

From State Responsibility to Individual Criminal Accountability: A New Regulatory Model for Core Human Rights Violations

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ALTHOUGH THE TERM “regulation” is rarely used in the literature on human rights, the core issues in the human rights area involve “making, implementing, monitoring, and enforcing of rules” to organize and control activities, which is the definition of regulation used in this volume. The concept is thus a useful and not unfamiliar way to think about standard-setting and rule enforcement in the human rights realm.

The area of human rights has experienced a dramatic increase in international regulation in the post–World War II period. In 1945, this area was virtually unregulated; by 2000, states had ratified many treaties involving diverse human rights, and those treaties had entered into effect. The human rights issue, however, is characterized by relatively weak enforcement mechanisms. Where accountability existed, it focused mainly on reputational accountability via moral stigmatization of state violators.¹ In the few cases where stronger enforcement mechanisms existed, especially the regional human rights courts in Europe and the Americas, the model of regulation was one that focused on state legal accountability for human rights abuses. That is, for example, when the European Court of Human Rights finds violations of human rights, it says that a *state* is in violation of its obligations under the Convention, and the state is asked to provide some kind of remedy, usually in the way of changed policy.

This regulatory model of state accountability with weak enforcement continues to be the main model for international human rights violations. But for a small set of core human rights and war crimes, states are

¹ I use Grant and Keohane’s definition of accountability that implies that “some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities . . . and to impose sanctions if they determine that these responsibilities have not been met.” Legal and reputational accountability are two of the seven forms of accountability they discuss. Ruth Grant and Robert O. Keohane, “Accountability and Abuses of Power in World Politics,” *American Political Science Review* 99, no. 1 (February 2005), 29–43.

increasingly using a new regulatory model of individual legal criminal accountability for human rights violations.² In this model, for example, when the Ad Hoc Tribunal for the Former Yugoslavia (ICTY) finds violations of human rights, it convicts a particular *individual* of these violations, and sentences that individual to time in prison. This change in regulatory model has emerged gradually over the last twenty years in domestic, foreign, and international judicial processes.³ I will argue that these regulatory changes, from no regulation to a weak regime without enforcement, and the gradual increase in enforcement via individual criminal accountability represent a movement toward more effective public interest regulation.

The bulk of enforcement is occurring in domestic courts applying a combination of domestic criminal law, international human rights law, and international humanitarian law. Because of this combination of forms of law, we could think of this as an example of "legal integration" of the type discussed by Burley and Mattli, in reference to the penetration of EC law into the domestic law of member states.⁴ In the human rights case, however, the individual criminal accountability model is the dominant model in domestic legal systems, and it has penetrated the international legal arena, rather than the other way around. Norms scholars have long recognized that powerful domestic norms may have a prominence that makes them likely candidates for international norms.⁵ In this chapter, I provide a description and initial explanation of this new regulatory development in the area of core political rights.

² See Steven Ratner and Jason Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 2nd ed. (Oxford: Oxford University Press, 2001).

³ Jenny Martinez argues that nineteenth-century antislavery courts were the first international human rights courts. These courts indeed applied individual accountability for a human rights violation, in that slave ships were confiscated from owners and sold, but they did not apply individual criminal accountability, since neither crews nor owners were held criminally accountable in these international tribunals. We might call this a form of individual civil accountability, in which slave traders were forced to pay damages, not to their victims, the people they enslaved, but to the governments that established the tribunals and were intercepting slave ships. Jenny S. Martinez, "Antislavery Courts and the Dawn of International Human Rights Law," *Yale Law Journal* 117, no. 4 (January 2008), 550–641.

⁴ Anne-Marie Burley and Walter Mattli, "Europe Before the Court: A Political Theory of Legal Integration," *International Organization* 47, no. 1 (Winter 1993), 41–76.

⁵ Ann Florini, "The Evolution of International Norms," *International Studies Quarterly* 40, no. 3 (1996), 363–389; David H. Lumsdaine, *Moral Vision in International Politics: The Foreign Aid Regime, 1949–1989* (Princeton, NJ: Princeton University Press, 1993); and Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," *International Organization* 52, no. 4 (Autumn 1998), 906.

THE PROCESS OF REGULATION OF HUMAN RIGHTS

The history of the evolution of the human rights regime has been told at length elsewhere, so I will provide only the briefest sketch to situate the current shift in earlier regulatory stages. Using the regulation stages put forward by the editors of this volume, the first stage of the process of regulating human rights began shortly after World War II. The Holocaust was the shock or demonstration effect that led states and non-state actors to identify the problem as a complete lack of international standards and accountability for massive human rights violations, and initiate action through the newly formed United Nations. The drafting and passage of the Universal Declaration of Human Rights in 1948 can be seen as setting the agenda for human rights regulation. In the second phase, the regulatory solution that states and non-state actors initially negotiated was a state accountability model that relied on standard-setting through international human rights treaties with weak enforcement. States negotiated and produced dozens of human rights treaties in the second half of the twentieth century. As late as 1975, however, effective international regulation of human rights was quite thin; only two human rights treaties had entered into effect—the Genocide Convention and the Convention on the Elimination of All Forms of Racial Discrimination. Relatively ineffectual international institutions, like the United Nations Human Rights Commission and the various committees established by most treaties, were assigned the task of overseeing the implementation of the new norms. There were few human rights NGOs, no government agencies devoted to human rights, and virtually no countries with bilateral human rights foreign policies.⁶ Only in Europe could we say that international regulation existed through the European Commission of Human Rights and the European Court of Human Rights.

During the 1970s and 1980s, the third and fourth phases of regulation came into effect. States implemented the rule-based solutions of a state accountability model, and states, international organizations, and increasing numbers of NGOs began to monitor compliance. The Covenant on Civil and Political Rights entered into force in 1976, which in turn created the UN Human Rights Committee to oversee the implementation of the Covenant. Over the next thirty years, the number of human rights

⁶ For documentation of these claims, see Kathryn Sikkink, “The Idea of Internationally Recognized Human Rights” and “Introduction to the Effectiveness of Human Rights Policies,” in *Mixed Signals: U.S. Human Rights Policy and Latin America* (Ithaca, NY: Cornell University Press, 2004), 23–47, 79–105.

treaties increased dramatically, as did the number of international and regional institutions to oversee compliance with those treaties, the number of international and domestic human rights NGOs, and the number of domestic institutions devoted to regulating civil and political rights. Most of these human rights treaties reflect a state accountability regulatory model. It continues to be the model used by virtually the entire human rights apparatus in the United Nations, including almost all of the treaty bodies. It 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. Likewise, even some of the new developments in the area of human rights, such as an increase in government reparations to past victims of human rights abuses, also reflect a state accountability model, with the reparations serving as a form of state remedy for past abuse.⁷

By the early 1990s, the human rights field had passed through the four first stages of the regulatory process, but there was still a great weakness in the area of enforcement. The human rights regime had been launched with high expectations in 1948, but a half century later, human rights violations had not subsided, and if anything, the perception was the human rights violations were on the increase. This was especially heightened by the demonstration effect of the conflict in the Balkans, since the discovery of concentration camps and perhaps genocide in the heart of Europe fifty years after World War II suggested that the regulatory model had failed. The ineffectiveness of the international response to the genocide in Rwanda in 1994 proved yet another demonstration effect of the failure of regulation to prevent major human rights violations. The new model of individual criminal accountability thus may have emerged as a way to provide additional enforcement mechanisms for the human rights regime in the wake of the perception that the current enforcement mechanisms were inadequate and new tools were needed.

The main changes in regulation involve *who* is being held accountable and *how* these actors are held accountable.⁸ Both models may involve legal accountability, but the old model involves *state civil* legal accountability, while the new regulatory model involves *individual criminal* legal accountability.⁹ Under a state civil accountability model, the state pro-

⁷ See, for example, Maria José Guembe, "Economic Reparations for Grave Human Rights Violations: The Argentinean Experience," in *The Handbook of Reparations*, Pablo de Greiff, ed. (Oxford: Oxford University Press, 2006), 21–54.

⁸ Ratner and Abrams, *Accountability for Human Rights*, 15.

