

Human Rights Prosecutions as Mechanisms for Translating Human Rights Law into Improved Practices¹

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Abstract. Although it is now becoming apparent that some international human rights treaties have an impact on improving human rights practices in transitional or new democracies, we do not yet understand well the mechanisms through which these treaties exert their influence. In this article I synthesize research from two of my previous co-authored research papers about the linkage between treaty ratification and domestic human rights litigation, and the link between human rights litigation and improved practices. This in turn allows me to draw new conclusions about human rights prosecutions as mechanisms. While all human rights treaties potentially provide tools for litigation, some treaties have much more direct and explicit provisions for holding individuals criminally accountable for violations. In earlier research with Geoff Dancy, we have found that ratifications of treaties with explicit provision for individual criminal responsibility (such as the Convention against Torture, and the Rome Statute of the ICC) are more likely to lead to domestic rights prosecutions than human rights treaties without such provisions. In earlier research with Hun Joon Kim, we have found that the use of human rights prosecutions is in turn more likely to be associated with improvements in basic integrity rights, including the right to life, freedom from torture, disappearance and political imprisonment. By connecting these two previous forms of research, I suggest that human rights prosecutions are one of the main mechanism through which human rights law translates into improved practices. A caveat, however, is that not all human rights law is likely to have such effects, but only ratification of treaties with provisions for individual criminal accountability.

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Although it is now becoming apparent that some international human rights treaties have some impact on improving human rights practices in transitional or partial democracies,² we do not yet understand well the mechanisms through which these treaties exert their influence. Thomas Risse et.al. argued over ten years ago that human rights law was one part of a much broader transnational “spiral model” of influence— involving domestic mobilization, international pressure, treaty ratification, and socialization— that brings about human rights change.³ Re-prioritizing country-level factors over transnational ones, Beth Simmons has recently developed a domestic politics theory of treaty compliance with three primary mechanisms: agenda setting, litigation, and mobilization.⁴ Under this theory, treaties are able to change slightly the behavior of states by raising the profile of human rights and activating courts in contexts where there is at least a modicum of accountability.

Hunjoon Kim and I argue that human rights prosecutions (domestic and international) lead to improvements in human rights practices through a combination of deterrence and normative communication.⁵ This work supports Simmons’ argument about the importance of litigation, but takes note of the impact and interconnection of prosecutions both internal and external to the state. Finally, Geoff Dancy and I have found a robust relationship between ratification of certain kinds of human rights treaties and the use of human rights prosecutions, holding many other factors constant.⁶ This paper will synthesize the findings of some of these

² BETH SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009) [hereinafter SIMMONS, *MOBILIZING FOR HUMAN RIGHTS*]

³ THOMAS RISSE, STEPHEN ROPP, AND KATHRYN SIKKINK, EDs., *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* (1999)

⁴ SIMMONS, *MOBILIZING FOR HUMAN RIGHTS*, *supra* note 2.

⁵ Hunjoon Kim and Kathryn Sikkink, *Explaining the Deterrence Effect of Human Rights Prosecutions*. *INT’L STUDIES QUARTERLY* (2010) [hereinafter *Explaining the Deterrence Effect*]

⁶ Geoff Dancy and Kathryn Sikkink, “Ratification and Human Rights Prosecutions: Toward a Transnational Theory of Treaty Compliance,” *New York University Journal of International Law and Politics*, Vol. 44:3 (Spring 2012): 751-790.

previous studies to develop a clearer argument about the role of human rights prosecutions as mechanisms for translating human rights law into improved practices.

Part I: The Linkage between Human Rights Law and the Use of Human Rights

Prosecutions:

While all human rights treaties potentially provide tools for litigation, some treaties have much more direct and explicit provisions for holding individuals criminally accountable for violations. One might surmise that such treaties are more likely to lead to prosecutions, but until recently, there was little empirical evidence to support this supposition. Using new data from our NF supported project on human rights prosecutions around the world, Geoff Dancy and I evaluated the strength of the assumed relationship between specific provisions in certain human rights treaties that should facilitate litigation for individual criminal accountability for past human rights violations and the use of domestic litigation. Following is a summary of the argument and evidence from that earlier article.

Individual Criminal Accountability

Most human right treaties hold the state as an entity accountable for human rights violations and require it to take action to remedy victims' losses and grievances. We will call this the "state accountability (SA) model", to be contrasted with an alternative "individual criminal accountability" (ICA) model.⁷ Both are legal accountability models,⁸ but the main differences between the SA model and the ICA model involve who is being held accountable and

⁷ KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING THE WORLD* (2011) [hereinafter SIKKINK, *THE JUSTICE CASCADE*]

⁸ See Ruth W. Grant and Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, AM. POL. SCI. REV. 99 (2005), at 36: "Legal accountability is the requirement that agents abide by formal rules and be prepared to justify their action in those terms, in courts or quasi-judicial arenas."

how these actors are held accountable.⁹ Under a state accountability model, the state is held responsible and it provides remedies and pays damages. Under a criminal model, individuals are prosecuted, and if convicted, they go to prison. Most human rights treaties reflect the SA model, as does virtually the entire human rights apparatus in the United Nations. When a state violated rights under the International Covenant on Civil and Political Rights, in some cases individuals could bring petitions before the UN Human Rights Committee, but this still involved the state accountability model because these petitions were against the state itself, not a particular state official. The state accountability model is also the model employed by the regional human rights courts, the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Court of Human Rights and Peoples' Rights. So, for example, when in 1988 the Inter-American court found Honduras responsible for disappearances, it ordered the Honduran state to pay damages to the families of the victims.¹⁰

In the last 20 years, however, the ICA model has gained increased prominence, in part as a response to the perceived impotence of the state accountability approach. In the 1970s and 1980s a small handful of states began to hold former state officials criminally accountable in their domestic courts for human rights violations. These countries used domestic criminal law to prosecute, but sometimes regional and international human rights institutions encouraged such litigation.¹¹ For example, although the Inter-American Court of Human Rights itself uses a state accountability model, the Inter-American Commission for Human Rights in its country reports frequently recommended that states hold criminal prosecutions for human rights perpetrators,

⁹ STEVEN R. RATNER AND JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY (2001), at 15.

¹⁰ Velásquez Rodríguez case, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).

¹¹ SIKKINK, THE JUSTICE CASCADE, *supra* note 7 at Chs. 3-4.

including in the cases of Argentina, Chile, and Haiti.¹² Although the Genocide Convention of 1948 and the Geneva Convention of 1949 contain specific language about individual criminal accountability,¹³ neither these treaties nor other human rights treaties were initially used in early domestic prosecutions.¹⁴ Only later, when provisions for individual criminal accountability were more clearly stated in the Convention against Torture and Cruel and Degrading Treatment (CAT) in 1984, and especially in the Rome Statute of the International Criminal Court in 1998, did treaties begin to play a more important role in prosecutions. These treaties are part of a broader process through which international law increasingly began to focus on the individual, both as the perpetrator of crimes, and as a victim who had standing to bring forward cases against perpetrators.¹⁵

This new ICA model is not for the whole range of civil and political rights, but rather for a small subset of “physical integrity rights”, especially the prohibitions on torture, summary execution, and genocide, war crimes and crimes against humanity. The treaties that contain provisions for ICA, including the Genocide Convention, the Geneva Conventions, CAT, and the

¹² See, Inter-American Commission on Human Rights, OAS, “Report on the Situation of Human Rights in Argentina,” OEA/Ser.L/V/II.49 Doc. 19 corr.1. (1980); Inter-American Commission on Human Rights OAS, “Third Report on the Situation of Human Rights in Chile,” OEA/Ser.L/V/II.40 Doc 10. (1977); and Inter-American Commission on Human Rights OAS, “Report on the Situation of Human Rights in Haiti,” OEA/Ser.L/V/II/46 (1979).

