

THE JUSTICE CASCADE



HOW HUMAN RIGHTS PROSECUTIONS
ARE CHANGING WORLD POLITICS

KATHRYN SIKKINK

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In memory of Ellen Lutz (1955–2010), friend, coauthor, human rights advocate, from whom I learned so much about law, justice, and friendship.

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CONTENTS

1. Introduction	1
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Part I

CREATING INDIVIDUAL ACCOUNTABILITY

2. Navigating Without a Map: Human Rights Trials in Southern Europe	31
3. Argentina: From Pariah State to Global Protagonist	60

Part II

SPREADING IDEAS ABOUT INDIVIDUAL ACCOUNTABILITY

<i>Interlude: How and why does the Argentine experience spread?</i>	87
4. The Streams of the Justice Cascade	96

Part III

DO HUMAN RIGHTS PROSECUTIONS MAKE A DIFFERENCE?

5. The Effects of Human Rights Prosecutions in Latin America	129
6. Global Deterrence and Human Rights Prosecutions	162
7. Is the United States Immune to the Justice Cascade?	189

Part IV
CONCLUSIONS

8. Policy, Theory, and the Justice Cascade	225
<i>Acknowledgments</i>	263
<i>Appendices</i>	266
<i>Notes</i>	279
<i>Bibliography</i>	307
<i>Index</i>	323

Introduction

I don't remember when I first heard it would be possible to hold state officials criminally accountable for human rights violations. No one mentioned it in 1976 when I lived in Montevideo, Uruguay, as a university exchange student. In 1973, the elected president of Uruguay, Juan María Bordaberry, and the Uruguayan military had overthrown the democratic government, closed down the Congress and the Supreme Court, and started imprisoning and torturing their opponents. Bordaberry continued to serve as president, and his participation gave a veneer of legitimacy to the new authoritarian regime. Once known as the Switzerland of Latin America for its small size, long democratic tradition, and mature social welfare policies, Uruguay quickly gained notoriety as "the torture chamber of Latin America."

I talked with people in Uruguay who had been imprisoned and tortured. It was hard for them to foresee an end to the dictatorship, and no one imagined that someday it would be possible to judge those responsible for human rights violations and send them to prison. At no time was such foresight more difficult than in 1976, when the country saw its darkest moments. In May of that year, Uruguayans were terrified to learn of the murders of two of the most revered Uruguayan opposition politicians living in exile. If even they could be murdered, no one was safe.

These assassinations took place in Argentina, where several leading opponents to Bordaberry's coup had sought refuge following the closure of the Uruguayan Congress. These opponents included Senator Wilson Ferreira Aldunate, the former presidential candidate for the main opposition

Blanco Party; Congressman Héctor Gutiérrez Ruiz, the Speaker of the House; and Senator Zelmar Michelini, one of the most eloquent spokesmen of the leftist opposition coalition, the Broad Front (*Frente Amplio*). The exiles' situation took a grim turn with the Argentine military coup in March 1976. Their relative safety evaporated, and they started to receive death threats. Michelini planned a trip to the United States, where he intended to meet with members of the U.S. Congress and staff from Amnesty International to brief them on what was happening in Uruguay. The plane ticket was reserved, and the U.S. government had already granted him a visa. But the Uruguayan foreign minister, Juan Carlos Blanco, gave explicit instructions to deny the renewal of Michelini's passport, so he was unable to travel. Without current documentation, his situation in Argentina was even more precarious. He wrote to a friend in the United States: "Since I don't have legal status in Argentina, I am now practically a man without a country, a prisoner in this land. . . . You can't imagine my anger, my grief, my impotence. . . ."¹

On May 18, 1976, groups of armed men kidnapped Gutiérrez Ruiz and Michelini from their apartments in Buenos Aires. Three days later, both men were found murdered, with signs of torture on their bodies. When the kidnappers bungled a similar attempt to capture Wilson Ferreira, he fled to London. He left an open letter to the new military president of Argentina, General Jorge Videla, describing at length the kidnapping and murders of Gutiérrez Ruiz and Michelini. Ferreira understood that the kidnappings had been an action coordinated between the Uruguayan and Argentine military governments. The letter ended: "When the hour arrives of your own exile, which will arrive, have no doubt, General Videla, if you seek refuge in Uruguay, a Uruguay whose destiny will be once again in the hands of its own people, we will receive you without cordiality and affection, but we will grant you the protection that you did not give to those whose deaths we are today grieving."²

