

Errors about Trials: The Emergence and Impact of the Justice Cascade

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Historically, government officials who abused the human rights of their populations were able to do so with impunity. Even after authoritarian regimes transitioned toward democracy, the architects of state-led atrocities typically did not face judicial proceedings for their crimes. Instead, for the sake of stability or reconciliation, transitional leaders preferred to offer amnesties for the human rights violations of previous regimes. Since the 1980s, however, states are increasingly using multiple transitional justice mechanisms including trials, truth commissions, reparations, lustration, museums and other “memory sites,” archives, and oral history projects, to address past human rights violations. This paper focuses on the most prominent of these transitional justice mechanisms: truth commissions and trials. While amnesties and impunity are still common, there has been a dramatic new trend: democratizing states throughout the world are beginning to hold individuals, including heads of state, accountable for past human rights violations, especially through the use of trials. This trend has been described by Lutz and Sikkink as “the justice cascade.”¹ Despite these changes in the international system, however, important segments of the International Relations literature are not persuaded about this trend. Not only do many realist scholars doubt that the use of human rights trials can advance democracy, they also call into question the very existence of the justice cascade. The purpose of this paper is to provide empirical data on the use of transitional justice mechanisms around the world which we

¹ Ellen Lutz and Kathryn Sikkink, “The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America,” *Chicago Journal of International Law* Vol. 2, No. 1 (Spring 2001), pp. 1-34; also see Chandra Lekha Sriram, “Revolutions in Accountability: New Approaches to Past Abuses,” *American University International Law Review*, 19:2 (2003), pp. 310-429, and *Transitional Justice in the Twenty-First Century: Beyond Truth vs. Justice* edited by Naomi Roht-Arriaza and Javier Mariezcurrena (Cambridge University Press, forthcoming 2006).

believe definitively proves the existence of the justice cascade. We use this data to correct some common errors about trials and to support our argument that the diffusion of changing ideas and norms about justice and human rights has made confronting past human rights abuse a political reality for many democratizing states and for the IR scholars that study them. It is much more difficult to establish the impact that trials have on human rights practices, democracy, and conflict, but the final segment of the paper uses the new data to present a preliminary exploration of the effects of trials and truth commissions, especially in Latin America.

In two recent influential articles, Jack Snyder and Leslie Vinjamuri make some provocative theoretical and empirical arguments about international justice.² They say that “despite what might seem like an increasingly institutionalized norms cascade in the area of international criminal justice, we are skeptical of these claims.”³ So the first claim of Snyder and Vinjamuri that we wish to evaluate is whether the justice cascade exists. Second, they argue that advocates of trials pay more attention to their ideals than to “political realities.” The second question we wish to ask is what exactly are the “political realities” at the current moment in terms of transitional justice? Finally, they argue that human rights trials themselves can increase the likelihood of future atrocities, exacerbate conflict, and can undermine efforts to create democracy.⁴ Their arguments are echoed in other recent work, most prominently in an essay by journalist Helena Cobban in the most recent issues of Foreign Policy, who concludes that “it is time to abandon the false hope of international justice.”⁵

² 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 and Leslie Vinjamuri and Jack Snyder, “Advocacy and Scholarship in the Study of International War Crimes Tribunals and Transitional Justice,” Annual Review of Political Science (May 2004) Vol. 7, pp. 345-362.

³ Snyder and Vinjamuri (2003/2004), p. 39-40.

⁴ Stephen Krasner has also made a similar argument, “After Wartime Atrocities Politics Can Do More Than the Courts,” International Herald Tribune January 16, 2001.

⁵“Thinking Again: International Courts,” Foreign Policy (March/April 2006).

Vinjamuri and Snyder argue that “the literature has been dominated by two general orientations, a legalism that is premised on the logic of appropriateness, and a pragmatism premised on the logic of consequences.”⁶ They identify pragmatists as engaged in rigorous research who pay attention to the political realities of power and self interest of actors. Pragmatists, they say, believe that “Proponents of legalistic justice who underrate the centrality of these political considerations cause more abuses than they prevent”⁷ This is a very specific and strong causal claim. Note that the claim is not just that certain transitional justice strategies, under certain conditions, can lead to more abuses. Rather the strong causal claim is that “proponents of legalistic justice ... *cause more abuses than they prevent.*” (emphasis added). Their second causal claim is that “the prosecution of perpetrators according to universal standards – risks causing more atrocities than it would prevent because it pays insufficient attention to political realities.”⁸ A third claim is that “amnesties, in contrast, have been highly effective in curbing abuses when implemented in a credible way.”⁹ We argue that Vinjamuri and Snyder fail to provide adequate evidence to support these strong causal claims. The final part of our article discusses empirical evidence that suggests that such general causal claims are false.

One key theoretical issue here is that we believe that it is not useful to cast the debate over transitional justice as the “logic of appropriateness” vs. logic of consequences (and the corresponding division between “idealists” who apparently do not appreciate political “realities” and pragmatists who understand them. The old division between realists and the idealists was

⁶ Leslie Vinjamuri and Jack Snyder, “Advocacy and Scholarship in the Study of International War Crimes Tribunals and Transitional Justice,” Annual Review of Political Science (May 2004) Vol. 7, pp. 345-362.

⁷ Vinjamuri and Snyder, “Advocacy and Scholarship in the Study of International War Crimes Tribunals and Transitional Justice,” Annual Review of Political Science (May 2004), p.

⁸ Vinjamuri and Snyder “Trials and Errors,” p. 5.

⁹ Vinjamuri and Snyder, “Trials and Errors,” p. 6.

between those who talked about what “is” and those who talked about what “ought to be.”¹⁰ In this article, we first describe what “is” – that is – the number of trials and truth commissions actually taking place in the world today. Snyder and Vinjamuri occasionally appear to be saying that these trials “ought” not to be taking place. Does that make us the idealists? Our project is firmly aligned with the political science task described by Stephen Krasner, “to explain what is, and thereby to hint at what might be.”¹¹

We find the stark division between idealism/pragmatism and logic of appropriateness and logic of consequences misleading.¹² This division misses what is most interesting about these changes: past advocacy (often motivated by the logic of appropriateness) has changed the *actual* practices of states and international institutions so that the strategic landscape and the logic of consequences with regards to past human rights violations today is simply different than it was twenty years ago. What was “rational” and pragmatic in the 1970s may no longer be rational today. In the 1970s, leaders of countries that engaged in gross violations of human rights faced virtually no legal or political consequences. Today, they increasingly face the possibility in the long term of political exposure and embarrassment, and perhaps trials in their country or abroad. These possibilities affect both the logic of appropriateness *and* the political calculations of strategic actors. In other words, not only the logic of appropriateness has changed with regard to

¹⁰ Anne-Marie Slaughter points out that these dichotomies have also often been used to characterize the difference between international law and international relations, and discusses how to move beyond these dichotomies. “International Law and International Relations,” Hague Academy of International Law, Recueil de cours Vol. 285 (2001).

¹¹ Stephen Krasner, “International Law and International Relations,” Chicago Journal of International Law Vol. 1, No. 1 (Spring 2000), p. 99.

¹² Here we echo arguments made earlier by Martha Finnemore and Kathryn Sikkink, “International Norms Dynamics and Political Change,” International Organization (1998). Likewise the argument for more synthesis between constructivist and rationalist accounts is not novel. See Robert O. Keohane, “International Institutions: Two Approaches,” International Studies Quarterly (1988) 32, p. 393; and Peter Katzenstein, Robert O. Keohane, and Stephen Krasner, “International Organization and the Study of World Politics,” International Organization (Autumn 1998), pp. 678-681.

past human rights violations and war crimes, but the logic of consequences has changed as well. To ignore these trends isn't necessarily pragmatic or good social science.

In contrast, we present evidence that the international justice cascade is sufficiently pronounced and dramatic that it is unlikely to be easily reversed. There is a dramatic empirical trend toward the increasing judicialization of world politics. We show that the frequency and timing of human rights trials are linked to transitional regions and that within these regions trials are tied to the severity of human rights violations. We also argue that the impact of human rights trials in terms of rule of law, future human rights violations, and conflict in many cases is more positive than scholars like Snyder and Vinjamuri have suggested. Although human rights trials are associated with conflict and severe human rights abuses, in most cases, conflict and abuse precede trials, rather than the reverse. In terms of policy recommendations, we suggest that states do not need to choose between transitional justice mechanisms to address past abuse. Rather, the evidence from our data demonstrates that many states use multiple justice mechanisms during and after democratic transitions. Furthermore, although amnesties appear to be a viable short-term option for states, amnesties often are not preventing human rights trials from occurring in the long-term, and in some cases amnesties are actually being reversed. So, for example, almost every transitional country in Latin America adopted some kind of amnesty law, and yet these countries also made extensive use of both trials and truth commissions.

In the first part of the paper, we introduce our data set of transitional justice mechanisms. We describe the empirical trends as they relate to truth commissions and three different categories of trials: domestic; foreign; and international or hybrid. This is the first effort to present quantitative evidence of the justice cascade, which previously has been described only in

qualitative case studies and legal analysis.¹³ The data permit some preliminary findings regarding the justice cascade and its distinct regional patterns. We focus our remarks on domestic trials since international trials, foreign trials, and truth commissions have been covered more extensively elsewhere.¹⁴ Finally, we begin to explore the impact of the justice cascade in terms of the effects of trials on human rights, democracy, and conflict. We will examine impact in particular with regard to the experience of Latin America – the region with the greatest number of human rights trials. Our evidence is not sufficient to show that human rights trials lead to improvements in human rights and democracy or to a decrease in conflict. But, on the basis of our evidence there is no reason to believe that human rights trials in general have a negative effect on human rights practices.

The Political Reality of the Justice Cascade:

To determine the dimensions of the global justice cascade, we have created a new data set of two main transitional justice mechanisms: truth commissions and trials for past human rights violations. To create this data set, we have gathered information from existing data sets, human rights organization reports, government documents, and information provided by non-governmental organizations; and analyzed our data in order to ascertain dominant trends. The data set includes domestic truth commissions and domestic, foreign and international trials for past human rights violations. Because of the already large scope of the project, we do not now

¹³ For example, Transitional Justice: How Emerging Democracies Reckon with Former Regimes, Vol. 1: General Considerations, Neil J. Kritz, editor. (Washington D.C: United States Institute of Peace, 1995); Steven R. Ratner and Jason S. Abrams, Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy 2nd Edition (Oxford University Press, 2001); Transitional Justice and Rule of Law in New Democracies, Edited by A. James McAdams (University of Notre Dame Press, 1997); Kathryn Sikkink, “The Transnational Dimension of the Judicialization of Politics in Latin America,” in The Judicialization of Politics in Latin America, edited by Rachel Sieder and Line Schjolden (New York: Palgrave/Macmillan, 2005); Geoffrey Robertson, Crimes Against Humanity: The Struggle for Global Justice (New York: The New Press, 1999).

