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Human Rights Enforcement From Below: Private Actors and Prosecutorial Momentum in Latin America and Europe*

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Over the last three decades, thousands of prosecutions for human rights abuses have progressed through domestic courts, a puzzling fact considering that state leaders have little incentive to punish their own agents. Previous studies have advanced rational-choice or sociological-institutionalist accounts of this phenomenon, emphasizing the role of political coalitions or regional cultures. Few, though, have recognized the local, private struggles that lie at the root of the trend toward domestic human rights enforcement. In this article, we develop a historical-institutionalist theory of normative change centered on the notion of "prosecutorial momentum." We contend that the rise in domestic trials against rights-abusing state agents in Europe and Latin America results in large part from the cumulative efforts of victims and human rights lawyers utilizing their rights to private criminal prosecution. Using a new data set and mixed methods, we offer a systematic analysis of how rights to private criminal prosecution, when activated in response to a legacy of repression, helps set in motion sustained efforts to pursue domestic enforcement and compliance with international law.

National leaders have little rational incentive to punish the very agents on whom they rely for coercion. Yet increasingly often, domestic courts across the world bring state agents to trial for human rights violations. Between 1970 and 2010, for example, more than 3,000 domestic human rights prosecutions were initiated, and this has resulted in moderate improvements to physical integrity rights protections (Kim and Sikkink 2010:956–58).[1] This is evidence of the global but decentralized enforcement of international law and norms (Sikkink 2011). How can we account for this rise in domestic efforts for criminal accountability of human rights violations?

While the human rights and transitional justice literature points to numerous explanations, we build on recent research that highlights domestic institutions as an explanatory factor behind the rise of human rights accountability efforts. Top-down rationalist or sociological explanations attribute the rise of prosecutions either to the stable preferences of political coalitions or to static regional cultures. Instead, we advance an historical-institutionalist argument about gradual change (Pierson 2004; Mahoney and Thelen 2010). Specifically, we contend that the rise in domestic trials against rights-abusing state agents results in large part from victims and human rights lawyers' litigating at the domestic level. By creatively utilizing existing legal-institutional tools over time, these opportunistic actors produce sustained campaigns for human rights accountability.

We are not the first to make the argument that individuals interacting with available institutions can promote human rights enforcement (Collins 2010; Sikkink 2011; Burt 2013; Michel and Sikkink 2013; Davis 2014; Gonzalez Ocantos 2014). In particular, Michel and Sikkink (2013) introduce the importance of victims' rights in criminal procedure. This article, however, makes two new contributions. First, we develop an historical-institutionalist theory centered on a mechanism called "prosecutorial momentum." We theorize that the presence of private prosecution rights in criminal procedure codes—which allow a victim and/or their relatives to initiate and participate in the criminal investigation and prosecution of a crime—helps account for the number of observed prosecutions across Latin America and Europe. Importantly, though, the presence of the right cannot alone account for human rights prosecutions. Instead, the effects of this institution are conditional on bottom-up legal mobilization across time. Once activated, private prosecution becomes more

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[1]This is based on a count of prosecutorial activities, which starts at the level of indictment. See http://www.transitionaljusticedata.com.

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impactful as years pass. Early efforts at private prosecution move slowly because activists are mobilizing against unresponsive states. But hard-won legal successes generate positive feedback. This inspires other victims to pursue criminal accountability, creates legal openings for future litigation, and urges reluctant government actors to take up human rights cases.[2] Our analysis shows how gradual change can be pushed from below, and it identifies the mechanisms through which judicial processes gather momentum and buttress human rights enforcement. In so doing, the article engages with and proposes a way to operationalize change in comparative and international politics.

Second, unlike most historical-institutionalist analyses, we subject our ideas to statistical evaluation. Using original data on judicial outcomes in European and Latin American countries, we test whether the design of key institutions within domestic criminal justice systems helps explain variation in human rights prosecutions. We push beyond generalizable effects of judicial design alone and consider interactions over time. These interactions show that other political and social factors mediate *de jure* legal institutions. For example, rights to private prosecution are more important in countries that experienced higher levels of repression, and where human rights NGOs are more active. Thus, where victim demand for justice is higher, and where those victims receive assistance from activists' organizations in articulating those demands, a stronger linkage exists between rights to private prosecution and the eventual prosecution of state agents. Moreover, the statistical findings support the theory that private prosecution of state agents generates a self-reinforcing process that becomes stronger as years pass. By theorizing and modeling this process of momentum, we accept the historical-institutionalist challenge to take time seriously in the study of law and politics (Pierson 2004).

In the following section, we define domestic human rights prosecutions and the questions they pose to theorists. Then, we develop our theory of human rights accountability and prosecutorial momentum, along with testable expectations. In Private Actors and Human Rights Prosecutions, we discuss the ways private actors have participated in human rights prosecutions over the last few decades, and we describe data on these phenomena. Findings presents the results from a systematic analysis using the new Transitional Justice Research Collaborative (TJRC) database, demonstrating that victims' rights to private prosecution strongly predict a higher count of human rights prosecutions in a country. The results also show the important role that the passage of time has on human rights accountability. The final section of the paper, Case Examples, illustrates how private prosecution generated prosecutorial momentum and impacted human rights cases in Germany, Chile, and Guatemala.

The Puzzle of Human Rights Prosecutions

We define human rights prosecutions as any prosecutorial event that reaches a domestic court after an arrest warrant and/or an indictment has been issued for cases related to human rights abuses committed by state agents. Human rights abuses are violations of physical integrity, including the right not to be tortured, summarily executed, disappeared, or imprisoned for political beliefs. Since human rights violations usually involve crimes committed by state officials, human rights prosecutions may be seen as a form of compliance with international legal norms that create duties for states to self-monitor and enforce protections against abuse.

Human rights prosecutions can be of two different types: (i) those that are aimed at previous political leaders responsible for centralized efforts at repression, counterinsurgency, or war crimes; and (ii) those that target police or security agents for everyday violations of human rights, including extrajudicial killing, torture, and mistreatment (Dancy 2013:245–47). The first type, which attracts a good deal of attention, targets architects of planned political violence that for years managed to escape rule of law (for example, Augusto Pinochet in Chile, Efraín Ríos Montt in Guatemala, and Juan María Bordaberry in Uruguay). Scholars often overlook the second type because they are not as high profile. But low-level prosecutions are just as relevant for theories concerning compliance with human rights norms. A number of studies in International Relations, for example, assume that regularly operating courts are needed to enforce international law, and provide a check on the excesses of the executive and its agents on the ground (Hathaway 2002; Staton and Moore 2011; Lupu 2013).

Theorists focusing on the nexus between courts and human rights compliance, however, normally rely on standardized aggregate measures of judicial independence, contract enforcement (contract-intensive money), or rule of law to test their hypotheses. To our knowledge, no systematic empirical studies of compliance exist that capture bottom-up efforts to criminally enforce human rights law. A key element of such enforcement involves not only pushing for individual criminal accountability against leaders who plan repression from the center, but also targeting lower-ranking state officials, like police officers and security agents, who engage in decentralized acts of brutality against civilians (Dragu and Polborn 2013:1048–49).

State leaders, particularly those located in the executive branch, have a clear conflict of interest when it comes to prosecuting human rights cases. They must simultaneously rely on and punish security forces for committing acts of repressive violence. This conflict is built into international human rights law. Multilateral agreements entrust sovereign states to be the primary guarantors of human rights protections, even though they are also the primary violators of the human rights held by their citizens (Donnelly 2003:35–37). Given the situation, a puzzle emerges: Why would we ever expect to see the domestic enforcement of human rights norms when, by holding trials, state leaders are essentially betraying their own agents of violence?

Scholars are only beginning to understand what accounts for this counterintuitive move to human rights enforcement through criminal prosecution. The transitional justice literature has developed a number of theories that may be characterized as rational-choice institutionalist (RCI).[3] RCI assumes that actors' preferences are given and that institutions place constraints on different actors engaged in strategic interactions (North and Weingast 1989; North 1990; Acemoglu and Robinson 2006). When explaining human rights trials of state agents, scholars

[2]For positive feedback, see Pierson (2004).

[3]Transitional justice is the study of the ways in which post-authoritarian or post-conflict regimes reckon with previous legacies of human rights violations. See Teitel (2000).

often focus on the fixed preferences of the executive branch in particular moments of time. One formulation is that state leaders cynically pursue criminal prosecutions as a legal masquerade in order to boost foreign investment, or to promote a positive international image (Subotić 2009; Appel and Loyle 2012). A second RCI explanation hinges on the balance of power between the new civilian government and the military. When a democratic transition is negotiated, and the new executive faces significant opposition from the military or holdover political leaders from the previous regime, it is more difficult to prosecute security forces (Huntington 1991; Sutil 1997; Barahona de Brito 2003; Olsen, Payne, and Reiter 2010). A third explanation is that governments presiding over periods of democratic change do not find it in their self-interest to pursue accountability because they could be implicated in the crimes of the former regime. Hence, they design diluted transitional justice institutions (Grodsky 2010; Nalepa 2010).

Each of these explanations proves useful for certain cases, but the rationalist approach falls short in some respects. First, RCI often treats courts as if they are almost entirely beholden to the executive branch. That is, if the ruling party wants to prosecute human rights violators, then the courts willingly oblige. This is not necessarily the case. Courts are, at a minimum, strategic actors in interaction with the executive (Helmke 2002), and, at a maximum, separate governing institutions with entirely distinct rules and interests (Hilbink 2012). Therefore, theories must account for why some courts produce certain outcomes and others do not.

