

RATIFICATION AND HUMAN RIGHTS
PROSECUTIONS: TOWARD A TRANSNATIONAL
THEORY OF TREATY COMPLIANCE¹

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INTRODUCTION

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

Hunjoon Kim and Kathryn Sikkink argue that human rights prosecutions (domestic and international) lead to improvements in human rights practices through a combination of deterrence and normative communication.⁵ This work supports Simmons’ argument about the importance of litigation, but takes note of the impact and interconnection of prosecutions both internal and external to the state. Likewise, Geoff

2. See generally BETH SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009).

3. *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE 3* (Thomas Risse, Stephen Ropp & Kathryn Sikkink eds., 1999).

4. SIMMONS, *supra* note 2, at 14.

5. Hunjoon Kim & Kathryn Sikkink, *Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries*, 54 INT’L STUD. Q. 939, 939 (2010).

Dancy and Eric Wiebelhaus-Brahm are finding initial evidence that the increased frequency of domestic rights trials following the termination of civil war decreases the propensity for the recurrence of violent conflict between government and opposition forces.⁶

It appears, based on these studies, that human rights prosecutions are one of the mechanisms that contribute to compliance with human rights law, but we still lack more direct evidence of the linkages between human rights treaty ratification and the use of prosecutions. Do treaty commitments lead to more trials of human rights violators? The purpose of this article is to answer this question systematically. In this article, we argue that we need to develop further a transnational political theory of treaty compliance in order to understand the complex interactions between domestic and international factors linking treaty ratification, human rights prosecutions, and ultimately, positive social change.⁷

While all human rights treaties potentially provide tools for litigation, some treaties have much more direct and explicit provisions for holding individuals criminally accountable for violations. One might surmise that such treaties are more likely to lead to prosecutions, but as yet, there is little empirical evidence of this supposition. Using comparative techniques, it is possible to evaluate the strength of the assumed relationship between specific provisions in certain human rights treaties that should facilitate litigation for individual criminal accountability for past human rights violations and the use of domestic litigation. In this article, we begin in Section I by describing the norm of individual criminal accountability and detailing its presence in international legal treaties. Section II presents empirical hypotheses regarding the linkage between formal state commitment to criminal accountability and the willingness to hold domestic trials of human rights violators. Section III then statistically tests whether ratifications of treaties with accountability stipulations are more likely to lead to domestic rights prosecutions than treaties without such

6. Geoff Dancy & Eric Wiebelhaus-Brahm, *Justice and the Peace: A Time-Sensitive Empirical Evaluation* (Mar. 16–19, 2011) (paper presented at the 52nd Annual Meeting of the International Studies Association).

7. See generally Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996); Harold Hongju Koh, *Why Do Nations Obey International Law*, 106 Yale L.J. 2599 (1997).

stipulations. Finally, in Section IV, we trace three different pathways that illuminate the ways in which human rights treaties are related to the use of human rights prosecutions.

I. INDIVIDUAL CRIMINAL ACCOUNTABILITY

Most human rights treaties hold the state as an entity accountable for human rights violations and require it to take action to remedy victims' losses and grievances. We will call this the "state accountability" (SA) model, to be contrasted with an alternative "individual criminal accountability" (ICA) model.⁸ Both are legal accountability models,⁹ but the main differences between the SA model and the ICA model involve who is being held accountable and how these actors are held accountable.¹⁰ Under an SA model, the state is held responsible and it provides remedies and pays damages. Under ICA, individuals are prosecuted, and if convicted, go to prison. Most human rights treaties reflect the SA model, as does virtually the entire human rights apparatus in the United Nations. When a state violated rights under the International Covenant on Civil and Political Rights, in some cases individuals could bring petitions before the UN Human Rights Committee, but this still involved the SA model because these petitions were against the state itself, not a particular state official. The SA model is also the model employed by the regional human rights courts, the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Court of Human Rights and Peoples' Rights. So, for example, when in 1988 the Inter-American court found Honduras responsible for disappearances, it ordered the Honduran state to pay damages to the families of the victims.¹¹

8. KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING THE WORLD* 13–15 (2011).

9. See Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29, 36 (2005) ("Legal accountability is the requirement that agents abide by formal rules and be prepared to justify their action in those terms, in courts or quasi-judicial arenas.").

10. See STEVEN R. RATNER & JASON S. ABRAMS, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY* 15 (2001) (noting that the forms of accountability differ in their "target" and in their "nature").

11. Velásquez Rodríguez Case, Judgment, Inter-Am. Ct. H.R. (ser. C) No.4, ¶¶ 4–5 (July 29, 1988).

In the last twenty years, however, the ICA model has gained increased prominence, in part as a response to the perceived impotence of the state accountability approach. In the 1970s and 1980s, a small handful of states began to hold former state officials criminally accountable in their domestic courts for human rights violations. These countries used domestic criminal law to prosecute, but sometimes regional and international human rights institutions encouraged such litigation.¹² For example, although the Inter-American Court of Human Rights itself uses a SA model, the Inter-American Commission for Human Rights in its country reports frequently recommended that states hold criminal prosecutions for human rights perpetrators, including in the cases of Argentina, Chile, and Haiti.¹³ Although the Genocide Convention of 1948 and the Geneva Convention of 1949 contain specific language about individual criminal accountability,¹⁴ neither

12. SIKKINK, *supra* note 8, at 60–128.

13. *See, e.g.*, Report on the Situation of Human Rights in Argentina, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.49, doc. 19 corr. 1 (1980) (recommending that the Government of Argentina, “[w]ith regard to the deaths that have been attributed to the governmental authorities and their agents, . . . initiate the corresponding investigations, [and] bring to trial and to punish, with the full force of the law, those responsible for these deaths”); Third Report on the Situation of Human Rights in Chile, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.40, doc. 10 (1977) (recommending that the Government of Chile “[a]dopt an adequate and firm policy of inquiry, trial and punishment, if in order, of those authorities who abuse their power and subject detainees to inhumane treatment, contrary to the right of physical integrity of the individual”); Report on the Situation of Human Rights in Haiti, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.46, doc. 66 rev. 1 (1979) (recommending that the Government of Haiti “investigate and punish those responsible for the numerous violations of the right to life and physical security”).

14. The Genocide Convention says that persons committing genocide shall be tried and punished by a competent tribunal either in the state in which genocide was committed or by an international penal tribunal. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951). Each of the four Geneva Conventions of 1949 contain identical language with regard to repression of abuses, calling upon each State Party to bring persons who have committed or ordered grave breaches of the Conventions before its own courts or to hand them over for trial to another High Contracting Party. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 49, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 50,

these treaties nor other human rights treaties were initially used in early domestic prosecutions.¹⁵ Only later, when provisions for individual criminal accountability were more clearly stated in the Convention Against Torture and Cruel and Degrading Treatment (CAT) in 1984, and especially in the Rome Statute of the International Criminal Court in 1998, did treaties begin to play a more important role in prosecutions. These treaties are part of a broader process through which international law increasingly began to focus on the individual, both as the perpetrator of crimes, and as a victim who had standing to bring forward cases against perpetrators.¹⁶

This new ICA model is not for the whole range of civil and political rights, but rather for a small subset of “physical integrity rights,” especially the prohibitions on torture, summary execution, and genocide, war crimes and crimes against humanity. The treaties that contain provisions for ICA, including the Genocide Convention, the Geneva Conventions, CAT, and the Rome Statute, all focus primarily on physical integrity rights. The Rome Statute, for example, addresses genocide, war crimes, and crimes against humanity, the latter defined as murder, extermination, enslavement, deportation, imprisonment, torture, rape, discriminatory persecution, disappearance, and apartheid, when “committed as part of a widespread or systematic attack directed against any civilian population.”¹⁷ The bulk of human rights prosecutions in the world today are for this small subset of rights violations, especially for mass kill-

Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War art. 129, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. All four conventions entered into force on Oct. 21, 1950.

15. For example, in the first human rights prosecutions in Greece (1975), Portugal (1979), Argentina (1983), and Bolivia (1983) no references were made to international human rights law. SIKKINK, *supra* note 8, ch. 2–3.

16. INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS, AND CONTENTS 41–42 (M. Cherif Bassiouni ed., 3rd rev. ed. 2008). For various models and perspectives on human rights legalization, see THE LEGALIZATION OF HUMAN RIGHTS: MULTIDISCIPLINARY PERSPECTIVES ON HUMAN RIGHTS AND HUMAN RIGHTS LAW (Saladin Meckled-García & Basak Çali eds., 2006).

17. Rome Statute of the International Criminal Court art. 6–8, July 17, 1998, 2187 U.N.T.S. 90 (ENTERED INTO FORCE JULY 1, 2002).

ing and massacre, although there are also some prosecutions for torture, rape, genocide, and disappearances.¹⁸

II. HYPOTHESES

Currently, we know that treaty ratification is correlated with improvements in physical integrity rights, predominantly among states transitioning to democracy.¹⁹ Based on previous studies,²⁰ we submit that one reason for this is that states that ratify legal instruments providing for individual accountability are more likely to have rights prosecutions, which drive down future abuses to physical integrity by state actors. To show this, we have to prove a link between ratification and rights prosecutions across a wide sample of cases. However, we might still fall prey to a simple counter-proposition: that both expressed commitment to accountability and willingness to hold prosecutions come from the same, third source—perhaps a stronger state commitment to international human rights law in general. So how might we test these propositions against one another? How do we test whether rights prosecutions are an intervening variable between international commitment to legal accountability and improvement in rights practices?