¹⁴ See, for example, Gary Bass, Stay the Hand of Vengeance (Princeton University Press, 2000) and Priscilla B. Hayner, Unspeakable Truths: Facing the Challenge of Truth Commissions; and Naomi Roht-Arriaza, The Pinochet Effect: Transnational Justice in the Age of Human Rights (University of Pennsylvania Press, 2005).

include other important transitional justice mechanisms such as “lustration” or vetting, reparations, and various forms of “memory work” such as museums and archives.¹⁵

We define truth commissions as a temporary body officially authorized by the state to investigate a pattern of past human rights violations and issue a report.¹⁶ Our data set on trials only counts judicial proceedings that seek to determine individual criminal responsibility for human rights violations. We define **domestic trials** as those conducted in a single country for human rights abuses committed in *that* country. **Foreign trials** are those conducted in a single country for human rights abuses committed in *another* country – the most famous of which are Spain’s trials for human rights violations that have occurred in Argentina and Chile.

International trials also involve trials for individual criminal responsibility for human rights violations in a particular country or conflict and result from the cooperation of multiple states, typically acting on behalf of the United Nations. Examples include the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). **Hybrid trials** are third generation criminal bodies defined by their mixed character of containing a combination of international and national features, typically both in terms of staff as well as compounded international and national substantial and procedural law. These typically occur in the country where the abuses were committed but with international assistance and

¹⁵ Lustration or vetting are assessments of individuals to determine their suitability for public employment based on their past involvement with repression. See <http://www.icj.org/en/tj/783.html>. Lustration has been an important transitional justice mechanism in Eastern Europe. See for example, Gabor Halmai and Kim Lane Scheppele, “Living Well is the Best Revenge: The Hungarian Approach to Judging the Past,” in Transitional Justice and Rule of Law in New Democracies. On “memory work,” see Elizabeth Jelin, State Repression and the Labors of Memory (Minneapolis: University of Minnesota Press, 2003)

¹⁶ Hayner, p. 14. Other forms of transitional justice mechanisms that have been established for the primary purpose of establishing the truth about past human rights violations have been excluded from our data. These include truth commissions or commissions of inquiry reports undertaken by nongovernmental organizations (Brazil, 1985), armed resistance groups (African National Congress, 1992 & 1993), special prosecutors (Ethiopia 1992, Mexico 2002), and commissions that have a mandate limited to a single human rights violation (Cote d’Ivoire, 2000 & Peru 1983).

oversight. Examples can be found in Cambodia, Sierra Leone, and Timor-Leste (formerly East Timor)¹⁷.

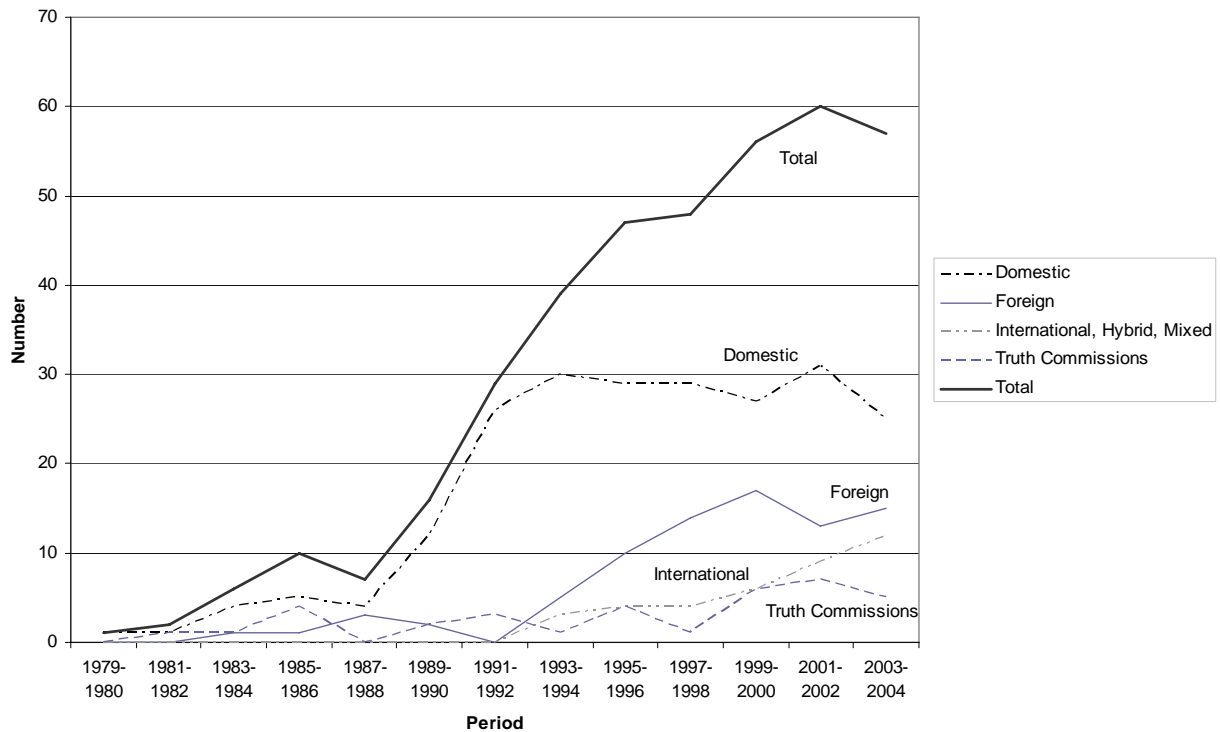
Our data set is a complete set of trials and truth commissions from countries in transitions to democracy from 1979 to 2004. Some of the countries adopting trials and truth commissions have experienced wars or internal conflicts short of wars and *some have not*. One key difference between human rights scholars and security scholars on the issue of transitional justice relates to the selection of the universe of cases. Security scholars are interested in the use of transitional justice mechanisms following conflict, and thus select only those cases for study. While understandable, this case selection in principle allows them to comment only on the effects of trials or truth commission in conflict situations. Instead, for example, Snyder and Vinjamuri make sweeping conclusions about the effects of trials in general, and about the effects of legalist advocacy of trials. Human rights scholars have been interested in transitional justice more generally and thus select a wider range of war and non war cases, allowing for more generalizable findings about the effects of trials.

Analysis of our data reveals a rapid shift toward new norms and practices providing more accountability for human rights violations – a shift that is regionally concentrated yet internationally diffuse. Specifically, our data reveals an unprecedented spike in state efforts to address past human rights abuses that has occurred both domestically and internationally since the mid-1980s (see figure 1). This represents a significant increase in the judicialization of world politics both regionally and internationally.

Figure 1

¹⁷ See for example, Sigall Horowitz, “Transitional Criminal Justice in Sierra Leone,” and Caitlin Reiger, “Hybrid Attempts at Accountability for Serious Crimes in Timor Leste,” in Transitional Justice in the Twenty-First Century: Beyond Truth vs. Justice edited by Naomi Roht-Arriaza and Javier Mariezcurrena (Cambridge University Press, forthcoming 2006).

Trends in Transitional Justice Mechanisms



The trends in transitional justice follow some distinct patterns. Of the 192 countries we surveyed over a twenty five year period, 34 countries have used truth commissions, and 50 countries had a least one transitional human rights trial. If we look only at the approximately 85 new and/or transitional countries in the period 1979-2004, we see that well over half of these transitional countries attempted some form of judicial proceedings.¹⁸ If we add to this list the 12 countries that used truth commissions but did not use trials, well over two thirds of transitional countries used either trials or truth commissions as a transitional justice mechanism. Second, of these fifty

¹⁸ We arrive at the estimate of approximately 85 total transitional countries by subtracting from our list of 192 countries the 41 democracies that existed in the world as the third wave of democratization began in 1974 and the 67 non-democracies that still exist in the world today and did not have even a failed experience with transition to democracy. Based on Larry Diamond’s coding of Freedom House data. “Can the Whole World Become Democratic? Democracy, Development, and International Politics,” Center for the Study of Democracy, University of California, Irvine, Paper 03’05, 2003, Table 1 and Table 3, pp.3-6.

countries, many carried out a series of trials, which we capture in our data set as “country-trial years.¹⁹” So, for example, the country with the most trials, Argentina, had transitional human rights trials underway during 19 of the 26 years we surveyed, followed by Chile (15), Guatemala (13) Paraguay (12) Ethiopia (12), Rwanda (11), Panama (11), and Croatia (10), to list the countries that had trials underway for at least 10 of the 26 years. Nor should we think that amnesties are an alternative to transitional justice that necessarily blocks trials. Almost all the transitional countries in Latin America, including four of the five above with the most trial years – Argentina, Chile, Guatemala, and Panama - also had amnesty laws of various kinds, and yet these laws did not succeed in blocking all trials.²⁰ In other words, the use of a truth commissions and/or human rights trials among transitional countries is not an isolated or marginal practice, but a very widespread social practice occurring in the bulk of transitional countries, and amnesties are not an alternative to transitional justice, but more often part of the transitional justice mix of policies. While we now look at each of the four types of transitional justice mechanisms (truth commissions, domestic trials, foreign trials, and international trials) separately, we believe that they are all part of a related global phenomenon – what we call the justice cascade. A satisfactory explanation for this phenomenon would need to explain change at all these levels. We believe that processes of international learning and diffusion are part of the explanation for the justice cascade, but this is not the topic of the current paper, which instead provides documentation of the trend and an initial examination of its impact.²¹

¹⁹ We define country-trial years as the number of years during which a state is actively engaged in judicial proceedings for individual criminal responsibility for human rights abuse. This number does not reflect the number of trials underway within that state during those years which may be far greater.

²⁰ The three transitional countries that did not have amnesties were Grenada, Guyana, and Paraguay. I want to thank Louise Mallander for sharing with me the data on post-1979 amnesties in Latin America from her global data set on amnesties.

²¹ See Lutz and Sikkink, 2001, and Sikkink and Walling, 2005, for initial attempts to explain the emergence of the justice cascade.