¹³ The Genocide Convention says that persons committing genocide shall be tried and punished by a competent tribunal either in the state in which genocide was committed or by an international penal tribunal. Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, *entered into force* Jan. 12, 1951. Each of the four Geneva Conventions of 1949 contain identical language with regard to repression of abuses, calling upon each State Party to bring persons who have committed or ordered grave breaches of the Conventions before its own courts or to hand them over for trial to another High Contracting Party. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85, Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, *all four entered into force* Oct. 21, 1950.

¹⁴ For example, in the first human rights prosecutions in Greece (1975), Portugal (1979), Argentina (1983) and Bolivia (1983) no references were made to international human rights law (Sikkink 2011).

¹⁵ M. CHERIF BASSIOUNI (ED.) INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS, AND CONTENTS, 3RD REV. ED. (2008) For various models and perspectives on human rights legalization, see SALADIM MECKLED-GARCIA AND BASAK ÇALI (EDS.). THE LEGALIZATION OF HUMAN RIGHTS: MULTIDISCIPLINARY PERSPECTIVES ON HUMAN RIGHTS AND HUMAN RIGHTS LAW (2006).

Rome Statute, all focus primarily on physical integrity rights. The Rome Statute, for example, addresses genocide, war crimes, and crimes against humanity; the latter defined as murder, extermination, enslavement, deportation, imprisonment, torture, rape, discriminatory persecution, disappearance, and apartheid, when “committed as part of a widespread or systematic attack directed against any civilian population.”¹⁶ The bulk of human rights prosecutions in the world today are for this small subset of rights violations, especially for mass killing and massacre, although there are also some prosecutions for torture, rape, genocide, and disappearances.¹⁷

Currently, we know that treaty ratification is correlated with improvements in physical integrity rights, predominantly among states transitioning to democracy.¹⁸ Based on previous studies¹⁹, I argue that one reason for this is that states that ratify legal instruments providing for individual accountability are more likely to have rights prosecutions, which drive down future abuses to physical integrity by state actors. Dancy and I showed a link between ratification and rights prosecutions across a wide sample of cases. However, we were aware of a simple counter-proposition: that both expressed commitment to accountability and willingness to hold prosecutions come from the same, third source—perhaps a stronger state commitment to international human rights law in general.

The best way to test these propositions was to split human rights treaties into three groups. The first group (Category 1) includes the Genocide Convention, CAT, and the Rome Statute, all of which address core rights and have specific provisions calling for individual criminal prosecution. In addition, the recent Convention on the Protection of All Persons from

¹⁶ ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, U.N. Doc. 2187 U.N.T.S. 90, *entered into force* July 1, 2002.

¹⁷ See our transitional justice database, soon available at www.transitionaljusticedata.com. Also see, generally, Ellen Lutz and Caitlin Reiger, *PROSECUTING HEADS OF STATE* (2009).

¹⁸ SIMMONS, *MOBILIZING FOR HUMAN RIGHTS*, *supra* note 2

¹⁹ Kim and Sikkink, *Explaining the Deterrence Effect*, *supra* note 5.

Enforced Disappearances (2006) has provisions for universal jurisdiction and individual criminal accountability almost identical to those of the CAT. Thus, we might expect countries which have ratified these treaties to be more likely to use human rights prosecutions than countries that have not ratified these treaties. In addition, one regional treaty, the American Convention on Human Rights of 1978, has been interpreted by the Inter-American Court of Human Rights as providing the legal basis for a state duty to hold individuals accountable for past human rights violations. In particular, the Inter-American Court has found amnesty laws that protect individuals against such prosecution to be contrary to the American Convention.²⁰ These treaties offer more explicit legal tools for legal mobilization using individual criminal accountability (ICA). We hypothesized that countries that ratify treaties protecting core rights with ICA provisions would be more likely to use human rights prosecutions than countries that have not ratified these treaties.

Other treaties only have provisions for state accountability (SA). Under the SA model, if the state refused to take action to change its policies or to provide remedies to victims, there were few forms of recourse available. Multilateral human rights treaty bodies, transnational advocacy networks and transgovernmental networks could use only the so-called “name and shame” strategy to bring pressure on governments. In some cases, such pressures succeeded in bringing about important modifications in human rights practices.²¹ But the actual individuals who carried out human rights violations remained beyond reach.

²⁰ See e.g., Barrios Altos Case, Judgment of May 14, 2001, Inter-Am Ct. H.R. (Ser. C) No. 75 (2001)., Gomes Lund (“Guerrilha do Araguaia”) Case, Judgment of November 24, 2010, Inter-Am Ct.

²¹ For transnational advocacy networks, see MARGARET KECK AND KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS* (1998). See also Harold Koh, *Transnational Legal Process*, NEBRASKA LAW R. 75 (1996) and ANNE-MARIE SLAUGHTER, *NEW WORLD ORDER* (2004) [hereinafter SLAUGHTER, *NEW WORLD ORDER*] (arguing that judges and jurists form transnational networks which have a demonstrable effect on domestic legal practices across

Treaties with ICA provisions allow domestic and international prosecutions to serve as a means of legally enforcing human rights legal commitments. In the case of the Rome Statute, the enforcement mechanism is vertical, as a supranational institution—the International Criminal Court—was established by the treaty and given the power to prosecute when states are unwilling or unable to do so. The ICC, thus far, has only been active in a handful of notable cases.²² Most of the time, however, domestic courts are the actors doing the lion’s share of the work, trying rights-abusing state officials using a combination of domestic criminal law and international law. Rather than ignoring domestic proceedings because they are not directly set in motion by a central international command structure, we argued that domestic human rights prosecutions should be conceptualized as a mechanism of horizontal enforcement for violations of international human rights law. If the horizontal enforcement conceptualization is accurate, we would expect states that have ratified treaties with precise provisions supporting individual prosecution in treaty law to be more likely to hold criminal trials for rights offenders.

Treaties in Category 1 are more legalized than other human rights treaties. In a special issue of *International Organization* in 2000, a group of influential scholars defined legalization along three dimensions--obligation, precision, and delegation. They wrote:

“*Obligation* means that states or other actors are bound by a rule or commitment or by a set of rules or commitments.... *Precision* means that rules unambiguously define the conduct they require, authorize, or proscribe. *Delegation* means that “third parties have been granted authority to implement, interpret, and apply the rules.”²³

the globe). For a criticism of these developments, see RAN HIRSCHL, *TOWARD JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004).

²² At the time of this writing, 13 cases in seven situations have been brought before the ICC. These cases address the situations in Uganda; The Democratic Republic of the Congo; Darfur, Sudan; Central African Republic; Kenya; Libya; and Côte d’Ivoire. Available at <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/>.

²³ Kenneth W. Abbot, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal, *The Concept of Legalization*, *INT’L ORG.* 54 (2000), at 401.

According to this three-part definition, Category 1 treaties are more legalized than other rights treaties. While Category 1 treaties may not create a greater sense of obligation,²⁴ they have more precise language regarding the use of criminal trials for remedy, and officials have written into them greater degrees of delegation.²⁵ In the latter case, however, we are concerned with a quite specific form of delegation, that which permits enforcement through third parties via individual criminal accountability. If the language and legal provisions of Category 1 treaties inspires prosecutions, we would expect ratification of these treaties to be more highly correlated with the use of prosecutions than other human rights treaties that do not have such provisions. This is because the precise and delegating nature of the treaties allows for agents of transnational pressure to focus their attention on a state's rule-bound obligations to hold rights violators criminally accountable.

