THE COLLAPSE OF IMPUNITY REGIMES IN LATIN AMERICA: LEGAL CULTURES, STRATEGIC LITIGATION AND JUDICIAL BEHAVIOR

A Dissertation

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by

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During the 1980s and 1990s, 16 Latin American countries passed some sort of amnesty law to bar prosecutions against former state officers responsible for perpetrating human rights violations during dictatorships and armed conflicts. Today the situation is very different. Since the early 2000s, judiciaries across the region have become a beacon of progress in the area of transitional justice by fully embracing a set of juridical arguments and doctrines derived from international human rights law that enabled them to take bold jurisprudential steps against impunity. Why did judicial corporations evolve from unresponsive bureaucracies into suitable arenas for the advancement of rights claims? Under what conditions do judicial branches acquire the technical capabilities and the political will to become powerful players in salient political struggles such as those surrounding transitional justice?

I argue that the aforementioned sea changes in jurisprudence are not circumstantial adaptations to changes in the political environment, but instead result from internal revolutions within judicial corporations. This transformation involves
the deinstitutionalization of formalist and positivist legal cultures, historically protective of conservative interests in Latin America, and the entrenchment of a juridical vision committed to the defense of human rights. Activists and their lawyers succeed in sending criminals to jail when they modify the legal thinking, technical capabilities and political will of judicial corporations. Effective activists contest control over the allegiances of judicial actors by mounting informal pedagogical interventions to familiarize judges and prosecutors with complex and unknown juridical doctrines derived from international human rights law. By promoting the acceptance of these novel arguments, activists make the toppling of impunity dispositions legally possible. Litigants further the process of institutional change by seeking the replacement of judicial actors who staunchly oppose the progress of the lawsuits. In addition to enhancing judges’ technical capabilities, these transformations reshape their understanding of their institutional mission, providing judicial actors with cultural resources that facilitate coordinated resistance against soldiers and politicians seeking to put trials on hold.

I explore these processes by comparing the cases of Argentina and Peru. Fieldwork in both countries included research in newspaper archives; content analysis of rulings and transcripts of oral trials; participant observation in various courts; interviews with political leaders, victims, human rights lawyers and especially, judges and prosecutors; and original surveys of judicial actors. Using these sources I am able to attribute the success of transitional justice in Peru and Argentina to the aforementioned informal mechanisms of institutional change activated by human rights organizations.
Para la abuela Esther, que partió cuando comencé con este proyecto
Para mamá, que estuvo siempre y está
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As an Argentine citizen born in the aftermath of the last military dictatorship, I belong to the first generation in my country’s history that has never experienced the breakdown of democracy. The human rights movement that emerged as a result of the painful legacy of state terrorism has been for many of us one of the moral compasses in our political upbringing. The issue of criminal prosecutions, however, opened rifts across society and is still a matter of heated controversies. My hope is that by understanding what goes on in courtrooms across the continent it will be easier to finally master our “un-mastered pasts,” and lay the factual and ethical foundations for a political game defined by high talk about citizens’ rights and responsibilities.
Looking back at that conversation, it’s remarkable how a few minutes of your life can shape your long-term obsessions, revolutionize your social networks, define who you will be as a professional, and lead you to incur in so many debts. Let me begin to repay some of them.

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the memory of my grandmother, who passed away when I began working on this project,
and to my mother, who always has my back.
Law is conservative in the same way in which language is conservative [...] It seeks to assimilate everything that happens to that which has already happened [...] Thus the lawyer's virtually instinctive intellectual response when he is confronted with a situation is to look for the respects in which that situation is like something that is familiar and that has a place within the realm of the understood.

Richard Wasserstorm

A rigorous science of the law is distinguished from what is normally called jurisprudence in that the former takes the latter as its object of study. In doing so, it immediately frees itself from the dominant jurisprudential debate concerning law, between formalism, which asserts the absolute autonomy of the juridical form in relation to the social world, and instrumentalism, which conceives of law as a reflection, or a tool in the service of dominant groups.

Pierre Bourdieu

Litigants are the unknown soldiers of jurisprudence

Mexican Supreme Court judge, Interview

To put the military in 2010 in jail is like hunting lions in the zoo.

Former Argentine prosecutor, Interview
CHAPTER 1:
INTRODUCTION: THE COLLAPSE OF IMPUNITY REGIMES IN LATIN AMERICA

1.1 The Empirical Puzzle: From Unresponsive to Responsive Judiciaries

One of the most conspicuous ways in which states exercise power is by managing people’s time. By making citizens wait in line to schedule a doctor’s appointment in a public hospital, or to obtain a benefit from a welfare office, the state plays with citizens’ expectations and greatly affects their ability to plan their lives (Auyero 2011). In the Latin American context, the most brutal manifestation of states’ capacity to force people to wait is the disappearance of thousands of individuals during the dictatorships and armed conflicts of the 1970s, 1980s and 1990s.\(^1\) Victims’ relatives, unaware of the fate of

\(^1\) In Argentina the truth commission set up by President Raul Alfonsín in the 1980s documented nearly 8000 cases of forced disappearances during the last military dictatorship (1976-1983), but human rights organizations suggest the number of victims is much higher *circa* 30000 (CONADEP 1984; Acuña 2006). In the case of Paraguay, the final report of the Truth and Justice Commission established that over 9000 citizens were victims of arbitrary detentions, torture, forced disappearances and forced exile during general Stroessner’s dictatorship between 1954-1989 (Comisión de Verdad y Justicia de Paraguay 2008). According to the Chilean Rettig Commission, the victim count during Pinochet’s rule is also dramatic, including the death of 2000 regime opponents and 1000 forced disappearances (Acuña 2006; Huneeus 2000). Similar truth-seeking initiatives in El Salvador implemented in the aftermath of the civil war, documented over 20000 human rights violations, most of which are cases of extrajudicial killings, forced disappearances and torture perpetrated by the armed forces between 1981 and 1993 (Wood 2000; Collins 2006, 2008, 2010; Cuéllar Martínez 2008). In 2003 the Peruvian Truth and Reconciliation Commission estimated that the armed conflict between the state and the Maoist guerrilla group known as the Shining Path left a toll of 70000 victims of extrajudicial killings, forced disappearances, massacres and torture (Comisión de la Verdad y Reconciliación de Perú 2003). Even more dramatic is the Guatemalan case: during the three decades of internal armed conflict prior to the UN sponsored peace accords of 1996, 200000 citizens were executed or disappeared by security forces (Amnesty International 2002). In
their loved ones, knocked on the doors of military barracks, filed *habeas corpus* petitions, risked their lives denouncing the disappearances in the press, and endlessly navigated the complex world of courts in order to promote investigations and seek punishment for those responsible. The quest for truth and justice can evolve into a tortuous and protracted battle, but these efforts sometimes pay off.

In April 2011 a former police officer, former mayor and former member of parliament, Luis Patti, was found guilty of planning and executing the kidnapping, torture and forced disappearance of several activists in 1977 during Argentina’s last military dictatorship (1976-1983). Until his arrest prior to the trial, Patti not only benefitted from the amnesty laws passed in the late 1980s, but also used his parliamentary immunity to escape prosecution. During the trial, his supporters launched threats against numerous witnesses. Manuel Goncalves, the son of one of the victims, appeared outside the courtroom and jubilantly declared: “This is the product of many efforts and struggles […] Our objective was to get to the day in which a court handed down this ruling. Being one

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Colombia, the decades long internal armed conflict has resulted in numerous violations of humanitarian law and international human rights law, yielding an incalculable number of deaths, millions of displaced individuals and thousands of kidnappings. Between 1997 and 2002, for example, the United Nations reports at least 28000 conflict-related deaths (Arévalo 2006). The military dictatorships of Brazil (1964-1985) and Uruguay (1973-1985) were less sanguinary but nevertheless perpetrated their fair share of human rights violations. In Brazil it is estimated that several hundreds were disappeared and thousands tortured and sent into exile, whereas in Uruguay the dictatorship is thought to have disappeared nearly 200 citizens¹ and tortured several hundred others (SERPAJ 1989; Pereira 2005; Sikkink 2005). Finally, although less known in the transitional justice literature, the Mexican armed forces under the control and leadership of the PRI also conducted the same type of criminal enterprises during the 1960s and 1970s. Beginning with the emblematic Tlatelolco massacre in 1968, the military launched a ruthless and clandestine campaign against insurgent guerrilla groups that included forced disappearances and the use of repressive techniques such as the “death flights” also utilized in the Southern Cone to drown political prisoners at sea (Sherer García and Monsiváis 1999; Acosta and Ennelin 2006; Castellanos 2007; Dutrenit Bielous and Varela Petito 2010).
of the protagonists of the subjugation of democracy, Patti used our country’s institutions to preserve his impunity.”

Peruvian military officers raided La Cantuta University outside Peru’s capital city in July 1992 in one of their many attempts to defeat illegal armed organizations. Gisela Ortíz never saw her brother again. The authorities turned a blind eye to her requests for information, to the point that they even denied her brother’s existence. He had not only disappeared; for the Peruvian state he had never been born. In April 2009, after nearly 17 years of legal battles, the Supreme Court found former President Fujimori responsible for mounting a repressive apparatus that executed these and other crimes. For Gisela, “the ruling made official a series of facts that everyone denied. Before that day I felt like a mad lady with a story that no one believed in. The judiciary finally validated our story. After putting so much effort in surviving economically, in providing for our families, and looking for our disappeared for so many years, one gets really tired. Today we can declare mission accomplished.”

In Latin America these stories are not unique. Over the last 10 years hundreds of former politicians and military officers have faced criminal courts, accused of planning and perpetrating crimes against humanity. A region that accounts for 8% of the world’s population was the site of 35% of the total of human rights trials held in the world (Sikkink 2011). Throughout the region, judges and prosecutors have become central actors in the efforts at strengthening democracy by punishing the brutality of past regimes. Figure 1.1 shows the explosion of anti-impunity rulings handed down by Supreme Courts.

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2 Página 12, April 15th 2011

3 Interview, Lima, April 27, 2010
and Constitutional Courts after the year 2000 overturning amnesty laws and presidential pardons; declaring the non-applicability of statutory limitations; and modifying the standards of criminal evidence in order to punish state agents.

Figure 1.1. Anti-impunity rulings by Latin American high courts (1980-2010)

Source: This original dataset includes rulings on cases of systematic human rights violations by state actors handed down until 2010 by Supreme Courts and Constitutional Courts that use principles, doctrines and instruments of international human rights law and humanitarian law to: a) limit the application of amnesty laws or declare their unconstitutionality, and modify other procedural and substantive aspects of criminal legislation to meet international standards; b) declare the inapplicability of statutory limitations for serious international crimes; c) establish individual criminal responsibility for human rights violations; d) recognize the victims’ right to know the truth about the crimes; and e) limit the jurisdiction of military courts over human rights crimes perpetrated by security forces. The dataset was constructed using online public information systems; consulting with country experts; and reading the relevant legal literature. I am grateful to Ximena Medellin for facilitating access to some of the rulings.
Courts in countries like Peru (Chapter 3), Argentina (Parenti and Pellegrini 2009; CELS 2010; Skaar 2011:47-93; Chapter 4), Chile (Collins 2006, 2008, 2010:61-148; Hilbink 2007a; Guzmán Dálborra 2008, 2009; Hunneus 2010 Skaar 2011:95-135), El Salvador (Cuéllar Martínez 2008), Guatemala (CEJIL 2011) and Uruguay (Galaín Palermo and González González 2008; Galaín Palermo 2009; Skaar 2011:137-187), have thus began to conclusively put an end to decades of judicial acquiescence. The magnitude of this shift in jurisprudential trends is remarkable not only because it took place decades after the onset of the so-called third wave of democratization, but because in the decades prior to this explosion of judicial activism in the area of human rights, Latin American democracies put in place seemingly impenetrable impunity regimes.

During the 1980s democratic transition, Argentina took the first step in the direction of transitional justice by creating a truth commission and filing criminal charges against the leaders of the military juntas (Nino 1996). Due to the civil-military tensions engendered by these initiatives, in the late 1980s and early 1990s there were important legal backlashes against transitional justice in the form of amnesty laws, presidential pardons and the termination of all criminal procedures against perpetrators (Pion Berlin 1994, 1995, 1997; Acuña and Smulovitz 1997; Huser 2002). Following the Argentine example, between the 1980s and 1990s 16 Latin American countries passed amnesty laws to prevent potentially destabilizing criminal investigations (Sikkink and Walling 2007).\(^4\) Moreover, as the years since the perpetration of the crimes passed, statutes of limitations

\(^4\) Some were blanket amnesties, like the one passed by the Peruvian Congress in 1995. Others like for example the Argentine and Guatemalan amnesties, contemplated exceptions. In Argentina the illegal abduction and trafficking of babies born in concentration camps was excluded. In Guatemala, crimes against humanity were not included in the law. For a discussion of the amnesties approved in the 1980s and early 1990s in Latin America see Cassel (1996). For an analysis of the practice of granting amnesties around the world see Mallinder (2009).
began to run out for most of the crimes in question, barring criminal prosecutions. Consequently, even though the policies of transitional justice that had taken effect immediately after the waning of authoritarian regimes showed some degree of cross-country variation, by the mid-1990s there was a region-wide convergence towards impunity (Sikkink 2005).

The institutionalization and legalization of impunity triggered political debates regarding the desirability or timeliness of demands for criminal accountability versus the need for peace and reconciliation (O’Donnell and Schmitter 1986; Nino 1991; Zalaquett 1992; Linz and Stepan 1996). In addition, as victims and their lawyers insisted in seeking redress for the violations in domestic and international courts, the question of transitional justice also gave rise to heated legal debates.

On one side were those who argued that international customary law, various human rights treaties signed and ratified by Latin American states before and after these violent episodes, and the jurisprudence of international courts such as the Inter-American Court of Human Rights, demanded that states treat human rights violations as serious international crimes subject to special judicial rules and procedures. According to this camp, when domestic actors invoke statutes of limitations or apply amnesties or pardons, they incur a violation of states’ international duty to investigate and punish crimes against humanity. On the other side were those influenced by positivist legal philosophies who argued that the passage of amnesty laws or pardons was a sovereign prerogative of presidents and congresses, and hence courts had no place in questioning them. Moreover, invoking unwritten principles of customary international law or treaties signed after the
perpetration of the crimes, amounted to a serious violation of due process and the legality principle.

The positivist/formalistic position was for decades the dominant one in Latin American judicial branches (López Medina 2004; Hilbink 2007a; Couso 2010; Guzmán Dálbora 2010; Pásara 2010). Today the situation is very different. Throughout the region, amnesty laws and presidential pardons have been either circumvented or overturned, and statutes of limitations have been ignored (Van Schaack et al. 2007; Sikkink 2011). Beginning in the late 1990s and especially during the 2000s, Latin American judiciaries became a beacon of progress in the area of transitional justice by fully embracing a set of juridical arguments and doctrines derived from international human rights law that enabled them to take these bold jurisprudential steps.

Why did human rights litigants manage to obtain, after a long and nasty fight, satisfactory answers from judicial actors? Why did judicial corporations evolve from unresponsive bureaucracies into suitable arenas for the advancement of rights claims? What is the process that led judges and prosecutors in several Latin American countries to leave behind the positivist legal orthodoxy and embrace a new legal worldview conducive to transitional justice? Are these changes in legal preferences among judicial actors relevant to understand the explosion of anti-impunity rulings, or do political processes taking place outside the courtroom better explain the phenomenon?

Underlying these empirical questions there are two broader theoretical ones. What role do legal preferences play in judicial decision-making? Under what conditions do judicial branches acquire the technical capabilities and the political will to become
powerful players in salient political struggles such as those surrounding transitional justice?

1.2 Existing Explanations of Transitional Justice in Latin America

Political scientists have developed two types of explanation in response to these questions. Some scholars suggest that the outcome of transitional justice processes is dictated by the preferences of elected politicians and the balance of power between them and the armed forces (e.g. Huntington 1991; Zalaquett 1992; Evans 2007; Karl 2007). Other authors emphasize bottom-up dynamics, describing the efforts of transnational networks of human rights activists to diffuse among national executives a behavioral norm in favor of criminal prosecutions (e.g. Sikkink 1993; 2005; 2011; Finnemore and Sikkink 1998; Lutz and Sikkink 2000; 2001; Roht-Arriaza 2005). I refer to the first approach as the Huntingtonian paradigm, and to the second as the Justice Cascade model.

Both explanations completely sideline the judiciary, unwarrantedly assuming that judicial actors respond perfectly to outside political pressures, handing down prison sentences or acquittals accordingly. As a result, these approaches fail to theorize and investigate a crucial step in the causal process that unfolds between the denunciation of the crimes and the outcomes of criminal trials. After all, judiciaries are the ones that must decide whether to uphold amnesties or apply statutory limitations. Understanding how transitional justice happens requires explaining how judges arrive at a certain type of decision, processing both outside pressures and complex legal controversies. In what follows I will explain the main insights of these two explanations and identify their shortcomings.
1.2.1 The Huntingtonian Paradigm

Samuel Huntington famously argued that the residual power of outgoing dictators during transitional moments is crucial when accounting for the fate of prosecutorial efforts. “The nature of the democratization process, and the distribution of political power during and after the transition” explain transitional justice outcomes (Huntington 1991:215). According to this view, if former autocrats retain some level of power or prestige after the transition, the likelihood of successful criminal prosecutions against them is low. It is the balance of power between the democratizing electoral or political coalition and the authoritarian coalition that determines whether or not there will be transitional justice. Huntington does not see human rights organizations playing a significant role in the process. In addition to delimiting the field of relevant players, he also suggests that debates over transitional justice constitute a relatively short episode at the onset of the newly found regime. If criminals are not punished during those initial years they will never again face charges, because transitional justice initiatives lose momentum as democratic leaders begin to focus on the future and not on the past.

The Huntingtonian model seems to square well with several important cases of transitional justice across the globe. The idea that the “victor tells the tale” is a powerful framework to understand the successful creation of international tribunals in Nuremberg and Tokyo after World War II. The model is also applicable to the Southern European regime transitions of the 1970s. For example, after the elite-brokered and negotiated Spanish transition (1975-1977), no attempts were made to prosecute those involved in the massacres committed during Franco’s regime. By contrast, when the Greek military

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5 In the past five years there have been attempts to uncover the truth about those crimes. Victims’ aspirations are circumscribed to finding what happened with their loved ones as opposed to filing criminal
relinquished power after an embarrassing military defeat in 1974, human rights abusers were quickly taken to military courts and most cases were resolved within two years (Alvizatos and Diamandouros 1997).6

The model is less successful in Latin America.7 It is true that in the immediacy of democratic transitions trials against high-ranking authoritarian officials were held only in Argentina (1985) and Bolivia (1993),8 where the military left power in a relatively unfavorable negotiating position. In Argentina, however, the process has proven much more dynamic than the one portrayed by the model (Malamud Goti 1996; Hunter 1998; Skaar 2011). A few years after the trial against the military juntas in 1985, the military put enormous pressures on two presidential administrations. This resulted in the passage of amnesty laws in 1986 and 1987, and presidential pardons in 1990 (Acuña and Smulovitz 1997).9 But the story, of course, did not end there: in the 1990s and 2000s, the question of transitional justice was revived by the tireless efforts of the human rights charges against those responsible because the latter have already died. The Spanish parliament passed a law recognizing the victims’ right to truth (Gonzalez Martin 2008). In addition, the principle of universal jurisdiction was used in a case filed in Argentine courts in order to force the Spanish state to find out the whereabouts of the victims. A federal court of appeals has accepted the request. See Diario Página 12, September 4th 2010.

6 See also Nobles (2010) for a positive review of the application of Huntington’s model to Eastern Europe and Africa.

7 Most of the early studies on Latin America’s third wave of democratization, however, endorsed the Huntingtonian view of transitional justice outcomes. See for example Karl and Schmitter (1991); Zalaquett (1992); Pion-Berlin (1993, 1995, 1997); Pion Berlin and Arcenaux (1998).

8 The Bolivian transition took place in 1982. General García Meza was only sentenced in 1993 after a protracted trial that began in 1986 (Mayorga 1997).

9 The military became uneasy when courts responded to the victims’ legal demands by opening hundreds of prosecutions against officers of all ranks in the aftermath of the 1984 trial. This move by the judiciary also contravened the president’s wishes. President Alfonsín wanted a speedy resolution of the human rights issue and hence preferred to focus prosecutions on the leaders of the past regime (Pion-Berlin and Arcenaux 1998)
community, leading to the incarceration of numerous human rights abusers, including many of those who had benefitted from the presidential pardons (Barahona de Brito et al. 2001; Sikkink 2005; Smulovitz 2002, 2010a, 2010b; Skaar 2011; Chapter 4). Similarly, in Chile and Uruguay\(^\text{10}\) the passage of amnesties by authoritarian governments or immediately after transitions to democracy has not been an obstacle for observing protracted struggles for justice. In the case of Chile, for example, where the transition to democracy was as closely controlled by the outgoing regime as it is imaginable, it took only a few years after Pinochet left power for some condemnatory rulings to begin coming out of the judicial system (Hilbink 2007a; Collins 2006, 2008, 2010; Skaar 2011).\(^\text{11}\)

In addition to these examples, the recent explosion of anti-impunity rulings in Latin America documented above, long after amnesties were put in place to settle the issue of past atrocities and many years after most transitions to democracy took place,

\(^{10}\) In the case of Uruguay, where the transition took place in 1985, there were three popular referenda on the question of whether or not to uphold the amnesty law, and in all instances the pro-transitional justice camp lost. According to Sikkink (2005) this is one of the reasons why the human rights movement remained dormant during the 1990s. However, civil society’s pressures for transitional justice have been reactivated. Over the last few years the human rights community has achieved important judicial victories, the most resonant being a Supreme Court ruling in 2009 declaring the amnesty law unconstitutional (El País, October 20\(^\text{th}\) 2009); a ruling by the Inter-American Court of Human Rights rejecting the invocation of local legal instruments to halt investigations and trials (I/A Court HR, Case of Gelman v. Uruguay, ruling of February 24\(^\text{th}\) 2011); and an indictment released by a lower court against former dictator Jose María Bordaberry in 2006. In 2011, however, the Supreme Court ruled that statutes of limitations were also applicable to the crimes committed during the dictatorship.

\(^{11}\) Initially, the condemnatory rulings limiting the application of the amnesty law were handed down by the Santiago appeals court and overturned by the Supreme Court. The appeals court judges who refused to invoke the amnesty to stop the investigations were severely disciplined by the Supreme Court. Since 1997, a partially renovated Supreme Court has granted many exceptions to the amnesty (Hilbink 2007a). A series of judicial reforms championed by the Concertación governments led to the gradual replacement of conservative judges. Congressional approval for these reforms was in part facilitated by corruption accusations launched against the Court by the right (Pion Berlin 2004).
further questions the model. The debate over transitional justice clearly transcends transitional moments and is not dominated by outgoing and incoming political elites.

Nevertheless, Huntington’s intuition about the role played by the stakeholders of power in transitional justice deserves close scrutiny as a plausible hypothesis. Trials may not be forever conditioned by the power of former dictators during transitions, but could be stalled by uninterested or ideologically opposed elected politicians. By the same token, the rise to power of supportive presidents and legislators may explain the observed revival.

In line with this view, in the Latin American case some observers have attributed this wave of pro-transitional justice rulings to the rise to power of left-wing governments. These authors claim that left-wing presidents have electoral incentives to re-activate the social and electoral cleavages that result from citizens’ views vis-à-vis the abuses of past dictators (Evans 2007). Right-wing politicians, by contrast, lack credibility among voters on this issue area. Other authors delve into the impact of the personal histories of these rising politicians, many of who participated in the left-wing movements that were targeted by repression in the 1970s and 1980s (Karl 2007). The formerly repressed left comes to power and becomes a justice seeker, leaving behind the politics of compromise with authoritarian leaders and enacting a politics of normative commitment to human rights.

There are empirical reasons why this argument is not convincing. First, not all left-wing governments pursued aggressive transitional justice efforts. Whereas in Argentina Néstor and Cristina Kirchner became active supporters of the human rights community, in Uruguay and Brazil center-left administrations did not aggressively
promote trials. Second, not all transitional justice victories in Latin America occurred under the leadership of left-wing governments. In fact, some landmark achievements in this area took place in adverse political environments, where both politicians and the military adamantly opposed the trials. In Peru, for example, many civilian and military officers were sent to prison during the García administration (2006-2011). García, who himself was accused of perpetrating human rights violations during his first administration (1985-1990), staunchly opposed the trials and publicly defended the military (Chapter 3). Similarly, the judiciary in Argentina was moderately active during the second half of the 1990s when Menem was in power, the same president who earlier in the decade had issued presidential pardons and campaigned on national reconciliation as one of his signature achievements. In sum, the “empowered left” thesis offers a temporally and geographically myopic perspective on the timing and dynamics of transitional justice.

In the case of Uruguay, President Tabaré Vázquez, the first leftist to reach the highest office in the land, was extremely cautious with the human rights issue and the progress of criminal cases filed in court has been slow. During his administration criminal charges were filed against former dictators Bordaberry and Alvarez. Using a presidential prerogative established by the amnesty law, Vázquez excluded crimes committed outside Uruguay (mainly in Argentina) from the amnesty. He also promoted the search for clandestine burial sites to find the bodies of disappeared activists. Even Vázquez’s successor, Pepe Mujica, who spent more than a decade in jail during the dictatorship, was hesitant to move forward with a proposal to nullify the amnesty. It was only after the Inter-American Court of Human Rights handed a ruling against the Uruguayan state that Congress debated the annulment of the amnesty law. The President did not support the initiative arguing that voters had rejected it in the various referenda. (El País, May 5th 2011) and the law was ratified. Finally in Brazil, although Lula’s successor, Dilma Rousseff, campaigned on the importance of declassifying secret files about the repressive activities of the dictatorship, once in power she changed her position on the subject due in part to pressures from the military and the lack of counterbalancing pressures from the human rights community and the left.

Incidentally, Menem spent several years in jail during the military dictatorship, further questioning the notion that formerly repressed politicians, when in power, promote transitional justice.

Another example is Chile since 2010. After President Piñera and his right-wing coalition (which includes pro-Pinochet parties) moved into La Moneda Palace, the special unit within the Interior Ministry in charge of human rights issues and of tracing the progress of the criminal investigations was not
These empirical inconsistencies indicate that the Huntingtonian approach has serious theoretical shortcomings. In the first place, the persistence over time of the transitional justice debate in many Latin American countries suggests the importance of civil society actors in keeping the relevance of the issue alive (Brysk 1994; Sikkink and Walling 2007; Collins 2010; Nobles 2010). The fate of transitional justice is thus not solely in the hands of the political and military elite during transitional moments. Moreover, the ability of politicians to enjoy electoral benefits by promoting the human rights cause after democratization depends on this continuous mobilization. If the issue is no longer relevant, the electoral hypothesis loses plausibility. In this sense, supportive presidents may amplify the effect of bottom-up processes, but do not constitute the primary explanation for observing legal victories.

Second, even in adverse political circumstances we observe victories. These poorly predicted events also reveal that transitional justice dynamics are not necessarily controlled from above. The occurrence of condemnatory rulings despite the presence of powerful authoritarian elites or ideologically opposed presidents, points to the need to look at judicial battles more closely, as potentially autonomous processes. Given that transitional justice battles take place within judiciaries, it is imperative to understand what goes on there. Not all litigation strategies are doomed when the preferences of political actors remain adverse to transitional justice because effective litigation strategies both inside and outside the courtroom may insulate the judicial process from outside pressures, thus empowering judges.

dismantled and still provides technical assistance to facilitate the judicial processes. Courts are also very active, constantly handing down condemnatory rulings.
Third, the Huntingtonian approach mischaracterizes judicial decision-making. Although it completely ignores the central role played by the judiciary in the phenomenon under study, implicit is a characterization of judicial actors as decisively constrained by outside political forces. Since the failure of judges to act within the tolerance levels of other powerful actors may result in negative consequences like removal from office, the prediction is that when the military or elected politicians are not willing to tolerate the involvement of the judiciary in the punishment of past human rights violations, we should observe judicial acquiescence. Similarly, when governments strongly endorse investigating the past, the prediction is that judges will respond favorably.

The behavior of this branch of government cannot be taken for granted as mere epiphenomena. It is not theoretically given that judges are perfect agents of politicians. Judicial bureaucracies have their own rules, reproduce their own legal cultures and political ideologies, and may therefore resist in a corporate fashion outside imperatives to rule in one particular direction. Furthermore, the reasons for observing certain patterns of judicial behavior in favorable and unfavorable political contexts must be hypothesized and researched because they constitute a fundamental step in the transitional justice process. Even when in agreement, judges may have different motives than politicians for handing down condemnatory rulings or for blocking investigations and acquitting the perpetrators. Without understanding this step in the process, our accounts of why we observe the collapse of impunity regimes will consist of deficient explanations plagued with incomplete causal chains.
1.2.2 The Justice Cascade Approach

Unlike the Huntingtonian model, the Justice Cascade approach goes beyond the preferences of elected leaders and military actors by putting litigation efforts at the forefront of the analysis. Heavily influenced by the pioneering work of Margaret Keck and Kathryn Sikkink (1998), according to these authors the driving force behind struggles for accountability for past human rights violations are transnational networks of activists and lawyers (Brysk 1990, 1994, 2005; Sikkink 1993, 2005, 2011; Risse Kappen et al. 1999). These individuals and groups are motivated by personal experiences and a principled commitment to the cause. They possess specialized knowledge of international human rights law, which they use in order to design a series of legal strategies to create at the domestic level a window of opportunity to initiate criminal prosecutions against former authoritarian leaders (Lutz and Sikkink 2000). Central to the approach is the notion that the battle for transitional justice is not a one shot-game during regime transitions. Instead the phenomenon should be seen as a protracted process in which victims and their lawyers seek to shape the conditions to institutionalize truth-seeking initiatives and eventually file criminal charges against those responsible for the crimes.

The central political dynamic described by these authors is known as the “boomerang effect” (Keck and Sikkink 1998; Risse Kappen and Sikkink 1999). According to the model, activists and litigants use the international arena to exert pressure on local governments that resist investigating the crimes. In particular, by forging alliances with organizations and lawyers in other nations, these advocacy networks invoke the principle of universal jurisdiction to take to foreign courts the cases
that are not being investigated at home (Lutz and Sikkink 2001). Domestic human rights organizations also work in tandem with international NGOs to file claims in international courts such as the Inter-American Court of Human Rights (Cavallaro and Brewer 2008; Villarán 2008).

Armed with the legitimacy enjoyed by the discourse and norms of international human rights law (Lutz and Sikkink 2000), these groups produce “norm-affirming” events that eventually trigger a cascading effect, transforming the identity of states (e.g. ratification of human rights treaties, compliance with the domestic legal changes mandated by the treaties, etc.). The diffusion of norms and practices related to human rights trials has an impact on behavior by modifying the preferences of state actors. In the words of Risse Kappen and Sikkink (1999: 5), this happens at the level of values and principles (“moral-consciousness raising”; “habituation”), and also at the level of the incentive structures faced by political leaders in the area of foreign policy (“instrumental adaptation and strategic bargaining”).

The most famous norm-affirming event that has become an explanation in and of itself for the renewed judicial activism against human rights criminals is the Pinochet saga of 1998. The so-called “Pinochet effect” has not only been posited as the primary causal mechanism to understand the fate of criminal prosecutions in Chile (Hilbink

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15 The notion of universal jurisdiction, initially developed to deal with the issues such as slavery and piracy, has been incorporated to the legal systems of countries like Belgium or Spain. It allows Spanish or Belgian courts to claim jurisdiction over crimes not committed within their national territories or against their own citizens, but that constitute a type of crime that under international law can be defined as offenses against humanity. See Amnesty International (2001); Roht-Arriaza (2006).

16 For example, Sikkink (2005) documents the diplomatic pressures exerted on President Menem by Scandinavian and French officials when he visited Europe in the late 1990s trying to interest investors. Argentine activists had filed criminal lawsuits in both countries.
2007a; Huneeus 2010a), but also in other countries (Roht-Arriaza 2006). During Pinochet’s arrest in London and after his return to Chile complaints about his responsibility in assassinations and disappearances during the dictatorship piled up in Chilean courts, thus opening the door for many indictments against him and other members of the military regime (Collins 2006, 2008, 2010).

Among scholars and commentators, the Pinochet saga as well as the trials in abstentia of former Argentine military officials in Europe (Lutz and Sikkink 2001; Sikkink 2011), are seen as key turning points in transitional justice processes in Latin America. First, the actions of European judges and prosecutors gave legitimacy to the victims’ moral arguments about the need to bring these individuals to justice. Second, it gave international visibility to the reigning impunity in the region, putting pressure on governments to open up avenues for resolving the issue according to accepted international legal standards. Third, these criminal procedures as well as various favorable rulings handed down by the Inter-American Court of Human Rights rejecting amnesties and statutes of limitations (Becker Lorca 2006; Huneeus 2010a; DPLF 2010) reaffirmed the validity of a series of legal doctrines and practices developed by the human rights community.

The Justice Cascade model is appealing because it presents a more dynamic view of transitional justice processes. It also underscores the importance of the normative/legal dimension of these struggles. The approach offers insights into the empowering effect of well-crafted legal arguments and of the transnational epistemic communities formed in support of those doctrines. In addition to its central role in the causal process, the emphasis on legal norms is important in a descriptive sense. This is after all the language
in which these issues are debated and the terrain in which these political battles are fought. Ignoring them implies overlooking an essential feature of the phenomenon of transitional justice in Latin America.

In spite of these contributions, the model has several problems. The first is empirical. The fixation with certain events like the arrest of Pinochet in London, simplifies explanations to an undesirable extent. Although it is true that after his return to Chile the activity of courts in this issue area was intensified, it is impossible to understand this particular outcome without looking at the progress of human rights cases within the Chilean judiciary before 1998 (Pion Berlin 2004; Collins 2008). Moreover, even if we accept that in the Chilean case the event was crucial, the international attention elicited by the saga is not enough to explain sea changes in jurisprudential trends in other Latin American countries. In other words, although these norm-affirming events may act as catalysts of bolder forms of accountability, it is unclear how norms become diffused among the actors involved prior to the affirming event and institutionalized after the event, in particular among judicial actors in charge of processing litigants’ claims.

The main problem, however, is theoretical. These scholars completely ignore the detour of cases when they reach the hands of judges and prosecutors. They simply look at judicial inputs (litigation efforts) and judicial outputs (rulings), and assume that the judicial process is governed by the same logic as the game of domestic politics or international relations. In other words, by marginalizing judiciaries, the model implicitly suggests that judicial actors internalize human rights norms in the same way as politicians, and face the same incentives to respond to outside pressures as presidents do. Most of the examples of behavioral change as a result of norm-affirming events and boomerang
effects refer to changes in the position of presidents *vis-à-vis* the human rights cause. But the adoption of a new identity may follow a different path in congress or the presidency than within the judiciary.

In this respect, the Justice Cascade model is similar to the Huntingtonian paradigm: it not only ignores the judiciary, but in doing so it suggests that what matters are behavioral changes at the level of politicians. The model leaves the impression that favorable judicial responses automatically follow suit. It cannot be assumed that judicial actors simply abide by the dictates of politicians, facing no constraints in their ability to legally formulate the requested jurisprudential solutions, or lacking the resources to put up a fight. Consequently, in addition to exploring the way litigants stage ambitious public relations and legal strategies at the global level in order to raise awareness of their claims and put pressure on local government actors, we must uncover the micro-foundations of judicial behavior in cases of gross human rights violations, investigating the interactions between litigants and judges at the domestic level. In order to fully understand the domestic diffusion of pro-human rights behavioral norms we must focus on the way judicial actors embrace the jurisprudential innovations initiated in the international arena. There is a legal learning process relevant to explaining judicial behavior, which is ignored if the analysis remains fixated with presidents’ foreign policy preferences. In other words, the “justice cascade” affects different sets of domestic actors via different diffusion mechanisms.

In order to present a full explanation of the phenomenon, the causal chain must be unpacked with an account of how international legal norms and practices become diffused and entrenched within judicial branches, and how judges and prosecutors
become proficient in the new legal discourse. In other words, we must be able to explain how is it that litigants manage to shape the legal preferences of judicial actors in their favor.

1.3 Transforming the Judicial Branch: Political Will and Technical Capabilities

To answer why impunity dispositions are removed, and why prosecutions end in prison sentences against the perpetrators, requires understanding how these events unfold. The process that begins with the filing of cases, continues with litigation battles and their political ramifications, and ends with judicial rulings, must be explored in its totality. As suggested in my critique of the extant models developed to explain accountability for past human rights violations in Latin America, the role of judges cannot be overlooked. After all, judicial bureaucracies are the ones that must decide whether to nullify amnesty laws or apply statutes of limitations, as well as how to gather and evaluate the evidence. The extent to which these decisions are arrived at autonomously or heteronomously is an empirical question. It cannot be assumed that judicial actors simply react to the dictates of influential political players, or that they easily absorb and internalize the normative and jurisprudential changes initiated in foreign courts or by transnational networks of activists.

I posit that the preferences and power of politicians and the military do not explain patterns of judicial decision making vis-à-vis transitional justice. On the one hand, in the presence of a hostile political environment, the activation of legal proceedings by human rights groups undermines the saliency of political calculations among the relevant judicial actors. For example, being presented with incontrovertible facts about the responsibility of certain individuals in the perpetration of abhorrent and flagrantly illegal
acts, leads judges to prioritize legal considerations over concerns about the consequences of rulings contrary to the preferences of powerful political actors. Moreover, strategic litigation on the part of human rights NGOs produces ideational changes inside judicial branches, forging a normative commitment to the values and requirements of international human rights law. This commitment induces judges and prosecutors to discount political risks. On the other hand, the presence of a supportive executive and/or a disgruntled military does not guarantee success. Judiciaries colonized by allies of the defendants, or technically unable to process or understand the legal issues brought before them, will have a hard time ruling against the status quo.

In order to observe transitional justice in the form of prison sentences against former military officers, the judiciary must be provided with the technical resources and endowed with the political will to successfully carry out the investigations. Judges who are supportive of the human rights cause must be persuaded that they have the appropriate legal tools to move forward. Indifferent judges must be enlisted in the struggle for truth and justice and also persuaded that the jurisprudential solutions offered by litigants are legitimate. Finally, recalcitrant anti-transitional justice judges must be removed or neutralized in order to avoid stalling tactics that delay the progress of the cases, or rulings acquitting the defendants.

These propositions point to the importance of studying the reproduction of institutionalized practices and norms within judicial bureaucracies. These norms and practices play a role in determining judicial behavior vis-à-vis these criminal cases. For example, the entrenchment of doctrines of legislative supremacy and limited judicial review within judicial branches, or judges’ lack of knowledge of international law, can
lead them to reject petitions to declare the unconstitutionality of amnesties or the inapplicability of statutes of limitations, without even considering the political ramifications of those decisions. By contrast, if a consensus exists among judicial operators that customary and positive international human rights law and jurisprudence impose binding obligations on states, judges and prosecutors will be willing to defy a powerful military in order to avoid contravening standards of proper professional behavior.

My explanation suggests that the toppling of impunity dispositions is a result of institutional changes within judicial corporations induced by human rights activists and lawyers. At the core of these changes are transformations in the legal preferences and legal knowledge of individual judicial actors, and in the perceived institutional mission of judiciaries. These changes give judges the *means and motives* to become involved in transitional justice processes. One the one hand, they endow judges and prosecutors with the *technical capabilities* they previously lacked in order to successfully deal with human rights cases, and on the other, they modify their *political will* to carry out these sensitive investigations. Two central causal mechanisms are involved in producing institutional changes.

First is a transformation in the norms and routine practices that guide judicial action. Activists succeed when they take seriously the cultural underpinnings of judicial decision-making, and design strategies to alter existing positivist legal cultures. By mounting pedagogical interventions within judicial branches and by forging alliances with some of their members, human rights litigants entrench a new legal vision that
favors the use of international human rights law. This provides judges and prosecutors with the jurisprudential tools they need in order to topple impunity regimes.

The theory presented in Chapter 2 identifies three conditions that affect the pace and reach of ideational changes and the adoption of new juridical standards. The timing of the intervention vis-à-vis efforts by the anti-transitional justice coalition to infiltrate the judiciary, affects the levels of resistance that pro-transitional justice groups will encounter among judicial actors. The type of agents chosen to speak on behalf of the human rights community in front of judges and prosecutors has an impact on the perceived neutrality and authoritativeness of the new legal orthodoxy. Finally, the systematicity of the pedagogical efforts determines the levels of consensus forged around the different legal controversies triggered by these trials.

Second, this process of normative change via the politicization of dominant judicial practices and ideas about the law also involves the replacement of judicial actors who staunchly resist changes in patterns of legal interpretation. By deploying naming and shaming tactics and promoting impeachments, human rights litigants deepen this institutional transformation and turn the judiciary into a suitable arena for advancing rights claims. Unlike the pedagogical strategies, personnel changes require the support of political elites, especially when seeking to appoint allies to vacant seats in the judiciary.

These initiatives have an empowering effect on judicial actors, enabling them to successfully process the demands for accountability. First and foremost, judges and prosecutors are introduced to a world of previously unknown legal solutions. By modifying judges’ technical capabilities, litigants fundamentally alter the scope of possible, conceivable outcomes. Second, when the aforementioned pedagogical efforts
are successful in institutionalizing a new set of standard practices and routines\textsuperscript{17}, the judiciary incorporates a new institutional mandate and set of values that \textit{qua} corporation it is willing to defend. The rekindled sense of mission grounded in a shared vision of the role of the institution in processing rights claims facilitates institutional responses to outside attacks, especially when transitional justice is opposed by powerful political players. The refusal to contravene entrenched ideas about the law and judicial practice leads to conclusive collective responses against politicians or soldiers seeking to stop criminal investigations. In this sense, the alliances and affinities that a pro-human rights vision generates with other organized groups in academia, civil society, the legal profession and international actors, further enhances the resource pool available to judicial actors to promote transitional justice in adverse political environments.

In a nutshell, I argue that in order for judicial actors to embrace the unorthodox legal solutions based on international human rights law needed to circumvent obstacles such as amnesties or statutes of limitations, human rights litigants must clear the legal space for judicial action. This is achieved by deinstitutionalizing certain constraining ideas about legal praxis and institutionalizing enabling doctrines of criminal law. Effective litigation strategies inside and outside the courtroom reconfigure the normative underpinnings of judicial decision-making, giving judges and prosecutors the tools to produce progressive jurisprudential outcomes; the ideational motivation to risk defying powerful military and political actors; and the cultural resources that facilitate the collective defense of a newly adopted institutional mandate.

\textsuperscript{17} For example, the idea that crimes against humanity cannot be subject to statutes of limitations and that cases filed invoking that criminal category cannot be dismissed on those grounds prior to any investigation.
My theory emphasizes the bureaucratically embedded nature of judicial action. Following historical and sociological institutionalist approaches (March and Olsen 1984; Powell and DiMaggio 1991; Steinmo Thelen and Longstreth 1992; Finnemore 1996b; Smith 2008), I argue that judicial behavior is processed within a complex organizational environment yielding judicial outcomes that are necessarily influenced by the institutionalization of “sticky” ideas about the law in courts’ routine practices. These informal behavioral norms shape the way judicial actors understand the law, the limits it imposes and the possibilities it affords; the way they relate to other branches of government; the way they adjudicate rights claims between parties; and the reach of their involvement and influence in policy disputes (Smith 1988; Gillman 1993, 1999, 2002, 2006; Sieder 2004; Hilbink 2007a; Woods 2008; Couso 2010).

Central to this account is the notion that judicial branches are the sites of struggles to impose hegemonic visions about the law and the role of judicial actors in political, economic and social debates. These struggles result in the crystallization of norms of judicial praxis and traditions of legal interpretation that structurally bias these bureaucracies in favor of the constituencies responsible for promoting the entrenchment of certain legal visions (Halliday et al. 2007). From the bureaucratically embedded perspective of the members of the judicial branch, the routine practices and legal doctrines into which they are socialized, determine what jurisprudential outcomes are professionally acceptable and the array of legitimate and appropriate legal solutions they can conceive of for the cases under consideration (Hilbink 2007b; Woods 2008).

A crucial background condition to be considered in the judicialization process of human rights violations is the hegemony of positivist and formalist legal cultures in Latin
American judicial branches (López Medina 2004; Hilbink 2007; Couso 2010; Pásara 2010). The dominant hermeneutic tradition in the region affirms the supremacy of domestic written law, promoting a vision of the law as a series of rules to be applied and not as a set of constitutionally enshrined principles to be pondered as demanded by the case under consideration. This legal consciousness fosters the subordination of judges’ interpretative discretion to the dictates of the legislator. This conception is fundamentally at odds with the arguments used by human rights litigants to remove impunity dispositions. Prioritizing rights such as the right to truth or state duties such as the duty to punish gross human rights violations over legal dispositions passed by national congresses like amnesty laws, requires a non-formalistic reading of the normative system that governs prosecutions. This is partly due to the fact that rights such as the right to truth are usually not part of domestic positive law.

State duties and standards of criminal procedures derived from international and human rights law indicate that states that promote amnesties and pardons incur breaches to their international responsibilities and that no internal legal disposition can formally bar prosecutorial efforts (Bassiouni 1986, 1996, 2011; Méndez 1997). These arguments are controversial because they often lead to the retroactive use of legal instruments and defy the positivization of the law when international customary law is invoked (Tietel 1997, 2000, 2003). The pillars of the legality principle, as understood by the region’s legal tradition, are therefore compromised (Malarino 2010). The legality principle limits the punitive powers of states by forbidding the retroactive application of the law, censuring the conviction for crimes not unequivocally defined in written statutes at the
time the crime is committed, and strictly commanding the enforcement of statutes of limitations.  

Given these legal controversies, Latin American judges and prosecutors confronted with human rights lawsuits must not only deal with cases that are very different in their nature from everyday criminal cases, but in order to even consider opening them they must invoke arguments with which they are not familiar and that involve a high degree of juridical experimentation. For there to be transitional justice in these circumstances judges need to internalize a new legal discourse. Even judicial actors favorable to the human rights agenda must learn the tools that allow them to process those preferences in an acceptable juridical language, and must be reassured that the legal legitimacy of their decisions will not be jeopardized. These bureaucratic inertias point to the importance of taking the judicial process seriously when trying to explain transitional justice outcomes.

This theoretical account departs from recent attempts at explaining the role of judicial branches in processes of transitional justice (Hilbink 2007a; Huneeus 2010b; Collins 2010; Skaar 2011). Most of these accounts focus on the impact of formal judicial reforms in judiciaries’ ability to become effective accountability actors. Skaar (2011) argues that reforms conducive to higher formal judicial independence (e.g. tenure security, depoliticized appointment procedures, etc.), in combination with the absence of a military threat and a renewed legal basis for prosecution (e.g. constitutional reforms that grant constitutional status to international law), explain the resurgence of human rights trials in some Latin American countries. By contrast, I argue that formal judicial

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18 See Chapter 2 for a full explanation of the legal case for transitional justice and its departure from the positivist approach.
reform does not necessarily yield more independent, adequately trained and normatively commitment judiciaries, both capable and willing to enforce transitional justice. As the case studies will show, anti-transitional justice social and political coalitions often find in judicial reform initiatives an unparalleled opportunity to craft judiciaries supportive of their interests, or use informal tactics such as personal and professional threats in order to undermine the protective character of formal constitutional parchment barriers. Moreover, I do not expect reforms that, for example, grant constitutional status to international law to have a direct impact on judicial decision-making. Judges and prosecutors must come to accept and endorse the principles of international law. My argument is that this occurs through informal channels such as litigants’ pedagogical interventions.

Instead of emphasizing formal institutional changes, my approach focuses on the informal and normative dimension of institutional change. Transformations in the norms and values that inspire judicial action, and in the legal knowledge of judicial actors, are crucial because they give judges and prosecutors the resources and motivations to stand up for the victims, irrespective of the levels of external threat and the formal legal basis for judicial action.

According to Collins (2010), changes in judicial receptivity to the human rights cause are important to explain the explosion of criminal trials in Latin America. Like Hilbink (2007a), she argues that in Chile efforts at formal judicial reform played an important role in this process. In particular, the appointment of new judges as a result of those reforms infused the judiciary with new voices, which were more open to the victims’ legal case. In Collin’s account, these changes in judicial receptivity are an exogenous factor that has an impact on the strategic choices of human rights activists and
lawyers. My explanation is diametrically opposed to hers because I invert the causal arrow: human rights activists and lawyers shape the receptivity of judicial actors by activating informal mechanisms of institutional change. It is not the case that litigants perceive greater judicial receptivity after the enactment of formal reforms, and then move on to re-activate transitional justice. They are the ones who purposefully alter judges’ and prosecutors’ perception of what is legally possible and what their institutional mission is about.

Finally, Huneeus’s (2010b) explanation of positive transitional justice outcomes in Chile suggests that judges saw an opportunity to expiate themselves and the institution, thus leaving behind an embarrassing record of passivity vis-à-vis state terrorism. Her emphasis is on the psychological process whereby judges seek atonement for past deeds. Unlike the theory put forward in this dissertation, Huneeus’s story does not involve any political dynamics. My depiction of judicial decision making in cases of gross human rights violations is also different from Huneeus’s because I argue it is not based on instrumental reasoning, i.e. it is not a strategic attempt to improve the public standing of the judiciary or to increase its legitimacy. My argument is that in those cases where transitional justice is observed, judges’ way of thinking about the law, and of what constitutes acceptable legal praxis in cases of state repression, was fundamentally transformed. In other words, judges and prosecutors become receptive to victims’ demands because they conclude that it is the legally appropriate thing to do.
1.4 Why Focus on Criminal Prosecutions?

Scholars interested in regime transitions have pointed out that one of the most daunting challenges faced by new democracies is the question of how to deal with the violations of human rights and humanitarian law perpetrated by previous regimes against unarmed populations or in their militarized struggle against armed insurgent groups (O’Donnell and Schmitter 1986; Linz and Stepan 1996; Huntington 1991; Elster 2004, 2006). The notion of transitional justice, or post-conflict justice, encompasses a vast array of initiatives states can implement in order to address these wrongdoings. These include criminal prosecutions, monetary reparations, instituting days of remembrance, building monuments, establishing truth commissions, implementing lustration policies, and establishing programs to re-train security forces (Bassiouni 2002; Teitel 2003; Roht-Arriaza 2006; Ambos et al. 2009; Nalepa 2010). This project adopts a narrower view of transitional justice “as the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes” (Teitel 2003:69, my emphasis)\(^{19}\). In particular, the focus is on criminal prosecutions aimed at establishing individual criminal responsibility for human rights violations during past dictatorships or internal armed conflicts. The political and legal challenges presented by criminal prosecutions make it an empirically and theoretically interesting topic.

From a political point of view, trials constitute one of the most challenging forms of transitional justice. When current or former members of the armed forces or leaders of politically representative groups run the risk of going to jail, the stakes in the process are

\(^{19}\) For a defense of a broader definition of transitional justice that includes both prosecutorial and non-prosecutorial justice mechanisms, see Ambos (2009).
much higher. Trials can lead to the destabilization of the democratic order and also accentuate the societal rifts opened up during the preceding armed conflict or authoritarian era. Academics have advised against the holding of human rights trials, and encouraged either adopting a forgive-and-forget strategy or choosing less destabilizing or vindictive alternatives like truth commissions or reparations. 20 The threat of destabilization or regression to authoritarianism has even led to the issuing of pardons and amnesty dispositions by democratic leaders. 21 Some scholars attack this position by invoking a moral imperative driving the need for prosecutions (Nino 1991; 1996). Others invite transitional leaders to “muster the political and personal courage to impose judgment against those accused of gross violations of human rights” as the “least worst strategy” (O’Donnell and Schmitter 1986:30).

In addition to being politically controversial, criminal prosecutions present a number of serious legal challenges 22. The legal case for prosecuting human rights violations is grounded on norms and principles of international human rights law and

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20 In an influential article Diane Orentlicher (1991) argues that although states have an international responsibility to investigate and punish these crimes, the scope of criminal accountability efforts should be defined by the regime’s political and legal capacities to undergo such risky and traumatic processes. See also Zalaquett (1992), Malamud-Goti (1995) and Osiel (1986, 2000). See Zalaquett (1995) for a comprehensive review of the different transitional justice scenarios that involve varying levels of political risk, and for a good treatment of the different positions in the debate.

21 For a defense of the role of amnesties in preserving peace and fostering reconciliation, see Judge’s García Ramírez dissenting vote in I/A Court of Human Rights, Barrios Altos v. Peru, ruling of March 14th 2001. The UN has also brokered peace accords in Central America and Africa that included amnesty provisions.

22 Some political theorists have argued that modern Western legal institutions and traditions cannot successfully deal with these crimes. According to Hannah Arendt “these crimes defy the possibility of human judgment and explode the frame of our legal institutions” (quoted in Young-Bruehl, 1982: 328). Similarly, Judith Shklar suggests that “it is indeed doubtful that legal provisions can be devised for events of this sort. There are no civilized responses that are fitting and certainly no legal norms can cope” (Shklar, 1964:167).
humanitarian law. Central to the evolution of the international legal regime throughout the 20th century is the notion that states have a duty to prosecute international crimes, often referred to as crimes against humanity (Meron 2000; Van der Voort and Zwanenburg 2001; Simmons 2009; Orentlicher 2011). According to Juan Méndez “the international law of human rights recognizes that the state is obliged not only to refrain from committing certain acts against the individual but also to carry out duties of an affirmative nature. Specifically, the state must give each person the right to seek remedial action under the relevant treaties” (1997:5).

In order to fulfill these duties, domestic judiciaries must incorporate international legal jurisprudence and doctrines into their decisions. As argued above, this a highly demanding intellectual endeavor. Judges and prosecutors are asked to consider legal arguments with which they are not familiar due to the fact that they rarely confront them on a daily basis. According to Ruti Teitel, “the attempt to impose accountability through criminal law often raised rule-of-law dilemmas, including retroactivity in the law, tampering with existing laws, a high degree of prosecutorial selectivity, and a compromised judiciary. Therefore, to whatever extent imposing transitional criminal justice included such irregularities, it risked detracting from the contribution that justice...

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23 This duty emerges from the texts of the Convention for the Prevention and Punishment of the Crime of Genocide (1948); the four treaties and three additional protocols of the Geneva Conventions (1949); and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984). The Inter-American Court of Human Rights consistently interpreted the American Convention on Human Rights as imposing upon states the duty to investigate and punish serious human rights violations and crimes against humanity. Similarly, in a case against Turkey, the European Court of Human Rights declared that amnesties, pardons and statutory limitations are inapplicable in cases of torture. See ECHR, Abdulsamet Yaman v. Turkey, ruling of November 2nd 2004. Some also argue that this duty emerges from the principles of customary international law and is therefore binding beyond the parties that signed and ratified the aforementioned legal instruments. Whether criminal prosecutions are a mandatory part of this duty is a controversial issue given the availability of other, non-retributive forms of justice. See Ambos (2009).
can make to re-establishing the rule of law” (2003:76-77).

In part due to the political and legal challenges presented by these trials, studying efforts at promoting criminal accountability offers an invaluable window into the behavior and performance of judiciaries. The role of courts in democracy, but especially in emerging ones, involves the development of a constitutional culture that socializes political actors into respecting the legal boundaries of their institutional prerogatives (Larkins 1996). These human rights cases constitute defining moments in the process of strengthening the ability of courts to protect the rights of citizens because they deal with the most radical violation of the aforementioned constitutional culture. Making the exercise of state violence accountable to republican rules and procedures secures the space of individual freedoms necessary for the flourishing of democratic politics (O’Donnell 2010). By contrast, passivity on the side of judges and prosecutors may erode the ethical foundations of a regime based on equality before the law and respect for basic rights and liberties (Acuña and Smulovitz 1997).

Identifying the conditions under which judicial bureaucracies can fulfill their role as protectors of these rights, overcoming the daunting political and legal obstacles mentioned above is a social scientific task of great normative importance. In addition, by studying the determinants of judicial behavior in these cases it is possible to make empirical and theoretical contributions to two bodies of scholarship: the literature on comparative judicial politics, and the literature on the impact of norms, ideas, and their diffusion, on political processes.

The radical jurisprudential changes demanded by criminal prosecutions against past torturers make this an excellent topic for analyzing the constraining and empowering
effects of legal orthodoxies on judicial outcomes. In this respect, the pages to come add to a growing body of scholarship that looks at the role of ideas and norms of professional conduct in determining the behavior of judges, and at the socio-political dynamics that lead to the formation of legal preferences and judicial organizational cultures (Hattam 1993; Hilbink 2007a; 2007b; forthcoming; Woods 2008; Hilbink and Woods 2009; Couso 2010; Rodriguez-Garavito 2011a, 201b; Ingram 2012). This dissertation contributes to this literature by bringing history into judicial politics, exploring the struggles that shape the institutionalization, reproduction and change of informal behavioral norms inside judicial branches, and the concomitant predisposition and ability of judiciaries to uphold certain rights at the expense of others.

By focusing on criminal prosecutions, I also engage with the literature on diffusion in international relations and comparative politics (e.g. Kuran 1991; Strang and Soule 1998; Beissinger 2002; Pavehouse 2002; Brinks and Coppedge 2006; Tannenwald 2007; Levitsky and Way 2010; Bunce and Wolchik 2011; Mainwaring and Pérez Liñán forthcoming). The legal ideas that enabled criminal prosecutions at the domestic level were originally developed in the international arena, and in order to topple impunity regimes, judges and prosecutors in Latin America had to learn them anew. My treatment of the mechanisms of ideational change involved in this process makes two different contributions to our understanding of diffusion.

First, I depart from previous work on the transnational spread of behavioral norms in favor of criminal prosecutions among states (Sikkink 1993; 2005 2011; Keck and Sikkink 1998; Finnemore and Sikkink 1998; Risse Kappen, Sikkink and Ropp 1999; Lutz and Sikkink 2001). I identify and explore the processes that lead to the entrenchment of
these norms among judicial actors, as opposed to just looking at presidents or legislators. My approach thus “de-centers” the state, and avoids reifying the domestic as a unitary dimension. My model is built on the assumption that different domestic actors are affected by different mechanisms of norm diffusion. In the case of judges and prosecutors, I underscore the importance of re-socialization efforts attuned to their profession specific concern with the legal legitimacy of their decisions.

Second, my analysis of diffusion puts emphasis on the importance of technical knowledge as an enabler of shifts in patterns of political behavior. Technical knowledge and particular forms of expertise help oppositions run more effective electoral campaigns against authoritarian incumbents (Bunce and Wolchik 2011); define the design of environmental, economic and health policies within and across states (Haas 1989, 1992; Peterson 1992; Dargent 2012); shape the content of treaties (Glasius 2005; Struett 2008; Deitelhoff 2009; García Iommi 2012); and affect the internal workings of international bureaucracies (Finnemore 1993, 1996a; Barnett and Finnemore 2004). The ability of political actors to do things is as important as their motivations. Politics, an especially political action embedded in highly bureaucratic spheres, has a technical dimension that cannot be overlooked. The account of judicial behavior in cases of human rights violations presented in this dissertation shows that the inflow of knowledge about international law is decisive in order to explain why judges were capable of toppling impunity regime. I show that even judges and prosecutors committed to the cause could not act upon that commitment when they lacked the necessary technical tools.
1.5 Research Design

1.5.1 Measuring the Variables and Establishing Causation

This dissertation seeks to refine our understanding of the causal process that leads to accountability for past human rights violation in Latin America, with a particular focus on the cases of Argentina and Peru. The guiding premise behind the project is that explaining transitional justice \textit{qua} political phenomenon involves investigating the determinants of judicial behavior in these sensitive cases. In order to do so it opens the “black box” of judicial institutions, exploring the decision-making process of judges and prosecutors. The research pays attention to litigants’ role in these judicial battles, to the political context in which judicial actors decide whether or not to open or re-open criminal prosecutions, and to the content of jurisprudential outcomes.

Influenced by the tradition of comparative historical analysis of judicial institutions and judicial behavior (e.g. Hattam 1993; Gillman 1993, 1996, 2002, 2008; Moustafa 2007; Hilbink 2007a Smith 2008), I seek to present a thick account of why we observe certain patterns of judicial action \textit{vis-à-vis} transitional justice. In this sense, this dissertation presents a context-rich exploration of the mechanisms that lead to a specific type of outcome in a theoretically interesting, but small number of judicial cases. In order to do so, I compare patterns of jurisprudential outcomes in two country-case studies, carefully evaluating the plausibility of the aforementioned alternative explanations in each context. The focus of the case studies is to diachronically document ideational changes inside judicial branches, attributing those changes to pedagogical and personnel replacement strategies deployed by human rights movements, and linking those transformations to variation in the dependent variable.
Paying close attention to the content of the suits, the dynamics of judicial proceedings and the context in which rulings are handed down, reduces the risk of misinterpreting the logic behind the decision-making process. Closely studying the vicissitudes of transitional justice in two countries and analyzing a reduced number of suits concerning human rights violations perpetrated by state actors, allows me to use multiple data sources to reconstruct in detail why condemnatory rulings are issued in some instances but not in others, assessing the relative impact of litigation strategies, the preferences of elected leaders and judiciaries’ own institutional characteristics. Moreover, given the ideational nature of the main contextual and causal variables identified by the theoretical framework, a small-N research design is also advantageous. In order to establish whether cultural and normative changes within judicial institutional indeed take place and affect transitional justice in the hypothesized direction, and whether litigants are the main driving force behind these changes, qualitative evidence derived from process tracing is called for.

The theoretical framework outlined above and explained in full in Chapter 2, yields a number of observable implications. Each of them, in turn, constitutes a different step in the story behind transitional justice outcomes. It is important to clearly identify these instances in the political process under study because explanations that emphasize causal mechanisms have the empirical burden of fully reconstructing the theoretically important nodes in the hypothesized causal chain. This is crucial in order to discard rival hypotheses and establish causation. In other words, conducting theoretically driven process tracing is like building a puzzle. To be rigorous it must be guided by a map not only of the pieces at the extremes of the board, but also of the connecting ones. This map
will dictate the search for different types of data corresponding to each of the pieces that make up the puzzle (Hall 2003; Collier, Brady and Seawright 2004; George and Bennett 2004).

According to the model presented above, the expectation is that transitional justice should be observed in those cases in which litigants successfully activate processes of institutional transformation within judicial corporations. This expectation stands in opposition to the belief that transitional justice happens only when the political class agrees to it. Moreover, in contrast to social movement theories of transitional justice the above model brings judges and prosecutors into the picture and posits a series of mechanisms whereby judicial actors and social movements interact. This generates at least three methodological challenges: measuring transitional justice outcomes; tracing the impact of litigant’s strategies on judicial actors; and measuring the impact of the political environment on judicial behavior.

1.5.1.1 Measuring the Dependent Variable

Objectively measuring the performance of courts in transitional justice processes is problematic. It is difficult, for example, to establish benchmarks in relation to the proportion of condemnatory rulings that makes a particular country at any given point in time score high on this variable. Judicialization initiatives characterized by a commitment to respect the due process of law, inevitably yield acquittals. This is especially true in these cases because establishing individual criminal responsibility beyond reasonable doubt for state crimes that took place in the distant past is a daunting task.