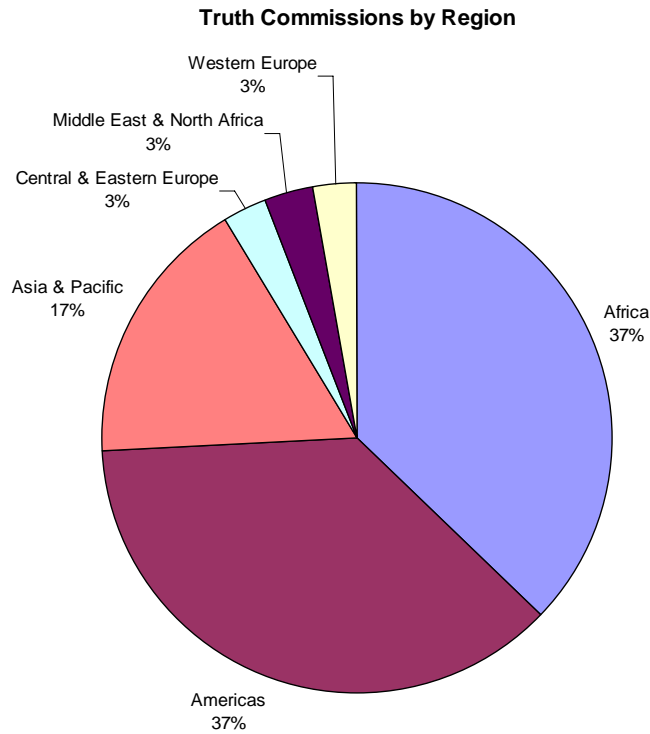
Truth Commissions:

Our data on truth commissions was gathered by combining existing data sets compiled by Priscilla Hayner (2001 & 2004) and the United States Institute for Peace Truth Commission Digital Collection with reports from nongovernmental organizations like the International Center for Transitional Justice.²² As figure 1 illustrates, the number of new truth commissions established has climbed steadily over time with a notable peak of growth in the early 2000s. By our conservative count, between 1974 and 2004 at least thirty-four truth commissions were inaugurated worldwide. At least an additional five truth commissions, not included in our data, were proposed or under development by the end of 2004, so we anticipate that the growth in truth commissions will continue.

Figure two demonstrates that the growth trend in truth commissions is regionally concentrated. Truth commissions are more prevalent in Africa and the Americas than in other regions, each comprising 37% of the total. Combined, the Africa and the Americas regions comprise nearly three-fourths of the total number of truth commissions worldwide. Seventeen percent of truth commissions are found within the Asia and Pacific region, followed by only 3% each in Central & Eastern Europe, Western Europe, and the Middle East & North Africa.

Figure 2

²² There are no important differences between our data and that presented by Hayner in her work and we are indebted to her for sharing her 2004 data with us before publication. What is new about our approach is to integrate the data on truth commissions with the data on domestic, foreign, and international trials.



Our data on truth commissions, when complemented with our data on domestic trials also illustrates that multiple transitional justice mechanisms frequently are used in a single case. Almost two-thirds of the countries identified in our data set as establishing truth commissions also held some form of trials to deal with past human rights abuses (See Table 1, in the appendix).

Remarkably, *every* country in the Americas region and in Europe that established a truth commission also held domestic trials. Alternatively, few of the twelve African states that established truth commissions also held domestic human rights trials – only Burundi, South Africa and Sierra Leone. In the Asia & Pacific region, three of the six states that established truth commissions also held domestic or international human rights trials. In sum, most countries that establish truth commissions also hold domestic human rights trials, but there are

important regional variations in this practice. Nevertheless, it has not been the case that countries must choose between trials or truth during or following democratic transition, as has sometimes been suggested in the transitional justice literature.²³

Domestic Trials:

In order to examine the contours of the justice cascade with regard to domestic human rights trials, we analyzed all U.S. Department of State Country Reports on Human Rights Practices covering the period 1979-2004. The State Department human rights reports are generally considered to be a reliable source of information on states' human rights practices.²⁴ Our data set includes information on human rights practices and domestic judicial activity for 192 countries and territories on an annual basis covering a period of 26 years. We gathered data on all domestic judicial proceedings held in response to human rights abuses committed by government officials or their agents in countries undergoing transitions from authoritarianism to democracy. To be included in the data set the judicial activity discussed in the report must inflict costs on a government agent accused of having *individual criminal responsibility* for human rights violations.²⁵ Judicial proceedings can be initiated either by governments themselves or by individuals or groups. Human rights groups in many countries, acting on behalf of victims, may

²³ See for example, the debate between Juan Mendez and Jose Zalaquett. Juan Mendez, "In Defense of Transitional Justice," in Transitional Justice and Rule of Law in New Democracies, pp. 1-26; Jose Zalaquett, "Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations," in Transitional Justice, p. 203-206. In a forthcoming book, Naomi Roht-Arriaza also argues that current models of transitional justice have moved beyond the justice vs. truth dichotomy: Transitional Justice in the Twenty-First Century.

²⁴ See Poe, Steven C., Sabine C. Carey, and Tanya C. Vazquez. "How Are These Pictures Different? A Quantitative Comparison of the Us State Department and Amnesty International Human Rights Reports, 1976-1995." *Human Rights Quarterly* 23 (2001): 650-77.

²⁵ Judicial proceedings may include the following: indictment, arrest, detention of a suspect (whether in house or in prison), or an extradition request that is being actively pursued, the initiation of a trial, or the continuance of a trial so long as there is active progress being made in the case, a ruling in a trial. Civil trials, the granting of reparations, apologies, or purely administrative inquiries or investigations and the like do not count as judicial activity in our data set. Nor are trials of insurgents or terrorists included. Further, the judicial system of the country (or court in the case of an international trial) must meet minimal human rights standards for a sufficiently free and fair trial – generally this means that trials are public and the accused have access to counsel.

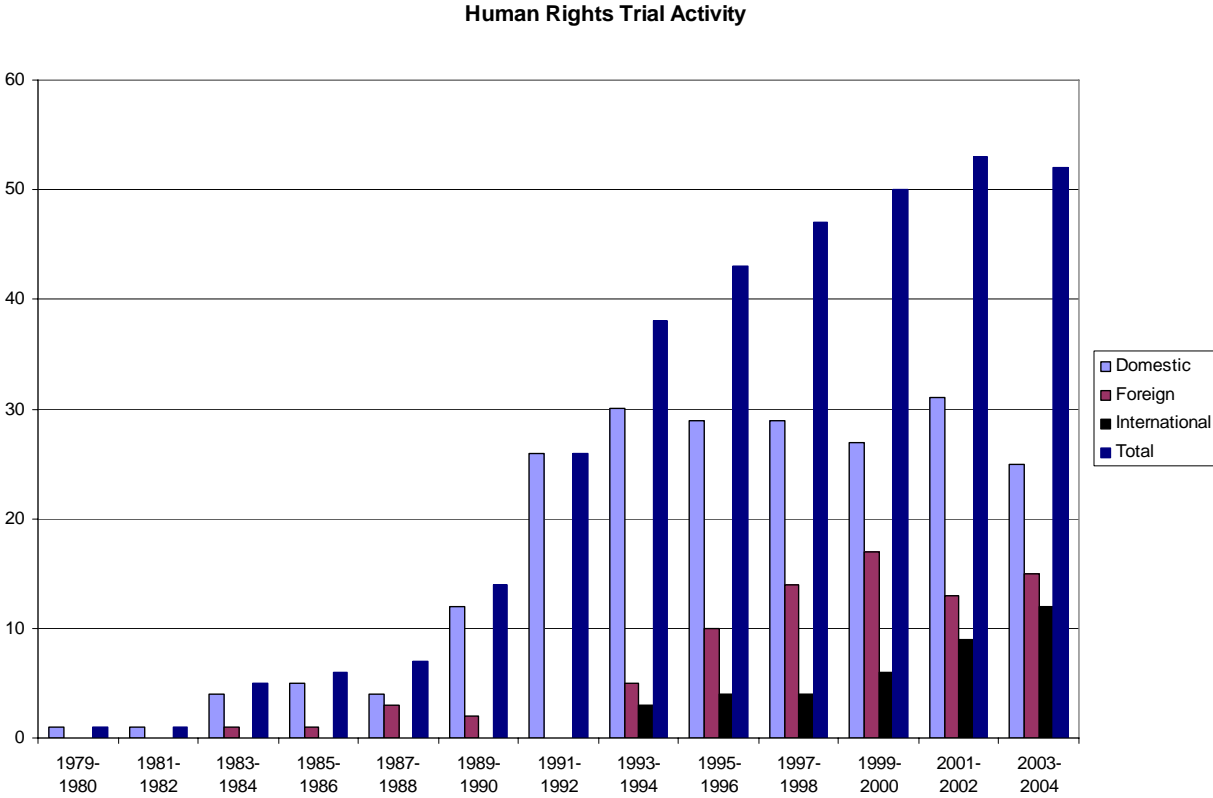
file criminal human rights cases in the courts. We only include human rights trials occurring in *transitional countries* – countries that have experienced or are undergoing regime change from an undemocratic regime to a more democratic political system marked by relatively free and fair elections. The data records the presence of judicial activity meeting the above qualifications in a given state or territory for each year. It does not measure the amount (the number of trials for example) or outcome of that activity in that year. We count all active judicial proceedings, not only those trials that result in convictions. Nonetheless, we do record convictions when available in our data. While reporting on convictions is not systemic enough to give accurate conviction rates, we can say that they are sufficiently common that the judicial proceedings included in our data carry with them the possibility of genuine sanctions for perpetrators.²⁶ Even judicial activity that does not lead to a conviction may impose significant costs on the accused, including detention, harm to reputation, lawyers fees and lost income while detained.

Figure 3 demonstrates the broad contours of the justice cascade. The most common form of trials is domestic trials which in most years exceed the number of foreign and international trials combined. Domestic trials were largely insignificant until the mid-1980s after which there

²⁶ We believe that our trial data underestimates the actual number of domestic human rights trials in the world today. In this initial paper, we are only considering “transitional trials” – those taking place in countries experiencing transitions from undemocratic to more democratic regimes. At this point in our research, we do not count human rights trials occurring in non-transitional countries, whether stable democracies or authoritarian countries, when making our conclusions. Nonetheless, we have begun creating a second larger data set that includes all human rights trials, and the total number of all human rights trials is much higher than that of transitional trials. Next, because it is not possible to accurately account for every human rights trial in every state, we simply code a state as having a human rights trials if at least one judicial proceeding for accountability for past human rights violation is occurring in that country during a given year. Because we are interested in trials involving *individual criminal responsibility*, we have excluded trials, like those held in the United States under the Alien Claims Tort Act, of individuals for civil damages for past human rights violations, despite the significant sanctions on individuals they may impose. This emphasis on individual responsibility also means that human rights trials in regional human rights courts, like the European and Inter-American Courts of Human Rights, and significant regional human rights activity short of trials, like that of the African Commission of Human Rights, are also excluded. In sum, our data is very conservative in terms of counting international transitional justice mechanisms, and we suspect that the increasing judicialization of human rights is an even more pronounced trend than that indicated in our graphs.