Secondly, we hypothesized that ratification of a second groups of human rights treaties (Category 2) dealing with core rights but lacking in provisions for criminal responsibility will still likely result in rights prosecutions, but will not have as pronounced an effect as those with such a provision. Category 2 treaties include the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR) and the African Charter on

²⁴ States are equally obliged to keep any and all of their treaty commitments, despite differences in treaty content. One could argue that obligation varies by states' written reservations and by the provided ability to derogate from various treaties in the event of emergency. While these are important variations, they are beyond the scope of this article, as we are mainly interested in the mobilizing effect of treaty provisions.

²⁵For example, the Convention Against Torture both obligates states to try criminally a "person alleged to have committed any offense" defined as torture or ill-treatment, and it further obligates states to "submit the case to its competent authorities for the purpose of prosecution" (art 7 sec 1). Furthermore, the Convention provides for universal jurisdiction, stipulating in (art 5 sec 2) that "Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 [concerning extradition] to any of the States mentioned in paragraph 1 of this article. Thus, the CAT essentially delegates enforcement both to states where the violation occurred and foreign states where the perpetrator resides. See also art. 9 sec 1, which provides that "State Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences referred to in article 4..." Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, G.A. Res. 39/46, U.N. GAOR, (entered into force June 28, 1987).

Human Rights and Peoples Rights (Category 2). These treaties detail prohibitions on the practices that are the focal point of most human rights trials: violations to the right to life, security of the person, and freedom from torture. The ICCPR and the ECHR also include important provisions about state obligations to provide “an effective remedy” to victims of human rights violations.²⁶ This obligation to provide remedies has increasingly been interpreted as a positive duty to provide legal remedies, that is, to provide for some kind of human rights prosecution.²⁷ But the language of the treaties themselves does not specify that such a remedy be a legal one, or that it involve individual criminal accountability for those responsible for human rights violations. Thus we might expect ratification of these treaties to be associated with the use of prosecutions, although at a lower level than ratification of Category 1 treaties. The European Court of Human Rights has not engaged in interpretation as far-reaching as the Inter American Court of Human Rights regarding amnesty or the duty to punish.²⁸

²⁶ See *International Covenant on Civil and Political Rights*, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, art 2 sec 3. “Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.” See also *European Convention on Human Rights*, art 13. “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

²⁷ See, for example, UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law : resolution / adopted by the General Assembly*, 21 March 2006, A/RES/60/147, available at: <http://www.unhcr.org/refworld/docid/4721cb942.html> [accessed 8 December 2011]; and

²⁸ For example, see *Al-Adsani v. The United Kingdom* (35763/97) 66 ECHR 2001: “The Court, while noting the growing recognition of the overriding importance of the prohibition of torture, does not accordingly find it established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State. The 1978 Act, which grants immunity to States in respect of personal injury claims unless the damage was caused within the United Kingdom, is not inconsistent with those limitations generally accepted by the community of nations as part of the doctrine of State immunity.” On the Inter-American Court, see Velásquez Rodríguez case, *supra* note 10, and the Barrios Altos Case and the Gomes Lund (“Guerrilha do Araguaia”) Case, *supra* note 20.

And finally, we hypothesized that ratification of a third set of human rights treaties (Category 3) not dealing with core rights nor containing any provisions for individual criminal accountability would have no impact on the use of domestic trials. Category 3 treaties involve different sets of substantive rights that are not typically featured in human rights prosecutions. This is the case, for example, with the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the Convention on the Elimination of All Forms of Racial Discrimination (CERD). These treaties rely on the state accountability model and contain no references at all to the possibility or desirability of individual criminal prosecution. Because these lack both the substantive and the procedural legal provisions we are theorizing to have an effect on prosecutions, we expect this third group of treaties to have no effect on domestic trial activity.

To reiterate, we expected the effects of treaty law on domestic prosecutions to vary by treaty type. If we see a link between treaty content and the initiation of prosecutions²⁹, it suggests that the treaties themselves are doing some work, providing specific legal arguments that can be used in litigation and judicial decisions. However, if we do not see such a specific link with treaty content, but rather a general correlation between all three categories of human rights treaty ratifications and prosecutions, it is more likely that some alternative explanation is needed to explain the use of prosecutions. For example, many states ratify treaties because they believe in them and can comply with them at reasonable cost, what Simmons calls the “theory of

²⁹ For our database, we did not limit our definition to only those prosecutions that resulted in convictions, but included the whole process of prosecution, from indictment, to extradition, to preventive detention, to the trials, and sentences.. See Section III.A. For an in-depth discussion, see SIKKINK, *THE JUSTICE CASCADE*, *supra* note 7, at 136-137.

rationally expressive ratification.”³⁰ There may be an equivalent “rationally expressive theory of prosecutions” that suggests that states also carry out human rights prosecutions because they believe in them and can carry them out at reasonable cost. This would contrast with the hypotheses presented above, which suggests that states use prosecutions because of more specific treaty obligations that create opportunities for litigants and judges.

While we centered our discussion on theorizing the relationship effect of international treaties, we know that treaties do not operate in a vacuum, and we also explored alternative explanations for patterns in distributions of domestic human rights trials. One main alternative explanation has to do with domestic legal practices. We expect some aspects of domestic legal systems to have an intervening effect on the degree to which a treaty commitment translates into use of prosecutions. Specifically, we would expect to see that human rights treaties have a greater impact in monist systems where treaties are directly incorporated into domestic law upon ratification than in dualist systems where treaties must be implemented in domestic law to take effect.

Second, we would expect human rights treaties to be more likely to contribute to prosecutions in countries that have domestic provisions for private prosecution in criminal cases. In these legal systems, individual victims and NGOs representing victims are permitted to initiate criminal cases or to accompany public prosecutors bringing cases forward. These provisions have allowed human rights organizations which are very knowledgeable about human rights treaties to bring forward criminal cases, and such organizations are more likely to raise points of law from treaty law than are ordinary public prosecutors. While these distinctions often correspond to the differences between common law and civil law systems, there is not a perfect

³⁰ SIMMONS, *MOBILIZING FOR HUMAN RIGHTS*, *supra* note 2 at 65.

correspondence. Unfortunately, there are no complete databases of either monist versus dualist legal systems, or a complete list of countries with private prosecution mechanisms. That being said, it is very unusual for common law countries (British legal tradition) to allow for private prosecution in criminal cases, and these common law countries are also more likely to be dualist than monist. In this sense, we can hypothesize that the link between treaty ratification and use of human rights prosecutions will be somewhat stronger in non-common-law countries.

Not a great deal of energy has been spent predicting the use of prosecutions across countries of the world, but outside of our theory of international legal obligations and the possible intervening effect of different legal traditions, four other explanations exist. The first, advanced most powerfully by Hunjoon Kim, centers on regional diffusion.³¹ Leaders in transitional situations, he finds, are more likely to seek justice if their neighbors have done so. A second explanation hinges on realistic political expediencies. Many theorists view it as law that human rights prosecutions can only follow ruptured democratic transitions wherein the *ancien* regime is embarrassed, discredited, and delegitimized.³² This notion is closely aligned with that of victor's justice, which is applicable to the post-conflict milieu. In those places, for example, where one side in an internal conflict loses totally, trials are more likely to take place because there is no risk of backlash from holdover elements of former armed groups.

