2009.<sup>560</sup> I include all post-conflict amnesties relieving actors of responsibility for human rights violations, insurgency crimes, or coups, including either state forces of opposition forces, over this period. Because OMTJD only covers democratic contexts, I also annexed this data with data on non-democratic post-conflict contexts using Louise Mallinder's Amnesty Database.<sup>561</sup> As opposed to other datasets on post-conflict trials, the OMTJD data captures all efforts to hold state actors accountable specifically for violations to physical integrity rights, meaning that it goes beyond victor's justice or those mechanisms arrived at by elites at the negotiating table. One drawback to the OMTJD, though, is that it does not comprehensively code the domestic prosecution of non-state actors, like rebel leaders and groups, for human rights crimes. For this reason, I cross-reference data from the OMTJD with data collected by PRIO's Post-Conflict

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<sup>560</sup> Soon available at [www.transitionaljusticedata.com](http://www.transitionaljusticedata.com).

<sup>561</sup> Mallinder, *Amnesty, Human Rights and Political Transition: Bridging the Peace and Justice Divide*, 21.

Justice Dataset to gather the most complete list possible of those instances where rebel combatants are held accountable in domestic courts for human rights violations.<sup>562</sup>

For the dyadic post-conflict peace models (Models 1-2), in which the subjects are specific conflict pairs, I include count variables to measure whether the post-conflict period included amnesties, international prosecutions, or domestic prosecutions for any actors involved in fighting between specific conflict dyads.<sup>563</sup> To reflect the notion that greater accountability early in the dyadic post-conflict period is most dangerous, I include the number of trials for actors that began within two years of the conflict termination.<sup>564</sup> For the general post-conflict peace models (Models 3-4), where the subjects are post-conflict *countries*, I measure the long-term effect of various mechanisms using cumulative coding starting from the beginning of the sample period in 1970 (See Chapter 6). Cumulative coding is an alternative to two less satisfactory methods: dummy variables or upward counting by each time period following the first instance of each mechanism. Cumulative coding assumes that conflicts and the ways in which they are resolved have lasting influence in a country. Reflecting this, some of the variables cumulate over time in stepwise fashion: if an amnesty or a prosecution is used only once, a peace spell's score would be coded as one in that month through the remainder of the panel. If these activities continue in time periods following the first instance in any given country, the score increases with each new action. For example, if a state ended four previous conflicts by passing amnesty laws, it will achieve and maintain a cumulative

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<sup>562</sup> Helga Malmin Binningsbø and Cyanne E. Loyle, "Armed Conflict and Post-Conflict Justice Dataset: Background Narratives," (Oslo, Norway: PRIO, 2012).

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<sup>564</sup> I also performed the analysis using a five-year threshold, and the results do not change.

score of four following the passage of the fourth law. Theoretically, this coding scheme is needed to capture the relative proneness of certain states to engage in exceptional accommodation versus human rights enforcement over time.<sup>565</sup> In the models analyzing general recurrence, I log the values of these cumulative measures to smooth the wide variation between various countries and peace spells. Table 7.2 provides a summary of each variable, along with the number of countries and post-conflict peace spells included in each analysis.

**Table 7.2. Description of Post-Conflict Data**

<i>Conflict Analysis</i>			<i>Country Analysis</i>		
<b>Time Period</b>	<b>1970-2009</b>		<b>Time Period</b>	<b>1970-2009</b>	
<b>Countries</b>	<b>89</b>		<b>Countries</b>	<b>85</b>	
<b>Conflicts</b>	<b>142</b>		<b>Post-conflict spells</b>	<b>162</b>	
<b>Post-conflict spells</b>	<b>252</b>		<b>Recurrences</b>	<b>98</b>	
<b>Recurrences</b>	<b>138</b>				
	Mean	Min/Max		Mean	Min/Max
Amnesties	0.32	0/7	Sum Amnesties	3.67	0/21
Int'l Trials	0.11	0/9	Sum Int'l Trials	0.433	0/47
Domestic Trials	0.67	0/9	Sum Domestic Trials	5.95	0/141

<sup>565</sup> Importantly, because we have count data for international and domestic trials for each time period, we do not use sustained coding on these variables. All variables constructed with sustained coding are labeled “Cumulative.”

Finally, in the analysis, I draw on peace science and work on liberal peacebuilding to identify 16 independent variables that may potentially influence conflict recurrence.<sup>566</sup> I then split these into four groups. The first group includes the characteristics of the previous conflict and its termination. In general, first-time conflicts that are low intensity and not fought over territorial issues are more likely to remain peaceful after termination.<sup>567</sup> Furthermore, decisive victories, negotiated settlements with power-sharing, and UN peacekeeping are believed to promote peace.<sup>568</sup> To ensure the effect of post-conflict prosecutions or amnesties are not explained by other post-conflict mechanisms, I include a second group of controls measuring the presence of a truth commission or monetary reparations for victims of conflict. A third group pertains to democracy. Because the primary data source, OMTJD, is collected specifically for democratic contexts, and because the end of civil war often coincides with efforts to install a new democratic regime,<sup>569</sup> I incorporate a third group of variables to account for the possibility that post-conflict mechanisms are contingent on democracy. These include a dummy for democracy transitions, Polity II democracy scores, and a measure of judicial independence. The fourth and final group of controls includes structural features of the

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<sup>566</sup> T. David Mason, *Sustaining the Peace after Civil War* (Carlisle, PA: Strategic Studies Institute, US Army War College, 2007); Joshua S. Goldstein, *Winning the War on War: The Decline of Armed Conflict Worldwide* (New York: Dutton, 2012), 301-07.

<sup>567</sup> Barbara F. Walter, "Does Conflict Beget Conflict? Explaining Recurring Civil War," *Journal of Peace Research* 41(2004); Michael J. Quinn, T. David Mason, and Mehmet Gurses, "Sustaining the Peace: Determinants of Civil War Recurrence," *International Interactions* 33(2007).

<sup>568</sup> Caroline Hartzell and Matthew Hoddie, "Institutionalizing Peace: Power Sharing and Post-Civil War Conflict Management," *American Journal of Political Science* 47, no. 2 (2003); Michael Doyle and Nicholas Sambanis, "International Peacebuilding: A Theoretical and Quantitative Analysis," *American Political Science Review* 94(2000).