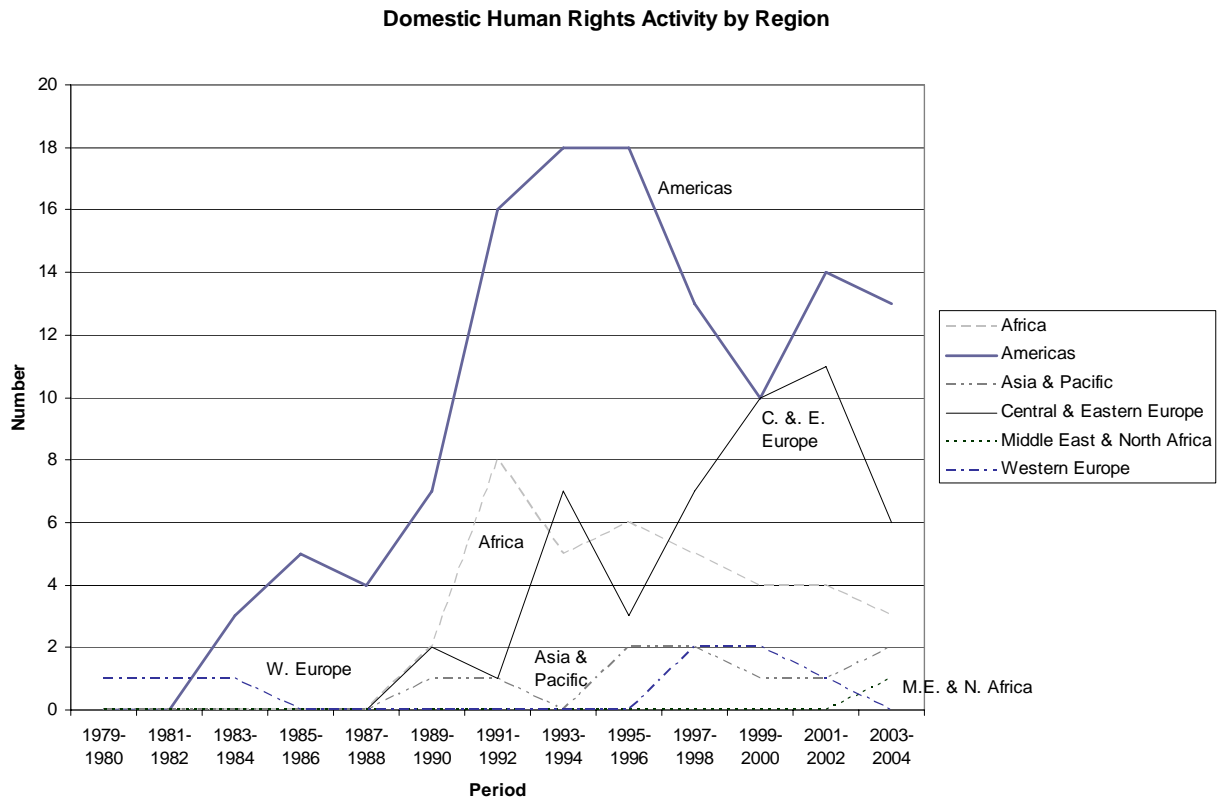
is a significant increase in the number of domestic trials in countries having undergone democratic transition. The number of domestic trials rapidly increases until the early 1990s when it begins to level out before reaching its greatest height in 2002, followed by a mild decrease in the number of trials. Except for the 1993-1994 period, foreign trials have decreased at the same time that domestic trials have increased. International trials, which emerge last in the sequence, have also increased over time and their forms have changed to include hybrid and mixed tribunals.

Figure 3



The trends in domestic trials, while widespread internationally, have strong regional variations as demonstrated in figure 4.

Figure 4



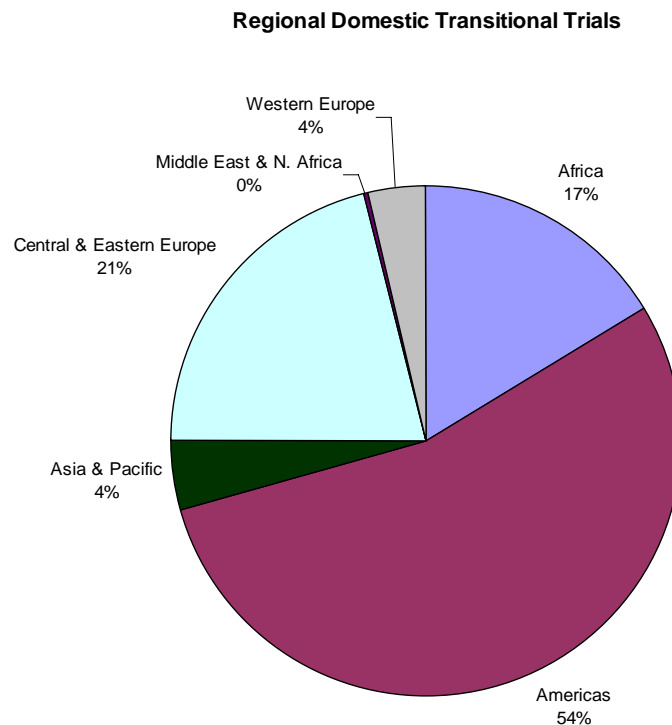
The first domestic trials captured by our data set emerge in Southern Europe (Portugal 1979 & Spain 1982) followed closely by Latin America (Argentina 1983 & Bolivia 1983).²⁷ By far the greatest concentration of domestic trials occurs in the Americas, followed by Central & Eastern Europe and Africa. The height of domestic trials appears to occur several years following democratic transition in both the regions of the Americas and Central & Eastern Europe.

As figure 5 indicates, the greatest number of transitional trials occurs in these regions with the Americas comprising 54% of transitional trials followed by Central & Eastern Europe

²⁷ Since our data set begins in 1979, we do not include perhaps the most important precursor to the modern wave of domestic human rights trials – the trial of the Greek juntas in 1974 and 1975. See Nicos C. Alivizatos and P. Nikiforos Diamandouros, “Politics and the Judiciary in the Greek Transition to Democracy,” in *Transitional Justice and Rule of Law in New Democracies*, pp. 27-60. Aside from the Greek trials, two other trials we miss are domestic human rights trials in Peru and Portugal in 1978. The U.S. State Department Human Rights Country reports in 1979 mention these trials, and the report labels the trial in Peru “the first of its kind in judicial history”. However, because we do not have data on all the countries in the data set for 1978 and because the State Department does not begin reporting on human rights practices until 1979 these initial domestic trials are not captured in the data-set.

with 21% and sub-Saharan Africa with 17%. Combined these three regions account for 92% of all country trial years. Seventeen countries in Latin America accounted for 122 country trial years; 12 countries in Africa accounted for 39 trial years, and 10 countries in Central and Eastern Europe, accounted for 48 country trial years.

Figure 5



In the Americas, the first domestic transitional trials occurred in 1983 but did not begin climbing steadily until later in the decade before peaking in 1995, a decade later. Although the number of domestic trials has lessened slightly in the first half of the 2000s, they remain at a higher level than in any other region. Similarly, domestic trials began in Central & Eastern Europe following the dramatic period of transition in the region after the collapse of the Soviet Union.

Seventeen Latin American countries carried out some form of judicial proceedings. Every transitional country in the region except Brazil carried out some form of human rights trials. Other regions do not exhibit this same wide dispersal of human rights trials that we see in Latin America. In East Asia and the Pacific, three countries, Cambodia, Timor-Leste, and Indonesia, account for over three quarters of trial years in that region. In Africa, two countries, Rwanda and Ethiopia, account for over half of country trial years.

Foreign Trials:

As in the case of domestic trials, foreign trials are concerned with individual criminal responsibility of state agents for human rights abuses committed in their home country. What differentiates foreign trials from their domestic counterparts is that foreign trials occur in the judicial system of a state other than the state where the abuse occurred. For example, the trial and conviction of the Argentine naval officer Adolfo Francisco Scilingo in Spain for human rights violations in Argentina is an example of a foreign trial. Not all countries permit such foreign human rights trials, and those that do use different bases for jurisdiction, and different mixes of domestic and international law.²⁸ As such, foreign trials are a patchy and incomplete option for transitional justice. Foreign trials are thus not a complete substitute for domestic trials, only a partial alternative used primarily when domestic trials are blocked for some reason such as an amnesty.

For the purposes of this project, foreign trial activity is counted, like domestic trial activity, by the year in which judicial activity occurred and for the state in which the accused is being prosecuted.²⁹ So while Spain held multiple foreign trials in 1998 for human rights crimes occurring in at least 3 different countries (Argentina, Chile, and Honduras), it counts as a single

²⁸ For a more in-depth discussion of these issues, see Lutz and Sikkink, "The Justice Cascade."

²⁹ For this project, we do not consider the more complex issues of the content of the trials and the type of law applied.

country-trial year in a single country in our data set. Because the State Department only systemically reports on states' *domestic* judicial activity, in the case of foreign, international and hybrid trials we have supplemented the State Department data with information gathered from human rights groups, nongovernmental organizations and intergovernmental institutions.³⁰

With regard to foreign trials, although we only count the country where the trials are held, we also keep track of the countries where the human rights abuses occurred that are the subject of the trials. Our data base includes 82 foreign trial years. Just over 80% of all foreign trials were held within the region of Western Europe; but the bulk of these trials involve human rights violations in Latin America and Eastern Europe. As figure 1 illustrates, foreign trials emerge early in the 1980s and steadily increase for much of the decade. The number of foreign trials dramatically increases throughout the 1990s growing until reaching its highest point in 2001. Part of this dramatic increase is probably the result of emulation after Pinochet's arrest, detention, and trial in London in 1998 and 1999, the so-called "Pinochet Effect."³¹ Although Pinochet was eventually allowed to return to Chile for health reasons, his trial nevertheless mobilized human rights organizations and individual lawyers representing families of victims to file new cases in foreign courts.

Nevertheless, the trend in foreign trials begins well before Pinochet was arrested in London in 1998. We record twenty nine foreign county trial years, or 35% of our total foreign

³⁰ The data on transitional justice trials was gathered from U.S. State Department Country Reports on Human Rights Practices (1979-2004); Human Rights Watch reports, United Nations Documents and Security Council Resolutions, and information found in the United States Institute for Peace Digital Collections, International Center for Transitional Justice, and the following non-governmental organizations: Coalition for International Justice, Prevent Genocide International, REDRESS, Universal Jurisdiction Information Network, Global Policy.org, and Track Impunity Always (TRIAL).