⁹ 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." Grant and Keohane, "Accountability and Abuses," 36.

vides remedies and pays damages, while under a criminal model, the convicted go to prison.¹⁰ The new regulatory model has emerged over the last twenty years, alongside of the state accountability model, and recently it has grown more dramatically than the state accountability model. States are beginning to hold individuals, including heads of state, accountable for past human rights violations. This trend has been described by Lutz and Sikkink as "the justice cascade."¹¹

This new regulatory model is not for the whole range of civil and political rights, but rather for a small subset of political rights sometimes referred to as the "rights of the person," especially the prohibitions on torture, summary execution, and genocide, as well as for war crimes and crimes against humanity.¹² Prior to the 1970s, it appears to be a classic case of regulatory capture, where state officials protected themselves from any individual legal accountability either during the repressive regime or after transition to another, more democratic regime. In principle, the citizens of any country could have held their past leaders legally accountable for human rights violations, but the continuing power of these leaders, and the fear of coups and instability, almost always prevented such accountability.

I argue that this process of regulation reflects a movement on the regulatory continuum discussed in the framework chapter of this volume toward a more public interest form of regulation. Individual criminal accountability is not necessarily more in the public interest than the state accountability model. But the addition of individual criminal accountability alongside of the existing state accountability model means that there is now significantly more enforcement of human rights norms than existed previously. Both the compliance literature in international relations and the deterrence literature in sociology suggest that an increase in the probability of enforcement is likely to reduce human rights violations.¹³ The

¹⁰ Although I focus on individual *criminal* legal accountability, there is also an increase in individual *civil* legal accountability, especially in U.S. courts, where individuals found guilty of human rights violations are required to pay damages to their victims. These are cases brought mainly under the Alien Claims Tort Act, which permits tort claims for violations of international customary law.

¹¹ Ellen Lutz and Kathryn Sikkink, "The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America," *Chicago Journal of International Law* 2, no. 1 (Spring 2001), 1–33.

¹² These include rights from only two or three of the twenty-seven substantive articles of the International Covenant on Civil and Political Rights, those protecting the right to life and prohibiting torture. The new model also provides enforcement of the Genocide Convention, the Convention against Torture, and those parts of the Geneva Conventions prohibiting war crimes.

¹³ See, for example, George W. Downs, David M. Rocke, and Peter N. Barsoom, "Is the Good News about Compliance Good News about Cooperation?" *International Organization* 50, no. 3 (1996), 379–406; and Daniel S. Nagin, "Criminal Deterrence Research at the

movement toward more enforcement thus should lead to greater compliance with human rights norms and deterrence of future human rights violations, although this is beyond the scope of this chapter.¹⁴

To determine the actual dimensions of the global justice cascade, Carrie Booth Walling and I have created a new data set of domestic, foreign, and international judicial proceedings for individual criminal responsibility for past human rights violations.¹⁵ We define *domestic trials* as those conducted in a single country for human rights abuses committed in *that* country. *Foreign trials* are those conducted in a single country for human rights abuses committed in *another* country—the most famous of which are Spain's trials for human rights violations that have occurred in Argentina and Chile. *International trials* also involve trials for individual criminal responsibility for human rights violations in a particular country or conflict and result from the cooperation of multiple states, typically acting on behalf of the United Nations. Examples include the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The international trials category also includes hybrid criminal bodies defined by their mixed character of containing a combination of international and national features, such as those in Cambodia, Sierra Leone, and Timor-Leste (formerly East Timor).

Our data reveal an unprecedented spike in state and international efforts to address past human rights abuses by focusing on individual criminal responsibility since the mid-1980s (see figure 4.1).¹⁶

Most previous discussions of these issues have only looked at parts of this trend, examining just international trials, or specific international tribunals, or just foreign trials, or domestic trials in certain countries.¹⁷ I believe that these different tribunals and doctrines are all part of a related global phenomenon that I refer to here as a new model of global regulation of core political rights.

Outset of the Twenty-First Century," in M. Tomry, ed., *Crime and Justice: A Review of Research* (Chicago: University of Chicago Press, 1998), 1–42.

¹⁴ See Hunjoon Kim and Kathryn Sikkink, "Do Human Rights Trials Make a Difference?" Paper presented at the American Political Science Association Annual Meetings, Chicago, Illinois, September 2007.

¹⁵ I am indebted to Carrie Booth Walling for her permission to use material from our joint data set, and for preparing the three figures based on that data for this chapter.

¹⁶ We have created two data sets on human rights trials, one for all human rights trials and one for human right trials in transitional countries. The data reported here are from the data set for all human rights trials. For a full discussion of the data set for transitional countries only, see Kathryn Sikkink and Carrie Booth Walling, "The Impact of Human Rights Trials in Latin America," *Journal of Peace Research* 44, no. 4 (July 2007), 427–445.

¹⁷ Stephen Macedo, ed., *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (Philadelphia: University of Pennsylvania Press, 2004); and Naomi Roht-Arriaza, *The Pinochet Effect* (Philadelphia: University of Pennsylvania Press, 2005).

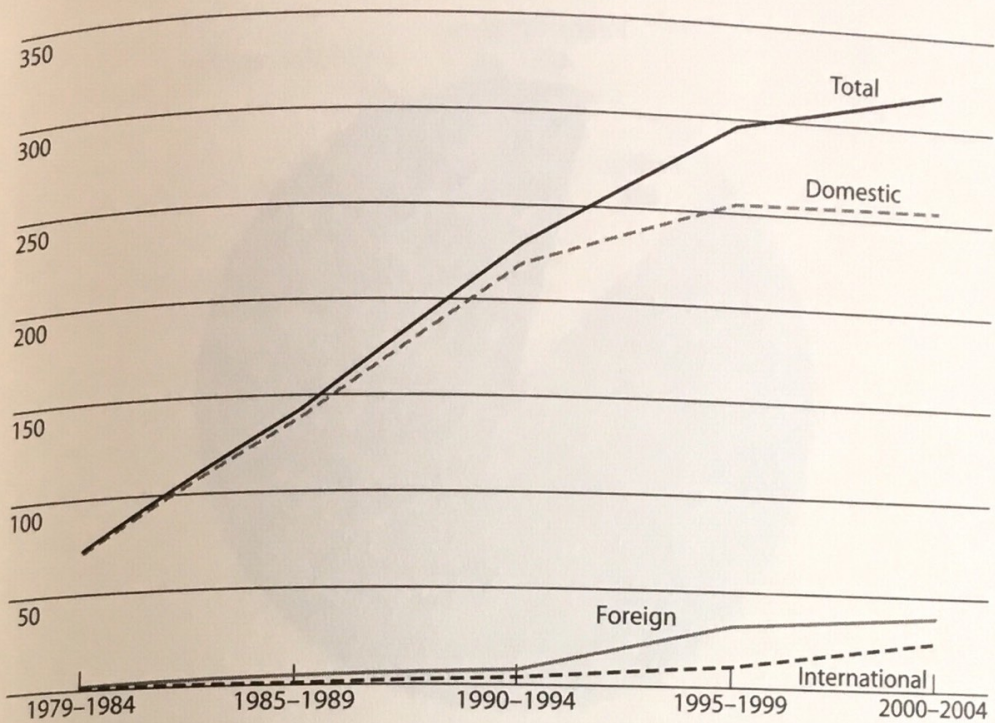


Figure 4.1. Human rights trials, 1979–2004

In figure 4.2, we divide all the trial years in the data set and find that 88 percent occur in the country where the crime was committed, and fully 96 percent of the trial activity takes place either in domestic or foreign courts, that is, in domestic judicial systems, either in the country where the crime occurred or in another country.

The doctrine of universal jurisdiction and the creation of the ICC are an important part of this new model of regulation, but it is much more than that. Given how new and embattled that ICC has been, it would be unpersuasive if the new model rested primarily on its shoulders. But because of the importance of domestic courts, the ICC is *not* the main institution through which regulation of the new model is enforced. The doctrine of complementarity in the ICC can be seen as a broader expression of the new model of enforcement. Contrary to the Ad-Hoc Tribunals, or to the European Court of Justice, which have primacy or supremacy over domestic courts, under the doctrine of complementarity the ICC can only exercise jurisdiction if domestic courts are “unwilling” or “unable” to prosecute.¹⁸

The primary institutions for enforcement of the new model thus are domestic criminal courts, and the ICC and foreign courts are the backup institutions or the last resort when the main model of domestic en-

¹⁸ William A. Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2001), 13, 67.