<sup>569</sup> On the overlap between democratizing and post-conflict contexts, see Dancy, "Impact Assessment, Not Evaluation: Defining a Limited Role for Positivism in the Study of Transitional Justice."



polity that may influence conflict patterns: degree of ethnic fractionalization, military expenditure, mineral rents, wealth, and population.<sup>570</sup>

[TABLE 7.3 HERE]

Table 7.3 reports the results of two single-spell Cox proportional hazard models of the duration of peace following the termination of fighting between conflict dyads, with standard errors clustered by country. Model 1 is the full specification, and Model 2 is a truncated model that removes control variables which have a large number of missing values. The models perform relatively well. In addition to meeting all of the proportional-hazards assumptions required by a Cox model, the coefficients on the control variables confirm findings repeatedly discovered by the peace studies literature. Government victories in war are least likely to resume fighting, as are those that are ended with peace agreements. As predicted by the theory, amnesties of state actors for human rights crimes are associated with longer dyadic peace spells following conflict termination (a negative coefficient indicates lower risk). That is, specific actors that are amnestied for their wartime acts are less likely to resume hostilities. For every additional amnesty, the risk of conflict recurrence decreases by approximately 30%. This finding is robust to both model specifications. Contrary to the theory, however, international prosecutions for human rights crimes do not have a strong relationship to conflict recurrence. While the coefficient is positive, indicating a higher risk, the finding is statistically insignificant. Also, as expected, domestic prosecutions for specific conflict actors do not increase or decrease the risk of conflict recurrence. This finding is also statistically insignificant.

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<sup>570</sup>For a comprehensive list, see Goldstein, *Winning the War on War: The Decline of Armed Conflict Worldwide*.

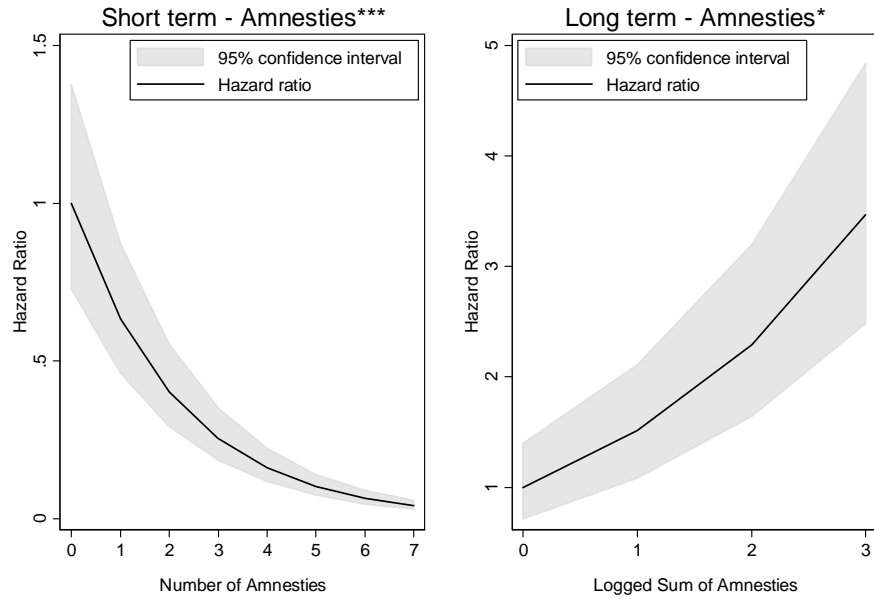
What about the long-term model of general conflict recurrence in a country following the termination of all conflict? Table 7.4 shows the results of two more single-spell Cox proportional hazards models with standard errors clustered by country. Again, the first is a full specification, and the second is truncated to eliminate missingness. These models also perform well, and again demonstrate the power of government victory to end conflict. With regard to the theory, a fascinating relationship emerges: as predicted, the more cumulative amnesties over time, the higher the risk of general conflict recurrence in a country. As the logged measure of cumulative amnesties moves from 0 to 1, indicating that 1-5 amnesties were passed in the post-conflict period, the risk of recurrence increases by around 50%. Domestic human rights prosecutions, however, are one of the most robust predictors of longer peace spells, even controlling for average democracy scores and judicial independence. As the log of cumulative domestic prosecutions increases by 1 unit, the risk of conflict recurrence decreases by 54%. This is the case despite the fact that in the short term, domestic trials appear to do little to dissuade armed actors from returning to hostilities. This could be the first evidence to date that the pursuit of human rights enforcement, and rule of law in general, has a general pacifying effect on societies emerging from severe relations of violence. This may be sobering news for proponents of international courts, though. There appears to be little long term positive effect on peace generated by the operation of international tribunals, a finding which resonates with previous research.<sup>571</sup>

[TABLE 7.4 HERE]

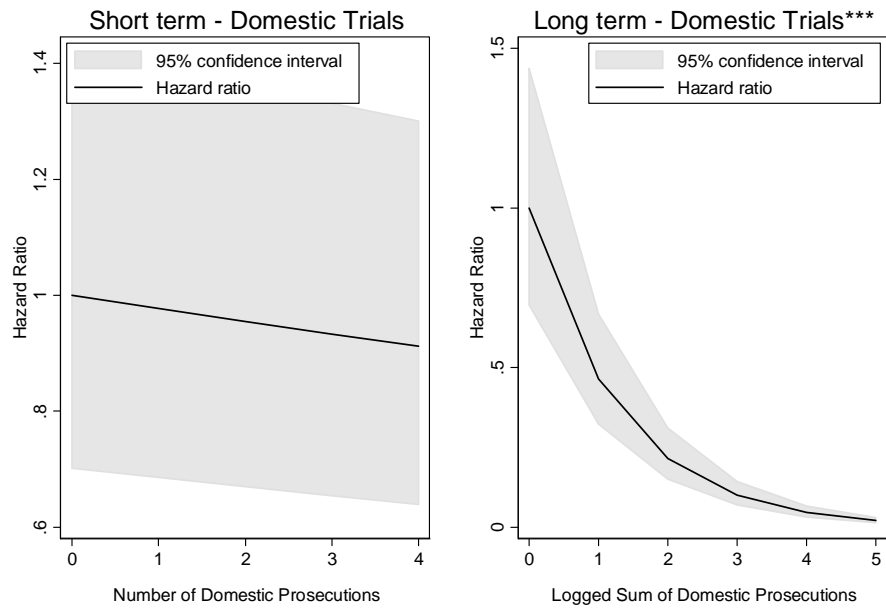
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<sup>571</sup> Meernik, Nichols, and King, "The Impact of International Tribunals on Peace and Human Rights after Civil War."

**Figure 7.1. Effect of Amnesties on Likelihood of Conflict Recurrence**



**Figure 7.2. Effect of Amnesties on Likelihood of Conflict Recurrence**



Figures 7.1 and 7.2 graphically depict the relationship between values on the amnesty and domestic prosecutions variables to short-term and long-term conflict recurrence. Asterisks next to the plots indicate whether the finding is statistically significant. For each plot, an increasing hazard ratio signifies a higher risk of conflict recurrence, whereas a decreasing hazard ratio signifies a lowered risk of violent conflict and war. One can clearly observe that the direction of the relationship between amnesties and conflict resumption changes when we consider the propensity for specific actors to resume fighting against the propensity for *any* actors within the country to take up arms against one another. The lesson is simple: amnesties are good for preventing specific actors from fighting again, but they are not good for generating rule of law cultures that can stop conflict in general over the long run. Finally, while domestic trials might do very little in the short term to stop conflict, the more that country engages in human rights enforcement over time, and the stronger the law becomes, the more likely that country will experience years of peace well into the future.

