The roots of transitional accountability:

McAuliffe, Padraig

Published in:
International Journal of Law in Context

DOI:
10.1017/S174455231200051

Publication date:
2013

Document Version
Early version, also known as pre-print

Q1 Please check that all names have been spelled correctly and appear in the correct order. Please also check that all initials are present. Please check that the author surnames (family name) have been correctly identified by a pink background. If this is incorrect, please identify the full surname of the relevant authors. Occasionally, the distinction between surnames and forenames can be ambiguous, and this is to ensure that the authors' full surnames and forenames are tagged correctly, for accurate indexing online. Please also check all author affiliations. **Done**

Q2 This is not listed in the References. If it refers to (2010), then the page number does not match the range given in the References (170-86).

The range given in the references is incorrect – it should run from 170-187 (page 17, line 805)

Q3 As above.

As I understand it, this has now been addressed in Q2 (page 17, line 805)

Q4 Walling is given as Booth Walling in the References.

Amend the main text to read Booth Walling (page 4, line 188)

Q5 This is given as (2008-09) in the References.

This should read as (2008-09) in the main text (page 6, line 290)

Q6 These are ambiguous to us. Do they mean, e.g. "In effect, she argues"?

Yes. Your suggestion is a better formulation (page 6, line 341, page 9, line 422, page 12, line 567)

Q7 This is given as (2003/04) in the References.

This should read as (2003-04) in the main text (page 13, line 599)

Q8 We can't find an in-text reference to this, and so propose to delete it. Please approve.

Agreed (page 17, line 687)

Q9 Do you have the et al. authors?

Yes – insert ELLIOT, Lani, HEGRE, Håvard, HOEFFLER, Anke, REYNAL-QUEROL, Marta and SAMBANIS, Nicholas (page 17, line 805).

CAMBRIDGE JOURNALS

Proof Delivery Form

International Journal of Law in Context

Date of delivery: 04-01-2013

Journal and vol/article ref: ijc IJC1200051

Number of pages (not including this page): 18

This proof is sent to you on behalf of Cambridge University Press. Please check the proofs carefully. Make any corrections necessary on a hardcopy and answer queries on each page of the proofs

Please return the **marked proof** within 3 days of receipt to:

Adrian Stenton
11 Mount Pleasant Cottages
Debden Road
Saffron Walden
Essex. CB11 4AE

Authors are strongly advised to read these proofs thoroughly because any errors missed may appear in the final published paper. This will be your ONLY chance to correct your proof. Once published, either online or in print, no further changes can be made.

To avoid delay from overseas, please send the proof by airmail or courier.

If you have **no corrections** to make, please email **stentons@compuserve.com** to save having to return your paper proof. If corrections are light, you can also send them by email, quoting both page and line number.

- The proof is sent to you for correction of typographical errors only. Revision of the substance of the text is not permitted, unless discussed with the editor of the journal. Only **one** set of corrections are permitted.
- Please answer carefully any author queries.
- Corrections which do NOT follow journal style will not be accepted.
- A new copy of a figure must be provided if correction of anything other than a typographical error introduced by the typesetter is required.

Copyright Form: **http://journals.cambridge.org/images/fileUpload/documents/IJC_ctf.pdf**

- If you have problems with the file please contact **pmoorby@cambridge.org**

Please note that this pdf is for proof checking purposes only. It should not be distributed to third parties and may not represent the final published version.

Important: you must return any forms included with your proof. We cannot publish your article if you have not returned your signed copyright form.

NOTE - for further information about **Journals Production** please consult our **FAQs** at http://journals.cambridge.org/production_faqs

Offprint order form

CAMBRIDGE UNIVERSITY PRESS

PLEASE COMPLETE AND RETURN THIS FORM. WE WILL BE UNABLE TO SEND OFFPRINTS UNLESS A RETURN ADDRESS AND ARTICLE DETAILS ARE PROVIDED.

VAT REG NO. GB 823 8476 09

International Journal of Law in Context (IJC)

Volume: ☐ *no:* ☐

Offprints

No paper offprints are provided, but the corresponding author will be sent the pdf of the published article. Print offprints may be purchased at extra cost at proof stage. Please complete this form and send it to **the publisher (address below)**. Please give the address to which your offprints should be sent. They will be dispatched by surface mail within one month of publication. For an article by **more than one author this form is sent to you as the first named. All offprints should be ordered by you in consultation with your co-authors.**

Number of offprints required: ☐ 0

Email: .....

Offprints to be sent to (print in BLOCK CAPITALS): .....

.....

.....

.....

..... *Post/Zip Code:* .....

Telephone: ..... *Date (dd/mm/yy):* ..... / ..... / .....

Author(s): .....

.....

Article Title: .....

.....

All enquiries about offprints should be addressed to ***the publisher****: Journals Production Department, Cambridge University Press, University Printing House, Shaftesbury Road, Cambridge CB2 8BS, UK.*

Charges for offprints (excluding VAT) *Please circle the appropriate charge:*

Number of copies	25	50	100	150	200	per 50 extra
1-4 pages	£41	£73	£111	£153	£197	£41
5-8 pages	£73	£105	£154	£206	£254	£73
9-16 pages	£77	£115	£183	£245	£314	£77
17-24 pages	£83	£129	£211	£294	£385	£83
Each Additional 1-8 pages	£14	£18	£31	£53	£64	£14

Methods of payment

If you live in Belgium, France, Germany, Ireland, Italy, Portugal, Spain or Sweden and are not registered for VAT we are required to charge VAT at the rate applicable in your country of residence. If you live in any other country in the EU and are not registered for VAT you will be charged VAT at the UK rate. If registered, please quote your VAT number, or the VAT number of any agency paying on your behalf if it is registered. *VAT Number:* .....

Payment **must** be included with your order, please tick which method you are using:

☐ Cheques should be made out to Cambridge University Press.

☐ Payment by someone else. Please enclose the official order when returning this form and ensure that when the order is sent it mentions the name of the journal and the article title.

☐ Payment may be made by any credit card bearing the Interbank Symbol.

Card Number: ☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

Expiry Date (mm/yy): ..... / ..... *Card Verification Number:* ☐☐☐☐

The card verification number is a 3 digit number printed on the **back** of your **Visa** or **Master card**, it appears after and to the right of your card number. For **American Express** the verification number is 4 digits, and printed on the **front** of your card, after and to the right of your card number.

Signature of card holder: ..... *Amount (Including VAT if appropriate):* £.....

Please advise if address registered with card company is different from above

Author Queries

Journal: IJC (International Journal of Law in Context)

Manuscript: S1744552312000511jrv

Q1 Please check that all names have been spelled correctly and appear in the correct order. Please also check that all initials are present. Please check that the author surnames (family name) have been correctly identified by a pink background. If this is incorrect, please identify the full surname of the relevant authors. Occasionally, the distinction between surnames and forenames can be ambiguous, and this is to ensure that the authors' full surnames and forenames are tagged correctly, for accurate indexing online. Please also check all author affiliations.

Q2 This is not listed in the References. If it refers to (2010), then the page number does not match the range given in the References (170-86).

Q3 As above.

Q4 Walling is given as Booth Walling in the References.

Q5 This is given as (2008-09) in the References.

Q6 These are ambiguous to us. Do they mean, e.g. "In effect, she argues"?

Q7 This is given as (2003/04) in the References.

Q8 We can't find an in-text reference to this, and so propose to delete it. Please approve.

Q9 Do you have the et al. authors?