The best way to proceed is to split human rights treaties into three groups. The first group (Category 1) includes the Genocide Convention, CAT, and the Rome Statute, all of which address core rights and have specific provisions calling for individual criminal prosecution. In addition, the recent Convention on the Protection of All Persons from Enforced Disappearances (2006) has provisions for universal jurisdiction and individual criminal accountability almost identical to those of the CAT. Thus, we might expect countries which have ratified these treaties to be more likely to use human rights prosecutions than countries that have not ratified these treaties. In addition, one regional treaty, the American Convention on Human Rights of 1978, has been interpreted by the Inter-American Court of Human Rights as providing the legal basis for a state duty to hold individuals accountable for past

18. See our transitional justice database, soon available for public use at, TRANSITIONAL JUSTICE, <http://www.transitionaljusticedata.com>. See generally PROSECUTING HEADS OF STATE (Ellen Lutz & Caitlin Reiger eds., 2009).

19. SIMMONS, *supra* note 2, chs. 4–5, 7.

20. Kim & Sikkink, *supra* note 5, at 957.

human rights violations. In particular, the Inter-American Court has found amnesty laws that protect individuals against such prosecution to be contrary to the American Convention.²¹

A. *Hypothesis 1: Countries that ratify treaties protecting core rights with individual accountability provisions are more likely to use human rights prosecutions than countries that have not ratified these treaties.*

This hypothesis relates to many larger debates about whether enforcement or sanctions are necessary for states to comply with international rules.²² Many commentators have long claimed that we should not expect human rights institutions to have any important effects because they lack mechanisms of enforcement, as opposed to treaties in international trade, where enforcement bodies have developed in order to prevent market failure or to maintain reciprocity between cooperating states with an incentive to cheat their partners.²³ But we argue that international human rights law is being increasingly enforced. Under the SA model, if the state refused to take action to change its policies or to provide remedies to victims, there were few forms of recourse available. Multilateral human rights treaty bodies, transnational advocacy networks and transgovernmental networks could use only the so-called “name and shame” strategy to bring pressure on govern-

21. See, e.g., *Barrios Altos v. Peru*, Judgment, Inter-Am Ct. H.R. (ser. C) No. 75, ¶ 43 (May 14, 2001); *Gomes Lund v. Brazil*, Judgment, Inter-Am Ct. H.R. ¶ 172 (Nov. 24, 2010).

22. . E.g., ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY* 2 (1995); George W. Downs, David M. Rocke & Peter N. Barsoom, *Is the Good News About Compliance Good News About Cooperation?*, 50 INT'L ORG. 379, 380 (1996); Beth Simmons, *International Law and State Behavior: Commitment and Compliance in International Monetary Affairs*, 94 AM. POL. SCI. REV. 819, 819 (2000).

23. For the argument that the human rights jurisprudence involves non-reciprocal treaty law, see SIMMONS, *supra* note 2, chs. 1–2. For the development of enforcement alongside cooperation, see Arthur A. Stein, *Coordination and Collaboration: Regimes in an Anarchic World*, 36 INT'L ORG. 299, 312 (1982); Kenneth A. Oye, *Explaining Cooperation Under Anarchy: Hypotheses and Strategies*, in *COOPERATION UNDER ANARCHY* (Kenneth A. Oye ed., 1986). For an analysis of enforcement mechanisms, see Andrew Guzman & Beth A. Simmons, *To Settle or Empanel? An Empirical Analysis of Litigation and Settlement at the World Trade Organization*, 31 J. LEGAL STUD. 205 (2002).

ments. In some cases, such pressures succeeded in bringing about important modifications in human rights practices.²⁴ But the actual individuals who carried out human rights violations remained beyond reach.

More recently, domestic and international prosecutions have begun to serve as a means of legally enforcing human rights legal commitments. In the case of the Rome Statute, the enforcement mechanism is vertical, as a supranational institution—the International Criminal Court—was established by the treaty and given the power to prosecute when states are unwilling or unable to do so. The ICC, thus far, has only been active in a handful of notable cases.²⁵ Most of the time, however, domestic courts are the actors doing the lion's share of the work, trying rights-abusing state officials using a combination of domestic criminal law and international law. Rather than ignoring domestic proceedings because they are not directly set in motion by a central international command structure, we argue domestic human rights prosecutions should be conceptualized as a mechanism of horizontal enforcement for violations of international human rights law. Such a position is consistent with recent work in legal theory that posits a role for national courts as international actors.²⁶ It is also consistent with George Scelle's 70-year-old notion of *dédoublement*

24. For a discussion of transnational advocacy networks, see MARGARET KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS* (1998); Koh, *Transnational Legal Process*, *supra* note 7; ANNE-MARIE SLAUGHTER, *NEW WORLD ORDER* (2004) (arguing that judges and jurists form transnational networks which have a demonstrable effect on domestic legal practices across the globe). For a criticism of these developments, see RAN HIRSCHL, *TOWARD JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004).

25. At the time of this writing, fourteen cases in seven situations have been brought before the ICC. These cases address the situations in Uganda; The Democratic Republic of the Congo; Darfur, Sudan; Central African Republic; Kenya; Libya; and CÔTE D'IVOIRE. *Situations and Cases*, INT'L CRIMINAL COURT, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases> (last visited Feb. 21, 2012).

26. See YUVAL SHANY, *NATIONAL COURTS AS INTERNATIONAL ACTORS: JURISDICTIONAL IMPLICATIONS* 9–10 (2009), available at <http://www.federalismi.it/AppOpenFilePDF.cfm?artid=13810&dpath=document&dfile=29072009111203.pdf> ("To my mind, national courts are often applying international law not as a result of complicated strategic considerations or comparative analysis of national and international norms, but simply because they regard the application of international law as deriv-

fonctionnel, wherein national judicial institutions can play a role-splitting function, at times administering law for domestic constituencies and at other times fulfilling the function of international courts.²⁷ If the horizontal enforcement conceptualization is accurate, we would expect states that have ratified treaties with precise provisions supporting individual prosecution in treaty law to be more likely to hold criminal trials for rights offenders.

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

Obligation means that states or other actors are bound by a rule or commitment or by a set of rules or commitments. . . . *Precision* means that rules unambiguously define the conduct they require, authorize, or proscribe. *Delegation* means that third parties have been granted authority to implement, interpret, and apply the rules.²⁸

According to this three-part definition, Category 1 treaties are more legalized than other rights treaties. While Category 1 treaties may not create a greater sense of obligation,²⁹ they have more precise language regarding the use of criminal trials for remedy, and officials have written into them greater degrees of delegation.³⁰ In the latter case, however, we are con-

ing from their constitutional role as guardians of the rule of law.”); see also SLAUGHTER, *supra* note 24, at 64–103.

27. See SHANY, *supra* note 26, at 13 n.48 (citing GEORGES SCELLE, II, *PRÉCIS DE DROIT DES GENS: PRINCIPES ET SYSTÉMATIQUE* 10–12 (1934)).

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

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

30. For example, the Convention Against Torture both obligates states to try criminally a “person alleged to have committed any offense” defined as torture or ill-treatment, and it further obligates states to “submit the case to its competent authorities for the purpose of prosecution.” Convention

cerned with a quite specific form of delegation, that which permits enforcement through third parties via individual criminal accountability. If the language and legal provisions of Category 1 treaties inspires prosecutions, we would expect ratification of these treaties to be more highly correlated with the use of prosecutions than other human rights treaties that do not have such provisions. This is because the precise and delegating nature of the treaties allows for agents of transnational pressure to focus their attention on a state's rule-bound obligations to hold rights violators criminally accountable.

B. *Hypothesis 2: Ratification of those treaties dealing with core rights but lacking in provisions for criminal responsibility will still likely result in rights prosecutions, but will not have as pronounced an effect as those with such a provision.*

A second group of human rights treaties we would expect to have a weaker effect on the use of prosecutions; these include the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR) and the African Charter on Human Rights and Peoples Rights (Category 2). These treaties detail prohibitions on the practices that are the focal point of most human rights trials: violations to the right to life, security of the person, and freedom from torture. The ICCPR and the ECHR also include important provisions about state obligations to provide "an effective remedy" to victims of human rights violations.³¹ This

Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 7(1), Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture] (entered into force June 28, 1987). Furthermore, the Convention provides for universal jurisdiction, stipulating that "[e]ach State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 [concerning extradition] to any of the States mentioned in paragraph 1 of this article." *Id.* art. 5(2). Thus, the CAT essentially delegates enforcement both to states where the violation occurred and foreign states where the perpetrator resides. See also *id.* art. 9(1) ("State Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences referred to in article 4 . . .").

31. See International Covenant on Civil and Political Rights art. 2(3), Dec. 16, 1966, 999 U.N.T.S. 171 ("Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstand-

obligation to provide remedies has increasingly been interpreted as a positive duty to provide legal remedies, that is, to provide for some kind of human rights prosecution.³² But the language of the treaties themselves does not specify that such a remedy be a legal one, or that it involve individual criminal accountability for those responsible for human rights violations. Thus we might expect ratification of these treaties to be associated with the use of prosecutions, although at a lower level than ratification of Category 1 treaties. The European Court of Human Rights has not engaged in interpretation as far-reaching as the Inter American Court of Human Rights regarding amnesty or the duty to punish.³³

ing that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.”); European Convention for the Protection of Human Rights and Fundamental Freedoms art. 13, Nov. 4, 1949, E.T.S. 5, 213 U.N.T.S. 221 (“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”).

32. *See, e.g.*, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, annex ¶ 4, U.N. Doc A/RES/60/147 (Mar. 21, 2006) (“In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him.”).