#### **7.4.1. Discussion**

This is the first comprehensive test of conflict recidivism that weighs the effects of amnesties and human rights mechanisms. How does this help us adjudicate between rule of law and accommodationist models? First, when it comes to *peacemaking*, amnesties might be a useful tool for stopping greedy or aggrieved armed combatants from returning to hostilities. Amnesties appear to have a specific preventative function. Pursuing trial justice for human rights violations, on the other hand, does very little to stop specific combatants. We should not expect it to. The aim for rule of law proponents

has rarely been articulated as the desire to resolve disputes that have already escalated to violence; usually, their focus is on sending a message to future actors, and making a statement about the power of law. An additional takeaway regarding peacemaking is that international prosecutions, normally the recipient of heavy-handed criticism for being counter-productive, do not appear to significantly increase the risk of conflict recurrence—even when taking into account early failures in Rwanda and Kosovo. One may generalize that international criminal interventions are weakly related to the resumption of specific conflicts, but the effect is very weak.

Second, when it comes to *peacebuilding*, amnesties might be a double-edged sword, especially when they are continually resorted to by governments over time. Amnesties represent exceptional behavior that is not centered in the law, and they signal that whoever possesses strength will be able to circumvent normal processes of accountability. While this may play well in the immediate post-conflict environment, over time amnesties are associated with a heightened propensity to experience future violent insurgency. Second, diligent domestic efforts at accountability over time, as have taken place in Guatemala, may pay institutional and behavioral dividends; members of society who believe there to be a functioning legal architecture in the country are less likely to take up arms. The data do indicate that this effect is not likely to come from international ‘transplants,’ as others have suggested.<sup>572</sup> To date, international justice has no demonstrable long term effect on conflict recurrence. This is likely because

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<sup>572</sup> Drumbl, *Atrocity, Punishment, and International Law*.

international interventions occur in difficult situations, and they are relatively new interventions. Still, the jury is still out on the long term.

## 7.5. CONCLUSION

My results should be read with a couple of criticisms in mind. First, the study examines the peace-promoting effect of TJ in post-conflict contexts. Yet, the peace versus justice debate, particularly with respect to international trials, also deals with the effect of accountability on *conflict duration*. My findings do not speak to this part of the debate because I look specifically at cases where conflict has already ended, at least temporarily. Second, this study, like others of civil war, considers only battle-related deaths, so it overlooks other persistent post-conflict threats like violent crime.<sup>573</sup> It may very well be that the evidence we are examining can account for the absence of all-out war, but it cannot capture variations in quality of life or human development in the post-conflict period, issues of the greatest concern. Finally, as with all quantitative studies, the measures miss significant differences in how various mechanisms are implemented in different contexts. The quality of justice produced by accountability mechanisms of the same ‘type’ could vary considerably based on factors such as institutional structures, resources, and personnel. Nonetheless, I view the main contribution of this piece to be the development of testable theory of prevention that combines ideas from different approaches to peacebuilding. Overall, the findings urge a more nuanced view of the rule of law v. accommodation debate.

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<sup>573</sup> Charles T. Call, ed. *Constructing Justice and Security after War* (Washington, DC: United States Institute of Peace, 2007).

Eric Posner and Adrian Vermuele unveil an ironic convergence of expectations between hard-core legalists and accommodationists when it comes to criminal trials, which is that those trials that do not become part of a sustained effort at peacebuilding—i.e. those perceived as show trials—are likely to have a deleterious effect on the polity.<sup>574</sup> The authors contend that the most successful trials are those that come to be perceived as regular and ordinary. In line with my theory, I argue that the more common trial processes become, the greater the positive effect on peacebuilding. Sustained domestic prosecution for core human rights crimes indicates continuity in legal institutions, and signals a concerted effort on the part of the government to address violations. With respect to international trials, limited judicial activity might be less peace-promoting than drawn-out domestic efforts for a couple of reasons. First, international actors might target high-profile veto players in the conflict immediately following the onset of a peace spell, thus inspiring those actors to renew fighting. Second, international efforts might promote a nationalist backlash against outside intervention. In some instances, domestic constituencies see international intervention as an affront to their own state's ability to hold offenders accountable. One such example is the Democratic Republic of the Congo,

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<sup>574</sup> Eric A Posner and Adrian Vermeule, "Transitional Justice as Ordinary Justice," *Harvard Law Review* 117, no. 3 (2004): 764-65. "The dominant instinct among academic commentators on transitional justice is to condemn transitional justice measures wholesale, either on the ground that transitional measures are retroactive and thus inherently illiberal, or on the closely associated ground that new regimes should reserve their energies exclusively for forward-looking measures that contribute to state building.... But this posture is no more coherent than would be a parallel condemnation of all the measures that legal systems ordinarily use to manage change."

where the general opinion is that the ICC is meddling in affairs that would more aptly be handled by state.<sup>575</sup>

The more sustained outside efforts are, however, the more likely it is that partnerships can grow between international and local institutions, a process that has unfolded slowly in the Balkans. Partially to remove international attention, states have volunteered to take over prosecutions from the ICTY, but only after they strengthened their own ROL institutions—a process that arguably ‘courted democracy.’<sup>576</sup> Signs are beginning to emerge that the international community is learning some of these lessons, and incorporating them into their post-conflict operations. For example, former ICC prosecution Luis Moreno Ocampo used his powers to bring cases against Kenyan leaders thought to be responsible for post-election violence in 2008. A strategically sound decision was to bring cases against leaders from different parties (KANU/ODM’s William Ruto and the PNU’s Uhuru Kenyatta), who represent different ethnic constituencies within the country. After some resistance, the leaders reported to The Hague, where they completed pre-trial hearings. Though the reception of the ICC cases has been divided down ethnic lines (*Kalenjin v. Kikuyu*), one might argue that the publicity and the interchange between the ICC and Kenyan society has had two impacts: first, it has made the local judiciary bolder in its response to bullying from local gangs and second, it made the propensity for organized gang violence around the elections in March 2013 far lower. In the run-up to the March elections, Justice Willy Mutunga

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<sup>575</sup> Philip Clark, "As the Bullets Fly, Doing Justice from Afar: Challenges for the Icc in the African Great Lakes," in *The Potential Role of Transitional Justice in Ongoing Conflicts* (Jerusalem 2011).