International Journal of Law in Context, 9,1 pp. 1–18 (2013) Cambridge University Press
doi:10.1017/S1744552312000511

Review essay
The roots of transitional accountability: interrogating the 'justice cascade'

The Justice Cascade: How Human Rights Prosecutions are Changing World Politics
By Kathryn Sikkink, New York: W. W. Norton & Co., 2011.
342 pp.
ISBN 978-0-39307-993-7 £10.80 hardback

Transitional Justice in Balance: Comparing Processes, Weighing Efficacy
By Tricia Olsen, Leigh Payne and Andrew Reiter, Washington, DC: US Institute of Peace, 2010.
248 pp.
ISBN 978-1-60127-053-5, £10.50 paperback

Reviewed by Padraig McAuliffe
Dundee Law School, University of Dundee

Q1

I Introduction: new methodology, old focus

This article argues that what is seen as a justice cascade may in fact amount to merely an advocacy cascade, which has facilitated justice policies that democratising states would inevitably have pursued (and helped neutralise opposition), but which in causal terms has been far less influential on justice policy than is commonly assumed. Because transitional justice is generally presented in very idealistic terms, scholars in the field have begun to acknowledge that its virtuous effects are more easily presumed than proven (Van der Merwe, 2009, p. 121). Amongst advocates and activists in particular, one sees in the literature an emotional commitment to transitional justice that generally foregoes doubts about its overall efficacy even where isolated shortcomings are accepted. Policy has hitherto proceeded less from analysis to conclusions than from commitments to action. Some argue that 'the commitment to advocacy has come at the expense of progress in empirical research' (Vinjamuri and Snyder, 2004, p. 345) – the benefits of certain mechanisms are assumed instead of treated as empirical propositions to be proven rigorously. Because so many of the early debates about transitional justice took the form of partisan advocacy in the dichotomised days of the 'justice versus peace' and 'truth versus justice', prospective hypotheses about likely outcomes dominated the literature at the expense of retrospective assessments of what generally had or had not worked. For at least a decade, scholars have noted the paucity of studies systematically examining the correlation between transitional justice and social reconstruction. Subsequently, the literature has variously been criticised for its dependency on anecdote and hypothesis (Crocker, 2002, p. 541), analogy (Brahm, 2008, p. 3) and wishful thinking (Olsen, Payne and Reiter, 2010, pp. 25–26). Until recently, scholarship had primarily been based on single or dual mechanism case-studies and comparative qualitative case-studies of a limited number of states, which gave disproportionate emphasis to certain transitions or transition types conducive to study. This in turn made generally applicable policy conclusions difficult to

elaborate. It has been argued that human rights research in general, and transitional justice research in particular, are enterprises directed at manufacturing legitimacy for their fields of practice (Gready, 2009, p. 159). Such endeavours must, however, retain at least a threshold plausibility. As a fear developed among practitioners and theorists about the damage to the credibility of transitional justice from wild, unsubstantiated claims, there has emerged in recent years a commendable attempt to clarify the causal relationships (if any) between individual mechanisms and general ends. By employing social science methodologies and hard data, a tentative literature has emerged on how to assess the impact of transitional justice (Thoms, Ron and Paris, 2010). The expectation is that this scholarship can chip away at falsity and overly ambitious claims. This article examines the extent to which two recent works do this. After surveying what is novel about their distinctive methodologies, Part II examines the primary difference between the works, namely the extent to which the work of transnational human rights activists has impacted on the decision of democratising states to pursue criminal accountability for crimes of the past. Part III explores alternative explanations for why states are seemingly more willing to undertake trials and the extent to which the works in question control for these variables. Part IV considers the extent to which the normative change both books note has impacted on the security dilemmas inherent in transitional accountability. The article concludes that transitional justice research has some distance yet to travel in disentangling correlation from cause.

These two books attempt to respond to the more critical scholarly environment outlined above and take seriously the need to systematically apply rigorous assessment methodologies to test the claims made for transitional justice. However, they reach radically divergent conclusions. Olsen, Payne and Reiter's *Transitional Justice in Balance* applies a Transitional Justice Data Base to test the various hypotheses in the transitional justice literature in 854 mechanisms (trials, truth commissions, amnesties, reparations and lustration policies) implemented in 161 countries from 1970 to 2007. Hailed in its foreword by the field's foremost theorist, Ruti Teitel, as one of the first scholarly works to evaluate what works and what does not in transitional justice through comparative empirical research (p. xv), the book employs quantitative social science methods to systematically test the main hypotheses of debates which have generated more heat than light for the last twenty years.

While these authors deliberately reject the impressionistic and anecdotal analysis that has hitherto dominated, Sikkink's *The Justice Cascade* by contrast is more willing to mix qualitative analysis in a database she has developed with a treatment of what she describes as her own 'personal and scholarly journey' (p. 7). Although this approach should not necessarily condemn the undertaking, in a work that primarily seeks to examine the role of human rights activism on prosecutions for human rights abuses, the dangers of the old anecdotal reasoning are more pronounced than is ordinarily the case. Transitional justice advocacy is often presented in heroic terms, speaking truth to power on behalf of disenfranchised masses, selflessly enduring rocky relationships with the state and reacting against the cynicism and betrayal of values inherent in the sovereign control of international affairs. As Kennedy (2004, pp. 119, 141–42) argues, the presumptions, biases, blindspots and professional vocabularies of human rights activists often lead them to attach an 'inherent humanitarian potency' to law and rights-based mechanisms, with a consequent risk that fealty to an idea or policy redirects humanitarians from consequences to mythological progress narratives about the mechanisms. Because in the context of international criminal law the norms in question are so fundamental and their preservation so urgent, the commitment to them 'may dull an appropriately sceptical attitude' to the issue in question (Follesdal, 2009, p. 233). This possibility is exacerbated in transitional justice, where practitioners typically have one foot in academia and the other in practice – it has been argued that because scholars and practitioners tend to become consultants to new justice projects rather than external critics of the enterprise, the influence of advocates is not yet fully understood, and consequently may be exaggerated (Coomans et al., 2009, p. 187; Miller, 2008, p. 290). Q2

The greater danger, however, is not that doubt is repressed but rather that the desire to promote institutions or react to atrocity results in research explicitly or implicitly designed to reach conclusions that support the researcher's activist commitments. A recent survey of human rights research methodologies by Coomans, Grunfeld and Kamminga (2009, p. 183) yielded the following conclusion:

> 'Our hypothesis is that human rights scholars tend to passionately believe that human rights are positive. Many of the scholars are activists or former activists in the field of human rights. Although seldom stated, the explicit aim of their research is to contribute to improved respect for human rights standards ... In accordance with these terms, there is little room for research challenging the conventional wisdom that such systems be applauded.'

Even Sikkink herself admits that scholars in the area have not found satisfactory ways to combine ethical commitments with empirical research (p. 229), and acknowledges a need to avoid romanticising the advocates her book examines (p. 95). However, explicitly and implicitly throughout her work, it becomes apparent that she is not entirely successful in either respect. Though she employs some quantitative assessments, one explanation for her rather more Whiggish treatment of transitional justice advocacy than that of Payne, Olsen and Reiter may lie in this emphasis on personal experience of transitions in which the writer was actively involved.

While the methodologies involved are innovative, the focus is surprisingly conventional. Both works have as their main purpose the attempt to establish what factors facilitate or retard the adoption of transitional justice and inquire whether the applied mechanisms achieved their advertised goals of promoting democracy and civil and political rights. In short, both books are unabashedly macro-level studies that return to the core questions which initially defined the study of transitional mechanisms, namely those of politics and stability in countries moving from authoritarianism or war to more rights-respecting, representative polities. This is in marked contrast to recent trends in transitional justice scholarship in its present 'do everything, engage everyone' incarnation (Gready, 2005, p. 7), which has largely de-emphasised the 'transitional' emphasis of the field. We see this first in the stretching of the concept of transition to non-transitional contexts like ongoing war, the politics of memory in long-stabilised industrial democracies and the use of justice mechanisms in societies where authoritarianism and war endure behind thin veils of peace and elections. Second, the transitional emphasis of transitional justice has been marginalised due to the expansion in the conception of justice, moving from a relatively narrow range of physical integrity violations characteristic of repression or war to the underlying, socio-economic abuses that are thought to lie at their roots. While the transitional justice scholarship increasingly emphasises the local, the bottom-up and the everyday, Sikkink concerns herself almost entirely with trials. Olsen, Payne and Reiter pointedly omit informal or independent mechanisms which do not involve state policy on transitional justice (p. 34).

As a result, both works return us to the distinctly old-school debate over the effect of transitional justice in mediating transition. The scope of the inquiry in both books requires a re-examination of the two generally competing ideas of the relationship between transitional justice and democratic development (Teitel, 2001, pp. 3–4). The first is the realist argument that justice in transition is epiphenomenal, where transitional responses are the product of political or institutional constraints. Usually, this position is examined in the context of a weak transition where the democratising regime is hamstrung by the risk of revanchist or self-protective violence which might imperil transition and assents to a 'minimalist' position of an official or de facto amnesty. The second competing idea is the legalist–idealist argument that legal responses to the crimes of the past are not only desirable but necessary if democracy and human rights are to take root. It is

argued that any ostensible switch to democracy and a rights-based policy will be superficial and precarious if abuses of the past are not reckoned with through judicial or restorative measures.