33. *See, e.g.*, *Al-Adsani v. United Kingdom*, App. No. 35763/97, 34 Eur. Ct. H.R. 11, at 292, ¶ 66 (2002) (“The Court, while noting the growing recognition of the overriding importance of the prohibition of torture, does not accordingly find it established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State. The 1978 Act, which grants immunity to States in respect of personal injury claims unless the damage was caused within the United Kingdom, is not inconsistent with those limitations generally accepted by the community of nations as part of the doctrine of State immunity.”). On the Inter-American Court, see *Velásquez Rodríguez Case*, Judgment, Inter-Am. Ct. H.R. (ser. C) No.4 (July 29, 1988); *Barrios Altos v. Peru*, Judgment, Inter-Am Ct. H.R. (ser. C) No. 75 (May 14, 2001); *Gomes Lund v. Brazil*, Judgment, Inter-Am Ct. H.R. (Nov. 24, 2010).

- C. *Hypothesis 3: Ratification of those treaties not dealing with core rights nor containing any provisions for individual criminal accountability have no impact on the use of domestic trials.*

A third group of treaties (Category 3) involve different sets of substantive rights that are not typically featured in human rights prosecutions. This is the case, for example, with the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the Convention on the Elimination of All Forms of Racial Discrimination (CERD). These treaties rely on the state accountability model and contain no references at all to the possibility or desirability of individual criminal prosecution. Because these lack both the substantive and the procedural legal provisions we are theorizing to have an effect on prosecutions, we expect this third group of treaties to have no effect on domestic trial activity.

To reiterate, we expect the effects of treaty law on domestic prosecutions to vary by treaty type. If we see a link between treaty content and the initiation of prosecutions,³⁴ it suggests that the treaties themselves are doing some work, providing specific legal arguments that can be used in litigation and judicial decisions. However, if we do not see such a specific link with treaty content, but rather a general correlation between all three categories of human rights treaty ratifications and prosecutions, it is more likely that some alternative explanation is needed to explain the use of prosecutions. For example, many states ratify treaties because they believe in them and can comply with them at reasonable cost, what Simmons calls the “theory of rationally expressive ratification.”³⁵ There may be an equivalent “rationally expressive theory of prosecutions” that suggests that states also carry out human rights prosecutions because they believe in them and can carry them out at reasonable cost. This would contrast with the hypotheses presented above, which suggests that states use prosecu-

34. For our database, we did not limit our definition to only those prosecutions that resulted in convictions, but included the whole process of prosecution, from indictment, to extradition, to preventive detention, to the trials, and sentences. See *infra* Section IV.A. For an in-depth discussion, see SIKKINK, *supra* note 8, at 136–37.

35. SIMMONS, *supra* note 2, at 64.

tions because of more specific treaty obligations that create opportunities for litigants and judges.

D. *Alternative Explanations*

1. *Legal System*

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

Second, we would expect human rights treaties to be more likely to contribute to prosecutions in countries that have domestic provisions for private prosecution in criminal cases. In these legal systems, individual victims and NGOs representing victims are permitted to initiate criminal cases or to accompany public prosecutors bringing cases forward. These provisions have allowed human rights organizations, which are very knowledgeable about human rights treaties, to bring forward criminal cases; such organizations are more likely to raise points of law from treaty law than are ordinary public prosecutors. For example, Argentina has a monist legal system, and it has provisions for private prosecution, while the U.K is dualist in its relationship with international law and does not have provisions for private prosecution. While these distinctions often correspond to the differences between common law and civil law systems, there is not a perfect correspondence. Uruguay, for example, is monist, but does not have provisions for private prosecutions in criminal cases. Unfortunately, there are no complete databases of either monist versus dualist legal systems, or a complete list of countries with private prosecution mechanisms. That being said, it is unusual for common law countries (British legal tradition) to allow for private pros-

ecution in criminal cases, and these common law countries are also more likely to be dualist than monist. In this sense, we can hypothesize that the link between treaty ratification and use of human rights prosecutions will be somewhat stronger in non-common-law countries.

2. *Democratization*

Not a great deal of energy has been spent predicting the use of prosecutions across countries of the world, but outside of our theory of international legal obligations and the intervening effect of British legal tradition, four other explanations exist. The first, advanced most powerfully by Hunjoon Kim, centers on regional diffusion.³⁶ Leaders in transitional situations, he finds, are more likely to seek justice if their neighbors have done so. A second explanation hinges on realistic political expediencies. Many theorists view it as law that human rights prosecutions can only follow ruptured democratic transitions wherein the *ancien* regime is embarrassed, discredited, and delegitimized.³⁷ This notion is closely aligned with that of victor's justice, which is applicable to the post-conflict milieu. In those places where one side in an internal conflict loses totally, trials are more likely to take place because there is no risk of backlash from holdover elements of former armed groups.

A third explanation hinges on the theorized nexus between institutionalized democracy and the rule of law practices. In those places exhibiting stronger moves toward formal democracy, one might expect more rights prosecutions. Some argue that the primary vehicle through which rule of law finds its expression is an independent judiciary. However, political scientists who study comparative judicial systems have noted that even those judiciaries that are formally independent, or have undergone 'reform' efforts, are many times beholden to

36. Hunjoon Kim, *Expansion of Transitional Justice Measures: A Comparative Analysis of Its Causes* (Aug. 2008) (Ph.D. dissertation, University of Minnesota), available at <http://proquest.umi.com/pqdweb?did=1601074211&Fmt=7&clientId=83650&RQT=309&VName=PQD>.

37. As opposed to negotiated transitions, where the former regime is able to negotiate its own displacement. *E.g.*, SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 211–231 (1991).

the executive branch, or are plagued by corruption.³⁸ Thus, Neil Tate and Linda Camp Keith distinguish between formal (de jure) and behavioral (de facto) independence of judiciaries; the latter is evident when judges refrain from corrupt behavior on a large scale, and when justices are both vertically and horizontally autonomous in their decision-making.³⁹ Because the agent behind prosecutions is the judiciary, we might easily assume that a more de facto independent court is likely to pursue justice for rights abuses.⁴⁰ For our hypotheses concerning the linkage between international rights commitments and prosecutions to hold water, a relationship must hold even controlling for these other factors and explanations.

III. STATISTICAL MODELS AND RESULTS

We are interested in whether official commitment to various treaties—specifically those with provisos for individual accountability—induce states to pursue domestic prosecutions when rights crimes have been committed. We test for such correlations using three dependent variables, and accordingly, our sample selection changes per the choice of dependent va-

38. See Gretchen Helmke, *The Logic of Strategic Defection: Court-Executive Relations in Argentina Under Dictatorship and Democracy*, 96 AM. POL. SCI. REV. 291 (2002); Julio Rios-Figueroa, *Judicial Institutions and Control of Corruption: Is There a Right Design?* 2 (Centro de Investigación y Docencia Económicas, Working Paper, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1132145 (arguing that complete judicial independence facilitates corruption because of a lack of accountability).

39. C. Neal Tate & Linda Camp Keith, *Conceptualizing and Operationalizing Judicial Independence Globally* 17 (Aug. 30–Sept. 2, 2007) (paper presented at the Annual Meeting of the American Political Science Association).

40. See also LISA HILBINK, JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE (2007), pgs. 239-245. Hilbink demonstrates that formal institutionalization of judicial independence is not enough to ensure rights guarantees; other factors are necessary to produce positive independence, that is, judges willing and able to assert themselves against powerful actors. See Emilia Justyna Powell & Jeffrey K. Staton, *Domestic Judicial Institutions and Human Rights Treaty Violations*, 53 INT'L STUD. Q. 149, 150–151 (2009), for a discussion of the relationship between effective judiciaries, international rights treaties, and rights protections. The authors find that countries with effective courts are both less likely to ratify treaties and less likely to commit abuses. The reason, they theorize, is that stronger courts are more likely to enforce rights law, which supports our notion that de facto independent courts will more likely hold criminal trials for rights abusers. *Id.* at 151.

riable. Previous empirical research on human rights trials has primarily been undertaken within the growing subfield of transitional justice studies.⁴¹ Researchers have typically studied the use of trial justice in states undergoing democratic or post-conflict transition, though their samples and dependent variables differ, sometimes widely. For instance, Grete Lie et al. include in their sample state-sanctioned trial activity in post-conflict transitions that was solely directed at members of rebel groups.⁴² In wide contrast, Tricia Olsen et al. count *all* high-profile court cases, following democratic transitions, that produced verdicts.⁴³

By contrast, Kim and Sikkink count all prosecutions with human rights content across all transitional democracies (including indictments, extradition requests, preventive detention, as well as the actual trials), even if the outcome was not a verdict.⁴⁴ The justification here is that the entire process of prosecution may impose significant costs on the accused, and thus could have a deterrent effect even when the prosecutions do not result in convictions. We find this to be a useful approach to follow in the definition of one of our dependent variables. However, Kim and Sikkink only studied prosecutions following democratic transitions, where such prosecutions dealt with human rights violations that took place under the former authoritarian regime. This means that any coun-

41. For some examples of empirical research in the subfield of transitional justice, see Grete Lie, Helga Malmin Binningsbø, & Scott Gates, *Post-Conflict Justice and Sustainable Peace* (World Bank, Policy Research Working Paper 4191, 2007); James D. Meernik, Angela Nichols & Kimi L. King, *The Impact of International Tribunals and Domestic Trials on Peace and Human Rights After Civil War*, 11 INT'L STUD. PERSP. 309 (2010); TRICIA D. OLSEN, LEIGH A. PAYNE & ANDREW G. REITER, TRANSITIONAL JUSTICE IN BALANCE: COMPARING PROCESSES, WEIGHING EFFICACY (2010) [hereinafter OLSEN ET AL.]; Kim & Sikkink, *supra* note 5.