<sup>576</sup> Nettelfield, *Courting Democracy in Bosnia and Herzegovina: The Hague Tribunal's Impact in a Postwar State*.



openly criticized political gangs called Mungiki for being a ‘cabal of retrogrades,’ and he issued a statement that the judiciary would continue to cooperate with the ICC and investigate presidential candidate Uhuru Kenyatta despite threats.<sup>577</sup> This is quite a statement from a judiciary that has a history of servility to corrupt executive institutions.<sup>578</sup> Justice for the election violence in 2007 remains pending, as one of the ICC’s indictees, Uhuru Kenyatta, won the March 2013 elections. But it is significant that this election proceeded with very little violence, and those who lost have accepted defeat. This may, then, be an example of unintended positive consequences of ICC intervention, in the form of democratic change.

Whatever one’s verdict regarding the prudence of ICC involvement in Kenya or elsewhere, what appears from our examination is that evidence supports the notion of a ‘liberal peace,’ but it is not where people have been looking. Indeed, international interventions do not appear to pacify societies—at least not yet. However, the development and sustained activity of domestic judiciaries, who hold state operative responsible for abuses committed against citizens, are less likely to witness the resumption of conflict in the long-term. In sum, if states and citizens are looking for solutions to their conflicted past, then they might find it in homegrown procedures of accountability.

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<sup>577</sup> "Kenya's Willy Mutunga 'Threatened' over Kenyatta Case," *BBC News Africa* February 20, 2013.

<sup>578</sup> Makau Mutua, "Justice under Siege: The Rule of Law and Judicial Subsistence in Kenya," *Human Rights Quarterly* 23(2001).

**Table 7.3. Cox Models of Conflict Recurrence, Dyadic Level of Analysis**

	Model 1	Model 2
Previous Episodes	0.0661 (0.0655)	0.0925 (0.0655)
Major Civil War	0.104 (0.460)	0.0923 (0.378)
Territorial Conflict	-0.0998 (0.241)	-0.168 (0.188)
Rebel Victory	-1.081* (0.613)	-0.901* (0.512)
Government Victory	-2.685*** (0.639)	-1.600*** (0.350)
Peace Agreement	-0.937** (0.439)	-0.602* (0.310)
UN Peacekeeping	0.623** (0.273)	0.632*** (0.232)
Amnesty within 2 Years	-0.456*** (0.162)	-0.348*** (0.126)
Int'l Prosecutions within 2 Years	0.0827 (0.143)	0.0168 (0.147)
Domestic Prosecution within 2 Years	-0.0230 (0.181)	-0.101 (0.163)
Truth Commission within 2 Years	0.217 (0.200)	0.0347 (0.207)
Reparations within 2 Years	-1.250* (0.705)	-0.927 (0.597)
Democratic Transition	-0.216 (0.289)	-0.210 (0.186)
Polity II	0.00247 (0.0201)	0.0117 (0.0122)
De Facto Judicial Independence	0.0354 (0.111)	
Ethnic Fractionalization	0.604 (0.744)	
Military Expenditure ( <i>ln</i> )	-0.159 (0.181)	
Mineral Rents / % GDP	-0.106 (0.207)	
GDP per capita ( <i>ln</i> )	-0.0823 (0.0958)	
Population ( <i>ln</i> )	0.122 (0.116)	
<i>Countries</i>	71	89
<i>Peace Spells</i>	165	252
<i>Failures</i>	94	138
<i>Time at risk</i>	17418.5	29571.4
<i>Log-Likelihood</i>	-405.1	-660.1

**Table 7.4. Cox Models of Conflict Recurrence, Country Level of Analysis**

	Model 3	Model 4
Previous Civil War Duration	0.000589 (0.00198)	-0.000751 (0.00185)
Max Number of Armed Groups	0.641* (0.333)	0.568*** (0.200)
Previous Conflict Episodes	0.00512 (0.145)	0.106 (0.119)
Previous Major Civil War	0.140 (0.319)	0.512*** (0.184)
Territorial Conflict	0.0770 (0.305)	0.148 (0.230)
Rebel Victory	-0.0683 (0.645)	-0.0188 (0.366)
Government Victory	-1.540*** (0.468)	-1.198*** (0.357)
Peace Agreement	-0.549 (0.525)	-0.601 (0.367)
Cumulative UN Peacekeeping Years (ln)	0.0698 (0.0829)	0.0162 (0.0606)
Cumulative Amnesties (ln)	0.326* (0.202)	0.414** (0.170)
Cumulative Int'l Prosecutions (ln)	0.140 (0.186)	-0.140 (0.145)
Cumulative Domestic Prosecutions (ln)	-0.936*** (0.185)	-0.768*** (0.157)
Sum of Truth Commission Years (ln)	-0.251** (0.127)	-0.117 (0.109)
Reparations	-0.614 (0.724)	0.181 (0.554)
Democratic Transition	0.00822 (0.335)	-0.116 (0.266)
Polity II	0.0797** (0.0364)	0.0200 (0.0214)
Ethnic Fractionalization	0.335 (0.924)	
De Facto Judicial Independence	-0.147 (0.258)	
Military Expenditure (ln)	0.0635 (0.117)	
Mineral Rents / % GDP	-0.0732 (0.0503)	
GDP Per Capita (ln)	-0.327** (0.135)	
Population (ln)	0.238 (0.158)	
<i>Countries</i>	72	84
<i>Spells</i>	131	161
<i>Failures</i>	79	98
<i>Time at Risk</i>	15633	17254
<i>Log-Likelihood</i>	-300.1	-405.2

**CHAPTER 8: TOWARD POSSIBILISM IN HUMAN RIGHTS POLITICS**<sup>579</sup>

Two of the more formidable arch-criticisms of the human rights project are, first, that it tolerates a ‘radical decoupling’ between government promises and government practices, and second, that rights-based legalism trades off with more productive forms of collective political action.<sup>580</sup> I believe that I have gone some way toward testing whether these lines of attack are based in the historical record. I find sufficient reason to be skeptical of skeptical arguments. Radical decoupling appears in the short term because a politics of human rights emerges in precisely those places where rights are being routinely violated. And while it is no doubt true that rights-based legalism often produces underwhelming results, there is considerable evidence of a productive, mutually reinforcing relationship between homegrown constituencies of resistance and the strengthening of human rights law at the domestic level. Even further, the legal developments that results from rights-based dissent can decrease repressive violence down the road.

One of the primary reasons that arch-criticisms are so convincing is that in the social world, it is difficult to track the layers of consequences, and ‘consequences of consequences,’ that send ripples through history.<sup>581</sup> When we witness events unfolding, or notice certain political ideologies gaining traction, it is difficult to separate the engines

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<sup>579</sup> This material is based upon work supported by the National Science Foundation under Grant No. 0961226.