³¹ Naomi Roht-Arriaza, The Pinochet Effect: Transnational Justice in the Age of Human Rights (University of Pennsylvania Press, 2005); see also Lutz and Sikkink, 2001; David, Madeleine, 2003. The Pinochet Case: Origins, Progress and Implications. (London: Institute of Latin American Studies).

trials, before Pinochet's arrest. Of these 29 trials, six are WWII successor trials, and the rest are foreign human rights trials from the more recent period. These foreign judicial processes led to the issuing of hundreds of extradition requests and international arrest warrants for accused perpetrators of human rights violations, especially military officers in Latin America, albeit with occasional arrests and convictions. A number of European judicial systems permit trials and convictions in *abstencia*, and some convictions were secured in this manner.

We note four characteristic types of foreign trials that we see in the data. First are the still ongoing European World War II successor trials.³² The second type of foreign trials involves crimes committed largely in the Americas, and particularly in Argentina, and Chile and in European courts. Human rights violations in a single country, Argentina, are the subject of one fourth of all foreign human rights trials. The third type involves trials held largely in Western European countries for *war crimes* committed abroad, most notably in the former Yugoslavia and Rwanda by individuals who are arrested on the soil of the prosecuting state and who are not under indictment by a domestic or international tribunal. Finally, we also see foreign trials occurring in Latin American states – 12% of all foreign trials – for human rights abuses committed in the territory of other Latin American states. Again, Argentina is the notable leader in transitional justice mechanisms for its region.³³

³² Although World War II successor trials are an important part of the foreign trial data they have occurred with regularity since the end of WWII as the perpetrators, often former Nazi officials and concentration camp guards, are discovered and brought to justice. We separate these trials that have been occurring since the 1940s in order to examine the fundamentally different trend in foreign trials that emerge in Europe in the 1980s to put former government officials and military officers on trial for crimes committed in Latin American and other authoritarian or formerly authoritarian countries. These trials have a distinct pattern from WWII successor trials.

³³ See Kathryn Sikkink and Carrie Booth Walling, “Argentina’s Contribution to Global Trends in Transitional Justice”, in Transitional Justice in the Twenty-First Century.

That foreign trials regularly decrease at the same time that domestic trials increase highlights the interaction between domestic and international legal and political spheres with regard to human rights trials. When amnesties block access to domestic courts, human rights activists seek justice in foreign courts. In this sense, domestic amnesties may lead to an increase in foreign trials. The “success” of some foreign judicial proceedings (and here we define success not only by the number of convictions, but also as the ability to generate arrest warrants, detentions, and to establish the legality of the procedure) in turn created new incentives to reopen domestic judicial proceedings, since many perpetrators (and governments) would prefer trials at home to foreign trials. As possibilities for domestic trials are now reopening in the Americas, especially Argentina, we can expect the number of foreign trials to decrease. Similarly, as we move further away in time from the wars in the former Yugoslavia and the genocide in Rwanda, the number of cases related to these conflicts will also likely diminish.

In some cases, the United States has pressured countries to end foreign trials. In 2003, for example, Belgium modified its universal competence law after the United States threatened to move NATO headquarters from Belgium because of controversial charges brought against members of the US presidential administration and military command. This led to the expectation that foreign trials would continue to decrease as European governments began to revise their judicial practices, and indeed their laws, because of political and economic pressure from the United States. But our data does not show a decline in the number of foreign trials in 2003 and 2004. Indeed the period 2003- 2005 also saw some of the biggest successes of foreign trials since the arrest of Pinochet. In 2003, when the Mexican Supreme Court voted to extradite a former Argentine navy officer, Ricardo Cavallo, to stand trial in Spain for human rights abuses in Argentina, it was the first time that “one country extradited a person to another country to

stand trial for crimes that happened in a third.”³⁴ In 2005, Spain convicted another Argentine, Scilingo, and sentenced him to 640 years in prison for crimes against humanity. The sentence was a significant affirmation of the principle and practice of universal jurisdiction.³⁵ Thus attempts by states to “rein in” the justice cascade have apparently not succeeded to date. As we said earlier, we anticipate a decline in foreign trials, but we think this decline will come more in relation to the reopening of domestic trials rather than to pressures from the United States to end foreign trials. For example, as hundreds of human rights trials reopen in Argentina after it declared its amnesty laws null in 2004, Argentine plaintiffs may withdraw from or pay less attention to foreign trials.

International and Hybrid

International and hybrid trials incorporate the efforts of multiple states working together to bring accountability for past human rights abuses in a particular state or conflict. In our data we count each international or hybrid court or tribunal once for each year in which it engaged in judicial activity such as trials, extraditions, or arrests.

International trials were instituted following both WWI (Constantinople, 1919) and World War II (Nuremberg, 1945; Tokyo 1946).³⁶ International trials for humanitarian law violations and human rights abuses remained closed until the International Criminal Tribunal for the former Yugoslavia (ICTY) was established by Security Council Resolution 808 in 1993, followed shortly thereafter by the International Criminal Tribunal for Rwanda established by Security Council Resolution 955 in 1994. Subsequently, hybrid trials combining international

³⁴ <http://www.hrcr.org/hottopics.argentina.html>

³⁵ For Scilingo’s confession, see Horacio Verbitsky, *El Vuelo* (Buenos Aires: Planeta, 1995); the sentence of the Spanish court, Audiencia Nacional Sala de lo Penal, Seccion Tercera, Sumario 19/1997 Rollo de Sala 139/1997, Juzgado C. Instruccion Numero 5 Sentencia Numero 16/2005.

³⁶ On the history of international trials, including cases where they were considered but never implemented, see Bass, 2000.

and domestic features have been initiated to deal with human rights abuses in Kosovo, East Timor (Timor-Leste), Sierra Leone and Cambodia.³⁷ The recent emergence of hybrid trials illustrates what seems to be increasing support for the belief that domestic judicial procedures are preferential to alternate international remedies and that when domestic political and legal structures are not sufficiently developed, hybrid trials containing some national elements are preferable to international trials.³⁸ Although they occur with much less frequency overall and we have fewer years of data to analyze for trends, international and hybrid trials appear to be increasing.

The Impact of the Justice Cascade:

In this paper, in addition to presenting the aggregate data and data disaggregated by region, we begin to explore the impact that trials and truth commissions have had on human rights violations, democracy and conflict resolution in regions and individual countries. We will place particular emphasis on the Americas, which account for over half of the country trial years. Snyder and Vinjamuri argue that “Policies and institutions of humanitarian justice are destined to fail.” More specifically, they argue that “recent international criminal tribunals have utterly failed to deter subsequent abuses in the former Yugoslavia and in Central Africa.”³⁹ Gary Bass makes a similar point: “War crimes tribunals often do not work. Despite the shining example of

³⁷ Kosovo presents an interesting case because it was the first time following the ad-hoc tribunals of the ICTY and ICTR that the UN placed international judges and prosecutors within the domestic criminal justice system of a country to work alongside its domestic jurists. See especially Hartmann, Michael E. “International Judges and Prosecutors in Kosovo: A New Model for Post-Conflict Peacekeeping,” United States Institute of Peace Special Report 112, October 2003. <http://www.usip.org/pubs/specialreports/sr112.html> So while Kosovo’s trials fit into the international and hybrid category they differ from the ad-hoc tribunals that preceded them and the hybrid models that followed. See also Richard Decker and Elise Keppler. “Beyond the Hague: The Challenges of International Justice” *Human Rights Watch World Report 2004*. <http://hrw.org/wr2k4/10.htm>

³⁸ Chandra Lekha Sriram, “Revolutions in Accountability: New Approaches to Past Abuses,” *American University International Law Review*, 19:2 (2003), pp. 310-429, and *Transitional Justice in Twenty-First Century*.

³⁹ Snyder and Vinjamuri, (2003/2004), p. 5.

Nuremberg, the history of international justice is full of failure.”⁴⁰ A recent article by Helena Cobban in Foreign Policy about international trials makes forceful claims that such tribunals “have squandered billions of dollars, failed to advance human rights, and ignored the wishes of victims they claim to represent.”⁴¹

But what do they mean by failure? And what method and kinds of evidence do they use to assess success and failure? Virtually all of the arguments about effectiveness are counterfactual arguments, comparing what did happen to what would have happened under some other scenario, so evaluating arguments about effectiveness means evaluating the plausibility of their counterfactual claims.

First, we need to separate the questions of the “success” of *setting up* transitional justice mechanisms from the effectiveness of those mechanisms, once established, in meeting their goals. When Bass says the history of international justice is “full of failure” he appears to refer mainly to the failure to set up institutions for international justice. The first part of this paper has addressed the emergence and growth of the transitional justice mechanisms and institutions. We have argued that states and individuals have been more successful in setting up such mechanisms in the last twenty five years than they were in the past. But the successful emergence of transitional justice norms and institutions does not necessarily imply or predict their “effectiveness.” Whether or not these trials and truth commission “work” is an empirical question that needs to be answered with additional research. We have made the case that the justice cascade is an empirical reality. Now we take up the separate issue of whether it has been successful in leading to specific outcomes.

⁴⁰ Gary J. Bass, “Milosevic in the Hague,” Foreign Affairs (May-June 2003), p. 84.

⁴¹ Helena Cobban, “Think Again: International Courts” (March/April 2006), p.

We define success of the justice cascade by whether transitional justice mechanisms can contribute to a reduction of future human rights violations. While our main determinant of success is a reduction of human rights violations, we are also interested in the impact of trials and truth commissions on democracy and conflict. There are many problems with evaluating the effectiveness of transitional justice mechanisms. The first dilemma of evaluating the success or failure of human rights trials is that it usually involves a counterfactual argument. We compare how many human rights violations a country has to what it *would have had* without transitional justice or with a different combination of transitional justice mechanisms. We can't eschew counterfactual argument because they are ubiquitous in political life. Counterfactual arguments are often contentious because well intentioned scholars can propose quite different counterfactual scenarios and it is difficult to prove whether one is more plausible than another.⁴²

So, for example, Snyder and Vinjamuri argue that "The backlash against the ICTY has complicated progress toward peace and democracy in Serbia." Their counterfactual apparently is --If the ICTY had not existed, Serbia would have made more progress toward peace and democracy. When they say that "recent international criminal tribunals have utterly failed to deter subsequent abuses in the former Yugoslavia and in Central Africa," the counterfactual is apparently that the former Yugoslavia and Central Africa would have had fewer human rights violations without international tribunals or with some other form of transitional justice. Bass disagrees, apparently. "The prosecutions themselves constitute the most basic success of the tribunal... To put it simply, rather than whipping up more nationalism back in the region, several major malefactors in the Balkan wars are now behind bars."⁴³ As with all counterfactuals, it is

⁴² Philip Tetlock and Aaron Belkin, editors, Counterfactual Thought Experiments in World Politics: Logical, Methodological, and Psychological Perspectives, p. 13-14.