With these considerations in mind I collected different types of indicators. I gathered data on the number of indictments issued by prosecutors and lower courts; the
rate at which indictments are confirmed by appeals courts; and the speed at which they make progress to the trial stage. I also looked for information on the number of rulings handed down after oral trials; the rate of confirmation of those rulings by appeals courts; the rates of conviction at different levels of the judiciary; and the severity of convictions measured in years of imprisonment.

In one of the case studies (Argentina) I took advantage of the federal structure of the judiciary and obtained information about the above indicators at the subnational level. This allowed me to expand within case variation in the dependent variable. My analysis in this case not only looks at temporal shifts in aggregate, national level patterns of judicial behavior, but also explores geographical variation within specific time periods.

In addition, the analysis relies on data about judges’ decisions on interlocutory appeals filed by defense lawyers at various instances in the judicial process, requesting the application of amnesties, the enforcement of statutes of limitations and the termination of preventive imprisonments. This information is particularly important to test my theory because if judges find merit in those appeals, there is evidence that formalist legal cultures have not been transformed. Successful interlocutory appeals put an end to prosecutorial efforts before the factual evidence for or against the defendants is weighted.

1.5.1.2 Measuring the Hostility of the Political Environment vis-à-vis Transitional Justice

In order to estimate the most preferred policy points of military and political actors in this policy area, and their ability to enforce those preferences, I focused on discrete temporal units defined by presidential terms during and after democratic transitions. I conducted archival research in newspapers of varying ideological
persuasions and read the relevant secondary literature to evaluate the salience of transitional justice during electoral campaigns and to trace the contours of the human rights policies pursued by presidents in the two countries. I also looked for evidence of intimidation tactics and court packing initiatives aimed at minimizing, deterring or promoting judicial action in cases of state repression. With respect to the military, I searched for public statements before and after important judicial rulings and before and after high profile presidential policy statements on the matter, to explore their reactions. I also conducted interviews with key political players including former ministers, government lawyers and congressmen in order to inform my interpretation of the aforementioned information.

1.5.1.3 Measuring Activists’ Strategies

To explore the heuristic productivity of my model of institutional change within judiciaries, I reconstructed the main arguments expounded by prosecutors, litigants and defense lawyers during legal battles. By interviewing those in charge of NGO’s litigation efforts, I learned about the evolution of the legal arguments they used and their strategic choices when deciding what cases to file. I triangulated this information with a careful analysis the documents they filed in court, of available transcriptions of oral trials and of the reports of journalists attending the trials.

To investigate litigant’s strategies to craft a friendlier judiciary, I explored their pedagogical efforts to diffuse the new legal orthodoxy. In particular, using archival information gathered at NGOs and conducting interviews with both litigants and judicial actors, I documented the existence of informal spaces of interaction between NGOs and judges (e.g. academic seminars on the implementation of international law by national
courts; informal meetings before important rulings; etc.), and the ideas circulated in those spaces. I also explored the involvement of these groups in processes of judicial appointments and the removal of judges. I looked for evidence of activists’ participation in the nomination or impeachment of judges in the media and in the minutes of the meetings of congressional committees and judicial appointment bodies.

1.5.1.4 Adjudicating Between Competing Hypotheses

The diachronic analysis of transitional justice indicators _vis-à-vis_ changes in the political environment is important in order to assess the impact of strategic considerations in the behavior of judges and prosecutors, and thus explore the sufficiency or necessity of favorable political conditions to explain transitional justice. In the interviews with judges and prosecutors I asked them about political pressures, personal threats and their perceptions of the risks involved in handing down convictions. In the Argentine case, the massive flow of human rights cases through the judiciary allowed me to build a dataset of judicial decisions in a specific legal issue area (preventive imprisonments) to statistically evaluate changes in adjudication criteria before and after changes in the political environment.

Interviews with judges and prosecutors were also crucial in order to assess the validity of my alternative model of legal judicial empowerment. My overall argument suggests that in interviews judges and prosecutors should recognize temporal shifts in their standards of adjudication as the impact of formal and informal litigation strategies cumulates, modifying their interpretative criteria and technical capabilities to successfully push the prosecutions and criminal investigations forward.
In interviews I asked about the obstacles they found when investigating and evaluating the cases; about their perception of the legal limits for assertive judicial behavior; about their perception of litigants’ legal strategies; and about the effect that the socialization strategies implemented by litigants had on their legal preferences and knowledge, in particular whether they increased the perceived legitimacy of the sources of law that allowed for the dismantling of impunity regimes. By triangulating evidence from interviews with judicial actors with information about litigants’ strategies, I was also able to reconstruct the informal interactions between the two groups that led to the diffusion of new ideas and ultimately to the persuasion of judges.

In the Peruvian case I also administered an online survey to the universe of prosecutors involved in human rights cases, in which I asked similar questions. I also relied on survey results found by conducting archival research at NGOs. These surveys were administered after judges and prosecutors attended pedagogical events organized by human rights activists, so they were particularly useful to explore judges’ views of these events, as well as to document attendance records.

The oral testimonies of judicial actors offered an invaluable window into the thought processes behind judicial decision-making. In contexts where the political establishment supports transitional justice, exploring these thought processes was essential in order to determine whether the actions of judges and prosecutors responded perfectly to the preferences of outside forces or followed a distinct logic. In this sense, closely analyzing judicial actors’ subjective perceptions of their role in the battle for criminal accountability was important in order to establish the extent to which their participation was guided by a rekindled sense of mission or corporate identity *qua*
members of the judiciary. To this end I also reviewed speeches and public statements delivered by judges (especially high court judges) in order to evaluate the relevance of the human rights cause in defining the institutional image the judiciary seeks to convey to the public.

To complement interview and survey data, and achieve a better understanding of judicial decision-making processes, I also conducted a careful content analysis of judicial decisions, exploring whether decisions make use of international sources of law (international precedents, legal doctrine, treaties, etc.); make reference to the political environment and the constraints it imposes on judges; and incorporate arguments made by litigants in the accusation stages.

1.5.2 Case Selection

Argentina and Peru experienced similar patterns of human rights violations. State repression took the form of forced disappearances, torture and massacres, targeting armed groups, urban left wing activists and innocent bystanders. The plans implemented for the perpetration of these crimes followed a common continental pattern. In both cases state repression did not take the form of isolated events, but according to the reports released by local truth commissions, it was hierarchically organized, systematic, and conducted on a mass scale. This is particularly relevant for the theoretical framework tested here. As already mentioned, the nature of the crimes places a number of common legal and practical obstacles for criminal investigations and trials. When dealing with crimes committed by state actors in the distant past, the gathering of evidence is difficult and domestic regulations such as statutes of limitations become an important juridical hurdle.
Moreover, the invocation of international human rights law by victims and their lawyers presented the same technical and normative challenges for judicial actors in both countries.

Argentina is the leading case in the literature on transitional justice due to the protracted nature of the battle over criminal accountability and the international impact of some of the landmark events in this process. Given the importance of the theoretical propositions and empirical findings derived from the study of this case (e.g. Sikkink and Walling 2006; Sikkink 2011), it is necessary to intensively test the heuristic productivity of my framework against the backdrop of the Argentine experience.

My analysis in Chapter 4 focuses on the events after the passage of amnesty laws and presidential pardons, which gave rise to a solid impunity regime. I identify two stages in which the institutional transformations ignited by strategic litigants led to progress in the area of transitional justice. The first stage covers the years between the mid-1980s until the early 2000s. During this period, litigants managed to build critical alliances with judicial actors in order to diffuse and entrench a new legal discourse favorable to their cause. This led to a number of judicial victories including truth-seeking trials without criminal consequences; criminal trials against high military commanders responsible for the kidnapping of babies born in concentration camps; and a landmark judicial ruling declaring the unconstitutionality of amnesty laws.

The second stage coincides with the beginning of an ambitious and widespread program of criminal prosecutions in federal courts as a result of the defeat of the amnesty laws and presidential pardons. During this period, human rights groups forged institutional bonds with the federal government, prosecutors and judges, redefining the
priorities of the judiciary and its sense of mission vis-à-vis the human rights cause. In order to dismantle islands of corporatist resistance to transitional justice, human rights organizations triggered a process of personnel turnover in the federal judiciary.

In direct contrast to Argentina, transitional justice and judicial politics scholars have not studied the Peruvian case in any detail. This is particularly surprising given the far-reaching nature of transitional justice in this Andean country. Intra-regional comparisons have historically included countries in the Southern Cone, primarily Argentina, Chile and Uruguay (e.g. Sikkink 2005; Acuña 2006; Skaar 2011). By focusing on Peru I not only contribute with new empirical evidence about transitional justice and judicial behavior in Latin America, but I also subject extant theories to a broader geographical test. Much like Argentina during the 1990s, transitional justice victories in Peru took place despite the staunch resistance of the armed forces and national administrations.

In Chapter 3 I document how the human rights movement deployed a massive pedagogical intervention in the judiciary, training judges and prosecutors in a new juridical discourse, thus opening up a world of previously unknown legal solutions for human rights criminal cases and transforming a positivist and formalist legal culture. This strategic alliance forged between human rights activists and lawyers and important groups within the judicial branch generated a number of ideological, technical and political resources that facilitated a series of collective responses on the side of judges and prosecutors against soldiers and politicians seeking to put an end to the investigations and trials.
In both countries judiciaries evolved from being unresponsive bureaucracies into becoming suitable arenas for the advancement of the human rights cause. In the two case studies I explore the determinants of variation in the responsiveness of judges and prosecutors to the demands made by activists and their lawyers. By analyzing temporal changes within the same country it is possible to control for a series of background conditions such as the brutality of state repression and the size and resources available to human rights organizations, while allowing variation in the strategies deployed by litigants and in the levels of hostility of the political environment (Table 1.1).
TABLE 1.1
ARGENTINA AND PERU IN COMPARATIVE PERSPECTIVE

<table>
<thead>
<tr>
<th>Period</th>
<th>Judicial outcomes</th>
<th>NGOs’ strategies</th>
<th>Political environment</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>ARGENTINA</td>
</tr>
<tr>
<td>1985-1989</td>
<td>-Geographically uneven commitment of the judiciary to the human rights cause</td>
<td>-Skepticism about the potential of a judicial path to transitional justice</td>
<td>-Moderate political support</td>
</tr>
<tr>
<td></td>
<td>-Landmark condemnatory rulings handed down by some courts</td>
<td>-Interactions with the judiciary limited to formal litigation efforts</td>
<td>-Amnesty laws passed in 1986 and 1987</td>
</tr>
<tr>
<td></td>
<td>-Endorsement of amnesties at the end of the decade</td>
<td></td>
<td>-Limited political intervention in the judicial branch</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>-Military uprisings in reaction to trials</td>
</tr>
<tr>
<td></td>
<td><strong>1995-2001:</strong> -Activation of truth and child abduction trials by courts in some jurisdictions</td>
<td>-Systematic filing of truth seeking and child abduction cases</td>
<td>-Court packing to stop further judicial action in the area of human rights</td>
</tr>
<tr>
<td></td>
<td>-Isolated rulings against amnesties</td>
<td>-Informal contacts with members of the judiciary</td>
<td>-The military is weaker but still refuses to cooperate with truth-seeking investigations</td>
</tr>
<tr>
<td></td>
<td>-Endorsement of international legal arguments by some courts</td>
<td>-Strategies mainly focused on courts in the City of Buenos Aires, and the Provinces of Buenos Aires and Córdoba</td>
<td>-President De la Rúa (199-2001) opposed to reopening trials; blocks extradition of military officers requested by European courts</td>
</tr>
<tr>
<td>Period</td>
<td>Transitional justice outcomes</td>
<td>NGOs’ strategies</td>
<td>Political environment</td>
</tr>
<tr>
<td>----------</td>
<td>---------------------------------------------------------------------------------------------</td>
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<td>-----------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>ARGENTINA</td>
<td>-Reopening of cases in federal courts across the country -High conviction rates -Resistance by high courts that were subject to court packing in 1990s -Stalling tactics by courts in the interior of the country not subject to diffusion strategies in the 1990s -Technical deficiencies lead to the slow progress of trials in courts that did not participate in the truth and child abduction trials of the 1990s</td>
<td>-Formal litigation efforts in courts around the country -Promotion of personnel changes in uncooperative courts (naming and shaming impeachments, criminal lawsuits)</td>
<td>-Extremely supportive national political environment during the presidencies of Néstor Kirchner (2003-2007) and Cristina Fernández (2007-) -Political support for personnel changes in the judiciary</td>
</tr>
<tr>
<td>PERU</td>
<td>-Unresponsive judiciary -Technical deficiencies and lack of resources -Lack of commitment to the human rights cause</td>
<td>-Denunciation of the crimes -Legal defense of terrorist suspects -Use of Inter-American System of Human Rights</td>
<td>-Governments focused on defeating the Shining Path -Few resources given to the judiciary -Amnesty law passed in 1995 -Court packing in the 1990s</td>
</tr>
</tbody>
</table>
### TABLE 1.1 (CONTINUED)

<table>
<thead>
<tr>
<th>Period</th>
<th>Transitional justice outcomes</th>
<th>NGOs’ strategies</th>
<th>Political environment</th>
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<tbody>
<tr>
<td></td>
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<td></td>
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</tr>
<tr>
<td>PERU</td>
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</tbody>
</table>
| 2000-2006| -Investigations begin after Truth Commission files emblematic cases in the judiciary  
-Initial embrace of international law by members of the judiciary | -Massive pedagogical intervention  
-Formal litigation in domestic courts  
-Participation in cabinet (2000-2001)  
-Participation in the Truth and Reconciliation Commission | -Support for the creation of a Truth Commission and the establishment of a specialized sub-system within the judiciary  
-Weak military |
| 2006-2011| -Moderate/high conviction rates in trial courts  
-Full endorsement of international legal doctrines  
-Disparate criteria used in the evaluation of evidence leading to acquittals  
-Fierce reaction to political attempts to institutionalize impunity | -Massive pedagogical interventions in the judiciary  
-Formal litigation strategies | -Hostility against human rights NGOs  
-Various attempts to informally and formally halt investigations and trials  
-Reinvigorated military |
In both cases I am able to document assertive judicial behavior during periods in which the political establishment opposed the trials (Peru 2006-2011 and Argentina 1990-2001), showing that a favorable political context is not a necessary condition for observing positive transitional justice outcomes, and empirically establishing the positive impact of legal diffusion strategies on judges’ ability and willingness to defy soldiers and politicians. By looking at periods in which the military was weak and the political class was supportive of human rights NGOs (Peru 2000-2006 and Argentina 2003-), I further test the impact of political factors on judicial behavior. Process tracing evidence indicates that a favorable political environment is not sufficient to turn judiciaries into responsive arenas for victims and their lawyers. I show that technical deficiencies were instrumental in delaying the progress of prosecutions under favorable political contexts. In the Argentine case I take advantage of the federal structure of the judiciary to explore these dynamics at a sub-national level. I show that those jurisdictions not affected by litigant’s diffusion strategies in the 1990s evidenced lower levels of judicial activism when a decade later the political class decisively endorsed the human rights cause. The explanation for these delays is the absence of litigant-triggered technical and political changes inside local judiciaries.

Variation in the focus of litigants’ strategies over time provides further empirical leverage to intensively test the theory. First, I show that NGOs’ failure to engage with the judiciary in the terms identified by the theory during certain periods (the armed conflict in Peru and the 1980s in Argentina), led to the absence of a strong or even commitment to the human rights cause among members of this branch of government. As mentioned above, the geographically biased nature of the pedagogical interventions in the 1990s also
provides variation in pedagogical interventions within certain time periods. Second, I show that in both cases the substantive focus of pedagogical interventions on certain legal topics at the expense of others, led to the forging of an uneven legal consensus. In other words, those ideas that were systematically and extensively touched upon in the amicus briefs or during the academic activities organized by human rights activists, evidence a deep penetration in the minds of judicial actors, whereas discrepancies between judges, prosecutors and litigants remain around those questions not addressed by the diffusion efforts.

Finally the protracted nature of the battle over criminal accountability in both countries allows me to explore the efforts by both pro and anti transitional justice coalitions to gain control of the judiciary. Argentina and Peru offer an excellent window to study the socio-political struggles that lead to the formation, change and locking in of legal preferences. The shaping of legal preferences guarantees long lasting jurisprudential support for the interests of the victorious coalitions. For example, I show how the early activation of diffusion efforts by Peruvian NGOs in the 2000s was instrumental in reconfiguring the identity of the judiciary, and in limiting the impact of counter-diffusion and intimidation strategies deployed by the anti-transitional justice coalition later in the decade.

Similarly, I show that court-packing initiatives launched in the early 1990s in Argentina were intended to construct judicial buffers against the progress of human rights cases. The success of these tactics was instrumental in entrenching anti-transitional justice positions within the judiciary, to the point that these judges actively halted the progress of trials 15 years later when the political conditions were reversed. Moreover,
the early colonization of the judiciary by the anti-transitional justice coalition constrained the ability of the human rights movement to implement far-reaching diffusion strategies during the 1990s. Anticipating resistance to their arguments in the courts infiltrated by their rivals, NGOs limited their interventions to certain courts in certain regions of the country. Despite the narrow focus of their interventions, litigants managed to forge strong and decisive alliances with some members of the judiciary stationed in key courts. These alliances proved effective in opening cracks in the impunity regime and in beginning to cement the legitimacy of international human rights law. These initial legitimization efforts set the foundations for the institution’s definitive change of identity the following decade.

1.6 Plan Ahead

In the next Chapter I present a fully-fledged version of my alternative explanation for the collapse of impunity regimes in Latin America. The chapter outlines my expectations about the determinants of judicial behavior in these cases. In order to do so I offer a critique of rational choice approaches to the study of judicial institutions, and present an alternative conceptualization of the nature of judicial decision-making processes that takes into account norms and cultures of legal interpretation. Chapters 3 and 4 present the empirical findings obtained during field research in Argentina and Peru. Although the case studies make constant reference to each other, in order to provide a sharper comparative perspective, Chapter 5 systematically analyzes the similarities and differences between them. The chapter concludes with a theoretical reflection on the role of legal preferences and the political processes that lead to their formation, reproduction and transformation, in judicial decision making and judicial independence.
CHAPTER 2:
THE IDEATIONAL FOUNDATIONS OF JUDICIAL POWER: POLITICAL WILL AND TECHNICAL CAPABILITIES IN THE STRUGGLE FOR HUMAN RIGHTS

Any appeal to culture implies that shared meanings and understandings can move people to act in ways not determined by either their self-interest or structural features. Couso (2010:143)

2.1 Introduction

In the previous chapter I argued that the two main theoretical paradigms in the study of the causes of transitional justice, the “Huntingtonian” and “Justice Cascade” approaches, completely sideline the judiciary as a relevant actor in the process. These works implicitly assume that judges are epiphenomenal players: judges and prosecutors respond to the interests and preferences of presidents, the military and legislators. The underlying assumption in the transitional justice literature is compatible with rational choice theories of judicial behavior. Rationalists picture judges as strategic players who easily adapt to the political environment in which they are immersed, in an effort to avoid conflict or political risks (Ferejohn and Weingast 1992; Epstein and Knight 1998; Epstein et al. 1998; Epstein et al. 2001; Epstein et al. 2001; Bergara el al. 2003). This is especially true in contexts of great institutional uncertainty such as those characteristic of
Latin American democracies (Iaryczower et al. 2002; Magaloni and Sánchez 2006; Helmke 2005; Staton 2010).

In Part I of this chapter I offer a definition of the concept of judicial power in order to develop a critique of the rationalist approach. I will argue that it over-predicts judicial submissiveness; ignores the vast array of internal resources that motivate and enable judges and prosecutors to discount external threats; and pays little attention to processes of preference formation, in particular, the origins and reproduction of legal preferences. Immediately following this critique, I propose an alternative theoretical approach located in the scholarly tradition of historical and sociological institutionalism (Di Maggio and Powell 1991; Hall and Taylor 1996; Mahoney and Thelen 2009).

Underpinning the model is an understanding of judicial behavior that emphasizes the role of ideas about the law and shared institutional values in judicial decision-making. I postulate that judges look at the political world through the lens of a corporate identity, which is the result of specialized training; the scope of legal knowledge available to judicial actors; the professional imperative to use a structured legal discourse; and the ensuing understanding of what constitutes an appropriate use of that discourse. This corporate identity demarcates the world of conceivable, imaginable or possible legal solutions for cases, and in turn influences the array of policy domains in which courts feel that their participation is legitimate. It also affects the tools, or technical capabilities, available for courts to interpret the actual reach of their formal prerogatives.

Instead of focusing on the external constraints imposed upon courts by the elected branches and the resulting degrees of freedom for independent behavior, I suggest that judges’ ability to become influential political players, defying politicians or affecting
public policy, is nurtured within judicial corporations. The entrenchment of norms and values shapes the technical capacity of judicial actors to become policy innovators defending minority rights or forcing states to recognize new entitlements. It also crafts professional identities that catalyze corporate resistance to outside pressures. The shared belief that certain courses of action are legally possible and that certain jurisprudential solutions are worth defending, is crucial in order to observe assertive judicial behavior. In other words, the logic of appropriateness trumps the logic of consequences (March and Olsen 1984; Finnemore 1993, 1996a, 1996b; Risse Kappen et al. 1999; Sikkink 2011).

Explaining the participation of judicial actors in the political arena requires understanding the processes that generate and reproduce these values and ideas. Judiciaries are politicized by alliances crafted between their own members and outside groups, leading to the institutionalization of standards of adjudication and routine practices. The outcome of these struggles is not politically neutral, affecting the propensity of judicial corporations to protect certain interests and ideas at the expense of others.

Armed with these theoretical insights, in Part II of this chapter I develop a model of institutional change within judicial branches in order to explain transitional justice in Latin America. This process of institutional transformation in which litigants promote changes in the norms guiding judicial action and in judicial personnel, constitutes a necessary condition for observing the opening or re-opening of criminal prosecutions. Litigants actively shape courts’ political will to become involved in struggles over transitional justice, and the technical capabilities that make that involvement possible. In this sense, transitional justice results from a process of judicial empowerment. The
changes promoted by human rights litigants enable judges and prosecutors to remove legal obstacles like amnesties or statutes of limitations employing previously unknown doctrines, and motivate them to withstand outside political pressures against the progress of criminal prosecutions.

2.2 Part I: Norms, Judicial Behavior and Judicial Power

2.2.1 Conceptualizing Judicial Power

An important step in explaining the determinants of judicial behavior is to account for those factors that by enabling or constraining judges to take certain courses of action, shape their power. In very broad terms, power refers to actors’ ability to affect the status quo, either by preserving it or by changing it. This ability may be exercised in ways that are more or less observable and tangible. For example, power refers to the overt exercise of violence on the part of the state, to the capacity of a legislative coalition to pass bills, or to the deterrent effect on potential primary challengers produced by an incumbent’s rhetoric or resources. Moreover, power is not only determined by forms of capital we can easily see or measure (votes, money, popularity ratings, etc.) but it may also be conditioned by cognitive capacities. In this sense, power is defined by the ability to imagine courses of action to affect the outcome of social or political processes or to exert domination over others. For instance, the leadership of a religious group may have the ability to direct the vote of their followers and decisively affect the outcome of an election, but a worldview that rejects religious involvement in politics may in fact make those individuals powerless in the electoral field.
I propose a threefold definition of the power of a court or judge: a) the extent to which courts are able to hand down rulings free from the direct coercive influence of other political players (*sincere behavior*), b) the degree to which their decisions are implemented and respected by the parties involved in the legal dispute (*compliance*), and c) the ability of courts to intervene in policy debates (*scope of involvement*). Tom Ginsburg offers a similar definition when he states that judicial power “results from the interaction of three different components: the independent input of the court in producing *politically significant* outcomes that are *complied* with by other actors” (2003: 252). Most definitions, however, simply focus on the first and second components (Larkins 1996; Cameron 2002; Staton 2010) and tangentially touch upon the third one by introducing the notion of judicial authority or jurisdiction referring to the formal prerogatives of courts to intervene in the cases brought before them (Stone 1992; Tate and Vallinder 1995; Stone Sweet 2000; Finkel 2008).24

*Sincere Behavior*: The key to the first dimension of judicial power is the sincerity of motives behind a court’s behavior. In this sense, power is severely diminished if politicians can credibly threaten to impose personal or professional sanctions on judges who rule against their wishes. A judge is therefore powerful when he or she disagrees with presidents or legislators and feels safe to express that disagreement on paper. It is important to notice that although often dismissed as irrelevant rubber stamps, courts that constantly and sincerely agree with the wishes of executives and parliaments can still be said to be powerful players in a political system if their decisions serve to endow a certain

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24 See Ríos Figueroa and Staton (2009) for a review of extant indicators of judicial independence. Most indicators equate independence with power, thus conceptualizing power in a very narrow way.
configuration of power relations with legal legitimacy. For example, a politicized court that interprets the constitution in favor of an incumbent expanding his or her prerogatives, legalizing a constitutionally dubious re-election bid, or validating laws that restrict the political and material resources available to the opposition, is an influential court.

**Compliance**: The second dimension of judicial power is compliance. If judges cannot command obedience to their rulings from politicians or other actors, their actions remain inconsequential. Not all forms of compliance, however, signal the presence of equally powerful courts. The most powerful courts are those that issue rulings that are implemented by executives that disagree with them or for whom implementation implies high economic or political costs. Courts remain influential bodies although less powerful ones when their decisions are implemented or respected by other actors because they do not affect their interests directly or because the costs of implementation are low. Finally, when politicians implement rulings that favor them, a court’s power on the compliance dimension is not necessarily augmented or reaffirmed.

There are degrees of compliance both across issue areas and with regards to individual rulings. Compliance can be immediate or can take time. Speed of compliance may be indicative of a court’s power, but it could also signal the complexity of a decision and the existence of budgetary or technical obstacles to implement it. Moreover, systematic non-compliance with court rulings on a particular area by executives may have varying effects on the power of the institution, depending on whether we take a short or long-term perspective. For example, non-compliance can pave the way for compliance in the long run. A court may rule with the expectation that the executive will
ignore its decisions in the present in order to build pressure on politicians for violating the law, ignoring popular decisions, or undermining the separation of powers.

*Scope of involvement:* The third dimension of judicial power refers to the scope of judicial intervention in political affairs. A court becomes a more influential body when its rulings have direct impact on the design and implementation of different kinds of public policies. By contrast, a court that focuses on strictly applying written laws in private individual disputes and is not able to intervene in important political and economic debates or apply constitutionality tests to governmental decisions, is a weak one. What distinguishes this dimension of judicial power from the first one is that instead of conceptualizing the ability to exert power and influence as the ability to act sincerely, here power refers to a prior step in the decision making process.

Before deciding whether it can issue a sincere ruling, a court’s power is determined by the menu of cases filed by litigants and its formal authority to oversee those cases (e.g. rules of standing, concrete vs. abstract or concentrated vs. diffuse powers of judicial review, etc.) (Brinks and Blass 2010). A third factor that also plays a role in determining a judiciary’s scope of involvement in politics is the array of legal solutions it is able to imagine for the lawsuits it receives. For example, the doctrinal and technical tools available to courts are crucial in shaping judges’ and prosecutors’ ability to conduct effective investigations on powerful political players. Moreover, these tools condition their creativity when interpreting the reach of their formal prerogatives or when they seek to identify the policy-making opportunities afforded by the cases brought for their consideration. In this respect, a poorly trained judiciary, or one whose members are
unaware of sources of law that could be used to make innovative readings of the existing legal framework, is likely to be weak.

Different theoretical approaches to the study of judicial institutions put forward distinct understandings of judicial power, emphasizing one or more of these three dimensions. In the next section I briefly characterize the three most influential brands of scholarship in judicial studies and argue that historical and sociological institutionalisms offer a more satisfactory conception of the origins of judicial power than rational choice theories.

2.2.2 The Three Institutionalisms and Judicial Behavior

Rational choice institutionalism, historical institutionalism and sociological institutionalism are the three theoretical families that populate the world of studies on judicial institutions (Hall and Taylor 1996; Gillman and Clayton 1999; Hilbink and Woods 2009; Whittington, Kelemen and Caldeira 2010).

According to rational choice institutionalists, institutions offer mechanisms that structure and coordinate individuals’ behavior. The constraining and enabling function of institutions determines the most efficient courses of action for utility maximizing actors within specified institutional domains. Players observe the surrounding environment and the institutional features that characterize it, anticipate the actions of their counterparts given those same rules and practices, and act in ways that maximize the expected benefits defined by ex ante specified preferences (Shepsle 1989; Tsebelis 1990; Ostrum 1990; Levi 1997; Greif and Laitin 2004).
The rational choice model is extremely influential in the field of judicial politics. In the 1990s, dissatisfaction with the hegemony of behavioralist approaches to the study of courts led several scholars to begin applying rationalist tools. Contra the attitudinal model of judicial behavior that assumed that judges were relatively unconstrained to act upon their policy preferences (Spaeth 1961; Hagle and Spaeth 1991; Hagle and Spaeth 1993; Segal and Spaeth 1993), Epstein and Knight’s (1998) seminal work began to look at the institutional constraints faced by judges and the impact these had on the choices they made.

The rationalist approach portrays justices as strategic actors who pay attention to the broader political environment due to their awareness of the fact that their failure to adjust their preferences to those of other powerful actors in the system can result in negative consequences like removal from office, non-implementation of their rulings by executives, etc. (Ferejohn and Weingast 1992; Ferejohn 1998; Iaryczower et al. 2002; Chávez 2003; Finkel 2003; Helmke 2005; Ríos Figueroa 2007; Rodríguez Raga 2011). Judges seek to have a long lasting impact on policy-making and avoid taking unnecessary risks (Ferejohn and Kramer 2002; Bergara et al. 2003; Helmke and Staton 2011). The structure of the separation of powers system, including the judiciary’s lack of both the sword and the purse, thus leads to strategic patterns of judicial behavior. Judicial actors prioritize goals such as tenure, over short-term assertions of judicial power that may lead to regrettable backlashes (Epstein et al. 2001; Chávez et al. 2001; Helmke 2005).

Historical and sociological institutionalists offer a different type of analysis of judicial behavior. Historical institutionalists study the socio-political struggles that lead to the creation of institutions. They analyze the way in which institutional outcomes
generate increasing returns to power, thus locking in certain political or economic trajectories, as well as the inequalities, inefficiencies and imbalances they entail (Skocpol 1979; Pierson 2000; Mahoney and Thelen 2009; Mahoney 2010). Most scholars within this tradition assume that institutions and institutional development endogenously shape the interests and identities of actors (Steinmo et al. 1992). The constitution of these behavioral predispositions leads to the widespread view that individuals act primarily as satisficers.\footnote{The term was coined by Simon (1957) in his pioneering studies of bounded rationality. See Jones (1999) for a review.} Actors do not necessarily adhere to certain rules and practices because defecting would not be a best response given the actions of other players, but they stick to routines and existing templates because the latter become conventional aspects of political sociability.

Sociological institutionalists make similar assumptions about the role of institutions in shaping behavior. The school was developed by organizational theorists under the influence of seminal contributions to the structure-agency debate in social theory (DiMaggio and Powell 1991). In particular, the cognitive turn in sociology led to the development of a notion of human action as embedded in taken-for-granted perceptual schemas used to make sense of the social world. The embeddedness of action in the practicality of daily life runs contrary to the rationalist portrayal of actors as calculating creatures unconstrained by unconscious cognitive predispositions. Conforming to conventions and routines reduces anxiety and reinforces a security system that endows social life with intelligibility (Giddens 1979, 1984), and nurtures feelings of social efficacy by yielding successful, scripted social encounters (Goffman 1974).
Institutions take the form of cognitive frameworks that embody culturally constructed ways of judging and interpreting (Bourdieu 1977, 1984; Bourdieu and Wacquant 1992), as well as conceptions about appropriate patterns of action within organizations. These frameworks naturalize certain rituals and routines, provide meaning-assigning tools to interpret the constraints and possibilities presented by the social environment, and lead to particular ways of conceptualizing problems and of perceiving the array of valid solutions (March and Olsen 1984; Fligstein 1991; DiMaggio and Powell 1991; Stinchcombe 1997; Thelen 1999).

In the field of judicial politics, what distinguishes this brand of scholarship from behavioralist and rational choice approaches is the view that the goals judges seek when handing down rulings are both constituted and bounded by the characteristics of the organization they staff (Smith 1988; Clayton 1999; Gillman 1999). The perception of a case, of existing jurisprudence, and of legal texts is mediated by legal visions or cultures/traditions of interpretation. These institutional lenses are political and historically constructed, and constitute informal norms of behavior that indicate how things are done or ought to be done by judges qua professionals of the legal field (Bourdieu 1986; Hilbink 2007a, forthcoming; Woods 2008; Ingram 2012). Howard Gillman, for example, suggests that judges develop a sense of mission and identity, which “generates motivations of duty and professional responsibility not easily incorporated into the worldview of rational choice” (1999:68).

These works tend to emphasize the constitutive role of political and legal struggles in the institutionalization of durable legal ideas and doctrines within judicial corporations (Novkov 2008a). In other words, the view that judicial organizations foster
certain patterns of behavior by developing norms, routines and standards, does not imply that the development of these institutionalized ideas is purely endogenous and a-political. For example, Gillman (1993, 2002) has persuasively shown how during the 19th century, different political coalitions in the United States managed to entrench legal doctrines within the federal judiciary, reproducing via jurisprudential outcomes certain economic and political inequalities beyond the demise of those coalitions (see also Gillman 2008; McMahon 2004; Novkov 2001, 2008b). Similarly, in Latin American countries like Chile and Colombia, Couso (2005, 2010), Couso and Hilbink (2011) and Nunes (2010) suggest that the reification of positivism as a corporate outlook may be changing with the greater academic diffusion of neoconstitutionalist doctrines, which transform judges’ understandings of their role in the political system and foster more activist and progressive positions in defense of fundamental rights.

The type of independent variables and empirical narratives promoted by these different brands of scholarship condition the way researchers think about judicial power and processes of (dis)empowerment. The argument presented below suggests that the strategic paradigm offers a very narrow view of what determines judges’ ability to become influential players in the political system, over-predicting judicial adaptation to the external political environment and under-predicting inter-branch conflict. On the basis of this critique I will then present my theory of judicial behavior drawing from the main insights developed by the historical and sociological traditions.
2.2.3 The Strategic Approach and Judicial Power

For rationalists an actor’s power is determined by the characteristics of the institutional environment in which s/he engages in struggles over resources, policy outcomes or status positions. Furthermore, for rational choice institutionalism, an actor’s power is determined by its ability to veto changes to the status quo and also by the ability of others to veto its preferred courses of action (Tsebelis 1995). Although institutional design (distribution of formal prerogatives, timing of intervention in decision making cycles, etc) plays a crucial role, exogenous factors like political capital or resource imbalances may moderate its effects by, for example, activating or annulling an institutional prerogative.

In the case of judicial politics, scholars working from a rational choice perspective see judicial power in terms of the first two dimensions outlined above: sincerity of motives and compliance. Special attention is paid to the formal institutions that shape judges’ calculations, namely tenure security and salary stability. These formal barriers to the encroachment of other branches in the work of judiciaries are thought to encourage sincere behavior (Domingo 1999; Domingo and Sieder 2001; Salas 2001; Skaar 2011). Research done outside the United States has pointed at informal mechanisms that often jeopardize the meaningfulness of these formal attributes of the bench (e.g. court-packing, regime instability), and has therefore put rationalists’ eyes on the workings of the system of checks and balances (e.g. Iaryczower et al. 2002; Helmke 2005; Pérez Liñán and Castagnola 2009). In contexts of formal institutional stability, however, scholars have also suggested that judges look at the political environment to
avoid handing down rulings which they don’t expect to be implemented by executives and legislatures, thus preventing legitimacy costs (Epstein and Knight 1998).

The process whereby courts are empowered to become influential actors in the political system is dictated by the formal prerogatives and informal resources available for elected officials to circumvent court decisions or to deactivate islands of opposition and independence within the judicial branch (e.g. Chávez 2003, 2004a, 2004b; Finkel 2003, 2004, 2008; Magaloni 2003; Ríos Figueroa 2007; Chávez et al. 2011; Scribner 2011). Given these determinants of judicial power, rationalists expect courts to be more likely to get involved in politically sensitive struggles and debates when the power of their counterparts in the republican institutional game is circumscribed by formal institutions protecting courts, or when political fragmentation weakens their resolve (Helmke and Rosenbluth 2009; Helmke and Ríos Figueroa 2011).

There are two reasons why this understanding of judicial power is unsatisfactory. In the first place, the strategic model sees judicial power as externally constituted. Courts’ lack of both a sword and a purse leaves their ability to wield power at the mercy of the credibility and severity of the threats launched by politicians with veto power in the political system. The approach leaves little room for identifying endogenous processes of empowerment and disempowerment born out of the internal dynamics of judicial corporations. Rationalists pay almost no attention to the resources and capabilities developed within judiciaries that nurture feelings of security to behave sincerely or a sense of mission to act independently, even in politically adverse circumstances.26

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26 The works of Staton (2004; 2010) and Vanberg (2001, 2005) are an exception. For example, Staton argues that courts’ can strategically craft communication strategies in order to enhance their public legitimacy and their leverage in inter-branch confrontations.
This deficiency is partly a result of their lack of attention to the role of ideas. The entrenchment of certain ideas or beliefs about legal praxis among judges can have decisive effects on their ability to influence political outcomes. One the one hand, these ideas can strengthen corporatist feelings and foster forms of internal associativism in defense of certain positions or judicial prerogatives threatened by hostile and resourceful political majorities (Hilbink forthcoming). On the other, ideas and norms of behavior can limit judges’ ability to control the actions of elected officials even when the latter lack the resources to retaliate. For example, the hegemony of doctrines of legislative supremacy within a specific judicial corporation may lead judges to abdicate their powers of constitutional review (Couso 2010).

Second, courts’ motivations to wield power are depicted by rationalists as dominated by a narrow form of self-interest. Courts have policy ideas and seek to express and implement them just like elected officials do, but in doing so are wary of their surroundings in order to preserve their tenure and professional privileges. A less cynical rationalist portrayal of judges’ interests suggests that caution is not simply a result of their desire to stay in office, but also of their desire to make a long-term impact on public policy (e.g. Bergara, Richman and Spiller 2003). In either case, the rationalist approach ignores the possibility that qua staffers of a bureaucratic body judges may develop a different type of interests and objectives than the one that dominates the actions of elected politicians (i.e. staying in office and implementing programmatic/ideological agendas). By virtue of their membership in the legal community, judicial actors may come to define their role in the political system in terms of pursuing legal goals such as
producing legally sound jurisprudence or abiding by accepted professional standards of legal interpretation.

In this sense, the rationalist characterization of judicial goals has limiting implications for understanding processes of empowerment for two reasons. On the one hand, it sidelines the constraining and facilitating impact that different legal discourses and traditions have on defining judges’ legal goals and the concomitant perception of the compatibility of these goals with assertive policy-making through their rulings. In other words, the enshrined professional standards followed with the intention of producing sound jurisprudence affect the universe of known or accepted legal solutions for cases, thus impinging on the perceived policy-making opportunities afforded by these cases. On the other hand, the defense of these alternative institutional or legal goals can decisively motivate courts to demonstrate power ambitions by entering into collision course with the political branches in ways deemed irrational (and hence unlikely) by the analytical approach under consideration.

These two shortcomings of the rational choice approach to judicial behavior and judicial empowerment lead scholars to over predict courts’ adaption to the preferences and wishes of other actors in the political environment. Rationalists tend to underestimate judicial power or judges’ willingness to assert power and fight for influence in political debates. This line of scholarship mischaracterizes the menu of resources available to judicial actors in legal struggles over public policies, portraying courts as obsequious and timid institutions except when they can avoid punishment. Moreover, court acquiescence or failure to confront elected officials is attributed to strategic calculations that indicate
the need for prudence and caution, and not to internal legal dynamics that may restrict courts’ ability to act as effective checks on executive or legislative authority.

As a result, rationalists tend to imagine two worlds of peaceful inter-branch relations: one in which power is fragmented so that executives and legislators lack the ability to punish dissident courts; and another in which courts’ calculations lead them to avoid confrontation in the midst of political adversity. This world of court acquiescence, few inter-branch conflicts and underestimated judicial ability to prevail in those struggles, does not square with empirical reality in many parts of the world (Hilbink forthcoming). The mismatch is so apparent that even some scholars within the rationalist tradition have begun to document and explain the much more convoluted relationship between politicians and judges (e.g. Helmke and Staton 2011).

The problem is of course a theoretical one. The strategic approach narrowly focuses on the first two dimensions of judicial power. By ignoring *scope of involvement*, they neglect the role of informal factors such as the technical and doctrinal resources available to judicial actors (and the ideas about professional duties and responsibilities that are associated with these informal resources), in shaping judges’ ability to rule sincerely or command compliance with their rulings. The strictly external understanding of judicial power leads these scholars to overlook the fact that empowerment along the third dimension can be conducive to empowerment along the other two by giving courts ideational and organizational resources to minimize the risks of confronting with outside players.

In the following section I rely on historical and sociological approaches to the study of institutions to overcome these shortcomings. My model argues that
institutionalized values and a sense of professional mission among judicial actors operate as cultural resources that enable collective action initiatives versus external encroachments, threats and impositions. I also suggest that judges’ conception of the law is central to processes of judicial decision-making. Legal visions and traditions of legal interpretation operate as a structuring lens that biases judges towards privileging known and institutionally legitimized jurisprudential solutions to cases. The bias inherent in traditions of legal interpretation qua structuring lenses, not only motivates judges to defend certain legal outcomes despite pressures to the contrary, but also constrains their cognitive ability to imagine radical departures from precedent.

2.2.4 The Ideational Foundations of Judicial Power: Technical Capabilities and Political Will

Like members of any bureaucracy or corporation that subjects its members to intensive socialization processes, judges develop relatively uniform ideas and abide by standardized practices and routines. These internal ideas or practices decisively affect judicial power. In what follows I propose three ontological assumptions about the role of ideas and technical knowledge in the workings of the judicial world.

First, ideas about the law and standardized adjudication practices constitute a reservoir of internal institutional resources that motivate the political will to venture into sensitive debates over policy. When threatened by external actors, judges and prosecutors find in these shared values a catalyst of defensive collective action initiatives.

Second, technical capabilities and legal knowledge affect judges’ ability to intervene in salient political debates. Institutionalized judicial worldviews demarcate the
world of conceivable, imaginable or possible legal solutions for cases, thus influencing the array of policy domains in which courts can participate effectively, or in which they feel their participation is warranted or legitimate.

Finally, in order to understand the levels of involvement and impact of judiciaries in political struggles it is important to study the coalitional dynamics that generate and reproduce institutionalized values and ideas. Judiciaries are politicized by alliances crafted between their own members and outside groups, entrenching norms and values relative to the exercise of judicial prerogatives. The outcomes of these struggles dictate the pace of change and the transformative capacity of judicial corporations vis-à-vis the protection of rights or the creation of new entitlements.

2.2.4.1 Institutionalized Dispositions for Action and the Political Will of Judicial Actors

Institutionalized dispositions for action constitute an internal and therefore more fundamental determinant of judicial power along all three dimensions of the concept, and provide a better window to understand processes of empowerment and disempowerment. Given the highly technical nature of the task performed by judicial actors, the legal socialization process that takes place in law schools and during the interactions within judicial branches fundamentally shapes the identity of judiciaries and their ability to become influential in political debates. Institutionalized dispositions include routine practices, standards of adjudication and norms that generate expectations about appropriate forms of behavior within the organization. These informal behavioral norms define judicial actors’ perception of what is the appropriate scope of involvement in political affairs, and dictate the extent to which they can muster the will, courage and
resources to *rule sincerely*, sometimes in defiance of powerful political majorities, and command *compliance* with their rulings from these external players.

The ability to do things and the subjective perception of what can or should be done are shaped by these internal dispositions for action. The institutionalized norms that promote certain ways of addressing political and social problems at the expense of others can severely constrain judicial actors in the relationships they establish with other members of their own organization, or with external players. The satisfaction of expectations associated with membership to the legal field or to judiciaries *qua* organizations, and the cognitive limitations imposed by deeply entrenched worldviews lead judicial actors to behave as *satisficers*, sometimes ruling out or ignoring available strategies to increase their power or pursue ideological agendas.

In this sense, the logic of appropriateness can fundamentally alter the cost-benefit analysis that determines whether or not to defy powerful external players. This has the potential of inducing judicial actors to engage in battles that would be ruled out by a purely rationalist perspective, or to shy away from fights they could conceivably win. Doing what is thought to be right or what a particular organizational role commands thus becomes more important than evaluating the costs of potential retaliations by external actors or of not pursuing a more activist agenda.

This is not to say, however, that these internalized norms always foster *hubris* or make judicial actors behave foolishly by disputing spaces of power they cannot win. Institutionalized dispositions have an impact on the resources that courts can generate internally to improve their leverage in political struggles. Shared values enhance the collective determination of organizational players and their ability to garner resources in
order to stand up against powerful political actors. For example, the formation of formal and informal professional associations of judges or prosecutors driven by similar corporate identities can amplify their voices and enhance their individual sense of security. From the perspective of those materially or politically more powerful players, this can increase the costs of retaliation, making it more difficult for presidents or the military to subject judiciaries to their control.

An important insight derived from the sociological school is that the development of corporate identities and institutional values can be accompanied by the creation of complex symbolic infrastructures that cement the authority of an organization in a particular field of struggle. In this respect, the imperative to fulfill behavioral expectations within judicial organizations responds to the field’s interest in preserving the sources of its symbolic distinctiveness vis-à-vis other fields, which enhances judicial actors’ authoritativeness when deciding over questions of general interest. This is why different professions expect their members to express findings or opinions in a specialized language or tailor explanations and narratives in the terms offered by accepted theoretical or conceptual paradigms. These discursive strategies are not only inevitable in so far as they are reproduced by internal socialization dynamics, but are also functional to the legitimation of an actor’s position vis-à-vis its peers and vis-à-vis external audiences that perceive in such practices an aura of authority, rigor and knowledge (Shapiro 1981; Baum 2006). In the case of judiciaries, the internal construction of authority through the consolidation and external projection of legal symbolic systems can act as a shield in struggles with other organizations or political actors.
As a result, judges and prosecutors have an incentive to produce sound jurisprudence. Despite the inevitable room for interpretative discretion, the professional duty of having to couch opinions in a specialized discourse is an “important legitimating ideal for courts” (Bybee 2010: 78; Clayton 1992). Legal reasoning and the concomitant myth of legality (Scheb and Lyons 2000), constitutes the cornerstone of courts’ “symbolic effectiveness” (Bourdieu 1984; Stinchcombe 1997). It is central to rendering the exercise of judicial power acceptable by the parties involved, including those who lose disputes. These symbols allow courts to distance themselves from political processes unfolding elsewhere in the system characterized by backroom deals, verbal attacks or clientelism: “legal controversies tend to reinforce judicial legitimacy by teaching the lesson that courts are different from other institutions of the American democracy, and are therefore worthy of respect” (Gibson and Calderia 2009:3).

What this sound jurisprudence is perceived to be is a function of routine practices and received legal understandings. Because of the entrenched nature of these norms and the imperative to preserve the judiciary’s symbolic effectiveness, it is difficult for outside forces to introduce changes to these criteria in order to induce radical jurisprudential shifts that favor their interests. In other words, judges see these legal values and norms as worth defending, even when abiding by them implies entering into collision course with the other branches of government.

With regards to transitional justice processes, the ideational foundation of judiciaries’ political will to become involved in this thorny political issue, and human rights litigants’ capacity to shape professional standards compatible with their goals, have important consequences for understanding the fate of cases of state repression inside the
judiciary. Corporate support or resistance to the human rights cause can find its roots in judges’ and prosecutors’ deeply held beliefs about what constitutes appropriate professional praxis. For example, the widespread belief in the need to enforce international human rights treaties ratified by states and the concomitant duty to sanction violations, may lead judiciaries to ignore political pressures to perpetuate impunity. Similarly, a professional rejection or lack of awareness of these non-domestic sources of law can limit the capacity of judiciaries to become suitable arenas for the defense of victims’ rights. Institutionalized dispositions for action thus become the foundation of judges’ and prosecutors’ political resolve to engage in struggles over transitional justice or to staunchly oppose the progress of these lawsuits. In other words, acting in accordance with accepted and positively sanctioned standards of legal practice provides the motivations to display independent behavior.

By identifying the internal culture of judicial institutions as a potential source of political will to defend certain jurisprudential outcomes against external impositions, this first theoretical assumption indicates that the political environment does not necessarily determine the result of transitional justice efforts. Judicial corporate identities can turn judiciaries into resourceful and hostile opponents of elected officials and military actors pushing for rulings in either direction. As I will argue in Part II of this chapter, human rights litigants’ success is hypothesized to be a function of the extent to which they mould judges’ and prosecutors’ logic of appropriateness in their favor.
2.2.4.2 The Importance of the Law and the Technical Capabilities of Judicial Actors

The previous section argued that norms about what constitutes appropriate professional praxis give judicial actors the motivations and resources to become involved in political struggles, even when their intervention can prove a risky affair. In this section I turn to the other aspect of the ideational foundations of judicial power: technical capabilities. The concept refers to the extent of legal knowledge and professional training available to judicial actors. Like the aforementioned normative commitments, technical capabilities also have an impact on the three dimensions of judicial power. First, they give judicial actors the legal tools to act upon their preferences in a sincere way. Second, grounding their decisions on a solid and sound jurisprudential basis can be instrumental in forcing compliance by external actors. Finally, technical capabilities determine the extent to which they can effectively go about conducting their professional duties and responsibilities.

Judges are socialized to think and act as lawyers. Legal rules and hermeneutic traditions are not epiphenomenal elements in judicial decision-making, but are constitutive of the game played by judicial actors. They are the means by which judges and prosecutors participate in social, economic and political debates. Paraphrasing Hobbes, the law, like hedges, is “set, not to stop Travellers, but to keep them in the way”. In this sense, the ability of judges to become powerful actors with high degrees of autonomous impact in political struggles can be determined from within judicial corporations through the reproduction of a habitus that defines the interpretative toolkit and therefore the perceived possibilities for assertive behavior (Bourdieu 1977; 1984; Hilbink 2007a; Hilbink and Couso 2011).
Working with the premise that actors are cognitive misers or satisfiers that hold on to what is known and predictable, the sociological approach suggests that judicial corporations need to be infused with new values or ideas about the law, signaling the formation of an alternative consensus about legal praxis, for there to be radical deviations from precedent or structural changes in the way judges understand their prerogatives. Put simply, judges and prosecutors will never arrive at jurisprudential solutions they do not know about. Moreover, because they are geared towards preserving the legitimacy of their decisions, they will not take unnecessary risks, using untested criteria that may dilapidate the authority of the doctrines and routine practices that they and their audiences are used to (Couso 2010).

The high level of educational specialization of the judicial profession, which is part of the much larger legal profession, results in the development and reproduction of cognitive schemas. The setting in which judges, prosecutors and their clerks work shapes the ways they think about their prerogatives, duties and personal interests, and also the ways in which they do not question certain routines. Anyone who has read through judicial dockets discovers that judicial actors operate on the basis of templates, repetition and pre-established formulas. When presented with a conflict or problem, members of the judicial field will initially approach it through the lens of known and previously used legal instruments (Gillman 1999). In addition, professional specialization engenders a whole array of expectations about others’ behavior. Human interactions in court, for instance, follow a very predictable formal and informal pattern, not only in terms of the order with which events unfold but also in terms of the way things are said and what things are allowed. This reliance on technical knowledge and the routines it establishes is
hardly surprising, because as Helmke and Levitsky suggest, “actors operating within a particular formal institutional context develop norms and procedures that expedite their work or address problems not contemplated by the formal rules” (2006: 19).

Just as institutionalized norms and practices nurture cultural resources that empower judges in their battles with other political players, traditions of legal interpretation and the socialization dynamics to which judicial actors are exposed, decisively bias their regard for or knowledge of certain types of legal instruments, doctrines and jurisprudential solutions. As a result, judicial actors are equipped with certain technical capabilities that may or may not allow them to respond to litigants’ demands.

This is not to say that judges do not care about policy outcomes or that they never act strategically to better advance their political, social or economic goals. Legal arguments and doctrines are usually ambiguous enough to be subject to manipulations in order to fit the needs of a judge’s pre-existing ideological or policy agenda. In this sense, the sociological approach to the study of judicial institutions does not suggest that judicial actors are completely incapable of articulating autonomous, personal opinions. What the approach indicates is that by virtue of their membership in a highly structured organizational environment, judges share values and ideas associated to the practice of the law that limit the number of ways in which personal, ideological, political, or opportunistic positions can be expressed in rulings. These shared practices and norms make certain patterns of behavior unthinkable, certain legal solutions unknown and certain doctrinal or jurisprudential innovations too risky.
Judicial actors are expected to explain their reasoning and conclusions in a specialized discourse to which certain parameters of argumentation apply (Bybee 2010). As a result, judges or prosecutors who as citizens could be allies of certain political causes, need to be convinced that as legal operators they have acceptable weapons to become agents of those causes in the judicial field. They need to be given the appropriate legal tools to be able to sincerely act upon those convictions. Similarly, those judges or prosecutors who for ideological or personal reasons would normally not be willing to uphold certain values and beliefs, can be pushed into adopting more activist positions through the construction of a hegemonic discourse about what is right or wrong in legal praxis (Mattli and Slaughter 1998: 197).

As we will see in Part II of this chapter, in the case of transitional justice in Latin America, the lack of awareness among judges and prosecutors of international human rights doctrines and legal instruments, and of certain theories of criminal liability, posed a serious challenge for victims and their lawyers. They could not expect to achieve justice if the arguments they expounded to overturn impunity dispositions were seen by judicial actors as incomprehensible, impractical or lacking a sound legal basis. Since these arguments contravened longstanding cultures of legal interpretation, the latter had to be confronted and changed. In addition, if judicial actors reproduced the techniques of criminal investigation used in regular cases of homicide in their attempts to build a case against military officers responsible for forced disappearances, it was very unlikely that they would be able to conclude that the evidence available was enough to incriminate the defendants. As a result litigants had to re-train investigators to entrench new standards for
the evaluation of evidence, in particular, to induce them to put a premium on indirect, as opposed to direct, smoking gun proofs.

2.2.4.3 Institutionalizing Interests in the Form of Ideas

Institutionalized ideas about legal praxis are important because they define the universe of legal solutions that judges can provide for the cases they receive. Moreover, judges’ understanding of their role in the political system can trigger collective resistance and defiance of impositions from external political players. In this sense, constructing a hegemonic discourse within judicial corporations about certain practices of legal interpretation reinforces their power by facilitating the coordinated defense of the institution and by elevating the authoritativeness of judicial decisions. The shared belief that certain courses of action are legally possible, that sound jurisprudence can be developed to defend particular judicial outcomes, and that certain doctrines and legal instruments can be invoked to preserve the symbolic effectiveness of those decisions, is crucial in order to observe bold, assertive judicial behavior, especially in the presence of powerful political actors with opposite preferences.

In other words, for judicial bodies to become influential agents of social, political or economic change in defense of unprotected, unrecognized or neglected rights, they must be able to support their actions with adequate legal arguments. Otherwise, they risk jeopardizing the authority of their decisions and the professional integrity of their members. In addition, at a more basic level of causation, jurisprudential breakthroughs or novel patterns of legal interpretation must be known and accepted by judicial agents in order to make their way through courts.
The reproduction of ideas about the law and the role of the judiciary is not politically neutral (Gillman 1993, 2002; Pickerill and Clayton 2004; Novkov 2008b). As Di Maggio and Powell put it,

Institutional reproduction has been associated with the demands of powerful central actors, such as the state, the professions, or the dominant agents within organizational fields. This emphasis has highlighted the constraints imposed by institutions and stressed the ubiquity of rules that guide behavior. (1991:28)

If legal education and judicial practice promote a characterization of the bench as an institution that applies the literal meaning of written laws and not as one that has the prerogative to defy the legislator, the judicial battleground will be biased against change or against political minorities, and the judiciary will operate as a conservative force (Hattam 1993; Couso 2007; Hilbink 2003, 2007a, 2007b). In this respect, following the historical institutionalist tradition, the complex of ideas, practices, standards and routines enshrined within judicial organizations can be seen as “distributional instruments laden with power” (Mahoney and Thelen 2009:8). For historical institutionalism, institutions qua outcome of socio-political struggles are a crystallization of power relations that lock in, in the form of established routines or written rules, a given intended or unintended allocation of resources. This distribution of resources is perpetuated or reinforced provided a certain degree of stability in the coalitional dynamics that gave rise to it (Pierson 1997).

The ability to exploit loopholes in the feedback mechanisms that reinforce existing institutional arrangements in order to gradually or radically disrupt them, is at the center of historical institutionalist accounts of power struggles and processes of empowerment (Thelen 1999). In order to fully understand the role of the judiciary in
political struggles and its capacity to exert power (rule sincerely, force compliance with rulings and expand its reach over multiple policy domains), we therefore need to explore the ways in which judicial corporations become politicized.

The construction of a legal consensus within judicial corporations about the role of judges, the limits of interpretative freedom or the validity of certain doctrinal positions can transform these bodies into powerful and effective stewards of specific interests, values or ideas. At the cornerstone of these processes of empowerment is the struggle for the circulation and entrenchment of ideas and values within judicial bureaucracies by social and political groups striving to promote particular types of judicial outcomes. The inherent ambiguity of legal norms and the informality of ideas about legal praxis make the judiciary a fertile field for these disputes (Thelen and Mahoney 2009).

Di Maggio and Powell remind us that “institutions are not only constraints on human agency; they are first and foremost products of human actions. Indeed, rules are typically constructed by a process of conflict and contestation” (1991:28). Struggles to define what the law is, how it should be interpreted, and what constitutes appropriate judicial behavior are crucial in explaining how formerly passive judicial corporations become increasingly relevant players in particular policy domains. A constellation of social and political forces promoting continuity or change in these standard practices takes part in these struggles. The levels of consensus each coalition manages to forge, bridging actors within and outside judicial corporations often determines the strength and durability of the ideational transformation. In other words, institutionalized legal ideas are not empowering simply because they may promote collective action in defense of
institutional positions. Ideas are empowering when they are embodied in particular social and political agents with access to material, organizational and mobilizational resources.

Central to the construction of legitimizing legal discourses for innovative and transformative judicial involvement in political struggles is what some authors have defined as the “legal complex” (Halliday, Karpic and Feeley 2007). Judges, prosecutors, private lawyers, public interest litigation groups, lawyers’ professional associations and academics make up this complex. The web of relations established among “legally-trained occupations” (ibid: 7) in pursuit of certain social and political causes constitutes the basis for effective policy change in the judicial field. The strategic associations established between these actors not only build on the discursive plane the legal fundamentals for jurisprudential changes, but also give public visibility and mobilizational strength to these initiatives. The concerted actions of the legal complex can undermine the reproduction of practices and standards within judicial corporations, freshen up these institutions, redefine their mission and open up a new world of legal solutions for social and political demands.

Consistent with my emphasis on the role of ideas about the law and shared institutional values in judicial decision-making, I suggest that it is imperative to look at sea changes in jurisprudential behavior such as the cases of transitional justice studied in this dissertation, not merely as circumstantial adaptations to changes in the political environment, but instead as internal revolutions within judicial corporations that yield relatively uniform, consistent and persistent changes in adjudication criteria. These revolutions are a result of multifaceted struggles for control over the normative
commitments of judicial corporations and for imposing the acceptance of the legal discourses used to support those commitments.

The quest for transitional justice in the cases under consideration brought before courts a set of legal arguments that departed radically from standard legal practice in Latin America. Successfully processing criminal prosecutions against human rights violators demanded from victims and their lawyers strenuous efforts at imposing a new legal orthodoxy among judges and prosecutors, making them comfortable with jurisprudential innovations that were not just intellectually challenging, but also politically risky. Litigants not only had to put these new ideas on the map, defying the institutional inertias that reproduce the cognitive frameworks underpinning judicial behavior. They also had to legitimize these new doctrines in order to convince judges of their applicability and of the political viability of that exercise of judicial power. In other words, litigants’ success depended on igniting a process of institutional change to transform formerly unreceptive and passive judiciaries into allied corporations in the struggle against impunity.

After explaining my three central assumptions about how judges think and about how judicial corporations become part of political struggles, three theoretical tasks lie ahead. First, in Part II I will carefully specify the antecedent norms underpinning judicial behavior that rendered judiciaries inhospitable arenas for the human rights cause. In so doing, I will also explain the arguments expounded by human rights litigants and their incompatibility with longstanding traditions of legal interpretation in Latin America. Identifying the clash of ideas will lead me to identify the actors that embody them in the struggles for criminal accountability for past violations.
Second, I will suggest a series of mechanisms I hypothesize as crucial in producing the institutional changes necessary for observing transitional justice. Litigants understand the empowering potential of nurturing an alternative sense of mission among judges (especially when judicial actors operate in political environments hostile to the human rights cause), and also identify the cognitive obstacles posed by this formalist and positivist tradition of legal interpretation (this is true in both favorable and unfavorable environments). Very much aware of these factors human rights litigants ignite a series of mechanisms of contention to transform technically deficient judiciaries that by virtue of those deficiencies are biased against the transitional justice cause. I suggest that these mechanisms fall under two main categories: pedagogical interventions and personnel changes.

Finally, I will identify three conditions that affect the extent to which these strategies are successful. A central challenge for constructivist scholarship is to show not only that ideas matter for political outcomes, but also under what circumstances values and norms have a meaningful causal effect. The first of the factors identified by the theory is the timing of litigants’ intervention vis-à-vis similar attempts, but in the opposite direction, launched by the anti-transitional justice coalition. Second, is the choice of the agents that will speak on behalf of the human rights cause in front of judges and prosecutors. I will argue that the choice of the actual agents of ideational diffusion has an impact on the perceived legitimacy and neutrality of the legal orthodoxy expounded by the human rights community. The final factor is the systematicity of the persuasion efforts.
2.3 Part II: Identifying the Ideas, the Actors and the Mechanisms of Change

2.3.1 Introduction

The theory of judicial behavior presented in Part I indicates that legal ideas and knowledge of the law are crucial to understand judges’ and prosecutors’ involvement in political affairs. Because these ideational variables can lead judicial actors to vehemently oppose or promote political causes at the expense of the preferences and interests of powerful political players, their role in struggles for transitional justice cannot be overlooked. In contexts in which the political environment opposes criminal prosecutions, judicial actors armed with the right types of ideas can respond favorably to litigants’ claims and muster the resources and determination to successfully defend themselves from hostile presidents and generals. By the same token, in contexts in which the political class decisively demands the opening of investigations and the holding of trials, judges and prosecutors who are poorly trained and lack the necessary technical resources to carry out those duties may constitute a hurdle for the transitional justice process. In these contexts, unreformed judicial branches can also actively oppose the cries for transitional justice coming from presidential palaces and the streets.