<sup>580</sup> For radical decoupling, see Hafner-Burton and Tsutsui, "Human Rights in a Globalizing World. The Paradox of Empty Promises." On tradeoffs, see Kennedy, "The International Human Rights Movement: Part of the Problem?."

<sup>581</sup> I borrow the term ‘consequences of consequences’ from Boris Pasternak. See Boris Pasternak, *Dr. Zhivago*, trans. Richard Pevear and Larissa Volokhonsky (New York: Vintage Books, 2010 [1957]), 600.

of progress from the hollow fad, or more simply, to separate the signal from the noise.<sup>582</sup> We are too close to real-time happenings to see into the distant future, and so our criticisms, like our predictions, remain attached to the event. This is perhaps why French historian Fernand Braudel, the premier theorist of time in the social sciences, thought it prudent to separate history into three parts: the *événementielle* (historical instant), the conjuncture, and the *longue durée* (long duration). “For nothing is more important, nothing comes closer to the crux of social reality than this living, intimate, infinitely repeated opposition between the instant of time and that time which flows only slowly.”<sup>583</sup> My research examines developments at the conjunctural (or 10-30 year) time period, and perhaps unremarkably, I find the picture to be different than that painted by those analyzing the *événementielle*. Research has yet to demonstrate the relationships discovered in the previous chapters. The aim for the remainder of this conclusion is, first, to revisit the goals and the findings of my dissertation. Second, I present a list of suggestions for scholars and policymakers studying human rights politics and law. And finally, I end with a consideration of gaps in my account, and hopefully point the way toward fruitful avenues for future research.

### **8.1. REVIEW OF THEORY AND FINDINGS**

In the chapters of this dissertation, I attempted to make two main contributions. The first was to develop a theory of human rights legal impact that centers on the efforts of domestic constituencies, or groups that frame their dissent and mobilize the law in line

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<sup>582</sup> Nate Silver, *The Signal and the Noise: Why Most Predictions Fail, but Some Don't* (New York: The Penguin Press, 2012).

<sup>583</sup> Fernand Braudel, *On History* (Chicago: The University of Chicago Press, 1982), 26.

with international norms. My theory conceptualizes a reservoir of power attached to international law that is normally not considered in models that focus on the capacity to regulate states—or treat this external body of law as powerful only to the extent that it can be enforced from the outside by international institutions or armies. That reservoir of power attached to human rights law is called constituent power. Constituent power is expressed by groups acting in concert in pursuit of greater human rights protections. These constituencies use threats of general civil unrest to pressure governments into making concessions, and they are instrumental in promoting the development of path-dependent legal institutions that protect civil liberties at the domestic level.

The second, and perhaps more significant contribution, comes from the statistically informed process-oriented approach to human rights change. Often those who study institutions from a historical perspective have an animosity toward numeracy, or toward the use of aggregate-level statistical inference. This is understandable. Numbers can hide as much as they can reveal. However, I hope to have shown the ways in which one can use statistics to animate studies that consider the processual development of institutions and their impact. I employed various tactics, including the use of duration models that incorporate time and fixed-effects regressions that track change over time isolated to particular countries. I also spent a good deal of time preparing my dataset to incorporate variables that were measured at different time periods (like short-term vs. long-term prosecutions). But the methods I employed were not just statistical. I also peppered the studies with examples, some extended, to demonstrate the historical richness of human rights change over the last few decades.

The payoffs of this approach, I hope, are three. The first is that the focus on processes in different contexts allowed me to address two levels of questions—about both the causes of human rights legalization and the impacts of that legalization. This addresses concerns about epiphenomenality, or the concern that the effect of law is spurious, attributable to coincidental political alignments. I went to great pains to show that, in fact, legal developments often originate from the demands of people who care about human rights within the country, and that the institutions established in times of transition are actually able to get some things done in the future. The second payoff is that zooming out allows us both to understand why studies within the Correlates of Repression (COR) approach have found certain difficult-to-explain relationships, and to provide a more comprehensive counter-explanation. For instance, the reason that dissent *and* treaty ratification are correlated with repression in autocracy is that dissent and treaty ratification are part of the *same process* of regime change. A third and final payoff to this approach is that it allows us to see patterns that were simply not evident before. For example, no theorists have yet discovered that certain human rights legal actions have *different impacts in different time periods*.

The major findings of this dissertation is that human rights law and legal action can exert a positive impact on democracy, the protection of human rights, and the prevention of conflict. Out of these studies, I have discovered, first, that human rights law is implicated in the process of democratization, though it might *seem* to contribute to repression in autocracy. That is, the relationship between human rights law and authoritarian entrenchment is a deceptive findings based on analysis centered in the short

term. When we zoom out, we see that both the reason for ratification and for increases in repression is the flagging power of the autocratic regime.

I also found that human rights prosecutions amidst democratization do not, contrary to what people have argued, present insurmountable obstacles in transitional periods. The notion that backlash will overwhelm efforts at strengthening human rights law is one that is based on short-term reading of events. But when we look over time, it is the case that human rights enforcement can flourish in a variety of contexts, and that domestic legal institutions can have an effect on repressive practices and conflict prevention down the road. The initiation of transitional justice and legal enforcement, though, will not be immediately followed by the betterment of human rights protections, or sudden ‘culture shift’ among security forces or insurgents. We should not expect sudden positive changes to be ushered in by well-intentioned action, but that well-intentioned action should not necessarily be marginalized, or derided for being naïve or foolish. It is not my claim that human rights legal developments *always* result in positive change over time, and I have tried to discover in which places we might expect some improvement. At the same time, though, human rights legal action will not always fail, even in extremely difficult circumstances. The main ingredient for success is having widespread support from local human rights constituencies who can make sustained demands for change.

Finally, in the long term, criminal prosecutions in new democracies can have a deterrent effect, and this effect is not dependent on other political deals, like amnesties, that were issued during the transitional period. In fact, early amnesties seem to diminish



the chances that a country will move down a path toward human rights protections. This speaks to the possibility that choices in transitional moments will be path dependent: the farther down one institutional path a regime travels, the more returns will accrue to those institutions. In the long term, we also see that those countries with greater legal responses to human rights violations over time experience less general risk of conflict recurrence. Moreover, prosecutorial activity does not appear to be related to increased risk of civil war in the short or in the long terms. These findings are not ironclad, and I expect that they will provoke a good deal of skepticism among social science, which is wary of claims made about progressive attempts to alter the course of conflict or injustice in the world. With all of this in mind, I would like to outline the implications of my research for both scholars and policymakers.