A third explanation hinges on the theorized nexus between democracy and the rule of law practices. In those places exhibiting stronger moves toward formal democracy, one might expect more rights prosecutions. Some argue that the primary vehicle through which rule of law finds

³¹ HUNJOON KIM, EXPANSION OF TRANSITIONAL JUSTICE MEASURES: A COMPARATIVE ANALYSIS OF ITS CAUSES, University of Minnesota Ph.D. Thesis (2008).

³² As opposed to negotiated transitions, where the former regime is able to negotiate its own displacement. See SAMUEL P. HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY (1991) [hereinafter HUNTINGTON, THE THIRD WAVE].

its expression is an independent judiciary. However, political scientists who study comparative judicial systems have noted that even those judiciaries that are formally independent, or have undergone ‘reform’ efforts, are many times beholden to the executive branch, or are plagued by corruption.³³ Thus, Neil Tate and Linda Camp Keith distinguish between formal (de jure) and behavioral (de facto) independence of judiciaries; the latter is evident when judges refrain from corrupt behavior on a large scale, and when justices are both vertically and horizontally autonomous in their decision-making.³⁴ Because the agent behind prosecutions is the judiciary, we might easily assume that a more de facto independent court is likely to pursue justice for rights abuses.³⁵ For our hypotheses concerning the linkage between international rights commitments and prosecutions to hold water, a relationship must hold even controlling for these other factors and explanations.

We tested our hypotheses and the alternative explanations using our new database on trials, coded from US State Department annual human rights reports (1976-2009), that includes all domestic human rights prosecutions around the world, as long as they take place in countries with a minimum capacity for free and fair trials. While this variable subsumes all ‘transitional rights’ trials it is also much more expansive. It includes, *inter alia*, the routine prosecution of police for abuse of their powers, state efforts to try military forces for egregious acts during prolonged internal conflicts, and the prosecution of political crimes that took place during or after the process of democratization—all incidents sometimes elided in the measure of specifically ‘transitional’ trials. We also examine the impact of treaty ratification only on the

³³ Gretchen Helmke, *The Logic of Strategic Defection: Court-Executive Relations in Argentina under Dictatorship and Democracy*, AM. POL. SCI. REV. 96 (2002); Julio Rios-Figueroa, *Judicial Institutions and Control of Corruption: Is There a Right Design?* Paper presented to Annual Meeting of the American Political Science Association (2007)

³⁴ C. Neal Tate and Linda Camp Keith, *Conceptualizing and Operationalizing Judicial Independence Globally*, Paper Presented to Annual Meeting of the American Political Science Association (2007).

³⁵ See also ELIZABETH HILBINK, *JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE* (2007).

group of transitional countries making a transition from authoritarian rule to democracy.

The discussion of the variables, control variables, models and the statistical results can be found in our earlier article.³⁶ Here I wish only to summarize the basic results. First, our research confirms that a number of factors long thought to be associated with the use of trials exert influence in our models as well. First, the international and temporal context in which countries find themselves has a large effect on their practices. So, for example, as time progresses, states located in regions where more countries have engaged in criminal trials are more likely to follow suit. Furthermore, in this study, states in the Americas continue to be home to more criminal prosecutions compared to those in other regions, supporting the viewpoint that Latin countries are a global protagonist in human rights accountability.³⁷

Second, the presence of political transition or unsettled conflict of any sort is liable to lead to the use of trials. Compared to all other countries, those engaged in civil war, those which are newly formed states, and those that have experienced any form of democratic transition are significantly more likely to hold rights prosecutions. This we should expect given that rights violations happen in times of political instability, institutional limbo, or internal turmoil. However, trials are not more likely to take place *after* civil war victories, or in “post-conflict” periods, calling into question the belief that rights prosecutions are a direct extension of power imbalances—or victor’s justice.³⁸

³⁶ Geoff Dancy and Kathryn Sikkink, “Ratification and Human Rights Prosecutions: Toward a Transnational Theory of Treaty Compliance,” *New York University Journal of International Law and Politics*, Vol. 44:3 (Spring 2012): 751-790.

³⁷ SIKKINK, *THE JUSTICE CASCADE*, *supra* note 7 at Ch. 4.

³⁸ For post-conflict justice, see CHERIF BASSIOUNI, ED. *POST-CONFLICT JUSTICE* (2002). For victor’s justice in different periods of history, see JON ELSTER, *CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE* (2004).

Third, domestic legal institutions and practices also appear to alter the propensity of various countries to have trials. The more formally democratic a state's institutions, the more likely it will hold trials. Furthermore, de facto judicial independence, as predicted, is very strongly related to the presence of rights trials. Courts that are insulated from executive control, it seems, are more likely to initiate rights-related prosecutions.

Even though these other factors explain a good deal of variance in the presence of domestic criminal trials, the hypothesized relationship between treaty ratification of treaties with explicit provisions for individual criminal accountability and the use of domestic rights trials is verified, and quite robust. Those countries with more outstanding commitments to treaties with individual accountability provisions (Category 1) are much more likely to have pursued rights prosecutions. Second, ratification of Category 2 treaties dealing with civil and political rights but not including provisions for individual criminal accountability is not correlated with the use of domestic human rights prosecutions. Therefore, we take these findings as evidence that treaties with teeth actually induce states to proceed with prosecutions for offending nationals.

Finally, to our surprise we found a significant negative relationship between Category 3 treaty commitment to other human rights treaties and the use of trials. Essentially, the greater commitment countries show to treaties not dealing with physical integrity rights, the less likely they are to have prosecutions. We cannot fully explicate why this is the case, but one reason might have to do with the theorized divide between economic and social rights, on the one hand, and civil and political rights on the other. Treaties dealing with economic and social rights are over-represented in Group 3. If commitment to this group of treaties signifies ideological devotion to economic over civil-political rights, it might be that this devotion brings with it less of an interest in punishing civil rights infringements. Still, this is only at the level of speculation.

The results from our second analysis of the sample only of trials in transitional states are quite similar to those of trials in all countries with a few exceptions. First, the type of transition makes a difference, and we see that both ruptured democratic transitions and civil war victories are more apt to produce prosecutions than negotiated transitions, or countries still embroiled in civil war.³⁹ This finding is expected in the literature on transitional justice, which consistently restates that trials are more likely when peace spoilers have been marginalized rather than incorporated into the political system.⁴⁰ Surprisingly, none of the legal institutional variables are significant any longer. This may owe to the fact that democratization is already happening among this sample of countries, so there is less variation across variables like de facto judicial independence.

As in Model 1, commitment to treaties with ICA provisions increases the probability of rights trials, and in significant fashion. In fact, moving from no commitment to full commitment on this composite score increases the probability for rights trials by around 30%.⁴¹ The power of this finding, net of other variables, suggests that legalization of individual criminal accountability norms has an independent effect on state behaviors.

Discussion

The three most robust predictors of trial prosecutions across our models are regional diffusion, ruptured democratic transition, and the degree of commitment to Category 1 international treaties, those with provisions for individual criminal accountability to enforce core rights. This appears to be the case irrespective of the character and valence of domestic

³⁹ “New state” was dropped as a variable in Models 2 and 3 so that it could serve as a baseline.

⁴⁰ HUNTINGTON, *THE THIRD WAVE*, *supra* note 32. See also, generally, A.J. MCADAMS, *TRANSITIONAL JUSTICE AND RULE OF LAW IN NEW DEMOCRACIES* (1997).