Additionally, the move to prosecute state agents for human rights violations sometimes occurs in stable democracies, and other times it happens decades after democratic transition has taken place. Theories focused on executive maneuvering amidst transition, like most RCI analyses, assume that human rights prosecutions result when leaders design new institutions in moments of transition produced by exogenous shocks (Huntington 1991; Teitel 2000).[4] Thus, some scholars argue that trials must happen quickly following transition if they are to happen at all (Huntington 1991). But in cases like Argentina, human rights prosecutions did not begin in earnest until almost two decades after the democratic transition ushered in new institutions. The move to trials in Argentina appears to be more of an endogenous change that happened gradually over time.

A second approach to explaining criminal prosecutions comes from sociological institutionalism, which emphasizes "institutional isomorphism" across countries (Powell and DiMaggio 1991). This school attributes the "revolution in accountability" occurring across states to various global factors including the worldwide diffusion of liberal legal models, the consolidation of human rights treaty law, and sustained transnational advocacy (Sriram 2005; Nagy 2008; Gready 2010; Drumbl 2011; Dancy and Sikkink 2012). Another global explanation posits that recent criminal prosecutions are the result of regional cultures (Kim 2008, 2012).

In fact, the empirical record shows that trends in human rights enforcement are indeed regionally uneven. More than 55% of all domestic prosecutions for rights violations took place in Latin America and Europe. When confronted with signs of human rights enforcement in these two areas of the world, observers often fall back on sociological institutionalism, intentionally or not. "In Latin America," write Hafner-Burton and Ron (2009:378), "the cultural embedding of 'rights' should be easier than in Asia, Africa, or the Middle East [. . .] The state in Latin America has a much longer history, and it was formed when constitutional liberalism was the dominant paradigm for postcolonial states." Furthermore, similar to "Latin America, the notion of 'rights' is more culturally embedded in Eastern Europe due to the longer history of independent statehood in that region." Put another way, both regions share a devotion to the Western ideological tradition, which has a history of commitment to rights-based ideals rooted in the secular, constitutional, and statist philosophies of Locke, Montesquieu, and John Stuart Mill (Linz and Stepan 1996; Lutz and Sikkink 2001; Sikkink and Walling 2007).

Macro-cultural explanations for the spread of human rights trials, though, prove problematic for three reasons. First, scholars use them to discount developments that were, and are, contingent transformative processes. The collective regional past, which may be alternately characterized as law*less* or law*ful*, democratic or *non*democratic, did not predetermine the human rights politics in Latin American and post-Communist European countries.[5] Second, sociological explanations focused on institutional diffusion neglect intraregional variations in human rights developments. While some countries within Latin America and Europe witnessed positive developments regarding the legal pursuit of justice for human rights violations, others faced severe barriers to change and remain mired in legacies of impunity. For example, where victims and human rights organizations scored some successes over time in Chile, Argentina, and Guatemala, they made less headway in Brazil, El Salvador, Peru, or Uruguay. Similarly in Europe, where Portugal and Poland made extensive efforts to legally address former rights abuses after transitions from authoritarian rule, countries like Spain did not. Third and finally, top-down cultural explanations can downplay the obstacles facing actors who fought to enforce individual criminal accountability for human rights violations. The rise of enforcement transpired in countries that had formerly been criticized for the weakness of their judicial institutions and their inability to uphold the rule of law (Schmitter and Karl 1991; Méndez, O'Donnell, and Pinheiro 1999; Schedler, Diamond, and Plattner 1999; Cichowski 2006; Hite and Ungar 2013). For example, two decades ago, no one expected Chile to be a leader in human rights. But today the trend toward calling former torturers to account in Chile "now seems unstoppable, and yet it represents a major turnaround for a continent that for most of the 1980s and 1990s had been a byword for impunity" (Collins 2010:1). What accounts for this kind of institutional shift?

[4]Mahoney and Thelen (2010:2) write that " . . . most scholars point to exogenous shocks that bring about radical institutional reconfigurations, overlooking shifts based on endogenous developments that often unfold incrementally."

[5]A little over 20 years ago, Tina Rosenberg (1991:17) wrote, "Most of Latin America was conquered and colonized through violence, setting up political and economic relationships based on power, not law." Likewise, Daniel Ziblatt (2006:313) argues that "Democratization in Europe, like elsewhere, . . . often entailed and—perhaps required—combining democratic reforms with micro-level formal and informal undemocratic elite safeguards."

Theory: Human Rights Criminal Accountability and Prosecutorial Momentum

Because the common understanding of institutions finds that they function to freeze certain rules into place and generate behavioral continuity (for example, Acemoglu and Robinson 2006), little is known about institutional change (Mahoney and Thelen 2010). How does a judiciary, for example, become more independent in practice without undergoing formal reform? Or, in our case, why do judiciaries become a site for increasing prosecutorial activity aimed at state agents for human rights violations, when they previously were not? Mahoney and Thelen (2010) establish a framework for considering how such changes occur. They begin with the assumption that actors' preferences are not exogenous, but endogenous, to domestic institutions. That is, institutions are not simply stations where actors bring their pre-formed? preferences and interact politically with other actors. Instead, institutions help produce actors' preferences (see also Thelen and Steinmo 1992; Thelen 1999). In their framework, "dynamic tensions and pressures for change are built into institutions" rather than existing prior to or outside of them (Mahoney and Thelen 2010:14). Based on this formulation, Mahoney and Thelen outline four types of endogenous change that do not rely on crises or external shocks. These are displacement, layering, drift, and conversion. Displacement and layering involve removing or adding rules to existing institutions. Drift takes place when existing rules suddenly exert an impact because of shifts in political or social circumstances. The fourth type of change is conversion, which occurs with "the changed enactment of existing rules due to their strategic redeployment" (Mahoney and Thelen 2010:16; cf. Thelen 2003). Where it is observed, conversion is normally initiated by opportunists, who "redeploy the prevailing rules for their own purposes" when wholesale institutional reform is not an available option (Mahoney and Thelen 2010:29).

The rise in domestic prosecutorial efforts against human rights violations in Latin America and Europe largely results from a process of institutional conversion led by victims and NGOs interacting with existing legal institutions over time.[6] Where it is available as a right in criminal procedure, private prosecution gives victims or their surviving relatives the opportunity to intervene in the pretrial and trial stages. They do so through a lawyer, who formally acts as private prosecutor on behalf of the victim. The private prosecutor has several rights, like the right to provide evidence and witnesses, to access the investigation files, and to appeal decisions that effectively end a prosecution (such as dismissals, acquittals, and plea bargains). When the Public Prosecutor's Office (PPO) wants to dismiss a case or drop charges, the private prosecutor can request that the judge mandate that the state reconsider that decision. In theory, these guarantees provided to victims emerged as a control mechanism to ensure that states prosecute and punish crime (Perez Gil 2003:164–165; Michel 2012:58–59).[7]

As explained in the previous section, human rights legal activism places the state in the uncomfortable position of deciding whether to prosecute its own agents. In this situation, the potential importance of private prosecution to serve as a check on the state is clear. Through the PPO, the state must investigate and prosecute crimes. In human rights cases, though, the PPO may be a bit less inclined to prosecute, or sometimes even blatantly opposed. Public prosecutors remain concerned about threats from state agents or about diminishing the popularity of the judiciary, which receives public criticism for pursuing contentious, high-profile cases. Of course, it is also possible that the public prosecutor actually acts in the interests of the executive in power. In any case, private prosecution can potentially serve as a societal check on an unresponsive PPO (and state) and improve access to justice for victims and their relatives.

In most cases, victims and activists prefer a centralized policy of human rights reparation that includes wholesale institutional reform and restitution. This would amount to some kind of large-scale institutional displacement or layering. The political will required for this kind of change, though, is not normally available. Thus, when private prosecution is available, private actors opt to participate in litigation, using long-standing rights to bring criminal prosecutions. Sometimes, this litigation ends in punishment. After one or two criminal prosecutions take place, a momentum can develop and produce an even greater number of prosecutions in the future.[8]

Prosecutorial momentum is generated in three ways. First, a claim by private actors can have a *demonstration effect* that shows other victims that bringing a case to the courts is a means to address a particular grievance. This demonstration effect is more likely to take place at the initial stage of conversion, that is, when opportunistic actors for human rights accountability strategically use the right to private prosecution for the first time. Furthermore, the demonstration effect is more likely to occur where the litigation effort is successful and/or it was accompanied by public media exposure. Greece, one of the first countries in the world to embark in domestic prosecutions for human rights abuses, best exemplifies this.[9] Following the military dictatorship that ruled the country from 1967 until 1974, Alexander Lykourezcos, an individual lawyer, took the first legal step toward trials when he filed a criminal suit in September 1974 against 35 state agents. The high profile of the Lykourezcos suit produced a demonstration effect by inspiring other citizens to consider using the courts as a means to channel grievances (Sikkink 2011:44–45).

[6]Note that in some countries, like Hungary or Mexico, private prosecution was only recently introduced through criminal procedure reform. If private prosecutors push human rights trials in such contexts, then we would see change happening through a process of displacement—criminal procedure reform—and at the same time a process of conversion, given that private prosecution would be used by citizens in ways that are unexpected by reformers (see Michel 2012:59).