Legal ideas are important to explain judicial behavior in cases of state repression. What is the content of the ideas that lead judges and prosecutors to support or oppose the victims? What type of technical knowledge is needed for judicial actors to become effective agents of truth and justice? Where do these ideas come from? What factors ignite and sustain the ideational change that is required to observe assertive judicial action in favor of transitional justice?
2.3.2 The Challenge of Explaining Ideational Change

Several scholars argue that the growing focus on substantive, fundamental rights over the formal and procedural aspects of adjudication constitutes a true revolution in Latin America’s legal culture (Gargarella, Domingo and Roux 2006; Rodríguez Garavito 2009, 2011a, 2011b, 2011c; Couso 2010). By promoting a greater predisposition to acknowledge the open nature of legal rules and codes, the spread of this new discourse, which strongly associates a moral vision grounded in the concept of universal human rights to the interpretation of legal norms (Nino 1992; García Figueroa 2003), puts judicial actors at the center of debates over minority rights, the use of state violence or the social effects of economic policy. According to the so-called *neo-constitutionalism*, judges ought to subject legislative acts to constitutionality tests, putting emphasis on those parts of constitutional texts that outline rights and obligations, as opposed to privileging those that outline the structure of government and formal procedures.

By releasing judicial actors from the formalist cultural straightjacket, the expectation is that they will become more influential players in policy debates, more often than not acting as a progressive force in defense of neglected entitlements (Garcia Villegas and Uprimny 2004; Gargarella, Domingo and Roux 2006). The paradigmatic shift contained in this rights-centered legal vision is often cited as the driving-force behind the “judicialization of politics” in Latin America and elsewhere (Gloppen, Gargarella and Skaar 2004; Sieder et al. 2005; Kapiszewski and Taylor 2008; Helmke and Ríos Figueroa 2011). Two types of explanations have been provided for the spread of the new constitutional discourse and the concomitant macro-trends in greater judicial involvement in politics.
First, scholars have documented structural changes in legal regimes throughout the world. These changes include the constitutionalization of judicial review, the creation of constitutional courts and the drafting of bills of rights (Ginsburg 2003; Hirchl 2004). By explicitly granting courts the formal prerogative to check legislation and by unequivocally recognizing a myriad of rights, judges have been empowered and thrown into the arena of thorny political and social debates (Gauri and Brinks 2008). In Latin America, the Spanish, French and German constitutions had an impact on the new constitutions of Colombia (1991) and Peru (1979, 1993) that created constitutional courts independent of the judicial branch (Uprimny 2004; Dargent 2009; Rodríguez Raga 2011). Similarly, recent reforms in countries like Costa Rica or Chile have led to the creation of special constitutional chambers within existing Supreme Courts (Wilson and Rodríguez Cordero 2006; Couso and Hilbink 2011). Finally, the Mexican Supreme Court, although not formally a European-style constitutional court, has began to behave like one as a result of the new prerogatives it was granted during the democratic transition (Magaloni 2003; Silva Meza and Silva García 2009).

Second, some authors suggest that the new discourse of rights has penetrated judiciaries as a result of internal organizational changes that opened the door for new voices inside these institutions. The creation of constitutional courts, for example, led to the judicial appointment of highly reputed legal scholars who were uncontaminated by the vices of formalist and positivist judiciaries. Many of the new appointees in Colombia and Peru were well-known constitutional law professors educated in Europe (and the

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27 Ginsburg (2008) suggests that currently 158 out of 191 constitutions “include some formal provision for constitutional review” (81). These provisions range from the creation of separate constitutional courts in 79 cases to the granting of judicial review to ordinary courts or to a supreme court in 60 cases.
United States) who brought with them the new legal orthodoxy developed there (Nunes 2010). In addition, in countries like Chile, gradual processes of judicial reform led to the greater professionalization of the bench via the creation of judicial schools with competitive entry exams and to the opening of numerous new positions in the judiciary. Due in part to the increasing presence of neo-constitutionalist positions in Chilean legal academia and education, a new generation of jurists began to occupy posts within the judicial hierarchy (Couso 2007, 2010; Couso and Hilbink 2011).

Although these explanations are in line with the understanding of judicial power outlined in this chapter, emphasizing the role of informal behavioral norms in conditioning judicial action, they suffer from two important shortcomings. First, they present a very linear account of the neo-constitutionalist transformation and hence fail to propose convincing causal mechanisms. The link between the influx of new ideas and judicial outcomes is presented as relatively straightforward. In the case of the first explanation, it is not clear how the existence of new prerogatives leads to different judicial outcomes given the persistence of cultural straightjackets. Similarly, the second explanation gives the impression that no conflict is involved in the establishment of a new discursive hegemony. In other words, both accounts beg the following questions: what is the process whereby judges come to believe in the new paradigm and how do they learn to apply these new tools when faced with actual cases?

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28 Some of the appointees to the new constitutional chamber of the Chilean Supreme Court had a similar background (Couso and Hilbink 2011:110). For the development of neo-constitutionalism in Europe see Stone Sweet (2000).

29 Couso (2007) documents the rise in graduates from legal programs in the Anglo-Saxon world returning to Chile with a new conception of the role judges and of adjudication in the political system.
Second, both accounts fail to clearly identify the agents of norm diffusion and the empirical mechanisms that explain the influx of those norms into judicial corporations. The above accounts do mention changes in education patterns as a mechanism of diffusion. Notwithstanding its undeniable importance, *qua* causal mechanism it remains underspecified, lacking any discussion of the actors involved, and once again, it is conflict-free.

Following Sheri Berman’s excellent study of the role of ideas in the formation of Europe’s social democratic movement, one may argue that in any ideational explanation in political science “ideas must be able to be clearly identified and associated with specific political actors” (1998:19). Moreover, “we must examine how ideas influence political behavior. This involves looking at the mechanisms by which ideas shape the motivations and choices of political actors, driving the decision-making process down one path rather than another” (ibid:25). In other words, ideas are not free floating entities whose entrance into political processes is fortuitous or abstract; ideas are carried by actors whose interests are sometimes shaped by those ideas or who, alternatively, make instrumental use of ideas. Who are these actors in the case of the neo-constitutional transformation? How do they manage to put these ideas into play in the judicial decision-making process?

The processes of transitional justice studied in this dissertation constitute an instance in which neo-constitutionalist ideals impact judicial decision-making. Indeed, my central claim is that the spread of neo-constitutionalist doctrines of criminal justice is a necessary condition for observing transitional justice in the cases in question. There are several reasons for this. First, the doctrines derived from international human rights law
open a legal window of opportunity by making transitional justice legally possible in the face of numerous legal obstacles. Second, it allows judges to enter a thorny political arena with a legitimized juridical discourse. Third, it provides judges with clear allies in civil society amongst whom this discourse is highly popular. Fourth, it has the potential of forging a new institutional identity that empowers judges to withstand political pressures by promoting collective responses to outside attacks. And fifth, this new identity makes the reopening of the investigations and the holding of trials a professional imperative, thus providing the motivation for adopting independent, risky behavior.

In contrast to the above explanations for the spread of neo-constitutionalism in Latin America and its impact on judicial decision-making, the story presented here overcomes several of the aforementioned shortcomings. First, I clearly identify what these ideas are. The term *neo-constitutionalism* can be used loosely to define a legal philosophy but its concrete implications are unclear. Instead, in the legal battles for transitional justice the meaning of a neo-constitutionalist position is very clear: it refers to the use of concrete (international) legal instruments and doctrines about a particular legal controversy. Second, I identify the actors who hold both the old and the new ideas (judicial actors and defendants, and human rights litigants, respectively). As a result of these two theoretical improvements, tracing the detour of neo-constitutionalist positions and their impact on judicial behavior during the political exchange between identifiable groups of actors facilitates rigorous empirical analysis *via* process tracing.

In the next sub-sections I will outline the legal ideas that are central in struggles over transitional justice and the mechanisms that I hypothesize lead to the empowerment of judicial actors to become effective brokers of transitional justice in Latin America.
2.3.3 The Case for Re-Opening Prosecutions and the Positivist Conundrum

The legal debate around the juridical tension triggered by criminal prosecutions of human rights violations perpetrated in the distant past is a heated one. This tension is produced primarily by the existence of amnesty laws barring criminal prosecutions; the years or decades passed since the perpetration of the crimes which often lead to the exhaustion of statutes of limitations; and the difficulties involved in gathering evidence to prove individual criminal responsibility for crimes committed by clandestine state organizations.\(^{30}\) In what follows I will explore this tension by describing the arguments developed for and against prosecutions.

2.3.3.1 States’ Duty to Investigate, Prosecute and Punish Human Rights Criminals

Human rights litigants in Latin America strategically use the norms developed in the international arena as part of the international legal regime of human rights. In particular, they invoke those norms that establish state duties to investigate, prosecute and punish human rights criminals. According to Beth Simmons, “human rights underwent a widespread revolution internationally over the course of the twentieth century. The most striking change is the fact that it is no longer acceptable for a government to make sovereignty claims in defense of egregious rights abuses” (Simmons 2009:3). The international human rights regime,\(^{31}\) developed in the aftermath of the Second World War

\(^{30}\) The juridical tension may also be enhanced by the existence of prior fraudulent trials or investigations in military courts that ended in acquittals. In theory the notion that individuals cannot be tried twice for the same crime prohibits further investigations.

\(^{31}\) Jack Donnelly defines an international regime as “norms and decision-making procedures accepted by international actors to regulate an issue area” (Donnelly 1986:602). International regimes crystallize states’ limited renunciation of sovereignty by instituting a series of constraints on state behavior regarded as necessary or legitimate. The international human rights regime consists of three main bodies of
as a response to the horror of the Holocaust,\textsuperscript{32} was founded on the idea that governments can be held accountable at the international level for their behavior \emph{vis-à-vis} their own citizens (Ratner and Abrams 1997). The United Nations Charter (1945), the Nuremberg Charter (1945), the Universal Declaration of Human Rights (1948), the Genocide Convention (1948), and the Geneva Conventions regulating state behavior in internal and international armed conflicts (1949), marked a momentous change in international relations\textsuperscript{33}: the subject of these landmark multilateral treaties was not the preservation of state sovereignty or the regulation of inter-state relations, but the protection of the human person from the arbitrary use of state power.

At the cornerstone of this transformation in international law is the development of the notion that certain forms of state repression constitute offenses against the community of civilized nations and against humanity as a whole (Bassiouni 2011). The law. First, international human rights law protects individuals against their own governments in times of peace. Second, international humanitarian law regulates state behavior in times of internal and international armed conflicts. These first two bodies of law deal with states’ international responsibilities. The distinction between international human rights law and humanitarian law has become less sharp in recent years. For example, crimes against humanity can be perpetrated both in times of peace and in times of conflict. See Aponte (2010) and Meron (2000). Third, international criminal law emphasizes the existence of international crimes for which particular individuals can be held accountable. The international community may mandate states to investigate and prosecute certain crimes at the domestic level or may create international courts to deal with these cases. These are usually the crimes that constitute the greatest offenses against the human person and are therefore seen as crimes against humanity or in violation of the minimum standards of civilization. See Ratner and Abrams (1997:8-15) for a description of these distinct bodies of law.

\textsuperscript{32} On the catalyst effect of World War II on the development of the human rights regime see Humphrey (1984). Before and after World War I, the Hague Treaties and the first three Geneva Conventions began to explicitly regulate the customs of war with the goal of protecting individuals from state abuses during times of international armed confrontation. See Bassiouni (1986, 2003).

\textsuperscript{33} Other important multilateral agreements on the protection of the human person include the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, the 1984 Convention Against Torture and the 1998 Rome Statute on the creation of the International Criminal Court.
international community outlines a series of rules and procedures to hold both states and individuals accountable for this type of behavior. These internationally sanctioned crimes include genocide and crimes against humanity (Ratner and Abrams 1997).

The crime of genocide was the first of these crimes to be codified in a multilateral treaty in 1949. Other serious international crimes such as crimes against humanity were not established by means of treaties but by the evolving body of international customary law. Crimes against humanity are crimes that do not fit into the narrow definition of genocide. They usually involve a series of common crimes such as murder, enslavement, deportation, imprisonment, torture, rape, forced disappearances and persecutions on political, racial and religious grounds, perpetrated in particular contexts against defined groups of civilians. “Systematicity” in the perpetration of the crimes is crucial, something which presupposes the existence of an organized criminal apparatus with a defined leadership and a plan of action (Rozanski 2011). This type of international crime is vaguely associated with the norms of jus cogens. In the famous words of a former chief

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34 One of the first times that the idea of “crimes against humanity” appears in international law is in the Hague Convention of 1907. The notion of “elementary laws of humanity” was also acknowledged in the 1919 report presented to the Preliminary Peace Conference after World War I (Ratner and Abrams 1997). After World War II, the Nuremberg Charter defined crimes against humanity as the “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal whether or not in violation of the domestic law of the country where perpetrated.” (Text can be found at http://avalon.law.yale.edu/imt/imtconst.asp [last accessed May 9th 2012]). In the 1990s, Article 3 of the International Criminal Tribunal for Rwanda defined them as crimes “committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds” (text can be found at http://www.unictr.org/Legal/StatuteoftheTribunal/tabid/94/Default.aspx [last accessed May 9th 2012]).

35 The “norms of jus cogens reflect core constitutive values and commitments of the international community” (Ratner and Abrams 1997:18)
justice of the Inter-American Court of Human Rights, crimes against humanity are acts that violate the “laws of humanity,” damaging the “juridical conscience of humanity.”

The idea that crimes against humanity and other serious international crimes must be investigated and their instigators and perpetrators punished, is an evolving norm in the international human rights regime. Domestic legal barriers for the progress of criminal prosecutions such as amnesty laws and statutes of limitations are seen as unacceptable and conducive to impunity (Orlentlicher 1991, 2011; Kok 2007; Van der Voort and Zwanenburg 2001). The most consistent jurisprudence on the matter is perhaps the one developed by the Inter-American Court of Human Rights. In the celebrated Barrios Altos case against Peru, the court argued:

This Court considers that amnesty dispositions, statutes of limitations and the establishment of exculpatory dispositions that seek to impede the investigation and punishment of those responsible for serious human rights violations such as torture, summary, extralegal or arbitrary executions and forced disappearances, all

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36 I/A Court HR, Barrios Altos v. Peru, ruling of March 14th 2001, concurrent opinion of Judge Cançado Trindade, paragraphs 24 to 26.

37 According to Ratner and Abrams, the Nuremberg Charter “eliminated the defenses of superior orders, command of law, and act-of-state immunity, thereby subjecting even heads of state to criminal liability” (1997:6). The Geneva Conventions, the Genocide Convention and the Convention Against Torture also demanded that states to take actions against impunity. The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity also dictates the removal of domestic obstacles for the progress of prosecutorial efforts.

38 Latin America has been a pioneer in the development of the international human rights regime. During the first half of the 20th century, Latin American countries developed numerous international instruments establishing and promoting the principle of non-intervention and state sovereignty crystallizing a centennial tradition of international peace in the region (Centeno 2003). In the aftermath of WWII, however, American nations issued the American Declaration of the Rights and Duties of Man in Colombia and thus exerted great influence at the United Nations’ San Francisco conference that led to the 1948 Universal Declaration of Human Rights (Glendon 2008). During the upcoming decades, countries in the region would agree on the establishment of the Inter-American Human Rights System. At the cornerstone of the system are the American Convention on Human Rights (1969), the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights. For a history of the Inter-American system see Goldman (2009). For a description of the formal rules governing of system see Huneeus (2010).
of which are banned because they contravene non-derogable rights recognized by International Human Rights Law, are inadmissible.\textsuperscript{39}

The Court has also emphasized the obligation of states to respect human rights, a duty that involves the development of a judicial structure that ensures the prevention and timely investigation and punishment of these crimes, especially those committed on a large scale;\textsuperscript{40} it has defined a breach to these obligations as an instance in which states incur in international responsibility;\textsuperscript{41} and it has justified the inapplicability of the \textit{non bis in idem} (double jeopardy) principle when a previous prosecution has not been conducted impartially.\textsuperscript{42} This Inter-American jurisprudence is illustrative of the use of customary international law\textsuperscript{43} and \textit{jus cogens} to show the existence of a norm against impunity when

\textsuperscript{39} I/A Court of HR, \textit{Barrios Altos v. Peru}, ruling of March 14\textsuperscript{th} 2001, paragraph 41, my translation. The Court arrived to the same conclusion for crimes defined as “crimes against humanity” as opposed to “serious human rights violations.” See I/A Court of HR, \textit{Almonacid v. Chile}, ruling of September 26\textsuperscript{th} 2006, paragraphs 96 to 113.

\textsuperscript{40} See for example I/A Court HR, \textit{Case of Radilla-Pacheco v. Mexico}, ruling of November 23\textsuperscript{rd} 2009

\textsuperscript{41} See for example I/A Court HR, \textit{Case of Velásquez-Rodríguez v. Honduras}, ruling of July 29\textsuperscript{th} 1988

\textsuperscript{42} For the Court’s doctrine of fraudulent double jeopardy, see for example I/A Court HR, \textit{Case of La Cantuta v. Peru}, ruling of November 29\textsuperscript{th} 2006.

\textsuperscript{43} Customary international law is “a far more unstructured method for prescription of law […]” Legal authorities have formulated numerous approaches and theories to determine whether a norm has achieved the status of customary international law. The most common formulation, one adopted by the International Court itself, stipulates two basic requirements: 1) that the norm be reflected in consistent state practice, and 2) that the practice be adhered to out of a sense of legal obligation (\textit{opinio juris}). Nevertheless, great debate surrounds the degree of consistency required to show state practice and on the necessity of, and requirements to demonstrate \textit{opinio juris} –especially in the area of human rights” (Ratner and Abrams 1997:16-17). One of the “methods by which international law has evolved […] include resolutions and other decisions of political organs, in particular the UN Security Council and General Assembly. Decisions of the Council represent binding international law, akin to treaties, by virtue of Article 25 of the UN Charter; Assembly resolutions may constitute highly influential or recommended positions, or strong evidence of an emergent or emerging custom. In addition, the studies and projects by subsidiary organs, such as the International Law Commission or the Commission on Human Rights, can have significant weight, as do other, less formal indicia of their actions” (ibid:18).
it comes to crimes against humanity. For example, the Court has referred to the Nuremberg Charter, the charters creating the international criminal tribunals for the Former Yugoslavia and Rwanda, and various United Nations resolutions to illustrate the longstanding international understanding that prohibits torture, forced disappearances and other inhumane acts (Dondé 2010).

As mentioned above, Latin American human rights litigants struggling against impunity at the domestic level resort to the doctrinal and jurisprudential bodies that are part of the international human rights regime. There are three reasons for this. First, invoking the notion of crimes against humanity allows them to question the validity of amnesties passed by elected congresses and approved by presidents, as well as other impunity dispositions such as statutes of limitations. Second, international human rights law offers legal tools to characterize the crimes in question in accordance with their gravity and societal implications. Finally, international criminal law puts great emphasis on the contextual characteristics of the crimes. This enables litigants to justify the adoption of special, more relaxed, evidentiary standards in trials against human rights criminals. In a nutshell, international human rights law puts into sharper focus victims’ right to truth and justice, often at the expense of legal niceties and procedural rules that benefit defendants. Let us look at the three ways in which litigants make use of international human rights law.

First, international human rights law enables litigants to characterize systematic human rights violations as crimes against humanity. The principle of *jus cogens* can be applied to declare organized and systematic attacks against civilian populations as exceptionally serious crimes long recognized and reproached by the international
community, and therefore part of the legal repertoire at the time when they were committed, irrespective of whether or not they existed in local criminal codes (in most cases they did not). This tacit international consensus may or may not have been explicitly enshrined in ratified treaties or conventions at the time, but perpetrators should have been aware of the prohibitions on state action imposed by accepted standards of civilized behavior.  

In this sense, the retroactive application of contemporary international instruments is justified when reopening prosecutions because these treaties crystallize previous understandings of the nature of the aberrations. Invoking this definition of state repression is crucial because the perpetration of crimes against humanity, so the argument goes, imposes upon states the duty to investigate and punish those involved, irrespective of when and where the crimes were committed.

Second, litigants resort to international human rights law because in addition to imposing state duties and obligations to investigate and punish, it provides a more adequate characterization of the crimes committed by state actors against civilian

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44 The arguments behind this reasoning are well illustrated by the words of Justice Robert Jackson, the United States representative to the 1945 International Conference on Military Trials: “When some of the participants in war, whether in high or low place, violate those principles of decency, honor, fair play, and humanity which we have come to know as ‘civilized’, they must be punished. The machinery is new, but the principles are ageless. Some of the atrocities committed around the world during the past war were so revolting that if the perpetrators thereof were permitted to escape punishment for lack of proper machinery, the word ‘civilization’ would be a mockery and deserve the contempt it would receive” (quoted in Mettraux 2009:4).

45 In the case of forced disappearances, for example, the Inter-American Convention on the Forced Disappearance of Persons signed in 1994, establishes that forced disappearances should be understood as crimes against humanity. The crime itself is defined in Article 2 as “the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.” (text found at http://www.oas.org/juridico/english/treaties/a-60.html [last accessed May 9th 2012]).
populations, with important implications for overcoming impunity dispositions. In this respect, in the Latin American context the concept of forced disappearances developed by the international community is particularly important given the recurrence of the crime during armed conflicts and dictatorial regimes in the region’s history. The juridical notion of forced disappearances began to develop in the 1980s, and hence was not present in most local penal codes when the crimes were perpetrated (Modollel González 2010). The Inter-American Court of Human Rights has repeatedly demanded that states include the crime of forced disappearance in their national penal codes clearly distinguishing it from other crimes such as homicide, kidnapping or arbitrary detention. For example, the court has argued that forced disappearances are “a distinct phenomenon, characterized by the multiple and continuous violation of various rights consecrated in the [American] Convention, since it not only produces an arbitrary deprivation of freedom, but also violates the personal integrity and security of the detainee and puts his/her life at risk, placing him/her in a state of complete defenselessness and leading to other related crimes.”

The doctrine behind the definition of the crime as pluri-offensive makes three central points in support of victims’ rights to truth and justice. First, forced disappearances are continuous crimes. The crime continues to be perpetrated for as long as the whereabouts of the victim remain unknown. This means that statutory limitations

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46 The OAS, for example, declared forced disappearances to be crimes against humanity in 1982.

47 I/A Court HR, Gómez Palomino v. Perú, ruling of November 22nd 2005, paragraph 92, my translation. See also I/A Court HR, Velásquez Rodríguez v. Honduras, ruling of July 29th 1988

48 For an extended doctrinal analysis of the crime of forced disappearance as understood by the jurisprudence of the Inter-American Court of Human Rights see Modolell González (2010).
begin to run only when the body is found. Second, the refusal to provide information about the fate of the victim is an essential part of the criminal type. This has important implications for the debates about criminal liability, because criminal responsibility can also be ascribed to those who participate in the criminal organization that plans and executes the disappearances without directly kidnapping, hiding or murdering the victim. This is usually the case of military dictators and other high-ranking officials. Finally, the absence of information provided by state actors involved in the criminal organization affects not only the victim’s fundamental rights, but also those of his/her relatives who must endure uncertainty and endless suffering. This expands the universe of legally recognized victims and opens the way for legal claims based on the right to truth as well as the right to justice.49

In order to make use of the notions of crimes against humanity or forced disappearances in domestic lawsuits, the doctrine suggests that charges should be based on penal types included in local criminal codes valid at the time the crimes were committed. In other words, state officials should be accused of normal crimes such as murder, kidnapping or torture. The context in which the crimes were committed and their systematic nature should then be cited to justify re-defining these charges as serious international crimes not included in positive law at the time of perpetration but that were already part of unwritten customary standards of state behavior. This re-definition does

49 On how forced disappearances affect the right to truth of the relatives of the victim, see I/A Court HR, Caso Castillo Páez v. Perú, ruling of November 3rd 1997, paragraph 90. The jurisprudence of the Inter-American Court of Human Rights also indicates that impunity for human rights violations affects not only the direct victims of the crimes but also their relatives. For example, the court has declared that a state of “impunity propitiates the chronic repetition of human rights violations and the total defenselessness of victims and their relatives” (I/A Court HR, Paniagua Morales and others v. Guatemala, ruling of March 8th 1998, paragraph 173)
not necessarily affect the type of punishment (established by the initial criminal definition), but leads to a reinterpretation of the rights of the victims and their relatives with regards to the validity of statutory limitations, double jeopardy and amnesties (Yacobucci 2005, Filippini 2006, Parenti 2008; Quinteros 2010).

Finally, by making use of human rights legal doctrine and international jurisprudence, especially the notion of crimes against humanity, litigants invite judges and prosecutors to pay attention to the context in which the crimes were perpetrated. The defining elements of the crime of genocide or crimes against humanity are, after all, contextual (Ratner and Abrams 1997). As we have seen thus far, the consideration of historical circumstances is crucial in order to overcome impunity dispositions such as amnesties or statutory limitations. It is also important when it comes to defining the standards of proof to be applied to these cases in criminal trials.

Together with the aforementioned legal obstacles to open or re-open criminal prosecutions and the concomitant complex legal solutions, state crimes present important challenges once the investigations begin and when individual criminal responsibility must be proved during trials. Proving that the crimes actually took place despite the usual official denial is not hard since victim groups have been denouncing the loss of their loved ones for decades. By contrast, establishing individual criminal responsibility beyond reasonable doubt for state crimes that perpetrated in the distant past is a daunting task. Direct incriminating evidence is rare, especially in cases of forced disappearances, since victims’ fate is unknown. The clandestine military and intelligence operations that lead to these crimes do not leave traces in official records and when they do, commanding the state apparatus allows for the effective destruction of the evidence.
Moreover, the oral testimonies of the victims’ relatives, survivors or eyewitnesses normally lack precision due to the passage of time.

For these reasons, systematic human rights violations cannot be treated using the same standards applied, for example, in regular cases of homicide. Litigants argue that judges must be open to the possibility of ascribing individual criminal responsibility on the basis of contextual historical evidence that suggests the existence of a clandestine repressive apparatus and indirect material evidence as opposed to direct proofs (Espinoza 2010; Vargas 2010). In addition, the oral testimonies of individual witnesses who escaped or were released from concentration camps or secret prisons, should acquire a special value. Given the absence of direct evidence on forced disappearances, sexual assaults or torture cases perpetrated decades ago, these witnesses become what the human rights criminal doctrine has defined as “necessary witnesses”.\textsuperscript{50} In many cases, their testimonies constitute the only data source to reconstruct the crimes and identify the culprits.

In addition to challenging standard practices and procedures for gathering, weighting and evaluating evidence, ascribing individual responsibility in the perpetration of these crimes to members at all levels of state criminal apparatuses requires the use of innovative theories of criminal liability. These doctrines were developed in conjunction with international criminal law and humanitarian law (Metrtauax 2009). They are particularly useful for human rights litigants arguing cases against military or political leaders who did not directly perpetrate the crimes, but whose input was necessary for the design and organization of the systematic attack against the civilian population.

\textsuperscript{50} The first time this concept was used in a trial in Latin America was in Argentina in the 1985 ruling against the members of the military juntas that governed the country between 1976 and 1983.
In the Latin American context, the theory of “command responsibility” or in Spanish “autéria mediata” has been extremely influential. Authoría mediata is a concept coined by German legal theorist Claus Roxin in the 1960s. It implies the existence of an illegal organization, hierarchically structured, in which the interchangeability of immediate perpetrators guarantees the man behind the scene, i.e. the leader, his dominion over the execution of the plan (Roxin 2006). The use of contextual and historical evidence is crucial to determine command responsibility given the lack of written orders for the constitution or daily operations of the criminal apparatus. Knowing how to adapt this theory to national contexts, in which the notion of command responsibility is usually not legislated, is crucial in order to bring high-ranking officials to court. According to Prusak “given the lack of evidence, which is usually due to a deliberate design,  

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51 Some jurisprudence understands ‘command responsibility’ as arising from an act of omission, i.e. when leaders fail to control their subordinates (Mettraux 2009). The Spanish term ‘autéria mediata’ does not refer to a crime of omission because it assumes that the leader or high-ranking official knows about the existence of the criminal apparatus and participates in the design of the repressive strategies. As a result, the translation used here should be read with caution. Other theories of criminal liability have been developed to address complex crimes committed by state and non-state organizations around the world. Here I only refer to ‘autéria mediata’ because it has been the most influential in Latin America. In fact, the 1985 ruling against the Argentine military juntas and the 2009 ruling against Alberto Fujimori handed down by the Peruvian Supreme Court have been extremely influential in the juridical development of the concept. Other doctrinal shifts in the area of criminal liability are the product of international jurisprudence on human rights violations. For example, the International Criminal Tribunals for the Former Yugoslavia and Rwanda and the International Criminal Court of Justice have made important contributions to the development of a theory of criminal liability for what have come to be known as “joint criminal enterprises”. For an excellent analysis of these doctrines see Olásolo Alonso (2010).

52 For example, Mettraux gives the example of how the International Criminal Tribunal for the Former Yugoslavia evaluated evidence to impute command responsibility: “In an oral ruling of 2 July 2007, a Trial Chamber of the ICTY held that ‘evidence of a general publication which is directed to conduct of a department [in this case, the police as an institutional branch of the Ministry of Interior] is information which, on its face, can be expected to be within the knowledge of the Minister of that department and the Minister’s immediate successor.’ Despite the absence of any evidence that this information had in fact become available to the accused, who was a Minister of the Interior of Macedonia at the relevant time, this information was regarded prima facie as relevant to establishing his mens rea for the purpose of the doctrine of superior responsibility.” (Mettraux 2009:10; footnotes omitted, italics in original)
“command responsibility” may in fact be the only way of assigning criminal responsibility to heads of state who are often the most desirable targets for criminal prosecution” (2010:892 ft.145).

To summarize, the use of international criminal law and human rights law allows litigants to 1) define the crimes in question as crimes against humanity, thus invoking state international responsibilities to investigate them and punish the perpetrators; 2) adequately characterize the crimes to further expand the rights of victims and their families; and 3) adapt standards of evidence in the trials against members of the criminal organizations that designed and implemented repressive strategies. As a result, victims and their lawyers are able to claim a series of rights, based on the rights to truth and justice, to remove the legal obstacles for the opening or re-opening of criminal prosecutions.

The recognition of these rights comes at the expense of the rules and standards of criminal procedures aimed at protecting defendants from the punitive powers of criminal systems. In the next section I present the arguments expounded against human rights litigants. I also show that these arguments based on positivist and formalist understandings of the law have a much closer affinity to the dominant traditions of legal interpretation in Latin American judicial branches.

2.3.3.2 The Positivist Conundrum

The case put forward by the human rights community is controversial. Critics contend that they construe their demands on the basis of vaguely defined terms such as “crimes against humanity.” These terms are derived from subjective interpretations of the norms arising from the customary practices of state actors, supposedly accepted and
binding when the crimes were committed. In addition to resorting to unwritten sources of law, litigants ask judicial actors to retroactively impute individual criminal responsibility on the basis of penal types codified in international legal instruments after the date when the crimes were perpetrated. This *ex post* codification almost never defines the precise terms of punishment corresponding to each crime. Finally, litigants are accused of demanding *sui generis* exceptions to rules of criminal procedures, such as statutory limitations, that were present in penal codes at the time of the crimes.

In line with this critique, Ratner and Abrams (1997) warn that since much of international criminal law is not codified, there is a greater reliance on interpretations of customary law. This interpretation is “fraught with dangers for defendants in criminal cases, who may face judges with different methodologies and approaches to the derivation of custom or other law. Moreover, overreliance on scholarly writings, where progressive views often seek to move the law forward, could instead lead to prosecutions that run afoul of defendants’ rights” (Ratner and Abrams 1997:20). Similarly, in a critique of the jurisprudence of the Inter American Court of Human Rights, from which domestic litigants draw to substantiate their claims, Ezequiel Malarino accuses the court of expounding a punitivist conception of human rights: “Hand in hand with victims’ super-right [sic] to justice, the Inter American Court is creating a true ‘statute of the victim’ opposed to the ‘statute of the defendant’, consecrated in the [American] Convention; that is, a non-written Bill of Rights of the victim that neutralizes the written Bill of Rights of the defendant” (Malarino 2010:46). In so doing, the Inter American Court demands state actors to modify their penal systems in order to accommodate the Court’s interpretation of victims’ rights, adapting due process guarantees retroactively or
in an *ex post* fashion to the particular characteristics of cases involving human rights violations.

In other words, by invoking this jurisprudence, litigants expect judges and prosecutors to limit the application of the legality principle. The notion of *nullum crimen sine lege, nulla poena sine lege paevia, scripta, stricta, et certa*, or no crime and no punishment without a prior, written, unambiguous and easily understandable law is a fundamental axiom of modern criminal law (Guzmán Dálbora 2010). The respect for this axiom constitutes a guarantee of legal certainty for the defendant since it limits the punitive powers of states by forbidding the retroactive application of the law; censuring the conviction for crimes not unequivocally defined in written statutes at the time when the crime is committed; limiting the possibility of interpreting the law by analogy because individual conduct should be clearly defined to be considered criminal; and strictly commanding the enforcement of statutes of limitations.\(^{53}\)

According to these critics, the lax interpretation of the legality principle defended by human rights litigants is also controversial because numerous human rights treaties explicitly outline the rights of individuals facing criminal charges. The limitations imposed upon the arbitrary exercise of state power as it pertains to criminal prosecutions that compromise the liberty and personal integrity of individuals has been one of the

\(^{53}\) With regards to statutes of limitations see Kok (2007). The debates over the rights of victims versus the principle of legality that protects defendants were very clearly present in the debates surrounding the 1969 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. Many states refused to sign or ratify the document arguing that it provided ambiguous and legally imprecise definitions, thus violating the principle of legality. There was also a heated debate during the Convention as to whether the application of the instrument should be retroactive. The conclusion was that the spirit of the convention indicated retroactivity. For a summary of these debates see Corte Suprema de Justicia de la Nación Argentina, *Arancibia Clavel, Enrique Lautaro s/homicidio calificado y asociación ilícita y otros*, ruling of August 24\(^{th}\) 2004, concurrent vote of Justice Carmen María Argibay.
motivations driving the development of international criminal law and human rights law. For example, the international recognition of due process guarantees for defendants is enshrined in articles 8 through 12 of the Universal Declaration of Human Rights (Donnelly 1986) and in articles 8 and 9 of the American Convention on Human Rights (Malarino 2010).

The incompatibility between many aspects of the case put forward by human rights litigants fighting against impunity, and these principles of modern criminal law naturally elicits qualms among judicial actors. Arguments derived from international human rights law represent the only normative source that enables the relaxation of these due process guarantees in order to challenge the validity of amnesties and to ignore statutes of limitations. State duties and standards of criminal procedures derived from international and human rights law and doctrine allow judges to rule that states that promote amnesties and pardons incur in breaches to their international responsibilities; that no internal legal dispositions can formally bar prosecutorial efforts; and that individual criminal responsibility can be ascribed despite the absence of direct proofs or the lack of proximate material involvement of the accused in the perpetration of the crimes. These arguments are nevertheless controversial because they apply law retroactively and defy the positivization of the law, thus contradicting the pillars of the legality principle.

This is normatively challenging for nascent democracies that seek to strengthen the rule of law after periods of brutal arbitrariness. It is also challenging for judicial actors that see themselves confronted with unusual legal arguments that defy the cultural understandings that underpin the functioning of the bureaucracies they staff.
In other words, the case for opening or re-opening prosecutions is not only legally challenging but also presents a series of practical difficulties for its endorsement by Latin American domestic judiciaries. Toppling impunity regimes via unconstitutionality rulings or by granting exceptions which are not explicitly legislated, implies redefining the traditional deferential position of Latin American courts *vis-à-vis* written laws and the political branches entitled to enact them (Couso 2010; Pásara 2010). In the cases studied in this dissertation redefining the role of courts involves reinterpreting the boundaries of the legality principle. The difficulties involved in processing these complex legal arguments are enhanced by the fact that only recently has international human rights law become part of universities’ curricula in Latin America, and that judges and prosecutors do not use it to solve the vast majority of the criminal prosecutions they deal with on a daily basis (López Medina 2004; Pásara 2010).

Latin American lawyers and judges are trained to rigorously invoke and apply the legality principle; relaxing it or simply ignoring it in cases of gross human rights violations requires a shift in the way those in charge of administering justice perceive the normative system that regulates their professional activities. Legal cultures within Latin America’s civil law tradition are in may ways pre-realist, and affirm the supremacy of domestic written law and the legality principle, promoting a vision of the law as a series of rules to be applied and not as a set of constitutionally enshrined principles to be interpreted, reconciled or ranked as demanded by the case under consideration.54 The dominant legal consciousness in the region, formalist and positivist in nature, promotes

54 Stone Sweet (2000) refers to this latter vision of law as “higher-law constitutionalism”.

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the subordination of a judges’ interpretative discretion to the dictates of the legislator, privileging procedural aspects over substantive ones.\footnote{On formalism as a legal philosophy see Shauer (2008).}

After reviewing the legal literature produced in Latin America during most part of the 20\textsuperscript{th} century, Javier Couso concludes that up to the 1980s “the dominance of legal positivism and a deferential understanding of the role of the courts \textit{vis-à-vis} the political system was absolute” (2010: 152). Judges, who are a product of this socialization process, thus come to see the bench as an instance in which only the formal legality of norms, and of private actions as literally described by those norms, is checked. The notion that laws are clear and that their application requires no interpretation, is widespread (Cuneo 1980; Pérez Perdomo 2004).\footnote{Argentina is possibly an exception since many of the region’s academic breakthroughs against this positivist and formalist approach took place there between 1960 and 1990. The work of Carrió (1965) and Carrió and Rabossi (1981), heavily influenced by Austin’s theory of language, and various books by Nino (1980, 1992), influenced by Dworkin and Hart, are some examples. Some scholars also point at the greater dialogue between the Argentine legal establishment and the Anglo-American tradition since the 19\textsuperscript{th} century. See Miller (1997).} This suggests the lasting impact of traditional scholarship like the work of Andres Bello, one of Latin America’s most prominent and influential legal thinkers. At the turn of the century, for example, he wrote:

\begin{quote}
Even if the law exhibits a notorious injustice, the judge ought to apply it as it is: ‘\textit{Dura lex, sed lex}’ (tough law is nonetheless law). If we allow judges to correct the injustice of legislation, these would be replaced according to the conscience of judge, and individuals would not know what to do, since each person has his own ways to understand fairness, and fairness would then inspire the most anomalous and contradictory decisions (quoted in Couso 2010:150)
\end{quote}

More recently, in the 1970s the president of the Superior Court of Lima, Peru, stated:

\begin{quote}
We suffer from mistaken and pungent criticisms for our decisions […] A judge cannot erect himself into a legislator by interpreting the law due to the obsolescence of legal instruments […] because so doing would mean erecting the
will of the judge into a source of law, something which is doctrinally inadmissible and very dangerous (quoted in Pásara 2010:37)

During the same period, the Chief Justice of the Chilean Supreme Court explained:

The mission of the Court is to defend the current legal order. We lack—as is evident—the power to alter the latter through interpretation […] The renovation of the legal order can only be pursued through new legislation. Therefore the violation—directly or indirectly—of legality is unacceptable, because without law there is no justice […] Judges ought to act strictly within the framework of existing legality (quoted in Couso 2010: 151)

A Colombian legal academic opposed to these formalist tendencies recalls their impact on his education:

The dominant way of teaching law, against which we rebelled, promoted at a basic level learning by heart the rules contained in laws and codes as a necessary step to remember and remain loyal to them […] “Legality”, as a tool of social control began there, in our memory, in order to pave the way for a journey in which the formalist techniques of legal interpretation prevailed (López Medina 2004:2; my translation)

In a similar critical vein, a current Mexican Supreme Court Justice proclaims the obsolescence of these still very popular ideas among his colleagues:

[A judges’ duty] is not simply to subject himself to the law, but to engage in a critical analysis of its meaning in order to control its constitutional legitimacy. And the legal science has ceased to be […] mere description to become critical (Silva Meza and Silva García 2009:xxi, ft.13; my translation)

The formalist and positivist mistrust for judicial interpretative discretion is enhanced when dealing with criminal prosecutions. The liberal ideal of the protection of individuals before the overbearing powers of states leads to a strong defense of the virtues of respect for positive, written laws via textualist readings because the liberty of indicted individuals is at stake (Malarino 2010; Pastor n.d.). As a result, the
aforementioned legal cultures are particularly consequential when seeking to re-open transitional justice processes. Judicial behavior conducive to the retroactive nullification of the effects of amnesties; to the overriding of statutes of limitations; or to convictions using criminal types such as crimes against humanity that were not part of local positive law at the time when the crimes were perpetrated, requires an understanding of adjudication that places the evaluation and ranking of values and principles over the mechanical application of written rules. Prioritizing rights such as the right to truth or state duties such as the duty to punish gross human rights violations (rights and duties which in Latin America are not part of domestic positive law), over the liberal guarantees of the rights of the accused, involves a non-formalistic reading of the normative system that governs criminal prosecutions.

Many of these ideas are elaborated in various treaties and conventions produced by the international community. The expansive impact that these international agreements can have on the way judges read the content of rights, can only become operative if they are not seen as undermining the supremacy of written constitutional dispositions, such as the legality principle, but as qualifying and enriching them in pursuit of the protection of higher juridical values (Abregú 1997; Rodríguez 2010). According to legal theorist Luigi Ferrajoli, this requires overcoming positivist prejudices about the validity of international instruments (Ferrajoli 2009: xvi).57 In the judicial cases studied in this dissertation, legally constructing the reception of the jurisprudence of the Inter-American Court of Human Rights was therefore central to successful attempts at transitional justice.

57 On international human rights legal jurisprudence as an affront to state sovereignty see Malarino (2010).
2.3.4 The Challenge Faced by Latin American Judicial Actors

There are two reasons why the old legal orthodoxy is a barrier for transitional justice. First, the legal arguments in favor of transitional justice must be learnt anew by judges and prosecutors. Making available a legal alternative to the status quo is the first step to legitimizing that alternative and making it politically viable.

Second, the case for transitional justice takes judges outside their comfort zone, disrupting their routines and standard practices. The fact that the jurisprudential innovations sought by human rights litigants entail a high degree of experimentation means that even the judges most favorable to the cause need reassurance that the symbolic effectiveness of their actions will not be jeopardized. They have to be able to make a legal case that finds some support in the legal community. In order to be able to occupy a prominent role in policy debates, judges and prosecutors must be able to legally justify their interventionism in a language that conforms to certain professional and bureaucratic standards. Unlike other domains in which political battles unfold, the judicial one requires the translation of political questions into the language of the law. When this translation is successful, judges and prosecutors are armed with accepted argumentative and legal tools that can be used to challenge received understandings about the role of the judiciary in the political system and the rules that govern judicial action.

These two obstacles are particularly consequential in the presence of powerful political actors opposed to the opening or re-opening of prosecutions. In the absence of an alternative legal vision, the positivist/formalist orthodoxy may engender a submissive reflex among judges and prosecutors faced with cases filed by human rights lawyers. Moreover, it provides a legitimizing discourse for the decision to perpetuate impunity and
to avoid entering into collision course with powerful majorities or elected officials. In order to alter the *status quo* in a politically adverse scenario, judges need to marshal the symbolic effectiveness of a new orthodoxy, appealing to potential allies in the social, political and legal world. The new orthodoxy must penetrate deeply into the identities of judicial actors and their institutional values in order to trigger risky, independent behavior in the midst of outside pressures to the contrary. As these new professional standards evolve and become ingrained in the functioning of judicial bureaucracies, it becomes more difficult for judges to accept political directives or threats to ignore those new standards, and at the same they become armed with legal instruments to resist those onslaughts. For example, the jurisprudential pressure exerted by the Inter-American Human Rights System, which plays an important role in the development of a new legal consciousness favorable to transitional justice, empowers judges by allowing them to invoke the primacy of international obligations over the domestic *raison d'état* (Orentlicher 1991).

I argue that successful attempts at promoting transitional justice via criminal prosecutions demanded the construction and incorporation of a counter hegemonic legal discourse within judicial corporations. The socialization of judges into traditions of legal interpretation that do not focus narrowly on national law as an empirical fact, but adopt more expansive criteria to identify alternative sources of law and to read rights and duties into constitutions, involves not only making judges aware of these alternative instruments but also persuading them of their validity and applicability. The question is how this change in the norms that guide judicial behavior comes about.
2.3.5 The Unknown Soldiers of Jurisprudence: Institutional Change Through Persuasion and Personnel Changes

I suggest that human rights activists play a central role in this process. As a Mexican Supreme Court judge stated in an interview “litigants are the unknown soldiers of jurisprudence.” Once we take the law as a theoretically serious dimension of judicial decision-making, we ought not to focus exclusively on judges but should also incorporate litigants, and their knowledge and resources. Litigants can transform courts by turning them into battlegrounds of ideas about the law. Qua agents of norm diffusion, litigants enable changes in the discursive and legal regimes that endow innovative patterns of judicial decision making with formal and informal legitimacy.

Human rights activists exert a disruptive exogenous force on the production and reproduction of norms of behavior (in this case, legal cultures) within judicial corporations. Effective organized litigation efforts both inside and outside the courtroom endow judges with a legitimizing legal discourse to intervene in political struggles over transitional justice. This empowerment process strengthens the position of judicial actors vis-à-vis soldiers and politicians by deinstitutionalizing certain constraining ideas about legal praxis and providing judicial actors with an alternative mandate. Qua agents of norm diffusion litigants therefore turn courts into battlegrounds of ideas about the law and eventually transform courts into viable outlets for advancing rights claims. By politicizing the judiciary, human rights litigants struggle to undermine the hegemony of the positivist and formalist legal orthodoxy that makes judges unaware and unreceptive to a neo-constitutionalist vision of criminal justice.

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58 Interview, Mexico City, July 27th 2010
There is a large literature on public interest litigation that emphasizes the transformative capacity of social movements that turn to courts to pursue their political objectives. As Charles Epp famously put it, “combining rights consciousness with a bill of rights and a willing and able judiciary improves the outlook for a rights revolution, but material support for sustained pursuit of rights cases is still crucial. A support structure for legal mobilization provides this missing ingredient” (1998:17). The idea that persistent litigation by organized groups can lead to important breakthroughs in the protection of individual rights, in the creation of new entitlements and in the launching of progressive policy reform features prominently in this literature.\textsuperscript{59}

The main hypothesis proposed here follows this scholarly tradition: human rights groups that equip themselves with professional teams of public interest lawyers to engage in sustained litigation efforts throughout time to keep judicial dockets full of cases are more likely to obtain judicial victories. Sustained litigation generates a positive information feedback. On the one hand, through trial and error litigants can use test cases to find where in the system judges are more responsive or what arguments are viable given the existence of impunity regimes. On the other hand, a cumulative process is

triggered in which victories are incremental. Limited accusations that find loopholes in the impunity laws are then used as jurisprudential benchmarks to launch bolder strikes.

Sustained litigation, although a crucial precondition for successful transitional justice efforts, is not enough. In this sense, my argument goes beyond traditional analysis of public interest litigation by focusing both on the formal and informal strategies deployed by litigants to achieve positive outcomes in court. Instead of simply emphasizing litigants’ formal moves in particular lawsuits, I explore their informal, often surreptitious efforts to transform judiciaries *qua* institutions in order to secure consistent and uniform macro-level jurisprudential shifts. I take Epps’s idea that a “willing and able judiciary” is necessary for observing rights revolutions very seriously, and argue that litigation groups do too. The mechanisms of legal contention I propose aim at transforming both the technical capacity and political will of judicial corporations to put an end to impunity. I choose to label these mechanisms of institutional change “pedagogical interventions” and “personnel changes.”

Human rights activists must potentially deal with three types of judicial actors: *committed, indifferent* and *recalcitrant*. The label committed is used to refer to those judges and prosecutors who are favorably predisposed to the human rights cause. This predisposition could be a function of prior exposure to the discourse of international human rights law, or to ideology and personal experiences with repression. Judges could also become committed to the human rights cause during the process of investigating the crimes, especially after being confronted with incontrovertible evidence of the aberrations (for example, after hearing witnesses recount their experiences in
concentration camps or secret prisons, or victims’ relatives explain their protracted struggle to find out what happened to the disappeared).

Indifferent judges and prosecutors are those with no prior commitment to the human rights cause. This could be the result of weak ideological positions, lack of knowledge of the extent and nature of state repression, or the absence of prior exposure to alternative legal discourses.

Finally, recalcitrant judges are those that exhibit a deeply ingrained positivist legal worldview. They could be legal scholars who have written about criminal law in the terms prescribed by the traditional legal orthodoxy. In addition, a judicial actor may fall into this category due to his or her unequivocal sympathy for the defendants. These sympathies could be the result of personal connections with former military officers or of their experience as collaborators of the previous regime.

I argue that persuasion strategies are targeted at the first two groups, whereas recalcitrant judges are essentially not susceptible to ideational change. The third group is the target of the second mechanism of institutional transformation: personnel changes.

2.3.5.1 Persuading the Persuadables: Pedagogical Interventions

The mechanism of persuasion involves a process of re-socialization of judges and prosecutors. Litigant groups that diffuse throughout the judiciary arguments derived from international law and international jurisprudence will be more successful in toppling impunity regimes. As suggested above, the arguments that enable the overcoming of amnesties or the restrictions imposed by statutes of limitations need to be learned by judges and prosecutors anew. The socialization of judges into new traditions of legal
interpretation is a subtle process. The diffusion mechanisms I propose do not only include the use of this normative baggage in formal legal documents filed in court.\textsuperscript{60} Socialization mechanisms also involve informal networking, organizing pedagogical activities for judges, circulating academic documents in court and exposing judges to the opinions of international experts and colleagues from other countries who managed to solve the same juridical problems.\textsuperscript{61}

In this sense, human rights movements politicize the judiciary, turning it into a conflict-ridden arena in which ideas about constitutionalism and the boundaries of legal hermeneutics clash, forming strategic alliances with particular judges and prosecutors and gradually galvanizing a critical mass of judicial actors to ensure the sustainability of litigation efforts. These alliances are crucial not only because they are the steppingstone for transforming the judiciary into a more hospitable institution for the human rights cause, but also because human rights litigants are not the only organized groups circulating legal arguments and doctrines among judges. Defendants and their allies also engage in lobbying tactics, and they can usually count on more resources to deploy effective legal strategies.

Given the high stakes involved in transitional justice criminal investigations (the liberty of powerful political and military actors, the reputation of the military \textit{qua} institution, the electoral interests of presidents and legislators, etc.), judges confront an

\textsuperscript{60} The literature on American courts shows that the information transmitted by litigants in this form is relevant when judges make their decisions, especially in areas that are controversial. See Johnson, Wahlbeck, & Spriggs (2006).

\textsuperscript{61} The Inter-American Court recognizes the importance of training judges in this new juridical language. In a decision against the Mexican state, the Court mandated that judges attend special training courses on international human rights law. See I/A Court HR, \textit{Case of Radilla-Pacheco v. Mexico}, ruling of November 23\textsuperscript{rd} 2009.
environment of crisscrossing pressures. Activists and their lawyers cannot simply rely on the ideal of judicial impartiality. They must win the favor of judicial actors and personally invest them in the human rights cause by convincing them of the legitimacy and superiority of the new legal vision.

The mechanism of persuasion has four empowering effects that enable transitional justice even in the presence of outside veto players. First, it infuses judiciaries with new technical capabilities. At the level of individual judges and prosecutors, pedagogical interventions provide a menu of previously unknown or unconsidered legal options that render it possible to move forward with the re-opening of prosecutions and trials. This effect is particularly consequential among committed judges and prosecutors who are thus provided the necessary legal instruments to topple impunity dispositions, acting upon their convictions. Invoking the international obligations of states to investigate crimes against humanity or treaties and conventions ratified by the country legitimizes deeply political decisions and provides a sense of professional security by assuring judicial actors that they are not jumping off a jurisprudential cliff. If they are attacked for taking these decisions, they can safely claim that they were not abusing or misusing their prerogatives but instead applied recognized legal criteria.

In addition to providing the legal fundamentals for activating human rights cases and legitimizing those decisions with internationally recognized legal criteria, pedagogical interventions provide judicial actors with practical skills that allow them to effectively conduct the investigations. In this respect, training judges and prosecutors in the art of gathering evidence is especially important because judicial actors usually have no experience in investigating this type of crime. For example, if judges approach this
task like they approach any regular homicide case, it is highly unlikely that they will be convinced about defendant’s criminal responsibility due to the absence of direct evidence. Given the secretive nature of clandestine repressive apparatuses in Latin America, it is difficult to establish the identity of the direct perpetrators and of the immediate superiors without putting a premium on victims’ (often) sloppy recollections of the events. Furthermore, when the military or the state is the subject of investigations it is not uncommon for authorities to deny access to official documents such as the list of names of military personnel deployed in the areas of the country where the crimes were perpetrated.

Pedagogical initiatives also help judges decide how to conduct judicial proceedings that are unprecedented in nature. For example, in the case of truth trials in Argentina, which were conducted in criminal courts but had no criminal implications (i.e. there were no defendants in the cases), judges struggled with the question of what rules of criminal procedure to apply in order to regulate the conduct of the trials. Human rights litigants were instrumental in helping them overcome this unexpected disruption to their routines and standard practices (Chapter 4).

Second, at the level of the judiciary qua institution, effective persuasion or re-socialization efforts have the potential of recreating the professional identity of its members. By galvanizing a critical mass of judges and prosecutors, human rights groups can redefine what is right and what is wrong in legal praxis. If, for example, a consensus is reached around the idea that statutes of limitations cannot be applied to crimes against humanity, judges with a rekindled human rights perspective will find it professionally unacceptable to be forced to ignore that basic legal standard by closing down
investigations. The new collective identity of an institution that sees the prosecution of these crimes as its mission or mandate, can catalyze collective reactions to outside impositions and put pressure over potential defectors within the institution. In this sense, bringing judicial actors together during seminars can foster the formation of networks or associations of judges and prosecutors, bound together by their adherence to a new legal orthodoxy that envisions a new role for the judiciary in politics and society. These forms of social capital enhance members’ sense of individual security when issuing controversial decisions against the wishes or interests of powerful political actors.

The conversion effect of pedagogical interventions is particularly important among indifferent judges and prosecutors. As I argued in Part I of this chapter, judicial actors are geared towards preserving the symbolic effectiveness of their decisions. By constructing a new hegemonic legal worldview, litigants lead this type of judge and prosecutor to adhere by the standards of international human rights law, irrespective of their ideological or personal commitment to the victims’ cause. Applying the new standards becomes the appropriate and professionally recognized course of action.

Third, pedagogical interventions have the potential of trumping political considerations by activating the logic of legality. Litigants engage judicial actors on legal grounds, thus encapsulating the debate around transitional justice in strictly juridical terms. When the question of whether or not to prosecute former military officers is framed as a debate about legal norms, doctrine and jurisprudence, political calculations become less salient. In other words, the attention of judges and prosecutors is drawn towards the imperatives set by international law as opposed to those set by the political environment; to substantive legal questions about what is just as opposed to what is
opportune; to what the facts say as opposed to what the authorities would like to hear. In this respect, in the case studies in Chapters 3 and 4 I will present evidence of indifferent judges and prosecutors who were persuaded about the need for justice after listening to the victims during hearings or informal encounters promoted by NGOs, or after being presented with incontrovertible evidence of defendants’ individual criminal responsibility. In those cases, judicial actors explained their reactions by making reference to their professional duty to administer justice and enforce the rule of law.

Finally, when persuasion efforts result in the recreation of the judiciary’s institutional mission or mandate, judiciaries may adopt the human rights cause as their own, using it as a public relations tool to enhance the institution’s legitimacy among the public (Huneeus 2010b). In countries with a history of arbitrary and brutal regimes characterized by the passivity of judicial corporations, judiciaries may use the reopening of investigations and the holding of fair trials in order to erase an embarrassing record. A judiciary that enjoys broad support is better equipped to challenge other political actors.

2.3.5.2 Under What Conditions is Persuasion Most Effective?

There are three factors that increase the effectiveness of pedagogical interventions: timing, the choice of agents of diffusion, and the systematic nature of the initiatives.

*Timing*: The approach to the study of judicial institutions promoted in this chapter indicates that judiciaries are the target of attempts by a myriad of political groups to entrench ideas about the law that guarantee stable jurisprudential outcomes in favor of
their interests. The battle for transitional justice is no different. Human rights litigants are not the only ones trying to galvanize the support of a critical mass of judicial actors. As the empirical chapters of this dissertation will document, in Peru and Argentina anti-transitional justice coalitions, often led by presidents, sought to colonize the institution or applied intimidation tactics to deter judicial action.

Because of the crisscrossing pressures that judiciaries are expected to be subject to, the timing of litigants’ pedagogical interventions *vis-à-vis* similar or more coercive strategies deployed by their opponents, matters to explain the level of success of these initiatives. When litigants enjoy a first-mover advantage, they will be able to engage in more ambitious and systematic efforts to craft a friendly judiciary, erecting buffers against potential future backlashes. If by contrast, the anti-transitional justice coalition successfully colonizes courts with recalcitrant judicial actors before litigants organize their campaign, the potential target population of pedagogical interventions will be greatly reduced.

In this sense, Peru and Argentina offer an interesting comparison. In Peru litigants realized before the anti-transitional justice coalition of the importance of having judicial actors on their side, and when the latter tried to fight back is was too late. Judges had already been persuaded to abide by the standards of international human rights law. In the Argentine case, president Menem successfully colonized the judiciary in the early 1990s, in an attempt to put the military question to rest. By the time human rights NGOs began to activate the mechanisms of diffusion, there were courts that were completely out of their reach. This does not mean that pedagogical interventions were not effective, because activists still managed to forge crucial alliances with committed and indifferent judges
who opened decisive cracks in the impunity regime. But as long as recalcitrant judges remained in their seats, the transitional justice cause faced serious obstacles.

*Agents of diffusion:* The second important factor that determines the success of pedagogical interventions is the choice of agents of diffusion. The literature on diffusion in comparative politics and international relations indicates that the diffusion of norms and practices is a function of the spatial proximity and the existence of linkages between the source and the target (Kopstein and Reilly 2000; Brinks and Coppedge 2006; Levitsky and Way 2010); the emulation of prior success stories (Kuran 1991; Brown 2000; Pavehouse 2002; Beissinger 2007; Bunce and Wolchick 2011); and the levels of influence, power or leverage of the source (Kopstein and Reilly 2000; Pavehouse 2002; Levitsky and Way 2010). Although these studies usually have countries as their unit of analysis, it is possible to apply these insights to understand diffusion between individuals in the microcosm of judicialization processes.

With regards to linkages, organizing pedagogical interventions in the form of seminars and events gradually immerses judicial actors in human rights circles. As mentioned before, this can lead to the formation of formal and informal networks/associations of judges and prosecutors, which can increase their leverage in fights with political actors. Most importantly, by means of these activities, human rights activists build strong personal connections with judges, prosecutors and their clerks. These connections in turn facilitate future informal contacts with them in order to further diffuse information or apply more targeted persuasion strategies during crucial moments.
in the judicialization process. As I will show in Chapter 4, these dynamics explain why an Argentine federal judge issued a historic ruling declaring the unconstitutionality of the amnesty laws in 2001, explicitly defying the president.

With regards to emulation effects, litigants are likely to be more successful if they carefully choose the agents who will speak on their behalf in front of judges and prosecutors. In this respect, litigants must forge alliances with respected judges or prosecutors, especially those who managed to successfully solve the same juridical dilemmas presented by cases of state repression. As Bunce and Wolchik put it, innovations “are usually more deeply rooted and more carefully crafted than they appear. At the same time, they are also less original than they seem. While “newness” is central to the idea of innovation, innovation nonetheless owes at least some of its originality to past developments” (2011: 280). Facilitating these contacts between the target population and their accomplished peers gives the former reassurance that toppling impunity regimes is legally viable and politically possible. For example, the contacts fostered by human rights NGOs between Peruvian Supreme Court Justices presiding over Fujimori’s trial in 2009 and the Argentine federal judges who conducted the trial against the military juntas in 1985, were crucial in guaranteeing a positive outcome in the Peruvian case.

Finally, in relation to the nature of the source, litigants’ choice of the agents of diffusion is also important. Mechanisms of diffusion are most effective when they are endowed with an aura of authority and neutrality. As parties in the legal dispute, human rights litigants must not appear to be exerting undue influence on the arbiters. NGOs are more likely to be successful if those who speak on their behalf are respected law

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62 Helmke and Levitsky (2006) identify personal contacts and networks as factor driving the emergence of informal institutions.
professors, international experts or members of prestigious international institutions dedicated to the promotion of human rights around the world. An *amicus brief* signed by a well-known constitutional lawyer, or a lecture delivered by the legal scholar who developed the innovative theories of criminal liability used by human rights activists in their suits, will appear as more authoritative and worthy of consideration. For example, forming partnerships with universities in the organization of pedagogical initiatives was an important move by Peruvian NGOs in their campaign to spread a new legal orthodoxy. These academic linkages can make pedagogical interventions a particularly effective strategy, especially in hostile political environments. Judges feel safer attending events organized in universities than those held in NGO headquarters because the former inoculate them from accusations of impartiality.

*Systematic nature of the persuasion efforts:* The final condition that is hypothesized to affect the effectiveness of pedagogical interventions is the extent to which litigants’ efforts are systematic. The logic behind this proposition is very simple: if judges and prosecutors are approached on a regular basis throughout the judicialization process, it is more likely that they will learn the new investigative techniques and juridical doctrines, and that they will be persuaded about their legitimacy. Even though Argentine and Peruvian human rights NGOs launched ambitious and sustained pedagogical interventions, their strategies varied across two dimensions.

First, in the Argentine case there was a geographic bias in the diffusion process. Central, urban provinces were targeted to a greater extent than the so-called interior of
the country. I anticipate that the outcome and pace of the judicialization process evidences corresponding patterns of sub-national variation.

Second, in both countries pedagogical interventions were biased in favor of certain topics. In particular, their primary goal was to diffuse knowledge and acceptance of international legal instruments and jurisprudence to enable the toppling of impunity dispositions including amnesties and statutes of limitations. Less attention was paid to questions relative to the gathering and evaluation of evidence (Peru) and to procedural aspects of the judicialization process, such as the criteria to determine whether or not defendants should wait for the start of trials in prison (Argentina). I therefore expect corresponding variation in the levels of consensus among judges and prosecutors across legal issue areas.

2.3.5.3 Removing Recalcitrant Judges

Persuading or re-socializing judges so that they endorse the legal vision that makes transitional justice possible may have long lasting effects on the progress of criminal prosecutions. Notwithstanding, persuasion has its limits because not all judges are persuadable. In the Latin American cases many members of the judiciary who remained in their jobs after democratic transitions were active accomplices of state terrorism. These judicial actors are usually closely attached to defendants on a professional and ideological level, and oftentimes also on a personal level. Moreover, for these conservative judges defending the hegemony of old legal orthodoxy within the corporations they staff is crucial in order to advance their interest in perpetuating impunity.
Transitional justice activists will strategically avoid filing lawsuits in courts staffed by these individuals. This is not always possible, especially when “unpersuadable” judges are highly ranked in appeals courts or even the Supreme Court. For this reason, I argue that successful litigants will also activate a second mechanism of institutional transformation: personnel changes. This mechanism involves replacing the old guard with new, friendlier or more approachable judges by promoting impeachments and forcing resignations through naming and shaming. In order to be effective, human rights litigants need not be successful in all of their removal efforts. In fact, a few disciplining actions may be enough to deter similar judges from stalling interlocutory appeals indefinitely, from closing down investigations or from systematically handing down acquittals.