Wilson Ferreira, in his hour of greatest despair, could envision a distant future of democracy in his country and in Argentina when General Videla would be forced into exile and Uruguay would be again in the hands of its people. But, at that time, he could *not* imagine accountability for the human rights violations he had just witnessed. He did not say that he awaited a time when Videla would be extradited or tried for his crimes. Ferreira assumed that in the future, as in the past, leaders responsible for

human rights violations would go into exile abroad, where they would be given protection, if not affection. This had long been the political tradition in Latin America, where military coups were a commonplace instrument of politics. Even the very viciousness of the crimes he had just witnessed did not change Ferreira's perception that leaders would not, or could not, be judged for their crimes. But Ferreira was not alone in being unable to imagine criminal prosecutions of state officials. No one I spoke with in Uruguay mentioned the possibility of prosecuting Bordaberry or the Uruguayan military. In a series of interviews and conversations since that time, I've asked friends and colleagues in Uruguay when they first thought it was viable to hold human rights prosecutions. They point to different dates, but never before 1983, when Argentine human rights movements started publicly demanding trials for past violations in Argentina.

President Bordaberry also believed he could not be judged for his actions. In a speech in December 1974, he said of the military and the June 1973 coup: "the armed forces must enjoy supreme tranquility, knowing that their stance of having accompanied and supported the government in the historic events of June 1973 cannot be judged by the citizenry. . . . It would be like assuming you could judge a man who broke the formal law to defend his mother, in this case, his motherland. And this stance cannot be the object of a judgment."³

Thirty-two years after this speech, Bordaberry found that he could in fact be the object of judgment. In 2006, a Uruguayan judge indicted Bordaberry and his minister of foreign affairs, Juan Carlos Blanco, ordering them into preventive prison to await trial for the murders of Gutiérrez Ruiz and Michelini. In 2010, the eighty-one-year-old Bordaberry was convicted and sentenced to thirty years in prison. Other top officials of the dictatorial government, including Blanco, and Gregorio Alvarez, the military president after Bordaberry, shared his fate, having since been convicted and sentenced to prison terms of twenty to twenty-five years.

The story of Jorge Bordaberry is just one of many stories of state officials for whom the unimaginable had occurred: criminal accountability for violations of human rights. A watershed moment for such accountability came in October 1998, when General Augusto Pinochet of Chile was arrested in London by British police executing a Spanish extradition request. The Spanish court wanted Pinochet to stand trial in Spain for crimes committed in Chile during his military dictatorship. No one pre-

dicted this arrest, certainly not in London, where Pinochet had just weeks before taken tea with his old friend Margaret Thatcher. The Law Lords (the British Supreme Court) decided that Pinochet could be extradited to Spain.⁴

As soon as it became conceivable to hold perpetrators criminally accountable, some observers began to make dire predictions about the effects of such trials. After Pinochet was brought into custody, many argued that it would lead to the demise of democracy in Chile because his supporters would carry out another coup. Ultimately, the British government allowed Pinochet to return to Chile because of his poor health. When he died there in 2006, facing domestic prosecutions both for human rights violations and for corruption, democracy was alive and well in Chile.

Some analysts offered similarly dire predictions in 1999, when President Slobodan Milošević of Yugoslavia became the first *sitting* head of state to be indicted for war crimes. Critics argued that actions taken by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in The Hague would lead Milošević to entrench himself in power and prolong the agony in the Balkans. But Serbians began to realize that Milošević was a liability, and they voted him out of office less than a year and a half after his indictment. Facing intense pressure from the United States and the European Union, the new Federal Republic of Yugoslavia government eventually extradited Milošević to The Hague to stand trial, where he died before he could be convicted for his crimes. In March 2003, a second sitting president was charged for war crimes, when the Special Court for Sierra Leone indicted Charles Taylor, the warlord president of Liberia. Taylor went into exile in Nigeria in August 2003 after his forces were defeated by a rebel group. In 2006, he was turned over to the Special Court, where he is currently on trial for human rights violations and war crimes. In 2009, the International Criminal Court (ICC) indicted a third sitting president, Omar al-Bashir, for war crimes and crimes against humanity in the Darfur region of Sudan.