[7]In some countries, private prosecution evolved naturally as the state concentrated the power of prosecution into its own hands, leaving citizens with some participation rights. For instance, in Spain or even Germany, private prosecution was allowed to remain even as the office of the public prosecutor was being created. In Greece or Italy, victims are only allowed to participate as civil actors for restitution purposes (Michel 2012:59). Other countries inherited the legal right through conquest, like many in Latin America. Thus, citizens of these countries widely know private prosecution as a *de jure* right.

[8]What we call momentum, others may call "positive feedback" processes, "self-reinforcing" processes, or processes of "increasing returns" (Pierson 2004:22–24,50). These are likely to take place when actors learn, coordinate, and adapt to new developments.

[9]Greece allows citizens to participate in criminal proceedings only when they also file a civil suit. If the victim does not become a civil party, then the victim has no role in criminal proceedings other than as a witness.

Second, a single case brought by private prosecutors can produce a ruling that then creates a *legal opening* for more cases to be brought in the future. This type of momentum is more likely to happen where courts act independently. We expect to see variations across countries depending on each legal system's rules regarding precedent. In Argentina, for example, junta generals tried in the early 1980s were pardoned by Carlos Menem in 1990, ushering in a period of national forgetting. In 1998, however, private prosecutors brought a case against Jorge Videla and others in Federal Criminal Tribunal No. 5 for "illegal abductions," using the argument that disappearances constituted ongoing crimes that were not subject to military jurisdiction, and that the accused were not protected by previous amnesties. This case not only inspired future prosecutions, but actually created the legal opening for them to advance (Michel and Sikkink 2013:891–899).

Finally, private prosecution can create momentum by *urging (*or *pressuring)* state actors to pursue or support human rights cases themselves in the future. Public officials do not want to lose face by continuing to avoid prosecutions amidst extensive efforts on the part of private actors. They are also inspired to use information learned in previous privately initiated cases to seek further prosecution. In either situation, what takes place is a handing-off of the prosecutorial burden between private actors and state actors, as members of the judiciary become more comfortable prosecuting state agents for human rights violations. Thus, this type of momentum is less likely to occur immediately after democratic transition. To continue with the Argentina example, the relentless legal fight and social mobilization of private actors such as *Abuelas de Plaza de Mayo* and CELS was crucial not only in pressuring the Alfonsín government to establish a Truth Commission (CONADEP) in 1983 (Lessa 2013:53–54), but also in developing a human rights policy that by 2003, under the Kirchner administration, supported human rights criminal accountability (Burt 2013:113).

Given the different ways that private prosecution can generate prosecutorial momentum, we would expect this legal right to be associated not only with more trials, but also with more guilty verdicts over time. As litigators create more opportunities to bring cases, and state actors become more willing to participate, criminal accountability is more likely to follow. In the next section, we describe our data, which demonstrate that private actors are in fact involved in human rights prosecutions.

Private Actors and Human Rights Prosecutions

Complete information on all human rights cases across regions that includes information on victims' participation through private prosecution does not exist. However, the Transitional Justice Research Collaborative (TJRC) is the first systematic attempt to code the use of private prosecution in human rights prosecutorial efforts that occurred in all democratic contexts from 1970 to 2010. The TJRC coded every prosecution event that was mentioned in the State Department Human Rights Reports for nearly every country in the world. The TJRC supplemented the information for each prosecution with other sources (LexisNexis and domestic newspapers) to get more complete and reliable information on the criminal proceedings and the outcome of the cases. The TJRC database codes a prosecution when a criminal proceeding is brought against one defendant *or* groups of defendants, and the coded data include information on "judicial proceedings at different stages of the criminal prosecution, including indictment, arrest, detention of a suspect (whether in house or in prison), plea bargain, the initiation of trial, and any other information regarding the outcome of the prosecutorial effort" (Transitional Justice Research Collaborative 2014:4).[10] The TJRC data do not yet include civil cases, leaving out "disputes involving tort, contract disputes, property disputes, administrative law, commercial law, and other matters that involve private parties and groups" (Transitional Justice Research Collaborative 2014:5). It focuses solely on criminal cases. The TJRC gathered information on the type of prosecution that participated in the case: that is, the state's public prosecutor or any other private actor participating in the criminal proceedings (NGOs or victims' relatives).[11]

One of the more interesting and unique pieces of information that the TJRC offers is that private actors have participated extensively in human rights prosecutions in Latin America and Europe since the early 1980s. Figure 1 plots the numbers or counts of prosecutorial events initiated in a given year in Latin America and Europe against one or more defendants, which may or may not have ended in trial. It shows the year in which one or more prosecutorial events began, disaggregated by type of prosecutor. Of the 2,244 recorded prosecutorial events that occurred in these two regions during the period 1970–2010, the TJRC only offers complete information on the type of prosecutor that participated in the criminal proceedings for roughly 45% (999) of the cases.[12] Among the cases that are known, qualitative evidence suggests that private actors are actively engaged and that there is a rising and continuous trend toward pressing claims for individual criminal accountability in human rights cases (Lutz and Sikkink 2001; Sikkink 2011).

Figure 1 reports statistics from a full universe of 37 European and 27 Latin American democracies. It shows that private prosecutors have maintained a steady level of involvement since the early 1990s, while state prosecutors have progressively increased their efforts. However, comparing all of these cases could be misleading because of the discrepancy in number of countries between the regions, but also because of the wide degree of intraregional variation in human rights violations, for example, between Western and Eastern and Southern Europe, or between Central America and the Southern Cone. In the end, we include in this study only countries for which we obtained the criminal procedure code to measure the presence of private prosecution rights across time and for which we could find data on the institutional design of

[10]For the TJRC, outcomes "include both guilty and non guilty verdicts. They also include convictions, acquittals, plea bargains, and dismissals." An acquittal was considered as such only in those instances where the defendant received a "full acquittal," rather than a partial acquittal for all the crimes.

[11]Others recognize that "the data are still not without limitations, two of which are worth mentioning. First, in order to be replicable and manageable, the database does not pretend to include every prosecution that has been initiated [...], but only prosecutions and trials initially mentioned in the US State Department Annual Country Reports on Human Rights Practices. And second, although coders followed up with additional research on prosecutions initially mentioned in the State Department reports, gathering complete information for every prosecution was not always possible, especially information concerning the type of prosecutor" (Michel and Sikkink 2013:884).

[12]Even for Latin America and Europe, the regions of the world that are usually most widely covered in information outlets, finding information on the type of prosecutor that participated in these criminal prosecutorial efforts is a daunting task as this information is not always reported on the sources from which the database is coded (State Department reports or newspapers).

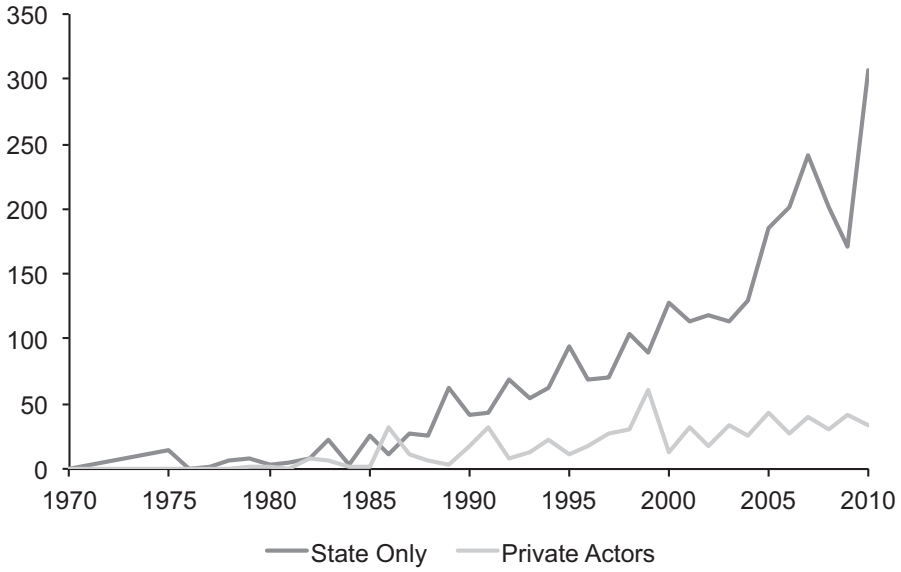

Fig. 1. Initiating Actors and Prosecutions in Latin America and Europe, 1970–2010
(*Notes.*'State only' prosecutions are those that are brought only by the state. 'Private actors' are those initiated against state agents where relatives of victims and/or non-governmental organizations (NGOs) also participated in the criminal proceedings.)

the PPO. For the sake of balance, we analyze an equal number of cases in each region from 1970 to 2010: 18 in Latin America and 18 in Europe (see Case Table in Appendix S1). In order to maximize variation, we include strong democracies like Costa Rica and Austria, but also weaker democracies like Russia and Guatemala. We also include countries that have had relatively mild experiences with repression—Uruguay and Denmark—but also countries that have witnessed horrific repressive violence—Romania and El Salvador. For the 1,436 country-year observations we include in our data set, 842 (58%) provide for rights to private prosecution.