Unlike the mechanism of persuasion, the coercive path to transitional justice requires litigants to build a much broader base of strategic alliances. Particularly important are allies in the press who can amplify litigant’s denunciations, and the members of the bodies in charge of appointing and removing judges. The latter include both legislatures and independent judicial councils staffed by members of political parties with presence in parliament, lawyers’ professional associations and judicial actors.63 Whereas the mechanism of persuasion operates with a lower level of public visibility, coercion requires taking the battle to transform the judiciary into the light of day. As a result, this mechanism can be most effectively activated in a partisan and public opinion environment that supports the transitional justice cause.

63 During the 1990s a wave of judicial reform throughout Latin America led to the creation of these bodies in countries like Peru, Argentina and Chile (see Hammergren 2007; Finkel 2008).
Departing from the rational choice paradigm, by proposing this causal mechanism once again I assume that judicial corporations do not necessarily respond automatically to the dictates of the political environment, even if that entails important risks. In other words, deeply entrenched interests and political and legal ideologies can generate pockets of corporate resistance to transitional justice in the presence of elected political coalitions favorable to the re-opening of prosecutions. In the same way that a re-socialized judiciary (via the persuasion mechanism) may be willing to openly confront with politicians that favor impunity, the presence of the old judicial guard can pose serious threats to the human rights cause when litigants can count on the support of presidents and legislators.

This is why politicizing the judiciary by promoting deep institutional transformations both at the level of norms and personnel is crucial for observing positive outcomes in transitional justice. The judiciary is an animal that must be domesticated to ensure uniform and durable macro-level jurisprudential shifts in this area and others.

The institutional transformation triggered by human rights litigants has been characterized thus far as a process of judicial empowerment. For obvious reasons, the mechanism of personnel changes seems to run contrary to this narrative. However, I suggest that it also has empowering effects on the judiciary. Like the persuasion mechanism, the replacement of a recalcitrant old judicial guard and the deterrence of dissenting voices, further consolidates the entrenchment of a new institutional vision and sense of mission in the area of human rights. Moreover, by decisively expunging a legal philosophy that constrains judges and limits the judiciary’s potential to operate as a progressive force defending neglected entitlements and favoring the creation of new rights, the fight for transitional justice can trigger spillover effects into other policy
domains. As a result, a renewed judiciary will be better prepared to impose progressive jurisprudence in the face of unwilling elected political coalitions. In sum, replacement can strengthen the judiciary as a whole to protect human rights by weakening individual judges, or pockets of judges, who help undermine human rights.

2.4 Conclusion

This chapter presented a framework for understanding judicial behavior that emphasizes the production and reproduction of legal ideas and behavioral norms within judicial corporations. Judicial behavior cannot be reduced to strategic responses to the surrounding political environment. Instead I argued that these institutionalized ideas about the law offer both the motivation and resources for judges to disregard those calculations and act in accordance with their professional standards and sense of mission.

The chapter also suggested that these ideas and norms are not politically neutral and are not only functional to the interests of the judiciary qua corporation. They are the product of struggles in which outside political groups, in alliance with judicial actors, seek to safeguard their interests by securing favorable jurisprudence.

In addition, the chapter identified the ideational components of the legal struggle for human rights, associating them to specific actors. It argued that human rights litigants seek to replace an old legal orthodoxy biased in favor of impunity with a neo-constitutionalist conception of criminal justice that favors prosecutions. In the above pages I explained the contention mechanisms that my theory identifies as conducive to positive outcomes in the area of transitional justice, as well as the conditions that increase the likelihood that they will be effective in bringing about prison sentences. In the
chapters that follow I put these theoretical insights to work presenting the case studies of Peru and Argentina.
CHAPTER 3:

PERU (2000-2012): TRANSITIONAL JUSTICE IN UNFRIENDLY TERRITORY

The lack of audacity to overcome the existing narrow legal framework with creative interpretations of the law, the lack of civic courage to defy the threats of powerful actors, that contrast with the negligence in attending to the needs of the poor, were and still are the defining features of the culture of our judicial operators, that must be overcome because otherwise we run the risk of perpetuating a dangerous Achilles’ heel of democracy.

Comisión de la Verdad y Reconciliación (Volume II, Chapter VI, pp. 249-250; my translation)

3.1 Introduction

In May 1980 Peru celebrated its first democratic presidential elections after 12 years of military rule. On Election Day, in a small village in the province of Ayacucho, an armed organization known as the Shinning Path made a violent entrance into the national political scene burning ballot boxes. That episode was the prelude of a bloody internal conflict in which the armed forces and the national police confronted the terror tactics of a ruthless Maoist group (Stern 1998). Over the next decade and a half, the violent military campaign against the Shinning Path would leave an estimated toll of 69,280 deaths. 31,331 of these deaths are attributed to the Shinning Path, 20,458 to national security forces, and the remaining 15,967 to other actors involved in the
conflict. Most of these victims were innocent bystanders who were subject to sexual violence, torture, extrajudicial killings, massacres and forced disappearances. When considering the collective execution of groups of 5 or more victims, state agents perpetrated 122 massacres whereas the *Shining Path* was involved in 215. When it comes to forced disappearances, the government was the main culprit. The Truth and Reconciliation Commission’s Final Report released in August 2003, characterized these crimes as serious human rights violations, in some cases constituting breaches to the standards set by international humanitarian law. The crimes can be referred to as crimes against humanity.

The conflict spanned across three different administrations presided by Fernando Belaúnde (1980-1985), Alan García (1985-1990) and Alberto Fujimori (1990-2000). All three were democratically elected governments, but during the third period there was a regime change in 1992 after Fujimori staged a self-coup (Tanaka 2005a, 2006). Although most of the deaths occurred during the 1980s, Fujimori’s strategy *vis-à-vis* the *Shining Path* was particularly ruthless. His tight alliance with the armed forces and the intelligence services led to the creation of a clandestine paramilitary group known as *Grupo Colina* responsible for two of the most emblematic massacres of the period.

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64 These figures are estimates that appear in the Final Report of the Truth and Reconciliation Commission released in August 2003. The figures and methodology used to calculate them can be found in Comisión de la Verdad y Reconciliación (2003), Appendix No.2.

65 Comisión de la Verdad y Reconciliación (2003), Volume VI, Chapter I. For a full account of forced disappearances during this period see also Report No.55 of the Ombudsman’s Office found at www.defensoria.gob.pe

66 Comisión de la Verdad y Reconciliación (2003), Volume I, Chapter IV.

Barrios Altos in 1991 and La Cantuta in 1992. Moreover, during his presidency, amnesty laws were passed in 1995 in order to exonerate military and police officers from their responsibility in human rights violations perpetrated between 1980 and 1995.

The 1990s were characterized by a complicit response of the judiciary vis-à-vis these criminals (Carrión 2006). With the exception of La Cantuta case, military courts usurped jurisdiction over all cases involving state agents in order to either close the investigations or hand down acquittals. No serious investigations were conducted in order to establish the truth about the whereabouts of the conflict’s victims or to punish those responsible.

The attitude towards those suspected of terrorism was markedly different. The government passed a series of anti-terrorist laws, which established a draconian legal framework to deal with these cases. The new regulations seriously affected the rule of law and due process guarantees. They gave defense lawyers no time to prepare the cases; allowed judges to conduct interrogations without appearing in front of the accused; gave military courts jurisdiction over civilians; enabled detentions without official judicial warrants; and promoted the use of ambiguous criminal types such as “treason” to indict

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68 See APRODEH (2008) and Burt (2007) for a full account of these massacres.

69 For a full account of the context in which the amnesty laws were passed and the legal consequences they had, see Defensoría del Pueblo (2001).

70 In La Cantuta case a number of military officials were sentenced to prison by military courts as part of a deal with the government that included the passage of amnesty laws within a year. As shown above, the government kept its promise. See Villarán (2007).

71 During the 1980s Congress initiated investigations to no avail. One of the cases investigated at the time was a massacre known as the Cayara case that took place during Garcia’s administration. See Villarán (2007).
individuals. Not surprisingly, these laws led to the incarceration of hundreds of innocent civilians. 72 According to the Final Report of the Truth and Reconciliation Commission,

The judiciary lacked a real capacity to act, or what is even worse, did not have the will to act in defense of the constitutional order […] [It became] an agent of violence against persons, either because -structurally- judicial operators were constrained by the organization of the judiciary and by ineffective norms, or because those same operators acted in such a way that they left the citizens whose rights they must defend, in a state of destitution (Comisión de la Verdad y Reconciliación 2003: Volume III, Chapter VI, pp. 249-250, my translation.)

In this context characterized by the state’s abdication of its duty to protect citizens from violence, human rights organizations became crucial actors. They amplified the victims’ voices, documented rights violations, and engaged in strategic litigation, first in the Inter-American system of human rights, and after the 2000 transition to democracy, in domestic courts.

In 1985 more that 40 regional and national NGOs joined efforts to create an umbrella organization known as the Coordinadora Nacional de Derechos Humanos (CNDH). 73 During its first five years of existence, the CNDH intensely denounced and documented human rights violations. During the 1990s, it began to forge alliances with international organizations such as Human Rights Watch, Amnesty International and the International Center for Justice and International Law (CEJIL). This strategy facilitated contacts with the Inter-American Commission of Human Rights, which intensified its concern with the Peruvian situation by giving it a prominent treatment in its annual

72 See de la Jara (2001).

73 For a comprehensive history of the CNDH and for a list of its members see Youngers (2003). The main organizations that make up the CNDH are IDL and APRODEH.
reports and by increasing its official visits to the country. During this decade, the lack of an adequate response by the local judiciary led Peruvian human rights NGOs to take cases to the Inter-American Court of Human Rights. These efforts yielded a series of rulings that highlighted the state’s international responsibility to investigate and punish the crimes. Finally, during the 1990s the CNDH mounted an ambitious media and litigation campaign in defense of innocent civilians imprisoned as a result of the aforementioned draconian anti-terrorist legislation. As a result of these and other initiatives, the human rights community was fiercely accused of defending the interests of terrorists.

The active presence of human rights organizations in the international scene largely contributed to Fujimori’s rapid loss of prestige and political support. After a series of corruption scandals shook the political arena in late 2000, Fujimori resigned and fled to Japan (Tanaka 2005). His resignation initiated a political transition to democracy, which one of my interviewees defined as the “NGO transition”. Human rights NGOs actively participated in the broad coalition that backed President Valentin Paniagua’s transitional government (2000-2001). Activists and their allies staffed crucial cabinet positions in the ministries of foreign relations, justice and women’s affairs, and in state agencies such as the Ombudsman’s Office and the Solicitor General’s Office. This

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74 See Villarán (2007)

75 Landmark rulings include I/A Court HR, *Case of Neira Alegría v. Peru*, ruling of January 19th 1995, and I/A Court HR, *Case of Durand y Ugarte v. Peru*, ruling of August 16th 2000 on forced disappearances during the massacre at El Frontón prison in 1986; I/A Court HR, *Case of Castillo Páez v. Peru*, ruling of November 3rd 1997 on the forced disappearance of Ernesto Castillo Páez; and I/A Court HR, *Case of Barrios Altos v. Peru*, ruling of March 14th 2001 on the Barrios Altos massacre that took place in 1991. This last ruling nullified the amnesty laws.

76 Interview with a member of the right-wing party Unidad Nacional, Lima, May 28th 2010.
instantly improved Peru’s relations with the Inter-American system, facilitated the implementation of an ambitious reparations program for the victims of the conflict, and shaped the political conditions suitable for the creation of a Truth and Reconciliation Commission with an unprecedented mandate. As a former CNDH’s executive director who was a minister in Paniagua’s cabinet stated in an interview, “when the cabinet debated the proposal to install a truth commission, I did not participate in those discussions as a minister but as a human rights activist infiltrated in the government.”

The Truth and Reconciliation Commission played a pivotal role in the transitional justice process initiated by domestic courts with the massive reopening of investigations in 2004. Apart from carefully providing judicial operators with the legal tools and doctrines necessary to define the crimes in question in a way that enabled the toppling of impunity dispositions such as amnesties and statutes of limitations, the report extensively documented the atrocities and the political context in which they were perpetrated, and expanded its initial mandate to file 47 emblematic cases in the domestic judiciary. Moreover, the Truth and Reconciliation Commission recommended the creation of a specialized sub-system within the judiciary to deal with the crimes in question.

The first post-transitional government ended in 2006 when Alejandro Toledo transferred the presidency to Alan García. The climate favorable to the NGO agenda ended abruptly. García was a former president formally accused of being responsible for

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77 In 1999 Fujimori removed Peru from the contentious jurisdiction of the Inter-American Court of Human Rights claiming that it defended terrorists.

78 Interview, Lima, April 30th 2010.

79 Some investigations were reopened in 2001 after the Inter-American Court handed down a series of rulings.
hundreds of human rights violations in the late 1980s. Not surprisingly his government was extremely hostile to transitional justice efforts. His presidency also coincided with the regaining of electoral strength by Fujimori’s party. As this chapter will document, however, the vast majority of Peru’s transitional justice achievements, measured in judicial rulings handed down by domestic courts rejecting formalist arguments invoking statutes of limitations and amnesties, and in the number of prison sentences against a former president and military and police officers, took place in this hostile political environment.

The pages to come will show that the political variables usually considered in the judicial politics and transitional justice literatures to explain the behavior of judicial actors, are not helpful to account for the Peruvian experience. Judges and prosecutors catalyzed an incredibly ambitious program of criminal prosecutions handing down exemplary rulings in the presence of powerful military and political establishments seeking to put an end to the investigations and trials. Judicial actors acted outside the tolerance levels of soldiers and politicians in a way that is not predicted by the most influential theoretical frameworks featured in extant scholarship.

In line with the model of legal judicial empowerment developed in the previous chapter, I explain the Peruvian success story by showing how litigant groups forged alliances within the judiciary, transforming the legal and normative platforms that underpin judicial decision-making. In particular, I show how human rights groups mounted an ambitious pedagogical intervention targeting judges and prosecutors in order to change their formalist and positivist cultures of legal interpretation. The informal diffusion of international legal instruments, jurisprudence and doctrine empowered
judges both discursively and normatively, and allowed them to justify the toppling of impunity regimes and the initiation of dangerous investigations, defying the dictates of other powerful actors. These strategies transformed a formerly passive and ineffective judiciary, incapable of transcending legal formalisms and constrained in its capacity to protect individual rights and the standing of the Peruvian state vis-à-vis its international legal responsibilities.

With regards to the conditions that enabled the success of informal diffusion strategies, I will show that the timing of the pedagogical intervention was important. Unlike their Argentine counterparts in the 1990s (see Chapter 4), Peruvian activists initiated their persuasion efforts before the anti-transitional justice coalition. The disarray and lack of legitimacy of the armed forces in the period spanning between the 2000 democratic transition and García’s inauguration in 2006, enabled human rights groups to infiltrate the judiciary at an early stage. They did so in the absence of a well-organized operation to neutralize their efforts. By the time the judiciary became the target of intimidation and colonization tactics by those who opposed transitional justice, human rights groups had already built strong bridges with crucial allies inside the institution. In fact, when the military realized the importance of diffusing its own legal ideas vis-à-vis the judicialization of international crimes, it began to adopt similar pedagogical strategies to those implemented by NGOs. To their dismay, they found it difficult to persuade the relevant judges and prosecutors.

In addition to timing, another factor that increased the effectiveness of the strategies designed by NGOs was the use of legal scholars and international experts as agents of diffusion. As suggested in Chapter 2, persuading judges and prosecutors to
adopt innovative legal doctrines that disrupt their standards of adjudication and routine practices requires legitimizing these ideas in the eyes of the target group. Ideas become more authoritative when they are taught and explained by neutral actors and not by the parties in the legal conflict. I will show that one of the reasons why Peruvian judicial actors were receptive was that human rights organizations directly exposed them to the opinions of their peers in neighboring countries who had confronted similar juridical challenges in the past, and to the insights of the international legal experts who produced the doctrinal innovations. Moreover, the seminars organized by NGOs were not taught by litigants themselves, but by law professors and former judges. As we will see in Chapter 4, Argentine activists also used this strategy.

Judges’ and prosecutors’ pre-existing ideological positions played a minor role in shaping this receptivity. For the most part, Peruvian judicial actors did not hold prior political views that favorably predisposed them to endorse the legal case presented by human rights NGOs. In the terms of my theory, the average judge or prosecutor did not fall in the “committed” category. For example, during interviews judges and prosecutors expressed sympathetic views towards the military and its role during the armed conflict. They decided to act in favor of the victims because their legal preferences changed, and because they felt compelled by the new ideas, not because of their pre-existing personal views.

Finally, the chapter will also demonstrate that although litigants managed to galvanize a critical mass of judicial actors who endorsed the principles and doctrines of international law, their persuasion efforts had a more limited impact on judges’ preferences with regards to evidentiary standards. In other words, judges accepted the
arguments against amnesties and statutory limitations, and those in favor of characterizing the crimes as crimes against humanity, but were more reluctant to relax their views on the need for direct of evidence to establish individual criminal responsibility. This variation is explained by the substantive emphasis of pedagogical interventions in the former topics at the expense of the latter.

I use the technique of process tracing analysis to adjudicate between competing explanations of transitional justice. In order to establish the impact of a) the levels of tolerance of political elites, and b) of litigants’ pedagogical interventions on judicial behavior, I rely on the testimonies of key political, civil society and judicial actors; elite surveys; public opinion data; and archival data. In addition to using information obtained during interviews with victims, human rights lawyers, law professors, journalists and politicians, I draw on the testimonies of numerous judges and prosecutors. Since only a few courts within the Peruvian judiciary have jurisdiction over human rights cases, I was able to interview a high percentage of the judicial actors involved in the process.\textsuperscript{80} In Table 3.1 I show the number of interviews with judges and prosecutors conducted at each of the relevant levels of the judiciary. I complement this qualitative evidence with the results from an anonymous survey of prosecutors. The survey was administered online and respondents were invited to participate by the chief human rights prosecutor. The response rate was 43.5%. Finally, the analysis also benefits from archival research conducted in various newspapers and NGOs, as well as from reading classified judicial dockets and observing various trials.

\textsuperscript{80} See the section “Transitional Justice in Peru” below for a description of the Peruvian judiciary and the sub-system created to process human rights cases.
The chapter begins with a careful analysis of the outcomes of Peru’s on-going efforts in the area of transitional justice. It continues with a description of the political environment that surrounded this process in order to show the insufficiency of strictly political explanations. The chapter then plunges into the analysis of the pedagogical intervention and the assessment of its impact by those targeted with these strategies. It shows that judges and prosecutors recognize the decisive impact human rights NGOs had in shaping the conditions for a successful transitional justice effort amidst serious political obstacles.
### TABLE 3.1
INTERVIEWS CONDUCTED WITH PERUVIAN JUDGES AND PROSECUTORS

FEBRUARY-MAY 2010

<table>
<thead>
<tr>
<th>Interviews</th>
<th>Judges</th>
<th>Prosecutors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constitutional Court</td>
<td>3 out of 7 (including two presidents)</td>
<td></td>
</tr>
<tr>
<td>Supreme Court</td>
<td>2 out of 3</td>
<td>1 out of 1</td>
</tr>
<tr>
<td></td>
<td>Supreme Prosecutor</td>
<td></td>
</tr>
<tr>
<td>National Criminal Court</td>
<td>5 out of 11 (including two presidents)</td>
<td>3 out of 4</td>
</tr>
<tr>
<td>Anti-Corruption Courts (Chambers 1 and 3)</td>
<td>1st Chamber: 2 out of 3; 3rd Chamber: 0</td>
<td>4 out of 14</td>
</tr>
<tr>
<td>Provincial Judges</td>
<td>3 out of 7</td>
<td>7 out of 28</td>
</tr>
<tr>
<td></td>
<td>Provincial Prosecutors</td>
<td></td>
</tr>
</tbody>
</table>

3.2 Transitional Justice in Peru

3.2.1 Measurement Challenges

Since the Truth and Reconciliation Commission released its final report in 2003, Peru has experienced an intense judicialization process of past human rights violations. A word of caution is in order before beginning the analysis of the quantitative indicators gathered to characterize this process. Objectively measuring the performance of courts is
problematic. Comparing the number of convictions versus the number of acquittals can be revealing of the extent to which judges are willing to punish powerful actors for their past deeds. Diachronically analyzing the pattern of rulings with respect to changes in the political resources available to these actors can offer insights into the ability and willingness of courts to act outside the tolerance intervals of soldiers and politicians. Notwithstanding, it is impossible to establish benchmarks in relation to the proportion of condemnatory rulings that constitute a successful transitional justice process.

Assessing the performance of an on-going process is also difficult. Most of the cases are still under investigation due to the difficulties in gathering enough evidence to substantiate formal accusations or are waiting for the start of oral trials since courts cannot organize multiple trials simultaneously. The tactics deployed by the defendants also delay the final resolution of most of the cases. Lawyers constantly file *habeas corpus* to suspend preventive imprisonments, as well as interlocutory appeals,\(^{81}\) which question the validity of the judicial processes among other reasons, for the running out of statutes of limitations, the retroactive effect given to the nullification of amnesties, and the absence of the criminal types used in the indictments in the criminal codes valid when the crimes were perpetrated. As a result of these appeals filed in appeals courts or in the Constitutional Court, cases are constantly immersed in a stop-go dynamic, navigating the judicial ladder backwards and forwards. When evaluating judicial performance by looking at the proportion of indicted military or civilian officials who received adverse rulings, it is important to bear in mind the slow pace of judicial bureaucracies.

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\(^{81}\) The Spanish term used is “*pedidos de excepción.*”
Finally, the route followed by these cases in the sub-system created within the judiciary to deal with human rights violations, is a convoluted one. Provincial prosecutors are in charge of the preliminary investigations and of either formalizing accusations or closing the cases. Once they file indictments, a provincial judge also gathers evidence and decides whether there is probable cause to advance to an oral trial. Subsequently, a higher-level prosecutor investigates again and sends another formal accusation to the National Criminal Court, where trials are held. After the case is decided, parties can appeal to the Supreme Court where a supreme prosecutor (equivalent to a solicitor general) takes control of the accusation. The cases that involve the paramilitary group created by Fujimori, known as Grupo Colina, follow a similar path but not in the sub-system created to deal with human rights violations. These cases are investigated in the special anti-corruption sub-system dependent of courts in the Lima circuit. Cases that involve former president Fujimori also follow a different track. A panel of three Supreme Court justices conducts the oral trial after an investigation by a supreme prosecutor. Another panel of Supreme Court justices acts as an appellate court.

3.2.2 Judicial Outcomes

After releasing its final report in 2003, the Truth and Reconciliation Commission filed 47 cases in the Peruvian judiciary, and the Ombudsman’s Office another 14. 159 additional cases were also put under investigation after a friendly accord was signed between Peru and the Inter-American Commission of Human Rights.82 This launched a judicialization process involving thousands of victims and over 750 military and civilian

82 See Report No. 139, Ombudsman’s Office, available online at www.defensoria.gov.pe
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of the military officers being investigated, 160 are still in active duty. See *El Comercio*, June 6th 2010.

84 2008 is the last year for which this disaggregated data is available. The Ombudsman’s office is the only agency that has access to the status of the cases under consideration and issued its last report on the subject in 2009. With respect to the 159 cases that were part of the aforementioned agreement with the Inter-American Commission, data is only available for 2008. That year, 101 cases were under preliminary investigation with prosecutors, 34 had open criminal prosecutions in the judiciary, and 10 had been decided in oral trials. The Ombudsman’s Office does not have information about the remaining 12 cases. See Report No. 139, *Ombudsman’s Office*, available online at www.defensoria.gov.pe.
and 14 years in prison, and 60 were acquitted. The National Criminal Court’s conviction rate was 24.1%. Most of the cases involved forced disappearances and massacres committed during the 1990’s. The cases of the most emblematic massacres of the 1980s are only beginning to be tried at the time of writing. All of the rulings shown in Table 3.2 were appealed and when considering those appeals, the Supreme Court invalidated 8 trials, which will be held anew. The rulings annulled by the Supreme Court include both acquittals and prison sentences.
<table>
<thead>
<tr>
<th>Case</th>
<th>Decade of perpetration</th>
<th>Date of ruling</th>
<th>Convictions</th>
<th>Acquittals</th>
<th>Confirmation by Supreme Court (a)</th>
<th>President at the time</th>
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</thead>
<tbody>
<tr>
<td>Castillo Páez</td>
<td>1990’s</td>
<td>March 2006</td>
<td>4</td>
<td>12</td>
<td>YES</td>
<td>Toledo</td>
</tr>
<tr>
<td>Céspedes Montalvo</td>
<td>1990’s</td>
<td>November 2006</td>
<td>0</td>
<td>1</td>
<td>NO*</td>
<td>Garcia</td>
</tr>
<tr>
<td>Chuschi</td>
<td>1990’s</td>
<td>February 2007</td>
<td>2</td>
<td>4</td>
<td>YES</td>
<td>Garcia</td>
</tr>
<tr>
<td>Céspedes Montalvo II</td>
<td>1990’s</td>
<td>February 2007</td>
<td>0</td>
<td>1</td>
<td>NO*</td>
<td>Garcia</td>
</tr>
<tr>
<td>Barrantes</td>
<td>1990’s</td>
<td>February 2007</td>
<td>0</td>
<td>5</td>
<td>NO*</td>
<td>Garcia</td>
</tr>
<tr>
<td>Bustios</td>
<td>1990’s</td>
<td>October 2007</td>
<td>2</td>
<td></td>
<td>YES</td>
<td>Garcia</td>
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<tr>
<td>Mancilla</td>
<td>1990’s</td>
<td>October 2007</td>
<td>0</td>
<td>3</td>
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<td>Garcia</td>
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<tr>
<td>Aponte Ortiz</td>
<td>1990’s</td>
<td>November 2007</td>
<td>2</td>
<td>0</td>
<td>YES</td>
<td>Garcia</td>
</tr>
<tr>
<td>Santa Bárbara</td>
<td>1990’s</td>
<td>March 2008</td>
<td>1</td>
<td></td>
<td>YES</td>
<td>Garcia</td>
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<tr>
<td>Haro/Mautino</td>
<td>1980’s</td>
<td>July 2008</td>
<td>0</td>
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<td>YES</td>
<td>Garcia</td>
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<tr>
<td>Matero</td>
<td>1990’s</td>
<td>August 2008</td>
<td>0</td>
<td>5</td>
<td>NO*</td>
<td>Garcia</td>
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<tr>
<td>Osorio Rivera</td>
<td>1980’s</td>
<td>December 2008</td>
<td>0</td>
<td>1</td>
<td>NO*</td>
<td>Garcia</td>
</tr>
<tr>
<td>Location</td>
<td>Decade</td>
<td>Month</td>
<td>Outcome</td>
<td>Judge</td>
<td></td>
<td></td>
</tr>
<tr>
<td>-------------------------------</td>
<td>--------</td>
<td>---------</td>
<td>---------</td>
<td>--------</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pomatanta</td>
<td>1990's</td>
<td>January</td>
<td>1</td>
<td>NO*</td>
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<td></td>
</tr>
<tr>
<td>Los Cabitos</td>
<td>1980's</td>
<td>October</td>
<td>4</td>
<td>NO*</td>
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<tr>
<td>Laureles</td>
<td>1980's</td>
<td>October</td>
<td>7</td>
<td>NO*</td>
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<tr>
<td>Barrantes</td>
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<td>Pucará</td>
<td>1980's</td>
<td>June</td>
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<td>Universidad Nacional del Centro</td>
<td>1980's</td>
<td>June</td>
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<tr>
<td>Pomatambo y Pracco Alto</td>
<td>1980s</td>
<td>October</td>
<td>0</td>
<td>YES</td>
<td></td>
<td></td>
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<tr>
<td>Pomatanta</td>
<td>1990s</td>
<td>October</td>
<td>1</td>
<td>NOT YET</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pucayacu II</td>
<td>1980s</td>
<td>October</td>
<td>2</td>
<td>NOT YET</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Baldeón</td>
<td>1990s</td>
<td>January</td>
<td>1</td>
<td>NOT YET</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td></td>
<td>19</td>
<td>60</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Source: Archival research in NGOs and National Criminal Court. All rulings are on file with the author.

Key: * Indicates that the Supreme Court requested another oral trial due to irregularities found in the proceedings. All Supreme Court rulings are on file with the author.

** Indicates that one of the three judges in the panel voted differently from the majority.
Outside the specialized sub-system for human rights violations, the Superior Court of Justice in the province of Junín sentenced 3 members of the so-called Rondas Campesinas to years in prison for a series of murders committed in the late 1980s.\footnote{During the armed conflict the Rondas Campesinas played an important part as civilian allies of the government in the anti-insurgency campaign. On occasion the Rondas perpetrated crimes against individuals suspected of participating in terrorist activities in their own communities (Van Cott 2006).} The ruling was not appealed. Most importantly, the First Criminal Chamber of the anti-corruption sub-system handed down a series of exemplary rulings against the members of the former paramilitary group created during the Fujimori administration to scale up anti-terrorist operations. In 2008, the panel of three judges ruled against 4 members of the \textit{Grupo Colina} and acquitted 5 others for the forced disappearance and murder of students at \textit{La Cantuta} University in 1992. Later that year, when the police captured two other members of the \textit{Grupo Colina} involved in these crimes, the court also issued prison sentences. In November 2005, the judges had already sentenced two other members of the paramilitary group after they confessed the crimes. In \textit{La Cantuta} case, the Supreme Court confirmed the 5 acquittals and 7 of the prison sentences, but requested a new trial for one of the officers who was found guilty. In 2010, the same anti-corruption court put an end to an oral trial that lasted 5 years sentencing 19 members of the paramilitary group to between 4 and 25 years in prison for perpetrating crimes against humanity in the \textit{Barrios Altos}, \textit{El Santa}, and \textit{Yaurí} cases. Among them was Valdimiro Montesinos, former chief of the intelligence services and symbol of Fujimori’s repressive apparatus. 11 officials were acquitted and the ruling is pending confirmation by the Supreme
During this period, the conviction rate of this anti-corruption court in Lima was 62.8%.

*Barrios Altos* and *La Cantuta* are the most emblematic cases of state terrorism during the 1990’s. These crimes constituted the basis of the accusation against former president Fujimori in the trial he faced between 2008 and 2009, and after which he was sentenced to 25 years in prison for the crimes of aggravated homicide, assault and kidnapping. The panel of Supreme Court judges accepted nearly all of the arguments presented by the prosecutor and human rights litigants, and concluded that the status of Fujimori as a former head of state justified the maximum punishment allowed by Peruvian Law. Fujimori’s trial constitutes an exceptional achievement in the Peruvian transitional justice process because it was the first time that a democratically elected head of state was sentenced by courts in his own country for human rights violations. The trial received international acclaim for its fairness and impartiality and attracted the daily attention of the Peruvian public who held the judges in very high esteem. For example, in a survey conducted in January 2009, individuals were asked whether they “approved or disapproved of the performance in the trial of César San Martín”, the judge presiding

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86 All rulings handed down by the First Criminal Chamber of the anti-corruption sub-system are on file with the author.

87 Suprema Corte de Justicia de la Nación (Peru), *Exp. N° 10–2001/ Acumulado N° 45–2003–A.V*, ruling of April 7th 2009. When Fujimori left power in 2000 he fled to Japan. The Peruvian government incessantly requested its Japanese counterpart for his extradition to no avail. When Fujimori traveled to Chile, he was imprisoned and in 2006 the Chilean Supreme Court accepted a new extradition request issued by Peru. The Peruvian judiciary tried Fujimori only for the crimes on the basis of which the Chilean Supreme Court granted the extradition. Peruvian human rights organizations joined efforts with their international counterparts to lobby for the extradition (e.g. they traveled to Chile with the victims on multiple occasions) and provided the legal arguments that would make it possible (e.g. see Human Rights Watch 2009).

over the hearings. He received a 37% job approval and 34% offered no answer. Three years earlier, in January 2006, only 26% believed that if Fujimori were to face a trial he would be treated impartially, and 41% thought that courts would be biased against him.  

Judges in most of these trials used international law and jurisprudence to characterize the crimes in question as “crimes against humanity”, thus being able to disregard statutes of limitations and aggravate the punishment of those found guilty. Moreover, in the cases Castillo Páez, Fujimori, La Cantuta and Barrios Altos, judges explicitly applied a non-formalistic human rights vision and recognized that given the nature of the crimes in question, it was unfair to demand prosecutors and human rights litigants to produce direct incriminating evidence in order to establish individual criminal responsibility, such as official documents ordering the disappearance of a prisoner. Evidence about the historical context in which the crimes were committed, as well as oral testimonies and journalistic investigations thus became crucial.

For example, in Fujimori, the Supreme Court stated that common knowledge about state sponsored criminal organizations “indicates that the usual practice is not to register the issuing of illegal commands in a [formal] request or document, because what is crucial is the concrete, effective and real power that is exercised by the heads of the organization, and that those below recognize”. Moreover, “it is precisely the clandestine nature and the illicit practices of an organization what leads to rule out, for

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89 This contrasts with the chronically low ratings of the judiciary in public opinion polls. The average approval rating of the judiciary between 1991 and 2009 is 26.8%. The figure does not include the ratings received in 2003, 2004 and 2006 due to missing data. Source: APOYO. All survey results on file with the author.

obvious reasons, the possibility of proving its existence and the acts it perpetrated using [written] normative instruments.”

The figures presented thus far indicate that judges regularly and consistently issued punishments and acquittals since the inception of the judicialization process. The above rulings show that judges adapted the standards of normal criminal prosecutions to the nature of the cases in question by applying human rights criteria. More importantly, in all cases acquittals were decided on the basis of the interpretation of available evidence, and not by invoking legal formalisms like amnesties or statutes of limitations to stop criminal prosecutions.

Apart from the evidentiary challenges and the difficulties in investigating state-sponsored organizations involved in macro-criminal enterprises, the judicial processes studied here are special because in order to move forward the legal barriers analyzed in Chapter 2 must be overcome. Doing so is particularly hard in contexts characterized by the hegemony of legal positivism. Exceptions to some of the most basic parameters of modern criminal law must be granted. For example, statutes of limitations must be overlooked, which requires an unorthodox definition of crimes resorting to international human rights law and jurisprudence. This juridical exercise often involves the retroactive application of these sources of law, which violates standard interpretations of the legality principle.92

91 Ibid.

92 For example, “crimes against humanity”, a category used in many rulings to contextualize the crimes and the circumstances that aggravate them in order to declare the inapplicability of statutes of limitations, is not codified in Peruvian Law. For a discussion of the problems raised by these issues see Quinteros (2010).
During the course of the investigations and trials, judges had to decide on numerous interlocutory appeals filed by the defendants invoking these formalisms or other explicitly written rules of criminal procedures with the intention of suspending the trials. In what follows I will document the rejection of most of these arguments. The data indicates the development of a culture of legal interpretation that transcends plain meaning interpretation and delves into questions about fundamental rights and state responsibilities, which may or may not be part of positive law.

Between 2004 and 2008 8 appeals were filed invoking the validity of amnesties, 13 invoking statutes of limitations, 35 arguing that criminal types used in the indictments were not part of Peruvian law at the time of the events, and 17 claiming that the trials could not proceed because they concerned matters already adjudicated (Table 3.3). In total, 24 of these appeals were granted, while the remaining 49 were rejected. These figures show that courts overwhelmingly dismissed arguments grounded in a formalistic and positivist understanding of the law in order to stop transitional justice. Of the 24 interlocutory appeals accepted by courts, 19 correspond to objections raised against the definition of the crimes. Unlike the running out of statutes of limitations or the application of amnesties, accepting this type of requests does not stop criminal prosecutions but demands prosecutors to reframe their accusations.

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93 This is because some of the cases in question were investigated and closed by military courts in the 1980s and 1990s.

94 All of these figures correspond to decisions made by the National Criminal Court and, when appeals did not reach that level, by lower courts.
TABLE 3.3
INTERLOCUTORY APPEALS FILED BY DEFENDANTS INVOKING THE
POSITIVIST LEGAL ORTHODOXY
(2004-2008)

<table>
<thead>
<tr>
<th>Type of Interlocutory Appeal</th>
<th>Accepted</th>
<th>Rejected</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amnesties</td>
<td>0</td>
<td>8</td>
</tr>
<tr>
<td>Statutes of Limitations</td>
<td>2</td>
<td>11</td>
</tr>
<tr>
<td>Definition of the Crime</td>
<td>19</td>
<td>16</td>
</tr>
<tr>
<td>Double Jeopardy</td>
<td>3</td>
<td>14</td>
</tr>
</tbody>
</table>

Source: Archival research in the Ombudsman’s Office.

It is important to highlight the impact of a series of rulings handed down by the Constitutional Court, which consolidated this jurisprudential trend ignited by lower courts. Among Peruvian prosecutors, for example, the jurisprudential path traced by the Constitutional Court was crucial for the success of transitional justice. In a survey I conducted among the 46 prosecutors who are part of the sub-system specialized in gross human rights violations, respondents were asked to rate, using a 1 to 10 scale, the importance of these rulings for the relative success of the judicialization process. The average response was 8.5.

The rulings handed down by the Constitutional Court made authoritative a series of criteria concerning the interpretation of the obligations of the Peruvian state in

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investigating and punishing gross human rights violations (e.g. extrajudicial executions, forced disappearances and torture). The Constitutional Court has read the 1993 constitution in light of international treaties and the rulings of the Inter-American Court of Human Rights. On several occasions it recognized the existence of a right to truth and the commitment of the state to fight against impunity in cases that involve offenses against humanity. For example, the Court defined the right to truth as an implicit right recognized by the constitution, since “the Nation has the right to know the truth about unjust and painful facts or events produced by multiple forms of state and non-state violence […] In this sense the right to truth is an inalienable collective juridical good.”

The magnitude of these atrocities, which the court has repeatedly defined as “crimes against humanity,” mandate that the state cannot put limits to its punitive prerogative to conduct a criminal investigation, prosecute and punish those responsible, even if “a long time has passed since the date when the illicit act was committed.” This expansive reading of rights embedded in the constitution, and of the international obligations of the Peruvian state, cemented the criteria developed by lower courts in order to reject the interlocutory appeals filed by defense lawyers. Various courts have thus established that there cannot be positive or formal legal barriers to redress the wrongs in question.

The Constitutional Court was also a central actor in putting limits to the jurisdiction of military courts. Disputes between civilian and military courts over which

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97 Ibid.

system had the right to intervene in the judicialization process threatened to jeopardize transitional justice in Peru. Defense lawyers claimed that their clients should be put under the orbit of military tribunals because the crimes they were being accused of were committed while serving as military officers, anticipating the lack of impartiality of military judges when investigating their peers. The institution still considers the crimes in question as normal “excesses” in what constituted a just and necessary war against terrorism.

When deciding on this issue, the Constitutional Court consistently ruled in favor of excluding gross human rights violations from the jurisdiction of military courts. It did so by rejecting the formalist definition of military misconduct as “crimes committed in service”99 thereby considering them as regular crimes subject to civilian jurisdiction. Moreover, the Court ruled that even in those cases in which military judges can intervene, they are not exempt from applying normal due process clauses and the human rights criteria established by the American Convention.

After 2009, the terms of some of the judges appointed to the Constitutional Court during the democratic transition expired.100 The departure of judges highly committed to the principles of international human rights law led to changes in the court’s criteria on some of the aforementioned legal issues. Human rights litigants heavily criticized these changes. Most notably, in 2008 the court refused to accept an appeal presented by the

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99 The Spanish term is “delitos en función.”

100 Constitutional justices are selected by congress and serve for a period of 5 years. Vacancies do not happen all at once. Typically judges are replaced in groups of 2 or three. For a critique of these decisions by a human rights organization see Justicia Viva (2009).
Institute of Legal Defense (ILD), one of the leading NGOs offering legal counsel to the victims of state repression. The appeal was filed on behalf of the victims of a massacre that took place in 1986, in which hundreds individuals convicted of terrorism were killed. The case is known as *El Frontón*. The ILD objected a ruling by a lower court in the Lima circuit that accepted an interlocutory appeal invoking statutes of limitations. The lower court did not characterize the massacre as a crime against humanity. The Constitutional Court ruled that the ILD could not claim to be a legitimate representative of the victims. It also minimized the extent to which the lower court was required to apply the Constitutional Court’s prior jurisprudence on the matter.\(^\text{101}\)

In another case which involved Julio Salazar Monroe, the leader of the *Goupo Colina*, the court considered that the proceedings conducted by the First Criminal Chamber of the anti-corruption sub-system had taken too long, thus violating the right of the accused to a fair and timely trial. The Constitutional Court gave the lower court a strict 60 days period to decide on the case. Failing to do so could result in the cancellation of the trial.\(^\text{102}\)

In an interview with one of the judges who voted with the majority in both rulings, he stated: “now the court is willing to defend the human rights of all the parties in the process; justice cannot come at all costs. Having the accused indefinitely in jail without certainty about their future is unacceptable [...] This judicialization process cannot last forever. Our country needs social peace and reconciliation.” In the interview he also characterized the ILD as an “enemy of the Court” because “now that we are no longer

\(^{101}\) Ruling 03173-2008-PHC/TC of December 11\(^{th}\) 2008.

\(^{102}\) Ruling 05230-2009-PHC/TC of August 10\(^{th}\) 2010.
their puppets, they criticize us.” His words made direct reference to the avalanche of rulings favorable to the arguments expounded by human rights groups handed down by the court under its previous composition. According to the judge, the former justices had built very close political connections with human rights NGOs.\textsuperscript{103}

Despite these changes in the court’s composition, the crucial jurisprudence on amnesties and statutes of limitations remained unchanged, suggesting that even those judges unsympathetic to human rights litigants participate in the broad consensus around the belief that the state has an international responsibility to investigate crimes against humanity. For example, in a case involving the Accomarca massacre that took place in the second half of the 1980s, the new constitutional justices unequivocally upheld the court’s previous jurisprudence on the inapplicability of domestic legal instruments that could bar the progress of the case.\textsuperscript{104} It did so with full knowledge of the fact that the President of the Republic was among the alleged perpetrators.

As this section has documented, victims and their lawyers achieved important victories in the judicialization process launched in the 2000s. The decisions issued by civilian courts led to the incarceration of perpetrators of all ranks for crimes committed under different political regimes. Those found guilty include members of the powerful Peruvian armed forces and the leaders of a political group that governed the country for a decade and continues to be a relevant actor in the political system. Moreover, all but four of the condemnatory rulings were handed down during Alan García’s presidency (2006-

\textsuperscript{103} Interview, Lima, March 12\textsuperscript{th} 2010.

\textsuperscript{104} Ruling 00218-2009-PHC/TC of November 11\textsuperscript{th} 2010.
2011), a period characterized by great political hostility towards human rights organizations.

What explains this intense judicial activism in the investigation and punishment of gross human rights violations in Peru? In the next two sections I will argue the observed patterns of judicial decision-making do not constitute instances of strategic judicial behavior. Courts were subject to all sorts of intimidation tactics deployed by sitting presidents and the military, with the goal of undermining their commitment to the progress of the cases. I will then show that human rights litigants paved the way that led to these outcomes by empowering judges and prosecutors with the legal instruments needed to move forward with the judicial proceedings in the midst of political adversity.

3.3 Transitional Justice in Unfriendly Territory

As mentioned in the introduction, some of my sources referred to the 2000 political transition as “the NGO transition”. During those years, human rights activists were a powerful voice in the political arena and staffed the state with their members. The issue of coming to terms with the past was a high priority and activists managed to implement their agenda. Congress investigated corruption scandals and human rights violations that had Fujimori and his cronies as the main protagonists; two consecutive presidents (Paniagua 2000-2001 and Toledo 2001-2006) offered support for the creation and operations of the Truth and Reconciliation Commission, heavily influenced by the human rights movement;¹⁰⁵ and the judiciary created a specialized court system to deal

¹⁰⁵ Both Valentin Paniagua (2000-2001) and Alejandro Toledo (2001-2006) were supportive of the commission’s work.
with criminals belonging to both state and non-state organizations. During this period a judge was even able to enter military headquarters to gather evidence for the human rights case she was investigating.

When I conducted my fieldwork between February and May of 2010, the good days had been over for quite some time. In the words of an activist lawyer, “the political discourse against the judicialization process has become the dominant voice. The things we achieved between 2001 and 2006 are impossible to imagine in this context.” Another one acknowledged that “our enemies have become more powerful; the armed forces have regained their political influence and the government has forged an alliance with them in order to anchor its power.” Yet another concluded that “we are weaker now and our adversaries take advantage of that in order to strengthen their influence over important arenas where our legal battle takes place.” In what follows I will show how the political space for action in the area of transitional justice indeed narrowed after 2006, as pointed out by these lawyers. In a nutshell, the rise to power of APRA’s Alan García, together with the electoral recovery of Fujimori’s party, completely changed the political environment. As later sections will indicate, however, this decline in the establishment’s tolerance for transitional justice is not associated with the decline or absence of prosecutions, trials or prison sentences. In fact it was during this period when court activity was most intense.

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106 For a full description of this sub-system see Report No. 139 released by the Ombudsman’s Office. The report can be accessed at [www.defensoria.gob.pe](http://www.defensoria.gob.pe)

107 Interview, Lima, April 14th 2010

108 Interview, Lima, April 21st 2010

109 Interview, Ayacucho, May 5th 2010
Between 1985 and 1990 Alan García presided over some of the bloodiest years of the armed conflict.\textsuperscript{110} As a result of his status as commander in chief of the police and the armed forces during those years, he was later accused of being responsible for several massacres, including the murder of hundreds of convicts at El Frontón and Castro Castro prisons.\textsuperscript{111} It therefore comes as no surprise that his second presidency was characterized by a hostile attitude towards the judicialization process. The vice-president, a former army general also accused of being involved in human rights violations, and the minister of defense were extremely vocal in their support for the army officers affected by the investigations and trials. The president himself demanded on several occasions the end of what he saw as a political persecution against those who “defended the interests of the fatherland.”\textsuperscript{112}

Changes in the presidential palace were accompanied by a recovery of the military’s political leverage. After the collapse of Fujimori’s regime, the armed forces were in disarray.\textsuperscript{113} As Figure 3.2 suggests, in 2002 they received the lowest approval rating since 1997. Since then, however, they have regained political prestige achieving levels of support similar to those registered during the years immediately following the capture of Shining Path’s leader, Abimael Guzmán, in the mid-1990s. This improvement

\textsuperscript{110} Although the greatest number of deaths in any given year took place in 1984 (approximately 4000), during García’s presidency the violence spread to more districts and reached the second highest peak of deaths in 1989 (over 2500 approximately). See Comisión de la Verdad y Reconciliación (2003), Volume I, Chapter III, p. 117.

\textsuperscript{111} El Frontón and Castro Castro cases have open criminal investigations.

\textsuperscript{112} El Comercio, June 6\textsuperscript{th} 2010

\textsuperscript{113} For an analysis of the politicization of the armed forces during the 1990s and the internal conflicts that emerged as a result see Comisión de la Verdad y Reconciliación (2003), Volume II, Chapter III.
in their public standing is correlated with higher levels of political leverage due to their strategic role in the government’s anti-narcotics policy\textsuperscript{114} and in dealing with the rise in violent social conflicts in the interior of the country.\textsuperscript{115} In 2009, for example, the Constitutional Court justified a decision that expanded the independence of military courts \textit{vis-à-vis} judicial oversight institutions in a case unrelated to the judicialization of human rights violations. It stated that the country witnesses “the reinvigoration of terrorism in alliance with drug trafficking” and hence the armed forces needed greater autonomy.\textsuperscript{116}

\textsuperscript{114} According to the United Nations, Peru is now the largest cocaine producer in the world. See United Nations (2010). For a journalistic account of the rise in military anti-narcotics activities see La República, May 5\textsuperscript{th} 2010.

\textsuperscript{115} For an analysis in the exponential increase in violent protests and social conflicts that has accompanied Peru’s economic growth in the last 10 years, see Meléndez and León (2009).

\textsuperscript{116} Ruling STC 00001-2009-PI/TC of December 4\textsuperscript{th} 2009.
Figure 3.2. Confidence in the Armed Forces (1991-2009)

Source: APOYO. National representative surveys. The figures represent responses to the question “In general, would you say you feel confidence in the Armed Forces or not?” No data is available for the years 2003, 2004 and 2006.

The greater reliance of the government on the armed forces to confront security and governability challenges naturally improved the standing of the institution in relation to human rights investigations. In the survey of prosecutors mentioned in the previous section, 100% of respondents strongly agreed with the statement that the Defense Ministry and the armed forces put obstacles for the progress of the investigations (Table 3.4). The results also indicate that the lack of cooperation from these actors is perceived
as more problematic for the success of the judicialization process than the large amount of cases they work on simultaneously and the lack of adequate material resources to carry out their duties.

### TABLE 3.4

PERCEIVED OBSTACLES FOR THE PROGRESS OF THE INVESTIGATIONS AMONG PERUVIAN PROSECUTORS

<table>
<thead>
<tr>
<th>Question</th>
<th>Average Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>Please indicate how much you agree with the following statements…</td>
<td></td>
</tr>
<tr>
<td>Strongly agree = 4; Somewhat agree = 3; Somewhat disagree = 2; Strongly disagree = 1</td>
<td></td>
</tr>
<tr>
<td>The Ministry of Defense puts obstacles that make the progress of the investigations for human rights violations slow</td>
<td>4</td>
</tr>
<tr>
<td>Large dockets make the progress of human rights investigations slow</td>
<td>2.6</td>
</tr>
<tr>
<td>The lack of economic resources makes the progress of human rights investigations slow</td>
<td>3.3</td>
</tr>
</tbody>
</table>

Source: Author’s Survey. Targeted universe: All prosecutors involved in human rights cases. Anonymous survey administered online: Link to survey sent via email by Chief Prosecutor. Response Rate: 43.5%

Given the questions asked, the above data cannot adequately gauge the extent to which García’s support for the armed forces increased their leverage vis-à-vis human rights investigations. In order to document temporal variation in the tolerance of elites I rely on qualitative evidence gathered during interviews. In all of my interviews with judges and prosecutors the lack of collaboration of the armed forces and the Defense Ministry was the first thing mentioned when asked about the main obstacles they faced when gathering evidence. My sources unanimously pointed out that the reticence to release documentation about the activities of the military and the police during the armed
conflict worsened since 2006. For example, the head of the anti-corruption team in the Attorney General’s office who presented charges against Fujimori and his allies for human rights violations indicated that

At first, gathering information was difficult because the military was still controlled by Montesinos’s allies. […] Paniagua [the transition president between 2000 and 2001] then removed many of these high commanders, and made our job much easier. In contrast to the current situation, during those years we did not face problems when asking the Defense Ministry to send us information. In fact, with the aid of a very courageous judge, we even broke into military intelligence headquarters and found documents, human remains and the ovens in which they were cremated.  

In the words of a prosecutor working in Ayacucho,

The lack of collaboration by the Defense Ministry is the biggest problem we face. The lack of information is key to explain the slow progress with many cases. If we cannot identify the military personnel active in this area in the 1980s and 1990s, we cannot individualize those responsible for the crimes we investigate, and therefore cannot file indictments. The military has those records. All that we have are the aliases of the alleged perpetrators that the victims remember they heard while in prison or when their relatives were kidnapped. It was very common for military officers to use aliases during clandestine operations.

A judged offered her own perspective on this issue:

During Toledo’s presidency [2001-2006], while I was an anti-corruption judge I took part in the investigations against the Grupo Colina […] In those years there was a lot of room for us to act, and we achieved many things. In fact we captured a lot of military and police officers who were on the run. This shows that there was political will, otherwise the police would not have responded to our requests to find these individuals. Nowadays the situation is different. We have submitted a number of arrest warrants but those in charge show no interest in following through […] Also, on many occasions the armed forces and the Defense Ministry refuse to submit the documentation we ask for. I now feel that they are in a more powerful position to overlook our requests.

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117 Interview, Lima, March 19th 2010.
118 Interview, Ayacucho, May 1st 2010.
119 Interview, May 6th 2010.
In addition to concealing information, the García administration strived to create resource imbalances between the parties involved in the trials, thus strengthening the position of military and police officers. For example, in 2006 the government sent to Congress a proposal to grant the Peruvian Agency of International Cooperation the authority to effectively punish civil society organizations that were considered to have violated regulations on the reception of international aid. The proposal was intended to enhance government controls over NGO funding, which comes disproportionately from foreign countries and foundations. The law was passed and resulted in sanctions against human rights NGOs. Similarly, the defense ministry was also active in ensuring that those accused of human rights violations had access to the services of prominent Lima attorneys.\textsuperscript{120} For instance, the state contacted the same firm privately hired by Fujimori’s family to defend him during the trial, to advise government lawyers in the design of military officers’ legal strategies. This possibility was never offered to the victims of state repression. Many of them still lack access to lawyers because NGOs do not have the resources to take on thousands of cases.\textsuperscript{121}

García also forged a parliamentary alliance with Fujimori’s party. The president never counted with a legislative majority and was forced to build coalitions to pass his agenda through Congress. After the 2006 elections, Fujimori’s followers consolidated a cohesive legislative caucus, which after other more numerous blocs disintegrated, became

\textsuperscript{120} See supreme presidential decrees Nº 061-2006 and Nº 022-2008-DE/SG (on file with the author).

\textsuperscript{121} Estimates indicate that only 39.1\% of the victims involved in the judicialization process have access to lawyers. See Report No. 139, Ombudsmán’s Office available online at www.defensoria.gov.pe.
the second largest in parliament (Valladares 2010). When Fujimori’s extradition was imminent, and during his trial, these legislators threatened to break the tacit alliance they had with APRA in order to gain leverage in their negotiations with the government. Although García did not stop the Supreme Court from convicting the former president, the alliance did not break and both parties consistently voted together in favor of the president’s economic agenda (Panfichi 2009).

The inroads that Fujimori’s followers made into the parliamentary arena after 2006 turned Congress into another hostile institution for human rights NGOs. Their capacity to lobby Congress to pass their legislative proposals was very limited. An indicator of this is the low participation of human rights NGOs in the debates of the Justice and Human Rights Committee, in charge of analyzing bills related to the human rights agenda. Between 2000 and 2009 the Justice and Human Rights Committee met 167 times, and only on 5 occasions were members of human rights organizations invited to present their point of view or participate in debates. By contrast, other civil society organizations had easy access to legislators. For example, the Energy and Mining Committee met 75 times between 2005 and 2009. Civil society and business representatives were invited to 23 of those meetings. The high presence of civil society actors in debates at the Energy and Mining Committee is explained by the fact that the

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122 García’s APRA and the Fujimoristas are the only caucuses that have not been decimated by the historic lack of party discipline in the Peruvian Congress. See Meléndez & León (2010).

123 Keiko Fujimori’s victory in the 2006 parliamentary elections also propelled the candidacy of the former president’s daughter to the presidency. In the second round of the 2011 elections, she lost against Ollanta Humala by less than 2 percentage points.

124 This information was gathered by carefully analyzing the minutes of all these meetings. The information is available upon request.
committee deals with a policy area in which there is greater consensus among political elites, and between them and powerful business organizations.\textsuperscript{125}

The above comparison shows that Congress is not necessarily an inhospitable arena for lobbying tactics. Human rights organizations, however, are not welcome. This was confirmed during fieldwork by numerous sources including the highest ranked clerk in the Justice and Human Rights Committee\textsuperscript{126} and human rights activists themselves. According to one of them,

"Congress is a lost cause for us. If in the previous congress [2001-2006] we were invited on a handful of occasions, in the current one the situation is even worse. Congress has adopted a confrontational attitude towards us that has worsened with time. The Justice and Human Rights Committee is mainly concerned with passing laws to control the activities of NGOs. Fujimori’s lawyer [congressman Sousa] is the committee’s president, so there’s no room for us there."\textsuperscript{127}

The President’s and Congress’s hostility towards the human rights cause peaked in 2010, when García issued Presidential Decree No. 1097. Human rights activists and sectors of the media characterized the move as an amnesty in disguise. In contrast to the subtle tactics deployed by the political and military establishments to minimize the impact of the investigations and trials, this decree intended to strike a fatal blow against the entire judicialization process. In August Congress interpreted a recent ruling handed down by the Constitutional Court\textsuperscript{128} as demanding a series of modifications in the

\textsuperscript{125} The mining industry is one of the pillars of Peru’s economy and the driving force behind its impressive economic performance over the past decade.

\textsuperscript{126} Interview, Lima, March 22\textsuperscript{nd} 2010.

\textsuperscript{127} Interview, Lima, April 14\textsuperscript{th} 2010.

\textsuperscript{128} Ruling STC 00001-2009-PI/TC of December 4\textsuperscript{th} 2009. Congress’s interpretation of the ruling is questionable because the court did not explicitly mandate this.
Criminal Code of Military Justice. In order to comply with the ruling, legislators passed a law granting the executive the power to introduce those modifications by decree.

In September the changes were announced and included a series of instructions in relation to the treatment of human rights cases by civilian courts. One of them mandated the immediate closing of all criminal prosecutions that had been open for more than 14 months without a final resolution. In order to justify this, the decree anticipated the enactment of the new Code of Criminal Procedures only for cases involving human rights violations. The new code contains the 14 months rule. Another instruction forced upon courts an interpretation of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. The decree stated that since Peru ratified the convention in 2003, the criteria used by courts to ignore statutes of limitations in cases involving human rights violations could not be applied to crimes committed before that year, i.e. to all of the cases still under investigation. The initiative also questioned the legitimacy of the rulings handed down until that day. In most of them, courts had applied the convention retroactively.

The decree triggered the immediate reaction of human rights organizations. They took center stage and denounced the government for trying to stop the judicialization process with unconstitutional dispositions. Constitutional law professors allied to the human rights movement explained in the media the arguments judges should use in order

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129 It was later revealed that the minister of defense received advise from Fujimori’s lawyers when drafting the decree. See IDL-Reporteros, September 24th 2010.

130 Examples of public statements by human rights NGOs can be found in La República, September 2nd 2010 and September 8th 2010, and Caretas, September 9th 2010.
to apply judicial review to bring down the decree. They emphasized the possibility of using international jurisprudence, in particular the rulings of the Inter-American Court to do so. If judges implemented the decree they would be violating the state’s international responsibility to investigate and punish gross human rights violations.

When several days later one of the accused in the Barrios Altos case asked the First Criminal Chamber of the anti-corruption subsystem to terminate the trial and close the case, judges handed down a unanimous ruling declaring the decree unconstitutional. Similarly, the prosecutors who were part of the judicial sub-system dealing with human rights violations released a document carefully explaining why they refused to apply the decree. In what amounted to a manifesto of what they perceived to be their institutional mission, they emphasized that if the new regulations were accepted, and cases were closed either because statutes of limitations were invoked or due to the delay in the investigations, the country would be sanctioning impunity, thus aggravating the victims’ destitution.

As a result of the strong opposition to the decree both in civil society and in the judiciary, the government was exposed to a political crisis. After he failed in trying to explain why the decree was not aimed at obstructing transitional justice, the president derogated the norm and completely restructured his cabinet. This episode is interesting

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131 La República, September 3rd 2010.
132 La República, September 6th 2010.
133 Ruling Exp. 28-2001 of September 15th 2010 (on file with the author).
134 La República, September 9th 2010.
135 The changes included the cabinet’s chief or prime minister, and the ministers of defense, justice and the economy.
because it clearly reveals two aspects of the Peruvian judicialization process. First, the tolerance of political actors for the investigations and trials was extremely low. Second, human rights organizations could count with a series of crucial allies in the judiciary who in spite of adverse political conditions expressed in no uncertain terms their commitment to the progress of the cases. In this sense, it is important to bear in mind that all but four of the condemnatory rulings documented in the previous section were handed down during García’s administration (see Table 3.2 above).

The judicialization of human rights violations in Peru had tremendously positive results that are not adequately accounted for by the strategic model of judicial behavior. According to this approach, and to standard explanations of transitional justice in Latin America, it is the will of political actors what guarantees success. The judiciary is seen as an appendix of politicians, and its actions as reflexes conditioned by the balance of power. One could argue that the progress of the cases after 2006 is explained by the inertias generated by a previous political environment supportive of the human rights cause. It is only because evidence could be gathered and accusations could be formalized during that period that we observe these positive outcomes. This perspective is problematic. The existence of extremely bold condemnatory rulings after 2006 and the reaction of judges and prosecutors to initiatives like Decree 1097, show there is something more going on than simply a bureaucratic inertia that carries on with the open judicial processes.

As predicted by the theory of legal judicial empowerment I outlined in the previous chapter, Peruvian human rights litigants and activists were extremely successful in crafting a constituency of friendly judges and prosecutors for whom ending of the
judicialization process contravened a series of norms and legal understandings that they internalized as guiding premises of their professional undertakings. I will show that this cultural transformation was the product of skillful interventions by human rights activists to empower judges with the legal tools necessary to defeat impunity, arguments with which they felt safe in defying powerful political players. Human rights activists were always aware that forging alliances within the judiciary was crucial for the success of their enterprise. Even when politicians’ tolerance for transitional justice was high, they knew that in absence of those alliances they could encounter serious obstacles, especially as they tried to bring down the legal hurdles that stood in the way of justice (amnesties, statutes of limitations, the legality principle, etc.). They also anticipated that if tolerance levels decreased, judges devoid of social support structures and of articulate pro-transitional justice legal arguments would be more likely to capitulate in the face of fierce political pressures.

Before I present evidence to back this claim, an additional alternative explanation must be ruled out. Did judges and prosecutors defy the political establishment because they counted with formal institutional safeguards that insulated them from politicians? Can formal judicial independence explain the outcome? How risky was it to confront with Congress and the executive in terms of their career prospects? Could they rule as they saw fit, or as my argument suggests, it was necessary to reconfigure their understanding of their institutional mission, providing them with normative incentives conducive to discounting risk?
3.4 Formal Judicial Independence and Informal Intimidation Tactics

After the 2000 political transition some of the institutional conditions highlighted in the judicial politics literature as guarantors of formal judicial independence were restored (Ferejohn 1998; Domingo 1999; Ríos Figueroa and Taylor 2006; Staton and Ríos Figueroa 2009; Ríos Figueroa 2011). During Fujimori’s authoritarian regime several judges and prosecutors were sacked in order to fill those positions with government allies. Moreover, the amount of untenured judicial operators increased, exposing judges and prosecutors to the fear of losing their jobs if they contradicted the regime’s wishes (Finkel 2008; Dargent 2009).