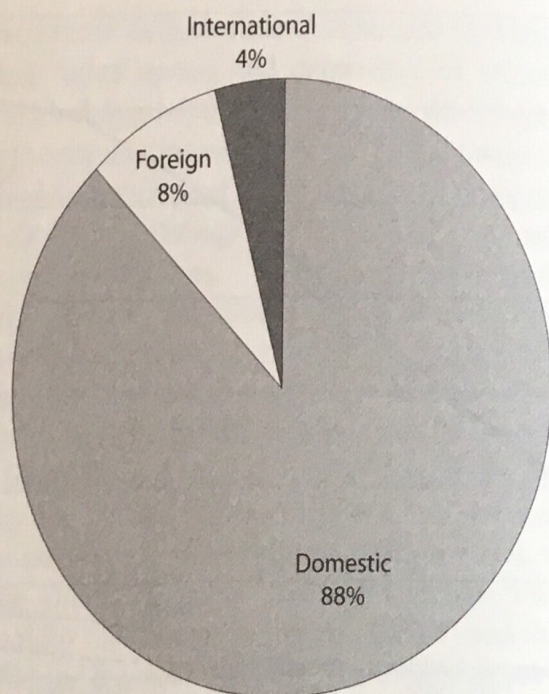


Figure 4.2. Percentage of total human rights trials

forcement fails.¹⁹ Such backup institutions, however, are necessary to create a fully functioning international model. If the model depended only on domestic courts, perpetrators could always escape either by blackmail and veto in the domestic constituencies (for example, the rattling of the sabers and coup attempts that former military leaders in Argentina and Chile tried each time they faced the possibility of domestic prosecution), or by retirement abroad in a friendly third country. The backup provided by foreign and international trials makes such options less possible than before. In the language of this volume, while regulation was only domestic, it was more subject to capture by domestic repressors, whereas the move to create a more transnational system of regulation reduced the opportunity for capture by domestic repressive forces. Thus, it is not the case that foreign and international trials are more in the public interest than domestic trials. But the existence of international and foreign trials make the overall decentralized system more effective and less open to regulatory capture.

Many critics of the ICC or the specialized courts have not understood their role as the backup institutions in a global system of regulation. For

¹⁹ Orentlicher calls this “domestic enforcement with an allowance for ‘fallback’ international jurisdiction,” and Naomi Roht-Arriaza refers to foreign trials as a “back-stop” for domestic justice. Diane F. Orentlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,” *Yale Law Journal* 100 (1991), 2537–2618; Roht-Arriaza, *The Pinochet Effect*, 200.

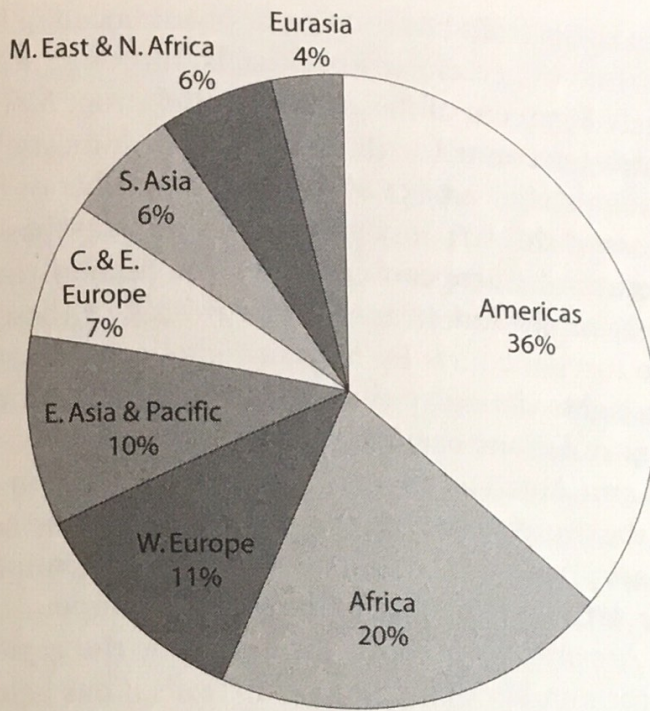


Figure 4.3. Regional distribution of human rights trials

example, Helena Cobban in *Foreign Policy* argues that international tribunals “have squandered billions of dollars” and that domestic solutions would be more cost-effective.²⁰ It would indeed be costly if international tribunals or the ICC were designed to provide a comprehensive system of individual criminal justice by themselves, but that is not how the model is currently working. The use of international tribunals or foreign courts as a backup is the exception, not the rule, in the new model of regulation. For the most part, the new model uses a decentralized system of enforcement that depends primarily on enforcement through domestic courts. In the Introduction to this volume, Mattli and Woods suggest that decentralized regulatory structures may be less open to capture, and this appears to true in the human rights case. Because the system is decentralized, however, the quality of the enforcement varies with the quality of criminal justice systems in different countries. At the international level, there are also concerns about the quality of regulation. Since the criminal justice model was transferred from domestic politics to international politics, it was sometimes not adapted to the different needs of international courts with international criminals.

There is significant variation in the frequency of human rights trials in different regions of the world. As figure 4.3 indicates, this trend toward

²⁰ Helena Cobban, “Think Again: International Courts,” *Foreign Policy* (March/April 2006), 22.

domestic human rights trials has been most pronounced in Latin America, which accounts for 36 percent of total trials, although it only accounts for approximately 8 percent of the world's population. Not only do Latin American countries account for the plurality of domestic human rights trials, but they are also the subject of the largest number of foreign human rights trials. Most of the 101 foreign trials in our database were held in the domestic courts of European countries for human rights violations committed largely in the Americas. The great bulk of these foreign trials were brought to foreign courts by human rights organizations acting on behalf of human rights victims or their relatives from the country in which the human rights violations occurred.

But, even in Latin America, there is significant variation among different countries in the degree to which they have adopted the new regulatory model. Some Latin American countries such as Argentina and Bolivia were among the very first to start making use of human rights trials in the mid-1980s. Argentina was both the leader in the region and also a global leader in the number of human rights trials it has held. Argentina's neighbors, Brazil and Uruguay, which experienced similar authoritarian regimes and transitions to democracy at roughly the same time as Argentina, made different choices about trials. Brazil has held no human rights trials for violations during the authoritarian government, and Uruguay held no trials for the first fifteen years after the transition, only to begin a handful of prosecutions in the early 2000s.

In the final section of this chapter, I will explore explanations for the emergence of the new regulatory model and for the particular institutional forms and regional patterns that we see in the database. In particular, explanations need to address the prominence of human rights trials in some regions, like Latin America or Africa, and their relative rarity in some other regions of the world.

KEY ACTORS IN HUMAN RIGHTS REGULATION AND CHANGE OVER TIME

The cast of key actors in the human rights realm has long included states, international organizations, and NGOs. In this issue area, the private sector has played a less important role and NGOs have played a more important role than in many other international issue areas. The shift in regulatory model has led to the involvement of new kinds of actors, in particular the addition of international and domestic criminal courts and individual litigants to the cast of actors. Human rights NGOs, some governments, and parts of international organizations, form the "pro-change alliance," in favor of greater regulation of human rights, and in

particular, of more enforcement. The inclusion of litigants and domestic courts in the pro-change alliance multiplies by hundreds the number of potential actors who could intervene in core human rights issues. The inclusion of this vast new array of potential actors thus increases the volatility and unpredictability of the issue area. Individual judges, such as Judge Garzon in Spain, suddenly are potentially actors on the international human rights stage. As the Spanish government found out, much to its dismay, foreign policy is no longer completely under the control of the foreign ministry.

Human rights NGOs are also active in the new regulatory framework, working domestically, and linked together in transnational networks. These human rights NGOs and networks have been the most important source of timely information in the process of human rights regulation. Even when international organizations and domestic and international courts became more deeply involved in the process of human rights regulation, NGOs often provided the original sources of information about human rights violations. To the degree that effective oversight requires costly information, these nonprofit NGOs have often taken on the burden and the cost of providing this information. The quality of this information may vary greatly; some NGOs produce very high-quality information, while others do not.