Of course, these dichotomised positions are unsatisfactory – most would readily accept on the one hand that domestic balances of power must be relevant to transitional justice policy and trials should not be pursued if it means political suicide for the new regime, but on the other hand that human rights advocacy can modify this political calculus and the fruits of any resulting justice mechanism can enrich the quality of the emerging democracy. Few would quibble with Teitel's reconciliation of the idealist and realist arguments in her seminal *Transitional Justice*, when she argues that justice in these periods is extraordinary and constructivist – it is 'alternately constituted by, and constructive of, the transition' (2001, p. 6). Even before its publication, and particularly after, the question of peace versus justice has largely been resolved in favour of the latter, which has manifested itself in a variety of different mechanisms of varying strength. As a consequence, both literature and advocacy largely presume that justice is more constructive of the transition than the alternate position that the strength of transition generally determines the scope of justice.

This assumption is apparent in both books under consideration – Sikkink's fundamental premise is that transitional accountability automatically bolsters the transition and she largely seeks to establish the degree to which this is due to a transnational justice advocacy network of which she is part (p. 11). Payne, Olsen and Reiter, though sceptical of the impact of this network, do not depart from the orthodoxy that justice drives transition, and like Sikkink, are ultimately satisfied that transitional justice does have a beneficial effect in strengthening democracy and human rights (pp. 132, 146, 153). However, two of their key findings – (a) that despite a huge increase in advocacy, the rate of trials and amnesties has remained stable over time, and (b) that human rights and democracy only begin to correlate positively with transitional justice a decade after the transition–tend to suggest that both the decision to pursue transitional justice and any improvements in terms of rights and democracy are more a function of the relative strength of the transition than a contributing factor to it. To summarise, while there may be a mutually beneficial interplay between the type of transition and the type of justice pursued, the domestic political factors that shape transition type determine the mode of justice pursued far more than vice versa. Payne, Olsen and Reiter usefully challenge the transitional justice community's orthodox belief in their own potency to affect domestic accountability policy, and suggest instead that the strength and competence of the liberalising state largely determines the nature of transitional justice policy. These states may have political reasons for pursuing trials independent of the human rights concerns that motivate civil society, and their resistance to the forces of impunity may be more a function of democratic consolidation than normative change at international level.

II The roots of the justice cascade

In the volume under consideration and a number of earlier publications, Sikkink has outlined what she calls the 'justice cascade' (see Sikkink and Walling, 2007; Lutz and Sikkink, 2001; Finnemore and Sikkink, 1998; Keck and Sikkink, 1998). She argues that the endeavours of a transnational justice advocacy network successfully opposed the defiance of recalcitrant governments and stimulated a 'shift in the legitimacy of the norm of individual criminal accountability for human rights violations and an increase in criminal prosecutions on behalf of that norm' (p. 5). She contends that a small stream of domestic entrepreneurship from the late 1970s onwards (particularly in Argentina) was followed by transnational emulation manifested in ongoing normative socialisation, public debate and pressure that human rights activists at international and domestic level have exercised to mitigate the unwillingness of nascent democracies (who care about what

other states are doing and global normative trends) to deal with human rights violations of the past (p. 250). International human rights and domestic politics interact in a boomerang pattern, whereby domestic actors' influence is leveraged by allying with the transnational network of activists who magnify the pressure to comply with the norm of individual accountability. It is important to bear in mind that she does not merely note an ideational shift in the legitimacy of transitional accountability – after all, increased legitimacy of a norm in and of itself says little about its effectiveness. She in fact argues that at the core of the cascade is the realisation of this trend in actual criminal accountability (p. 5). Though she fully accepts that all or even most state officials who have committed crimes will never be sent to prison, through statistical analysis she notes a discernible increase in the judicialisation of transitional politics as made evident in increased numbers of trials and truth commissions (p. 12).

This notion of the justice cascade is one that has been accepted uncritically by a number of scholars (see Barahona de Brito, 2010; Sriram, 2003; Huneeus, 2007; Levy, 2010; Roht-Arriaza and Marrizcuena, 2006). However, Payne, Olsen and Reiter register a notable dissent. Though they fully accept the increase in demand for justice, they are sceptical as to whether it has actually translated into increased willingness to endure risky accountability processes. They contend that if the justice cascade should prove true, as a matter of logic 'the domestic considerations that drive minimalists to support amnesties, and moderates to endorse truth commissions, would yield to the accountability norm and the international and local pressures advancing it' (p. 99). However, employing a different methodology in assessing what constitutes criminal accountability and controlling for the increase in the number of transitions over time, they argue that the relative *frequency* of prosecutions and amnesties has remained stable and that the increased *number* of the former is attributable simply to the greater number of transitions since the late 1970s (pp. 101–103). Indeed, they argue that the rate of trial usage peaked in the late 1970s when a quarter of all transitions employed trial, and trial usage is not more likely today (p. 104), while formal and de facto amnesties have remained the most frequently applied mechanisms (pp. 39–41).[1] As such, they contend that any increases in the adoption of trials merely reflect global democratisation trends (p. 101).

What is most notable about this disagreement is that Sikkink, in publishing her book a year later than the trio and in referencing the other volume on numerous occasions, chooses not to engage with the substance of this critique but instead merely reasserts the merits of her own methodology (p. 145), effectively allowing Payne, Olsen and Reiter's particularised criticisms of her previous findings to win much of the debate. This is not to say that the trio's arguments are incontestable – in particular, their assertion that the cascade should automatically see a shift from amnesty to trial (pp. 36, 97) ignores the inevitability that even the most vigorous, genuine and widespread process of criminal accountability conceivable would require de jure or de facto amnesty at lower levels on account of the sheer scale of criminality. However, these are not arguments that Sikkink chooses to make, relying instead on her methodology to defend the justice cascade.

It is instructive therefore to turn to this methodological difference between the works. The fundamental disagreement relates to how to define and code what Sikkink calls a 'human rights prosecution' (p. 135). To enter the database Sikkink has developed in recent decades, a prosecution activity must inflict costs on a government agent accused of having individual criminal responsibility for a human rights violation (p. 136). Crucially, it is not necessary in this methodology for the prosecutions to result in conviction or even a completed trial. Sikkink argues that even when an investigation or prosecution does not result in conviction or imprisonment, it imposes significant reputational, economic and political costs on the individual (pp. 136, 186).

1 Thirty-four out of ninety-one transitions in this period saw no transitional justice method whatsoever used.

Payne, Olsen and Reiter adopt a paradigmatically contradictory method with the specific intention of avoiding over-counting by demanding manifestly credible prosecutions that end in a verdict of either a conviction or an acquittal (p. 32). Sikkink argues that this coding decision implies that trials can only have an impact if they are completed (p. 137), but this seems to misunderstand why an actually completed trial is the best means of assessing the impact of the putative accountability norm. The history of transitional justice is replete with sham prosecutions designed to momentarily appease those figures in the international or domestic communities demanding that something be done in the aftermath of atrocity, but where exculpation is nevertheless a foregone conclusion. While initiating a prosecution against an individual may impose some costs to the prestige, personal convenience and political legitimacy of an indictee, this is a trade-off many in the old regime have historically made to secure their own impunity when it was guaranteed that the trials would ultimately peter out. A prime example is Indonesia's Ad Hoc Human Rights Court for East Timor, which Sikkink includes as one of her examples of human rights prosecution (p. 269). This process became the paradigmatic example of biased domestic proceedings lacking credibility. Serving more to buttress the Indonesian military in the aftermath of the international revulsion occasioned by the attacks on East Timor after the 1999 autonomy referendum, it indicted none of the senior army echelon, acquitted all Indonesian indictees and ultimately convicted only one relatively low-level Timorese. One can also point to trial processes such as the Special Criminal Court on the Events in Darfur (SCCED) established by the Sudanese government in June 2005 to try individuals of suspected crimes against humanity to forestall the ICC's exercise of jurisdiction over alleged war crimes in Darfur. Thus far it has recorded no convictions of any Sudanese official, demonstrating that mere initiation of proceedings cannot alone indicate the triumph of an anti-impunity norm.