When Fujimori resigned as president, the transitional government reinstated a number of those judges, many of whom were given jurisdiction over the corruption and human rights cases that involved Fujimori and his cronies. Figure 3.3 shows that the levels of untenured judges declined, enhancing the formal political insulation of the judiciary. Among these judges were three former members of the Constitutional Court who in 1997 ruled against Fujimori’s intentions to run for a third term and were impeached. The Inter-American Court of Human Rights backed these judges in a ruling that demanded the Peruvian state to reinstate them.136

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136 I/A Court HR, Case of Constitutional Court v. Peru, ruling of January 31st 2001
As Dargent’s (2009) analysis of the Constitutional Court suggests, the higher levels of political pluralism and fragmentation that accompanied the transition also opened up spaces for bolder patterns of judicial behavior with greater impact in sensitive policy areas, often against the government’s wishes. This is because in such context it was harder for parties to galvanize enough votes in Congress to appoint extremely partisan nominees,137 and also because once they were seated, judges knew that high levels of inter-party consensus had to be reached in order to impeach them. Furthermore,

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137 Any lawyer can apply for a position. Applicants are ranked according to a number of meritocratic criteria including past experience, academic degrees, publications and results in candidacy exams. A special congressional committee interviews those at the top of the ranking and then a qualified congressional majority is needed in order to pass the nominations.
my interviews with several Supreme Court and Constitutional Court justices indicate that after the democratic transition they felt more secure in their positions because Fujimori’s takeover of the judiciary was still a very traumatic and vivid memory. As a result, “any politician who seeks to imitate the previous regime, would pay an incredibly high political cost because he or she would be reproached both locally and abroad.”

Formally independent judges, however, were not a guarantee that transitional justice efforts by NGOs would succeed. Like in Argentina during the Menem years (see Chapter 4), the Peruvian anti-transitional justice coalition engaged in systematic attempts to prevent the judiciary from further advancing with human rights cases. These players came to the realization that judicial autonomy would put their interests in jeopardy, and decided to act in order to undermine that autonomy, and the commitment of certain judges and prosecutors to the human rights cause. These tactics aimed at inducing strategic behavior among judicial actors involved in the investigation and trials, by highlighting the risks entailed in defying powerful political and military groups. During my fieldwork I identified three types of interventions in the judiciary by soldiers and politicians contrary to the judicialization process: physical threats, the manipulation of the rules governing the internal workings of the judiciary, and judicial clientelism.

Despite the aforementioned institutional safeguards, and especially after the mid 2000s, judges and prosecutors were constantly exposed to intimidation tactics and anonymous threats. Their investigations and rulings affected extremely powerful actors and institutions, which counted with the necessary intelligence information and means of violence to do harm. For example, a judged stated in an interview that:

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138 Interview, Lima, May 28th 2010 with a Supreme Court Justice.
I constantly receive threats, especially by the accused during oral hearings. Once one of these individuals tried to intimidate us saying that he knew where my colleague in the court and I spent time when we weren’t at work. It was clear that he knew exactly at what time we left the office, etc. My colleague’s son has also been shot at.\footnote{Interview, Lima, March 23\textsuperscript{rd} 2010.}

Similarly, disciplinary sanctions against judicial actors were also applied in order to trigger a deterrent effect within the judiciary. These initiatives were intended to set standards of acceptable behavior, especially among those judges and prosecutors who sought to be promoted or ratified in their posts. In this sense, the anti-transitional justice coalition played with a rule that stipulates that judges and prosecutors must be evaluated every 7 years, and subsequently ratified or removed on the basis of those evaluations. Disciplinary sanctions or being formally accused of malicious prosecution\footnote{In Spanish the word “prevaricato” refers to a charge raised against a judge or prosecutor who wrongfully applies the law.} harms individuals’ chances of keeping their jobs.

In 2006 Provincial prosecutor Cristina Olazábal, in charge of investigating the Cayara and Accomarca massacres perpetrated during García’s first presidency in the 1980s, decided to indict then presidential candidate García\footnote{The formal accusation was presented when Garcia was still a presidential candidate in 2005.} and a number of former military officers. She accused them of perpetrating genocide and other related crimes. Her decision put her job security at risk. After García was sworn in, the nation’s chief prosecutor initiated an internal investigation and presented charges against Olazábal. The argument was the she had engaged in an act of malicious prosecution. Olazábal was untenured, and demoted to provisional assistant prosecutor in Ayacucho. This action
became an emblem of the executive’s determination to undermine the commitment of judicial actors vis-à-vis human rights cases. As one Olazábal’s colleagues admitted,

What happened to Cristina Olazábal is frightening. We need to be very careful when confronting these individuals. After that unfortunate episode many prosecutors have seriously considered whether to move on with the investigations or to put them on hold.142

A superior prosecutor who litigates before the Supreme Court also described how this episode affected his subordinates:

The accusation presented against Olazábal is something that I think should not have happened. It has spread a lot of fear among prosecutors. I can make a mistake, but it’s my opinion and cannot lead to formal charges for malicious prosecution! Instead of backing prosecutors and giving them the tools they need to face extremely complicated and dangerous investigations, the chief prosecutor attacks them. These shenanigans are aimed at discouraging prosecutors, at dilapidating their commitment to truth and justice.143

Finally, a provincial judge also acknowledged that judges were not exempt from these fears. He explained that since the aforementioned episode many of his colleagues “are afraid to launch bold accusations using innovative juridical language that precisely characterizes the crimes, like Cristina did using the word genocide. They do not want to suffer the consequences.”144

Prosecutors and judges interpreted the Olazábal case as a warning sign and a reminder that their professional futures did not necessarily depend on their merits as public servants. In this sense, arbitrary disciplinary sanctions were combined with the activation of well-known patterns of judicial clientelism, in order to produce the desired

142 Interview, Ayacucho, May 1st 2010.
143 Interview, Lima, May 26th 2010.
144 Interview, Ayacucho, May 3rd 2010.
effects. García’s political party, APRA, was mentioned in many of my interviews with judges and prosecutors as having expanded its influence over the judiciary between 2006 and 2011. With the aid of some judicial authorities, García manipulated appointments and arbitrarily transferred judges from one court to another in order to remove unfriendly judges from sensitive human rights cases. The message was clear: being out of sync with powerful political actors, or not having the right political connections could lead to a stagnant judicial career or to an abrupt termination of it. One of the judges I interviewed crystallized this consensus about APRA’s relationship with the judiciary when stating the following:

The judiciary is full of staunch APRA supporters, especially here in Lima. I was part of the anti-corruption subsystem and could have been promoted to a criminal chamber. Instead I was sent back to a regular criminal court. My problem was that in the 1980s I was a high-ranking clerk in a special Supreme Court panel that tried four of Garcia’s ministers. As a result, for APRA I am a persona non grata. These are the informal mechanisms that do not kick you out of the game, but make your life really difficult. They are the ones who decide on your professional future. When I was about to begin investigating the El Fronton case, they sent me to another court. They obviously know about my position with regards to, for example, statutes of limitations, so they got rid of me.145

The party’s past record in office enhances the credibility of my sources: APRA’s colonization of the bench in the late 1980s was one of the central arguments used by Fujimori when he launched the restructuring of an institution seen as corrupt and inefficient (Lovatón 2003; Finkel 2008). Fujimori used the discourse of accountability to take over the institution.

The extant literature on judicial behavior and common sense both indicate that in this type of political environment one should observe high levels of judicial caution and

145 Interview, Lima, 26th March, 2010.
timid rulings. In transitional justice processes, this pattern should be enhanced, not only because the liberty of powerful individuals is at stake, but also because the legal arguments that judges and prosecutors must endorse to make those politically risky moves, defy some of the most basic rules of professional behavior in criminal prosecutions. When ruling against the defendants, judges not only challenge the political and military establishments, but do so using arguments that challenge the legal establishment. Why put their careers on the line if received legal understandings indicate that statutes of limitations constrain the punitive power of states? Why jeopardize their physical integrity if the legal categories invoked by litigants were not part of positive law at the time when the crimes were committed and are therefore inapplicable? Why take such risky moves if they could easily argue against the retroactive application of international treaties and conventions?

The outcome in the Peruvian case is very different from that predicted by the strategic approach because human rights groups deployed an ambitious lobbying strategy within the judiciary in order to signal the presence of a vocal and organized support structure willing to publicly back courageous judges and prosecutors, and most importantly, designed a pedagogical intervention in order to craft a constituency of judges convinced of the legitimacy of the legal arguments that make transitional justice a normative imperative, in both the legal and moral sense of the word.
3.5 Crafting A Friendly Judiciary: The Transformation of Legal Cultures in Peru

3.5.1 The Poor Record of the Peruvian judiciary

In the immediate aftermath of the 2000 democratic transition, human rights litigants were aware of the poor record of the Peruvian judiciary in the defense of fundamental rights during the internal armed conflict. Triggering important changes within the institution was seen as a precondition for achieving victories in a future judicialization process. In order to successfully process human rights cases, judicial actors had to overcome the numerous obstacles posed by complex and dangerous investigations against powerful political and military players, and engage in creative interpretations of the law. Activists’ diagnosis of the situation indicated that even in the presence of a favorable political environment, Peruvian judges and prosecutors would lack the necessary technical capabilities and professional commitment to appropriately deal with cases of state repression.

According to the Final Report of the Truth and Reconciliation Commission, judges and prosecutors became “agents of violence” during the armed conflict. In the 1980s they abdicated their prerogative to investigate the crimes perpetrated by both parties involved in the conflict (the military and the Shining Path), and in the 1990s they passively endorsed and applied draconian anti-terrorist legislation. For example, the Final Report describes how prosecutors delegated their investigative duties to the police, systematically failing to check those proceedings in order to guarantee respect for civil rights and due process, as well as satisfactory outcomes, particularly when the subject of those investigations were state agents. Similarly, judges recurrently allowed military
tribunals to usurp jurisdiction in cases of state repression, allowing them to exonerate their peers.\textsuperscript{146}

The judiciary’s inability to perform its constitutional duties during that period has been attributed to two factors: the lack of adequate material resources and poor training. Figure 3.4 shows the evolution of the percentage of the state’s budget assigned to the judiciary between 1980 and 2000. During the course of two decades the judicial branch was never assigned more than 1.5\% of the states’ total expenditures. This obviously had an impact on the capacity of the judiciary to conduct investigations that required among other things, trips to remote areas in the Peruvian highlands where the crimes were perpetrated, expensive forensic tests, and translators for the non-Spanish speaking victims who were called in to testify as witnesses.\textsuperscript{147}

\textsuperscript{146} See Comisión de la Verdad y Reconciliación (2003), Volume III, Chapter 2, Section 6.

\textsuperscript{147} 70\% of the victims do not speak Spanish as their first language.
Figure 3.4 Resources assigned to the judicial branch by the state (1980-2000)

Source: Comisión de la Verdad y Reconciliación (2003)

With regards to the technical capabilities of the judiciary, the consensus in the literature and among legal practitioners interviewed during fieldwork is that Peruvian judicial actors suffered from enormous deficits. In the words of Peru’s most prestigious legal sociologist, “doctrinal training has separated […] the law from its social consequences […] The inoculation of a professional ideology within universities weakens the student’s critical spirit […] We have concrete evidence about the prevalent presence of mediocre professionals in the judiciary, with an inadequate or barely acceptable technical expertise” (Pásara 2010: 133-135). Similarly, according to the Truth and Reconciliation Commission, until the 2000s Peruvian judicial actors ignored their duty to enforce checks and balances due to their lack of adequate training in “constitutional law and the lack of awareness of international human rights instruments” (Comisión de la
Verdad y Reconciliación 2003, Vol. 3, Chapter 2, 255). Judges limited themselves to a “strict and mechanic enforcement of norms, without considering principles, values and fundamental rights” (ibid: 256). The influence of positivism and formalism led them to operate with a restricted interpretation of the reach of their formal prerogatives. For example, although the Peruvian Constitution grants judges the power of judicial review,\textsuperscript{148} it was rarely used. In fact, in the 1980s and 1990s, the Constitutional Court created in 1979 and reformed in 1993, checked the constitutionality of laws only on a handful of occasions (Dargent 2009).

Peruvian human rights activists immediately saw the need to approach judges and build alliances with them in order to guarantee the success of transitional justice efforts. The diffusion of the legal and jurisprudential tools necessary for prosecutors to formalize accusations and for judges to circumvent the legal formalisms invoked by the defendants was the central component of their strategy to craft a receptive, committed and capable judiciary. These strategies and their impact are the focus of the following section.

3.5.2 Legal Judicial Empowerment From Below

Human rights NGOs devised a myriad of strategies to equip judges and prosecutors with the technical capabilities they lacked in order to successfully process cases of state repression. Their pedagogical initiatives included organizing academic seminars; facilitating informal contacts between judicial actors and prominent national and foreign legal experts; and producing documents and briefs explaining judicial actors

\textsuperscript{148} Article 234 of the 1979 Constitution, and article 138 of the 1993 Constitution.
how to incorporate international legal instruments and jurisprudence into their rulings in order to fulfill the responsibilities of the Peruvian state.

The human rights movement staffed the legal team of the Truth and Reconciliation Commission with this pedagogical goal in mind. The lawyer in charge of the team stated in an interview that

We knew that apart from gathering evidence about the violations documented in the Final Report of the commission, we had to expand the commission’s original mandate to provide a clear, almost pedagogical interpretation of the Peruvian legal framework in light of international law. We had to make it clear that it was unacceptable and illegal to use legal formalisms and a parochial reading of the law to stop the judicialization process.  

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Human rights lawyers made sure that that the Final Report contained an account of the legal framework that should guide judicial proceedings. An authoritative document backed by the Peruvian state was thus made available so that judges and prosecutors could consult it and invoke it in court.

In addition to the inclusion of the legal chapter, the influence exerted by activists also led the commission to recommend the authorities the creation of a special court system under the orbit of the National Criminal Court to deal with crimes against humanity. This constituted a major victory because it offered human rights litigants an institutional setting in which to activate mechanisms of norm diffusion. In particular, it have them the opportunity to ignite a special relationship with a small group of judges and prosecutors who would then participate in the investigations and trials. Building trust with individuals at the National Criminal Court, and encouraging them to reinforce their

149 Interview, Lima, March 10th 2010. See Comisión de la Verdad y Reconciliación (2003) Volume I, Chapter IV
demand to create this special jurisdiction, was paramount in order to facilitate the spread of the aforementioned doctrines and legal ideas.

Our relationship with the judges of the National Criminal Court began in the early years of the transition when we litigated cases of terrorism before that court. Besides those formal interactions, we approached them informally to persuade them to demand jurisdiction over cases involving human rights violations. Once this special subsystem was created, we knew that it was an unprecedented opportunity to make sure that they shared our same legal criteria when assessing the difficulties presented by these cases. We had a demarcated group of judges and prosecutors that we could approach by inviting them to seminars and discussions and by circulating academic materials among them. We thus began to share with judges and prosecutors the same educational initiatives we designed for our own legal teams.\textsuperscript{150}

Another litigant explained the need for these initiatives:

We had to cover what we anticipated would be the main legal hurdles in the judicialization process. The inapplicability of amnesties, the previous adjudication of these cases by military courts, the inapplicability of statutory limitations, the limits to military jurisdiction, the definition of forced disappearances as continuous crimes and the techniques to apply international human rights law in criminal procedures, were juridical issues that had never been confronted by courts before. There were no precedents in Peru. We had a couple of international rulings and a ruling that refused to apply the amnesties in 1995, but nothing else. We knew these would be the main arenas of confrontation during investigations and trials, and because of that it was crucial to ensure a minimum level of expertise in these matters among judges and prosecutors.\textsuperscript{151}

Litigants did not want judges to excuse themselves from applying these innovative legal criteria due to lack of knowledge or awareness. This could be the perfect pretext for judges not willing to get involved in thorny territory. But the problem was more acute than that. Even those judges willing to expose themselves to political

\textsuperscript{150} Interview, Lima, April 14\textsuperscript{th} 2010.

\textsuperscript{151} Interview, Lima, April 10\textsuperscript{th} 2010.
pressures had difficulties in understanding the legal options available to them. A prominent human rights lawyer admitted that:

At the beginning of the process, between 2001 and 2004 some of the formal accusations issued by prosecutors and the first arrest warrants issued by provincial judges were written by us. They would come and tell us “I would like to issue these warrants but I have no idea how to do it.” This was a warning sign about the obstacles we could face if we did not act within the judiciary, as opposed to simply being vocal in the media or staffing government agencies. At first we began by distributing documents and briefs, but then we decided to invite them to seminars and lectures given by experts in the field.\textsuperscript{152}

In this sense, human rights litigants had to struggle against a jurisprudential inertia reproduced by the educational system and enhanced by the taboo built around the human rights discourse often accused of being functional to the interests of terrorist organizations:

In our universities these topics are not part of law programs. Even though I studied law relatively recently, in the 1990s, I never took a human rights course. In addition, especially here in Ayacucho, human rights are considered subversive. The situation was even worse in the 1980s, when most of the judges and prosecutors active today studied law. As a result, judicial operators have a narrow focus on internal law and are not used to invoking international norms and precedents. This was a huge problem for us at the beginning of our litigation efforts because central to those efforts was the use of the arguments and instruments of international law. Without expanding judges’ and prosecutors’ legal knowledge and without encouraging them to transform their legal praxis, it would have been impossible to punish human rights violators. Creating a new legal current within the judiciary was the key to our success.\textsuperscript{153}

In the section describing the dependent variable I suggested that judicial actors in Peru fully embraced the new legal orthodoxy in their rulings on transitional justice. Can we attribute this to the diffusion strategies designed by the human rights community? In a

\textsuperscript{152} Interview, Lima, April 21\textsuperscript{st} 2010.

\textsuperscript{153} Interview, Ayacucho, May 5\textsuperscript{th} 2010.
survey of prosecutors conducted in 2010, almost 7 years after the launching of the pedagogical initiatives, respondents confirmed their attendance to on average 3.5 courses (Table 4). Only 3 respondents said they had studied international human rights law in law school. When asked about their agreement with the statement that after attending the seminars organized by NGOs they were more likely to apply international legal instruments in their decisions, the average response was 3.8 out of a maximum of 4 on the agreement scale. Similarly, the prosecutors who participated in the survey showed high levels of agreement with the statement that in the seminars they became familiar with legal instruments they previously did not know about. The fact that the average prosecutor somewhat disagreed with the idea that the lack of training makes the progress of the judicialization process difficult, provides further evidence of the positive effect of these pedagogical interventions on the technical capabilities of judicial actors (Table 3.5).

In order to complement the results from the survey, in what follows I analyze the testimonies obtained during interviews with judicial actors. The judges and prosecutors I interviewed were surprisingly candid in accepting their prior ignorance of these legal tools and the positive impact of activists’ strategies in their ability to prosecute and punish human rights criminals. All of the judicial actors I talked to had at one point or another attended the pedagogical events organized by NGOs or received informal training by activists.

154 There are no public records of the number of seminars organized by NGOs, of the lists of participants or of the dates of the informal distribution of academic materials among judges and prosecutors. I accidentally became an agent of norm diffusion. Academics at the Catholic University knew of my upcoming trip to Ayacucho and asked me to distribute among the judges and prosecutors I was going to interview, a recently published book with the proceedings from a seminar offered to judicial actors (See Quinteros 2010). In that seminar a series of experts gave lectures on how to approach a number of legal hurdles like statutes of limitations, on how to justify charges against military commanders not directly responsible for the crimes, and on international and national jurisprudence.
### TABLE 3.5
EFFECTS OF LITIGANTS’ PEDAGOGICAL INTERVENTIONS AMONG PERUVIAN PROSECUTORS

<table>
<thead>
<tr>
<th>Question</th>
<th>Average Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>Please indicate the number of seminars on human rights organized by civil society that you attended since 2004</td>
<td>3.5</td>
</tr>
<tr>
<td>Did you take International Human Rights Law Courses in law school?</td>
<td>YES = 15% (3 respondents)</td>
</tr>
</tbody>
</table>

**Please indicate how much you agree with the following statements...**
*Strongly agree = 4; Somewhat agree = 3; Somewhat disagree = 2; Strongly disagree = 1*

<table>
<thead>
<tr>
<th>Question</th>
<th>Average Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>The lack of training makes the investigation of human rights crimes more difficult</td>
<td>2.1</td>
</tr>
<tr>
<td>After attending these seminars I am more likely to use international legal instruments in my decisions</td>
<td>3.8</td>
</tr>
<tr>
<td>In the seminars I became familiar with legal instruments I previously did not know about</td>
<td>3.5</td>
</tr>
<tr>
<td>After attending these seminars I am more likely to accept indirect evidence to ascribe individual criminal responsibility</td>
<td>2.6</td>
</tr>
</tbody>
</table>

Source: Author’s Survey. Targeted universe: All prosecutors involved in human rights cases. Anonymous survey administered online: Link to survey sent via email by Chief Prosecutor. Response Rate: 43.5%
In the words of a provincial prosecutor “the lack of training in these legal questions is a big problem. It was even worse at the beginning of the judicialization process. All of these topics were new! When I went to school I took one human rights class that did not cover the debates with the depth required by these cases.” An anti-corruption judge also explained the impact of the seminars:

The biggest contribution of these seminars organized by human rights NGOs is that they connect us with debates and questions that have already been answered in other countries. This makes our job much easier and enriches our decisions. […] Without the diffusion of this information we would have encountered insurmountable obstacles to bring down amnesty laws or to properly characterize the nature of crimes that were committed decades ago.

One of the provincial prosecutors I interviews was even more conclusive:

Due to the training we received in law school, we did not see these cases as special cases that involved gross human rights violations, and instead approached them as normal cases applying the conventional standards of criminal law. This whole process has involved first and foremost an intellectual journey. We had to attend seminars both here and abroad in order to understand new legal paradigms, the use of international instruments and above all, understand that we had to invoke customary law as a source of law already in place at the time when the crimes were committed. We had to fight against the legality principle and we had to know how to do that correctly in order to respect due process clauses. […] Without the training offered by NGOs and by some universities it would have been impossible to achieve these results. We were blinded by the rules of conventional criminal law. If you had conducted this interview 10 years ago I would be talking about statutes of limitations! Now we can talk about crimes against humanity, we can see the importance of the Inter-American Court, etc.

These testimonies are examples of the broad consensus I found among judges and prosecutors with respect to the doctrinal shifts that constituted a necessary condition for

155 Interview, Ayacucho, May 1st 2010.
156 Interview, Lima, March 23rd 2010.
157 Interview, Ayacucho, May 3rd 2010.
transitional justice. Broadening the normative and jurisprudential foundations of judicial decision-making was crucial in order for judicial actors to overcome the legal prejudices that stood in the way of criminal prosecutions and punishments. Forging a new consensus about the validity of certain arguments and legal instruments, and providing judges and prosecutors with the tools needed to articulate sophisticated constitutional arguments, made justice possible in the Peruvian case.

The fact that the old formalist legal orthodoxy exerted such a constraining force on judicial decision-making in cases of transitional justice suggests that litigants could not rely on judicial actors’ good will or prior ideological predispositions. There are two reasons for this. First, before NGOs reached out to judges and prosecutors, those that were ideologically predisposed or committed to support the victims felt ill equipped when they sought to translate personal or ideological commitments into legal language. For example, the following testimony of a judge who investigated a case of forced disappearances in the 1990s shows that judicial actors were indeed constrained by their technical capabilities. He recalled the

Decisive impact that my contacts with human rights NGOs had when I was investigating that crime. Had I not attended the seminars they organized at the time, I would have never been able to hand down an arrest warrant. They opened the jurisprudential doors I needed by making me familiar with questions of constitutional law and human rights law, and with international legal instruments and their applicability in a domestic setting. I have attended many of these courses, first as a student and now as a lecturer.\textsuperscript{158}

Second, the typical judicial actor was not ideologically predisposed to rule in favor of the victims. In the terms of the theory developed in Chapter 2, most Peruvian judges and prosecutors were neither recalcitrant nor committed; they were indifferent.

\textsuperscript{158} Interview, Lima, March 19\textsuperscript{th} 2010.
The above judge, who personally declared himself a long time supporter of the human rights cause, constitutes an exception. The prosecutors who responded to my survey revealed fairly centrist tendencies: the mean score for ideological self-placement in a 1 to 10 scale was 4.3. Moreover, the way judicial actors presented their views about the internal armed conflict and their opinions of NGOs made it clear that their pro-transitional justice behavior was not simply driven by an ideological commitment that led them to look for sources of law that would rationalize a pre-existing position. In interviews judges and prosecutors often accused human rights NGOs of being too leftist and many even referred to members of the military with pity and admiration as “brave” and “inexperienced” “young soldiers” (“soldaditos”) who selflessly combated the terrorist threat.

The typical judge or prosecutor was therefore compelled to support the victims after NGOs successfully entrenched new professional standards and legal ideas associated to the principles and values of international human rights law. In interviews judges and prosecutors referred to the diffusion of these new legal standards as revolutionary, eye opening and intellectually challenging. The exposure to these new legal doctrines was something they did not look for but was offered to them by human rights NGOs. In fact, in a number of interviews, respondents told me that attending these courses had sparked an academic interest in these matters.

The evidence presented so far supports the idea that legal cultures and legal knowledge exert a constraining force on judicial decision-making. But my argument also suggests that by forging a consensus around the legitimacy of certain legal standards and values, NGOs can transform judiciaries’ corporate identity and institutional mission
providing them with the motivation and the means to defy powerful political players. I suggested earlier that the resistance to the Presidential Decree 1097 that sought to put an end to the judicialization process is an example of this new identity at work. What exactly compels judicial actors to engage in these bold and risky acts of defiance? Are NGOs pedagogical interventions responsible for this sense of empowerment in the face of political adversity?

The testimony of a judge who in the midst of Fujimori’s dictatorship declared an amnesty law passed by congress inapplicable, is instructive. Her action contravened all standards of professional behavior, as judges understood them at the time:

At that time the idea that laws had to be in harmony with the principles established in international treaties was not something internalized among us. Moreover, it was a law passed by congress. Although judges are allowed to apply decentralized judicial review, in 1995 I only knew of one example in Peru and it wasn’t even by a criminal court. My colleagues told me that I was mad, how could I declare a law unconstitutional! It was a valid piece of legislation. We weren’t supposed to meddle in political affairs. […] I didn’t know how to back my decision to declare the inapplicability of the amnesty, it was something radically new! […] My contacts with a well-known human rights lawyer proved crucial. He gave me the legal instruments I needed to show that I was acting correctly, as mandated by the law, and that I wasn’t circumventing the amnesty because I was against the military or because it was a crazy idea of mine. I felt extremely constrained by the information I had before I visited this lawyer. In fact when I entered his office I was shocked by the size of his book collection on human rights law.¹⁵⁹

Once again we see the crucial intervention of human rights litigants in providing the judge with the legal tools she lacked and without which she could not have acted as she did.¹⁶⁰ More importantly though, in the interview she also recognized the empowering

¹⁵⁹ Interview, Lima, March 26th 2010

¹⁶⁰ Congress then passed a second amnesty and declared that it could not be subject to judicial review. This amnesty was never challenged in court during Fujimori’s regime.
aspect of this intervention given the political context in which she handed down that decision: “knowing about these issues gives us power, power to decide. It allows us to act following our convictions, despite political pressures to the contrary. I cannot let them intimidate me because I have the legal tools with which to justify the correctness of my actions.”

The idea that expanding the sources of law that are seen as legitimate is empowering, was a recurrent theme in my interviews with judges and prosecutors. A superior prosecutor who participated in oral trials at the National Criminal Chamber stated that “these doctrinal and jurisprudential sources empower prosecutors, especially when we have to present politically sensitive accusations. International law and the legal human rights discourse become our best allies, our biggest sources of legitimacy and personal security.” Another prosecutor referred to knowledge as an insurance policy against charges for malicious prosecution. She argued that “getting to know other judicialization experiences and their respective jurisprudential developments reduces our uncertainty when we decide on a case. If others used this or that interpretation or instrument, then we know that we can also do it without running the risk of being accused of prevarication. Better understanding these new and complex issues protects us and empowers us.”

Like a judge suggested in an interview, judicial actors felt that entering the human rights legal world amounted to throwing themselves “into a void”. When they enter

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161 Interview, Lima, March 26th 2010.
162 Interview, Lima, April 22nd 2010.
163 Interview, Ayacucho, May 2nd 2010.
politically inhospitable territories or when they seek to pursue their moral commitments, it is important for judicial actors to know how to legitimize their actions in the language of the law. Critics of legal perspectives to the understanding of judicial decision making argue that the law is epiphenomenal because its use constitutes an *ex-post* rationalization of political or ideological decisions (Segal and Spaeth 1993). By contrast, the above testimonies show that when the law to be applied is unknown or contravenes established standards of judicial praxis, this process is not straightforward. Litigant groups can expand the possibilities for assertive judicial behavior by transforming the ways judges and prosecutors perceive the reach of their formal prerogatives. The law and cultures of legal interpretation put limits on what judges and prosecutors think is acceptable professional behavior, even when those limits severely constrain their policy preferences. The consequences of their actions in transitional justice processes are so far reaching, both politically and legally, that the epistemic and social support offered by human rights activists is crucial.

Human rights activists were successful in diffusing a new legal orthodoxy in part because of their correct diagnosis of the problem and the systematic nature of their efforts. By taking seriously the technical and cultural underpinnings of judicial decision-making, they activated a process of ideational transformation that modified judicial actors’ sense of possibility and obligation *vis-à-vis* cases of state repression. The renewed sense of possibility was crucial among committed judges and prosecutors, whereas modifying the perception of what was legally possible *and* mandatory, was fundamental to convert indifferent judicial actors.
We know that the diffusion of ideas was successful, but why exactly did activists manage to persuade judges and prosecutors? Explaining the conditions under which ideas impact political and social behavior is a central challenge of constructivist social science, which I address in the next three sections. I discuss two conditions identified in Chapter 2 that made activists’ pedagogical efforts effective (the timing of the intervention and the agents chosen to speak on their behalf), as well as a factor that limited to their ability to completely put judicial actors on their side (the differential effect of diffusion strategies across legal issue areas).

3.5.3 Timing of the Pedagogical Interventions

In Chapter 4 we will see that during the 1990s Argentine human rights activists had a hard time expanding the reach of their pedagogical efforts beyond certain actors and jurisdictions, in part because they were not the first movers in the game to colonize the judiciary. By the time they launched these initiatives, the anti-transitional justice coalition had already taken control of key courts. Their Peruvian counterparts, by contrast, launched their strategies to craft a friendly and receptive judiciary before the anti-transitional justice coalition began exerting pressures on judicial actors. As I discussed in a previous section of this chapter, the political environment immediately following the collapse of Fujimori’s regime in 2000 was favorable to their cause, to the point that they even participated in the transitional cabinet and played a crucial role in the creation and workings of the Truth and Reconciliation Commission.

The effect of timing on the positive impact of litigants’ pedagogical intervention can be observed by analyzing the strategies designed by the military in order to stop the
judicialization process. When it was clear to them that the intimidation tactics used during García’s presidency had failed to fully deter the judiciary from making progress with the investigations and trials, the military decided to imitate NGOs’ pedagogical approach.

In 2010 the armed forces decided to amicably court prosecutors, following the “academic” model. With the help of the nation’s chief prosecutor, an ally of President García, they organized a seminar which included lectures by two officials formally accused of perpetrating human rights violations. The lectures had the following titles: “Basic and conceptual criteria about Peruvian National Identity;” “Analysis of the social and political situation, and other important factors, of emergency areas” (referring to the regions in which the Shining Path is still active); “Problems faced by the Peruvian Armed Forces as a result of their involvement in emergency areas;” and “The organizational structure of the Army and the chain of command: Planning operations.” These titles clearly reveal the two main pedagogical goals of the organizers.

First, they intended to make prosecutors sympathetic to the current challenges faced by the institution. In particular, they wanted to call attention to their patriotic involvement in an endless combat against insurgent groups, with precarious training and equipment. Second, the seminar sought to explain officers’ vision of military command structures during the internal armed conflict, arguing that high commanders had no control over the actions of their subordinates. If prosecutors accepted this understanding of military operations, they would have to circumscribe their accusations to those materially or directly responsible for the crimes, and abstain from presenting charges.

165 The program is on file with the author.
against those suspected of designing the anti-terrorist insurgency and of giving orders to the rank and file. In cases involving hundreds of victims and with little access to military records about who was deployed in each combat area, it is almost impossible to identify the direct perpetrators. That is why accusations have mainly focused on the indirect perpetrators in command of the military apparatus. Endorsing the military’s vision would have almost certainly led to impunity.

In the words of one of the prosecutors who attended the event, “we won’t cease in our efforts to achieve justice. The arguments they tried to convey to us clearly do not persuade us and we won’t use them.”\textsuperscript{166} Another participant said she told the military officers that “we have lived through decades of a bloody conflict. You talk about pacification and reconciliation, but that cannot happen without justice because the nation’s scars are still bleeding.”\textsuperscript{167} It is clear that litigant’s efforts to craft a constituency of friendly judicial actors, sensitive to their cause and their novel legal arguments were effective. When the anti-transitional justice coalition sought to counterbalance these normative and ideational forces operating against their interests inside the judiciary, it was too late. In fact, the military was accused of organizing the aforementioned seminars in order to intimidate prosecutors, and they defended themselves by saying that human rights NGOs had extensively resorted to the same paralegal strategies before them. The controversy led to the suspension of all future contacts between judges and prosecutors with the parties involved in the trials outside the courtroom or university settings.

\textsuperscript{166} Interview, Ayacucho, May 4\textsuperscript{th}, 2010.

\textsuperscript{167} Interview, Lima, April 22\textsuperscript{nd} 2010.
As the reaction of the prosecutors to the arguments presented by the military shows, human rights NGOs won the intellectual and legal battle to topple impunity regimes. The fate of ongoing transitional justice efforts now hinges on the quality of the evidence brought before courts, and not on legal formalities devoid of the human rights perspective required by these cases. Human rights litigants diffused the legal criteria that enabled judges and prosecutors to withstand political pressures. Moreover, they molded a new legal consensus that judicial actors internalized as the appropriate normative and doctrinal foundation of their professional undertakings.

3.5.4 Agents of Diffusion

One of the central challenges faced by human rights litigants who seek to transform a hegemonic legal orthodoxy, is to make jurisprudential innovations look legitimate in the eyes of judicial actors. In other words, judges and prosecutors must be persuaded that when they invoke international legal instruments, or when they modify standards for evaluating evidence in order to take into account the special nature of human rights cases, they are not violating acceptable standards of professional behavior. Moreover, making an authoritative case in favor of unknown legal ideas is important in order to manufacture a deeper commitment to the values underlying the new orthodoxy. As I suggested in Chapter 2, litigants are more likely to succeed when others speak for them. In particular, they must enlist prestigious law professors as well as local and foreign judicial actors who can establish a more horizontal, peer-to-peer connection with the target population. Mechanisms of diffusion require an aura of neutrality. As one of
the parties in the criminal investigations and trials, they must not appear as trying to exert undue influences on the arbiters.

A careful analysis of the speaker series in the various programs I had access to, reveals that this is exactly what Peruvian human rights activists did. Human rights activists do not appear in those records, despite the fact that they were the official organizers of some of the events. In addition, NGOs had an important ally in the academic world that took on the challenge of training judges and prosecutors: the Institute for Democracy and Human Rights at the Catholic University of Peru. The Institute is a hub of prestigious academics, and for most of the period under study was led by the former president of the Truth and Reconciliation Commission, a respected philosopher. The Institute received the highest number of mentions in the online survey of prosecutors, when respondents were asked to name the organizations that had provided them with the training (Figure 3.5).
Figure 3.5. Organizations providing unofficial training courses to prosecutors

Source: Author’s Survey. Targeted universe: All prosecutors involved in human rights cases. Anonymous survey administered online: Link to survey sent via email by Chief Prosecutor. Response Rate: 43.5% Question: Please name up to four institutions in charge of organizing the courses you attended

Key: IDL: Instituto de Defensa Legal; CNDH: Coordinadora Nacional de Derechos Humanos; IDEHPUCP: Instituto de Democracia y Derechos Humanos; CAJ: Comisión Andina de Juristas

The strategy to disguise these interventions with an aura of neutrality is most clearly seen in the ways that NGOs approached the judges and prosecutors involved in the historic trial against Fujimori. These were members of the Supreme Court and of the upper echelons of the Solicitor General’s office. Among them were highly respected experts in criminal law. It is unlikely that these individuals would have attended their seminars or that they would have had any patience for human rights organizations trying to “teach” them international law. In fact, many of them were obviously well versed in the juridical issues at stake. From the activists’ perspective, however, none of these actors
had experience in cases of the magnitude and complexity of the Fujimori case. They anticipated that these judges and prosecutors would need reassurance that the juridical innovations they were being asked to endorse during the trial constituted a legitimate way of interpreting the law. Activists wanted to expose them to similar experiences in other countries, to convince them that they were not being asked to do anything out of the ordinary, and most importantly, that it was possible to sentence a powerful former President for crimes he had not directly perpetrated, but that he had planned and endorsed.

To this end, NGOs flew in a series of international observers (examples include human rights experts, international lawyers, and the Argentine judges of the historic 1985 trial against members of the military junta), and organized meetings between them and the judges. A litigant described the purpose of this strategy:

During the course of the trial there was one non-legal strategy that was of paramount importance. We invited international experts to informally talk with the judges. The aim was to show the judges that what we were asking them to do was possible. These Argentine judges did it; you can do it too. Our hidden message was: do not listen to us; listen to them. These experts were the true conveyor belts of our legal arguments and gave these Supreme Court judges the certainty that they needed to accept our theory about the crimes in question and the international jurisprudence we invoked. Although the three judges are experts in criminal law, they are not necessarily top-notch experts in international human rights law. I think that for them it was important to have this international support.168

In other words, the central concern of human rights NGOs was not simply to show judges that a well-organized and vocal civil society group was backing their efforts and would publicly defend them if necessary, but also to give them certainty about the legal tools they had to apply in order to issue a prison sentence.

168 Interview, Lima, April 21st 2010.
This type of trial, involving extremely complex crimes and little direct evidence of a former president’s criminal responsibility, was unexplored territory for these judges. As one of the three Supreme Court judges explained in an interview:

Both the meetings with international experts and the *amicus curiae* filed by international NGOs were important intellectual contributions. The meeting with the Argentine judges, for example, was a reassurance that we were on the right track. They shared their experience and the way in which they had applied the doctrines of criminal responsibility in complex criminal enterprises we were evaluating for our case.\(^{169}\)

The effect of this strategy was similar on the chief prosecutor. He emphasized that the informal contacts with international experts were reassuring of the fact that he was doing what was legally permissible:

We needed an impartial, academic take on these matters. I had the pleasure of discussing many of the questions and doubts I naturally had with one of Roxin’s former students who was invited by the NGOs to observe the trial. He helped me refine arguments, which were not that clear in my head.\(^{170}\)

### 3.5.5 Limits of Persuasion

Although Peruvian human rights activists managed to forge a strong consensus around the basic principles of international human rights law, including the rejection of amnesties and statutes of limitations, they were not equally successful in persuading judges and prosecutors to relax the standards for evaluating evidence of defendants’ individual criminal responsibility.

\(^{169}\) Interview, Lima, May 28\(^{\text{th}}\) 2010.

\(^{170}\) Interview, Lima, May 26\(^{\text{th}}\) 2010. Roxin is a famous jurist known for his theoretical work on determining criminal responsibility in crimes perpetrated via organized structures of power.
With regards to this specific legal issue area, NGOs’ argument was that in cases of state repression direct incriminating evidence is rare, especially in cases of forced disappearances, since victims’ fate is unknown. The clandestine military and intelligence operations that lead to these crimes do not leave traces in official records, and when they do, commanding the state apparatus allows for the effective destruction of the evidence. Moreover, the oral testimonies of the victims’ relatives, survivors or eye-witnesses normally lack precision due to the passage of time. In the Peruvian case the quality of witnesses was further jeopardized by the fact that many had died, and those who were still alive were extremely poor, uneducated and non-Spanish speakers.\footnote{171}

Judicialization processes respectful of the rule of law inevitably yield acquittals. However, given the great number of them documented at the beginning of this chapter, human rights organizations aggressively criticized judges for this aspect of their rulings. In particular, they argued that the above criteria were not consistently applied.\footnote{172} For example, in the cases \textit{Matero}, \textit{Pomatanta} and \textit{Los Laureles} the National Criminal Court ruled to acquit some or all of the accused due to the absence of direct proof, whereas in \textit{Castillo Páez}, \textit{Fujimori}, \textit{La Cantuta} and \textit{Barrios Altos} the criteria used was different. Human rights organizations complained that judges did not contemplate the fact that the Ministry of Defense and the armed forces systematically refused to open up their archives to investigators.

The results from the survey of prosecutors allow us to begin to understand this controversy between judicial actors and activists. As shown in Table 3.5, human rights

\footnote{171} 75\% of the victims spoke Quechua as a first language. According to Jo Marie Burt this “is an astonishing figure given that only 16\% of Peruvians are not primary Spanish speakers” (2009:393).

\footnote{172} See for example Rivera (2010)
NGOs were less effective at persuading judicial actors in this area: prosecutors’ level of agreement with the statement that after attending the seminars they were more likely to accept indirect evidence are significantly lower when compared to responses to the other questions, such as the one about changes in the rate of citation of international legal instruments: an average of 2.6 in the 4-point agreement scale, versus an average of 3.8.

Proving that the crimes actually took place despite the usual official denial is not hard since victim groups have been denouncing the loss of their loved ones for decades. By contrast, establishing individual criminal responsibility beyond reasonable doubt for state crimes that took place in the distant past is a daunting task. In this sense, one of the reasons for the aforementioned controversy is the prevalent perception among judicial actors that the indirect evidence presented to them is of low quality. The available documents and testimonies are not enough to persuade them to sentence an individual to years in prison. As a Peruvian judge who participated in various oral trials stated in an interview,

> Although I am aware that the nature of these crimes demands a special treatment of the evidence and that I should not expect smoking guns, if I am not convinced that this or that person participated in the crime in question, I cannot send him to jail and then be able to sleep at night. I hate it when this happens because I know I am not offering the victims the kind of justice they deserve.\(^{173}\)

In line with her colleague, another judge stated that:

> We do not demand direct proof in all cases. We understand that due to the passage of time and the patterns of behavior that one observes in these crimes, it is necessary to work with indirect evidence. But that evidence needs to be based on factual certainties. In the emblematic *Castillo Páez* case I had direct evidence and on that basis I interpreted the indirect evidence. [...] We often encounter contradictions in the testimonies of the victims or their relatives. Sometimes what they said in previous iterations of the investigations does not coincide with what

\(^{173}\) Interview, Lima, May 6\(^{th}\) 2010.
they say in the oral hearings. It is really hard to reconstruct what happened. True, our standards are high because we are not dealing with cases that are irrelevant for Peru’s life as a nation, and on top of that, the liberty of the accused is at stake.\textsuperscript{174}

In addition to the quality of the available indirect evidence, there is another reason why human rights litigants were less successful in diffusing their ideas on this particular issue area. The emphasis of the seminars was primarily on diffusing knowledge about international human rights law, and not about the evaluation of the evidence or procedural aspects of criminal investigations. This statement is consistent with the theoretical framework advanced in this dissertation: variation in the intensity of the intervention across issue areas is related to varying levels of persuasion across issue areas. For example, in 2009, 5 years after the launching of the pedagogical intervention, IDEHPUCP organized a seminar attended by judicial actors (both judges and prosecutors). At the end of the seminar, a survey was distributed and 107 participants filled in the questionnaire. One of the questions asked respondents to suggest topics for future seminars, i.e. topics that had not been sufficiently covered during that and prior academic events. Figure 3.6 shows the ranking of topics as a percentage of total suggestions.

\textsuperscript{174} Interview, Lima, May 17\textsuperscript{th} 2010.
The red bars indicate those topics related to questions about how to conduct criminal investigations in order to establish individual responsibility, including the production of evidence, the use of domestic criminal types, criminal procedural law and criminal law. Although not perfect, there is an identifiable pattern. Questions about constitutional law and international law, i.e. the legal framework needed to bring down amnesties or ignore statutes of limitations, rank at the bottom of the list, indicating that judges and prosecutors already felt competent in those areas. In a final report on the seminar, the organizers concluded: “we must highlight that among the five most voted topics, [there are] topics related to the gathering of evidence and the conduct of investigations […] [This] represents the most relevant novelty, which requires special
attention in view of the design of future training activities” (IDEHPUCP 2009: np). Echoing the report, during an interview with a provincial prosecutor she expressed frustration for the fact that the amount and variety of courses being offered had diminished in recent years, putting special emphasis on the lack of training in these topics. She argued:

We need more and better training. Defendants are all the time presenting new arguments to stop these prosecutions, to invalidate pieces of evidence, etc. What do I do, for example, if after 3 decades the medical and psychological reports do not find evidence of torture? What other kind of evidence can I look for? How do I use it and what importance can I give to it? We need help! These are really tough questions and we are not trained to answer them. We always have to grapple with these issues and hand down decisions in a context of fear. We need better training to back the choices we make, often against powerful people. Moreover, we need better training in order to know exactly the criteria being used by our superiors. We are afraid that we may end up being accused of prevarication like Cristina Olazábal.

3.6 Conclusion

Contrary to the core postulates of the Huntingtonian paradigm (e.g. Huntington 1991; Zalaquett 1992; Evans 2007; Karl 2007), the outcome of the Peruvian transitional justice process cannot be explained by a favorable political context or the presence of a disgruntled military. As this chapter has shown, litigant’s victories, measured in terms of prison sentences handed down against former military officers and politicians, were achieved in a context characterized by high levels of hostility towards human rights NGOs. In other words, against the expectations of the rational choice school of judicial

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175 My sources in the human rights community agreed with this and explained that their budgets have become progressively tighter.

176 Interview, Ayacucho, May 4th 2010.
behavior (e.g. Epstein and Knight 1998; Epstein et al. 2001; Iaryczower et al. 2002; Bergara et al. 2003; Helmke 2005), Peruvian judges and prosecutors did not engage in strategic behavior, avoiding confrontation with resourceful political majorities and the military.

The hostility of the anti-transitional justice coalition was tangible and observable, and clearly aimed at deterring further judicial action in cases of state repression. Some judicial actors where physically threatened and others suffered serious setbacks in their professional careers. The formal institutional rules designed to insulate judicial actors from political pressures were thus manipulated and undermined during the García administration via the activation of informal intimidation tactics. As a result, it is unlikely that as some scholars would assume (Domingo 1999; Finkel 2008; Skaar 2011; Ríos Figueroa 2011), formal judicial independence can account for judicial actors’ bold attempts to hold powerful political and military actors accountable for their past deeds.

Despite these dangerous precedents, the vast majority of Peruvian judicial actors showed an unwavering commitment to the progress of the judicialization process. The evidence presented in this chapter supports the theory outlined in Chapter 2, which emphasizes the empowering effect of a new legal discourse and of social support structures. These factors are crucial to understand why judges and prosecutors felt appropriately equipped to defy the political and military establishments, and to explain why they modified their received legal criteria. Deinstitutionalizing certain constraining ideas about the law and locking in an alternative legal vision was a necessary condition in order to unleash the potential of the Peruvian judiciary as a viable site for the defense of victims’ rights. The pedagogical strategies deployed by civil society organizations thus
managed to convert indifferent and poorly trained judicial actors into effective and committed agents of transitional justice.

In the aftermath of the 2000 democratic transition, human rights organizations anticipated that even if the political class coalesced behind their agenda, the historic technical deficiencies of the Peruvian judiciary, in particular its poor performance during the internal armed conflict, would pose insurmountable obstacles for the progress of the investigations and trials. NGOs deployed a myriad of strategies to change this situation, thus making future victories possible. In other words, transitional justice in Peru cannot be explained without accounting for changes in the legal preferences and skills of the relevant judges and prosecutors. As a crucial link in the causal chain between the denunciation of the crimes and the observation or not of prison sentences, judicial institutions must be taken seriously by scholars seeking to answer the question of why former politicians and military officers sometimes end up in jail. In more general terms, the ability of political actors to do things is as important as their motivations. Politics, an especially political action embedded in highly bureaucratic spheres, has a technical dimension that cannot be overlooked.

Unlike what Collins’s (2006, 2008, 2010) and Hilbink’s (2007a) accounts of transitional justice indicate, Peruvian litigants did not simply respond to perceived changes in the growing receptivity of the judiciary by filing suits. Instead they engineered those changes themselves. Because judiciaries are subject to pressures and lobbying tactics deployed by a myriad of outside forces that seek to build receptivity for their claims, their support for particular socio-political causes is never the outcome of an endogenous or conflict free normative evolution. Peruvian human rights litigants clearly
understood this, and devised cunning pedagogical interventions to transform an incompetent and uncommitted judiciary into one that favored their objectives.

The importance of these struggles for capturing the allegiance of judicial actors also points at the explanatory deficits of the Justice Cascade model (e.g. Sikkink 1993, 2005, 2011; Risse Kappen et al. 1999; Lutz and Sikkink 2000, 2001; Roht-Arríaza 2005). Despite the fact that the Peruvian state was intensely exposed to “norm affirming events” at the international level, it took a strenuous effort on the part of human rights activists to diffuse and entrench ideas about international human rights law inside the judicial branch. The existence of multiple rulings by the Inter-American Court against the Peruvian state, most of them handed down during the 1990s and early 2000s, did not automatically translate into awareness, let alone endorsement, of those novel legal ideas by domestic judicial actors. In sum, the impact of international norms in the Peruvian judicialization process was mediated by diffusion mechanisms specifically tailored to the organizational and cultural specificities of the targeted population.

Given the emphasis on ideational change as a key explanatory factor, this chapter also identified the conditions that led to the effectiveness of litigants’ efforts to diffuse a new legal orthodoxy. In particular, the timing of the intervention was important. As we will see in the next chapter, Peruvian activists enjoyed a strategic advantage in the game to control the judiciary that was denied to their Argentine counterparts. The choice of the agents of diffusion was also important in order to endow the pedagogical intervention with an aura of neutrality and authority. Finally, the systematic nature of the efforts also explains success. The consensus among judicial actors vis-à-vis the new legal orthodoxy is broader and stronger around those issue areas that received a more central treatment in
the seminars organized by NGOs and their allies. The more limited penetration of ideas about investigative techniques and standards for evaluating evidence had important consequences in judges’ willingness and ability to hand in prison sentences.
CHAPTER 4:

ARGENTINA (1983-2012): PERSUASION AND PERSONNEL CHANGES IN THE STRUGGLE FOR HUMAN RIGHTS

4.1 Introduction

In the previous chapter I showed that changing the legal preferences of Peruvian judicial actors was a necessary step for the success of criminal prosecutions against state agents responsible for human rights violations. Human rights activists and lawyers took seriously the cultural underpinnings of judicial decision-making and anticipated the obstacles that a formalist/positivist legal culture would pose for the success of the judicialization process. By staging a massive pedagogical intervention in the Peruvian judiciary they managed to become agents of norm diffusion, spreading technical knowledge associated with the domestic incorporation of international legal instruments, jurisprudence and doctrine, and strengthening judges’ and prosecutors’ commitment to become champions of transitional justice. A rekindled professional identity, accepting of the supremacy of the legal standards and values of international human rights law, was instrumental in motivating judicial actors to resist political pressures to put an end to the investigations and to hand down acquittals. In sum, changes in legal preferences empowered judicial actors because they equipped them with the technical capabilities and political will to process these complex cases in the midst of a hostile political environment.
I now turn to the analysis of the Argentine experience with the judicialization of human rights violations perpetrated during the military dictatorship that ruled the country between 1976 and 1983.\textsuperscript{177} The chapter has two central goals. First I show that in the period that spans between the passage of amnesty laws in the late 1980s, and the first judicial ruling declaring their unconstitutionality in 2001, human rights activists focused their efforts on opening up a legal space for assertive judicial behavior. Their strategy included filing lawsuits for cases not covered by the amnesties; encouraging courts to hold truth seeking trials without legal consequences; and building alliances with key judicial actors. The latter component of the strategy aimed at diffusing the acceptance of juridical arguments derived from international human rights law, in particular among federal judges with a seat in the City of Buenos Aires and the Provinces of Buenos Aires and Córdoba. Like in the Peruvian case, I demonstrate that pedagogical interventions were crucial in order to open cracks in the impunity regime, despite the presence of a Supreme Court and two different national administrations (Menem -1989-1999- and De la Rúa -1999-2001-) not willing to endorse the reopening of the trials.

Second, I show that in the period between 2002 and the present, the active support of presidents Néstor Kirchner (2003-2007) and Cristina Fernández (2007-) cannot explain internal variation in the success of the judicialization process across legal issue areas and subnational jurisdictions. A highly favorable political environment at the national level was not enough to fully break the \textit{espirit de corps} of certain sectors of the judiciary that opposed either reopening the investigations or certain aspects of victims’ legal case

\textsuperscript{177} For an explanation of the origins of the dictatorship see O'Donnell (1988). For an account of the violations perpetrated during this period see CONADEP (1984), Pion Berlin (1989), Novaro and Palermo (2003), Pereira (2005)
against the perpetrators. The resilience of islands of resistance within the federal judiciary is in part explained by the colonization of the judicial branch by the anti-transitional justice coalition that dominated the political arena during the 1990s, and by the type of pedagogical interventions deployed during that period by human rights organizations, which unlike those seen in Peru, were highly targeted to certain courts and judicial actors.

In order to break these anti-transitional justice circles in the federal judiciary, activists activated the second mechanism of institutional transformation identified by the theoretical framework presented in Chapter 2: personnel changes. First, human rights organizations promoted changes at the level of the Supreme Court in order to guarantee the presence of supportive judges. Second, they made the judiciary a primary target of human rights investigations, presenting accusations against judicial actors who actively supported the dictatorship’s repressive tactics in their capacity as judges and prosecutors during the 1970s. Finally, they promoted impeachments and staged shaming events in order to remove unfriendly judges, and generate a deterrence effect on their uncooperative colleagues. The activation of this second mechanism of institutional transformation was consistent with human rights organizations’ longstanding repudiation of judicial passivity during the dictatorship and of the lack of renovation after the democratic transition. I argue that these strategies of personnel change, coupled with the pedagogical interventions of the previous decade, fundamentally transformed the institutional mission of the Argentine judicial corporation. In the 2000s the judiciary adopted the human rights cause as one of its signature issues.

In addition to reinforcing the thesis that a favorable political environment does not necessarily lead to pro-transitional justice patterns of judicial behavior, the need for
activating a process of personnel turnover suggests that there are limits to the impact of ideational diffusion strategies. As I suggested in the theoretical chapter, the main challenge of constructivism in political science is to show that ideas motivate behavior and can explain important political outcomes. In addition, constructivists must explain the conditions under which ideational variables can be expected to be more or less consequential. In this sense, the Peruvian case suggests that a poorly trained judiciary can be susceptible to the impact of pedagogical interventions, especially when these educational efforts are systematic, when they precede efforts by anti-transitional justice groups to colonize the judiciary, and when those who speak on behalf of the human rights cause are highly legitimized actors such as academics or are perceived as peers by the targeted population (e.g. foreign judges who confronted and solved similar juridical problems). Moreover, the greater effectiveness of pedagogical efforts in undermining beliefs about the validity of amnesties or statutory limitations than in transforming judges’ and prosecutors’ criteria for evaluating evidence, suggests that pro-transitional justice legal ideas have a differential effect across issue areas. Judicial actors were more willing to endorse ideas that relax criminal legal standards when what was at stake is the possibility of investigating the crimes, than when the fundamental rights of the accused were on the line (i.e. culpability and personal liberty).

Evidence from the Argentine case allows me to further precise the conditions under which pedagogical interventions are most successful. First, the case study shows the obstacles faced by human rights NGOs when they sought to implement diffusion mechanisms in the 1990s, after the anti-transitional justice coalition deployed strategies to secure the cooperation of judges and prosecutors. Second, the analysis below
demonstrates that in part due to the highly targeted nature of pedagogical interventions in the 1990s, the judicialization process during the 2000s faced enormous obstacles in the interior of the country. In addition to lack of commitment to these cases among many of these judges and prosecutors, serious technical deficiencies caused delays in the progress of the investigations and trials. Finally, I will show there are differences in the levels of persuasion across issue areas. For example, whereas there is ample consensus about the inapplicability of amnesties and presidential pardons, fierce conflicts exist around the issue of whether the law on the limits of preventive imprisonment before the issuing of a definitive court ruling should be applied to those accused of crimes against humanity. I will present evidence that indicates that not even the most decisive political pressures led to changes in jurisprudential criteria among high court judges.

Analyzing the activation and impact of the second mechanism of institutional change, also affords a different perspective on the effect of political elites’ tolerance levels vis-à-vis transitional justice on the judicialization process. I will show that unlike the pedagogical mechanism, which as we have seen can be successful in the presence of hostile executives, the effectiveness of efforts at triggering personnel turnover is amplified by the support of political elites. This is especially true for impeachment proceedings and for the nomination and confirmation of friendlier judges and prosecutors.

A word is in order regarding the temporal focus on the period between the mid-1980s and 2012, as opposed to either the entire period after the 1983 democratic transition, or the full-blown judicialization process characteristic of the post-2001 period. One of the central claims of this dissertation is that given the nature of the crimes in question, understanding the behavior of judges and prosecutors requires taking their legal
preferences seriously. In this respect, the rise of impunity regimes via the approval of amnesty laws, the exhaustion of statutes of limitations and/or the erosion of direct evidence as the years pass, poses a series of legal challenges for judicial actors confronted with human rights cases. This is particularly true in contexts characterized by the predominance of formalist and positivist legal cultures and the concomitant rejection or unawareness of the principles and instruments of international human rights law. The empirical puzzle is therefore under what conditions positivist and formalist cultures of legal interpretation are transformed, leading judicial actors to endorse an alternative juridical discourse that makes it legally possible to overturn amnesty laws or disregard statutory limitations. Consequently, the “contrast space” of my theory is restricted to those cases in which such impunity regimes are present. With the partial exception of the problem of proving individual criminal responsibility, none of these hurdles existed in the period between the democratic transition of 1983 and the passage of amnesty laws later in the decade. As a result, this chapter focuses on the two decades and a half following congressional approval of the Due Obedience and Final Stop laws, explaining the process whereby judicial actors came to conclude that no formal legal dispositions could bar criminal prosecutions and trials.

Focusing on the period after 2001, when a second wave of criminal trials against former military and police officers was launched, would be problematic. Although no criminal trials were held in the 1990s, a series of judicial decisions during that decade were instrumental in laying the legal fundamentals for the collapse of the impunity regime. By studying judicial decision making in those years we can gain a better perspective on judges’ changing legal preferences as the impact of informal and formal
litigation strategies cumulates. In this sense, we cannot understand the recent success of human rights organizations without understanding their earlier efforts to build alliances with key judicial actors and diffuse a new legal orthodoxy.

Finally, a wider temporal focus that takes into account the protracted nature of the Argentine judicialization process allows for a better exploration of politicians’ and interest groups’ struggles to gain control of the judicial corporation in order to guarantee consistent and favorable judicial outcomes in a particular issue area. The chapter will document efforts by pro and anti transitional justice coalitions to politicize the judiciary over the course of two and a half decades, showing the heuristic productivity of historicizing judicial politics to understand the social and political origins of legal preferences and stable jurisprudential positions among judges and prosecutors. In the early 1990s conservative interest groups and politicians sought to lock in judicial support for the impunity laws by staffing the Supreme Court and high appeals courts with their allies. Similar dynamics, but in the opposite direction, are observed in the second period under study. In other words, this chapter shows that behavioral patterns within the judiciary are the product of complex interactions between actors inside and outside the institution, which perpetuate and disrupt the reproduction of internal routines and standards of adjudication as well as levels of commitment to particular socio-political causes.

The analysis below relies on extensive interviews with the key judicial and non-judicial actors involved in the judicialization process between 1983 and 2012. I gathered the testimonies of most of the judges and prosecutors who handed down landmark decisions on the cases during the 1980s and 1990s in order to reconstruct the decision-
making process and assess the impact of litigants’ diffusion efforts. I also interviewed leading members of the human rights NGOs that were at the forefront of this process in order to understand their goals and intentions when designing the various strategies. In addition, I conducted archival research in newspapers, NGOs, government agencies and federal courts to obtain evidence of NGOs’ efforts to diffuse a new legal orthodoxy and trigger personnel changes in relevant courts; patterns of judicial decision-making; and politicians’ preferences vis-à-vis transitional justice. In the discussion of the last stage of the judicialization experience (2002-2012) I use case studies, descriptive statistics and simple regression models to describe the outcomes of the trials, sub-national variation in court performance, and systematically analyze judges’ decisions on specific legal issues across time.

The chapter proceeds as follows. Part I offers a brief history of the origins of the judicialization process in the 1980s. I show that during those years the judiciary displayed an uneven commitment to the human rights cause. This uneven commitment led both pro and anti transitional justice coalitions to realize the need of intervening in the judicial branch in order to guarantee stable jurisprudential outcomes consistent with their preferences. In other words, Part I describes the strategic environment that both camps confronted after the passage of amnesty laws in 1986 and 1987. This environment defined the nature and focus of their activities in the 1990s. In Part II, I analyze the struggles between pro and anti transitional justice coalitions during that decade, showing how the political establishment colonized the federal judiciary with the goal of guaranteeing jurisprudential support for the amnesty laws, and exploring the efforts of human rights organizations to counterbalance these tactics. This section concludes with
an analysis of the first judicial ruling handed down by a federal court declaring the unconstitutionality of the amnesty laws in 2001. Finally, Part III explores the second phase of the judicialization process. I show the limits of strictly political explanations, identifying the obstacles faced by activists and their lawyers even in the presence of a favorable political environment. I then document their efforts at triggering a process of personnel turnover and their effects on recreating the judiciary’s institutional mission.