42. Lie et al., *supra* note 41, at 12. The authors do not seem to distinguish between those trials that are for rights abuses, which follow due process, and those that are political trials meant to punish rebels.

43. OLSEN ET AL., *supra* note 41, at 32 ("We code a trial when perpetrators of human rights violations are held criminally accountable in a court of law and a verdict is rendered.")

44. Kim & Sikkink, *supra* note 5, at 942. Human rights content means that the person or persons being held criminally accountable were responsible for abuses to physical integrity that are categorized as core violations of international law. *Id.* at 947.

tries with rights trial activity that are not democratizing would be missed or excluded from the model.

To address this issue, and to allow for tests with a global sample, we also use a new variable, coded from U.S. State Department annual human rights reports (1976-2009), that includes all domestic human rights prosecutions around the world, as long as they take place in countries with a minimum capacity for free and fair trials. While this variable subsumes all 'transitional rights' trials modeled in Kim and Sikkink's study, it is also much more expansive. It includes, *inter alia*, the routine prosecution of police for abuse of their powers, state efforts to try military forces for egregious acts during prolonged internal conflicts, and the prosecution of political crimes that took place during or after the process of democratization—all incidents sometimes elided in the measure of specifically 'transitional' trials. Finally, among victims and the activist community, judicial proceedings themselves are less important than the outcome produced. For these groups, justice is constituted by punishment, not by excessively procedural trials that end in acquittal. Therefore, we also examine the relationship between international legal commitments and convictions. However, due to data limitations, we can only examine determinants of convictions among the sample of transitional prosecutions. While this is not ideal, we emphasize that, to date, no attempt has been made whatsoever to model human rights convictions throughout the world, so our limited effort represents a first cut.

Our three dependent variables of interest—all domestic rights trials, transitional human rights trials, and convictions in transitional trials—can only be modeled if appropriate samples are chosen. Because 'all domestic trials' captures prosecutions in the full range of political and social contexts, the appropriate sample is all countries (all samples are 1976–2009 because that is the period covered by the source reports). Because 'transitional rights trials' occur in the context of democratization, our sample is all country-years following a democratic transition. To determine the subsample of democratic transition cases, we follow an accepted method used by other scholars of democratization and transitional justice.⁴⁵ We in-

45. This entails application of Polity IV's Regime Transition Variable (Regtrans). Monty Marshall et al., *Polity IV Project: Political Regime Characteris-*

clude major and minor democratic transitions as defined by the Polity IV Project.⁴⁶ Finally, among the sample of transitional prosecution years, we tested whether convictions were produced. We use the more limited pool of transitional trials because those are the cases on which we have conviction data.⁴⁷

A. *Independent Variables*

Our main variables of interest involve ratification of international human rights treaties, but in order to test our propositions more sufficiently, we construct our measures of ratification in a way that differs from the current quantitative literature. Scholars have followed two general strategies when operationalizing treaty ratification variables with the intent of testing the effects of legal instruments. The first is that they generally code country-years as “0” if a country has not ratified a treaty. Whereupon a country does ratify, the year the legislation passes is coded as “1,” as are all years following. This es-

tics and Transitions, 1800–2010, CENTER FOR SYSTEMIC PEACE, www.systemicpeace.org/polity/polity4.htm (last visited Feb. 21, 2012). The data used for this study extended through 2009.

46. A major democratic transition is a six-point or greater increase in the POLITY score over a period of three years or less; or a shift from an autocratic POLITY value (-10 to 0) to a partial democratic POLITY value (+1 to +6) or full democratic POLITY value (+7 to +10); or a shift from a partial democratic value to a full democratic value. A minor democratic transition is a three- to five-point increase in the POLITY score over a period of three years or less, and a shift from autocratic to partial democratic or from partial to full democratic value. MONTY MARSHALL ET AL., POLITY IV PROJECT: POLITICAL REGIME CHARACTERISTICS AND TRANSITIONS, 1800–2009, DATASET USERS’ MANUAL 35–36 (2009), available at <http://www.systemicpeace.org/inscr/p4manualv2009.pdf>. One drawback in the Polity data is that states subject to partial or extensive foreign administration, like post-independence East Timor or post-war Bosnia and Herzegovina, are treated as lacking any system of governance (-66 in POLITY and 0 in POLITY 2). *Id.* at 34. Moreover, newly independent states that begin their rule under institutionalized democratic regimes are not considered to be transitional in nature. Sensitive to the fact that prosecutions might occur in such contexts, we lean toward inclusivity by coding these states with foreign interventions and new democratic states as transitional.

47. Choosing to model convictions by sampling only from those country-years that have trials could be seen as a form of selection bias: our model might leave out information on those cases that have no trials in the first place. We tested for the possibility of selection bias, and we ultimately found none. See discussion of Model 3 at *infra* text accompanying note 67.

entially allows the researcher to compare average statics under the pre-ratification regime to the post-ratification regime.⁴⁸ Second, scholars code each legal instrument separately, so that the effect of each can be modeled, controlling for the relative effects of others.⁴⁹ We deviate from these two practices by constructing composite scores of rights commitments. For our models, we generated three such composite scores, one for each of the three groups of rights treaties specified in Section II:

- Category 1: those protecting physical integrity rights and containing individual accountability provisions. This includes the *Convention on the Prevention and Punishment of Genocide* (1948), *The American Convention on Human Rights* (1969), *The Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment* (1984), the *Rome Statute for the International Criminal Court* (1998), and *The Convention on the Protection of All Persons from Enforced Disappearances* (2006).⁵⁰
- Category 2: those protecting physical integrity rights but not containing ICA provisions. This group includes *The European Convention on Human Rights* (1981), *The International Covenant on Civil and Political Rights* (1966), *The African Charter on Human and People's Rights* (1981), and *The European Convention Against Torture* (1987).
- Category 3: those not protecting primarily with physical integrity rights. This group includes the *International Covenant on Economic, Social, and Cultural Rights* (1966), *The Convention on the Elimination of Discrimination Against Women* (1979), *The Convention on the Rights of the Child* (1989), and *The Convention on Migrant Workers* (1990).

48. One exception is Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 AM. J. SOC. 1373 (2005). The authors count up every year following ratification, *id.* at 1393–94, which problematically assumes the effects of ratification increase linearly over time.

49. See, e.g., Eric Neumayer, *Do International Human Rights Treaties Improve Respect for Human Rights?*, 49 J. CONFLICT RESOL. 925, 937–39 (2005).

50. The year in parentheses is the year in which the treaty was first available for ratification, not the year that it went into force.

Composite scores for each group are percentages that were generated using a two-step procedure. First, each country-year was coded “1” following a state’s ratification of each treaty.⁵¹ Second, by group, the total number of ratifications in any year was summed, and then that figure was divided by the maximum number of treaties available for ratification in that year. For example, for Category 1, if the year was 1985, each country’s total ratifications would have been divided by three because three total treaties were available for ratification at that time: Genocide, IACHR, and the CAT. A country having ratified all three would receive a score of 1, where a country having ratified only two would receive a score of 0.67, and so on. By measuring commitment in this fashion, we are able to model the overall commitment of each state to specific norms, while also being able to observe the combined effect of various treaties with similar legal provisions.⁵²

We split the remaining control variables into four additional groups. Those belonging to region are the dummies mentioned in citation for the paragraph above, coded using UN world regional categories. Also included here is the percentage of a country’s regional neighbors that have had at least one trial, which was derived by adding the total number of countries with trials and dividing it by the total number of states in each region. Those variables within transition-type are all dummies. Three dummies are “1” if the state in question was experiencing democratization following a clean break

51. It should be noted here that ratification is not a uniform process, and it may vary from state to state. For example, states may issue declarations of reservation upon ratification, which may express an unwillingness to accept in full the provisions of the treaty. However, we do not distinguish between types of ratification for two reasons: first, it is not commonly done in the quantitative literature, on which we are building; and second, it is quite difficult to generate a coding scheme that accounts for reservations. The reason is that any reduction in the score assigned to a reserving country would be arbitrary, given that reservations are not always similar. Future research should work to generate new ways of dealing with this issue.

52. We decided to include region-specific treaties in the first two groups, despite the fact that this will weight some countries more heavily simply because they are able to ratify some instruments not available to countries in other regions (thus increasing their composite scores). While we recognize the potential problem caused by this regional weighting, we deem it justified because those regional treaties provide specific justiciable content that should not be ignored; at the same time, we control for the favoritism this may show to particular regions by including region dummies in our models.