In our 36-country data set, of the 615 prosecutions in Latin America and Europe for which we have data on the type of prosecutor, 165 cases had some actor litigating as private prosecutor (that is, victims, victims' relatives, and/or non-governmental organizations). That is to say that in *approximately one-quarter* of all prosecutorial efforts in Latin America and Europe (from those on which we have information on the type of prosecutor), private actors were actively engaged in seeking criminal accountability for human rights violations through the courts. To be sure, this is not the complete universe of human rights cases with private prosecution, but in this sample of 615 cases we can already see that private prosecution is potentially a key factor that is missing in studies of human rights criminal accountability efforts.

The fact that private actors are clearly involved in human rights prosecutions already suggests that victims or their relatives are indeed interested in criminal accountability and that they are not relying solely on the state to achieve it. That victims are themselves initiating human rights cases seems to be an appropriate response when considering that, in general, governments have either low incentives to prosecute and convict their own agents (Brinks 2008), or little legal room to prosecute given that amnesty laws are commonly implemented amidst democratic transitions (Lessa and Payne 2012).

Furthermore, the data suggest that private actors bring cases across different types of political contexts. Table 1 reports the number of prosecutions aimed at three different "criminal contexts." The first are those prosecutions devoted to punishing crimes of the former regime that took place before a democratic transition; the second are those devoted to try crimes committed by state agents in the period following a democratic transition; and the third are those that prosecute state agents for crimes committed within stable regimes that had not transitioned since 1970.[13] For an example of this classification, first consider Peru. After fraudulent elections in July 2000, President Alberto Fujimori fled Peru and faxed in his resignation. The semi-authoritarian regime then transitioned to a constitutional democracy. Two weeks after a ruling by the Inter-American Court of Human Rights in March 2001, which held the Peruvian state responsible for the Barrios Altos massacre in early 1991, a judge in Peru "ordered the arrest of two army generals and 11 members of the Colina Group death squad . . . "(Burt 2009:390). In

Table 1. Prosecutions by Type of Prosecutor and Criminal Context, 1970–2010

	Transitional	Post-Transitional	No Transition	Total
Only State	94 (20.9%)	289 (64.2%)	67 (14.9%)	450 (100%)
Private Actor	48 (29.1%)	88 (53.3%)	29 (17.6%)	165 (100%)
Total	142	377	96	615

Source: TJRC. We exclude 610 cases missing information on type of prosecutor.

[13]We focus on the period 1970–2010 and define as transitional countries those countries that have major and minor democratic transitions as defined by Polity IV. A major democratic transition is a six-point or greater increase in the POLITY score over a period of 3 years or less, and 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 (Marshall, Jaggers, and Gurr 2013).

2005, Fujimori himself underwent extradition proceedings in Chile after he was arrested during a visit. These efforts to try the former President and members of his security forces we categorize as "transitional" trials because they target leaders culpable for human rights violations that occurred *prior* to a democratic transition.

In Peru, trials proceeded in other criminal contexts as well. For example, in 2005 the Commission for Human Rights (COMSEDH) pursued a case against three police officers for beating Ricardo Huaringa Félix to death after his arrest in 2004. This was a crime committed by security forces *following* the democratic transition in 2001. This case attracted some international attention, involving petitions from organizations like Amnesty International and REDRESS. But because it did not try members of the previous authoritarian regime, it is of a different type than the prosecutions discussed above. We label this kind of trial "post-transitional."

Finally, we also include prosecutions of crimes that occur in contexts unassociated with political transitions. For instance, in Venezuela, prior to the gradual slide toward unchecked presidential power under Hugo Chavez in 2009, the country was generally considered by the Polity IV Project to be a democracy (Marshall et al. 2013). It was not, though, without its troubles. The regime of President Carlos Andrés Pérez oversaw, among other things, controversial IMF structural adjustments and the *Caracazo* protest, a violent state-led repression, and later two coup attempts (one by Hugo Chavez). In 1990, groups petitioned the Inter-American Commission on behalf of victims of police and soldiers that used excessive force in the shooting of 14 civilians near El Amparo in the Western state of Apure on October 29, 1988. In 1991–1992, military courts in Venezuela ruled that the perpetrators were not guilty and dismissed the case. In a reversal, the country's *Corte Marcial AdHoc* found in 1993 that the defendants were guilty and sentenced them to seven years. Later, the Inter-American Court ordered that Venezuela pay reparations to the victims. We label this case, which took place during turbulent but continuous democratic rule, as "no transition" because it did not (yet) involve a change in regime.

Although a majority of prosecutorial efforts were initiated in countries that at some point had a democratic transition (as they were dealing with crimes that occurred before or during the transition to democracy), there are still many prosecutions initiated in contexts of no transition. Perhaps more interesting is that the state (acting through the PPO) seems to be comparatively reluctant to engage in transitional cases, as most of their efforts have taken place in post-transitional contexts. Private prosecutors have participated more in transitional criminal contexts, contributing to about one-third of those efforts. In other words, private actors are more involved in trying former regime members for their involvement in previous human rights abuses.

This suggests that private actors take on more "difficult" and "ambitious" cases, if we consider that investigating and prosecuting crimes that occurred before a democratic transition are complicated affairs given political circumstances. Another possible measure of the difficulty of the cases that private prosecutors litigate is the rank of the defendant. Table 2 shows how each type of prosecution (that is, state only versus private prosecution) has targeted its efforts. To qualify as "high rank," the defendant at some point must have served as head executive (president) or as a leader of state security or military forces (at the level of a general). Private prosecutors do not target high-ranking officials a higher percentage of the time: In our data, they participated in only eight cases against former state leaders. This suggests that private actors do not often successfully target those in high-ranking positions. Still, private prosecutors must be recognized as a relevant actor, present in at least one-quarter of the recorded cases brought against state leaders and in nearly 30% of all criminal cases involving human rights abuses by low-ranking officers.

Table 2. Prosecutions by Type of Prosecutor and Rank of Defendant, 1970–2010

	Low Rank	High Rank	Unknown	Total
Only State	386 (85.7%)	25 (5.6%)	39 (8.6%)	450
Private Actor	148 (89.6%)	8 (4.8%)	9 (15.4%)	165
Total	534	33	48	615

Source: TJRC. As before, we exclude 610 unknown values.

Based on the available information, it is clear that private actors are extensively involved in domestic prosecutions in Latin America and Europe and that along with the PPO, they brought human rights cases to the courts. However, it remains unclear whether the right to private prosecution (i) explains variations in observed prosecutorial efforts across countries or (ii) alters the prospects of success of criminal accountability efforts. Are countries with the right to private prosecution significantly more likely to pursue criminal trials against state agents? And does private prosecution actually have an impact on the future of human rights law enforcement? In the next section, we operationalize our theoretical framework, introducing testable expectations and variables that we will use to evaluate those expectations. We then demonstrate how the use of private prosecution rights generates prosecutorial momentum, which helps us explain cross-national variations over time in human rights trials in Latin America and Europe.

Variables and Hypotheses

Though we have access to new data on human rights prosecutions in the world, we still do not have perfect information on the extent of private prosecution involvement in all cases—a problem we acknowledge in the Theory: Human Rights Criminal Accountability and Prosecutorial Momentum section. Nonetheless, we test the catalytic role that private prosecution plays in generating trials in Latin American and European courts. To do so, we create a *de jure* measure of private prosecution by coding whether the legal right was offered in the criminal procedure code (CPC) of each country. Our dummy variable takes on the value of "1" when the right to private prosecution is available to citizens in any of our 36 countries from 1970 to 2010. The language that refers to victims' rights is easy to identify. Just like CPCs detail the rights of the defendant, they also detail the rights of the victim. For example, Art. 75 of the Bulgarian CPC of 2005 states that "In the pretrial procedure the victim shall have the following rights: to be notified of his/her rights in the penal procedure; [. . .] to participate in the procedure as per this Code [. . .]." Similarly, the German CPC of 1987, Section 395, refers to "the Right to Join as a Private Accessory Prosecutor." In Latin America, the language is quite similar. In the CPC of Guatemala of 1992, Art. 116 explains

that "[. . .] the aggravated party may initiate the prosecution or adhere to the state's prosecution." Also, Art. 78 of the CPC of Nicaragua of 2001 explains the "Right to Constitute as a Private Prosecutor." These are only a few truncated examples of the many articles that relate to victims' rights. CPCs typically provide much richer detail on private prosecution rights throughout the code. To produce our measure, we studied CPCs in the various countries before and after they underwent major reforms. If rights to private prosecution were introduced during criminal procedure reform, then we coded that country a "1" in the year that the CPC entered into force.

We present the following hypotheses related to the right to private prosecution, which are based on the assumption that private actors, when allowed by law, will bring more criminal cases and struggle in the courts to achieve justice for victims.

Hypothesis 1: Countries where private prosecution is allowed will feature a higher number of human rights prosecutions and convictions.