The NGO networks in turn are often closely linked to the transgovernmental networks, especially of the so-called like-minded states that have supported human rights regulation.²¹ In this sense, the pro-change alliance behind the regulatory shift discussed here is a hybrid creature—including elements of transgovernmental networks, advocacy networks, and epistemic communities of legal experts. So, for example, the drafting of the ICC was the product of a transgovernmental network of foreign ministry lawyers from a core group of like-minded countries, including Canada, Argentina, Sweden, Norway, and the Netherlands. This transgovernmental network worked in close collaboration with an NGO network, supporting and often participating informally in the drafting process of the ICC Statute.²²

²¹ See Ann-Marie Slaughter, *A New World Order* (Princeton, NJ: Princeton University Press, 2004); Eric Voeten, "The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights," *International Organization* 61, no. 4 (October 2007), 669–701.

²² William R. Pace and Mark Thieroff, "Participation of Non-Governmental Organizations," in Roy S. Lee, ed., *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (The Hague: Kluwer Law International), 391; and interview with Silvia Fernandez, Argentine foreign ministry official and key participant in all phases of the ICC negotiations, December 11, 2002, Buenos Aires.

Contrary to what Realist theory would predict, international human rights regulation was not the result of regulatory innovation in a dominant state. The United States, though it supported the ICTY and the ICTR as well as some domestic human rights trials, has been the major opponent of the ICC, the main embodiment of the new regulatory model. Rather, the hybrid network, with the crucial support of like-minded states, often worked without U.S. support, and sometimes in direct opposition to the United States, to develop the new model.

THE TURN TO THE NEW MODEL OF REGULATION: CHANGING NORMS AND LAWS

The gap between the domestic and international realms, what Ian Clark calls “the great divide” that saw domestic society as “rule-bound” and the international system as anarchy, once made domestic criminal law and international human rights law two completely separate realms. When these separate realms began to converge, it was difficult for some to see the convergence because of the continuing grip that the great divide has on our imagination.²³ I argue that this divide has made it difficult for scholars to recognize and understand the initial emergence of a unified system of international regulation of core political rights with often decentralized and fragmented enforcement primarily in domestic courts.

For many years, there was a huge disjuncture between the treatment of crime in the domestic and the international realms. Domestically, there was a clear hegemony of the individual criminal justice model, while this model was absent internationally. If an individual killed one person, there was an expectation and an apparatus to permit that he would stand trial for murder, and possibly be convicted and imprisoned. But if that individual was a head of state, and gave orders for thousands of individuals to be killed, the expectation was that nothing would happen. When their regimes were replaced by another, former dictators like Idi Amin, Jean Claude (Baby Doc) Duvalier, or Alfredo Stroessner traditionally lived a comfortable exile without any expectation of facing criminal trials for human rights violations committed during their regimes.

Thus, the oldest model of human rights regulation is a “no-accountability” model, or what we could call an impunity model. The Nuremberg and Tokyo trials, and the domestic and foreign World War II successor trials, were the important exceptions to this rule, but they were also exceptions that proved the rule. If the leaders ordered such crimes and then

²³ Ian Clark, *Globalization and International Relations Theory* (Oxford: Oxford University Press, 1999), 16.

utterly lost a war, they could indeed be held individually criminally responsible for their crimes by the victors of the war or by domestic or foreign courts. Since these were exceptional circumstances, they did not break the hegemony of the impunity model.²⁴

After World War II, we began to see the emergence of the state accountability model where the state was occasionally held responsible for human rights violations carried out by its officials. Why did states initially adopt a state accountability model for human rights violations? This state accountability model is simply the application of standard international law principles to the realm of human rights. When a state breaches any international obligation under international law, it incurs responsibility and must provide some remedy to the injured party, be it a state or an individual. Thus, when states began regulating human rights as part of international law, they simply applied to the area of human rights the state accountability model that was used in the rest of international law. But human rights issues were quite different from most other international law issues. Most international law regulated interactions among states. Human rights law regulated interactions mainly between a state and its own citizens. This disjuncture between most international law and human rights law created some tensions in the state accountability model for human rights.

Nevertheless, these differences were initially ignored, and a state accountability model was adopted for international human rights law. In this model, determining state responsibility has always involved *attributing* conduct to the “act of the State,” as opposed to individuals or groups.²⁵ For many years, the state accountability model accepted that one could attribute to the state significant violations of core human rights carried out by individuals and groups associated with the state. The advocates of the new model argued that a gross violation of human rights could not be a legitimate “act of state” and thus it must be a criminal act carried out by individuals (even heads of state like Pinochet or Milosevic) acting in their individual capacity and thus criminally liable. This argument was made in the Nuremberg Judgment, which argued that “the principle of international law, which under certain circumstances protects the representative of a State, cannot be applied to acts which are condemned

²⁴ Jon Elster, who writes about historical cases of transitional justice, says that there are no important episodes of transitional justice between classical Athens and the post-World War II trials, and then again no human rights trials until the Greek trials in the mid-1970s. *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge: Cambridge University Press, 2004), 47–48, 61.

²⁵ Louis Henkin et al., *International Law: Cases and Materials*, 2nd ed. (St. Paul, MN: West Publishing, 1986), 522.

as criminal by international law."²⁶ Despite Nuremberg, international and domestic law and practice continued to protect state officials from prosecution for human rights violations.

Two key legal developments permitted the move from the state accountability model to the individual criminal accountability model. First was the simple argument that the fact that an individual has been a head of state or a state official shall not exempt him from criminal responsibility for gross violations of human rights. The second and related legal development was the idea that victims of human rights violations have a right to judicial remedies. The International Covenant on Civil and Political Rights and the American Convention on Human Rights both specify that states shall ensure that people have a right to an effective remedy for a human rights violation, even if such a violation has been committed by a state official. The right to a remedy does not necessarily imply a duty to punish, but it provides a basis for human rights trials. Finally, the Torture Convention and the Inter-American Convention to Prevent and Punish Torture, both of which entered into effect in 1987, specify that states have a duty to punish. Indeed, the notion of punishment is so important that it is part of the title of the Inter-American Convention. Human rights organizations, especially Amnesty International and Human Rights Watch; legal scholars and jurists, such as Professor M. Cherif Bassiouni; regional organizations, such as the Inter-American Court of Human Rights; and the governments of like-minded states, especially Canada, Norway, the Netherlands, and Argentina, proposed the treaty language and helped develop the jurisprudence that put the new model into place.

The drafters of various treaties, especially the Genocide Convention of 1948 and the Convention against Torture (CAT) negotiated in the late 1970s and early 1980s, managed to insert clear references to individual criminal accountability.²⁷ These treaties did not create a new legal framework all at once, but rather contributed gradually and in an understated way to the development of the new norms. The CAT refers to various state obligations, but the actual offender in most of the treaty is "a person"—specifically a public official who either inflicts torture directly or instigates, consents, or acquiesces to it. The Convention requires states to ensure that acts of torture are offenses under domestic criminal law, and to investigate alleged cases of torture and either to extradite or prosecute the accused and grant universal jurisdiction in the case of torture. The lan-

²⁶ *Trial of the Major War Criminals, before the International Military Tribunal 1* (Nuremberg 1947), 223.

²⁷ United Nations Convention of the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (1948).

guage granting universal jurisdiction is unobtrusive, simply saying that a State Party shall take measures to establish its jurisdiction over torture if the alleged offender is present in its territory. Universal jurisdiction provides for a system of decentralized enforcement in any national judicial system against individuals who commit or instigate torture. Legal experts from Amnesty International were very involved in proposing language about individual criminal accountability and universal jurisdiction to the states drafting the Torture Convention. Many states, including the United States, supported the inclusion of universal jurisdiction in the treaty.²⁸ But, at the time of drafting and ratification, it is not clear that all State Parties understood the ramifications of this provision buried in section 2 of article 5. For example, when Pinochet himself approved the Chilean ratification of the treaty in 1989, he could not have understood that it could lead to his arrest in the future.

Meanwhile, at the same time as the CAT was being drafted and ratified, and well before the Ad-Hoc Tribunals, the Pinochet case, or the ICC, legal developments were occurring in domestic polities around the world that began to reinforce the idea of individual criminal accountability for state officials for human rights violations. Thirty-three countries initiated domestic human rights trials before the ICTY began working in 1993. We don't know the exact legal reasoning courts used in each of these countries to justify the trials, but they were beginning to implement an individual criminal accountability model for human rights violations.