⁴³ "Milosevic in the Hague," p. 85.

very difficult to either prove or disprove, but we find the image of Serbia making more progress towards peace and democracy without the ICTY less persuasive than Bass's counterfactual that locking up perpetrators lessens the chance of future violations.

Likewise, Cobban's argument that trials "squander billions of dollars" presupposes a counterfactual, but she is not clear exactly what it is. It would appear that international trials squander dollars relative to a domestic truth commissions, especially that of South Africa, which is highlighted as a success story in her article.⁴⁴ But this presupposes that Rwanda and the former Yugoslavia would have and could have carried out truth commissions similar to those in South Africa. It presupposes that international trials and domestic trials and truth commissions are menu choices where one option can be easily substituted for another, rather than mutually reinforcing processes, where the existence of one transitional justice mechanism reinforces or makes possible another.

To address the issue, we try two kinds of empirical comparisons: first, using a quantitative measure, we compare the human rights situation in individual countries before and after trials to see if we can discern any impact of trials on human rights, and second, we compare countries without trials to countries that had trials to gain further insight into the effects of trials. We also compare those countries that had more trials to those countries that had fewer trials. Note that in the Latin American cases we can not compare the effectiveness of amnesties to trials because every transitional country in Latin America except Guyana, Grenada and Paraguay had an amnesty. Nor can we compare the efficacy of just using truth commission to the effectiveness of trials, because every country in the region that adopted a truth commission also used trials. There are however, countries that used trials and not truth commissions, so we can compare the effect of using both truth commissions and trials to the effects of using just trials. Each of these

⁴⁴ "Think Again: International Courts," p.

involves empirical comparisons of actually existing cases before and after trials or truth commissions. The argument implies a counterfactual (what would have happened in the absence of trials) but doesn't depend on a far-fetched counterfactual to persuade.

First, we should note that an overview of the entire data set makes it clear that *within regions* there is a connection between the severity of human rights violations and the existence of trials. In the Americas, the 17 cases of transitional trials are in those countries that have experienced the more serious episodes of past human rights violations. Because the severity of human rights violations is associated with the use of trials, it may sometimes give the impression that trials exacerbate human rights problems, since the human rights situation is usually worse in the countries that have had trials than it is in the countries that have not had trials (even after the trials have occurred). However, bad human rights situations precede trials. Countries in the Americas with relatively good human rights situations did not initiate human rights trials. There also is a connection within regions between the severity of human rights violations and *the number* of country trial years. Countries with more severe human rights violations have carried out more country trials years.

But while the severity of human rights violations explains some variation within regions, it doesn't explain the variation between regions. The dominance of Latin America in the realm of trials cannot be explained by the fact that more human rights violations occurred in Latin America than in other parts of the world. Indeed, the number of people killed in a genocidal episode in a single country like Rwanda or Cambodia is much greater than an estimate (based on truth commission reports) of the total deaths and disappearances at the hands of governments in the entire region of Latin America for the period under study (1979-2004).

First, we need to address the argument made by Snyder and Vinjamuri that amnesties “have been highly effective in curbing abuses, when implemented in a credible way, even in such hard cases as El Salvador and Mozambique.”⁴⁵ At least in Latin America, there is no evidence that amnesties are “highly effective” because amnesties are almost a constant, and it is difficult to untangle their impact from that of other transitional justice mechanisms. Amnesties were used in various forms in 16 of the 19 transitional countries in Latin America (all except Guyana, Grenada, and Paraguay). Many of these countries passed multiple amnesty laws. For example, according to one data set, El Salvador passed six amnesty laws; Guatemala passed seven, Honduras passed six, Nicaragua seven, and Peru five.⁴⁶ Snyder and Vinjamuri refer to amnesties implemented in a credible way, but is in not clear a priori what that means. Rather, it would seem that a credible amnesty law is defined ex post facto as one that has the effect of actually blocking human rights trials. Of these sixteen countries that passed amnesty law, only in Brazil did the amnesty appear to have the desired effect of blocking trials. Each of the amnesties in the remaining countries is slightly different,⁴⁷ yet each of these countries also had truth commissions and also had human rights trials, in some cases, frequent human rights trials. So, for example, using the case listed by Snyder and Vinjamuri, El Salvador passed six different amnesty laws (1979, 1980, 1983, 1987, 1992, and 1993), and had a truth commission in 1993, and held human rights trials in 1990, 1991, 1992, and 1998. It is the case that El Salvador has seen a significant improvement in its human rights record, but it is not clear what explains the

⁴⁵ Snyder and Vinjamuri, 2003/2004, p. 6.

⁴⁶ Data from a data set prepared by Louise Mallander, used with permission.

⁴⁷ The amnesty in Uruguay covered members of the military and excluded civilians, the amnesty in Guatemala had an exception for genocide and crimes against humanity. Even where exceptions were not written into the laws, courts later found exceptions to the amnesty laws. The Chilean Supreme Court, for example, decided in 1999 that the amnesty law didn’t cover disappearances, which were an on-going crime until the body was located, and thus not addressed by an amnesty that ended in 1978. The Argentine courts decided that the amnesty laws didn’t include the crime of kidnapping babies and falsifying their identities, so while cases of disappeared mothers were covered by the amnesty law, member of the military could be prosecuted for taking the babies from those disappeared mothers and putting them up for adoption.

improvement: amnesties, the truth commission, trials, redemocratization, or the end of the civil war. In any case, there is not evidence here that the amnesties in El Salvador or anywhere else in the region were “highly effective” by themselves in curbing abuses. At least in the Latin American cases, no generalization can be made at all about the effects of amnesty laws except that they have not been effective in preventing human rights trials.

To explore the impact that trials have on human rights, we begin by looking at the human rights situation in individual countries before and after trials to see if we can discern any impact of trials on human rights. Using averages of the Political Terror Scale (PTS) as a measure, we examined the human rights conditions prior to trials and after trials in all of the Latin American countries with two or more trial years.⁴⁸ We compared the average PTS score for the five years preceding the first trial to the average PTS score for the ten years after the first trial.⁴⁹ Of the 14 countries that held human rights trials for at least two years, 11 improved their human rights situation after trials, and in three countries (Haiti, Mexico, and Venezuela) the human rights situation worsened after trials. The average improvement of the 14 countries was .6 on a 5 point scale, where 1 is the best human rights score and 5 is the worst human rights score.

It is very likely that much of this improvement is due to transitions to democracy rather than to the trials themselves. This is difficult to test because there are only two transitional countries – Brazil and Guyana - that did not carry out trials. But if we look at Brazil before and after transition to democracy in 1985 we see that Brazil’s average score on the Political Terror

⁴⁸ The PTS is a quantitative scale from 1 to 5 measuring extreme human rights violations, including summary execution, torture, disappearances, and political imprisonment (with 1 as the best score and 5 as the worst). The scores are coded from Amnesty International and State Department annual human rights reports. The countries with two or more trial years in Latin America are: Argentina, Bolivia, Chile, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, and Venezuela.

⁴⁹ We don’t use an average of the PTS for 10 years before trials because the PTS only begins in the 1980, and thus we don’t have 10 years prior to the trials in the countries with trials in the early 1980s, like Argentina and Bolivia. We use 10 years after the first trial, however, because many countries had multiple trials, and thus the 10 year time period allows us to look at changes that may occur from multiple trials over time.

Scale was 3.2 in the five years before transition to democracy, and worsened to an average of 4.1 for the ten years after transition. Brazil, one of only two transitional country without trials in Latin America, experienced a greater decline in its human rights practices than any other transitional country in the region. The Brazil case suggests that the transition to democracy, in and of itself, does not guarantee an improvement in basic human rights practices. Guyana had a strong human rights record both before transitional to democracy (average PTS of 2) and after the transition to democracy (PTS 1.9).

We also are able to isolate somewhat the effects of trials from the effects of transition to democracy by looking at the differences between transitional countries that had many trials and those that had fewer trials. All 14 countries that held trials went through processes of democratic transition. And yet the countries that held more trials had a higher average improvement in human rights than the countries that had fewer trials. So, the seven countries in the region that had more trials (eight or more country trial years) experienced an average improvement of .9 on the 5 point PTS, while the seven countries that had fewer trials (six or fewer country trial years) had an average improvement of .3 on the PTS. (See Table 2 below)

Table 2:

The Effect of Trials on Human Rights in Latin America

Transitional Countries with 8 or more country trial years

Country	Trial years	Pre-trial PTS average	Post-trial PTS average	Change in PTS average
Argentina	19	4	2.3	1.7
Chile	15	4	2.8	1.2
Guatemala	13	4.4	4	0.4
Paraguay	12	3.2	2.6	0.6
Panama	11	3	2	1
Peru	8	4.8	3.9	0.9
Honduras	9	3.2	2.5	0.7
Total Average Change				0.928571

Transitional Countries with 6 or fewer country trial years

Country	Trial years	Pre-trial PTS average	Post-trial PTS average	Change in PTS average
Haiti	6	3	3.8	-0.8
Ecuador	5	3	2.7	0.3
Mexico	5	3.2	3.4	-0.2
Nicaragua	5	3	2.7	0.3
El Salvador	4	4.6	3	1.6
Venezuela	3	3.2	3.5	-0.3
Bolivia	2	4	2.6	1.4
Total Average Change				0.328571

Transitional Countries with 0 country trial years

Country	Trial years	Pre-transition PTS average	Post-transition PTS average	Change in PTS average
Brazil	0	3.2	4.1	-0.9
Guyana	0	2	1.9	0.1
Total Average Change				-0.4

Countries in Latin America that held more trials were also more likely to have a truth commission than countries that held fewer trials. The countries that had both truth commissions and trials had a better score than countries that just had trials. Countries that both had a truth commission and human rights trials had an average improvement of .7 on the five point scale, while countries that only had trials had an average improvement of .1 on the same scale (see Table 3). These results, together with the evidence from Brazil, suggest that the use of transitional justice mechanisms, in and of itself, may have some independent effect separate from that of transition to democracy. It could be possible that there is some other factor doing the work here rather than trials themselves – perhaps the existence of political will to hold perpetrators accountable for past human rights violations. But it is not clear how one could separate out the political will to hold trials from the effects of trials themselves. As regards Snyder and Vinjamuri’s claim that amnesties are “highly effective” in curbing abuses, all the countries in Table 2 except Guyana and Paraguay had amnesties. Since there is significant variation in the human rights improvements of the countries in question, there is no reason to believe that countries with amnesties were more effective in curbing human rights violations than countries without amnesties. Regardless of which part of the human rights improvement comes from transition to democracy, political will for accountability, or from trials, it remains hard to sustain in the face of this data that human rights trials actually lead to more atrocities, as Snyder and Vinjamuri suggest, at least in the Latin American cases.