## **8.2. IMPLICATIONS**

### **1. Focus Less on Treaties**

International legal treaties are not an end in themselves. This almost goes without saying, but International Relations has spawned a whole research agenda on treaties (by my count, scholarship has produced around three dozen significant correlates of either ratification or compliance with the Convention Against Torture alone). The primary objective of this agenda has been to establish whether, net other factors, human rights law is ‘effective’ or whether it ‘matters.’ That effectiveness, as we have seen, is typically measured by correlational averages between ratification status and the degree to which human rights are violated. We should not cease to consider realistically law’s effectiveness. However, questioning the independent effects of treaty ratification is an

unfair test of human rights law, and perhaps most useful as a straw man for skeptical thinkers to knock down. Law itself *can never* alone produce policy implementation; this takes willing implementers. Yet IR theorists using statistics must often make assumption that the mere presence of law by itself is meant to produce results without delay. There is likely a hidden reason that this research agenda has unfolded the way that it has: data on treaty ratification can be painlessly assembled from U.N. records, or secondary web-based sources. That means treaty ratification data can be quickly collected and inserted into prefab regression models. Without mincing words, the truth is that it is simply *easy* to test big theories about treaty commitment and compliance.

Pointing this out does not amount to arguing that research on treaties is a dead end. This dissertation has benefited greatly from the many research papers and books devoted to the effects of international human rights law. But it could be the case that the study of the causal effect of treaties is reaching a point of diminishing returns. Indeed, it may seem strange that in a dissertation devoted in part to the topic of treaties, the author would in the conclusion argue that future researchers should move away from a study of treaties. However, one of the major findings of this dissertation is that treaties *themselves* do not have an independent effect on leader behavior. Treaties do not change autocrats' behaviors, and they are not significantly associated with repressive practices in new democracies. Findings that argue to the contrary are likely sensitive to slight changes in variable specification, the inclusion of more years in the analysis, or the addition of omitted variables. A better way of thinking about treaty ratifications is that they are embedded within larger processes of change. This argument has resonance with activists

on the ground, who understand it to be a rather obvious point. When I was conducting interviews of lawyers and activists in Israel and Sri Lanka in 2011, they would often seem puzzled when asked about the impact of treaty ratifications. Lawyers see treaties as a useful tool for developing a body of actionable law, but they do not understand them to be all that significant, politically or socially. The implication for my research for scholars *and* policymakers is that less attention should be devoted to treaties, *per se*, and more attention should be given to the variations in mobilization and implementation of the law that has formed out of those treaties.

## 2. Account for Time and Information Effects

According to Google's Ngrams Viewer, a web-based program that allows a user to study trends in word usage among Google's entire catalogue of books, by far the most used word in written English is 'time.' Time is the organizing principle of modernity, and without it the contemporary world would not make sense. Yet social sciences have not afforded time the role it could potentially play in most analyses. Some theorists have discussed how politics are speeding up, and our expectations are accelerating with them.<sup>584</sup> We now think that reforms should take hold as soon as they are instituted, or at least we pretend that this is the case in order to make partisan arguments. Information, too, is subject to acceleration. Written information in the world keeps doubling at faster and faster rates, meaning that its growth is exponential. Datasets, another word for frozen matrices of information, are also growing in number. Furthermore, analysis of these datasets can happen faster than ever before. Years ago, people 'running regressions' like

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<sup>584</sup> Paul Virilio, *The Information Bomb* (London: Verso, 2005); William E. Scheuerman, *Liberal Democracy and the Social Acceleration of Time* (Baltimore, MD: Johns Hopkins University Press, 2004).

those that appear in this dissertation would have had to punch holes systematically in a series of punchcards, feed those punchcards into a large computer, and wait for hours for the results to be produced. Now we simply type one command, and out pop the results, almost immediately.

The acceleration of the political world, the increased ease with which we can retrieve data and run statistical models, and the added difficulty of converting all of that information into *knowledge*, creates two issues that we should be mindful of. First, we need to account for the possibility that some political change will take generations, and we need to perform our assessments in ways that attend to that possibility. Second, we should keep in mind that our data is subject to bias as a result of information effects. Promising new work on human rights is getting more and more sophisticated, and generating intriguing discoveries regarding the gap between appearance and reality caused by events-based histories and the changes in *data* itself the happen with time. For instance, a talented methodologist named Chris Fariss has proven using Bayesian statistics that data measuring repression are inflated over the last twenty years because information, reporting and ‘accountability standards’ have improved.<sup>585</sup> What this means is that though government repressive violence is declining, more data makes it *appear* as if repression is worse. In other words, the human condition may be improving, but due to a steady stream of negative information produced in part by human rights activists, we are not seeing the improvements. In reference to data on war, this is an effect that Joshua Goldstein refers to as chronological bias, or “...the problem of having more information

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<sup>585</sup> Fariss, "Have Levels of Political Repression Changed? ."

about recent events than long-past events.”<sup>586</sup> In the future, these informational issues should be accounted and controlled for more directly in research on repression and violence.

### **3. Consider *Positive Unintended Consequences***

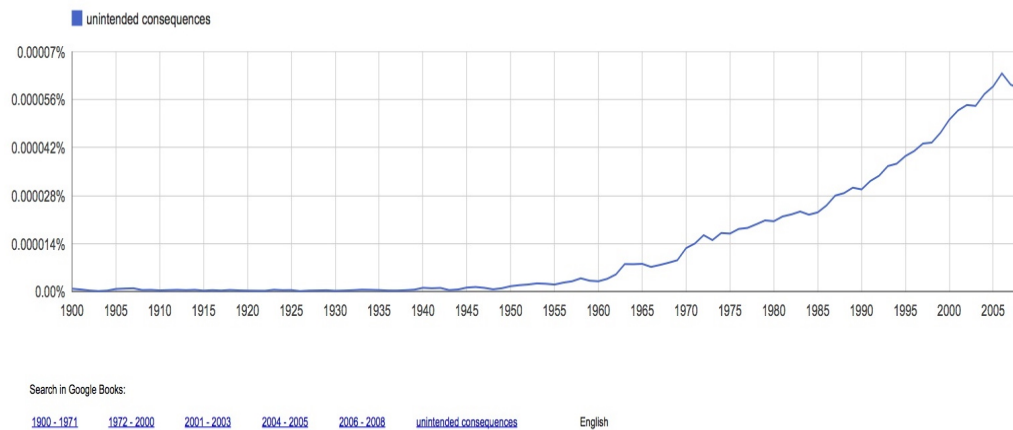
In previous work, I have noted that the study of human rights law and repression is pervaded by a ‘negativity bias.’ By this, I mean that it is incredibly difficult to prove the positive impacts of various policies, even if one is objectively convinced that those policies are working. The reason for this difficulty is “positive assessments are saddled with the burden of proving a progressive impact” while holding “all other sources of variation constant.”<sup>587</sup> This is far more difficult than proving the negative, or locating some thorny negative unintended consequence of policies, which are manifold. I began in Chapter 1 by introducing the work of Albert Hirschman, who documented the remarkable tendency for social scientists to speak of negative unintended consequences, almost as a kind of orthodoxy. It appears that he was onto something. Figure 8.1 shows a Google NGrams word search of the term “unintended consequences” from 1900 to 2010. The chart shows a steady increase in the use of the term since the early 1960s.