(rupture) from the previous regime, following a negotiation between rival forces, or following the creation of a new state. These were taken from the list compiled by Tricia Olsen et al. in their recent book on democratic transitions and efforts at providing redress for victims.⁵³ The other two dummies relate to internal conflict; one measures the presence of ongoing civil war involving state military forces, the other whether a civil war was previously terminated through a victory of one oppositional force over the other. These variables were drawn from the UCDP/PRIO Armed Conflict Project.⁵⁴ The third group, legal institutions and practice, are taken from four different sources. The Polity 2 variable is a -10 to 10 measure of regime type taken from the POLITY IV Project, where a -10 is a fully autocratic state and a 10 is a fully democratic state.⁵⁵ De facto judicial independence is a scaled measure (0-2) of how independent a country's courts are in practice, taken from previous cross-national scholarship on courts and updated by the authors.⁵⁶ The Political Terror Scale (PTS) is a standard-based measure of levels of repression in each country of the world.⁵⁷ British legal tradition is a dummy drawn from the work of Beth Simmons.⁵⁸ Finally, structural conditions within the polity are included in two models as controls. Wealth is measured by GDP per capita (in 2000 US Dollars) divided by 1000, and population is measured using a log value of the total

53. OLSEN ET AL., *supra* note 41, at 173–75.

54. See Nils Petter Gleditsch, Peter Wallensteen, Mikael Eriksson, Margareta Sollenberg & Håvard Strand, *Armed Conflict 1946-2001: A New Dataset*, 39 J. PEACE RES. 615 (2002). The data we used extended through 2009. Updated versions of the dataset can be found at *UCDP/PRIO Armed Conflict Dataset*, UPPSALA UNIVERSITET DEPARTMENT OF PEACE AND CONFLICT RESEARCH, http://www.pcr.uu.se/research/ucdp/datasets/ucdp_prio_armed_conflict_dataset (last visited Feb. 21, 2012). Following UCDP/PRIO, we define a conflict as “a contested incompatibility that concerns government and/or territory where the use of armed force between two parties, of which at least one is the government of a state, results in at least 25 battle-related deaths.” UCDP/PRIO ARMED CONFLICT DATASET CODEBOOK 1 (2011), *available at* http://www.pcr.uu.se/digitalAssets/63/63324_Codebook_UCDP_PRIO_Armed_Conflict_Dataset_v4_2011.pdf.

55. Marshall et al., *supra* note 45. See also *supra* note 46.

56. Tate & Keith, *supra* note 39, at 25–26.

57. Mark Gibney, Linda Cornett & Reed Wood, *Political Terror Scale 1976–2010*, POLITICAL TERROR SCALE, <http://www.politicalterror scale.org> (last visited Feb. 21, 2012).

58. For complete source information, see SIMMONS, *supra* note 2, at 383.

number of citizens within each country. Both are adapted from the World Bank.

B. Results

The statistical results are presented in Table 1, at the end of this paper.⁵⁹ The leftmost column presents the outcomes of Model 1 using *All Domestic Rights Trials* as the dependent variable, sampling from all countries in the world.⁶⁰ The second model, whose results are listed in the middle column, uses data sampled from only transitional democracies. For this model, the dependent variable is trials that were initiated for the crimes of previous authoritarian regimes (*Transitional Rights Trials*). Finally, the column on the right shows the results from Model 3, which predicts the likelihood that any of the transitional trials in the second model produce a conviction (*Convictions*).

Before discussing the findings related to our primary hypotheses, we look first to the control variables in Model 1 that are significant. These variables confirm conventional wisdom that criminal trials do not happen in a social or political vacuum. First, the international and temporal context in which countries find themselves has a large effect on their practices. As time progresses, states located in regions where more countries have engaged in criminal trials are more likely to follow suit. In Model 1, regional diffusion (percentage of countries in region with trials) is a strongly significant variable. Furthermore, the binary variable, "Americas," is also significant, suggesting that states in the Americas are home to more criminal prosecutions compared to those in other regions and support-

59. We estimate five models, the first four of which employ discrete time logits using binary time-series cross-sectional (BTSCS) data. We use discrete time logits, rather than continuous time functions, because our data are yearly aggregates. Following common statistical practice, we include three cubic splines and a variable measuring how many recorded prosecution-years were previously present in each country (previous trials). These measures are taken to control for temporal dependence in the data. Due to the significance on the spline variables in our models, there does seem to be evidence of temporal dependence in our data, meaning that our choice to use a BTSCS logit was justified. See Nathaniel Beck, Jonathan N. Katz & Richard Tucker, *Taking Time Seriously: Time-Series-Cross-Section Analysis with a Binary Dependent Variable*, 42 AM J. POL. SCI. 1260, 1261 (1998).

60. This would include trials that occur within stable democracies, partial democracies, anocracies, and autocracies alike.

ing the historical viewpoint that Latin American countries are global protagonists in the human rights cause.⁶¹

Second, the presence of political transition or unsettled conflict of any sort is liable to lead to the use of trials. Compared to all other countries, those engaged in civil war, those which are newly formed states, and those that have experienced any form of democratic transition are significantly more likely to hold rights prosecutions. This we should expect given that rights violations happen in times of political instability, institutional limbo, or internal turmoil. However, trials are not more likely to take place *after* civil war victories, or in “post-conflict” periods, calling into question the belief that rights prosecutions are a direct extension of power imbalances—or victor’s justice.⁶²

Third, domestic legal institutions and practices also appear to alter the propensity of various countries to have trials. The more formally democratic a state’s institutions, as measured by its score on the 21-point Polity II scale, the more likely it will hold trials. Furthermore, *de facto* judicial independence, as predicted, is very strongly related to the presence of rights trials. Courts that are insulated from executive control, it seems, are more likely to initiate rights-related prosecutions.

Even though these other factors explain a good deal of variance in the presence of domestic criminal trials, the hypothesized relationship between Category 1 treaty ratification and domestic rights trials is verified and quite robust. The coefficient on the Category 1 Commitment variable is significant at the .01 level. Those countries with more outstanding commitments to treaties with individual accountability provisions are much more likely to have pursued rights prosecutions. Importantly, though, Category 2 Commitment is not significant. The main disparity between these two groups of treaties is that the latter lacks content dealing with punishment for individual rights violators. Therefore, we take the significance of Group

61. See SIKKINK, *supra* note 8, ch. 4 (discussing Latin American countries’ initiative in spearheading domestic and international prosecutions for human rights crimes).

62. For post-conflict justice, see *POST-CONFLICT JUSTICE* (M. Cherif Bassiouni ed., 2002). For victor’s justice in different periods of history, see JON ELSTER, *CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE* (2004).

1, coupled with the insignificance of Group 2, as evidence that treaties with teeth actually induce states to proceed with prosecutions for offending nationals.

Unexpected is the statistically significant negative relationship between Group 3 Treaty Commitment and the use of trials. Essentially, the greater commitment countries show to treaties not dealing with physical integrity rights, the less likely they are to have prosecutions. We cannot fully explicate why this is the case, but one reason might have to do with the theorized divide between economic and social rights, on the one hand, and civil and political rights on the other. Treaties dealing with economic and social rights are over-represented in Group 3. If commitment to this group of treaties signifies ideological devotion to economic over civil-political rights, it might be that this devotion brings with it less of an interest in punishing civil rights infringements. Still, this is only at the level of speculation. Finally, while we expected countries with British legal heritage to eschew trial justice, we find no relationship between this variable and the incidents of prosecutions.

How do the above findings fare when we sample from only democratic transitions? Model 2 tests the same variables within a smaller sample of democratizing countries, and focusing specifically on criminal trials for members of the former regime. The results between the two models are relatively uniform, with a few exceptions. First, the percent of regional neighbors with trials remains a highly significant factor, hinting at a diffusion effect, but all of the region-specific variables lose their significance. This supports policy diffusion research which suggests that decision makers, when they are in times of institutional uncertainty (i.e. during democratization), are more likely to engage in inferential shortcuts and mimic choices of predecessors who have undergone similar experiences.⁶³ While states might be influenced by the policy choices of their neighbors, it does not seem—due to the insignificance of the other region dummies—that other unobserved regional characteristics color states' decision to hold prosecutions. Second, the type of transition still makes a difference, but we see that both ruptured democratic transitions

63. Kurt Weyland, *The Diffusion of Revolution: '1848' in Europe and Latin America*, 63 INT'L ORG. 391, 400 (2009).

and civil war victories are more apt to produce prosecutions than negotiated transitions, or countries still embroiled in civil war.⁶⁴ This finding is expected in the literature on transitional justice, which consistently restates that trials are more likely when peace spoilers have been marginalized rather than incorporated into the political system.⁶⁵ Third, and surprisingly, none of the legal institutional variables are significant any longer. This may owe to the fact that democratization is already happening among this sample of countries, so there is less variation across variables like *de facto* judicial independence.

As in Model 1, commitment to Category 1 treaties produces strong results, but unlike before, the other treaty commitment variables fall out of conventional levels of significance. Regardless of the operationalization of the dependent variable and no matter our sample, commitment to those treaties with ICA provisions increases the probability of rights trials, and in significant fashion. In fact, moving from no commitment to full commitment on this composite score increases the probability for rights trials by around thirty percent⁶⁶ The power of this finding, net of other variables, suggests that legalization of individual criminal accountability norms has an independent effect on state behaviors.

Model 3, though, presents results that are more sobering. When we use convictions as the dependent variable, selecting only those country-years featuring transitional rights trials, we find that Category 1 commitment is negatively related to conviction, while Category 2 commitment is very positively related to conviction. Furthermore, African trials and trials following negotiated settlements are less likely to end in conviction. While the small sample size makes us hesitant to accept these findings at face value,⁶⁷ there may still be reason to believe

64. "New state" was dropped as a variable in Models 2 and 3 so that it could serve as a baseline.

65. See HUNTINGTON, *supra* note 37, at 211–31. See generally A. JAMES MC-ADAMS, *TRANSITIONAL JUSTICE AND RULE OF LAW IN NEW DEMOCRACIES* (1997) (arguing that new democracies particularly seek accountability trials to right the wrongs of former dictators).

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

67. This finding might also be attributable to the difficulties of modeling processes that proceed over a number of years. While we can only test for

that the very same countries that are compelled by their international obligations to have rights prosecutions in periods of democratization are in fact less likely to produce convictions.