Table 3:

Difference in Effects of Trials and Truth Commissions on Human Rights in Latin America

Transitional Countries with Trials and Truth Commissions

Country	Trial Years	pre-trial PTS average	post-trial PTS average	Change in PTS average
Argentina	19	4	2.3	1.7
Chile	15	4	2.8	1.2
Guatemala	13	4.4	4	0.4
Paraguay	12	3.2	2.6	0.6
Panama	11	3	2	1
Peru	8	4.8	3.9	0.9
Bolivia	2	4	2.6	1.4
Haiti	6	3	3.8	-0.8
El Salvador	4	4.6	3	1.6
Ecuador	5	3	2.7	0.3
Total Average Change				0.83

Transitional Countries with Trials but no Truth Commissions

Country	Trial Years	pre-trial PTS average	post-trial PTS average	Change in PTS average
Honduras	9	3.2	2.7	0.5
Nicaragua	5	3	2.7	0.3
Mexico	5	3.2	3.4	-0.2
Venezuela	5	3.2	3.5	-0.3
Total Average Change				0.075

Second, we look at the potential impact of trials on democracy. If we compare regions that have made extensive use of trials to regions that have not made extensive use of trials, we find that Latin America, which has made the most extensive use of human rights trials of any other region, has made the most complete democratic transition of any developing region. In the 20th century, political instability and military coups were endemic in Latin America.⁵⁰ Since 1980, however, the region has experienced the most profound transition to democracy in its history, and there have been very few reversals of democratic regimes. Ninety one percent of the countries in the region are now considered democratic, well above the level for Eastern Europe and the former USSR (67%) or Asia & Pacific (48%) or Africa (40%).⁵¹

Since 1978 when the first trials were initiated in the region, the only examples of successful coups included President Alberto Fujimori's "self-coup" in Peru in 1992 (which has since experienced a transition to democracy), the coup in Haiti in 2004, and the coup in Ecuador in 2005 (where the military immediately turned power back to civilian leaders). But the remaining 14 countries that used trials have not had a successful coup attempt since the use of trials, and in many cases, are increasingly considered consolidated democratic regimes. Brazil and Guyana, the only transitional countries that have not used trials, have also not experienced a military coup. While we cannot now attribute any causation to the justice cascade, the data from Latin America provides no evidence that human rights trials have contributed to undermining democracy in the region.

Part of the argument that trials undermine democracy came from early fears in Latin America that trials would lead to military coups. Some people make counterfactual arguments

⁵⁰ See Peter Smith, "Cycles of Electoral Democracy in Latin America 1900-2000," Center for Latin American Studies, University of California, Berkeley, Paper No. 6, January 2004.

⁵¹ Larry Diamond, "Can the Whole World Become Democratic? Democracy, Development, and International Politics," Center for the Study of Democracy, University of California, Irvine, Paper 03'05, 2003, Table 5.

about what would have happened if trials had not been held. So, for example, this has been used in the case of Argentina in the late 1980s. Since Argentina held far reaching trials of the three juntas for past human rights violations, leading to the conviction and imprisonment of some past military leaders, and later experienced a series of coup attempts, the plausible counter-factual was frequently made that if Argentina had not had trials, it would not have had coup attempts in the late 1980s. Like most counterfactuals, this implies a causal argument: human rights trials lead to coup attempts, and thus undermine democracy. While plausible, the argument is difficult, like all counterfactuals. Argentina passed an amnesty law, and at the same time, dealt more harshly with coup attempts, and such attempts were not repeated. Thus, while people feared that trials would undermine democracy, in the end, they did not do so. To the contrary, since the transition to democracy and the first trial in 1983, Argentina has enjoyed the longest uninterrupted period of democratic rule in its history. If we look at Bolivia, which also held trials in the 1980s, and which has a history of even more frequent coups than Argentina, we find that Bolivia had fewer coup attempts after it held trials than it did before. Despite coup attempts, neither Bolivia nor Argentina has experienced a successful overthrow of democracy since they held human rights trials.

But once again, trials alone cannot account for such an outcome, since Brazil, which did not hold trials, and Uruguay, which held only few trials, also are enjoying periods of uninterrupted democratic rule. So, one can not make the case that trials and truth commissions are a necessary condition to consolidate democracy. Nevertheless, there is not a single case in Latin America where trials can be shown to have undermined democracy by leading to successful coup attempts.

Another key claim in the security literature is that human rights trials can lead to more conflict.⁵² Latin America had many internal conflicts in the period under examination. Using the PRIO/Uppsala Armed Conflict Data Base, 17 Latin American countries experienced some form of internal conflict or international conflict (from minor to a full fledged war) in the period 1970-2003: Argentina, Chile, Colombia, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay, and Venezuela.⁵³ There is clearly some kind of connection between trials and conflict because 16 of these countries also had some form of judicial proceedings for past human rights violations. The only countries that had transnational trials but did not have either type of conflict were Bolivia and Honduras. Meanwhile, most of the countries in the region that did not have trials also did not have conflicts. If we compare the dates of the conflict to the dates of the trials, however, we find that in most cases, judicial proceedings followed rather than preceded conflict (see Table 4). In other cases, there was some overlap between the earliest trials and the armed conflict, but the conflicts did not extend significantly in these cases, and trials continued after conflict had ended. There is not a transitional trial case in Latin America where it can be reasonably argued that the decision to undertake trials extended or exacerbated conflict.

⁵² For a summary and discussion of the arguments about the relationship between truth commissions and peacebuilding, see David Mendeloff, "Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm?" *International Studies Review* (2004) 6, 355-380.

⁵³ http://www.prio.no/cwp/armedconflict/current/conflict_list_1946-2003.pdf

Table 4

Country	Dates of Conflict(s)	Dates of Human Right Trials
Argentina	1973-77 1982	1983-1990, 1993-1996, 1998-2004
Bolivia	-	1983, 1995
Chile	1973	1986, 1991-2004
Ecuador	1995	1992-1995, 1997
El Salvador	1979-1991	1985, 1990-1992, 1998
Grenada	1983	1991
Guatemala	1965-1995	1988, 1991-1994, 1996-2003
Haiti	1989, 1991	1986, 1987, 1989, 1995, 1996, 1997
Honduras	-	1992, 1993, 1996, 1997, 1999-2002, 2004
Mexico	1994, 1996	1992, 1993, 2002, 2003, 2004
Nicaragua	1978-1989	1992-1996
Panama	1989	1991-1999, 2002, 2004
Paraguay	1989	1989, 1991, 1992, 1994-1999, 2002-2004
Peru	1980-1999	1978, 1990, 1993-1995, 2001-2004
Suriname	1986-1988	1989
Uruguay	1972	2002
Venezuela	1992	1991, 1994, 1995

What the correlation between conflict and trials picks up, we suspect, is that trials are connected to the existence of prior human rights violations. Quantitative studies have demonstrated that conflict (both internal and international war) is the best predictor of human rights violations.⁵⁴ Therefore, it appears that conflict indeed leads to human rights violations, but past human rights violations, in the new normative context, have led to trials and not the reverse.

After a history of fairly extensive internal conflict for decades, the region is now for the most part free of internal and international wars and conflict. Indeed, there is only one case in the entire region where significant internal conflict continues to date, and that is a non-

⁵⁴ Steven C. Poe, C. 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* (1999) pp. 291-313.

transitional case: Colombia. Because Colombia is not a case of transition, it is not included in our transitional trial data set - it is a part of our larger human rights trials data set. There is an important debate in Colombia today about amnesty and conflict resolution.⁵⁵ While we do not underestimate the importance of that debate, with 122 country trial years in Latin America between 1979 and 2004 and only a single case where conflict continues to date, it is difficult to sustain the argument that trials have contributed to exacerbating conflict more generally in the region.

Most scholars recognize that for human rights violations to decrease, countries need to strengthen their rule of law systems. But this raises the crucial issue of how to build the rule of law in such countries. Latin America has been undergoing a process of judicial reform and promotion of the rule of law over the last fifteen years that parallels the process of human rights trials we describe here. Rather than see the construction of rule of law as a process that is separate from or that must precede human rights trials, it has been the case that building rule of law has gone hand in hand with human rights trials in many countries in the region.⁵⁶ Indeed, Thomas Carothers argues that the rise of a broad field of rule of law assistance in the 1990s in large part grew out of the human rights movement of the 1970s and the 1980s. As the human rights movement pushed for transitional justice mechanisms, it “raised the profile of law and legal institutions as a cause of external attention and internal reform in the region. As such it paved the way for the current nature of rule of law aid in the region.”⁵⁷ In other words, human rights trials did not interfere with the construction of rule of law in the region – they helped

⁵⁵ Maria José Gueembe and Helena Olea, “No Justice, No Peace: Discussion of a Legal Framework regarding the Demobilization of Non-state Armed Groups in Colombia,” in Transitional Justice in the Twenty-First Century.

⁵⁶ Pilar Domingo and Rachel Sieder, Rule of Law in Latin America: The International Promotion of Judicial Reform (Institute for Latin American Studies, University of London, 2001).

⁵⁷ Thomas Carothers, “The Many Agendas of Rule of Law Reform in Latin America,” in Rule of Law in Latin America, p. 5.

promote it. This is counter to the point made by Snyder and Vinjamuri, who argue that “Amnesty -- or simply ignoring past abuses -- may be a necessary tool in this bargaining. Once such deals are struck, institutions based on the rule of law become more feasible.”⁵⁸

Specific human rights trials can help also build rule of law, as they did in Argentina according to arguments made by Smulovitz. Smulovitz argues that the trials of the Juntas in 1985 in Argentina encouraged “the discovery of law,” as ordinary citizens perceived a system of law as more viable and legitimate if law could be used to hold the most powerful former leaders of their country accountable for past human rights violations. Smulovitz argues that human rights trials depend on certain prior levels of rule of law, and they in turn, contribute to the development of the rule of law.⁵⁹ Many definitions of rule of law include as crucial elements “respect for political and civil rights,” and “accountability of holders of government office to the law.”⁶⁰ The most crucial ingredient of a rule of law system is the idea that no one is above the rule of law. As such, it is difficult to build a rule of law system while simultaneously ignoring recent gross violations of political and civil rights, and failing to hold past and present government officials accountable for those violations.