Given the extended period of time covered in the chapter, in Table 4.1 I offer the reader a guide to the main events in the judicialization process between 1983 and 2012. Figure 4.1 outlines the structure of the Argentine Federal Judiciary.
### Table 4.1

**Main Events in the Struggle for Truth and Justice in Argentina**

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
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</table>
| 1983 | Transition to democracy.  
President Alfonsín (UCR) is sworn in as President.  
Congress repels the self-amnesty passed by the outgoing dictatorship. |
| 1984 | Congress amends and passes the legal framework proposed by the government to regulate human rights trials. The law grants military courts original jurisdiction on human rights cases and Federal Appeals Courts appeal jurisdiction. The law limits the application of the principle of due obedience. |
| 1985 | The Buenos Aires Federal Appeals Court hands down its historic ruling against junta leaders. |
| 1986 | The Supreme Court confirms the ruling by the Buenos Aires Federal Appeals Court.  
The Buenos Aires Federal Appeals Court rules against other military and police officers in *Camps*.  
The Ministry of Defense instructs military prosecutors to apply an ample interpretation of the principle of due obedience.  
Congress passes the Punto Final law. |
| 1987 | Federal Appeals Courts in various parts of the country cancel their summer holidays to process as many lawsuits as possible to undermine the effects of the Punto Final law.  
First military uprising against Alfonsín.  
Congress passes the Due Obedience Law.  
The Supreme Court upholds the Due Obedience Law. |
| 1989 | Menem (Peronist Party) is sworn in as president  
Menem launches his plan to colonize the judiciary with anti-transitional justice allies. |
| 1990 | Menem crushes the fourth military uprising since 1983 and issues two sets of pardons.  
The Supreme Court hands down its first ruling upholding the pardons. |
<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
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<tbody>
<tr>
<td>1992</td>
<td>The Supreme Court recognizes the superiority of international law over domestic law in a case unrelated to human rights violations.</td>
</tr>
<tr>
<td>1994</td>
<td>Constitutional reform recognizes the constitutional status of a series of international treaties and conventions.</td>
</tr>
<tr>
<td>1995</td>
<td>Former torturer Adolfo Scilingo makes the first confession about the crimes perpetrated by the military during the dictatorship. The Buenos Aires Federal Appeals Court recognizes the victims’ right to truth under international law. Truth trials without criminal consequences begin in several federal courts.</td>
</tr>
<tr>
<td>1998</td>
<td>Federal Appeals Courts begin to call in former military and police officers to offer witness testimony in the truth trials. Investigative federal judges issue arrest warrants against former junta leaders Videla and Massera in cases about the illegal abduction of children during the dictatorship. Congress repeals the amnesty laws, but the decision has no retroactive effect.</td>
</tr>
<tr>
<td>1999</td>
<td>Fernando de la Rúa (UCR) is sworn in as President.</td>
</tr>
<tr>
<td>2001</td>
<td>Investigative federal judge Cavallo declares the unconstitutionality of the amnesty laws. Fernando de la Rúa resigns in the midst of a severe economic crisis.</td>
</tr>
<tr>
<td>2003</td>
<td>Néstor Kirchner (Peronist Party) is sworn in as President. Congress repeals the amnesty laws.</td>
</tr>
<tr>
<td>2005</td>
<td>Kirchner makes his last appointments to renew the Supreme Court. Prestigious pro-transitional justice judges are appointed and the Supreme Court declares the unconstitutionality of the amnesty laws.</td>
</tr>
<tr>
<td>2007</td>
<td>Cristina Fernández (Peronist Party) is sworn in as President.</td>
</tr>
<tr>
<td>2010</td>
<td>The Supreme Court declares the unconstitutionality of Menem’s pardons.</td>
</tr>
<tr>
<td>2011</td>
<td>Cristina Fernández (Peronist Party) is reelected.</td>
</tr>
<tr>
<td>2012</td>
<td>The new wave of trial is still underway: over 800 indictments; 89% conviction rate; trials in 12 out of 24 provinces.</td>
</tr>
</tbody>
</table>
Figure 4.1. Structure of the Argentine federal judiciary in criminal cases

Note: In addition to indictments, prison sentences, etc. there are other types of decision that travel across the different levels of the judiciary. Here I only include the ones mentioned in the chapter. Each court has a prosecutor assigned to it. The Solicitor General litigates in the Supreme Court. The arrows indicate the avenues of appeal. For a full account of the Argentine criminal justice system see Brinks (2008).
4.2 Part I: Uneven Judicial Commitment to the Human Rights Cause During the 1980s

This section documents the uneven commitment to the human rights cause among members of the judiciary during the 1980s. I will show that certain judges and prosecutors significantly deviated from President Alfonsín’s moderate stance on prosecutions, leading to the escalation of tensions between civilian and military authorities and the passage of amnesty laws in 1986 and 1987. Despite isolated instances of judicial rebellion, the ambivalent attitude of most judges and prosecutors with regards to transitional justice, coupled with growing concerns about the precariousness of the new democracy, led the judiciary to endorse the impunity regime promoted by the President.

Exploring the erratic participation of the judicial branch during this period is important to understand the strategies designed by pro and anti transitional justice groups in the following decade. It became clear to both groups that in order to guarantee stable jurisprudential outcomes in their favor, the judiciary had to be the main target of their militant efforts.

4.2.1 Judicial Behavior and Amnesty Laws

Upon inauguration in 1983, President Alfonsín (UCR) issued an order to launch investigations against the members of the former military juntas, arguing that they “conceived and instrumented a plan of operations against subversive and terrorist activity, based on clearly illegal methods and procedures.” The decree added: “approximately
between the years 1976 and 1979, thousands of people were illegally deprived of their liberty, tortured and killed as the result of the application of these procedures, inspired by a totalitarian doctrine of national security” (quoted in Sancinetti 1987:173). This ignited a protracted judicialization that peaked in 1985, when the Federal Appeals Court of the City of Buenos Aires handed down a historic ruling against the leaders of the three military juntas that governed the country between 1976 and 1983.\(^\text{178}\)

The 1985 ruling did not put the human rights question to rest. In the famous punto 30, the judges instructed military courts to begin new judicial proceedings against police and military officers who had been in charge of managing the repressive strategy in the different administrative zones that made up the military’s bureaucratic apparatus during the dictatorship.\(^\text{179}\) The decision to extend the trials beyond the junta leaders constituted a bold act of defiance of President Alfonsín’s human rights policy, and it took the administration by surprise (Pion-Berlin 1997:84-88). The executive’s plan had always been to expedite the judicialization process by circumscribing it to those with the highest levels of responsibility (Manzetti 1993:188; Linz and Stepan 1996).\(^\text{180}\)

\(^{178}\) Videla and Massera were sentenced to life imprisonment; Viola to 17 years in jail; Lambruschini to 8 years in jail; and Agosti to 3 years and 9 months in jail. Galtieri, Anaya, Lami Dozo and Graffigna were acquitted.

\(^{179}\) According to Law 23049 passed by Congress right after the 1983 elections, the Supreme Council of the Armed Forces had original jurisdiction on human rights cases.

\(^{180}\) In 1983 Alfonsín sent to Congress a bill to nullify the self-amnesty law approved by the military before the transition, thus making it possible to criminally prosecute members of the armed forces. The government sought to include in the law a clause that would limit the number of prosecutions, by exempting officers who had followed superior commands from any criminal responsibility. When Congress debated the bill, members of the Peronist and Radical parties as well as human rights organizations sponsored modifications that expanded the universe of cases susceptible to prosecution. In particular, when the law was finally passed it stated that officers who had followed orders would be exempt from any criminal responsibility except when following that order had implied the perpetration of “atrocious and abhorrent” acts. Ample room was thus left for judicial discretion when deciding whom to prosecute (Manzetti 1993; Acuña and Smulovitz 1995).
In order to appease a still powerful military, Alfonsín devised a strategy to limit the reach of the new wave of judicial investigations. First, early in 1986 the ministry of defense issued a series of instructions to military prosecutors to exclude from the prosecutions those who had followed superior commands. The instructions thus mandated a generous interpretation of the principle of due obedience (Smulovitz 1995; Norden 1996:103). Contemporary sources also indicate that the government struck a deal with the chief of the armed forces, promising to issue pardons at the end of the presidential term (Morales Solá 1990; Norden 1996:127-128). Finally, in December 1986 Alfonsín sent to Congress the Punto Final Law, which enforced a strict 60 days limit for the filing of new cases against military and police officers in federal courts (Sancinetti 1987). The law was passed days after the Buenos Aires Federal Appeals Court handed down a second ruling against several military officers, including the chief of the Buenos Aires police during the dictatorship. The Punto Final Law was a direct response to the news of growing discontent among the military rank and file, delivered to the President by the leadership of the armed forces (Verbitsky 2003; Novaro 2009).

Some members of the judiciary reacted negatively to the government’s strategy. First, the members of the Federal Appeals Court of the City of Buenos Aires, who had become widely respected and admired, threatened to resign if the administration insisted with the issuing of instructions to military prosecutors (Pion-Berlin 1997:96). These pressures were accompanied by massive demonstrations organized by the human rights movement and attended by members of all political parties, including ranking members of the governing UCR’s legislative bloc (Acuña and Smulovitz 1995; Novaro 2009). As a result of the widespread opposition, the minister of defense resigned and the president
ordered the rewriting of the instructions to avoid, at least until the passage of the *Punto Final* law, arbitrary restrictions on the prosecutions (Norden 1996; McGuire 1997).

Second, during 1986 some Federal Appeals Courts began to usurp jurisdiction over cases of state repression involving junior officers. Just like the Buenos Aires court had done in 1984 in the case against the leaders of the military juntas, they accused the Supreme Council of the Armed Forces of delaying judicial proceedings in order to favor their military colleagues. Following the decision by the Buenos Aires court to intervene in the cases involving crimes perpetrated in the most emblematic clandestine detention centers set up during the dictatorship (cases *ESMA* and *1er Cuerpo del Ejército*), appeals courts in cities like La Plata, Rosario and Bahía Blanca took control of investigations in cases under their jurisdiction (Novaro 2009). Civilian federal judges justified their move by invoking Law 23049, which established that although military courts had original jurisdiction, civilian courts had the right to intervene if cases suffered delays of 6 months or longer.

Finally, towards the end of 1986, Federal Appeals Court judges in cities like Buenos Aires, Bahía Blanca, Rosario, and Comodoro Rivadavia decided to suspend their summer holidays in order to process as many cases as possible before the end of the 60 days window established by the Punto Final law (Acuña and Smulovitz 1995). By the end of February 1987, more than 300 officers were facing judicial proceedings, a move that decisively undermined the effectiveness of the law. The Bahía Blanca federal prosecutor at the time explained in an interview the motivations behind this reaction:

> When in December 1986 I requested the Federal Appeals Court of Bahía Blanca to swiftly process the incoming lawsuits, the government fiercely attacked me. I publicly stated that I would not cave in to those pressures because despite being a federal prosecutor I was not subject to the executive’s instructions. I was part of
an independent entity and would abide by existing legal principles. What we were investigating were not isolated patterns of behavior during the fight against subversive groups, but specific crimes defined in the Argentine Criminal Code. From my point of view, it was unacceptable that through the Punto Final law the government sought to establish a series of privileges for some members of the population. In the end, I did not question the constitutionality of the law because by February we had been able to issue all of the indictments.\footnote{181 Interview, Buenos Aires, November 9th 2010}

The corrosive effects of the actions of this and other judicial actors during the summer of 1986/1987 on the Punto Final law also implied a bold defiance of the executive’s insistence that prosecutors limit their accusations applying some version of the principle of due obedience. According to the newspaper Clarín, in January 1987 the aforementioned prosecutor declared that he would act in accordance “with the principles of legality and impartiality, without receiving commands from the executive.”\footnote{182 Clarín, January 25th 1987; my translation.}

A federal judge who was appointed to the Buenos Aires’s Appeals Court in 1986 also recalls the combative spirit prevalent among some of his colleagues during the months immediately following the approval of the Punto Final law. In an interview he described it as follows: “I found a court that was willing to pursue the path demarcated by the “punto 30,” bringing the territorial bosses in charge of executing the anti-subversive repressive plan to justice. The time frame for filing cases expired between February 19th and 22nd 1987. I basically didn’t sleep.”\footnote{183 Interview, Buenos Aires, May 20th 2011}

This high profile involvement of judicial players in salient political struggles was unprecedented. What is particularly puzzling is that their actions radically departed from the preferences of the executive branch and the military, the two institutional actors that
during the 20th century had reduced the judiciary to a submissive and politically irrelevant organization (Oyahnarte 1972; Smulovitz 1995; Iaryczower et al. 2002; Chávez 2004b; Helmke 2005; Spiller and Tomassi 2009; Chávez et al. 2011). Some have argued that rising levels of formal judicial independence explain courts’ feistiness during this period (Skaar 2011). The problem with this explanation is that the formal structure of the judiciary, including appointment procedures, was not reformed during the 1980s (Smulovitz 1995). Others have focused on informal political dynamics that eased prior constraints on judicial autonomy (Filippini 2007; Novaro 2009). For example, Novaro (2009:36-37; 44) suggests that Alfonsín’s ambivalent and erratic human rights policies, the perceived disorientation and weakness of his administration, and the divisions within the Radical Party, encouraged courts to defy him.184 This account has some merits because it is clear that since 1983, when Congress introduced important changes to the legal framework for regulating human rights trials proposed by the government (Law 23049), Alfonsín had been notoriously unable to control the judicialization process.185

When explaining independent judicial behavior during this period, however, it is important to bear in mind that the examples presented above are not representative of the entire judiciary. Macro level accounts emphasizing changes in formal rules or broad political dynamics obscure the fact that very few judicial actors got involved in thorny political territory. It is true that in the aftermath of the transition Argentines “discovered

184 Novaro’s explanation is more complex that is suggested here. He also highlights President Alfonsín’s principled commitment to respect the division of powers as one of the reasons why he was not more decisive in his attempts to subordinate the judiciary (2009:66).

185 The issuing of instructions to military prosecutors and the subsequent backing down after intense pressures from judges, members of the Radical and Peronist parties, and civil society, is another example of the obstacles the government found in imposing its policy preferences on the subject.
the law” and the possibilities afforded by the judicialization of social and political conflicts. Like never before members of the judiciary became media stars, revealing the “potentially subversive and mobilizing character of legal rhetoric” (Smulovitz 1995:88; 2002). The high profile acquired by some juridical battles, especially the human rights trials, allowed certain judicial actors to stage concrete displays of a new commitment to the rule of law, central to the post-transitional political discourse and public aspirations. But this commitment was not generalized. As a former prosecutor stated in an interview, “judicial activity was circumscribed to a few protagonists. It wasn’t massive. What explains certain types of behavior is the personal commitment of the actors, the will of the judges. It was similar to what happened during the dictatorship with the granting of habeas corpus petitions. Granting those petitions was a personal choice.”

The Argentine judiciary remained in many ways unchanged. Although Alfonsín sought to overhaul the institution, the practical problems inherent in trying to revise the entirety of judicial appointments led the administration to confirm 70% of the judges that were active during the dictatorship. This continuity meant that the outgoing dictators had appointed the majority of the sitting judges in the new democracy. According to

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186 For example, human rights organizations began the democratic period with a high level of skepticism regarding the possibility of advancing their cause through the judiciary. As the trial against the military juntas unfolded, they fully embraced the “judicial path” and adopted terms such as “judicial independence” or the “impartiality of the law” as the main arguments against attempts to stop or limit the trials (Novaro 2009:50-51).

187 Interview, November 9th 2010

188 La Nacion, August 3rd 1984.

189 For example, the executive’s inability to impose a lustration policy in the judiciary enabled conservative provincial elites with strong influence in the Senate to successfully sponsor the reconfirmation of federal judges in their districts, many of whom had began their judicial careers during the dictatorship. The executive’s inability was in part a result of the aforementioned practical difficulties but also due to its minority status in the Senate (Novaro 2009:44).
Verbitsky (1993), the juntas fired 32% of the judges in the city of Buenos Aires and 42.4% of those in the interior of the country, and replaced them with loyalists. Furthermore, after the 1976 coup judges were forced to swear they would abide by the statutes drafted by the de facto administration when they suspended the Constitution (Pereira 2005). It was highly unlikely that many of these individuals would feel compelled by the values and goals of the new political era. A former federal judge confirms this: “the judiciary had a strong authoritarian component […] pro-military in many respects” (quoted in Novaro 2009:44 ft. 28).

Apart from the members of the Supreme Court, the government made very few important new appointments. The most notable exceptions were the members of the Buenos Aires Federal Appeals Court. Some of them had been part of the small group of judges who during the dictatorship granted habeas corpus petitions to the relatives of the disappeared and who declared the unconstitutionality of the self-amnesty approved by the military government in 1982. Others were young lawyers with little experience in the judiciary. It is therefore not surprising that they were among the few judicial actors who consistently behaved according to the new logic of judicial autonomy and respect for human rights and the rule of law. This was precisely the mission they had been enlisted for.

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190 For a similar description of the post-transition judiciary see also Sancinetti (1987:14-15).

191 For example, in a 1983 ruling Judges Ledesma and Torlasco argued against the constitutionality of the amnesty “because these are atrocious and inhumane crimes, because the kidnappings are ongoing and the death of the victims was not established during the period covered by the amnesty […] and because it is an offense against the will of the people who will soon decide whether or not an amnesty is in order” (Clarín, September 28th 1983).
The members of the Buenos Aires Federal Appeals Court not only weighed in during public debates about the judicialization process, sometimes even threatening to resign in order to put pressure on other political actors, but also jealously guarded the court’s autonomy and professional integrity. For example, when some of these judges left the bench disgusted with Alfonsin’s retrenchment in the area of human rights, the president of the Appeals Court, Agustín D’Alessio, made sure that the vacancies were filled with individuals who were also committed to the newly discovered “legal logic”. Horacio Cattani, who replaced one of the outgoing judges, explained his appointment in the following terms:

When D’Alessio asked me to join the court I told him I was skeptical that the Senate would confirm my appointment. I was neither a Peronist nor a Radical, and I would not be subject to partisan control. D’Alessio told me: “Let me take care of that. In a few months you will be sworn in.” The Court was fully committed to maintain its standing and prestige. It was fantastic.192

The integrity of this court was unique. According to one of Alfonsín’s closest advisors on the human rights question, “judges lacked a group or institutional identity” (quoted in Novaro 2009: 217; my translation), which in turn impeded the establishment of uniform jurisprudential criteria and led to disparate levels of commitment to the issue. For example, a Buenos Aires federal judge describes the attitude of other members of the judiciary in the weeks prior to the 1985 trial:

It was a period of great solitude. People in Tribunales [the headquarters of the federal judiciary in Buenos Aires] did not support us. They were scared, afraid. When we met with them in the corridors, they asked us: “Is it true that you will hold this trial? Are you nuts?” […] Many thought it was impossible to bring the leaders of the military regime to justice.193

192 Interview, Buenos Aires, May 20th 2011

193 Ricardo Gil Lavedra quoted in Eliaschev (2011); my translation.
It is clear that judges in other federal courts were reticent or simply unwilling to follow the leadership of their counterparts in the City of Buenos Aires. After the trial against the military juntas was over, Appeals Courts all over the country had to decide whether to take over cases involving inferior military and police officers. The La Plata court, that due to its location in the Province of Buenos Aires had jurisdiction over the case 2do Cuerpo del Ejército, initially refused to get involved. According to a federal judge, “La Plata did not want to have anything to do with the case. They wanted the court in the City of Buenos Aires to do it.”194 In the end it was the Buenos Aires Court the one that demanded the Supreme Council of the Armed Forces to stop deliberately halting judicial proceedings. Like the La Plata Court, the Córdoba Appeals Court also refrained from exerting pressures on the military tribunals. At the same time as the judges in the capital were taking decisive steps to regain civilian jurisdiction over the cases, the judges in Córdoba granted the Supreme Council of the Armed Forces a 120 days extension (Novaro 2009).

The Supreme Court was also highly erratic in its behavior vis-à-vis human rights cases. During the 1980s, Alfonsín’s prestigious appointees improved the public standing of the institution and managed to establish a fairly liberal record in privacy cases involving, for example, drug use and divorce laws (Carrió 1996; Bacqué 1995; Gargarella 1996; Molinelli 1999). The court also upheld the constitutionality of Law 23049 that granted civilian courts the right to attract human rights cases from military courts (Garro and Dahl 1987a; Novaro 2009:38 ft. 17); confirmed the Buenos Aires Federal Appeals Court’s ruling against the military juntas; and in Videla (1986) expanded the conditions

under which subordinate officers could be subject to criminal prosecutions, thus limiting the applicability of the principle of due obedience (Garro and Dahl 1987b). Less than a year later, however, the Court reversed its position on this question. In *Camps* (1987) the court validated the constitutionality of the second amnesty law, the *Due Obedience* Law, sponsored by the executive and approved by Congress with the support of the conservative faction of the Peronist Party. The law barred criminal prosecutions against all subordinate officers. Justice Petracchi explained the Court’s decision in the following terms:

> It is relevant to point out that the law cannot be interpreted turning a blind eye on the particular political context that motivates it, or with indifference towards the effects that this Court’s decision to declare it void could produce. Notwithstanding the serious deficiencies in the norm, this Court cannot ignore that irrespective of the letter of the law, there is a clear political decision on the side of the legislator, which the judicial branch should not evaluate. (CSJN, *Decreto 280/84 PEN*, 1987).

The political context to which Justice Petracchi makes reference in the ruling was one dominated by growing fears of a military insurrection. After federal courts issued indictments against almost 300 officers, thus undermining the effects of the *Punto Final* Law, the military rank and file became increasingly worried about the multiplication of trials against subordinate officers (Romero 2002:263). Many of them thought that their superiors were not doing enough to protect them from the actions of federal judges and prosecutors. Early in 1987 some of these officers began to receive court orders mandating

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195 During most of 1985 and 1986, the administration lobbied to Supreme Court in order to persuade the judges to force upon lower courts an expansive interpretation of due obedience. The Court resisted these political pressures (Manzetti 1993:192).

196 For a legal analysis of the law see Sancinetti (1987, chapter 3)

197 Severe cuts to the military budget by the administration also added to the growing discontent among generals and soldiers. In 1989 salaries were only half of what they were in 1983 (Manzetti 1993:189-190).
them to testify in the various ongoing human rights cases. The persistent autonomy of the military *vis-à-vis* civilian institutions became apparent when several officers decided to ignore these orders, openly defying the judiciary. During the Holy Week of 1987 tensions exploded as a group of junior officers led by Malvinas veterans organized a mutiny in a military barrack outside the capital. It was in the wake of this uprising that Alfonsín’s decided to send the Due Obedience Law to Congress (Manzetti 1993:193; Norden 1996; Romero 2002).

Despite the commitment to democracy made explicit by the entire political establishment and important sectors of the population who attended massive demonstrations in support of the new regime, it was clear that the human rights question was still a divisive issue. It was unlikely that the small group of junior officers intended or would have been able to organize a successful *coup d’etat*, but the uncertainty generated by the uprisings was enough to undermine the president’s authority and the government’s capacity to focus on other pressing issues facing the nation (Manzetti 1993:201). Consequently, as Justice Petracchi’s words make it clear, the Supreme Court felt it was unwise to worsen the precariousness of the political situation by striking down the Due Obedience law.

As I have suggested thus far, lack of professional interest in the human rights cases, the absence of significant institutional and personnel changes, fear of the military, and persisting loyalties with the previous regime, all contributed to the uneven commitment and erratic responses of judges and prosecutors *vis-à-vis* transitional justice. Alfonsín left the presidency in 1989 with several junta leaders in jail, but with the formal
architecture of impunity barring further prosecutions firmly in place. It would take almost a decade for the judiciary to begin to question the legal *status quo*.

### 4.2.2 Lessons from the 1980s

The 1980s left one central lesson for pro and anti transitional justice groups. Although the position of the judiciary with regards to these cases was not unanimous or monolithic, there were some important actors at the federal level who had shown a striking ability and willingness to act independently. It was clear that judges and prosecutors had become key players in deciding the fate of the judicialization process. If left to act autonomously, however, there was no guarantee that the judiciary would deliver consistent jurisprudential outcomes in one direction or the other. As a result, from then on the judiciary would not be ignored: dominating the judicial apparatus became a central component of the strategies deployed by both camps. Catalina Smulovitz was incredibly perceptive when in the mid 1990s she noted:

An unexpected effect of the initial enthusiasm with the “abilities” of the judiciary and of its judges has been the judicialization of social and political conflicts. At the same time this phenomenon has turned traditional and relatively silent conflicts for control over the judicial apparatus into public and highly politicized ones. The current intensification of political conflicts for control over the judicial apparatus is a consequence not only of the need to legally ratify government policies, but also of the recent “discovery” of its potential by some other actors. In fact, the judiciary has become an additional space for publicly solving political conflicts […] Concerns about the design and reform [of judicial institutions] has become the subject of debate not only among specialists, but it has also become a topic of interest for citizens and organized actors (1995:73)

For anti-transitional justice groups, the instances of judicial autonomy observed during the 1980s were a source of concern given their proven ability to destabilize and jeopardize attempts to put trials indefinitely on hold. It took two military uprisings and
the passage of a second amnesty law to finally contain these “rebellious” judicial actors. Alfonsín’s noble commitment to show respect for the separation of powers by exerting less than decisive pressures on judicial actors to force them to endorse the government’s moderate prosecution policy (Pion-Berlin 1997; Novaro 2009), was incompatible with the perceived need to put an end to the military question. Judges were not by fiat perfect agents of the executive branch. For example, Alfonsín’s closest advisor on the human rights issue, Jaime Malamud, explains the origins of the problem of judicial insurrection: “[Alfonsín] had allowed the provinces to designate their own judges […] To cede these power quotas can be very dangerous, especially when you have in your hands something like the prosecution of military officers, because there is a need to unify jurisprudential criteria” (quoted in Novaro 2009:217).

Similarly, albeit for different reasons, pro-transitional justice groups also set their eyes on the judiciary. Bursts of favorable judicial decisions during the 1980s signaled that pursuing a legal strategy had some potential. This put an end to their militant skepticism about the transformative capacity of the judiciary (Acuña and Smulovitz 1995; Filippini 2007; Novaro 2009).

Created in the 1970s before and during the military dictatorship, organizations such as the Asamblea Permanente por los Derechos Humanos (APDH), Madres de Plaza de Mayo (Madres), Abuelas de Plaza de Mayo (Abuelas) and Centro de Estudios Legales y Sociales (CELS) brought together politicians from all political parties, lawyers, intellectuals and victims of the repression (Brysk 1990; Mignone 1991). During the 1980s their attitude towards the government was one of permanent confrontation and intransigence (Jelin 1994). Most of the aforementioned groups remained highly skeptical
about the path drawn by the administration to deal with the human rights question. Anti-
government protests began as early as 1983 when Congress debated Alfonsín’s plan to
reform of the military code of justice in order to establish a legal framework for the
subsequent trials. Although the demonstrations only attracted a few thousand protesters,
the public pressure they exerted led to changes in the government’s proposal to apply a
generous interpretation of the due obedience principle (Novaro 2009: 40-41; 52).

Despite these lobbying efforts, human rights groups were never confident of the
effectiveness of the “judicial path.” Their lack of trust in the judiciary’s ability and
willingness to carry out the trials led them to propose a “political trial” instead of a legal
one (Mignone 1991: 158). Consistent with this position, they rejected the ruling handed
down by the Federal Appeals court in 1985 (Novaro 2009: 201). They objected to both
the prosecutor’s strategy to ground the accusation on a limited number of cases
(approximately 700), and the court’s decision to acquit some of the junta leaders
(Sancinetti 1987). Their opposition to the government also included criticisms of the plan
to create an independent truth commission. Indeed, many activists declined the
government’s invitation to be members of the CONADEP (Fernández Meijide 2009). 198
Finally, as expected, human rights organizations were extremely critical of the amnesty
laws. In fact they convened the largest anti-government demonstration in the decade
(circa 50000 people) after the passage of the Punto Final law in 1986 (Novaro 2009: 239
ft. 74).

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198 Most human rights organizations favored the creation of a bi-cameral commission in Congress
that would be in charge of the investigations. Some members of the APDH like Graciela Fernández Meijide
were an exception and accepted to be part of the commission.
Despite these objections to the government’s approach to the subject, human
rights groups did participate in the judicial proceedings against military and police
officers. There were three main forms of participation: a) testifying as witnesses in the
investigative stages and during trials; b) transferring information about the crimes from
NGO archives to the courts; and c) offering legal counsel to the victims and their
relatives. Whereas the first form of participation was characteristic of victim-led
organizations such as the Madres and the Abuelas and the third form was mainly the
domain of lawyer-led institutions and think tanks such as CELS and the APDH, the
second was a joint effort.

The NGOs staffed by human rights lawyers were definitely more “cooperative”
with the judicial processes (Mignone 1991: 160). As Vecchioli’s (2010, 2011) excellent
work on the origin of these professional organizations explains, the first generation of
human rights lawyers in Argentina began their careers defending workers’ rights as well
as political prisoners during the 1960s and early 1970s. Many of them were forced into
exile by the dictatorship and established links with international legal groups such as the
International Commission of Jurists and the International League for the Rights of Man
(see also Dezalay and Garth 1998). These international connections were instrumental in
providing the funding required to further professionalize the staff of local NGOs after the
democratic transition. Until the 1980s “participation in the human rights movement was
voluntaristic and even desperate […] The four lawyers that founded CELS would add to
that militancy the professionalism, efficiency and skill to take that struggle to the courts,
to produce systematic documentation and to take their claims to the international arena”
(Brunschtein quoted in Vecchioli 2010: 18). The impact of CELS’s professionalism in
the early years of the judicialization process is evidenced by the fact that it alone filed 600 of the 2000 charges against military officers received by federal courts between February and August in 1984 (Pion Berlin 1997: 91; Osiel 1986; Norden 1996).

It is important to note that the more cooperative human rights activists and lawyers limited their interactions with judicial actors to the formal stages of the judicial process (e.g. filing charges, testifying as witnesses, providing evidence, etc.) In other words, they did not engage in the type of infiltration or transformative strategies described in Chapter 2 as the most effective or conducive to achieving stable and enduring jurisprudential outcomes. In many respects, like the Alfonsín administration, human rights organizations allowed the judiciary to act on its own. The personal commitment of some members of the judiciary led to the construction of ad hoc alliances, but no systematic efforts were made to diffuse uniform criteria across different jurisdictions. For example, according to the chief prosecutor in the 1985 trial against the juntas, “I had no informal encounters or conversations with human rights lawyers about the legal strategy chosen by the prosecution. I did approach prestigious academics, but that wasn’t helpful because most of them expressed profound disagreements with our approach.”199 The following quote from an interview with a former federal prosecutor also illustrates the focus of these organizations on formal litigation strategies: “When I decided to question the Due Obedience law, Horacio Verbistky [member of CELS] helped me a lot by publishing the decision in the newspaper he directed [Página 12]. But I did not have a direct legal collaboration with CELS. They did not litigate in my court.”200

199 Interview, Buenos Aires, December 20th 2010
200 Interview, Buenos Aires, November 9th 2010.
If the first lesson drawn from the 1980s was that the “judicial path” was not futile, the second was that the number of committed judicial actors did not constitute a large enough critical mass that could launch a decisive and effective corporate reaction by the judiciary in favor of the victims’ requests. This second lesson became even more apparent as judicial actors such as the members of the Buenos Aires Federal Appeals court privileged concerns about regime stability and passively endorsed the Supreme Court’s decision to declare the constitutionality of the Due Obedience law in 1987. The day after the Supreme Court handed down its decision the judges who had been at the forefront of judicial efforts to bring the military to justice, issued a unanimous ruling accepting the precedent set by their superiors. Five of the judges, Gil Lavedra, Valerga Araoz, Arslanian, Peres and Cattani, did so reluctantly. They justified their decision invoking their duties as members of a hierarchical organization. By contrast, Chief Justice D’Alessio emphatically defended the Supreme Court’s criteria dismissing counter arguments based on Argentina’s obligations under the Convention Against Torture as inapplicable due to the retroactivity principle, and arguments based on customary international law as mere rhetoric (Sancinetti 1987). It was obvious that although these judges had shown a principled commitment to transitional justice, human rights organizations could not count them among their most reliable allies. Building strong bridges with the judiciary was a pending task, one to which they would dedicate time and resources in the years to come.

In Part II of this chapter I will show that both camps took the lessons learnt during the 1980s very seriously and designed strategies to institutionally transform the judiciary into a reliable and allied institution. During the first half of the 1990s the Menem
administration succeeded in enlisting the judiciary behind its anti-criminal trials policy. Things began to change later in the decade when human rights group started to see the fruits of their pedagogical interventions.

4.3 Part II : The Struggle Over the Judiciary in the 1990s

4.3.1 Menem and the Takeover of the Judiciary

The Due Obedience law passed after the 1987 mutiny dramatically reduced the number of officials being prosecuted from 450 to 20 (Norden 1996: 133). Notwithstanding, in January and December 1988 there were two more uprisings led by the same junior officers. They demanded the Radical government to grant amnesties to those involved in the mutinies and to vindicate the role of the military during the 1970s (Manzetti 1993: 193-194). In both cases the rebels surrendered after a few days, but their actions made it clear that the military question was far from being resolved.

The transfer of power from Alfonsín to Peronist Carlos Menem (Peronist Party) in 1989 did not put an end to the problem. Although Menem campaigned on the promise to change the state’s policy vis-à-vis the military, and soon after inauguration granted presidential pardons to the junior officers who had organized the uprisings and to those charged with crimes perpetrated during the dictatorship and the Malvinas war (Manzetti 1993: 195; Norden 1996: 140; McGuire 1997), the group responsible for the second 1988 mutiny rose in arms once again in December 1990. Instead of adopting Alfonsín’s negotiating stance Menem violently crushed the rebels with the support of other factions within the armed forces. The government’s decisive response was instrumental in finally
subordinating the military to civilian control (Linz and Stepan 1996). Deprived of the
benefit of hindsight, however, Menem took further steps to appease the military. On
December 29th he fully embraced the discourse of national reconciliation and issued a
second set of pardons, this time benefiting eleven members of the dictatorship who were
still serving time in jail as well as the leader of the leftist guerrillas active during the
1970s, Mario Firmenich.

Together with the Punto Final and Due Obedience laws, these presidential
pardons became the pillars of the legal impunity regime that severely limited the scope of
transitional justice efforts in Argentina. The decision triggered a massive demonstration
in front of the presidential palace on the last day of the year (Manzetti 1993: 196).
Moreover, as they did in response to the first set of pardons, CELS lawyers filed suits
before the Supreme Court denouncing the decrees as unconstitutional (Mignone 1991:
167). These reactions made it clear that civil society demands for truth and justice would
not simply wither away. The judiciary was once again at the center of the dispute. The
government was quick to realize this, and acted swiftly to prevent adverse judicial rulings.

During the 1980s the Radical government had seen its authority eroded by various
acts of defiance orchestrated by the military, the courts and the Peronist opposition, and
had consequently been unable to fully address a series of pressing issues in the country’s
social and economic agenda (McGuire 1997; Murillo 2001; Gargarella, Murillo and
Pecheny 2010). When Menem took office in 1989 Argentina was in the midst of a
hyperinflationary crisis, a situation that triggered a sense of urgency among members of
the new administration. In this context, closing the military front was seen as necessary to
allow Menem to fully focus on the economy and the consolidation of governability
In many respects, however, both the implementation of a market reform agenda, the path chosen by the president to address the economic crisis (Corrales 2000; Stokes 2001; Levitsky 2003, 2005), and the subordination of the military to civilian rule, faced one common obstacle: the courts. The judiciary had not only undermined Alfonsín’s transitional justice strategy but it had also been inimical to key economic decisions such as the declaration of the state of emergency of the pension system. The Supreme Court’s decision striking down that policy had made it impossible for the government to alleviate fiscal pressures. For some of Menem’s closest advisors, “homogenizing the Court vis-à-vis the executive,” was paramount to prevent the administration’s reform initiatives from suffering the same fate as Roosevelt’s New Deal in the early 1930s (Smulovitz 1995; Ferreira Rubio and Gorretti 1998; Novaro 2009).

With regards to the military question, the Peronists could not trust the judiciary’s willingness to stop the few cases still in process, especially those not covered by the amnesty (i.e. the illegal kidnapping of the children of the disappeared). For example, since 1988 first Alfonsín and then Menem had implored the Supreme Court to no avail to usurp jurisdiction over these cases, bring them to a quick close and thus avoid further indictments and subpoenas. Similarly, after the first set of pardons was issued, two federal prosecutors echoed the arguments put forward by the human rights community and asked their respective appeals courts to nullify them. Fierce lobbying efforts by the

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201 These were the terms used by Eduardo Bauzá, the President’s General Secretary. La Nación, September 26th 1989.

202 Government officials became staunch supporters of the doctrine of judicial restraint. In fact one of Menem’s ministers had been a member of the Supreme Court in the 1960s and was one of the main proponents of the doctrine (Oyhanarte 1972).

203 Some examples are the Court’s decisions in the cases of a massacre in the Province of Chaco and of the abduction of a girl in the 1970s whose parents were later disappeared (Verbitsky 1993: 33-34).
Menem administration were not enough to prevent these acts of judicial defiance, confirming politicians’ worst fears about the dangers of allowing the persistence of islands of judicial commitment to the human rights cause:

The toughest days of my judicial career were those before and after I asked the Federal Appeals Court of Bahía Blanca to declare the unconstitutionality of the pardons. The Menemist avalanche to destroy me was terrible. Before I filed my petition the Solicitor General sent me a letter stating that I could not question an unobjectionable presidential decree. I told him that between a decree and the Constitution, I would choose the latter. He replied saying that he agreed with me but that as prosecutors we could not question a political decision made by the President. They also tried to bribe me and later, to suspend me […] At some point in your life you have to act according to what you think is right, juridically and ethically. Even my father warned me that I could lose my job, but if I had capitulated I would have gone home defeated.204

If the military question was to be put to rest in order to allow the government to focus on other pressing issues, Peronists had to prevent these rebellious attitudes, especially those that could lead to “the holding of public hearings in which victims of the dirty war could evoke their daily lives in concentration camps” (Verbitsky 1993: 33, my translation). Decisively infiltrating the bench and engaging in court packing was the strategy devised by Menem and his advisors to cement the reliability of the judiciary. The plan was meant as a clear threat to the judicial actors: not acting as requested by the government could have negative consequences. At this point, it was clear that the Menem administration and the upper echelons of the armed forces were acting in tandem as a unified anti-transitional justice coalition, deploying a myriad of tactics to prevent further judicial action.

The plan was launched on September 15th 1989 when Menem sent to Congress a bill to increase the number of Supreme Court justices from 5 to 9. Among contemporary

204 Interview, Buenos Aires, November 9th 2010.
observers it came as no surprise that the President announced his plan only a few days before an army general had to attend a hearing at the Federal Appeals Court of San Martín as part of the proceedings in a case of state repression during the dictatorship (Verbitsky 1993). His subpoena had been delayed for a month, after the government with the aid of a military doctor managed to produce a medical certificate temporarily exempting the general from his mandated day in court. Since the hearings could not be postponed indefinitely, and the general had been allowed to leave the country, the government needed the judiciary to shelve the case to avoid the general’s absence in court to be interpreted as a new act of military defiance to the executive.

Judges Belluscio, Bacqué, Petracchi and Fayt reacted to Menem’s court packing by issuing a statement (the famous 44th Accord), in which they denounced the executive’s plan as contrary to judicial autonomy and the judiciary’s democratic mission to uphold the Constitution and the laws of the country (Ferreira Rubio and Gorretti 1998; Helmke 2005). When it became clear that the President would manage to get away with the initiative, two justices resigned. As a result, Menem was able to name 6 new judges, thus guaranteeing his administration the presence of a friendly majority in the Supreme Court (Verbitsky 1993). The newly appointed judges, Barra, Cavagna Martínez, Levene, Nazareno, Moliné O’Connor and Boggiano, were conservative and had strong personal and political ties to President Menem (Baglini et al. 1993: 80-82).

In addition to validating Menem’s economic reforms (Helmke 2005; Kapiszewski 2007), the new Court endorsed the constitutionality of the presidential pardons on two occasions: December 1990, days after the last military uprising and days before the second set of pardons signed by the President; and October 1992, when the military threat
was no longer present. In the former case the majority explained that under the military
code of justice the family of the victim lacked standing as a party in the case, and
therefore their interlocutory appeal demanding the rejection of the pardons was invalid.
In the latter, they invoked US jurisprudence on the subject. The fact that the
administration was anxious to receive jurisprudential support for its signature initiative in
the transitional justice area, is illustrated by a public statement made by one of Menem’s
closest legal advisors: “If any claimant or prosecutor questions the possibility of
pardoning indicted officers, and if this Court declares the unconstitutionality [of the
pardons], that day the Chief of the Army will come and we will have an infernal mess”
(quoted in Verbitsky 1993: 142).

Attempts to control the judiciary did not stop at the level of the Supreme Court.
By the end of the 1980s there was a growing consensus in the legal community in relation
to the need to introduce structural changes to the judiciary.\textsuperscript{205} Menem took advantage of
this impetus for reform and proposed a new Code of Criminal Procedures. Some of the
changes passed by Congress in 1991 included the creation of federal oral tribunals and of
a Court of Cassation as the highest criminal court in the land (Finkel 2004, 2008). This
gave the executive an unparalleled opportunity to staff the new courts with allies, and to
get rid of inconvenient judges.

The creation of federal oral tribunals doubled the number of seats in the federal
judiciary (Finkel 2008), so it is not surprising that during his first term (1989-1995)
Menem set a record by making over 700 nominations. Between 1992 and 1994 alone, he

\textsuperscript{205} Several important changes were proposed during Alfonsín’s presidency, but Congress failed to
approve them. Some of the initiatives included the creation of family and youth courts and the modification
of the Code of Criminal Procedures to introduce among other things, the possibility of trial by jury
(Smulovitz 1995: 102)
submitted to the Senate 238 nominations for seats in oral tribunals (Llanos and Figueroa 2008). Although only 26% of the nominees had a background in the judiciary (ibid: 622), Menem used those few promotions strategically by filling some of the vacancies with Federal Investigative Court judges who had caused trouble to the administration in several high profile corruption cases (Verbitsky 1993). Among their many duties, Federal Investigative Courts are the ones that conduct the initial investigations in cases involving federal officials and decide whether to file indictments and submit cases to the trial courts. The promotion of his judicial enemies was not a magnanimous gesture: it allowed the government to “expel judges upward” (Baglini et al. 1993:87) from strategic seats in the courts in charge of deciding on the activation of sensitive corruption cases, to positions with less room for discretion. To replace them, Menem appointed loyalists.

The most blatant attempt to colonize the judiciary was the saga behind the creation of the Court of Cassation. The administration vetoed an initial list of potential nominees for the court, which included the country’s most prestigious criminal lawyers. Instead, it nominated personal and political allies of the president and lawyers with no background in criminal law. Most importantly, the nominees had clear links to the dictatorship and were unsympathetic to the transitional justice cause. Of the 13 judges, 2 had worked at the infamous Camarón, a Federal Criminal Court created to deal with political crimes during the 1970s; 3 had worked in the judiciary during the dictatorship in courts that systematically denied habeas corpus petitions filed by the victims of state repression; 1 had filed a libel case against a prominent Peronist leaders who publicly denounced the dictatorship in the late 1970s; 1 had filed a criminal case against a Grandmother of Plaza de Mayo who shouted at him during a hearing in a case about the
illegal abduction of her grandchild by the armed forces; 1 had been fired by the chief prosecutor in the 1985 trial against the junta leaders on the grounds that his personal defense of state terrorism made him ill-suited to investigate the generals; and 4 of them had voted to uphold the constitutionality of Menem’s pardons as members of the Federal Appeals Court of the City of Buenos Aires (Verbitsky 1993).206

By appointing these judges to the highest criminal court in the country, Menem created a buffer zone that would systematically stop or delay the progress of human rights cases. The entrenchment of judges with anti-transitional justice positions in the upper echelons of the federal judiciary was effective in guaranteeing stable and reliable jurisprudential outcomes for the next decade and a half. In fact, as we will see later on, removing these judges from the bench was one of the main goals of the human rights movement when it activated aggressive mechanisms of institutional transformation in the 2000s. When some of the judges were removed, they did not cease in their militant efforts to support the perpetrators of human rights violations: some of them took on the legal defense of high profile torturers.

The nomination to the federal bench of stewards of the impunity regime put pro-transitional justice groups at a clear strategic disadvantage. Unlike their Peruvian counterparts, who were the first movers in the struggle over the judiciary after the 2000 democratic transition, Argentine human rights organizations arrived to the game at a later stage. Like Peruvian activists and lawyers, however, they also deployed a persuasion strategy in order to diffuse among judges and prosecutors the acceptance of international

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206 In fact, the only two members of the Federal Appeals Court of the City of Buenos Aires who were not promoted to the Court of Cassation were those who had signed the minority position in that ruling. For a profile of the judges appointed by Menem see Página 12, April 1st 2007.
legal principles and jurisprudence contrary to the Argentine legal *status quo*. The presence of an extremely hostile judicial branch led them to plan a highly targeted pedagogical intervention, building alliances with specific judges in order to open cracks in the impunity regime. In the next two sections I explore the origins and first results of their diffusion efforts, which laid the foundations for the consolidation of a new legal orthodoxy supportive of the human rights cause.

### 4.3.2 Human Rights Groups Strike Back: Identifying the Challenge Ahead

When Menem’s takeover of the judiciary was consummated, human rights organizations faced two related challenges. First, they had to keep the issue of state repression alive. Although opinion polls showed a strong rejection of the presidential pardons granted by Menem,\(^{207}\) they also made it clear that the public did not think the human rights question should be a priority in the executive’s agenda.\(^{208}\) In fact, Menem’s defeat of hyperinflation granted him a solid reelection victory in 1995 (Gervasoni 1998; Levtisky 2005).

Second, and perhaps most important, human rights activists and their lawyers had to reenlist judicial actors behind their cause, and make available to them the juridical tools necessary to activate cases within the judiciary. The impunity regime made up of the amnesty laws and presidential pardons effectively killed all judicial activity after the

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\(^{207}\) Both Manzetti (1993) and Smulovitz (1995) cite a poll indicating that 70% disapproved of the initiative.

\(^{208}\) For example in a poll conducted in large urban centers in November 1988 only 2% thought the human rights question was a high priority issue. By contrast, 28% and 24% of respondents ranked inflation and unemployment respectively as the top priority (Catterberg 1991: 95).
The slow progress of the human rights question during the 1990s was a direct consequence of the passage of the laws and the pardons. They were laws approved by Congress! When some actors questioned them in court, judges upheld their constitutionality […] An overwhelming majority of courts validated the laws and the pardons. Certain aspects of the judiciary had to be restructured in order to make it possible to observe courts declaring the unconstitutionality of those legal instruments. That took a very long time209.

In the interview the judge also made reference to the onerous task that toppling the impunity regime via unconstitutionality rulings imposed upon courts, namely promoting a radical departure from the Argentine judiciary’s doctrine of “self-restraint in political questions” (Oyahnarte 1972: 96), which has been one of the “constants in Argentine judicial politics” (ibid: 116) since the late 19th century.210 Although during the 1980s lower federal courts and to some extent the Supreme Court departed from this principle in human rights cases, at the end of the day the highest courts in the land accepted the amnesties and the pardons. On what grounds would lower courts now accept the demands of human rights civil society groups, defying in the process both politicians and their superiors in the judiciary? How could the cases be reignited without violating, for example, the principle of double jeopardy, which protects an individual from being prosecuted twice for the same crime? After all, the amnesties and the pardons not only

209 Interview, Buenos Aires, December 17th 2010

210 The most radical expression of this doctrine was the Supreme Court’s famous accord in the wake of the 1930 military coup, which recognized the legitimacy of the new authorities as a consummated fact. After the ousting of President Frondizi in 1962, the Supreme Court reinforced this doctrine, accepting the irreversibility of the coup and ruling that the president of the Senate should be sworn in.
put an end to prison sentences, but also suspended indictments and ongoing investigations.

To further complicate matters, after the issuing of the pardons the human rights community began to design a new legal strategy based on international human rights law. The strategy looked promising, especially after the Inter-American Commission of Human Rights published a country report in 1992 denouncing the amnesties and the pardons as illegal under the American Convention on Human Rights (Fillipini 2007). Nevertheless, the legal solutions identified by human rights groups as the only way to alter the status quo, not only undermined the authority of the political branches entitled to approve and promulgate legislation and decrees, but also required from judicial actors understanding, endorsing and implementing international legal instruments and principles rarely used in Argentine jurisprudence.

During the trials of the 1980s courts did not have to resort to these arguments in order to open the investigations and hand down prison sentences. For example, since there were no amnesties or pardons in place and statutes of limitations were still running for most of the crimes in question, there was no need to use categories from international human rights law or customary law such as crimes against humanity to define the crimes in a way that made them subject to procedural exceptions. Moreover, there is evidence that at the time not even the most committed members of the federal judiciary were either aware or sympathetic to the international legal case against impunity.

In an interview with the lawyer that led the prosecution’s case against the military in the 1985 trial he stated:

At the time Argentina was the only country in which civilian courts created in the 19th century tried former military leaders. We applied the criminal code of 1922
valid at the time of the crimes. By contrast, in Nuremberg a military court, a “victors’ court”, applied criminal law retroactively and violated the legality principle. Nothing of the sort happened in Argentina. The members of the juntas were found guilty for common crimes unequivocally described in existing, written law […] Moreover, we were well within the limits specified by statutes of limitations.211

The former prosecutor then went on to criticize the criteria promoted by human rights organizations in the 1990s and 2000s to reopen the investigations:

Argentina was one of the last countries to ratify the Convention on the Non-Applicability of Statutory Limitations for Crimes Against Humanity. It’s the least ratified convention! Not even countries that suffered the evils of Nazism ratified it […] It is wrong to declare statutes of limitations void on the basis of that convention when it wasn’t part of domestic law at the time of the crimes. I am against the idea of invoking the principles of international law. I do not think the legality principle, which took centuries to be accepted by nations worldwide, should be thrown out of the window.212

His then colleagues in the Federal Appeals Court of the City of Buenos Aires have also publicly expressed their opposition to these changes in legal orthodoxy. I mentioned before that in his opinion in the Federal Appeals Court’s decision accepting the Supreme Court’s 1987 ruling in support of the Due Obedience law, Judge D’Alessio dismissed customary international law as “mere rhetoric” (Sancinetti 1987: 147). In a recent interview two other former members of that court made a similar argument. Judge Torlasco disapproved of the fact that at the time of the interview courts were deciding on cases “that would have normally been subject to statutes of limitations according to

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211 Interview, Buenos Aires, December 20th 2010.

212 Ibid.
Article 18 of the Constitution. [Judges are] applying the Convention on the Non-Applicability of Statutory Limitations retroactively.”

Certain passages of the 1985 historic ruling also point to the lack of penetration of international human rights principles and instruments in judges’ understanding of the law. For example, in cases in which the Air Force had transferred detainees to either the Army or the Navy early on during the dictatorship, the court acquitted the representative of the Air Force in the junta invoking the exhaustion of statutory limitations. Since the notion of crime against humanity was not used, this made perfect legal sense. The lack of juridical innovation is also exemplified by the treatment of cases of disappearances in the ruling. The legal category of “forced disappearance” was not used or understood by judges at the time. On several occasions it applied criteria normally used in regular cases of homicide to conclude that the lack of direct proof of the final whereabouts of the victims inhibited the court from assuming the death of the victim when evaluating the charges and the punishment (Sancinetti 1987 : 41-44).

Finally, the arguments used by the prosecutors who questioned the pardons in the late 1980s and 1990s provides further evidence of the fact that the international legal case against impunity was not part of the cognitive map of judicial actors. For instance, Prosecutor Cañón did not use those criteria when he asked the Federal Appeals Court of Bahía Blanca to declare the unconstitutionality of the pardons. Instead, his argument was cast on exclusively domestic legal grounds as a separation of powers issue, characterizing the pardons as an illegal encroachment of the executive in the affairs of the judiciary (Verbitsky 1993: 147-148). As he stated in an interview, “in those days we followed the

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213 La Nación, August 15th 2010
principles of domestic law. The only non-domestic source of law I made reference to during the 1980s and early 1990s was Roxin’s theory of command responsibility.”

When these domestic legal arguments against the pardons and the amnesty laws failed, it was clear that the pro-transitional justice coalition had to find new ones. As mentioned above, by the early 1990s they were already persuaded that the only way forward was to invoke international human rights law and customary law. However, the rejection or lack of awareness of these principles by their allies within the judiciary called for the need to diffuse the acceptance of these novel doctrines. How did human rights organizations go about building a new legal case for re-opening the prosecutions and punishing the perpetrators?

4.3.3 Human Rights Groups Strike Back: Diffusion Strategies in the 1990s

Two events allowed human rights organizations to begin to confront the two challenges outlined in the previous section. With regards to keeping the human rights issue alive in the political agenda, in 1995 the public was shocked when journalist Horacio Verbitsky published an interview with former navy officer Adolfo Scilingo, in which he described the methods used to disappear political prisoners during the dictatorship (Verbitsky 1995; CELS 1995b; Payne 2003, 2008). As a federal judge who would later become a protagonist in the quest for truth and justice told me in an interview, “the landmark in this process was Verbitsky’s El Vuelo [N.B. the title of the book in which the interview was published].” This initial crack in the military’s wall of silence

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214 Interview, Buenos Aires, November 9th 2010

215 Interview, Buenos Aires, May 20th 2011
was followed by several other confessions. In all of them the former torturers vindicated their actions during the dirty war (Skaar 2011).

To appease the public discontent voiced by the human rights community, President Menem managed to get one of his allied federal judges to indict and detain Scilingo. The irony, which added to the general outrage, was that since the amnesty laws and the pardons prohibited pressing charges against him for the crimes he had confessed, the judge prosecuted Scilingo for having paid his rent with checks with insufficient funds (Novaro 2009).

With regards to the second challenge, important changes in the country’s legal structure opened a new window of opportunity for pro-transitional justice groups to successfully make their case before federal courts. One the one hand, in the case *Ekmekdjian v. Sofovich* (1992) the Supreme Court ruled that international law had primacy over domestic law. Although the case was unrelated to the issue of transitional justice, it set an important precedent in Argentine jurisprudence. Second, Article 72 of the constitutional text reformed in 1994 granted constitutional status to a series of international treaties signed and ratified by the state, including the American Declaration of the Rights of Man, the American Convention on Human Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention Against Torture, and the Convention on the Rights of the Child. The incorporation of these international human rights instruments to the country’s legal structure reinforced the viability of an anti-impunity legal strategy based on non-domestic legal arguments. As a constitutional lawyer quoted in Skaar (2011: 77) indicates, “incorporating those treaties into the
Constitution was a way of making them more seriously regarded by judges. Now you cannot reject or neglect to apply these treaties because they are part of the Constitution.”

Contrary to Skaar’s argument, however, the premise that guides the present study suggests that the mere existence of a new legal window of opportunity (or the reinstallation of the human rights question in the country’s public agenda) does not automatically translate into changes in patterns of judicial behavior. In other words, the causal effect of a new legal window of opportunity is mediated by the process whereby judges are made aware of the instruments now incorporated into the Magna Carta; are persuaded that abiding by those treaties is mandatory; and, finally, learn how to incorporate them into their daily jurisprudential routines. As researches it is important to document this process, in particular, the changes in levels of commitment to transitional justice among judicial actors as well as the transformation of legal preferences that enabled judges to act upon that commitment.

CELS lawyers at the time explicitly recognized the challenge they faced in activating this process. In its 1994 annual report the NGO’s executive directors made it clear that “recognizing the constitutional status [of international treaties] means the [opening] of a real possibility to work with new tools to improve the protection of human rights, at the same time as it opens numerous alternatives that will depend on our imagination and ingenuity to turn them into results” (CELS 1995a:5). The task ahead was even more daunting if one considers that during this period the Menem administration cemented its alliance with military sectors by promoting former torturers within the ranks of the armed forces, and appointing individuals with a dictatorial past to lead the government’s citizen security policies (Novaro 2009). In addition, after the passage of the
Constitutional reform Menem insisted in his public and conclusive vindication of the role of the military during the dirty war, and even accused human rights organizations of promoting the return of “la subversión” to the country (CELS 1995a: 63)

The strategy to diffuse international legal principles within the federal judiciary had three main components and was primarily designed and executed by the Centro de Estudios Legales y Sociales (CELS) and the Grandmothers of Plaza de Mayo (Abuelas). First, in the early 1990s CELS’s lawyers designed a series of educational initiatives to teach judges about the requirements of the new Constitution in the area of human rights and international law. Second, lawyers took advantage of the aforementioned revelations about the repressive activities of the military during the 1970s to demand the judiciary to open “truth seeking trials” without criminal consequences. This part of the strategy included the use of the Inter-American system of human rights. Finally, since the amnesty laws were designed so that they did not apply to the cases of children abducted during the dictatorship, litigants filed numerous criminal lawsuits in federal courts. These strategies had varying degrees of immediate success in entrenching ideas about international law among judicial actors, but in the medium run they converged in a major victory: a landmark ruling by a federal criminal court in 2001 declaring the amnesty laws unconstitutional. I what follows I analyze each of these diffusion strategies.

4.3.3.1 Informal Pedagogical Interventions

Argentine human rights organizations understood early on that if they were to obtain judicial victories and eventually trigger the collapse of the impunity regime, they had to take judges’ legal preferences seriously. With the legal criteria dominant in the federal judiciary in the early 1990s, it was impossible to expect courts to act in their favor.
The recognition of the constitutional status of international treaties in 1994 was not enough to change these historic patterns of decision-making, because those instruments did not specify the ways in which domestic judicial actors could combine national and supra-national juridical frameworks to open new avenues for truth and justice. Like their Peruvian counterparts, lawyers at CELS realized the importance of informally training judges and prosecutors in order to diffuse new standards of legal praxis.

To this end, between 1992 and 1996 CELS organized a series of seminars to which it invited members of the legal community. In order to reconstruct the motivations and reach of these initiatives I conducted archival research at CELS’s headquarters. The documents I found are incredibly rich: letters between CELS’s president Emilio Mignone and the speakers he invited to the seminars; grant proposals outlining the pedagogical goals of the organization; transcripts of the discussions that took place between the speakers and the audience; attendance records; and evaluations of the seminars submitted to the international agencies that provided the funding.

The following is a passage from a funding request sent in 1992 to the International Commission of Jurists:

The course’s goal is to analyze the use of international and regional human rights conventions in Argentina’s domestic law […] This analysis will include a study of the relevance [of international human rights law] and the objections and obstacles that oppose it […] In countries like Argentina […] both judges and lawyers, and even universities, scholars and legal journals frequently ignore [the obligation to abide by those norms], depriving citizens of the rights and protections they safeguard. For this reason, CELS deems it convenient to organize a regional seminar that brings together legal scholars, judges, lawyers, university professors and advanced law students […] with the goal of analyzing this problem and diffusing the conclusions among the aforementioned groups […] [The meeting] will constitute the first step of a movement that will translate into workshops,
seminars, research, publications and judicial rulings conducive to a comprehensive domestic use of the norms of international human rights law.\textsuperscript{216}

The quote makes it clear that CELS saw the diffusion of new legal ideas as a long-term priority, and hoped that by making judges one of the main target constituencies, international law would eventually trickle down into local jurisprudence. The organizers invited a myriad of national and foreign experts on constitutional law and international human rights law to lecture on these subjects. The syllabi put special emphasis on the technical aspects of the use of treaties and conventions in court briefings and rulings.\textsuperscript{217}

The careful selection of the speakers was instrumental in raising the appeal of the events among lawyers and judicial actors:

One of the really successful strategies was to try to find very prestigious individuals within the judiciary and in the legal profession, who would come and endorse our initiatives. We invited them, we explained them our objectives and they were given a prominent role in the program. Their presence made it easier to overcome certain prejudices among judges and prosecutors, who maybe would have refused to come if the speakers had been CELS’s lawyers.\textsuperscript{218}

By organizing these academic workshops CELS thus “added an educational component to its institutional objectives.”\textsuperscript{219} These pedagogical interventions became progressively more ambitious, especially after the 1994 reform.\textsuperscript{220}

\textsuperscript{216} Letter from CELS to ICJ, July 6\textsuperscript{th} 1992. Document on file with the author.

\textsuperscript{217} Among the speakers one finds Carlos Nino, German Bidart Campos and Eugenio Zaffaroni, three of Argentina’s most influential legal minds, as well as well-known international experts such as former President of the Inter-American Court of Human Rights, Augusto Cancado Trinidade.

\textsuperscript{218} Interview with former CELS Executive Director, Buenos Aires, November 3\textsuperscript{rd} 2010.

\textsuperscript{219} Interview with former CELS Executive Director, Buenos Aires, November 3\textsuperscript{rd} 2010.

\textsuperscript{220} Further evidence of CELS’s obsession with the importance of diffusing these new ideas is the fact that in 1995 its president, Emilio Mignone, published a commentary of the new constitution in which he carefully analyzed the changes introduced to Article 75. See Mignone (1995).
seminar organized in 1992 convened a very select group of lawyers and judicial actors (35 in total), in 1996 the institution reports an attendance rate of over 150 individuals per day during three days of intense academic discussions.\textsuperscript{221} Since the speakers also submitted essays that were published in edited volumes, it is likely that the ideas and legal solutions proposed in the seminars traveled beyond the participants.\textsuperscript{222}

The main limitation of the educational initiatives, however, was that unlike those organized in Peru, they had a very narrow geographical scope. My sources explained that very few judges and prosecutors outside the City and Province of Buenos Aires participated. For example, a human rights lawyer stated in an interview that:

We had difficulties moving outside the capital city. I always say that Argentina is like a dwarf with the head of a giant. Everything is concentrated here […] You have no idea of the lack of knowledge and awareness of international law that we found in the interior of the country. I once gave a talk in Córdoba and a member of a provincial Supreme Court came to tell me that after listening to my lecture she had concluded that she had to go back to university. She did not know anything about international law.\textsuperscript{223}

As it will become clear below in the discussion of the truth seeking and child abduction trials, most of the legal and extra-legal initiatives launched by leading human rights organizations in Argentina during the 1990s suffered from the same shortcoming. By focusing their interventions on a few judges, they only obtained jurisprudential victories in courts usually located in the City of Buenos Aires and the Provinces of Buenos Aires and Córdoba. Given the dire circumstances they faced after the approval of the amnesty laws and the pardons, and Menem’s colonization of the judiciary, it is not surprising that

\textsuperscript{221} CELS (1996), mimeo. [On file with the author].

\textsuperscript{222} The most influential is CELS (1997).

\textsuperscript{223} Interview, Buenos Aires, December 2\textsuperscript{nd} 2010.
activists concentrated their energies in only building a handful of alliances with judicial actors.

This limited number of alliances would nevertheless prove resilient and extremely effective in progressively undermining the impunity regime. For example, in the archival data I found the names of 51 judicial employees who attended the 1996 seminar, and among them I was able to identify four individuals (Horacio Cattani, Pablo Parenti, Manuel Garrido and Felix Crous) who would later play a tremendously influential role in championing the human rights cause in the Buenos Aires judiciary as judges, clerks and prosecutors. I also interviewed judges and prosecutors from Buenos Aires, Mar del Plata and Bahía Blanca who were at the forefront of the institutionalization of truth trials in the second half of the 1990s, and they all reported attendance to these seminars.

Despite their geographical limitations, the pedagogical interventions were important because they constituted the first attempt to diffuse the legal ideas that would make future judicial victories possible. The seminars provided the building blocks of a common discursive space in which the advocates of international law and the judges could understand each other. In this sense, the immersion of certain judges and prosecutors into the networks of human rights activists and lawyers certainly facilitated informal contacts between the two camps during the judicial proceedings initiated later in the decade. Given the narrow political space for transitional justice initiatives during the Menem years, these informal connections were crucial in order to carefully plan risky legal moves. Finally, by beginning to engage judicial actors in strictly juridical terms, the seminars allowed CELS’s lawyers to begin to isolate legal questions from political ones, thus minimizing the impact of political calculations in judicial decision-making. The
importance of these factors will become clear in the discussion of the truth seeking and child abduction trials, to which I now turn.

4.3.3.2 Diffusing the Notion of a “Right to Truth”

The first formal attempt to open cracks in the impunity regime involved asking the Buenos Aires Federal Appeals Court to recognize the victims’ right to truth on the basis of the jurisprudence of the Inter-American Court of Human Rights in Velázquez Rodríguez vs. Honduras (1988) and an interpretation of Argentina’s international obligations under the American Convention of Human Rights. In a nutshell, the argument was that despite the limits on criminal prosecutions imposed by the amnesty laws and the pardons, the judiciary could still request information to the executive and the armed forces in order to establish the fate of the disappeared. The initial diffusion of this idea among the relevant judicial actors was a relatively quick process that can be established by closely looking at the jurisprudence of the Buenos Aires Federal Appeals Court between March and July of 1995. Judge Horacio Cattani, who attended and lectured in the seminars described above, was the nexus between human rights organizations and the court.