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<sup>586</sup> Goldstein, *Winning the War on War: The Decline of Armed Conflict Worldwide*, 241.

<sup>587</sup> Dancy, "Choice and Consequence in Strategies of Transitional Justice," 414.

**Figure 8.1. Percentage of Books Using ‘Unintended Consequences’ Over Time**



Strikingly, the discussion of unintended consequences is always focused on those that are *negative*, but what of the possibility that many unintended consequences of policy and progressive action are positive—that is, *positive unintended consequences*? An example related to human rights law comes from the involvement of the International Criminal Court in Kenya, as discussed in the conclusion of Chapter 7. While it remains too early to tell what its long-term impacts will be, it is a definite possibility that one result of ICC indictments and prosecutions against prominent politicians in the country was the peaceful operation of relatively free and fair elections in March 2013. The reason is that the country’s leaders and their hired thugs who previously engaged in post-election violence knew that the world was watching, as the ICC had achieved a good deal of publicity in Kenya by engaging in fairly extensive outreach over the past few years. The peaceful election of Uhuru Kenyatta, one of those indicted by the tribunal, will no doubt

be understood as a general failure by critics of the ICC. But the possibility that the court has promoted democracy, even when it is not directly attempting to do so, might be worth considering when we are assessing impacts. Moreover, the concept of positive unintended consequences in general might be worth analyzing, at least as a counterweight to the undue emphasis that is placed on negative outcomes.

#### **4. Avoid Overestimating Western Influence**

Struggling against imperialism is certainly a worthy cause given the abuses of colonial expansion, but lumping everything to do with rights, democracy, or markets into the broad category of Western Empire, and then railing against that Empire is a strategy that soon loses its luster.<sup>588</sup> Within the field of human rights law, it is common for people to frame the operations of international tribunals, or the appeal to international treaties, as a direct and unmediated extension of American or Western interest, as if states in the Global South had almost nothing to do with the development of international law. This could not be farther from the truth, making this perspective itself rather hubristic: only critics from Western countries could take seriously the idea that the West has been mostly responsible for the advance of human rights in the last two decades. The findings of the analysis within this dissertation show that rights-based action is occurring all over the world, and most of this action is independent of Western influence. A different manifestation of this hubris is assuming that Western powers can directly alter the

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<sup>588</sup> I do want to be very clear that I am not referencing Michael Hardt and Antonio Negri here. I find their ideas elegant and useful, and while about capital-E Empire, their theory does not situate international human rights law on the side of networked war, but on the side of the resisting multitude. See Hardt and Negri, *Multitude: War and Democracy in the Age of Empire*, 273. "Significant grievances in terms of civil rights continue to be expressed today...Increasingly, particularly in the subordinated countries, where the nation-state is not capable of guaranteeing rights, protestors appeal directly to international and global authorities, shifting the discussion from 'civil rights' to 'human rights.'"

domestic politics of other countries to slow the pace of change or alter the decisions that are made based on domestic politics (see the next point). Thus, both critics of imperialism and agents of imperialism share an unrealistic notion that the ‘West’ has such unchecked power that it can mute the agency of local actors. It cannot.

### **5. Understand Gradualism Without Preaching Sequencing**

Conservative observers frequently maintain that human rights enforcement should be delayed, or embedded within other compromises like until political conflicts have been neutralized and the new democratic regime has had time to consolidate. The logic here is that political transitions proceed more smoothly if demands for justice are temporarily put on hold while functioning institutions are constructed. The idea of sequencing has long been in the conservative lexicon, from responses to the abolitionist movement to arguments against desegregation. Implicit in this idea are a few assumptions. The first is that *it is possible* to delay reforms in states undergoing regime change. The second is that long term policies are not dependent on those that come before. For example, it is possible to have little enforcement early in a transition, and increase it later. The third and final assumption is that the political risks associated with pursuing human rights enforcement are greater in the short term than they are in the long term. Unfortunately, neither critics nor proponents have analyzed these issues of timing and sequencing in adequate fashion. I side with Seyla Benhabib, who argues that such thinkers tend to “ignore that international human rights norms empower citizens in



democracies by creating new vocabularies for claim making, as well as by opening new channels of mobilization for civil society actors...<sup>589</sup>

Some bristle at the assumption underlying a sequencing approach. First, there is reason to be suspicious of claims that transitions can be crafted and properly sequenced (perhaps with the assistance of cautious advocates from the outside). To cite Thomas Carothers, “the core sequentialist argument rests squarely on the belief that the West does have power to shape political change in other societies precisely by convincing frustrated, mobilizing citizens to ignore—perhaps for decades—their own heartfelt desire to take part openly and actively in politics.”<sup>590</sup> A political theory that deals seriously with the influence that domestic constituencies have on the development of justice policies amidst democratic transition might need to account for the embeddedness and irreversibility of justice policies within larger processes of change.<sup>591</sup> Second, choices involving justice policies are the result of demand, not simply supply. For this reason, “The challenge of reckoning with the past is not like a fancy buffet, where one pauses to review a menu of options and then chooses the most attractive dishes: ‘I’ll take two truth commissions, one short trial, but no property issues, thank you.’ If only the challenges of governance were this easy!”<sup>592</sup> Policymakers should think through the ways decisions concerning human rights made at one point in the transition might affect decisions down the road, rather than assuming that each policy can be independently crafted in any given time period.

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<sup>589</sup> Benhabib, "Claiming Rights across Borders: International Human Rights and Democratic Sovereignty," 696.

<sup>590</sup> Carothers, "The 'Sequencing' Fallacy," 23.

<sup>591</sup> On transitional justice as embedded, see Dancy, "Choice and Consequence in Strategies of Transitional Justice."

<sup>592</sup> McAdams, "Transitional Justice: The Issue That Won't Go Away " 305-6.

Finally, the risks attached to rights enforcement have been argued to have effects which differ by proximity to the transitional moment: those that come early may cause more severe backlash. This has bred caution among some observers and advisers. Robert Meister argues that the paradigm of transitional justice has evolved into one that promotes endless waiting for those victims who have been tormented with injustice, and Reem Abou-El-Fadl, speaking in the context of the Egyptian (non)transition, has issued direct challenges to the conventional wisdom of transitional justice, which “appears to offer mechanisms for a more conservative conception of transition...”<sup>593</sup> In the end, for her, “the call for transitional justice may have to become a strategy for political pressure in Egypt, before it can become a process for genuine change.”<sup>594</sup> For policymakers, the lessons is this: change may take time, i.e. it might be gradual, but *intentionally* delaying will only halt momentum. Therefore, we should approach the world through the scheme of gradualism without sequencing.