That something more than mere initiation of a criminal proceeding is expected in transition is also apparent from the negotiations on the Rome Statute, where the states' demand for a lenient regime of complementarity was qualified by the requirement in Article 17 of the Statute for prosecutions to be 'genuine'. Without this qualifier, '*any* national proceeding would preclude ICC action, even if the national proceeding were fraudulent or hopelessly inadequate', reflecting a reluctance to accept mere indictment or reputation injury as evidence of a criminal proceeding's bona fides (ICC Office of the Prosecutor, 2003, p. 5). Sikkink's minimal criteria are consistent with the three indicia of non-genuineness in Article 17(2), where 'unwillingness' to prosecute effectively can be determined, namely: (i) processes made for the purpose of shielding the person concerned from criminal responsibility, (ii) unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice, and (iii) proceedings conducted in a manner inconsistent with an intent to bring the person concerned to justice. Payne, Olsen and Reiter's more rigorous requirement of a completed trial, by contrast, reduces the possibility of bogus proceedings. Though one can find flaws in Payne, Olsen and Reiter's methodology (for example, isolated convictions of low-level offenders can mask national impunity for high-level offenders), their system is a more convincing way of assessing national commitment to accountability. While Sikkink repeatedly lauds the contribution of the Inter-American Court of Human Rights to the fight against impunity in Latin America, the superficial criteria she employs for testing the accountability norm would fall foul of the increasingly assertive jurisprudence one sees on issues of impunity between the seminal *Velasquez-Rodriguez* and *Barrios-Altos* decisions on the duties of governments to investigate *and* punish human rights abuses (Laplante, 2008, pp. 974–77). Q5

In addition to difficulties over what qualifies as criminal proceedings, the method of quantifying the number of countries and years in which prosecutions have been undertaken also raises cause for concern. Sikkink quite reasonably argues that the information collated on trial processes is not sufficiently fine-grained to allow for calculation of the actual number of trials. Instead, she

deploys a system of 'country-prosecution years', whereby evidence of any cost-imposing prosecutions occurring in a given country is coded as a '1' for that year, regardless of how many trials a country had in that year (p. 137). A state that has an active programme of prosecutions over a number of years over time builds a score of 'cumulative prosecution years', and using this methodology she calculates a dramatic increase in the number of prosecutions between 1989 and 2009 (p. 138). Though Payne, Olsen and Reiter use the country-prosecution years methodology when assessing political economy and international factors influencing prosecution policy, they doubt the utility of this method for quantifying criminal accountability. They contend that one trial extending over a number of years would give the appearance of several trials (sham trials arguably run a greater risk of this than genuine trials), consequently over-counting global efforts to hold perpetrators accountable for atrocities and 'stacking the deck' in favour of the justice cascade (pp. 32, 104). There is some truth in this argument. For example, Sikkink finds that Argentina has garnered the most prosecution years because most years since the 1980s have seen erratic spurts of prosecutorial activity (however minimal), even though its amnesty laws were only declared null and void in 2005 and the main glut of prosecutions has occurred only in the last five years (p. 7). Though Bosnia has seen numerous prosecutions and convictions at international or domestic level every year since 1995, Argentina's patchy prosecution record surpasses it on the prosecution-year scale. The conviction of eighty-four indictees at the Timorese Special Panels between 2000 and 2005 yields the same cumulative prosecution score as Indonesia's single conviction in the same timeframe.

These methodological differences explain why the trio doubt the justice cascade, and throughout their methodologies are more convincing. This is particularly the case when they are assessing the impact of transitional conditions on justice policy, employing variables for authoritarian regime, the transition type, impact of civil society and the new liberalising government, and controlling rigorously for each through regression analyses using a logit model. By contrast, Sikkink acknowledges that many scholars have been unconvinced in the past by the methodologies she has employed in her research on the justice cascade (pp. 153, 167). Because she did not control sufficiently for these intervening factors, the apparent cascade could be explained by factors other than advocacy, such as a prior democratic history, peace-building missions or sheer vindictiveness on the part of the new polity. As Chapters 3 and 4 make clear, this has resulted (a) in exaggerating the causal significance of transnational advocacy on national decisions to pursue transitional criminal accountability, in turn resulting in (b) an unmerited downplaying of the significance of transitional political balances on the decision to pursue accountability. It is to these two issues that attention now turns.

III Why states pursue justice

At the root of the justice cascade is the assertion that the historically large number of prosecutions in the last thirty years 'is a result "of deliberate, strategic organizing by rights advocates"' (Sikkink, p. 16). Sikkink is not arguing that the actions and campaigns of advocates are merely facilitative of transitional criminal trials, not that they capitalise on the processes of liberalisation, not that lobbying is just one of a number of reasons a liberalising state would pursue trials. She is arguing that *but for* the activity of activists, trials would not occur or would only occur less often or in diminished form. As she explicitly puts it, '[t]hese new practices of accountability would not have emerged without the combination of new human rights movements, new human rights law, and regional institutions to implement law' (p. 20). These statements, presented almost as truisms, are worth close examination. Effectively, Sikkink argues that even though almost all Western European states pursued transitional criminal accountability in the absence of an NGO or human rights network in the aftermath of World War II, and even though in the present day states such

Q6

In effect.

as Ethiopia, Cambodia and Rwanda (who show scant regard for human rights movements and human rights law) have proven the most enthusiastic exponents of transitional trial, generally speaking trials would never have occurred in transitional countries without the efforts of the transnational advocacy network. Of course one can argue that the Western European trials were exceptional because of their prior history of the rule of law and that Ethiopia, Cambodia and Rwanda are using trials illiberally to buttress repressive rule, but these examples nevertheless prove the point that transitional trials may not require the catalytic effect of civil society. Accountability for atrocity often occurs (and indeed occurs most enthusiastically) in areas far removed from the mainstream of transnational justice networks and in places which have shown themselves deeply hostile to universal human rights norms.

Why then does Sikkink insist the presence of national and international civil society pressure is determinative of the decision to pursue trial? One sees in her book two particular blind spots. The first is a disregard for the actual significance of transition. Though Sikkink argues that the justice cascade has overturned the prior impunity-driven system of state responsibility in favour of an individual accountability model, the very process of transitioning to a state based on a democratic majority opposed to the prior regime automatically places the option for individual criminal responsibility in play independent of any pressure from civil society or the international human rights regime. The second blind spot is the role of the state based on democracy and the rule of law (however imperfect) which has compelling reasons to try the ancien regime that are complementary to, but independent of, human rights based advocacy.

3.1 Over-playing the significance of sovereign immunity

Sikkink argues that the significance of the justice cascade is that previously immune state officials can now realistically expect to be prosecuted at domestic and international level (p. 12). As she puts it, '[t]his conceptual change also reflects the move from state accountability that is at the heart of the justice cascade' (p. 100). Noting the complacency in their own impunity of the Latin American caudillos like Bordaberry of Uruguay and Pinochet of Chile at the height of their power (p. 4), she argues that after the Greek colonel trials of the 1970s a justice norm established the principles that basic violations of human rights cannot be acts of the state and that individuals who commit crimes should be prosecuted (p. 13). In so doing, she contends that the global justice movement challenged the doctrines of sovereignty and sovereign immunity which protected state officials from prosecution and which were previously the norm (p. 17).

There are two responses to this argument. The first, and very obvious one, is that since the Leipzig, Nuremberg and Tokyo trials, sovereign immunity has steadily and irreversibly eroded, as evidenced by the trials themselves and the 1948 Genocide Convention that long pre-date the Greek trials. Sikkink's assertion that Argentina had no roadmap for how the trials of authoritarian leaders should be pursued only bears scrutiny if one disregards the domestic post-World War II trials and Latin America's long (if undistinguished) record of treason trials (p. 72). The second objection is that while sovereign immunity is deployed as a shield against external interference in domestic policy at international level, it has significantly less purchase at domestic level, especially in a context of transition from authoritarianism to democracy, where it is no longer a case of human rights abusers hiding disingenuously behind state immunity. To the extent that sovereign immunity is argued as a shield against prosecution (permissive legislation and doctrines of national necessity have always proven more popular), the nouveau regime can waive it, prosecute *erga omnes* crimes to which no amnesty can attach or simply prosecute that narrower spectrum of crimes that constituted breaches of the domestic law or constitution.

Sikkink cites the accountability norm as the reason for the otherwise 'puzzling' decision of state officials to relinquish the privilege of state immunity (p. 237), but the very fact of transition presupposes that those who committed crimes and therefore stand to benefit most from the

privilege are no longer those in power. In genuinely liberalising transition, the 'privilege' to abuse one's own citizenry or to prosecute war in disregard of humanitarian law is willingly renounced by the Alfonsins, Havels and Mandelas who presumably do not intend to commit war crimes, genocide or torture in future and who may or may not wish to place their former antagonists behind bars. While she argues that the perspectives underpinning the justice cascade have 'empowered the individual vis-à-vis the collective and the state', the very fact of political liberalisation does this too (p. 234). Where transitional states have actually surmounted revanchist opposition (Sierra Leone, East Timor, Bosnia), it is often a case of NGOs and victims' groups pushing at an open door. To the extent that a norm of accountability has struggled against the 'reigning orthodoxy of immunity' (p. 231), democratising states invariably eschew prosecutions due to realpolitik concerns and not due to a solemn belief that past abuses were legitimate state acts.