C. Discussion

The three most robust predictors of trial prosecutions across our models are regional diffusion, ruptured democratic transition, and the degree of commitment to Category 1 international treaties, those with provisions for individual criminal accountability to enforce core rights. This appears to be the case irrespective of the character and valence of domestic legal/constitutional institutions. Global politics, it seems, have a direct and measurable influence on state behavior, and treaties are not as meaningless or unenforceable as critics of the human rights regime like to claim.⁶⁸ If the inclusion of ICA provisions become a more standard practice for treaty drafters, and these provisions come to be part of the legal landscape, more states might become subject to a kind of induced rights enforcement. Such inducement is unconcentrated and need not be through coercion or threat. Furthermore, it can circumvent those wielding the most power in the state, finding an outlet in the courts, or regional bodies. That said, it would be foolish to assert that leaders do not still exert influence, or that instruments of the rights regime nullify political calculation. In other words, we do not argue that rights trump politics, or exist outside political parameters. In fact, the empirical record shows us complex patterns of interaction between the two—patterns which we demonstrate in the next section.

IV. PATHWAYS TO COMPLIANCE

There are different possible relationships between treaty ratification and human rights prosecutions, and the ways in

the presence of a conviction in every given prosecution-year, many trials unfold over a period of many years. So, the findings of Model 3 might simply be indicating that the very same countries which have multiple prosecutions over a series of years do not produce convictions *every year*.

68. See, e.g., Anthony Woodiwiss, *The Law Cannot Be Enough: Human Rights and the Limits of Legalism*, in *THE LEGALIZATION OF HUMAN RIGHTS*, *supra* note 16, at 34 (“The disproportion between human rights related legal events and social events with a potential human rights content is in all probability even greater, since human rights tend not to be proactively enforced . . .”).

which the content of specific human rights treaties is used in human rights prosecutions in practice. We suggest three different “pathways” though which international human rights treaties might be translated into the greater use of human rights prosecutions: (1) mainly domestic mobilization, (2) international imposition, and (3) hybrid mobilization wherein international and regional institutions combine with domestic mobilization.⁶⁹ These pathways are elaborated more in depth elsewhere but here we provide a brief overview.⁷⁰

First, treaties are neither a necessary nor a sufficient condition for human rights prosecutions. In our database we have examples of countries such as Greece in 1975 that carried out domestic human rights prosecutions before they ratified the relevant treaties and therefore relied entirely on domestic criminal law.⁷¹ But in more recent cases of human rights prosecutions, most countries have ratified at least one human rights treaty with a provision for individual criminal accountability, and those treaties play some role in facilitating domestic prosecutions.

The role that human rights treaties play, however, differs from one country to another. On one extreme, such as the case of Argentina, treaties are implemented as a result of domestic institutional processes and domestic mobilization, while international actors play a secondary role. On another extreme, which we illustrate with the case of Montenegro, the use of prosecutions after ratification is almost entirely the result of international pressures and sanctions, and there is little domestic mobilization in support of prosecutions. Local human rights activists are weak and completely unable to persuade domestic authorities to hold past state officials accountable. Only through very strong international pressures, usually involving some form of material conditionality, do national judicial authorities decide to extradite former officials or hold them accountable in domestic courts. In the middle are what

69. We do not eliminate the possibility that other pathways exist, but these are the three primary types that we have observed from the data. We chose the three cases based on how well they represent each pathway.

70. Geoffrey Dancy & Kathryn Sikkink, *Induced Enforcement: Treaty Ratification and Human Rights Prosecutions* (forthcoming) (on file with the authors).

71. See our forthcoming transitional justice database, TRANSITIONAL JUSTICE, *supra* note 18.

we suspect are the majority of cases, where domestic mobilization is present and plays an important role, but also where pressures from regional and international institutions and actors are essential to help support domestic mobilization and remove blockages to prosecutions. In this case, domestic groups are unable by themselves to use international law provisions to secure prosecutions in domestic courts. But additional support from international and regional actors, short of full material conditionality, grants greater strength to domestic actors, and permits greater accountability than would have been possible only with domestic mobilization. Each of these three pathways will be briefly discussed in the case sections below.

A. *Pathway #1: Treaties as a Tool of Domestic Groups: Argentina*

After its ruptured transition to democracy in 1983, Argentina ratified a series of human rights treaties, including the American Convention on Human Rights (in 1984), the ICCPR (in 1986), the CAT (in 1986), the Rome Statute, and the Genocide Convention (both in 2001). In a monist legal system, the act of ratifying immediately incorporates the treaty into national law, so that it can be directly applied by a national judge, and can be directly invoked by citizens, just as if it were national law. Argentina has a particularly strong example of this kind of monist legal system, further strengthened by a provision in the 1994 Constitution that gave constitutional status to those international human rights treaties that Argentina had ratified. And, as opposed to systems like those of the United States, where only public prosecutors can initiate criminal prosecutions, Argentina allows for private prosecution plaintiffs in criminal cases, which has facilitated domestic mobilization leading to human rights prosecutions.

A very broad and diverse set of human rights groups developed over time in Argentina.⁷² The Center for Legal and Social Studies (CELS) was one of the groups most involved in

72. See generally ALISON BRYSK, *THE POLITICS OF HUMAN RIGHTS IN ARGENTINA: PROTEST, CHANGE, AND DEMOCRATIZATION* (1994) (examining the achievements of the socially wide-reaching human rights movement in Argentina); EMILIO F. MIGNONE, *DERECHOS HUMANOS Y SOCIEDAD: EL CASO ARGENTINO* 99–124 (1991) (detailing the birth and development of human rights organizations in Argentina).

bringing human rights cases to the courts, using provisions for private prosecution, but virtually all the human rights organizations mobilized against impunity for perpetrators of human rights violations. These groups networked actively with international and regional human rights organizations, both NGOs and intergovernmental organizations. Argentine human rights activists were especially active in relation to the Inter-American Commission on Human Rights (IACHR), a human rights institution of the Organization of American States (OAS). Members of Argentine human rights organizations filed hundreds of cases with the IACHR, corresponded regularly with the staff, and met with Commission staff when visiting Washington D.C. At the urging of the Argentine human rights community, the IACHR made an on-site visit to Argentina in 1979, and issued an in-depth country report in 1980. In this report, the IACHR was the first entity to call in print for human rights prosecutions in Argentina.⁷³

With support from domestic and international groups, and in the context of a ruptured transition, the Alfonsín government held the first human rights prosecutions of military leaders in the Americas in the path-breaking trials of the *Juntas* in 1985. These prosecutions used domestic criminal law, rather than international human rights law. But when fears of a military coup led the Alfonsín government to pass an amnesty law—the Due Obedience law—that blocked future trials, domestic groups began to mobilize and use international law, foreign trials, and regional institutions to try to bring pressure on the judiciary to reopen human rights prosecutions in Argentina. The Due Obedience law blocked prosecutions because it said that Argentine members of the military and security agencies could not be legally punished for crimes committed during the dictatorship because they were acting out of due obedience, that is, obeying orders from their superiors.

A good example of how Argentine human rights organizations learned to combine domestic legal mobilization, strategic litigation, and regional and international law was a private prosecution case led by CELS to have the amnesty laws declared unconstitutional. The case was against a member of the Argentine Federal Police, Julio Simón, who was involved in the

73. Report on the Situation of Human Rights in Argentina, *supra* note 13.

1978 kidnapping, torture, and murder of José Poblete and his wife Gertrudis, along with the abduction of their then eight-month-old daughter, Claudia, who was stripped of her identity and turned over for adoption to a military family. The CELS lawyers argued that the amnesty laws put the Argentine judicial system in the untenable position of being able to hold people criminally responsible for kidnapping a child and falsely changing her identity, but not for the more serious crimes—the murder and disappearance of the parents (which later gave rise to the crime of kidnapping). Additionally, they argued that the amnesty laws were a violation of international and regional human rights treaties to which Argentina was a party, and which were directly incorporated into Argentine law, especially the American Convention on Human Rights and the Convention Against Torture. Federal Judge Gabriel Cavallo found the arguments compelling and wrote a judgment that was a lengthy treatise on the significance of international human rights law in Argentine criminal law.⁷⁴

The importance of the case was not just that it invalidated the amnesty law, but that it did so combining arguments from domestic law with arguments from international and regional human rights law. This was the first case where a national court invalidated an amnesty law in this way.⁷⁵ In June 2005, the Argentine Supreme Court, in a 7-1 majority vote, upheld the lower court ruling, and declared in the Poblete case that the amnesty laws were unconstitutional.⁷⁶ The Court cited jurisprudence from the Inter-American Court of Human Rights (in a case against Peru, not Argentina) that limited the ability of member state legislatures to enact amnesty laws for crimes against humanity. The Supreme Court also decided that the crime of disappearance was a crime against humanity for

74. Juzgado Nacional en lo Criminal y Correccional Federal [Juzg. Nac. Crim. Corr. Fed.] [National Court for Federal Criminal and Correctional Matters], 06/03/2001, “Simón, Julio y otro,” *Jurisprudencia Argentina* [J.A.] (2001-III-240) (Arg.) (declaring unconstitutional, null, and void Argentina’s Full Stop Law and Due Obedience Law).

75. Interview with Pablo Parenti, in Buenos Aires, Argentina (Dec. 6, 2002).

76. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 14/6/2005, “Simón, Julio Héctor y otros / privación ilegítima de la libertad” (Arg.), *available at* <http://www.unhcr.org/refworld/pdfid/4721f74c2.pdf>.

which there are no statutes of limitations. In its reasoning, the Court relied on the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity adopted by the U.N. General Assembly in 1968, which Argentina had ratified in 2003.⁷⁷ This concept is also present in the Inter-American Convention on Forced Disappearance of Persons, which Argentina ratified in 1995, and which entered into force March 28, 1996.⁷⁸ The effect of the Court's decision was to permit the reopening of hundreds of human rights cases that had been closed for the past fifteen years. Between 2005 and 2010, these human rights cases have progressed through the courts, leading to dozens of convictions.