The right to private prosecution, however, is not a right without limits. We recognize that bringing a case to trial is done within the context of a criminal justice system, where different actors interact: defense lawyers, judges, and most importantly, the Public Prosecutor's Office (PPO). For the purposes of this study, a PPO has to fulfill the following criteria, as defined by Van Aaken, Salzberger, and Voigt (2004:264). The PPO is a state organ that (i) has the competence and authority to investigate a crime (by gathering information/evidence or instructing the police to gather such information/evidence); (ii) has the competence to indict or press charges; and and most important (iii) represents the interests of the public (that is, the state). Data on the PPO were drawn from the official Web sites of the PPO in each country and, when available, from their organic laws. The data set possesses information on the location of the PPO from 1970 to 2010. A dummy variable measure for each country-year registered whether the prosecutorial organ is an autonomous public ministry (Autonomous PM), located outside the executive and judicial branches of government. Although we recognize that location of the PPO may not translate into *de facto* autonomy, we do assume here that PPOs that are designed as autonomous institutions are more likely to be shielded from political interference; thus, we hypothesize that:

Hypothesis 2: Countries with an Autonomous PM will feature a higher number of human rights prosecutions and convictions than countries with PPOs within the judiciary or the executive.

A key component to the theory is that the relationship between private prosecution and the initiation of criminal trials against human rights violators is inconstant over time. Specifically, the theory expects that the activation of private prosecution rights to human rights cases will develop *prosecutorial momentum*. There are two ways of further conceptualizing momentum, which is complexly related to the acceleration of social and judicial change. The first way involves an external factor: world time (Giddens 1984:251). The effect of private prosecutions should change with global normative shifts that take place over discrete historical periods. The notion of "individual criminal accountability" for human rights violations has become more diffuse, first with Argentina's trial of the juntas in 1983 and the prosecution of heads of state like Chile's Augusto Pinochet and Serbia's Slobodan Milosevic in the 1990s (Sikkink 2011:1–4). A direct result of this diffusion could be that private actors, who learn from global focal events, seek accountability in their own settings. Because the demand for criminal accountability is higher in countries with more repressive violence, evidence should reflect that countries with higher-than-average levels of repression *and* rights to private prosecution feature more human rights trials as world time progresses. That is, we should observe an interactive effect between repression and private prosecution over time. In order to model these effects, we use two variables: The first is a robust normalized estimate of latent physical integrity protections (HR Protection) recently created by Christopher Fariss (2014) and a nominal variable (World Time) registering which of eight different five-year periods each observation belongs to, starting with 1970–1975(0) and ending with 2005–2010(7).[14]

A second conceptualization of momentum involves accelerating shifts in internal domestic practices. The theory expects that early efforts made by private prosecutors will resonate in the future by generating a demonstration effect, creating legal openings, and/or pressuring state prosecutors to reform their own actions. This jibes with Kathryn Sikkink's notion of a "justice cascade" (Sikkink 2011). If cascades occur, then the impact of private prosecution should become more pronounced after initial successes at bringing cases to court. In order to account for this possibility, we created a measure called Momentum that counts up yearly after the first prosecution was initiated in each sample country. We expect the effect of private prosecution to strengthen as the time since the first prosecution increases.

Hypothesis 3a: High-repression countries with rights to private prosecution will have more human rights prosecutions over time.

Hypothesis 3b: Countries with private prosecution feature a greater number of human rights prosecutions as the number of years since the first prosecution increases.

Controls

Important intervening and confounding factors must also be considered in this analysis. First, because our measure of private prosecution is *de jure*, it lacks content concerning the actual behavior of private actors. This is a problem because laws on the books do not necessarily translate into practice. Unfortunately, no complete data exist to measure the activity of private prosecutors in prosecutorial efforts (see Private Actors and Human Rights Prosecutions); therefore, the models include an imputed measure of the number of human rights NGOs (HRNGOs) active in the country, taken from Murdie and Bhasin (2011).[15] Because HRNGOs assist victims in seeking justice for human rights violations, their presence in a

[14]We chose the five-year nominal periodization of time for two reasons: First, we expect that changes in world time happen over years, rather than every year, and periodizing the observations allows this to be modeled; second, a decadal periodization groups too many observations together, causing loss of information. The models were run with all different specifications, including "Year" and "Decade" controls, and the findings in each case were similar enough to sustain the interpretations in the next section.

[15]For multiple imputation, see Findings.

country should exert an independent effect on the outcome variable; but according to the theory, HRNGOs should also interact with the right to private prosecution. Active HRNGOs that have the resources to mobilize the law will be more effective if they are given legal standing as private prosecutors in court.

Another potential intervening factor for our theory is change in democracy. As is demonstrated in Table 1, human rights prosecutions often take place during or after democratic regime change, which is referred to as transitional justice. Like the presence of repressive violence, democratic transition is a factor that affects the demand for prosecutions. Citizens that recently lived under an autocratic regime often will campaign for justice against former state-led abuses. If the theory is true, then private prosecution should explain observed variation in the outcome variable, prosecutions, over and above the mere presence of a change in regime. To analyze whether this is the case, we included a variable measuring year-to-year change in Polity II scores (Democratic Change), with higher values indicating a swifter and more substantial process of formal democratic institutionalization (Marshall et al. 2013). To control for overall Level of Democracy, the regular non-differenced Polity II measure is also included in the models.

Third, given the emphasis that the literature has placed on rule of law as theoretically relevant for human rights prosecutions and access to justice, a measure of Judicial Independence is also included (Linzer and Staton 2012). This measure is normalized (0–1), and it is based on a Bayesian model that assigns a value for each country-year after accounting for information from a number of different data sets purported to measure judicial independence. For ease of interpretation, we re-scale this variable from 0 to 100. We expect that that judicial independence will be positively correlated with more prosecutorial activities. Legal studies have also shown that access to the justice system tends to be unequal (Galanter 1974). In particular, trials are quite an expensive means to push for accountability. Thus, to account for the role that development may play in providing capacity to initiate prosecutions and sustain trials, we included in the model an indicator of GDP Growth. Countries with greater growth will likely have more resources to devote to the judiciary. A list of variables and summary statistics is available in the Appendix S1.

Findings

Given the data limitations explained in Private Actors and Human Rights Prosecutions, we consider a count model the most appropriate tool to explore the role of private prosecution in human rights cases in Latin America and Europe. Count models take as their dependent variable the count of events, which in this case is the number of prosecutions initiated and the number of convictions produced in any given year.[16] The range of prosecutions against state agents initiated in any given year is 0–13, and the range of convictions is 0–8. To assess the relationship between private prosecution and the amount of trials observed in a country, we test whether having the right to private prosecution in a criminal procedure code, net other factors, has any impact on the number of prosecutorial efforts observed in that given country in a given year. Also, because we hypothesize that private prosecution will help build prosecutorial momentum and will even have an impact on future outcomes, we also test whether the presence of the right to private prosecution impacts how many convictions a country has had to date.

Two base models are specified: one with count of prosecutions as the dependent variable and one with convictions (full results reported in the Appendix). Both employ negative binomial regressions with multiple imputation to address the problem of missing values in the covariate matrix.[17] The negative binomial model fits best because it accounts for overdispersion in the prosecutions count data.[18] Model 2 includes an additional lagged count of previously initiated prosecutions, to control for the possibility that the number of convictions is simply a function of a higher number of overall trials. The findings, depicted in Figure 2, support the hypothesis regarding Private Prosecution (H1), which is one of the most statistically and substantively robust coefficients in both models. Countries with rights to private prosecution have, on average, 42% more trials of state agents in any given year, and 38.6% more convictions.[19] These findings hold, even when controlling for the overall level of HR Protection, Judicial Independence, Level of Democracy, Democratic Change, and GDP Growth. The second hypothesis (H2), regarding the PPO, is not supported. Though in the direction predicted, the coefficient for Autonomous PM is statistically insignificant. As Figure 2 shows, the predicted counts caused by a one-unit change are indistinguishable from zero. Counterintuitively, Judicial Independence is not statistically significant. This supports a theoretical point raised earlier, that legal rights matter as a means to open the courts to victims, and it explains why empirically we see private actors bringing claims to the courts even in contexts where judicial independence is still weak, like Guatemala.

Some of the control variables also prove to be significant, including HR Protection, HRNGOs, and Level of Democracy, though not Democratic Change. By far, the most powerful of all the variables is HR Protection. A one-standard-deviation change in latent protection against abuse decreases the count of prosecutions by 64.2%. Additionally, as the number of HRNGOs in a country increases by 10, the count of prosecutions increases by roughly 14%, and a one-standard-deviation change increases the count by 57.7%. Both of these findings suggest that a demand-based theory of criminal accountability is warranted, and it highlights the conditions in which

[16]The prosecutions data drawn from the TJRC may be subject to certain limitations or biases that are associated with all events data. Uneven reporting across cases in source documents, human coding error, and data management errors can all affect final event counts. Because the count variables are used as the dependent variables in our analysis, however, these measurement problems are accounted for in the count model's error term.

[17]The dependent count variables have no missing values and are therefore not imputed. Imputation algorithms are used to generate values primarily for the HRNGOs and Judicial Independence variables. Imputations are created with a Bayesian iterative Markov chain Monte Carlo (MCMC) procedure in STATA, which assumes a multivariate normal model. Twenty iterations were performed, and these variables were assumed to be a function of World Time, HR Protection, GDP, and GDP growth.

[18]This simply means that the conditional variance is larger than the conditional mean.

[19]These figures are derived by exponentiating the coefficients. In raw numbers, this equates to a little over 0.3 prosecutions each year, which may seem a minimal effect. However, it should be noted that most of the observations in the outcome variable (941 of 1,330) are 0, so the mean count is low. It should also be noted that initiating even one prosecution, or achieving even one conviction, in any year is sometimes a difficult venture, so increasing the probability of either by roughly 40% is quite significant.