3.2 The significance of transition

Sikkink's second blind spot is the significance of the very fact of transition to a democratic state which, presumably, intends to function as states normally do. She is entirely correct in arguing that power is the main explanatory factor behind impunity and that only when that power is diminished can trials take place (p. 232). However, in domestic transitions the power shift conducive to (but by no means guaranteeing) accountability has occurred through transition itself, and not through the triumph of an accountability norm (admittedly, the argument has greater credence at the level of international prosecutions, a matter addressed in Chapter 4).

As noted above, Sikkink's analysis is explicitly transitional, but throughout the work the transition itself is treated as a merely incidental factor, as opposed to a significant independent variable, as Payne, Olsen and Reiter do (pp. 46–48). Sikkink acknowledges that 'new elites continued to be important because prosecutions were often held only after previous office holders had stepped down from their positions of power and had lost the ability to overturn the new democratic regimes' (p. 245). However, she contends that the change from authoritarian to representative government alone 'cannot help us understand well ... why all this started to change' in the first place (p. 233), and goes on to assert that the third wave of democratisation which underpins modern transitional justice amounted to nothing more than a 'background condition' for domestic norm entrepreneurship and transnational emulation (p. 246). Effectively, it is argued that new governments generally would not prosecute former abusers were it not for determined campaigns against impunity by a mutually sustaining network of domestic and international human rights activists. Q6

However, the very fact of transition defined in its most basic forms by Teitel (2001, p. 5) as 'the move from less to more democratic regimes' or by Smiley (2001, p. 1336) as one from a regime 'whose norms are bad to one whose norms are good' actually provides a very good explanation for why trials might occur independently of any contemporaneous norm diffusion in the international human rights community. As Payne, Reiter and Olsen demonstrate, through controlling for old and new regime types, conflict type, duration, democratic history and the presence of a negotiated regime change, transition type ultimately is the key deciding factor in determining whether transitional justice is pursued or not. The precise manner in which these other factors impact on transitional justice is examined in Chapter 4, but it is necessary to recap briefly from the vast literature some of the reasons a state would wish to try human rights abusers independently of a concern to punish human rights abuse. These include sovereignty, the related issue of establishing the authority of the new polity, and the rule of law.

One of the key reasons transition to democracy is in itself conducive to punishing human rights abuses is the simple and uncontroversial fact that enforcement of the law is a core element of sovereign authority itself, the assertion of which is made all the more likely when (i) that criminality was directed against those who now constitute the new political leadership and (ii)

the competence and legitimacy of the new state order is in question. Transitional prosecutions are not merely a reassertion of the state's sovereign power, they also demonstrate the government's bona fides not only as a rights-respecting regime but as an authoritative one. An entire body of transitional criminological literature has been developed on the pedagogical role of trials, which extends beyond the admittedly important role of outlining the outward boundaries of political or military behaviour. While Sikkink would no doubt agree with Cohen (1995, p. 42) that transitional trials can re-educate the public on 'the value of human rights ... the limits of obedience, the virtues of whistle-blowing, the duty to intervene, the permissible limits of dissent', they also serve as a naked political power play, demonstrating that there is a 'new sheriff in town'. As Kirchheimer (1961, p. 308) puts it, the trial of the past regime enables 'the construction of a permanent, unmistakable wall between the new beginnings and the old tyranny'. Impunity or amnesty, on the other hand, call into serious question the bona fides and power of the new state and hence the permanence and revolutionary nature of the new constitutional order. Sikkink is correct to note that transnational norm diffusion has improved due process standards of trial and mitigated the risk of victor's justice (p. 136), but at the root of this concern for victor's justice is the acknowledgement that there are compelling political and social reasons why transitional states would wish to try the ancien regime that may catalyse accountability far more than human rights campaigning.

Sikkink's faith in the centrality of a norm cascade and transnational advocacy to the decision of transitional governments to prosecute also tends to underestimate rule of law-based motivations for prosecuting crimes under the terms of international treaties ratified by the state in the past. While trial serves as a critical response to past human rights abuses, it also serves to signal that the new state intends to uphold *all* law:

> 'When the state is complicit in persecution, threshold notions of equality and security under the law are put into jeopardy. Accordingly, the transitional response's significance transcends the individual case to express a normative message of equal protection that is basic to the rule of law.' (Teitel, 2001, pp. 65–66)

While Sikkink expresses puzzlement that Karamanlis's Greek government would choose to pursue accountability given his lack of human rights background (pp. 41–42), a personal commitment to human rights is hardly a prerequisite for the desire of a transitional government to enforce the law against one's enemies, as evidenced by the vigour of prosecutions in Egypt, Ethiopia, Rwanda, the DR Congo, and others. Both books note that the majority of transitional prosecutions have occurred in Europe (Sikkink, pp. 22–23; Payne, Olsen and Reiter, p. 39). One can interpret this, as per the justice cascade, as evincing Europe's greater susceptibility to normative theorising, but the more likely explanation is the pre-existing strength of their legal systems and a comparatively long history of the rule of law that predates the justice cascade. Sikkink's argument that Uruguay's prosecutions drew on models horizontally diffused from Argentina and Chile (p. 249) may be true insofar as prosecutorial tactics and sequencing are concerned, but the primary influence on the process are two centuries of spasmodic constitutional and democratic traditions derived from Europe, even if their historical realisation has been imperfect thus far. Payne, Olsen and Reiter find that states with a significant democratic history are more likely to use trial than those transitioning to democracy for the first time, concluding that this is a primary influence on the decision to pursue prosecutions (pp. 55–57). In the countries where most prosecutions have occurred, therefore, transnational networks have probably had the least impact on the actual decision to prosecute, even if they are influential in increasing the scope and urgency of prosecutions. Though Sikkink argues at the outset that scholars need to 'zoom out and look at all of the pieces together' to understand the advance of accountability (p. 18), her presentation

of human rights-based norm diffusion as fundamental to decisions to prosecute underestimates compelling motivations based on sovereignty, political propagandising and the rule of law.

Perhaps one explanation for the fact that Sikkink sees prosecutions of past atrocities of war and repression as something more original and revolutionary than they actually are, is that she defines them throughout as 'human rights prosecutions' (pp. 21, 48) constituting a newly adopted norm when they might with equal justice be seen as a revived form of criminal trials rooted somewhere in the constitution or history of even the most developing states. Though she notes the role of Greece and Argentina in kick-starting the modern era of human rights prosecutions, trials in the former were for the domestic crimes of abuse of power and bodily damage (p. 48), while in the latter most of the initial prosecutions were crimes that breached Argentinian law (p. 72). Of course, one can argue that modern trials for war crimes or crimes against humanity in Latin America or in the states of the former Yugoslavia are different because of their conscious application of international law. However, while the definitions of the crimes are qualitatively different, they remain criminal trials, a responsibility democratic states based on even the thinnest, most formal rule of law are generally willing to accept in the absence of political instability or military force majeure. Though she argues that a key explanation for the spread of the criminal accountability model was the fact that it was 'familiar and obvious' to the people from their domestic experience with it (p. 20), she does not follow this proposition to its logical conclusion, i.e. that criminal prosecutions of physical integrity violations are something that even weak democratic states accept a responsibility to do most of the time, and that is in no way revolutionary. At one point, Sikkink expresses astonishment that the Greeks she interviewed did not realise how innovative and unusual the trials of the colonels were, but their response that the trials were 'common sense' and 'obvious' would not surprise scholars in the rule of law reconstruction or state-building communities who typically see a widespread social expectation that state institutions will function as they are supposed to (pp. 46, 50). Given that Greece had previously tried Nazi collaborators for physical integrity abuses and coup leaders for treason in the 1930s, the complacency that so surprises her is understandable. Fealty to the justice cascade idea presents a very definite risk of not seeing the wood for the trees.