Three weeks after the newspaper Página 12 published excerpts of Verbitsky’s interview with Scilingo, a lawyer filed a petition before the court asking the judges to request national authorities for information about two French nuns who had been detained and disappeared during the dictatorship. In a unanimous decision, the plenary of the court accepted the petition, making it clear that this was not an attempt to open a formal investigation to determine criminal responsibilities, but an administrative act that
did not violate the amnesty laws or the pardons. In this first ruling the judges did not make reference to international law but described their decision as guided by a “humanitarian” spirit. In other words, it did not expand the sphere of victims’ rights vis-à-vis the state’s decision to stop all prosecutions and investigations.

The situation changed when the same court formally accepted two requests for information filed by Emilio Mignone and Carmen Lapacó. In contrast to the lawyer who filed the first case, Mignone and Lapacó who were founders and members of CELS, made a much more sophisticated argument based on international legal instruments and jurisprudence. Their petitions introduced to the debate the idea of a right to truth and to mourning, rights which CELS explicitly recognized as not being part of Argentine domestic law (CELS 1999). In Mignone’s case, all five of the judges ruled in his favor, and 3 did so by fully endorsing his innovative doctrine. Cattani, Luraschi and Cortelezza concluded their joint opinion by stating that they were acting “in observance of the fundamental principles of international human rights law,” among which they included victims’ and society’s right to know the truth about what happened during the dirty war.

International law made further inroads into the legal discussion when, asked by CELS lawyers, two global NGOs (Human Rights Watch -HRW- and the Center for Justice and International Law –CEJIL-) and the prestigious jurist Eugenio Zaffaroni, filed

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224 Cámara de Apelaciones en lo Criminal y Correccional de la Ciudad de Buenos Aires, Méndez Carreras, Horacio s. presentación en c. Nro. 761 E.S.M.A. Hechos que se denunciaron como ocurridos en el ámbito de la Escuela de Mecánica de la Armada. March 20th 1995 [ruling on file with the author].

225 Cámara de Apelaciones en lo Criminal y Correccional de la Ciudad de Buenos Aires, Mignone, Emilio s/presentación en causa Nro. 761 E.S.M.A. Hechos que se denunciaron como ocurridos en el ámbito de la Escuela de Mecánica de la Armada. April 20th 1995. See also Lapacó, Carmem s/presentación en causa nro. 450. May 18th 1995. [Rulings on file with the author].

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an *amicus curiae* brief “to subject to the court’s consideration some arguments derived from international human rights law related to the state’s responsibility with regards to the victims of forced disappearances.”226 Judges’ decision to accept the brief as part of the case constituted a landmark in the truth seeking process for a number of reasons. First, for the first time in Argentine jurisprudence a Federal Court was open to considering arguments beyond those expounded by the parties in a case. Second, the brief incorporated a wealth of information about international law, treaties, doctrine and jurisprudence that had been absent in the prior proceedings. Finally, the ruling made it clear that amicus briefs would only be accepted when filed by “non-governmental organizations with a valid and genuine interest in the subject, and proven specialization in it”, in “exceptional cases of the magnitude of the present one.”227 In other words, NGO’s international connections were now allowed to take a prominent role in the domestic judicialization processes, trying to diffuse and legitimize international legal arguments in the eyes of federal judges.

The inflow of new legal ideas clearly strengthened the position of the allies of NGOs in the court, providing them with a stronger legal case to pursue their commitment to truth and justice than that afforded by the invocation of “humanitarian” concerns. This is how judge Cattani, the leading judge in the majority opinions in the aforementioned cases, describes the truth seeking process before and after the inflow of these new legal arguments:

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226 Cámara de Apelaciones en lo Criminal y Correccional de la Ciudad de Buenos Aires, C. 761 *Hechos ocurridos en el ámbito de la Escuela de Mecánica de la Armada*. May 18th 1995. [Ruling on file with the author].

227 Ibid.
After the issuing of the pardons some of us decided to reactivates human rights cases very slowly and very cautiously. We didn’t want to call the attention of politicians or the media. We were fearful that at some point the Ministry of the Interior would step in and complicate things. The other problem was that some members of the court were staunch Menem supporters […] But we began working on the basis of a bad legal argument. Why did we continue with the investigations? One of the answers was that there were still some unidentified human remains. Other things were also still open. For example, when victims needed official documents to process their petitions for monetary reparations under Menem’s reparations law, they came to the court to request formal proof that their relatives had been victims of state repression […] The entire legal approach changed when CELS intervened in Mignone’s case. The whole question of the right to truth was something introduced to us by them. Now we had a much better argument to justify our judicial proceedings, despite the existence of the impunity laws. The “humanitarian” argument was useful, especially at the beginning of the process and in particular when trying to persuade some of my menemist colleagues, but it did not affirm new rights or establish the basis for future triumphs as the right to truth argument did. ²²⁸

In addition to enhancing the technical capabilities of receptive and committed judges, the inflow of new legal ideas also forced non-receptive judges to engage with international legal arguments they had previously ignored. Some of them, like judge Riva Aramayo, continued to offer a formalistic reading of the law, concluding that the court had no jurisdiction on truth seeking trials because they were not criminal cases with two parties in conflict. As a result, even if the court decided on humanitarian grounds to request information to the relevant authorities, it could not declare the existence of new rights such as the right to truth. Moreover, she argued that her colleagues could not accept the existence of a “justicia de excepción,” in which exceptions to the judiciary’s routine practices were granted invoking the special nature of the cases. ²²⁹ Others like

²²⁸ Interview, Buenos Aires, May 20th 2011

²²⁹ See Riva Aramayo’s opinon in Cámara de Apelaciones en lo Criminal y Correccional de la Ciudad de Buenos Aires, Causa 761 Hechos ocurridos en el ámbito de la Escuela de Mecánica de la Armada. July 18th 1995. [Ruling on file with the author].
judge Cortelezza, who was the swing vote in *Lapacó* and *Mignone*, concluded in a second ruling on *Lapacó* that since the authorities responded to the court’s formal request for information denying the existence of documents about the whereabouts of the disappeared, there was nothing else the judiciary could do. Taking further actions on the basis of the state’s international responsibility to investigate, a responsibility that in his view had been partially fulfilled, would amount to a flagrant violation of the rules against double jeopardy because they would inevitably require judges to inquire about the individual criminal responsibility of members of the armed forces. In this sense Cortelezza explained that any further action was barred by the amnesties and the pardons, which given Supreme Court jurisprudence, lower federal courts had to accept.\(^{230}\)

Cortelezza’s vote was part of the majority in that second ruling on *Lapacó*, in which it was decided that the judiciary could not insist in obtaining the relevant information. This decision made it clear that despite the court’s earlier affirmation of the right to truth, the acceptance of this new legal principle was still precarious among swing judges. Not content with this result, CELS lawyers appealed. Although in 1998 the Supreme Court ruled against them, their international legal arguments in support of the right to truth were fully embraced by at least two judges in the minority opinion (Petracchi and Bossert) and by the Solicitor General. For example, according to the Solicitor General, pursuing further investigations did not violate the rules against double jeopardy (CELS 1999).

\(^{230}\) See Cortelezzas’s opinion in *Cámara de Apelaciones en lo Criminal y Correccional de la Ciudad de Buenos Aires*, *Causa 761 Hechos ocurridos en el ámbito de la Escuela de Mecánica de la Armada*. July 18th 1995. [Ruling on file with the author].

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The Supreme Court’s decision was also the springboard to launch a supra-national legal strategy. CELS filed a complaint at the level of the Inter-American Commission of Human Rights. The events that followed continued to erode the impunity regime. As aptly explained by Karthryn Sikkink in her various works on Argentina (e.g. Sikkink 1993; 2005; 2011), this type of move enabled the human rights community to increase the visibility of their case at the international level and enhance pressures on the government to deal with their demands. In 1999 the Menem administration signed a friendly accord with the Inter-American Commission, committing itself to find remedies for the human rights violations during the dictatorship. Making good on this promise, the Solicitor General instructed prosecutors to “analyze all procedural options within their reach to collaborate with the relatives of the disappeared who seek information in the judiciary about the fate of the victims of those violations, and avoid raising jurisdictional questions […] that could put obstacles to the investigations” (quoted in CELS 1999). The Solicitor General also created an institutional space for assertive judicial action by setting up a special committee of prosecutors led by the historic ally of the human rights movement, Federal Prosecutor Hugo Cañón.231

The progressive accumulation of cracks in the impunity regime opened up by these truth-seeking efforts generated new opportunities for the human rights community

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231 Interestingly, by giving carte blanche to these actors, the Solicitor General allowed NGOs and their judicial allies to trigger a positive feedback effect on their international litigation strategy: “When Italian judges opened up an investigation on the fate of Italian victims of the dictatorship, the Solicitor General gave me permission to collaborate with my Italian counterpart. As a member of the special commission of prosecutors I went to all the courts that had the relevant cases stalled in their dockets and introduced the judges to the Italian prosecutor. I asked for copies of everything the prosecutor needed. With the information the prosecutor was thus obtaining via non-official channels, he now knew exactly what to ask the Italian government to request via the official diplomatic channels. As you can see, putting the judiciary to work, and allowing foreign courts to successfully put pressure on Argentina was a craft!” Interview, Prosecutor Cañón, Buenos Aires, November 9th 2010.
to persuade receptive judges to take even bolder courses of action *circa* 1998. In 1995 the *amicus curiae* brief filed by CEJIL and HRW on behalf of CELS planted the seed for these more assertive efforts. The brief introduced the idea that courts’ responsibility in the search for truth was not limited to promoting administrative acts such as formal requests for information, but also included the gathering of testimonies from victims and alleged perpetrators. CEJIL and HRW indicated that courts should identify via these testimonies those individuals who participated in the illegal detentions, as well as those who facilitated logistical support to the military. Judges at the time were reticent to follow this advice because uncovering illegal patterns of behavior could render certain individuals criminally liable, something prohibited by the letter and spirit of the impunity laws.

As from 1998 the situation changed, triggering fierce legal controversies between pro and anti transitional justice judges. Judges and prosecutors in the Federal Appeals Courts of Buenos Aires, La Plata, Bahía Blanca and Córdoba fully embraced the argument about the victims’ right to truth, and began to subpoena former members of the military (CELS 2000). Defense lawyers questioned the legality of these court orders by invoking the amnesty laws, and generated a jurisdictional battle when they argued that these cases should be put under the orbit of military courts. In 2000 one of them filed a formal complaint before the Court of Cassation, which subsequently ordered the Federal Appeals Court in Bahía Blanca to transfer the original copies of all witness testimonies, written evidence and court proceedings (approximately 15000 pages), and refused to accept the duplicates sent by their lower court counterparts. The intention was to remove the case from the orbit of pro-transitional justice judges and stall it indefinitely. The
Supreme Court was quick to intervene in favor of the Court of Cassation, thus blocking the progress of truth trials in Bahía Blanca for more than a year (CELS 2000). This behavior is evidence of the long lasting impact of Menem’s colonization strategy on the low levels of commitment of these high courts vis-à-vis human rights. Although by 1999 Menem was no longer in power, the judges he appointed continued to work on behalf of the military (CELS 2001).

Despite the stalling tactics, the procession of military officers continued in the aforementioned Federal Appeals Courts. As was expected, some members of the military refused to show up. In response to these acts of defiance, a handful of federal judges took a more aggressive strategy and ordered the arrest of army and navy officers who did not want to testify. According to one of the judges, these decisions were not without cost:

The conservative media and the political establishment came after us. For example, the federal police in charge of the security of the court stole drug we had sequestered in another case, and when this became public the media accused us of supporting drug-traffickers, of not taking seriously cases involving current as opposed to past criminals. Why were we investigating crimes that took place 30 years ago if we could not be effective in contemporary cases? Politicians even filed charges in the Judicial Council, and lots of individuals who were incriminated by witnesses during the hearings, filed libel cases against us.\textsuperscript{232}

In order to engage in these bold assertions of judicial power, which given the political context could and did have negative professional and personal consequences, the judges I interviewed for this study explained that they first had to solve a series of legal hurdles. Even the most committed ones needed clarification on the procedural grounds on which to require the presence of alleged perpetrators in court as part of a non-criminal investigation, let alone arrest them. As one of them explained,

\textsuperscript{232} Interview, Mar del Plata, November 16th 2010

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It was doubtful that we had the power to do this kind of moves. We had constructed a legal space based on the right to truth that allowed us to say, ‘we want to know certain things,’ but that wasn’t enough. For example in the early stages of the process Massera [N.B. former member of the military juntas] agreed to testify in court. Lots of activists and human rights lawyers attended the hearing and they began to ask Massera for documents they thought he had hidden in his house. He agreed to let us look for those documents. When we arrived several journalists asked us if we were conducting a search and seizure. Of course we weren’t! We were not allowed to issue that kind of warrant in these cases. We were there because the guy let us in! We had been able to ask questions because he had agreed to it! Formally we had no power.233

Several of these judicial actors also explained that in this context of legal uncertainty, human rights organizations, and CELS in particular, were the ones who provided the technical capabilities necessary to carry out those proceedings. The following quote from an interview with a federal judge is illustrative:

We would not have been able to do many of these things without the intervention of CELS. It was the most active organization, and the most committed to democracy. They never suggested crazy moves and always offered the best juridical backing […] If someone tells you, you should do this or that, and that person has the prestige of Eugenio Zaffaroni [N.B. one of the most influential criminal lawyers in Latin America who worked closely with CELS during the 1990s], then as a judge you are put in a very different position. It’s a way of empowering you to do things. […] For example, it was not clear which Code of Criminal Procedures we had to use. The new code approved in 1991 or the one valid before that date? Well our decision was based on the advice given to us by CELS.234

The intervention of NGOs was therefore a crucial catalyst of judicial behavior in truth seeking trials, progressively emboldening some members of the bench. Human rights lawyers made available international legal instruments and persuaded judges to use them in order to expand the sphere of victims’ rights. By asking prestigious international

233 Interview, Buenos Aires, May 20th 2011
234 Interview, Buenos Aires, February 7th 2011
organizations and jurists to act on their behalf, they improved the legitimacy of their arguments. But as the last quote makes it clear, these interventions also answered non-trivial questions about how to conduct the daily court proceedings in this kind of cases. Although international human rights law can be very helpful in solving macro-juridical questions at the heart of these processes, it is not designed to address the minutiae of judicial decision-making at the domestic level.

In sum, this analysis of truth seeking trials in the 1990s shows the empowering effects of legal diffusion strategies designed by civil society actors. In particular, since 1995 litigants were successful in activating and sustaining these trials because they understood that in order to obtain judicial victories they had to equip judges and prosecutors with the appropriate tools. Exerting public pressure on the relevant actors through the media or public demonstrations would have clearly fallen short of the objective, since these strategies do not address the multiple hurdles faced by even the most pro-human rights judges when navigating unchartered judicial territories.

Moreover, the victories obtained in the search for information about the whereabouts of the disappeared and in forcing the Argentine state to take the matter seriously despite the existence of laws barring prosecutions, show that by encapsulating the human rights issue within the logic of courts and legal proceedings, human rights activists were able to offset the limitations imposed by a hostile political environment. By reenlisting judges and prosecutors behind their cause, and by teaching them how to legally defend their acts of defiance vis-à-vis the executive and the military, they unleashed a truth seeking process that could be stopped by neither Menem nor his successor after 1999, UCR’s Fernando de la Rúa. The trials became so institutionalized
that hearings continued well into the 2000s when there were no longer legal barriers to pursue more orthodox criminal strategies. The protracted nature of the truth seeking trials personally and emotionally affected the judges involved, convincing them of the validity of the moral imperative behind victims’ demands, and turning them into reliable allies of the pro-transitional justice coalition. As one of them stated in an interview:

During the days of the truth seeking trials I was accused of malicious prosecution for ordering the arrest a navy officer who had allegedly raped one of the disappeared in a clandestine detention center. He was obviously in jail for only a few hours because the impunity laws were still in place […] Of course I anticipated the political consequences that my decision would have, but I didn’t care! If there is one thing I learnt during this process is that I care about what victims think of me. I care that victims think ‘at last I found a judge that I can trust’.

4.3.3.3 Stolen Babies and the Unconstitutionality of the Amnesties

In addition to the explosion of truth trials, the second half of the 1990s was characterized by intense judicial activity in another set of cases related to state repression during the dictatorship: the abduction of babies born in clandestine detention centers. According to Abuelas, an organization created to locate the missing children, detainees gave birth to approximately 400 babies who were then illegally adopted by members of the security forces and their allies (Abuelas de Plaza de Mayo 2007, 2009). As this section will show, the progress made in these cases after 1997 led to a historic ruling declaring the unconstitutionality of amnesty laws in 2001.

Since the kidnapping of babies was purposefully excluded from the amnesty laws passed in the 1980s, prosecutions in these cases were not formally barred. In the early

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235 Interview, La Plata, November 13th 2010
1990s, when judicial activity in the area of human rights violations was essentially non-existent, the few cases that were still alive in the dockets of federal civil and criminal courts were the ones about the restitution of abducted children. The moral outrage caused by these crimes made it harder for politicians to openly oppose the victims’ cause or put pressure on the judiciary to stall the proceedings. In fact, on several occasions both the Alfonsín and Menem administrations actively supported the Grandmothers. For example, Menem’s Secretary for Human Rights invited the lawyers of Abuelas to a United Nations preparatory meeting on the Convention of the Rights of the Child, and helped them to successfully lobby for the inclusion of Articles 7 and 8. These articles recognized the human right to an identity, and the international responsibility of states so protect that right. According to the head of the Abuelas’s legal team during the 1990s, these international victories were instrumental in strengthening their case before domestic courts.²³⁶

The legal challenge faced by Abuelas’s lawyers in the 1990s was to build a case that proved the existence of a systematic plan to illegally adopt babies in order to charge junta leaders on the basis of their command responsibility, and to show that although 6 abduction cases were included in the 1985 ruling against them, new prosecutions would not constitute an instance of double jeopardy. Most of the cases filed by the organization’s lawyers accusing the adopted parents of these children of suppression of identity and kidnapping of minors fell into the hands of two investigative federal courts in the Buenos Aires area led by judges Servini and Marquevich. These judges were the ones

²³⁶ Interview, Buenos Aires, December 2nd 2010
in charge of conducting the preliminary investigations and of eventually indicting those responsible for the crimes.

Judge Marquevich was the first to respond favorably to the victims’ demands. In 1997 he indicted a military doctor responsible for delivering babies in the clandestine maternities, and a year later he shocked the public when he put former *de facto* President Videla in preventive imprisonment accusing him of designing a systematic plan to abduct children. The head of Abuelas’s legal team explained the impact of the ruling in the following terms: “That day many victims felt that they no longer had reasons to be afraid. We began to receive tons of phone calls and letters from people who were now ready to talk, to tell things about their experiences in the clandestine detention centers that they had decided not to make public due to fear.”

Following Marquevich’s lead, a few weeks later judge Servini issued a similar arrest warrant against Videla’s colleague in the military junta, Emilio Massera. In January 1999, another federal judge did the same with 7 other high-ranking former military officers (CELS 1998; Skaar 2011).

Apart from the emotional and political shockwaves caused by Marquevich’s decision, it also had important legal consequences. Indicting Videla on the basis of being the mastermind behind an extended criminal enterprise was crucial because it allowed the victims to later dismiss an interlocutory appeal filed by the defendant, claiming that the ruling violated rules regarding double jeopardy. It gave human rights lawyers the possibility to argue that not only was the criminal type invoked in the ruling different from the one used in 1985, but also that since Videla was the one who planned the illegal operation he was still perpetrating the crimes by not telling the truth about the

237 Interview, Buenos Aires, December 2nd 2010
whereabouts of those children. Most importantly though, by affirming the supremacy of international law over domestic law, Marquevich’s decision echoed the international legal argument that human rights organizations had been trying to diffuse among judicial actors since the early 1990s. For example, he set an important precedent by being one of the first judges in the country who used the notion of crimes against humanity to characterized Videla’s actions. He explained that this criminal type is derived from customary law and is therefore not subject to statutory limitations. He also mentioned in the ruling that the nature of the crimes allowed rules about statutory limitations to be set by treaties and international conventions signed after their perpetration, thus granting an exception to the legality principle (CELS 1999: 98-99).  

As we saw in the previous section on the pedagogical interventions designed by CELS in the early 1990s, some of the judges and prosecutors in the Federal Appeals Courts that were at the forefront of the truth-seeking trials were also immersed in human rights networks. Understanding the spread of the new legal orthodoxy among them is easy: their proximity to the community of victims and their lawyers made them more receptive to legal arguments that allowed them to back radical departures from existing jurisprudence. By contrast, the federal judges who indicted former junta leaders between 1998 and 1999 were not allies of the NGOs. Servini, for example, was one of Menem’s closest friends in the federal judiciary. As a result it is unlikely that the diffusion of

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238 The defendants filed several interlocutory appeals in the Buenos Aires Federal Appeals Court invoking statutes of limitations, the absence of direct criminal responsibility and double jeopardy. Although some of these former military officers were granted the privilege of house arrest or even released from preventive imprisonment, the court did not accept the interlocutory appeals, leaving the cases open. In fact, even Judge Riva Aramayo, who in the early 1990s had not been receptive to the victims’ case in the truth-seeking trials, was part of the majority rejecting the arguments expounded by the defendants. The supremacy of international legal principles was thus affirmed in two different judicial instances, at least in the case of stolen babies (CELS 2000; 2001).
international legal arguments in these cases happened via informal avenues. The level of informal contacts was so low between litigants and these judges that on many occasions the arrest warrants took them by surprise. Servini’s and Marquevich’s behavior is better explained by other mechanisms of persuasion.

In Servini’s case, it is clear that her decision had strictly personal motivations: “as a mother and a grandmother I understood these women. I would have gone mad if that had happened to me. I felt that something had to be done.”239 In my interview with her she never mentioned, like other judges quoted in this and the previous chapter did, legal motivations. She was not particularly compelled by the new legal orthodoxy diffused by NGOs. In Marquevich’s case what compelled him to act was the realization, after being bombarded with very similar and related cases since 1996, that there were criminal patterns indicative of a broad and systematic criminal plan. He then incorporated the arguments expounded in the formal briefs written by Abuelas’s lawyers to justify the indictment:

We had no informal contacts with him, we never told him what to say. We simply explained our arguments in our written communications with the court. However, in conversations I had with him as part of the natural relationship between a lawyer and a judge, I noticed that the numerous cases we filed had persuaded him that these were not isolated events. That is exactly what we needed to bring Videla to court, so we clearly had something to work with. After I realized this change in the judge’s perception of the cases I immediately requested that the court call in a former military doctor who had witnessed the crimes. Fortunately, he decided to tell everything. He even answered the questions about the chain of command that I had formally requested the court to ask. He explained the location of the clandestine maternity, the individuals who have him the orders, the officers present when the orders were given, etc. This is how the chain of command finally came to light, as did the criminal responsibility of superior officers. A week later Marquevich arrested Videla.240

239 Interview, Buenos Aires, November 5th 2010

240 Interview, Buenos Aires, December 2nd 2010
It is clear that judicial behavior during the reactivation phase of cases of illegal child abductions does not perfectly conform to my theoretical framework. In spite of this, the above discussion sheds light on one of the central claims of this dissertation: the dynamics of court proceedings can insulate juridical questions from political ones by directing the attention of judicial actors to evidentiary and legal questions. This can happen by emotionally investing judicial actors, or by exposing them to incontrovertible facts that compel them to act as servants of the law. As a result, these dynamics have the potential to enlist indifferent judges in the ranks of the pro-transitional justice coalition.

In these particular cases, the president’s position was explicitly against the arrests since he publicly led the case in favor of the idea that the pardons prohibited a second prosecution for the same crimes (Skaar 2011). Concerns about potential political retaliations lost centrality, however, when judicial actors were confronted with unequivocal facts indicating the responsibility of certain individuals in the perpetration of abhorrent crimes. As one of the human rights lawyers involved in the process told me “once we managed to separate discussions about the facts and the law from the ideological and political debate, judges began to respond.”

Apart from providing another arena for activating the legal logic in order to neutralize the impact of a hostile political environment, the cases of child abductions also opened the possibility for human rights organizations to strike their first blow against the

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241 Marquevich, for example, clearly upset certain sectors of the establishment. Years later these animosities took a toll on his judicial career. He was accused of misconduct in these and other non-human rights cases, and was finally impeached.

impunity laws. In the judicial processes analyzed so far, neither litigants nor judges questioned the constitutionality of the amnesties or the pardons. However, the possibility of conducting fact finding proceedings in the case of truth-seeking trials, or of indicting high-ranking military officers for having stolen hundreds of babies, made apparent the contradictions inherent in the Argentine judicialization process. Victims could discover what happened to their loved ones and identify those responsible, but could not ask the judiciary to prosecute them. Similarly, police and military officers could go to jail for abducting children, but no one could ask a court to punish them for the torture and murder of the parents of those children. In 2000, human rights NGOs finally found a case in which these contradictions became crystal clear, enabling them to persuade a judge to declare the unconstitutionality of the impunity laws.

*Simón* was a case about the illegal abduction of Victoria Poblete who was kidnapped with her parents in the 1970s. The parents were disappeared and she was given to a family with close connections to the military. After Victoria’s real identity was established, Abuelas’s legal team filed a criminal lawsuit against her adopted parents in judge Cavallo’s federal investigative court. The available evidence in this case was exceptionally conclusive, to the point that the Grandmothers knew who had been responsible for transporting the baby from the clandestine detention center to her new home. Knowing the identity of those who had personally stolen the baby also meant knowing the identity of those who had been involved in the disappearance of the biological parents. CELS lawyers took note of this, asked their colleagues at Abuelas for permission to intervene in their case, and filed an interlocutory appeal in the same court demanding that the judge prosecuted the defendants for the crime of forced
disappearance. They invoked a myriad of international legal instruments, and well as doctrinal and jurisprudential sources to persuade judge Cavallo that the impunity laws were invalid and could not stand in the way of justice. On March 6th 2001 the judge responded favorably striking down the laws.

The ruling was a remarkable jurisprudential achievement because at this point not even the Inter-American Court of Human Rights had set a precedent on the illegality of amnesty laws under international law. The ruling crafted an incredibly sophisticated and innovative legal argument. Among other things, it explained why the recognition of ius gentium as a source of law in Article 118 of the Argentine Constitution, as well as the recognition of the constitutional status of several international treaties by the 1994 constitutional reform, enabled the court to conclude that customary international regulations against crimes against humanity were present in the 1970s. Given the characteristics of state repression in Argentina, Cavallo used this criminal category to legally define the forced disappearance of Victoria’s parents. Not prosecuting crimes against humanity, he argued, violated the international responsibilities of the Argentine state, thus calling for the nullification of the amnesties.

This ruling was a radical jurisprudential breakthrough in the judicialization process. As a result, it is important to reconstruct at a very micro level the dynamics that

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243 The internal deliberations within CELS and between CELS and GPM lawyers were confirmed during interviews with members of both organizations.

244 Juzgado Nacional en lo Criminal y Correccional Federal Nro. 4 de la Capital Federal, Causa Nro. 8686/2000 caratulada Simon, Julio, Del Cerro, Juan Antonio s/sustracción de menores de 10 años, en particular, sobre el contenido de la presentación del Centro de Estudios Legales y Sociales. Ruling of March 6th 2001 [on file with the author].

245 Some examples of the extensive academic commentary triggered by the ruling can be found in CELS (2008).
made it possible, and assess whether they support my theoretical assumptions about judicial behavior and the process that leads to transitional justice victories. What impact did the political environment have on the court’s decision? Did the judge feel constrained by the traditional legal orthodoxy? Did his legal preferences change in the process? Did human rights litigants trigger those changes by activating informal diffusion strategies?

As mentioned above, in 2000 CELS lawyers began to articulate their strategy with Abuelas lawyers. Before formally filing the brief, the first step was to informally contact the judge.246 This was not difficult for two reasons. First the judge had a personal relationship with Horacio Verbitsky, president of CELS. Second, his clerks were immersed in human rights networks. For example, they appear in the attendance records of the seminars organized by CELS in the early 1990s. During these meetings CELS lawyers confirmed that the judge shared their view about the contradictions offered by the case: the defendants were being indicted for stealing a baby, but could not be indicted for disappearing her parents.

The next move involved assuring the judge that it was legally possible to remove the legal obstacles posed by the amnesty laws. In an interview, Cavallo explained the problem as follows:

It was a very new topic. It raised all sorts of intractable philosophical and legal questions […] At some point we realized that we had to violate some crucial principles of criminal law, in particular the legality principle. We needed to make sure we got that right.247

246 Interviews with litigants, Buenos Aires, December 21st and December 20th 2010.
247 Interview, Buenos Aires, October 21st 2010
In other words, the judge felt he needed the appropriate legal tools in order to depart from standard legal praxis. This was particularly important in his case, because as he also stated in the interview, these were questions he had never considered before. He did not belong to a group of scholars or practitioners who had been long trying to find a legal solution for the problem of the amnesties. According to the classification of judges and prosecutors outlined in Chapter 2, Cavallo was part of the group of indifferent judicial actors. Moreover, he wasn’t willing to destroy “all that we know and hold dear about modern criminal law. I seriously evaluated whether I could reach that decision or if it was nonsense. It was an experiment, and it could fail.”

Having solid legal foundations was not only important for professional reasons, but also for political ones. Cavallo made it clear that he knew that if he did not uphold the laws, his career could be in trouble. After President de la Rúa took office in 1999, his administration systematically tried to avoid adding a conflict with the military to its list of political and economic problems. For example, the president denied all requests by European governments to extradite members of the military who were being investigated by foreign courts (Skaar 2011). Consistent with this policy, when the administration found out that Cavallo was considering striking down the laws, the Minister of Justice personally lobbied him. In this context, the judge needed a good case in order to defy the government.

When the judge was finally persuaded, Cavallo sealed a deal with CELS by asking them to formally file a request to nullify the Punto Final and Due Obedience laws, in which they should cite as many international jurisprudential precedents as possible.248

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248 This was confirmed during interviews with both the judge and two human rights lawyers involved in the case.
A brief drafted by a prestigious institution like CELS would not only provide him with a large amount of additional information, but it would also send the government the signal that he was not acting alone. The first ruling declaring the unconstitutionality of the impunity laws was therefore a “collaborative” effort, in which human rights lawyers and activists put to work their contacts within the judiciary to informally persuade a judge to act in their favor.

Consistent with my theoretical expectations, litigants succeeded because they took legal preferences seriously as an important dimension of judicial decision-making. By enhancing judges’ technical capabilities, CELS activated a legal space for assertive judicial behavior. This idea was nicely condensed in an interview with one of the members of the Buenos Aires Federal Appeals Court that 9 months later upheld Cavallo’s ruling:

During these informal exchanges between us and CELS lawyers we often told them: ‘give us more of this and less of that.’ We could negotiate with them. They understood our needs. CELS knew perfectly well that they needed to put their best legal talent to draft those briefs, and that they couldn’t just bring the victims to move us. They had to design and offer us clever juridical solutions. That is exactly what they did.  

Another judge made a similar point about the importance of CELS’s focus on the technical aspect of judicial decision-making:

CELS provided us the intellectual resources we needed. They organized conferences, published books, and even built strong personal ties with some members of the judiciary. I remember once telling them “what do you want me to do, I have my hands tied by the amnesty laws.” They then intervened and told me

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249 Interview with Judge Cavallo, Buenos Aires, October 21st 2010

250 Interview, Buenos Aires, May 20th 2011
“That is not true, here are all these alternative solutions to put an end to impunity.”

4.3.4 Summary

The struggle over the allegiances of judicial actors in the 1990s shows the impact of timing in the effects of NGOs diffusion strategies. By entering the game after the judiciary had been successfully colonized by the anti-transitional justice coalition, human rights organizations had to focus their persuasion efforts on a handful of courts and judges. Their actions did not lead to the full repeal of the impunity laws or to an explosion of criminal trials, but they did lay the foundations for future victories. Their networking efforts built bridges with key judges and prosecutors in certain parts of the country. Moreover, these pedagogical interventions allowed international legal ideas to make their way into the judiciary, providing committed judges with the technical resources they previously lacked to take bold actions in support of transitional justice. By encapsulating the human rights question within the logic of the law, they also eased the constraints imposed by a hostile political environment, and gained the favor of indifferent judges like Marquevich and Cavallo. Litigants forced judges and prosecutors to focus on the facts of the cases, emotionally moving some of them and technically persuading others that not taking any actions would seriously contravene basic moral and legal standards.

251 Interview, Buenos Aires, October 26th 2010.
4.4 Part III: The Explosion of Transitional Justice in the 2000s

4.4.1 Hunting Lions in the Zoo?252

Until the mid 2000s judicial activity in the area of transitional justice focused for the most part on the truth seeking and child abduction trials analyzed in Part II. In addition, the 2001 landmark ruling paved the way for the filing of new lawsuits against former military and police officers. In response to these petitions to re-open the cases stalled by the amnesties, several federal courts concluded that even though Cavallo’s decision lacked confirmation by the Court of Cassation or the Supreme Court, they could still initiate proceedings. Instead of automatically invoking the amnesty laws, judges argued that their validity had to be explored on a case-by-case basis after conducting a thorough investigation on the alleged crimes.

The course of the judicialization process changed dramatically between 2004 and 2010 when the Argentine Supreme Court finally handed down a series of rulings declaring the inapplicability of statutory limitations in cases of crimes against humanity 253; the retroactive unconstitutionality of the amnesty laws; 254 and the unconstitutionality of the pardons 255 (ADC 2008: 435-458). The highest court in the land thus endorsed the international legal case for transitional justice, triggering an explosion

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252 This was the phrase used by Prosecutor Strassera when he compared the power of the military in the 1980s, when he led the prosecution’s case against the leaders of the military juntas in the 1985 trial, with that of the institution in the 2000s. Interview, Buenos Aires, December 20th 2010.


254 Corte Suprema de Justicia de la Nación, Simón, Julio Hector y otros s/privación ilegítima de la libertad. Ruling of June 14th 2005 [On file with the author].

of trials in Federal Oral Tribunals (FOTs). FOT No.5 of the City of Buenos Aires issued the first condemnatory ruling in 2006, sentencing a former military officer to 25 years in prison.256

The evolution of criminal trials after 2005 was dramatic. As Figure 4.2 shows, the number of indictments almost tripled between 2007 and 2011. Whereas in the years immediately after the aforementioned Supreme Court rulings the number of indictments was 349, four years later the figure was 843. In December 2011 70.34% of indicted military officers were detained, 50.5% of them in regular prisons and the rest under house arrest. During this period, prison sentences increased almost 7 times, resulting in an 89% conviction rate (Figure 4.3). Of the 296 decisions on individual criminal responsibility, only 30 resulted in acquittals. These rulings were handed down in 46 trials held between 2006 and 2011 (Figure 4.4). After carefully reading each of these decisions, I can conclude that in all of them judges rejected the application of statutes of limitations; defined the crimes using international legal categories; and gave a prominent role to indirect evidence, contextual factors and witness testimony to establish individual criminal responsibility, especially in those cases in which the accused were not the immediate perpetrators.257 In addition to forced disappearances, torture and homicides, judges also categorized crimes such as rape as crimes against humanity.258

256 Tribunal Oral Federal No. 5 de la Capital Federa, Causas N° 1.056 y1.207. Ruling of August 4th 2006 [On file with the author].

257 All rulings are on file with the author.

258 On this point see Balardini et al. (2011:223-226)
Figure 4.2. Number of indictments by year

Source: Data obtained from the records of the Solicitor General’s Office

Figure 4.3. Number of convictions by year

Source: Data obtained from the records of the Solicitor General’s Office
This dramatic turn around in the fate of human rights cases in the Argentine judiciary is explained by a variety of factors. The first is the diffusion of a new legal orthodoxy by human rights organizations initiated during the 1990s and made authoritative by Supreme Court rulings issued between 2004 and 2010. The interview data presented in the previous section suggested that in the 1990s the judicial actors who were pioneers in incorporating international human norms to the rulings handed down by courts in the City of Buenos Aires and the Province of Buenos Aires, Córdoba and Santa Fe, were at first doubtful and insecure about taking those jurisprudential steps. The contrast with judges and prosecutors involved in the current judicialization process could not be sharper:

The Supreme Court rulings in *Simón* and other cases shook the minds of many people. They were the outcome of the consolidation of a new current of ideas within the judiciary. Today, for example, nobody questions the validity of customary international law as a source of law. What we do discuss among

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Figure 4.4. Number of oral trials by year

Source: CELS (2011) and data gathered by the author
colleagues is the question of how to make sure that these trials finish as quickly as possible in order to close a chapter in Argentine history.\footnote{Interview, FOT Judge, Buenos Aires, February 9th 2011}

There is no problem with investigating these cases even after the exhaustion of statutes of limitations. Statutes of limitations are not a fundamental principle of criminal law. They have to do with process, and procedural rules can be changed without affecting the rights of the defendants. It’s not an issue.\footnote{Interview, Investigative Federal Judge, November 19th 2010}

Many people outside the judiciary, especially legal practitioners, don’t understand what we are talking about when we say that prior to the 1970s there was an international consensus crystallized in principles of international human rights law that makes it possible to establish, for instance, the inapplicability of statutory limitations for crimes against humanity, or that any law that contradicts these principles is invalid. At least in this court this no longer a debate.\footnote{Interview, FOT Judge, Buenos Aires, February 11th 2011}

I did not have a pre-existing legal vision that I had to change in order to work in these cases […] We are not violating the principle of legality. These are simply cases that we are not used to investigating on a daily basis, and they require us to use international legal norms that we don’t normally invoke. But I didn’t have to be persuaded about their validity in domestic law. I grew up intellectually in the 1990s, when the truth trials were under way. I was a student and then a young practitioner during those years, so as the judicialization process moved forward I organically incorporated those new ideas. The ones who did have to be persuaded and transformed in their legal visions were those who took the first steps towards truth and justice. They belong to a different generation.\footnote{Interview, Federal Prosecutor, November 26th 2010.}

As these quotes indicate, the new legal discourse became internalized among members of the judiciary, thus replacing the behavioral norms that in the past led to formalist patterns of judicial decision-making. By adhering to new juridical standards, judges now see it as their mission to fulfill the international responsibilities of the Argentine state, investigating and punishing serious human rights violations. Coupled with the wealth of evidence amassed during the truth seeking trials held in the 1990s, this
transformation in legal preferences greatly facilitated the task of issuing indictments and handing down prison sentences in the 2000s.

Changes in the political environment also improved the chances of success of the judicialization process. The arrival of Néstor Kirchner (Peronist Party) to power in 2003 put an ally of the human rights movement in the presidential palace. In his first two years in office he promoted a series signature policies in the area of transitional justice. For example, he systematically retired army generals who publicly expressed support for the dictatorship; pushed for the repeal of the amnesty laws by parliament in 2003;\(^{263}\) changed the ideological composition of the Supreme Court by appointing pro-transitional justices between 2003 and 2005; created a special team in the Solicitor General’s office in charge of monitoring the investigations conducted all over the country and providing technical support to prosecutors;\(^{264}\) and instructed his Human Rights Secretary to act as a claimant on behalf of the state in cases filed in federal courts (Levitsky 2005; Skaar 2011; CELS 2011; Etchamendy and Garay 2011).\(^{265}\)

Was the achievement of over 200 prison sentences between 2006 and 2011 as easy as hunting lions in the zoo? In other words, did the combination of a non-existent military threat and a supportive administration mean that victims faced no obstacles in the quest for justice? A possible explanation for this explosion in judicial activism is that

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\(^{263}\) In 1998 Congress had already repealed the laws with no retroactive effects. Both repeals were essentially symbolic gestures. Notwithstanding, the law approved by congress in 2003 led the Buenos Aires Federal Appeals Court to send the files it had accumulated during the truth trials to investigative federal courts. This precipitated the start of the new investigations before the Supreme Court actually retroactively nullified the impunity dispositions.

\(^{264}\) For the creation of this special unit see Resolución PGN 14/07, Procuración General de la Nación, March 7th 2007 [On file with the author].

\(^{265}\) These policies were continued by Kirchner’s successor, Cristina Fernández (2007-).
the diffusion of international legal ideas among federal judicial actors constituted a necessary background condition, and that later changes in the political environment acted as catalysts. In other words, it could be argued that although Kirchner’s actions do not explain on their own the fact that criminal trials were held in Argentina after 2001, his unequivocal and decisive support for transitional justice caused the intensity of judicial activity during this period.

In the next two sections I will analyze geographical and temporal patterns of judicial decision-making in human rights trials in order to show that this story is too simple. It assumes that the entire judiciary simply gave in to the president’s demands. In fact, some sectors of the Argentine judicial branch ignored his directives. I will demonstrate that in the geographical and legal issue areas where the diffusion of the new legal orthodoxy by NGOs was limited, changes in the political environment did not lead judges to strategically avoid confronting with the executive. In some cases, particularly that of the Court of Cassation created and packed by Menem in the early 1990s, judges proved loyal to their anti-transitional justice allies. In other cases, judicial actors sympathetic to the human rights cause stuck to their pre-existing legal preferences in debates about the rules that should govern judicial proceedings in cases of crimes against humanity, in ways that put them at odds with the goals of victims and their lawyers. I will then show that what ultimately triggered the dismantling of these islands of resistance within the judiciary were not actions initiated by the executive, but personnel turnover initiatives launched by human rights organizations.
4.4.2 The Limits of Persuasion

Despite a political environment fully supportive of transitional justice, human rights cases were subject to stalling tactics by appellate court judges who were not sympathetic to the human rights cause. Of the 44 rulings handed down by FOTs between 2008 and 2011 only 14 were confirmed by the Court of Cassation, and it took the court an average of 18 months to hand down the confirmations. At the time of writing, the cases that are still pending have been in the court’s docket for up to a maximum of 28 months. In addition to delaying confirmations, the Court has also paralyzed important cases. For example, the court shelved the case involving the crimes perpetrated in the largest clandestine detention center (ESMA) for over a year because the Second and Fourth Chambers\(^{266}\) could not agree on which one had jurisdiction. The Supreme Court finally solved the controversy handing over the case to the Second Chamber. This lack of commitment of the Court of Cassation to the progress of human rights cases, and the deliberate delay in the proceedings is hardly surprising because until 2008 7 of Menem’s 13 original appointees were still occupying seats in this court.

The Court of Cassation has also been subject to criticisms from the human rights community and the government for its handling of preventive imprisonments. Before cases reach the oral trial stage, the defendants are often put under arrest. According to Argentine law, preventive imprisonments can only last for a maximum of three years. If at the end of that period the accused has not received a condemnatory ruling, s/he should be released until the trial. Human rights lawyers claim that these rules should not apply to cases of crimes against humanity, among other reasons because the defendants can use

\(^{266}\) The Court is divided into four chambers with three members each.
their political connections to flee the country if set free before the trial. Contrary to this view, between 2006 and 2011 the Court of Cassation ordered the release of numerous military officers including high profile torturers.

Among the most recent members of the Court, i.e. those who were not the product of Menem’s court packing efforts, the question of preventive imprisonments seems to be a question of strict legality:

My decisions are not ideological. We had to rule on preventive imprisonments that had legally expired 6 years ago. In non-human rights cases we always apply the same criteria, the criteria we teach our university students. Why would we change it? […] Fundamental legal questions such as the applicability of statutory limitations have all been answered, and I personally endorse the solutions offered by the Supreme Court. I agree that torturers should know that they cannot rely on the absence of a written law defining crimes against humanity in order to avoid a trial. Disappearing people is against any basic moral standard, even though the crime is not included in a country’s criminal code. But questions about process are still unresolved. There is a debate, and my views do not coincide with those of human rights organizations.267

Given that this judge voted with the majority in a decision striking down Menem’s presidential pardons even before the Supreme Court’s 2010 ruling on the subject,268 it is very possible that he is telling the truth about the motivations behind his views on the issue of preventive imprisonments. As he also mentioned in the interview, many of his menemista colleagues were not motivated by a legal position, but by an ideological one.

What is interesting about the behavior of the Court of Cassation is that not even the fiercest political pressures led these judges to change their position on the subject, or to accelerate the confirmation rate of FOTs’ rulings. For example, in 2008 the court

267 Interview, Buenos Aires, October 26th 2010.

268 Cámara Nacional de Casación Penal, Videla, Jorge Rafael y Massera, Emilio Eduardo s/ recurso de casación. Ruling of July 3rd 2009 [On file with the author].
released Alfredo Astiz, one of the most emblematic torturers from the dictatorship era.\footnote{Astiz was responsible for the disappearance of famous political prisoners such as the founder of Madres de Plaza de Mayo. In the 1990s he gained public notoriety by telling a reporter he was proud of what he had done.} The following day Kirchner’s successor, Cristina Fernández, appeared at an event organized by human rights NGOs and publicly shamed the judges accusing them of trying to perpetuate impunity.\footnote{Pág. 12, December 19\textsuperscript{th} 2008.} Three months later, human rights groups filed an impeachment request in the Judicial Council against the judges who signed the release. How did the judges respond to these threats?

In order to test the impact of these unequivocal political pressures on the behavior of the Court of Cassation I analyzed decision-making patterns in 232 rulings handed down by the Second Chamber on preventive imprisonments between 2007 and 2010.\footnote{The Second Chamber is the one that concentrates most of the cases for human rights violations. Moreover its members were the ones fiercely attacked by the President.} I coded the rulings 1 if they upheld the arrest and 0 if they released the prisoner. I then run two separate bivariate regressions to explore whether the rate of releases decreased after politics intervened by putting the judges in the spotlight, thus bringing strategic considerations to the fore. Figure 4.5 presents the model exploring the impact of the President’s menacing speech, and Figure 4.6 shows the results of the model exploring the impact of the materialization of those threats when activists filed the aforementioned impeachment request.
Figure 4.5. Decisions on preventive imprisonments before an after the President’s threat (Court of Cassation between 2007 and 2010)

Bivariate regression. Whiskers represent 95% confidence intervals. Source: Court of Cassation
Figure 4.6. Decisions on preventive imprisonments before and after the impeachment threat (Court of Cassation between 2007 and 2010)

Bivariate regression. Whiskers represent 95% confidence intervals.
Source: Court of Cassation

In neither model the effect is significant, suggesting that the judge quoted above was right when he indicated that “after the threats we continued to rule as we saw fit […] The reason why we were attacked is the bad reputation of this Court, especially after the Fourth Chamber sat on such an emblematic case as ESMA, paralyzing it for a long time.”

272 The Court of Cassation’s behavior in human rights cases is therefore interesting because it illustrates two sources of opposition to the goals and methods of NGOs. On the one hand, simple ideological objections to transitional justice and longstanding membership to the anti-transitional justice coalition. On the other hand we can also

272 Interview, Buenos Aires, December 26th 2010.
observe principled rejection of some of the legal arguments that make up the new juridical orthodoxy. As expected, the penetration of new ideas and values into an institution is never a linear process. Some ideas are more persuasive than others, and some individuals more persuadable than others. We saw a similar pattern in the previous chapter, in the case of the uneven penetration of new legal standards for evaluating evidence in human rights trials among Peruvian judicial actors.

Another example of judicial resistance is found when one compares courts in the City of Buenos Aires, the Province of Buenos Aires, and Córdoba, Santa Fe, the bastions of pro-transitional justice judges, with courts in the rest of the country, where the diffusion strategies designed by litigants in the 1990s were not deployed. Table 4.2 uses as an indicator of performance the rate at which indictments issued by investigative federal courts were filed in FOTs to initiate oral trials (Column 4). I focus on 2010 figures due to availability. 2010 is nevertheless a good year to look at because it was the year with the largest number of oral trials. Ideally the analysis would also incorporate the rate at which the alleged perpetrators mentioned in each docket are indicted by investigative judges. Unfortunately I could not get hold of that information. Despite this shortcoming, the chosen indicator is useful for two reasons. First, it controls for the size of the docket. The indicator shows the extent to which cases advance to the trial stage, irrespective of the number of individuals under investigation or those that receive indictments. Second, the indicator reflects the impact of the stalling tactics of Federal Appeals Courts in each jurisdiction. The reason why indictments cannot be automatically sent to the trial courts is that Federal Appeals Courts must usually decide on a series of
legal issues raised by defendants in interlocutory appeals (Figure 4.1). Appellate judges can therefore delay the progress of the case by not resolving those appeals in due time.

### TABLE 4.2

**INDICTMENTS FILED IN FEDERAL ORAL TRIBUNALS TO INITIATE ORAL TRIAL (DECEMBER 2010)**

<table>
<thead>
<tr>
<th>Jurisdiction (Province)</th>
<th>Indictments</th>
<th>Filed in FOTs</th>
<th>% of Indictments filed in FOTs</th>
<th>Intensity of truth trials during the 1990s</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chaco</td>
<td>63</td>
<td>36</td>
<td>57.14</td>
<td>LOW</td>
</tr>
<tr>
<td>Misiones</td>
<td>19</td>
<td>10</td>
<td>52.63</td>
<td>LOW</td>
</tr>
<tr>
<td>Córdoba</td>
<td>319</td>
<td>150</td>
<td>47.02</td>
<td>HIGH</td>
</tr>
<tr>
<td>City of Buenos Aires</td>
<td>380</td>
<td>138</td>
<td>36.32</td>
<td>HIGH</td>
</tr>
<tr>
<td>Tucumán</td>
<td>129</td>
<td>42</td>
<td>32.56</td>
<td>LOW</td>
</tr>
<tr>
<td>Province of Buenos Aires</td>
<td>314</td>
<td>93</td>
<td>29.62</td>
<td>HIGH</td>
</tr>
<tr>
<td>Santa Fe</td>
<td>102</td>
<td>30</td>
<td>29.41</td>
<td>HIGH</td>
</tr>
<tr>
<td>Rio Negro</td>
<td>160</td>
<td>35</td>
<td>21.88</td>
<td>LOW</td>
</tr>
<tr>
<td>Chubut</td>
<td>29</td>
<td>5</td>
<td>17.24</td>
<td>LOW</td>
</tr>
<tr>
<td>Salta/Jujuy</td>
<td>88</td>
<td>14</td>
<td>15.91</td>
<td>LOW</td>
</tr>
<tr>
<td>Mendoza</td>
<td>466</td>
<td>61</td>
<td>13.10</td>
<td>LOW</td>
</tr>
<tr>
<td>Entre Ríos</td>
<td>28</td>
<td>1</td>
<td>3.57</td>
<td>LOW</td>
</tr>
</tbody>
</table>

Source: Author’s own calculations based on data gathered at the Solicitor General’s Office
* The total number of indictments is higher than the one reported in Figure 1 because here I count each indictment, not each indicted individual.

Although the relationship between the rate reported in Column 4 and the holding of truth trials in the 1990s is far from perfect (r = 0.26), there is an identifiable pattern. The average rate among those jurisdictions that had truth trials in the 1990s is 35.6, whereas that of the provinces in the interior of the country is 26.8. Since Federal Appeals Courts were the ones in charge of the proceedings in the truth seeking trials, the courts in which human rights organizations did not litigate cases in the 1990s were not affected by
their diffusion strategies. Activists had no opportunities to build alliances with judges, change their legal preferences, and enlist them behind their cause. As a result judicial actors in these regions of the country are less well versed in the new legal orthodoxy and poorly trained in the investigative and juridical techniques needed to efficiently and effectively work in these cases. In addition, appellate judges who were not targeted by human rights organizations are more likely to be unsympathetic to their cause, appropriate dockets, and intentionally delay the progress of the cases. Let us analyze these two factors.

With the regards to the technical capabilities of judicial actors in the interior of the country, interview evidence gathered during fieldwork is illustrative. The judicial actors I interviewed made it abundantly clear that human rights cases are disruptive of the routines and standard practices to which judges and prosecutors in the interior of the country are accustomed. Especially those with no experience in the truth trials have a hard time understanding the special requirements of these cases, which pose unique practical and legal challenges. For example, a member of the Solicitor General’s office in charge of providing legal support to provincial prosecutors explained that:

These individuals do not have an open mind. In Salta, for instance, they have no experience in dealing with these cases […] They operate with an extremely formalistic understanding of the law and of the way the judiciary should work. As a result we have a hard time getting them to respond favorably to our requests. It is hard to make them understand the historic importance of the trials. But beyond these political issues, it is also hard for them to understand that according to Supreme Court jurisprudence it is their responsibility to make an effort to speed up the proceedings. The Court has clearly stated that fulfilling the international responsibilities of the Argentine state also involves getting rid of formalistic interpretations of the law that slow down the progress of the cases. Either they do not feel the pressure of these instructions, or they are not aware of them.²⁷³

²⁷³ Interview, Buenos Aires, November 26th 2010.
Another member of the special team in the Solicitor General’s office reinforced the point made by his colleague:

It was difficult to persuade judges and prosecutors in the interior of the country that it was their job to apply international criminal law to these cases. In response they would tell us: ‘Don’t come to me with strange ideas. During our entire career we were perfectly fine by focusing on domestic law.’ This cases go against the inertias characteristic of any bureaucracy, interrupting the routines if their members.

Yet another gave me a specific example of how these dynamics play out in practice, delaying the progress of the cases from the investigative stage to the trial stage:

Where technical deficits are more apparent is in the resistance to accumulate individual cases in larger mega-cases involving a multiplicity of victims. This resistance reflects a lack of understanding of the fact that these were not isolated homicides or kidnappings but were all instances of a systematic plan to disappear political opponents. Because they were all a consequence of the same criminal enterprise, they should be investigated together. Thinking of these cases as isolated events responds to a cultural reflex of members of the judiciary. That is how they are used to proceed. They were never trained to act differently […] For example, during the truth trials the Córdoba Federal Appeals Court produced a mega-case including crimes perpetrated by the 2nd division of the army based in Córdoba but with jurisdiction in other provinces of the northwest such as La Rioja. When the prosecutors outside Córdoba began investigating the specific crimes perpetrated in their provinces essentially dismembered the mega-case! This incredibly slowed down the proceedings.

Finally an appellate judge who regularly reviews the decisions made by courts in the interior spoke about the technical errors he finds in many of the cases:

We read decisions sent by lower courts in the interior over and over again, because many of them are disastrous. Who are the ones who issue those rulings? Are they expert jurists? No! They have no expertise in these questions. It is very nice to talk about crimes against humanity, but at the end of the day you have to

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274 Interview, Buenos Aires, November 2nd 2010.

275 Interview, Buenos Aires, October 27th 2010.
know how to evaluate and analyze the evidence. A standard legal education is clearly not enough to successfully do this in cases of human rights violations that took place decades ago, in part because of the nature of the evidence that we must use […] I understand it is very hard to study when one is working in a court. If one hasn’t been studying these issues for a long time, it is hard to do a good job from a technical point of view. Roxin’s theory of command responsibility is not as simple to apply as some people think.276

In addition to technical deficiencies, my interviewees also mentioned the pre-existing political loyalties of judicial actors in the interior of the country as a major factor slowing down the progress of human rights cases. Figures presented in Table 4.3 speak to this. Judges outside the city and province of Buenos Aires are more likely to offer much more favorable arrest conditions to the defendants. Among the former military officers arrested in military barracks, 78% were indicted by courts in the interior of the country. The geographical pattern is reversed when one looks at those arrested in regular prisons. Defendants who are under the watch of their own colleagues and former subordinates in the military enjoy more privileges, especially the possibility of making temporary illegal escapades.

276 Interview, Buenos Aires, October 26th 2010
### TABLE 4.3.

**DEFENDANTS UNDER ARREST BY PRISON TYPE IN 2008 (%)**

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>% in military barracks</th>
<th>% in regular prisons</th>
</tr>
</thead>
<tbody>
<tr>
<td>City of Buenos Aires</td>
<td>9</td>
<td>51</td>
</tr>
<tr>
<td>Province of Buenos Aires</td>
<td>13</td>
<td>26</td>
</tr>
<tr>
<td>Rest of the country</td>
<td>78</td>
<td>23</td>
</tr>
</tbody>
</table>

Source: CELS (2008)

To further illustrate the patterns of complicity between judges and military officers I conducted archival research and interviews to explore the situation of human rights cases in two jurisdictions that rank poorly in terms of the indicators used in Table 4.2: Mendoza and Salta/Jujuy.

Jujuy courts have in their dockets 115 cases of human rights violations involving 158 victims, and to date no oral trials have been held. Similarly, in Salta only 1 trial has taken place, in the case of a single victim of forced disappearance. These two northwestern provinces are under the jurisdiction of the Salta Federal Appeals Court. The complicity between investigative and appellate judges and the military goes a long way explaining the dire situation of human rights cases. Not even the most decisive pressures exerted by the national government via the Solicitor General’s office were able to induce strategic judicial behavior among these judges.

Judge Rabbi Baldi, president of the Salta Federal Appeals Court, was appointed after his predecessor resigned in 2009, accused of collaborating with the military in the perpetration of crimes against humanity in Salta during the 1970s. The new judge also has connections with the armed forces: his brother in law is investigated for crimes committed by the Fifth Division of the Army. In fact, in 2008 he used his contacts in the
police to delay a search and seizure operation in his sister’s house. As a Federal Prosecutor explained in an interview:

In Salta the judge who had original jurisdiction in many of these cases was removed due to his participation in the crimes! [...] Like in many other jurisdictions of the interior of the country, it is not uncommon that the accused have all sorts of personal relations with judicial actors. Everyone knows each other. These are very small provinces, which have the characteristics of feudal societies. Federal judges have great connections, and an enormous amount of influence and authority.\textsuperscript{277}

Rabbi Balbi’s commitment to stall human rights cases is clearly shown by the fact that he systematically rejected interlocutory appeals filed by litigants and the prosecution questioning decisions made by his protégé in the neighboring province of Jujuy, judge Olivera Pastor. The latter was appointed in 2004 to an investigative federal court after Rabi Balbi heavily lobbied the Judicial Council. Olivera Pastor had under his jurisdiction all the cases of victims disappeared in his province. Initially, the judge was reluctant to accumulate cases to facilitate the proceedings and reflect the systematic nature of the dictatorships’ repressive plan. There was an average of 1.3 victims per case. Not even the strong and decisive pressures exerted by the Solicitor General’s office managed to convince the judge to change his criteria. For example, data from the 6 accumulation requests filed by this office and answered by the judge, indicates that it took Olivera Pastor an average of 7 months to decide whether or not to group the cases of 76 victims. Moreover, of the 170 alleged perpetrators who are still alive in the province, only 15 have

\textsuperscript{277} Interview, Buenos Aires, November 26\textsuperscript{th} 2010.
been indicted. This is partly due to the fact that the between 2007 and 2011 the judge rejected 88% of the prosecution’s requests to call in the military for questioning.\textsuperscript{278}

In the province of Mendoza, where the dictatorship disappeared almost 200 people, the situation during the second half of the 2000s was not very different from the one described in the cases of Salta and Jujuy. In 2008, for example, there were only 15 indictments and not a single former military officer was serving time in jail. The Federal Appeals Court was responsible for nullifying all arrest warrants issued by investigative federal court judges in Mendoza and neighboring provinces. One of the decisions accepted the promise of abiding by future court orders made to the judges by a former fugitive. Although as shown in Table 4.2, in 2010 there were 466 indictments, by late 2011 only one oral trial had been held. Moreover, the press has reported several attacks against human rights activists, including the electrification of the fence surrounding the house of a prominent lawyer.\textsuperscript{279}

The situation is hardly surprising if one considers that the members of the Federal Appeals Court and the Federal Prosecutor with jurisdiction in that court had strong connections to the military. One of the prosecutors working in Mendoza as part of the special team in the Solicitor General’s office explained the situation in an interview:

\begin{quote}
These were judges who supported the theory of the two demons. There was an enormous resistance to investigate the past. But it wasn’t a resistance based on a disagreement with the norms of international law. It was ideological, and also personal, given their connections with the defendants. They thought that by stalling the cases they could buy time for the human rights fervor to wither away.\textsuperscript{280}
\end{quote}

\textsuperscript{278} These figures were obtained by consolidating data made available by the Solicitor General’s Office in a report written in April 2011. It is on file with the author.

\textsuperscript{279} Página 12, November 28\textsuperscript{th} 2008.

\textsuperscript{280} Interview, Buenos Aires, December 16\textsuperscript{th} 2010
His colleague reinforced the idea that judges had clear ideological motivations to stop the cases:

Judges usually face a dilemma. If they reject all of the appeals filed by the defendants they can be accused of not guaranteeing due process; if by contrast they are permissive with those requests, they can be accused of protecting torturers. But in the case of Mendoza, the members of the judicial branch had an extremely permissive attitude with the stalling tactics of the defendants. They delayed decisions on interlocutory appeals and released the detainees. They applied the worst legal doctrines. They rejected the accumulation of the cases, they did not accept as a crime the crime of forced disappearances, etc.\textsuperscript{281}

Most of the judges involved in these cases were judges or prosecutors during the dictatorship, and have publicly declared their friendship with the military officer who was appointed by the juntas to govern Mendoza in the 1970s. According to the President of CELS, the judges “do not want a parade of witnesses telling the people of Mendoza what they did during the military dictatorship.”\textsuperscript{282} In fact, in 2009 a special team sent by the Supreme Court to organize the documentary evidence of the crimes of the dictatorship in Mendoza, found that two of the aforementioned judicial actors, judge Romano and prosecutor Miret, participated in the torturing of several detainees in the 1970s. Romano was later formally accused by human rights organizations of the perpetration of 103 crimes against humanity.

In sum, the examples of judicial resistance described in this section (the Court of Cassation and the judges in the interior of the country) suggest that the judicialization process faced serious obstacles despite the presence of an extremely supportive political

\textsuperscript{281} Interview, Buenos Aires, December 16\textsuperscript{th} 2010

\textsuperscript{282} Página 12, April 21\textsuperscript{st} 2010
environment after Kirchner won the presidency in 2003. These cases illustrate the long lasting impact of the court packing initiatives led by an anti-transitional justice political coalition in the 1990s, and of the limited enlistment and persuasion of judges in the aforementioned courts and jurisdictions during the diffusion process ignited by human rights organizations in the second half of that decade. Whereas Menem’s colonization of the judiciary explains the ideological resistance of some judicial actors to the new wave of prosecutions, the unevenness of the diffusion process accounts for both the technical deficiencies found in the interior of the country as well as the lack of commitment of these judges to the human rights cause. By exploring the impact of these historical processes it is possible to highlight the limits of strategic explanations of judicial behavior. Recalcitrant judges were willing to defy a powerful executive, and those with limited technical skills were not able to effectively respond to the preferences of the administration and human rights organizations because they lacked the ability to do so. In other words, corporate and ideological commitments, as well as ignorance of certain investigative techniques or jurisprudential solutions, make judges and prosecutors imperfect agents of elected politicians.

All in all, both factors do a better job at explaining variation in advances and shortcomings during the transitional justice process initiated in Argentina during the 2000. If we only analyze national statistics on the number of convictions and their temporal correlation with the political changes introduced by Kirchner, we do not obtain a nuanced picture of the behavior of the judiciary during this process. The behavior of the Court of Cassation as well as of several federal judges in the interior of the country suggests that positive transitional justice outcomes require deep institutional changes inside judicial
branches. Political pressures or the empowerment of pro-transitional justice electoral coalitions in power, are not sufficient conditions.