These domestic developments are all the more surprising because both scholars of transitions to democracy and many policymakers generally concluded that domestic trials for past human rights violations were politically untenable and likely to undermine new democracies. These scholars, such as Huntington, and O'Donnell and Schmitter, referred in particular to the cases of transition in Latin America.²⁹ But over time, as it became clear that trials in Latin America neither blocked transitions to democracy nor led to coups, the initial hesitance to adopt trials may have moderated. Since 1978, when the first trials were initiated in the region, there have been only three examples of coups in Latin America, and none was provoked by human rights trials. The remaining fourteen countries that used trials have not had a successful coup attempt since the use of

²⁸ Herman Burgers and Hans Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht, Netherlands: Martinus Nijhoff Publishers, 1988), 78–79, also see 58, 62–63.

²⁹ Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1991); Guillermo O'Donnell and Phillippe C. Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (Baltimore: Johns Hopkins University Press, 1986).

trials, and in many cases, are increasingly considered consolidated democratic regimes. The argument that trials undermine democracy came largely from observations of a single case: the early coup *attempts* in Argentina against the Alfonsín government after it carried out far-reaching trials of the three juntas for past human rights violations. But twenty years after those failed coup attempts, Argentina has had more transitional human rights trials than any other country in the world and has enjoyed the longest uninterrupted period of democratic rule in its history.³⁰

Although the CAT granted universal jurisdiction in the case of torture, this power wasn't exercised until the Pinochet case in 1998–99. The Law Lords determined that a head of state of Chile was not immune from extradition to Spain for torture committed while he was head of state, since both countries had ratified the Torture Convention recognizing international jurisdiction for the crime of torture. The Law Lords limited their decision only to the Torture Convention because the letter of treaty law ratified by all parties clearly stated that universal jurisdiction existed for torture.

Finally, the ICC Statute must be seen as the clearest statement of the new doctrine of individual criminal accountability. The statute is explicit in that it deals with individual criminal responsibility and individual punishment, and that the fact that an individual has been a head of state, or a member of government “shall in no case exempt a person from criminal responsibility” nor lead to a reduction of sentence.³¹ The ICC, as the clearest distillation of new rules, came relatively late in the regulatory process and benefited from and drew upon the experience of other efforts at individual criminal accountability, especially the ad-hoc tribunals, but also individual country experiences. A pro-change alliance of like-minded states and human rights NGOs promoted the ICC and eventually persuaded a large number of states to sign and ratify the Statute, despite strong U.S. opposition to the final draft. The NGOs organized The Coalition for the International Criminal Court, a global network of over 2,000 NGOs advocating for the ICC and ratification of the Rome Statute. The like-minded states, initially a small group of states chaired by Canada, eventually expanded to include more than sixty states by the time the Rome Conference began. The like-minded were motivated by human rights ideals, and by their opposition to a court controlled by permanent members of the Security Council.³² Lloyd Axworthy, Ministry of Foreign Affairs of Canada at the time the ICC was established, explained that

³⁰ For more support of this argument, see Sikkink and Walling, “The Impact of Human Rights Trials in Latin America.”

³¹ Rome Statute of the International Criminal Court, U.N. Doc. 2187 U.N.T.S. 90 (2002).

³² Schabas, *An Introduction*, 15.

Canadian support for the ICC reflected its broader human security agenda. Central to that agenda was not only protecting individuals from risk, but also holding accountable those responsible for human rights violations.³³ The Statute of the International Criminal Court opened for signature in 1998, and by early 2008, 106 states had ratified it.

This new regulatory model involves an important convergence of international law (human rights, humanitarian, and international criminal law) and domestic criminal law.³⁴ This blurring of the distinction between international law and domestic law is not unique to this issue area, but characterizes many areas of global regulatory governance or global administrative law, as it is also termed.³⁵ In some cases, international human rights law might be absent from the reasoning of the judges. Domestic criminal law prohibiting murder may be perfectly adequate to prosecute individual government officials accused of carrying out summary executions in their official capacity. But the idea that heads of state were immune from individual criminal prosecution kept the model from being applied to state officials either in domestic courts or international courts. What created the political conditions and legal conditions to hold former government officials accountable for crimes?

EXPLANATIONS FOR THE EMERGENCE OF THE NEW REGULATORY MODEL

How do we account for this striking agenda change from a state accountability model to a criminal justice model of human rights regulation?

Two different kinds of explanations are required. We need to explain the general phenomenon of the dramatic rise of individual criminal accountability in the world, and account for the significant variation in the use of such forms of accountability, both across regions and among countries in a single region. The factors that can explain the general increase in human rights trials in the world are not necessarily the same factors

³³ Lloyd Axworthy, "Afterword: The Politics of Advancing International Criminal Justice," in Stephen Macedo, ed., *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (Philadelphia: University of Pennsylvania Press, 2004), 261.

³⁴ Rattner and Abrams, *Accountability for Human Rights*, 9–14, refer to four interrelated bodies of law that underpin the move toward individual accountability for human rights violations: international human rights law, international humanitarian law, international criminal law, and domestic law.

³⁵ See Nico Krisch and Benedict Kingsbury, "Introduction: Global Governance and Global Administrative Law in the International Legal Order," *European Journal of International Law* 17, no. 1 (February 2006), 11.

that explain variation among regions and countries. Nevertheless, in both cases, demonstration effects and negative externalities form part of the explanation. The fact that the ICTY and the ICTR were responses to the crises in the Balkans and genocide in Rwanda, and the ICC Statute was drafted also in the wake of these events, points to the importance of the demonstration effects and the negative externalities of inadequate regulation as the final impetus for the new regulatory model at the global level. In the Latin American regional context, demonstration effects were also important. The human rights violations of the 1970s and 1980s in many countries in Latin America were the highest recorded levels in the twentieth century, and in many cases, we would have to go back to the colonial period to find equally high levels of repression. The fact that violations occurred in countries like Chile and Uruguay that had experienced decades of democracy and rule of law was particularly troubling and called into question the existing regulatory model.

The factors that may help explain the increase of human rights trials in Latin America, for example, include the demonstration effects of the severity of human rights violations, as well as institutional features such as the nature of the transition to democracy, the strength of domestic human rights organizations, and types of legal systems in many countries in the region.

But these factors can't necessarily explain the general increase in the number of trials in the world, or the variation between regions. So, for example, although there are more trials in Latin America than elsewhere in the world, it is *not* because Latin America has experienced more severe forms of human rights violations than other developing regions in the world. Nor can we explain the general increase in trials in the world as a result of the increase in global human rights violations. To the degree that we have a measure of human rights violations in the world, there is a general agreement that such violations have stayed at a relatively constant high level during the entire period under study. And yet, despite the relatively stable level of human rights violations, there has been a very dramatic change in how states respond to them. So, the changes are due not to the increase in human rights violations, but to increased information about such violations, made available through human rights NGOs and the media, and to changing ideas about the legitimacy of governments that engaged in or tolerated such human rights violations.

In this initial discussion of the phenomena, I will focus on the factors that can explain the adoption and the initial growth of the new model of regulation rather than those that explain the variation among countries and among regions. Why would actors choose to initiate and increasingly regulate and enforce standards in this area of human rights, and why did they choose this particular model of regulation?

Who are the relevant groups in the process of regulation of core human rights issues, and how do they understand their interests in this process? The core set of actors I will consider include different states, different agencies within states, including the judiciaries and the military and police perpetrators of human rights violations, and victims of human rights violations and their NGO/transnational network allies. These actors often have strong preferences about the primary question of whether or not there should be some form of accountability for human rights violations. In addition, they may also have preferences about the particular form of accountability, that is, state versus individual. We can assume for purposes of simplicity that victims of human rights violations prefer some kind of retributive justice, while state perpetrators of such violations (usually the military and police) will always work to block accountability.