Indeed, as Sikkink points out, the idea that violations of physical integrity are wrong:

> 'can be found in every legal system and culture in the world ... virtually all [legal cultures] include prohibitions of murder, rape and other forms of violence ... there is also a globally shared notion that ... there should be some form of sanction for wrongs against the community.' (p. 255)

Though she points out that issues involving these crimes are most likely to stimulate activists' campaigns because these abuses resonate across borders, she misses the very obvious corollary that these crimes may also resonate with the new political elite regardless of whether they have a strong human rights background. They may not therefore require squadrons of civil society actors from Europe and North America to remind them of the fact. That criminal accountability has historically not been pursued in transition cannot be explained by a lack of awareness of legal obligations, a lack of will, a reluctance to relinquish state sovereignty or deafness to cries of very vocal victim and human rights organisations. Given the compelling state interest in prosecutions, not only in terms of signalling a commitment to human rights but in terms of buttressing its own authority and the authority of law, the roots of impunity must instead continue to lie in transitional power balances. It is to this issue that attention now turns, for Sikkink argues that the justice cascade has fundamentally altered the transitional political calculus.

IV An altered security balance?

The second claim Sikkink makes about the impact of the cascade is that it has fundamentally altered the hitherto dominant realist security–democracy calculus of transition. The orthodoxy here is best described by Huntingdon (1991, pp. 124–40), who argued that significant accountability is generally only feasible with the domestic overthrow of rulers by the opposition or where external militaries forcibly bring about change of regime. Here, former power brokers who have most to lose from trial enjoy no 'wrecking' or 'spoiling' ability and are less able to stoke hostility. Where spoilers retain significant power through the military or control of the civil service, or where power is handed over as part of an implicit bargain that prosecutions will not be pursued, political scientists warned that nascent democracies who confront the most reprehensible facts of its recent past risked political suicide (O'Donnell and Schmitter, 1986). Where negotiations and not rupture defined the transition, the pursuit of accountability was considered infinitely less feasible, perhaps best exemplified by the Chilean dictator Augusto Pinochet's warning: 'Touch one hair on the head of my soldiers, and you lose your new democracy.' Scholars and activists such as Zalaquett (1992, p. 1429) argued that new rulers were fully aware of their obligations under international law but in these circumstances follow a commendable Weberian ethical maxim of responsibility by considering the predictable consequences of the actions instead of an ethic of conviction about what is right.

Sikkink contends that whereas once it was possible to hold state perpetrators of gross human rights abuses accountable only after the complete and forced collapse of power and legitimacy of the ancien regime, as a result of the success of transnational advocacy this is no longer the case (p. 83). She argues that because of the change in the ideational context in which decisions about accountability are taken, a ruptured transition is no longer a precondition for prosecutions, citing the examples of negotiated transitions in Guatemala, Chile, Argentina and Uruguay, where some measure of criminal accountability was ultimately secured (p. 83). Though she accepts that a diminution in power of the ancien regime is a precondition for trials, she contends that power differentials alone can never explain why trials might occur (p. 232). Effectively, she argues that **Q6** the 'momentum' generated by NGOs and the international community crucially buttress the will of a domestic government in the face of credible pressure from recalcitrant figures from the old regime who retain significant military, economic or political power (p. 245). On this basis, it is argued that the NGO battle-cry of 'no peace without justice' is now heeded even in the most precarious instances of democratic regime change.

However, the transitions she uses to demonstrate this point do not disprove the realist arguments of the time. Sikkink points to convictions like those of Uruguay's Bordaberry (2010), Peru's Fujimori (2009) or the hundreds of re-opened Argentine trials since 2005, and observes that none of these countries has been undermined because of trials (pp. 26, 108–149). However, in suggesting that '[c]ontrary to the arguments made by trial sceptics, transitional prosecutions have not tended to exacerbate violations' (p. 27), she both distorts the nature of the realist arguments and employs anachronistic evidence to support her thesis. The realist arguments were made in the early days of the transitions occasioned by the end of the Cold War. As a result, they were generally made at the most tentative time of the transition. The Eastern European and Latin American transitions typically had three phases – the *abertura* (opening), where some liberalisation is forced by pressure from below (civil society) and abroad, followed by the actual process of transition (the *breakthrough*), defined politically by pacts, agreements, elections, referenda, constitutions and peace treaties, and finally *consolidation*, where danger of revanchism recedes and institutions of democracy take root. The realist caution over the wisdom of trial was expressed during the opening and the breakthrough, and long before consolidation. At the time, arguments based on caution were highly plausible. Argentina's trial of the junta leadership was abandoned in the late

1980s after an army coup, Chile's armed forces simulated a coup in 1993 (p. 232), and Uruguay's population were cowed into voting for amnesty in a referendum in 1989. Of course, at the time, advocates of trials posited that states should be willing to take risks to ensure accountability, but the scale of those risks were significant. While Sikkink argues that the realist perspective is born of a distrust of international law (p. 132), it would be fairer to say that it is the product of a legitimate mistrust of proven human rights abusers. Transitional societies are more precarious than maximalists are willing to credit--countries with a recent history of civil violence run nearly a 50 per cent risk of slipping back into violence within five years of peace (Collier *et al.*, 2003, p. 83), while of the nearly one hundred states considered transitional in the decade after the fall of the Berlin Wall, less than twenty made a clear progression to well-functioning democracy (Carothers, 2002, p. 9). Empirical analysis of thirty-two transitions by Snyder and Vinjamuri (2003) suggests that in certain conditions, transitional accountability can increase the risk of reversing transition and extending conflict.

In response to this pessimism, Sikkink posits the encouraging spate of criminal accountability in Latin America. However, over a decade and half after the Latin American transitions took place, Sikkink is effectively arguing merely that trial can occur after consolidation without jeopardising that consolidation. Given that consolidation is a period where, as Carothers (2002, p. 7) puts it, 'democratic forms are transformed into democratic substance through the reform of state institutions, the regularization of elections, the strengthening of civil society, and the overall habituation of the society to the new democratic "rules of the game"', this is a materially different context to that foregrounding arguments made by the realist scholars. The realist position that weak transitions, hamstrung by the risk of revanchist or self-protective violence, should adopt a 'minimalist' position of an official or de facto amnesty incorporates a necessary, albeit underexplored, corollary – strong, secure transitions as they advance towards consolidation should in theory and in likelihood be willing and able to pursue accountability where the risk is minimal. Significantly, Payne, Olsen and Reiter find that transitional justice corresponds with increased scores for civil liberties, political rights and democracy ten years after transition, but has limited effects before and after five (p. 142). Realist caution is therefore compatible with maximalist demands for as much justice as possible in contexts where it is unlikely to jeopardise the democratic settlement. If questioned whether they believed transitional accountability might be possible after a number of election cycles, thoroughgoing military reform and economic stabilisation, realists like Huntingdon might well have assented, but this was not the dilemma posed at the time.[2] Applying the arguments of 2011 to the context of 1991 is both anachronistic and methodologically unsound and cannot vindicate the influence of the justice cascade.

No one can doubt the role of NGOs in Latin America in rallying opinion and supporting or undertaking private prosecutions, as Sikkink consistently illustrates (p. 146). However, she is unable to establish her thesis that the strength of international and domestic advocacy networks is the main causal explanation for accountability there. In Argentina, her primary focus, the expansion of the trials beyond the nine junta leaders to hundreds of other officers provoked attempted coups and the notorious Full Stop and Due Obedience Laws. The period since 1989 has been spent trying to erode these laws (most notably through the use of the Inter-American Court of Human Rights (IACtHR) by NGOs and private prosecutions), but it was only in 2003 that Congress voided the laws and only in 2005 that the Argentine Supreme Court declared amnesty laws unconstitutional (p. 79). While Sikkink is right to applaud the role of civil society's interaction with international organisations and the IACtHR in reaching this position, at the core of Payne, Olsen and Reiter's argument is the need to control for other factors. Among these, the

2 Though it should be noted that they advised prosecutions to be undertaken quickly if pursued in opening or breakthrough periods.

political majority in Congress of the left-populist Kirchner administration (who found it a useful means of self-legitimising against the Menemist party, who historically were more sympathetic to amnesty) was crucial. Significant too is the ongoing process of institutional reform in the likes of Chile, Peru and Argentina, where changes in criminal procedural codes required entirely new judicial institutions which very successfully developed the capacity to enforce the rule of law (Bhansali and Biebesheimer, 2006). Indeed, in Chile, where the threat of military revanchism stalled accountability, the leftist Aylwin government viewed criminal procedural reform as an essential means of buttressing its unsteady power and dismantling the institutional remnants of Pinochetism. Collins (2010, p. 3) concludes that while strategic campaigning by NGOs has played a role in accountability there, judicial and military reforms in the late 1990s that reached fruition around 2004–2005 were the determining factors, and that it is important 'not to overemphasize the relative contribution of international, or "outside-in" dynamics to national change'. The slow progress of accountability reflects a general Latin American trend towards an initial 'weak state perspective' emphasising transitional stability, realistic goals for the state and incremental institutional development over risky liberalisation (Serrano and Kenny, 2005).