I group the prosecutions that I have just mentioned, along with others that are currently underway across the globe, into three basic types. Some are *international*, like the trial of Milošević in The Hague. International trials happen when states, typically acting on behalf of the United Nations, set up tribunals such as the ICTY and the ICC. In this category, I also include so-called “hybrid” criminal tribunals, such as the Special Court for Sierra

Leone that is prosecuting Charles Taylor, which combine international and national legal processes. Other prosecutions are *foreign*, meaning that a state decides to use its domestic courts to try an official from another state, sometimes using a procedure known as “universal jurisdiction.” An example is the case of Pinochet, which included legal action in courts in both the United Kingdom and Spain. The third and most common type is a *domestic* prosecution, like that of Bordaberry in Uruguay, when courts within the country where the human rights violations occurred assume the task of trying human rights criminals.

Together, these three kinds of prosecutions comprise an interrelated, dramatic new trend in world politics toward holding individual state officials, including heads of state, criminally accountable for human rights violations.⁵ In this book, I call this trend the “justice cascade.” Originally, this term served as the title of an article that I wrote with my friend and colleague Ellen Lutz, an attorney with extensive experience as a human rights activist, scholar, and mediator.⁶ By justice cascade, I *do not mean* that perfect justice has been done or will be done, or that most perpetrators of human rights violations will be held criminally accountable. Rather, justice cascade means that there has been 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. The term captures how the idea started as a small stream, but later caught on suddenly, sweeping along many actors in its wake.⁷

In retrospect, the justice cascade may seem an inevitable reaction to the unprecedented violence of the twentieth century. But this wave of prosecutions was by no means preordained. The seeds of the justice cascade have been present for decades—the legal underpinnings were outlined in the Nuremberg Tribunals from 1945 to 1949. The Nuremberg and Tokyo trials after World War II were in many ways both the beginning of the trend and the exception that proved the rule: only in cases of complete defeat in war was it possible to hold state perpetrators criminally accountable for human rights violations. The Nuremberg precedents then lay dormant for decades. It was not until the mid-1970s, around the time when Michelini and Gutiérrez Ruiz were murdered in Buenos Aires, that the newly democratic government in Greece resurrected the idea of individual criminal accountability for past human rights violations when it put its past state officials on trial for torture and murder. The puzzle is why

Greece and other states chose to hold state officials accountable and how the practice spread.

In this book, I explain why this new trend has emerged and evaluate its impact. I have organized this analysis into three parts around three big questions. Part I uses a historical approach to answer the question of *emergence*: what are the origins or sources of new ideas and practices concerning individual criminal accountability for human rights? In Chapters 2 and 3, these origins are traced by looking at the first three cases of domestic trials in Greece, Portugal, and Argentina. In Part II, I try to answer how and why these ideas *spread or diffused* across regions and, ultimately, across the globe. Chapter 4 examines the diffusion of prosecutions, first in domestic courts, and later in foreign courts and international tribunals. Part III tackles questions about effects: what is the *impact* of these trials? Can human rights prosecutions actually help prevent future human rights violations? Chapters 5 and 6 present work I have done demonstrating that these trials are not dangerous, as some worry, and that they can actually improve protection for human rights. But a skeptic will ask: "If this is really a global trend, what difference does it make for powerful countries like the United States or China?" To begin to answer this question, Chapter 7 focuses on U.S. practices during the so-called "war on terror."

Throughout these chapters, several kinds of evidence are employed. I draw on years of travel and interview-based field research conducted mainly in Argentina and Uruguay, but also in Guatemala, Chile, Greece, Portugal, Italy, Belgium, Spain, the Netherlands, and Brazil. To answer the first question about why human rights prosecutions first emerged, I compare Greece and Portugal, the countries that first used prosecutions, to Spain, a country in the same region that chose not to pursue human rights prosecutions. Similarly, Argentina, an early adopter of prosecutions, can be compared to Brazil and Uruguay, countries in the same region with political transitions around the same time that adopted different approaches to justice. To answer the second question about why practices and ideas about accountability spread from one country to another, I compare why there was much greater diffusion of the Argentine prosecutions than of prosecutions in Portugal and Greece. To answer the third question, about the effects of prosecutions, in addition to field research I use statistical analyses. These analyses are based on a database of human rights prosecutions compiled with the help of colleagues. The point of the statistical research

is to systematically test some arguments that have emerged from the work of journalists and scholars who have also observed the spread of trials. My goal is to address the questions and puzzles above and to communicate to both academic and non-academic audiences.