Victims are important because they are often the litigants who bring human rights cases to the courts. As Mattli and Slaughter argue in the case of Europe, "Without individual litigants, there would be no cases presented to national courts and thus no basis for legal integration."³⁶ Victims and their families want accountability, but it is not obvious why human rights victims and their families should prefer a criminal accountability model instead of a state accountability model. From the point of view of material benefits, a state (civil) accountability model would be more likely to provide financial compensation to a victim than an individual criminal model. Nevertheless, in the countries where I have conducted field research—Argentina, Uruguay, Chile, and Guatemala—victims and their families have been at the forefront of demanding individual criminal accountability, while some have rejected financial compensation, or accepted it with hesitance and guilt. I argue that victims prefer individual criminal accountability (retributive justice) and that these are "ideational" preferences rather than "material" ones.³⁷

Victims, in turn, had NGO allies that also had strong preferences for accountability. In most countries of the world, victims become litigants when they receive assistance from lawyers associated with human rights NGOs. Eventually, in addition, a transnational network of small groups of activist lawyers began to emerge working in favor of accountability for human rights violations. These lawyers helped pioneer the strategies, develop the legal arguments, often recruit the plaintiffs and/or witnesses, marshal the evidence, and persevered through years of legal challenges.

³⁶ Walter Mattli and Anne-Marie Slaughter, "Revisiting the European Court of Justice," *International Organization* 52, no. 1 (Winter 1998), 186.

³⁷ Mattli and Slaughter, "Revisiting," use the term "ideological preferences," but I prefer the term ideational, to signal that these preferences have to do with strongly held beliefs, which may or may not be connected to particular political ideologies.

These groups of lawyers resemble an *advocacy network*, in that they are interconnected groups of individuals bound together by shared values and discourse who engage in dense exchanges of information and services.³⁸ The transnational justice network tended to be confined to lawyers with appreciable technical expertise in international and domestic law who systematically pursued the tactic of human rights trials. This network had strong ideational preferences for accountability but not necessarily for individual criminal accountability. Network members were equally at home working on cases in the European Court of Human Rights or the Inter-American Court of Human Rights (state accountability) and for human rights trials in domestic or foreign courts. But since the network has strong preferences for more accountability, the addition of individual criminal accountability to existing state accountability models allowed them to expand dramatically the reach of accountability. To the extent that the continued existence of these groups depended on the continuation of human rights trials, we could say that these groups of lawyers had both material and ideational interests in trials.

The institutional features of the countries also affect the ability of victims and their NGO allies to successfully pursue lawsuits. First, democratic countries with rule of law systems that are at least minimally fair, transparent, and open are more likely to hold human rights trials. Although the data set surveyed above includes some human rights trials in nondemocratic countries, the great bulk of human rights trials occurred in democratic countries or countries in transition to democracy. In this sense, the "Third Wave" of democratic transitions is part of the explanation for regional patterns of the new system of global regulation. Since Latin America has experienced the most significant wave of transitions to democracy in the last decades, it is not surprising that it is also the region with the most trials.³⁹

But just attributing the level of trials to the number of transitions would be misleading. Latin America experienced a similar wave of transitions to democracy between 1945 and 1975, but that wave of transitions was not accompanied by a new system of regulation of human rights violations.⁴⁰ Prior to the mid-1980s, the expectation after transition to democ-

³⁸ Margaret Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Ithaca, NY: Cornell University Press, 1998), 2.

³⁹ Ninety-one percent of the countries of Latin America and the Caribbean are now democratic. See table 5, "Democracy and Freedom by Region, 2002," in Larry Diamond, "Can the Whole World Become Democratic? Democracy, Development, and International Policies" (Irvine: Center for the Study of Democracy, University of California, Irvine, 2003), Paper 03'05.

⁴⁰ For an overview of waves of transition in Latin America, see Frances Hagopian and Scott Mainwaring, eds., *The Third Wave of Democratization in Latin America: Advances and Setbacks* (Cambridge: Cambridge University Press, 2005).

racy was that the new governments would pass an amnesty law, and there would be impunity for past human rights violations.⁴¹ Other institutional and ideational factors were also necessary to lead to the changing model of regulation.

Another institutional feature of the legal system also appears to be important. Civil law systems with provisions for private prosecution in criminal cases give victims and their allies more access to domestic courts than common law systems or civil law systems without provisions for private prosecutors. Judicial institutions where the government controls access to criminal prosecutions will be more open to capture than judicial institutions where private citizens have some ability to initiate criminal trials. This may help explain why more human rights trials occurred in Latin America than in other regions, because there were many countries in transitional democracy with relatively open civil law systems that included some provisions for private prosecution.

Finally, regional institutional features also play a role. Latin America has a more propitious legal context for human rights activism than Asia or the Middle East, for example, because of the existence and density of the Inter-American human rights norms and institutions, while Asia and the Middle East have no such regional human rights regime.⁴² And while not generally considered a highly judicialized region, Africa has the third most significant regional human rights regime in the world after that of Europe and Latin America. So the regional propensity to hold human rights trials may be related to levels of regional judicialization or legalization, especially as regards human rights law. These regional institutions give victims and their allies an opportunity to bring forward human rights cases against their governments. In Latin America, the decision of the Inter-American Court that amnesty laws were contrary to the American Convention on Human Rights has had an important impact on opening more space for domestic human rights trials.

For government officials or members of the security forces that have already carried out human rights abuses, the strategic landscape is initially straightforward: it is in their interests to prevent prosecution for past human rights violations. These are the so-called spoilers, who are often

⁴¹ This pattern has been documented very carefully in Chile, for example, but similar patterns exist throughout the region. See Brian Loveman and Elizabeth Lira, *Las suaves cenizas del olvido: Vía Chilena de Reconciliación Política 1814–1932* (Santiago: LOM Ediciones, 1999); *Las ardientes cenizas del olvido: Vía Chilena de Reconciliación Política 1932–1994* (Santiago: LOM Ediciones, 2000); and *El Espejismo de la Reconciliación: Chile 1990–2002* (Santiago, Chile: LOM Ediciones, 2002).

⁴² On the low level of legalization in Asia, see Miles Kahler, “Legalization as Strategy: The Asia-Pacific Case,” in Judith L. Goldstein and others, eds., *Legalization and World Politics* (Cambridge, MA: MIT Press, 2001), 165–187.

willing to go to great lengths to capture the regulatory process and prevent prosecution. Given a choice, they will always prefer no transitional justice at all, preferably guaranteed by an amnesty. They very often succeed in blocking domestic trials, through threats, coup attempts, or stalemated peace processes.⁴³ These former repressors have resisted all forms of accountability, but they have been much more forceful in rejecting individual criminal accountability than state accountability. While their motives include a mixture of ideological and material concerns, it is not difficult to understand why these officials would prefer to avoid trials and individual punishment.

But the motivations of other actors are more complex. Newly democratic governments are often portrayed as primarily interested in stability, continuity, and political survival. If they believe that human rights trials will undermine stability by provoking military coups, for example, they will oppose them. But, if they believe that trials will limit the power of veto players and thus promote stability, democratic governments may promote them.

The roles of lawyers, judges, and courts are even more complex. As parties interested in the growth of rule of law, we might expect such actors to support legal accountability over other forms of accountability. Resolving accountability issues in courts could contribute to the growth, power, and influence of the judicial sector and increase its autonomy vis-à-vis the executive. But it is less clear why judges would support individual criminal accountability over state accountability. In some cases, judges are part of transgovernmental networks that embrace new forms of judicial activism. In other countries, however, taking up a human rights case or trial could be dangerous and could undermine one's career. For example, during and after the dictatorship in Chile, involvement in such trials had a negative effect on judicial careers, and thus judicial actors tended to shun trials.⁴⁴ Elsewhere, as Judge Baltazar Garzon discovered, despite the animosity his arrest warrants provoked with the conservative Spanish government, he became an international celebrity as a result of his stand on human rights. Judges in Argentina under suspicion of corruption charges have also found that human rights trials have a way of burnishing their corroded images.

⁴³ Jack Snyder and Leslie Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice," *International Security* 28, no. 3 (Winter 2003/04), 5-44; and Leslie Vinjamuri and Jack Snyder, "Advocacy and Scholarship in the Study of International War Crimes Tribunals and Transitional Justice," *Annual Review of Political Science* 7 (May 2004), 345-362.

⁴⁴ See, for example, Elisabeth Hilbink, *Judges beyond Politics in Democracy and Dictatorship: Lessons from Chile* (New York: Cambridge University Press, 2007).