⁴¹ This figure is derived using probability value predictions with the other variables in the model set at their means.

legal/constitutional institutions. Global politics, it seems, have a direct and measurable influence on state behavior, and treaties are not as meaningless or unenforceable as critics of the human rights regime like to claim.⁴² If the inclusion of ICA provisions become a more standard practice for treaty drafters, and these provisions come to be part of the legal landscape, more states might become subject to this a kind of rights enforcement. Such enforcement is the result of coercion or threat, but of treaty commitments states have made voluntarily, and is often enforced through domestic courts. Furthermore, these domestic trials can, at times, hold powerful state officials accountable. Our results are largely supportive of the Simmons' model of domestic mobilization and litigation. We show for the first time, however, a direct link between the ratification of certain kinds of human rights treaties with provisions for individual criminal accountability and the increased likelihood that countries will use domestic human rights prosecutions. It very much appears that some kinds of treaty law bolster the pursuit of trials, that with provisions for individual criminal accountability. And the more treaties ratified with ICA provisions, the better. We think each of these treaties provides additional opportunity for litigants to make a case against offenders, and to set in motion a judicial process that is difficult to halt.

Part II: The Link between Human Rights Prosecutions and Human Rights Practices

But in order to know if trials are a main mechanism through which international human rights law translates into improved human rights practices, we next need to explore the linkages between prosecutions and practices. In this section, I summarize the results of this large statistical study that I co-authored with Hunjoon Kim and published in the academic journal

⁴² See, e.g., Anthony Woodiwiss. *The Law Cannot Be Enough: Human Rights and the Limits of Legalism* in THE LEGALIZATION OF HUMAN RIGHTS: MULTIDISCIPLINARY PERSPECTIVES ON HUMAN RIGHTS AND HUMAN RIGHTS LAW (Saladim Meckled Garcia and Basak Cali, eds.) (2006) at 34: "The disproportion between human rights related legal events and social events with a potential human rights content is in all probability even greater, since human rights tend not to be proactively enforced...."

International Studies Quarterly.⁴³ In our statistical analysis, Kim and I tested four different propositions that had emerged out of previous research. First, we wanted to test the proposition that human rights prosecutions are associated with improvements in human rights. Second, we wanted to explore whether prosecutions contribute to human rights because they impose punishment on state officials, or because they communicate and dramatize norms. Third, we wanted to test if prosecutions in one country can contribute to improvements in other countries as well, in other words, if it is possible to have deterrence across borders. Finally, we wanted to answer the main question raised by trial skeptics: do prosecutions in situations of internal or civil war exacerbate human rights conditions? In this paper, I will limit my remarks only to question one and two above – are human rights prosecutions associated with improvements in human rights practices, and if so, through what processes?

To try to test all of these propositions, Hunjoon Kim and I used an earlier version of our human rights prosecutions dataset. It was not yet as complete or detailed as the NSF supported dataset that Dancy and I used for the research discussed above. It did have the advantage, however, of allowing us to examine both the impact of domestic prosecutions, and the added effects of any foreign and international human rights prosecutions on human rights practices. To gather information on foreign and international prosecutions, we had to supplement the State Department data with information gathered from human rights groups, nongovernmental organizations, and intergovernmental institutions. Because foreign and international prosecutions exist for only a relatively small number of countries, we could not test to see if these trials had a separate and independent effect on human rights. Instead, we put international and foreign

⁴³ Hunjoon Kim and Kathryn Sikkink, “Explaining the Deterrence Effect of Human Rights Prosecutions” *International Studies Quarterly* (December, 2010).

prosecutions in a single category we called “international,” and we added the international prosecutions to those of domestic human rights prosecutions. Even after adding international prosecutions, domestic prosecutions made up the great bulk of total prosecutions in the database.

We used these data to explore the impact of human rights prosecutions on human rights practices. We tested the argument of recent realist discussions of trials, in particular the argument that human rights prosecutions lead to more human rights violations.⁴⁴ We also examined the alternative argument that domestic human rights prosecutions would be expected to lead to a decrease in violations.

In our study, we didn’t only want to figure out *if* human rights prosecutions had an effect on human rights practices; we wanted also to learn more about *why and how* human rights trials make a difference. We wanted to understand the theoretical processes through which human rights prosecutions lead to change. There are a number of theories about why human rights prosecutions might contribute to change, but they can be grouped into two general arguments: rational theories that focus on the role of deterrence or enforcement, and social-psychological theories that look at the contributions that prosecutions make to socialization of security forces and state officials and the internalization of new norms.

Many advocates for trials stress that they support prosecutions because they believe they could prevent human rights violations in the future. In other words, people want prosecutions not necessarily for retribution, but to deter future crimes. But these advocates don’t usually clarify the processes through which they expect transitional justice to work. Sometimes, they assume that just telling the truth and revealing the facts will have an effect in and of itself. But

⁴⁴ Jack Snyder and Leslie Vinjamuri, “Trials and Errors: Principle and Pragmatism in Strategies of International Justice,” *International Security* Vol. 28:3 (Winter 2003/04), pp. 5-44

more often, advocates embrace some version of deterrence theory; explicitly or implicitly, they believe that some kind of punishment is most likely to deter future human rights violations.

This proposition relates to many larger debates about whether enforcement or sanctions are necessary for states to comply with international rules.⁴⁵ Many commentators have long claimed that we shouldn't expect human rights norms to have any important effects because they don't have any enforcement or teeth. But, human rights prosecutions can be conceptualized as a form of enforcement or sanction for violations of domestic and international criminal and human rights law. If enforcement is necessary to get countries to comply with the law, we would expect human rights prosecutions to lead to better human rights practices.

This argument draws on an important criminology literature on deterrence in domestic legal systems which explores whether increases in punishment lead to declines in common crime. There are contentious and still- unresolved debates among criminologists. One of the most controversial issues involves the death penalty, and particularly whether the death penalty deters crime. Indeed, at least in the United States, the debate over the death penalty is so prominent that many people believe that deterrence arguments are themselves discredited because we have little evidence showing that harsh penalties deter crime. But deterrence focuses on two different factors: (1) the probability or likelihood of punishment and (2) the severity of punishment. Arguments about the death penalty are only about the severity of punishment. There is little evidence that an increase in the severity of punishment leads to lower levels of

⁴⁵ Abram Chayes and Antonia Handler Chayes, *The New Sovereignty* (Cambridge, MA: Harvard University Press, 1995). George W. Downs, David M. Roache, and Peter N. Barsoom. "Is the Good News About Compliance Good News About Cooperation," *International Organization* 50, no. 3 (1996), pp. 379-406. Beth Simmons, "International Law and State Behavior: Commitment and Compliance in International Monetary Affairs." *American Political Science Review* 94, no. 4 (2000), pp. 819-835.

crime. Studies have shown, however, that increasing the *likelihood* of punishment *can* deter crimes within countries.⁴⁶

To date, there are few parallel studies to test these arguments about deterrence in the international system. Kim and I applied these deterrence arguments to international politics to see if human rights prosecutions lead to a decrease in human rights violations. We did not explore the issue of the severity of punishment. Our dataset indicates that what has changed dramatically in the realm of international human rights is the likelihood of individual punishment of state officials responsible for violations. Prior to the 1970s, there was virtually a zero percent chance that heads of state and state officials would be held accountable for human rights violations, either during the repressive regime or after transition to democratic regime. Indeed the international realm may provide some kind of natural experiment for deterrence theory, since a key variable, the likelihood of punishment, has moved from zero to a positive number in a relatively short period of time in many states. Likelihood of punishment varies from country to country and from region to region, and we would expect those countries that have more trials to see a greater deterrence effect.