The Latin American experience further illustrates the wisdom of what Paris (2004) calls 'institutionalisation before liberalisation', which begins from the premise that inherently tumultuous liberalising activities such as electoralisation, marketisation and (it might be argued) criminal justice that have the potential to undermine a fragile peace should be forestalled until a rudimentary network of institutions (such as courts and a secure executive) capable of managing these strains have developed. Few would quibble with the assertion that a well-organised campaign for justice is highly conducive to such development, but a state restoring the rule of law may cultivate its own institutions and momentum independent of the justice cascade. While Sikkink argues that the transnational campaign that resulted in Pinochet's European trial stimulated domestic prosecutions (p. 4), these prosecutions were effectively free-riding on the decade of democratic stability Chile was enjoying. Similarly, when she argues that because Argentine democracy 'was now more consolidated and the judicial system more experienced, few people argued as they did in the past, that these trials were threatening to democracy', it unwittingly tends to confirm that the strength of transition in fact exerts the strongest influence on justice policy (p. 79). Democratic consolidation and human rights advocacy are of course mutually sustaining phenomena, but the absolute causal primacy Sikkink attributes to advocacy does not reflect this.

By contrast, Payne, Olsen and Reiter reach more sober conclusions that tend to suggest that two decades of norm diffusion have done little to alter the transitional stability calculus – the strength of the transition relative to the power of the ancien regime remains highly influential. Through analysis and coding of the pace of numerous transition types, they find that in the period of the justice cascade, a 'clean break with the past' such as overthrow, collapse or military defeat remains far more conducive to trial than a negotiated transition, with trials being twice as frequent (p. 54). Furthermore, negotiated transitions are most strongly associated with truth commissions or no transitional justice at all (p. 55). Further evidence that transition type exercise more influence on transitional justice than global norm diffusion comes from the fact that trials are far less likely after war (observing only thirty-nine postwar trials between 1970 and 2007) than authoritarian transition (228 trials). While crimes are generally more serious and more numerous in war, the obviously credible threat from experienced holders of arms ensures that transitional governments prefer to risk the wrath of Amnesty International than that of soldiers (p. 33). Though there have been some post-civil war trials (for example, in Sierra Leone and the former Yugoslavia), Olsen, Payne and Reiter find that they usually occur only where international forces have intervened to stabilise the polity (p. 28). International peacekeepers increase the likelihood of trial (p. 6), but this has long been a tenet of those realists who assert the determinative influence of power

balances. Historically, where the transition to liberal rule is introduced or mediated by a foreign power who can ensure the marginalisation of abusive figures, justice is usually more trial-based and rigorous (Elster, 2004, p. 49). By contrast, where endogenous autocratic regimes undergo endogenous transitional justice, the tendencies towards amnesty and pardon noted earlier are the norm (Elster, 2004, p. 49). Both books convincingly argue on the basis of the empirical evidence that prosecutions do not exacerbate conflict, destroy democracy or imperil human rights standards and in fact help to develop them (Sikkink, pp. 148–56; Payne, Olsen and Reiter, pp. 131–47). However, because Olsen, Payne and Reiter illustrate that trials still generally occur in times of rupture or international intervention, this does not disprove the realist thesis that trials should not be pursued when there is significant risk that they can imperil transition. Sikkink is correct that no government in Latin America committed suicide by carrying out prosecutions, but equally no country actually risked suicide in the timing of their processes. The one exception of course was Argentina, which risked trial in the mid 1980s, endured attempted coups and responded with amnesty. As Payne, Olsen and Reiter put it, 'new democracies tend to move cautiously, making it difficult to test the assumption that moving too far, too fast, threatens democracy' (p. 5).

Even if one does accept Sikkink's argument that the stability calculus radically shifted in Latin America (though the widespread post-Communist impunity in Eastern Europe has seen no comparative revision) and assume the experience of countries who have undertaken prosecutions and 'changed the terrain of expectation' (p. 83), recent experience outside Latin America tends to reaffirm the arguments of both the realists and Payne, Olsen and Reiter. Indeed, their warning that transitional justice scholarship gives disproportionate emphasis to certain transitions or transition types conducive to study appears particularly apposite where purportedly general trends are drawn from the idiosyncratic conditions of Latin America alone (pp. 25–26). Globally, domestic transitional accountability remains the exception rather than the rule in all but the least precarious transitions. For example, criminal justice was quietly jettisoned even in areas where the UN, the West or the international human rights community have been active, such as Afghanistan (its Action Plan for Peace, Reconciliation and Justice did not include prosecutions), Liberia (UNMIL's rule of law mandate does not include transitional trial, resulting in de facto amnesty) and, of course in the United States under the Obama administration post-Guantanamo. In trying to reconcile the justice cascade with the endurance of impunity in the place where the vanguard of the justice cascade is based, Sikkink is reduced to asserting that the Bush–Cheney legal memos and strategies are a 'perverse' indication of the strength of the cascade because officials perceived the need to protect themselves from prosecution (pp. 190–92). An equally valid interpretation, however, would suggest that accountability for human rights abuses remains as dependent on power differentials as ever.

While the case that the justice cascade has altered the domestic political calculus over prosecutions is oversimplified, Sikkink's analysis of the international impact of transitional justice is more compelling. Her argument that the experiences of domestic prosecutions in the early 1990s created the backdrop for the ad hoc tribunals and ICC seems undisputable (p. 251). The centrality of the 2,000 NGOs in the Coalition for the International Criminal Court in getting the Rome Statute agreed and ratified cannot be gainsaid (p. 119), while the transnational network of human rights lawyers and advocates were integral to creating the 'Pinochet effect' by pressing for and utilising third-party universal jurisdiction. While both innovations demonstrate the increased legitimacy of the accountability norm, it must be remembered that at the core of the cascade argument is an increased enforcement, which does not appear to have materialised. Universal jurisdiction has seen far more 'virtual' cases in the media than 'hard' cases in courts, at best generating a reputational loss for tyrants and making their travel more difficult, but has also generated a widespread backlash that ultimately caused its premature desuetude (Reydams, 2010). The ICC has secured only the solitary conviction of Thomas Lubanga, and has been powerless to

secure accountability for atrocities in Darfur, Burma, Syria and Israel. Operating internationally as they must, neither universal jurisdiction nor the ICC will generally impose significant political costs on those who voluntarily employ them. However, where they do (for example Washington's threat to remove NATO from Brussels after the Rumsfeld indictment or the Ugandan government's attempt to convince the ICC to withdraw its indictments against LRA leaders after its self-referral complicated peace talks), accommodation continues to trump accountability. Sikkink is correct to call this blackmail (p. 161), but, crucially, it remains successful blackmail. The efforts of transnational activists may have turned individual criminal accountability from a one-level (domestic) game to a two-level (internationalised) game (p. 241), but it is one that nevertheless remains stacked in favour of the powerful, the resistant and the recalcitrant. Both universal jurisdiction and the ICC affirm the norm that state agents should be tried in their domestic courts or, failing this, should be tried abroad. However, they have generally failed in both respects where political circumstances are inhospitable to justice.

V Conclusion

In arguing for the existence of a justice cascade, Sikkink makes four interrelated arguments: (i) that transitional prosecutions are increasingly common, and (ii) constitute a new model of individual accountability (iii) the prevalence of which is primarily due to human rights NGOs working domestically and linked together in transnational networks, and (iv) would not have happened without them. Each of these claims suffers somewhat under the more rigorous empirical scrutiny of Payne, Olsen and Reiter because of their greater willingness to look at explanatory variables beyond the undoubtedly beneficial influence of domestic and transnational activists. They find that the increase in prosecutions reflects the increased number of transitions, suggesting that activists have changed world politics far less than Sikkink's title might suggest. For a long time, concern has been expressed that transitional justice advocacy 'claims too much' (Fletcher and Weinstein, 2002, p. 601). In proposing that the emergence and diffusion of the accountability is due to the intrinsic power of a norm advanced by NGOs and consequently embedded in law and institutions, Sikkink may do just that. Human rights norms are just one of a number of reasons a transitional state chooses to punish atrocities of war and repression. Prosecutions, some fair and some lacking in due process, have occurred far from the influence of the networks examined herein. Where trials and advocacy have interacted, no data is presented to disentangle correlation from cause. Indeed, lack of knowledge of the impact of international actors and the domestic demand for justice are two of the areas where Payne, Olsen and Reiter admit least is known (p. 160). Overly teleological attempts to correlate trials with norms may obscure possible free-riding by human rights institutions. The messianic self-image of human rights activists rarely allows for the impact of more mundane indigenous influences like politics, history and economics. As Charlesworth (2002, p. 384) puts it, '[o]ur discipline does not encourage the weighing up of competing versions of events. What we glean then as "facts" may be inaccurate or partial and the way we report and emphasize them is an act of political interpretation.'