In the Argentine example, rights treaties and institutions were a tool for domestic groups who wanted to circumvent troublesome amnesty laws that were put in place to block justice. Human rights NGOs sought rulings in regional institutions, in order to supersede some domestic laws in place in Argentina. But once domestic judicial actors overturned the amnesty laws or domestic statutes of limitation, courts primarily used existing domestic criminal laws to prosecute perpetrators.

B. *Pathway #2: Treaties as a Forum for Outside Pressure: Montenegro*

The State Union of Serbia and Montenegro, the last of the various configurations of the former Yugoslavia, ended in 2006 when Montenegro declared its independence and was admitted to the United Nations. One of the reasons for the dissolution was that Montenegro did not want its bid to join the European Union (EU) to be "hostage" to Serbia's failure to extradite war crimes suspects to the Hague, especially the infamous duo of Radovan Karadzic and Ratko Mladic.⁷⁹ The EU had explicitly linked future relations with Serbia and Mon-

77. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. Res. 2391 (XXIII), at 40, U.N. Doc. A/7342 (Nov. 26, 1968).

78. INTER-AMERICAN CONVENTION ON FORCED DISAPPEARANCE OF PERSONS art. 7, June 9, 1994, O.A.S.T.S. No. A-60 (entered into force MAR. 28, 1996).

79. Ekrem Krasniqi, *Montenegro Says It Will Not Be Serbia's Victim in EU Talks*, EUOBSERVER.COM (Apr. 5, 2006, 10:16 AM), <http://euobserver.com/9/21508>.

tenegro to the country's ability to come to grips with its past, especially as regards the extradition of war crimes suspects like Mladic to the ICTY. In particular, the EU had made it clear that Serbia and Montenegro would not be admitted to Europe as long as it continued to stonewall on the issues of extradition and accountability. Eventually, Serbia arrested Milosevic, Karadzic and Mladic, but only because of significant external pressure. This case illustrates the pathway of where domestic accountability is almost solely the result of external pressure for accountability combined with what Jelena Subotic has called "strategic quasi compliance" with international norms.⁸⁰ For Subotic, this leads to "hijacked justice" or the domestic misuse of transitional justice norms. For our purposes, Serbia and Montenegro, and later Montenegro by itself, illustrate yet another pathway of interaction of international treaties and domestic prosecutions. While this pathway exists outside of the Balkans, we would argue that it is not the most common of the pathways discussed here.

International treaties are directly applicable in courts in Serbia and Montenegro, and provisions of international conventions have priority over domestic law, where there is a conflict. But, direct application of the law has not been sufficient in the case of Serbia and Montenegro to ensure accountability for past human rights violations, in part because there has not been strong domestic mobilization on behalf of human rights victims, many of whom are Bosnian Muslims, Albanians, or Kosovars. Instead, domestic prosecutions and extradition to the ICTY has come only as a result of external pressure with material conditionality, most importantly, the carrot of EU membership. In addition, until very recently, the EU had adopted a quite narrow understanding of transitional justice with respect to Serbia and Montenegro, focusing almost exclusively on full cooperation with the ICTY, especially with regard to extradition, rather than on encouraging domestic prosecutions.

In June of 2006, Montenegro issued its declaration of independence after reaching the fifty-five percent yes vote necessary to do so in a referendum. In January 2007, Supreme Court President Ratko Vukotic assured the ICTY that it was

80. JELENA SUBOTIC, *HIJACKED JUSTICE: DEALING WITH THE PAST IN THE BALKANS* 77 (2009).

ready to try domestically those responsible for war crimes.⁸¹ In 2007 and 2008, the high court in Podgorica carried out at least two documented human rights investigations, but they did not move forward to indictment. This is perhaps why, at the end of its forty-first session, the UN Committee Against Torture admonished the country, ruling that “Montenegro expedite its investigation of war crimes, and ensure that all perpetrators were brought to justice.”⁸² However, in May 2009, with its application for EU membership pending, Montenegro began a trial of the former army reservists implicated in the Morinj camp tortures, and by May 2010, six were convicted for the crime, receiving the “first ever conviction for war crimes committed in Montenegro.”⁸³ The sentences, though, ranged from one to four years, which might be argued to fall short of just punishment.⁸⁴ Shortly after the European Commission sent an official communication to the Council and European Parliament on Montenegro’s application that did not specifically mention the issue of human rights prosecutions and accountability,⁸⁵ the sentences given to the JNA officers for the Morinj tortures were annulled by an appeals court on grounds that the case against the officers was “political” in nature.⁸⁶ At the time of writing, the officers still face a re-trial. In another human rights case, The High Court acquitted nine former police officials of deporting seventy-nine Bosnian prisoners to Serb-controlled Bosnia, where they would almost certainly be tortured. The judge argued there was not enough evidence to convict, and the police officers could not be convicted of war crimes since Montenegro was not formally at war with Bosnia

81. *Supreme Court Chief Says Montenegro Ready to Take Over Cases from Hague Tribunal*, BBC MONITORING EUROPE, Jan. 7, 2007.

82. U.N. News & Media, *Committee Against Torture Concludes Forty-First Session: Issues Concluding Observations on Reports of Lithuania, Serbia, Kazakhstan, China, Montenegro, Belgium and Kenya* (Nov. 21, 2008), http://www.unog.ch/80256EDD006B9C2E/%28httpNewsByYear_en%29/9DBAEAAD42BE032DC1257953004490D8.

83. *Retrial for Montenegrins Accused of Torturing Croats*, RADIO NETH. WORLDWIDE, Dec. 7, 2010, <http://www.rnw.nl/international-justice/article/retrial-montenegrins-accused-torturing-croats>.

84. *Id.*; *Annual Report: Serbia and Montenegro 2010*, AMNESTY INT’L (May 28, 2010), <http://www.amnesty.org/en/region/montenegro/report-2011>.

85. *Commission Opinion on Montenegro’s Application for Membership of the European Union*, COM (2010) 670 final (Nov. 9, 2010).

86. *Retrial for Montenegrins Accused of Torturing Croats*, *supra* note 83.

and Herzegovina. This decision provoked criticism from primarily external human rights organizations in Canada and the United States, revealing the extent to which outrage has mostly come from the outside.⁸⁷ Any progress in Serbia and Montenegro has primarily been the result of external pressure, and likely will remain so in the future.

This case provides an illustration of some of our statistical findings. Montenegro's ratification of the Convention Against Torture subjected it to open pressure from the international community. Their obligations under this and other conventions were clear—to punish those responsible both for committing acts of torture and for illegal refouler of prisoners⁸⁸—but the courts might still have done nothing if it were not for additional pressure applied by the European Union. That said, very few domestic human rights prosecutions in Montenegro appear to result in satisfactory convictions. This case, then, shows how it might be that countries with more legal obligations to hold individuals accountable for rights crimes are also less likely to produce convictions.

C. *Pathway #3: Treaty and Domestic Law as Complexly Intertwined: Uruguay*

Like Argentina, Uruguay ratified most human rights treaties shortly after its transition to democracy in 1983, including the American Convention on Human Rights (in 1985), the CAT (in 1986), the Rome Statute (2001), and the Genocide Convention (2002). Although a monist legal system, treaties do not have constitutional status in Uruguay, as they do in Argentina, but rather are seen as having the same force as national law. Unlike Argentina, Uruguay had a negotiated or pacted transition, where the military was able to impose some protection for itself from prosecution. As a result, Uruguayans took a different and more cautious approach to human rights prosecutions. Initially after the transition to democracy, vic-

87. See, e.g., CNAB, IRGC, AND BAGI JOINT PRESS RELEASE: SHAMEFUL DECISION BY COURT IN MONTENEGRO, CONGRESS N. AM. BOSNIAKS (Mar. 30, 2011), <http://www.bosniak.org/cnab-irgc-and-bagi-joint-press-release-shameful-decision-by-court-in-montenegro> (condemning the “decision of Montenegro’s Higher Court to acquit those responsible of deportation and mistreatment of Bosniaks”).

88. For the obligation to punish, see Convention Against Torture, *supra* note 30, arts. 5, 7. For refouler, see *id.* art. 3(1).

tims and their families brought hundreds of cases of human rights violations during the previous regime to court. But in 1986, the Uruguayan Congress approved an amnesty law which protected the military and the police from prosecution for human rights violations committed prior to the transition. Human rights organizations and the leftist political parties opposed the law, and engaged in considerable domestic mobilization to organize a petition campaign to gain signatures to compel a national referendum on the law. They secured the referendum, but, to their dismay, they lost the vote, thus further legitimating the amnesty law with a democratic mandate. As a result, the human rights movement lost momentum, and did not continue to demand accountability in the courts. No new human rights cases were brought to court for a decade after the amnesty law was passed. It was not until the leftist coalition, the Broad Front, won the presidential election in 2005 that the situation began to change. Many members of the Broad Front had been imprisoned and tortured during the military regime, and felt more committed to accountability for past human rights violations. The Executive Branch began to interpret the amnesty laws in new ways that permitted human rights prosecutions to prosper. But the judiciary was still conservative and cautious.