Applying a deterrence model to the realm of human rights implies a rational choice assumption that state leaders choose repression in light of the costs and benefits it is likely to

⁴⁶ Johannes Andenaes, *Punishment and Deterrence* (Ann Arbor: University of Michigan Press, 1974); Alfred Blumstein, Jacqueline Cohen and Daniel Nagin (eds), *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* (Washington, DC: National Academy of Sciences, 1978); Daniel Nagin (ed), *Criminal Deterrence Research at the Outset of the Twenty-First Century* (Chicago: University of Chicago Press, 1998); Bill McCarthy, "New Economics of Sociological Criminology." *Annual Review of Sociology* 28 (2002), pp. 417-442. Ross Matsueda, David Huizinga and Derek Kreager, "Deterring Delinquents: A Rational Choice Model of Theft and Violence." *American Sociological Review* 71 (2006), pp. 95-122.

yield.⁴⁷ Studies of repressors have long suggested that they are, for the most part, ordinary people with common motivations. Some state officials carry out repression because it brings them specific political, ideological, or economic benefits. For example, repression often allows state officials to confront and punish their political opponents, prolonging in the process their own political regimes and careers, or can provide economic payoffs for repressors. In situations where human rights violations provide significant benefits to repressors and impose few costs, one doesn't have to be a diehard rational choice theorist to understand that it will be difficult to stop repression.

The alternatives to the rationalist deterrence model are social, psychological, or normative models, which posit that sometimes both repression and compliance occur mainly for reasons that have more to do with culture and beliefs than with a rational calculation of costs and benefits. These psychological or norm models stress logics of “appropriateness” and obedience to authority. Lower-level state officials may carry out human rights violations because they are ordered to do so, and they lack the moral compass or the verbal formula that permits them to refuse.⁴⁸

Human rights prosecutions are not only instances of punishment or enforcement but also high-profile symbolic events that communicate and dramatize norms and socialize actors to accept those norms. Prosecutions are an expression of social disapproval; the informal social

⁴⁷ The assumption that state leaders choose repression after calculating the costs and benefits is also consistent with the literature on causes of repression. Steven C. Poe, Neal Tate, and Linda Camp Keith, "Repression of the Human Right to Personal Integrity Revisited: A Global Cross-National Study Covering the Years 1976-1993," *International Studies Quarterly* 43, no. 2 (1999); Steven C. Poe, "The Decision to Repress: An Integrative Theoretical Approach to 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).

⁴⁸ Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York, Penguin Books, 1994).

sanctions that follow from the formal sanctions of prosecutions can have important effects in political arenas where reputation is essential.⁴⁹ Because state officials care about their reputation and esteem, and the reputation and legitimacy of their state, they may change behavior in response to processes involving the mobilization of shame by advocacy networks and international organizations.⁵⁰ As norms become even more deeply internalized in society, certain options are no longer even considered.

Another way that law has a normative effect is by being embedded in collective memory. Joachim Savelsberg argues, for example, that “Law steers collective memory,” he argues, and it does so “directly but selectively.” “Trials produce images of the past” but those images are not an objective portrayal of the truth, but a ritualized presentation of evidence of the kind required by the legal system.⁵¹ In a recently published book, *Crime and Human Rights: Criminology of Genocide and Atrocities*,⁵² he contends that human rights scholars have often ignored the large literature in criminology when we think and write about human rights.

These social and psychological literatures suggest that enforcement may not be necessary in all circumstances and that behavioral change might be possible in the absence of strong enforcement mechanisms. They *do not necessarily say* that stronger enforcement is counterproductive for compliance, just that it may not be necessary. Thus, while sociologists

⁴⁹ Thomas Risse, Stephen Ropp, and Kathryn Sikkink (eds) *The Power of Human Rights: International Norms and Domestic Change* (Cambridge, Cambridge University Press, 1999). Ryan Goodman and Derek Jenks "How to Influence States: Socialization and International Human Rights Law." *Duke Law Journal* 54 (2004).

⁵⁰ Risse, Ropp, and Sikkink, *The Power of Human Rights*

⁵¹ Joachim Savelsberg and Ryan King, “Law and Collective Memory,” *Annual Review of Law and Social Sciences*, 3 (2007), pp. 189-211.

⁵² Joachim Savelsberg, *Crime and Human Rights: Criminology of Genocide and Atrocities* (New York: Sage Publications, 2010).

and international relations theorists of compliance disagree about whether enforcement is necessary for compliance, few argue that stronger enforcement is counterproductive.

It is difficult to tell whether normative and performative aspects of prosecutions produce greater impacts than their material punishment and enforcement aspects. To help us understand better the mechanisms through which prosecutions affect human rights practices, we decided to contrast the impact of human rights prosecutions with the impact of truth commissions. Truth commissions are high-profile communicative processes about past human rights violations that seldom involve any punishment. Truth commission reports rarely give names of perpetrators, and even when they do, such naming does not lead to a material sanction. Because truth commissions do not result in any material punishment of individuals, if only material costs matter, truth commissions are unlikely to have any independent effect on human rights practices. If, however, both social and material costs are important, we would expect to see that both prosecutions and truth commissions have a positive impact on human rights practices.

If trials work primarily through their effects on collective memory, we shouldn't expect them to have a rapid or direct effect on future perpetrators. The effects of trials will depend on how they become embedded in collective memory. We used our data on human rights prosecutions in transitional countries during the period 1980-2004 to explore the research propositions stated above. We look at transitional countries because the entire transitional justice literature tells us that transitional societies are in processes of instability and fluctuation; choices about accountability made during these processes could have an enduring impact. Simmons also demonstrates that human rights law has had more impact in a subset of transitional societies than

in fully authoritarian or fully democratic countries.⁵³ Simmons, however, does not examine the impact of human rights prosecutions. There is no corresponding theoretical literature that posits that human rights prosecutions will have an important impact on the already-high level of human rights protections in fully democratic societies, or in fully authoritarian societies.

We included all states that experienced a transition between 1974 and 2004. This includes the countries from the beginning of what Huntington has called the “third wave” of democratization.⁵⁴ We considered all countries undergoing three types of transition: democratic transition, transition from civil war, and transition by state creation. Democratic transition occurs when a country changes from a repressive and closed regime to an open and decentralized government. Transition from civil war occurs when a state recovers from instability and turmoil of a domestic armed conflict. Transition by state creation happens when new countries (such as those that emerged after the break-up of the Soviet Union) also changed from repressive and closed regimes into a more open and democratic governments. We found 100 transitional countries from 1980 to 2004.⁵⁵

We created two measures of human rights prosecutions: the first (called human rights prosecutions -HRP) tracks whether a country had a prosecution at any point after transition. The second is a measure of the cumulative number of prosecution years in any country (called cumulative human rights prosecutions – CHRP) which captures the persistence and frequency of

⁵³ Beth Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge: Cambridge University Press, 2009).

⁵⁴ Samuel Huntington, *The third wave: democratization in the late twentieth century*. (Norman, OK: University of Oklahoma Press, 1991), p. 21.

⁵⁵ To determine transition, we used the regime transition variable (Regtrans), which was derived from the yearly changing values of the Polity score. We began with all 192 countries in the world and excluded 32 countries with population less than 500,000.

prosecutions in the country. Our cases include 48 countries with at least one human rights prosecution, including 33 countries with two or more cumulative prosecution years.