The impact of advocacy must be tested and not assumed, but on the preliminary evidence assembled in these volumes, it appears that the advocacy network is more facilitative of justice than determinative, helping to restrain impunity but unable to alter policy fundamentally. The accountability norm may, as Sikkink argues, be embedded in law and institutions. However, where accountability is realised, it constitutes less a new model of individual accountability than a revived commitment by the state to exercise a pre-existing responsibility to enforce the criminal law. The desire to assert the value of transitional accountability in the face of strong (albeit weakening) global scepticism is understandable and laudable.

References

AKHAVAN, Payam Akhavan (2003) 'The International Criminal Court in Context: Mediating the Global and Local in the Age of Accountability', *American Journal of International Law* 97: 712–21.

BARAHONA DE BRITO, Alexandra (2010) 'Transitional Justice and Memory: Exploring Perspectives', *South European Society and Politics* 15: 359–76.

BHANSALI, Lisa and BIEBESHEIMER, Christina (2006) 'Measuring the Impact of Criminal Justice Reform in Latin America', in Thomas Carothers (ed.), *Promoting the Rule of Law Abroad: In* Thomas Carothers Washington, DC: Carnegie Endowment for International Peace, 301–326.

BRAHM, Eric (2008) 'The Impact of Transitional Justice in Post-Conflict Environments', Ralph Bunche Institute for International Studies Paper.

CAROTHERS, Thomas (2002) 'The End of the Transition Paradigm', *Journal of Democracy* 13: 5–21.

CHARLESWORTH, Hilary (2002) 'International Law: A Discipline of Crisis', *Modern Law Review* 65: 377–92.

COHEN, Stanley (1995) 'State Crimes of Previous Regimes: Knowledge, Accountability, and Policing the Past', *Law and Social Inquiry* 20: 7–50.

COLLIER, Paul *et al.* (2003) *Breaking the Conflict Trap: Civil War and Development.* New York: Oxford University Press.

COLLINS, Cath (2010) *Post-Transitional Justice: Human Rights Trials in Chile and El Salvador.* Philadelphia: Pennsylvania State University Press.

COOMANS, Fons, GRUNFELD, Fred and KAMMINGA, Menno T. (2010) 'Methods of Human Rights Research: A Primer', *Human Rights Quarterly* 32: 170–87.

CROCKER, David A. (2002), 'Democracy and Punishment: Punishment, Reconciliation and Democratic Deliberation', *Buffalo Criminal Law Review* 5: 509–549.

ELSTER, Jon (2004) *Closing the Books: Transitional Justice in Historical Perspective.* New York: Cambridge University Press.

FINNEMORE, Martha and SIKKINK, Kathryn (1998) 'International Norm and Political Change', *International Organisation* 52: 887–917.

FLETCHER, Laurel E. and WEINSTEIN, Harvey (2002) 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation', *Human Rights Quarterly* 24: 573–639.

FOLLESDAL, Andreas (2009) 'Methods of Philosophical Research on Human Rights', in Fons Coomans, Fred Grunfeld and Menno T. Kamminga (eds), *Methods of Human Rights Research.* Antwerp: Interstentia, 233–46.

GREADY, Paul (2005) 'Reconceptualising Transitional Justice: Embedded and Distant Justice', *Conflict, Security & Development* 5: 3–21.

GREADY, Paul (2009) 'Telling Truth? The Methodological Challenges of Truth Commissions', in Fons Coomans, Fred Grunfeld and Menno T. Kamminga (eds), *Methods of Human Rights Research.* Antwerp: Interstentia, 159–85.

HUNEEUS, Alexandra (2007) 'Norms Trickling Down: Of Judges, the Justice Cascade and Pinochet Era Cases in Chile', *Santa Clara Journal of International Law* 5: 352–92.

HUNTINGDON, Samuel P. (1991) *The Third Wave: Democratization in the Late Twentieth Century.* Oklahoma: University of Oklahoma Press.

ICC OFFICE OF THE PROSECUTOR (2003) 'Informal Expert Paper: The Principle of Complementarity in Practice'. Available at: www.icc-cpi.int/iccdocs/doc/doc654724.PDF.

KECK, Margaret and SIKKINK, Kathryn (1998) *Activists Beyond Border: Advocacy Networks in International Politics.* Ithaca, NY: Cornell University Press.

KENNEDY, David A. (2004) *The Dark Sides of Virtue: Reassessing International Humanitarianism.* Princeton, New Jersey: Princeton University Press.

KIRCHHEIMER, Otto (1961) *Political Justice: The Use of Legal Procedure for Political Ends.* Princeton: Princeton University Press.

LAPLANTE, Lisa (2008–2009) 'Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes', *Virginia Journal of International Law* 49: 915–84.

LEVY, Daniel (2010) 'Recursive Cosmopolitization: Argentina and the Global Human Rights Regime', *British Journal of Sociology* 61: 579–86.

LUTZ, Ellen and SIKKINK, Kathryn (2001) 'The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America', *Chicago Journal of International Law* 2: 1–34.

MILLER, Zinaida (2008) 'Effects of Invisibility: In Search of the "Economic" in Transitional Justice', *International Journal of Transitional Justice* 2: 266–91.

O'DONNELL, Guillermo and SCHMITTER, Philippe C. (1986) *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies.* Baltimore, MD: Johns Hopkins University Press.

PARIS, Roland (2004) *At War's End: Building Peace After Civil Conflict.* New York: Cambridge University Press.

REYDAMS, Luc (2010) 'The Rise and Fall of Universal Jurisdiction', in William Schabas and Nadia Bernaz (eds), *Routledge Handbook of International Criminal Law.* New York: Routledge, 337–54.

ROHT-ARRIAZA, Naomi and MARRIZCUENA, Javier (eds) (2006) *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice.* New York: Cambridge University Press.

SERRANO, Monica and KENNY, Paul (2005) 'Columbia and the Andean Crisis', in Simon Chesterman, Michael Ignatieff and Ramesh Thakur (eds), *Making States Work: State Failure and the Crisis of Governance.* New York: United Nations University Press, 102–121.

SIKKINK, Kathryn and BOOTH WALLING, Carrie (2007) 'The Impact of Human Rights Trials in Latin America', *Journal of Peace Research* 44: 427–45.

SMILEY, Marion (2001) 'Democratic Justice in Transition', *Michigan Law Review* 99: 1332–47.

SNYDER, Jack and VINJAMURI, Leslie (2003–2004) 'Trials and Errors: Principle and Pragmatism in Strategies on International Justice', *International Security* 28: 5–44.

SRIRAM, Chandra Lekha (2003) 'Revolutions in Accountability: New Approaches to Past Abuses', *American University International Law Review* 19: 310–429.

TEITEL, Ruti (2001) *Transitional Justice.* Oxford: Oxford University Press.

THOMS, Oskar, RON, James and PARIS, Roland (2010) 'State-Level Effects of Transitional Justice: What Do We Know?', *International Journal of Transitional Justice* 4: 1–26.

VAN DER MERWE, Hugo (2009) 'Delivering Justice During Transition: Research Challenges', in Hugo van der Merwe, Victoria Baxter and Audrey R. Chapman (eds), *Assessing the Impact of Transitional Justice: Challenges for Empirical Research.* Washington, DC: USIP Press, 115–42.

VINJAMURI, Leslie and SNYDER, Jack (2004) 'Advocacy and Scholarship in the Study of International War Crimes Tribunals and Transitional Justice', *Annual Review of Political Science* 7: 345–62.

ZALAQUETT, Jose (1992) 'Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations', *Hastings Law Journal* 43: 1425–38.