Although state officials accused of perpetrating human rights violations oppose trials, states more generally have not opposed the move to create law and ratify treaties that underpin individual criminal accountability models. If we look at the state ratification of the treaties that include some provisions for individual criminal accountability, we see many states ratify these treaties, but somewhat fewer states ratify human rights treaties calling for individual criminal accountability than treaties without these provisions. Of the three treaties that form the backbone of individual criminal accountability, 146 countries have ratified the Torture Convention, 136 countries have ratified the Genocide Convention, and 105 countries have ratified that Statute of the ICC, which was only opened for ratification in 1998. This compares to the most highly ratified of the core human rights treaties, the Convention on the Rights of the Child, with 192 ratifications. Only nineteen countries have not ratified at least one of the three treaties that underpin the move toward individual criminal accountability, and the list reads more like an inventory of small island countries with scarce state capacity than a coherent movement against the practice of individual criminal accountability. The relatively high number of ratifications of the ICC in a short time is especially significant, since the U.S. government has initiated a campaign against the ICC, and uses political and economic sanctions against countries that ratify and refuse to sign bilateral agreements promising not to turn U.S. personnel over to the ICC. We could argue that it is in the interests of states not to ratify the ICC Statute and thus avoid possible sanctions.⁴⁵ Yet, it appears that the great majority of states supported the development of general legal underpinnings of the individual criminal accountability model. Why would states do this? It seems possible that most states believed that individual criminal accountability would be reserved for individuals in other states, not their own (this, for example, was the position of the United States in the drafting of the Torture Convention). Second, since the ICC can only examine violations that occur after a country has ratified the statute, current state officials know that they are safe from prosecution for any past crimes. So, for example, the Argentine armed forces supported the move toward the ICC because it allowed them to support the cause of human rights without any fear that it would lead to their prosecution for past human rights violations.⁴⁶

Even so, it is difficult to find a strong interest-based motivation for why states would have supported the move toward individual criminal

⁴⁵ On this issue, see Judith Kelley, "Why Do States Keep International Commitments? The International Criminal Court and Non-surrender Agreements," *American Political Science Review* 101, no. 3 (August 2007), 573–589.

⁴⁶ Interview with Silvia Fernandez, Buenos Aires.

accountability for human rights violations. Rather, we need to suggest that states too may be motivated by ideational or reputational concerns, and they may believe (except in the case of the ICC) that there are relatively low costs to treaty ratification.

We could make a rational argument that states would want to pass accountability from the state to individuals previously associated with the state. This permits the state itself to avoid accountability, perhaps avoid payment of remedies, and allows the state to scapegoat certain individuals. It may lower reputation costs of human rights violations if, for example, the crimes of Serbia are associated with Milosevic instead of Serbia.

But such an intuitively simple rationalist solution is not persuasive. If it were so rational, why did it take governments so long to make the move to individual criminal responsibility, and why have some governments, the Bush administration in particular, resisted the move so strenuously? Why would the socialist government of Chile fight so hard against Augusto Pinochet's detention in the United Kingdom and seek his return to Chile?

Targeted states did, however, resist specific international, foreign, or domestic trials for individual criminal accountability. In virtually all cases of foreign trials, the governments of the countries where the human rights violations have occurred have argued, often vehemently, that foreign trials for individual criminal accountability for human rights violations are either illegitimate or unnecessary or both. Their arguments varied, but generally, the arguments were *not* against the *concept* of individual criminal accountability per se, but against individual criminal accountability in foreign courts. This often led these governments to advocate individual criminal accountability in domestic courts, even if they had not initially taken this position. The Chilean government, for example, after Pinochet was detained in London argued forcefully that Pinochet could and should be tried at home, even though such trials were initially blocked by domestic amnesty legislation.

The interests of state actors often changed when individual criminal accountability moved from being a one-level game to a two-level game. When Pinochet thought that he was just in a domestic game, it was clear that his interest (and those of his military colleagues) was to block domestic trials at all costs, and he was able to do so with threats of coups and shows of military strength. When he was arrested in London, on the basis of an arrest warrant from Spain, it became clear that he was operating in a more complicated two-level game. The Chilean foreign ministry was unable to use the standard tools of diplomacy to get him released. It was at this point that the interests of some of those who opposed trials in Chile began to change. It was no longer the question of trials or no trials (in Chile), but now a question of trials in Spain, trials in the United King-

dom, or (perhaps) a trial in Chile. Under these circumstances, the option of a trial in Chile started looking better than before. This is why the possibility of international and foreign trials is a necessary backup system in the regulatory model. It is this possibility that converts the one-level game into a more complicated two-level game and changes the interests of the players in question.

In these circumstances, foreign and international trials may also have the strategic impact of changing calculations of past and current members of the security forces to make them more favorable to domestic trials than they would have been otherwise. Once perpetrators believe that they can not prevent trials completely, the accused may decide that they prefer domestic courts to foreign or international courts. Along these lines, domestic trials opened up not only in Chile with the arrest of Pinochet in London, but the threat of extradition to Spain also led to new trials in Argentina, and more recently, the threat of extradition of Uruguayans to Argentina to stand trials has given impetus to the first human rights trials in Uruguay.

The discussion of interests, however, misses what is most interesting about this issue, and those are the very beliefs about what people think is possible. In the human rights area, for years, people didn't advocate individual criminal responsibility for human rights violations because they didn't think it was possible or realistic. Even months before Pinochet was arrested in London, most experts in this area didn't think it was politically possible to arrest him, even though it was legally possible in principle. This issue area illustrates that before we can think of the obvious or natural interests of actors, we have to understand the conditions of what they thought was possible. First it had to become possible to imagine that powerful leaders could face consequences for their human rights violations. Only then could actors begin to consider what kind of model of regulation should be adopted.

Most victims of human rights violations historically did not imagine that it was possible to turn their deeply felt need for justice into any practical form. Even when groups spoke out for justice, it wasn't always clear what that meant. So, for example, when human rights organizations in Argentina began to call for "trials and punishment for all those guilty of human rights violations" ("*Jucio y Castigo a Todos los Cupables*"), it wasn't clear exactly what justice and punishment meant or what they should mean.⁴⁷ It wasn't clear because in 1983, there was no history in Latin America, and little experience in the entire world, with how domestic courts might hold former government officials responsible for human

⁴⁷ Elizabeth Jelin, "La política de la memoria: el movimiento de derechos humanos en la Argentina," in *Jucio, Castigo, y Memoria* (Buenos Aires: Nueva Vision, 1995), 119–120.

rights violations. The “transitional justice mechanisms” that eventually emerged during the Alfonsín government were the result of interactions of the human rights movement, the government, and the political opposition, each engaged in forms of improvisation in this uncharted realm. The treatment of human rights violations in Argentina during this period “was a process with a life of its own, the course and results of which escaped the calculations and desires of each of the actors directly involved.”⁴⁸

When we try to understand why governments chose to use the criminal accountability model, there is a striking fact that comes to our attention. Once it became possible to imagine accountability for individual leaders, the model of regulation chosen (individual criminal accountability) was an extension of the criminal model already used for domestic crimes. It is possible that a logic of appropriateness was at work here rather than a logic of consequences.⁴⁹ For hundreds of years, most societies have regulated crimes like murder or kidnapping with domestic trials for individual criminal accountability. Many people never questioned what form accountability for past human rights violations should take, but took for granted that the criminal accountability model would be used.

The first trials for individual criminal accountability (after the World War II trials) took place in the domestic judicial systems of individual countries (Greece, Argentina, and Bolivia). While leaders in those countries could have chosen other models of accountability than individual legal criminal accountability (and they sometimes did choose other models), they increasingly focused on criminal trials. For example, Carlos Nino, the brilliant legal theorist who was President Alfonsín’s adviser on the trials in Argentina, considered many factors (such as how many members of the military should be tried), but did not seriously consider an option other than individual criminal accountability.⁵⁰ Because the enforcement was happening through domestic criminal courts, these same courts just took a process they know well—individual criminal accountability—and used it on a new set of perpetrators: past government officials. They did not do this without substantial legal and political difficulties, but over time, domestic courts established that it was possible to hold government officials criminally accountable for human rights violations.

These domestic trials began to create a certain precedent, and the weight of example. When international actors searched for a solution to

⁴⁸ Oscar Landi and Inés González Bombal, “Los derechos en la cultura política,” in *Juicio, Castigo, y Memoria*, 163 (translation mine).