In the next section of the chapter I will document the efforts of human rights organizations to get rid of these islands of resistance. The impossibility of persuading certain judicial actors, and the opportunities afforded by a favorable political environment, led human rights activists to leave behind their persuasion and diffusion strategies, and activate a different mechanism of institutional transformation: personnel changes.

4.4.3 Personnel Changes in the 2000s

4.4.3.1 The Supreme Court

The aforementioned obstacles faced by the judicialization process did not trigger the realization that promoting personnel changes in the federal judiciary was necessary for the advancement of a progressive rights agenda. Human rights organizations, in particular the Mothers of Plaza the Mayo, had already promoted the lustration the judiciary in the early 1980s when they produced a list of the judges who had taken oath under the Statute of the Armed Forces in the 1970s. As we saw in Part I, partly as a result of Alfonsín’s failure to replace the questioned judges, many NGOs initially had little faith in a transitional justice process put in the hands of the judiciary.

The second major attempt to have a say in who occupies a seat in the federal bench was launched 20 years later, when in 2002 a series of civil society groups led by CELS began to draft a document entitled “A Court for Democracy,” promoting changes

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283 The list is on file with the author.
at the level of the Supreme Court (CELS et al. 2002). Among its various proposals, the NGO coalition suggested mechanisms to increase the transparency of the nomination process. In particular, it demanded the opening up of an institutional space for civil society to express support for or to question the nominees. The document also expressed that both the President and the Senate should strive to ensure gender, regional and expertise diversity among the proposed candidates for the Court. Finally, in order to avoid judges like those appointed by Menem, the document insisted that the candidates should meet certain ethical and professional standards (ADC 2008).

When Kirchner got to power in May 2003 he instructed his party to begin impeachment proceedings against some of the members of the Supreme Court. This decision was immensely popular due to the public’s growing discontent with Menem’s court (Ruibal 2009). These political pressures led to the resignation of three justices. In 2004 and 2005 Congress removed two more justices, thus putting an end to Menem’s so-called “automatic majority.” Facing the prospect of having to fill vacancies in the Supreme Court, in 2003 Kirchner’s Minister of Justice approached CELS lawyers indicating that the government was ready to endorse the aforementioned proposals. The result of the collaborative effort was Presidential Decree 222/2003, which was a replica of “A Court for Democracy.”

Between October 2003 and February 2005, Kirchner announced four nominees to fill the vacancies. According to one of the civil society organizations that were part of

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284 Interview, CELS lawyer, December 20th 2010.

285 Kirchner was entitled to fill in 6 vacancies as a result of the resignations and impeachments. However, in 2005 the president accepted another proposal from these civil society organizations and reduced the Court’s size from 9 to 7. That way the President did not have the chance to fully pack the court.
the NGO coalition, the new system forced the Executive branch to put greater care when choosing the nominees, and allowed the citizenry “to evaluate and debate about them” (ADC 2008:32, my translation). Among the candidates proposed by the President there was a historic ally of the human rights movement and one of the most prestigious Latin American legal theorists (Eugenio Zaffaroni), a judge from the International Criminal Court and former political prisoner during the dictatorship (Carmen Argibay), and two respected civil law experts (Ricardo Lorenzetti and Elena Highton). All of the nominations, but in particular the first two, were applauded by the human rights community. My sources indicate that when the President met with the potential candidates before going public with the nominations, he asked them about their position on the constitutionality of the amnesty laws.  

In fact, when interviewed by the media during the nomination process, the future President of the Court, Ricardo Lorenzetti, made his pro-transitional justice position crystal clear. When the Senate confirmed the nominees, human rights organizations’ strategy to promote personnel changes in the federal judiciary achieved its first major victory.

As we saw in previous sections, under its new composition, the Supreme Court handed down a series of key rulings that enabled the re-launching of the judicialization process. Most importantly, the institutional mission of the Court changed dramatically. There is evidence to suggest that the judges think of transitional justice as the Court’s signature issue. According to one of its members,

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286 Interview, CELS lawyer, Buenos Aires, December 20th 2010.

287 Página 12, September 3rd 2004.
The emphasis on human rights cases has had a tremendously positive impact on the Court’s legitimacy. The Court consciously gave this issue a prominent position in its institutional agenda.288

For example, the Supreme Court promoted the creation of an inter-branch commission to monitor the progress of human rights cases across the country. The commission gained notoriety when it summoned in the President of Salta’s Federal Appeals Court to publicly question him about the sorry state of the judicialization process in his jurisdiction. Moreover, in an attempt to publicize the work of the judiciary, the Court created an in house news agency. The agency has a Twitter account that informs about important rulings, what is going on in oral trials around the country, the holding of public hearings and the issuing of indictments in high profile cases, with the expectation that journalists will pick up the news and comment on the announcements. A content analysis of the agency’s tweets between January 2009 and December 2011 indicates that 23.5% of the times the Supreme Court sought to inform the public about the judiciary’s agenda it highlighted the achievements of federal courts in human rights cases. Similarly, 32% of the speeches delivered by the President of Supreme Court between 2002 and 2011 were about the state of human rights cases, emphasizing their priority status in the Courts’ agenda. When analyzing statements to the media made by the President of the Court during the same time period, 28% mentioned human rights cases.289

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288 Interview, Buenos Aires, December 17th 2010.
289 Other issues such as judicial independence, division of powers, the internal workings of the judiciary, domestic violence and the need for more resources, received a prominent treatment but a less central one. This data was obtained after classifying articles from newspaper Página 12 between 2002 and 2012. The articles were obtained by conducting an online search of the words “Ricardo Lorenzetti” on the paper’s website: www.pagina12.com.ar.
4.4.3.2 The Court of Cassation

The second major battle launched by human rights organizations to promote personnel changes in the federal judiciary was the one involving the composition of the infamous Court of Cassation. The objective was to remove the recalcitrant judges appointed by Carlos Menem in 1991. As was discussed in Part II of this chapter, Menem’s objective was to nominate judges with a clear anti-transitional justice position in order to erect a judicial buffer that would stop any future human rights cases. 7 of Menem’s 13 judges were still in the Court of Cassation in the mid 2000s.

The saga began in 2004 when the ESMA case showed no signs of progress because the court was deliberately delaying decisions on the interlocutory appeals filed by the defendants. Two months after Congress repealed the amnesties in 2003, the Court appropriated the case, removing it from the jurisdiction of an investigative federal court judge. It did so after one of the defendants questioned the constitutionality of the law repealing the amnesties. In 2007 the Court had still not ruled on the interlocutory appeal. The case was emblematic because it included the victims disappeared in the largest clandestine detention center.

Lawyers from two organizations, Asociación de ex Detenidos Desaparecidos and the Liga Argentina por los Derechos del Hombre, recused the judges of the Fourth Chamber accusing them of being the “military chamber.” They had previously filed a criminal lawsuit against 10 members of the Court of Cassation for deciding to grant the Fourth Chamber jurisdiction on the ESMA case. In response to these attacks, judge Bisordi, the President of the court, referred to one of the lawyers as a “delinquent terrorist”
in a ruling rejecting the recusals.\footnote{290} Joined by other human rights organizations, the lawyers alluded to by the judged filed an impeachment request in the Judicial Council.\footnote{291} In November 2005 the Judicial Council ruled to fine judge Bisordi. Although the majority of the council’s members agreed with the claimants that Bisordi’s ideological positions made him unfit to rule in human rights cases, they failed to impeach him or the other two members of the Fourth Chamber.\footnote{292}

Two years later, in March 2007, human rights organizations tried once again to get rid of unsympathetic judges in the Court. At this point the Court had over 200 pending decisions on interlocutory appeals. In contrast to the previous attempt at removing the judges, this time they managed to enlist President Kirchner behind them. 61 former political prisoners who were claimants in four mega cases stalled by the court (1er Cuerpo del Ejército, Campo de Mayo, ESMA and Plan Cóndor), filed a suit in the Judicial Council against judges Hornos, Capolupo, Riggi and Bisordi.\footnote{293} Five days later, Kirchner made a speech fully endorsing the efforts of human rights organizations to remove the judges. He stated: “I tell the Judiciary, and I know that in the Judicial Council they will also hear: please, enough! Trials and punishment! This is what we need. I swear that I push and push, but there are judges and prosecutors that turn a blind eye.”\footnote{294}

\footnote{290} Página 12, September 23\textsuperscript{rd} 2004.

\footnote{291} When the Court of Cassation finally accepted the recusal of the judges, it appointed two provisional judges to rule on the interlocutory appeals related to the ESMA case. One was an attorney who worked for military officers facing charges for human rights violations. The other had been Under-Secretary of Justice during the dictatorship. NGO lawyers also successfully recused them. See Página 12, April 7\textsuperscript{th} 2005.

\footnote{292} Página 12, November 2nd 2005.

\footnote{293} Página 12, March 20th 2007

\footnote{294} Página 12, March 25th 2007
days after that, judge Bisordi took a 30 days leave of absence but insisted that he would not resign, and a week later another judge who was not formally questioned in the suit but who had connections with the defendants, resigned after securing her retirement package.\footnote{Página 12, April 11th 2007. This judge had previously recused herself from intervening in another case (1er Cuerpo del Ejercito) due to her personal friendship with one of the defendants.} Finally, in November, both Bisordi and Cupolupo stepped down, leaving only two of the questioned judges still standing.\footnote{Página 12, November 6th 2007.}

When the obstructionist judges resigned, the Court began to hand in decisions on the interlocutory appeals that were stalling the progress of the cases. In particular, the appeal filed by one of the defendants in ESMA that the judges had been unwilling to resolve thus blocking the proceedings of the largest human rights case, was finally decided endorsing the Supreme Court’s 2005 decision on the unconstitutionality of the amnesties. Moreover, the court handed down rulings confirming the prison sentences issued by FOTs in two oral trials (CELS 2011).

The attempts to purify the court did not end here. As I mentioned in the previous section, in December 2008 the judges of the Second Chamber decided to end the preventive imprisonment of high profile tortures. When these judges were sworn in April 2008 to provisionally fill some of the vacancies in the Court, they had expressed their commitment to human rights cases. Judge Yacobucci, for example, stated: “we have all the well-known human rights cases and we will pay special attention to make sure that everything is done without delays.”\footnote{Página 12, April 18th 2008.} In fact, in the following two years they confirmed 8 condemnatory rulings handed down by FOTs. Despite this, their criteria on preventive
imprisonments did not satisfy human rights organizations. Following the aforementioned rulings of December 2008, they filed an impeachment suit against them in the Judicial Council. As one of the judges told me in an interview:

We were threatened. Bonafini [the President of Mothers of Plaza de Mayo] said she would come after our families. We were accused of protecting the perpetrators. They accuse everyone who does not rule like they want. Some because they grant house arrests, others because instead of sentencing all of the accused they acquit a few, etc. […] Some judges in lower courts resigned, fearing they could suffer a similar fate. 298

As I showed in the previous section, these pressures did not change the court’s decision-making patterns in preventive imprisonment cases. But the pressures were effective in forcing the resignation of five more judges, both old and new, between 2010 and 2011. One of them faced two suits filed by human rights organizations, one of them in the Judicial Council and another in a federal court, in which he was accused of collaborating with the dictatorship’s plan to abduct babies. 299

What had taken Menem less than a month in the early 1990s took human rights organizations nearly 6 years in the 2000s. The constant pressure exerted on the Court in the form of criminal lawsuits and impeachment requests paid off because it put the situation in the spotlight, calling the attention of politicians supportive of their cause. In 2011 President Fernández announced her nominees to finally change the composition of the Court of Cassation. Among the candidates confirmed by the Senate and applauded by the NGOs was a human rights lawyer from the Province of Santa Fe. Although at the time of writing the new judges have yet to hand down major rulings concerning cases of

298 Interview, Buenos Aires, October 26th 2010

299 Página 12, November 8th 2011
the dictatorship era, there is evidence that the profile of the court has changed dramatically. The most relevant decision thus far has been the drafting of a series of rules to speed up the proceedings. For example, when evaluating the rulings handed down by FOTs, the court will no longer evaluate evidence that has already been approved in related cases. The judges also created a registry of victims/witnesses to avoid the same witnesses from testifying about the same events in different oral trials.  

4.4.3.3 Lower Federal Courts

Although the main target of human rights investigations are members of the military and the police during the dictatorship era, judges who collaborated with the dictatorship are starting to be investigated and prosecuted. According to the Solicitor General’s Office in charge of monitoring the progress of the cases, in 2011 there were between 45 and 60 former judges and prosecutors formally accused of perpetrating crimes against humanity. One of these former judicial actors has received a prison sentence. These figures indicate that there is a growing commitment on the side of the Argentine federal judiciary to clean its image in relation to the accusations that it was a crucial civilian ally of the de facto regime.

In addition to investigating past judicial behavior, since the very beginning of the new phase of the judicialization process human rights organizations have sought to remove lower court judges and prosecutors whom they think obstruct the ongoing investigations. A careful reading of the Judicial Council’s rulings in cases debated

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300 La Nación, January 14th 2012.

301 Página 12, August 18th 2011.

302 A former judge in the province of Santa Fe was sentenced in 2010.
between 2003 and 2012 indicates that 29% of lower federal court judges who went through impeachment proceedings, faced accusations filed by NGOs concerning their behavior in human rights cases.\textsuperscript{303} Table 4.4 complements this figure by listing different types of actions taken against members of the judiciary. The data was obtained by conducting research in the online archives of national and provincial newspapers, the Judicial Council, NGOs and the Solicitor General’s office. In total I was able to identify 24 different actions taken between 2003 and 2011 in 8 different provinces. In 17 of these instances, human rights cases were removed from the orbit of the questioned judges and prosecutors.

\textsuperscript{303} The information was obtained by analyzing rulings found in www.pjn.gov.ar
**TABLE 4.4**

**JUDICIAL ACTORS FORMALLY QUESTIONED BY HUMAN RIGHTS ORGANIZATIONS**

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Year</th>
<th>Judicial Actor*</th>
<th>Action taken by NGOs**</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Buenos Aires</td>
<td>2010</td>
<td>1 Investigative Court Judge</td>
<td>Suit filed in the Judicial Council (Abuelas de Plaza de Mayo)</td>
<td>In process</td>
</tr>
<tr>
<td>Chaco</td>
<td>2003</td>
<td>3 Federal Appeals Court Judges</td>
<td>Suit filed in the Judicial Council (CELS, HIJOS)</td>
<td>Suspended; not impeached; removed from case</td>
</tr>
<tr>
<td></td>
<td>2004</td>
<td>1 Federal Prosecutor (Federal Appeals Court)</td>
<td>Criminal lawsuit for collaboration with the dictatorship; Complaint filed in the Solicitor General’s Office (CELS, HIJOS)</td>
<td>Removed from the case</td>
</tr>
<tr>
<td></td>
<td>2004</td>
<td>1 Federal Prosecutor (Investigative Federal Court)</td>
<td>Criminal lawsuit for collaboration with the dictatorship; Complaint filed in the Solicitor General’s Office (CELS, HIJOS)</td>
<td>Removed from the case</td>
</tr>
<tr>
<td></td>
<td>2004</td>
<td>1 Federal Prosecutor (Investigative Court)</td>
<td>Complaint filed in the Solicitor General’s Office (CELS, HIJOS)</td>
<td>Removed</td>
</tr>
<tr>
<td></td>
<td>2004</td>
<td>1 Federal Prosecutor (Federal Appeals Court)</td>
<td>Complaint filed in the Solicitor General’s Office (CELS, HIJOS)</td>
<td>Removed</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>Year</td>
<td>Judicial Actor*</td>
<td>Action taken by NGOs**</td>
<td>Outcome</td>
</tr>
<tr>
<td>-----------------------</td>
<td>------</td>
<td>-----------------</td>
<td>------------------------</td>
<td>-------------------------------------------------------------------------</td>
</tr>
<tr>
<td>City of Buenos Aires</td>
<td>2005</td>
<td>1 Federal Oral Tribunal Judge</td>
<td>Suit filed in Judicial Council (CELS)</td>
<td>Resigned</td>
</tr>
<tr>
<td></td>
<td>2005</td>
<td>1 Federal Prosecutor (Federal Oral Tribunal, Federal Appeals Court)</td>
<td>Complaint filed in the Solicitor General’s Office (CELS)</td>
<td>Resigned</td>
</tr>
<tr>
<td></td>
<td>2005</td>
<td>1 Investigative Court Judge</td>
<td>Suit filed in Judicial Council</td>
<td>No action taken</td>
</tr>
<tr>
<td></td>
<td>2009</td>
<td>1 Federal Oral Tribunal Judge</td>
<td>Suit filed in Judicial Council (Secretariat of Human Rights)</td>
<td>Judge asked to be transferred to a different court with not human rights cases in its docket</td>
</tr>
<tr>
<td>Córdoba</td>
<td>2011</td>
<td>1 Federal Investigative Court Judge</td>
<td>Suit filed in Judicial Council (Abuelas de Plaza de Mayo)</td>
<td>In process</td>
</tr>
<tr>
<td></td>
<td>2011</td>
<td>1 Federal Appeals Court Judge</td>
<td>Suit filed in Judicial Council (no information)</td>
<td>In process; judge was successfully recused</td>
</tr>
<tr>
<td>Jujuy</td>
<td>2011</td>
<td>1 Federal Investigative Judge</td>
<td>Suit filed in the Judicial Council (Human rights organizations)</td>
<td>Resigned</td>
</tr>
<tr>
<td>Mendoza</td>
<td>2008</td>
<td>4 Federal Appeals Court Judges</td>
<td>Suit filed in Judicial Council (Movimiento Ecuménico por los Derechos Humanos and Fundación Liga Argentina por los Derechos Humanos)</td>
<td>3 Resigned; 1 Impeached</td>
</tr>
<tr>
<td></td>
<td>2010</td>
<td>1 Federal Prosecutor (Federal Appeals Court)</td>
<td>Suit filed in Judicial Council (Asociación de Ex Detenidos Desaparecidos)</td>
<td>Removed; Impeached</td>
</tr>
<tr>
<td>Salta</td>
<td>2007</td>
<td>1 Federal Appeals Court Judge</td>
<td>Suit filed in Judicial Council (Human rights organization)</td>
<td>Resigned</td>
</tr>
<tr>
<td>Santa Fe</td>
<td>2009</td>
<td>3 Federal Oral Tribunal Judges</td>
<td>Suit filed in Judicial Council (Human Rights NGOs and Ministry of Justice)</td>
<td>No Information</td>
</tr>
</tbody>
</table>

Key: * In parenthesis is the type of court in which the prosecutor litigates cases

** In parenthesis is the name of the NGO and/or government agency that filed the lawsuit or complaint. The category “human rights organization” is used when the available information does not specify which NGO is behind the initiative.
In absolute terms, these figures are not all that impressive. However, a detailed look at the judges and prosecutors involved reveals that in some jurisdictions like Chaco and Mendoza, activists were able to totally overhaul the federal judiciary, changing the fate of human rights trials in those places.

Table 4.2 (see previous section) showed that in 2010 the Chaco federal judiciary was the top performer in terms of the percentage of indictments that were filed in FOTs to initiate oral trials. This performance is puzzling given that Chaco was not significantly affected by the truth or child abduction trials sponsored by human rights organizations in the 1990s. The answer to this puzzle is that the shortcomings of the diffusion process in this province were compensated by the activation of an intense personnel-changing strategy in the 2000s.

Chaco was the site of one of the most well known massacres perpetrated by the military: the Margarita Belén massacre. When the case was re-opened after 2003, human rights organizations realized that the two federal prosecutors in charge of promoting the investigations had collaborated with the military in the perpetration of crimes against humanity. They immediately filed criminal lawsuits against them and managed to remove them from the case. They also filed complaints in the Solicitor General’s office to remove their substitutes because they systematically put obstacles for the progress of the investigations. Moreover, in 2004 CELS and the local chapter of HIJOS, an organization that groups the sons and daughters of the disappeared, also launched serious accusations in the Judicial Council against the members of the Federal Appeals Court who nullified all the arrest warrants issued by the federal investigative judge. Although the impeachment failed, the judges were suspended and removed from the case.
After the lustration of the federal judiciary was complete, the chief of the special team of prosecutors in the Solicitor General’s office, a Chaco native himself, was put in charge of the prosecution and of closely monitoring the proceedings. In 2010 the local FOT finally sentenced 8 former military officers to life imprisonment for their criminal responsibility in the Maragarita Belén massacre. Chaco thus became a “leading case” of the effectiveness of naming, shaming and suing judges and prosecutors who put obstacles to human rights investigations.

The Mendoza federal judiciary, whose stalling tactics I discussed in the previous section, suffered a similar fate between 2008 and 2012. When it became clear that the province was an outlier in the national judicialization process, human rights organizations put their eye on the federal judges. They discovered evidence of their past connections with the defendants. The situation of human rights cases in the province was curious because by 2010 it was the only one of the so-called “metropolitan” provinces with a large middle class and modern urban centers, where no prison sentences had been issued.

After local NGOs went public with their accusations against members of the Federal Appeals Court, the Supreme Court intervened the court putting reliable judges in charge of human rights cases. The President of the court resisted this move by trying to no avail to lobby the Supreme Court. Impeachment proceedings were subsequently initiated against 6 of Mendoza’s federal judges. Two of them, the ones also accused of perpetrating crimes against humanity, were impeached and the others resigned.

The turnaround in the situation of human rights cases in Mendoza is impressive. For example, a year after the Federal Appeals Court judges were removed, the province
passed from having 4 cases in the trial stage to having 20 (CELS 2010). According to the federal prosecutors put in charge of those cases by the Solicitor General’s Office,

The decisive factor was the partnership between the new prosecutors and the victims. For the first time there were judicial players in Mendoza willing to push the cases from within the judiciary. Before we got there the defendants put obstacles, the judges supported them and the prosecutors turned a blind eye […] Once the victims managed to remove the judges, our job was much easier.304

In sum, after 2003 human rights organizations sought the removal from the bench judges and prosecutors who proved unfriendly to their cause. Given their personal and ideological connections to the military, it was unlikely that these individuals could ever be persuaded by the new legal orthodoxy or by the political imperative to move forward with the judicialization process. Human rights organizations pursued this strategy at all levels of the judiciary, seeking to have an impact on the composition of the Supreme Court, the Court of Cassation and lower federal courts. In the cases of the Court of Cassation and lower federal courts, NGOs were the first movers, calling the attention of their political allies. Politicians, from Presidents Kirchner and Fernández to government and opposition representatives in the Judicial Council, were willing to accept the impeachment suits filed by victims and their lawyers, initiate the impeachment proceedings, and go public against the questioned judges. As shown above, the shaming tactics forced many to resign. The authorities removed those who refused to leave.

4.5 Conclusion

After the experience of the 1980s, Argentine pro and anti transitional justice coalitions sought to galvanize a critical mass of judicial actors to act in their favor in

304 Interview, Buenos Aires, December 16th 2010.
order to guarantee stable jurisprudential outcomes. The analysis presented in this chapter shows the heuristic productivity of historicizing judicial politics in order to understand the social and political origins of judges’ legal preferences and levels of commitment to socio-political causes. The evidence analyzed here indicates that these factors can lead to enduring patterns of judicial decision-making, irrespective of changes in the strategic incentives faced by judicial actors as political support for the causes they are willing to champion varies. For example, Menem’s court packing initiatives managed to entrench enemies of transitional justice. 20 years later, when political power had completely changed hands, these actors still exerted pressures to halt the judicialization process. Similarly, judges who collaborated with the military in the 1970s and reached high positions inside the judiciary after the democratic transition were not dissuaded from actively defying the Kirchner administration and the human rights movement in the 2000s. Another example of the long lasting impact of the entrenchment of ideas and interests in the judiciary is the diffusion of international law among certain federal court judges, which led them to depart from Menem’s and De la Rúa’s policies in the 1990s, and facilitated transitional justice efforts the following decade.

These dynamics show that the Huntingtonian paradigm (e.g. Huntington 1991; Zalaquett 1992; Evans 2007; Karl 2007) and the rational choice school of judicial behavior (e.g. Epstein and Knight 1998; Epstein et al. 2001; Iaryczower et al. 2002; Bergara et al. 2003; Helmke 2005) fail to successfully explain the Argentine case. The preferences of executives never fully conditioned the actions of judicial actors. Judges and prosecutors handed down landmark rulings in favor of transitional justice in the 1990s, decisively undermining the impunity regime promoted by Alfonsín and Menem.
They did so in an environment in which successive executives clearly indicated that they preferred opposite outcomes. Similarly, in the 2000s judges in many parts of the country showed reluctance to follow Presidents Kirchner’s and Fernández’s transitional justice policies. In the process they compromised their careers, and in some cases, they even ended up facing criminal investigations.

The analysis of these historical processes also sheds light on the impact of judicial reform on judicial behavior in cases of transitional justice. Contrary to the argument expounded by authors like Collins (2006, 2010), Hilbink (2007a) and Skaar (2011), the reforms introduced to make the judiciary more efficient (e.g. the creation of oral tribunals), and to further insulate it from politics (e.g. the creation of a judicial council in charge of appointments and removals), did not result in a judiciary that was more willing and technically capable to undermine the impunity regime. In fact, during the 1990s judicial reform represented a perfect opportunity for the Menem administration to build buffers against transitional justice within the organization. Far from being able to take advantage of a more independent and competent judiciary as a result of judicial reform initiatives, Argentine human rights NGOs informally created their own windows of opportunity for successful litigation efforts. Like in Peru, they actively crafted a friendlier judiciary, first by persuading some judges about the rightness of their cause, and later by removing unpersuadable judges. These events indicate that the impact of changes in formal institutions cannot be fully understood without looking at the interplay between formal rules and informal practices and political processes.

Moreover, enhanced formal judicial independence did not fully protect judicial actors from outside encroachments, and as a result it cannot explain either the landmark
rulings issued by members of the federal judiciary in the 1990s, which decisively undermined the impunity regime, or the staunch resistance of judges in the interior of the country to the new wave of prosecutions in the 2000s. Although in both periods judges and prosecutors faced strong incentives to avoid confronting executives, reality shows that strategic behavior was not necessarily the norm. In this chapter I identified ideational factors that better account for the observed patterns of judicial behavior. Changes or the absence of changes in judges’ and prosecutors’ legal preferences and knowledge, as well as in their commitment to the human rights cause, explain the motivations of individual judicial actors to defy powerful executives.

With regards to the model of institutional change presented in Chapter 2, the Argentine judicialization process offers ample within-case variation in terms of the dynamics and impact of litigants’ persuasion strategies. In the 1990s, human rights NGOs succeeded in enlisting those judges targeted by their formal and informal legal strategies, but failed to persuade or commit judges that they did not target. Their inability to launch more ambitious diffusion strategies was related to the timing of their intervention. The effects of the differentiated reach of the process of ideational diffusion were clearly seen in the 2000s, when the explosion of trials and intense judicial activity in dictatorship era cases was more prevalent in the courts that had handled truth-seeking trials during the previous decade. By contrast, courts in the interior of the country, where truth trials were non-existent or less intense, had a harder time processing the cases. This was a consequence of the lower levels of technical proficiency of these judicial actors, and also of the fact that human rights organizations never tried to include them within their sphere of influence.
In this sense, this chapter reinforces the main theoretical argument of this dissertation, which underscores the importance of considering legal preferences and legal knowledge when seeking to explain judicial behavior. As mentioned before, technical deficiencies go a long way explaining sub-national variation in the outcomes of the judicialization process in the 2000s. Most importantly, the analysis of the 1990s indicates that even judges and prosecutors who had a long standing and proven commitment to human rights needed to be targeted with diffusion strategies in order to acquire the necessary tools to successfully champion that cause. The cultural features of organizational environments constrain the ability of actors to act upon their ideological and personal preferences. In order to explain behavioral patterns in bureaucratic and non-bureaucratic environments, it is as important to answer the question of how actors accomplish their goals as to document why they seek those goals in the first place. This is particularly true in the case of judges like Cavallo, who were not only asked to radically depart from existing precedent, but also to defy the executive.

The importance of changes in legal preferences and of the infusion of new technical capabilities underscores some of the shortcomings of the Justice Cascade model (e.g. Sikkink 1993, 2005, 2011; Risse Kappen et al. 1999; Lutz and Sikkink 2000, 2001; Roht-Arriaza 2005). Like Peru, Argentina was subject to the international norm-affirming processes emphasized by these scholars when seeking to explain transitional justice. The evidence presented in this chapter indicates that these events and pressure tactics are not enough to enable local judicial actors, not even the most pro-human rights among them, to rule in favor of the victims. A series of domestic diffusion processes had to be ignited in order for international jurisprudence and legal doctrine to become part of their thinking.
about these matters. These diffusion processes involved pedagogical interventions; the forging of close personal and professional links with judges, prosecutors and their clerks in order to facilitate communication during judicial proceedings; and the filing of amicus briefs and other documents in court in order to formally expose judges to developments in international law, as well as to incontrovertible evidence about individual criminal responsibility in the perpetration of human rights violations. As the evidence presented in this chapter shows, the use of a technical discourse, and the enlistment of respected professionals and academics to deliver the message of NGOs, was instrumental in facilitating the diffusion of new legal ideas.

Finally the case study presented in this chapter illustrates the second mechanism of institutional transformation identified by my theoretical framework: personnel changes. Persuasion strategies had geographical and ideological limits, as well as a differential impact across legal issue areas. When persuasion fails, and when a supportive political environment rises the probability of success of lustration initiatives, there are incentives to abandon diffusion efforts and embrace naming and shaming tactics. In the Argentine case, NGOs took advantage of the opportunity to remove from the bench unredeemable judges and prosecutors that put obstacles to the progress of human rights cases. Personnel changes, coupled with the prior spread of a new legal orthodoxy transformed the identity of the judiciary. Key courts such as the Supreme Court and the Court of Cassation now see the progress of human rights cases as part of their institutional mission. Moreover, judges have become more prone to acting against their colleagues and former colleagues who were important civilian allies of the de facto regime.
CHAPTER 5:
CONCLUSIONS: IDEATIONAL TRANSFORMATIONS, TRANSITIONAL JUSTICE AND JUDICIAL INDEPENDENCE

5.1 Introduction

As the preceding chapters have shown, unpacking judicial decision-making processes is crucial in order to understand the advances and setbacks in the progress of criminal prosecutions against the perpetrators of human rights violations in Argentina and Peru. What happens inside judicial branches constitutes an important step in the causal chain that links the denunciation of the crimes and the outcome of investigations and trials. It cannot be assumed that judicial actors simply abide by the dictates of politicians, facing no constraints in their ability to legally formulate the requested jurisprudential solutions, or lacking the resources and motivations to put up a fight. The technical capabilities and the political resolve of judges and prosecutors shape their ability and willingness to rule for or against the defendants, irrespective of the preferences of presidents, legislators and the military. In both countries, human rights NGOs played a crucial role in transforming the ideational profile of judicial branches, thus enabling the collapse of impunity regimes.

In this final chapter I will summarize the main empirical findings and explain how they relate to different aspects of the theory outlined in Chapter 2. I will then explore the main contributions of this dissertation to political science, in particular to the literatures
on judicial behavior, norm diffusion, and judicial institutions. The chapter ends with an analysis of the sociological deficits in the concept of judicial independence, calling for more studies about the historical processes that shape judiciaries’ ideational profiles and normative commitments.

5.2 Types of Judges, Diffusion Strategies, and the Limits of Persuasion

In Chapter 2 I argued that human rights litigants must deal with three types of judges and prosecutors in their attempt to transform judicial branches into suitable arenas for the advancement of victims’ cause: committed, indifferent and recalcitrant. The cases of Peru and Argentina are illustrative of the dynamics behind the enlistment of these different ideal-typical judicial actors in the ranks of the pro-transitional justice coalition.

In the Peruvian case, survey and interview evidence suggests that the judiciary was not necessarily favorably predisposed to support NGOs. Judges and prosecutors expressed centrist political ideologies, and some showed sympathies for the military and often criticized NGOs’ intransigent activism. The typical Peruvian judicial actor was therefore neither committed nor adamantly opposed to transitional justice. Most of them became effective agents of transitional justice after human rights litigants managed to transform their legal preferences, thus shaping their perception of what amounted to appropriate professional behavior or legal praxis.

The ambitious pedagogical interventions designed by NGOs brought before judicial actors a set of principles, precedents and doctrines that emphasized their duty to become enforcers of Peru’s international obligation to investigate and punish those responsible for gross human rights violations. As explained in Chapter 3, most judicial actors were not familiar with these legal concepts. In fact, the pedagogical efforts sparked
their intellectual curiosity to find out more about the imperatives of the new orthodoxy. By engaging judicial actors in an exclusively juridical terrain, human rights lawyers activated the logic of the law, which trumped the logic of political calculations. In the process, indifferent judges were converted to the pro-transitional justice camp on strictly legal grounds. They were given both the technical resources and the professional motivations to stand up for the victims, often defying powerful political players such as President García and the military.

In the Argentine case, the discussion in Chapter 4 indicates that litigants had to deal with a mix of indifferent and committed judicial actors. During the early 1990s, NGOs built bridges with judges, prosecutors and clerks working in the Capital City and some provinces, with the intention of diffusing the principles of international human rights law. Some of the judicial actors incorporated to these networks had already shown commitment to the cause during the previous decade. Despite this normative commitment, interview evidence is conclusive in pointing at the fact that prior to these diffusion efforts, judges and prosecutors felt ill equipped to act upon those commitments. In other words, because the logic of appropriateness guides judicial behavior, these actors could not engage in juridical experimentation in the absence of solid legal arguments. The truth trials, in which criminal courts were asked to conduct non-criminal investigations, are a case in point.

In addition to showing the need to diffuse new technical capabilities in order to enable allied judicial actors to respond favorably to the victims’ cause, the Argentine judicialization process also suggests the importance of activating the logic of legal considerations in order to neutralize political calculations, and convert and motivate
indifferent judges. The child abduction trials, in which judges with no prior commitments to the human rights movement ruled against the constitutionality of the amnesties and departed from the preferences of the executive by putting former de facto leaders in prison, is an example of this. The evidence indicates that the landmark rulings obtained in these cases were a result of skilful persuasion efforts enabled by contacts established within the judiciary in the early 1990s, and also the result of confronting federal judges with incontrovertible evidence about individual criminal responsibility in the design and execution of the crimes. Some were motivated by personal, emotional reasons, and others by the professional duty to enforce the law. When judicial actors are presented with strong legal arguments and factual evidence, the margin to ignore those duties in order to avoid a risky confrontation with powerful political players narrows. Turning a blind eye on the substance of the lawsuit becomes blatantly inappropriate from a professional point of view. Moreover, the costs of potential retaliations decrease since accusations of arbitrariness and misconduct can be easily refuted.

In both countries, diffusion mechanisms followed similar patterns. As argued in Chapter 2, it is possible to identify three main factors that affect the success of diffusion processes: proximity and linkages between the target and the source (Kopstein and Reilly 2000; Brinks and Cannedge 2006; Levitsky and Way 2010); emulation (Kuran 1991; Brown 2000; Pavehouse 2002; Beissinger 2007; Bunche and Wolchik 2011); and the authority and power of the source (Kopstein and Reilly 2000; Pavehouse 2002; Levistky and Way 2010).

The strongest evidence for the importance of linkages comes from the success of Argentine human rights activists in opening cracks in the impunity regime during the
second half of the 1990s. The networks built during the pedagogical interventions organized between 1993 and 1996 were crucial in enhancing the receptivity of judges to arguments about the right to truth, and in facilitating informal contacts with specific courts overseeing key cases, especially the federal court that eventually declared the unconstitutionality of the amnesties in 2001.

With regards to emulation, in the Peruvian case human rights litigants took advantage of the fact that the judicialization process was launched several years after the issuing of landmarks rulings by Argentine federal courts. As I showed in Chapter 3, NGOs enabled contacts between local judges, especially the Supreme Court judges in charge of the trial against Alberto Fujimori, and Argentine judges who had confronted similar cases in the past. Emulation was also encouraged by exposing these actors to the legal scholars who as members of the academic world, created and elaborated the juridical concepts and ideas at the core of the pro-transitional justice case. Interview evidence indicates that these contacts were instrumental in reassuring Peruvian judicial actors about the legal and political viability of the jurisprudential moves requested by victims and their lawyers.

This type of face-to-face emulation was less important in Argentina than in Peru because Argentina was in many ways a pioneer in the domestic application of international human rights law to cases of state repression (Sikkink and Walling 2006; Sikkink 2011). Nevertheless, the very nature of judicial decision-making made emulation a core component of diffusion in both cases. As shown in Chapters 3 and 4, judges and prosecutors in both countries were adamant to read about relevant jurisprudence produced by other national and international courts in order to be able to write similar
decisions. Litigants used seminars, amicus briefs and informal contacts to provide judicial actors with such rulings in order expose them to specific examples of how to deal with human rights criminals and with domestic legal dispositions issued in violation of international law. NGOs in Argentina and Peru were successful because they did not expect domestic judicial actors to innovate \textit{ex nihilo}. They were aware of the fact that judges think and act on the basis of formulas, templates and precedents, and designed their formal and informal litigation strategies with an eye on these cultural underpinnings of judicial decision-making.

Finally, in both cases, litigants made sure that the agents of diffusion who spoke on their behalf in front of judges and prosecutors, were respected legal experts and international organizations. This was important in order to increase the authoritativeness of the legal ideas they sought to diffuse, and to endow the pedagogical interventions with an aura of neutrality. In Argentina, for example, organizations such as the Center for Justice and International Law and Human Rights Watch, as well as prestigious Latin American intellectuals like Eugenio Zaffaroni, became key allies in diffusing new ideas such as the right to truth. Peruvian litigants followed a similar strategy. In fact, the available evidence indicates that universities, not NGOs, organized most of the seminars and pedagogical events attended by judges and prosecutors.

In both countries diffusion efforts had shortcomings, which helps understand why litigants suffered some defeats and frustrations during the judicialization process. Peruvian judges and prosecutors responded favorably to victims’ requests in those areas in which persuasion mechanisms were more ambitious and better orchestrated. As the data described in Chapter 3 shows, judicial actors were persuaded of the non-applicability
of amnesties and statues of limitations, but were not fully convinced that they could lower the standards for evaluating evidence. On several occasions this led them to clash with human rights activists, especially after handing down acquittals. Similarly, some prosecutors expressed their frustration for the lack of adequate training in the type of skills needed to successfully carry out these investigations, and to build solid cases against defendants using scarce direct evidence. In other words, judges and prosecutors did not endorse NGOs’ arguments when they felt ill equipped from a technical and doctrinal point of view, or in those legal areas in which the imperatives of the old legal orthodoxy were not fully undermined.

Similarly, in Argentina diffusion efforts in several jurisdictions, coupled with a series of landmark rulings handed down by courts at different levels of the judiciary, forged a strong consensus around the need to re-open the investigations and trials, disregarding amnesties and statutes of limitations. As the interview evidence presented in Chapter 4 shows, in the 2000s key aspects of the new legal orthodoxy were no longer in question. Judges and prosecutors naturalized them as part of their professional duties and regular routine practices. However, the geographical bias of the pedagogical interventions negatively affected the progress of the investigations and trials in the interior of the country, even in the presence of a favorable political environment after Kirchner’s inauguration in 2003. In particular, my sources pointed to the lack of adequate training as one of the reasons why judges and prosecutors in those jurisdictions failed to effectively conduct investigations.

Variation in the systematicity of diffusion dynamics across geographical regions and legal issue areas had an impact on transitional justice outcomes. This supports the
theoretical arguments expounded in Chapter 2. Judges and prosecutors are wary about the symbolic legitimacy of their actions and are not willing to jeopardize their authority, acting on thin or shaky legal grounds. When the legal arguments they are provided with are not convincing, or when the re-socialization efforts are not systematic enough so as to persuade them of their applicability, judges and prosecutors will be less likely to respond to victims’ demands. For judicial actors to become effective agents of particular values, ideas or interests, they must be equipped with the appropriate technical capabilities, because if they are not, they will lack the resources and professional motivations to alter routine practices and received understandings of their institutional roles.

5.3 The Timing of the Interventions and the Removal of Recalcitrant Judges

Whereas committed and indifferent judicial actors are susceptible to re-socialization efforts, recalcitrant ones are unlikely to modify their legal preferences. Many of them have ideological and personal affinities with the alleged perpetrators. Most importantly, their opposition to the progress of human rights trials is backed by the imperatives of the hegemonic formalist and positivist legal orthodoxy. The legal legitimacy of their position is therefore not in question.

As argued in Chapter 2, litigants must activate a different mechanism of institutional transformation in order to neutralize these islands of resistance to transitional justice: personnel changes. The latter involve naming and shaming tactics in order to raise the visibility of judges, often pointing to their past collaboration with authoritarian regimes, as well as the promotion of impeachments. Unlike pedagogical interventions, personnel changing strategies require the support of the political bodies in charge of removing, nominating and appointing lawyers to the judiciary.
The struggle for transitional justice often involves multiple coalitions seeking to gain control of the judiciary in order to galvanize support within the organization. The temporal dynamics of this struggle are important in determining the extent to which recalcitrant judges will make up an important portion of the universe of judicial actors that human rights litigants will have to deal with in their efforts to transform the institution. In this respect, Peru and Argentina offer a most interesting contrast.

In the Argentine case, the anti-transitional justice coalition took the initiative in the early 1990s, and successfully colonized key instances within the hierarchy of the federal judiciary in order to put an end to the military question. When NGOs such as CELS began their attempt to diffuse a new legal orthodoxy, certain courts were out of their reach. This meant that from the very beginning their persuasion efforts had clear limits. The recalcitrant judges strategically placed by Menem in the Supreme Court and the Court of Cassation remained influential players in determining the scope and progress of the trials even after the demise of the political coalition that appointed them, and after the rise to power of a political coalition with opposite preferences in the area of transitional justice. During the 2000s, human rights litigants were quick to identify the opportunities afforded by the new political environment and launched an ambitious effort to remove from the bench those judges and prosecutors that systematically stalled the progress of the investigations and oral trials. They were successful at fully reforming the Supreme Court, the Court of Cassation and the entire federal judiciary in certain provinces of the interior of the country. These tactics, coupled with the process of normative diffusion launched during the previous decade, triggered changes in the judiciary’s perception of its institutional mission vis-à-vis human rights.
In contrast to the Argentine judicial branch, which survived the democratization process almost intact and which was an early target of the anti-transitional justice coalition, in the Peruvian case recalcitrant judges made up a smaller portion of the judiciary. This was in part a result of Fujimori’s policy in the 1990s that avoided the appointment of permanent judges, in order to subject untenured ones to political pressures (Finkel 2008; Dargent 2009). Once democracy was reestablished after 2000, there were few permanent judges who directly responded to the ancien régime, and some of the judges removed by Fujimori returned to the bench. In addition to this legacy, the poor technical qualifications of the average Peruvian judge and the absence of clear political alignments within the institution made it a fertile ground for the deployment of persuasion strategies (Pásara 2010). The chaos within the armed forces in the immediate aftermath of Fujomori’s resignation also allowed NGOs to begin to make inroads into the judicial branch before their enemies launched similar initiatives to build buffers against transitional justice. When the military eventually followed the steps of human rights NGOs, they found a judiciary that was not receptive to their case.

These struggles around the appointment and removal of recalcitrant judges are indicative of the importance of history and politics in defining the institutional profile and ideational make-up of judicial corporations. Because of the existence of efforts like those of pro and anti transitional justice groups, it is an analytical mistake to think of judges and prosecutors as individual decision-makers detached from a collectivity. The aforementioned political dynamics are constitutive of organizational cultures, hegemonic legal discourses and mainstream ideological positions within judiciaries (Wasby 1983; Gillman 2002, 2006, 2008; Halliday et al. 2007; Couso 2007; Hilbink 2007b). These
aspects of the organizations they staff matter in judicial decision making processes. Normative and ideational variables affect the way judicial actors think about their prerogatives, their institutional duties and their professional roles. In other words, individuals are decisively embedded in a collectivity, which shapes their preferences and propensity to act in defense of certain interests and in detriment of others. In order to understand judicial decision making processes we must study the historical origins of legal preferences and organizational cultures, not just the strategic environment confronted by individual judges or prosecutors when making specific jurisprudential decisions.

5.4 Transitional Justice, Judicial Behavior and the Strategic Approach

The emphasis of my approach to the study of judicial behavior on the role of historical struggles in shaping the ideational profile of judicial institutions, contrasts with the theoretical core of the strategic approach. The defeat of impunity regimes in Latin America was the result of activists’ efforts to disrupt the reproduction of the ideational infrastructure of judicial decision-making in the region. Positivist and formalist cultures of legal interpretation, historically protective of conservative interests and biased against the rights of individuals vis-à-vis state abuses (Oyahnarte 1972; Nino 1992; López Medina 2004; Hilbink 2007a; Silva Meza and Silva García 2009; Couso 2010; Pásara 2010), had to be dismantled in order to observe assertive judicial behavior in cases of state repression. This process infused judiciaries with a new set of technical resources and manufactured a new institutional mission among its members, eventually enabling and motivating the involvement of judges and prosecutors in complex and risky investigations and criminal trials.
Changes in patterns of *satisficing* behavior in accordance with shifting socially and politically constructed ideas about what constitutes appropriate professional behavior, do a better job at explaining the observed outcomes than explanations that see judges as interest maximizers. There are theoretical reasons for this. The methodological individualism of strategic approaches abstracts judicial actors from their organizational environments, and imputes them preferences such as tenure stability or the desire to elicit compliance with their decisions (Ferejohn and Weingast 1992; Epstein and Knight 1998; Epstein et al. 2001; Epstein, Knight and Shvetsova 2001; Iaryczower et al. 2002; Bergara et al. 2003; Helmke 2005; Staton 2010). In other words, according to rationalists, judges are guided by instrumental reason or the logic of consequences. They act in ways that secure their interests. What usually determines the best course of action is their vulnerability or levels of exposure to external threats.

By ignoring the internal process in which the reproduction of organizational cultures shapes the preferences and cognitive maps of members of the judiciary, rationalists fail to identify the limits of instrumental reasoning in highly bureaucratic environments. Not only do these organizational dynamics define the set of conceivable courses of action that factor into decision-making processes, but also nurture organization-specific preferences, such as legal preferences, that trump the logic of consequences and activate the logic of appropriateness (March and Olsen 1984; Finnemore 1996; Gillman 1999; Woods 2008; Hilbink forthcoming).

For example, it cannot be assumed that judges who refrain from questioning amnesties in hostile political environments do so because they are fearful of potential retaliations. Given the predominance of certain legal cultures, it is possible that defying
an amnesty law passed by congress is not even considered as a viable option from a juridical point of view. Similarly, we cannot assume that a judge who ascribes to the new legal orthodoxy will cave in, and abide by the dictates of powerful anti-transitional justice presidents or the military. His/her perception of appropriate professional behavior may lead him/her to act in ways that undermine the maximization of self-interest as understood by the strategic approach. In this sense, the logic of appropriateness is not trivial: it defines the set of available courses of action and motivates the choice of some at the expense of others.

There is a third reason why this logic is not trivial: it empowers actors to effectively act upon their chosen course of action. Perceptions about what constitutes appropriate legal praxis or levels of involvement in political affairs are a collective trait of judiciaries qua organizations, not simply of judges qua individual decision makers. For instance, it is likely that other members of the judicial branch share the resolve of the aforementioned hypothetical judge to defy amnesty laws. This is because ideas about professional roles are the outcome of socialization processes operative across the organization. This collective dimension of the judicial world makes available a whole array of resources to resist external attacks. Informal norms of behavior are crucial in determining judicial power as conceptualized in Chapter 2. By defining the parameters of appropriate scope of involvement in political affairs, these ideas allow judges and prosecutors to rule sincerely and force compliance with their decisions. Shared norms enhance their individual sense of security by signaling peer support and facilitating collective action, thus leading them to discount the risk of defying external actors.
In Chapters 3 and 4 we saw the logic of appropriateness at work in the judicialization process of human rights violations in Peru and Argentina. First, I showed that the logic of consequences cannot explain why Argentine judges took bold steps to undermine the impunity regime in the late 1990s and early 2000s, when both their superiors in the judiciary and two successive presidential administrations opposed the reopening of trials. Moreover, if strategic behavior were characteristic of judiciaries in processes of transitional justice, neither the anti-transitional justice coalition in the early 1990s, nor the pro-transitional justice one in the 2000s, would have resorted to personnel replacement strategies in order to guarantee favorable jurisprudential outcomes. Professional and personal threats would have sufficed. Second, I also showed that the logic of consequences cannot explain why Peruvian judicial actors decisively departed from the preferences of the García administration, often risking their job security and personal integrity. Judges and prosecutors acted on the basis of what they thought was right or legally appropriate given the evidence and legal arguments at stake in the cases brought for their consideration. On some occasions, such as the reaction against President García’s Decree 1097 in 2010, these ideas served as a catalyst of collective responses to political affronts against transitional justice.

In addition to motivating principled behavior and defiance of presidents and the military, the logic of appropriateness also defined judges’ ability and willingness to become involved in transitional justice struggles in contexts in which doing so did not pose personal or professional risks. Both in Peru and Argentina litigants had to put the possibility of defying amnesties and statutes of limitations on the map. Existing legal cultures decisively narrowed the set of available or known solutions for human rights
cases. Moreover, judges and prosecutors had to be persuaded of the validity and applicability of international legal doctrines, precedents and instruments before they decided to act in favor of the victims of state repression. In other words, strategic considerations were not central to the decision making process. Instead, what mattered were judges’ legal knowledge and the implications of their decisions vis-à-vis existing understandings of legal praxis.

5.5 The Norm Cascade and Transitional Justice

The empirical and theoretical shortcomings of the strategic approach raise serious doubts about the validity of the Huntingtonian paradigm, which sees transitional justice outcomes as determined by the balance of power between the military and the political class, or by the preferences of politicians with respect to prosecutions (Huntington 1991; Zalaquett 1992; Pion-Berlin 1993; Evans 2007; Karl 2007).

In addition, the theory and evidence put forward in this dissertation also put into question important aspects of the Justice Cascade approach, which is the dominant model among students of transitional justice in Latin America (Sikkink 1993, 2005, 2011; Finnemore and Sikkink 1998; Risse-Kappen et al. 1999; Lutz and Sikkink 2000, 2001). According to this school of thought, the collapse of impunity regimes is the result of partnerships between domestic and global human rights activists, who produce events in the international arena in order to diffuse and affirm among states a behavioral norm in favor of prosecutions. The mechanisms of diffusion include the shaming of presidents, the manipulation of their foreign policy interests, and a deep transformation of their beliefs and convictions.
Although some authors have questioned the actual effectiveness of these international “norm affirming” events (Collins 2006, 2008, 2010), the focus of my critique is not empirical but theoretical. As I argued in Chapter 1, the Justice Cascade model completely ignores the role of judiciaries in the process, and implicitly assumes that the tactics designed to change the position of executives vis-à-vis transitional justice will eventually produce similar effects among judges. In this respect, I indicated that the same criticism levied against the Huntingtonian paradigm applies to this approach.

Most importantly, if the purpose of these international relations scholars working within the constructivist tradition is to explain how norms impact state behavior, it is unwarranted to reduce the state to presidents or the political class. The Justice Cascade model therefore remains underspecified because in order to fully understand the domestic diffusion of pro-human rights behavioral norms we must also focus on the way judicial actors come to embrace the jurisprudential innovations initiated at the international level. Due to the specificities of the organizational environment in which judges and prosecutors operate, there are reasons to believe that in order to explain norm diffusion within judiciaries, additional theoretical tools are required.

The framework developed in Chapter 2 constitutes an attempt to fill in this theoretical void. There is a legal learning process relevant to explaining judicial behavior, and the diffusion of norms of international human rights law within judicial branches, which is ignored if the analysis remains fixated with, for example, president’s foreign policy preferences. Judicial action against impunity regimes required the spread of new technical capabilities and legal values among Latin American judicial actors. My theory proposed a series of diffusion mechanisms that apply to the microcosm of litigation
battles in order to generate expectations about the conditions or factors that increase the likelihood that normative changes will be successful in this branch of government. In other words, this dissertation adds an important theoretical block or link to the causal chain proposed by Justice Cascade scholars.

The cases of Peru and Argentina are suitable in order to assess the importance of this theoretical contribution. During the 1990s, both countries were among the most highly exposed to the dynamics of international norm-affirming events. Argentine human rights activists were pioneers in the deployment of these strategies, and the Argentine case is often cited as one of the initiators of the global justice cascade (Lutz and Sikkink 2000, 2001; Sikkink and Walling 2006; Sikkink 2011). In Chapter 4, for example, I described how human rights litigants resorted to the Inter-American Commission of Human Rights after the Supreme Court ruled against them in the Lapacó case in 1998. With regards to Peru, in Chapter 3 I described litigants’ use of the Inter-American System of Human Rights in the 1990s, when Fujimori scaled up his repressive strategy (Youngers 2003; Villarán 2007). During this period, Peru was the Latin American country that received the largest number of adverse rulings by the Inter-American Court.

Yet, in both countries the diffusion of international law among judges was not automatic. The fact that norm-affirming events achieved their goals, and that states were punished for their lack of abidance by their responsibility to investigate and punish human rights violations, did not directly translate into action by domestic courts. As interview and survey evidence indicates, the pedagogical interventions organized by NGOs and their academic allies were instrumental in making local judicial actors aware of these emerging norms. In this sense, the interactions between litigants and judicial
actors described in this dissertation, in which NGOs gave judges and prosecutors the technical tools needed to circumvent impunity dispositions, and explained to them the international precedents that resulted from their transnational strategies, are a testament of the need to explore how international norms get diffused inside judiciaries.

Given the design of these pedagogical interventions, their success is consistent with the expectations of the theory of judicial behavior outlined in Chapter 2. Litigants succeeded because they paid close attention the cultural underpinnings of judicial decision-making. They addressed judges and prosecutors in juridical terms, thus activating the logic of legal reasoning and undermining the saliency of political calculations; they gave interventions an aura of neutrality and impartiality; and promoted the emulation of peers in other courts and countries, thus showing an accurate understanding of the fact that judges and prosecutors operate on the basis of standard practices, pre-established templates and formulaic behavior.

5.6 Formal Institutions, Informal Rules and Judicial Independence

The argument and evidence presented in this dissertation also make a contribution to the literature on formal judicial institutions and judicial independence. Over the past decades, international organizations and local administrations have spent millions of dollars to strengthen the independence of Latin American judiciaries via formal institutional changes (Hammergren 1998, 2007; Carothers 1999; Salas 2001; Sarles 2001; Finkel 2008; Ginsburg 2008; Nunes 2010; Hilbink and Couso 2011; Skaar 2011). These reforms included the constitutionalization of judicial review; the creation of judicial councils to depoliticize the process of appointing and removing judges; the establishment of judicial academies; and a transition from inquisitorial to accusatorial criminal procedures, including the creation of oral
The goal of these reforms was to insulate judicial actors from political pressures, enhance their ability to hold elected officials accountable, professionalize judiciaries, secure their impartiality, reduce their caseloads and expedite procedures.

Some authors argue that in countries like Argentina and Chile, these reforms have increased the formal independence of judicial institutions (Skaar 2011) and infused courts with new voices (Hilbink 2007a; Hilbink and Couso 2011), leading judges and prosecutors to become active players in the transitional justice game. Others are more cautious, and suggest that formally more independent courts have the potential of becoming agents of criminal accountability only when judicial reforms are guided by a coherent purpose or are backed by a broad consensus (Carothers 1999; Collins 2010). Although the argument presented here is more in line with this second group, my skepticism about changes in formal institutions as a relevant causal factor runs deeper. Reforms can infuse new voices to previously hermetic judicial institutions, and they can reduce the levels of dependency of judges on politicians in terms of career advancement. Nevertheless, there are two reasons to expect formal changes to be neither necessary nor sufficient conditions for real judicial empowerment.

First, formal institutional changes generate opportunities for socio-political coalitions to manipulate courts in order to craft judicial institutions that favor their interests or normative commitments (Finkel 2008). In other words, it is not true that judicial reforms insulate judges and prosecutors from political maneuvers. Argentina is a great example of this. The reforms introduced by Menem in the early 1990s allowed him to colonize the judiciary, thus creating buffer zones for the progress of human rights cases. In the 2000s, the pro-transitional justice coalition used recently created institutions like the judicial council to
remove recalcitrant judges from the bench. Similarly, heightened formal judicial independence in the aftermath of Fujomori’s regime in Peru did not deter the García administration from deploying all sorts of tactics to stop further judicial action against military officers. Judicial actors ignored and actively resisted these pressures, not because formal rules effectively secured their professional futures, but because they were driven by an informally crafted ideational motivation, which facilitated collective action initiatives.

In other words, criminal accountability for human rights violations was not the outcome of formally independent judiciaries. If anything, it was the politicization of the judiciary by human rights NGOs via pedagogical interventions and personnel replacement strategies what brought about changes at the level of informal legal hermeneutic practices and the judiciary’s perceived institutional mission, which in turn transformed judiciaries into suitable arenas for the advancement of their cause. There is nothing about neutrality and impartial decision making in these dynamics. The pressures exerted by the human rights community led to jurisprudential outcomes that some, including the author, welcome from a normative point of view. However, it is fair to admit that having one of the parties in a criminal lawsuit informally contact judges, or having groups in society that are overzealous about removing judicial officers who rule against their wishes, is not what the idea of judicial independence is about (Shapiro 1981; Fiss 1993).

Second, the reproduction of informal behavioral norms within judicial corporations can severely constrain the capacity of judges and prosecutors to develop a constitutional culture that socializes political and military actors into respecting the legal boundaries of their institutional prerogatives. In this sense one of my central theoretical claims is that a cultural layer that fixes the world of known legal solutions, and defines the judiciary’s understanding
of its institutional mission, decisively affects judicial behavior. Formal rules designed to insulate judges and prosecutors form external pressures can be rendered ineffective if informal behavioral norms, such as positivist or formalist traditions of legal interpretation, deprive these actors of the motivations and the technical capacity to subject government policies to constitutionality tests (Sieder 2004; Couso 2010). Following Helmke and Levitsky’s typology of informal institutions, these norms could be thought of as competing informal institutions (2006: 15).

For example, had the legal culture of Peruvian judicial actors remained unchanged, García’s 2010 presidential decree calling for the end of criminal trials would have probably been enacted without major obstacles. Changes in the formal prerogatives of judges with regards to judicial review or changes in the formal rules protecting their tenure had little to do with the reaction of some members of the judiciary against the president’s decision. Similarly, the formal inclusion of human rights treaties in the 1994 Argentine constitution did not automatically guarantee a shift in patterns of judicial decision-making. It took changes at the level of informal behavioral norms, for the invocation of those treaties to become a standard practice in human rights cases. This transformation is what actually empowered judges and prosecutors to defy impunity regimes. In other words, changes in formal rules are not enough to empower judges by amplifying their scope of involvement in political debates, or their predisposition to rule sincerely. I contend that collective ideational transformations play a more important role, because they transform perceptions about actual possibilities for assertive behavior, provide the normative motivations for risky behavior, and enhance individual security when defying powerful political players. In this respect, the Argentine and Peruvian case studies show how civil society groups can become effective stakeholders in the process
of improving judges’ ability to enforce checks and balances, by informally undermining
limiting legal cultures. These efforts have probably a longer lasting impact than the
promotion of formal judicial reforms by international aid agencies.

These two reasons for lowering expectations about the transformative potential of
formal institutional changes, lead me to a final point about how the present study contributes
to debates about judicial politics. Both academic and practitioners interested in the effects of
formal rules on judicial power ascribe to a sociologically problematic understanding of the
notion of judicial independence. Independence is equated to freedom from interference with
courts’ decision making processes (e.g. Ferejohn 1998; Domingo 1999; Cameron 2002; Ríos
Figueroa and Staton 2009); impartiality in courts’ adjudication criteria (e.g. Shapiro 1981;
Fiss 1993); respect for the legitimacy of courts’ decisions by other political actors (e.g.
Verner 1984); and the absence of the politicization of the judiciary (e.g. Dodson 2002).
Larkins’s definition of judicial independence is representative of the way scholars understand
the term: “Judicial independence refers to the existence of judges who are not
manipulated for political gain, who are impartial toward the parties of a dispute, and who
form a judicial branch which has the power as an institution to regulate the legality of
government behavior, enact "neutral" justice, and determine significant constitutional and

This widespread understanding of judicial independence suffers from a key
sociological deficit. It wrongly assumes that given the right constitutional scaffolding, courts
can be impartial. The reason for this is that it does not take seriously the idea that courts are
the product of historical struggles. Once this is factored in, it becomes clear that
independence is only conceivable or imaginable in a world in which judges are other-worldly
figures. It is true that there are profession-specific imperatives that incline judges to behave in ways that preserve the legal-symbolic legitimacy of their decisions, meaning that they will not jump off a jurisprudential cliff promoting radical departures from accepted legal standards and that they will seek to cast their choices in the language of neutrality and impartiality (Bybee 2010). However, what amounts to legitimate judicial decision making criteria and accepted forms of argumentation is a social and political construction.

Even if formal constitutional parchment barriers are fully respected, courts are never fully abstracted from the social and political worlds. As this dissertation has shown, socio-political dynamics are constitutive of courts’ preferences and ideas about correct legal praxis. As a result, even if they occasionally or regularly rule against the executive without suffering major retaliations, it does not mean they are independent. In fact, courts could very well be responding to the interests of specific social and economic groups. The reproduction of cultures of legal interpretation, for example, favors certain interests at the expense of others by privileging the rights of some groups over those of other groups. These legal criteria, which guide the adjudication process, are not born out of endogenous institutional dynamics or purely technical considerations, but out of struggles in which judicial and non-judicial actors participate. Socio-political coalitions may successfully lock in standards of legal interpretation, thus motivating and empowering courts to assert themselves in favor of particular values, ideas and interests. The very nature of that empowerment, biases judicial actors in favor of those who succeed in efforts at consolidating hegemonic discourses within judicial branches.

This dissertation is therefore a call to think less about the formal architecture of courts, and the formal and political changes that are needed for courts to become stewards of
impartial arbitration, and to pay more attention to the processes that lead courts to become agents of certain interests at the expense of others, and the implications of such transformations for the rights of individuals and groups. All efforts at transforming the formal structure of judiciaries or their ideational profiles are value laden. The masterminds of judicial reform initiatives in Latin America in the 1980s and 1990s publicly stated their desire for more competent and impartial courts, but they did so guided by a clear agenda favorable to neoliberal economics. The rationale was simple: stronger, more insulated courts would protect property rights and make countries more attractive for investors, thus promoting economic growth (Finkel 2008; Rodríguez Garavito 2011b). Similarly, efforts at constitutionalizing judicial review powers and spreading the practice of subjecting laws to constitutionality tests, was inspired by a progressive agenda that favored an expansion in the sphere of individual and collective rights (Rodríguez Garavito 2011b).

How courts think and whom they are willing to stand up for, is the outcome of their interactions with the non-judicial world. We cannot fully understand the political impact of courts if we do not study the broader social and historical processes that craft courts’ interests and identities, as well as their biases when deciding what power arrangements to endow with the legitimacy of favorable and authoritative constitutional interpretations.
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