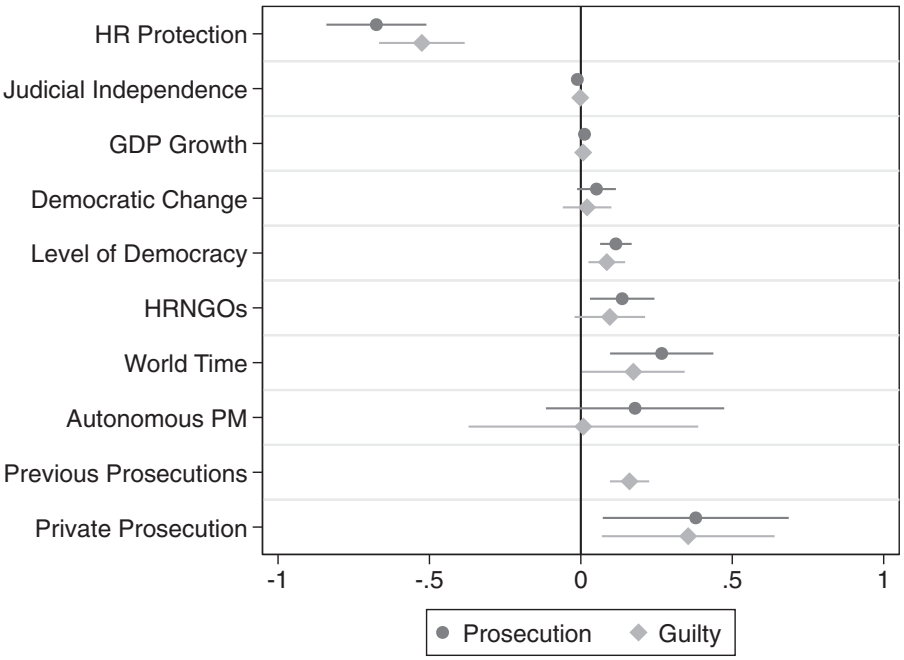

Fig. 2. Effect of Various Factors on Count of Prosecutions and Convictions
(*Notes.* Depicted are the average marginal effects of the independent variables on expected yearly counts of prosecutions and conviction, with 95% confidence intervals. When the whiskers cross the zero line, the effects are indistinguishable from zero. For the purposes of visualization, HRNGOs and Previous Prosecutions are transformed by a factor of ten, so that changes reflect the effect of a change in ten NGOs or previous prosecutions.)

private prosecution will matter the most. The more victims produced by state violence, the greater chance that prosecutions will be needed; the more HRNGOs are available to assist victims' litigating, the more likely victims will see perpetrators taken to court.

The covariates included in the models, treated independently, cannot be used to evaluate the more complex relationships theorized in variables and hypotheses. How do these factors interact with the presence of the right to private prosecution over time? Does the private struggle for justice generate momentum in any measurable way? In general, the models offer limited support for Hypothesis 3. Since the 1970s, passage of each five-year period brings a 30.7% increase in the count of trials in any given country, and a 19% increase in convictions. But while this result supports the notion that world time is influential, it cannot serve as an adequate test of the hypotheses about momentum. The first momentum hypothesis (H3) is a formal expectation about the impact of world time. If it is the case that justice is "cascading," in some part due to the efforts of private actors fighting state violence and impunity through litigation, then we should witness an interactive effect between private prosecution and measures of repression over time. That is, the effect of private prosecution, conditioned on repression, should grow stronger as time passes. Figure 3 represents the best test of this theory, based on a specification slightly different from Model 1. We substituted a dichotomous variable, High Repression, for HR Protection, and interacted it with Private Prosecution. High Repression is recorded "1" in any country-year that was in the lower 50th percentile of HR Protection, meaning that the country was in the more repressive half of the sample in that year. The figure shows that across time periods, the country-years most likely to have human rights trials are those with high levels of repression and rights to private prosecution. This serves as significant support of Hypothesis 3a: litigation became a more common response to government violence since the beginning of global human rights campaigning in the mid-1970s (Moyn 2010). However, this figure also demonstrates that the effect of World Time is nonlinear. The period 1995–1999 was the heyday of domestic human rights prosecutions, and since then the expected count of prosecutions has decreased by nearly 40%.

Though useful, the test of world time depicted in Figure 3 cannot tell us about the *internal* momentum effects predicted in Hypothesis 3b. The decline in trials in the 2000s might simply reflect an overall decline in the global count of prosecutions across countries, rather than a weakening of demand in specific countries. If private prosecution generates prosecutorial momentum as predicted—by inspiring other victims, opening legal space for future litigation, and pressuring state actors—then the number of trials initiated should increase as the time since the initial criminal prosecution increases. Figure 4 demonstrates that this is in fact the case. The predicted count of prosecutions increases as the interaction between Private Prosecution and time since the first trial (Momentum) gets larger. This suggests that private prosecution efforts become more important over the long term, after early barriers to litigation are overcome. Like the findings on World Time, though, the internal momentum effect of private action is not unmitigated. As Figure 4 shows, when controlling for the sum of previous trials, Private Prosecution appears to generate little momentum toward guilty verdicts. The most straightforward interpretation of this finding is that having private prosecution rights does not produce an increased rate of guilty verdicts over time, though countries with private prosecution do have more guilty verdicts overall (See Figure 2).

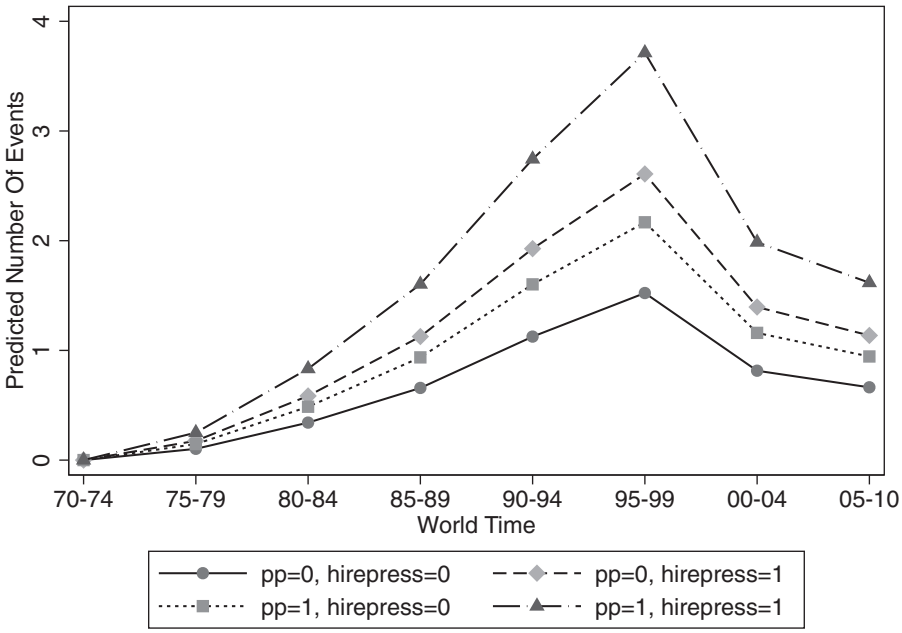

Fig. 3. Predictive Margins for Interaction of Repression and Private Prosecution Over Time
(*Notes.* In the legend, pp=1 if the country allows for private prosecution. A country-year gets a value of 1 on hirepress if it is in the lower 50th percentile on the HR Protection variable, meaning that it is more repressive than 50% of cases. Estimates based on Model 1 specification with a dichotomous *High Repression* variable substituted for the *HR Protection variable.*)

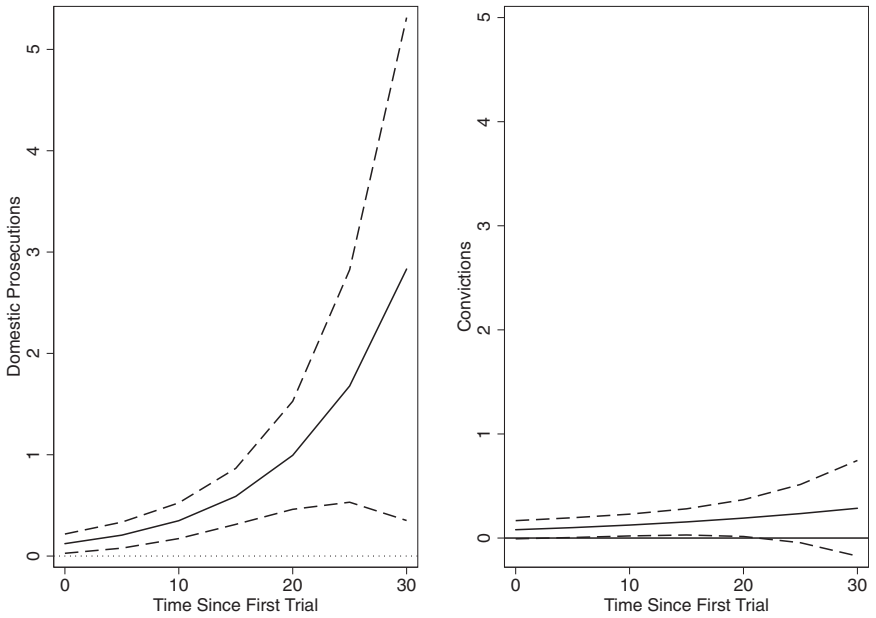

Fig. 4. Conditional Marginal Effects of Private Prosecution and Time Since First Trial
(*Notes.* Based on a negative binomial estimation of interactive effects of *Private Prosecution with Momentum* variable, controlling for level of *HR Protection* and *World Time.* As before, the control for previous number of prosecutions is included in the Convictions model.)