This book is a story not only about changes in the world but also about my own personal and scholarly journey. In some ways, I came upon the unfolding processes of justice by accident. But this discovery has shaped my outlook on the world and its possibilities, leaving me at times both frustrated and inspired. I hope this work will offer insights about crafting accountability for past human rights violations, including for Americans, as we grapple with whether and how to hold individuals accountable for torture and cruel and degrading treatment during the administration of George W. Bush.

Part I: Creating Individual Accountability

To answer the first question about the origins of ideas and practices of individual criminal accountability, I had to go back and explore a period through which I had lived personally. After returning to the United States from Uruguay in 1977, I finished my undergraduate degree, then applied for and was awarded an international human rights internship by the Ford Foundation. The program placed me as a long-term paid intern with the Washington Office on Latin America (WOLA), a small human rights organization based in Washington, D.C. I arrived at WOLA in December 1979, and was assigned to work on Argentina and Uruguay. Over the next two years, part of my job was to receive human rights leaders and members of the opposition who arrived from Argentina or Uruguay, or from exile, and help them make contact with policy makers in Washington to explain their histories and their concerns. I set up interviews with congressional staff (sometimes with members of Congress, when we were very fortunate), meetings in the State Department, interviews with the press, and receptions for civil society leaders. I accompanied our visitors to their meetings, translated for them, and sometimes put them up in my small apartment. I also worked with Argentines and Uruguayans living in Washington, D.C., who had set up small human rights or solidarity committees.

The unofficial head of the Argentine committee, a political exile named Juan Méndez, helped teach me about Argentina and guide my work in that

early difficult time in Washington. As a member of the Peronist Youth, the left wing of the Peronist Party in Argentina in the early 1970s, Méndez had been a labor lawyer, defending workers, including labor activists who had been imprisoned for political activity. Because of his work the police arrested Méndez in August 26, 1975, nine months before the military coup in 1976. In prison, he was tortured and repeatedly interrogated, in his words, “about my clients, about my contacts, about the relatives of my clients, about the ways in which lawyers like me were able to file petitions for habeas corpus after someone had been arrested by the security forces.”⁸

Méndez believes that if he had been arrested after the coup, he probably would not be alive today. Of the group of lawyers working with him, seven were arrested after the coup, and they were among the thousands of “disappeared” people whom the military kidnapped and killed. In 1976, Amnesty International adopted Juan Méndez as a prisoner of conscience. The members of the first Amnesty International mission to Argentina in 1976 asked specifically about Méndez’s case when they met with Argentina’s minister of interior. Less than three months later, Méndez was released from prison into exile in the United States. Clearly, external pressure was important for his release. Méndez also speculated that the government thought that “I wasn’t that important. It was easy enough to get Amnesty International out of their hair.”

If the Argentine government had realized what a thorn in their side Juan Méndez in exile would be, they might have reconsidered their decision. He recalls thinking upon his arrival in the United States, “I had to work on behalf of all these people who were staying behind. It was almost an obsession.” The prisoners called the cell block where Juan spent the last weeks of his imprisonment “death row.” The military arbitrarily took some inmates, including four of Méndez’s close friends, out of the prison and killed them. Before leaving, he memorized the names of all the people in his cell block because he had the sense that “all would be killed unless I did something.”⁹ When he arrived in the United States in 1977, Méndez gained asylum, began the arduous task of studying U.S. law, and passed the bar exam. He helped organize the Argentine exile community in Washington, D.C., into a coherent human rights group. Méndez and the Argentine group became my mentors, prodders, and accomplices in our work to keep the case of human rights violations in Argentina in the minds of U.S. policy makers.