## 6. Treat Law as Pragmatic

The next point dovetails from these thoughts on sequencing. One of the more troubling developments of the last decade is innovation of the word ‘lawfare,’ a term that has guided extensively reportage on by actors in countries like Israel, and that is even the subject of a blog written by American legal scholars.<sup>595</sup> According to the blog, “Lawfare refers both to the use of law as a weapon of conflict and, perhaps more importantly, to the depressing reality that America remains at war with itself over the law governing its

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<sup>593</sup> Meister, *After Evil: A Politics of Human Rights*; Abou-El-Fadl, "Beyond Conventional Transitional Justice: Egypt's 2011 Revolution and the Absence of Political Will," 320.

<sup>594</sup> "Beyond Conventional Transitional Justice: Egypt's 2011 Revolution and the Absence of Political Will," 330.

<sup>595</sup> See [www.lawfareblog.com](http://www.lawfareblog.com)

warfare with others.” The impression that engagement with the law is a source of radicalism, or a weapon, is one that is disturbing on many levels. Implied is the idea that defeating enemies might require exiting the legal terrain altogether, and engaging only in counter-insurgency techniques that are secret, non-transparent, and not guided by the rule of law but instead by national security imperatives. Bandyng about the term lawfare, or attacking the law for being radical, is thus one of the more right-wing theoretical positions fathomable.

Using law to mobilize and moderate political conflict, as opposed to picking up actual arms, is one of the more peaceful tactics of political change available to resisters—it so peaceful that it is often belittled by *actual* radicals, who want change to come with a revolutionary bang. Limiting legal options on the basis that they assist the enemy thus seems to amount to an invitation to a constant state of war. Policymakers need to acknowledge that legal tactics should be supported, not attacked, and legal mobilization should be encouraged as pragmatic action, rather than fanaticism.

## **7. Support Local Groups**

A final for policymakers is that it is extremely important to empower local groups that are seeking to mobilize against abusive governments. This almost goes without saying, but follow-through on capacity-building remains remarkably absent. The amount of aid earmarked for democracy promotion and human rights, relative to the amount earmarked for military purposes, is paltry. Nancy Bermeo has systematically collected data on this, and she presents this in ratio form for a number of countries. Just for Middle Eastern countries, which are the new site for the development of potentials human rights

legal commitments and action, the figures are arresting: Bahrain (258:1), Oman (245:1), Morocco (103:1), Jordan (73:1), Egypt (65:1), Tunisia (16:1), and Yemen (7:1).<sup>596</sup> Commenting on this overwhelming discrepancy between military and democratic goals in the Middle East, Benoit Challand argues that “Despite widespread talk of ‘exporting democracy,’ it seems as if Western money does not buy democracy in the region, but rather its repression...”<sup>597</sup> It is not too late to assist human rights constituencies that have emerged and have even spread through this area of the world traditionally thought to be impervious to such pressures. To quote expert Shadi Mokhtari, “Domestically, where there have been uprisings (not facing crippling state violence) human rights have emerged at the fore of calls for political change and local human rights activists long relegated to the realm of the out-of-touch Westernized elite, have gained considerably in their legitimacy, numbers, and influence.”<sup>598</sup>

True idealism would be thinking that the United States or other states might change their aid policy in a direction toward human rights promotion. I am not foolish enough to believe that this will happen, but this is not necessarily cause for despair. Policymakers need not come from government, but can also come from the private sector. In 1998, a student resistance movement, *Otpor*, developed to oppose the strong-armed, non-democratic policies of Slobodan Milosevic. It started with 15 students at University of Belgrade, and within two years blossomed into a movement of 30,000 people and 126 chapters. Former members of *Otpor* now operate CANVAS, Centre for

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<sup>596</sup> Nancy Bermeo, "Democracy Assistance and the Search for Security," in *New Challenges to Democratization*, ed. Peter Burnell and Richard Youngs (London: Routledge 2010).

<sup>597</sup> Challand, "The Counter-Power of Civil Society and the Emergence of a New Political Imaginary in the Arab World," 273.

<sup>598</sup> Mokhtari, "The New Politics of Human Rights in the Middle East."

Applied Non-Violent Action and Strategies, an organization that aims to help groups in other countries lead demonstrations to change government in line with human rights demands. *Otpor*, and CANVAS are backed by an unlikely source of funds and support, Peter Ackerman, managing director of Rockport Capital Incorporated. Ackerman is also the founder of the International Center on Nonviolent Action and writer of the 2006 book *A Force More Powerful*. According to reporter William Dobson, “Activists from Egypt, Iran, Russia, Venezuela, Zimbabwe, and dozens of other countries know Ackerman well.”<sup>599</sup> One lesson from my research that might assist individuals like Ackerman and other private actors aspiring to contribute to the struggle against repression is that human rights legalization should be encouraged as a demand for constituent groups whenever and wherever they are provided support.

#### 8.4. FINAL THOUGHTS

After all this, I imagine that many will remain unconvinced of my findings. At the very least, I assume that some will reject the *tone* of this work, because it implies that the triumphant human rights discourse and its legal offshoots are doing some good. I am sure that some of the findings might be understood to be a blind acceptance of Enlightenment progress. While I welcome the hard-core deconstruction of my findings, I want to preempt any efforts to pigeonhole this research as blindly liberal, or naively hopeful. I am not, in the words of philosopher John Gray, bathing in the comforts provided by the “secular religion” of progress.<sup>600</sup> In fact, my theory provides expectations for where we

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<sup>599</sup> Dobson, *The Dictator's Learning Curve: Inside the Global Battle for Democracy*.

<sup>600</sup> John Gray, *The Silence of Animals: On Progress and Other Modern Myths* (New York: Farrar, Straus and Giroux, 2013).

should *not* expect much progress in the pursuit of human rights. These include, roughly, three types of contexts: long-standing ‘conflict democracies’ plagued by internal threats (Israel and Sri Lanka); autocracies with no budding human rights constituencies (Venezuela); or civil war states that where both sides show little concern for human dignity (Syria). These contexts will remain mired in violence and human tragedy for the foreseeable future. My theory does though demonstrate that concerted action with rights legalization as its goal can, amidst difficult circumstances, produce positive political change. What I have not done is make a deterministic statement in support of progress, or issue a Leibnizian argument about how this is the best of all worlds. Instead, I have sought to demonstrate that resisting oppression does not make everything worse, that seeking to enforce international human rights laws can assist in the protection of physical integrity, and that change, while difficult, is possible.

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