Figure 6.2. Changes in the Average Cumulative Prosecution Years (CHRP) over Time by Region

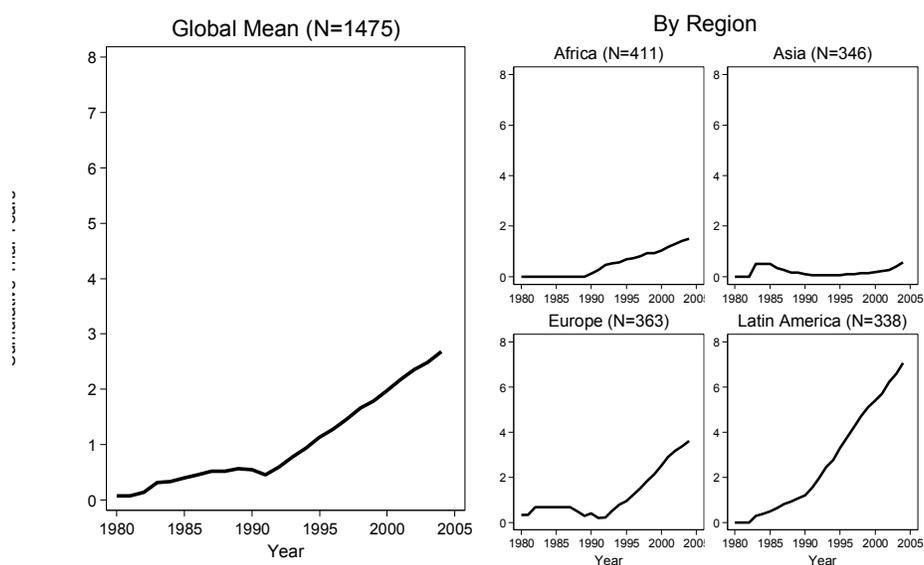


Figure 6.2 shows the change in the average cumulative prosecution years over time globally and by region. The larger graph on the left shows the global cumulative prosecution years, and the smaller graphs on the right break that trend down by region. They show that Latin America certainly is leading the trend, but average cumulative prosecution years in Africa and Europe are also moving upward over time.

Next, we explored the impact that human rights prosecutions and truth commissions have on a core set of human rights violations – torture, summary execution, disappearances and

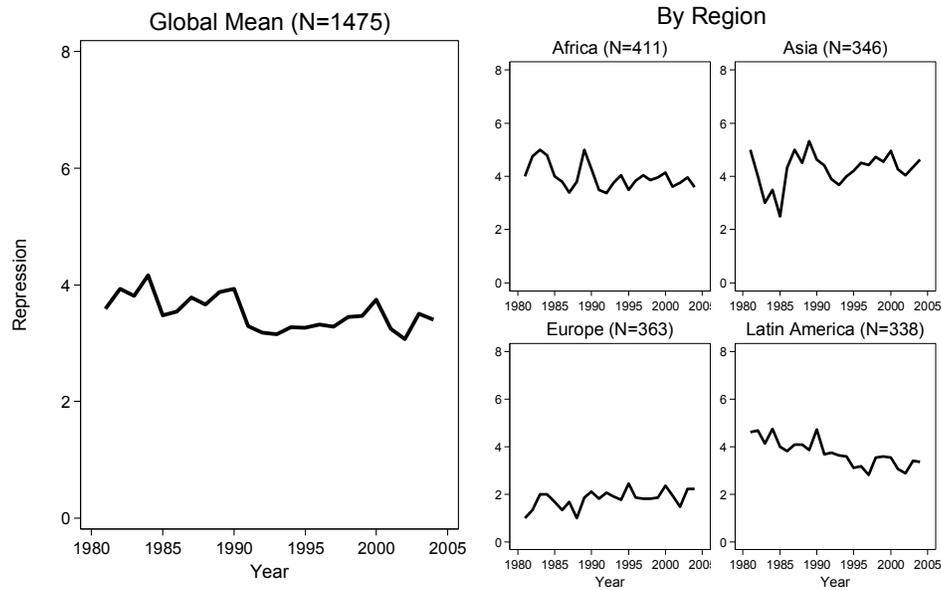
political imprisonment – which we refer to as repression or as physical integrity rights. Human rights prosecutions mainly address executions, torture, disappearances, and genocide, so we should look for impact on these physical integrity rights. We measured it using a physical integrity rights index developed by Cingranelli and Richards.⁵⁶ We also cross-checked our findings using an alternative measure—the political terror scale (PTS), coded both from the Amnesty International report and State Department report.⁵⁷ Our findings were basically the same whether we used the physical integrity index or the PTS.

Figure 6.3 summarizes this physical integrity measure over time in the world and in different regions. Using the physical integrity scale from 0 to 8 where 8 represents the highest level of human rights violations and 0 the lowest, it shows changes in the mean score of repression of physical integrity rights in transitional societies over time. This is a kind of snapshot of changing levels of basic human rights violations in all the transitional countries in the world and in the various regions. The graph on the left panel represents the mean score of all transitional countries. The average level of repression is fairly constant, but we can see a slight drop over time. Moreover, there are visible discrepancies when we examine the mean level of repression by region. This data is also useful to establish the basic point that the dramatic increase in human rights prosecutions is not due to a corresponding dramatic increase in human rights violations in the world.

Figure 6.3. Change in the Average Level of Repression over Time Globally and by Region

⁵⁶ David R. Cingranelli and David L. Richards, *The Cingranelli-Richards (CIRI) Human Rights Database Coder Manual*. (2004). We also reversed the original index into a 9-point scale where “8” indicates the highest level of repression (no respect for physical integrity rights) and “0” indicates an absence of repression (full respect).

⁵⁷ Mark Gibney and M. Dalton "The Political Terror Scale." *Policy Studies and Developing Nations* 4 (1996), pp. 73-84. Gibney, M. (2004). *Political Terror Scale*.



Once the data had been gathered, Hunjoon Kim used three different statistical methods to explore the interactions between human rights prosecutions and the level of human rights violations. Previous studies point to eight other factors that typically influence the level of human rights violations. These include, most importantly, the level of democracy, the level of development, and the presence of international wars or civil wars. Some other studies have also shown that the fact that a country has ratified an international human rights treaty as well as the population size and population growth of the country can also have an impact on human rights practices. We expected that these factors will continue to be important, so we took them into account in our statistical analysis. Previous studies have not explored the impact of human rights

prosecutions, so our study added a new dimension to statistical analyses in the field. We also explored the impact of truth commissions because they are the most often cited alternative transitional justice mechanisms in addition to prosecutions.⁵⁸ Truth commissions publish ample data on past violations but do not lead to punishment, so they permit us to look at the independent effect of normative processes of naming and shaming.