Figure 5 depicts a final set of interactive effects between Private Prosecution and HRNGOs. Because the measure Private Prosecution captures a *de jure* right written into a country's criminal code, we cannot be sure that it is a good proxy for the behavior of private actors in line with that right. Though it is still imperfect, one way of testing whether this is the case is examining the interaction between the right to Private Prosecution and HRNGOs. Figure 5 shows the conditional marginal effect of the interaction is positive and distinguishable from zero, even though its substantive significance is small. This is to be expected: HRNGOs assist in bringing private criminal

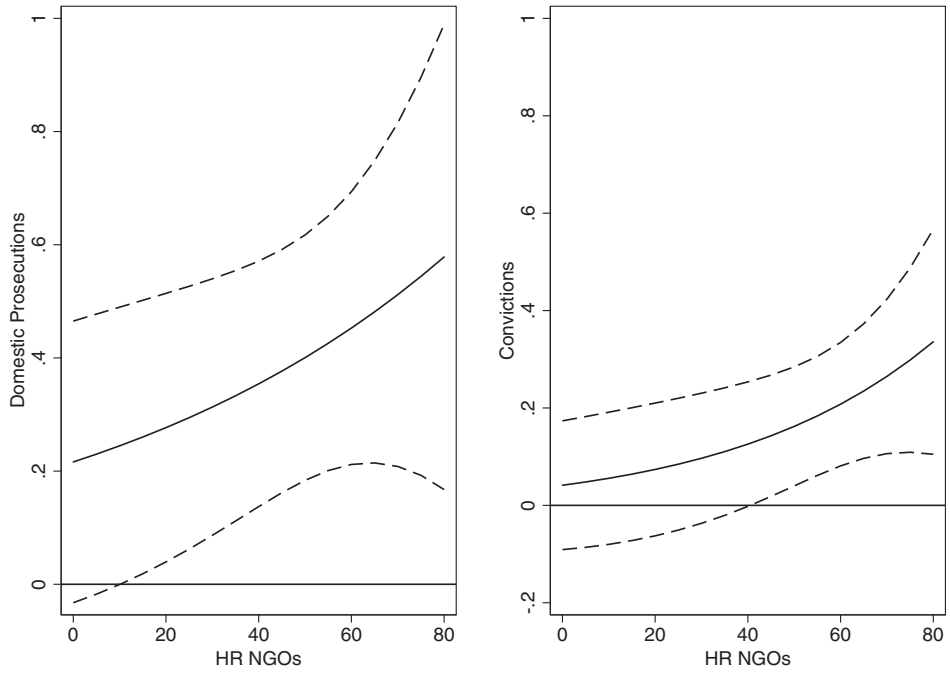

Fig. 5. Conditional Marginal Effects of Private Prosecution and HRNGOs (*Note*. Based on Model 1 and Model 2 specifications.)

claims, though they are by no means necessary for the process to be activated. Still, that the effect of the right to private prosecution strengthens with more HRNGOs in the country is some evidence that private prosecution as *de jure* right is claimed in practice by societal actors.

Case Examples

To this point, much of the discussion is based on quantitative data. We find evidence that *de jure* rights to private prosecution can translate into more human rights accountability in practice and that private actors generate momentum over time when they exercise their rights to get involved in criminal cases against state agents. We conceptualize prosecutorial momentum as being produced by private prosecutors in three distinct and sometimes reinforcing ways: inspiring other victims to press claims, producing legal openings, and pushing state actors. In this section, we offer qualitative illustrations of how prosecutorial momentum works to improve access to justice for victims of human rights violations, due to the catalytic role that private prosecution plays in the move toward human rights compliance and enforcement over time.

Germany: Inspiring More Litigation

Evidence of prosecutorial momentum appears in the European context. East Germany experienced a unique type of transition that has had important consequences for transitional justice efforts. The transition meant that both the repressive regime that had ruled for more than four decades disappeared, along with the country itself, and the polity was thus reunited (or absorbed) to a wealthier, democratic regime through a unification process (1990). This provided important resources for transitional justice efforts. Thus, and in part pushed by the memory of the abuses by the Nazi regime, reunited Germany "engaged in one of the most comprehensive transitional justice projects, comprised of trials, a parliamentary commission of inquiry similar to a truth commission, a commission to give citizens access to their secret police files, property restitution, lustration, and rehabilitation" (Mihai 2010:217).

In contexts such as those in Germany, the society that emerged after the transition lacked organizations working on justice (litigation) and instead focused its efforts on transparency (truth) as well as cultivating democratic values and transparency (Sa'adah 1998). To our knowledge, NGOs played no role in the early prosecutorial efforts after the reunification process. This raises interesting questions relating to world time (that is, the global normative shifts that take place over discrete historical periods) and the conditions of when private prosecution will be used. In contrast to the examples from Chile and Guatemala, explained below, where the use of private prosecution has been buttressed by NGOs providing a vast support structure to mobilize for justice,[20] in Germany evidence suggests that some victims used and resorted to existing legal rights to fight an unresponsive state.

After reunification, the most relevant human rights trials in Germany concerned prosecutions against Eastern border guards for their roles in the use of deadly force against Eastern citizens that attempted to escape over the border into West Berlin or the Federal Republic of Germany. Before reunification "it was customary for guards to receive official praise and rewards for such actions" (Quint 1999:304). The first border guard trial began on September 2, 1991. It involved the killing of Chris Gueffroy, who was shot to death a few months before the fall of the Berlin Wall in 1989. His death was officially declared legitimate, the result of an attack on military installations. It was his mother, Karin Gueffroy, who, using procedural law to her advantage, decided to seek justice for her son and participate as private prosecutor in the

[20]A characteristic that is actually shared across Latin America. See for instance, Michel (2012), Michel and Sikkink (2013), and Burt (2013).

criminal proceedings. Karin gathered most of the evidence against the defendants. Commentators at the time "argued that the proceedings would not have been initiated at all had it not been for Karin Gueffroy's investigatory work" (Mihai 2010:216).

At the end, the guards that killed Gueffroy were convicted, though with mild sentences. This outcome was in part attributable to the fact that the reunification process faced legal obstacles. A legal amnesty per se was not issued, but an effort to protect the rule of law created important consequences for meaningful prosecutions. "According to the Unification Treaty, criminal offences committed in the GDR could only be prosecuted if they were also punishable under GDR law. The principle of *nulla poena sine lege* is clearly stated in the Basic Law: 'an act could be punished only if it was an offence against the law before the act was committed'" (Mihai 2010:216). This meant the treaty made successful prosecutions extremely difficult to achieve (Posner and Vermeule 2004).

However, this case exerted a demonstration effect that generated prosecutorial momentum. Probably the most important consequence of the Gueffroy's case was that it became widely popular and, apparently, served as an inspiration to other victims' relatives. By the end of the 1990s, there had been at least 90 trials against border guards (Quint 1999:305), and in many of them victims' relatives participated as private prosecutors. Victims' participation has even been reported in prosecutions against high-ranking officials, like the case against President Honecker (Muller 2001). Thus, Germany highlights that even in the absence of a vast support structure, one case of private prosecution can inspire other victims push for justice and generate prosecutorial momentum.

Chile: Producing Legal Momentum

Probably one of the most famous attempts to prosecute a former head of state is that of Augusto Pinochet, a case of universal jurisdiction initiated by Spain in 1998. Less known, however, are the decades of continuous legal struggles that preceded that case. The Chilean efforts to prosecute human rights abuses highlight the usefulness of private prosecution as a legal mechanism that empowers private actors to produce prosecutorial momentum even when facing an unresponsive state. Supported by NGOs, victims' relatives found in domestic procedural law a legal resource to fight for justice, even in a context where the political will was against accountability. It is known today that the first prosecutorial efforts were made by "an organization of the Catholic Church, the Vicaría de la Solidaridad (Vicariate of Solidarity). The Vicaría gathered for years large amounts of information from the victims' families, and in 1978 decided to present, in the name of 70 victims, a criminal complaint against various high-ranking officials, including General Manuel Contreras Sepúlveda, head of the DINA (the National Intelligence Service)" (Michel and Sikkink 2013:895). This first legal step against the dictatorship eventually inspired more victims' relatives to initiate more prosecutions using the right to private prosecution.[21]

In 1978, the enactment of a self-amnesty law precluded prosecution for crimes committed during the crudest part of the dictatorship from 1973 to 1978, excluding cases that were already in trial or cases where defendants were already convicted (Collins 2010:68). Furthermore, in the Chilean criminal justice system, judges also acted as prosecutors (that is, the PPO was within the judiciary), which translated into stalled criminal investigations, the automatic application of the amnesty law to most cases, or the transfer of cases to military courts where usually the amnesty law was applied in an automatic fashion (Hilbink 2007, 2008; Collins 2010).