In this context, decisions of the Inter-American Commission on Human Rights and eventually the Inter-American Court of Human Rights helped to alter the legal context. The Commission found that the Uruguayan amnesty law was contrary to the country's obligation under the American Convention on Human Rights.⁸⁹ Such a finding eventually helped open the door to a handful of human rights prosecutions of top level former officials in Uruguay. In 2006, a Uruguayan judge indicted former dictator Juan Maria Bordaberry and his Minister of Foreign Affairs Juan Carlos Blanco, ordering them into preventive prison to await trial for the murder of their political opponents. In 2010, the eighty-one-year-old Bordaberry was convicted and sentenced to thirty years in

89. The IACHR found that the Amnesty Law (Law 15,848 of December 22, 1986) "is incompatible with Article XVIII (Right to a Fair Trial) of the American Declaration of the Rights and Duties of Man, and articles 1, 8 and 25 of the American Convention on Human Rights." Inter-Am. Comm'n H.R., Rep. No. 29/92 (Oct. 2, 1992).

prison. Other top officials of the dictatorial government, including Juan Carlos Blanco, and Gregorio Alvarez, the military president after Bordaberry, shared his fate, having since been convicted and sentenced to prison terms of twenty to twenty-five years. In these prosecutions, some—but not all—judges made references to international treaties Uruguay had ratified, in particular, the American Convention on Human Rights, the ICCPR, and the Inter-American Convention on Forced Disappearance of Persons. Eventually, the Uruguayan Supreme Court, on three separate occasions, found that the amnesty law was unconstitutional and that human rights cases should be permitted to move ahead in Uruguayan courts. The Court argued that the amnesty law violated the separation of powers and interfered with the right of victims to have access to justice.⁹⁰ Because of the nature of the Uruguayan civil law system, however, these Supreme Court decisions do not create precedents for lower courts.

Even so, Uruguayan courts have been less open to international law than their counterparts in Argentina. When the Uruguayan prosecutor Mirta Guíaze used “forced disappearance” as one of the crimes for which Uruguayan military were being charged, a practice used successfully in Argentina, the appeals court in Uruguay decided the application of the crime of forced disappearance would violate the prohibition on non-retroactivity of the law, because Uruguay had not ratified the Inter-American Convention on Forced Disappearance of Persons until 1996. This decision was later upheld by the Uruguayan Supreme Court.⁹¹ But, in a historic decision in November 2011, the Uruguayan Congress passed a law mandating that the crimes committed during the dictatorship could be considered crimes against humanity in accordance with the international treaties of which Uruguay was a party, and would not be subject to statutes of limitations.⁹²

90. Mauricio Pérez, *Ley Violó Separación de Poderes*, LA RED 21 (Oct. 20, 2009, 4:50 AM), <http://www.lr21.com/uy/politica/385131-ley-violo-separacion-de-poderes>.

91. *Uruguay: Para la Corte los Crímenes de la Dictadura son Delitos Comunes*, CLARÍN.COM (May 31, 2011, 5:24 PM), http://www.clarin.com/mundo/Uruguay-Corte-crimenes-dictadura-comunes_0_490751194.html.

92. *Uruguay: Es Ley, Los Delitos de Lesa Humanidad Ya No Prescriben en Uruguay*, [Uruguay, It is Law, Crimes Against Humanity are no Longer Subject to Statutes of Limitation in Uruguay], REVISTA PENSAMIENTO PENAL, (Nov. 2,

Because Uruguay had a negotiated transition which left the military with considerable power in society, it was slower to seek accountability for former human rights violations. The considerable domestic mobilization was disillusioned by the failed referendum vote, and it did not recover until the movement for accountability was well advanced in the region. By the time Uruguay started prosecuting former officials, many other countries in the region had already taken the path of individual criminal accountability, and Uruguay benefitted from the regional diffusion of ICA practices.⁹³ The combination of continuing mobilization, a change in the party affiliation of the executive, pressure from regional human rights institutions, and regional diffusion eventually led to considerable accountability in Uruguay. As compared to Argentina, where accountability emerged primarily as a result of domestic mobilization and pressures after the ruptured transition to democracy, Uruguay's pactured transition and different legal system meant that it took decades and a combination of domestic and international pressures and processes to lead to eventual accountability.

V. CONCLUSIONS

Our results are largely supportive of the Simmons model of domestic mobilization and litigation. By focusing exclusively on domestic politics, however, Simmons has missed the role that both international judicial institutions, such as the Inter-American Court of Human Rights, and regional political actors, such as the European Union, play in facilitating domestic litigation and extradition for international prosecutions. The domestic and the international cannot be neatly separated as Simmons proposes, with the international coming in the form of the international treaty that in a second stage is used by domestic constituencies. Instead, there is a far more interesting interplay of the domestic and the international at both stages. Our findings suggest that we need to look at the

2011), <http://www.pensamientopenal.com.ar/articulos/uruguay-ley-delitos-lesa-humanidad-ya-no-prescriben-uruguay>.

93. By the time it moved forward with domestic trials, forty percent of countries in Latin America had moved forward with transitional trials. SIKKINK, *supra* note 8, at 249. See also our transitional justice database, TRANSITIONAL JUSTICE, *supra* note 18.

transnational politics of treaty compliance, rather than relying primarily on domestic politics, as Simmons does.

More horizontal forms of enforcement of international human rights law are still not adequately theorized or operationalized. What we have seen in our cases is that proactive litigants and enabling courts, operating with treaty law in hand, have induced enforcement from leaders, sometimes even obliging unwilling executive authorities to arrest and imprison former state officials. In Argentina, civil society was a force to be reckoned with, working tirelessly to make sure that accountability was achieved. In Serbia and in Montenegro, the regional international community has been much more influential, applying pressure until states extradite or move on the trials, though progress has been slow. In Uruguay, there is a continued balancing act between jurisprudential innovation, executive reluctance, and both civil society pressures for prosecutions as well as democratic opposition to accountability from the electorate. Trials, a long time in the making, have taken place, and some have resulted in conviction.

This is never an easy political process to navigate, but the fact that accountability happens at all is unexpected. That is why we are somewhat surprised at the robustness of our findings linking ICA treaty ratification to the use of trials, holding many other factors constant. It very much appears that some kinds of treaty law bolster the pursuit of trials—particularly treaty law with provisions for individual criminal accountability. And the more treaties ratified with ICA provisions, the better. We think each of these treaties provides additional opportunity for litigants to make a case against offenders, and to set in motion a judicial process that is difficult to halt. But the path of justice is complicated by our findings about the opposite effect of treaty ratification on convictions. While this finding that treaty ratification seems to be inversely related to convictions might be based on too small a number of cases, the preliminary evidence is that the very same trials that are inspired by mobilization around international ICA provisions might be less likely to result in convictions. Further research is needed to sort out this lingering puzzle.

TABLE I. RESULTS OF LOGIT ANALYSES TESTING THE EFFECT OF TREATY RATIFICATION ON CRIMINAL PROSECUTIONS AND CONVICTIONS

		(A) All HR Trials	(B) Transitional HR Trials	(C) Conviction
Independent Variables		Model 1	Model 2	Model 3
<i>Region</i>	% of Countries in Region with Trials	1.119*** (-0.335)	4.036*** (1.205)	
	Americas	0.610*** (0.168)	-0.215 (0.494)	0.268 (0.520)
	Europe	(0.168) (0.206)	0.254 (0.426)	-0.640 (0.599)
	Africa	-0.293* (0.171)	-0.101 (0.415)	-1.285** (0.513)
	Ongoing Civil War	0.355** (0.139)	0.400 (0.294)	0.413 (0.354)
<i>Transition Type</i>	New State	0.00865 (0.201)		
	Ruptured Transition	0.383** (0.151)	0.691** (0.305)	-0.0965 (0.365)
	Negotiated Transition	0.302** (0.126)	0.330 (0.309)	-0.700* (0.382)
	Civil War Victory	0.0605 (0.0921)	0.326** (0.153)	0.0624 (0.165)
	<i>Legal Institutions and Practice</i>	PTS Score	0.0710 (0.0628)	-0.0288 (0.142)
Polity 2 Score		0.0218** (0.0107)	0.0453 (0.0327)	0.0357 (0.0442)
De facto Judicial Independence		0.406*** (0.0729)	0.221 (0.146)	0.0447 (0.142)
British Legal Tradition		0.101 (0.119)	-0.350 (0.395)	-0.437 (0.538)
<i>International Human Rights Legal Commitments</i>		Category 1 Treaty Commitment	0.822*** (0.208)	0.859** (0.424)
	Category 2 Treaty Commitment	-0.0405 (0.339)	0.530 (0.629)	2.170** (0.849)
	Category 3 Treaty Commitment	-0.574** (0.224)	0.181 (0.581)	-0.292 (0.634)
<i>Domestic Structure</i>	Log Population	0.219*** (0.0372)	0.156* (0.0877)	
	Per Cap GDP (in thousands)	-0.0489*** (0.00990)	-0.0668* (0.0394)	
	Previous trials	0.0259* (0.0133)	0.0451 (0.0401)	
	spline 1	0.0798*** (0.00871)	0.118*** (0.0179)	
	spline 2	-0.0310*** (0.00369)	-0.0424*** (0.00711)	
	spline 3	0.00453*** (0.000689)	0.00903*** (0.00182)	
	Constant	-5.371*** (0.651)	-5.407*** (1.530)	0.0224 (0.975)
	N	3828	1465	218
	Log-Likelihood	-1616.0	-393.1	-137.3
Pseudo-R2	0.271	0.362	0.0892	

Robust standard errors in parentheses *p<0.10 **p<0.05 ***p<0.01