Empirical Analysis

Figure 6.4. Changes in Mean Score of Repression by Human Rights Prosecution Experience

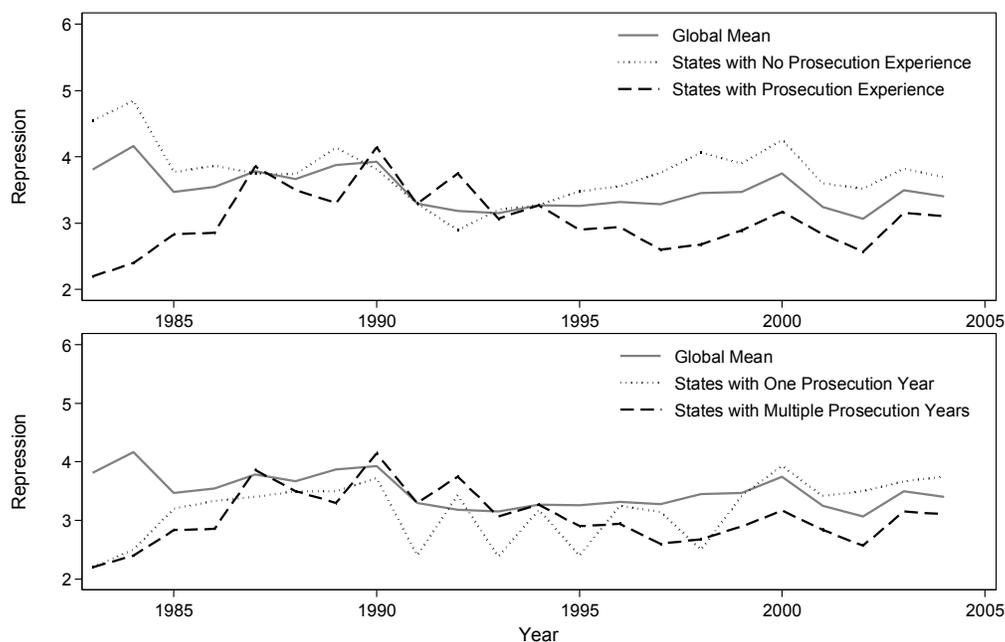


Figure 6.4 provides a simple visual representation of the basic findings of the study – that countries with human rights prosecutions tend to have lower levels of repression than countries

⁵⁸ Hunjoon Kim, “Expansion of Transitional Justice Measures: A Comparative Analysis of Its Causes.” *Department of Political Science*. Minneapolis, University of Minnesota. Ph.D. (2008).

without human rights prosecutions. It shows the changes in the average repression score of countries with different experiences with human rights prosecutions. On the left hand side is the measure of repression: the higher the number, the higher the level of human rights violations. Within each graph, a gray solid line indicates the global means, that is, the changes in the yearly mean of the repression score for all the countries in the analysis, both those that experienced prosecutions and those that did not. In the upper graph, we compared this global mean repression score of countries with prosecutions (dash) to those without any prosecutions (dot). The distinction between the two lines becomes clear and remains stable after 1994. The mean repression score of the group of countries without prosecutions are constantly above the average global level of human rights violations while the mean repression score of the group of countries with prosecutions are below the average. The lower graph compares the mean repression scores of countries with one prosecution year (dot) to those with multiple (two to twenty) prosecution years (dash). While countries with one prosecution year for most of the time period have a below-average mean repression, states with multiple prosecution years tend to have more stable and lower repression scores than the average after 1994. These are still just averages, and the reader who wishes to see the regression tables should look to the original article. Basically we have similar findings to those in the previous chapter, but this time we were able to control for the other important factors that might also have an impact on repression.

In many ways, our findings are consistent with previous studies. Democracy, civil war, economic standing, population size, and past levels of repression have a statistically significant and substantively important impact on the level of repression. But in addition, human rights prosecutions have a strong and statistically significant downward impact on the level of repression. When controlled for all the other relevant factors discussed above, the level of

repression in countries which have had a prosecution is lower than that of countries which never had a prosecution. Moreover, not only prosecution experience, but also the persistence and frequency of prosecutions, matter. The level of repression decreases as the number of years with human rights prosecutions increases in a country. If a country were to move from the minimum (0) to maximum possible number of prosecution years (20), this would bring about a 3.8% decrease in the whole repression scale.

The truth commission variable was included in the model both as a control variable to estimate the true effect of human rights prosecutions and as an independent variable to test whether truth commissions have an independent effect on repression. Truth commission experience also contributes to improved human rights protection in transitional societies. Our model shows that a truth commission brings about a 0.19-point decrease in the repression score in the short-term and a 0.43 point decrease in the long-term. If a country were to have both a human rights prosecution and a truth commission after transition, that would bring about a 0.35 point decrease in the repression score in the short-term and a 0.8-point decrease in the long-term. This finding provides some support for the social and psychological explanations for a decrease in repression. Our finding suggests not only that punishment matters, but that truth-telling matters as well. This may imply that prosecutions function not only through rational deterrence, but also through communicating and dramatizing societal norms.

In sum, we found that countries with human rights prosecutions have better human rights practices than countries without prosecutions. In addition, transitional countries that have experienced more prosecutions over time (and thus a greater likelihood of punishment for past human rights violations) have better human rights practices than countries that have not had or

had fewer prosecutions. Contrary to the arguments made by some scholars, human rights prosecutions have not tended to exacerbate human rights violations.

This research calls into question the claim by trial skeptics that human rights prosecutions aggravate poor human rights practices. Recall that we conceptualize human rights prosecutions as an increase in the enforcement of existing human rights norms. This kind of enforcement involves individual criminal sanctions for state officials who engaged in human rights violations. The prosecutions database shows that there has been an increase in enforcement and in the costs of repression, which is likely to be perceived by government officials who make choices about how much repression to use. We cannot distinguish these costs, but we believe they are both the economic and political costs of the formal sanctions (lost wages, litigation fees, inability to participate in elections while on trial or in jail, etc.) and the informal social and political costs that arise from the publicity surrounding the prosecutions (loss of reputation or legitimacy, and the resulting loss of political and social support). At the same time, there is no reason to believe that the benefits of repression have increased. So, if the benefits of repression have remained constant and the formal and informal costs of repression have increased, the economic theory of crime predicts a decrease in crime, which is what we see in the countries that have experienced more cumulative country trial years. We also found that truth commission experience also has a positive impact on human rights. This suggests that the mechanisms through which transitional justice measures influence human rights involve not only a calculation of the possibility of punishment, but also a response to processes that provide information and communicate norms.

These findings are still preliminary and have been contested by other authors. For example, work by Olsen, Payne and Reiter, using different data, arrives at somewhat different

conclusions.⁵⁹ Studies of prosecutions often agree that they appear to be having an impact, but we don't yet understand well enough the ways in which trials work. We dispute the claims of trial skeptics that prosecutions are exacerbating human rights violations in the world. We suggest, to the contrary, that it appears that prosecutions lead to improvements in human rights. But until we resolve some of our differences, we won't have more precise theoretical statements or clearer policy recommendations. We can't yet sort out clearly whether trials work mainly through deterrence and punishment or through socialization and collective memory. We also can't say yet whether it is better to combine prosecutions with amnesties, or whether it is better to annul amnesties. We suspect that the answers, like most in the social world, are complicated: that prosecutions work both through deterrence and socialization; that prosecutions combined with some kinds of partial amnesties may be a good solution; and that blanket amnesties should be avoided.

In this article, I have endeavored to provide an empirical response to those who advance a generally negative reading of human rights developments and their expression in legal action. The combined research presented above suggests that human rights prosecutions are an important mechanism through which human rights law can be translated into improvements in human rights practices around the globe. Protecting and improving human rights practices requires that transitional countries make substantial structural changes in the nature of their domestic institutions. Such changes are not easy to make. Human rights prosecutions are only one of the many forces and pressures that can contribute to positive human rights change. They

⁵⁹ Tricia Olsen, Leigh Payne, and Andrew Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (Washington, D.C.: U.S. Institute of Peace, 2010).

are not a panacea for human rights problems; they appear to be one form of sanction that can contribute to the institutional and political changes necessary to limit repression.