For years, recognizing that the political climate was against any form of accountability, victims' lawyers only worked to prevent cases from being sent to the archive or from being dismissed. Thus, for decades private prosecutors focused only on keeping their cases open within the courts. This meant that the success of most of these cases was not defined by their becoming trials or convictions, but by the case having a chance to wait for a more receptive judiciary. Interestingly, the Pinochet government did not repress these first litigation efforts, which allowed for NGOs to support victims and their relatives in using private prosecution as a means to channel grievances through the courts. Eventually, just like our theory suggests, over time these litigation efforts did pay off.

The fate of human rights prosecutions did not change after the transition to democracy in 1989.[22] The "courts did allow some justice, most prominently with the conviction of Manuel Contreras in 1995 for the assassination of Orlando Letelier in Washington DC but this was largely due to U.S. interest and pressure in this particular case of a violation on U.S. territory" (Michel and Sikkink 2013:896). These developments came only after important judicial reforms were introduced in the late 1990s, which greatly improved judicial independence.[23] The impact of such reforms was immediately evident, as judges reportedly stopped automatically applying the amnesty law (Hilbink 2008:192). Facing a better domestic environment by the end of 1998 and using the public support generated by the arrest of Augusto Pinochet in the UK (Roht-Arriaza 2005:22), private prosecutors brought 60 new claims to the courts by private prosecutors. These became known as "the *querellas* (or private prosecution cases) against Pinochet." (Michel and Sikkink 2013:896).

Thus, in Chile private prosecution generated prosecutorial momentum not only by inspiring future prosecutions, but most importantly, by creating legal openings. Today, Chile is one of the countries with the most human rights prosecutions for past violations in the region. This progress cannot be explained only as the result of democratization and the strengthening of judicial independence (Tiede 2004), but also by the way that private prosecution allowed societal actors to open the legal space for justice. Through the use of private prosecution rights, human rights lawyers introduced creativity into litigation, such as making the legal argument in the Poblete Cordova case that kidnapping constituted an ongoing crime that was excluded from the amnesty law. (Michel and Sikkink

[21]Cath Collins (2010:67), an expert on Chile, notes that although during the dictatorship a few cases started through police investigations, these resembled "Kafkaesque affairs" that actually put claimants at risk of facing charges.

[22]Although there were attempts to deal with past repression, evidenced in the 1991 report of the Rettig Commission *(Comisión Nacional de Verdad y Reconciliación)*, the focus was not on criminal accountability.

[23]By 1998, Chile had introduced various important judicial reforms. Particularly useful for transitional justice efforts, the Chilean Supreme Court created "specialized judicial benches" that were in charge of human rights cases. Furthermore, judicial reforms changed appointment procedures in the judiciary radically changed the composition of the Supreme Court. These meant that by 1998, a minority of the Supreme Court justices (four out of 21) came from the Pinochet administration (Collins 2010:81).

2013:897). This creativity provided the grounds for the amnesty law to be circumvented over time.

Guatemala: Urging State Actors

In contrast to Chile, Guatemala's struggle for individual criminal accountability for human rights violations started after the transition to democracy (1985) and peace (1996). Amnesty was granted to both military personnel and guerrilla groups as part of the peace agreement in 1996, but the democratic transition and a series of judicial reforms opened a small window for victims or their relatives to channel grievances through the courts. This was possible because the amnesty explicitly excluded acts of genocide and certain acts against humanity, which gave legal room for victims' lawyers to bring some claims (Roht-Arriaza and Gibson 1998).

However, in Guatemala, *de jure* independence did not translate easily into *de facto* independence, and compared to Chile, it has seen fewer successful prosecutions. With notable exceptions, such as the Myrna Mack or the Bishop Gerardi cases,[24] most human rights abuses have remain untried, in particular those committed against the indigenous population during the crudest period of repression called *La Violencia*, the worst of which occurred when General Efraín Ríos Montt was in power (1982–1983) (Sanford 2003). But similar to Chile, NGOs that had for years worked as private prosecutors for victims were quite attentive to the political will around the issue of accountability. After noticing a more favorable political climate in 2009, two NGOs joined forces. CALDH *(Centro para la Acción Legal en Derechos Humanos)* and AJR (Association for Justice and Reconciliation) together filed a criminal complaint that forced the reopening of a previous genocide investigation that had stalled for years. As in Chile, private prosecution and time interact to produce prosecutorial momentum in Guatemala. The timing of the genocide complaint responded in part to a sense of urgency for justice: NGOs realized that Rios Montt was getting older and could die without a trial.[25] Initially, the defense appealed the new criminal complaint through various dilatory tactics, in part claiming that the former dictator was in poor physical condition, but Ríos Montt was protected and enjoyed immunity as a member of Congress. The turning point came on January 26, 2012, when Judge Carol Flores decided that there was enough evidence to continue with the proceedings. Rios Montt was stripped of his immunity.

The change in the political climate, which gradually improved judicial independence, helped private prosecutors renew efforts for justice. Lawyers and activists report a considerable decrease in threats since the mid-2000s, compared to those they used to receive in the 1990s. The relationship with the PPO also improved as the political will within that institution improved. A change in political climate was signaled when the leftist President Alvaro Colom appointed in 2010 Claudia Paz y Paz as the new District Attorney, a lawyer who previously worked in academia and human rights organizations. But also, NGOs noticed a considerable change in how "receptive" judges are now to their requests.[26] In Guatemala, the years of efforts by human rights lawyers somehow pushed or inspired over time state actors to be more receptive toward accountability. The Ríos Montt case demonstrates that judicial independence on the books, however, may not translate well in practice. The conviction of Ríos Montt on May 20, 2013, showed lower court judges and a PPO willing to take the risks involved in the prosecution and conviction of the former dictator.[27] But the subsequent annulment of the conviction by the Constitutional Court also highlights how vulnerable the top echelons of the judiciary still are to pressures from the elite.

The case of Guatemala shows that the use of private prosecution by societal actors is very important when facing an unresponsive state. Private prosecutors brought cases to the courts and even generated prosecutorial momentum over time by reviving the cases when the political climate was perceived as more receptive, and by pushing key state actors within the judicial system to support their pleas for justice.

Conclusions

When observing the advance of domestic human rights enforcement in the world, skeptics tend to make two assumptions. First, countries with trials possess conducive political circumstances, such as an absence of serious opposition to the advance of justice policies. Second, human rights trials occur in the two regions of the world already culturally predisposed to rights norms: Latin America and Europe. We take issue with both of these assumptions. They place undue emphasis on determinative structures and fail to account for the processes behind the struggles for justice. The advance of justice for rights violations in large part results from activists' efforts to take advantage of existing legal rights and use the courts as an arena for change. These efforts set in motion prosecutorial momentum because they inspire other victims to press claims, create legal openings for future prosecutions, and/or urge state actors to increase accountability. When the PPO is not willing to push for justice but the right to private prosecution is present, victims use this right to bring cases against egregious violators. They do so even when facing significant political risks, as in Chile and Guatemala, or even when lacking a support structure, as in Germany. In places where the law does not provide the right to private prosecution, it is more difficult for victims to bring cases. These variations exist within the regions that are seen to uniformly advance rights-based issues in the world. We demonstrate this by showing with quantitative and qualitative evidence from 36 European and Latin American countries that private prosecution rights are on average associated with higher counts of trials.

Our article adds to the debate on normative change that has puzzled international studies scholars for decades. A dynamic historical-institutionalist approach explains why we should understand domestic human rights enforcement as more than solely a product of state policy. States and regimes are not good at monitoring them-

[24]See, for instance, Lynn (1998), Wiesel and Corillon (2003), and Goldman (2007).

[25]Interview by Veronica Michel with Rodrigo Salvado, member of CALDH, in Oxford, England, June 30, 2012.

[26]Ibid.

[27]One of the judges in the panel, Jazmin Barrios, is known for her commitment to human rights and was also involved in other relevant human rights cases, including the conviction of the killers of Bishop Gerardi in 2007. See, for instance, "Jazmin Barrios, la jueza que condeno a Rios Montt" *Prensa Libre*, May 11, 2013; "Jazmin Barrios, la jueza que no temio a los militares" *Presna Libre*, May 18, 2013. Retrieved from: http://www.prensalibre.com.

selves. It takes challenges from citizens to propel human rights progress. The other point of the argument is to confront top-down, reductionist explanations of the "justice cascade" that are based on regionalism. Regions themselves are not actors, and they do not make change uniformly. Differences within regions matter a great deal. In fact, if our theory of enforcement through private prosecution holds true, then we should expect actors from countries in other regions, who enjoy the right to private prosecution, to also bring cases against abusive state agents. We can only test this idea when we gather more data on legal codes from Africa, Asia, and the Middle East. Until then, our study suggests that victims' litigation efforts, not their state leaders or their cultures, largely created the human rights change that occurred in Latin America and Europe.

Furthermore, this study raises interesting questions for both scholars and policymakers. Our findings suggest that change in respect for human rights can happen over time, and the introduction of strong victims' participation rights may catalyze efforts at domestic enforcement. This study also highlights the issue of judicial reform and brings to our attention the importance of procedural rules in legal systems. Leaders looking for ways to buttress the rule of law in the long term may want to first strengthen victims' rights in criminal procedure—and therefore provide societal actors with legal tools to push for human rights accountability in the long run.

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Supporting Information

Additional Supporting Information may be found in the online version of this article:

Appendix S1. Statistical Tables.