⁴⁹ James G. March and Johan P. Olsen, “The Institutional Dynamics of International Political Orders,” *International Organization* 52, no. 4 (Autumn 1998), 943–969.

⁵⁰ Carlos Santiago Nino, *Radical Evil on Trial* (New Haven, CT: Yale University Press, 1996).

the problem in the Balkans in the early 1990s, the possibility of a court using individual criminal accountability for past human rights violations was on the agenda, having been put there by high-profile domestic examples. The ethnic cleansing in the Balkans, followed shortly after by the genocide in Rwanda, created the kind of international demonstration effect that pointed to the weaknesses of the human rights regime. While trials weren't the only possible solution (indeed, military intervention was another response to massive human rights violations that was increasingly proposed), the move to criminal accountability represented one effort by the international community to find more effective models of enforcement of human rights norms. The justice cascade in domestic politics contributed to increasing the salience of the individual criminal accountability as an option for the international community.

We therefore cannot explain changing trends in regulation of human rights without reference to changing ideas about justice and the embodiment of those ideas in international law and institutions. As Mattli and Woods point out, ideas are a key explanatory variable for changes in regulation. These include both ideas about what is desirable and about what is possible. Gary Bass attributes international war crimes tribunals primarily to the legalism of wealthy liberal states, as well as to their unwillingness to sacrifice their own soldiers and citizens in actually intervening to stop war crimes from happening. But the fact that domestic human rights trials first began as domestic trials in countries of the periphery, such as Greece, Argentina, and Bolivia, suggests that these liberal ideas about trials and human rights did not necessarily derive from the wealthy northern countries. Nevertheless, I agree with Bass that one can not understand the emergence of the model of individual criminal accountability "without reference to ideas drawn from domestic politics."⁵¹ Bass also argues that domestic trials are the most sincere indication of the strength of ideas and norms, since it is more difficult to put one's own leaders and soldiers on trial than those of another country, especially one vanquished in war.⁵²

The ideas that underpin both international and domestic trials are mainly liberal ideas about human rights, due process, and in particular, individual responsibility for human rights violations. Latin America is a particularly interesting region in this regard because it has a long tradition of liberal thought that coexisted with increasingly authoritarian regimes. In Latin America there was a tradition of support for human rights and international law.

⁵¹ Gary J. Bass, *Stay the Hand of Justice: The Politics of War Crimes Tribunals* (Princeton, NJ: Princeton University Press, 2000), 12.

⁵² *Ibid.*, 14.

There were various counter-ideas to individual criminal jurisdiction. The first was to propose a continuation of the impunity model. This idea was increasingly discredited. Essentially changing ideas about the desirability and possibility of some form of accountability for human rights violations had become sufficiently entrenched that they have made it more difficult to advocate a return to a pure impunity model. The most powerful counter-idea to the individual criminal accountability, however, was the idea that countries should focus only on "restorative justice" via truth commissions and reparations, but should eschew "retributive justice" through human rights trials. The proponents of this idea claimed that restorative justice could promote reconciliation and satisfy victims with truth and reparations without causing divisions and rancor through retributive trials. The South African case, with its Truth and Reconciliation Commission, is held up as the paradigmatic example of how restorative justice should function. Because the impunity model has been discredited, many prior advocates of impunity have now embraced restorative justice. Because restorative justice ideas have a much more positive connotation than impunity, opponents of trials find it more legitimate to oppose them by proposing reconciliation. The restorative justice model also finds strong support from activists and legal scholars who have long criticized harsh retributive punishment in their domestic legal systems as counter-productive. The restorative justice idea thus also has a strong alliance behind it. Once again, debates about domestic legal systems are transposed to the international arena.

Finally, can the factors discussed in the framework chapter help explain the degree or speed of the adoption of individual criminal accountability in different Latin American countries? First, transition to democracy is the most important predictor of the use of human rights trials in the region. All of the countries that held human rights trials were democracies or were in the process of a transition to democracy. This is consistent with the point made by Mattli and Wood in the framework chapter that an institutional context offering participatory mechanisms is a necessary condition for public interest regulation. Second, the level of severity of human rights violations also affected the decision to use trials, so that countries with more severe violations, like Argentina and Guatemala, were more likely to use trials than countries with less severe violations, such as Brazil. This fits with the argument of Mattli and Woods that the scale and scope of the negative externalities of existing regulatory models may influence the demand for a change in regulation. Third, the nature of the transition has effects on the use and timing of trials, because some transitions gave more power to perpetrators of human rights violations. The transitions literature called our attention to the differences between the so-called negotiated or "pacted" transitions, where the military

negotiate the transition, and ensure significant protections and guarantees for themselves from prosecution for human rights violations, and the “society-led” transitions, where the military are forced to exit from power without negotiating specific protections.⁵³ Countries that had negotiated or pacted transitions to democracy are less likely to use trials than those that have had society-led transitions forcing authoritarian regimes out of power.⁵⁴ Again, this is consistent with the Mattli and Woods argument that the relative power of the pro-change alliance vis-à-vis the agents of capture helps determine regulatory outcomes. Basically, in pacted transition, the military used their power to ensure their continued capture of regulation. In Latin America, Argentina, Bolivia, Peru, and Panama are all examples of ruptured transitions, and all are examples of countries where trials occurred more promptly after transition. Chile, Uruguay, El Salvador, Guatemala, and Brazil are examples of pacted transitions. Pacted transitions can lead to no trials (in the case of Brazil, for example), fewer trials than we might expect given the level of prior human rights violations (as is the case of El Salvador), or delayed trials (as in the case of Chile, Uruguay, and Guatemala). Nevertheless, what is most striking is that even in most pacted transitions, over time, the military have not been able to completely block human rights trials. Changing ideas and norms about appropriate transitional justice made the impunity model increasingly untenable, and with the passage of time, human rights trials became increasingly common throughout the hemisphere. These ideas did not just emerge from dominant countries but from a diverse pro-change alliance of like-minded governments, including many newly democratic Latin American governments, human rights NGOs, and judges and lawyers in many parts of the world.

CONCLUSIONS

The demonstration effect of the Holocaust first led to the emergence of a human rights regime focused on state accountability with weak enforcement mechanisms. States negotiated a series of increasingly precise human

⁵³ Alfred C. Stepan, “Paths Towards Redemocratization: Theoretical and Comparative Considerations,” in Guillermo O’Donnell, Philippe C. Schmitter, and Laurence Whitehead, eds., *Transitions from Authoritarian Rule* (Baltimore: Johns Hopkins University Press, 1986).

⁵⁴ Rene Antonio Mayorga has argued that only with ruptured transitions “has it historically been possible to open space necessary to bring military dictators to justice.” “Democracy Dignified and an End to Impunity: Bolivia’s Military Dictatorship on Trial,” in A. James McAdams, ed., *Transitional Justice and the Rule of Law in New Democracies* (Notre Dame: University of Notre Dame Press, 1997), 67.

rights treaties that began to enter into effect in the 1970s, 1980s, and 1990s. At the same time, networks of human rights NGOs multiplied, and they found allies among the governments of like-minded states and increasing numbers of lawyers and legal experts to form a powerful pro-change alliance in favor of more enforcement of existing human rights norms. This created the ideational, legal, and political conditions in some transitional countries to first experiment with human rights trials, starting with Greece in 1974–75, but picking up steam and legitimacy in particular after the Argentine trials of the juntas in 1985. While these trials had mixed results, the accumulation of trials in over thirty transitional countries eventually created an ideational and political context where trials were seen as a salient and workable solution to the failure of the existing regulation model in the Balkans and Rwanda. Human rights NGOs lobbied for more accountability, including individual criminal accountability, and diffused the ideas and practices being used by state actors in domestic trials.

In the end, these processes led to an important but still incomplete change in ideas and practices at both the domestic and international levels. Before the 1970s, state officials and publics alike took the impunity model for granted, and did not imagine it was possible to hold state officials accountable for human rights violations. Now in many parts of the world, repressors are no longer certain they can block domestic or international trials. This change is too recent to say with any certainty whether government and security forces around the world are actually persuaded by the new ideas or simply constrained by them. But the dramatic increase in human rights trials in the world and their geographical spread suggest that the individual criminal accountability model will not be easily reversed and will continue to grow together with state accountability to provide greater enforcement for human rights law.