Of course, human rights trials are not the only means of building the rule of law. Other authors have pointed to the key role of individuals and institutions within domestic legal systems, and to transnational actors, including other governments, especially transgovernmental networks of judges, NGOs, and international organizations, in the construction of rule of law.⁶¹

But the Latin American cases where rule of law has been strengthened at the same time as

⁵⁸ Snyder and Vinjamuri, 2003/2004, p. 6.

⁵⁹ 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*, Edited by Yves Dezalay and Bryant G. Garth, University of Michigan Press, pp. 249-275.

⁶⁰ Pilar Domingo and Rachel Sieder, “Conclusions: Promoting the Rule of Law in Latin America,” in *Rule of Law in Latin America*, p. 147.

⁶¹ See, for example, Jennifer A. Widner, *Building the Rule of Law* (New York: Norton, 2001); and see Anne-Marie Slaughter, “Breaking Out: The Proliferation of Actors in the International System,” in *Global Prescriptions*.

human rights trials have been carried out in most transitional countries illustrate that it is unreasonable to portray human rights trials and construction of the rule of law as two different stages or mutually contradictory processes.

If trials and truth commissions have an effect on future human rights practices and on the consolidation of democracy, through what mechanisms are they working? Few who work on human rights believe that trials and truth commissions work only by changing the logic of appropriateness. Rather we believe there is an interesting blend of logics of appropriateness and logics of consequences at work for different actors. Actors that propose trials are often motivated by the logic of appropriateness. If we were discussing explanations for the emergence of human rights trials, we would stress the role of such principled action. But if we define effectiveness of such trials in terms of a reduction in human rights violations, the actors that interest us are those capable of carrying out future human rights violations—mainly the security forces. When we ask how trials and truth commissions change the perceptions and motivations of these actors we also need to understand how trials change the strategic context within which they operate.

To do so, we first need to distinguish between current members of the security forces, some of whom have already carried out human rights violations, and younger members or future members of the security forces who have not carried out human rights abuses, because they operate in very different contexts. For security forces that have already carried out human rights abuses the strategic landscape is straightforward: it is in their interests to prevent both truth telling and especially prosecution for past human rights violations. These are the so-called spoilers, who are often willing to go to great lengths to prevent prosecution. We do not believe that either trials or truth commission change their calculations very much. Given a choice, they

will always prefer no transitional justice at all, preferably guaranteed by an amnesty. If they have less negotiating room, they will prefer truth commissions to trials. They very often succeed in blocking domestic trials, through threats, coup attempts, blocked peace processes, and the like. This group has been the main concern of so-called “pragmatists” like Snyder and Vinjamuri, who point out the obvious difficulties of such a strategic situation. What they miss, however, is the bigger and longer strategic game that trials can set in motion.

First, it is much harder for spoilers to block foreign or international trials than domestic trials. The spoilers’ threats to overthrow their own government have less of an impact on a foreign government or international institutions. If foreign or international trials leading to arrest warrants are initiated, it may change the strategic calculations of the spoilers, since the choice is no longer between “trials” and “no trials,” but perhaps between “trials abroad” or “trials at home.” These spoilers may in effect find themselves in the gilded cage of their country: free at home, but unable to venture abroad. In these circumstances, foreign and international trials may have the strategic impact of changing calculations of current members of the security forces to make them more favorable to domestic trials than they would have been otherwise.

More interesting yet is the strategic impact of trials on the new generations of military leaders. Young officers who were not involved in the last round of repression may look at their past leaders and draw strategic conclusions about their future choices. They observe their past leaders, perhaps in jail through domestic trials, or in gilded cages of their countries through foreign and international trials, or with tattered international and domestic reputations. If logics of appropriateness are working simultaneously, future military leaders may decide that military coups, torture, or disappearances are not the appropriate standard of behavior for the modern professional military leader. But even if mainly logics of consequences are working, they may

indeed decide that trials have made repression and coups too costly for use in the future. Thus, while trials may have a short term effect on repression, they are most likely to have a long term impact by altering both the logic of appropriateness and the logic of consequences of future generations of military leaders. The “pragmatists” have only looked at the short term game and have ignored the long term game over the next ten to twenty years.

Second, because of the interconnected nature of international justice, trials in one country may affect the strategic calculations of military leaders in another country. Even trials that do not “succeed” in terms of a conviction can impose other forms of sanctions that are relevant for deterring actors from human rights violations in the future. Individuals are influenced by a range of possible sanctions, including issues that impact their national and international reputation, ability to travel, or to live in desirable international locations during retirement, ability to keep one’s assets safe in banks in foreign countries, desire to send one’s children to study abroad and then to visit them when they do. Foreign trials, even when they do not lead to imprisonment, can lead to indictments and international arrest warrants that affect reputation and make it risky to travel abroad. Civil trials for damages, while they may never result in imprisonment, can permit courts to attach people’s assets, and make it difficult to keep funds abroad. When such trials affect reputation, they may lead to a decline in the level of international support or contacts. Indicted war criminals get fewer invitations to international conferences than do other ex-presidents. Mladic, and Karadzic are free, and it could be the fact that their freedom in a small hiding place in Serbia emboldens future war criminals and does not serve as a deterrent, but we doubt it. So, these could be seen as “soft sanctions” or “smart sanctions” that alter the logic of consequences, not for the Mladics or Karadzics of the world, but for future military leaders.

Empirically, we may not yet be able to prove or resolve what exact impact these sanctions have on the likelihood that future regimes will choose to use repression. But the so-called “pragmatic arguments” are not necessarily more realistic than the norm argument. We argue that human rights norms have been translated into concrete sanctions that can be a genuine deterrent for future military leaders who consider using repression as the tool of choice. The difference between our approaches are the difference between a short term and a long term approach. Norm change is a long term project. The passage of time makes a big difference for these scenarios. Powerful spoilers at point A become weaker players at point B. We are not talking about 100 years, just about the 15 or 20 years it takes for a generation of military leaders to retire. These powerful veto players can not ensure that future generations will continue to protect them when they leave power. It may be the case, in the short term, as Snyder and Vinjamuri argue, that it may be necessary to offer amnesties to end conflict, but in the long term, these amnesties are not holding in practice. The decision to offer such amnesties is what game theorists call a “time inconsistent commitment” – it is rational to make at the time, but not rational to keep later.⁶² Transitional justice mechanisms are not the products of idealists who do not understand the political realities, but tools that can change the power dynamics among actors on the ground.

Conclusions:

Our purpose as IR scholars is to explain change and continuity in the international system. We argue that it is not pragmatic to ignore the political reality of the justice cascade in the modern world. Our data systematically documents the existence of the justice cascade. We find that states are increasingly putting their agents on trial for the commission of human rights abuses in domestic courts in addition to using other justice mechanisms such as truth

⁶² We are indebted to Robert Keohane for this observation.

commissions to deal with their repressive pasts. Further, while foreign and international trials of human rights abusers similarly have been increasing, this trend is intricately connected to the ability of domestic judicial systems to address past human rights crimes. This undeniable trend toward justice is regionally concentrated and internationally diffuse.

The justice cascade trend is relatively recent and thus its effects are difficult to ascertain. In this article, we look at Latin American cases because they account for over half of the country trial years in the data set and because many Latin American countries were early innovators of human rights trials and truth commissions, and thus the most time has passed in order to be able to evaluate the impact of these transitional justice mechanisms. Our evidence is not yet sufficient to be able to say with certainty that human rights trials or truth commissions lead to improvements in human rights and democracy or to a decrease in conflict. But, on the basis of our evidence there is no reason to believe that they have a negative effect on human rights practices. We suggest then that the general claim that pragmatists like Snyder and Vinjamuri make that proponents of legalist justice “cause more abuses than they prevent” is false. Nor do we find evidence for their general claim that human rights trials can lead to more human rights violations, nor that amnesties are “highly effective” in and of themselves in reducing human rights violations. There may be some conditions under which these claims holds, particularly in some situations of civil war where in the short term the demand for trials can impede conflict resolution, but it would be a mistake to see this as a general rule and to derive theoretical and policy implications from it, as they do.

Security studies and human rights used to be totally different fields of inquiry, but scholarly developments and changes in the world have led to increasing convergence. There are now few conflict situations where human rights issues are not also being debated. Various forms

of transitional justice mechanisms for accountability with past human rights violations, such as trials, truth commission, or amnesties, are now a routine part of processes of conflict resolution. At the same time, quantitative research on the causes of repression has revealed that the presence of civil or international war is one of the factors most highly correlated with increased in human rights violations. This increasing interaction of the fields calls for more dialogue between security scholars and scholars of human rights. But this dialogue is not going to go far if security scholars simply claim to be the pragmatists and label human rights scholars as the idealists. Rather, in this article, we hope we have contributed to a more productive dialogue based on systematic attempts to document actual developments in the international system, and make preliminary efforts to explain and understand these new global trends.

Appendix:

Table 1: Use of Multiple transitional justice mechanisms: truth commission and trials

Country	Region	Truth Commission	Domestic Human Rights Trials
Bolivia	Americas	1982	1983, 1995
Argentina	Americas	1983	1983-1990, 1993-1996, 1998-2004
Uruguay	Americas	1985	2002
Zimbabwe	Africa	1985	None
Philippines	Asia & Pacific	1986	None
Uganda	Africa	1986	None
Chad	Africa	1991	None
Chile	Americas	1990	1986, 1991-2004
Nepal	Asia & Pacific	1990	None
El Salvador	Americas	1992	1990-1992, 1998
Germany	Western Europe	1992	1997, 1999-2000
Sri Lanka	Asia & Pacific	1994	1990, 1992
Burundi	Africa	1995	1996
Haiti	Americas	1995	1986, 1987, 1989, 1995, 1996, 1997
South Africa	Africa	1995	1992
Ecuador	Americas	1996	1992-1995, 1997
Guatemala	Americas	1997	1988, 1991-1994, 1996-2003
Indonesia	Asia & Pacific	1999	2000-2001, 2003-2004

Nigeria	Africa	1999	None
Grenada	Americas	2000	1991
Sierra Leone	Africa	2000	1998, 2003-2004
South Korea	Asia & Pacific	2000	1996
Uruguay	Americas	2000	2002
Timor-Leste	Asia & Pacific	2001	none; hybrid trials
Nigeria	Africa	2001	None
Serbia-Montenegro	Central & Eastern Europe	2001	2001-2004
Panama	Americas	2001	1991-1999, 2002, 2004
Peru	Americas	2001	1978, 1990, 1993-1995 2001-2004
Central African Republic	Africa	2002	None
Democratic Republic of Congo	Africa	2002	None
Ghana	Africa	2002	None
Liberia	Africa	2003	None
Paraguay	Americas	2003	1989, 1991, 1992, 1994-1999, 2002-2004
Morocco	Middle East & North Africa	2004	None