During my first year at WOLA, President Jimmy Carter was still in office. The Carter administration State Department had made Argentina and Uruguay two of its three priority countries for applying its new human rights policy, so official Washington was relatively receptive to talking to human rights leaders from these countries. Some of the top people from Argentina and Uruguay visited us in Washington. In my first week on the job, I set up a reception for Wilson Ferreira, who arrived from exile in London. The head of the Mothers of the Plaza de Mayo, an imposing woman named Hebe de Bonafini, arrived with other Mothers to lobby Congress to pressure the Argentine government to stop disappearances. Bonafini and the Mothers were fearless advocates for their cause, and I was a little intimidated by her, mostly because I felt I could never meet her expectations. As far as Hebe was concerned, any time I wasn't devoting to helping the Mothers was not well spent. At the same time, Juan Raul Ferreira, an ardent D.C.-based advocate for Uruguay and the son of Wilson Ferreira, thought I should instead be devoting all my time to advancing human rights in Uruguay. It was also around this time that I met Emilio Mignone, who set up the most important legal human rights organization in Argentina, the Center for Legal and Social Studies (*Centro de Estudios Legales y Sociales*, or CELS).

During my internship year in Washington in 1980, Ronald Reagan defeated Jimmy Carter in the presidential elections. Reagan had criticized the Carter human rights policy and promised to renew support for anti-Communist allies around the world, including the authoritarian regimes in Latin America. To signal this new policy after his inauguration in 1981, Reagan invited the military "president-designate" of Argentina, General Roberto Viola, to be the first Latin American leader to make an official visit to Washington. In a speech given while in the United States, Viola underscored his ideas about justice. He argued: "A victorious army is not investigated. If the Reich's troops had won the last World War, the Tribunal would have been held not in Nuremberg but in Virginia." In some ways, Viola was only expressing a worldview held by many contemporary realists in international relations—that international law is the tool of the powerful, who use it against their enemies. But the comments did not play well in Washington, since they equated U.S. behavior during the war with Nazi war crimes. Even the censored press of Buenos Aires criticized Viola's remarks. "Viola is supposed to be a moderate, and if moderates think the

only thing the Nazis did wrong is lose, the normal mind will find it hard to imagine what the view of the hardliners must be,” editorialized the *Buenos Aires Herald*.¹⁰ Yet Viola’s comments suggest that he was at least subliminally worried about accountability. Despite some embarrassment, the Reagan administration pressed ahead on its proposal to improve relations with authoritarian allies like Viola.

Just four years later, in 1985, General Viola was prosecuted in Buenos Aires in what was an unprecedented trial of top military leaders for human rights violations. True to Viola’s predictions, by the time of the prosecutions, the Argentine military had lost a war in the Malvinas/Falklands Islands. Yet the trials were not for what they did during the war they lost, but for crimes committed during the struggle they claimed to have won against a leftist insurgency, and for human rights violations during the military government. By the time of the trials, I was living in Argentina, conducting the research for my doctoral dissertation (on the completely different topic of economic policy making). The trial of the Juntas in Argentina transfixed the Argentine public—and me, of course—during the entire year of 1985. They were open to the public, and I was able to visit one day and watch the proceedings from the visitors’ gallery. Just weeks before I left Argentina, the tribunal handed down its sentence, convicting Generals Videla and Viola to life in prison—the first time that a court in Latin America had ever convicted heads of state for human rights violations.

Over the next twenty-five years, Viola and Videla were joined by other authoritarian leaders in the region. Ex-President Alberto Fujimori of Peru was sentenced in 2009 to twenty-five years in prison for human rights violations; the former authoritarian presidents of Uruguay, Alvarez and Bordaberry, were convicted; and ex-President General Ríos Montt of Guatemala is the subject of ongoing trials in Spain and Guatemala. So, what happened between Viola’s triumphant speech in Washington and these trials that started to change the way we think about accountability? Contrary to Viola’s predictions, all these governments had defeated leftist insurgencies in their countries, and yet they were being held accountable for massive human rights violations during their authoritarian regimes.

When I first started the research for this book, I wracked my brains for a memory of the first time one of the activists from Argentina or Uruguay mentioned the possibility of prosecuting state officials for human rights